

INVOCATION OF STRICT SCRUTINY IN INDIA: WHY THE OPPOSITION?

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*The primary focus of this paper is to analyse the suitability and applicability of the United States doctrine of strict scrutiny to Indian constitutional jurisprudence. Courts in India have employed the principle of presumption of constitutionality as well as the rational nexus test to ascertain the constitutionality of laws allegedly violating the rule of equality. In contradistinction, the strict scrutiny doctrine subjects laws based on certain suspect classifications or infringing fundamental rights to higher judicial scrutiny. This paper seeks to analyse the contours of the strict scrutiny doctrine and the approach of the Indian judiciary in engaging with it. Though elements of the doctrine are enshrined in the Indian Constitution, it remains to be seen whether a direct application of the same is desirable in the Indian context, given its vagueness and the constitutional conceptions of equality and rights. ***

I. INTRODUCTION

Some recent decisions of the Supreme Court and many High Courts have shown an increasing willingness of judges to engage with the United States ('US') doctrine of strict scrutiny while reviewing legislative actions for their implications on fundamental rights. There have been instances where the application of the doctrine has been categorically rejected, whereas many cases have gone ahead and incorporated it in Indian constitutional law and practice. While this development has been welcomed by many, Prof. Mahendra P. Singh has criticized the Delhi High Court for resorting to the strict scrutiny test in *Naz Foundation v. Government of NCT of Delhi* ('*Naz Foundation*').¹ His point is that courts in India have been applying the rational nexus test to ascertain the constitutionality of laws in equality cases requiring a reasonable classification based on an intelligible differentia having a rational nexus with the objective sought to be achieved, and that the presumption of constitutionality has been a

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¹ 160 DLT 277; see generally, Mahendra P. Singh, *Decriminalization of Homosexuality and the Constitution*, 2 NUJS L. REV. 361 (2009).

self imposed judicial restraint for as long as the Constitution has been in force. On the contrary, to explain the strict scrutiny doctrine tersely, it subjects laws based on certain suspect classifications or infringing preferred fundamental rights to heightened judicial scrutiny. It requires the classification or infringement to be narrowly tailored to achieve a compelling governmental necessity to save the law from the taint of unconstitutionality, and the burden is on the State to prove the compelling necessity and narrow tailoring rather than the individual proving the violation of fundamental rights. I am broadly in agreement with Professor Singh, but the question remains: Why should Indian courts not be taking recourse to the doctrine of strict scrutiny? The assertion is not against learning and borrowing from foreign jurisdictions. The rational nexus test was itself imported from the US in the 1950s. So are there any distinct features in the Indian constitutional tradition which preclude the judiciary from shifting to a strict scrutiny analysis? If not, standards of judicial review are not entrenched like the constitutional text; there is nothing that prevents the courts from treating strict scrutiny as an integral component in the judicial review of fundamental rights in years to come.

I argue in this paper that the ability of courts to select an appropriate standard of review is limited by the constitutional text and tradition. The Constitution of India enshrines the most valuable ingredient of a strict scrutiny analysis by prohibiting discrimination purely on status grounds. But we would do well to desist from embracing the doctrine in its entirety given its vagueness and the constitutional conceptions of equality and rights.

II. STRICT SCRUTINY – A VAGUE STANDARD OF REVIEW

As we begin to muse over the utility of the strict scrutiny doctrine to the Indian context, it would be most instructive to get an idea of the value it commands in the US – the place where it was born and developed. Proponents of its use have never called for a blanket subjection of all fundamental rights infringing measures to this test. Indeed, “laws infringing upon fundamental rights are subject to strict scrutiny, but only some of those rights, only some of the time, and only when challenged by some people.”² But the moment it comes into play, legislative actions to which it applies are invariably invalidated, earning it the epithet “strict in theory and fatal in fact”³ although this may not be entirely true.⁴

The origin of strict scrutiny in American constitutional law has generally been traced to the judicial response to the problems of a formalistic constitutional interpretation. Faithful to the imperative of protecting civil and

² Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 239 (2006).

³ See Gerald Gunther, *The Supreme Court, 1971 Term - Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). (This term was coined by Gerald Gunther in 1972).

⁴ For empirical evidence see Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VANDERBILT L. REV. 793 (2006).

political liberties from State encroachment, the US Supreme Court, in the well-known *Lochner* case struck down a worker-protective law for its adverse implications on the freedom of contract.⁵ It is only after the situation created by the New Deal Legislations that the Court began to show more deference to legislative policy with the adoption of the rational nexus test to review labour and economic regulations.⁶ But then, in the famous Footnote 4 of *Carolene Products*, an exception was carved out requiring a heightened standard of review for the protection of certain ‘preferred rights’ and ‘discrete and insular minorities’.⁷ It took a considerably long time for the doctrine to evolve into the coherent three part test as we have it today- a story which is not very relevant for my analysis⁸ but one point bears mention here. The chief concern guiding the enunciation and subsequent development of the doctrine was to arrive at an outcome-determinative rule-like standard in constitutional adjudication which could discipline judicial discretion.⁹

The vagueness in the test, however, leaves much to be desired for. What is a compelling governmental necessity? Is this determination a part of the judicial function in the first place? In a constitutional democracy, the legislature should principally be entitled to make laws for the achievement of any purpose as long as it is not excluded by the constitution. Ascertaining the importance of the object of legislation is a political question requiring only a minimal role for courts committed to the idea of non-interference with the constitutional powers and functions of other organs. Also, what counts as an important legislative purpose cannot be determined in abstraction without having any knowledge of the right being sought to be regulated and the intensity of the infringing measure? Resultantly, in countries like Germany where the doctrine of proportionality is the predominant test invoked in rights-adjudication, the question of importance arises only at the final stage of balancing.¹⁰ With strict scrutiny, however, what qualifies as a compelling

⁵ *Lochner v. New York*, 198 U.S. 45 (1905).

⁶ See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Nat'l Labor Relations Bd. v. Jones & Laughlin*, 301 U.S. 1 (1937); *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

⁷ *Id.*, 152-53, n.4 (emphasis added). (There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . . Nor need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry).

⁸ See generally, Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355 (2006).

⁹ Christina E. Wells, *Beyond Campaign Finance: The First Amendment Implications of Nixon v. Shrink Missouri Government PAC*, 66 MO. L. REV. 141, 160 (2001).

¹⁰ See generally, Dieter Grimm, *Proportionality in Canadian and German Constitutional Law Jurisprudence*, 57 UNIV. OF TORONTO L.J. 383 (2007).

interest depends on the value that individual judges ascribe to different rights and the rigorouslyness of scrutiny an infringing measure has to undergo regardless of any textual basis for it or not.¹¹ Moreover, there is little that US courts have said about the level of generality at which to specify governmental interests.¹²

Apart from this, what if an impugned State action is thought to be directed towards an objective deemed compelling enough? Is this a sufficient reason to prevent it from being declared unconstitutional? Strict scrutiny definitely requires it to be narrowly tailored, but does the provocation of the compelling objective and narrow tailoring give the State a license to act in ways which are otherwise unacceptable under the constitution? Debates over affirmative action policies in the US have focused on whether redressal of lingering effects of past discrimination or racial diversity in American society is a more acceptable rationale to base them on. If, however, there is consensus that the US Constitution espouses a colour-blind public sphere, what makes either of these reasons so special as to permit this deviation in the first place?¹³ I believe that extra-constitutional reasons cannot help justify the violation of constitutionally-entrenched rights. If reasons can be located in the constitution itself, these measures no longer remain exceptional cases tolerated for the sake of certain interests deemed important enough to be protected irrespective of other foundational concerns. At times, as I elucidate in part IV below, these restrictions are in themselves integral elements of the constitutional framework. Thus, in India, no matter how compelling it may be for the State to curb dissent, the freedom of newspapers to point out flaws in the government's employment guarantee programme cannot be curtailed as long as the grounds for imposing restrictions are not derived from Article 19(2) of the Constitution.¹⁴ The only issue then that remains to be figured out whether there exists a textual basis for the restriction.

¹¹ Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 56 UCLA L. REV. 1267, 1315, 1322 (2007). (Fallon notes that judicial practice in the US reveals three distinguishable versions of strict scrutiny- "One stringent version allows infringements of constitutional rights only to avert catastrophic or nearly catastrophic harms. Another, which views legislation as appropriately suspect when likely to reflect constitutionally forbidden purposes, aims at "smoking out" illicit governmental motives. A third version of strict scrutiny, partly belying the test's name, is not terribly strict at all and amounts to little more than weighted balancing, with the scales tipped slightly to favour the protected right." This leaves ample discretion with judges to vary their applications of strict scrutiny depending on personal assessments of circumstances.) *Id.*, 1271.

¹² *Id.*, 1271, 1323-1325.

¹³ Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427 (1997) (posing a similar question and going on to argue that affirmative action programmes are constitutional in the US).

¹⁴ The Constitution of India, 1950, Art. 19(2): "Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence."

Again, it is difficult to find a constitutional grounding for arguments on narrow tailoring, while striking down a law or executive action on this prong of the two-part test, how can courts be so sure that there exist alternative means which would be as effective in achieving the desired goal by imposing lesser burdens on fundamental rights? Courts in the US generally enquire whether an impugned measure is ‘under-inclusive’ or ‘over-inclusive’ to see if it is the least restrictive means available under the circumstances¹⁵ but it is also possible for the impugned measure to dispense rewards, making the context extremely important. For George Schetler, over-inclusiveness becomes relevant only when a benefit is conferred, whereas under-inclusiveness is pertinent in case a burden is imposed.¹⁶ Having it the other way around would be indulging a fallacy – if one deserves an advantage or deprivation, one does so regardless of how others are placed or affected.¹⁷ This nicely explains why courts in India have refused to strike down social reform measures merely because they are not uniformly applied to all religious communities.¹⁸ In fact, even in case of a benefit-conferring measure, if under-inclusiveness is to be the only criterion to judge narrow tailoring, a positive measure like reservations for Scheduled Castes would likely be held unconstitutional for not including similarly situated Muslim and Christian castes within its ambit, thereby depriving other deserving beneficiaries.¹⁹ The problem here lies in the limited remedies available under a strong form of judicial review to check constitutional wrongs. Courts inspired by the American model only pronounce upon the constitutionality of a State action. Little attention is paid to explore other logical remedies catering to the peculiar facts and issues of a given case.

Finally, what if the impugned measure is over-inclusive, but at the same time remains the least restrictive means available to the State?²⁰ Also, do the two stages of the strict scrutiny analysis adequately protect fundamental rights? If it is feasible to take away a right in its entirety to accommodate a measure which is narrowly tailored to achieve a desired purpose, the rights discourse would lose its normative significance. It would only take more pressing utilitarian concerns for rights to be discarded away. On the contrary, we see that even though German courts carry out a balancing exercise; the Basic Law of 1949 prevents the validation

¹⁵ See, *Church of the Lukumi Babalu Aye Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (under inclusive); *Simon & Schuster Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121-23 (1991) (over inclusive).

¹⁶ George Schedler, *Does Strict Judicial Scrutiny Involve the Tu Quoque Fallacy?* 9 LAW AND PHILOSOPHY 269-283 (1990).

¹⁷ *Id.*

¹⁸ See, *State of Bombay v. Narasu Appa Mali*, AIR 1952 Bom 84.

¹⁹ Kamala Sankaran, *Issues Before the Courts*, India Seminar, October 2009, available at http://www.india-seminar.com/2009/602/602_kamala_sankaran.htm (Last Visited on April 13, 2010). (The question of the constitutionality of Paragraph 3, Constitutional (Scheduled Castes) Order, 1950 which makes these exclusions is pending before the Supreme Court, but it has not been put to rigorous scrutiny in the past in spite of the elaborate powers assumed under the guise of judicial review).

²⁰ Fallon, *supra* note 11, 1328-1329.

of measures which affect the very essence of a fundamental right.²¹ Similarly, courts in the US have developed other alternatives like intermediate scrutiny through which meaningful protection is accorded to fundamental rights, resulting in a diminished pragmatic significance of strict scrutiny. For Richard Fallon, the operative terms of the test are so vague that it is “capable of varying applications from one justice and one case to another.”²² Courts would do well, he believes, in acknowledging the role of a proportionality-like analysis when confronted with questions of justification of infringements, while at the same time remaining slightly tilted in favour of rights.²³

As far as India is concerned, the choice of courts in selecting an appropriate standard of review is constrained and guided by the provisions of the Constitution. A blanket importation of the doctrine would be implausible and untenable for the Indian context. There are definitely some positive features which the framers of the Constitution have done well to incorporate, but having strict scrutiny as the sole determinative test in all fundamental rights adjudication would contradict the constitutional text and spirit and judicial practice of sixty years or so. I elaborate below with special emphasis on equality, personal autonomy and rights.

III. THE CONSTITUTIONAL CONCEPTION OF EQUALITY

Ambiguities in the constitutional text leave considerable scope for judicial interpretation. The problem is rooted in the indeterminacy of any language generally but it becomes more apparent when the framers of the constitution opt merely to state a constitutional ideal in the particular text rather than enshrining an intelligible rule of decision-making which can then be mechanically applied to reach a determinative outcome. To proscribe the State from denying to “any person within its jurisdiction the equal protection of the laws” as the Fourteenth Amendment to the US Constitution does, is to simply embody the ideal of equality in the constitution, leaving the determination of its meaning and import to the courts. How is equality to be interpreted? What kinds of State actions violate the Equal Protection Clause (‘EPC’)? What desirable end should the idea of equality be envisaged to be leading to? These are difficult questions, all for the judicial branch in the US to mull over.

Answers to these questions have largely been guided by what Owen M. Fiss calls the mediating principle of antidiscrimination.²⁴ The EPC has come to be understood as prohibiting discrimination on the basis of illegitimate, irrational, or purely arbitrary grounds. Motivated by the history and purpose of the EPC which

²¹ Basic Law for the Federation of Germany (Grundgesetz, GG), 1949, Art. 19, §2.

²² Fallon, *supra* note 11, 1336.

²³ *Id.*, 1330.

²⁴ See generally, Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

was added to the Constitution for the protection of African Americans after the American Civil War, courts have gone on to designate certain similar classes as ‘suspect’, invocation of which would invite heightened judicial scrutiny. Today, any distinction on the basis of race, national origin or being an alien is viewed skeptically, requiring it to be narrowly tailored to achieve a compelling State necessity to withstand judicial disapproval.²⁵ The problem here is that these distinctions are seen as suspect regardless of their context or purpose. Constitutional interpretation guided by a symmetrical notion of colour blindness may prevent hostile discrimination against African Americans, but it would at the same time, using the same criterion, hold preferential treatment in favour of African Americans to be impermissible. This prompts Fiss to argue for the abandonment of the anti-discrimination principle and its substitution in judicial deliberations by a group-disadvantaging one premised on the recognition of social groups, requiring the invalidation of only those State practices that aggravate the subordinate position of specially disadvantaged groups.²⁶ Again, how is it to be ascertained which of the classifications are suspect in the first place? Footnote 4 in *Caroline Products* alluded to discrete and insular minority status, but it lost much of its importance subsequently with distinctions on the basis of gender and illegitimacy being recognized as quasi-suspect, triggering a different standard of intermediate scrutiny where a challenged law is required to “substantially advance an important State interest.”²⁷ Distinctions on the basis of sexual orientation, mental retardation, disability or age have never been subjected to such high standards of scrutiny; they continue to be evaluated by the conventional rational nexus analysis.²⁸ What this indicates is that since strict scrutiny is such a powerful analytical tool for the review of State action, courts have been reluctant to extend it to all categories of people lest they may significantly impede governmental functioning.

These problems have rarely arisen in India. A part of Article 14 of the Constitution is definitely inspired by the EPC: “The State shall not deny to any person...the equal protection of the laws within the territory of India.” The framers of the Constitution, however, did not end with Article 14. They ventured ahead and provided context to the ideal of equality in Articles 15 to 18 of the Constitution. Whereas Articles 15(1), 15(2), 16(1) and 16(2) enshrine something akin to the anti-discrimination principle, Articles 15(3), 15(4), 15(5), and 16(4) recognize the existence of disadvantaged social groups and exclude positive State actions in their favour from being scrutinized for their implications on the anti-discrimination principle. Article 17 mandates the abolition of untouchability by a law of Parliament – an

²⁵ See, *Regents of the University of California v. Bakke*, 438 U.S. 265, 290-93 (1978) (race), and *Graham v. Richardson*, 403 U.S. 365, 371 (1971) (national origin and being an alien).

²⁶ Fiss, *supra* note 24.

²⁷ See, *Craig v. Boren* 429 U.S. 190, 197 (1976) (gender); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972) (illegitimacy).

²⁸ Aaron Baker, *Proportional, Not Strict, Scrutiny: Against A U.S. “Suspect Classifications” Model Under Art.14 ECHR in the U.K.*, 56(4) AJCL 847, 869 (2008).

²⁹ *Naz Foundation v. Government of the National Capital Territory of Delhi*, (2009) 160 DLT 277.

obligation which cannot be understood simply in terms of the anti-discrimination principle. Instead, the provision enshrines a duty to protect socially disadvantaged groups from the subordinating practice of untouchability. Here, I respectfully disagree with Sujit Choudhry who regards the reliance of the Court in *Naz Foundation*²⁹ on foreign judgments condemning the criminalization of homosexuality for being discriminatory on the basis of sexual orientation to be analogous with the abolition of untouchability by Article 17.³⁰ His dialogical method of comparing constitutional law is indeed attractive, but the assertion that there is a resonance in this case with pre-existing Indian constitutional premises is neither supported by the text of the Constitution nor by the history of India. Article 17 alludes to the unique Indian practice of ‘untouchability’, a point signified by placing the expression within inverted commas.³¹ The provision seeks to put an end to a continuing history of certain dehumanizing experiences suffered by people placed at the bottom of the caste hierarchy. I doubt if the homosexual community can claim to share a similar history of social ostracization in India. Also, if both were thought to be analogous, the framers would not have treated them differently – while discrimination only on the basis of caste is sought to be dealt with by the public law remedy of writs, the practice of untouchability is a criminal offence.³² Finally, the abolition of titles under Article 18 has got more to do with the ‘equality before the law’ aspect of Article 14, which although crucial, will be ignored in the rest of the paper.

So, when the Constitution itself provides an indication about the content of equality, judges are bound to defer to it in their interpretative exercises. The discretion of Indian courts is limited by the text of the Constitution. In this case, what the ‘equal protection of the laws’ under Article 14 means must be informed and guided by the content of Articles 15 and 16 in particular. Indiscriminate use of the strict scrutiny standard of review is therefore not in sync with the provisions of the Constitution.

Articles 15(1), 15(2), and 16(2) which prohibit discrimination against citizens only on the basis of certain specified grounds in fact embody the most valuable aspect of the strict scrutiny test. Most certainly, the Constitution would not permit invidious discrimination only on the basis of a citizen’s status. But at one level, these provisions are only an explanation to Article 14, and so we ought not to be reading in a higher standard of review to aid in their interpretation. The

³⁰ See generally, Sujit Choudhry, *How to do Comparative Constitutional Law in India: NAZ Foundation, Same Sex Rights and Dialogical Interpretation*, in *COMPARATIVE CONSTITUTIONALISM IN SOUTH ASIA* (2010).

³¹ V.N. SHUKLA, *CONSTITUTION OF INDIA* 113 (M.P. Singh ed., 2010).

³² It is important to make this clarification here because the Court had relied on strict scrutiny to strike down the legislative provision. So, if Arts. 14 and 15 do not call for its invocation as I argue below, there is even little textual support in Art. 17 to justify its use.

³³ *Supra* note 29.

³⁴ *Id.*, ¶ 48.

only possible questions that may arise for determination are: What is discrimination? Has the citizen been discriminated against only on the basis of one or more forbidden grounds? *Anuj Garg v. Hotel Association of India*,³³ (*'Anuj Garg'*) a leading decision of the Supreme Court invoking the strict scrutiny standard could have simply been decided by adhering to the text of Articles 15(1) and 16(2). In this case, §30 of the Punjab Excise Duty Act 1914, which prohibited the employment of women in premises where liquor or intoxicating drugs were consumed by the public was struck down as unconstitutional for not satisfying the strict scrutiny test. Notable here is that gender is not yet a suspect classification in the US. In fact, a lot of the analysis by Sinha J. confused strict scrutiny with the doctrine of proportionality in vogue in European courts. Rather than ascertaining if the legislative interference was justified in principle, and whether it was proportionate in measure,³⁴ the Court could have held it to be violative of Articles 15(1) and 16(2) for discriminating against women only on the basis of sex. Sticking to the constitutional text, it could have clarified why §30 did not amount to a special provision in favour of women under Article 15(3) while emphasizing the responsibility of the State for the maintenance of law and order and the protection of women.³⁵

Similarly, the question for determination in *Subhash Chandra v. Delhi Subordinate Services Selection Board*³⁶ did not warrant the invocation of strict scrutiny. The Court was required to determine if migrants to Delhi recognized as belonging to Scheduled Castes or Scheduled Tribes in their native States could be brought within the purview of the reservations scheme for employment in the Union Territory of Delhi. It was correct in holding that doing so was not in conformity with Articles 341 and 342 of the Constitution which require Presidential notifications for the specification of Scheduled Castes and Scheduled Tribes in respect to any State or Union Territory and a subsequent law of Parliament for their variation. There was no notification pertaining to Scheduled Tribes in this case. Besides, the Constitution (Scheduled Castes) (Union Territories) Order, 1951 identifying Scheduled Castes in respect of Delhi speaks of the residents of Delhi alone. So, what required a Presidential notification or a law of Parliament, could not be achieved merely by issue of circular letters as it would be violative of the procedure laid down in the Constitution. The assertion that migrants be regarded as Backward Classes under Article 16(4) was untenable in the absence of material before the Court making such a suggestion.³⁷ Given all this, there is nothing additional that strict scrutiny did in this case and so the resort to it was needless.³⁸ On the contrary, even if there were a compelling necessity and the impugned

³⁵ (2008) 3 SCC 1, ¶ 36-37.

³⁶ (2009) 15 SCC 458.

³⁷ *Id.*, ¶ 41-42.

³⁸ *See Id.*, ¶ 43 (for the discussion on strict scrutiny.)

³⁹ P.K. TRIPATHI, SOME INSIGHTS INTO FUNDAMENTAL RIGHTS 67 (1971). (Prof. Tripathi was critical of the nexus test for noticing only the object and criterion of classification (what he termed as

scheme was thought to be narrowly tailored, the Court could not have affirmed it owing to the stated constitutional impediments. Requiring the reservations policy not to abrogate competing rights of others to an unnecessary extent has never been a consistent stand of the judiciary, and it is not uncommon for reservations beyond the 50% threshold to be held valid on account of the special circumstances of a particular case. In fact, the introduction of the 50% rule can better be explained as a judicial attempt to break the shackles of the nexus formula which does not require an examination of the reasonability or quantum of disparity created by the impugned measure.³⁹ This is closer to a proportionality analysis, and not in line with what strict scrutiny does.⁴⁰

To provide this theoretical framework, there are two competing approaches to the limits of legal legitimacy. Whereas John Stuart Mill believes that the use of law in a free society is the task of harm prevention, John Rawls is of the opinion that law should be concerned with the ensuring of justice between different social groups.⁴¹ These are conflicting views, and both find space in the equality provisions of the Constitution. If such is the case, we cannot have the same judicial standard to review all State actions. A strict scrutiny type of review which is more suited for a view of law committed to the prevention of harm and discrimination may not help in examining the validity of affirmative action programmes which aim at achieving distributional equity in education and employment. And hence, in *Ashoka Thakur v. Union of India*,⁴² ('*Ashoka Thakur*') the application of the strict scrutiny test in affirmative action cases was categorically rejected.⁴³ In fact, unlike the US, the debate over reservations in

the 'why' and 'whom' elements respectively) and their mutual relationship. It altogether ignores the special treatment devised for the selected class of persons (the 'what' element) and its relationship with the other two elements. *Id.*, at 58-59. This made him embrace the Supreme Court decision in *M.R. Balaji v. State of Mysore*, AIR 1963 SC 649 which for the first time laid down the 50% limit on reservations).

⁴⁰ See, *Union of India v. Rakesh Kumar*, decided on January 12, 2010, MANU/SC/0021/2010, ¶ 28; <http://www.indiankanoon.org/doc/1356187/> (Last visited on November 11, 2010) (The Supreme Court has clearly stated that inquiries pertaining to the validity of affirmative action measures should be governed by the standard of proportionality rather than the standard of strict scrutiny).

⁴¹ See generally, John Gardner, *Discrimination as Injustice*, 16 OXFORD JOURNAL OF LEGAL STUDIES 353 (1996). I have borrowed this idea from this article.

⁴² (2008) 6 SCC 1.

⁴³ *Id.*, ¶ 209. (K.G. Balakrishnan, C.J. clearly laid down that: "The aforesaid principles applied by the Supreme Court of the United States of America cannot be applied directly to India as the gamut of affirmative action in India is fully supported by constitutional provisions and we have not applied the principles of "suspect legislation" and we have been following the doctrine that every legislation passed by Parliament is presumed to be constitutionally valid unless otherwise proved. We have repeatedly held that the American decisions are not strictly applicable to us and the very same principles of strict scrutiny and suspect legislation were sought to be applied and this Court rejected the same in *Saurabh Chaudri v. Union of India* (supra).")

⁴⁴ See generally, Mahendra P. Singh, *Ashoka Thakur v. Union of India: Divided Verdict on an*

India has rarely focused on equality or the violation of any other fundamental right; it has centered around constitutional provisions on reservations only.⁴⁴ There is also a contestable view that Articles 15(3), 15(4), 15(5) and 16(4) enshrine fundamental rights to positive action.⁴⁵ Even if we reject it, there is still a line of thought endorsed by the Supreme Court which regards these provisions as embodying a substantive conception of equality.⁴⁶ Alternatively, we may also view them as enshrining the principle of asymmetric discrimination in the Constitution, making the use of strict scrutiny less relevant.⁴⁷ So, the recent invocation of the doctrine by the Andhra Pradesh High Court to pronounce upon the constitutionality of reservations for Muslims was uncalled for.⁴⁸ Strict scrutiny is applied when fundamental rights are violated, whereas over the years we have achieved some convergence on the efficacy of reservations as a constitutionally sanctioned policy in favour of backward social groups.

IV. THE PERSONAL AUTONOMY ARGUMENT

It is possible to make a principled differentiation between cases of affirmative action and discrimination and apply the strict scrutiny standard only to the latter. This is precisely what has been attempted in scholarly writings seeking to reconcile *Anuj Garg* with *Ashoka Thakur*.⁴⁹ Drawing from *Anuj Garg* and *Naz Foundation*, Tarunabh Khaitan has tried to establish that Articles 15 and 16 are premised on ideas of personal autonomy and group vulnerability and that it is discrimination disadvantaging a member of a vulnerable group on the basis of a characteristic related to personal autonomy which must be subject to a rigorous standard of review – something which can be principally distinguished from affirmative action programmes enhancing the autonomy of members of vulnerable groups.⁵⁰ He goes ahead to endorse the view of the Delhi High Court in *Naz Foundation* that personal autonomy can act as the common thread to read in

Undivided Social Justice Measure, 1 NUJS L. REV. 193 (2008).

⁴⁵ See, the debate between Mahendra P. Singh and Parmanand Singh: Mahendra P. Singh, *Are Arts. 15(4) and 16(4) Fundamental Rights?*, (1994) 3 SCC (Jour) 33 (arguing in favour of the fundamental right to reservations), and Parmanand Singh, *Fundamental Right to Reservation: A Rejoinder*, (1995) 3 SCC (Jour) 6 (arguing to the contrary).

⁴⁶ See, *State of Kerala v. N.M. Thomas*, AIR 1976 SC 490 (Mathews J.) in *A.B.S.K. Sangh v. Union of India*, (1981) 1 SCC 246 (Chinnappa Reddy J.) and *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 (Jeewan Reddy, J.).

⁴⁷ Sudhir Krishnaswamy & Madhav Khosla, *Reading A K Thakur v. Union of India: Legal Effect and Significance*, 43 EPW 53 (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1376826 (Last visited on April 13 2010).

⁴⁸ *T. Muralidhar Rao v. State of Andhra Pradesh*, Writ petitions Nos. 15267, 15268, 15269, 15270, 15330, 16562, 17086, 18494, 25852 of 2007 and 17679 of 2008.

⁴⁹ See generally, Tarunabh Khaitan, *Beyond Reasonableness – A Rigorous Standard of Review of Article 15 Infringement*, 50 JOURNAL OF INDIAN LAW INSTITUTE 177 (2008).

⁵⁰ See generally, Tarunabh Khaitan, *Reading Swaraj into Article 15: A New Deal for All Minorities*, 2 NUJS L. REV. 419 (2009).

⁵¹ Khaitan, *supra* note 49.

unspecified analogous grounds into Articles 15 and 16. Influenced by writings of John Gardner and Joseph Raz, he regards factors such as immutable status and fundamental choices as affecting personal autonomy. In Articles 15 and 16, while race, sex, place of birth and dissent are immutable in that we have no effective control over them, religion and place of residence are fundamental choices which are also protected by other constitutional rights.

Without denying the significance of personal autonomy, I respectfully disagree with this reading of Articles 15 and 16. Courts may adopt purposivism as the appropriate tool of interpretation, but history and text ought not to be rendered irrelevant. Khaitan himself points out that calls for the enumeration of political creed as a protected category were rejected by the Constituent Assembly as it was thought to be a legitimate basis for the State to discriminate.⁵¹ Is political creed not a matter of personal autonomy? If yes, should courts go ahead and read it into Articles 15(1) and 16(2) against the wishes of the framers of the Constitution? Should it not be left to the Parliament to include it by a constitutional amendment if need be? If courts do decide to disregard the Constituent Assembly on this in the interest of preserving personal autonomy, where should the line be drawn to separate judicial commitment for the protection and enforcement of fundamental rights from its encroachment into the domain of other constitutional organs? There are no clear answers. Moving ahead, on a closer examination of Articles 15(1), 15(2), and 16(2), it is found that the grounds of dissent and place of residence which find mention in Article 16(2) dealing with discrimination in State employment are not listed in the first two clauses of the more general Article 15. In other words, Article 15(1) may not frown upon discrimination only on grounds of dissent or place of residence even if they are regarded as facets of personal autonomy. Resultantly, reservations in education on the basis of residence requirements or institutional preference have never been held to be unconstitutional.⁵² Even with regards to employment or appointment under the Government of, or any local or other authority within a State or Union Territory, the Parliament is free to make a law laying down any requirement as to residence within the particular State or Union Territory prior to such employment or appointment.⁵³ Besides, Article 16(5) immunizes the “operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.” Unlike the affirmative action provisions, here there is no reference to group vulnerability; the protection is available to all religious groups, and the law operates regardless of its implications on personal autonomy.

Reference to personal autonomy would lead us to a lot of uncertainty. What all counts as facets of personal autonomy? How is it to be decided if a

⁵² See, Pradeep Jain v. Union of India, (1984) 3 SCR 942.

⁵³ The Constitution of India, 1950, Art. 16(3).

⁵⁴ JOSEPH RAZ, THE MORALITY OF FREEDOM 372-373 (1986).

category is founded on immutable status or fundamental choices needing heightened protection? If this criterion were accepted, a large number of laws would not be able to withstand judicial scrutiny for invariably implicating some or the other aspect of the individual's autonomy. For example, the Indian Contract Act, 1872 holds contracts involving minors and persons with unsound mind to be void and unenforceable in a court of law. How would such a legal provision survive the autonomy challenge? For Joseph Raz, minimum rationality is an essential condition of autonomy. Since children and persons with unsound minds do not have the requisite mental abilities to form intentions of a sufficiently complex kind and plan their execution, they cannot be said to be makers or authors of their own lives.⁵⁴ So on this account such exclusions in law do not really pose a challenge for the autonomy interpretation of non-discrimination. But this is only one among various conceptions of autonomy. From the perspective of the capabilities approach, the goal of development is the enhancement of human capabilities, and presumption of legal capacity is crucial for enabling all individuals regardless of their mental state to develop such capabilities.⁵⁵ While calls for legal reforms may not be unjustified, the suggestion that they are needed to rectify a discriminatory situation would not be entirely correct as the exclusion here is not solely on an irrelevant status ground. The law is presently valid because it is possible to infer incapacity in the functional realm for children and persons with unsound minds. To clarify further, the exclusion might not indicate a lack of autonomy in the absence of minimum rationality. But at the same time, it would possibly survive the autonomy challenge posed by the capabilities approach.

Now, let us consider a scenario where State run hospitals prefer women over men as nurses. Similarly, we see women and children being selected to work as tea pickers in plantations. How are these selections justified? I clarify that these preferences are not motivated by Articles 15(3); they are solely a result of the traditional association and suitability of women and children with these roles. So, the distinction is made on the basis of a facet of personal autonomy, and yet some of us would not find this unsustainable. Men and older persons may be denied some options for employment which is an integral element of the Razian conception of autonomy,⁵⁶ yet a proper reading of the Constitution I would believe, uphold such actions. It cannot be argued here that the distinction was made purely with a malicious intention of excluding certain groups or classes of people from accessing the stated employment opportunities. We can contrast this with the situation of a woman who was refused permission to appear for an entrance examination for recruitment in a bank only on account of her blindness. Since disability was the only basis for exclusion, the Supreme Court held this to be

⁵⁵ Amita Dhanda, *Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?*, 34(2) SYRACUSE JOURNAL OF INTERNATIONAL LAW AND COMMERCE 429, 436 (2007) (relying on Martha Nussbaum, *FRONTIERS OF JUSTICE: DISABILITIES, NATIONALITY, SPECIES MEMBERSHIP* (2006)).

⁵⁶ Raz, *supra* note 54, 372.

⁵⁷ *Amita v. Union of India*, Writ Petition (civil) 31/ 2000.

⁵⁸ Raz, *supra* note 54, 381.

violative of Article 14.⁵⁷ Her reasonable accommodation in the bank was a distinct possibility. But the story might unravel differently if the visually impaired challenge the Indian Railways' requirement of sight perception as mandatory for anyone who wishes to be employed as a driver. Even if supported by the autonomy paradigm- Razian or otherwise, the challenge would most likely fail unless sufficient technological developments are made to enable their functionality and participation in this sphere.

Article 14 can also invalidate a provision of law prohibiting homosexuals from voting or contesting elections. But holding §377 of the Indian Penal Code, 1860 unconstitutional to the extent to which it criminalizes consenting sex between adults would not be permitted by this reading of Articles 14 and 15 as the discrimination here is not only on grounds of sexual orientation. The argument here is not for or against decriminalizing homosexuality. Only that recourse to strict scrutiny and personal autonomy to justify the holding may not be in line with the institutional constraints imposed on courts by the Constitution. It is to be noted here that for Raz, the ideal of autonomy requires only the availability of morally acceptable options. Non-availability of morally repugnant options rarely reduces a person's choice sufficiently to affect his autonomy.⁵⁸ Now it must surely be for society or State to influence and stipulate what is good and what is evil. He, however, calls for a restraint on coercion unless justified by the need of preventing autonomy infringing harm.⁵⁹ So even if we regard consenting homosexual sex to be undesirable, it ought not to be curbed as it does not harm anyone. On the contrary, as I have been trying to argue, harm prevention and autonomy enhancement are not the only legitimate objectives which the State is constitutionally permitted to undertake. In this case, there are other reasons- maintenance of order in society, health, morality, procreation and the like, which prompt the legislature to designate certain acts and omissions as offences and prescribe punishments for them, and it is not for courts to subject them to a rigorous scrutiny unless required by the Constitution.

The Preamble to the Constitution promises equality of status and opportunity. Equal treatment finds no explicit mention anywhere in the Constitution. I believe other non-specified status grounds may be read into Article 14 without recourse to personal autonomy. As long as discrimination is made only on certain status grounds, it is liable to be struck down. But if we allow other reasons irrespective of their nature to be disregarded in antidiscrimination analysis, there is great likelihood that predilections of judges may end up holding sway over motivations of the legislature.

So, it is the responsibility of courts to ascertain if discrimination is only on specified or non-specified status grounds. If other reasons are involved, the only task they have is to figure out whether these reasons are permissible under the

⁵⁹ *Id.*, 419.

Constitution or not. For example, a State may pass a law exclusively reserving seats in public employment for people domiciled within its territory for a certain period of time. Even though the Legislature may have been guided by the motivation of protecting local interests as more and more enterprising citizens from other States garner most of the State benefits for themselves, such a reasoning howsoever genuine it may be, is not permissible under the scheme of the Constitution: Article 16(1) provides for the equality of opportunities in public employment, Article 16(2) specifically prohibits discrimination only on grounds of dissent and place of residence in public employment, and Article 19(d) guarantees to every citizen the right to move freely throughout the territory of India. But as noted above, the Parliament can stipulate residence requirements in such cases if it so wishes. If personal autonomy were indeed the common thread animating Articles 15 and 16, such constitutionally tolerable outcomes may not have been possible.

Interestingly, we find in the writings of Raz a distinction between rights and values.⁶⁰ There are many valuable conditions, and many conditions we value. But does that mean that the necessary corollary is to have them translated into legal or constitutional rights? By that token he asserts, “if the love of my children is the most important thing to me then I have a right to it.”⁶¹ So, personal autonomy may be important for human beings, and we must strive to create conditions so that everyone is able to lead a worthwhile life without being considerably subordinated by choices of others, but this may not be a sufficient justification especially with the arguments made here, for treating it as the foundational principle of the antidiscrimination provisions in the Constitution. Moreover, following John Rawls, he reckons that human rights in the international arena are moral principles disabling the notion of State sovereignty to the extent of their violation and justifying external intervention for their restoration. Yet there are limits to justifiable interference even in the affairs of an offending State for want of impartiality or possibility of superpower domination. Similarly in the domestic arena, interference of a hegemonizing state in all spheres of human life may pose threats to the autonomy of individuals and groups. At times, even if group practices may appear to be contrary to a particular conception of equality, intervention in their affairs may still be unjustified as untamed diversity is more preferable to a dominant homogeneity. On this account, the existence of personal laws after more than sixty years since the birth of the Republic may not be an anomaly just waiting to be strictly scrutinized; they are reflective of the constitutional culture tolerant of diversity, and so invoking personal autonomy to strike them down may not be supported by the Constitution.

V. INDIVIDUAL AND GROUP RIGHTS

A strict scrutiny approach holds value for societies recognizing the special significance of rights. If rights are important, their infringement deserves

⁶⁰ Joseph Raz, *Human Rights Without Foundation*, available at http://www.ucl.ac.uk/laws/jurisprudence/docs/08_coll_raz.pdf (Last visited on April 13, 2010).

⁶¹ *Id.*

a higher standard of review. Going with the Dworkinian understanding, rights act as trumps over other utilitarian goals of society.⁶² This understanding can be traced to the post-enlightenment Western conceptualization of rights as universal and inalienable which ought to be protected against State encroachments. But if rights are absolute, admitting no limitations what so ever, their ambit must also be restricted to leave space for legitimate government engagements. This is exactly what has happened in the US- the strict scrutiny doctrine is applied only in cases involving certain ‘preferred rights’,⁶³ whereas other more ordinary rights are governed by the intermediate or rational nexus tests.⁶⁴ And even when strict scrutiny is applied, infringement of preferred rights is tolerated if the governmental measure in question is narrowly tailored to promote a compelling State necessity.

The prime target of rights talk in the West has always been State action which was thought to be unnecessarily interfering with the individual’s pursuit of a good life. In the relative absence of State sponsored persecution and oppression, the Indian tradition did not require the development of such a conception of rights. In fact, as Professor Mahendra P. Singh notes, thinking in terms of rights was probably never characteristic of the Indian civilization in its five millennia of existence before colonization by the British in the nineteenth century. People in India have psychologically been more attune to think in terms of duties and responsibilities towards each other rather than making assertions of rights against an all powerful State.⁶⁵ Wary of the possibility of the State’s transgressions vis-à-vis its people, and prompted them to enshrine a code of rights in Part III of the Constitution protected against ordinary laws of the land. The idea of its transcendence mooted in *I.C. Golaknath’s* case,⁶⁶ however, did not find much favour with anyone subsequently, and with the basic structure doctrine firmly entrenched today, it is only the essence of rights which remains sacrosanct akin to the German position.⁶⁷ Talks of Indian constitutionalism being uniquely premised on an interrelationship between rights and duties, and the increasing judicial deference for the Directive Principles of State Policy laid down in Part IV are instances suggesting that Fundamental Rights in the Indian Constitution are a modest exercise having very little to do with the absolutist negative liberty claims in the natural rights tradition.⁶⁸

⁶² Ronald Dworkin, *Rights as Trumps*, THEORIES OF RIGHTS, 153-167 (1984).

⁶³ *Caroline Products*, *supra* notes 6 –7. (Footnote 4 in the *Caroline Products* case cited the rights listed in the Bill of Rights, rights crucial to the operation of the political process, and the right of ‘discrete and insular minorities’ to be free from discrimination as leading candidates for an ‘exacting judicial scrutiny’).

⁶⁴ Fallon, *supra* note 11, 1285.

⁶⁵ Mahendra P. Singh, *Human Rights in the Indian Tradition: An Alternative Model*, 2 NUJS L. REV. 145 (2009).

⁶⁶ *I.C. Golaknath v. State of Punjab*, AIR 1965 SC 845.

⁶⁷ *M. Nagraj v. Union of India*, (2006) 8 SCC 212.

⁶⁸ SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA, 3 - 10 (2009).

So, provisions pertaining to fundamental rights in India can be amended, and most of the guaranteed rights are subject to reasonable restrictions which bear more resemblance to a proportionality analysis than strict scrutiny.⁶⁹ Often, these restrictions are not necessitated merely by exigencies of the time; they may as well be embodiments of other equally important constitutional values. For example, the prohibition of offensive speech against women ought not to be viewed as simply a reasonable restriction in the interest of decency or morality under Article 19(2). Rather, it may also be regarded as stemming from the fundamental duty to renounce practices derogatory to the dignity of women which is as much a part of the Indian Constitution as preferred rights are part of the US Constitution.⁷⁰ Also, true to the Indian tradition of duties, the Constitution enshrines important Directive Principles which the State is obliged to follow in governance. A lot many of them reflect the aspiration of realizing important socio economic rights for the people which requires positive action more than non-interference. Strict scrutiny becomes relevant when the need is to protect fundamental rights from State encroachments. It has little utility in situations where courts assess inactions of other organs on the touchstone of rights. The only possible remedy that strict scrutiny may offer for a fundamental rights violation in a strong judicial review scenario is the declaration of unconstitutionality. But when socio-economic rights are involved, courts need to explore other creative options which would help in the realization of these rights.

Again, as noted in part II, the close link of the strict scrutiny doctrine to the antidiscrimination principle presupposes a constitutional order which does not accord recognition to social groups. What we get is a set of individualistic rights which may rarely be infringed unless more pressing needs so require. But rights in the Indian Constitution are available not only to individuals. Some rights are extended also to distinct social groups. In fact, if diversity is regarded as one of the hallmarks of Indian constitutionalism, rights can never begin and end with the individual citizen alone. Articles 15(1) and 16(2) prohibit discrimination only on grounds of caste, religion, race and the like. Nowhere does the Constitution, however, call for the dismantling of these group affiliations and identities. Certain

⁶⁹ See, *State of Madras v. V.G. Row*, 1952 SCR 597. (The Supreme Court stated: "It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorizing the imposition of the restrictions, considered them to be reasonable.")

⁷⁰ The Constitution of India, 1950, Art. 51A(f).

entitlements are available to citizens on the basis of their membership to social groups,⁷¹ and some other rights have been conferred to groups themselves.⁷²

It can be argued that the nature of rights in the Indian Constitution does not really have much of a bearing on the kind of scrutiny courts subject infringing measures to. So, a strict scrutiny approach may be employed to uphold group rights against undue State interference just as it has been used in other traditions to uphold individual rights. The existence of group rights, however, does not imply absence of individual rights. In fact, both exist simultaneously in the Constitution. It may so happen that strict scrutiny might help in preserving group rights, but just as there are problems with its disregard for groups in the US today, we may end up with a situation where it is invoked to deny the value of individual rights. Instead, the Constitution envisages a balance between the two; while the rights to freedom of religion and of religious denominations to manage their own affairs are safeguarded in Articles 25 and 26, the power of the State to carry out social reforms is also recognized. And the courts have also endeavoured to maintain this balance between denominational autonomy in religious matters and the need for ensuring civil and social liberties against oppression.⁷³

VI. CONCLUSION

This paper has argued against a full fledged embrace of the strict scrutiny doctrine by Indian courts. But the fear that absence of a heightened standard of review will result in the under protection of rights merits some consideration. As evidenced by Article 13, fundamental rights are important no doubt; but the importance they deserve must be gauged from the text of the Constitution, and not the ideological inclinations and policy preferences of judges. Judges are obliged to perform their crucial duty of protecting fundamental rights remaining within the parameters set by the Constitution itself. Having a deferential attitude towards the legislature ought to not invariably imply diminished fundamental rights protection. Rather it signifies respect for a co-equal constitutional creature which is as responsible for upholding the constitutional text and spirit as they are. Conceding ground to legislative interpretation of fundamental rights and reasonable restrictions, and the significance accorded to other important constitutional values is not a sign of weakness it is the most imperative prerequisite for a harmonious constitutional order where every organ of the State diligently carries out its responsibilities for the greater social good. Yet at the same time, in doing so, all organs are obliged to observe fidelity to the Constitution- any transgression must be strongly dealt with.

⁷¹ See, constitutional provisions on affirmative action discussed in part II. See also The Constitution of India, 1950, Art. 29 (every citizen has a right to preserve his distinct script, culture and language).

⁷² Art. 26 providing for rights of religious denominations and Art. 30 guaranteeing the autonomy of religious and linguistic minorities to establish and administer educational institutions of their choice are good examples.

⁷³ See, Venkatarama Devaru v. State of Mysore, AIR 1958 SC 255.

So, if the legislature violates the constitutionally guaranteed rights of the people, it is for courts to step in and check the deviance. But, in doing so they are duty bound to uphold the Constitution, and not anything else. Regardless of the standards they invoke, I believe a culture respectful of rights in the way they are understood in the Constitution will help judges be more cautiously vigilant about infractions.

The argument against strict scrutiny is largely connected to the problems with a strong form of judicial review which has the declaration of unconstitutionality as the only conceivable remedy against violations of fundamental rights. Possibilities of a weaker form of judicial review must be explored so that increasing judicial vigilance may allow the fashioning of other creative remedies which are more respectful of democratic institutions. For example, a weak review coupled with proportionality analysis would, in case of rights infringements let courts have the liberty to suggest alternative means which are less restrictive, while at the same time leaving the option open for allowing the impugned measure to operate for sometime if the goal it pursues is legitimate within the parameters of the Constitution. The Constitution, however, is paramount, and the text would preclude the complete adoption of the doctrine of proportionality either. While Article 19 speaks of reasonable restrictions, Article 25 enshrining the right to freedom of conscience and religion does not. The right is simply subject to public order, morality and health, and the other provisions of part III of the Constitution. Whether this enables the State to take away the right itself if the situation so demands is a discussion for some other time, but what courts cannot do is to employ a proportionality analysis here and claim constitutional backing for it. Even though no hierarchy can be discerned in the importance the Constitution attaches to different rights, it is evident that no single standard of review can be invoked in all rights cases. The leeway judges enjoy in interpreting the Constitution is tempered by its text and tradition, and such ought to be the case with fundamental rights as well.

