



The Need for Principled Balancing when Constitutional Values Collide

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Two of the most important values protected by the U.S. Constitution are religious freedom and equality before the law. Religious freedom was included in the Constitution as part of the First Amendment; equality before the law was added after the Civil War as part of the Fourteenth Amendment. For nearly 150 years, the two lived side-by-side without much interruption.

That constitutional harmony was interrupted by the aftermath of the Supreme Court's 2015 decision of *Obergefell v. Hodges*, which announced a constitutional equal right to same-sex marriage. Assertions of religious freedom and equality began to clash. Vendors asked to serve same-sex weddings – florists, photographers, wedding-cake bakers and others — cited religious freedom as basis for their right to refuse providing services. Same-sex couples, in contrast, cited equality as basis for their right to demand purchasing services in the open market just like any other couple. In the only case the Supreme Court was willing to hear so far – the wedding-cake baker case — the Court punted, refusing to reach a principled result (*Masterpiece Cakeshop*). In particular, the Court refused to balance the competing constitutional values. This brief suggests why avoiding constitutional balancing may have been a mistake and how the court could have handled it differently.

The History of Rights to Religious Freedom and Equal Protection

Prior to *Masterpiece*, most religious-freedom cases involved either a constitutionally-protected right clashing with a statutorily-protected right (protected by legislation), or a clash between two statutorily-protected rights. In these cases, the Supreme Court typically sided with parties who invoked their religious freedoms against the state who attempted to curtail those freedoms.

For example, in 1963 the Court ruled in *Sherbert v. Verner* that a state cannot deny a former worker the right to unemployment compensation only because she refused, on religious grounds, to work on the Seventh Day. Similarly, in 1972 the Court ruled that an Amish family's right to religious freedom outweighs the right of the state to compel their children to study beyond the eighth grade. In both cases, the Court stated that any law that burdens religious freedom will be reviewed under the heaviest-burden test, known as strict scrutiny.

A different approach was developed in the 1990 case of *Employment Division v. Smith*. There, the Court held that Native Americans who were fired for smoking peyote were not entitled to receive unemployment compensation, despite their claim that such smoking was done solely for religious purposes. That decision adopted a much easier test for reviewing the law interrupting with the religious freedom — the rational-basis test. The Court held that as long as the law generally applies to all people equally, it will be presumed to be valid even if disrupting some people's religious freedoms. Congress was unhappy with that reversal, and in

1993 enacted the Religious Freedom Restoration Act (RFRA), essentially restoring the strict-scrutiny *Sherbert* test. But the Supreme Court held that the act, while valid with regards to the federal government, was unconstitutional as applied to the states. As a result, some 21 states enacted their own version of the Religious Freedom Restoration Act.

In 2014, applying RFRA, the Court began to assert religious freedoms more vigorously. In the *Hobby Lobby* case, the Court held that a family-owned business should be allowed to assert religious-freedom claims to justify their refusal to provide its female employees with contraception insurance coverage. Applying the Religious Freedom Restoration Act, the Court gave the business's constitutionally-protected religious freedom claims greater weight than the employees' statutorily-protected rights to health-insurance coverage. In that, the Court ushered in a new era of religious freedoms — claimed by both individuals and businesses — which may be used to justify a discriminatory treatment in the open market based on religious considerations.

The Masterpiece Cakeshop Case and the Need to Balance Principles

In 2018, the Court was called upon to decide the case of a Colorado baker who refused to prepare a cake for the wedding of a same-sex couple solely on religious grounds. This time, the Court had to decide between the vendor's constitutionally-protected right to religious freedom, and the same-sex couples' constitutionally-protected right to equality. The right to equality before the law, the Court explained, entails the right to enjoy "the constellation of benefits" related to marriage "on the same terms and conditions as opposite-sex couples." This was the first instance where the Supreme Court dealt directly with a conflict between two constitutional rights. On one hand, the right to religious freedom and on the other the right to equality before the law. Yet rather than directly addressing the constitutional conflict, the court punted — ruling on narrow, technical grounds in favor of the baker. No constitutional balancing test was suggested, and, obviously, none was applied.

Among legal scholars, constitutional balancing tests have both supporters and opponents. Some opponents argue that "constitutional balancing" is a mere euphemism for asserting the judge's own moral preferences on the Constitution. Other, opponents claim that balancing should be reserved for legislatures. My research, however, suggests that it is the role of courts to carefully examine conflicting constitutional values. Moreover, they should do so in a principled manner, alleviating fears of subjective adjudication.

Applying constitutional-balancing approach to *Masterpiece Cakeshop* case, such principled balancing would raise the following three questions: Does a seller in the open market have the right to refuse services on religious grounds? Can a same-sex couple insist on buying goods and services from a particular vendor, despite the potential existence of other options? And, does the right to consume goods and services include the right to require the seller to endorse the purpose for which the goods or services are used?

Indeed, Constitutional courts all over the world — in Canada, Germany, South-Africa, France, and Israel, to name just a few — use constitutional balancing as the cornerstone for resolving constitutional disputes. These courts announce carefully-established balancing formulas, which in turn can be used by lower courts, legislatures, and rights-advocates when considering their own policies. Such balancing formulas are excellent, transparent, tools that allow institutions and citizens alike to navigate their way through the conflicts that are the inevitable result of a complex constitutional system such as ours.

Read more in Doron Kalir and Barak Aharon, *Proportionality: Constitutional Rights and their Limitations* (2012).