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RESEARCH ARTICLE

Laycock's Defense of Strict Scrutiny

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Abstract

There is likely no law and religion scholar who has done more to shape the doctrine of strict scrutiny as a protection for religious exercise than Professor Douglas Laycock. Since five justices have called the notorious Free Exercise case—*Employment Div., Dept. of Human Res. of Ore. v. Smith*—into question, Laycock's work has taken on additional salience. And that is even more true as justices and scholars have asked and debated what test should replace *Smith* if overruled. Some scholars have argued that the court should abandon strict scrutiny across the board and *Bruen*-ize the First Amendment—that is, incorporate the newly minted Second Amendment historical-analogue approach from *New York State Rifle & Pistol Ass'n v. Bruen* into the First Amendment context. In this article, I discuss three important aspects of Laycock's work regarding strict scrutiny: (1) the textual and historical arguments Laycock has made to support strict scrutiny in the religious exercise context; (2) the important insights he has offered about how the doctrine should operate, particularly with respect to his most-favored-nation theory; and (3) the normative justifications Laycock has offered to support this approach. Building on previous work of mine, I explain additional reasons why strict scrutiny is an important and historically justified doctrine in the free exercise context. I also explain why *Bruen*'s categorical historical-analogue approach, while potentially useful in some constitutional contexts, would be problematic in the Free Exercise context. More importantly—and ironically—*Bruen*'s purported historical approach would be contrary to the best textual and historical understanding of the Free Exercise Clause.

Keywords: religious exercise; equality; liberty; strict scrutiny; *Bruen*

It is unlikely that any other law and religion scholar has done more to shape the doctrine of strict scrutiny as a protection for religious exercise than has Douglas Laycock. Since five justices called the notorious Free Exercise case—*Employment Div., Dept. of Human Res. of Ore. v. Smith*[1]—into question, Laycock's work has taken on additional salience.[2] That salience has only increased as justices and scholars have asked and debated what test should replace *Smith* if overruled.[3] Indeed, some scholars argue that the U.S. Supreme Court should abandon strict scrutiny across the board and *Bruen*-ize the First Amendment, incorporating the newly minted Second Amendment historical-analogue approach from *New York State Rifle & Pistol*

[1] 494 U.S. 872 (1990).

[2] *See* Fulton v. City of Philadelphia, 593 U.S. 522, 543 (2021) (Barrett, J., concurring); *id.* at 545 (Alito, J., concurring in the judgment).

[3] *See* sources cited *supra* note 2.

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Ass'n v. Bruen into the First Amendment context.[4] Here, I build on Laycock's work discussing strict scrutiny and explain why a strict historical-analogue approach, focusing more on *how* free exercise was historically regulated than *why*, would be contrary to the best historical understanding of the Free Exercise Clause itself.

Textual and Historical Justifications for a Strict Scrutiny Approach to Religious Exercise

Laycock has done very important work shedding light on some of the historical justifications for strict scrutiny. To this end, his work helps reveal the false dichotomy of those who contrast strict scrutiny with a historical approach to free exercise.

To begin with, strict scrutiny applies broadly. Laycock has argued that this is consistent with the text of the First Amendment: "The text of the Constitution applies to all forms of religious practice, central or peripheral."[5] Laycock has also relied on Michael McConnell's work for this same point.[6]

Some of Laycock's historical work on this issue has involved pointing to a U.S. founding-era backdrop that logically supported a legal regime of providing religious exemptions to religious objectors. In *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, he writes: "Toleration applied throughout the colonies. Once a state decided that minority faiths should be permitted to freely worship, the logic of toleration suggested that they should also be exempted from other laws that made their lives unnecessarily difficult. The impulse that led to toleration was that religious dissenters should be free to live in a jurisdiction and that their lives should not be made miserable because of their faith."[7]

Of course, at that time, being able to live consistent with one's faith did not necessarily mean being able to practice one's faith in unlimited ways. In the Cato Institute's *Supreme Court Review*, Laycock and Thomas Berg, another prominent scholar in the field of law and religion, provided more arguments regarding the historical support for strict scrutiny, a test that provides important limits on religious exercise that resemble founding-era limits on religious exercise:

> As Justice Alito noted in *Fulton*, the original meaning of free exercise harmonizes with Founding-era state constitutional provisions; the majority of those provisions limited the right when it interfered with public "peace or safety." … Significant damage to property also fits comfortably within that standard. And the increase in the complexity of modern life expands the scope of government's regulatory interests. But it cannot be that every expansion of regulation produces an equal constriction of freedom to practice religion. Scrutiny of generally applicable laws—especially scrutiny of government interests at the margin rather than in the abstract—prevents that zero-sum result.[8]

[4] *See, e.g.*, J. Joel Alicea, *Bruen Was Right*, 174 University of Pennsylvania Law Review 13 (2025) (critiquing strict scrutiny across the board).

[5] Douglas Laycock, *The Religious Exemptions Debate*, 11 Rutgers Journal of Law and Religion 139, 151 (2009).

[6] Douglas Laycock, *The Remnants of Free Exercise*, 1990 Supreme Court Review 1, 2 ("Michael McConnell has shown that the understanding of free exercise in the founding generation included exemptions for religiously motivated conduct." (citing Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harvard Law Review 1409, 1466–73 (1990))).

[7] Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 Notre Dame Law Review 1793, 1804 (2006).

[8] Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under* Smith *and After* Smith, 2020–2021 Cato Supreme Court Review 33, 59.

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Both Laycock and McConnell have argued that early state constitutional protections of religious liberty were roughly the eighteenth-century versions of what judges today would do under a compelling-interest test.[9] Early state constitutional provisions protecting religious liberty frequently contained provisos to "protect public peace and safety." Laycock argued, "peace and safety in their language, compelling interest in ours."[10]

In *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, Laycock also pointed to early founding-era courts that provided religious exemptions in a way that reflected the importance of society providing legal protections to ensure this sort of religious toleration. And he observes ways in which these early cases were doing something that looks quite similar to modern strict scrutiny. He writes:

> [In a] New York case [*People v. Philips* (N.Y. Ct. Gen. Sess. June 14, 1813)] ... the state sought to compel a Catholic priest to testify to what he learned in the confessional. Mostly the prosecutor argued that New York's guarantee of freedom of worship did not excuse the performance of civic duties. ... The court interpreted the New York Constitution in a quite modern way that *sounds much like the compelling interest test.* The state constitutional exception, permitting regulation of religion in cases of "licentiousness, of practices inconsistent with the tranquillity and safety of the state," "has reference to something actually, not negatively injurious. To acts committed, not to acts omitted—offences of a deep dye, and of an extensively injurious nature." *The court did not use the phrase "compelling government interest," but the idea is plainly similar.* In the court's view, free exercise required regulatory exemptions, and the argument that the commitment to disestablishment might prohibit them did not deserve a response.[11]

Elsewhere, I have built on Laycock's important work and highlighted ways in which those early founding-era questions were not just asking about government interests that look similar to modern-day compelling interests—the courts were asking evidentiary questions that look like modern-day least restrictive means analysis.[12]

But what should one make of the claim by some scholars that there is not much evidence at the U.S. founding of judicial protection of religious exemptions? Justice Scalia bemoaned the paucity of early cases "refusing to enforce a generally applicable statute because of its failure to make accommodation."[13] This argument was recently repeated by Richard Garnett, who writes, "There is very little evidence from the Founding that judges were expected to create exemptions whenever they concluded that a valid government action imposed a burden on a person's religiously motivated actions."[14]

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[9] Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief That Was Never Filed*, 8 Journal of Law & Religion 99 (1990); McConnell, *supra* note 6, at 1414–15, 1511–13.

[10] Laycock, *supra* note 9, at 102–03.

[11] Laycock, *supra* note 7, at 1827–28 (emphasis added) (footnotes omitted) (quoting People v. Philips (N.Y. Ct. Gen. Sess. June 14, 1813), *reprinted in* William Sampson, The Catholic Question in America 113 (1813) (emphasis omitted)); *see also id.* at 1828 ("There is a similar holding, a good bit later than the other cases discussed, from a Virginia trial court in *Commonwealth v. Cronin.* There the defendant, who had fatally beaten his wife, called her priest as a witness and asked if she had admitted to adultery in her final confession. The court held, in a substantial opinion, that compelling the priest to testify would have the effect of suppressing a sacrament of the Catholic faith, and that constitutional guarantees of religious liberty clearly precluded such a result. There is no reference to any Establishment Clause argument.") (footnotes omitted).

[12] *See* Stephanie Hall Barclay, *Replacing Smith*, 133 Yale Law Journal Forum 436 (2023).

[13] City of Boerne v. Flores, 521 U.S. 507, 542 (1997) (Scalia, J., concurring).

[14] Richard W. Garnett, Letter to the Editor, *Overruling Smith Would Be a Supreme Mistake*, Wall Street Journal, Sept. 16, 2025, at A16. *See also* Vincent Phillip Muñoz, *If Religious Liberty Does Not Mean Exemptions, What Might It Mean? The Founders' Constitutionalism of the Inalienable Rights of Religious Liberty*, 91 Notre Dame Law Review 1387, 1388 (2016);

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This has always struck me as an odd argument. Frankly, there is very little evidence at the U.S. founding that judges protected *any* constitutional rights. This is, in part, because judicial decisions were not regularly recorded, as Justice Alito recognized in his *Fulton* concurrence.[15] But it is also because the role of the judiciary in some quarters of the United States was contested, and the framing generation was still working out how to meaningfully implement constitutional rights that operated in part as a limitation on government.[16]

In fact, there is more evidence of judicial protection of religious exercise than there is of the vast majority of other constitutional rights.[17] That means that, relatively speaking, the case for constitutional religious exemptions by the judiciary is quite strong.

Why did the Supreme Court, and an originalist jurist like Justice Scalia, not pay more attention to the historical evidence that Laycock discusses and that Michael McConnell has also written about? In *The Remnants of Free Exercise*, Laycock writes: "*Smith* is probably wrong as a matter of original intent; certainly no plausible opinion can be written without taking account of the evidence McConnell musters. His work was completed before the Court's decision, and published immediately after. It was not brought to the Court's attention, because no one knew the Court was reconsidering the right to exemptions."[18]

Why was the Supreme Court reconsidering its strict scrutiny religious exercise regime? In *The Religious Exemptions Debate*, Laycock provides some insights. He explains: "The Reagan Administration saw the *Sherbert-Yoder* rule as a prime example of judicial activism. Reagan did not run on the issue, and his advisers did not want the evangelical part of his base to know what they were doing, but his Justice Department initiated the current round of the exemptions debate, quietly hammering at the Free Exercise Clause in briefs to the Supreme Court. That effort bore fruit after Reagan left office [in *Smith*]."[19]

In a recent article, my co-author and I survey recently released papers of Justice O'Connor that corroborate Laycock's hunches about the influence of the Solicitor General's office of the Reagan administration on the approach taken by the Supreme Court.[20]

The consequence of the Supreme Court's decision in *Smith* was to replace a legal framework under *Sherbert* that had required government to satisfy strict scrutiny whenever its laws burdened a claimant's religious exercise. The new rule that *Smith* instituted would not allow for strict scrutiny unless a law was not neutral or generally applicable, a phrase that many commentators initially thought would incorporate nearly all laws.

The *Smith* decision was a loss for religious liberty, and a widely criticized one, including by Laycock.[21] But Laycock's work giving input on the legislative drafting process of both the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons

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Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 Hofstra Law Review 245, 267, 271–72 (1991).

[15] Fulton v. City of Philadelphia, 593 U.S. 522, 587 (2021) (Alito, J., concurring in the judgment) ("[W]here cases arose, the courts' decisions may not have always been reported.").

[16] Stephanie Hall Barclay, *Constructing Constitutional Rights*, 138 Harvard Law Review Forum 140, 142–43, 147–59 (2025). It took some time to settle the role of the judiciary with respect to enforcement of constitutional rights. *See id.* But certainly, by the time of Reconstruction, there is additional evidence that supports a public understanding of judicially provided religious exemptions from generally applicable laws. *See* Kurt T. Lash & Stephanie Hall Barclay, *A Crust of Bread: Religious Resistance and the Fourteenth Amendment*, 78 Vanderbilt Law Review 1203, 1256–57 (2025) (citation omitted).

[17] *See* Barclay, *supra* note 12, at 448–65.

[18] Laycock, *supra* note 6, at 2.

[19] Laycock, *supra* note 5, at 141–42.

[20] *See* Stephanie Hall Barclay & Matthew M. Krauter, *The Untold Story of the Proto-Smith Era: Justice O'Connor's Papers and the Court's Free Exercise Revolution*, 174 University of Pennsylvania Law Review 435 (2025).

[21] *See* Ira C. Lupu, *Employment Division v. Smith and the Decline of Supreme Court-Centrism*, 1993 BYU Law Review 259, 260 n.9 (collecting sources that discuss potential implications of Smith); *see also* Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 559 (1993) (Souter, J., concurring in part, concurring in the judgment) (noting that

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Act proved hugely influential. These statutes operated to restore strict scrutiny and allow for exemptions from generally applicable laws that substantially burdened a claimant's religious exercise.

Nor did Laycock's work regarding strict scrutiny end there. Even in the constitutional context, Laycock's scholarship and advocacy had the effect of continuing to narrow the most negative implications of *Smith* and turn the general applicability and neutrality test into one that was much more favorable for religious liberty, as discussed in the following section.

Fleshing Out the Doctrinal Operation of Strict Scrutiny

Laycock pioneered the "most-favored nation" approach to strict scrutiny under the court's new *Smith* regime.[22] Under this approach, as originally developed by Laycock, government action denying a religious exemption will be subject to strict scrutiny any time the government simultaneously offers a "single secular exemption" that "undermines the state's interest to the same degree" as, or to a greater degree than, the religious exemption allegedly would:[23] "The question is not whether one or a few secular analogs are regulated. The question is whether a *single* secular analog is not regulated. The constitutional right to free exercise of religion is a right to be treated like the most favored analogous secular conduct. It is not enough to treat a constitutional right like the least favored, most heavily regulated secular conduct."[24]

there are doubts as to 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 University of Pennsylvania Journal of Constitutional Law 850, 851–56 (2001) (arguing that despite the conclusion and subsequent criticism of *Smith* free exercise is still "alive and well"); James D. Gordon III, *Free Exercise on the Mountaintop*, 79 California Law Review 91, 114 (1991) ("What is there to admire [about *Smith*]? The Court wanted to reach its result in the worst way, and it succeeded."); Laycock, *supra* note 6, at 2–3 (arguing that Smith was incorrectly decided based on precedent and original intent); Kenneth Marin, Employment Division v. Smith: *The Supreme Court Alters the State of Free Exercise Doctrine*, 40 American University Law Review 1431, 1475–76 (1991) (arguing that "the Smith Court has rendered the free exercise clause impotent"); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 University of Chicago Law Review 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 American Indian Law Review 1, 11–26 (1991) (critiquing Justice Antonin Scalia's use of history and precedent in the Smith decision); Carol M. Kaplan, Note, *The Devil Is in the Details: Neutral, Generally Applicable Laws and Exceptions from Smith*, 75 New York University Law Review 1045, 1046 (2000) (arguing that "[Smith] was not well crafted and was based on mischaracterizations of precedent"); Mark J. Rosen, Comment, *Constitutional Law—Free Exercise of Religion—Native Americans May Be Denied State Unemployment Benefits for Ceremonial Ingestion of Peyote Without Violating First Amendment's Free Exercise Clause*, 23 Rutgers Law Journal 209, 230 (1991) (arguing that "[t]he Court's cursory disregard for precedent in arriving at its holding suggests the Court's willingness to forego long-standing doctrinal jurisprudence, and substitute its new, stultified vision of the Free Exercise liberties 'protected' by the Constitution."); Whitney Travis, Note, *The Religious Freedom Restoration Act and Smith: Dueling Levels of Constitutional Scrutiny*, 64 Washington & Lee Law Review 1701, 1707 (2007) (noting that "*Smith* was met with enormous criticism."). To be sure, Smith did have some contemporaneous academic defenders. *See, e.g.*, Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 George Washington Law Review 915, 916 (1992) (questioning the originalist historical evidence in favor of religious exemptions); William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 University of Chicago Law Review 308, 309 (1991) (defending "*Smith*'s rejection of constitutionally compelled free exercise exemptions without defending *Smith* itself").

[22] *See* Laycock, *supra* note 6, at 49.

[23] Brief of Constitutional Law Professors as Amici Curiae in Support of Appellees at 19–20, Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015) (Nos. 12-35221, 12-35223) [hereinafter Stormans Brief]; *see also* Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 Nebraska Law Review 1, 19 (2016).

[24] Laycock & Collis, *supra* note 23, at 22–23 (emphasis added).

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The Supreme Court's clearest adoption of this rule occurred in *Tandon v. Newsom.*[25] There, the court stated that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."[26] Applying the rule, the court held that religious at-home gatherings must be exempted from a law prohibiting gatherings of more than three households because various commercial businesses are not subject to the same limitation as are private homes.[27]

The most-favored-nation theory is often described as being grounded in equality considerations or antidiscrimination norms.[28] As Laycock also noted, "Exemptions for secular interests without exemptions for religious practice reflect a hostile indifference to religion."[29] As Andrew Koppelman similarly observed, "A law's underinclusiveness may be evidence of bias" against religious claimants.[30] And "Prejudice sometimes contaminates decision-making and renders it illegitimate even in the absence of malign purpose."[31] Both Laycock and Koppelman anticipate that, properly implemented, the most-favored-nation approach will allow a court to account for "religious and secular interests in a way that would not significantly impede any important state interests."[32]

But there is separate evidentiary work that the most-favored-nation approach is doing as well. Laycock writes that generally, secular exceptions provide "substantial evidence" that religious ones would be possible and "would not threaten the statutory scheme."[33] In other words, comparable secular exemptions may point to the existence of alternatives for the government to *both* accomplish its stated goal and protect the religious claimants.[34]

For example, in *Holt v. Hobbs*, a prison forbade a Muslim inmate from growing a half-inch beard for religious reasons. But the prison allowed quarter-inch beards for medical reasons, and the court concluded that the prison had "not adequately demonstrated why its grooming policy is substantially underinclusive" in light of that exemption.[35] Thus, exemptions of related secular conduct revealed that the state's goal could be achieved in less restrictive ways.

When litigants point to alternatives that would both protect the religious right and the government's compelling interest that have been tried in other contexts, the government must respond with an explanation regarding why those alternatives are not feasible.[36]

However, Laycock does not take the view that the existence of comparable secular exemptions will automatically be fatal to strict scrutiny. As Laycock and Collis point out: "There may be cases where an unusual secular reason for acting is so important that the government has a compelling interest in treating that secular act more favorably than

[25] Tandon v. Newsom, 593 U.S. 61, 62–63 (2021) (per curiam).

[26] *Id.* at 62.

[27] *Id.* at 62–63.

[28] *See* Laycock, *supra* note 6, at 49–51.

[29] *Id.* at 50.

[30] Andrew Koppelman, *The Increasingly Dangerous Variants of the Most-Favored-Nation Theory of Religious Liberty*, 108 Iowa Law Review 2237, 2248 (2023).

[31] *Id.* at 2246; Andrew Koppelman, Antidiscrimination Law and Social Equality 13–56 (1996). For a discussion of equal regard, see Christopher L. Eisgruber & Lawrence G. Sager, Religious Freedom and the Constitution (2007).

[32] Koppelman, *supra* note 30, at 2250.

[33] Laycock, *supra* note 6, at 50.

[34] *See* Stephanie Hall Barclay, *Constitutional Rights as Protected Reasons*, 92 University of Chicago Law Review 1179 (2025).

[35] 574 U.S. 352, 367 (2015).

[36] *See, e.g.*, McAllen Grace Brethren Church v. Salazar, 764 F.3d 465, 479–80 (5th Cir. 2014) (eagle feathers); United States v. Marcavage, 609 F.3d 264, 290 (3d Cir. 2010) (speech); Poffenbarger v. Kendall, 588 F. Supp. 3d 770, 792 (S.D. Ohio 2022) (COVID-19 vaccine mandate).

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analogous religious acts. At the oral argument in *Lukumi*, one of us told Justice Scalia that 'saving human life by killing an animal in self defense is a compelling interest.'"[37]

And when should courts consider whether the government has adequately justified secular exemptions that it declines to extend to religious exercise? Laycock states as follows: "That limited consideration of the reasons for secular exceptions goes at the end of the case, subject to strict scrutiny under the compelling-interest test. That is very different from comparing reasons at the beginning of the case under a much more deferential standard of review."[38]

In other words, the existence of comparable secular exemptions can trigger strict scrutiny, as it did in *Tandon.* But the existence of comparable secular exemptions does not mean that government automatically loses strict scrutiny.

Why Protect Religious Exercise?

In addition to providing important historical arguments defending strict scrutiny and conceptual arguments to help flesh out the doctrinal operation of strict scrutiny, Laycock has offered a powerful normative defense of this judicial doctrine.

Laycock has explained that "[e]ither overruling *Smith* or enforcing a serious requirement of general applicability would lead to much better protection for religious liberty. And that would be a good thing not just for conscientiously objecting wedding vendors, but for a broad range of cases."[39] He is quick to point out that "this battle over legal doctrine" is not primarily about culture-war cases dealing with things like abortion, contraception, or same-sex weddings.[40] While those cases "grow out of deep moral disagreement about matters relating to sex, and they get all the headlines ... they are not the typical cases."[41]

Instead, the typical cases "mostly—not exclusively—involve the small religious minorities that Justice Scalia thought he was disadvantaging in *Smith*,"[42] such as Muslim prisoners seeking beards, Amish groups wanting to drive buggies, churches seeking to feed the homeless, and Native Americans wishing to use substances necessary for religious ceremonies.

One of Laycock's most powerful normative defenses of strict scrutiny comes when he tells the story of Mary Stinemetz, "the Kansas woman who died for her faith, in America, in the twenty-first century":

> She was a Jehovah's Witness, so she could not accept a blood transfusion, and she needed a liver transplant. Bloodless liver transplants were available in Omaha, and they were actually cheaper than any transplant hospital in Kansas. But Kansas Medicaid had a rule: we don't pay for out-of-state medical care. She sued under the state constitution, and she eventually won, but by then it was too late. Her condition had deteriorated to the point that she was no longer medically eligible for a transplant. She died soon thereafter. If you support *Employment Division v. Smith* and oppose religious exemptions, your explanation has to address why Mary Stinemetz should not have gotten one. Smith led Kansas officials to believe that they never have to consider religious exemptions—that they didn't have to talk to Mary Stinemetz or take her seriously. And they didn't.

[37] Laycock & Collis, *supra* note 23, at 16.
[38] *Id.*
[39] Douglas Laycock, *The Broader Implications of Masterpiece Cakeshop*, 2019 BYU Law Review 167, 202–04.
[40] *Id.* at 202.
[41] *Id.*
[42] *Id.*

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> As the case of Mary Stinemetz graphically illustrates, and as Jack Phillips's surrender of nearly half his business illustrates less dramatically, religious liberty reduces human suffering. It reduces social conflict. It is one of America's great contributions to the world. We should not let it slip away, either in legal wrangling or in a bitter culture war.[43]

Why *Bruen*'s Regulatory Historical-Analogue Approach Would Be Problematic for Religious Exercise

If the court overruled *Smith*, what test should replace it? Laycock has, as discussed above, argued that the test should be strict scrutiny. But other scholars have suggested that the court should incorporate the approach it took in the Second Amendment in other constitutional areas, including the Free Exercise Clause.[44] Laycock, Michael McConnell, Mark Storslee, and I have written about why that would be a grave mistake in the free exercise context.[45]

The Supreme Court's decision in *New York State Rifle & Pistol Association v. Bruen* is the most prominent example of the regulatory historical-analogue approach to enforcing a constitutional right by limiting government regulation of it to analogues of government regulations at the founding.[46] Thus, though the court in *Rahimi* has subsequently softened its approach in positive ways, I will 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. The court ruled that such a 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.

Under *Bruen*'s two-prong test, courts must first determine whether the conduct being regulated is protected by the text of the Second Amendment. If the conduct falls within the Second Amendment's protection, the government must then demonstrate that the regulation is consistent with the nation's historical tradition of firearm regulation. This involves identifying historical laws or practices from the founding era or the ratification of the Fourteenth Amendment that are "relevantly similar" to the challenged regulation.[47] Modern considerations, such as public safety or efficacy, are not part of any clear evidentiary burden the government must satisfy as part of the analysis.

Mapping this test directly onto the free exercise context would cause a number of significant problems, especially if that test focused more on the historical analogues themselves rather than the historical reasons for them, which Laycock's work helps make clear. First, as Laycock's work discussed above illustrates, this juxtaposition creates a false dichotomy. Strict scrutiny, as applied in the Free Exercise Clause, has significant historical support, both in the text and history of the natural right to religious exercise and the First Amendment.

Second, categorical historical analogues, while valuable for identifying rights (and thus limitations on government action), are much more problematic when identifying

[43] *Id.* at 203–04.

[44] *See, e.g.*, Alicea, *supra* note 4.

[45] Michael W. McConnell, Douglas Laycock, Stephanie Hall Barclay & Mark Storslee, *The Court Shouldn't* Bruen*-ize the Free Exercise Clause*, Reason (Mar. 8, 2025), https://reason.com/volokh/2025/03/08/the-court-shouldnt-bruen-ize-the-free-exercise-clause/. For a more in-depth discussion about this issue, see Barclay, *supra* note 16, at 142–43, 147–59.

[46] 597 U.S. 1 (2022).

[47] *Id.* at 28–29.

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government authority (and thus permissions for government action). 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.[48] But in that context, the historical analogue is identifying the protected zone of activity in 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 would result in a right being narrowly defined, but deeply protected.

However, the regulatory historical-analogue approach in *Bruen* functions in the opposite manner. There the court identifies the historical analogue not of the protected activity but of the government *regulation*, and then limits permissible modern regulations to those mirroring that historical regulation. The contrast can be sharpened as follows: the historical analogue in the ministerial exception tells the government a limited realm of things the government absolutely *cannot* do; the historical analogue in the *Bruen* context tells the government the very limited range of things the government *can* do.

Once the use of the historical analogue is flipped in that way, it creates a limited permission rather than a limited prohibition. At that point, courts have two options. On the one hand, they can prioritize judicial constraint and identify the level of generality for the regulation at a very low level of generality. That would, as the court recognized in *Rahimi*, effectively handcuff modern government regulation and lead to absurd results where the political authority is disarmed from being able to regulate rights in many ways necessary for the common good of a modern society. On the other hand, courts can dial up the level of generality to make modern-day regulation more permissible even if it is more loosely analogous. But the court must do so in ways that are entirely at the court's discretion, lead to unpredictable results, and compound tension with democratic principles. And these issues are aggravated where the right at issue is broadly applicable, rather than narrow and well defined.

I have explained in greater depth elsewhere why this level-of-generality problem is not shared by strict scrutiny.[49] The regulatory historical-analogue approach also assumes, as Justice Barrett pointed out, that the government was regulating to the extent of its authority at the founding and could not have chosen to regulate further at the founding.[50] That is a dubious assumption without any historical backing or evidence—which the defenders of the regulatory historical-analogue approach have not offered.

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, there would likely be a significant range of activity left unprotected, particularly for minority religious groups in our pluralistic society.[51] Conversely, there are many types of activity that the government did not regulate

[48] Our Lady of Guadalupe School v. Morrissey-Berru, 591 U.S. 732 (2020).

[49] *See* Barclay, *supra* note 34, at 1262–64.

[50] United States v. Rahimi, 602 U.S. 680, 739–40 (2024) (Barrett, J., concurring).

[51] *See generally* Donald L. Beschle, *Does a Broad Free Exercise Right Require a Narrow Definition of Religion?*, 39 Hastings Constitutional Law Quarterly 357 (2011) (discussing some tradeoffs between expansive definitions of religion and expansive concepts of free exercise); *see also* Mark Strasser, *Definitions, Religion, and Free Exercise Guarantees*, 51 Tulsa Law Review 1 (2015); Donald L. Beschle, *No More Tiers? Proportionality as an Alternative to Multiple Levels of Scrutiny in Individual Rights Cases*, 38 Pace Law Review 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 Journal of Law, Ethics & Public Policy 253, 255–60 (2017) (discussing some "hazards" that can arise if absolute protections are extended too far under a too-expansive definition of religion).

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at the founding, but that it is difficult to imagine a court providing a religious exemption for today.

Consider a 2016 case, which I have written about elsewhere,[52] involving a mother who asserted a religious-freedom defense to beating her seven-year-old son with a coat hanger.[53] The mother "claimed her discipline method came straight from her evangelical Christian beliefs."[54] 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 state in the United States had laws that specifically protected children from abuse until 1875, and Britain did not adopt such laws until 1884.[55] 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.[56] Further, one could certainly argue for a strong historical tradition of parental rights, including for religious reasons.[57]

Perhaps an advocate of the historical-analogue approach would try to resolve this issue by arguing that the relevant "long, unbroken tradition of restriction"[58] by government need not date to the founding era, and so we could point to a long tradition of child-protection laws dating at least to the 1960s. But this leads to a further problem: the historical-analogue approach as applied by *Bruen* raises difficult questions about which history we should be looking to (that is, when is the relevant ending point) and why that history is entitled to special privilege that would be folded into the scope of a constitutional right enacted long before.[59] Justices Thomas and Kavanaugh have suggested that historical evidence that far postdates the founding period should be relevant for this analysis in some contexts.[60] If the relevant historical period allows for significant judicial discretion, is this test any less discretionary than the balancing test it hopes to replace?

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[52] Barclay, *supra* note 12, at 466–68.

[53] *See* Vic Ryckaert, *Mom Who Cited Religious Freedom Pleads Guilty*, IndyStar (Oct. 28, 2016), https://www.indystar.com/story/news/crime/2016/10/28/mom-who-cited-religious-freedom-plead-guilty-abuse/92876808.

[54] *Id.*

[55] *See* John E.B. Myers, *A Short History of Child Protection in America*, 42 Family Law Quarterly 449, 449 (2008) (noting that no government agency in the United States was responsible for child protection prior to 1875); Donald N. Duquette, *Child Protection Legal Process: Comparing the United States and Great Britain*, 54 University of Pittsburgh Law Review 239, 243 (1992). The case of R v. Hopley (1860) 2 F. & F. 202, 175 Eng. Rep. 1024, establishes that as of the mid-nineteenth century child discipline was a good defense to battery at common law. Excessive force has been forbidden since before then, but states generally did not second-guess parents' avowed need for corporal punishment. *See, e.g.*, Johnson v. State, 21 Tenn. 283 (1840); State v. Pendergrass, 19 N.C. 365 (1837). For helpful background, see generally Sallie A. Watkins, *The Mary Ellen Myth: Correcting Child Welfare History*, 35 Social Work 500 (1990).

[56] *See Child Abuse*, Britannica, https://www.britannica.com/topic/child-abuse (last visited Mar. 23, 2026) ("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*, New York Society for Prevention of Cruelty to Children, https://nyspcc.org/about-nyspcc/history to https://healing-ny.org/about/history/ (last visited Mar. 23, 2026).

[57] *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 Journal of Law & Education 83, 95 n.78, 108–10 (2009); Noa Ben-Asher, *The Lawmaking Family*, 90 Washington University Law Review 363, 373–74 (2012).

[58] William J. Haun, *Keeping Our Balance: Why the Free Exercise Clause Needs Text, History, and Tradition*, 46 Harvard Journal of Law and Public Policy 419, 421 (2023).

[59] *See generally* Sherif Girgis, *Living Traditionalism*, 98 New York University Law Review 1477 (2023). *But see* Marc O. DeGirolami, *First Amendment Traditionalism*, 97 Washington University Law Review 1653, 1661, 1666 (2020) (arguing that enduring practices are "one of the crucial … ingredients" of textual meaning and "represent the people's decisions about" their governance, and thus greater weight is given to founding-era traditions).

[60] Justice Thomas's *Vidal* and *Samia* opinions and Justice Kavanaugh's *Rahimi* concurrence would give long-post-ratification practices weight in constitutional analysis. *See, e.g.*, Vidal v. Elster, 602 U.S. 286, 300–02 (2024).

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To 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. There is no doubt that there is a long tradition dating back to the founding of government regulation to protect public safety, and doing so even in ways that limit religious exercise.[61] And at that higher level of generality, one could easily argue that preventing child abuse is also protecting public safety. True enough. But at that level of generality, government could tie just about any regulation in any context to public safety. And government would then *always* have a justification for violating nearly any right.

Which level of generality should be 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.[62] But in fact it is an unavoidable problem that any form of originalism—or for that matter any legal doctrine—must grapple with.[63]

More importantly, for the reasons I discuss elsewhere, the level-of-generality problem is a much bigger issue for the historical-analogue test than for strict scrutiny if the historical-analogue approach is not tied to an evidentiary burden requiring government to prove that its actions actually advance the same sort of reason advanced by the historical tradition. The evidentiary burden of strict scrutiny forces government to articulate its own government interest in a way that will allow it to prove that its actions advance that interest, and that the government could not do so another way.[64]

In that vein, the regulatory historical-analogue test, at least as applied in *Bruen*, does not ask those sorts of evidentiary questions of government: to prove that what it says about its interest is true, and that its actions are advancing a goal that it could not advance some other way more protective of religious exercise. If the government is not required to demonstrate, through some sort of evidentiary burden, that its actions are causally linked to its stated goal, government could use a reference to public safety as a trump card in any case to defeat a religious exercise right. This would be true even if the government's actions were not improving public safety in any meaningful sense.

In contrast, strict scrutiny would allow a government to properly prohibit this sort of religious exercise, because it could assert a historically justified government interest in protecting against serious bodily injury. And the government could prove, as an evidentiary matter, that preventing this type of religious exercise—the beating—was absolutely necessary to advance that interest.

I anticipate one other problem if a regulatory historical-analogue approach were adopted wholesale in the context of religious exercise. Not all the founding-era regulations of these rights were consistent with the widely shared understandings of how these rights should be protected. Blasphemy laws may be a particularly good example of this problematic type of founding-era regulation. When Madison introduced the federal Bill of Rights, he noted that although many states already had their own bills of rights, it was "true" that "there are a few particular states in which some of the most valuable articles have not, at one time or other, been *violated.*"[65] Madison still thought it worth including a bill of rights in the constitution to decrease the chances of such violations. But he was candid that the new experiment in popular sovereignty in which the founding generation was engaged often resulted in action

[61] *See* Barclay, *supra* note 12, at 456.

[62] *See* Alicea, *supra* note 4, at 65–88.

[63] *See* Barclay, *supra* note 12, at 461.

[64] For an in-depth discussion of this phenomenon, and ways strict scrutiny is far less vulnerable to the level-of-generality problem, see Barclay, *supra* note 34, at 1262–64.

[65] 11 Documentary History of the First Federal Congress of the United States, March 4, 1789–March 3, 1791, 825 (Charlene Bangs Bickford *et al.* eds., 1992) (emphasis added).

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that fell short of the constitutional ideal.[66] That is perhaps more true of religious exercise than other sorts of constitutional rights. Thus, looking to founding-era regulations as conclusive evidence of what limitations on rights are constitutionally permissible could easily lead an interpreter astray and result in far less protection than was anticipated for important rights like speech and religious exercise.

Conclusion

Laycock has done incredibly important work to explicate, defend, and advance the doctrine of strict scrutiny in the context of Free Exercise. It is a doctrine that has deep historical roots, doctrinal coherence, and strong normative justifications. Those who seek to defend religious exercise should hesitate to cast this work and this doctrine aside in favor of untested approaches that might prove unworkable and ultimately far less protective of religious exercise.

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[66] *Id.* Conversely, as Justice Barrett has pointed out, the fact that the government did not regulate something at the founding did not mean that the relevant government actor was regulating at the limit of its constitutional authority and believed it was constitutionally prohibited from further regulations. It may simply mean that the government actor believed that further regulation, while permissible, would be unnecessary. United States v. Rahimi, 602 U.S. 680, 739–40 (2024) (Barrett, J., concurring).

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