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# A BALANCING ACT: OVERCOMING INCOMMENSURABILITY IN RIGHTS ADJUDICATION

*Samantha Knutson Jex*<sup>1</sup>

## INTRODUCTION

If you asked your boss, neighbor, father-in-law, or the clerk at the grocery store which constitutional right is the most important, you would receive a vast array of answers. Some people would say that the right to free speech is more important than the right to privacy. Others would maintain that the right to bear arms is more important than the right to marry who you choose. The conclusion you would likely reach from this exercise would be that different fundamental rights matter more to different people. Because ranking fundamental rights is a subjective process, the concept of rights adjudication at the Supreme Court level can be disconcerting. Rights adjudication—the legal process of resolving a dispute regarding rights<sup>2</sup>—in the United States’ highest court influences who has rights as well as which rights will be upheld in various situations. The holdings of these cases have the potential to limit or expand the reach of fundamental

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  - 2 Wex Definitions Team, *Adjudication*, Legal Information Institute (May 2020), [https://www.law.cornell.edu/wex/adjudication#:~:text=A djudication%20refers%20to%20the%20legal%20process%20of%20resolving,of%20the%20case%20have%20matured%20enough%20to%20](https://www.law.cornell.edu/wex/adjudication#:~:text=A%20djudication%20refers%20to%20the%20legal%20process%20of%20resolving,of%20the%20case%20have%20matured%20enough%20to%20)

rights Americans hold dear, whatever they may be, making the process of rights adjudication worth evaluating.

The Supreme Court's current tiered system for rights adjudication suggests that the Court respects rights. This respect is demonstrated by their commitment to protect rights from unnecessary infringement by the government. The tiered system also suggests that the Court believes that not all rights are created equally since various rights are given different levels of scrutiny. In the past, the Supreme Court has applied these tiers of scrutiny to reject affirmative action programs that benefit groups that have not personally experienced discrimination,<sup>3</sup> laws that target certain classes of people because of animus,<sup>4</sup> and policies that exclude women from male-only institutions on the basis of stereotypes about men and women's capabilities.<sup>5</sup> These applications have prioritized rights over government agendas, emphasizing the importance of rights in our American federal system. While the existing tiers of scrutiny provide a strong framework for the Court to use as they adjudicate cases involving fundamental rights, they are not sufficient to be applied in cases involving conflicting fundamental rights—rights that the Court uses the highest level of scrutiny to protect because they are of primary importance in America.

In cases such as *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*<sup>6</sup> and *Cox Broadcasting Corp. v. Cohn*,<sup>7</sup> both parties feel that their fundamental rights have been violated. The Court typically applies the highest level of scrutiny in cases involving fundamental rights because these rights are of primary importance to the American sense of liberty, but even the highest level of scrutiny is insufficient to deal with cases that involve conflicting fundamental rights for reasons that will be expounded in this paper. This paper

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3 City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989).

4 United States Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973).

5 United States v. Virginia, 518 U.S. 515 (1996).

6 Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 584 U.S. \_\_\_\_ (2018).

7 Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

discusses the current systems in place for rights adjudication in the United States and internationally. I will examine the insufficiencies of both systems and the consequences of such insufficiencies to support my claim that a modified system should be applied in rights adjudication cases to ensure that all fundamental rights are given the deference they deserve. The modified system that I propose is called the “incommensurability test.”

## BACKGROUND

### I. FUNDAMENTAL RIGHTS

Fundamental rights are those seen as central to “the American scheme of ordered liberty.”<sup>8</sup> In this paper, rights will refer to “claim[s] recognized and delimited by law for the purpose of securing [them].”<sup>9</sup> The idea that we have inherent rights was powerfully articulated in the Declaration of Independence, which states: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of happiness.”<sup>10</sup> That idea was reemphasized with the enumeration of rights in the Bill of Rights which was officially adopted in 1791.

In *Barron v. Baltimore*, Justice Marshall declared that the Bill of Rights only applied to the federal government.<sup>11</sup> It remained that way until 1897 when the Supreme Court began applying the Bill of Rights to state actions via the Fourteenth Amendment through a process called incorporation. Today, most of the Bill of Rights has been incorporated to apply to the states. It is also through the Fourteenth Amendment that other rights have come to be seen as fundamental

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8 McDonald v. City of Chicago, Illinois, 561 U.S. \_\_\_\_ (2010), *Duncan v. Louisiana*, 391 U.S. 145 (1968).

9 *Legal Right*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/legal%20right> (last visited Dec. 7, 2021).

10 DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

11 *Barron v. Mayor & City Council of Baltimore*, 32 U.S. 243 (1833).

rights. These include the right to privacy,<sup>12</sup> the right to marry,<sup>13</sup> the right to vote,<sup>14</sup> and the right to travel.<sup>15</sup>

It should be noted that if a right is deemed fundamental by the Supreme Court through the process of incorporation, it is not guaranteed to remain a fundamental right. In *Lochner v. New York*, decided in 1905, the Supreme Court found that the right to contract is a fundamental right protected by the due process clause of the Fourteenth Amendment.<sup>16</sup> In justifying this decision, the Supreme Court focused on the importance of economic contracts in the context of individual liberty. This idea was overturned in *West Coast Hotel v. Parrish*<sup>17</sup> in 1937. Here the Court declared that there is not a fundamental right to contract, saying, “The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law.”<sup>18</sup> Because incorporated rights are not included in the text of the Constitution and instead derive from contemporarily informed interpretations of the Constitution, incorporated fundamental rights may later be viewed as non-fundamental.

## II. WHEN MIGHT A FUNDAMENTAL RIGHT BE PITTED AGAINST ANOTHER?

If litigants feel that a constitutional right has been violated, they turn to the Courts to seek redress. On occasion, both parties involved in a Court case feel that a fundamental right has been violated. Some examples include:

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- 12     *Griswold v. Connecticut*, 381 U.S. 479 (1965).
  - 13     *Loving v. Virginia*, 388 U.S. 1 (1967), *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).
  - 14     *See, e.g., Wesberry v. Sanders*, 376 U.S. 1, 6-7 (1964), *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964), 42 U.S.C. §1973gg.
  - 15     *See, e.g., Dunn v. Blumstein*, 405 US 330 (1972).
  - 16     *Lochner v. New York*, 198 U.S. 45 (1905).
  - 17     *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).
  - 18     *Id.*

*A. Masterpiece Cakeshop v. Colorado Civil Rights Commission*

In 2012, Jack Phillips, owner of Masterpiece Cakeshop, chose not to make a cake for a same-sex couple's wedding, citing religious reasons. The couple filed a charge pursuant to the Colorado Anti-Discrimination Act (CADA), which forbids discrimination based on sexual orientation. Supporting the same-sex couple's case, the Supreme Court ruled that the right to marry is a fundamental right in *Loving v. Virginia*.<sup>19</sup> In *Obergefell v. Hodges*, the Supreme Court held that that fundamental right includes the right to marry someone of the same gender.<sup>20</sup> While denying someone a wedding cake is not directly denying their right to get married, it can be understood as discrimination based on a fundamental right. The treatment of such discrimination reflects how the Court views the underlying fundamental right. On the other side of the case was Jack Phillips. He viewed his cakes as acts of expression and, as such, exercises of his free speech. Additionally, he did not feel comfortable complying with their request for a cake because of his sincerely held religious convictions. He claimed that CADA attempted to inhibit his rights to free speech and to practice his religion, both of which are fundamental rights guaranteed by the first amendment. Thus, in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the rights of freedom of speech and religion are pitted against the prevention of sex discrimination in the public sphere based on the fundamental right to marry.<sup>21</sup>

*B. Cox Broadcasting Corp. v. Cohn*

*Cox Broadcasting Corp. v. Cohn* addresses the right to privacy versus the right to freedom of speech and the press.<sup>22</sup> Martin Cohn's daughter was raped and killed by a group of youth. During the

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19 *Loving v. Virginia*, 388 U.S. 1 (1967).

20 *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).

21 *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 584 U.S. \_\_\_\_ (2018).

22 *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

criminal proceedings, a reporter covering the trial found the name of the rape victim on the indictments that were public record, though the name had not previously been announced. That day, the reporter broadcasted the name over a television station owned by Cox Broadcasting Corp. Cohn filed a case against Cox Broadcasting, claiming that his right to privacy had been invaded by the release of his daughter's name over the television channel. The right to privacy has been recognized as a fundamental right since *Griswold v. Connecticut*.<sup>23</sup> Appellants claimed that they had the right to broadcast the information under the First and Fourteenth Amendments. Hence, this case pits the right to privacy against the rights to freedom of speech and the press.

For cases like *Cox Broadcasting* and *Masterpiece Cakeshop*, the preeminent argument against rights adjudication is that rights are incommensurable, or that there is no common standard by which they can be judged. As Justice Kennedy stated, attempting to compare rights is like “judging whether a particular line is longer than a particular rock is heavy.”<sup>24</sup> One can attempt to determine the weight of a line or the length of a rock, but the results of the attempt would be unsatisfactory at best. Similarly, one can attempt to compare the right to privacy and the right to free speech, but there is no common denominator that can be used to simplify the comparison. Fundamental rights are individual and protect very different aspects of American life, making it impossible to determine which is of greater worth or which right should trump all. Additionally, comparing rights creates situations in which one person's fundamental rights are minimized because another person's fundamental rights are being exercised which is antithetical to the very idea of individual rights. Thus, when certain cases necessitate that the Court adjudicate between incommensurable fundamental rights, the Court is essentially being asked to do the impossible.

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

24     *Bendix Autolite v. Midwesco Enterprises*, 486 U.S. 888 (1988).

### III. CURRENT SYSTEM FOR ADJUDICATING RIGHTS IN THE UNITED STATES

Currently, the United States has a three-tiered structure for adjudicating rights: the rational basis test, the intermediate scrutiny test, and the strict scrutiny test. The rational basis test is the lowest tier of scrutiny. The idea encapsulated by rational basis was applied in *Munn v. Illinois*,<sup>25</sup> though some attribute the foundation of the test to be Footnote 4 from *United States v. Carolene Products Co.*<sup>26</sup> The test is used in economic cases, as well as cases that do not warrant intermediate or strict scrutiny. The rational basis test requires that a legitimate government interest is met by a means that is rationally related. The intermediate scrutiny test, developed in *Craig v. Boren*,<sup>27</sup> is used for quasi-suspect equal protection clause classes like gender and discrimination against nonmarital children. To satisfy intermediate scrutiny, the government must have an important interest that is met by a means that is substantially related to the end. The highest tier is strict scrutiny, a test that was first articulated as we understand it today in *Sherbert v. Verner*.<sup>28</sup> Strict scrutiny requires that a compelling governmental interest be met by a means that is narrowly tailored and the least restrictive way of seeking the compelling interest. Strict scrutiny is used in cases that fall under the due process clause and suspect equal protection clause classes such as race and national origin. Because fundamental rights are so important, a governmental regulation that infringes a fundamental right must meet strict scrutiny.

Strict scrutiny has been used in cases such as *Korematsu v. United States*,<sup>29</sup> *Regents of the University of California v. Bakke*,<sup>30</sup>

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25 *Munn v. Illinois*, 94 U.S. 113 (1876).

26 *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), from footnote 4 of SCOTUS decision.

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

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

29 *Korematsu v. United States*, 323 U.S. 214 (1944).

30 *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978).

*Grutter v. Bollinger*,<sup>31</sup> *Gratz v. Bollinger*,<sup>32</sup> and *City of Richmond v. J.A. Croson Co.*<sup>33</sup> Strict scrutiny cases show the high bar that the highest tier sets for the government in cases involving immutable characteristics and fundamental rights. Few governmental interests have been deemed compelling, and even fewer have been met by narrowly tailored means. For example, in *Gratz* and *Grutter*, the Court articulated that promoting diverse educational environments in higher education is a compelling interest. The admissions system examined in *Grutter* was held to be narrowly tailored because it used race as a factor in holistic, individualized assessment for university admission.<sup>34</sup> However, the Court ruled that the admissions system examined in *Gratz* violated the equal protection clause because it used race as a determining factor in university admissions.<sup>35</sup> These cases demonstrate that even when a compelling interest has been identified, the rule or act designed to meet the compelling interest might not justify the compelling governmental interest. Passing strict scrutiny is uncommon.

#### IV. CURRENT SYSTEM FOR ADJUDICATING RIGHTS IN OTHER COUNTRIES

The prevailing alternative to strict scrutiny is the proportionality test. Though this test has no standing in the United States, some form of the proportionality test is used in the constitutional courts of Europe, Canada, and some Latin American courts, as well as in South Korea, Taiwan, Hong Kong, Malaysia, South Africa, Israel, and Australia.<sup>36</sup> Because the test is used so widely, it is fitting to examine—and potentially learn from—this international rights

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31 *Grutter v. Bollinger*, 539 U.S. 306 (2003).

32 *Gratz v. Bollinger*, 539 U.S. 244 (2003).

33 *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989).

34 *Grutter v. Bollinger*, 539 U.S. 306 (2003).

35 *Gratz v. Bollinger*, 539 U.S. 244 (2003).

36 Jamal Greene, *Rights as Trumps*, 132 Harv. L. Rev. 28, 30-38 (2018) (importance of rights and frameworks used to determine them).

adjudication approach. Proportionality has similar elements to the United States' strict scrutiny test, but there are key differences. The proportionality test originated in German administrative law and was first articulated in *R Daly v. Secretary of State for the Home Department*.<sup>37</sup> The test can be broken into four questions: Is the government's purpose in taking the case legitimate? does the means used to achieve the legitimate end make some contribution to that purpose? is the law in question necessary to achieve the stated interest and is it the least restrictive means of doing so? and is the law proportional in the strictest sense and do the benefits associated with the law outweigh the burden imposed on the fundamental right? We look at each question in comparison with strict scrutiny.

The first two questions resemble the language our Supreme Court uses when invoking the rational basis test, the test used for cases involving nonfundamental rights in the United States. Whereas strict scrutiny asks for a compelling purpose, the first question of proportionality seeks only a legitimate governmental purpose, making the qualifying threshold easier to cross. Like the first prong of proportionality, the second question creates a fairly lax standard as most ends can be construed to be reasonably related to a legitimate governmental end. The third question examines the necessity of the law and whether the law is the least restrictive way of reaching the legitimate end. This question closely resembles the narrowly tailored prong of strict scrutiny, indicating that both tests are interested in protecting fundamental rights from unnecessary government encroachment. Taken together, the first three parts to the proportionality test utilize a different approach than strict scrutiny but do not offer anything additional to the United States' existing tests. The last step of the proportionality test is what sets proportionality apart from strict scrutiny. To measure proportionality in the strictest sense, judges assess whether there is "significant disproportionality between the marginal benefit to the government and the marginal cost to the rights bearer."<sup>38</sup> The United States court system uses a

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37 Regina v. Secretary of State for the Home Department, Ex Parte Daly, UKHL 26 (2001) (appeal taken from HL).

38 Jamal Greene, *Rights as Trumps*, 132 Harvard L. R. 28, 59 (2017).

similar cost-benefit analysis in cases involving fourth amendment violations and the exclusionary rule, but the courts have yet to apply similar analyses in other realms.

Because the idea of proportionality is not commonly used or understood in the United States, it may be helpful to see what proportionality looks like in practice. In *R. Daly v. Secretary of State*, a prisoner—Daly—challenged the lawfulness of a policy that allowed prison staff to conduct searches of the living quarters of the prisoners without them present.<sup>39</sup> During such a search of Daly’s room, prison officers examined privileged legal correspondence between Daly and his attorney, a violation of his common law right to confidentiality. The Secretary of State argued that searches of the prisoner’s quarters without the prisoners there were necessary to maintain security and prevent intimidation of the guards by the prisoners. The House of Lords ruled in favor of Daly, concluding, “The infringement of prisoners’ rights to maintain the confidentiality of their privileged legal correspondence is greater than is shown to be necessary to serve the legitimate public objectives already identified.”<sup>40</sup> When balanced, the right of R. Daly to confidential correspondence with his attorney weighed heavier than the prison’s objectives for passing the intrusive policy. This balancing has not been applied in strict scrutiny cases, setting the proportionality test apart from the United States’ current system.

#### PROOF OF CLAIM

While both the proportionality and the strict scrutiny tests have their merits, neither of the tests are sufficient to handle cases with incommensurable rights. I examine both tests to show why they are insufficient in cases with fundamental rights on both sides to support my claim that an additional test for rights adjudication is necessary.

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39 Regina v. Secretary of State for the Home Department, Ex Parte Daly, UKHL 26 (2001) (appeal taken from HL).

40 *Id.*

## V. INSUFFICIENCIES OF STRICT SCRUTINY

Strict scrutiny is a hard test to pass. As Justice Souter put it in his dissent to *Alameda Books v. City of Los Angeles*: “Strict scrutiny leaves few survivors.”<sup>41</sup> It needs to be this way because it limits the number of situations in which a fundamental right can be infringed. Knowing the steepness of the test can inform the legislation that is passed. Strict scrutiny seeks to protect minorities in meaningful ways and emphasizes the importance of fundamental rights. It declares that there are few compelling reasons for the government to infringe on fundamental rights. However, strict scrutiny is insufficient for cases involving incommensurable rights because (a) it is intrinsically hard on the government, (b) it is one-sided and inflexible, and (c) it remains subjective in implementation.

### A. Hard on the Government

Strict scrutiny assumes that the government’s regulation that infringes upon a fundamental right is unconstitutional. The government bears the burden of proving that it has a compelling interest and that its law is narrowly tailored to meet that interest. Chief Justice Roberts once said, “It is a rare case when a law would survive strict scrutiny” against a fundamental right such as those found in the First Amendment.<sup>42</sup> In most cases, this is good. Fundamental rights should take precedence over governmental regulations whenever possible. However, when the government’s statute is in place to protect a fundamental right, the high wall to hurdle becomes unnecessarily high.

Consider the Colorado Anti-Discrimination Act (CADA) in question in the *Masterpiece Cakeshop* case. This law declares that “it is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny [service] to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, marital status,

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41 *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002).

42 *Williams-Yulee v. Florida Bar*, 115 S.Ct. 1656 (2015).

national origin, or ancestry.<sup>743</sup> Colorado seeking to protect protected classes from discrimination is a compelling purpose. CADA has been cited in cases regarding sexual orientation discrimination<sup>44</sup> and race-related discrimination.<sup>45</sup> Clearly, the law in place has done a lot to protect the fundamental rights of minority groups. Because strict scrutiny is such a high standard, acts such as the Colorado Anti-Discrimination Act might not survive its test because they are not narrowly tailored enough, no matter how much good they have done and how important the rights they seek to protect are. If the goal is to protect fundamental rights, overturning laws that protect fundamental rights is counterintuitive. Because the burden of proof falls so heavily on the government, important laws that help protect fundamental rights or prevent discrimination may be deemed unconstitutional, regardless of the good they do. Consequently, in cases involving conflicting fundamental rights, the nongovernmental party has an immediate advantage.

### *B. One-Sided & Inflexible*

Strict scrutiny is easily applied to cases like *Grutter v. Bollinger*<sup>46</sup> and *Gratz v. Bollinger*.<sup>47</sup> In *Grutter*, a white student was denied admission to the University of Michigan Law School. She sued, claiming that the school's use of affirmative action in its admissions policy violated her Equal Protection rights under the Fourteenth Amendment. Here we have a civilian versus an institution. Institutions do not have fundamental rights so it is a fundamental right versus private policy. The university's admission policy had to pass strict scrutiny and it did.

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43 CO Rev Stat § 24-34-601 (2016).

44 *Houchin v. Denver Health*, 2019 COA 50 (2019).

45 *Colorado Comm'n v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963).

46 *Grutter v. Bollinger*, 539 US 306 (2003).

47 *Gratz v. Bollinger*, 539 U.S. 244 (2003).

In cases such as *Cox Broadcasting v. Cohn*,<sup>48</sup> it is more complicated. The right to privacy—privacy being a fundamental right since *Griswold v. Connecticut*—is weighed against the right to free speech and freedom of the press.<sup>49</sup> Georgia’s law is the law in question, so the Court can apply strict scrutiny to see if the Georgia law concerning privacy is constitutional. However, due to the nature of strict scrutiny, it cannot be applied in reverse to then determine how compelling the right to free speech and freedom of the press would be. In cases involving two fundamental rights, one side will always be backed up by a governmental provision that should be constitutionally sound, and it is likely that the other is backed by the Constitution itself. The inflexibility of strict scrutiny is intentional and sufficient for cases involving one fundamental right or protected class, but it falls short in cases involving incommensurable rights. A better test for cases with multiple fundamental rights at play would successfully weigh both sides rather than just critiquing the validity of the governmental law.

### C. Subjective

Strict scrutiny is clearly defined with its two prongs. Nonetheless, even choosing which level of scrutiny to apply is subject to deliberation. For example, *Sherbert v. Verner*<sup>50</sup> and *Wisconsin v. Yoder*<sup>51</sup> were cases involving free exercise of religion claims. In both cases, the Court applied strict scrutiny and ruled in favor of the individuals who felt their fundamental rights had been violated, effectively declaring that the citizens’ rights were more important than the governmental interests in these cases. However, in *Employment Division v. Smith*, the Supreme Court argued that exemptions to every state law affecting religion “would open the prospect of constitutionally required exemptions from civic obligations of almost every

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48 *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

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

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

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

conceivable kind.”<sup>52</sup> In the 6-3 decision, half of the Justices chose to move away from using strict scrutiny in free exercise of religion cases. Justice O’Connor concurred in the judgment but not the reasoning, arguing that strict scrutiny should continue to be applied in free exercise clause cases.<sup>53</sup> Justice Blackmun wrote a dissenting opinion which disagreed with the reasoning on the same grounds as Justice O’Connor.<sup>54</sup> In this case, we see a clear division among the Justices as to which level of scrutiny to apply. The Justices had the same case details and frameworks to choose from and they chose differently. Because legal matters are not equations with clear and definitive answers, we might expect such an outcome. Ultimately, the decisions made about what level of scrutiny to apply will be made subjectively.

Deciding which laws are narrowly tailored or which interests are compelling is also subjective. In *Korematsu v. United States*, the majority concluded that the government’s interest in protecting national security in a time of war was compelling and stated that the government was justified in demanding that “all citizens of Japanese ancestry be segregated from the West Coast temporarily.”<sup>55</sup> Using strict scrutiny, the Supreme Court held that the Civilian Exclusion Order No. 34 was constitutional. In a dissent, Justice Murphy declared, “this exclusion of ‘all persons of Japanese ancestry, ...’ from the Pacific Coast area on a plea of military necessity ... ought not to be approved. Such exclusion goes over ‘the very brink of constitutional power’ and falls into the ugly abyss of racism.”<sup>56</sup> He claimed that the military necessity and concern about espionage and sabotage the majority cited was not reasonably related to the forced evacuation. In his opinion, the Act in question should not have passed strict scrutiny. Later Justices agreed with Murphy and

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52      *Employment Division v. Smith*, 494 U.S. 872 (1990).

53      *Employment Division v. Smith*, 494 U.S. 872 (1990) (O’Connor, S.D., concurring).

54      *Employment Division v. Smith*, 494 U.S. 872 (1990) (Blackmun, H., dissenting).

55      *Korematsu v. United States*, 323 U.S. 214 (1944).

56      *Id.*

*Korematsu* was eventually overturned, demonstrating that what is deemed “compelling” and “least restrictive” is subjective and will change with different Justices, especially different Justices at different times.<sup>57</sup>

Thus, deciding which level of scrutiny to apply, which interests are compelling, and which laws are narrowly tailored is arbitrary and up to the discretion of the Justices. Subjectivity is not problematic when constituents align with the ideology of the Justices. However, this is not always the case in our polarized society. Having Justices with different ideologies is acceptable when the American people believe that Supreme Court Justices are neutral arbitrators of the law, but tests such as strict scrutiny require a Justice to be at least somewhat subjective, and subjectivity opens the door to ideology. Even though Justices may opt to use their subjectivity to make neutral decisions, reducing the number of instances where subjectivity is necessitated can reassure citizens that the Supreme Court is more neutral than ideological.

## VI. INSUFFICIENCIES OF PROPORTIONALITY

The rest of the democratic world’s approach to rights adjudication—the proportionality test—has the advantage of being flexible, the ability to weigh the interests of both sides, and the capability to be accommodative to each case. However, like strict scrutiny, the proportionality test is insufficient in fundamental rights adjudication. Three major weaknesses to the proportionality test in incommensurable cases are (a) it does not require a recognition of the importance of the right, (b) it is not the Court’s role to balance, and (c) it is highly subjective.

### *A. No Recognition of Importance of the Right*

The first two questions asked when applying the proportionality test constitute a low bar for the government to pass. The government can argue that its purpose is legitimate for almost any law that it

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57 *Trump v. Hawaii*, 585 U.S. \_\_\_\_ (2018).

passes. It is likewise not hard to say that the measures designed to meet the legitimate objective are rationally connected to that objective. Thus, cases involving rights that would qualify for the rational basis test and cases involving rights that would qualify for the strict scrutiny test in the United States would receive the exact same treatment under proportionality. The fairly lax standards set forth in the first two questions do not necessarily mean that all rights for which the government has a legitimate interest are automatically equalized. The importance of the right may be considered when the Court balances the benefits to the government versus the costs to the rights bearer. However, the outcome of this balancing act does not reveal the importance of the right: it reveals the importance of the right in relation to the government's interests. Rather than having the importance of the right determine the lens through which the Court approaches the case, the importance of the right is a mere consideration in the fourth step of proportionality.

The U.S. Department of State's webpage states, "The protection of fundamental human rights was a foundation stone in the establishment of the United States over 200 years ago."<sup>58</sup> If fundamental human rights are foundational in the United States, it follows that those rights should be foundational in rights adjudication cases. A test that does not acknowledge the importance of or defer to fundamental rights until the end—if at all—is unsuited for rights adjudication in the United States. This makes the proportionality test especially insufficient in cases where multiple fundamental rights are being considered.

### *B. Not Court's Role to Balance*

The fourth step of the proportionality test is determining proportionality in the strictest sense which requires balancing rights versus government interests. The backbone for all Supreme Court decisions is the Constitution of the United States. Justices are to make decisions that align with the Constitution, not the choices that they feel

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58 *Human Rights and Democracy*, U.S. DEPARTMENT OF STATE, <https://www.state.gov/policy-issues/human-rights-and-democracy/> (last visited Feb. 19, 2022).

are correct. Fundamental rights are clearly articulated in the Constitution; it is, therefore, the Supreme Court's job as protectors and upholders of the Constitution to protect and uphold fundamental rights and other constitutional provisions. There is nothing in the Supreme Court's job description that says they are to say what constitutional provisions carry more weight than another.

In Chief Justice Roberts's concurrence in *June Medical Services v. Russo*,<sup>59</sup> he discusses that the court's opinion in that case "could invite a grand 'balancing test in which unweighted factors mysteriously are weighed.'"<sup>60</sup> Under such a balancing test, "equality of treatment is . . . impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired."<sup>61</sup> In *June Medical Services*, the Court attempted to balance the potentiality of human life and the health of a woman against the woman's liberty, according to Roberts.<sup>62</sup> He stated:

There is no plausible sense in which anyone, let alone the Court, could objectively assign weight to such imponderable values and no meaningful way to compare them if there were . . . Pretending that we could pull that off would require us to act as legislators, not judges, and would result in nothing other than an 'unanalyzed exercise of judicial will' in the guise of a 'neutral utilitarian calculus.'<sup>63</sup>

The sitting Chief Justice recognizes that seeking to balance in situations such as these would require the Court to perform a task that no human can do and no judge should do. Balancing in such a matter would require the Supreme Court to act as legislators which our three separate branches of government with checks and balances

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59 *June Medical Services L.L.C. v. Russo*, 591 U.S. \_\_\_\_ (2020).

60 *Michael Marrs v. Motorola Incorporated, et al*, No. 08-2451 (7th Cir. 2009).

61 Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U Chi L Rev 4, (1989) (on judicial fairness pertaining to rights).

62 *June Medical Services L.L.C. v. Russo*, 591 U.S. \_\_\_\_ (2020).

63 *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (Brennan, J. concurring in part, dissenting in part).

seeks to prevent. These arguments presented by Chief Justice Roberts demonstrate that the balancing required by proportionality is inherently problematic for our American federal system.

### *C. Highly Subjective*

The judicial branch is the only branch of government not elected by the people. That makes them a step removed from American citizens. They do not need to impress anyone so they can move up the career ladder because they are already at the top. Additionally, Supreme Court Justices have life-tenure. They do not need to worry about being re-elected because their term does not end until they want it to, and time has shown that they do not need to fear impeachment. Thus, the Supreme Court has a lot of independence. The American people are comfortable with this because they view the Court as impartial administrators of the law. Justices are supposed to be bound by the law, not creators of it. However, as discussed earlier, the current system in place for adjudicating fundamental rights is still subject to a justice's interpretation, and a justice's interpretation is partially informed by their policy goals.

Proportionality has similar drawbacks to those I discussed in connection with strict scrutiny, but the drawbacks with proportionality are intensified. The cost-benefits analysis required by proportionality has no apparent structure. It is up to the administrators of the test to determine how to approach the analysis, what lens to frame the analysis with, and what the ultimate outcome will be. Consider how landmark cases such as *Obergefell v. Hodges*,<sup>64</sup> *Loving v. Virginia*,<sup>65</sup> and *Brown v. Board of Education*<sup>66</sup> could have been decided under proportionality. The potential outcomes are endless. Perhaps the Court could have decided in *Obergefell* that the cost of not allowing gay couples to legally marry was proportional with the benefit that the government derived from preserving the traditional family

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64 *Obergefell v. Hodges*, 576 U.S. \_\_\_ (2015).

65 *Loving v. Virginia*, 388 U.S. 1 (1967).

66 *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

advocated in the Bible or at the founding of the nation.<sup>67</sup> The justices who decided *Brown* could have ridden the Jim Crow tide prevalent in the 1950s and declared that the cost of segregated schools for African Americans was proportional to the benefits gained by the government by maintaining separate but equal.<sup>68</sup> A balancing test would give our unelected Supreme Court justices undue power to turn their policy preferences into law due to the subjective manner of proportionality. This constitutes a major weakness of the proportionality test.

VII. *MASTERPIECE CAKESHOP LTD. v. COLORADO CIVIL RIGHTS COMMISSION*

Perhaps the easiest way to see the insufficiencies of strict scrutiny and the proportionality test would be to apply the tests to *Masterpiece Cakeshop v. Colorado*. It is important to note that the Court did not apply either test in this case. Justice Kennedy delivered the majority opinion, stating, “Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission’s consideration of this case was inconsistent with the State’s obligation of religious neutrality.”<sup>69</sup> The Supreme Court acknowledged the rights on both sides, acknowledged that the “case presents difficult questions as to the proper reconciliation of at least two principles.”<sup>70</sup> However, they also acknowledged that the Colorado Civil Rights Commission had clear animus towards Jack Philips’ sincerely held religious beliefs and the case was a bad vehicle to make such a decision between rights. Because of the Commission’s animus, they remanded the case to the lower court and

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67 *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).

68 *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

69 *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 584 U.S. \_\_\_\_ (2018).

70 *Id.*

did not adjudicate between the rights.<sup>71</sup> We look at what might have happened if they did.

### *A. Masterpiece Cakeshop & Strict Scrutiny*

Justice Gorsuch, joined by Justice Alito, wrote a concurrence for *Masterpiece Cakeshop*. He writes that since *Employment Division v. Smith*, neutral and generally applicable laws will usually survive a constitutional free exercise challenge.<sup>72</sup> However, “when the government fails to act neutrally toward the free exercise of religion . . . . The government can prevail only if it satisfies strict scrutiny, showing that its restrictions on religion both serve a compelling interest and are narrowly tailored.”<sup>73</sup> In their opinion, the Commission’s “judgmental dismissal of a sincerely held religious belief” did not satisfy strict scrutiny.<sup>74</sup> Gorsuch claimed that if we should protect speech that we disagree with, we should also protect religious beliefs that we disagree with. In sum, Gorsuch argues that the Commission failed to show a compelling reason for its failure to give Jack Phillip’s case neutral consideration and thus does not meet the compelling interest requirement of strict scrutiny.<sup>75</sup> The fact that Justices Gorsuch and Alito were the only justices to advocate for strict scrutiny to be applied shows the subjectivity involved in when to apply which tier of scrutiny. While strict scrutiny was ultimately not applied in this case, I apply it now.

It can be argued that the Colorado law was not narrowly tailored. Jack Phillips lost at the state court of last resort and Court of Appeals levels.<sup>76</sup> The Colorado Civil Rights Commission ordered Phillips to cease and desist discriminatory practices, conduct comprehensive

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71 *Id.*

72 *Employment Division v. Smith*, 494 U.S. 872 (1990).

73 *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 584 U.S. \_\_\_ (2018).

74 *Id.*

75 *Id.*

76 *Id.*

staff training on the public accommodations section of CADA, and change any company policies to comply with this order. It also mandated that Phillips prepare quarterly compliance reports for a period of two years documenting the number of patrons denied services and why. The cease-and-desist order basically denies Jack Phillips his ability to choose what kinds of cakes to make. It places him between a rock and a hard place: on the one hand, he could obey the Commission's order to cease and desist and thereby compromise his sincere religious beliefs. On the other hand, he could choose to disobey and thereby be ineligible to keep his bakery open and participate in the market. This is clearly not narrowly tailored.

The Colorado Civil Rights Commission has a compelling interest in preventing discrimination and ensuring that people of protected classes should have the same opportunities as everyone else in places of business. The Commission could have chosen a narrowly tailored means such as requiring Jack Phillips to direct same-sex couples to other bakers who will complete their cake request. That way, Phillip's cakeshop gets to remain open and gets to keep practicing his sincerely held religious beliefs and the same-sex couple can get a wedding cake. In some ways, Phillip's shop might lose customers, but that could be a price he was willing to pay. Alternatively, the Commission could withdraw the cease-and-desist order but still require that Phillip's business complete the reports and the training. That would not infringe on Jack Phillip's free exercise rights but would also give him an opportunity to review his beliefs and how they might affect marginalized groups.

If we applied the strict scrutiny test to *Masterpiece Cakeshop*, we might reach the conclusion that the Colorado Anti-Discrimination Act does not satisfy strict scrutiny because its requirements were an impermissible encroachment of Phillips' fundamental rights. The Colorado Civil Rights Commission would then have to rework the act to make it comply with strict scrutiny which might result in the act's losing power to protect the compelling interests involving the prevention of discrimination and the fundamental right to marry who one chooses, demonstrating that strict scrutiny may be unnecessarily hard on the government in rights adjudication cases. Jack

Phillips would win against the government-backed same-sex couple, as would be expected in strict scrutiny cases.

### *B. Masterpiece Cakeshop & the Proportionality Test*

The United States Supreme Court has never applied the proportionality test in cases, but, if it had, it would look similar to the following. We would first look at the legitimacy of the government's purpose in taking the case. Colorado clearly has a legitimate interest in protecting protected classes from discrimination and ensuring that their fundamental rights are upheld. This requirement would be met. Concerning the suitability of the means used to reach this legitimate end, Colorado's Anti-Discrimination Act would likely pass. If their interest is to prevent discrimination, an act requiring discriminatory businesses to cease-and-desist discriminatory practices and change discriminatory policies is rationally related to that interest. We would then consider the necessity of the law in question and whether it is the least restrictive means to achieve the legitimate end. In order for same-sex couples' rights to be protected, they need a law that offers that protection in the courts. CADA fulfills this role and offers a place for same-sex couples to find remediation. In this sense, the law can be seen as necessary. Concerning least restrictive, we would have similar findings as presented in the narrowly tailored discussion presented under strict scrutiny. Though CADA may fall short of the requirements to pass the third question because it is not narrowly tailored, we proceed to the fourth step to observe how it might play out.

The final consideration is whether the case is proportional in the strictest sense. We would weigh the benefits of the challenged measure against the cost in terms of infringement of protected rights. The proportionality test states that only if the benefits exceed the burden it imposes does the challenged measure survive. The benefits of the Colorado Anti-Discrimination Act include protection of protected classes, a means for redress, and a more inclusive, open market. The costs in this case, however, include stifling Jack Phillip's ability to exercise his sincere religious beliefs and his right to freedom of speech. The decision could reasonably go either way

at this point and the Court would necessarily be subjective in the decision. If the Court decided that the costs outweigh the benefits, CADA would not be able to stand and would have to be modified. If the Court decided that the benefits outweighed the costs, CADA would stand and the baker would have no legal right to deny the cake, in spite of his sincerely held religious beliefs. He would either be required to compromise his beliefs or cease operating a public business in Colorado.

Strict scrutiny has a fairly predictable outcome and would likely lead to the modification or revocation of the Colorado Anti-Discrimination Act which would be seen as a loss for marginalized groups in the state. The proportionality test does not have a predictable outcome. Justices would be forced to balance incommensurable rights. Their decision would be reached on the grounds of who hurts the most, not who is backed more completely by the Constitution. This approach to rights adjudication could harm the legitimacy of the Court which would severely inhibit the Supreme Court's capacity to be good since they lack power to enforce their decisions.

### VIII. REVISED TEST: INCOMMENSURABILITY TEST

The leading models for rights adjudication in the United States and elsewhere have weaknesses that cannot address the primary issue of incommensurability when a fundamental right faces a fundamental right, though both tests have promising aspects. Cases like *Masterpiece Cakeshop*<sup>77</sup> and *Cox Broadcasting*<sup>78</sup> do not arise very often, but it is inevitable that they will arise again, especially if the Court uses the Fourteenth Amendment to declare more rights fundamental. Near the end of the majority opinion in *Masterpiece Cakeshop*, Justice Kennedy wrote, "The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and

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77 *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 584 U.S. \_\_\_\_ (2018).

78 *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

without subjecting gay persons to indignities when they seek goods and services in an open market.”<sup>79</sup> In preparation for further elaboration in the courts, I propose a test the Court can apply in incommensurability cases such as *Masterpiece*.<sup>80</sup>

I call the test the incommensurability test. This test considers four questions: (a) is there a fundamental right on both sides? (b) is the law in question necessary to protect the fundamental right? (c) could the law be applied in a way that does not infringe fundamental rights? (d) what harm would come from allowing the infringement of the right? We consider the purpose and function of each of these questions.

#### *A. Is There a Fundamental Right on Both Sides?*

This initial question serves as a threshold question. If only one fundamental right is in question, strict scrutiny should still stand. Only if both sides have a constitutionally protected fundamental right would a case qualify for the incommensurability test. Recognizing the importance of the rights that have been violated on both sides provides a frame through which the Court can approach the case. For example, in *Masterpiece*, the Court would recognize the fundamental right to free exercise of religion and the right to marry who one chooses and the protected class’s right not to be discriminated against, qualifying the case for the incommensurability test. This acknowledgement of rights would set the stage for the pursuant deliberation and decision.

#### *B. Is the Law in Question Necessary to Protect the Fundamental Right?*

A law of some sort will almost always be involved in incommensurability cases. Two citizens might get into an argument, and both sides may feel that their rights are violated. However, the citizens of

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79 *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 584 U.S. \_\_\_ (2018).

80 *Id.*

themselves have no ability to enforce the protection of their rights. For enforcement, litigants must appeal to an existing statute, executive order, or precedent. In *Masterpiece*, the same-sex couple could not force Jack Phillips to make a cake because they felt they had been discriminated against. Instead, they “filed a charge with the Colorado Civil Rights Commission alleging discrimination on the basis of sexual orientation in violation of the Colorado Anti-Discrimination Act.”<sup>81</sup> Because citizens do not have authority in and of themselves to protect their rights, there will always be a law involved in incommensurability Court cases.

This aspect of the incommensurability test determines whether the fundamental right could be protected in the absence of the law. In *Masterpiece*, the same-sex couple had somewhere to turn because of the Colorado Anti-Discrimination Act and it is not clear that they could have turned anywhere else for redress. It can thus be said that the Act is necessary to prevent discrimination based on the fundamental right. If a law is important in the defense of fundamental rights, it can be assumed that the government’s interest is compelling and the incommensurability test will proceed. If the law is not essential to the preservation of fundamental rights, the law should be placed under the scrutiny it would receive under strict scrutiny to determine if the law’s infringement of a fundamental right is constitutional.

Handling the government’s interest in this way takes pressure off of the government and recognizes the importance of the rights on both sides of the case. It does not assume that the government is guilty, nor does it assign the burden of proof to the government. The case then becomes about the rights rather than proving the government had a compelling interest.

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81 *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 584 U.S. \_\_\_\_ (2018).

*C. Could the Law Be Applied in a Way That Does Not Infringe Fundamental Rights?*

At this point, the Court has determined that both sides of the case have fundamental rights and the government statute in question is legitimate. This next step is similar to the narrowly tailored or the least restrictive means prong that is used in both strict scrutiny and the proportionality test. However, rather than determining whether the law should be struck down or upheld, the Court determines if it could be applied differently. This helps ensure that the law in place to protect fundamental rights can remain in place to protect those rights in the future. If the law can be applied differently, the Court would order those changes in the application of the law be made. If the law cannot be applied differently, the incommensurability test will proceed.

In *Masterpiece*, the Court might look at the Colorado Anti-Discrimination Act and what it prescribes for violations of the Act. Pursuant to CADA, the Colorado Civil Rights Commission declared that Jack Phillips must cease and desist the discriminatory action, conduct training with his staff, provide reports about customers that had been turned away, and change store policies to make them compliant with CADA. Some of these actions could reasonably have been taken by the Commission without infringing on Phillips' fundamental rights. For example, the Commission could have declared that Jack Phillips must conduct training with his staff and provide reports of who had been turned away. The reports could legitimize that Phillips had turned away the couple because of sincerely held religious beliefs. The reports could also show that Phillips turns away a lot of people for a lot of reasons and the Commission could then have reason to assume that Phillips is discriminatory in his practices. Additionally, the Commission could require that Phillips direct the customers to other bakers who would be willing to bake a cake. If this were the case, Jack Phillips would not lose the right to live his sincerely held beliefs and the couple could still find a cake. The Commission could monitor the baking establishment to ensure that discriminatory practices are not common or malicious. No fundamental rights would be violated and the law would not have to change.

*D. What Harm Would Come from Allowing the Infringement?*

This last step draws from the last step of the proportionality test. It is not anticipated that most cases would reach question four. However, there may arise cases in which the first three steps are insufficient for the Court to reach a verdict. If the Court decides that both sides have a fundamental right and the law is necessary and cannot be applied in a way that does not infringe on the other side's fundamental right, the Court must ask itself what harm would come from allowing infringement. The question considers the marginal cost to the rights-bearer without considering the marginal benefits to the government. If *Masterpiece* made it to step four, the Court would consider whether it would cause more harm to have the same-sex couple go elsewhere to find a wedding cake or whether it would cause more harm to prevent Phillips from living his sincerely held religious beliefs.

While judging which infringement is more harmful will require some subjectivity, a helpful starting point is an examination of the source of the fundamental right. In this last step of the incommensurability test, rights that are included in the Bill of Rights would likely trump rights incorporated through the Fourteenth Amendment. This is not because the first ten amendments are more important than the Fourteenth Amendment is but because rights codified in the actual text of the Constitution are more permanent than those written in the case law of jurisprudence. Consider the right to contract which was declared fundamental by the Supreme Court in *Lochner v. New York*.<sup>82</sup> Because the right to contract is not included explicitly in the text of the Constitution, the Supreme Court easily changed its precedent in *West Coast Hotel v. Parrish*, stating "the Constitution does not speak of freedom of contract."<sup>83</sup> The Supreme Court deferring to the text of the Constitution supports the idea that written amendments would trump incorporated amendments. While there may be situations in which the Court takes this question into consideration

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

83 *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937).

and decide not to let it influence the decision, this question is a good starting point.

Additionally, when the Court is applying the incommensurability test, they should be very careful to distinguish between what they are saying and what they are not saying when they conduct the last step of the test. In *Masterpiece Cakeshop*, if the Court applied the incommensurability test and decided that the cost to the same-sex couple was greater than the cost to Phillips, the Court would need to articulate clearly that they are not saying that one right is more important than another, only that the cost of one in this case is greater than another. The fourth step of the incommensurability test should be applied on a case by case basis to preserve the integrity of the right without creating a hierarchy of fundamental rights where none exists.

## IX. BENEFITS OF INCOMMENSURABILITY TEST

The incommensurability test is designed to circumvent the insufficiencies of the strict scrutiny test and the proportionality test. From the outset, it identifies the importance of the rights in question. The test takes the burden of proof off of the government to give both fundamental rights fair consideration. It considers whether the law and application of the law are narrowly tailored. Looking to enforce the existing law in a more just way allows for more flexibility than either upholding the law or striking it down. The first three steps can be handled in a fairly objective manner. Since most cases should be resolved before the fourth step, the incommensurability test should rarely require balancing. When balancing is necessitated, the Justices balance the costs rather than the importance of the right. By approaching it in this way, they are able to avoid the problems that accompany incommensurability cases.

Ultimately, the incommensurability test is not perfect because no rights adjudication system is. Instead, it is a step in the right direction. The ideas presented here can be further developed and finetuned. Perhaps the greatest benefit that the incommensurability test offers is its potential for future applicability. The test could be extended to private cases like those between a silenced voice on

social media and the owner of the platform. The incommensurability test would be suitable in cases like this because it is flexible enough to deal with the rights and interests on both sides. This paper has focused on fundamental rights, but the conversation started and the test proposed here could easily be extended to a conversation about protected classes. The incommensurability test could be applied to future cases that are similar to *Bob Jones v. United States* which involved the protected class of race against religious freedom.

### CONCLUSION

The current system in place in the United States to evaluate cases involving fundamental rights is sufficient only when one side of litigation feels as if a fundamental right has been violated; when the case involves incommensurable rights, strict scrutiny falls short. The proportionality test, the system for adjudicating rights abroad, is likewise insufficient. In *Craig v. Boren*, the Supreme Court faced an issue regarding gender discrimination.<sup>84</sup> They decided that rational basis nor strict scrutiny provided the right amount of scrutiny for gender, so they created the intermediate scrutiny test. Just as the Supreme Court created a new test in 1976 to deal with insufficiencies in their existing system, it is again time in the American judicial system for a new test to be implemented to deal with insufficiencies in today's rights adjudication system. In cases where fundamental rights are violated on both sides, a modified system is needed. The incommensurability test is proposed as a viable modified system to deal with cases like *Masterpiece Cakeshop* and *Cox Broadcasting*. It might not be the perfect solution, but the insufficiencies addressed in this paper should serve as a call to action for the Court to address the insufficiency in their rights adjudication framework as they did when they created intermediate scrutiny. Recognizing the shortcomings and the possible avenues to overcome those shortcomings like the incommensurability test is a step in the right direction to preserve the sanctity of rights in the United States today.

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

