ARTICLES

# Constitutional Rights as Protected Reasons

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*This Article proposes and defends a new theoretical model of constitutional rights. Virtually all the prevailing theories about constitutional rights envision, at some level, judges balancing the importance of various individual rights against the importance of other societal goods in tension with those rights. These theories also generally hold out the judiciary as the primary guardian of these rights, whereas the other political branches are often viewed as fulfilling a role of interfering with (or protecting) rights only as much as the judiciary will allow. This Article explains*

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*why the existing accounts of constitutional rights are either incoherent or incomplete. And it proposes and defends an alternative model that is more consistent with democratic principles and the institutional competencies of the various branches of government.*

*Specifically, I argue that a constitutional right is a specific type of what legal philosopher Joseph Raz called a "protected reason." It has two elements: First, it operates as a first-order reason for action by government officials to protect a private interest that has been specified in a constitution. Second, it operates as a second-order exclusionary reason to prohibit a government from relying on some reasons that would, absent the constitutional rule, weigh against protection of the private interest specified in the constitution. This definition also includes a separation of powers element: I argue that the government's weighing of first-order reasons with respect to constitutional rights should be entitled to deference from courts. But the following questions can be carefully examined by the judiciary in the context of as-applied challenges: whether the government's actions advanced a countervailing permitted reason that strictly conflicted with the pro tanto right, or whether the government acted on reasons that should have been excluded. I describe the evidentiary requirements courts can (and do) implement to make an exclusionary reason efficacious in an adjudicative context, though I also explain why that same factual scrutiny does not neatly track to the context of facial challenges.*

*This Article then brings these arguments together, rethinking doctrines like strict scrutiny, the Supreme Court's jurisprudence under § 5 of the Fourteenth Amendment, and the global proportionality model. I argue that reconceptualizing rights in the way I propose would preserve meaningful protections for minority groups while reducing both the phenomenon of "conflicts" of rights and concerns about judicial balancing. I also explain how this conception of constitutional adjudication has deep historical roots. This theory is, in other words, one philosophical way of capturing how rights were understood to operate at the time that some of the earliest written constitutions were drafted.*

## INTRODUCTION

Consider a case where the government claims it needs to widen a highway to include a turn lane for public safety reasons.[1] But the widening project, as proposed, would result in destruction of an Indigenous sacred site near the highway.[2] Let's assume for the sake of discussion that this destruction would interfere with the way various tribal members have exercised their religion at that site in a legal context where the right to religious exercise is given constitutional protection. What legal work should a constitutional right do in this context? And which branch(es) of government should do that work?

Many scholars have argued that, at some level, it is inherent in the nature of a constitutional right that it calls upon the judiciary to weigh the importance of the sacred site and the intensity of interference with that religious exercise against the importance of highway safety.[3] In other words, balancing generally means

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[1] For such a case, see Findings & Recommendations at *2, Slockish v. U.S. Fed. Highway Admin., 2018 WL 4523135 (D. Or. Mar. 2, 2018) (No. 3:08-cv-01169-YY); Slockish v. U.S. Fed. Highway Admin., 2018 WL 2875896, at *1 (D. Or. June 11, 2018); Joint Stipulation to Dismiss at 5–6, Slockish v. Dep't of Transp., 144 S. Ct. 324 (2023) (mem.) (No. 22-321). *See also* Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 HARV. L. REV. 1294, 1328–33 (2021) (discussing *Slockish*).

[2] *See Slockish*, 2018 WL 4523135, at *2.

[3] *See, e.g.*, Jamal Greene, *Foreword: Rights As Trumps?*, 132 HARV. L. REV. 28, 61 (2018) [hereinafter Greene, *Rights as Trumps?*] (agreeing with the notion that adjudicating constitutional principles necessarily involves weighing); RICHARD H. FALLON JR., THE NATURE OF CONSTITUTIONAL RIGHTS: THE INVENTION AND LOGIC OF STRICT JUDICIAL SCRUTINY 34 (2019) [hereinafter FALLON, THE NATURE OF CONSTITUTIONAL RIGHTS] (describing strict scrutiny as a disciplined form of balancing "fit for judicial administration"); ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 132–34 (Julian Rivers trans., Oxford Univ. Press 2002) (1985) [hereinafter ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS] (describing how concepts like "right" and "privilege" stand as "legal relations between two legal subjects"); Timothy Endicott, *Proportionality and Incommensurability*, *in* PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING 311, 311–27 (Grant Huscroft et al. eds., 2014) [hereinafter PROPORTIONALITY AND THE RULE OF LAW] (justifying judicial balancing of rights in the context of European judges' weighing of migrants' rights against state interests in deportation cases); Mattias Kumm, *Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review*, 1 EUR. J. LEGAL STUD. 153, 161–62 (2007) [hereinafter Kumm, *Institutionalising Socratic Contestation*] (discussing a case involving gay soldiers discharged from the British military to explain that rights involve balancing); Jeff King, *The Democratic Case for a Written Constitution*, 72 CURRENT LEGAL PROBS. 1, 3 (2019) [hereinafter King, *The Democratic Case for a Written Constitution*] ("[The] theories [of democracy the author endorses] seek to integrate our deep commitments to rights, distributive justice and democracy. That is no mean feat, for such values have been at war with each other for much of European political history."); Jeff King, *The Instrumental Value of Legal Accountability*, *in* ACCOUNTABILITY IN THE CONTEMPORARY CONSTITUTION

that, to receive protection, the religious exercise must increase in importance as the importance of the government's countervailing interest also increases, and it must be judged more weighty by a court. Many of the scholars who defend this approach also suggest that the defense of constitutional rights is ultimately up to the judiciary rather than other branches of government. This notion of rights has been defended in the United States and even more so globally under the proportionality model.[4] But despite the strong gravitational force of a balancing framework, there are serious problems with this approach.

For example, how does one determine whether highway safety is more valuable than an ancient Native American burial ground and location of sacred ceremonies? Weighing these two incommensurable values does not appear to be guided by reason any more than determining whether a string is longer than a rock is heavy.[5] Because the answer to such a weighing exercise is not required by reason, it is ultimately a result of discretionary judicial determination. And an approach that grants judges the discretion to make such determinations both creates significant tension with other democratic principles and virtually eliminates predictability for litigants about which value, in any given case, a court might determine is weightier.

U.S. Supreme Court Justices have increasingly voiced concern about this balancing approach. Justice Brett Kavanaugh recently argued in his *Ramirez v. Collier*[6] concurrence that strict scrutiny requires a judicial balancing exercise, obligating judges to perform moral reasoning they are incompetent to perform.[7] And outside the strict scrutiny context, Justices Neil Gorsuch (in an opinion joined by Justices Clarence Thomas and Amy Coney Barrett) and Barrett have also recently criticized the legitimacy of judicial balancing in a democracy.[8]

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124, 143, 146 (Nicholas Bamforth & Peter Leyland eds., 2013) [hereinafter King, *The Instrumental Value of Legal Accountability*]; KAI MÖLLER, THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS 102 (2012) (discussing the argument that judicial review necessitates balancing between "personal and political autonomy"). *See generally* Sherif Girgis, *Unfinished Liberties, Inevitable Balancing*, 125 COLUM. L. REV. 531 (2025) [hereinafter Girgis, *Unfinished Liberties*].

4 *See infra* Parts III.A, V.C.

5 *See* Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment).

6 142 S. Ct. 1264 (2022).

7 *Id.* at 1286–88 (Kavanaugh, J., concurring).

8 Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1160 (2023) (plurality opinion); *id.* at 1167 (Barrett, J., concurring in part).

Recognizing the inherent problems in the balancing approach, some scholars have proposed other frameworks, often envisioning a much more categorical approach to rights. Legal philosopher Ronald Dworkin's "rights as trumps" approach has become emblematic of this view, though others have critiqued Dworkin as not offering anything meaningfully different from balancing.[9] A few new voices in this space, such as Professor Joel Alicea, have advocated for a different categorical approach to constitutional rights that would compare modern government regulation to analogues of government regulations at the Founding.[10] The Court appeared to adopt something similar to this constitutional approach in *New York State Rifle & Pistol Ass'n v. Bruen*.[11] There, the Court focused on whether there was a historical analogue for the government regulation in the case; the Court did not ask whether such restrictions were necessary to advance an articulated government interest.[12]

Identifying historical analogues can be a valuable way of identifying narrow and deep categorical rights, such as the First Amendment's ministerial exception.[13] But if it is the only tool in the constitutional toolkit, it can result in difficulties when used to identify the only types of permissible government regulations that will be allowed for broadly applicable rights. To illustrate this problem, let us return to the free exercise highway-widening example. In that case, one could likely find historical examples of the government widening the wagon roads in the District of Columbia, and there are certainly historical examples of governments destroying and desecrating sacred sites at the Founding.[14] Does this mean that in the highway-widening case, the government should always win and the Native Americans should always lose, no matter how unimportant or unnecessary the widening project? Does it matter whether the Founding generation honored or dishonored Native American religious practices more generally? Or, at the other end of the spectrum, because during

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9 *See infra* Part II.B.

10 J. Joel Alicea, Bruen *was Right*, 174 U. PA. L. REV. (forthcoming 2025) (manuscript at 18–46) (available on SSRN); J. Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, 41 NAT'L AFFS. 72, 83–85 (2019); Brief of J. Joel Alicea as Amicus Curiae in Support of Petitioners and Reversal at 26–27, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843); *see also* William J. Haun, *Keeping Our Balance: Why the Free Exercise Clause Needs Text, History, and Tradition*, 46 HARV. J.L. & PUB. POL'Y 419 (2023).

11 142 S. Ct. 2111 (2022).

12 *See generally id.*

13 *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060–61 (2020).

14 *Cf.* Barclay & Steele, *supra* note 1, at 1310–11 (discussing the United States' dispossessions of Native Americans' sacred lands at the Founding).

the Founding Era the Framers were concerned about religious liberty, should that be the relevant historical analogue, and should the government always lose in those conflicts?

What should be evident from these questions is that a historical-analogue approach used in this way can result in zero-sum conflicts where analogues provide little room for consideration of relevant facts in particular contexts and little predictability (or constitutionally provided guidance) about what level of generality a court will select for that analogue. Perhaps acknowledging some of these concerns, in its subsequent case *United States v. Rahimi*,[15] the Court softened its categorical historical-analogue approach to some extent and focused more on the reasons for government interference with a pro tanto right, along the lines I discuss in Part IV.

Finally, a different group of scholars has offered a different categorical solution: to avoid some of the problems with balancing, we should get courts out of the business of adjudicating constitutional rights altogether.[16] Rather than a judicially enforceable legal proposition, a constitutional right is simply an invitation for the legislature to consider how best to protect and limit a constitutional right. This new vision of constitutional rights has a Thayerian resonance.[17] So in the highway conflict described above, we would leave it entirely to the political process to decide how to limit religious exercise and disallow any judicial second-guessing of such decisions. If the political process did not protect the sacred site, there would be no constitutional recourse. This raises the following pressing question: If the consequence of memorializing a right in the Constitution is simply to invite the government to choose how to limit and specify that right, what legal work exactly is the constitutional right doing? Treating the Bill of Rights as a bill of suggestions does not seem to answer a question so much as eliminate it.

This Article proposes and defends a new theoretical model of constitutional rights. This model does not rely on the problematic

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15 144 S. Ct. 1889 (2024).

16 Richard Ekins, *Legislation as Reasoned Action*, *in* LEGISLATED RIGHTS: SECURING HUMAN RIGHTS THROUGH LEGISLATION 86, 113 (2018) [hereinafter LEGISLATED RIGHTS]; PAUL YOWELL, CONSTITUTIONAL RIGHTS AND CONSTITUTIONAL DESIGN: MORAL AND EMPIRICAL REASONING IN JUDICIAL REVIEW 104–14 (2018) [hereinafter YOWELL, CONSTITUTIONAL RIGHTS AND CONSTITUTIONAL DESIGN]. *See generally* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006) [hereinafter Waldron, *The Core of the Case*].

17 *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (arguing that a court should only disregard a legislative act when it has determined that the legislature has made a mistake "so clear that it is not open to rational question").

process of judicial balancing, and it also avoids some of the pitfalls that the categorical alternatives have fallen into. This proposed approach is more consistent with the institutional competence of a judiciary operating within a democracy than are other theories, and it also envisions an important role for the political branches in the protection of rights. This approach has global and modern relevance. But for a U.S. audience, I would also argue that this approach is more consistent with a Founding Era natural law understanding of rights in the United States than are other proposals on offer.[18]

Specifically, I argue that a constitutional right is a special type of what legal philosopher Joseph Raz called a "protected reason."[19] As such, it has two elements: It operates as a first-order reason for action by government officials to protect an interest that has been specified in a constitution. And it operates as a second-order exclusionary reason to prohibit government reliance on some reasons that would, absent such a rule, weigh against protection of the private interest specified in the constitution. A first-order reason for action is simply another normative reason that must be added to the mix of all things considered in rational deliberation about the best course of action. An exclusionary reason, however, is a reason that operates to exclude other reasons.[20] In other words, it is a second-order reason not to act on all of the first-order reasons that would normally be relevant. The types of reasons I focus on most particularly are what philosophers of practical reason refer to as a "normative" reason, meaning a factual reason rather than a motivating reason of a party, and the official reasons that are offered publicly by the relevant government actor or institution.[21]

There are multiple ways in which this theoretical approach to rights is new. Raz did not discuss protected reasons in the context of constitutional rights. He often described a legal norm paradigmatically as a type of protected reason that government gives to the people—a first-order reason to follow the law and a reason

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[18] For a more in-depth discussion of the way in which the approach I suggest is consistent with Founding Era history relevant to constitutional rights in the United States, see generally Stephanie Hall Barclay, *Constructing Constitutional Rights*, 138 HARV. L. REV. F. 140 (2025) [hereinafter Barclay, *Constructing Constitutional Rights*].

[19] *See infra* Part IV.

[20] *See* JOSEPH RAZ, PRACTICAL REASON AND NORMS 61–62 (Oxford Univ. Press 1999) (1975) [hereinafter RAZ, PRACTICAL REASON AND NORMS]; Joseph Raz, *Facing Up: A Reply*, 62 S. CAL. L. REV. 1153, 1157 (1989) [hereinafter Raz, *Facing Up*].

[21] *See infra* Part IV.A.

to exclude other justifications for breaking the law.[22] In the model I propose, a constitutional right operates as the reverse—it is the giving of reasons by the constitution makers to the government both to protect a specific interest identified in the constitution, and to exclude certain additional reasons for interfering with that interest. The definition of rights I propose also includes a separation of powers element: I argue that the government's weighing of first-order reasons or determinations about how to proceed in the face of incommensurability should be entitled to deference from courts. But whether government action advanced a countervailing reason that strictly conflicted with the pro tanto right, or whether the government acted on reasons that should have been excluded, are questions that can be examined with much more judicial rigor, particularly in the context of constitutional as-applied challenges.

So how do these elements of a right play out in an adjudication context? I argue that if government officials interfere with a defeasible pro tanto right and the purported rightsholder brings an as-applied challenge, a court should carefully consider at least four questions in determining the scope of the conclusive right (i.e., the protections to which the rightsholder is ultimately entitled). Those four questions are (1) which reasons does the pro tanto right exclude, (2) what official reasons did the relevant government authority offer to justify interfering with the pro tanto right, (3) is it impossible for the government to take an action that would advance its official reason without interfering with some aspect of the constitutionally protected interest, and (4) is the government's official reason an actual reason (i.e., is the government factually correct about the reason it asserts based on the relevant evidentiary record), or is the government's assertion based on unsupported evidentiary claims?[23] Determination of the conclusive right will depend on the outcome of those questions (though not necessarily all of them and not in that order). I also argue that the way in which a court assesses these questions should differ depending on whether the constitutional remedy sought is facial or as-applied. The court's role should be far more modest in the facial context.

Consider a brief outline of how my approach would operate with the highway example discussed above. Begin with the first question—the exclusionary reason aspect of rights. Assume that

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[22] *See* Raz, *Facing Up*, *supra* note 20, at 1154.

[23] *See generally* Barclay, *Constructing Constitutional Rights*, *supra* note 18.

historical evidence suggests that the First Amendment's Free Exercise Clause excluded all reasons for interfering with an individual's exercise of religion other than to promote public safety or public health.[24] The government in this case argues that it needs to widen the highway to decrease car accidents on that stretch of road.[25] So far, so good. Public safety is not an excluded reason. But what if the government could widen the highway by building on the other side of the road, opposite the Native American sacred site, and thus avoid the destruction? If the action the government must take to advance its reason of needing to protect lives lost through the lack of a turn lane is not actually in conflict with the tribal members' interest in accessing a sacred site, then there is not a conflict between the two reasons. Therefore, the government's public safety justification cannot override the constitutional interest of religious exercise. Without balancing any values, a court could determine that a Pareto-efficient outcome is available: protect the sacred site and widen the highway on the other side of the road. On the other hand, if the government argued that it did not want to widen on the other side of the road and protect the site so as to advance administrative convenience, *that* reason likely *is* excluded. As such, it is not a reason on which the government can rely to create a conflict of reasons and override religious exercise.

This approach does not create a zero-sum game where, in these types of conflicts, government will either always win or always lose. The outcome of the conflict is contingent on the specific facts. While this approach could raise difficult evidentiary questions, it does not call on the judiciary to compare the value of increased lives saved to the value of an ancient Indigenous sacred site. And it provides predictability to parties in the sense that they know what evidence and which questions will be relevant to the analysis.

The first-order aspect of rights not only means that government must identify a strictly conflicting countervailing reason to override the first-order reason; it also means that government may choose to go to much greater lengths than the judiciary would require to protect and give great weight to the right. For example, the right to religious exercise identified in a constitution creates an important reason as to why political branches may

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[24] For a discussion of the types of reasons likely excluded under the Free Exercise Clause, as a historical matter, see Stephanie H. Barclay, *Replacing* Smith, 133 YALE L.J.F. 436, 442–48 (2023) [hereinafter Barclay, *Replacing* Smith].

[25] Slockish v. U.S. Fed. Highway Admin., 682 F. Supp. 2d 1178, 1190 (D. Or. 2010).

want to protect rights above and beyond what is required by the exclusionary norm. Indeed, rights in any country would likely be in a dire position if the political branches did not care about protecting those rights at all and instead effectively relied solely on the judiciary to supply the constitutional brakes. So, if the political branches decided to pass laws offering additional procedural requirements and protections any time federal projects threatened Native American sacred sites, the response of the judiciary should generally be deference to, and not scrutiny of, that political attempt to provide more robust protection.

While this theoretical account of rights is new, it captures the scope and operation of rights that are very old, including some of the earliest rights protected by written state constitutions in the United States. Indeed, this model offers one philosophical way of capturing how natural rights were understood to operate at the Founding.[26] In other words, I do not take my task to be "peddling a radical new invention,"[27] but instead providing and defending a rational reconstruction of a mode of reasoning that I believe captures the best of what our public servants are doing when they create and protect constitutional rights. While descriptively informed by the actual operation of rights on the ground, this is a theory that will operate at the prescriptive level—offering a critical perspective from which to argue that certain approaches to rights are more desirable than others.[28] To that end, strict scrutiny is just one legal doctrine that is better understood when viewing rights through this theoretical lens.

The alternative approach to rights I present highlights a few mistakes that some Justices on the Supreme Court have been making in the way that they define and constrain constitutional rights, and it points to some refining of legal doctrine that could remedy those errors. On the one hand, a *Bruen*-esque historical-analogue approach that makes all rights essentially categorical is not the only theory of rights that can lay claim to the use of Founding Era history for an understanding of rights. Identifying

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[26] *See infra* Part IV.F. *See generally* Barclay, *Constructing Constitutional Rights*, *supra* note 18.

[27] *See* HENRY S. RICHARDSON, DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY 76 (2002) (taking a similar approach when providing a philosophical defense of certain types of public reasoning).

[28] In that way, my approach offers an account of rights that plausibly fits a sufficient empirical range of rights jurisprudence while also defending the account that is most normatively justified. For similar approaches, see RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 36–38 (1996). *See generally* RONALD DWORKIN, LAW'S EMPIRE (1986) [hereinafter DWORKIN, LAW'S EMPIRE].

the historically understood *reasons* excluded by a right is also consistent with Founding Era understandings and is likely much more consistent with a natural law approach to rights.[29] Indeed, the Court's reasoning in *Rahimi* seems to track this latter approach more closely by focusing on excluded reasons under the Second Amendment.

In addition, while I share concerns Justices and scholars have expressed about judicial balancing, I disagree that strict scrutiny can be understood only as a balancing exercise. I argue instead that strict scrutiny is one manifestation of the protected reason aspect of rights: this doctrine excludes some government interests as impermissible, and then it imposes an evidentiary burden on the government to demonstrate that nonexcluded reasons are actually in conflict with the government's desired outcome. Thus, to avoid balancing, the Court has other alternatives besides jettisoning doctrines like strict scrutiny and requiring the protection of all constitutional rights in a categorical manner based on historical analogues of government regulation of those rights.[30] Understanding strict scrutiny in this way lends credence to a recent statement by Justice Barrett that in the First Amendment context, "scrutiny" is likely "here to stay."[31]

I also argue that it is problematic when the Supreme Court limits the scope of a constitutional right to whatever a court is judicially competent to protect or remedy and simultaneously prevents political branches from providing protection beyond the judicial floor to rights. This troubling approach is exemplified in

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[29] *See* Barclay, *Constructing Constitutional Rights*, *supra* note 18, at 170; *see also* Jud Campbell, *Determining Rights*, 138 HARV. L. REV. 921, 980–82 (2025) [hereinafter Campbell, *Determining Rights*] (arguing that "[t]he problem with [the *Bruen* absolute approach to rights] is that the draftsmen of the Bill of Rights did not embrace this approach" and that the *Bruen* approach "is a jumbled interpretive method that conceives of rights as fully determined from the get-go, barring subsequent determinations. It thus undercuts democratic authority in countless ways that the Founders never intended."); Michael McConnell, Douglas Laycock, Stephanie Barclay & Mark Storslee, *The Court Shouldn't* Bruen*-ize the Free Exercise Clause*, THE VOLOKH CONSPIRACY (Mar. 8, 2025), https://perma.cc/CA67-8XDW ("The irony is that incorporating a *Bruen* approach into the Free Exercise Clause risks ignoring the ways that something like strict scrutiny analysis is the *best* doctrinal tool for implementing the Free Exercise Clause's historic meaning." (emphasis in original)).

[30] To be sure, *some* constitutional rights (or some aspects of some rights) should likely be protected in a categorical way—rights like the ministerial exception in the United States or rights against torture in other countries. But categorical protection is not the only legitimate tool in the judicial toolkit to protect rights.

[31] Ordain and Establish, *A Conversation with Justice Amy Coney Barrett*, CTR. FOR THE CONST. & THE CATH. INTELL. TRADITION, at 25:23 (Sept. 25, 2023), https://podcasts.apple.com/us/podcast/a-conversation-with-justice-amy-coney-barrett/id1654514316?i=1000629089530.

some of the Court's cases interpreting § 5 of the Fourteenth Amendment, including *City of Boerne v. Flores*[32] and *United States v. Morrison*.[33] While bracketing constitutional federalism and enumerated powers issues, I argue that political branches may, as a general matter, permissibly provide enhanced protection for rights above any minimally enforceable level that judges can administer. When legislatures act to protect rights in ways that judges cannot, the proper judicial response should be deference, not scrutiny.[34]

Finally, the framework for constitutional rights I propose would reduce the phenomenon of conflicts of rights without erasing important interests on either side of the equation. It would do so in part by incorporating limitations posed by other competing interests into the scope of the right itself, and in part by incentivizing the government to look for solutions that avoid unnecessary conflicts altogether.

## I. CONSTITUTIONAL ADJUDICATION AND DEMOCRATIC PRINCIPLES

Much scholarly discourse has focused on the question of whether constitutional adjudication is appropriate in a democracy.[35] This Article contributes to that conversation by using democratic principles as a normative criterion to assess the desirability of competing theories about what it means to constitutionalize a right and the implications of doing so for the judiciary

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[32] 521 U.S. 507 (1997).

[33] 529 U.S. 598 (2000).

[34] For a discussion of the relevant type of deference in the § 5 context, see *infra* Part V.B.

[35] *See, e.g.*, Richard Bellamy, *Democracy as Public Law: The Case of Constitutional Rights*, 14 GERMAN L.J. 1017, 1036–37 (2013); CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 54–56 (2001); Richard Ekins, *Models of (and Myths About) Rights Protection*, *in* LAW UNDER A DEMOCRATIC CONSTITUTION: ESSAYS IN HONOUR OF JEFFREY GOLDSWORTHY 227, 232–34 (Lisa Burton Crawford et al. eds., 2019); Richard H. Fallon, Jr., *The Core of an Uneasy Case* for *Judicial Review*, 121 HARV. L. REV. 1693, 1701–04 (2008); King, *The Democratic Case for a Written Constitution*, *supra* note 3, at 3–4; King, *The Instrumental Value of Legal Accountability*, *supra* note 3, at 135–36; Kumm, *Institutionalising Socratic Contestation*, *supra* note 3, at 162–63; NIELS PETERSEN, PROPORTIONALITY AND JUDICIAL ACTIVISM: FUNDAMENTAL RIGHTS ADJUDICATION IN CANADA, GERMANY AND SOUTH AFRICA 20–23, 35 (2017); Ekins, *in* LEGISLATED RIGHTS, *supra* note 16, at 113; YOWELL, CONSTITUTIONAL RIGHTS AND CONSTITUTIONAL DESIGN, *supra* note 16, at 109–11; Waldron, *The Core of the Case*, *supra* note 16, at 1354–58; Aileen Kavanagh, *Participation and Judicial Review: A Reply to Jeremy Waldron*, 22 L. & PHIL. 451, 459–61 (2003). *See generally* Rosalind Dixon, *The Core Case for Weak-Form Judicial Review*, 38 CARDOZO L. REV. 2193 (2017); Alon Harel & Tsvi Kahana, *The Easy Core Case for Judicial Review*, 2 J. LEGAL ANALYSIS 227 (2010); DIMITRIOS KYRITSIS, WHERE OUR PROTECTION LIES (2017); MÖLLER, *supra* note 3; MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (2000).

versus the political branches. This Article does not purport to focus on one specific conception of democracy,[36] which is itself a hotly contested topic.[37] Instead, as others have done, I refer to democracy in the thin sense as "a class of political systems that are participatory, where each citizen has the ability to participate (preferably, at some foundational stage, equally) in the creation of government and policy."[38]

A normative defense of the desirability of democracy is beyond the scope of this Article.[39] But it is worth making the cursory observation that scholars have noted justifications for democracy that include its treatment of citizens as moral equals, its increased likelihood of better decisions, its just distribution of power among citizens, and its positive impact on the development of the moral and intellectual abilities its citizens, among others.[40]

I assume, without defending, a few propositions about democracy here. First, consistency with democratic principles should be a scalar rather than a binary assessment, meaning some policies and institutional arrangements will be more (or less) consistent with democratic principles than others.[41] It follows that one can assess individual government policies or institutional arrangements on a retail basis for their degree of consistency with democratic principles. Second, there may be some threshold above

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[36] Certain moral concepts, like "justice" or "equality," have some common or shared meaning as a concept, but people disagree on the criteria for the application of that concept. For a discussion of the difference between a concept and a conception, see generally W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167 (1956). *See also* JOHN RAWLS, A THEORY OF JUSTICE 7–11 (1971) (discussing the difference between justice as a concept and conceptions of it); DWORKIN, LAW'S EMPIRE, *supra* note 28, at 297–301 (discussing the distinction between the concept of equality and conceptions of it).

[37] *See* Scott Hershovitz, *Legitimacy, Democracy, and Razian Authority*, 9 LEGAL THEORY 201, 216–19 (2003).

[38] *Id.* at 213.

[39] Though this is a question I engage with further in a separate research project.

[40] *See* N.W. BARBER, THE PRINCIPLES OF CONSTITUTIONALISM 148–49 (2018); Hershovitz, *supra* note 37, at 213–15; ROBERT DAHL, DEMOCRACY AND ITS CRITICS 164 (1989); AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 37–41, 48–49 (1996); JEREMY WALDRON, LAW AND DISAGREEMENT 26–27 (1999).

[41] *See* Lawrence B. Solum, *Outcome Reasons and Process Reasons in Normative Constitutional Theory*, 172 U. PA. L. REV. 913, 933 (2024):

> Democratic legitimacy is a scalar and not a binary. Institutions can be more or less democratic. For example, a Supreme Court composed of Justices that are nominated and confirmed by elected officials is more legitimate than a self-perpetuating Supreme Court. Similarly, a constitution that was ratified by supermajoritarian democratic processes is substantially more legitimate than a constitution that was imposed by an occupying foreign power after consulting local elites. In other words, democratic legitimacy is not "all or nothing."

which additional consistency with democratic principles is not helpful for good governance and may in fact be inconsistent with that goal. For example, Professor Nicholas Barber has observed that if direct democracy were the only defensible form of democratic rule, this type of government could not "provide the structures that allow the state to achieve its defining purpose" of advancing "the well-being of its people."[42] This is so because it is unlikely that the state decisions would be "coherent or stable"; nor would they allow for accountability of decision-makers.[43] Third, as Professor Andrei Marmor has argued, the ability of the citizenry to hold government authority accountable is the remedy for the fact that sometimes authorities will make errors; and thus the need for political accountability is highest where the risk of error is also high, even if there are "deep and irresolvable disagreements about what is right and wrong, just or unjust, and so on."[44] Fourth, there is likely a threshold below which citizens have lost any meaningful control over (or ability to participate in the making of) certain policy questions.

It is at this lower threshold that concerns about constitutional adjudication by a politically independent judiciary usually arise. In a constitutional system with an unelected judiciary designed to be independent, there is at least a superficial tension between democratic legitimacy and constitutional adjudication. This is because, as Professor Robert Alexy acknowledged, "[t]he judges of the constitutional court have, as a rule, no direct democratic legitimation, and the people have, normally, no possibility of control by denying them re-election."[45] This thus raises the pressing question of whether such judicial activity is "compatible with democracy."[46]

Much of the existing literature assesses the democratic compatibility of judicial adjudication of constitutional rights in

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[42] BARBER, *supra* note 40, at 153.

[43] *Id.* at 152–53. James Madison expressed similar concerns, noting that the injustice of laws passed by majoritarian state legislatures in the Articles of Confederation period "brings [ ] into question the fundamental principle of republican Government, that the majority who rule in such Governments, are the safest Guardians both of public Good and of private rights." JAMES MADISON, VICES OF THE POLITICAL SYSTEM OF THE UNITED STATES (1787), *reprinted in* 9 THE PAPERS OF JAMES MADISON 345, 354 (Robert A. Rutland & William M.E. Rachal eds., Univ. of Chi. Press 1975) (available at https://perma.cc/7TQH-Z89L).

[44] Andrei Marmor, *Authority, Legitimacy, and Accountability*, *in* ENGAGING RAZ: THEMES IN NORMATIVE PHILOSOPHY 465, 471 (Andrei Marmor et al. eds., 2025) [hereinafter ENGAGING RAZ].

[45] ROBERT ALEXY, LAW'S IDEAL DIMENSION 139 (2021).

[46] *Id.*

a binary compatible-noncompatible manner; this literature also approaches this issue almost exclusively in the context of facial invalidation of legislation in order to protect constitutional rights.[47] Jeremy Waldron has taken this approach, even while acknowledging that "much of what is done by the European Court of Human Rights is judicial review of executive action."[48] The definitional exclusion of executive action is even more consequential in a presidential system, where the 800-pound gorilla in the room for alleged rights violations is the executive branch—not deliberative legislative bodies.

However, there are likely various multifaceted aspects of constitutional adjudication of rights that make a court's action more or less compatible with democratic principles. For example, the positive law at issue that the judiciary assesses and how the judiciary approaches its task with respect to that law are relevant to democratic compatibility. Let us assume, as Professor Scott Hershovitz argued, that statutory "[l]aw in a democracy does not merely tell us what we may and may not do," but is "how we decide what we may and may not do," and thus may "lay[ ] the greatest claim to participatory development."[49] If democratic participation was available for the making of a constitution, then this argument also applies to constitutional law. One could argue that the more the judiciary understands its constitutional task as focused on interpreting the meaning of a law,[50] and the more that meaning constrains judicial discretion and provides advance notice about rights and responsibilities that logically flow from the meaning of that law, the more democratically compatible that task is. On the other hand, the more the law at issue is open-ended and leaves the outcome up to the court's strong discretion, the less one can link that judicial outcome to participation by citizens in a democratic process.

Another obvious issue is the degree to which a constitutional system allows citizens to override judicial decisions with which a majority disagrees through political processes. In the United

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47 *See* Waldron, *The Core of the Case*, *supra* note 16, at 1353–54; Ekins, *in* LEGISLATED RIGHTS, *supra* note 16, at 112–13; Mattias Kumm, *Alexy's Theory of Constitutional Rights and the Problem of Judicial Review*, *in* INSTITUTIONALIZED REASON: THE JURISPRUDENCE OF ROBERT ALEXY 201, 201 (Matthias Klatt ed., 2012).

48 *See* Waldron, *The Core of the Case*, *supra* note 16, at 1353 n.20.

49 Hershovitz, *supra* note 37, at 209–10.

50 *See* Timothy Endicott, *Legal Interpretation*, *in* THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 109, 112 (Andrei Marmor ed., 2012) (arguing that interpretation "comes into play when there is a possibility of argument as to [a text's] meaning" and that meaning is not merely a matter of "doubt or disagreement").

Kingdom, the answer is fairly straightforward: Parliament, as sovereign, can override judicial rulings simply by enacting legislation contrary to the judicial decision.[51] Canada's Charter of Rights and Freedoms contains the seldom- but sometimes-used § 33, which states that Parliament or a provincial legislature may expressly declare that a law shall operate notwithstanding judicial interpretations of the law's unconstitutionality compared to other sections of the Charter.[52] Famously in the United States, when it comes to constitutional adjudication, the people have only one primary method to override Supreme Court decisions: a constitutional amendment requiring supermajoritarian agreement.[53] Democratic override in the United States is thus far more difficult than in other systems in circumstances where the majority of citizens think the Supreme Court got it wrong when interpreting constitutional rights. Constitutional systems like India's go even further, prohibiting amendment of significant aspects of the constitution altogether and thus removing a wide range of judicial decisions from democratic oversight entirely.[54]

The type of remedies the judiciary uses might also affect democratic compatibility. For example, Justice John Paul Stevens described facial remedies as legal "sledge hammer[s]" to democratic

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[51] *Glossary: Parliamentary Sovereignty*, UK PARLIAMENT, https://www.parliament.uk/site-information/glossary/parliamentary-sovereignty/:

> Parliamentary sovereignty is a principle of the UK constitution. It makes Parliament the supreme legal authority in the UK which can create or end any law. Generally, the courts cannot overrule its legislation and no Parliament can pass laws that future Parliaments cannot change. Parliamentary sovereignty is the most important part of the UK constitution.

[52] *See Section 33 – Notwithstanding Clause*, GOV'T OF CAN. (last updated Aug. 13, 2024), https://perma.cc/7VUX-ZJ5G:

> To date, [Canada's] federal government has not invoked the notwithstanding clause.
>
> Section 33 has been invoked on occasion by provincial governments. The clause was first invoked in 1982 when Quebec passed an omnibus enactment that repealed all pre-Charter legislation and re-enacted it with the addition of a standard clause that declared the legislation to operate notwithstanding section 2 and sections 7 to 15 of the Charter.

[53] *See* U.S. CONST. art. V. One could debate whether democratic input on the composition of the Supreme Court over time through the President and Senate is a mechanism for override, albeit a very slow and unpredictable one.

[54] Kesavananda Bharati Sripadagalavaru v. State of Kerala, (1973) Supp. SCR 1, 225–26 (India) (holding that the Indian judiciary has the power to review and override amendments to the constitution enacted by Parliament that violate the fundamental structure of the constitution).

work product.[55] On the other hand, he described as-applied remedies as legal "scalpel[s]" that attempt to redress constitutional problems in a targeted way.[56] These labels are perhaps unhelpful, and the distinction may be less binary and more one of degree. But a facial remedy refers to a situation in which the court's reasoning means that no aspect of a statutory provision could be validly applied in any context; the individual litigants are in some sense irrelevant. An as-applied remedy refers to situations in which courts do not challenge the overall application of a law but instead invalidate a particular application of a law to a specific set of facts and a specific set of litigants. Holding that a statute allows for absolutely no valid legal application arguably has a larger impact on the rule of law than does invalidating a specific application. The fact that the judiciary generally receives fairly minimal input from members of society about the ways in which parties not before the court will be affected by such broad remedies compounds the risk of using a legal sledgehammer like a facial remedy.

These factors are not exhaustive, and this discussion falls far short of a thorough analysis of any of them. At the very least, I wish to make plausible that there are multiple dimensions along which to assess whether judicial adjudication of constitutional rights is democratically compatible. If that is true, then as the judicial process diminishes the opportunity for people to democratically participate in the creation of legal policy that binds them, the pressure for democratic compatibility provided through other aspects of the judicial function will increase and vice versa. Where the judiciary has a high amount of discretion in choosing the legal outcomes, meaningful democratic compatibility may still be present where citizens have realistic procedural options available to override a disfavored judicial decision. But in the United States, where there is virtually no opportunity for citizens to override judicial decisions in the constitutional context, the need for the judiciary to engage in constitutional adjudication with less discretion and more democratic sensitivity and modesty is heightened. Again, I do not argue that unmitigated democratic compatibility is the summum bonum. I make the more modest claim that democratic compatibility ought to rise at least above the threshold level discussed above, below which there can be said to be little

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[55] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 399 (2010) (Stevens, J., concurring in part and dissenting in part).

[56] *Id.*

meaningful connection between citizen participation in political process and significant policies affecting those citizens.

## II. A CRITICAL REVIEW OF CURRENT APPROACHES

This Part first surveys some of the problems inherent in calling upon the judiciary to balance the importance of constitutional rights against the government's interests in limiting those rights. It then turns to other alternatives scholars have offered. I begin by describing the democratic deficit involved in constitutional judicial balancing. I then describe how other proposed alternatives either fail to eschew balancing as much as they suggest, or else lack sufficient analytical tools to address large swaths of constitutional law without creating unworkable zero-sum conflicts between rights and important government interests.

### A. The Democratic Deficit of Judicial Balancing

With some prominent exceptions discussed below, the majority of the prevailing theories of rights envision a role for judges balancing the importance of various private interests against the importance of other societal goods that are in apparent tension with those private interests. This Section begins by explaining the tension between judicial balancing and democratic principles. It then explains why existing theories of rights that defend balancing are either incoherent or overlook alternatives for protecting rights that are more consistent with the institutional competencies of a judiciary operating within a democracy.

Robert Alexy is one leading scholar who has embraced judicial balancing and defended it as not only rational but also inherently connected with the very notion of rights.[57] Much other scholarship about constitutional rights, including recent important works by Professors Jamal Greene and Mattias Kumm,[58] builds on and is sympathetic to Alexy's theory. These scholars have defended balancing in the context of proportionality, a judicial doctrine that involves the following four-part inquiry regarding a justification for interfering with a right: whether the legal provision restricting the interest (1) pursues a legitimate aim, (2) actually advances that purpose, (3) restricts the interest no more than is necessary to achieve the purpose, and (4) restricts the interest in a proportionate way. It is the last prong of this

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[57] *See* ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS, *supra* note 3, at 133.

[58] *See* Greene, *Rights as Trumps?*, *supra* note 3, at 61; Kumm, *Institutionalising Socratic Contestation*, *supra* note 3, at 158–63.

test that gives proportionality its name and that most explicitly involves weighing competing interests.

Professor Richard Fallon has offered a particularly nuanced defense of an approach to constitutional rights that "requires interest-balancing" by the judiciary in the United States.[59] He has argued that legal doctrines like strict scrutiny, at least in many contexts and at the margins, "require an inquiry analogous . . . to those that other countries' courts conduct in assessing 'proportionality.'"[60] Strict scrutiny is a U.S. constitutional doctrine that asks whether the government has a compelling interest, advanced in the least restrictive way, when the government interferes with some constitutional rights.[61]

Fallon has argued that under this doctrine, when judges determine "whether a particular degree of statutory under- or overinclusiveness is tolerable," they "must judge whether the harm attending a governmental infringement on a protected right is constitutionally acceptable *in light of* the government's compelling aims, the probability that the challenged policy will achieve them, and available alternative means of pursuing the same goals."[62] He pointed out that judges are asking "whether a less restrictive alternative exists that would achieve almost as much risk reduction while infringing less on protected rights."[63] And it is "impossible to think sensibly" about this question unless we are asking "whether a particular, incremental reduction in risk justifies a particular infringement of protected rights *in light of* other reasonably available . . . alternatives."[64] In other words, the amount of risk that would be permissible to the government's interest is relative to the amount of harm to the constitutional right, and this analysis ultimately requires balancing the competing interests against one another.

Fallon posited that judges can determine which interest should take priority in a given context through the Rawlsian methodology of reflective equilibrium.[65] Through this process,

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59 FALLON, THE NATURE OF CONSTITUTIONAL RIGHTS, *supra* note 3, at 151.

60 *Id.* at 63.

61 For a discussion of historical analogues of strict scrutiny, see Stephanie H. Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 NOTRE DAME L. REV. 55, 69–90 (2020) [hereinafter Barclay, *Historical Origins*]; Barclay, *Replacing* Smith, *supra* note 24, at 457–61.

62 FALLON, THE NATURE OF CONSTITUTIONAL RIGHTS, *supra* note 3, at 64 (emphasis added).

63 *Id.*

64 *Id.* at 64–65 (emphasis added).

65 *Id.* at 74.

judges will consider the two competing interests at a high level of moral abstraction, assess the case-by-case application of those moral principles in a specific dispute, and then make adjustments as necessary to "bring [their] understanding of controlling principles and morally best outcomes into harmony with one another."[66] This means that abstract principles "should be rejected or reformulated if they yield results that strike us as morally unacceptable, upon due reflection, in too many cases."[67]

In sum, under the most widely accepted definition of judicial balancing (and the one I use in this Article), the court must in some way compare the weight or value of the government interference with the weight or value of the right. In other words, deciding whether a right weighs "enough" to warrant protection is a relativized question that could not be answered without comparison to the countervailing weight of the government interest.[68]

Before discussing problems with *judicial* balancing, I will begin with some preliminary observations about balancing in general. To observe interests or values in relation to one another, one must be able to put them into a joint context—they need a common measure or, to use Professor Ruth Chang's term, a relevant "covering value."[69] Thus, if the government were deciding between a policy that would protect a Native American sacred site and a policy that would widen a road in a way that would destroy that site, those policies could be compared with various covering values. One could ask which policy would result in the greater financial expense or which policy will most increase the aesthetic beauty of the landscape.[70] But the comparison becomes more complex if one asks a question like which policy is best or most important. It is in those contexts, if the covering value is itself vague or very complex, that the decision-maker may run into

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66 *Id.*

67 FALLON, THE NATURE OF CONSTITUTIONAL RIGHTS, *supra* note 3, at 74.

68 Professor Sherif Girgis is a recent scholar to join the ranks of those defending balancing. *See generally* Girgis, *Unfinished Liberties*, *supra* note 3. However, Girgis defines balancing in a unique way that does not require putting competing values in relation with one another, which is how I define balancing here. He argued that balancing occurs any time a judge makes "political-moral determinations" instead of "reading off legal sources." *Id.* at 553. But he acknowledged that "*[t]ruly* comparing incommensurable costs and benefits isn't inevitable since it's impossible." *Id.* (emphasis in original). Because Girgis and I agree on this point—and thus, it appears, on one of the core problems with what is commonly understood as balancing elsewhere—I do not engage further with his article in this Section.

69 *See* Ruth Chang, *Introduction*, *in* INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 1, 5 (Ruth Chang ed., 1997).

70 *See* FRANCISCO J. URBINA, A CRITIQUE OF PROPORTIONALITY AND BALANCING 40–41 (2017).

problems related to either incommensurability or unresolvable epistemic uncertainty.[71]

To see why, consider an example of balancing outside the constitutional context inspired by Professor Francisco Urbina's work. An individual wants to buy a house, and the relevant question is: What is the best house for her to live in? Let us assume that this decision turns on two variables: proximity to work and size of the house.[72] Assume there are only two houses available and money is not an issue. House *A* is close to work but very small, and House *B* is big but very far from work. Note that the houses can be ranked ordinally by reference to size or to proximity. And the houses can even be compared cardinally by reference to things like the lot size. But the problem is that there is no unifying property that can capture all that is relevant regarding which is the "best" house.[73] For purposes of deciding which is best in this context, then, the houses are incommensurable.

As a result, any decision between the houses would be rationally underdetermined, meaning that there is more than one option that would be reasonable to choose. That is not to say that the buyer would be irrational to choose one of these homes. It just means that the buyer would be rational to choose *either* home; the buyer has no conclusive reason to choose one of the homes. Put differently, the buyer has no way of saying that one of the options is better or worse than the other.[74] Indeed, as Raz pointed out in the context of incommensurability, it would be false to say that one value is better than the other.[75] Rather, the decision is merely intelligible in that it has not been defeated by reasons. And at that point, it is simply an act of *will* for the buyer to separate the choice made from other intelligible alternatives.[76]

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71 Chang argued that, for values to be comparable, one must be able to select a relevant covering value that puts the two values in relation. For example, chalk and cheese are comparable under the covering value of being better for a housewarming gift. Commensurability is a narrower category than comparability in Chang's view. She argued that values can only be commensurable if they can be precisely measured by some common scale of units of value. Chang, *supra* note 69, at 1, 6–7.

72 This example is a modified version of an example used by Urbina, and I am indebted to him for many discussions that sharpened and informed my understanding of incommensurability and its many problems. *See* URBINA, *supra* note 70, at 41.

73 *See id.*

74 *See id.* at 42.

75 *See* Joseph Raz, *Value Incommensurability: Some Preliminaries*, 86 PROC. ARISTOTELIAN SOC'Y 117, 117 (1986) [hereinafter Raz, *Value Incommensurability*].

76 *See* Joseph Raz, *Incommensurability and Agency*, *in* INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 110, 110–13, 126–28 (Ruth Chang ed., 1997) [hereinafter Raz, *Incommensurability and Agency*].

Of course, that does not mean that a buyer's only option is to flip a coin. The buyer might ultimately rank the underlying values[77] and decide that proximity matters more than size. In that case, House *A* will be the better option. But that sort of determination—that act of will—is a discretionary one, and not one that someone else could say is incorrect. A buyer could also artificially commensurate the values by assigning numeric values to the proximity and to the size of the house. But the numbers the buyer would choose to assign are, again, discretionary and may not actually represent anything real about the competing values.

What do I mean here by the term discretionary? That term can be (and has been) used in more than one sense. In this context, a buyer deciding between House *A* and House *B* resembles what Dworkin referred to as strong discretion, meaning the buyer must make a choice without any governing rule or standard that provides meaningful bounds for the discretion.[78] In contrast, Dworkin argued that proper judicial discretion is more constrained—what we might call weak discretion.[79] Raz made a similar distinction between discretion that occurs when there are simply no legal standards governing a situation (which he saw as relatively rare) and discretion in interpreting and applying existing but indeterminate standards. He argued that even when applying apparently indeterminate standards, judges are still generally constrained by legal rules of interpretation and are not simply making free policy choices.[80]

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[77] *See generally* LUDWIG VON MISES, HUMAN ACTION: A TREATISE ON ECONOMICS (1949). Mises, the Austrian economist, acknowledged that many goods or choices are incommensurable; they cannot be measured against each other in absolute terms because there is no common unit of measure for subjective experiences or values. However, this does not prevent individuals from making choices. Indeed, if the would-be homebuyer chose the larger house, Mises would say that this human action itself demonstrates preference. By choosing one option over another, an individual implicitly ranks those options, even if they are otherwise incommensurable. This act of choosing reveals the discretionary value order at that moment. Mises emphasized that ranking these values is discretionary. Goods and services have no inherent value; their value is determined by individual human preferences at the moment of decision-making. Thus, Mises suggested that while incommensurability exists (though he did not use that term), it does not hinder human action or decision-making because individuals can still rank their preferences. This ranking is revealed through their actions, providing a practical solution to the problem of incommensurable values without needing to quantify or compare them directly. But while this provides a means of overcoming incommensurability internal to the decision-maker, on an intrapersonal level, that solution would not translate to an interpersonal level.

[78] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 31–33 (1978) [hereinafter DWORKIN, TAKING RIGHTS SERIOUSLY].

[79] *See id.* at 33–39.

[80] *See* JOSEPH RAZ, *Legal Reasons, Sources, and Gaps*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 53, 73–77 (1979).

So, for example, if a general in the army says to a subordinate officer, "Bring me a serviceman to complete this mission," the subordinate officer has something approaching strong discretion in making the selection. But if the general says instead, "Bring me your best serviceman to complete this mission," there is still discretion, but it is discretion of a much more bounded nature. In the first scenario, there is virtually no possibility for the officer to make a mistake in whom he selects, so long as the individual is in the military. But in the second scenario, there is a standard to be applied, and clear mistakes can be made.[81]

I argue that a government actor is exercising strong or unbounded discretion if she is being asked to assess which value is weightier—the religious exercise importance of a sacred site or the safety benefits of a highway construction program. To start, the selection of the relevant criteria for weighing these competing values would be an exercise of strong discretion. Choosing the weight to assign to each value may be an exercise of strong discretion. And depending on the criteria selected, those competing values may still be incommensurable—in which case it would not be incorrect to choose either option. Both are supported by reason. But neither is supported by a conclusive reason. The government official could at least articulate which value the official preferred, or the official could artificially commensurate the values. But again, those would be choices unconstrained by any rules or standards.

Fallon has candidly recognized that his proposed balancing approach leaves the "'incommensurability' problem untouched."[82] Indeed, he acknowledged the question whether competing interests are "sufficiently commensurable with one another to permit rational judgments about how to weigh, balance, or accommodate them when they compete" and claimed it "may be the deepest problem of practical reasoning."[83]

Realizing this difficulty, Fallon appealed to our own intuitions about balancing in our individual lives. He pointed out that nearly everyone in ordinary life must, at one point or another, "balance competing interests in rationally defensible ways."[84] It would be "naïve" to assume that judges do not engage in similar reasoning, notwithstanding the fact that the resulting reasoning

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[81] I am indebted to David Enoch for this example, which is also a modified version of an example provided by Dworkin.

[82] FALLON, THE NATURE OF CONSTITUTIONAL RIGHTS, *supra* note 3, at 73.

[83] *Id.*

[84] *Id.* at 74–75.

would likely result in "reasonable moral disagreement among morally conscientious people."[85]

There are two significant problems with attempting to transplant this reasoning to the judiciary. First, when it comes to constitutional judicial review, courts are not in the shoes of a frontline decision-maker who must make some choice between incommensurable options. Instead, courts are in the business of telling litigants that the legal doctrine, as applied to the litigants' facts, *required* the courts' ruling, and that the government's prior decision was wrong.

But a court cannot say that a political authority's choice is incorrect if it is rationally underdetermined.[86] In other words, political authorities often have to make choices that are underdetermined by reason to resolve coordination problems—any choice is better than no choice in many contexts. For example, a political authority must determine whether we drive on the right side or left side of the road, and any decision there would be better than no decision.

That same reasoning does not apply if the judiciary is seeking to overturn that choice. The choice of the political authority in the face of incommensurables may not have been required by reason, but neither could such a decision be prohibited by conclusive reasons. And according to Raz, if in fact the original alternatives the government decided between were incommensurable, it would always be false for the court to say that the government made the wrong choice.[87] There was not one right choice to be made.

The second issue is that there is a deficit of democratic accountability when the judiciary, rather than policymakers, is being asked to exercise strong discretion. When a political authority decides on which side of the road the public may drive, it may also exercise strong discretion to rank the preference of the underlying incommensurable values, or it may artificially commensurate. While this sort of ranking or artificial commensuration does not necessarily translate interpersonally, the citizenry could presumably hold government officials accountable for those decisions in ways they could not hold unelected judges accountable.

Balancing competing values related to constitutional rights is a context where the risk of judicial error is high—or where it is often hard to identify or agree upon what counts as error. And as

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85 *Id.* at 75.

86 *Cf.* URBINA, supra note 70, at 42 (defining a "rationally underdetermined" decision as one in which "there is not just one alternative that it would be reasonable to choose").

87 *See* Raz, *Value Incommensurability*, *supra* note 75, at 117.

Marmor argued, the need for political accountability is highest when the risk of error is high or when there are deep and intractable disputes about how to even determine if an error has been made.[88] Yet assigning this role to unelected judges removes most meaningful avenues of political accountability in constitutional systems like the United States'.

In contrast, when politically accountable government officials exercise strong discretion—making choices in the face of epistemic uncertainty or options that are underdetermined by reason—it is at least possible for political actors to identify what they view as the relevant covering value in a transparent and politically accountable way.[89] This allows citizens to weigh in both on whether they think the chosen criterion is the right one and on whether the relative weights given to competing goods are correct. In other words, they can participate in the act of will that is an important aspect of agency.[90]

The citizens may be no more effective as moral philosophers than are judges, but they will have to live with the consequences of whether the string is deemed longer than the rock is heavy. In other words, the consequences of arbitrary decision-making may be best borne by the makers of those arbitrary decisions. That is particularly true if the judiciary is operating in a system where citizens' other political options to correct arbitrary constitutional decision-making are very limited (i.e., only possible through difficult constitutional amendment).

This sentiment is captured in a recent passage penned by Justice Gorsuch in *National Pork Producers Council v. Ross*.[91] He stated:

> [W]e remain left with a task no court is equipped to undertake. On the one hand, some out-of-state producers who choose to comply with Proposition 12 may incur new costs. On the other hand, the law serves moral and health interests of some (disputable) magnitude for in-state residents. Some might reasonably find one set of concerns more compelling. Others might fairly disagree. How should we settle that dispute? The competing goods are incommensurable. Your guess is as good as ours.

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88 Marmor, *in* ENGAGING RAZ, *supra* note 44, at 471.

89 *See* Richard Ekins, *Legislating Proportionately*, *in* PROPORTIONALITY AND THE RULE OF LAW, *supra* note 3, at 343, 358.

90 *See* Raz, *Incommensurability and Agency*, *supra* note 76, at 110–13, 126–28.

91 143 S. Ct. 1142 (2023).

> More accurately, your guess is *better* than ours. In a functioning democracy, policy choices like these usually belong to the people and their elected representatives. They are entitled to weigh the relevant "political and economic" costs and benefits for themselves, and "try novel social and economic experiments" if they wish.[92]

Fallon recognized that a balancing vision of the judiciary engaging in contestable interest-based balancing "implicates democratic theory" and raises questions about judicial legitimacy.[93] For example, if courts are expected to engage in "value-based and instrumental calculations about how best to promote competing interests, the question inevitably arises: How does the judicial role in doing so differ from the function of legislatures, which also should seek to balance and accommodate competing interests?"[94]

Ultimately, Fallon did not provide a normative answer to this normative problem. He stated that he had "not provided . . . a determinate formula for resolving debates about competing interests of constitutional stature."[95] Instead, his aim was to "explain what constitutional argument is about" as an "analytical" rather than "normative" matter.[96] However, there is more than one analytical theory that can be used to capture the theoretical underpinnings of a constitutional right—I offer another such theory below. And if more than one option is available, then a normative explanation is required for preferring one over another. Fallon adopted democratic theory as a relevant normative criterion, but he never quite explained how his theory is consistent with democratic principles.

Professor Timothy Endicott has offered another justification for judicial balancing. Endicott acknowledged the problem of incommensurability inherent in judicial "balancing" of constitutional interests, concluding that the doctrine of proportionality does not "deliver" on its promises of "rationality, transparency, objectivity, and legitimacy."[97] However, he still allowed for its use by the judiciary.[98] Endicott argued that judicial resolution of disputes over incommensurable values is not necessarily a departure

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92 *Id.* at 1160 (emphasis in original) (first quoting Moorman Mfg. Co. v. Bair, 437 U.S. 267, 279 (1978); then quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

93 FALLON, THE NATURE OF CONSTITUTIONAL RIGHTS, *supra* note 3, at 11.

94 *Id.*

95 *Id.* at 75.

96 *Id.*

97 Endicott, *in* PROPORTIONALITY AND THE RULE OF LAW, *supra* note 3, at 311.

98 *Id.*

from the rule of law because it is an inevitable task required by a legal system.[99] For example, he pointed out that courts are regularly required to determine things like the sentence for a serious crime like rape. But he observed that "there is no precise period of incarceration that is equal in its penal seriousness to the seriousness of the criminality of a rape or a serious assault."[100] Thus, there is "no practical alternative to a judicial power and responsibility to balance the unbalanceable."[101]

But contexts like sentencing are different for two important reasons. First, there is much more political accountability in such a setting, where the legislature could override decisions made by the judiciary by establishing rules for sentencing. Second, unlike in the context of constitutional adjudication, in sentencing the judiciary is acting as the frontline decision-maker. It may have to decide among incommensurable options. But that is very different from a court telling a political actor who made that sort of decision that the political actor got it wrong.

Further, the legislature may have already taken steps to artificially commensurate the values by focusing the inquiry on purposes like protecting the public from further rape by this wrongdoer, deterring other would-be rapists, or rehabilitating the offender.[102]

Perhaps most importantly for purposes of this discussion, Endicott's argument (like Fallon's) turns on the inevitability of judicial balancing in order to protect constitutional rights. This suggests that, if there were a way for the judiciary to protect individual rights without resolving such difficult incommensurable values, such an approach would be preferable. I argue below in Part IV for such an alternative.

### B. Rights as Trumps . . . in the Balance

Dworkin's approach to rights as "trumps" famously critiques many aspects of balancing.[103] Dworkin argued that rights are best understood as "trumps" against utilitarian and collective justifications for laws.[104] He maintained that "[i]ndividuals have rights

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99 *Id.*

100 *Id.* at 324.

101 *Id.*

102 Ekins, *Legislating Proportionately*, *in* PROPORTIONALITY AND THE RULE OF LAW, *supra* note 3, at 354–57.

103 DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 78, at xi.

104 *Id.*; *see also* RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? 30–33 (2006). *See generally* RONALD DWORKIN, A MATTER OF PRINCIPLE (1985); DWORKIN, LAW'S EMPIRE, *supra* note 28; RONALD DWORKIN, SOVEREIGN VIRTUE (2000).

when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them."[105] At times, Dworkin claimed to reject the model that involves "striking a balance between the rights of the individual and the demands of society at large."[106] He described that model as "false," and he said the "heart" of the "error" with conceptions about rights is the metaphor of balancing.[107]

However, Dworkin's own theory does not avoid the pitfalls of a balancing approach. Both Raz and Professor Paul Yowell have argued that a closer look at Dworkin's theory reveals that he seemed to embrace balancing in a number of contexts.[108] To be a right according to Dworkin, an individual's legal interest must "override[ ] at least a marginal case of a general collective justification."[109] Yet under Dworkin's theory of rights, it is permissible for the government to curtail the exercise of a fundamental right to prevent substantial harm to others or to society.[110] Dworkin may have put a heavier thumb (how much heavier, who can say?) on the scale in favor of the right by requiring showings like a "substantial risk" that its exercise will do "great damage."[111] But if this analysis seeks to weigh the importance of the right against the gravity and risk of the potential harm to society, at some level that is still a form of balancing. As Raz explained, Dworkin's argument amounts to two truisms: "that rights matter and that they may defeat other considerations" some of the time.[112] At bottom, Dworkin's approach is merely balancing by another name—and just as flawed.

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[105] DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 78, at xi.

[106] *Id.* at 197–98.

[107] *Id.* at 198.

[108] *See* Joseph Raz, *Professor Dworkin's Theory of Rights*, 26 POL. STUD. 123, 126 (1978) [hereinafter Raz, *Dworkin's Theory*]; Paul Yowell, *A Critical Examination of Dworkin's Theory of Rights*, 52 AM. J. JURIS. 93, 97 (2007) [hereinafter Yowell, *A Critical Examination*].

[109] DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 78, at 366.

[110] *Id.* at 200–04.

[111] *Id.* at 204.

[112] Raz, *Dworkin's Theory*, *supra* note 108, at 126; *see also* Yowell, *A Critical Examination*, *supra* note 108, at 97. Note that Jamal Greene may have overstated at times the contrast between Dworkin's "rights as trumps" approach and other balancing approaches by overlooking the extent to which Dworkin's approach involves balancing. To be fair, Greene is certainly not alone in that reading of Dworkin's account. But the upshot is that these theoretical conceptions of rights are often set up as divergent constitutional models on opposite ends of a spectrum, when in fact they are more often than not fellow constitutional travelers that may simply have some distance along a spectrum. *See* Greene, *Rights as Trumps?*, *supra* note 3, at 33–34.

### C. A Structural Approach to Rights

Professor Richard Pildes has written that practice reveals that rights, at least in the U.S. context, seldom operate as values-balancing mechanisms. Rather, they operate in a structural way, enabling courts to "police the kinds of purposes government can offer to justify its action" rather than "protect[ing] the atomistic interests of individuals" in a way that disregards the common good.[113] When operating in this way, rights "channel[ ] the *kinds of reasons* government can invoke when it acts in certain arenas" by acting as exclusionary reasons.[114] Much is promising about this approach, both descriptively and normatively.

However, Pildes did not sidestep balancing entirely. He argued that while "balancing plays less of a role in constitutional adjudication" under his theory,[115] his approach "will not completely eliminate balancing," and some rights will require courts to "decide which [reasons] are stronger and override the others."[116] But Pildes never explained *which* rights elude the structural frame and thus invite balancing, or how courts might know when to use the structural frame or when to use the balancing frame.

There is another important unanswered question lurking within Pildes's structural frame: How should courts determine which justifications for government action are excluded and which are permissible in relation to a given constitutional right? When discussing the right to vote, Pildes stated that courts must decide "whether a particular [voting] condition is 'germane' to the legitimate constitution of the political community," which will require "judgment[ ] about how best to interpret the common good of democratic self-government."[117] He acknowledged that this raises the question of "to what authoritative sources do or should courts look in this value-laden role of giving content to distinct common goods."[118] But he also admitted that his theory does not

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[113] Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 730–31 (1998) [hereinafter Pildes, *Why Rights Are Not Trumps*]; *see also* Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 722 (1994) [hereinafter Pildes, *Avoiding Balancing*] (describing rights not as "protecting individual autonomy" but as "the tools constitutional law uses to maintain appropriate structural relationships of authority").

[114] Pildes, *Why Rights Are Not Trumps*, *supra* note 113, at 729 (emphasis in original); *id.* at 735 n.28 (discussing Raz's concept of exclusionary reasons).

[115] *Id.* at 733.

[116] *Id.* at 735 n.30.

[117] *Id.* at 747 (quoting Harper v. Va. Bd. of Elections, 383 U.S. 663, 668 (1966)).

[118] Pildes, *Why Rights Are Not Trumps*, *supra* note 113, at 754.

address these difficult issues of "constitutional theory."[119] Thus, while Pildes's theory points us in a fruitful direction regarding rights, it leaves undertheorized many of the most important issues necessary to operationalize an exclusionary reason theory for rights.

### D. A Categorical Historical Analogue for Government Regulation of Rights

Another alternative to balancing involves the judiciary defining rights with reference to historical analogues of government regulations that existed at the Founding. I will refer to this as the regulatory historical-analogue approach. The Supreme Court's decision in *Bruen* is the most prominent example of this approach. Thus, though the Court in *Rahimi* has subsequently softened its approach in positive ways (which I discuss further in Part IV.E.1), I begin with *Bruen* as a paradigm of this type of constitutional construction. In that case, the Court struck down a New York law requiring individuals to demonstrate a "proper cause" to obtain a concealed carry permit.[120] The Court ruled that the law violated the Second Amendment's protection of the right to bear arms in public for self-defense. In so doing, the Court set forth a new test for adjudicating Second Amendment rights.[121]

As a threshold matter, courts must first determine whether the conduct being regulated is protected by the text of the Second Amendment.[122] If the conduct falls within the Second Amendment's protection, the government must demonstrate that the modern regulation is "consistent with the Nation's historical tradition of firearm regulation."[123] This involves identifying historical laws or practices from the Founding Era or during the ratification of the Fourteenth Amendment that are "relevantly similar" to the challenged regulation.[124] Modern considerations, such as public safety or efficacy, are not part of this analysis.

The upshot of this test is to turn Second Amendment rights into absolute rights, which government is not justified in limiting based on any modern facts. While the Court nods to governmental limits on the right, by looking only at government limits on the

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[119] *Id.*

[120] *Bruen*, 142 S. Ct. at 2122–23.

[121] *Id.* at 2126.

[122] *Id.* at 2129–30.

[123] *Id.* at 2130.

[124] *Id.* at 2132 (quotation marks omitted) (quoting Cass Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 773 (1993)).

right that are "frozen in amber" historically, this essentially just becomes part of the step-one inquiry of determining, as a historical matter, which zone of activity the government must not regulate. Identifying relevant historical analogues of regulation all becomes part of that initial question of deciding whether the activity is protected or not. If activity falls within that historical scope, there is no action that government can take in the present or evidence it can marshal that would justify the government's decision to regulate the right differently.

To be fair to defenders of the historical-analogue approach, I do not claim that constitutional rights should never be given absolute protection, nor that historical materials are irrelevant for courts to determine whether and how to protect an activity. To the contrary, I discuss some important absolute rights below in Part IV.E.1.

Identifying historical analogues can be a valuable way of identifying categorical rights, such as jury rights or the First Amendment's ministerial exception. Under the ministerial exception doctrine, for example, in certain contexts the government is flatly prohibited from forcing a religious organization to hire or maintain an employment relationship with a religious leader that the church does not wish to be its leader.[125] But note that in that context, the historical analogue identifies the protected zone of activity into which the government *cannot* intrude. In that context, the doctrine can still lend itself to judicial restraint by historically identifying the protected activity at a low level of generality. In other words, it will result in a right being narrowly defined but deeply protected. And in this context, there is historical support for the notion that the Framers intended this sort of activity to receive constitutional protection.

However, the historical-analogue approach in *Bruen* functions in the opposite way. There, the Court identifies the historical analogue not of the right but of the government regulation and then limits permissible modern regulation to those mirroring that historical regulation. In other words, the analogue in the ministerial exception tells the government a limited realm of things the government absolutely cannot do. The analogue in the *Bruen* context operates to tell the government the very limited range of things the government *can* do. This approach also assumes, as Justice Barrett pointed out, that the government at the Founding was regulating to the extent of its constitutional authority and

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[125] *See generally* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).

thus could not have chosen to regulate further, despite the lack of historical evidence for such an assumption.[126]

Once the analogue is flipped in this way, to create a limited permission rather than a limited prohibition, courts have two options. First, they can prioritize judicial restraint and identify the historical analogue at a very low level of generality. Where the historical record has limited regulation, that approach would effectively handcuff modern regulators. On the other hand, where the historical record involves troubling regulations that may have violated the constitution, those historical analogues could open the door to modern abuses of rights. Or second, courts can dial up the level of generality, but in ways that are entirely at their discretion, leading to unpredictable results and compounding tension with democratic principles. And these issues are aggravated where the right at issue is broadly applicable, rather than narrow and well-defined.

However, I argue in Part IV and elsewhere that, as a textual and historical matter, many rights almost certainly include more than just categorical protections.[127] If we limited a theory of constitutional rights to only categorical ones, this approach would fail to descriptively capture wide swaths of constitutional law, both in the United States and in other constitutional democracies. As a practical matter, categorical protection is a very strong form of protection, and it thus lends itself best to clearly defined and limited rights. If only absolute protections were recognized for something like free exercise rights, then there would likely be a significant range of activity left unprotected, particularly for minority religious groups in our pluralistic society.[128] Conversely, there are many types of activity that the government did not regulate at the Founding, but for which it is difficult to imagine a court providing a religious exemption today.

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126 *Rahimi*, 144 S. Ct. at 1925 (Barrett, J., concurring).

127 *See generally, e.g.*, Barclay, *Constructing Constitutional Rights*, *supra* note 18.

128 *See* Donald L. Beschle, *No More Tiers? Proportionality as an Alternative to Multiple Levels of Scrutiny in Individual Rights Cases*, 38 PACE L. REV. 384, 407 (2018) (noting that some Justices "seem to have clearly understood that no legal system can provide absolute constitutional protections without limiting the scope of the right entitled to such protection"); Lucien J. Dhooge, *The Equivalence of Religion and Conscience*, 31 NOTRE DAME J.L. ETHICS & PUB. POL'Y 253, 255–60 (2017) (discussing some "hazards" that can arise if absolute protections are extended too far under a too-expansive definition of religion). *See generally* Donald L. Beschle, *Does a Broad Free Exercise Right Require a Narrow Definition of "Religion"?*, 39 HASTINGS CONST. L.Q. 357 (2012) (discussing some tradeoffs between expansive definitions of religion and expansive concepts of free exercise).

Consider a 2016 case, which I have written about elsewhere,[129] involving a mother who asserted a religious freedom defense to beating her 7-year-old son with a coat hanger.[130] The mother "claimed her discipline method came straight from her evangelical Christian beliefs."[131] Under a regulatory historical-analogue test, the mother has a powerful argument. There is no strong historical pedigree of child-protection laws at the Founding Era. At least by one account, no U.S. state had any formal organization that specifically protected children from abuse until 1875 (and the earliest organizations were nongovernmental), and Britain did not adopt laws providing such protection until 1889.[132] Even then, these early laws were aimed at nonfamily members, and something like a parental beating would not have received specific focus until much later.[133] Further, one could certainly argue for a strong historical tradition of parental rights, including for religious reasons.[134]

Perhaps an advocate of the historical-analogue approach would try to resolve this issue by arguing that the relevant "long, unbroken tradition of restriction"[135] by government need not date to the Founding Era, so we could point to a long tradition of child-protection laws dating at least to the 1960s. But this leads to the second problem: the historical-analogue approach as applied by *Bruen* raises difficult questions about which history we should look to (e.g., when is the relevant ending point?) and why that

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[129] *See* Barclay, *Replacing* Smith, *supra* note 24, at 466–67.

[130] *See* Vic Ryckaert, *Mom Who Cited Religious Freedom Pleads Guilty*, INDYSTAR (Oct. 28, 2016), https://perma.cc/VK39-E2GZ.

[131] *Id.*

[132] *See* John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 451 (2008); Donald N. Duquette, *Child Protection Legal Process: Comparing the United States and Great Britain*, 54 U. PITT. L. REV. 239, 243 (1992). *R v. Hopley* (1860) 175 Eng. Rep. 1024, 1026; 2 F. & F. 202, 206, establishes that, as of the mid-nineteenth century, child discipline was a good defense to battery at common law if "moderate and reasonable." Excessive force has been forbidden since before then, but states generally did not second-guess parents' and teachers' avowed need for corporal punishment. *See generally, e.g.*, Johnson v. State, 21 Tenn. 283 (1840); State v. Pendergrass, 19 N.C. 365 (1837). For helpful background, see generally Sallie A. Watkins, *The Mary Ellen Myth: Correcting Child Welfare History*, 35 SOC. WORK 500 (1990).

[133] *See* John Philip Jenkins, *Child Abuse*, BRITANNICA (last updated Sept. 11, 2023), https://perma.cc/5DDL-DNBW ("In 1962, American medical authorities discovered the phenomenon of 'baby battering'—the infliction of physical violence on small children—and both the federal government and states adopted laws to investigate and report such acts."); *History*, N.Y. SOC'Y FOR THE PREVENTION OF CRUELTY TO CHILD., https://perma.cc/8MQ2-8QCH.

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

[135] Haun, *supra* note 10, at 421.

history is entitled to special privilege that would be folded into the scope of a constitutional right enacted long before.[136] Justices Thomas and Kavanaugh have suggested that historical evidence that far postdates the Founding period should be relevant for this analysis in some contexts.[137] If the relevant historical period is just up to a judge's preferences, is this test any less discretionary than the balancing test it hopes to replace?

If we return to the example of the mother beating her child, perhaps an advocate of the historical-analogue approach would try to address this issue by raising the level of generality.[138] There is, no doubt, a long tradition dating back to the Founding of public safety regulation, even in ways that limit religious exercise. And at that higher level of generality, one could argue that preventing child abuse is also protecting public safety. True enough. But, at that level of generality, a government could tie virtually any regulation in any context to public safety. The government would then *always* have a justification of violating nearly any right.

Which level of generality is appropriate for the historical-analogue test? Ironically, defenders of a historical-analogue approach have pressed the level-of-generality problem against doctrines like strict scrutiny.[139] But it is also an unavoidable problem that any form of originalism—or any legal doctrine—must grapple with.

More importantly, for the reasons I discuss below at the conclusion of Part IV.E.3.a, the level-of-generality problem is a much bigger issue for the historical-analogue test than for the alternative approach to rights that I propose.

Finally, in the as-applied context, the key question should not just be whether public safety is a goal worth pursuing, but also whether the government's justification for denying something like a religious exemption could be accomplished without interfering with the constitutional interest, and whether its chosen

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[136] *See generally* Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477 (2023). *But see* Marc O. DeGirolami, *First Amendment Traditionalism*, 97 WASH. U. L. REV. 1653, 1661, 1666 (2020) (arguing that enduring practices are "one of the crucial . . . ingredients" of textual meaning and "represent the people's decisions about" their governance and thus greater weight is given to longer-lived traditions).

[137] Justice Thomas's *Vidal v. Elster* and *Samia v. United States* opinions and Justice Kavanaugh's *Rahimi* concurrence would give long-postratification practices weight in constitutional analysis. *See* Vidal v. Elster, 144 S. Ct. 1507, 1519–22 (2024); Samia v. United States, 143 S. Ct. 2004, 2012–13 (2023); *Rahimi*, 144 S. Ct. at 1915–19 (Kavanaugh, J., concurring).

[138] Much of the analysis in this paragraph and the following paragraph is adapted from my earlier article. Barclay, *Replacing* Smith, *supra* note 24, at 468–69.

[139] *See* Alicea & Ohlendorf, *supra* note 10, at 80–81.

means actually advance its stated justification. If the government is not required to demonstrate, through some sort of evidentiary burden, that its actions are causally linked to its stated goal, it could use a reference to "public safety" as a trump card in any case to defeat a religious exercise right. This would be true even if the government's actions were not actually improving public safety in any meaningful sense. Evidentiary questions are unavoidable in as-applied contexts if rights are to be given any meaningful protection.

But once we start to ask those sorts of questions (like "were the government actions here necessary to advance public safety?"), the legal analysis becomes virtually indistinguishable from the type of protected-reason analysis (and the analysis courts perform under strict scrutiny) that I discuss below in Part IV.

## III. THE UNDERTHEORIZED RELATIONSHIP OF THE POLITICAL BRANCHES TO CONSTITUTIONAL RIGHTS

The role of the political branches in the protection of rights is a topic that receives too little attention. Most theories of rights treat the judiciary as the vanguard of rights and the only branch of government with any meaningful role in protecting rights. Under this view, the legislative and executive branches become little more than serial violators of rights who must be reined in by a watchful judiciary. Other recent theories, discussed below, have rightly acknowledged that this approach overlooks the critical ways in which political branches of government do and should protect constitutional rights. But these theories have swung the pendulum to the opposite side by giving the judiciary virtually no role in the protection of rights. In this Part, I explore the problems with both extremes. And as discussed further in Part IV, while I agree that the political branches should play a key role in the protection of rights (one that is often overlooked), I believe the judiciary plays an important role as well (one that need not crowd out political actors).

### A. Should the Judiciary Have the *Only* Meaningful Role in Protecting Rights?

Most theories of constitutional rights (particularly balancing theories) hold as their "key premises" that rights "are the special province of the courts" and that the work of the political branches

of government "represents a threat rather than a means of protecting" those rights.[140] For example, a group convened by former British Prime Minister Gordon Brown and advised by a philosophers' committee published a report on the Universal Declaration of Human Rights.[141] The report has a section devoted to the Declaration's implementation within national legal systems. In that section, it affirms that the "front-line work of upholding human rights is always conducted under the auspices of national constitutions and bills of rights."[142] And the report states that the "judiciary has a pivotal role to play in upholding human rights," given that "[o]nly an independent judiciary can render justice impartially on the basis of law, thereby assuring the rights and fundamental freedoms of the individual."[143] In contrast, much of this discussion about the implementation of constitutional rights is quite skeptical of the political branches' contributions.[144] One scholar has argued that, in Jordan and the Middle East, it is "the judicial branch," rather than the political branches, that must "undertake[ ] the substantial responsibility of enforcing the safeguards [of law], thereby protecting human rights."[145] In Germany, another scholar argued: "The seminal novelty of the German Constitutional Court, the protection of individual fundamental rights, . . . was not based on a decision made by any constituent assembly," yet it "entrusted the individual protection of rights to all courts."[146]

In other words, the judiciary has the most important (and maybe even the exclusive) role when it comes to the protection of constitutional rights. The problematic corollary is that the political branches need not focus on whether their actions violate rights—that legal boundary is solely up to the judiciary to police.

This approach has led to perverse outcomes at two extremes: On the one hand, the other political branches can be viewed

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[140] Grégoire Webber & Paul Yowell, *Preface* to LEGISLATED RIGHTS, *supra* note 16, at vii.

[141] *See generally* GLOBAL CITIZENSHIP COMMISSION, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS IN THE 21ST CENTURY: A LIVING DOCUMENT IN A CHANGING WORLD (Gordon Brown ed., 2016) (available at https://perma.cc/545X-2W34).

[142] *Id.* at 95.

[143] *Id.* at 96; *see also* Grégoire Webber & Paul Yowell, Legislated Rights *in the Real World*, 21 JERUSALEM REV. LEGAL STUD. 145, 147 (2020).

[144] GLOBAL CITIZENSHIP COMMISSION, *supra* note 141, at 96 (discussing a dearth of legislative action in the United States to extend statutes of limitation on human rights claims, with the sole exception of California).

[145] Fahed Abul-Ethem, *The Role of the Judiciary in the Protection of Human Rights and Development: A Middle Eastern Perspective*, 26 FORDHAM INT'L L.J. 761, 762 (2003).

[146] László Sólyom, *The Role of Constitutional Courts in the Transition to Democracy: With Special Reference to Hungary*, 18 INT'L SOCIO. 133, 136 (2003).

essentially as serial violators of rights tasked with interfering as much as the judiciary will allow in the service of good governance.[147] On the other hand, when some political branches have sought to protect rights above and beyond the level the judiciary felt competent to recognize under the relevant constitution, courts have sometimes prevented the political actors from offering those additional protections. In essence, if the judiciary is incompetent to decide that a particular right extends this far and no further, the legislature is *also* incompetent to go any further.

For example, the U.S. Supreme Court has run into particular trouble with this territoriality about rights in some of its cases interpreting § 5 of the Fourteenth Amendment. Section 5 provides an express grant of power to Congress to enforce the substantive rights laid out in the rest of the Amendment.[148] At the same time, § 1 imposes a positive duty on the states to provide for the equal protection of their laws and for due process of law.[149] However, when asked to remedy alleged § 1 violations, the Court has limited the scope of § 1 rights to state *action*, reasoning that the judiciary is not competent to devise remedies for a state's failure to affirmatively act.[150] But even accepting the premise that the judiciary is ill equipped to remedy state inaction, it does not follow that Congress is similarly incompetent.

Consider the 2000 case of *Morrison*, involving the Violence Against Women Act of 1994[151] (VAWA) that Congress enacted to implement what it viewed as an important aspect of the Equal Protection Clause.[152] Before enacting VAWA, Congress produced a voluminous record indicating that many participants in state justice systems were "perpetuating an array of erroneous stereotypes," which often led to "insufficient investigation and prosecution of gender-motivated crime."[153] Rather than impose a remedy on the

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[147] *See* Grégoire Webber & Paul Yowell, *Introduction: Securing Human Rights through Legislation*, *in* LEGISLATED RIGHTS, *supra* note 16, at 13 [hereinafter Webber & Yowell, *Securing Human Rights*].

[148] U.S. CONST. amend. XIV, § 5.

[149] *See* Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEORGE MASON U. CIV. RTS. L.J. 1, 3 (2008).

[150] *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 202–03 (1989).

[151] Violent Crime Control and Law Enforcement Act of 1994, tit. IV, Pub. L. No. 103-322, 108 Stat. 1796, 1902 (codified as amended at scattered sections of 42 U.S.C.).

[152] VAWA, § 40302, 108 Stat. at 1941–42 (codified at 34 U.S.C. § 12361) (previously codified at 42 U.S.C. § 13981), *invalidated by Morrison*, 529 U.S. 598; *see also Morrison*, 529 U.S. at 620.

[153] *Morrison*, 529 U.S. at 620; *see also* Letter from Justice Joseph P. Bradley to Judge William B. Woods (Mar. 12, 1871), *in* RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT, at xiv, xiv–xvi (2021); BARNETT & BERNICK, *supra*, at 362 (2021); Kermit Roosevelt III, *Bait and*

states for their failure of protection (which would raise federalism concerns), Congress instead established a private federal cause of action against individuals to be enforced in federal courts for gender-motivated crimes. This was a political remedy above the minimal threshold that any court could constitutionally require.

But in *Morrison*, the Court invalidated this congressional remedy on the ground that Congress had exceeded its power under § 5 because it sought to go beyond the state action doctrine the Court had adopted for enforcing the Equal Protection Clause.[154] Yet that doctrine had been principally justified on the ground that the courts, not the political branches, were incompetent to police state inaction.[155]

Essentially, the Court's ruling limited Congress to enforcing the floor created by the Equal Protection Clause, rather than allowing it to use the legislative power of § 5 to provide a remedy above that floor. As I argue below, the judicial floor of a right should not simultaneously operate as a legislative ceiling.[156]

The Court engaged in an even more egregious example of that reasoning in *City of Boerne*. Leading up to *City of Boerne*, in the 1960s and 1970s, the Court's decisions in *Sherbert v. Verner*[157] and *Wisconsin v. Yoder*[158] set forth a constitutional standard under the Free Exercise Clause requiring that the government satisfy strict scrutiny for most government actions that substantially burdened religious exercise.[159]

Then, in the 1990 *Employment Division v. Smith*[160] decision, the Court overturned this rule.[161] It instituted a much less protective norm—one that some commentators described as excluding government discrimination alone as problematic.[162] Yet the Court's justification in *Smith* was not primarily a change in its substantive interpretation of the Free Exercise Clause based on

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*Switch: Why* United States v. Morrison *Is Wrong About Section 5*, 100 CORNELL L. REV. 603, 621 (2015).

154 *See Morrison*, 529 U.S. at 627.

155 *See* Shelley v. Kraemer, 334 U.S. 1, 13–14 (1948).

156 *See infra* Parts IV.B, V.

157 374 U.S. 398 (1963).

158 406 U.S. 205 (1972).

159 *Id.* at 221; *Sherbert*, 374 U.S. at 403.

160 494 U.S. 872 (1990).

161 *Id.* at 883–90.

162 *See, e.g.*, Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 157 (1997) [hereinafter McConnell, *Institutions and Interpretation*]. That norm resurfaced recently. *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2422 (2022); Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1878 (2021); *see also* Stephanie H. Barclay, *The Religion Clauses After* Kennedy v. Bremerton School District, 108 IOWA L. REV. 2097, 2110–13 (2023).

textual or historical arguments. Rather, the Court's reasoning in *Smith* was primarily about limitations on the judiciary's institutional competency and the corresponding need for deference to the political branches.[163]

The Court admitted in *Smith* that its nondiscrimination interpretation of the Free Exercise Clause was only one of multiple "permissible reading[s]" of the constitutional text.[164] And the Court acknowledged that this reading would "place at a relative disadvantage those religious practices that are not widely engaged in."[165] But the Court expressed concern that requiring more religious protection would interfere too much with the government's ability to "carry out other aspects of public policy" and risk "courting anarchy."[166] Whether the government should accept such a risk was not a question "appropriate[ly] . . . discerned by the courts."[167] As an institutional matter, courts were not well positioned to "weigh the social importance of all laws against the centrality of all religious beliefs."[168] Thus, "the *Smith* Court consciously decided to give less than full protection to free exercise in order to protect legislative prerogative."[169] Or, as Professor Ira Lupu observed:

> *Smith* indicates that it is a decision about institutional arrangements more than about substantive merits. A significant portion of the Court's justification focuses on the difficulties that courts encounter in balancing interests . . . . The opinion suggests that only the political branches possess the requisite competence and authority to make these judgments. . . . Under this view, *Smith* is a political question case, holding that judicially manageable standards for the resolution of Free Exercise exemption claims are lacking.[170]

The Court's decision in *Smith* received widespread criticism,[171] and Congress responded just three years later by passing,

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[163] McConnell, *Institutions and Interpretation*, *supra* note 162, at 189–92.

[164] *Smith*, 494 U.S. at 878.

[165] *Id.* at 890.

[166] *Id.* at 885, 888.

[167] *Id.* at 890.

[168] *Id.*

[169] McConnell, *Institutions and Interpretation*, *supra* note 162, at 191.

[170] Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1, 59 (1993).

[171] *See* Ira C. Lupu, Employment Division v. Smith *and the Decline of Supreme Court-Centrism*, 1993 BYU L. REV. 259, 260 n.9 (collecting sources that disapprove of *Smith*); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 559 (1993) (Souter, J., concurring in part and concurring in the judgment) (noting "doubts about

in near unanimity, the Religious Freedom Restoration Act of 1993[172] (RFRA). RFRA offered heightened legislative protection to religious exercise where the Court was no longer offering protection under the constitutional minimum of that right.[173] RFRA again permitted government to substantially burden religious exercise *only* when it was necessary to do so to advance a compelling government interest.[174] In a way, Congress responded to the Court by essentially saying:

> We've carefully considered your concern about the burden on political branches of government that occurs if the law protects religious exercise more robustly and allows for judicial intervention with government policies. But given the value of religious exercise in our society, we've determined that additional protections for this right are worth that risk.[175]

As applied to state and local governments, RFRA was enacted pursuant to Congress's power under § 5 of the Fourteenth Amendment to pass "appropriate legislation" to "enforce" the provisions of that Amendment.[176]

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whether the *Smith* rule merits adherence"); Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith*,* Lukumi *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 851–56 (2001); James D. Gordon, III, *Free Exercise on the Mountaintop*, 79 CALIF. L. REV. 91, 114–16 (1991); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 2–3 (arguing that *Smith* was incorrectly decided based on precedent and original intent); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990) ("There are many ways in which to criticize the *Smith* decision. . . . *Smith* is contrary to the deep logic of the First Amendment."); Harry F. Tepker, Jr., *Hallucinations of Neutrality in the Oregon Peyote Case*, 16 AM. INDIAN L. REV. 1, 11–26 (1991). *But see* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 917–32 (1992) (questioning the originalist historical evidence in favor of religious exemptions); William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 309 (1991) (defending "*Smith*'s rejection of constitutionally compelled free exercise exemptions without defending *Smith* itself").

[172] Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to bb-4).

[173] For a more detailed exposition of this view of RFRA, see generally Stephanie H. Barclay & Mark L. Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. REV. 1595 (2018).

[174] *See* 42 U.S.C. § 2000bb-1.

[175] *Cf.* McConnell, *Institutions and Interpretation*, *supra* note 162, at 191:

> [T]he congressional judgments embodied in RFRA are fully consistent with the enforcement mandate of Section Five. Congress has not attempted to "alter" the meaning of the Free Exercise Clause, or to create "new rights," despite Justice Kennedy's opinion. It has simply decided to enforce the Free Exercise Clause fully, even though doing so involves a greater risk to social policies and a greater likelihood of judicial overreaching than the *Smith* Court was willing to demand.

[176] U.S. CONST. amend. XIV, § 5.

Yet the Supreme Court in *City of Boerne* struck down RFRA as an unconstitutional use of Congress's § 5 power.[177] The Court did not just resuscitate *Smith*'s methodological conclusions. It also evinced a problematic territorialism about constitutional interpretation itself: "The power to interpret the Constitution in a case or controversy remains in the Judiciary."[178] Put differently, only the Court, not Congress, can determine rights' bounds—§ 5 notwithstanding. In arrogating to itself not only the power to adjudicate rights claims but also the power to interpret and determine the scope of any aspect of constitutional rights,[179] the Court "adopted a startlingly strong view of judicial supremacy" that was "the most judge-centered view of constitutional law since *Cooper v. Aaron*."[180]

By declaring that only the judiciary may interpret the Constitution authoritatively and reading uniquely judicial worries about judicial competency into the constitutional text, *City of Boerne* made § 5's judicial floor coterminous with its legislative ceiling. In so doing, *City of Boerne* overshot *Smith*, which expressly contemplated legislative action to protect religious freedom. *Smith* acknowledged that "[v]alues that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process," gesturing to the possibility that a society valuing "religious belief can be expected to be solicitous of that value in its legislation."[181] The Court in *Smith* justified its more minimal protection of religious exercise as deference to the political branches. But what the Supreme Court gave with one hand, it took away with the other when the legislature sought to provide more robust free exercise protections. Moreover, in *City of Boerne*, the Court imposed that same minimal standard on another institution (Congress) in the absence of the judicial institutional limitations that had driven the *Smith* Court's concern to begin with. Indeed, Justice Antonin Scalia argued in *City of Boerne* that the Court was striking down a nearly unanimous piece of legislation passed by the people's representatives in the name of democratic legitimacy. The primary question under *Smith*, Justice Scalia explained, "is, quite simply,

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177 *City of Boerne*, 521 U.S. at 536.

178 *Id.* at 524.

179 Under *City of Boerne*, it is the judiciary—and the judiciary alone—that draws the class of excluded reasons.

180 McConnell, *Institutions and Interpretation*, *supra* note 162, at 163 (citing Cooper v. Aaron, 358 U.S. 1 (1958)).

181 *Smith*, 494 U.S. at 890.

whether the people, through their elected representatives, or rather this Court, shall control the outcome of those concrete cases [where laws burden religious practice]."[182] But the actual holding of *City of Boerne* is difficult to square with Justice Scalia's answer: "It shall be the people."[183]

### B. Should the Political Branches Have the *Only* Meaningful Role in Specifying and Protecting Rights?

The authors of *Legislated Rights* rightly drew attention to the problematic received wisdom of human rights discourse, in which the legislature is wrongly viewed as a serial violator of rights that must be hemmed in by the vigilant judiciary—the sole protector of rights.[184] However, in sharp contrast to this typical approach, the authors argued that it is primarily the lawmaker's role to give specification to rights and to perfect relations between persons, articulating no real role for the judiciary in that process.[185]

This work builds on an argument by legal philosopher John Finnis that constitutional rights are generally only "two-term right[s]," meaning they provide only a vague notion that a class of persons has a right pertaining to a subject matter related to human well-being (e.g., a right to freedom of expression or to equal protection).[186] Finnis argued that rights of this type are too amorphous to provide legal guidance and must be "translated" by a legislature into "specific three-term relations" with "real conclusory force."[187] A three-term relationship involves (1) "the identity of the duty-holder(s) who must respect [the] right," (2) "the content of the duty, in terms of specific act-descriptions," and (3) "the identity or class-description of [ ] the correlative claim-right-holder(s)."[188] Absent legislative action delimiting constitutional rights in this way, Finnis argued, they are essentially devoid of any legal meaning.[189]

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[182] *City of Boerne*, 521 U.S. at 544 (Scalia, J., concurring in part).

[183] *Id.*

[184] Webber & Yowell, *Securing Human Rights*, *supra* note 147, at 13–14. *See generally* LEGISLATED RIGHTS, *supra* note 16.

[185] Grégoire Webber, *Rights and Persons*, *in* LEGISLATED RIGHTS, *supra* note 16, at 27–28, 52–54 [hereinafter Webber, *Rights and Persons*].

[186] JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 219 (2d ed. 2011).

[187] *Id.* at 218.

[188] *Id.* at 218–19.

[189] *See id.* at 220–21.

Such an approach leaves unanswered the question of why we constitutionalize rights at all rather than leaving rights specification to fields like tort and criminal law.[190] It is doubtful that the only purpose of bills of rights is to inspire governments to limit those rights. Doesn't government have plenty of reasons to regulate absent such a constitutional document? Further, *Legislated Rights* acknowledges that judicial review under a bill of rights is not necessarily inconsistent with democratic principles.[191] But it voices caution about "pathologies of judicial review" and notes that the appropriateness of judicial review will depend heavily on the context of a specific community.[192] The legitimate role that judicial review of legislation might play in a specific community is a possibility *Legislated Rights* leaves unexplored. The book also does not address what role (if any) the judiciary ought to have vis-à-vis the executive in applying the legislature's work product, particularly when the executive makes a choice within the scope of law in a way that would surprise the legislature.

Therefore, none of the theories offered thus far can satisfy. Is there a theory of constitutional rights that grants both the democratic branches of government and the judiciary unique rights-protecting roles, without swinging to the extremes of judicial supremacy on the one hand and Thayerian ultradeference on the other? I take up this question in the following Part.

## IV. A PROTECTED-REASON MODEL OF CONSTITUTIONAL RIGHTS

This Part provides an alternative theoretical account of constitutional rights. It also addresses the role that different government actors should and do play with respect to protection of those rights. I offer a philosophical definition of constitutional rights that is formal, in that it does not indicate which substantive rights societies ought to have as a matter of either morality or constitutional law.[193] This theory also assumes but does not defend the notion that rights are fundamentally a type of interest—generally a private interest.[194] I explain here the unique type of private interest a *constitutional* right creates.

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[190] *See id.* at 270–74.

[191] Bradley W. Miller, *Majoritarianism and Pathologies of Judicial Review*, *in* LEGISLATED RIGHTS, *supra* note 16, at 181–82, 200.

[192] *Id.* at 200.

[193] For another work that offers only a formal conception of rights, see DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 78, at xi.

[194] JOSEPH RAZ, THE MORALITY OF FREEDOM 166 (1986) ("'X has a right' if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.").

While this theoretical account of rights is new, it provides a rational reconstruction of rights that is deeply rooted in history, including some of the earliest rights protected by written U.S. state constitutions.[195] The definition proposed below is empirically informed by ways that rights in constitutional systems, including the United States', do in fact operate. But this theory of rights self-consciously does not attempt to vindicate all of the ways in which constitutional systems recognize and define rights.[196] Thus, this theory operates at the prescriptive level—providing conceptual and normative arguments with a reformist edge about how to constitutionalize rights and the implications of doing so.

In this Part, I explain why a constitutional right is best understood as a special type of "protected reason."[197] In brief summary, this means that a right provides two things. First, it creates a first-order reason for government actors to protect the interest specified in the constitution. And second, it provides an exclusionary reason—meaning that it excludes certain reasons as being invalid justifications for government action that would interfere with the constitutional interest.

In my discussion below, I also distinguish between pro tanto rights and conclusive rights, which track what Dworkin referred to as abstract and concrete rights.[198] A pro tanto right includes the range of activity or interests identified by the constitution that fall within the first-order reason. It is worth noting that, at least for purposes of this Article, deciding what constitutes a pro tanto right is no more difficult, nor less difficult, than any other two-step constitutional right approach, in which the first step assesses whether a right is even implicated before turning to the government justification.

If the government interferes with a pro tanto right and the rightsholder brings an as-applied challenge, the judiciary should

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[195] *See generally* Barclay, *Constructing Constitutional Rights*, *supra* note 18.

[196] Other scholars, such as Professors Kai Möller and Mattias Kumm, are more explicit in at least purporting to offer a theory of rights that captures widespread practices. *See* MÖLLER, *supra* note 3, at 101–02; Kumm, *Institutionalising Socratic Contestation*, *supra* note 3, at 162–63.

[197] *See* Christopher Essert, *A Dilemma for Protected Reasons*, 31 L. & PHIL. 49, 51 (2012) (summarizing Raz's claim that "protected reasons are necessary for the proper explanation of authoritative directives (and therefore of law), as well as obligations, decisions and commitments, and rules more generally").

[198] *See* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 78, at 93–94 (distinguishing "abstract" from "concrete" rights that take account of further, legally relevant considerations before an ultimate determination of who is entitled to what). One could also think of a pro tanto right as a prima facie right. *See, e.g.*, Campbell, *Determining Rights*, *supra* note 29, at 978.

carefully consider at least four questions in determining the scope of the conclusive right (i.e., the protections to which the rightsholder is ultimately entitled). Those four questions are (1) which reasons does the pro tanto right exclude; (2) what official reason(s) did the relevant government authority offer to justify interfering with the pro tanto right; (3) is it impossible for the government to take an action that would advance its official reason without interfering with some aspect of the constitutionally protected interest, such that the government's official reason strictly conflicts with some aspect of the pro tanto right; and (4) is the government factually correct about the reason it asserts based on the relevant evidentiary record, or has the government relied on a merely apparent reason that does not actually justify its action?

Determination of the conclusive right will depend on the outcome of those questions, though they need not be addressed sequentially. For example, if after steps one and two it is clear that the government has relied on an excluded reason to interfere with a pro tanto right, a court could rule against the government without proceeding to additional questions. The same is true if a court determines that the government's alleged reasons are not in conflict with the relevant aspect of the pro tanto right. That alone is an independent basis to rule against the government. So, too, if the court concludes that the government's alleged reason is simply not supported by any of the facts in the record, and the government thus factually erred in its determination.

I also argue that the questions a court assesses should change in the context of a facial challenge to a statute and that the court's role should be more modest. For example, where the legislature has asserted evidentiary findings justifying the enactment of a statute, a court should not rigorously second-guess those in the way it would press evidentiary assertions made in an as-applied context. Below, in Part IV.E, I discuss evidentiary burdens and other practical considerations that can be implemented to make all of these theoretical concepts efficacious in litigation, and in ways that are appropriate for the judicial role in a democracy.

One of the insights of this argument is the new context in which I apply the concept of protected reasons that Raz famously elaborated. As Raz argued, authoritative legal decrees are protected reasons. They affect the reasoning of citizens (or subordinate government officials or institutions) not only by excluding certain considerations for noncompliance with the law, but also

by adding a reason to "the balance of first-order reasons" for acting consistently with the legal decree.[199] While Raz described legal authority as operating as a protected reason for citizens or lower-level officials, he did not extend the concept of protected reasons to the context of constitutional rights.[200]

In addition, the theory of rights I outline addresses separation of powers elements with respect to which branch of government has duties created by different aspects of the protected reasons created by constitutional rights. I argue that politically accountable branches of government are better positioned to answer questions about the weights that should be assigned to both the first-order reason created by the pro tanto constitutional right and first-order countervailing reasons, as well as to determine how to proceed in the face of incommensurability. Such an institutional arrangement results in far less of a democratic deficit than does calling upon courts to second-guess decisions that are underdetermined by reason and have no one right answer.

This Part offers one practical way to cash out the theoretical concept of a right I have been discussing thus far. And it is a method that I argue fits with a critical mass of constitutional doctrine, at least in the United States, while still being normatively justified based on democratic and institutional considerations. But I hasten to offer the important caveat that I do not allege this proffered practical framework is the *only* way a society might implement the idea of constitutional rights as protected reasons. Nevertheless, to demonstrate the workability of this theory in at least one constitutional system, my hope is that the practical application of concepts outlined here will provide a helpful starting point for discussion.

To better explain all of this, I begin with some foundational concepts, including the relevant types of reasons at play when it comes to constitutional rights.

### A. Starting with the Basics: A Taxonomy of Reasons

Before explaining the meaning of a protected reason in the constitutional rights context, it is important to reflect on the very

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[199] Raz, *Facing Up*, *supra* note 20, at 1160; *see also* RAZ, PRACTICAL REASON AND NORMS, *supra* note 20, at 61–62.

[200] *See* RAZ, PRACTICAL REASON AND NORMS, *supra* note 20, at 10. Indeed, Raz thought that a lawgiver like the U.K.'s Parliament was not subject to exclusionary reasons in the same sense that citizens were, given its ability to change the law in ways that ordinary people could not. Raz, *Facing Up*, *supra* note 20, at 1172.

concept of a "reason."[201] I do not attempt here to resolve all the controversies about what a reason is. Rather, I identify the theoretical concepts that track most helpfully with constitutional doctrines explored below and that shed important light on disputes about constitutional rights.

In the context of actions taken by government officials or institutions, the word reason might bring to mind an internal motivation, intent, or purpose for such action. But a reference to motives is not the only—or even the most important—way in which this term is used in the philosophy of practical reason. Philosophers often discuss two categories of reasons. First are motivating reasons, meaning roughly the reasons that motivated the agent to act in a certain way; in other words, there is a causal relationship between the agent's motivating reason and the agent's action. Second are normative reasons, meaning roughly a state of affairs that actually exists, where such existence counts in favor of or justifies an action. A more straightforward way of describing the latter category of reasons is to say that normative reasons are simply true propositions that count in favor of an action.[202]

For the unique context of government action, which often occurs through multimember bodies, I offer a third type of reason that is relevant for constitutional discourse: the official reason, meaning the reason a government official or body offers publicly

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[201] Persons engage in practical reasoning by, among other things, deliberating about which actions to take and how to take them. When persons act in light of certain reasons, those reasons can potentially explain or justify their actions. These ideas can be traced back to Plato and Aristotle. *See* PLATO, PROTAGORAS 351b–358d (Gregory Vlastos ed., Benjamin Jowett & Martin Ostwald trans., 1956); PLATO, REPUBLIC 419a–445e (T.E. Page et al. eds., Paul Shorey trans., 1930); ARISTOTLE, DE ANIMA 3.10.433a9–434a15 (R.D. Hicks ed. & trans., 1907). *See generally* A.W. PRICE, VIRTUE AND REASON IN PLATO AND ARISTOTLE (2011). Aristotle is associated with the view that the normativity of practical reasons depends on the goodness, intrinsic or instrumental, of doing what there is reason to do. In the *Nicomachean Ethics*, Aristotle links what is right to do (what one has reason to do) with what is conducive to the good. ARISTOTLE, NICOMACHEAN ETHICS 3.2.1103b–1104b (Roger Crisp ed. & trans., 2000); *see also* THOMAS AQUINAS, SUMMA THEOLOGIAE I, Q 82 (Laurence Shapcote trans., 2017). *See generally* G.E.M. ANSCOMBE, INTENTION (2d ed. 1963).

[202] *See* T.M. SCANLON, WHAT WE OWE TO EACH OTHER 22–25 (1998); *see also* DEREK PARFIT, 1 ON WHAT MATTERS 34 (Samuel Scheffler ed., 2011); Maria Alvarez, *False Beliefs and the Reasons We Don't Have*, *in* THE FACTIVE TURN IN EPISTEMOLOGY 161, 164–71 (Veli Mitova ed., 2018) [hereinafter Alvarez, *False Beliefs*]; RAZ, PRACTICAL REASON AND NORMS, *supra* note 20, at 15–28; Jonathan Dancy, *Arguments From Illusion*, 45 PHIL. Q. 421, 426 (1995). *See generally* STEPHEN L. DARWALL, IMPARTIAL REASON (1983); MICHAEL SMITH, THE MORAL PROBLEM (1994); JONATHAN DANCY, PRACTICAL REALITY (2002). For a scholar who disagrees that reasons are facts, see generally Christine M. Korsgaard, *The Normative Question*, *in* CHRISTINE M. KORSGAARD, G.A. COHEN, RAYMOND GEUSS, THOMAS NAGEL & BERNARD WILLIAMS, THE SOURCES OF NORMATIVITY 7 (1996).

to justify the relevant government action.[203] This type of reason is similar, in some (though not all) respects, to a category of reason Professor David Enoch described as "the agent's reason," meaning the reason an agent provides when asked why the agent acted, regardless of whether such an action did in fact motivate the agent or provide a normative justification for the agent's action.[204] In Enoch's account, to count as the agent's reason, it must be the case that the agent is sincere in offering that reason as the rationalization for the action, though that agent may be factually incorrect in thinking that this stated reason was the internally motivating reason that caused the agent's action.[205]

As a matter of ideal principle, perhaps the most logical argument is that all three of these reasons must align to justify a government's interference with a pro tanto right. This framework presents questions about how to make such a principle efficacious, and what role courts should have in doing so. Before addressing that question much more fully, let me offer a few prefatory observations.

In the United States, courts are often wary of delving too deeply into questions about the intentions that motivated government officials. Of course, that rule has its exceptions, but it is often a default position.

Thus, to avoid one possible source of confusion, I should emphasize at the outset that my theory does not primarily focus on the first category of reasons: the considerations that actually motivated the relevant government body or actor.[206] Instead, as I explain further below, my theory is concerned much more with official reasons and normative reasons and the relationship between the two. As a descriptive matter, I believe that most constitutional rights adjudication can occur with courts primarily focusing on which reason was offered by the relevant actor as the official reason, whether that reason actually conflicts with

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[203] Arguably, each of these categories still fit within the same concept of a reason, but are just being used to answer different questions, such as whether there is actually a reason for someone to do something (normative) or what someone believes their reason for acting is (motivating). *See* Maria Alvarez & Jonathan Way, *Reasons for Action: Justification, Motivation, Explanation*, STAN. ENCYCLOPEDIA OF PHIL. (last updated Aug. 22, 2024), https://plato.stanford.edu/entries/reasons-just-vs-expl/.

[204] DAVID ENOCH, TAKING MORALITY SERIOUSLY: A DEFENSE OF ROBUST REALISM 221–24 (2011).

[205] *Id.*

[206] It is certainly possible that a constitutional system could assess this question, but such inquiries are disfavored in the U.S. context and, as I explain further below, generally not necessary to provide robust protection of constitutional rights.

the pro tanto right, and whether the official reason is true, such that it could at least possibly constitute a normative reason.

In as-applied constitutional contexts, the U.S. Supreme Court has indicated on multiple occasions that, absent exceptional circumstances, it will essentially presume that a government agent's reason for interference with a pro tanto right is sincere if offered contemporaneously with such interference (or at least shortly thereafter).[207]

The exception courts have recognized (and that I agree with in as-applied contexts) to this default rule of not delving into motivating reasons arises in situations where the government has regulated basically nothing *but* the constitutional right under some asserted official reason, such that the law appears gerrymandered to only regulate the pro tanto right. In such contexts, the Court has concluded that the government's officially offered reason was a pretext for other illicit motives.[208] And at that point, the Court is much more willing to scrutinize the motivating reasons for action.

What is the relevance of these categories of reasons to a dispute about constitutional rights? Consider a government action that denied a permit for a requested protest. If the would-be protestors sued, and if they demonstrated that the government action interfered with desired activity that fell within the protective zone of a pro tanto right, then the analysis would shift to an assessment of reasons. A court should assess the official reason given by the government for why it chose to deny the permit. Perhaps the government explained in a letter to the applicants that this protest raised concerns about an outbreak of violence. A court should also ask whether the government's official reason is true,

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[207] The U.S. Supreme Court recently articulated this timing requirement for government reasons in *Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2432 n.8 (2022). The Court rejected an argument from the school district, raised years into litigation, that "it had to suppress Mr. Kennedy's protected First Amendment activity to ensure order at Bremerton football games." *Id.* The Court noted that "the District never raised concerns along these lines in its contemporaneous correspondence with Mr. Kennedy." *Id.* In rejecting this late-breaking rationalization, the Court emphasized that "[g]overnment 'justification[s]' for interfering with First Amendment rights 'must be genuine, not hypothesized or invented *post hoc* in response to litigation.'" *Id.* (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)).

[208] *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534–35 (1993) (identifying religious hostility as a motivating reason); Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (identifying racial hostility as a motivating reason).

meaning the government's concern is justified as an empirical matter, such that it could at least qualify as a normative reason.[209]

Of course, we could also ask what the government's actual motivating reason was for interfering with the expression. Was hostility toward that expression actually the cause of the permit denial? However, unless the government somehow announces such hostility or its regulation is so inconsistent as to appear pretextual and targeted to that expression, courts are again hesitant to probe such internal inquiries. Nor would doing so routinely be necessary under the theory I propose.

Nor would such an inquiry necessarily resolve the dispute. Even if the government officials had laudable motivations for determining how to apply a law, the government may simply be wrong on the facts. Perhaps the government could not demonstrate, with any evidence, a safety risk from the protest. The government might have what moral philosopher Derek Parfit referred to as a "merely apparent reason," which is a falsehood the government believed to be true.[210] That might make the government's action rational, but it does not make the government's action normatively justified.[211] In such a context, I argue that, as a legal matter, the government should not be able to justify its interference with a pro tanto right when the reason it offers lacks any factual basis—at least based on the evidence it submits to a court in the as-applied litigation. Thus, permissible internal motivations for the action would not justify the government's interference with the right.

Such an approach is consistent with how some theorists focus on the importance of normative reasons in the philosophy of practical reason. In much of their work, Raz and other objectivists generally emphasize normative reasons over motivating reasons, at least in the context of deciding whether a reason counted in favor of some action. Raz argued, "it is the *fact* and not [an actor's] *belief* in it" that justifies his action as a normative matter.[212] Professor Maria Alvarez similarly argued that "false beliefs are not reasons that favour anything" as a normative matter, and

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[209] To make conclusions about empirical questions, courts are generally limited to the facts in the record, so I should clarify that normative reasons in a case are qualified, in the sense that a court will decide if they are or are not normative based on the evidence they have before them. But of course, the evidence in the case may be incomplete or inaccurate, and thus the court could be incorrect about whether the reason is a normative reason.

[210] *See* PARFIT, *supra* note 202, at 35.

[211] *See id.*; *see also* Niko Kolodny, *Why Be Rational?*, 114 MIND 455, 521–22 (2005).

[212] RAZ, PRACTICAL REASON AND NORMS, *supra* note 20, at 17 (emphasis added).

therefore they cannot constitute a normative reason, even if they could constitute a motivating reason.[213]

Keeping those distinctions between types of reasons in mind, I turn to the implications of first-order and second-order reasons coming together to create constitutional rights as protected reasons. Elsewhere, I have argued these elements are consistent with a historical understanding of constitutional rights in the United States.[214] Here, I focus more generally on how this theoretical structure of rights provides robust protection for pro tanto rights in ways that are consistent with institutional roles and democratic principles.

### B. Rights as First-Order Reasons for Action

Under my theory, the first element of a constitutional right is that it creates a first-order reason for action. There are two implications of this argument. First, this first-order reason may not be overridden unless it is actually in conflict with a countervailing first-order reason. Second, the memorialization of a right in a constitution provides a normative reason—and likely a weighty normative reason—for the political branches to act and specify standards that are protective of the pro tanto right. But the determination of just how much weight to assign that first-order reason ought to be a political, rather than a judicial, determination.

#### 1. The need to demonstrate a conflict of first-order reasons.

The fact that a right creates a first-order, normative reason for action does not generally require the government to protect that pro tanto right.[215] Rather, the pro tanto right likely becomes one of multiple first-order reasons for action that must be added to the mix of all-things-considered rational deliberation about the best course of action.

For reasons discussed above in Part II.A, politically accountable actors are best situated to decide which reason or set of reasons is weightiest when considering competing reasons. If faced with incommensurable competing reasons, political actors are also best situated to simply engage in an agentive act of will and pursue one of multiple choices that are supported (but not

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213 Alvarez, *False Beliefs*, *supra* note 202, at 162.

214 *See generally* Barclay, *Constructing Constitutional Rights*, *supra* note 18.

215 The exception to this point is when the right excludes all countervailing reasons and thus becomes absolute.

required) by reason.[216] But before there is even a need to make such a determination between countervailing reasons, there must first be a true conflict between those reasons.

As Raz explained, a normative "reason can be overridden only by a fact which is itself a reason for contradictory action."[217] Reasons for action are in conflict when it is impossible to perform both.[218]

This principle, that one first-order reason can only be overridden by another first-order reason, has a powerful implication for the constitutional rights discourse. If the government can both take action to protect a pro tanto constitutional right and take action on its other relevant reason, no conflict in fact exists. In such circumstances, government has no justification for overriding the pro tanto constitutional right.

A court need not engage in balancing for this type of analysis. Rather, the court can effectively assess whether government could have found an alternative that allows for a Pareto-efficient improvement, whereby government will not be meaningfully less well off in pursuing its goal through a different means, and the constitutional rightsholder will be in a better position if government avoids the action that imposes a burden on the pro tanto right.[219] Economists have long observed that Pareto-efficient alternatives like this one do not require commensurability or comparability. If one option out of two is preferable to at least one party, then ceteris paribus, that option is normatively preferable overall.[220] Requiring the judiciary to ask this question is premised on the idea that government can often both pursue its policy goals

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[216] *See* Raz, *Incommensurability and Agency*, *supra* note 76, at 110–13, 126–28.

[217] RAZ, PRACTICAL REASON AND NORMS, *supra* note 20, at 27.

[218] *Id.* at 25–26.

[219] ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 283 (6th ed. 2012) ("Making someone better off [as measured by their own desires] without making anyone worse off is a 'Pareto-efficient' change.").

[220] *See* MURRAY N. ROTHBARD, MAN, ECONOMY, AND STATE WITH POWER AND MARKET 309–10 (2d ed. 2009) (discussing the ranking of preferences as revealed by action); AMARTYA SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE: AN EXPANDED EDITION 106 (3d ed. 2017); DANIEL M. HAUSMAN & MICHAEL S. MCPHERSON, ECONOMIC ANALYSIS, MORAL PHILOSOPHY, AND PUBLIC POLICY 45–50 (2d ed. 2006) (explaining preference rankings and utility functions); KLAUS MATHIS, EFFICIENCY INSTEAD OF JUSTICE? SEARCHING FOR THE PHILOSOPHICAL FOUNDATIONS OF THE ECONOMIC ANALYSIS OF LAW 12–14 (Deborah Shannon trans., 2009) (modeling human action as determined by preferences and constraints); KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 22–23 (2d ed. 1963) (describing social welfare as depending on changes in the realization of the preferences of "at least some individuals"). *See generally* WALTER J. SCHULTZ, THE MORAL CONDITIONS OF ECONOMIC EFFICIENCY (2008) (theorizing a relationship between Pareto-efficient welfare maximization and moral principles).

and protect the pro tanto right. And when it can, it should. Indeed, when courts press governments on these questions, one recent empirical study suggests that this may incentivize governments to identify such solutions.[221]

For instance, in the highway-widening example mentioned at the beginning of this Article, a court should probe whether there was a way for government to both widen the highway to create a turn lane *and* protect the Native American sacred site. If government can take actions that will advance both reasons, there is no basis for one of those reasons to override the other. They are not in conflict.

I discuss some of the practical considerations about how this might play out in a courtroom setting below in Part IV.E, including with respect to evidentiary burdens. But for now, I simply want to reiterate the following conceptual point: the very fact that a pro tanto constitutional right creates a first-order reason for protecting that interest entails that, to override it, there must be some other countervailing reason that is, in fact, in conflict with the constitutional interest. And, in the context of as-applied challenges, assessing that conflict may be one of the most important roles the court plays.

### 2. A political determination of the weight of countervailing reasons.

I have thus far discussed the implications of a pro tanto constitutional right creating a first-order reason to protect a constitutional interest in settings where government wishes to override that interest. But the first-order nature of that reason also has implications when government seeks to *protect*, rather than override, that constitutional interest.

Specifically, the existence of a constitutional right provides a normative justification for actions that political actors may take to protect constitutional rights. If political actors protect those constitutional interests to a greater extent than other interests not specified in the constitution, the government should be able to point to the constitution itself as a first-order reason for preferential treatment of the constitutionalized right, at the very

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[221] Brady Earley, *Responsible Religious Freedom: Factual Scrutiny in Free Exercise Doctrine*, J.L. & RELIGION 3 (Sept. 30, 2024), https://perma.cc/BZX6-EWRA ("As courts put greater focus on this underlying factual inquiry in constitutional law, state actors will be incentivized to empirically strengthen their justifications when brought into court by a religious claimant.").

least as a political justification but also as a defense in some contexts against judicial challenge.[222]

Consider, for example, a repository of eagle feathers the federal government created to accommodate Native American groups' desires to use feathers in sacred ceremonies. The government collects these feathers when eagles land on electric wires or are otherwise inadvertently killed, and then lets Native American tribes apply for them.[223] The First Amendment's pro tanto religious exercise rights provide a normative reason supporting the government's development of such a creative solution to facilitate religious exercise. That reason created by the pro tanto right only applies to Native American religious practitioners and not to bird enthusiasts, for example.[224] Note that this is precisely the sort of program that a court would be ill-suited to develop and then impose on another branch of government.[225] Conversely, the judiciary should not lightly second-guess the government when it chooses to protect pro tanto religious exercise rights above what the judiciary might deem to be a minimum or floor of protection.

In other words, just how much weight to give the first-order pro tanto rights of religious exercise, and thus how much protection to affirmatively offer those rights above a minimum baseline, is an act of unbounded discretion properly left to political actors. That does not make this an unimportant function of constitutional rights. In fact, as Professor Lawrence Sager has argued, political action to protect rights may be at the core of rights protection.[226]

Judicial deference to legislative determinations about enhanced protections for constitutional rights could plausibly justify a significant shift in some of the Supreme Court's current jurisprudence, including when it comes to the Court's interpretation of Congress's powers under § 5 of the Fourteenth Amendment to

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[222] If the political branches believed they were bound to treat the existence of a constitutionalized right as a very weighty reason for action, then even without judicial review, this right would constitute law in a Hartian sense. *See* H.L.A. HART, THE CONCEPT OF LAW 18–25 (3d ed. 2012).

[223] *Possession of Eagle Feathers and Parts by Native Americans*, U.S. FISH & WILDLIFE SERV. (Feb. 2009), https://perma.cc/WB4R-EQVN.

[224] *See* United States v. Wilgus, 638 F.3d 1274, 1291–96 (10th Cir. 2011).

[225] *Cf.* 16 U.S.C. § 668a (outlining a scheme that authorizes executive action by the Interior Department and state governors subject to several defined parameters).

[226] Lawrence G. Sager, *Thin Constitutions and the Good Society*, 69 FORDHAM L. REV. 1989, 1989–90 (2001) (arguing that the Constitution offers us not only a set of (mostly negative) rights enforced by the judiciary, but also a set of "[a]ffirmative social rights" that "come wrapped with questions of judgment, strategy, and responsibility that seem well beyond the reach of courts in a democracy").

enforce rights like equal protection and due process of law. I discuss that issue below in Part V.B.

### C. Rights as Second-Order Exclusionary Reasons

Another element of constitutional rights, under my proposed model, is that they operate as a type of second-order reason called an exclusionary reason. Before discussing exclusionary reasons in the constitutional context, I briefly explain the concept generally and contrast it with first-order reasons.

First-order reasons, discussed above, "can be overridden only by a fact which is itself a reason for contradictory action."[227] Reasons for action are in conflict when it is impossible to perform actions supported by both reasons.[228] If conflicting reasons are commensurable (or if the deliberating actor has artificially commensurated the values), then conflicts between such reasons "are to be resolved by assessing the relative strength or weight of the conflicting reasons and determining what ought to be done on the balance of reasons."[229]

But that is not true of conflicts between first- and second-order reasons. Second-order reasons often arise as exclusionary reasons, and they prevent an agent from acting on certain other normative, first-order reasons.[230] Importantly, "exclusionary reasons do not compete in weight with the reasons they exclude; rather, they always win in such conflicts" by simply blocking certain other reasons from being acted upon.[231] In this way, an exclusionary reason allows courts to avoid the conundrum posed by balancing and weighing incommensurate values, discussed above in Part II.A. As Raz explained, the "very point of exclusionary reasons is to bypass issues of weight by excluding consideration of the excluded reasons regardless of weight."[232]

Raz also noted, "An exclusionary reason may exclude all or only a certain class of first-order reasons."[233] The scope of an exclusionary reason generally increases as the number of reasons it excludes increases.

How does the existence of an exclusionary reason play out in concrete terms? Consider a hypothetical posed by Scott Hershovitz.

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[227] RAZ, PRACTICAL REASON AND NORMS, *supra* note 20, at 27.
[228] *Id.* at 25–26.
[229] *Id.* at 36.
[230] *See id.* at 62, 189; Raz, *Facing Up*, *supra* note 20, at 1157.
[231] RAZ, PRACTICAL REASONS AND NORMS, *supra* note 20, at 189.
[232] *Id.* at 190.
[233] *Id.* at 46.

Imagine you are the commissioner of Major League Baseball, and your favorite team is the Milwaukee Brewers. The fact that they are your favorite team is a reason to cheer for them at public events and support them in a number of ways. But your role as commissioner gives you an exclusionary reason not to act based on favoritism in discharging official duties. In other words, your position as commissioner "gives you an exclusionary reason not to act for reasons that would otherwise apply to you."[234] But note that an exclusionary reason does not prevent the excluded reason from still having weight, or even from being considered by you. It prevents action based on that reason.

Let me introduce one final wrinkle about exclusionary reasons. Enoch has built on Raz's framework of exclusionary reasons and introduced an additional concept: quasi-exclusionary reasons, which prohibit someone from even considering or deliberating about a reason, as opposed to acting on an excluded reason.[235]

Now let us explore the application of these concepts to the realm of constitutional rights. I argue that the second element of a constitutional right is that it operates as a duty of government officials to exclude certain normative reasons the government would otherwise act on as justifications for interfering with the pro tanto right. If the right includes quasi-exclusionary reasons, it may also impose a duty on government to avoid even deliberating about certain reasons. Whether the government has complied with the exclusionary (or quasi-exclusionary) reason when interfering with a pro tanto right is a question that is appropriate for judicial assessment in ways I discuss in further detail in Part IV.E.

How do these reasons affect the scope of the protection of a constitutional right? As discussed above, an "exclusionary reason may exclude all or only a certain class of first-order reasons."[236] Thus, a constitutional right might exclude *some* reasons for interfering with the identified constitutional interest, *most* reasons, or *all* reasons. As the scope of the exclusionary reason broadens, the strength of the protection for the constitutional right generally increases. For example, all things being equal, an exclusionary reason that excludes all reasons for government interference with a pro tanto right other than protecting national security offers

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[234] Hershovitz, *supra* note 37, at 202–03.

[235] David Enoch, *Authority and Reason-Giving*, 89 PHIL. & PHENOMENOLOGICAL RSCH. 296, 321–22 (2014) [hereinafter Enoch, *Authority and Reason-Giving*].

[236] RAZ, PRACTICAL REASONS AND NORMS, *supra* note 20, at 46.

more protection than an exclusionary reason that excludes only administrative convenience.

Once an exclusionary reason excludes *all* reasons for interfering with a constitutionally specified interest, the right becomes what is often described as an absolute or categorical right.[237] For example, the right not to be tortured is a right some constitutional systems understand to operate as absolute in that it excludes all reasons for interference with the interest.[238] If a constitutional regime bans torture in such an absolute way, it does not matter whether very powerful reasons militate in favor of torturing.[239] In the U.S. context, one example of an absolute right is the ministerial exception.[240] If a religious actor is deemed to be a "minister," within the doctrinal meaning of that term, it does not matter whether powerful reasons exist for the government to prevent a church from firing such a religious leader.[241] Many criminal procedural rights in the United States also operate in this categorical way. For example, the Sixth Amendment guarantees criminal defendants a right to trial by jury in any case in which the maximum penalty exceeds six months in prison; this rule excludes any reasons for the government to override that right.[242] In these contexts, the constitutional right is not merely a pro tanto right; it is simultaneously absolute and conclusive.

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[237] For a general discussion of categorical requirements in constitutional law, see Jeffrey L. Fisher, *Categorical Requirements in Constitutional Criminal Procedure*, 94 GEO. L.J. 1493, 1498–1502 (2006).

[238] *See, e.g.*, U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. I, Dec. 10, 1984, 1465 U.N.T.S. 85 (prohibiting torture regardless of the perpetrator's motive); *id.* art. II (clarifying that "[n]o exceptional circumstances whatsoever . . . may be invoked as a justification for torture"). *But see* Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, *opened for signature* Nov. 4, 1950, E.T.S. No. 5 (entered into force Sept. 3, 1953) (declining to offer such a precise definition).

[239] Bernhard Schlink, *Proportionality (1)*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 718, 722 (Michel Rosenfeld & András Sajó eds., 2012).

[240] *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188–90 (2012).

[241] *See id.*; *see also* Douglas Laycock, Hosanna-Tabor *and the Ministerial Exception*, 35 HARV. J.L. & PUB. POL'Y 839, 857 (2012) (citing JOHN LOCKE, A LETTER CONCERNING TOLERATION (1690), *reprinted in* TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 211, 215 (Ian Shapiro ed., 2003)) (discussing the intellectual history that generated such an "essentially absolute right").

[242] *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."); Baldwin v. New York, 399 U.S. 66, 73–74 (1970) (describing the Sixth Amendment as a categorical right to trial by jury in criminal cases "where the possible penalty exceeds six months' imprisonment").

In the context of absolute rights, the judiciary need inquire only whether the government has interfered with a desired activity that falls within the scope of the constitutional interest. If so, that concludes the analysis. There is no shift of the burden of proof to the government to demonstrate that it acted on permissible and factual reasons that conflicted with the pro tanto right.

On the other hand, many constitutional rights, as interpreted, exclude the government from relying on all but a few enumerated reasons—commonly things like "public peace or safety."[243] In these contexts, the constitutional right would allow the government to interfere with the pro tanto right if and only if it did so for at least one of the permissible (nonexcluded) reasons.

Some of the earliest U.S. state constitutions enumerated these types of nonexcluded reasons for limiting pro tanto rights.[244] These enumerations have been referred to as "limitation clauses,"[245] and they are common in modern human rights instruments such as the Universal Declaration of Human Rights,[246] the International Covenant on Civil and Political Rights,[247] the European Convention on Human Rights,[248] the Canadian Charter of Rights and Freedoms,[249] and the South African Bill of Rights;[250] statutory bills of rights such as the United Kingdom's Human Rights Act 1998[251] and the New Zealand Bill of Rights Act 1990;[252] and some aspects of the U.S. Bill of Rights. For example, under the Fifth Amendment, taking private property for public use is a textually permitted reason to interfere with pro tanto private property rights. Notably, the use of this sort of nonexcluded reason comes with a fee: just compensation.[253]

Other rights in the U.S. Bill of Rights have been interpreted in similar ways as rights with these explicit limitation clauses.

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[243] *See, e.g.*, Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1461–62 (1990).

[244] *Id.*

[245] GRÉGOIRE C.N. WEBBER, THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS 133 (2009) [hereinafter WEBBER, THE NEGOTIABLE CONSTITUTION].

[246] G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 29(2) (Dec. 10, 1948).

[247] International Covenant on Civil and Political Rights art. 4(1), Dec. 16, 1966, 999 U.N.T.S. 171.

[248] Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 238, at arts. 8(2), 9(2), 10(2), 11(2).

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

[250] S. AFR. CONST., 1996 § 36(1).

[251] Human Rights Act 1998, c.42 (U.K.) (incorporating the European Convention).

[252] New Zealand Bill of Rights Act 1990 s 5.

[253] *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

For example, the Court has interpreted the Fourth Amendment to exclude any reason for warrantless searches of the home, except for "the need to assist persons who are seriously injured or threatened with such injury,"[254] the mitigation of an imminent risk of destruction of evidence of a serious crime,[255] or the completion of a "hot pursuit" of a suspect who officers have "probable cause" to believe has recently committed a crime.[256]

Modern additions of constitutional rights to state constitutions also follow this model. For example, Ohio recently constitutionalized the right of any individual to "carry out one's own reproductive decisions, including but not limited to decisions on: contraception; fertility treatment; continuing one's own pregnancy; miscarriage care; and abortion."[257] One reason that was not excluded for "interfer[ing]" with this pro tanto right was if the "State demonstrates that it is using the least restrictive means to advance the individual's health in accordance with widely accepted and evidence-based standards of care."[258] Where a constitution identifies the nonexcluded (or excluded) reasons for interfering with a pro tanto constitutional right, one could consider this the general structure of the exclusionary reason aspect of a constitutional right.

Here it is worth making a brief observation about some of the rhetoric used to discuss constitutional rights disputes. Note that the government might interfere with a pro tanto right. But that is different from saying the government has interfered with a right in its *conclusive* form, which means an all-things-considered right. This approach stands in contrast to much of the received wisdom about rights, where limitations on rights are viewed as acting on rights externally and thus understood as justified "infringement[s]" or "violation[s]" of the right.[259] On my account, a constitutional right in its conclusive form means that the government owes a duty to the rightsholder not to interfere with an identified constitutional interest (a pro tanto right) for the reasons excluded.

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[254] Brigham City v. Stuart, 547 U.S. 398, 403 (2006).

[255] Welsh v. Wisconsin, 466 U.S. 740, 754 (1984).

[256] Stanton v. Sims, 571 U.S. 3, 6 (2013).

[257] OHIO CONST. art. I, § 22, cl. A (numerals omitted).

[258] *Id.* cl. B.

[259] WEBBER, THE NEGOTIABLE CONSTITUTION, *supra* note 245, at 5. For an additional discussion of external versus internal limitations on rights, see ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS, *supra* note 3, at 178–79. For a discussion of the related (but different in important respects) specification theory of rights, see generally Russ Shafer-Landau, *Specifying Absolute Rights*, 37 ARIZ. L. REV. 209 (1995); John Oberdiek, *Specifying Rights Out of Necessity*, 28 OXFORD J. LEGAL STUD. 127 (2008).

But the government may interfere with a pro tanto right if it demonstrates that it is acting based on true, nonexcluded reasons that conflict with the pro tanto right. Such action by the government does not interfere with a constitutional right in its conclusive form.[260] The right never created an entitlement to protection against such interference to begin with.

As a result, when a right is conceived of as containing an exclusionary reason, it does not present the conflict between the right and the public interest along the lines of the concerns that Justice Bradley Miller of the Court of Appeal for Ontario rightly raised in *Legislated Rights*.[261] The nature of the right itself contains the extent of the limitations internal to the right. These limitation clauses thus operate as a type of boundary or demarcation line for the right.[262] For example, a right to have one's private property free from takings is not unlimited; it is a right to have one's private property taken only for the nonexcluded reason of a public purpose.[263] And that particular nonexcluded reason comes with a fee—payment of just compensation. As I discuss elsewhere, a pro tanto right like private property could be viewed as an interest important enough to the overall public good that the constitution makers decided to entrench and further protect that interest by constitutionalizing it.[264] The exclusionary reason operates to remove all reasons for interfering with the right but those that the constitution makers deem consistent with the public good. A constitutional right, then, operates as a sort of heuristic in practical reasoning to ensure the government considers the reasons that the constitution drafters thought would be most relevant to the public good. The right applies in contexts in which the government may be tempted to discount the interests protected by pro tanto rights or to inflate countervailing interests that conflict with them. Under this theoretical framework,

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[260] One could therefore say that, when a government interferes with a pro tanto right for a nonexcluded reason that conflicts with the right, there is no moral remainder, meaning the government has done nothing wrong. For a discussion of moral remainders, see generally Iris van Domselaar, *Law's Regret: On Moral Remainders, (In)commensurability and a Virtue-Ethical Approach to Legal Decision-Making*, 13 JURIS. 220 (2022). Of course, that does not mean that government should not exercise prudence. Governments would often be wise to give enough weight to the first-order reason of a right that they would politically choose to say countervailing interests are not weighty enough to override the pro tanto right.

[261] *See* Miller, *supra* note 191, at 183–85.

[262] *See* WEBBER, THE NEGOTIABLE CONSTITUTION, *supra* note 245, at 6.

[263] U.S. CONST. amend. V.

[264] *See generally* Barclay, *Constructing Constitutional Rights*, *supra* note 18.

rights and the public interest are two sides of the same coin, not opposing parts.

### D. Putting the Elements Together: Rights as Protected Reasons

To summarize the discussion thus far, when constitution drafters memorialize a particular interest, they create two elements that are constitutive of the right. First, that constitutional act creates a first-order normative reason for action by government officials to protect a private interest that has been specified in the constitution. Accordingly, the government has a duty not to override that first-order reason without pointing to a strictly conflicting normative reason. And the government may rely on that same first-order reason to give significant protection to the pro tanto right. Second, the constitution creates a second-order exclusionary reason to prohibit the government from acting on certain normative reasons to override the pro tanto right, even if those normative reasons are relevant and in conflict with the interest. If the pro tanto right involves a quasi-exclusionary reason, then the government may have a duty not to even consider certain reasons for action.

In other words, these elements affect the rationally required reasoning of the government not only by excluding certain considerations from being acted on or considered, but also by adding reasons to the balance of first-order reasons.[265] This "combination of reasons" is a *protected reason*: both a reason to perform a certain action and an exclusionary reason excluding "at least some of the reasons" against taking that action.[266]

Raz and other legal philosophers argued that these protected reasons are stronger than mere exclusionary reasons or mere normative first-order reasons. A promise one makes to someone else is a typical example of a protected reason. A promise provides a first-order reason to comply with the action one promised. It also provides an exclusionary reason—a reason not to even weigh certain contradictory reasons against that promise in the overall consideration of right action.[267]

As discussed above, Raz's legal framework typically describes a government authority as giving first-order reasons to

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[265] *See* Raz, *Facing Up*, *supra* note 20, at 1160; RAZ, PRACTICAL REASON AND NORMS, *supra* note 20, at 62.

[266] Enoch, *Authority and Reason-Giving*, *supra* note 235, at 319.

[267] Ulrike Heuer, *The Point of Exclusionary Reasons*, *in* ENGAGING RAZ, *supra* note 44, at 123.

citizens for compliance and excluding reasons for noncompliance with the law. But my theory extends this concept to the constitutional rights context, and it envisions the constitution makers as giving first-order reasons to the government while excluding certain reasons on which government can rely to interfere with private interests.

So how should the judiciary determine which reasons for interference with pro tanto rights are permitted (if any), which are excluded, and which conflict with the first-order reason created by the pro tanto constitutional right? Can the judiciary do so without exercising unbounded discretion? To these, and other lingering practical questions, I now turn.

### E. Practical Considerations: Making Rights as Protected Reasons Legally Efficacious

This Section touches on some of the practical considerations relevant to making the protected-reason nature of a constitutional right efficacious in legal settings. These considerations include how to determine which reasons are excluded, what evidentiary burden applies, how to assess risk versus undisputed harm, and which government official or institution is competent to articulate the official government reason for purposes of litigation.

#### 1. Which reasons are excluded?

When the government interferes with a pro tanto right and thus triggers the exclusionary norm, how does one identify the substance of the reasons that are excluded (and not excluded)? In other words, how does one give content to the reasons excluded by a right?

In the most straightforward context, a constitution will identify which types of reasons are excluded, or permitted, to interfere with the identified interest. Constitutional instruments with textual limitations clauses, such as those discussed above in Part IV.C, do just that.

But what if a constitutional right does not identify such excluded reasons expressly? For example, consider rights like those mentioned in the First and Second Amendments in the U.S. Constitution: "Congress shall make no law . . . abridging the freedom of speech,"[268] and "the right of the people to keep and bear Arms, shall not be infringed."[269] Does this language mean courts should

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[268] U.S. CONST. amend. I.

[269] U.S. CONST. amend. II.

assume, as a matter of interpretation, that these rights are absolute and that they therefore exclude all reasons for interfering with the protected interest? No. Because absolute rights receive strong protections and leave no room for democratic qualification or specification, the judiciary should look for clear evidence that the constitutional text articulating these rights was originally understood to provide absolute protection.

But how would the judiciary identify any excluded reasons that are not specified in the constitutional document? I propose two potential solutions. First, some rights identified in a constitution may be understood historically to include internal limitations to that right. In the United States, this historical understanding related to how some fundamental rights were understood to be part of natural law. Some scholars have argued that this is the case, for example, with the First Amendment, clarifying why the First Amendment refers to "the" freedom of speech or religious exercise: it refers to a preexisting right that was understood and already had limitations baked into it.[270] A historical inquiry can thus help reveal the nonexcluded reasons that were originally understood as permissible for limiting a pro tanto right.

The Supreme Court recently made this sort of determination about permissible reasons to limit the right to bear arms in *Rahimi*. As Justice Barrett explained in her concurrence, "[d]espite its unqualified text, the Second Amendment is not absolute. It codified a pre-existing right, and pre-existing limits on that right are part and parcel of it."[271] Based on a historical analysis, the Court concluded that a "permissible reason" for restricting firearm use under the Second Amendment is "preventing individuals who threaten physical harm to others from misusing firearms."[272] Looking at "[w]hy" governments had historically "burden[ed] the right [is] central to this inquiry."[273] Reasons for limiting the pro tanto right that do not fall within this historical category of permissible reasons are thus excluded.

The second solution is conceptual. There are some reasons for interfering with constitutional interests that, if considered permissible, would always conflict with a right and be easy for government to prove. These types of reasons would thus provide

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[270] *See* Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 295–313 (2017) [hereinafter Campbell, *Natural Rights*]; *see also* Barclay, *Replacing* Smith, *supra* note 24, at 441–49; Barclay, *Historical Origins*, *supra* note 61, at 69–90. *See generally* Campbell, *Determining Rights*, *supra* note 29.

[271] *Rahimi*, 144 S. Ct. at 1924 (Barrett, J., concurring).

[272] *Id.* at 1896, 1898 (majority opinion).

[273] *Id.* at 1898.

a ready justification for interfering with any constitutional interest and would, in other words, be coextensive with any understanding of the scope of the right itself. Some of these reasons are generic and could always defeat any constitutional interest. For example, if the state were allowed to interfere with rights based on administrative inconvenience or any marginal increase in cost, that would be tantamount to declaring that such a constitutional interest will never be protected. As Professors Stephen Holmes and Cass Sunstein—and other economists—have explained, any time society protects individual rights in any respect, that protection results in administrative burdens and additional costs for society.[274]

Some of these types of all-defeating reasons are specific to particular legal interests. At a minimum, an exclusionary reason would need to operate against any reason based on government hostility toward or unwillingness to value the constitutional interest itself. For example, imagine that a state's proffered reason for punishing speech is that the government does not value the speech. If devaluing speech were a sufficient reason to interfere with the freedom of speech, one could argue that any right to freedom of speech was illusory and pointless.[275] Thus, any exclusionary reason could be interpreted at minimum to exclude reasons that—if they justified government interference—would always defeat the right in toto in any context.

Finally, there might also be some considerations, like hostility toward a particular racial group, that are so problematic they are excluded by quasi-exclusionary reasons. The government might simply be prohibited from deliberating based on those sorts of considerations at all.[276]

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[274] STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES 87–89 (1999); *see also* Stephanie H. Barclay, *An Economic Approach to Religious Exemptions*, 72 FLA. L. REV. 1211, 1228–31 (2020) [hereinafter Barclay, *An Economic Approach*].

[275] Professor Jud Campbell has argued that, if the freedom of speech meant anything to our nation's Founders, it meant that "it was beyond the power of the government to punish speech that criticized the government in good faith." Campbell, *Natural Rights*, *supra* note 270, at 309. Relatedly, the U.S. Supreme Court has said that "[c]riticism of government is at the very center of the constitutionally protected area of free discussion." Rosenblatt v. Baer, 383 U.S. 75, 85 (1966).

[276] From a general rationality point of view, when something such as racism is a non-reason, you should never take it into account in deliberation. But it is not always illegal or immoral to be less than fully rational, so quasi-exclusionary reasons that have been given the force of law could still prevent that sort of deliberation.

One might wonder at what level of generality the excluded or permitted reason should be identified. I take up that particular discussion below in Part IV.E.3.a.

2. Who provides the government's official reasons?

To proceed with any sort of assessment of the government's reasons, there must first be a method of determining *who* gets to speak for the government about which reasons, official or otherwise, it has relied on to justify its interference with a pro tanto right.

In his structural theory of rights, Pildes offered one potential answer to the question of who provides this reason. He argued that "courts must necessarily evaluate the government's underlying justifications for its actions."[277] Courts should look for the "social meaning" that government actions are "perceived to have within the relevant community," as opposed to "actual intent."[278]

However, if one is concerned about the appropriate role of a judiciary within a democracy, this type of inquiry raises some concerns. Such an analysis requires the judiciary to impose its own guess as to citizens' ideas about the social meaning of government actions, rather than looking to the reasons that the government actually sets forth (and is accountable to voters for). The inquiry Pildes proposed would also raise pragmatic questions about the judiciary's ability to determine the social meaning of laws (or whether there even is such a thing).[279] In short, this approach provides courts with broad, and likely close to unbounded, discretion.

Indeed, because of such pragmatic concerns, the U.S. Supreme Court recently overturned as unworkable the test in *Lemon v. Kurtzman*,[280] a doctrine on which Pildes had relied to defend his social meaning approach.[281] The Court described the *Lemon* test's quest for social meaning as incoherent and acknowledged that it had proven unsuccessful; it yielded confusion, inconsistent results, and inadequate guidance for lower courts and government officials

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[277] Pildes, *Why Rights Are Not Trumps*, *supra* note 113, at 752; *see also* Pildes, *Avoiding Balancing*, *supra* note 113, at 747 ("[T]he question is what distinct kind of social good public education should be understood to be.").

[278] Pildes, *Why Rights Are Not Trumps*, *supra* note 113, at 752–53.

[279] For a critique of the idea of social meaning in general, see generally Richard Ekins, *Equal Protection and Social Meaning*, 57 AM. J. JURIS. 21 (2012).

[280] 403 U.S. 602 (1971); *see Kennedy*, 142 S. Ct. at 2427–28 (overruling *Lemon* and the related Establishment Clause test of government "endorsement" of religion).

[281] Pildes, *Why Rights Are Not Trumps*, *supra* note 113, at 749–50 (citing the endorsement test that arose from *Lemon*).

seeking to prevent their policies from being overturned.[282] There is a substantial risk that the same sorts of incoherent results would follow if the rules of constitutional adjudication generally required courts to attempt to divine laws' social meanings and then assess the sufficiency of these hypothesized reasons. Such a process would be rife with subjectivity—either because no such social meaning exists or because courts are poorly situated to determine such social meaning.

In contrast to social meaning, some scholars have argued that the primary role of the judiciary in constitutional rights disputes is to identify the internal motives of government officials[283]—so perhaps those are the relevant reasons we are looking for. In this vein, doctrines like strict scrutiny are understood as being primarily focused on smoking out the forbidden intentions of government officials.[284] But as discussed above in Part IV.A, the theory I offer here is not primarily focused on motivating reasons for government action. My theory applies when government officials have laudable internal motives (e.g., concerns about public safety) that simply turn out to be insufficiently based in reality. In other words, the government may have had a benign or even beneficent motivating reason, but that reason was not a normative reason because it was merely an apparent reason. Likewise, my theory applies to cases in which government officials transparently provide their motivating reason as their official reason (e.g., avoiding cost or inconvenience), which might even run together with a normative reason. But if that reason turns out to be excluded by the pro tanto right, the government's candor and accuracy do not justify its action.

Is there a better, more democratically accountable approach for identifying the relevant government reasons for interfering with a pro tanto right? I offer two alternatives below. These alternatives are inherently tied to the judicial remedies sought by (and available to) the parties and the government body that is creating the interference with the pro tanto constitutional right. Again, I do not claim that these are the only ways of identifying relevant government reasons. I do argue, however, that my proposal is

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[282] *Kennedy*, 142 S. Ct. at 2427–28.

[283] *See* Charles Fried, *Types*, 14 CONST. COMMENT. 55, 62–63 (1997); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 436–43 (1997); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 145–48 (1980).

[284] *See* FALLON, THE NATURE OF CONSTITUTIONAL RIGHTS, *supra* note 3, at 126 n.14 (citing Johnson v. California, 543 U.S. 499, 505 (2005) ("The reasons for strict scrutiny are familiar. Racial classifications raise special fears that they are motivated by an invidious purpose.")).

more consistent with democratic principles and judicial competence than is the social meaning approach or an approach that would invite the judiciary routinely to attempt to identify the internal motivating reasons for interference with a right.

*a) As-applied remedies.* Regarding the first mechanism, frequently it is not legislation *as such* that necessarily interferes with a pro tanto right. Rather, it is often the application (usually discretionary) of a statute by government officials (frequently unelected) that creates this interference. In that context, I argue that the official reason(s) for interference (i.e., the reason the official offers for enforcing the law in that way) must be supplied by the government officials either at the time of interference with the pro tanto right or soon after the beginning of litigation. As discussed above, the U.S. Supreme Court has rightly said that, for a variety of reasons, it will treat reasons offered contemporaneously as more credible than post hoc, late-coming reasons offered as a litigation tactic.[285] Limiting official reasons to contemporaneously offered reasons decreases the likelihood that a government actor's official reasons reduce to the comedian Groucho Marx's maxim: "[T]hese are my principles. If you don't like them, well, I have others."[286] But whatever the timing, requiring the government officials to offer an official reason for an interference with a pro tanto right offers transparency and accountability benefits.

To illustrate how this would play out in a dispute, let us return to the highway-widening example previously discussed, in which the proposed project would destroy a Native American sacred site.[287] There, the government offered the need to create a turning lane to decrease car accidents as its official reason for interfering with the tribal plaintiffs' free exercise rights. Importantly, nothing on the face of the Department of Transportation Act[288] required or even hinted at the destruction of a Native American sacred site during highway widening; it is almost certainly the case that Congress never considered such a scenario.[289] Therefore, it was not the statutory language itself that created the unavoidable interference with the pro tanto right in that case, and it was not an interference caused directly by legislators. Instead, the more proximate source of the interference with the pro tanto right came from government

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[285] *See supra* note 207 and accompanying text.

[286] *10 Groucho Marx Jokes to Make You Laugh*, PBS AM. MASTERS (Dec. 14, 2022), https://perma.cc/4BQC-SDAL.

[287] *See* Slockish v. U.S. Fed. Highway Admin., 2018 WL 2875896, at *1 (D. Or. June 11, 2018); *see also* Barclay & Steele, *supra* note 1, at 1328–33 (discussing *Slockish*).

[288] Pub. L. No. 89-670, 80 Stat. 931 (1966).

[289] *See id.*; *see also* 49 U.S.C. § 303.

officials exercising their discretionary authority under the statute to create a particular highway-widening plan. The relevant official reason warranting judicial assessment, therefore, was not a legislative one; rather, it was the reason offered by the highway-widening officials.

Below, I discuss in greater depth the evidentiary standard that could be used to assess whether officially offered reasons are in fact normative reasons that conflict with the pro tanto right. But the bottom line is that, in this as-applied context, the relevant government actor must both articulate the official reasons for the challenged action at the time it takes the action, and then persuade the court that those reasons actually obtain. If the government is unsuccessful in that endeavor, the conclusive constitutional right prevents the action, and the constitutional remedy will be as-applied.[290] In other words, the discretionary application of the Department of Transportation Act by officials to widen a highway in a particular way could be held unconstitutional. But the statute would remain generally valid as a source of authority to widen the highway in many other ways, the vast majority of which likely would not involve pro tanto constitutional rights at all.[291]

Sometimes in the as-applied context, government officials might announce an official reason that is an excluded reason under the pro tanto right.[292] The Supreme Court seems to have taken that view in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[293] where some government commissioners expressed hostility toward petitioner Jack Phillips's religious beliefs during official proceedings as a basis for denying his claim.[294] The Court did not engage in a strict scrutiny analysis to assess potentially conflicting reasons or the factual accuracy of the reasons. Instead,

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[290] *See* Barclay & Rienzi, *supra* note 173, at 1608–31.

[291] Constitutional rights jurisprudence should not roam abroad looking for potential problems to preempt—it should instead be narrow and tailored to the actual conflict at issue. *See Rahimi*, 144 S. Ct. at 1902–03 (discussing the disfavored nature of facial challenges); *see also* Eric S. Fish, *Choosing Constitutional Remedies*, 63 UCLA L. REV. 322, 366 (2016) ("[T]he scope of remedial power is limited by the problem at hand."); Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 329 (2006) ("[T]he 'normal rule' is that 'partial, rather than facial, invalidation is the required course,' such that a 'statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact.'" (alteration in original) (quoting Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985)).

[292] This occurs most frequently in the as-applied context, but it is also possible (though likely far less common) that a statute's text could announce reliance on an excluded reason as well.

[293] 138 S. Ct. 1719 (2018).

[294] *Id.* at 1729–31.

it "set aside" the government's action "without further inquiry"[295] because the government had candidly announced that it had acted on at least one excluded reason for its action.[296]

On the other hand, sometimes the burden on the pro tanto right is clear from the face of the law, rather than the way the law was enforced. This brings us to the context of facial remedies.

*b) Facial remedies.* Regarding the second mechanism for finding unconstitutionality, sometimes it *is* the act of the legislature that creates the unavoidable interference with a pro tanto constitutional right.[297] I argue that *only* in those contexts should a facial remedy be considered by a court. By facial remedy, I mean that the court would rule there is no valid application of the contested provision of law in any context.

In the facial context, the politically accountable government body at least has the opportunity to identify a nonexcluded reason for its action in the text of the law creating the burden on pro tanto rights. The judiciary ought to be particularly hesitant to disregard such an official articulation of a nonexcluded reason.[298]

For example, in the statute at issue in *Holder v. Humanitarian Law Project*,[299] Congress prohibited the provision of "material support or resources" to certain foreign organizations that engage in terrorist activity.[300] The statute defined "material support" to include activities like "training" or "expert advice."[301] Thus, this

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[295] *Kennedy*, 142 S. Ct. at 2422 n.1 (quotation marks omitted) (quoting *Masterpiece Cakeshop*, 138 S. Ct. at 1732).

[296] Questions might arise about which sorts of "official statements" count for announcing reliance on an excluded reason. For review of legislation, a facial remedy would be appropriate where the legislature announces reliance on the excluded reason on the face of the statute itself. When it comes to other government policies or enforcement actions, there are pressing evidentiary questions about which sorts of statements a court could look to. This seemed to be part of the issue animating the Court's analysis in *Trump v. Hawaii*, 138 S. Ct. 2392, 2418–23 (2018). How far back could the President's statements be traced to a policy that has evolved since he spoke? *See id.* It is beyond the scope of this Article to plumb the depths of those sorts of evidentiary issues. Suffice it to say that not every statement made by a government official would count as an official reason for overriding a pro tanto constitutional right.

[297] Though I refer to an interference coming from the text of the law itself, one might more accurately say that the legislature has made the proposition authoritative by enacting the text. For an example of a statute that sets forth the reasons for its enactment, see MICH. COMP. LAWS § 722.124e(1) (2024).

[298] This argument focuses on laws passed by a legislature. I leave for another day the question of how the arguments discussed here would apply to something like regulations passed through an administrative law process, as the democratic principles at play in that context may be very different from the principles at stake with respect to legislation.

[299] 561 U.S. 1 (2010).

[300] *Id.* at 7 (quotation marks omitted) (quoting 18 U.S.C. § 2339B(a)(1)).

[301] 18 U.S.C. § 2339A(b)(1); *see also id.* § 2339B(g)(4).

statute prohibited some of the most basic types of expressive activity possible: teaching others and giving advice to them. This created an obvious conflict with the pro tanto right to freedom of speech that resulted from the legislation itself.

However, in the text of the legislation, Congress also offered a nonexcluded reason (protection of national security) for interfering with speech interests. In its section on "Findings and Purpose," Congress stated that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct."[302] In other words, Congress believed that providing expressive support to these groups aids terrorist organizations that harm national security and thus creates a conflict between the speech interests and the nonexcluded interest in national security. The Supreme Court accepted this rationale and upheld the law as a facial matter.[303] That conclusion was defensible under the approach I propose.

Courts should rarely assume that a legislature acted to advance an excluded reason if that reason was not identified in the text of the statute. In this legislative context, courts do not have a comparative institutional advantage for the evidentiary assessment of social and polycentric facts that affect wide swaths of people across long ranges of time[304]—facts like society-wide threats caused by gun violence or terrorism or impacts on international diplomacy. Thus, courts have little justification for second-guessing those empirical determinations to justify holding invalid any application of the relevant law.[305]

The statute at issue in *Loving v. Virginia*[306] offers a counterexample. There, the legislature arguably created an unavoidable burden on a pro tanto right without also offering any nonexcluded reasons in conflict with that pro tanto right for its action. The law at issue stated, "If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five

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[302] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1214, 1247 (codified at 18 U.S.C. § 2339B).

[303] *See Humanitarian Law Project*, 561 U.S. at 33–39.

[304] *See* YOWELL, CONSTITUTIONAL RIGHTS AND CONSTITUTIONAL DESIGN, *supra* note 16, at 109–14.

[305] Note that this assumption does not hold in the more discrete, as-applied context where the facts relevant to a particular litigant or group of litigants are likely much more competently assessed by a court with those facts before it than by a legislature that may not have had anything like those particular litigants in mind.

[306] 388 U.S. 1 (1967).

years."[307] Let us assume (to oversimplify the issue) that a pro tanto right under the Fourteenth Amendment's Equal Protection Clause[308] protects against racial classifications in the law, other than to advance nonexcluded reasons. The Supreme Court said something along these lines in *McLaughlin v. Florida*,[309] when it stated that race-based classifications are suspect and are constitutional "only if . . . necessary, and not merely rationally related, to the accomplishment of a permissible state policy."[310]

Which reasons might be permissible to justify a form of race-based classification? A thorough answer to that question is beyond the scope of this Article, but for illustrative purposes, I offer a few possibilities. Prior to *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*,[311] some argued that antisubordination interests might constitute a nonexcluded reason for a race-based classification.[312] In addition, Justice Scalia suggested that a permissible reason for race-based classifications would be "a social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates."[313] In a similar vein, Justice Thomas asserted that "only those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a 'pressing public necessity'" in this context.[314] So for this example, let us assume those are relevant nonexcluded reasons.

Returning to *Loving*, the legislature's use of a racial classification triggered the exclusionary reason. But the legislative body offered no nonexcluded reason on the face of the law for that action. Nor could the government's attorneys even offer any post hoc permissible reasons that had any rational relationship to the law.[315] The Court thus held that this law's "racial classifications violate[ ] the central meaning of the Equal Protection Clause."[316] In other words, the Court held there was no valid application of this law under the Constitution (a facial remedy).

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307 *Id.* at 4.

308 U.S. CONST. amend. XIV, § 1.

309 379 U.S. 184 (1964).

310 *Id.* at 196.

311 143 S. Ct. 2141 (2023).

312 *See, e.g.*, Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 18–19 (2003).

313 City of Richmond v. J.A. Croson Co., 488 U.S. 469, 521 (1989) (Scalia, J., concurring in the judgment).

314 Grutter v. Bollinger, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part) (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944)).

315 *See Loving*, 388 U.S. at 7–8.

316 *Id.* at 11–12.

Similarly, in *Carson v. Makin*,[317] the text of a state law itself arguably interfered with the pro tanto right to religious exercise by prohibiting the government from making a generally available benefit available to some schools simply based on their "sectarian" or religious status.[318] The law itself did not offer permissible reasons for this prohibition. And the Court noted that the law was inconsistent with the types of post hoc reasons the government's lawyers offered on appeal.[319] The Court thus held the "nonsectarian" requirement of the law unconstitutional on its face.[320]

In addition, sometimes government officials involved in the passage of a law announce an excluded reason as the official reason. In *Moody v. NetChoice, LLC*,[321] which dealt with a government attempt to regulate social media companies, the Supreme Court explained that "Texas has never been shy, and always been consistent, about its interest: The objective is to correct the mix of speech that the major social-media platforms present."[322] Texas had announced that reason for passing the law in the Governor's signing statement. The law's primary sponsor was concerned that "social-media companies were 'silenc[ing] conservative viewpoints and ideas.'"[323] But because the Court determined this reason was excluded under the right of freedom of speech, the Court held that this reason could not justify Texas's law and thus left open the possibility for a facial challenge.[324]

There are a few important implications of my approach. First, courts should let a deliberative democratic body speak for itself through its legal work product—generally legislation—about its official reasons for the challenged action. In contrast, government

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317 142 S. Ct. 1987 (2022).

318 *Id.* at 1994.

319 *Id.* at 1998–2000.

320 *Id.* at 2002.

321 144 S. Ct. 2383 (2024).

322 *Id.* at 2407.

323 *Id.* (quoting NetChoice, LLC v. Paxton, 573 F. Supp. 3d 1092, 1116 (W.D. Tex. 2021)).

324 *Id.* (emphasis in original) (alterations omitted) (quoting Sorrell v. IMS Health Inc., 564 U.S. 552, 578–79 (2011)):

> [A] State may not interfere with private actors' speech to advance its own vision of ideological balance. States (and their citizens) are of course right to want an expressive realm in which the public has access to a wide range of views. That is, indeed, a fundamental aim of the First Amendment. But the way the First Amendment achieves that goal is by preventing *the government* from "tilting public debate in a preferred direction." It is not by licensing the government to stop *private actors* from speaking as they wish and preferring some views over others. . . . On the spectrum of dangers to free expression, there are few greater than allowing the government to change the speech of private actors in order to achieve its own conception of speech nirvana.

officials applying laws in discretionary ways will provide their own official reasons. There are benefits related to democratic accountability that follow from requiring the relevant government actors to provide their own official reasons. The legislature is accountable for the text of legislation and the reasons articulated therein. Those reasons can later be invoked in response to a facial challenge, should one arise. This is preferable to courts divining the reason based on social meaning or controversial analysis of isolated statements by a few legislators in the legislative history.[325] And relevant government officials subject to an as-applied challenge can offer their *own* reasons for applying a law the way that they did, which often involve discretion and different considerations from the original passage of the law.

Second, this process provides transparency by requiring the government—ex ante—to articulate publicly and directly to rightsholders why their constitutional interest is being interfered with. This transparency creates a dialectic that not only might help citizens more readily accept justifications for intrusions on constitutional interests, but also disciplines the government. If the government knows it will have to articulate plainly and defend its reasons for interfering with some constitutional interests, it might think much harder about whether such interference is necessary.

Third, this approach would more closely link constitutional remedies to the source of the rights violation. It would allow facial remedies *only* when it is the text of a law that creates an unavoidable conflict with a pro tanto right, thus avoiding any unnecessary constitutional conflicts. And this approach would otherwise allow as-applied remedies when the law is applied in ways that interfere with pro tanto rights based on excluded reasons. Such remedies should (and do) function as the default of constitutional rights adjudication. Given that interference with rights in an as-applied context often occurs at the hands of a government official

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[325] Skeptics of inquiries into motivating legislative intentions range from Justice Scalia to Ronald Dworkin. *See* Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 16–23 (Amy Gutmann ed., 1997); Edwards v. Aguillard, 482 U.S. 578, 636–38 (1987) (Scalia, J., dissenting) (noting the difficulty of discerning the internal intent of even one legislator, let alone a multimember legislature whose members were likely to have had different intentions); DWORKIN, LAW'S EMPIRE, *supra* note 28, at 321–33.

who is less democratically accountable and responsive than a legislature, this default position creates less tension with democratic principles.[326]

3. How to determine if the government's official reason requires an action that is in conflict with the pro tanto constitutional right?

One of the most important questions a court should ask regarding the government's reasons for interfering with a pro tanto constitutional right is whether the government has demonstrated that the official reason it offered requires an action that conflicts with actions that would protect the first-order reason protected by the pro tanto right, such that it is even necessary for one reason to override the other. Particularly in the as-applied context, this factual question is one that a court should assess rigorously and that a court will have an institutional advantage over the executive or legislatures in assessing.

As discussed above, a normative "reason can be overridden only by a fact which is itself a reason for contradictory action."[327] Reasons for action conflict when it is impossible to perform both.[328] When it is possible for the government to act on its desired justification *and* act to protect the pro tanto constitutional right,

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[326] This approach is consistent with the Supreme Court's preference for as-applied over facial remedies. The Court has explained that "the 'normal rule' is that 'partial, rather than facial, invalidation is the required course,' such that a 'statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact.'" *Ayotte*, 546 U.S. at 329 (alteration in original) (quoting *Brockett*, 472 U.S. at 504). Such a principle flows from the "axiom[ ] that a 'statute may be invalid as applied to one state of facts and yet valid as applied to another.'" *Id.* (quoting Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 289 (1921)). As Justice Stevens put it, when the Court strikes down statutes facially, rather than as-applied, "[t]he Court operates with a sledge hammer rather than a scalpel." Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 399 (2010) (Stevens, J., concurring in part and dissenting in part). Scholars have also noted the Roberts Court's preference for as-applied remedies over facial remedies. *See* Luke Meier, *Facial Challenges and Separation of Powers*, 85 IND. L.J. 1557, 1557–58 n.3 (2010) (citing, among others, David L. Franklin, *Looking Through Both Ends of the Telescope: Facial Challenges and the Roberts Court*, 36 HASTINGS CONST. L.Q. 689, 697 (2009) (arguing that the Supreme Court's "as-applied" preference confirms its "fidelity to the traditional model")); Gillian E. Metzger, *Facial and As-Applied Challenges Under the Roberts Court*, 36 FORDHAM URB. L.J. 773, 784 (2009) (arguing that "[o]ne recurring theme of the Roberts Court's jurisprudence to date is its resistance to facial constitutional challenges and preference for as-applied litigation"); Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1233, 1239 (2010) (noting that "the Court insists that 'as-applied' challenges are the most common and preferred form of constitutional challenge"). For a different view, see Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 956 (2011) (discussing as-applied challenges as a form of severing).

[327] RAZ, PRACTICAL REASON AND NORMS, *supra* note 20, at 27.

[328] *Id.* at 25–26.

there is no justification for overriding the pro tanto right. Rather, the lack of conflict means a Pareto-efficient solution is available whereby one party can be made better off without expense to the other. A court can arrive at this conclusion without ever weighing or comparing the relevant first-order reasons.

Let us again look closely at how this question could be assessed in the context of the highway-widening example. A court could agree that public safety was a nonexcluded reason that was an appropriate basis for government action, but still find that the government's asserted reason of needing to protect public safety was not at odds with the religious exercise of the tribal plaintiffs.[329] If the highway could be widened on the opposite side of the road without destroying the sacred site, and if the government has no explanation for why it could not widen on the other side of the highway (as was true in the real case), a court could conclude that the government failed to meet its burden of demonstrating that a conflict of reasons necessitated interfering with the pro tanto right to religious exercise. A court could arrive at this conclusion by relying on adjudicative facts within its competence to assess and without ever weighing the comparative value of public safety against the value of the Native American sacred site.[330] And after making that determination, it would follow that the right conclusively prevents the government from interfering with the religious exercise on the government's proffered basis. In other words, if the government had no explanation for why it could not widen on the other side of the road, the highway example should provide an easy case in which first-order reasons are not in conflict. As a result, the government would have no justification for overriding the pro tanto constitutional right, and the conclusive constitutional right would prevent the government action.

There will also be easy cases in which the opposite is true and the conflict is essentially conceded by the parties. The previously discussed Indiana mother who claimed a religious constitutional right to beat her child with a metal object provides an example.[331] Let us assume that the government's desire to prevent this form of child abuse is a nonexcluded reason under the right. In that

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[329] *See Slockish*, 2018 WL 2875896, at *1; *see also* Barclay & Steele, *supra* note 1, at 1328–33 (discussing *Slockish*).

[330] For a discussion of adjudicative facts, see YOWELL, CONSTITUTIONAL RIGHTS AND CONSTITUTIONAL DESIGN, *supra* note 16, at 63–64.

[331] *See supra* Part II.D. For another Indiana case with similar facts, see *Blattert v. State*, 190 N.E.3d 417, 421 (Ind. Ct. App. 2022).

context, the government need not provide evidence that tangentially addresses the issue of conflict between the mother's pro tanto right to beat the child and the government's official reason for limiting that right to protect the child. The pro tanto rightsholder essentially conceded that these reasons are, in fact, in conflict. The nonexcluded reason that the government wishes to advance—preventing a severe beating of a child—itself constitutes the rightsholder's desired exercise of the pro tanto right. Thus, additional evidence about the conflict of reasons is unnecessary, and the court was correct to rule for the government.

The same was true in a case involving a plaintiff who sought a religious exercise right to assisted suicide.[332] Let us assume that, for this right, protection of human life is again a nonexcluded reason for interfering with religious exercise. Here, as with the previous case, the plaintiff conceded that loss of human life is constitutive of the religious exercise. This was another concession essentially that the pro tanto right and the government's nonexcluded reason unavoidably conflicted. As before, the court was correct to rule for the government without needing to engage in evidentiary assessment of whether the reasons are in conflict.

But what about more difficult cases in which the conflict (or lack thereof) with a particular type of harm is not so clear? What if the issue is that there is some degree of *risk* of a harm?

*a) Questions of risk and evenhandedness.* Let us tweak the highway example a bit. What if the government argues that widening the highway on the side of the road opposite the sacred site would be possible but that it would lead to an increase in safety risks for drivers? In other words, the government argues that if it protects the religious exercise of the tribal plaintiffs by building on the other side of the road, there is some increased risk of more car accidents than if the government destroys the sacred site and builds on that side of the road. Is there an unreconcilable conflict now between the government's ability to act to reduce risk of harm and to act to protect the Indigenous religious exercise?

To answer that question, it is important to consider the nature of risk itself and the relationship between risk and reasons in the constitutional rights context.[333] Risk is a "complex and sometimes elusive" concept, but here I adopt Professor Stephen Perry's

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[332] *See* Sanderson v. People, 12 P.3d 851, 852 (Colo. Ct. App. 2000).

[333] This is a topic that is unfortunately undertheorized. *But see* Stephen Perry, *Risk, Harm, Interests, and Rights*, *in* RISK: PHILOSOPHICAL PERSPECTIVES 190, 203 & n.25 (Tim Lewens ed., 2007) [hereinafter Perry, *Risk*] ("The question of whether or not there is ever a right not to be risked is a complex and controversial one . . . .").

description of risk as "a chance or probability of a bad outcome."[334] Perry argued that the best way to understand the concept of probability is objectively, as "the relative frequency of a specified type of outcome within a reference class of entities, events, or actions that are, in some specified way, similar to one another."[335]

Now let us consider that concept of risk in the context of government arguments about a harmful event that has some probability of occurring if the government does not override the pro tanto constitutional right. First, note that the government cannot just point to the reduction of *any* type of risk in the abstract as a normative reason to justify its action. It must point to a reduction of the risk of something that is *itself* a nonexcluded reason. For example, if the government argues that protecting the sacred site would increase the risk that some members of the public would dislike the religious ceremonies Native Americans would perform there, the government may well be correct. The risk may even be very high—perhaps 99%. But the type of harm risked is an excluded reason under the Free Exercise Clause. Others' dislike of a religious exercise simply should not be acted on (or perhaps even deliberated upon) in any relevant choice made by political actors. So, if a reason is excluded, a risk analysis that relies on that excluded reason does not somehow transform it into a nonexcluded reason. There is never a permitted reason to reduce risk unless it is derivative of the reason to prevent a type of harm that the government has a permitted reason to prevent under the right.

To describe the relationship between risk and nonexcluded reasons, I propose an approach analogous to Perry's. He argued that "risk, at least as that notion is ordinarily understood in moral and legal contexts, cannot plausibly be regarded as harm in itself. In the final analysis risks are just relative frequencies," which "are properties not of individuals but of classes of individuals; it is, however, individuals who suffer harm."[336]

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[334] *Id.* at 190.

[335] *Id.* at 191. For subjectivist theories of risk, which Perry persuasively argued are either incomplete or not inconsistent with objective approaches to risk, see LEONARD J. SAVAGE, THE FOUNDATIONS OF STATISTICS 27–55 (2d ed. 1972); BRUNO DE FINETTI, THEORY OF PROBABILITY: A CRITICAL INTRODUCTORY TREATMENT 5–7 (Antonio Machí & Adrian Smith trans., Wiley & Sons Ltd. 2017) (1974).

[336] Perry, *Risk*, *supra* note 333, at 196; *see also* Stephen Perry, *Harm, History, and Counterfactuals*, 40 SAN DIEGO L. REV. 1283, 1306 (2003) [hereinafter Perry, *Harm*] ("[B]ecause of the peculiar epistemic character of risk, subjecting another person to risk cannot, in and of itself, constitute a harm."); Stephen R. Perry, *Risk, Harm, and Responsibility*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 321, 330–34 (David G. Owen ed., 1995).

Individuals may have secondary interests in avoiding risk, but those interests are only instrumentally valuable for the primary interest of preventing the actual harm that would occur if the potential negative outcome came to fruition.[337] Therefore, concerns about risk are simply derivative of the ultimate setback against the core or primary interest itself.

An agent's desire to decrease risk for these secondary reasons still constitutes a reason for action. And that reason for action may, if proven, be in direct conflict with pro tanto rights in some contexts. So what if, in the highway example, the government alleged a 1% greater risk of car accidents if only the opposite side of the road were widened as its reason for needing to construct on the sacred site's side of the road?

I address challenges the government would face in making such a claim momentarily. But let me first note that for the government to even make this allegation in a credible way itself offers nontrivial protection for a rights claimant. First, the exclusionary reason framework requires the government to point to risk that is itself related to a permitted reason, rather than risk of any type. And sometimes the reason the government attempts to rely on is excluded, as any risk related to that reason would be. The framework requires the government to have actually assessed the alternative that would protect the claimant's interest, which the government often fails to do. It would require the government to submit factual evidence related to risk—evidence that the Supreme Court, applying strict scrutiny, has said must be based on more than mere "speculation" or "conjecture" regarding "hypothetical" outcomes.[338] If in fact the risk is truly as low as the government alleges, there may be many cases in which the government is incentivized to settle the case in a way that accommodates a rights claimant rather than go through the effort to prove a 1% increase in risk that the court may not find credible. All of this provides meaningful protection for a rightsholder. But there is more that the government must demonstrate if its desired action relies on a risk analysis.

Specifically, if the risk of harm the government alleges is in fact quite low, the government will face two other significant

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[337] Perry, *Harm*, *supra* note 336, at 1306–08 (distinguishing between "core interests on the one hand, and secondary interests on the other"); *see also* Perry, *Risk*, *supra* note 333, at 202.

[338] *Ramirez*, 142 S. Ct. at 1280 (quoting Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021)).

obstacles to winning its case on that basis—one related to risk mitigation options and the other related to pretext. For a discussion of each in turn, consider *Holt v. Hobbs*,[339] in which a Muslim prisoner claimed the right to wear a beard for religious reasons.[340] The Arkansas state prison denied the request and offered as its official reason the need to reduce risk of prison security breaches that could occur if an inmate hid weapons or other contraband in a beard.[341]

But there were a few problems with the government's argument. To begin, Arkansas allowed the *same* type of beard for medical reasons.[342] This provided evidence that, regardless of how much risk the government asserted based on the desired religious beard, the government likely had options at its disposal to mitigate that precise type of risk. For example, the Court noted that the government "failed to establish" that it could not mitigate the relevant security risk "by simply searching petitioner's beard," particularly given that the government already regularly "searche[d] prisoners' hair and clothing."[343] If the government were worried about having a security guard perform the search, it could also "hav[e] the prisoner run a comb through his beard" to perform the search himself.[344] These alternatives were all presumably the same mitigation options the government deployed to deal with risks caused by the permitted medical beards. And if the risk could be mitigated, then the government did not in fact have a reason that conflicts with the pro tanto right.

These questions about comparability and mitigation options are related to assessing whether there really are conflicting reasons in a case, rather than just concerns about abstract equality values. This is highlighted by the fact that courts in rights disputes often do not limit their analysis to whether the government defendants in the case before them acted in an evenhanded manner. Courts also assess how government officials in *other* jurisdictions have assessed the relevant risk threshold and mitigated that risk. In *Holt*, for example, the Supreme Court found it significant that the vast majority of U.S. states and the federal government had found ways to protect prison security and still accommodate

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339 574 U.S. 352 (2015).

340 *Holt* arose in a statutory context rather than a constitutional context under the Religious Land Use and Institutionalized Persons Act. *Id.* at 355–56. But the facts are relevant for constitutional analysis related to the point I make here.

341 *Id.* at 363.

342 *Id.* at 358.

343 *Id.* at 365.

344 *Holt*, 574 U.S. at 365.

religious beards.[345] These other prisons all seemed to think that the risks from prisoner beard wearing, if existent, could be easily mitigated. Arkansas could neither explain how the risk it faced was relevantly different from the risk other jurisdictions dealt with nor credibly claim that its ability to mitigate that risk was relevantly different.[346] For these and other reasons, the Supreme Court ruled against the government.[347]

Thus, the widespread evidence of beard protecting (in both the prison being sued and other jurisdictions) was evidence of the possibility of Pareto-efficient options to both protect the prisoner's pro tanto right and ensure prison security. As Professors Douglas Laycock and Steven Collis have argued, comparable nonconstitutional exemptions (either by the challenged government actor or by other similarly situated ones) often present evidence that it is also possible to protect that same sort of activity under a pro tanto right.[348]

One might respond by saying that available mitigation efforts may not actually reduce the risk to zero. Of course, that itself is a factual question the government must prove with evidence. But it points to a second potential response of the Court regarding risk.

The Court in *Holt* essentially outsourced the question of what constituted an actionable risk threshold to politically accountable actors by assessing the way in which they themselves had assessed the relevant threshold of risk in settings involving comparably risky activity. For example, the Court observed that the government "suggest[ed] that requiring guards to search a prisoner's beard would pose a risk to the physical safety of a guard if a razor or needle was concealed in the beard. But that is no less true for searches of hair, clothing, and ¼-inch beards."[349] It was important to the Court that, elsewhere, the government simply had not found that level of risk troubling. In fact, the government did not point to evidence that it treated this level of risk

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345 *Id.* at 368–69.

346 *Id.*

347 *Id.* at 369–70. Courts can also look to whether the government actors before them have themselves allowed activity in the past that is included in the scope of the pro tanto right. If such past activity never resulted in the undesired outcome, that may undercut the government's claims about risk. *See Ramirez*, 142 S. Ct. at 1279–80 (observing that the government had "historically and routinely" allowed the type of activity that it now claimed was impermissibly risky and ruling against the government).

348 Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 11–16 (2016).

349 *Holt*, 574 U.S. at 365.

from searches as impermissible *anywhere* else. That type of evidence raised questions about government pretext and provided grounds for questioning whether the government's motivating reason was not in fact related to risk, but was perhaps an excluded reason (like hostility toward prisoners).[350]

As a practical matter, it is likely that the more marginal the risk that the government asserts it needs to prevent when attempting to interfere with a pro tanto right, the less likely it is that the government actually regulates that level of risk in an evenhanded way in other comparable contexts. There will simply be less political pressure or incentive to regulate very small risks in many contexts. And as the government approaches a situation in which it looks like it is regulating *only* the risk posed by the pro tanto right, and not the same sort of risk posed by anything else, courts should increase their skepticism of the likelihood of pretext.

Of course, the existence of comparable activity that the government protects does not end the analysis. The government has at least two potential responses. First, it might argue that the activity protected by a pro tanto right is riskier than the comparator activity. And if the government could demonstrate the truth of that claim based on the facts in the record, that would diminish the evidentiary relevance of other comparator situations—meaning that those comparators would be less indicative of available risk-mitigation techniques or of concerns about pretext.[351]

Second, the government might also be able to argue that its lack of evenhandedness with respect to *one* nonexcluded reason is justifiable if necessary to allow the government to advance a *separate* nonexcluded reason served by comparator situations (and not served by the pro tanto right). Let us examine that principle in the highway example. What if constructing on the other side of the highway would require the workers to use a more dangerous construction technique that put their lives at serious risk? Note that this is a different type of safety reason from the government's original safety reason: avoiding car accidents. Should a court rule

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[350] *See* Brief of Former Prison Wardens as Amici Curiae in Support of Petitioner at 26, *Holt*, 574 U.S. 352 (No. 13-6827) ("In the experience of *amici*, political pressure from some groups can cause a penal administration to resist inmates' requests for [civil rights] accommodations, regardless of the merit of such accommodations.").

[351] *See, e.g.*, Tandon v. Newsom, 141 S. Ct. 1294, 1297 (2021) (per curiam) ("Where the government permits other activities to proceed with [risk-mitigating] precautions, it must show that the [activity under the pro tanto constitutional right] at issue is more dangerous than those activities even when the same precautions are applied.").

that the government's actions were still unnecessary because the government could make the highway equally safe for *drivers* either way? I think the answer is no. When the only alternative a government has to avoid interfering with a right would implicate a separate nonexcluded reason (e.g., protecting the lives of construction workers), this context may require tradeoffs between the importance of those two nonexcluded reasons. And politically accountable actors are better situated to make those tradeoffs, for reasons discussed above based in both political accountability and institutional competence.

This type of reasoning may have influenced the Supreme Court's decision to deny the requested relief in *Dr. A v. Hochul*.[352] There, the state of New York argued that it was unable to offer religious exemptions from a COVID-19 vaccine requirement for all healthcare workers.[353] The government explained that interfering with this pro tanto constitutional right was necessary to prevent the spread of COVID-19 to the public.[354] Yet the government allowed secular exemptions to this law if a worker could demonstrate that the vaccine would cause an adverse medical consequence for the worker.[355]

If the only relevant government reason under consideration had been preventing the spread of COVID-19, then this lack of evenhandedness would seem problematic. One could argue that, at least in the abstract, both types of exemptions equally increase the risk of the spread of the disease. But calling both the interest in preventing the spread of COVID-19 and the interest in preventing adverse medical consequences for vulnerable workers interests in promoting "public health" does not resolve the problem because they are different *types* of public health interests that are differentially affected by regulations.

Indeed, perhaps the Court understood the government to be articulating a second (assumed here to be nonexcluded) reason for this alternative exception: the need to protect the health of the healthcare workers themselves, which might be significantly threatened by the vaccine. Thus, the government argued its lack of evenhandedness was necessary to advance two different but equally permissible reasons that were not excluded under the pro

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[352] 142 S. Ct. 552 (2021) (mem.) (Gorsuch, J., dissenting from denial of application for injunctive relief).

[353] *Id.* at 553.

[354] *Id.* at 556.

[355] *Id.*

tanto right to religious exercise. Perhaps that is why the Supreme Court denied the application for relief.[356]

Let me make one final point about how this discussion relates to level-of-generality problems and why my theory does not share that vulnerability with the historical-analogue approach discussed above in Part II.D. Under the historical-analogue approach, the judiciary alone shoulders the burden of deciding the correct level of generality at which to identify whether government regulations are similar enough to Founding Era regulations. In *Rahimi*, the Court tried to address this issue. It made clear that the level of generality need not be at the "dead ringer" or "historical twin" level but that the challenged regulation must still somehow "comport" with the historical principle.[357] This still leaves a vast swath of discretion about where to identify that level. Justice Barrett admitted, candidly, that the Court would have to leave the exact determination of level of generality for "another day."[358]

In contrast, under the approach I suggest (and under strict scrutiny as generally applied), the government identifies the level of generality of the reason it wishes to defend when it offers its official reason for limiting the pro tanto right at whichever level it chooses. But the government faces serious constraints with this choice.

To see why, consider the nature of the reasons that must be offered to justify limitation of a pro tanto right. In this context, a reason includes two descriptions: (1) an action description and (2) a description of the justification for the action. The action to be justified must be described in a way that matches the limitation of the pro tanto right. So, in the case of widening a highway, the action to be justified is not widening highways in general or even widening a particular highway. The action that must be justified is widening this highway *so as to destroy a particular sacred site*. Likewise, the justification for the action must correspond to that particular action. The very general justification description—widening highways conduces to public safety—is too general because it does not justify widening the particular highway in the particular manner that destroys the sacred site. Instead,

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[356] *See id.* at 552. Note the same could not be said for the exemptions in *Tandon*, which allowed exemptions for economic reasons—reasons that do not rise to the level of a dueling compelling government interest. *Tandon*, 141 S. Ct. at 1297–98.

[357] *Rahimi*, 144 S. Ct. at 1897–98 (quotation marks omitted) (quoting *Bruen*, 142 S. Ct. at 2133).

[358] *Id.* at 1926 (Barrett, J., concurring).

the justification must be described at a level of particularity that corresponds to the pro tanto violation of the right. Thus, to satisfy its evidentiary burden, the government will not be able to operate at high levels of generality.[359]

The government faces other constraints at too low a level of generality. Consider a case where the government described its reason in a manner as marginal and particularized as possible—say, to decrease the risk of accidents by 0.01% by constructing the road in the way that resulted in the destruction of the sacred site. At that low level of generality, the government may be more vulnerable to claims that it has ready mitigation tools at its disposal (meaning other actions government could easily take to reduce that risk without destroying the sacred site). The government is also vulnerable to claims at such a low level of generality that its official reason for action was pretextual. This is because it is unlikely the government took similar steps to reduce a 0.01% risk of highway accidents on nearby stretches of road.

In other words, the protected-reasons approach to rights does not permit arbitrary government choice between reason descriptions at different levels of generality. Nor does it put the weight of determining the level of generality on an unaccountable judiciary. This follows from the conceptual structure of the protected-reasons approach and is a major advantage of the approach over the rival historical-analogues view.

*b) Questions of cost and line drawing.* Let us modify the highway example once again. What if the government argues that widening the highway on the side opposite the sacred site would be equally effective at saving lives but would be more expensive? How is a court to assess that sort of government reason as an evidentiary matter? First, it will depend on whether cost is an excluded reason under the constitutional right. The substance of excluded reasons is discussed in greater depth above in Part IV.E.1. But one point to keep in mind from that discussion is that if any marginal cost could constitute a nonexcluded reason for government to limit a pro tanto right, then the right could be defeated in every case. Thus, marginal cost must be, at least at some low level, an excluded reason for any constitutional right to be more than a nullity. And for some constitutional rights, cost might be excluded as a reason altogether.

Let us assume for the sake of argument that cost is generally

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[359] I am indebted to Lawrence Solum for helping me think through how to more clearly articulate this point. Any errors are, of course, my own.

an excluded reason under the pro tanto right to religious exercise. But even so, is there a point at which costs could become so exorbitant that this translates into something like a public safety reason for action? I am neutral on this question. But it is certainly possible that a court could take that approach and say that costs above some threshold become a nonexcluded reason. Is there a way to determine such a threshold without relativizing the cost to the benefits of the pro tanto right—in other words, without judicial balancing? And is there a way to determine such a threshold without again providing unbounded discretion to the judiciary?

One way that a court could accomplish that difficult analysis without merely relying on its own discretionary judgment would be to outsource what is essentially a task of artificial commensuration to the political branches. To provide an example of how this reasoning could go, the Department of Transportation currently values a human life at $13.2 million.[360] Thus, one could argue that if widening the highway on the opposite side of the road from a sacred site rose to the cost of $13.2 million, it could be viewed as a public safety issue (the equivalent of saving one human life). Once viewed as a public safety reason, it would be a nonexcluded government reason based on an artificial commensuration that a politically accountable branch of government has already performed. That is far different from a court determining how much cost is too much based on the court's unbounded discretion in making a moral judgment about which value is more important.

Of course, this sort of politically accountable artificial commensuration need not occur only in the context of policy or legislation that identifies the value of a human life. The government could also offer evidence in a particular context that it had performed an artificial commensuration and determined that a certain level of cost would threaten public safety. And then a court could assess whether such an allegation was credible. For example, in an Eleventh Circuit case, Jewish prisoners requested kosher dietary accommodations.[361] The government argued that the costs involved in providing such accommodations would result in less funding for "roofs for prisons, mental health and medical care for inmates, and salaries for security staff," and thus would

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[360] *Departmental Guidance on Valuation of a Statistical Life in Economic Analysis*, U.S. DEP'T OF TRANSP. (May 7, 2024), https://www.transportation.gov/office-policy/transportation-policy/revised-departmental-guidance-on-valuation-of-a-statistical-life-in-economic-analysis.

[361] United States v. Sec'y, Fla. Dep't of Corr., 828 F.3d 1341, 1344–45 (11th Cir. 2016).

ultimately compromise the "security and safety" of the prison.[362] The court did not find these claims credible, noting that the government offered "no 'concrete evidence'" about the impact on the prison from the costs of a kosher diet.[363] The court refused to recognize an artificial commensuration based on mere "speculation, exaggerated fears, or post-hoc rationalizations."[364]

While cost might be relevant in some cases, its importance *can* be overstated. Professor Sherif Girgis made this mistake when he argued that options for mitigating risk (thus removing conflicts between government reasons and pro tanto rights) will *always* ultimately boil down to questions of cost—specifically the cost of the alternatives that would allow for accommodation of the right.[365] To support that claim, he pointed to a case in which an inmate on death row requested his pastor be allowed to lay hands on his feet during his execution, which the state resisted based on its desire to reduce security risks.[366] Girgis argued:

> [S]ince security concerns stemmed from the execution chamber's cramped size, another alternative [for accommodating the prisoner] was razing the chamber and building a larger one. Yet that would have been so costly that no court would cite the state's failure to pursue it as evidence of ignoring less restrictive alternatives. . . . Thus, proving a regulation's necessity is not just an empirical inquiry but involves an assessment of costs and benefits.[367]

But Girgis was wrong to assume that building a costly new prison would even conceivably be a permissible way to resolve the case. The Court in *Ramirez* stated that the pro tanto right to religious exercise includes as nonexcluded a government's interest in "the *timely* enforcement of a sentence."[368] There would be nothing timely about requiring a government to build a new prison in order to mitigate any security risks, so without engaging in arguments about cost at all the government could easily

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[362] Appellants' Initial Brief at 36, 38, *Fla. Dep't of Corr.*, 828 F.3d 1341 (No. 15-14117); Stephanie H. Barclay, *First Amendment "Harms"*, 95 IND. L.J. 331, 356 (2020).

[363] *Fla. Dep't of Corr.*, 828 F.3d at 1347 (quoting Garner v. Kennedy, 713 F.3d 237, 246 (5th Cir. 2013)).

[364] *Id.* (quoting Rich v. Sec'y, Fla. Dep't of Corr., 716 F.3d 525, 533 (11th Cir. 2013)).

[365] Girgis, *Unfinished Liberties*, *supra* note 3, at 576–77.

[366] *Id.* at 577 (citing *Ramirez*, 142 S. Ct. at 1272–73, 1281; *id.* at 1287–88 (Kavanaugh, J., concurring)).

[367] *Id.*

[368] *Ramirez*, 142 S. Ct. at 1282 (emphasis added) (quotation marks omitted) (quoting Hill v. McDonough, 547 U.S. 573, 584 (2006)).

point to a conflict between its nonexcluded reasons for action and that alternative.

There are a number of ways that courts could resolve cases without ever needing to address questions relating to cost. The government might have simply announced an excluded reason as its official reason for action, as the Court determined it did in *NetChoice*.[369] The government may have failed to offer any concrete evidence about cost beyond mere speculation. Relatedly, the government might not have performed any cost analysis at all, as is often true and was true in the actual highway-widening case.[370] In fact, the government may have failed to consider important alternatives to mitigate risk or remove conflicts of reasons altogether. And again, for some rights, the court may conclude that cost is an excluded reason at any threshold—as is true when it comes to absolute rights like the ministerial exception.

Note also that line-drawing questions about whether a certain reason falls within a category like "public safety" may still arise in contexts other than financial cost. Imagine a case in which the government argued that its desire to avoid the risk of paper cuts constituted a public health interest justifying a refusal to process the paperwork for a free speech parade permit request. Such an argument would require a court to look hard at the criteria for a "public health" interest. I do not pretend to offer the definitive definition for that category of reasons. But suppose a court concluded that the category of public health reasons required permanent or lengthy impairment of the normal functioning of the human body (as opposed to mere inconveniences) or a risk of such impairment. Under that definition, a court might determine that paper cuts fall outside the relevant permitted category. This example seems trivial. But a court might arrive at a similar conclusion for requests to accommodate pro tanto rights like circumcision of male infants or peyote use by Native Americans.

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Are line-drawing questions about government interests at the margin just a way of smuggling balancing into an exclusionary reason, as Richard Fallon suggested?[371] Or, as Girgis argued, does the protected-reasons approach still require judges to use

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[369] *NetChoice*, 144 S. Ct. at 2407.

[370] *See* Slockish v. U.S. Fed. Highway Admin., 682 F. Supp. 2d 1178, 1197–99 (D. Or. 2010) (discussing the government's failure to conduct statutorily required analyses).

[371] *See supra* Part II.A; FALLON, THE NATURE OF CONSTITUTIONAL RIGHTS, *supra* note 3, at 64.

"political-moral determinations" that "cannot be read off legal materials"?[372] I ask both of these questions somewhat differently, but in a way that gets to the heart of the issue: Does my proposed approach still require judges to exercise unbounded discretion in order to protect constitutional rights? The answer is no.

Let us begin with Fallon's argument. As discussed above, "balancing," at least as I (and most scholars) engage with that term, implies some sort of comparison between countervailing weights. Or, as Fallon has said, it requires assessing one value "in light of" the other value with which it competes.[373] It suggests that, as the harm caused by the pro tanto right increases, the value of that right must increase as well to justify protection. Or vice versa. A court's role is to pit these values against each other and determine which is weightier—and to make the moral determination of what normative criteria it will use to evaluate weight.

In contrast, if the basis for excluding a reason remains constant, regardless of the gravity or importance of the countervailing pro tanto right, then that activity does not constitute balancing as I define it.

As Professor William Lucy explained in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, "sorting reasons" involves a court taking steps to determine whether a reason qualifies to be placed in a certain class.[374] In contrast, "weighing reasons" requires a court to determine the "strongest, most weighty reason" (or collection of reasons) out of a "class of genuine reasons" by comparing the weight of the reasons.[375]

One might also ask whether the approach I articulate is any different from the model of rights Dworkin advocated. After all, he suggested we should not override a right based on a minimal utilitarian calculus,[376] but a right could still be overridden to avoid a "substantial risk" of "great damage."[377] Is that simply sorting reasons above a certain static threshold, along the lines discussed above? Dworkin was far from clear on his approach to rights, so there is probably more than one answer to that question.[378] But in

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372 Girgis, *Unfinished Liberties*, *supra* note 3, at 548–49, 553.

373 FALLON, THE NATURE OF CONSTITUTIONAL RIGHTS, *supra* note 3, at 64.

374 William Lucy, *Adjudication*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 206, 230 (Jules L. Coleman ed., 2011).

375 *Id.* at 230–31.

376 DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 78, at 366.

377 *Id.* at 204.

378 *Compare generally* Richard H. Pildes, *Dworkin's Two Conceptions of Rights*, 29 J. LEGAL STUD. 309 (2000), *with* Jeremy Waldron, *Pildes on Dworkin's Theory of Rights*, 29 J. LEGAL STUD. 301 (2000).

the main, I think the answer is no; Dworkin did not merely advocate sorting reasons. First, Dworkin *did* contemplate that the ability of an interest to "override" a right might depend on the relative weights of these two values. He said that in conflicts of interests (in our example, the rights of Native Americans to worship at a site versus the rights of other Americans to avoid car accidents), the government must "protect[ ] the *more important* at the cost of the less."[379] This is a quintessential balancing analysis because it requires a comparison of the two values, which in turn requires assuming that they share a common criteria of measurement, or a covering value. Second, Dworkin seemed to suggest (or at least does not rule out) that any form of government interest, if conceptualized to protect some individual right, could override another right if it became weighty enough.[380]

The same would not be true of my approach discussed above. For example, it is possible that a court could determine that cost, which could be individualized as a burden on taxpayers, is never a nonexcluded reason. A court could find the same for other sorts of reasons: offense caused by speech to some could, in certain contexts, never pass a certain threshold of extreme disagreement such that it would become a nonexcluded reason. Some reasons (like costs) might lend themselves to a threshold at which they become nonexcluded reasons (likely by virtue of a credible artificial commensuration by politically accountable government officials). But other reasons would not, and they would remain excluded at any level of intensity.

Even if one agreed, one might still worry that determining thresholds or assessing evidentiary concerns regarding marginal interests is still a highly discretionary exercise. In other words, if my approach is aimed (in part) at the normative goal of reducing discretionary judicial outcomes that are unpredictable and underdetermined by reasons, have we gained anything with this approach or simply traded it for other forms of judicial discretion and unpredictability? This was essentially Girgis's argument, in which he asserted that the protected-reasons approach would still require judges to engage in "political-moral determinations" that "cannot be read off legal materials."[381]

But Girgis's claim was based on a misunderstanding of the definition of legal materials on which he relied. Girgis relied on Professor Larry Alexander's seminal work, which provides both a

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379 DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 78, at 193–94 (emphasis added).

380 *See id.* at 194.

381 Girgis, *Unfinished Liberties*, *supra* note 3, at 548–49, 553.

definition of law as inherently formalistic and a moral defense of law as necessarily including formalistic elements in order to resolve coordination problems.[382] To satisfy this requirement of formalism, on Alexander's view, law must be specified on grounds other than pure moral judgments. So far, so good, and with much of that I agree. But then Girgis asserted that "Alexander thinks a norm is pure positive law *only* to the extent that it can be applied without fresh political-moral reasoning."[383] Girgis's critique of the protected-reasons approach, using this criterion of legal materials, suggests that he understood it to prohibit *any* moral consideration for something to count as law. But that is not what I understand Alexander to have said.

Instead, Alexander contrasted pure legal rules with impure rules—the former might exclude any moral judgments, and the latter might allow for a much narrower range of moral judgment.[384] But both, on his account, still constitute legal materials, which he contrasted with a standard that simply replicates the type of moral judgment in which an individual would ordinarily engage and thus does not satisfy the definition or purpose of law.[385]

Consider the preceding points in Alexander's example of speed limits. A standard that simply tells drivers to "drive reasonably," he argued, might contain vague or moral terms that would not solve any of the coordination problems that law must address.[386] In contrast, a "pure" legal rule would look like "[d]rive fifty-five," and it would settle "all questions about what ought to be done that fall within its scope."[387] However, Alexander also pointed to the possibility of impure rules, like "[d]rive fifty-five unless it is raining, in which case drive reasonably."[388] Impure rules, Alexander argued, "move[ ] some distance from being a pure standard and toward being a 'rule'" because they still settle "some . . . questions that fall within [their] scope."[389] The difference between a rule and a standard is thus a matter of degree

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[382] *See id.* at 547–48 (citing Larry Alexander, *"With Me, It's All er Nuthin'": Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 530–31 (1999) (arguing that "[l]aw is essentially formalistic" and defining "formalism" as "adherence to a norm's prescription without regard to the background reasons the norm is meant to serve," even in case of conflict)); *see also* Alexander, *supra*, at 533–35 (discussing the utility of law in solving coordination problems).

[383] Girgis, *Unfinished Liberties*, *supra* note 3, at 548–49.

[384] Alexander, *supra* note 382, at 543–44.

[385] *Id.*

[386] *Id.* at 543.

[387] *Id.* at 544.

[388] *Id.*

[389] Alexander, *supra* note 382, at 543–44.

rather than of immutable categories. Ultimately, Alexander described law as adjacent to the concept of exclusionary reasons; precisely one of the elements I describe above with respect to rights.

The proposal I offer above allows for pure rules when the right is absolute, and it allows for impure rules for rights that are defeasible. Defeasible rights still narrow the range of judicial discretion far more than balancing would. They prevent the government from acting based on a range of reasons that would otherwise be valid. They require, under my view, the judiciary to assess whether the government can both act on its nonexcluded reason and protect the pro tanto right. They also require the judiciary to assess whether the official reason the government is advancing is a true proposition. And more. All of this excludes unbounded discretion and freewheeling moral analysis in which judges might prefer to engage, and in which balancing allows them to engage. All of it operates as legal material under Alexander's definition.

To be sure, I do not claim that my approach removes judicial discretion altogether. Nor would that be possible (or perhaps even desirable) in any legal system, as Girgis also realized. But I do argue that my approach involves a much more bounded form of judicial discretion, and one that is more consistent with the judiciary's institutional competencies.

Enforcing constitutional rights as protected reasons will sometimes involve line drawing and the exercise of bounded discretion. But virtually all legal rules involve line-drawing questions at the margins, not all of which require balancing. After the line is drawn, its precedent offers predictability and stability for future cases.

Treating constitutional rights as protected reasons decreases opportunities for judicial use of strong discretion, increases predictability for rightsholders, and focuses the constitutional inquiry on the types of questions that fall more squarely within courts' institutional competence (evidentiary questions). This approach avoids balancing the weight of competing (and perhaps incommensurable) values in ways that require moral (and unpredictable) analysis that should be subject to greater democratic accountability.

For example, in the highway-widening case, my approach would never require a court to answer the impossible question of which is more important: the specific Native American sacred site or the highway safety served by the particular construction project. This is a complicated moral question—not an evidentiary question. Thus, there is no way for a litigant assessing the

evidence to predict how that analysis would go or how to most effectively litigate the case. Further, under my approach, the government would lose its case in the highway-widening example if it offered *no* good answers about the reasons it chose and whether there was in fact a conflict between its reasons and the pro tanto constitutional right. That was true, for example, in the case's actual litigation, in which the government had no response to why it could not simply widen on the other side of the road. That was why the government admitted on appeal that destruction of the Native American sacred site was unnecessary and, perhaps, why the government settled the case and offered remediation efforts to the tribe.[390]

In other words, many cases will not even reach tricky line drawing at the margins or evidentiary questions. A prior resolution will occur in *any* of the possible independent scenarios in which the government loses on other bases: (1) it articulated an excluded reason as the basis for its action, (2) it failed to articulate any official reason, (3) it could not demonstrate that its official reason is actually true based on the factual record, or (4) it could not demonstrate that its official reason, even if true, requires an action that conflicts with the pro tanto constitutional right. In addition, a protected-reasons framework avoids tricky line-drawing questions when the government articulates a quintessential nonexcluded reason (e.g., protecting human life) and demonstrates through evidence that it has no other options to protect that nonexcluded reason (e.g., a human life).[391]

These sorts of easy cases *will* arise under a protected-reasons approach to rights. But I argue that they would *not* arise in any case that requires judicial balancing as at least part of its analysis.

Let me conclude by noting one final situation in which I recommend against the evidentiary assessment we have been assessing. As discussed above in Part IV.E.2, when a legislature has offered a nonexcluded reason for its action on the face of a

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[390] Answering Brief for Federal Appellees at *1, Slockish v. U.S. Dep't of Transp., 2021 WL 5507413 (9th Cir. Nov. 24, 2021) (No. 21-35220) ("On one issue, Plaintiffs and the government agree: 'the destruction of Plaintiffs' sacred site never had to happen.' . . . [T]he agencies could have avoided any impact on Plaintiffs' sacred site." (quoting Opening Brief of Plaintiffs-Appellants at *4, *Slockish*, 2021 WL 5507413 (No. 21-35220))); Joint Stipulation to Dismiss at 6–10, Slockish v. U.S. Dep't of Transp., 144 S. Ct. 324 (mem.) (2023) (No. 22-321) (outlining the government's agreement to take steps to mitigate the needless destruction of the Native American sacred site).

[391] For a further discussion of these sorts of contexts, see Stephanie Hall Barclay, *Necessity, Equality, and Religious Exemption Requests to COVID-19 and Abortion Laws*, 99 CHI.-KENT L. REV. (forthcoming 2025).

law, courts should almost never offer a facial remedy enjoining every application of that law. In other words, courts should be very wary of rigorously prodding the evidentiary support of such legislative reasons. Courts cannot claim an institutional advantage over legislatures when it comes to assessing empirical questions that affect entire societies over long periods of time, and scholars have argued that the use of judicial discretion in these contexts is thus problematic.[392] There is also reason for courts to be more cautious about invalidating democratically enacted work product in toto. Thus, in cases like *Humanitarian Law Project*, courts should allow the legislature's articulated reasons for action to stand—at least to the extent that the interference with the right is required on the face of the law and that same law offers a nonexcluded reason for the interference.[393]

### F. Historical Support for a Protected-Reason Model of Constitutional Rights

The arguments in this Article are primarily theoretical and conceptual rather than historical. It is beyond the scope of the Article to provide a complete originalist defense of the approach to constitutional rights proposed here.[394] Nevertheless, this Section at least gestures to why the model of rights suggested here has a long historical pedigree, allowing it to be consistent with the U.S. constitutional rights framework.

First, and consistent with Part III.B of this Article, multiple scholars have written about how Founding and Reconstruction Era legal culture understood legislatures as playing a critical role in the interpretation and protection of rights—likely a far more important role than we envision today. Professor Jud Campbell has observed that, beyond certain limitations on government interference with rights (such as legislating arbitrarily or to promote private interests),[395] "natural rights mostly framed

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[392] Professor Kent Greenawalt helpfully discussed Dworkin's and Professor Rolf Sartorius's position that judges would be exercising problematic amounts of discretion when they engage in these types of complex empirical predications about social consequences. *See* Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359, 391–94 (1975).

[393] *See supra* Part IV.E.2.

[394] For a more in-depth discussion of the originalist grounds for a protected-reason model of constitutional rights, see Barclay, *Constructing Constitutional Rights*, *supra* note 18.

[395] *See, e.g.*, JAMES OTIS, THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED 14 (Boston, Edes & Gill 1764) ("There is no one act which a government can have a *right* to make, that does not tend to the advancement of the security, tranquility and prosperity of the people." (emphasis in original)).

how people thought about the grounding of political authority."[396] The Founders saw natural rights as inalienable, which meant in part that "the people had to maintain control of them through representative institutions. In short, it was up to the people to determine their own rights."[397]

Similarly, Professor Michael McConnell has explained:

> It may seem odd to say that the legislative branch can engage in constitutional interpretation, but it should not. The congressional power to interpret the Fourteenth Amendment for purposes of passing Section Five enforcement legislation is one instance of the general principle that each branch of government has the authority to interpret the Constitution for itself, within the scope of its own powers. . . . Such situations have occurred, not infrequently, throughout our history.[398]

He also noted that, during the Reconstruction Era, "Congress did not consider itself limited to enforcing judicially determined rights under the Fourteenth Amendment. Between 1866 and 1875, Congress engaged in extensive debates over the substantive reach of the various Reconstruction era Civil Rights Acts."[399] Congress did so because it believed that its "interpretation mattered. [Congress was] not content to leave the specification of protected rights to judicial decision."[400]

Second, the way Founding Era courts used doctrines like the mischief rule to equitably protect common law rights in England and the early republic reflects a type of reasoning that is analogous to an exclusionary-reason model. For example, jurist William Blackstone argued that a law stating that "whoever drew blood in the streets should be punished with the utmost severity" could not justify punishing a "surgeon, who opened the vein of a person that fell down in the street with a fit."[401] One way to understand this reasoning is as disapproving of a government official applying the law inconsistently with the permitted reason the legislature had for it—reducing violent bloodshed.

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396 *See* Campbell, *Determining Rights*, *supra* note 29, at 933.

397 *Id.* at 934; *see also* Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85, 96–97 (2017).

398 McConnell, *Institutions and Interpretation*, *supra* note 162, at 171.

399 *Id.* at 175.

400 *Id.* at 176; *see also* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 253–73 (1997).

401 1 WILLIAM BLACKSTONE, COMMENTARIES *60. For an additional discussion of equitable interpretation of statutes related to the government's reasons, see Barclay, *Historical Origins*, *supra* note 61, at 78.

Instead, such an official may be acting on an excluded reason when the justification for enforcing the law is to prevent a surgeon from saving someone's life.

In addition, even in cases in which the government based its enforcement of the law on a permissible, nonexcluded reason, jurists still rigorously analyzed whether the government's action actually advanced those reasons in a given case. For example, as I have written about elsewhere[402]:

> In a famous 1767 speech in the House of Lords, Lord Mansfield, a well-known English jurist, discussed the proper interpretation of the Corporation, Test, and Toleration Acts, as well as a municipal bylaw in London, as applied to religious dissenters. The Corporation and Test Acts barred nonconforming Protestants from serving as sheriff of London (among other things). London then passed a bylaw that fined anyone who refused to serve as sheriff. This created a useful money-making operation for the city, which repeatedly elected dissenting Protestants in order to fine them. Eventually, some of the dissenters refused to pay the fine, and their case went up to the House of Lords. The House of Lords ultimately ruled in favor of the religious dissenters, and Lord Mansfield's speech was in favor of the ruling.[403]

Lord Mansfield looked carefully at the government's "professed design" for its legal scheme.[404] The government said that its appointment of religious dissenters to be sheriffs "was to get fit and able persons to serve the office."[405] If the government "excluded" the dissenters from this requirement (i.e., gave them a religious exemption), the government claimed it would lack "fit and able persons to serve the office."[406] But as Lord Mansfield saw it, the government's evidence did not support its proffered reason. He speculated that the government "did not so much wish for their services, as for their fines."[407] Mansfield arrived at this conclusion because the government had been appointing religious

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402 Barclay, *Replacing* Smith, *supra* note 24, at 453–55, 465.

403 *Id.* at 453; *see also* JAMES OLDHAM, ENGLISH COMMON LAW IN THE AGE OF MANSFIELD 240–41 (2004) (discussing the background of Mansfield's speech).

404 THE SPEECH OF THE RIGHT HONOURABLE LORD MANSFIELD IN THE HOUSE OF LORDS, IN THE CAUSE BETWEEN THE CITY OF LONDON AND THE DISSENTERS 24 (Belfast, Daniel Blow 1774) [hereinafter SPEECH OF LORD MANSFIELD].

405 *Id.*

406 *Id.*

407 *Id.*

dissenters to office who were "blind" or "bedridden"[408] and thus disabled from serving, irrespective of their religious disqualification. The government did not actually "want [these dissenters] to serve the office."[409] In other words, the government's action did not advance its stated interest. Perhaps the government's asserted reasons were even pretext. Mansfield argued that this needless interference with religious exercise was contrary to the "eternal principles of Natural Religion," which were "part of the Common-law,"[410] and he therefore concluded that the dissenters should not be subject to penalty.[411] Founding Era state courts also reflected this sort of interest in identifying the government's reason and then determining whether the government's actions were necessary to advance that reason.[412]

Third, consistent with Part IV.C of this Article, the distinction between categorical and presumptive or defeasible constitutional rights in the context of a judicially enforced exclusionary norm (i.e., the exclusion of all reasons for interference versus the exclusion of some reasons for interference) might map in some important ways onto the historical distinction between what Campbell has termed specificatory rights and declaratory rights. The former were understood at the Founding to be creatures of positive law brought into being by the text of constitutions, and the latter were understood to be creatures of customary or natural law that are simply referred to but not brought into being by constitutions.[413]

Elsewhere, I have written about how a historical understanding of religious exercise rights at the Founding is consistent with an exclusionary-reason approach to rights.[414] When religious exercise rights overlap with Establishment Clause interests, which are created by positive law rather than natural rights, the resulting protection is historically justified as being categorical in nature rather than merely presumptive. For example, rights available to religious organizations under doctrines like the ministerial exception exclude any reasons for government interference and are thus

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408 *Id.*

409 SPEECH OF LORD MANSFIELD, *supra* note 404, at 25.

410 *Id.* at 12.

411 For further discussion of Lord Mansfield's opinion, see Barclay, *Replacing* Smith, *supra* note 24, at 453.

412 *Id.* at 454–55.

413 *See* Campbell, *Determining Rights*, *supra* note 29, at 929. Of course, it is possible that the text creating a specificatory right might also specify nonexcluded reasons for interfering with the prima facie right (as many modern national or U.S. state constitutions do), so the mapping between these categories is not exact.

414 *See* Barclay, *Replacing* Smith, *supra* note 24, at 455–61.

categorical.[415] In contrast, the ordinary natural right to religious exercise was understood to contain certain limitations on the exercise of religion, often including limitations related to government protection of a society's peace and safety. And early courts determining whether governments could interfere with religious exercise closely analyzed the government's asserted reason for interference, then asked whether that interference was really necessary for the government to advance its asserted reason.[416]

Further work is needed to identify the historical reasons (if any) understood as permissible to limit other pro tanto rights identified in the Bill of Rights. But it is at least plausible that the theoretical model presented here provides a helpful lens through which to understand that historical evidence.

## V. IMPLICATIONS OF A PROTECTED REASON APPROACH TO RIGHTS

The nature of constitutional rights I advocate in this Article, if adopted, would have significant global ramifications. Here, I discuss two important consequences relevant to recent decisions by the U.S. Supreme Court, some brief implications for the international proportionality model, and how this theory would mitigate the phenomenon of conflicts of rights that exists in every constitutional jurisdiction.

### A. Strict Scrutiny

Strict scrutiny has recently come under fire from those who take issue with judicial balancing. For example, Justice Kavanaugh has argued that strict scrutiny enables a judicial balancing exercise that courts are incompetent to perform.[417] Some scholars have made similar arguments.[418]

As discussed above in Part II.A, I share the concerns of these scholars and jurists that judicial-balancing approaches invite irrational or discretionary outcomes in tension with the institutional competence of courts and with democratic principles, particularly when strict scrutiny is performed at the facial level. But I disagree

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[415] *Id.* at 442–43.

[416] *Id.* at 462–64.

[417] *Ramirez*, 142 S. Ct. at 1286–88 (Kavanaugh, J., concurring).

[418] *See, e.g.*, Alicea & Ohlendorf, *supra* note 10, at 81; VERMEULE, *supra* note 10, at 166–68 (critiquing the "typical formulation" under strict scrutiny "that individual rights can be trumped or overridden when there is a 'compelling governmental interest' and the government can show that the law at issue is the 'least restrictive alternative'").

that this is necessarily what strict scrutiny asks courts to do.[419] Instead, at least in as-applied contexts, strict scrutiny is better understood as one doctrine that can implement the protected-reason nature of rights in contexts in which not all reasons are excluded by the right, along the lines discussed above in Part IV. Specifically, strict scrutiny is a mode through which the judiciary assesses whether the government has articulated a nonexcluded reason for its interference with the right (a compelling reason) and then assesses through an evidentiary inquiry whether the government has demonstrated a causal relationship between its goal and its action (the least restrictive means), and whether the government's asserted reason actually conflicts with the pro tanto right. These are all discrete modes of analysis that the judiciary routinely performs in various other contexts.[420]

Regarding the compelling interest portion of the test, Justice Kavanaugh recently raised concerns, asking "what does 'compelling' mean, and how does the Court determine when the State's interest rises to that level?"[421] Joel Alicea and John Ohlendorf argued that allowing judges to determine whether an interest is compelling results in the "constitutionality of governmental action depend[ing] on each judge's own subjective assessment of questions that can only be described as quintessentially political."[422]

As a matter of first principles in constitutional law, I agree it would be preferable for courts to articulate specific reasons that are or are not excluded under the constitutional right.[423] Of course, when it comes to statutes like RFRA, Congress has codified the compelling-interest standard, so it is here to stay regardless of how the Constitution is interpreted. As a result, it is worth thinking about whether there is a way to interpret the compelling interest standard that is less malleable and less prone to simply becoming a vehicle for judicial moral preferences. If one looks at a common thread running through cases identifying whether a government interest is compelling, a potential pattern emerges. Specifically, as discussed above,[424] courts seem to reject government interests that, if allowed to be raised at broad levels of generality, could always defeat any request for protection under

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[419] *See* Stephanie H. Barclay, *Strict Scrutiny, Religious Liberty, and the Common Good*, 46 HARV. J.L. & PUB. POL'Y 937, 947–48 (2023).

[420] *See supra* Part III.A.

[421] *Ramirez*, 142 S. Ct. at 1287 (Kavanaugh, J., concurring).

[422] Alicea & Ohlendorf, *supra* note 10, at 81.

[423] I argue for an approach along these lines under the Free Exercise Clause. *See* Barclay, *Replacing* Smith, *supra* note 24, at 460–61.

[424] *See supra* Part IV.E.1.

the right.[425] For example, government interests like administrative convenience or avoiding any financial cost are ruled out under this rubric.

In other words, the very decision to constitutionalize a right means that some interests identified in the Constitution exclude certain government reasons to interfere with the constitutional interest. The "compelling interest" portion of the analysis can therefore be understood as, at minimum, excluding from government reliance those sorts of reasons that would defeat the identified constitutional interest in all contexts. Otherwise, the constitutional right (or in the case of RFRA, statutory right) at issue would be rendered a nullity.

Perhaps more importantly, under modern strict scrutiny analysis in the United States, the determination of whether a government interest is "compelling" rarely turns out to be the dispositive issue of a case. Courts will generally either agree that a government interest is compelling or simply assume so for the sake of analysis, then move on to assess whether the government's action was necessary to advance its stated interest.[426]

Once a permissible government interest has been properly articulated, the analysis shifts to the evidentiary burden portion of the exclusionary reason. The Court then asks whether the government has presented sufficient evidence to demonstrate that denying the religious exemption is necessary to advance the government's stated reason for interference with the right. For example, in *Gonzales v. O Centro Espírita Beneficente União do Vegetal*,[427]

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[425] *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 220 (1995) (concluding that "societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy" (quotation marks and alteration omitted) (quoting Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 276 (1986))); Goswami v. Am. Collections Enter., 280 F. Supp. 2d 624, 626 (S.D. Tex. 2003), *aff'd in part, rev'd in part, and remanded on other grounds*, 377 F.3d 488 (5th Cir. 2004) ("Administrative convenience is not a compelling interest."). Narrowing asserted interests to the facts at issue is an important part of the analysis; at a sufficiently high level of generality, any interest could become insuperable. *See, e.g.*, Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881–82 (2021) (emphasis added):

> The City asserts that its non-discrimination policies serve three compelling interests: maximizing the number of foster parents, protecting the City from liability, and ensuring equal treatment of prospective foster parents and foster children. The City states these objectives at a high level of generality, but the First Amendment demands a more precise analysis. . . .
>
> *Once properly narrowed*, the City's asserted interests are insufficient.

[426] *See* Justin Collings & Stephanie H. Barclay, *Taking Justification Seriously: Proportionality, Strict Scrutiny, and the Substance of Religious Liberty*, 63 B.C. L. REV. 453, 488 (2022). *But see* Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 429 (2006) (holding that the government bears the burden of proving a compelling interest).

[427] 546 U.S. 418 (2006).

the Court explained that the government must "offer[ ] evidence that [protecting the right] would seriously compromise its ability to administer [its desired] program."[428]

As discussed above in Part IV.B.2, proving a conflict of actions required by the competing reasons as an epistemological matter is rarely what courts are looking for within the imperfect and limited bounds of litigation.[429] Instead, courts must simply rely on the evidence before them to determine whether the government can take actions to advance its official reason while also taking action to protect the pro tanto right.[430]

Effectively, instead of judicial interest balancing, strict scrutiny directs courts to analyze whether the government could have found a Pareto improvement, whereby it will not be meaningfully less well off in pursuing its goal through different means that place no burden on the constitutional rightsholder. Indeed, requiring the judiciary to ask this question is premised on the idea that the government can often both pursue its policy goals and protect the constitutional right. Or as Justice Kavanaugh has recently observed, constitutional rights incentivize government to "look for the win/win," meaning "the situation where you can respect the [constitutional interest] and accommodate [those interests] while the state or city . . . can pursue its goals."[431] And when the government can act to advance both reasons, there is no conflict, so it should protect the pro tanto right.

As discussed above in Part IV.E.3, courts can also probe questions related to these conflicts by assessing whether the government is pursuing its interest in an evenhanded way, including by not denying protections for religious activities that pose risks to governmental goals comparable to those from the secular activities that the government allows.[432] The Court reiterated in *Fulton*

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[428] *Id.* at 435 (assuming but not deciding that the government's interest was compelling).

[429] *See generally* Haley N. Proctor, *Rethinking Legislative Facts*, 99 NOTRE DAME L. REV. 955 (2024) (discussing different types of factfinding used by courts in adjudication).

[430] For a helpful discussion of the need for the Supreme Court to craft workable doctrines that provide guidance to lower federal courts, see Tara Leigh Grove, *Sacrificing Legitimacy in A Hierarchical Judiciary*, 121 COLUM. L. REV. 1555, 1566–81 (2021).

[431] Transcript of Oral Argument at 132, Mahmoud v. Taylor, 143 S. Ct. 1223 (No. 24-297) (argued Apr. 22, 2025).

[432] It is worth noting that scholars and jurists debate what counts as comparable between secular and religious activities. *See, e.g.*, Brief Amicus Curiae of Professor Eugene Volokh in Support of Neither Party at 27, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123):

> [I]f the presence of the exceptions were seen as making the statute no longer "generally applicable" for *Employment Division v. Smith* purposes, that would require more than just the application of strict scrutiny to religious exemption

that government policies face greater scrutiny when they "prohibit[ ] religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."[433] And as discussed above, unless that allowance of comparable conduct is necessary to advance a separate permitted government reason, the government's lack of evenhandedness suggests that it is possible to both protect the pro tanto right and act to advance its official reason. Looking to whether activities are analogous for the purpose of comparators is also a mode of analysis courts frequently apply elsewhere. For example, in antitrust law, courts must address the similar question of whether one good is substitutable for another as a precursor to determining what counts as the "relevant market."[434]

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requests: It would also mean that the laws would often be seen as failing strict scrutiny, precisely because of their underinclusiveness.

*See also, e.g.*, Thomas C. Berg, *Religious Liberty in America at the End of the Century*, 16 J.L. & RELIGION 187, 195 (2001) ("[I]f the presence of just one secular exception means that a religious claim for exemption wins as well, the result will undermine the *Smith* rule and its expressed policy of deference to democratically enacted laws." (citing Eugene Volokh, *A Common Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1554 (1999))); Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 199 (2002) (concluding that "the very foundation for the most favored nation framework is intellectually incoherent" and that "[t]here are too many conceptual and practical problems with the [framework] for it to be accepted"); Douglas Laycock, *The Broader Implications of* Masterpiece Cakeshop, 2019 BYU L. REV. 167, 173 ("[T]hink about it. If a law with even a few secular exceptions isn't neutral and generally applicable, then not many laws are."); Laycock & Collis, *supra* note 348, at 10–11, 21–23 (2016) (discussing rules surrounding analogous secular conduct); Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y 627, 664 (2003) (describing the most favored nation approach as "an unprincipled and bizarre manner of distributing constitutional exemptions"); James M. Oleske, Jr., *Free Exercise (Dis)Honesty*, 2019 WIS. L. REV. 689, 731 (2019) (noting that "despite the fact that the *Smith* Court specifically cited laws 'providing for equality of opportunity for the races' as examples of generally applicable laws to which strict scrutiny should *not* apply," the most favored nation theory would apply strict scrutiny to such laws because they have small-employer exemptions (emphasis in original) (quoting *Smith*, 494 U.S. at 889)); Zalman Rothschild, *Free Exercise's Lingering Ambiguity*, 11 CALIF. L. REV. ONLINE 282, 282–87 (2020) (summarizing the debate surrounding "the meaning of religious discrimination").

[433] *Fulton*, 141 S. Ct. at 1877.

[434] In *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948), the Court had to determine whether the relevant market included only steel plates and shapes or extended to all rolled steel products. Applying supply substitutability analysis, the Court held that the relevant market must include all comparable rolled steel products in the relevant geographic market. *Id.* at 508–11; *see also* Richard McMillan, Jr., *Special Problems in Section 2 Sherman Act Cases Involving Government Procurement: Market Definition, Measuring Market Power, and the Government as Monopsonist*, 51 ANTITRUST L.J. 689, 693 (1982).

In addition, asking whether the government's actions will actually advance its interest is an inquiry not unlike other causation inquiries courts routinely perform in a variety of legal contexts.[435] This inquiry assesses the nexus between the government's stated goal and its action, often by relying on circumstantial evidence that the parties present during litigation.[436] And as it turns out, this inquiry involves the same types of questions that some early, Founding Era courts asked when deciding to rule against the government when it claimed, without sufficient evidence, that interference with a constitutional interest was necessary to accomplish its government interest.[437]

Thus, those who object to judicial balancing need not reject strict scrutiny. To the contrary, particularly in the context of as-applied constitutional challenges, strict scrutiny asks judges to address many evidentiary questions that courts are uniquely situated to resolve. And it provides a context for them to do so with far less judicial discretion than *Bruen*'s historical-analogue approach.

### B. Cases Interpreting § 5 of the Fourteenth Amendment

Current discourse about constitutional rights often overlooks the very important role that the political branches play in the real world when it comes to specifying and giving meaning to rights.[438] This discourse also underestimates how precarious important legal interests would be if the political branches believed that courts were the lone protectors of rights, and the job of the political branches was to interfere with rights as much as courts would let them get away with.[439] This discourse also overlooks creative options available to the political branches to accommodate constitutional interests—options that would not be available to (or likely even occur to) the judiciary to require of parties.

In the United States, the Supreme Court's interpretation of Congress's powers under § 5 of the Fourteenth Amendment is one

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

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

437 *See, e.g.*, Barclay, *Historical Origins*, *supra* note 61, at 70; *see also* WILLIAM SAMPSON, THE CATHOLIC QUESTION IN AMERICA 52 (New York, Edward Gillespy 1813) (describing *People v. Philips*, an unreported case decided by the New York Court of General Sessions in 1813); Commonwealth v. Cronin, 1 Q.L.J. 128, 136 (1855), *reprinted in* 2 Va. Cir. 488, 498 (same).

438 Webber, *Rights and Persons*, *supra* note 185, at 52–54.

439 *See* Webber & Yowell, *Securing Human Rights*, *supra* note 147, at 13.

manifestation of this problem. More deference to Congress's attempts to protect rights was likely warranted from the judiciary in cases like *Morrison* or *City of Boerne*. In *Morrison*, Congress sought to provide equal protections for women under VAWA. In *City of Boerne*, Congress sought to protect religious exercise through RFRA. In each of these cases, the Court struck down provisions of these laws based in part on the fact that Congress was attempting to provide protections above what the Court viewed as the constitutional minimum. Without addressing all the relevant legal issues in these cases—including the scope of Congressional enumerated powers or structural federalism concerns about the relationship between state and federal governments—I argue that the Court erred by treating a judicially administrable floor as simultaneously a Congressional ceiling and by ignoring any meaningful role for Congress in protecting constitutional rights above and beyond what the Court has specified.

As discussed above in Part III.A, in both *Morrison* and *City of Boerne*, the Court had instituted a more minimal standard for protection of constitutional rights by the judiciary based in part on the institutional limitations of the judiciary. These limitations involved valid concerns about the judiciary's inability to weigh different competing values. But in a problematic turn of events, the judiciary then imposed that same legal restraint on a legislature that is not subject to the same institutional limitations as a court.

Prior to *City of Boerne*, the Court provided more deference to Congressional action under § 5 of the Fourteenth Amendment. In *Katzenbach v. Morgan*,[440] the Court stated:

> It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected . . . . It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.[441]

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[440] 384 U.S. 641 (1966).

[441] *Id.* at 653.

This standard resembles rational basis review. Yet the Court's decision in *City of Boerne* replaced this standard with something closer to intermediate or strict scrutiny.[442]

One implication of my argument is that the Court should return to a legal approach more similar to *Katzenbach*'s. When Congress has independently determined that the existence of a constitutional right provides a reason for greater protection than the judiciary affords (particularly because of institutional limitations that apply to the judiciary and not a legislature), the appropriate judicial response to Congress is deference rather than scrutiny.

### C. Proportionality

The implications of the arguments made in Part IV are particularly striking when it comes to the proportionality framework used by virtually every country outside the United States.[443] On that front, this Article's treatment is brief, as this issue will be explored in depth elsewhere.

As a doctrine of constitutional law, proportionality was heavily influenced and refined by the German Federal Constitutional Court in the second half of the twentieth century.[444] This framework has now spread to many other countries and tribunals. Indeed, even skeptics of proportionality have said that "[t]o speak of human rights is to speak of proportionality."[445] It was the German Court that first elaborated and canonized the following four-step approach to adjudicating rights claims: courts are to ask whether the legal provision restricting the right "(1) pursues a legitimate aim; (2) actually advances that purpose; (3) restricts

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[442] *See* McConnell, *Institutions and Interpretation*, *supra* note 162, at 166.

[443] For sources exploring the differences and similarities between proportionality and strict scrutiny, see YOWELL, CONSTITUTIONAL RIGHTS AND CONSTITUTIONAL DESIGN, *supra* note 16, at 27–35 (discussing the adjudication of constitutional rights through both proportionality and tiered-scrutiny frameworks); Greene, *Rights as Trumps?*, *supra* note 3, at 85–89; JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART 110–11 (2021).

[444] AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 180–81 (Doron Kalir trans., Cambridge Univ. Press 2012) (2010). *But see* YOWELL, CONSTITUTIONAL RIGHTS AND CONSTITUTIONAL DESIGN, *supra* note 16, at 16–24, 57–61 (arguing that German proportionality derives from *Lochner*-era constitutional analysis in the United States).

[445] Grant Huscroft, Bradley W. Miller & Gregoire Webber, *Introduction* to PROPORTIONALITY AND THE RULE OF LAW, *supra* note 3, at 1.

the interest no more than is necessary to achieve the purpose; and (4) restricts the interest in a proportionate way."[446]

> The final step in the justification phase—the step that gives proportionality its . . . name and notoriety—requires that even a law pursuing a legitimate end rationally and necessarily must not restrict an individual interest . . . *disproportionately*. This last step requires proportion, or *balance*: an equilibrium and fit between what the law give[s] and what the law take[s] away.[447]

As one court in Israel explained, "[t]he greater the importance of the right infringed, and the more serious the infringement, the stronger the public interest must be, in order to justify the infringement."[448]

There are five adjustments I propose for this model based on the alternative theory of rights offered in Part IV. First, the conventional way of speaking about rights, particularly in the proportionality context, suggests that governments can and do legitimately violate rights all the time, so long as they are justified in doing so. The alternative suggested above would first offer a rhetorical shift, which is to ask (rather than assume) at a preliminary stage whether the constitutional *interest* or *pro tanto right* has been interfered with.[449] If the government demonstrates that it is acting on a permitted reason that requires limiting the constitutional interest, then there is no infringement of a right in its conclusive form. Rather, that limitation is internal to the scope of the right. Conversely, once there is a recognized right (properly delimited), the right simply defines the reasons (if any) for which the government may properly interfere with that interest. So if the government interferes with a constitutional interest based on an action that advances a permissible reason, and it cannot both act to advance

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[446] Collings & Barclay, *supra* note 426, at 471; *see also* YOWELL, CONSTITUTIONAL RIGHTS AND CONSTITUTIONAL DESIGN, *supra* note 16, at 16 (outlining the four-step proportionality inquiry).

[447] Collings & Barclay, *supra* note 426, at 475 (emphasis in original).

[448] HCJ 6055/95 Tzemach v. Minister of Defense, 53(5) PD 241 (1999) (Isr.), *translated in* Tzemach v. Minister of Defense, VERSA: OPINIONS OF THE SUPREME COURT OF ISRAEL, https://perma.cc/W95Y-4375; *see also S v. Bhulwana; S v. Gwadiso* 1996 (1) SA 388 (CC) at 12 para. 18 (S. Afr.) ("The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be."); R. v. Oakes, [1986] 1 S.C.R. 103, 140 (Can.) ("The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.").

[449] *See* Webber, *Rights and Persons*, *supra* note 185, at 36–39; Collings & Barclay, *supra* note 426, at 471 n.101.

that interest and act to protect the pro tanto right, it does not violate a right in its conclusive form.

Second, the analysis proposed above would require more careful scrutiny of which government interests are permitted under a constitutional instrument and which are not. As explained above, for that scrutiny to serve a transparency function, the government's interest should be articulated as an official reason by the government itself and early in the process, rather than proffered as an eleventh-hour, post hoc litigation strategy.

Third, I suggest that steps two and three should incorporate generally a more robust evidentiary burden on government than many international courts employ. Many courts use the language of government justification but do not actually require the government to demonstrate why its official reason requires an action that is inconsistent with protecting the constitutional interest.[450]

Fourth, for the reasons discussed in Part II, I would remove the fourth prong of the test, which specifically calls on courts to balance.[451] In reality, many courts employing a proportionality framework do in fact end their analysis before reaching this prong, perhaps because they sense that engaging in this unapologetic balancing exposes them as making discretionary policy decisions better reserved for the political process.[452]

Fifth, as with strict scrutiny, the remedies offered under this judicial approach will be more democratically compatible if they are generally offered on an as-applied, rather than facial, basis. So under the doctrine of legality, for example, a court in the United Kingdom offered something resembling a U.S. as-applied remedy under something like proportionality reasoning. In *Regina v. Home Secretary ex parte Simms*,[453] an inmate wanted to speak to journalists to demonstrate that his imprisonment was a miscarriage of justice. The prison authorities attempted to prevent this communication, relying on a statute giving the Home Secretary authority to make rules for the prison. The Home Secretary made an administrative rule that prevented the prisoner from engaging in

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[450] For a comparison of different courts' approaches, see Collings & Barclay, *supra* note 426, at 489–96.

[451] For another advocate of removing this prong of the analysis, see generally Bernhard Schlink, *Der Grundsatz der Verhältnismäßigkeit*, *in* 2 FESTSCHRIFT 50 JAHRE BUNDESVERFASSUNGSGERICHT: KLÄRUNG UND FORTBILDUNG DES VERFASSUNGSRECHTS 445 (Peter Badura & Horst Dreier eds., 2001).

[452] *See* Collings & Barclay, *supra* note 426, at 489–96; *see also* BARAK, *supra* note 444, at 245–46; ALEC STONE SWEET & JUD MATHEWS, PROPORTIONALITY BALANCING AND CONSTITUTIONAL GOVERNANCE: A COMPARATIVE AND GLOBAL APPROACH 38 (2019).

[453] [1999] UKHL 33, [2000] 2 AC 115.

oral interviews with journalists for publication. The House of Lords ruled that this was unlawful and explained that courts would not presume that broadly worded statutes were intended to interfere with the basic rights of the inmate. The court would not lightly assume that Parliament had wanted to interfere with such rights, and as a result, it required clarity that Parliament would have really intended such a result. That type of remedy contrasts with the facial remedy issued in *Carter v. Attorney General of Canada*,[454] in which the Canadian court purported to facially strike down provisions of the criminal code dealing with assisted suicide, thus preventing their application in all contexts to all relevant parties.[455] The latter type of remedy results in much more tension with democratic principles by affecting much larger swaths of the citizenry who had very little input in or control over that outcome.

### D. Conflicts of Rights

A final brief note about conflicts of rights is warranted. Greene has argued that the U.S. "rights-as-trumps frame cannot accommodate conflicts of rights," and thus "it forces us to deny that our opponents have them."[456] In other words, under the balancing frame Greene advocated, such conflicts are seen as ubiquitous and appropriate for judicial resolution. The difficulty is that this frame leads us into the teeth of the problems with courts attempting to reconcile conflicts between incommensurable values, as discussed above in Part II. This frame still ultimately commands courts to compare the length of a string to the weight of a rock. Yet litigation means courts must pick winners anyway. And when the court selects the inevitable winner and loser by declaring someone's string is longer than another person's rock is heavy, has it really satisfyingly (or even rationally) dealt with these conflicts? More accurately, it has simply made a choice based on unbounded discretion. As scholars like Webber and Yowell have noted, proportionality means that rights are everywhere, but they mean virtually nothing, leaving the outcomes of cases up to the judiciary's ad hoc judgments.[457]

If rights are framed in the "two-term," open-ended way that Finnis described[458]—e.g., religious exercise means the right to do whatever my religion leads me to believe, and any encroachment

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[454] [2015] 1 S.C.R. 331 (Can.).

[455] *Id.* at 389–91.

[456] Greene, *Rights as Trumps?*, *supra* note 3, at 34.

[457] Webber & Yowell, *Securing Human Rights*, *supra* note 147, at 13.

[458] *See* FINNIS, *supra* note 186, at 199–202.

on my actions violates my right—then conflicts of rights will in fact abound along the lines that Greene suggested. And courts will be in the problematic—and highly political—position of simply choosing which rights should take priority over others.

On the other hand, the framework for rights I propose will greatly reduce these supposed conflicts while still taking account of important interests on all sides. Consider a framework in which someone's right to exercise her religion simply entitles her to a legal claim to exercise her religion free from government interference other than for certain permissible reasons (including protecting the safety of others) that the government must demonstrate require action that conflicts with the religious exercise. This limitation is internal to the right, so the safety of others does not conflict with the right. Indeed, this framework means that rights are far less likely to conflict and much more likely to fit together as different puzzle pieces of the larger public interest.

Furthermore, the evidentiary burden I propose above incentivizes governments to avoid conflicts of interests and instead seek Pareto-efficient alternatives. If the government must demonstrate that its actions are necessary to advance its permissible interest, that means the government cannot overlook constitutional interest–advancing alternatives that do not interfere with the constitutional interest. In other words, the government must find ways to avoid unnecessary conflicts.[459]

Professor Joel Feinberg argued in *The Moral Limits of the Criminal Law: Harm to Others* that some sorts of harms arise from "bad social institutions," meaning institutions that cause conflicts that could be avoided, or at least mitigated, if the institutions were modified.[460] Thus, the problem may often lie not with inherently clashing rights but with a policy or institution that puts the interests of individuals "on a predictable and easily avoidable collision course."[461]

Return, for instance, to the highway-widening example. Arguably, safety concerns are incommensurable with the religious exercise of Indigenous Peoples. So if those interests really are in irreconcilable conflict, a court cannot justifiably choose between them. But by the government's own admission,[462] it could

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459 *See* Barclay, *An Economic Approach*, *supra* note 274, at 1240.

460 1 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS 220 (1984) ("A form of competition is illegitimate if it is 'avoidable' . . . ." (citing JOHN STUART MILL, ON LIBERTY ch. 5, para. 3 (London, John W. Parker & Son 1859))).

461 Barclay, *An Economic Approach*, *supra* note 274, at 1240.

462 *See* Answering Brief for Federal Appellees at *1, Slockish v. U.S. Dep't of Transp., 2021 WL 5507413 (9th Cir. Nov. 24, 2021) (No. 21-35220).

have widened the highway *and* protected the sacred burial grounds by using alternative construction methods. In the actual legal conflict before the court in *Slockish v. United States Federal Highway Administration*,[463] the government had employed such an alternative to protect nearby wetlands and even a tattoo parlor.[464] Had the government been willing to offer the same alternative for the Native American site, the conflict would have been avoided. And had the court deployed the approach I recommend here, the government would have been incentivized to do so.

To put it another way, the government potentially could have found a solution that improved public safety (widening the highway on the other side of the road) without making tribal members worse off by destroying their sacred site. Pareto-efficient decisions like this do not require commensurability between competing values or preferences. All the decisionmaker needs is one available decision out of two or more alternatives that, relative to those alternatives, improves at least one party's welfare without harming any other. If this condition is satisfied, then the decisionmaker can know that one option is normatively superior to all the others.[465] Courts can, without balancing incommensurable values, thus enforce an evidentiary burden in a way that encourages the government to look for these Pareto-efficient solutions.

## CONCLUSION

Reconceptualizing the meaning of constitutional rights as protected reasons has implications for the roles of the judiciary and the political branches in protecting such rights. This Article proposes a new account of rights that is more sensitive to the institutional competencies of these different branches of government in a democracy. Specifically, I argue that a constitutional right operates as a first-order reason for action by government officials to protect a private interest that has been specified in the constitution, and it also operates as a second-order exclusionary reason to prohibit government reliance on some reasons that would, absent such a rule, weigh against protection of the private interest specified in the constitution.

The theoretical framework I offer here does not defend judicial balancing of incommensurable values, but it would involve

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[463] 2018 WL 2875896 (D. Or. June 11, 2018).

[464] Carol Logan, *The Government Bulldozed My Tribe's Sacred Burial Site. We Want an Apology*, WASH. POST (Oct. 23, 2017), https://perma.cc/RT2Q-GWEY; *Slockish*, 2018 WL 2875896, at *1.

[465] *See supra* note 220.

judicial rigor in requiring governments to demonstrate that their actions are necessary to advance permissible reasons and to transparently articulate the reasons they seek to advance. It would also envision a more significant role for the political branches in treating the existence of constitutional rights as a reason to offer protection above the judicial floor of protection—a determination that should be entitled to judicial deference.

The arguments made here also have significant implications for how we should think about legal frameworks like strict scrutiny in the United States, proportionality abroad, and the amount of deference that ought to be given to institutions like Congress when they protect rights through mechanisms like their power under § 5 of the Fourteenth Amendment. Strict scrutiny need not—and indeed should not—involve the kind of balancing or unbounded discretion about which some Justices have expressed concern. Rather, strict scrutiny operates as an exclusionary reason: it excludes some government interests as impermissible, then it imposes an evidentiary burden on the government to demonstrate that it cannot both act to advance that reason and protect the constitutional interest. The political branches often can and do provide enhanced protections for rights above any minimally enforceable level that judges can administer. When legislatures act to protect rights in ways that judges cannot, the proper judicial response should be deference, not scrutiny. And in all of these contexts, allowing the government to limit the exercise of rights based on permissible reasons does not situate rights in an intractable conflict with the public interest—it conceptualizes these limitations as inherent in the nature of constitutional rights themselves.