STRICT SCRUTINY, COMPELLING STATE INTERESTS, AND RELIGIOUS FREEDOM

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Kathleen Brady's book is a remarkably thorough treatment of contemporary jurisprudence about the Religion Clauses and takes up many of the most important themes—notably equality—that animate those cases and the legal scholarship on them. In these short comments, I would like to highlight just one doctrinal area in which I was left with questions after reading Brady's book.

Brady notes at various places (especially chapters 6 and 7) that the "compelling state interest" component of the strict scrutiny regime that marked the post–*Sherbert v. Verner* period and was incorporated into RFRA suffers from indeterminacy and under-protection of claims for religious freedom. In its place, Brady derives a constitutional principle from the founding that would broadly protect religious freedom. Brady argues, "The formulation that I propose for these limits is as follows. Even where a law or regulation places a substantial burden on religious practice essential to the believer's relationship with the divine, relief is not required under the Free Exercise Clause if the application of the law to the claimant is necessary to protect the existence, peace, or safety of the state, or basic conditions of public order" (239).

My initial question is simply how, if at all, this principle really differs from strict scrutiny, if it were faithfully applied. But more generally, I think Brady is on to a bigger problem here, namely the muddled doctrine surrounding what constitutes a compelling state interest in the first place. There is a problem—or at least a persistent lack of clarity—as to how courts have often arrived at conclusions about whether some asserted government interest is "compelling." And so while my question here is, at one level, a doctrinal quibble, it opens up to a more important set of questions about the authority of the state and the scope of religious liberty.

Strict scrutiny in free exercise cases (pre-*Smith* or under RFRA) is, of course, part of the more general constitutional doctrine of tiered scrutiny, increasing levels of judicial review applicable to a range of constitutional liberties moving up from rational basis review to strict scrutiny. In addition to its application to RFRA claims, the doctrine of judicial scrutiny is shot through the case law in free speech, equal protection, and substantive due process.

But as Richard Fallon noted in one of the only comprehensive treatments of judicial scrutiny as such, the doctrine has garnered little attention, either from the courts or from scholars.[27] And as often happens when we do not really understand what we are talking about, we resort to metaphor.[28] So, we talk about "weighing" the interests of the government against the right to religious freedom. Or as I tell my students, it is sort of like walking into Starbucks and choosing among tall, grande, and venti-sized drinks. If you just need a little pick-me-up, you get a tall coffee—that is like rational basis review. Or maybe even just a decaf, applicable, say, to economic regulation. But if you need a little more to get you going, you get a grande. This is like intermediate scrutiny, applicable to restrictions on commercial speech or sex discrimination. But these areas are now subject to something like heightened intermediate scrutiny after the Virginia Military Institute case (*United*

27 Richard Fallon, "Strict Judicial Scrutiny," *UCLA Law Review* 54, no. 5 (2007): 1267–338.

28 For another effort to capture the tiers of scrutiny by metaphor, see Michael Stokes Paulsen, "Medium Rare Scrutiny," *Constitutional Commentary* 15, no. 3 (1998): 397–402.

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States v. Virginia), so it is like a grande coffee with a shot of espresso. And then there is a venti coffee when things are really bad—strict scrutiny, the most demanding of judicially administered reviews of legislation, which Gerald Gunther famously said was "'strict' in theory and fatal in fact."[29]

Besides the sloppy metaphors, though, one of the key problems with the scrutiny-based approach is the lack of conceptual clarity about the elements of the test itself. The compelling interest prong of strict scrutiny calls for a *normative* judgment about the end (as opposed to the means, in narrow tailoring) of legislation. But where do we get the normativity?

As Fallon notes, the doctrine of strict scrutiny developed suddenly in the 1960s as the Warren Court sought to craft a judicially administered doctrine across different areas of constitutional law that would differentiate between rights that would garner heightened protection (freedom of religion, freedom of speech, deprivation of life or liberty through criminal procedure) and those (especially economic liberty cases) that would receive only rational basis review, thereby avoiding the dreaded Lochnerism of an earlier Court. The first uses of the phrase "strict scrutiny" or "most rigid scrutiny" came in *Skinner v. Oklahoma* in 1942 (striking down sterilization of repeat criminal offenders) and *Korematsu v. United States* in 1944 (upholding racial classification of Japanese in internment camps during World War II)—ironically because the racial classification in *Korematsu* was upheld, the first signal that perhaps application of strict scrutiny was more rhetorical than precise. The strict scrutiny formulation was then extended dramatically during the 1960s to freedom of speech, free exercise of religion, substantive due process, and equal protection cases. It was tied up with incorporation doctrine as well—as certain constitutional rights came to be seen as fundamental and thereby incorporated against the states through the Fourteenth Amendment, judicial protection and enforcement of those rights came to be tied to heightened scrutiny analysis

But back to my question about where we might get a normative answer to what constitutes a compelling interest, the Supreme Court has, notes Fallon, "frequently adopted an astonishingly casual approach to identifying compelling interests."[30] Consider a sampling of the government interests that the Court has found insufficiently compelling in recent cases: parental control over children's access to violent video games, a host of asserted government interests in campaign finance regulation, preventing social group bias, and administrative efficiency. The Court has, however, found compelling interests in requiring insurance plans to cover contraception, diversity in higher education, national security concerns, preventing criminals from profiting from their crimes, shielding minors from obscenity but not from violence, and preventing judicial corruption. Then there are a host of cases in which the level of scrutiny is never, arguably, adequately specified. Finally, there are cases in which the Court splinters over whether strict scrutiny applies, notably in cases involving the distinction between content-neutral and content-based regulation of speech.

So what *is* a compelling interest? How do we know a compelling interest from a non-compelling, "mundane" interest? The mistake, I think, is trying to answer the question without working out at some level the purposes of political authority. A compelling interest cannot be merely whatever the legislative majority happens to enact—that would undermine the whole purpose of the scrutiny approach, which is to provide the judiciary with the ability to conduct an independent review of the adequacy of the government interest in the legislation. The danger, too often realized, is that the tiers of scrutiny become subject to a judicial realist complaint that something else is going on.

29 Gerald Gunther, "The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," *Harvard Law Review* 86, no. 1 (1972): 1–48, at 8.

30 Fallon, "Strict Judicial Scrutiny," 1321.

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Maybe strict scrutiny can be salvaged from its Warren Court roots, but only if we get clear about the purposes and aims of political authority. This account might be that because government is limited, the rights of liberty are necessary to the achievement of human goods. This would involve an assessment of the *weight* of an interest (denoting its importance amid a hierarchy of ends of government), the *occurrence* of an interest, and the *centrality* of an interest (as a core function of government, an overall assessment of core and peripheral purposes). What we would need is discourse and deliberation about the *ends*—not interests—of government and the need for political authority to foster the common good. One aspect of that good is freedom of religion, as we have been so admirably reminded in Brady's book.

FREE EXERCISE EXEMPTIONISM AND THE EVAPORATION OF THE INALIENABLE CHARACTER OF RELIGIOUS LIBERTY

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There is much to admire in Kathleen Brady's *The Distinctiveness of Religion in American Law*. First and foremost, the book thoroughly engages the current church-state scholarly literature. Brady seems to have read nearly every recent publication on the subject, which is no small task. For those new to the field or those looking to get caught up on current academic thinking about religious liberty and American constitutional law, *The Distinctiveness of Religion in American Law* is a good place to start.

The book also serves as an excellent example of what Jack Balkin calls "living originalism,"[31] though Brady does not describe it as such. Brady takes the founders seriously, attempting to understand their underlying principles. She is not slavish toward them, however, nor does she defer to their original intentions or even to the original meaning of the First Amendment's Religion Clauses. One certainly may dispute whether living originalism is the best method (or, even, a proper method) for interpreting the Constitution, but if one is going to adopt it, *The Distinctiveness of Religion in American Law* offers a distinctive example of how to do living originalism well.

The book has other virtues, but let me mention just one more: Brady's attempt to answer the charge of sectarianism. "Religious faith is not inscrutable," she writes, "to those without religious commitments. It is also not silly or outdated. It is something rooted in our nature as humans" (93). I am not one of the critics she is attempting to persuade, but I think she offers them as good of an argument as can be made. It too often is simply presumed that faith is opposed to reason. That is not true; at least, it need not be true. Reason may not confirm the truth of any particular faith—it may not even *confirm* the truth of faith at all—but reason does not demonstrate the falsity or irrationality of all faith. Brady is exactly right when she concludes that "we must leave open the possibility that the religious commitments many people hold refer to something true about the world and about human ends and purposes. Any other assumption . . . would not fit with human capacities and human realities" (99). I would add that any other assumption also does not fit with epistemological or philosophical reality.

31 Jack M. Balkin, *Living Originalism* (Cambridge, MA: Belknap Press of Harvard University Press, 2011).

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