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Fundamentally Wrong About Fundamental Rights

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INTRODUCTION

If there is one phrase that every student of constitutional law learns, it is that fundamental rights trigger strict scrutiny. As Justice William Brennan Jr. wrote, "a government practice or statute which restricts 'fundamental rights' or which contains 'suspect classifications' is to be subjected to 'strict scrutiny' and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available."[1] According to Justice Clarence Thomas, "strict scrutiny" is the "appropriate standard" for "infringements of fundamental rights."[2] Justice Antonin Scalia has recognized that "strict scrutiny will be applied to the deprivation of whatever sort of right we consider 'fundamental.'"[3]

There is one small problem with this well-worn adage. It is simply not true. Fundamental rights do not trigger strict scrutiny, at least not all of the time. In fact, strict scrutiny—a standard of review that asks if a challenged law is the least restrictive means of achieving compelling government objectives—is actually applied quite rarely in fundamental rights cases. Some fundamental rights trigger intermediate scrutiny, while others are protected only by reasonableness or rational basis review. Other fundamental rights are governed by categorical rules, with no formal "scrutiny" or standard of review whatsoever. In fact, only a small subset of fundamental rights triggers strict scrutiny—and even

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1. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 357 (1978) (Brennan, J., concurring in the judgment and dissenting in part).

2. Troxel v. Granville, 530 U.S. 57, 80 (2000) (Thomas, J., concurring in the judgment).

3. United States v. Virginia, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting).

among those strict scrutiny is applied only occasionally. In short, the notion that government restrictions on fundamental rights are subject to strict scrutiny review is fundamentally wrong.

Part of the problem may be that the Supreme Court has never bothered to define with any precision what counts as a "fundamental right." There are at least three possible definitions. First, following footnote four of *United States v. Carolene Products Co.*,[4] we might consider all of the individual rights guaranteed in the first eight amendments in the Bill of Rights to be fundamental. Second, we might alternatively view all of the provisions of the Bill of Rights that have been incorporated to apply against the states to be fundamental; the test for incorporation asks if a right is fundamental to American political institutions and our system of justice. Finally, we might define as fundamental those rights that have been thought of as "preferred rights" because of their role in promoting human dignity or democratic self-government. Any way you slice it, however, not all fundamental rights trigger strict scrutiny.

I consider each of these three definitions of fundamental rights and show that, regardless of the definition used, the old saying about strict scrutiny is descriptively wrong. Laws infringing upon fundamental rights are sometimes subject to strict scrutiny, but often they are not.

I. THE FUNDAMENTAL BILL OF RIGHTS

Like so much of modern American constitutional law, the false notion that laws infringing upon fundamental rights are reviewed under strict scrutiny has roots in footnote four of *Carolene Products*. Justice Harlan Fiske Stone famously wrote, "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."[5] Ever since, constitutional law professors have taught their students that the individual rights guarantees found in the Bill of Rights trigger heightened review, while economic rights (such as those read into the Fourteenth Amendment's due process clause by the *Lochner* Court)[6] receive only rational basis protection. And half of that lesson is true. But

4. 304 U.S. 144, 153 n.4 (1938).
5. *Id.*
6. *See* Lochner v. New York, 198 U.S. 45 (1905).

that half is the part about economic rights, not the part about heightened review for the rights spelled out in the text of the Bill of Rights.

The Court has never purported to apply strict scrutiny in every provision of the Bill of Rights. Of the "first ten amendments" referred to in footnote four, a grand total of two trigger strict scrutiny. Laws invading on First Amendment rights of speech, association, and religious liberty are often subject to strict scrutiny, as are laws that restrict the due process and (invisible) equal protection guarantees of the Fifth Amendment. But strict scrutiny is nowhere to be found in the jurisprudence of the Second Amendment, the Third Amendment, the Fourth Amendment, the Sixth Amendment, the Seventh Amendment, the Eighth Amendment, the Ninth Amendment, or the Tenth Amendment. Two amendments trigger strict scrutiny; eight do not.

Let us look at the Bill of Rights provisions a bit more closely. The Second Amendment protects the right to bear arms—or, more accurately, does not[7]—but in Second Amendment cases the Court will uphold challenged laws so long as they have a "reasonable relationship to the preservation or efficiency of a well-regulated militia."[8] The Court has justified the lack of strict scrutiny here by suggesting that there are rights "far more fundamental" than those protected by the Second Amendment.[9]

The Third Amendment, which protects against the quartering of troops in one's home, has never triggered strict scrutiny (or, for that matter, any other standard). As the Tenth Circuit Court of Appeals recently noted, "Judicial interpretation of the Third Amendment is nearly nonexistent."[10] Should courts one day find reason to consider the Third Amendment, perhaps strict scrutiny will be adopted. To date, however, there has been no opinion in a Third Amendment case using that standard.

Unlike the Third Amendment, the Fourth Amendment, barring unreasonable searches and seizures, has bred voluminous case law. Yet the Court does not apply strict scrutiny to governmental searches and seizures; it applies a reasonableness test. Of course, the reasonableness language comes from the text of the amendment itself. Still, the Court certainly could create

7. *See* United States v. Miller, 307 U.S. 174 (1939).
8. *See id.* at 178.
9. Lewis v. United States, 445 U.S. 55, 66 (1980).
10. Custer County Action Ass'n v. Garvey, 256 F.3d 1024, 1043 (10th Cir. 2001).

substantive requirements of "reasonableness" that mimic strict scrutiny. For instance, the Court could hold that any search that is more overinclusive than necessary is constitutionally unreasonable, effectively adopting strict scrutiny's fit requirement.[11] But the Court has very clearly declared in recent years that such precision is not required. In *Vernonia School District 47J v. Acton*, the Court insisted, "We have repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment."[12] Searches and seizures are thus not strictly scrutinized.

The Sixth Amendment right to counsel is not treated to strict scrutiny protection either. Indeed, in Sixth Amendment cases, we do not find any type of standard evocative of tiered scrutiny. Rather, the Court uses categorical rules to "implement" the right to counsel. For instance, the right is violated if the government refuses to provide a criminal defendant access to counsel after the defendant has asserted the right.[13] The courts do not ask what reasons the government had for the denial or whether the denial was narrowly tailored to achieve the government's ends. If the government violates the rule, the denial of counsel is unconstitutional.

Categorical rules such as this could substitute for strict scrutiny if, in practice, they created the same heavy burden on the government to defend the constitutionality of the underlying state action. But in Sixth Amendment doctrine, the burden is on the individual, not the government, to show that he has been denied the right. And the substantive rules themselves—the precise elements or facts that the individual has to prove to win—favor, rather than disfavor, the government. To prove an ineffective assistance of counsel claim, for example, the defendant must show that counsel's performance was patently unreasonable and that the shoddy performance actually harmed the defendant.[14] This test is exceedingly hard to meet. A strict scrutiny substitute, by contrast, should make the individual's job easy and the government's job hard.

The right to a civil jury trial guaranteed by the Seventh Amendment is governed by categorical rules—such as that which holds that Congress cannot statutorily deny the right to a

11. *See* Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 436-37 (1988).

12. Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 652-53, 663 (1995).

13. *See* Michigan v. Jackson, 475 U.S. 625 (1986).

14. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984).

jury in a controversy involving private, as compared to public, rights[15]—and, when Justice Thomas writes for the Court, analogy based on historical exegesis.[16] A Westlaw search turns up no Seventh Amendment decisions in which a federal court applied strict scrutiny.[17]

The Eighth Amendment prohibits excessive bail, excessive fines, and cruel and unusual punishments. Laws challenged on Eighth Amendment grounds are adjudicated primarily by categorical rules, most of which strongly favor the government. For example, the bar on cruel and unusual punishments prevents almost nothing short of exile,[18] burning at the stake, or pillorying.[19] (And, with the war on terror in full swing, that short list may soon be even shorter.) In reviewing criminal sentences under the Eighth Amendment, the courts engage in some balancing to ensure proportionality between the offense and the sentence.[20] Quite the opposite of strict scrutiny, however, this balancing is weighted in favor of the government; only grossly disproportionate sentences are invalid.[21]

The Ninth Amendment, as Robert Bork reminded us, is just an "ink blot" with no real meaning in contemporary constitutional law.[22] In the absence of any contemporary controlling Supreme Court case law interpreting this provision,[23] it remains unclear what standard of review would apply in a Ninth Amendment case.

The Tenth Amendment reserves to the states and the people the residual powers not granted to the federal government.

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15. *See* Gianfranciera, S.A. v. Nordberg, 492 U.S. 33, 51–52 (1989).

16. *See* Feltner v. Columbia Pictures Television, 523 U.S. 340, 348–54 (1998).

17. Westlaw search: "seventh amendment" /s "strict scrutiny" in the federal courts database, conducted April 17, 2006.

18. *See* Trop v. Dulles, 356 U.S. 86, 101–03 (1958) (noting that torture is barred by the Eighth Amendment).

19. *See In re* Kremmler, 136 U.S. 436, 446 (1890).

20. *See* Solem v. Helm, 463 U.S. 277 (1983).

21. *See* Harmelin v. Michigan, 501 U.S. 957, 997–98 (1991) (Kennedy, J., concurring) (describing the Eighth Amendment's proportionality requirement); Coker v. Georgia, 433 U.S. 584, 592 (1977) (holding that imposition of the death penalty for the crime of rape was grossly disproportionate and therefore a violation of the Eighth Amendment).

22. *See* ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 166 (1990). *But see* RANDY BARNETT, RESTORING THE LOST CONSTITUTION 224 et seq. (2004) (finding many pretty images in the Ninth Amendment's ink blot).

23. There is some contemporary interpretive case law that is not controlling. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 486–99 (1965) (Goldberg, J., concurring) (relying on the Ninth Amendment to protect the fundamental right of marital privacy).

Worse than an ink blot, the Tenth Amendment has been labeled a "truism"[24] that "added nothing to the [Constitution] as originally ratified."[25] Traditionally, Tenth Amendment disputes were not even justiciable,[26] although in recent years the Court has breathed life into the amendment and relied on it to support judicial rulings circumscribing federal power.[27] The Court has held that the amendment reflects an inviolable principle of the constitutional structure under which the federal government must respect the sovereignty of the states. The Court has been explicit that balancing of the interests, such as we might expect with some form of scrutiny, has no place in the Tenth Amendment context.[28]

So, of the ten provisions of the Bill of Rights, the vast majority does not trigger strict scrutiny. Perhaps this is normatively wrong, and courts should apply strict scrutiny to laws invading each of these rights. But descriptively, as a matter of current constitutional doctrine, strict scrutiny is not the standard of review applied to laws invading all the textual provisions of the Bill of Rights. If these are the rights that are properly thought of as "fundamental," then clearly the ancient wisdom about strict scrutiny is incorrect. Strict scrutiny only applies in the doctrines emerging from two of the ten provisions in the Bill of Rights, the First and Fifth Amendments. Even then, as we will see, strict scrutiny is only occasionally the applicable standard.

II. FUNDAMENTAL RIGHTS OF INCORPORATION

A second way to define what rights are "fundamental" is through the doctrine of incorporation. Under the Supreme Court's "selective incorporation" approach, only the most fundamental provisions of the Bill of Rights—those whose denial, in the words of Justice Felix Frankfurter, "shocks the conscience"—are incorporated.[29] In *Duncan v. Louisiana*, the Court held that incorporation is appropriate when "a right is among

24. United States v. Darby, 312 U.S. 100, 124 (1941).

25. *See* United States v. Sprague, 282 U.S. 716, 733 (1931).

26. *See* Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985).

27. *See* Printz v. United States, 521 U.S. 898, 919–22 (1997).

28. *See id.* at 932 ("It is the very *principle* of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect.") (emphasis in original).

29. *See* Rochin v. California, 342 U.S. 165, 209 (1952); *see also* Powell v. Alabama, 287 U.S. 45, 67–68 (1932) (incorporating the Sixth Amendment because of the "fundamental character" of the right to counsel).

those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[30] In theory, then, incorporated rights are fundamental rights.[31]

All incorporated rights may be fundamental, but not all incorporated rights trigger strict scrutiny. As noted above, there is no strict scrutiny found in Fourth Amendment doctrine, Sixth Amendment doctrine, or in the case law emerging from the incorporated provisions of the Eighth Amendment. Strict scrutiny is only used in the doctrines of two incorporated provisions of the Bill of Rights: the First and Fifth Amendments.

In 1897, the Fifth Amendment became the first provision in the Bill of Rights to be incorporated against the states.[32] Pedigree aside, the Fifth Amendment only requires strict scrutiny some of the time. Strict scrutiny analysis is not used in cases alleging a violation of the Fifth Amendment's takings clause, which protects private property from being appropriated without compensation by the government. The Court uses a deferential, rational basis-like scrutiny to review the constitutionality of so-called "regulatory takings" under *Penn Central Transportation v. New York*.[33] A similar type of deferential review is used to determine if a taking meets the textual requirement of "public use."[34] In "excessive exaction" cases, the Court applies a form of heightened review when the regulation completely annihilates the economic value of the property,[35] but it is not strict scrutiny and the cases are few and far between.

The Fifth Amendment right against self-incrimination does not trigger strict scrutiny either. It is governed by categorical rules, although these have some strict scrutiny-like bite. The government faces an onerous task to show that an exception

30. 391 U.S. 145, 148–49 (1968) (internal quotation marks and citations omitted).

31. In practice, most of the Bill of Rights has been incorporated. Unincorporated areas include the Second Amendment, *see* Presser v. Illinois, 116 U.S. 252 (1886); the Third Amendment, *see* ERWIN CHEMERINKSY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 383 (1st ed. 1997); the Fifth Amendment's right to criminal indictment by grand jury, *see* Hutardo v. California, 110 U.S. 516 (1884); the Seventh Amendment's right to civil jury trials, *see* Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211 (1916); and the Eighth Amendment's prohibition of excessive fines, *see* Browning-Ferris Indust. v. Kelco Disposal, 492 U.S. 257, 276 n.2 (1989).

32. *See* Chicago, Burlington & Quincy Ry. Co. v. City of Chicago, 166 U.S. 226 (1897).

33. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

34. *See* Kelo v. New London, 125 S. Ct. 2655, 2664 (2005) ("For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.").

35. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

should be made from the exclusionary rule barring the use of a defendant's testimony acquired from a custodial interrogation conducted without adequate *Miranda* warnings. Exceptions are only allowed for compelling reasons, such as public safety or the integrity of the judicial process.[36] Here, we see at least traces of strict scrutiny even if the traditional formulation is not invoked.

The two clear sites of Fifth Amendment strict scrutiny are its guarantees of due process and equal protection[37]—the substance of which are effectively coextensive with the Fourteenth Amendment's due process and equal protection clauses. These provisions protect the fundamental rights of privacy, to marry, to travel, to vote, and of equal citizenship. Strict scrutiny is usually applied to laws interfering with these rights, but not always.

Consider the right to privacy. Laws burdening a woman's right to abortion were subject to strict scrutiny review under *Roe v. Wade*.[38] The Court derived that decision's well-known trimester framework from strict scrutiny analysis. Under that framework, the Court invalidated nearly all pre-viability abortion restrictions, including parental notification laws, informed consent requirements, and 24-hour waiting periods.[39] In *Planned Parenthood v. Casey*,[40] the Court reaffirmed the "central holding" of *Roe*, while at the same time the joint opinion (and later a majority of the Court)[41] discarded the strict scrutiny-based trimester framework in favor of the more lenient "undue burden" test.[42] The right to abortion was not deemed to be somehow less fundamental; indeed, the joint opinion argued that "[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."[43] Nevertheless, strict scrutiny was no longer applicable. Some commentators have argued that the undue burden standard is more like a form of intermediate scrutiny or even ra-

36. *See* New York v. Quarles, 467 U.S. 649, 655 (1984) ("public safety" exception); Harris v. New York, 401 U.S. 222, 226 (1971) (impeachment of testimony exception).

37. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (reading an equal protection guarantee into the Fifth Amendment).

38. 410 U.S. 113 (1973).

39. *See, e.g.*, Hodgson v. Minnesota, 497 U.S. 417 (1990) (invalidating a parental notification requirement under *Roe*); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983) (invalidating a waiting period under *Roe*).

40. 505 U.S. 833 (1992) (joint opinion).

41. *See* Stenberg v. Carhart, 530 U.S. 914 (2000).

42. *Casey*, 505 U.S. at 876.

43. *Id.* at 851.

tional basis review.[44] Alternatively, one might read *Casey* to establish a categorical rule: if the law is determined to be an undue burden it will be invalidated, but otherwise the law will be upheld. In any event, the undue burden test is clearly more tolerant of regulation than traditional strict scrutiny, as indicated by the fact that *Casey* upheld several laws similar to ones that had been invalidated under *Roe*, including parental notification, informed consent, and 24-hour waiting periods.[45]

More recently, the fundamental right to privacy triggered only rational basis review in *Lawrence v. Texas*.[46] The Court did not state unambiguously that the right involved was "fundamental," leaving some confusion. But the underlying right extended from a line of cases, such as *Griswold v. Connecticut*[47] and *Roe*, which clearly did recognize privacy to be a fundamental right.[48] The Court also explained that the "right to liberty under the Due Process Clause gives [the petitioners] the full right to engage in their conduct without intervention of the government,"[49] and such substantive due process rights are usually considered fundamental. Despite the importance of the underlying right, the Court only required that that the law be justified by a "legitimate state interest"[50]—the language of the rational basis test. This was perhaps a rational basis with some bite, however, as the Court invalidated the law. Yet it was just as clearly not the strict scrutiny formulation one would expect for a fundamental right. Subsequent to *Lawrence*, the sole federal circuit court decision to date to address the question of *Lawrence*'s standard of review held that it was rational basis review.[51]

The Fifth Amendment's implicit equal protection guarantee does not always require strict scrutiny, either. Intermediate, not strict, scrutiny is applied to sex discrimination.[52] Alienage dis-

44. *See, e.g.*, Gillian E. Metzger, *Unburdening the Undue Burden Standard: Orienting* Casey *in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025, 2033 (1994); Deborah A. Ellis, *Protecting "Pregnant Persons": Women's Equality and Reproductive Freedom*, 6 SETON HALL CONST. L.J. 967, 976 (1996).

45. *See Casey*, 505 U.S. at 881–900.

46. 539 U.S. 558 (2003). In dissent, Justice Scalia argued that the majority's standard was rational basis review. *See id.* at 586, 599 (Scalia, J., dissenting).

47. 381 U.S. 479 (1965).

48. *Lawrence*, 539 U.S. at 564–66 (majority opinion).

49. *Id.* at 578.

50. *Id.*

51. *See* Lofton v. Secretary of Dep't of Children & Family Servs., 358 F.3d 804, 817 (11th Cir. 2004). This circuit court decision is not without controversy. *See* Mark Strasser, *Rebellion in the Eleventh Circuit: On* Lawrence, Lofton, *and the Best Interests of Children*, 40 TULSA L. REV. 421 (2005).

52. *See* Nguyen v. INS, 533 U.S. 53, 60 (2001).

crimination leads courts to apply strict scrutiny in some circumstances,[53] but only rational basis review when the discriminatory law is federal (and thus governed by the Fifth, not Fourteenth, Amendment).[54]

In short, even rights fundamental enough to be incorporated do not always trigger strict scrutiny. And even those that do, like the Fifth Amendment (and, as we will see below, the First Amendment), only do so some of the time.

III. FUNDAMENTALLY PREFERRED RIGHTS

A third definition of "fundamental rights" limits them to an even smaller subset of rights: so-called "preferred rights,"[55] such as the freedom of speech, the freedom of religion, the right to vote, the right to marry, and the right to privacy.[56] The Court has not made clear precisely why some rights are to be preferred over others, but traditional theories emphasize that some rights are so central to self-government and human dignity as to warrant special judicial protection. According to Laurence Tribe, these rights "touch[] more deeply and permanently on human personality [and] came to be regarded as the constituents of freedom."[57]

We have already seen that one of these "preferred rights," the right to privacy, does not always activate strict scrutiny. The same goes for other preferred rights. For example, as Michael Dorf has shown, the courts often avoid applying strict scrutiny to laws infringing on fundamental rights by claiming that the infringement is only an incidental burden on the right.[58] Although even incidental burdens are, according to Dorf, "real infringements of rights," the courts often apply only a lower level scrutiny—or none at all—absent a "substantial burden."[59] Dorf finds this approach common in speech, religion, and privacy cases.[60] Here, the courts have effectively created a way around strict

53. *See* Graham v. Richardson, 403 U.S. 365, 376 (1971).

54. *See* Matthews v. Diaz, 426 U.S. 67, 79–80 (1976).

55. *See* Henry J. Abraham, *Fundamental Rights*, in 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1176, 1177 (Leonard W. Levy et al. eds., 2d ed. 2000).

56. *See id.* at 1177; LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 770 (2d ed. 1988) (identifying "preferred rights").

57. *See, e.g.*, TRIBE, *supra* note 56, at 770.

58. *See* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1179 (1996).

59. *Id.*

60. *See id.* at 1199–1200.

scrutiny even for laws burdening our most basic, core individual rights.

Even preferred rights that ordinarily trigger strict scrutiny do not do so when the individual challenger is himself, shall we say, "unpreferred." Convicts, for example, are subject to having their most fundamental rights of speech, to marry, and of privacy denied by prison officials, and courts will only apply a lenient, rational basis-type of review to such policies under *Turner v. Safley*.[61] Although insisting that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution" and that "when a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights,"[62] *Turner* held that such a regulation will be "valid if it is reasonably related to legitimate penological interests."[63] "Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration."[64] Consequently, the fundamental rights of prisoners are not clothed with strict scrutiny protection.

So what if the individual is not an inmate and the burden on a preferred, core right is more than incidental? Strict scrutiny must apply, no? No.

Perhaps the most preferred of all rights is the freedom of speech, the so-called First Freedom. Yet strict scrutiny is not always applied in free speech cases. Traditional speech doctrine distinguishes between regulations that are content-based and those that are content-neutral. The former generally trigger strict scrutiny, but the latter do not. Content-neutral laws that limit the freedom of speech are subject to the much more deferential standard of *United States v. O'Brien*,[65] under which laws are regularly upheld.[66] Even content-based speech regulations do not always receive strict scrutiny treatment. If the content regulated is commercial speech, the courts apply a form of intermediate review established in *Central Hudson Gas & Electric Corp.*

61. 482 U.S. 78 (1987).
62. *Id.* at 84 (quotations and citations omitted).
63. *Id.* at 89.
64. *Id.*
65. 391 U.S. 367 (1968).
66. *See* Dorf, *supra* note 58, at 1204.

v. Public Service Commission of New York.[67] A similarly less stringent form of review is applied to content-based regulations when the government is acting as an employer (as compared to a sovereign) under the rule of *Pickering v. Board of Education*.[68] These First Amendment doctrines have led Ashutosh Bhagwat to characterize intermediate scrutiny as the "test that ate everything" in free speech jurisprudence.[69]

Free exercise of religion—another preferred right found in the First Amendment—does not always trigger strict scrutiny. Although the Warren Court adopted strict scrutiny for free exercise claims in *Sherbert v. Verner*,[70] the Rehnquist Court overturned that choice of standard in *Employment Division v. Smith*,[71] which held that strict scrutiny was inappropriate for generally applicable laws burdening religious practice. For claims for exemptions from generally applicable laws, which make up the majority of religious liberty controversies,[72] the Constitution now only requires rational basis review. One might even read *Smith* to mean that the free exercise clause no longer provides constitutional protection from generally applicable laws. Fortunately for religious adherents, federal statutory law reinstated strict scrutiny for many claims for exemptions. The case law under these statutes, the Religious Freedom Restoration Act[73] and the Religious Land Use and Institutionalized Persons Act,[74] raise the additional question of what it means to apply "strict scrutiny." Despite the formal use of this standard, courts uphold laws against claims for religious-based exemptions in three of every four cases (74%).[75] Even where courts claim to apply compelling interest analysis, the scrutiny is not always so strict.

Courts may prefer strict scrutiny when adjudicating the constitutionality of laws burdening preferred rights, but that practice

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67. 447 U.S. 557 (1980).

68. 391 U.S. 563 (1968); *see also* Garcetti v. Ceballos, 126 S. Ct. 1951 (2006) (holding that government may discipline employees for speech made pursuant to official duties).

69. *See* Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. (forthcoming).

70. 374 U.S. 398, 406 (1963).

71. 494 U.S. 872 (1990).

72. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. (forthcoming 2006) (finding that between 1990 and 2003 the federal courts ruled on 58 claims for exemptions compared to 15 claims of intentional religious discrimination).

73. 42 U.S.C. § 2000bb-1 (2000).

74. 42 U.S.C. § 2000cc-1(a) (2000).

75. *See* Winkler, *supra* note 72.

is hardly uniform. If the burden is less than substantial or the affected individual is a prison inmate, strict scrutiny is not applied. Moreover, even the most basic First Amendment rights of speech and religious liberty are only given the protection of strict scrutiny in some, not all, cases.

CONCLUSION

There are three ways of defining what rights are "fundamental," but no matter which definition is used, strict scrutiny is not applied to all laws invading the rights included in the definition. Courts employ a host of standards and categorical rules in fundamental rights cases, with strict scrutiny only used from time to time.

In one sense, none of this story about fundamental rights is new to law professors or judges. Constitutional law professors teach the *O'Brien* and *Central Hudson* tests year in and year out, and judges apply those less-than-strict standards regularly in the course of their duties. I make no claim to have discovered Xanadu. But the old adage about laws infringing fundamental rights being subject to strict scrutiny remains a favorite of scholars, judges, and law students. And it is flatly wrong.

Perhaps the notion remains popular because it makes a rather complex doctrinal reality quite simple and easy to memorize. Such simplicity, however, comes at considerable cost: year after year, lawyers repeat an equation that does not add up, breeding confusion and misunderstanding about how constitutional law works. It is time the fundamental truth be told: 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.