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Constitutional Law in the Age of Balancing

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Source: *The Yale Law Journal*, Apr., 1987, Vol. 96, No. 5 (Apr., 1987), pp. 943-1005

Published by: The Yale Law Journal Company, Inc.

Stable URL: <https://www.jstor.org/stable/796529>

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# The Yale Law Journal

Volume 96, Number 5, April 1987

## Articles

### Constitutional Law in the Age of Balancing

T. Alexander Aleinikoff†

**Balancing:** The metaphoric term generally used in the law to describe an exceedingly important conceptual operation. In almost all conflicts, especially those that make their way into a legal system, there is something to be said in favor of two or more outcomes. Whatever result is chosen, someone will be advantaged and someone will be disadvantaged; some policy will be promoted at the expense of some other. Hence it is often said that a “balancing operation” must be undertaken, with the “correct” decision seen as the one yielding the greatest net benefit.

That some such process must be a part of any practical legal system is undeniable. But that should not blind us to the extreme danger of too facile a use of “balancing” in a system of justice.<sup>1</sup>

This essay is an attempt to explore and evaluate a form of constitutional reasoning—balancing—that has become widespread, if not domi-

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† Professor of Law, University of Michigan Law School. B.A. 1974, Swarthmore College; J.D. 1977, Yale Law School. This Article is dedicated to the memory of Robert M. Cover. Bob was my teacher, my advisor, my mentor, my friend. No one I have ever known has possessed such a rare combination of brilliance, compassion, humility, and moral conviction. The law has lost a *tzaddik*.

Many colleagues and friends slogged through drafts of this Article or tolerated conversations about it. Sincere thanks to all.

1. Leff, *The Leff Dictionary of Law: A Fragment*, 94 YALE L.J. 1855, 2123–24 (1985).

nant, over the last four decades.<sup>2</sup> Disputes over the wisdom and utility of constitutional balancing were fashionable in the 1950's and 1960's when Justices Frankfurter and Black represented different sides of the argument on the Supreme Court. At that time, "balancing" was largely attacked for the illiberal results it produced in free speech cases.<sup>3</sup>

Today, the debate has all but disappeared.<sup>4</sup> Criticism from the left softened when it was recognized that balancing could lead to liberal as well as conservative results.<sup>5</sup> Academia fashioned a truce based on the view that little separated the opposing sides except terminology and attitude.<sup>6</sup> Most important, familiarity bred consent. As the Supreme Court applied a balancing approach to area after area in constitutional law, the methodology began to appear natural.

In this Article, I will chart the rise and spread of "balancing" as a method of constitutional interpretation. I will argue that balancing is uncontroversial today because of its resonance with current conceptions of law and notions of rational decisionmaking. This complacency, however, blinds us to serious problems in the mechanics of balancing and prevents

2. The acceptance of balancing as the predominant method of constitutional interpretation is demonstrated by its frequent appearance in published student notes and comments. See, e.g., Note, *The Constitutionality of the INS Sham Marriage Investigation Policy*, 99 HARV. L. REV. 1238 (1986); Note, *INS Factory Raids as Nondetentive Seizures*, 95 YALE L.J. 767 (1986); Comment, *The First Amendment Right of Access to Civil Trials after Globe Newspaper Co. v. Superior Court*, 51 U. CHI. L. REV. 286 (1984). But see Note, *Judicial Balancing of Foreign Policy Considerations: Comity and Errors Under the Act of State Doctrine*, 35 STAN. L. REV. 327, 329 (1983) (arguing against balancing approach in favor of "a rehabilitation of a strict definitional approach to the act of state doctrine").

3. See T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 717-18 (1970); M. SHAPIRO, *FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW* ch. 3 (1966); Frantz, *Is the First Amendment Law?—A Reply to Professor Mendelson*, 51 CALIF. L. REV. 729, 746-49 (1963) [hereinafter Frantz, *Reply*]; Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1442-45 (1962) [hereinafter Frantz, *Balance*]; Meiklejohn, *The Barenblatt Opinion*, 27 U. CHI. L. REV. 329 (1960); Meiklejohn, *The Balancing of Self-Preservation Against Political Freedom*, 49 CALIF. L. REV. 4 (1961); Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245;.

4. But see Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592 (1985). The dispute over balancing continues primarily in the First Amendment area. Compare Baker, *Press Rights and Government Power to Structure the Press*, 34 U. MIAMI L. REV. 819, 848-51 (1980) [hereinafter Baker, *Press Rights*] and Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations*, 78 NW. U.L. REV. 937 (1983) [hereinafter Baker, *Parade Permits*] (criticizing balancing) with Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915, 955-58 (1978) and Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U.L. REV. 1212, 1251-52 (1983) [hereinafter Shiffrin, *General Theory*] (advocating balancing). For additional discussion of balancing, see Elson, *Balancing Costs in Constitutional Construction: The Burger Court's Expansive New Approach*, 17 AM. CRIM. L. REV. 160 (1979) (discussing balancing in Sixth Amendment jurisprudence).

5. See *Goldberg v. Kelly*, 397 U.S. 254 (1970) (due process requires hearing prior to termination of AFDC payments).

6. See H. KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* (1965); Black, *Mr. Justice Black, the Supreme Court, and the Bill of Rights*, HARPER'S, Feb. 19, 1961, at 63, 65-66; Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 296-305 (1981).

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us from recognizing how balancing has transformed constitutional adjudication and constitutional law. My purpose is not to propose a comprehensive alternative to balancing, though I suggest that alternatives exist; rather, I hope to raise enough questions about the form and implications of balancing to force a re-opening of the balancing debate.

### I. THE DEFINITION AND FORMS OF BALANCING

#### A. *Definition*

The metaphor of balancing refers to theories of constitutional interpretation that are based on the identification, valuation, and comparison of competing interests. By a “balancing opinion,” I mean a judicial opinion that analyzes a constitutional question by identifying interests implicated by the case and reaches a decision or constructs a rule of constitutional law by explicitly or implicitly assigning values to the identified interests. As Part III will show, this definition captures most of the work that the Supreme Court does under the name of balancing.

Some commentators see balancing as any method of resolving conflicts among values.<sup>7</sup> As I explain below, choices may be made among values in ways that are not based on an assessment of the “weights” of the values at stake. Similarly, balancing, as I define it, differs from methods of adjudication that look at a variety of factors in reaching a decision. These would include some of the familiar multi-pronged tests<sup>8</sup> and “totality of the circumstances” approaches.<sup>9</sup> These standards ask questions about how one ought to characterize particular events. Was the confession voluntary or involuntary? Did the government action constitute a “taking”? In answering such questions, one starts with some conception of what constitutes voluntariness and involuntariness and then asks whether the particular situation shares more of the voluntary elements or the involuntary elements. Or one begins with a checklist of factors that have been used in the past to determine whether a “taking” has occurred. The reasoning is thus primarily analogical. Balancing represents a different kind of thinking. The focus is directly on the interests or factors themselves. Each interest seeks recognition on its own and forces a head-to-head comparison with competing interests.

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7. See, e.g., Shiffrin, *General Theory*, *supra* note 4, at 1249 (“[B]alancing is nothing more than a metaphor for the accommodation of values.”).

8. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602 (1971). See generally Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165 (1985) (examining constitutional formulas).

9. See, e.g., *Connolly v. Pension Benefit Guar. Corp.*, 106 S. Ct. 1018, 1026 (1986) (takings claim); *Cleavinger v. Saxner*, 106 S. Ct. 496, 501 (1985) (immunity from suit); *Illinois v. Gates*, 462 U.S. 213, 230–31 (1983) (probable cause under Fourth Amendment).

## B. *Metaphorical Forms*

The balancing metaphor takes two distinct forms. Sometimes the Court talks about one interest *outweighing* another. Under this view, the Court places the interests on a set of scales and rules the way the scales tip. For example, in *New York v. Ferber*,<sup>10</sup> the Court upheld a statute criminalizing the distribution of child pornography because “the evil . . . restricted [by the statute] so overwhelmingly outweighs the expressive interests, if any, at stake.”<sup>11</sup> Constitutional standards requiring “compelling” or “important” state interests also exemplify this form of the balancing metaphor.<sup>12</sup>

The Court employs a different version of balancing when it speaks of “striking a balance” between or among competing interests. The image is one of balanced scales with constitutional doctrine calibrated according to the relative weights of the interests. One interest does not override another; each survives and is given its due. Thus, in *Tennessee v. Garner*,<sup>13</sup> which considered the constitutionality of a state statute permitting the use of deadly force against fleeing felons, the Court ruled neither that the state interest in preventing the escape of criminals outweighed an individual’s interest in life nor that the individual’s interest outweighed the state’s. The “balancing process”<sup>14</sup> recognized both interests: The Court ruled that an officer may not use deadly force unless such force is necessary to prevent escape and the officer has probable cause to believe that the suspect poses a threat of serious physical harm.<sup>15</sup> What unites these two types of balancing—and the reason they will be considered together—is their shared conception of constitutional law as a battleground of competing interests and their claimed ability to identify and place a value on those interests.

## C. *Which Interests Are Balanced?*

We usually think of balancing cases as pitting the interests of the individual against the interests of the government. Sometimes the interests of the government are taken to mean interests in the functioning of government, for example, the protection of the lives of police officers<sup>16</sup> or the avoidance of administrative costs.<sup>17</sup> At other times, the government’s inter-

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10. 458 U.S. 747 (1982).

11. *Id.* at 763–64.

12. *See, e.g.*, *Trimble v. Gordon*, 430 U.S. 762 (1977); *Craig v. Boren*, 429 U.S. 190 (1976).

13. 471 U.S. 1 (1985).

14. *Id.* at 9.

15. *Id.* at 11.

16. *See, e.g.*, *Terry v. Ohio*, 392 U.S. 1 (1968).

17. *See, e.g.*, *Mathews v. Eldridge*, 424 U.S. 319 (1976).

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est is identified with the interests of the public, such as the interest in national security<sup>18</sup> or the apprehension of criminals.<sup>19</sup>

While the individual/government conflict describes a large number of famous balancing cases, including many First Amendment opinions,<sup>20</sup> a surprising number of cases involve different sets of competing interests. Balancing may occur where the government is not a party<sup>21</sup> or when the interests of two governmental entities conflict.<sup>22</sup>

The interests considered in balancing opinions may or may not, be grounded in the Constitution. In all balancing cases concerning federal action, the competing interest of the federal government is grounded, at least in part, in the Constitution; the challenged statute or conduct must fall within the powers delegated by the Constitution.<sup>23</sup> In other cases, particularly those challenging state conduct, the Court weighs constitutional rights against interests not derived from the Constitution. In *Schneider v. State*,<sup>24</sup> an early balancing case, the Court weighed the injury to the defendants' First Amendment interests against the state's interest in clean streets in concluding that a municipality could not prohibit the distribution of handbills.

Although we tend to associate balancing with rights cases, the Court has balanced in other situations. Again, sometimes the interests on both sides of the scales are constitutionally-based—for example, in separation of powers<sup>25</sup> and inter-sovereign immunity cases.<sup>26</sup> At other times, a constitutional power is balanced against a non-constitutional state interest, as in dormant commerce clause cases.<sup>27</sup>

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18. See, e.g., *New York Times Co. v. United States*, 403 U.S. 713, 718-19 (1971) (Black, J., concurring); *Hirabayashi v. United States*, 320 U.S. 81, 101 (1943).

19. See, e.g., *Tennessee v. Garner*, 471 U.S. 1 (1985).

20. See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Schneider v. State*, 308 U.S. 147 (1939).

21. For example, in cases involving libel actions, the Court has balanced the First Amendment rights of the press against private interests in reputation. See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

22. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 562-63 (1985) (Powell, J., dissenting) (federalism); *United States v. Nixon*, 418 U.S. 683 (1974) (separation of powers).

23. See, e.g., *United States v. Montoya de Hernandez*, 105 S. Ct. 3304 (1985); *Mathews v. Eldridge*, 424 U.S. 319 (1976).

24. 308 U.S. 147 (1939).

25. See, e.g., *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245, 3258 (1986); *United States v. Nixon*, 408 U.S. 683 (1974).

26. See, e.g., *Helvering v. Gerhardt*, 304 U.S. 405 (1938). The Court also has balanced the interests of one state against another in full faith and credit clause cases. E.g., *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980).

27. See, e.g., *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981); *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945). Some cases fall in several categories. E.g., *Gannett Co. v. DePasquale*, 443 U.S. 368, 398 (1979) (Powell, J., concurring) (First Amendment right of press weighed against constitutional right of fair trial and "needs of government to obtain just convictions and to preserve the confidentiality of sensitive information and the identity of informants").

### D. "Definitional" and "Ad hoc" Balancing

Commentators have occasionally distinguished balancing that establishes a substantive constitutional principle of general application (labeled "definitional" balancing by Professor Nimmer) from balancing that itself is the constitutional principle (so-called "ad hoc" balancing).<sup>28</sup> *New York v. Ferber*<sup>29</sup> is an example of definitional balancing. *Ferber's* holding, that the distribution of child pornography is not protected by the First Amendment, may be applied in subsequent cases without additional balancing. Ad hoc balancing is illustrated by the Court's approach in procedural due process cases. Under *Mathews v. Eldridge*,<sup>30</sup> the process that the Constitution requires is determined by balancing the governmental and private interests at stake in the particular case.<sup>31</sup>

The Court's choice of balancing methodology may influence results; certain interests may count more or less when considered on a global or case-by-case basis.<sup>32</sup> Furthermore, ad hoc balancing may undermine the development of stable, knowable principles of law. But the critique of balancing developed below will generally apply with equal force to definitional and ad hoc variants.

## II. THE ORIGINS OF BALANCING

Balancing is not nearly as old as the Constitution. As an explicit method of constitutional interpretation, it first appears in majority opinions in the late 1930's and early 1940's.<sup>33</sup> No Justice explained why such

28. See M. NIMMER, NIMMER ON FREEDOM OF SPEECH §§ 2.02-.03 (1984); Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022, 1027-28 (1978); Nimmer, *The Right to Speak From Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 942 (1968).

29. 458 U.S. 747 (1982).

30. 424 U.S. 319 (1976).

31. *Id.* at 348. Definitional balancing may mandate ad hoc balancing. See, e.g., *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981) (definitional rule that entitlement of indigent parents to state-provided counsel in proceedings to terminate parental rights should be determined by ad hoc balancing).

32. Ad hoc balancing may work against First Amendment claims (when compared to governmental interests in national security), but in favor of procedural due process claims (where the threatened harm to the individual is compared with financial costs to the government).

33. There are some hints of balancing earlier. See, e.g., *Missouri ex rel. Hurwitz v. North*, 271 U.S. 40, 42 (1926) (due process for revocation of medical license satisfied if doctor had "reasonable notice, and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceedings and the character of the rights which may be affected by it"); *Carroll v. United States*, 267 U.S. 132, 149 (1925) ("The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens."); *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) (Holmes, J.) (All rights "are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached."); *Lawton v. Steele*, 152 U.S. 133 (1894) (value of nets and cost of judicial proceeding considered in determining that summary destruction of fishing nets not violation of due process).

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a methodology was a proper form of constitutional construction, nor did any purport to be doing anything novel or controversial. Yet balancing was a major break with the past, responding to the collapse of nineteenth century conceptualism and formalism<sup>34</sup> as well as to half a century of intellectual and social change. Building on the work of Holmes, James, Dewey, Pound, Cardozo, and the Legal Realists, and flying the flags of pragmatism, instrumentalism and science, balancing represented one attempt by the judiciary to demonstrate that it could reject mechanical jurisprudence without rejecting the notion of law.

### A. *The Non-Balancing Past*

The great constitutional opinions of the nineteenth century and early twentieth century did not employ balancing as a method of constitutional argument or justification. Marshall did not hold for the Bank in *McCulloch v. Maryland*<sup>35</sup> because the burden of the state's tax outweighed the state's interest in taxation.<sup>36</sup> Webster's argument in *Gibbons v. Ogden*<sup>37</sup> was not persuasive because he demonstrated that the interest of the national government outweighed the interests of the states in regulating interstate commerce. Nor were the purchasers of land in *Fletcher v. Peck*<sup>38</sup> entitled to keep their property because, on balance, the interest in security of transactions outweighed the interest of the State of Georgia in repealing corrupt legislation.

To be sure, early Justices such as Marshall, Story, and Taney recognized great clashes of interests: federal versus state, public versus private, executive versus legislative, free versus slave. But they resolved these disputes in a categorical fashion.<sup>39</sup> Supreme Court opinions generally recognized differences in kind, not degree.<sup>40</sup> The power to tax was the power to destroy; states could exercise police power but could not regulate commerce; legislatures could impair contractual remedies but not obligations.

Nineteenth century constitutional doctrine was not constructed in a vac-

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34. I adopt Thomas Grey's definition of formalism: "[L]egal theories that stress the importance of rationally uncontroversial reasoning in legal decision, whether from highly particular rules or quite abstract principles." Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 9 (1983).

35. 17 U.S. (4 Wheat.) 316 (1819).

36. Indeed, Marshall expressly noted the inappropriateness of ad hoc judgments; by adopting a *per se* rule, the Court was not "driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power." *Id.* at 430.

37. 22 U.S. (9 Wheat.) 1 (1824).

38. 10 U.S. (6 Cranch) 87 (1810).

39. See Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. L. & SOC. 3, 8 (1980).

40. See, e.g., *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 488-90 (1939) (Frankfurter, J., concurring) (analyzing Marshall's dictum in *McCulloch* that power to tax is power to destroy); *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting) (same).



uum. The Court was acutely aware of the interests at stake and the impact of its decisions. In the *Charles River Bridge Case*<sup>41</sup> for example, both the majority<sup>42</sup> and dissenting<sup>43</sup> opinions openly addressed the impact of the Court's reading of the contract clause on progress and technological innovation. But neither opinion based its conclusion on the relative "weights" of the private and public interests.

Given the grip that balancing has on modern constitutional analysis, it takes an act of will not to read, or understand, earlier opinions in today's style. But careful attention to the Court's language makes clear that its method of justification, its way of talking about constitutional law, did not use the vocabulary of balancing.<sup>44</sup>

This may be seen in an opinion that is generally viewed as the progenitor of the modern balancing approach in the dormant commerce clause area, *Cooley v. Board of Wardens*.<sup>45</sup> In *Cooley*, the Court considered whether Pennsylvania could require ships entering the Philadelphia harbor to have local pilots on board. The pilot rules clearly applied to interstate commerce, and the plaintiffs sought to have the rules invalidated as a violation of Congress' exclusive power to regulate commerce among the states. The Court disagreed: "Whatever subjects of [the commerce power] are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."<sup>46</sup> In other areas, however, where local regulation alone "can meet the local necessities of navigation," state regulation of interstate commerce would be permitted.<sup>47</sup> Under this test, the Pennsylvania law was upheld.

*Cooley* is certainly an instrumental opinion. The Court recognized that interstate commerce "embraces a vast field," and that to permit only Congress to regulate it would hardly be useful to a nation as large as the

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41. 36 U.S. (11 Pet.) 420 (1837).

42. *Id.* at 552-53.

43. *Id.* at 608 (Story, J., dissenting); see also *The Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 78 (1872) (noting that broad reading of Fourteenth Amendment would radically alter power relationships between federal and state governments); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 623-24 (1842) (suggesting exclusive power of Congress to enact fugitive slave laws as way to avoid interstate conflicts).

44. Thus, I disagree with Kenneth Karst's description of *Willson v. The Blackbird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829), as a balancing case. See Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 78 n.14. While, no doubt, today we see the case as a balancing case, any fair reading of Marshall's opinion makes clear that he justified his conclusion in categorical terms: Draining a marsh by construction of a dam was an exercise of the "police power," not a regulation of commerce. 27 U.S. at 252. I believe Laurence Tribe makes a similar mistake in his description of the mid-nineteenth century contract clause codes. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 9-6, at 467 (1978) (asserting that Supreme Court used "reasonableness" standard to decide such cases).

45. 53 U.S. (12 How.) 299 (1851).

46. *Id.* at 319.

47. *Id.*

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United States.<sup>48</sup> In the case at hand, the Court was convinced of “the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants.”<sup>49</sup> But *Cooley* was not a balancing opinion. The Court did not purport to weigh the state’s interest against the burden on interstate commerce. The solution was categorical. The regulation at issue was not “of a nature such as” to demand a uniform rule established by Congress.<sup>50</sup>

The *bête-noire* of modern constitutional law, *Lochner v. New York*,<sup>51</sup> exhibits a similar mode of reasoning. In addressing the constitutionality of the New York maximum hour statute, Justice Peckham did not balance the interests of the state against the interests of the individual; nor did he attempt to assess the importance (or “weight”) of the various interests. Rather, the “reasonableness” of the regulation was viewed as a question of category: “Is [the statute] within the police power of the State?”<sup>52</sup>

To be “within” the police power, a statute had to pursue a legitimate end, such as protection of health or safety; and the gains to health or safety had to be more than fanciful—otherwise, the category of individual liberty would evaporate. Thus, the Court required the state to demonstrate that its statutory regulation actually contributed to healthier bread or bakers. This attention to the strength of the state’s interests was part of the process of categorization, not a balance of competing interests, as the Court’s final paragraph makes clear:

It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed . . . . It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employés (all being men, *sui juris*), in a private business, not dangerous in any degree to morals or in any real and substantial degree, to the health of the employés.<sup>53</sup>

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48. *Id.*

49. *Id.* at 320.

50. *Id.*; see also Henkin, *supra* note 28, at 1038 (*Cooley* doctrine did not imply any doctrine of balancing). *But see* C. BLACK, PERSPECTIVES IN CONSTITUTIONAL LAW 34 (1970) (*Cooley* rested on Court’s assessment of relative weight of state and federal interests).

51. 198 U.S. 45 (1905).

52. *Id.* at 57.

53. *Id.* at 64; see Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J.

The Court's rhetoric does not conclusively demonstrate that it did not balance competing interests in defining categories. And some might say that *Lochner* and many constitutional decisions of the nineteenth century were based on implicit, undisclosed balances. While this claim cannot be disproved, I think it is quite unlikely to be correct. Indeed, the best evidence that we have—the words used by the Justices—certainly runs the other way. If judges thought that the weight of interests was the controlling question, would they not have wanted evidence and advice from the parties on what interests were implicated by the case and what weight those interests ought to be accorded? And would they not have sought such information by making clear in their opinions what was motivating their decisions? Furthermore, it seems odd to assume that a decisionmaker would have wholly separate intellectual modes of analysis and expression; and it would grossly understate the power of legal training to suppose that the way a court describes its reasoning in no way reflects how it conceived of the problem presented.<sup>54</sup>

As described below, balancing appeared as an explicit method of constitutional interpretation in the mid-twentieth century. Two interpretations of this change in opinion writing are plausible. First, something happened to allow judges to express what they had been doing all along. Second, ways of thinking about constitutional law and constitutional reasoning changed and that change was reflected in the new form of opinion writing. The next section will explore the ample evidence for the second view.

## B. *The Call for New Forms of Constitutional Adjudication*

There are a number of reasons why the Supreme Court might have been searching for new ways of reading an old document in the third and fourth decades of the present century. Three distinct complaints about earlier constitutional methodology all supported a move towards balancing.

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920, 941 (1973) (analyzing *Lochner* as a non-balancing opinion). One can also see “categoricalness” in commerce clause cases that spanned the *Lochner* era. See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251, 271–72 (1918); *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895).

54. This is not to say that the nineteenth century mind was unable to examine a constitutional question from the perspective of the relative weights of the competing interests. Indeed, Thomas Cooley appears to have supported balancing in dormant commerce clause cases:

The States may authorize the construction of bridges over navigable waters, for railroads as well as for every other species of highway, notwithstanding they may to some extent interfere with the right of navigation. . . . The character of the structure, the facility afforded for vessels to pass it, the relative amount of traffic likely to be done upon the stream and over the bridge, and whether the traffic by rail would be likely to be more incommoded by the want of the bridge than the traffic by water with it, are all circumstances to be taken into account

T. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS 592–93 (1st ed. 1868) (footnotes omitted).

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### 1. *The Political Call*

By the mid-1930s, the Court was viewed as wildly out of touch with the needs and desires of modern America. After all, it had dismantled much of the New Deal. For the most part, the New Dealers thought that it was not the Constitution, but rather the interpreters and their methods of interpretation that needed changing. The Constitution, *read properly*, could yield results necessary and proper for a successful restructuring of the American economy and federal/state relations. As Franklin Roosevelt told the nation in 1937 in defending his court-packing plan:

[W]e have . . . reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will do justice under the Constitution—not over it.<sup>55</sup>

A Court under fire may first respond by denying responsibility, by placing blame elsewhere—such as on the Constitution or the nature of the judicial role.<sup>56</sup> When it becomes clear, however, that what is demanded is not an explanation for the bad news but rather a change in outcomes, the Court may start searching for new methods of interpretation. The famous 1937 shift was such a movement.<sup>57</sup> Under the guise of returning to the Constitution,<sup>58</sup> the Court sought new ways of reading it.

### 2. *The Judicial Call*

It was not only *Lochner* that troubled the New Deal Court. The days of substantive due process could plausibly be described as a frolic, a short-lived, wrong-headed experiment. Reversing *Lochner* could have meant a return to the original Marshallian understanding. But the problem was that many of John Marshall's tunes simply wouldn't play any more. Categories designed to create and protect an ideal structure of federalism and individual rights in the nineteenth century seemed out of place in a country that had grown in ways wholly unforeseeable by the Framers and early Justices. The poor fit between doctrine and the real world led some

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55. Quoted in G. GUNTHER, *CONSTITUTIONAL LAW* 130 (11th ed. 1985) (bracket in original). For contemporaneous objections that the Court was imposing its political views in the guise of constitutional interpretation, see C. HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* (2d ed. 1932).

56. See *United States v. Butler*, 297 U.S. 1, 62 (1936); R. COVER, *JUSTICE ACCUSED* (1975).

57. See R. McCLOSKEY, *THE AMERICAN SUPREME COURT* 177–79 (1960).

58. See *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 492–93 (1939) (Frankfurter, J., concurring) (“[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.”).

members of the Court to question earlier constitutional truths, and they did so with an eye more to social facts than to abstract categories.

Holmes, Brandeis, and Stone led the early charge in constitutional law. To Holmes, the absolutes of the past had to yield to experience and the social facts of the day. Dissenting in a case in 1928 that woodenly applied the prevailing intergovernmental immunity doctrine, he wrote: "In [Marshall's] days it was not recognized as it is today that most of the distinctions of the law are distinctions of degree. . . . The power to tax is not the power to destroy while this Court sits."<sup>59</sup> Brandeis carried his brief-writing style with him to the Supreme Court. In dissent after dissent, he criticized the Court for ignoring the facts of the social problem that the challenged legislation was crafted to remedy. "Knowledge is essential to understanding," he wrote epigrammatically in 1924, "and understanding should precede judging."<sup>60</sup> Stone inveighed against "mechanical" interpretation that was "too remote from actualities . . . to be of value."<sup>61</sup>

The call for realism in constitutional adjudication was not only a result of the Justices' recognition that new times demanded new doctrine. After all, doctrine had grown and changed throughout the nineteenth century in response to the "felt necessities of the time."<sup>62</sup> The significance of the Stone and Brandeis dissents lies in their attention to facts and social conditions—the self-conscious analysis of the societal sources of law.<sup>63</sup> The new form of opinion writing was more than a change in literary style; it reflected a new way of looking at constitutional law influenced by almost half a century of ferment in legal philosophy. By the mid-1930's, the academy's relentless mocking of the premises and performance of nineteenth century jurisprudence had taken its toll.

59. *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting).

60. *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 520 (1924) (Brandeis, J., dissenting); *see also* *Truax v. Corrigan*, 257 U.S. 312, 356–57 (1921) (Brandeis, J., dissenting) (calling for consideration of contemporary social, industrial, and political consideration by judges); *Adams v. Tanner*, 244 U.S. 590, 600 (1917) (Brandeis, J., dissenting) ("[W]hether a measure relating to the public welfare is arbitrary or unreasonable . . . should be based upon a consideration of relevant facts, actual or possible.").

61. *Di Santo v. Pennsylvania*, 273 U.S. 34, 44 (1927) (Stone, J., dissenting); *see also* *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523–24 (1926) (urging "practical construction").

62. O.W. HOLMES, *THE COMMON LAW* 5 (1963).

63. Whether a law enacted in the exercise of the police power is justly subject to the charge of being unreasonable or arbitrary, can ordinarily be determined only by a consideration of the contemporary conditions, social, industrial, and political, of the community to be affected thereby. Resort to such facts is necessary, among other things, in order to appreciate the evils sought to be remedied and the possible effects of the remedy proposed.

*Truax v. Corrigan*, 257 U.S. at 356–57 (Brandeis, J., dissenting); *see also* *Di Santo v. Pennsylvania*, 273 U.S. at 44 (Stone, J., dissenting) (advocating "consideration of all the facts and circumstances").

### 3. *The Academic Call*

Oliver Wendell Holmes, the patron saint of all the various antiformalist schools, had fired the first salvos long before. Holmes' views were based on the now banal recognition that law is a product more of social experience than of deductive logic: "[I]n the broadest sense it is true that the law is a logical development, like everything else. The danger of which I speak is . . . the notion that a given system . . . can be worked out like mathematics from some general axioms of conduct."<sup>64</sup> In language that would be quoted again and again, Holmes admonished lawyers to "think things[,] not words . . . ."<sup>65</sup>

Roscoe Pound broadened and deepened Holmes' attack. In a number of widely influential pieces written after the turn of the century, Pound lambasted what he termed "mechanical jurisprudence"<sup>66</sup> or the "jurisprudence of conceptions" in constitutional law.<sup>67</sup> The academic critique was greatly aided by the non-judicial writings of Benjamin Cardozo, who took "judge-made law as one of the existing realities of life."<sup>68</sup> Again, Cardozo's willingness to admit a role for creativity and social responsiveness in the law appears uncontroversial today. But, at the time, his analysis raised a storm of protest.<sup>69</sup>

Pound and Cardozo, while recognizing the limits of logical deduction, thought it still had an important role to play in legal decisionmaking. Indeed, they believed that most cases could be disposed of without judicial policymaking.<sup>70</sup> The Legal Realists went a step further. The "rule-skepticism" of some Realists denied that in any case "doubtful enough to make litigation respectable," prevailing legal doctrine compelled an answer.<sup>71</sup> Legal opinions were no more than "trained lawyers' arguments . . . intended to make the decision seem . . . legally inevitable,"<sup>72</sup> they

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64. O.W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 180 (1920) [hereinafter O.W. HOLMES, *The Path of the Law*].

65. O.W. HOLMES, *Law in Science—Science in Law*, in COLLECTED LEGAL PAPERS, *supra* note 64, at 238 [hereinafter O.W. HOLMES, *Law in Science*].

66. Pound, *Liberty of Contract*, 18 YALE L.J. 454, 462–63 (1909); Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 610 (1908) [hereinafter Pound, *Mechanical Jurisprudence*]. Pound defined one of the manifestations of mechanical jurisprudence as "the rigorous logical deduction from predetermined conceptions in disregard of and often in the teeth of the actual facts . . . ." Pound, *Liberty of Contract*, *supra*, at 462.

67. Pound, *Mechanical Jurisprudence*, *supra* note 66, at 610.

68. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 10 (1921).

69. See G. GILMORE, *THE AGES OF AMERICAN LAW* 77 (1977).

70. See B. CARDOZO, *THE GROWTH OF THE LAW* 59–60 (1924); Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 706–07 (1931).

71. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1239 (1931).

72. *Id.* at 1238–39.

were based not on logic, but on judges' "hunches,"<sup>73</sup> personal political views,<sup>74</sup> or psychological dispositions.<sup>75</sup>

The debunking of the role of logic in judicial decisionmaking was part of a larger shift from the abstract to the real in legal philosophy. Nineteenth century conceptualism gave way to twentieth century instrumentalism. Law was viewed as a means to an end, as purposeful human activity aimed at achieving social goals.<sup>76</sup> The instrumental approach had both descriptive and normative implications that revolutionized prevailing notions of legal science. From the descriptive perspective, the scholarly critics agreed that the study of law should concern "law in action," not "law in the books."<sup>77</sup> The normative side of instrumentalism, like so much else, could be traced to Holmes: "[T]he real justification of a rule of law . . . is that it helps to bring about a social end which we desire . . . ."<sup>78</sup> Pound,<sup>79</sup> Cardozo,<sup>80</sup> and Llewellyn<sup>81</sup> expressed similar views, each in his own distinctive language.

The philosophical pragmatism of William James and John Dewey heavily influenced the recognition of the limits of logic and the adoption of an instrumental approach to law.<sup>82</sup> "The truth of an idea is not a stagnant property inherent in it," wrote James in 1914. "Truth happens to an idea. It *becomes* true, is *made* true by events."<sup>83</sup> This message of truth-in-consequences supported a view of law as dynamic, functional, relativistic, and experimental.<sup>84</sup> Law was not a "brooding omnipresence,"<sup>85</sup> but rather a particular means to socially defined ends, and the test of the law

73. See Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929).

74. See J. FRANK, *LAW AND THE MODERN MIND* 113-14 (1970).

75. See *id.* at 119-20. For studies of the Realists, see W. RUMBLE, *AMERICAN LEGAL REALISM* (1968); W. TWining, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973).

76. See, e.g., Pound, *Mechanical Jurisprudence*, *supra* note 66, at 609 ("We do not base institutions upon deductions from assumed principles of human nature; we require them to exhibit practical utility, and we rest them upon a foundation of policy and established adaptation to human needs.").

77. See K. LLEWELLYN, *THE BRAMBLE BUSH* 16-17 (1930); Cohen, *The Problems of Functional Jurisprudence*, 1 MOD. L. REV. 5 (1937).

78. O.W. HOLMES, *Law in Science*, *supra* note 65, at 238. See generally R. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* 46-48, 61 (1982) (discussing views of Holmes, Pound, Dewey, Cohen and other instrumentalists on theory of value and general nature of law).

79. See Pound, *Mechanical Jurisprudence*, *supra* note 66, at 605 ("Being scientific as a means toward an end, [law] must be judged by the results it achieves, not by the niceties of its internal structure.").

80. See B. CARDOZO, *supra* note 68, at 66 ("The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence.").

81. See Llewellyn, *supra* note 71, at 1236 ("The conception of law [is] as a means to social ends . . . so that any part needs constantly to be examined for its purpose, and for its effect . . . .")

82. See E. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY* (1973); D. WIGDOR, *ROSCOE POUND* 185 (1974).

83. W. JAMES, *PRAGMATISM* 201 (1907).

84. See R. SUMMERS, *supra* note 78, at 30-33.

85. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

was empirical. Pound made explicit the link between pragmatism and legal scholarship in his influential article *Mechanical Jurisprudence*:

I have referred to mechanical jurisprudence as scientific because those who administer it believe it such. But in truth it is not science at all. We no longer hold anything scientific merely because it exhibits a rigid scheme of deductions from *a priori* conceptions. In the philosophy of to-day, theories are “instruments, not answers to enigmas, in which we can rest.” . . . We have . . . the same task in jurisprudence that has been achieved in philosophy, in the natural sciences and in politics. We have . . . to attain a pragmatic, a sociological legal science.<sup>86</sup>

Pragmatism reassured legal scholars that abandonment of the goal of formal certainty did not necessarily entail nihilism; on the contrary, it liberated scholars to develop and test new rules for new social conditions. Thus Cardozo could write, without a sense of fear or intellectual paralysis: “Nothing is stable. Nothing absolute. All is fluid and changeable. There is an endless ‘becoming.’”<sup>87</sup>

Pragmatism also provided legal scholars with a new form of logic, one that supported a different conception of legal reasoning. In an important article published in 1924, John Dewey described a logic “*relative to consequences rather than to antecedents*,” a logic of prediction of probabilities rather than one of deduction of certainties.” Such a logic treated legal rules in a revolutionary manner:

For the purposes of a logic of inquiry into probable consequences, general principles can only be tools justified by the work they do. They are means of intellectual survey, analysis, and insight into the factors of the situation to be dealt with. Like other tools they must be modified when they are applied to new conditions and new results have to be achieved.<sup>88</sup>

Pragmatism, therefore, supported the attack on formalism and provided an instrumental, non-formalist mode of legal reasoning attuned to the way in which law actually functioned in society. It also supported the research agenda urged by Holmes, Pound, and the Realists. If the value of a legal rule was established by its consequences, then scholars should eschew historical or analytical treatments of legal doctrine for scientific analyses of

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86. Pound, *Mechanical Jurisprudence*, *supra* note 66, at 608–09 (quoting W. JAMES, PRAGMATISM 53 (1907)).

87. B. CARDOZO, *supra* note 68, at 28.

88. Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 26 (1924).



“the ends sought to be attained [by law] and the reasons for desiring them.”<sup>89</sup>

Where did the new legal philosophy leave judges? Certainly they were far less constrained by legal doctrine than had been previously thought. In some of the most celebrated phrases of our legal culture, Holmes and Cardozo acknowledged the creative freedom inherent in the judicial process.<sup>90</sup> And most scholars openly recognized that, in the new jurisprudential world, not a great deal separated the judge and the legislator.<sup>91</sup>

### C. *Balancing and Pragmatic Jurisprudence*

To be put into action, a jurisprudence needs an interpretive methodology. While a pragmatic, instrumental view of law does not compel a balancing approach, balancing was certainly a logical doctrinal application of the new jurisprudence. Balancing openly embraced a view of the law as purposeful, as a means to an end; and it demanded a particularized, contextual scrutiny of the social interests at stake in a constitutional controversy. Thus balancing seemed to be just what the academic doctors would have ordered.

Indeed it was. Holmes had written long before that “judges . . . have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious . . . .”<sup>92</sup> Cardozo had summarized his own analysis of the judicial process as follows:

[L]ogic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case must depend largely upon the comparative importance or

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89. O.W. HOLMES, *The Path of the Law*, *supra* note 64, at 195; see O.W. HOLMES, *Law in Science*, *supra* note 65, at 242.

90. See B. CARDOZO, *supra* note 68, at 166 (judicial process “in its highest reaches is not discovery, but creation”); O.W. HOLMES, *Law in Science*, *supra* note 65, at 239 (“sovereign prerogative of choice”).

91. See B. CARDOZO, *supra* note 68, at 113; O.W. HOLMES, *Law in Science*, *supra* note 65, at 242; O.W. HOLMES, *The Path of the Law*, *supra* note 64, at 184; Llewellyn, *supra* note 71, at 1252:

If deduction does not solve cases, but only shows the effect of a given premise; and if there is available a competing but equally authoritative premise that leads to a different conclusion—then there is a choice in the case; a choice to be justified; a choice which *can* be justified only as a question of policy—for the authoritative tradition speaks with a forked tongue.

92. O.W. HOLMES, *The Path of the Law*, *supra* note 64, at 184; cf. *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) (Holmes, J.) (applying balancing test to constitutional law).

## Age of Balancing

value of the social interests that will be thereby promoted or impaired.<sup>93</sup>

Balancing received its fullest explication from Roscoe Pound. In 1921, Pound presented a paper entitled *The Theory of Social Interests*,<sup>94</sup> which set forth his view that the task of the legal order was the identification and weighing of interests. Pound adopted Jhering's view of "law as a means to an end"<sup>95</sup> and borrowed from James the claim that "the guiding idea for ethical philosophy (since all demands conjointly cannot be satisfied in this poor world) [must] be simply to satisfy at all times as many demands as we can . . . ."<sup>96</sup> Together, these ideas supported the theory that:

[T]he law is an attempt to satisfy, to reconcile, to harmonize, to adjust . . . overlapping and often conflicting claims and demands, either through securing them directly and immediately, or through securing certain individual interests, or through delimitations or compromises of individual interests, so as to give effect to the greatest total of interests or to the interests that weigh most in our civilization, with the least sacrifice of the scheme of interests as a whole.<sup>97</sup>

Pound clearly believed that his approach was appropriate to constitutional analysis.<sup>98</sup> The liberty of contract cases were wrongly decided, he wrote, because in striking down protective legislation the Court had failed to recognize the "social interest in the human life of the individual worker."<sup>99</sup>

Harlan Fiske Stone, after some early skepticism about "sociological jurisprudence,"<sup>100</sup> became a devotee of balancing. In 1936, in his eleventh year on the Court, Stone delivered a lecture at Harvard Law School, entitled *The Common Law in the United States*, in which he assailed "dry and sterile formalism."<sup>101</sup> Stone asserted that the judge "is often engaged

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93. B. CARDOZO, *supra* note 68, at 112; *see also* B. CARDOZO, *supra* note 70, at 85–127 (praising Pound and pragmatism).

For Cardozo, as for Holmes, the notion of judges as balancers was more a recognition of what judges had always been doing than an exhortation to a new judicial mode of reasoning: "We are balancing and compromising and adjusting every moment that we judge." B. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 75 (1928) [hereinafter B. CARDOZO, *PARADOXES*].

94. The paper was published two decades later. Pound, *A Survey of Social Interests*, 57 *HARV. L. REV.* 1 (1943).

95. 3 *R. POUND*, *JURISPRUDENCE* 15–16 (1959).

96. *Id.* at 16 (quoting W. JAMES, *The Will to Believe* 196 (1897)).

97. Pound, *supra* note 94, at 39.

98. 3 *R. POUND*, *supra* note 95, ch. 14; *see* Pound, *supra* note 94, at 16–38.

99. Pound, *supra* note 94, at 9.

100. *See* Stone, *Some Aspects of the Problem of Law Simplification*, 23 *COLUM. L. REV.* 319 (1923); Stone, Book Review, 22 *COLUM. L. REV.* 382 (1922) (reviewing B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921)).

101. Stone, *The Common Law in the United States*, 50 *HARV. L. REV.* 4, 10 (1936).

not so much in extracting a rule of law from the precedents, as we were once accustomed to believe, as in making an appraisal and comparison of social values, the result of which may be of decisive weight in determining what rule he is to apply."<sup>102</sup> Stone identified the "resulting tendency of our legal thinking" as follows:

We are coming to realize more completely that law is not an end, but a means to an end—the adequate control and protection of those interests, social and economic, which are the special concern of government and hence of law; that that end is to be attained through the reasonable accommodation of law to changing economic and social needs, weighing them against the need of continuity of our legal system and the earlier experience out of which its precedents have grown; that within the limits lying between the command of statutes on the one hand and the restraints of precedents and doctrines, by common consent regarded as binding, on the other, the judge has liberty of choice of the rule which he applies, and that his choice will rightly depend upon the relative weights of the social and economic advantages which will finally turn the scales of judgment in favor of one rule rather than another. Within this area he performs essentially the function of the legislator, and in a real sense makes law.<sup>103</sup>

Stone made clear that this attitude towards the proper development of the common law, when coupled with a presumption in favor of a statute's constitutionality, was applicable to constitutional adjudication.<sup>104</sup>

Along with balancing's respectable intellectual pedigree,<sup>105</sup> several other factors enhanced its attraction as a method of constitutional adjudication. On the most practical level, balancing facilitated doctrinal change in times of social flux. The law could grow because balancing focused on interests in the real world; changes in society would provoke corresponding developments in constitutional doctrine. But balancing did not necessarily commit the Court to a liberal or conservative agenda. Changes could occur in either direction. As the First Amendment cases of the 1950's and 1960's showed, balancing could provide for an expansion or a restriction of

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102. *Id.*

103. *Id.* at 20.

104. *Id.* at 22-23.

105. Thomas Reed Powell was also an early advocate of balancing in constitutional cases, although he never developed a general theory of balancing as constitutional interpretation. See Powell, *Indirect Encroachment on Federal Authority by the Taxing Powers of the States VIII*, 32 HARV. L. REV. 902, 930 (1919) ("[W]e must study the cases as practical adjustments of competing interests, each of which is entitled to a degree of consideration."); Powell, *Logic and Rhetoric of Constitutional Law*, in 1 SELECTED ESSAYS ON CONSTITUTIONAL LAW 474, 478 (1938) (work of courts in constitutional cases "is to a very large extent the task of weighing competing practical considerations and forming a practical judgment").

rights.<sup>106</sup> Nor did balancing commit the Court to an overall theory of a constitutional provision. The old conceptualization could be discarded and a balancing approach could temporarily fill the theoretical void while the Court groped towards a conception more attuned to the times. Of course, there was the risk that balancing's flexibility would be viewed as unprincipled adjudication.<sup>107</sup> But the manner in which balancing proceeded undercut this criticism. Balancing suggested a particularistic, case-by-case, common law approach that accommodated gradual change and rejected absolutes. The outcome of a case would turn on a careful analysis of the particular interests at stake. Today, the plaintiff might win because of the unjustified burden imposed by a governmental regulation; tomorrow, the government could demonstrate an adequate public interest to sustain its legislation. Balancing could keep everyone in the game.<sup>108</sup> It thus provided flexibility without sacrificing legitimacy.

The attractiveness of balancing went beyond its practical utility. It was the manifestation in legal studies of a far broader intellectual movement that dominated the first half of the twentieth century. Darwinism, non-Euclidean geometry, and relativity theory had shaken the foundations of formalism in the traditional sciences; and the impact in the social sciences was dramatic. Universals, logically deduced from fixed categories, gave way to culturally-based, small "t" truths. The new science demanded empirical observation of the ways in which societies actually functioned.<sup>109</sup> The balancing judge could assume the role of a social scientist, trading deductive logic for inductive investigation of interests in a social context.

Moreover, substantive developments in the social sciences directly linked up with the mechanics of balancing. In political science, pluralist theory taught that law and policy were the outcome of competition among interests.<sup>110</sup> In economics, theoretical advances sparked the development of cost-benefit analysis.<sup>111</sup> The demands of a nation at war gave rise to policy sciences that applied the new theory to human needs.<sup>112</sup> Thus, judges and academics, if even only vaguely attuned to the larger intellectual mi-

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106. *Compare* NAACP v. Alabama, 357 U.S. 449 (1958) (invalidating state law compelling disclosure of NAACP membership lists) *with* Konigsberg v. State Bar, 366 U.S. 36 (1961) (bar admission for refusal to answer questions concerning Communist Party membership).

107. *See* M. SHAPIRO, *supra* note 3, at 82 ("[I]t was widely felt [in the 1950's] that the Court was using the wonderfully arbitrary capacities of the balancing technique to bestow First Amendment rights on those organizations it liked and to withhold them from those it didn't.").

108. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 34 (1986).

109. E. PURCELL, *supra* note 82, at 61 ("[E]mpirical investigation [became] the undisputed foundation of all knowledge and the validating criterion of all theory.").

110. *See* A. BENTLEY, *THE PROCESS OF GOVERNMENT* (1908).

111. Tribe, *Policy Science: Analysis or Ideology?*, 2 PHIL. & PUB. AFF. 66, 67-75 (1972).

112. *Id.* at 67-69.

lieu of which law is a part, must have seen balancing as excitingly consistent with developments in the social sciences in the 1930's and 1940's.

Finally, balancing was no doubt seductive—and continues to be seductive—because it fits our usual conceptions and metaphors of justice, fairness, and reasonableness. Justice holds scales in her hands. We “weigh” the evidence to determine which party prevails. In reaching difficult personal decisions, we list the “pros” and “cons.” Policymakers undertake cost-benefit analyses when choosing among alternative courses of action. Balancing provides a careful, sensitive, thoughtful way to dispense justice, to give each his or her due.<sup>113</sup> By gently urging us to consider all the relevant factors, it fosters serenity and confidence. It is the mark of a reasonable, rational, subtle mind.<sup>114</sup>

For all its allure, balancing presented constitutional jurisprudence with a difficult problem. As a methodology for bringing pragmatic instrumentalism to constitutional doctrine, it seemed to be precisely the activist, policy-oriented approach to constitutional law about which the public and the academy had been complaining for a quarter of a century. Such an approach might be acceptable in deciding common law cases; since the legislature had the power to overturn common law doctrines, democracy could triumph. But in constitutional cases, a court's scientific analysis could not be supplanted by the popularly elected branches. The defense of formalism (“we just find the law”) was obviously no longer available: Balancers lived in a post-Realist age, and they were painfully aware that judging entailed choice, not deduction.<sup>115</sup> How, then, could choices be made without reintroducing the bane of constitutional law—the judge's personal preference?

The answer lay in externalizing the balancing process.<sup>116</sup> Judges ought

113. See Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821, 825 (1962) (“Open balancing compels a judge to take full responsibility for his decisions, and promises a particularized, rational account of how he arrives at them—more particularized and more rational at least than the familiar parade of hallowed abstractions, elastic absolutes, and selective history.”).

114. See P. KAUPER, *FRONTIERS OF CONSTITUTIONAL LIBERTY* 96 (1956) (“The concreteness and the tough-mindedness that characterize the judicial process at its best are demonstrated by a careful examination of the facts before the Court in a given case and the resolution of the conflict by reference to conceptions of underlying interest.”).

115. See *Sweezy v. New Hampshire*, 354 U.S. 234, 267 (1957) (Frankfurter, J., concurring in result) (“[I]n the end, judgment cannot be escaped . . .”).

116. Another solution was to limit resort to balancing by deferring to the legislative process. See, e.g., *Dennis v. United States*, 341 U.S. 494, 517 (1951) (Frankfurter, J., concurring).

Justice Stone's famous fourth footnote in the *Carolene Products* case suggested an additional approach. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). While the Court would generally defer to the legislative process, it recognized a “narrower scope for operation of the presumption of constitutionality” for legislation “which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation” or which demonstrates “prejudice against discrete and insular minorities . . .” *Id.* Although footnote four today is generally understood in “process” terms, see J. ELY, *DEMOCRACY AND DISTRUST* 75–77 (1980), Justice Stone

to search for the relevant interests in society at large and give them the weight that history, tradition, and current society attributed to them.<sup>117</sup> The social science-like methodology of balancing instructed the judge to look for values “out there.”<sup>118</sup> Balancing could be seen as primarily descriptive. Just as a physicist could measure atomic weights without inquiring into values, so the balancer could discover that free speech outweighed governmental interests in public order without expressing a personal view on the result.<sup>119</sup> Constitutional law simply was the result of the balance.

The balancers’ belief in an external resolution of constitutional cases was important because they were fighting on two fronts. Not only did they need an alternative to Lochnerism; they also needed a response to Legal Realism which, in its most extreme moments, spoke in nihilistic tones. Although balancing was, in part, an outgrowth of the Realist critique of formalism, it was also a response to Realism. It attempted to overcome the problems of indeterminacy and subjectivity that some Realists had preached were inevitable. Balancing was a progressive, up-beat, “can-do” judicial attitude. It was certainly likely to appeal to judges who could not forget the lessons of Realism, but still had to decide constitutional cases.

### III. THE GROWTH AND SPREAD OF BALANCING

Balancing entered constitutional law like wild clover, not poison ivy. It appeared in disparate fields, adding color to dreary doctrinalism. Once rooted, however, it spread, ultimately changing the hue of the landscape. Harlan Fiske Stone applied the new methodology with creativity and

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seemed to be advocating a substantive approach: When the legislative process could not be trusted to make law, the Court would have to evaluate the interests itself. Thus, Stone’s “strict scrutiny” was a call for judicial balancing—one that gave extra weight to the interests of ignored or underrepresented groups. *See infra* note 243.

117. [S]triking the balance implies the exercise of judgment. . . . It must be an overriding judgment founded on something much deeper and more justifiable than personal preference.

As far as it lies within human limitations, it must be an impersonal judgment. It must rest on fundamental presuppositions rooted in history to which widespread acceptance may fairly be attributed.

*Sweezy v. New Hampshire*, 354 U.S. at 267 (Frankfurter, J., concurring in result); *see also* B. CARDOZO, *PARADOXES*, *supra* note 93, at 55 (“A judge is to give effect in general not to his own scale of values, but to the scale of values revealed to him in his readings of the social mind.”). *See generally* Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 *YALE L.J.* 319, 327–34 (1957) (reviewing effort to eliminate purely personal preferences from due process analysis).

118. *Cf.* E. PURCELL, *supra* note 82, at 24 (“[B]y the end of the twenties particularist, functionalist objectivism was the dominant tone of the social sciences.”).

119. *See Rochin v. California*, 342 U.S. 165, 172 (1952) (Frankfurter, J.) (due process analysis “based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts, exactly and fairly stated, [and] on the detached consideration of conflicting claims) (citing *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) (Holmes, J.)).

vigor to commerce clause,<sup>120</sup> intergovernmental immunity,<sup>121</sup> and civil liberties cases.<sup>122</sup> Chief Justice Hughes in 1934 balanced the interests in upholding the Minnesota Mortgage Moratorium Law in *Home Building & Loan Association v. Blaisdell*.<sup>123</sup> In 1939, Justice Roberts wrote the first explicit balancing opinion in a free speech case, *Schneider v. State*.<sup>124</sup> In 1944, the Court, through Justice Black(!), ruled that government actions that discriminated on the basis of race or national origin could be constitutional if supported by “[p]ressing public necessity.”<sup>125</sup>

During these formative years, balancing was never considered the only proper method of constitutional interpretation. Justices continued to rely on existing doctrine and traditional methods of analysis in most constitutional cases—even in areas where balancing had been adopted to resolve other cases. The spread of balancing was hardly systematic. Balancing simply seemed to appear when useful.

Over the past few decades, with little justification or scrutiny, balancing has come of age. Every sitting Justice on the Supreme Court has relied on balancing,<sup>126</sup> and Justices Blackmun, Brennan, Marshall, Powell, and

120. See *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945).

121. See *Helvering v. Gerhardt*, 304 U.S. 405 (1938).

122. See *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 601 (1940) (Stone, J., dissenting); see also *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935) (Stone, J.) (full faith and credit clause).

123. 290 U.S. 398 (1934). Although Hughes did not use the word “balancing,” he stated: “[T]here has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare.” *Id.* at 442.

124. 308 U.S. 147 (1939).

125. *Korematsu v. United States*, 323 U.S. 214, 216 (1944). Dean Ely sees *Korematsu* as a case about impermissible purpose. See J. ELY, *supra* note 116, at 246 n.45. And certainly the opinion can be read that way. See *Korematsu*, 323 U.S. at 216 (“[P]ressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.”). However, Ely’s general description of equal protection doctrine can only awkwardly explain the requirement of a “compelling” or “substantial” state interest. He argues that the “substantiality” prong of equal protection analysis serves the function of identifying state goals so trivial that “you have to suspect it’s a pretext that didn’t actually generate [the state regulation].” J. ELY, *supra* note 116, at 148. But Ely ignores the roots of this branch of the test. The requirement of “compellingness” appears to have been borrowed from First Amendment opinions of the 1950’s and 1960’s that required the state to bring forth very strong reasons for burdening free speech and associational rights. See, e.g., *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960); *NAACP v. Alabama*, 357 U.S. 449, 464–65 (1958); *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957) (Frankfurter, J., concurring in result). It was adopted in early equal protection cases. See, e.g., *Kramer v. Union Free School Dist.*, 395 U.S. 621, 627 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). These were not opinions looking for motives; they were exercises in balancing. Ely’s work may be a reasonable account of what equal protection analysis ought to be, but as history, it is, at best, “a brilliant reconstruction.” Sandalow, *The Distrust of Politics*, 56 N.Y.U. L. REV. 446, 461 (1981).

126. See *United States v. Montoya de Hernandez*, 105 S. Ct. 3304 (1985) (Rehnquist, J.); *Tennessee v. Garner*, 471 U.S. 1 (1985) (White, J.); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 580 (1985) (O’Connor, J., dissenting); *Plyler v. Doe*, 457 U.S. 202 (1982) (Brennan, J.); *Young v. American Mini Theatres*, 427 U.S. 50 (1976) (plurality opinion) (Stevens, J.); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (Powell, J.); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 70 (1973) (Marshall, J., dissenting); *Roe v. Wade*, 410 U.S. 113 (1973) (Blackmun, J.); *Block v. Meese*, 793 F.2d 1303 (D.C. Cir. 1986) (Scalia, J.).

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White frequently adopt a balancing approach. As a result, balancing now dominates major areas of constitutional law.

In Fourth Amendment cases, the Court has balanced in determining the scope of the Fourth Amendment,<sup>127</sup> the definition of a search,<sup>128</sup> the reasonableness of a search,<sup>129</sup> the reasonableness of a seizure,<sup>130</sup> the meaning of probable cause,<sup>131</sup> the level of suspicion required to support stops and detentions,<sup>132</sup> the scope of the exclusionary rule,<sup>133</sup> the necessity of obtaining a warrant,<sup>134</sup> and the legality of pretrial detention of juveniles.<sup>135</sup> Balancing has been a vehicle primarily for weakening earlier categorical doctrines restricting governmental power to search and seize.<sup>136</sup> Occasionally, however, the balance works against the government.<sup>137</sup> Whichever way the balance tips, the role of balancing in the law of search and seizure is clear. As the Court has stated and restated, “‘the balancing of competing interests’ [is] ‘the key principle of the Fourth Amendment.’”<sup>138</sup>

Balancing has also become the central metaphor for procedural due process analysis. The rise of balancing here is closely linked with the recognition of new forms of property protected by the due process clause.<sup>139</sup> The importance of “entitlements” such as welfare benefits and government employment seemed to demand procedural protections against their deprivation, but the ever-increasing size of the welfare state made imposition of procedures a costly enterprise.<sup>140</sup> Balancing provided a flexible

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127. See *Hudson v. Palmer*, 468 U.S. 517 (1984). See generally Note, *The Civil and Criminal Methodologies of the Fourth Amendment*, 93 *YALE L.J.* 1127 (1984) (criticizing balancing methodology in Fourth Amendment jurisprudence).

128. See *United States v. Place*, 462 U.S. 696 (1983).

129. See *New York v. Class*, 106 S. Ct. 960 (1986); *Winston v. Lee*, 470 U.S. 753 (1985); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

130. See *Tennessee v. Garner*, 471 U.S. 1 (1985); *United States v. Montoya de Hernandez*, 105 S. Ct. 3304 (1985).

131. See *Camara v. Municipal Court*, 387 U.S. 523 (1967).

132. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 560–61 (1976) (upholding stops at fixed checkpoints and referrals for secondary inspections upon weighing public and private interests); *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975); *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

133. See *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984); *United States v. Leon*, 468 U.S. 897 (1984); *Stone v. Powell*, 428 U.S. 465 (1976); *United States v. Calandra*, 414 U.S. 338 (1974).

134. See *New Jersey v. T.L.O.*, 469 U.S. 325, 340–41 (1985) (dictum).

135. See *Schall v. Martin*, 467 U.S. 253 (1984).

136. See *United States v. Montoya de Hernandez*, 105 S. Ct. 3304, 3320 (1985) (Brennan, J., dissenting) (criticizing balancing as process “in which the judicial thumb apparently will be planted firmly on the law-enforcement side of the scales”) (quoting *United States v. Sharpe*, 470 U.S. 675, 720 (1985) (Brennan, J., dissenting)).

137. See, e.g., *Tennessee v. Garner*, 471 U.S. 1 (1985) (striking down state statute authorizing use of deadly force against nondangerous fleeing suspect).

138. *Id.* at 8 (quoting *Michigan v. Summers*, 452 U.S. 692, 700 n.12 (1981)).

139. See, e.g., *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

140. See *Redish & Marshall, Adjudicatory Independence and the Values of Procedural Due Process*, 95 *YALE L.J.* 455, 471 (1986).



strategy that took account of both interests. By 1976, the Court had settled on the now familiar three-pronged test of *Mathews v. Eldridge*.<sup>141</sup>

Justice Stone introduced balancing to the dormant commerce clause cases.<sup>142</sup> Since the 1970s, the Court has increasingly relied on a balancing test to decide whether state regulations impose an "undue burden" on interstate commerce. The classic formulation is Justice Stewart's in *Pike v. Bruce Church, Inc.*:

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.<sup>143</sup>

Given the prominence of *Pike* in modern dormant commerce clause cases, it is not surprising that a leading constitutional treatise concludes: "[t]he Court now accepts its judicial role of balancing conflicting economic policies until such time as Congress chooses to act."<sup>144</sup>

Balancing, of course, has had a long affair with the First Amendment.<sup>145</sup> Balancing entered the field as a sword, striking down regulations

141. 424 U.S. 319, 334-35 (1976). For recent uses of the "*Mathews* calculus," see *Walters v. National Ass'n of Radiation Survivors*, 105 S. Ct. 3180, 3192 (1985) (upholding statutory limit of \$10 fee for veteran seeking VA benefits); *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981).

142. See *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945). Stone was aided by the scholarly writings of Felix Frankfurter, Noel Dowling and others. See Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1 (1940); Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 720-25 (1925); Sholley, *The Negative Implications of the Commerce Clause*, 3 U. CHI. L. REV. 556 (1936).

143. 397 U.S. 137, 142 (1970) (citation omitted). Professor Donald Regan, in an important and exhaustive review of the dormant commerce clause cases, has argued that a careful reading of the "movement of goods" cases demonstrates that, despite what it is saying, the Court is not actually balancing. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986). Regan suggests that an anti-protectionism principle, not balancing, best explains the results of the cases. There is much in Regan's *tour de force* that is persuasive; indeed, he may be correct as to what constitutional law ought to look like in this area. But I have difficulty reading cases like *Pike* and believing that the burden on commerce played no role in the Court's decision. Moreover, lower courts, lawyers and commentators continue to interpret the Supreme Court's dormant commerce clause cases as directives for balancing. See, e.g., *ANR Pipeline Co. v. Schneidewind*, 801 F.2d 228 (6th Cir. 1986); *Grocery Mfrs. of Am., Inc. v. Gerace*, 755 F.2d 993, 1003-05 (2d Cir. 1985). (This is what makes Regan's thesis—that the Court really isn't balancing—so interesting.) Finally, Regan sees a role for balancing in what he labels "the transportation cases." E.g., *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981).

144. J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 270-71 (3d ed. 1986); see also C. DUCAT & H. CHASE, *CONSTITUTIONAL INTERPRETATION* 548 (3d ed. 1983) (Court has decided dormant commerce clause cases on basis of "a case-by-case balancing of the interests").

145. Pound had suggested balancing in free speech cases early on. Pound, *Interests of Personality*

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that were not intended to affect the flow of speech but that the Court found to be overly burdensome.<sup>146</sup> Balancing was also an important tool in early right of association opinions invalidating state statutes that required disclosure of the membership of civil rights groups.<sup>147</sup> In the 1950's and early 1960's, however, balancing became associated with the Court's retreat from the protection of allegedly subversive groups.<sup>148</sup>

Despite vituperative criticism of balancing as an unprincipled technique for restricting speech,<sup>149</sup> the Court never abandoned the methodology. Indeed, over the past decade the Court has resorted to balancing in First Amendment cases with increasing frequency. It is well-established that time, place, and manner regulations, as well as other "content-neutral" limitations on speech, are constitutional if they are "designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication."<sup>150</sup> Even within the once sacrosanct category of content-based regulations,<sup>151</sup> the Court is beginning to construct a "sliding scale" of protection based on the perceived value of the speech in question. As Justice Powell wrote for the Court in a recent libel case, "[w]e have long recognized that not all speech is of equal First Amendment importance."<sup>152</sup> Speech pertaining to commercial<sup>153</sup> or private mat-

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(pt. 2), 28 HARV. L. REV. 445, 454 (1915) ("[I]ndividual interest in free belief and opinion must always be balanced with the social interest in the security of social institutions and the interest of the state in its personality."). Zechariah Chafee relied on Pound's balancing to argue against restrictive interpretations of the First Amendment. Chafee, *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 958 n.85 (1919); see Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 588 (1981).

146. See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296, 306-07 (1940); *Thornhill v. Alabama*, 310 U.S. 88, 96 (1940); *Schneider v. State*, 308 U.S. 147, 161 (1939).

147. See *Bates v. Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958).

148. See, e.g., *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 88-89 (1961); *Konigsberg v. State Bar*, 366 U.S. 36, 51, 56 (1961); *Barenblatt v. United States*, 360 U.S. 109, 126-27 (1959); *American Communications Ass'n v. Douds*, 339 U.S. 382, 407-08 (1950); M. SHAPIRO, *supra* note 3, at 76-83.

149. See, e.g., *Subversive Activities Control Bd.*, 367 U.S. at 164-66 (Black, J., dissenting); *Beauharnais v. Illinois*, 343 U.S. 250, 275 (1952) (Douglas, J., dissenting); T. EMERSON, *supra* note 3, at 167-68.

150. *City of Renton v. Playtime Theatres, Inc.*, 106 S. Ct. 925, 928 (1986); see *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293-95 (1984); *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 817 (1984).

151. See L. TRIBE, *supra* note 44, at 580-84.

152. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). Justice Stevens has been a persistent advocate of this view, suggesting that child pornography, *New York v. Ferber*, 458 U.S. 747, 777 (1982) (Stevens, J., concurring); "dirty words," *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); and adult movies, *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), occupy a lower rank on the constitutional hierarchy of protected speech. Justice Felix Frankfurter's concurring opinion in *Dennis* is perhaps the first expression of this view: "Not every type of speech occupies the same position on the scale of values. There is no substantial public interest in permitting certain kinds of utterances . . ." *Dennis v. United States*, 341 U.S. 494, 544 (1951) (Frankfurter, J., concurring).

153. See *Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. 2265, 2274-75 (1985); *In re R.M.J.*, 455 U.S. 191, 203 (1982); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980).

ters,<sup>154</sup> or to child pornography<sup>155</sup> is now deemed to be of lower constitutional value.

Perhaps the most surprising use of balancing in the First Amendment area appears in cases involving speech traditionally accorded the greatest degree of protection. *F.C.C. v. League of Women Voters*,<sup>156</sup> in which the Court struck down a federal statute prohibiting editorials by public broadcasting stations, demonstrates that balancing has penetrated to the core.<sup>157</sup> Justice Brennan, in the majority opinion, conceded that the speech burdened by the statute “lies at the heart” of the First Amendment<sup>158</sup> and is generally “entitled to the most exacting degree of First Amendment protection.”<sup>159</sup> However, he did not apply the normal high level of scrutiny. Instead, the Court recognized the Government’s interest in regulating scarce airwaves and the public’s interest in receiving a balanced presentation of views on diverse matters of public concern. Brennan formulated the following test:

[Broadcast restrictions] have been upheld only when we were satisfied that the restriction is narrowly tailored to further a substantial governmental interest, such as ensuring adequate and balanced coverage of public issues. . . . Making that judgment requires a critical examination of the interests of the public and broadcasters in light of the particular circumstances of each case.<sup>160</sup>

The First Amendment story is paralleled by developments in Fourteenth Amendment law. The two-tiered approach that arose from the ashes of *Lochner*—economic legislation subjected to “rationality review”; statutes impinging on fundamental interests or relying on “suspect classifications” subjected to “strict scrutiny”—is cracking, and a sliding-scale balancing approach may be slowly emerging.<sup>161</sup>

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154. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749; *Connick v. Myers*, 461 U.S. 138, 146–47 (1983).

155. See *New York v. Ferber*, 458 U.S. 747, 756–57 (1982).

156. 468 U.S. 364 (1984).

157. For other similar examples of balancing, see *Tashjian v. Republican Party*, 107 S. Ct. 544, 548–54 (1987) (invalidating state law restricting voting in political party primaries to members of party); *Connick v. Myers*, 461 U.S. at 142 (discussing need to balance speech on “matters of public concern” with “interests of the state”).

158. 468 U.S. at 381.

159. *Id.* at 375–76.

160. *Id.* at 380–81 (citation omitted). It is unclear exactly how strict the Court thought its test was. In the end, we know only that an ad hoc balance was struck and that “the specific interests sought to be advanced by [the statute’s] ban on editorializing are either not sufficiently substantial or are not served in a sufficiently limited manner to justify the substantial abridgment of important journalistic freedoms which the First Amendment jealously protects.” *Id.* at 402; see also *id.* at 415 (Stevens, J., dissenting) (Court should reach different balance based on “overriding importance” of “keeping the Federal Government out of the propaganda arena”).

161. Of course, even the old approach leaves room for balancing. Despite claims that the top tier

Equal protection has witnessed the development of a middle tier of scrutiny which requires that a statute be “substantially related” to “important governmental interests.” This test has been applied to claims of discrimination based on gender<sup>162</sup> and legitimacy,<sup>163</sup> and, by four Justices, to racial classifications intended to aid blacks.<sup>164</sup> Mid-level review gives the Court flexibility in adjudicating equal protection claims involving classifications which it deems troubling but not impermissible *per se*. Thus, the government’s interest in “administrative ease and convenience” may be dismissed as not substantial enough to justify a gender classification.<sup>165</sup> However, the interest in remedying past discrimination against blacks may be strong enough to sustain a governmental policy based on race.<sup>166</sup>

In substantive due process cases as well, the Court has fashioned a third test, falling between “strict scrutiny” and “mere rationality.” This mid-level standard is the product of a regime of judicial review that seeks both to protect non-textual “fundamental rights” and to avoid criticism that the Court is operating beyond the bounds of the Constitution. *Youngberg v. Romeo*<sup>167</sup> provides an example. Writing for the Court, Justice Powell recognized that involuntarily committed mental patients have constitutionally protected liberty interests in safe conditions, freedom from bodily restraint, and sufficient training to ensure safety and freedom from undue restraint. But these interests had to be balanced against “the demands of an organized society.”<sup>168</sup> Although the Court did not spell out the standard with which it calibrated the scales, it clearly rejected the “compelling state interest” test. Powell noted that such a test would place an “undue burden” on the state. Powell’s balance produced the rule that the Court ought to defer to the judgment of hospital professionals, ensuring only that “professional judgment in fact was exercised.”<sup>169</sup> The usefulness of the balancing approach here is apparent. The Court may recognize a new right (and

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of review was “strict’ in theory and fatal in fact,” Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972), members of the Court have concluded on a number of occasions that the state met its burden of demonstrating a compelling state interest. See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 490 (1980) (opinion of Burger, C.J.); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (opinion of Powell, J.); *Roe v. Wade*, 410 U.S. 113, 162–63 (1973) (State may regulate abortions in second trimester).

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

163. See *Trimble v. Gordon*, 430 U.S. 762 (1977).

164. See *Bakke*, 438 U.S. at 326 (Brennan, White, Marshall & Blackmun, JJ.).

165. *Craig*, 429 U.S. at 198; see also *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (opinion of Brennan, J.) (“‘[A]dministrative convenience’ is not a shibboleth, the mere recitation of which dictates constitutionality.”).

166. *Fullilove*, 448 U.S. at 483.

167. 457 U.S. 307 (1982).

168. *Id.* at 320 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J. dissenting)).

169. *Id.* at 321. Powell’s opinion is thus reminiscent of Justice Frankfurter’s concurring opinion in *Dennis v. United States*, 341 U.S. 494, 517 (1951).

hence permit further growth) without imposing stringent new burdens on the state. Plenty of room is left for the state in the next case to present reasonable arguments for placing restrictions on patients.

A general balancing approach may also be emerging in a class of cases that lies at the intersection of equal protection and substantive due process—the so-called “fundamental interest” prong of equal protection analysis. In *Plyler v. Doe*,<sup>170</sup> the Court invalidated a Texas statute that authorized local school districts to deny free public education to undocumented alien children. Justice Brennan, writing the majority opinion, recognized that illegal aliens were not a suspect class and that education was not a fundamental right. Nevertheless, the statute was not judged under the “minimum rationality” standard:

[M]ore is involved in these cases than the abstract question whether [the statute] discriminates against a suspect class, or whether education is a fundamental right. [The statute] imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of [the statute], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in [the statute] can hardly be considered rational unless it furthers some substantial goal of the State.<sup>171</sup>

*Plyler* and *Romeo* provide an interesting contrast. In both, the Court struggles with the extension of constitutional doctrine to new areas of societal concern. Both cases raise claims to substantive rights, the satisfaction of which could impose heavy financial costs on the states. In each case, the Court jettisons the traditional two-tier scheme for a balancing approach that considers the importance of the individual interest and the strength of the state’s justifications for its regulations. Unlike the two-tier approach, the choice of a balancing methodology does not determine the result. In *Romeo* the state wins; in *Plyler* the plaintiffs win. If these cases represent

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170. 457 U.S. 202 (1982).

171. *Id.* at 223–24. The Court’s test is similar to the sliding-scale approach long advocated by Justice Marshall. See *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249, 3265–68 (1985) (Marshall, J., concurring in part and dissenting in part); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 98–99 (1973) (Marshall, J., dissenting).

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a trend, then Fourteenth Amendment law is headed away from a multiple levels-of-review strategy toward an overall balancing approach.<sup>172</sup>

Similar stories describe other areas of constitutional law. Over the last fifty years, older ways of understanding constitutional clauses, amendments, and structures have been supplemented, and sometimes replaced, by balancing analyses. The movement is evidenced by the use of balancing in cases interpreting the contract clause,<sup>173</sup> the privileges and immunities clause,<sup>174</sup> the Fifth Amendment's protections against self-incrimination<sup>175</sup> and double jeopardy,<sup>176</sup> the Sixth Amendment's guarantees of a jury trial<sup>177</sup> and a public trial,<sup>178</sup> the Eighth Amendment's prohibition of cruel and unusual punishment,<sup>179</sup> the Fourteenth Amendment's due process clause in criminal proceedings,<sup>180</sup> cases considering the rights and liabilities of Richard Nixon<sup>181</sup> and other executive branch officers,<sup>182</sup> separation of powers,<sup>183</sup> and the right to domestic<sup>184</sup> and international travel.<sup>185</sup> There are also indications that principles of federalism will soon be explicated in terms of a balance of competing federal and state interests.<sup>186</sup>

To see the current hold that balancing has on our approach to constitutional cases, consider the following questions: Do mandatory drug tests for pilots and train engineers violate the Fourth Amendment? May the government prohibit reporting on elections until after all the polls have closed? Without a pause, our minds begin analysis of these questions by thinking in terms of the competing interests. Before we have time to wonder whether we ought to balance, we are already assessing the relative

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172. See Hutchinson, *More Substantive Equal Protection? A Note on Plyler v. Doe*, 1982 SUP. CT. REV. 167, 193.

173. See *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410-13 (1983); *City of El Paso v. Simmons*, 379 U.S. 497, 508-09 (1965); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 438 (1934).

174. See, e.g., *Supreme Court v. Piper*, 470 U.S. 274, 284 (1985).

175. See, e.g., *Moran v. Burbine*, 106 S. Ct. 1135, 1143-44 (1986); *New York v. Quarles*, 467 U.S. 649, 657 (1984); *Oregon v. Haas*, 420 U.S. 714, 723 (1975); *Harris v. New York*, 401 U.S. 222, 225 (1971).

176. See, e.g., *United States v. Tateo*, 377 U.S. 463 (1964).

177. See, e.g., *Ballew v. Georgia*, 435 U.S. 223, 245 (1978) (remarkable, Jerome Frank-type opinion written by Justice Blackmun disapproving five man juries); *Baldwin v. New York*, 399 U.S. 66, 73-74 (1970).

178. See, e.g., *Waller v. Georgia*, 467 U.S. 39, 44-47 (1984); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508-10 (1984).

179. See *Whitely v. Albers*, 106 S. Ct. 1078, 1084-86 (1986).

180. See, e.g., *Ake v. Oklahoma*, 470 U.S. 68, 78-83 (1985).

181. See *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 450-55 (1977); *United States v. Nixon*, 418 U.S. 683, 705-07 (1974).

182. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 813-14 (1982).

183. See, e.g., *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245, 3258 (1986).

184. See *Attorney Gen. v. Soto-Lopez*, 106 S. Ct. 2317, 2325 (1986).

185. See *Haig v. Agee*, 453 U.S. 280, 306-10 (1981); *Zemel v. Rusk*, 381 U.S. 1, 14-16 (1965).

186. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 558-59 (1985) (Powell, J., dissenting) (emphasizing balancing analysis); *id.* at 588 (O'Connor, J., dissenting) (advocating balancing).

weights of the interests. Constitutional law has entered the age of balancing.

#### IV. AN INTERNAL CRITIQUE OF BALANCING

Despite the widespread use of balancing, the Supreme Court has spent surprisingly little time exploring the difficult analytic and operational problems the method presents. The following sections highlight a number of these issues.<sup>187</sup> The first set of problems takes the balancing metaphor seriously and examines how interests are identified, valued and compared. The second set of problems raises the question of whether balancing—even if adequately performed—is a justifiable or sensible method of constitutional interpretation.<sup>188</sup>

##### A. *The Problem of Evaluation and Comparison*

A frequent criticism of balancing is that the Court has no objective criteria for valuing or comparing the interests at stake. As Laurent Frantz has nicely put it, the judge's task is to "measur[e] the unmeasurable . . . [and] compare the incomparable."<sup>189</sup>

The exact nature of the objection here is important. Some critics of balancing surely overstate their case by claiming that balancing, because it demands the comparison of "apples and oranges," is impossible. Whether or not we can describe how we do so, we seem regularly to reduce value choices to a single currency for comparison. In deciding whether to call or to write, to move to New York or to stay in Los Angeles, to see the raise or to fold, we often think of ourselves as weighing the costs and benefits of the alternatives. We rarely hear objections that legislatures are unable to value and compare competing social interests. Furthermore, we expect courts to make exactly these kinds of judgments in crafting common law doctrine. Professors praise the decisions of great common law judges who conscientiously weigh the consequences of imposing liability or not, of finding the contract binding or not. Even in constitutional law, we can occasionally say with certainty that a particular interest outweighs another. Will anyone doubt, for example, that the NAACP's interest in

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187. I do not consider the usual practical critiques of balancing—that courts lack adequate information to balance and that balancing produces a conservative bias. For discussion of these points, see Baker, *Press Rights*, *supra* note 4, at 849; Baker, *Parade Permits*, *supra* note 4, at 942; Frantz, *Balance*, *supra* note 3; Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 717 (1963). Professor Shiffrin properly notes that balancing can achieve both conservative and liberal results. Shiffrin, *General Theory*, *supra* note 4, at 1027-28; see also Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 391-92 (1981) (describing balancing as tool of "perfectionists"—i.e., liberal constitutional theorists).

188. See *infra* Section V.

189. Frantz, *Reply*, *supra* note 3, at 748.

keeping its membership list confidential in 1958 was greater than Alabama's interest in having the list to aid in the enforcement of its foreign corporation registration statute?<sup>190</sup>

Competing interests are not, by definition, incomparable. Apples and oranges can be placed on a fruit scale or assigned a price in dollars per pound. The problem for constitutional balancing is the derivation of the scale needed to translate the value of interests into a common currency for comparison. The balancer's scale cannot simply represent the personal preferences of the balancer, lest constitutional law become the arbitrary act of will today characterized as "lochnering."<sup>191</sup> Moreover, a personal scale would undermine a system of precedent and provide little guidance to lower courts, legislators, administrators, and lawyers and clients.<sup>192</sup>

Balancing, therefore, must demand the development of a scale of values external to the Justices' personal preferences. But from where and what might such a scale be derived? This is a problem that has bedeviled balancers for some time.<sup>193</sup> It is almost sad to read Roscoe Pound's attempt to describe, in the multi-volume summary of his life's work, a method of valuing and weighing interests. He states that interests must be weighed on the same level (that is, individual interest against individual, social interest against social) and that it is "expedient" to put interests in their most generalized form to compare them. However, Pound concedes that a scientific method of valuing the competing interests has yet to be formulated:

Philosophical jurists have devoted much attention to deducing of some method of getting at the intrinsic importance of various interests so that an absolute formula may be reached in accordance with which it may be assured that the intrinsically weightier interests shall prevail. If this were possible it would greatly simplify the task of legislators, judges, administrative officials and jurists and would conduce to greater stability, uniformity and certainty in the administration of justice. . . . But however common and natural it is for

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190. See *NAACP v. Alabama*, 357 U.S. 449 (1958).

191. See Ely, *supra* note 53, at 944.

192. See T. EMERSON, *supra* note 3, at 16 ("The ad hoc balancing test is so unstructured that it can hardly be described as a rule of law at all."); cf. Reich, *supra* note 187, at 737-38 (balancing opinions offer less generality than common law for application of precedents; they "tak[e] little from the past and offer[] less for the future; each is a law unto itself").

193. And it was criticized early on. See Lepaulle, *The Function of Comparative Law with a Critique of Sociological Jurisprudence*, 35 HARV. L. REV. 838, 844 (1922):

[S]o far as [balancing] means anything, it must be based on a knowledge of the weight of the different claims. Apparently, up to the present time, few efforts have been made to solve these problems. For instance, between two claims equal in every respect except that one represents a force of the past, the other a new-rising force, which shall prevail? . . . If we have not even a rough idea of what the weights are, it is logically impossible to say that any fact is the result of the weighing.



philosophers and jurists to seek such a method, we have come to think today that the quest is futile. Probably the jurist can do no more than recognize the problem and perceive that it is put to him as a practical one of securing the whole scheme of social interests so far as he may; of maintaining a balance or a harmony or adjustment among them compatible with recognition of all of them.<sup>194</sup>

Cardozo was no more helpful. He merely advised judges to “get [their] knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself.”<sup>195</sup>

In the search for an external scale—for weights “out there”—the modern Court has relied upon several sources that seem sensible. It may turn to history<sup>196</sup> or search for a current “social consensus”<sup>197</sup> on the importance of an interest. Interests may also be assigned weight based on their contribution to the achievement of constitutional or non-constitutional goals. This instrumental valuation (often expressed in quasi-empirical terms) is evident in dormant commerce clause opinions (measuring, for example, the burden a state’s regulation places on interstate commerce and the safety benefits afforded by the regulation),<sup>198</sup> First Amendment libel cases (evaluating the impact on the news media occasioned by various sets of liability rules),<sup>199</sup> procedural due process cases (examining the financial burden that procedural requirements would impose on the government),<sup>200</sup> and exclusionary rule cases (considering the benefit of deterring unlawful police conduct against the cost of excluding probative evidence).<sup>201</sup> Sometimes the Court looks at actual numbers, but frequently it adopts a seat-of-the-pants approach, freely speculating on the real world consequences of particular rules.<sup>202</sup>

Whether or not these potentially conflicting sources of value are defen-

194. 3 R. POUND, *supra* note 95, at 330–31 (footnote omitted).

195. B. CARDOZO, *supra* note 68, at 113; *see also* B. CARDOZO, *PARADOXES*, *supra* note 93, at 55 (“A judge is to give effect in general not to his own scale of values, but to the scale of values revealed to him in his readings of the social mind.”).

196. *Compare* Zablocki v. Redhail, 434 U.S. 374, 383–86 (1978) (right to marriage deeply rooted in our society) *with* Bowers v. Hardwick, 106 S. Ct. 2841, 2844–46 (1986) (right to homosexual relations never recognized by society).

197. *See, e.g.*, Hudson v. Palmer, 468 U.S. 517, 528 (1984) (“[S]ociety would insist that [privacy interests] always yield to . . . the paramount interest in institutional security.”).

198. *See, e.g.*, Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 670 (1981) (plurality opinion).

199. *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985); Gertz v. Robert Welch, Inc., 418 U.S. 323, 343–48 (1974).

200. *See, e.g.*, Lassiter v. Department of Social Servs., 452 U.S. 18 (1981); Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

201. *See, e.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032, 1041–50 (1984); United States v. Leon, 468 U.S. 897, 915–22 (1984); United States v. Janis, 428 U.S. 433, 447–60 (1976).

202. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 230 (1982) (speculating on how class of illiterate illegal aliens would affect unemployment, welfare, and crime).

sible (and no balancer has developed a theory explaining which should prevail and why), they do not solve the “external scale” problem unless the same scale is applied to all the interests at stake in the case. It is here that the “apples and oranges” critique has real bite. We may know with a fair degree of certainty that society places a high value on procedural fairness in the deprivation of property and that the cost of providing welfare recipients pre-termination hearings is (let’s say) \$500 per case. But what follows? Nothing in the “external” sources offers a clue about how to compare differently derived values.

If constitutional cases rarely offer the possibility of a common scale,<sup>203</sup> it should hardly surprise us that majority and dissenting opinions often reach conflicting conclusions about the balance of the competing interests.<sup>204</sup> More interesting are the techniques the Court has adopted to strike the unstrikeable balance.

Sometimes the Court adopts a vocabulary to make it appear that it is rendering values comparable. The best example of this strategy is the frequent and increasing resort to cost/benefit terminology. But even the quickest glance beneath the surface of the language of these cases shows that the Court has not developed any common scale for evaluation. This is evident, for example, in the exclusionary rule cases, which “weigh” the “likely social benefits of excluding unlawfully seized evidence” against the costs of “loss of often probative evidence and all of the secondary costs that flow from the less accurate or more cumbersome adjudication that therefore occurs.”<sup>205</sup>

Another technique is to depreciate the value of one of the interests at stake. In *Branzburg v. Hayes*,<sup>206</sup> a case considering First Amendment limits on grand jury subpoenas of reporters, the Court found that the reporter plaintiffs had not presented convincing empirical evidence that the challenged subpoenas would significantly impede the flow of information. This approach allowed the Court to devalue the First Amendment interest

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203. A thoroughgoing commitment to an economic analysis of constitutional law could avoid the “apples” and “oranges” problem discussed in this section. See, e.g., R. POSNER, *ECONOMIC ANALYSIS OF LAW* 581–642 (3d ed. 1986). “Economic efficiency” could serve as the common currency for evaluating competing interests. But, even in its most empirical moments, the Supreme Court’s theory of interpretation does not adopt an efficiency standard. The Court may talk about “costs” and “benefits” to give the impression that some agreed upon common scale is being used for weighing values, but the Court’s analysis is decidedly non-economic.

204. See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985); *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984); *United States v. Leon*, 468 U.S. 897 (1984); *Hobby v. United States*, 468 U.S. 339 (1984); *Mathews v. Lucas*, 427 U.S. 495 (1976); *Branzburg v. Hayes*, 408 U.S. 665 (1972). Thus, while the split between the majority and the dissenters was once about whether balancing was a proper method of constitutional interpretation, today disagreement centers on weights of the interests in the balance.

205. *INS v. Lopez-Mendoza*, 468 U.S. at 1041.

206. 408 U.S. 665 (1972).

and uphold the subpoenas.<sup>207</sup> What is not explained, however, is why even a weakened First Amendment interest did not outweigh the grand jury's interest.

A third strategy is to set up a constitutional problem in balancing terms, but to decide the case without actually balancing. The Court sometimes avoids balancing by deferring to another decisionmaker's evaluation of the interests at stake.<sup>208</sup> In other cases, the Court sends up smoke, supplying words that look like a balance, but in fact are something quite different. Thus, in *Roe v. Wade*,<sup>209</sup> the Court held that the state's interest in protecting fetal life became compelling, and therefore outweighed the woman's privacy interest in deciding whether or not to terminate her pregnancy, at the point of fetal viability. "This is so," the Court explained, "because the fetus then presumably has the capability of meaningful life outside the mother's womb."<sup>210</sup> As has been noted, this statement is a definition of viability, not an explanation of value.<sup>211</sup>

The most troubling consequence of the problem of deriving a common scale are those cases in which the Court simply does not disclose its source for the weights assigned to the interests. These balancing opinions are radically underwritten: interests are identified and a winner is proclaimed or a rule is announced which strikes an "appropriate" balance, but there is little discussion of the valuation standards. Some rough, intuitive scale calibrated in degrees of "importance" appears to be at work. But to a large extent, the balancing takes place inside a black box. Of course, the hidden process raises the specter of the kind of judicial decisionmaking that the Realists warned us about<sup>212</sup> and that balancing promised to overcome.

207. *Id.* at 693-95; *see also* *Globe Newspapers Co. v. Superior Court*, 457 U.S. 596, 609 (1982) (state offers no "empirical support" for claim that automatic exclusion of press in cases involving sex crimes committed against minors would encourage victims to come forward and provide accurate testimony). The dormant commerce clause cases provide perhaps the best example of the Court depreciating an interest to resolve the balance. *See, e.g.*, *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 671-73 (1981) (plurality opinion); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 779 (1945).

208. *See* *Youngberg v. Romeo*, 457 U.S. 307, 322-23 (1982); *Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring).

209. 410 U.S. 113 (1973).

210. *Id.* at 163.

211. *See* Ely, *supra* note 53, at 924.

212. *See* *New Jersey v. T.L.O.*, 469 U.S. 325, 369 (1985) (Brennan, J., dissenting) (Fourth Amendment "'balancing tests' amount to brief nods by the Court in the direction of a neutral utilitarian calculus while the Court in fact engages in an unanalyzed exercise of judicial will."); *see also* *Roe v. Wade*, 410 U.S. at 162-64 (failing to explain why state interest in protecting fetal life outweighs woman's privacy interest at viability).

B. *The Problem of a Universe of Interests*

Early theories of balancing were largely theories of common law adjudication. Under an instrumental view of the common law, the conscientious decisionmaker would make an inventory of all relevant interests and choose a rule of law that furthered social welfare in light of those interests. No interest—unless prohibited by the Constitution or a statute—would be ignored.

In theory, balancing strives to apply the same method to constitutional adjudication.<sup>213</sup> The task is seen as requiring the consideration of all relevant interests, whether traceable to the Constitution or to society at large.<sup>214</sup> Thus, due process interests are considered with governmental interests in limiting cost and attaining accuracy.<sup>215</sup> First Amendment interests are weighed against reputation<sup>216</sup> or bureaucratic efficiency.<sup>217</sup> Fourth Amendment interests are weighed against the societal need to see how public funds are spent.<sup>218</sup> It is remarkable that in a scholarly literature full of attacks on “non-interpretivism,” it is never recognized that balancing—by transforming any interest implicated by a constitutional case into a constitutional interest—is the ultimate non-interpretivism.

While, in theory, balancing takes an expansive view of what should count as a constitutional interest, in practice, the Court never makes a full inventory of the relevant interests. In *Goldberg v. Kelly*,<sup>219</sup> for example, the Court did not consider a huge range of interests that ought to bear on the question of whether there should be a hearing before welfare benefits are terminated. These might include broader societal notions of fairness; the willingness of society to continue funding the welfare program and other entitlement programs; the ripple effect of wrongful terminations on poor communities, housing stock and crime rates; the morale of the welfare bureaucracy and its views of its clients; the weakening or strengthening of political groups pressing for welfare reform. The Court no doubt recognized that including these considerations would have turned the opinion into a monograph on the welfare system. But on what basis (other than convenience) does the Court restrict its balance to just a few of the

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213. Cf. Heineman, *A Balance Wheel on the Court*, 95 YALE L.J. 1325 (1985) (describing Justice Stewart's method as applying common law analysis to constitutional balancing).

214. Except those interests prohibited by the Constitution. See, e.g., *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249, 3258 (1985) (“bare . . . desire to harm a politically unpopular group” not legitimate state interest) (quoting *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

215. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

216. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974).

217. See, e.g., *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 564 (1973).

218. See *Wyman v. James*, 400 U.S. 309, 319 (1971).

219. 397 U.S. 254 (1970).

relevant interests? The point may be generalized. Taking balancing seriously would seem to demand the kind of investigation of the world that courts are unable or unwilling to undertake.

### C. *The Problem of Cumulation*

Even if a balancer has properly identified the relevant interests and has an objective scale for their valuation, there is still the problem of *which* holders of the relevant interests should be counted. Again, consider *Youngberg v. Romeo*,<sup>220</sup> the case involving treatment of a mentally retarded person involuntarily committed to a state hospital. There the Court purported to weigh the individual's interest in safety and freedom from restraint against the hospital's interest in confining his movements.<sup>221</sup>

A solution to the particular dispute—whether Romeo had been denied constitutional rights by Youngberg—should arguably have required the Court to weigh the claimant's interest against the needs of the hospital. But the Court does not only resolve individual disputes in constitutional cases; it establishes general principles of governmental power and individual rights that legislatures will notice and lower courts will follow. Thus the Court usually appears to adopt a global balance, examining the interests on some classwide basis.

In many balancing cases, however, courts make no serious effort to place the interests of non-parties on the scale.<sup>222</sup> In *Romeo*, the Court did not survey other institutions in the state or around the country. It did not estimate whether the conditions in the defendant hospital were typical or whether the cost of fewer restrictions would be less burdensome in other institutions. It did not “sum up” the individual weights of all Romeos or ask whether other similarly situated persons might have greater or lesser interests in freedom from restraint. Romeo stood for all patients and Penhurst State Hospital for all institutions.

This problem is endemic to the balancing methodology; the alternative is an unwieldy litigation process in which the trial court would have to make a complete survey of similar institutions. Every case would demand Brandeis briefs of extraordinary complexity, and the costs of constitutional litigation would skyrocket. It is no wonder that the Justices are content to see Romeo as “all patients.” However, in making balancing work, the

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220. 457 U.S. 307 (1982).

221. *Id.* at 320–21. The Court never defines the state interests, although it does give the example of protecting patients from violence. *Id.* at 320.

222. *Cf. Mashaw, The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 38–39 (1976) (criticizing Court for “incomplete and problematic” computation of private interests at stake in Social Security disability claims).

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Court has adopted a truncated form that ought not to be acceptable to the conscientious balancer.

### D. *The False Promise of Definitional Balancing*

Professor Nimmer praised “definitional” balancing for its ability to generate a rule “which can be employed in future cases without the occasion for further weighing of interests.”<sup>223</sup> It thus promises far more certainty than “ad hoc” balancing, which demands a new balance in every case. Upon closer analysis, however, definitional balancing does not prove to be a panacea. Any gain in certainty it provides comes at the price of reduced coherence.

Assume that in Case 1 “definitional” balancing has generated a rule. For example, the Court might conclude that the harms associated with child pornography far outweigh its benefits, and thus that child pornography is not protected by the First Amendment.<sup>224</sup> Now in Case 2, a producer of child pornography argues that he produces his works with less harm to the child subjects and with greater First Amendment benefits. What follows? Under definitional balancing, such arguments are ruled out of bounds; these factors supposedly were considered in deriving the first rule. But this response is untrue to the purpose and asserted strength of a balancing methodology. If the pornographer in Case 2 is correct about the harms and benefits of his work, why should he be burdened by the earlier rule? The definitional balancer no doubt will respond that the benefits of certainty outweigh the costs of wrongly punishing the pornographer in Case 2. But it is difficult to imagine how one would locate or evaluate data to substantiate this meta-balance. In Professor Nimmer’s work, this claim appeared simply as an assertion supported by a fanciful hypothetical.<sup>225</sup>

It is therefore unsurprising that “definitional” balances are often undermined by new interests or different weights for previously considered interests. Such was the case in *New York v. Quarles*,<sup>226</sup> in which the Court carved out a “public safety exception” to *Miranda*. The *Quarles* rule permits prosecutors to use statements of defendants whom police sub-

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223. M. NIMMER, *supra* note 28, § 2.03, at 2-17. I am reminded of the story about the crusty Dean of Students who, in the late 1960’s, argued for retaining parietal hours in a college dorm. When it was suggested that students could do anything before 11 p.m. that they would seek to do afterwards, the Dean replied: “Yes, but they can’t do it twice.”

224. See *New York v. Ferber*, 458 U.S. 747 (1982).

225. See M. NIMMER, *supra* note 28, § 2.03, at 2-18 to 2-20.

The Court appears quite willing to strike the meta-balance. See, e.g., *Colorado v. Bertine*, 107 S. Ct. 738, 743 (1987) (bright-line test for inventory searches essential for police in the field; no requirement that officers weigh strength of individual’s privacy claim).

226. 467 U.S. 649 (1984).

ject to custodial interrogation without first delivering *Miranda* warnings if the officers' questions were reasonably prompted by a concern for public safety. Justice Rehnquist, writing for the majority, began by characterizing *Miranda* as based on the judgment "that whatever the cost to society in terms of fewer convictions of guilty suspects, that cost would simply have to be borne in the interest of enlarged protection for the Fifth Amendment privilege."<sup>227</sup> Then he added a new weight to government's side of the scales, public safety:

[W]hen the primary social cost of . . . added [procedural] protections is the possibility of fewer convictions, the *Miranda* majority was willing to bear that cost. Here, had *Miranda* warnings deterred Quarles from responding to Officer Kraft's question about the whereabouts of the gun, the cost would have been something more than merely the failure to obtain evidence useful in convicting Quarles. Officer Kraft needed an answer to his question not simply to make his case against Quarles but to insure that further danger to the public did not result from the concealment of the gun in a public area.<sup>228</sup>

According to Justice Rehnquist, this additional cost tipped the scales towards recognition of a public safety exception.

Rehnquist's opinion shows the fragility of a definitional balance and the artificiality of the distinction between "definitional" and "ad hoc" balancing.<sup>229</sup> New situations present new interests and different weights for old interests. If these are allowed to re-open the balancing process, then every case becomes one of an "ad hoc" balance, establishing a rule for that

227. *Id.* at 656-57.

228. *Id.* at 657.

229. Rehnquist's move hardly guarantees coherence. First, Rehnquist does not explain why the additional weight changes the *Miranda* balance. It may simply shift the balance toward admissibility of the evidence without, in the end, tipping it. Second, Rehnquist concedes that the new exception, by blurring the bright-line test of *Miranda*, entails "some degree" of additional costs. *Id.* at 658. Although Rehnquist believes that these costs are not significant, we are not given any indication of how a complete balance would come out. Not surprisingly, other Justices disagreed with the majority's balance. *Id.* at 664 (O'Connor, J., concurring in part and dissenting in part) (arguing that "public safety" cost was included in original *Miranda* balance); *id.* at 678-80 (Marshall, J., dissenting) (arguing that majority miscalculated costs that implementing public safety exception would impose on police).

Of course, the problem can run the other way too: the Court may strike a balance in Case 1, and refuse to change it in Case 2 despite good reason to believe that the costs are different. In *Oregon v. Hass*, 420 U.S. 714 (1975), the Court extended the rule of *Harris v. New York*, 401 U.S. 222 (1971), to allow impeachment use of statements that a suspect made after receiving *Miranda* warnings and requesting a lawyer. The majority dismissed the dissenters' argument that the new rule provided less incentive to follow *Miranda*, stating: "[T]he balance was struck in *Harris*, and we are not disposed to change it now." *Id.* at 723; see also Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1644 (1979) (criticizing *Planned Parenthood v. Danforth*, 428 U.S. 52, 69 (1979), for failing to recognize that balance in *Roe* might come out differently in case where the father opposes abortion).

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case only.<sup>230</sup> Balances are “definitional” only if the Court wants to stop thinking about the question.

### E. *The Problem of the Individual/State Dichotomy*

Balancing opinions typically pit individual against governmental interests. This characterization, however, is arbitrary. Interests may be conceived of in both public and private terms.<sup>231</sup> The *individual* interest in communicating one’s ideas to others may also be stated as a *societal* interest in a diverse marketplace of ideas. Time, place, and manner limitations on expressive behavior may be based on a *governmental* interest in public safety or a *private* interest in unencumbered access to public facilities.

Consider *Hudson v. Palmer*,<sup>232</sup> in which the Court described a search of a prisoner’s cell as posing a conflict between the prisoner’s Fourth Amendment interest in privacy and the government’s interest in jail security. In that case, the prisoner’s interest could also have been stated as a public interest. Society has a general interest in preventing unwarranted governmental intrusions. Extending the Fourth Amendment’s protection of privacy in one context may contribute to, and reinforce, a social sense of personal freedom and liberty. As a collective body, we are in the cell with Palmer; the interests at stake are not his alone. Similarly, the government’s interest in prison security may also be stated as a private interest. Both prisoners and guards have an individualized interest in being free from assaults and in having a governmental authority protect them. Because public and private interests appear on both sides, there is little sense in seeing the balance in terms of individual versus governmental interests.<sup>233</sup>

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230. Compare *Colorado v. Bertine*, 107 S. Ct. 738 (1987) (applying established Fourth Amendment rule regulating inventory searches) *with id.* at 744 (Marshall, J., dissenting) (arguing against application of earlier rule because government interests weaker and individual interests stronger in present case).

The “un-definitionalness” of “definitional” balancing is evidenced by the line of cases that followed Professor Nimmer’s prime example, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). See M. NIMMER, *supra* note 28, § 2.05[c][1]. In these cases, the Court has repeatedly “re-struck” the *New York Times* balance in crafting a body of rules regarding libel laws and the First Amendment. See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348–50 (1974). In my view, it is simply a matter of taste whether one views these cases as illustrations of “definitional” or “ad hoc” balancing.

231. Pound, *supra* note 94, at 1–2. Pound identified three levels of interests: individual, public and social. The Court generally speaks of two, collapsing public and societal into governmental. I will do the same and use governmental, public, and social interchangeably.

232. 468 U.S. 517 (1985).

233. Cf. *New Jersey v. T.L.O.*, 469 U.S. 325, 363 n.5 (1985) (Brennan, J., concurring in part and dissenting in part) (criticizing Court’s recognition of government interest in apprehending criminals but not in protecting privacy).

The Court occasionally recognizes that individual and governmental interests coincide. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 766 (1982) (government and parent share interest in accurate parental rights termination proceedings); *United States v. Tateo*, 377 U.S. 463, 466 (1964) (society



To answer these problems, Roscoe Pound recommended that interests be compared "on the same plane,"<sup>234</sup> and occasionally the Court does so.<sup>235</sup> But this "solution" reintroduces the incompleteness objection discussed above. In *Hudson v. Palmer*, one *could* state the conflict as the social interest in freedom from unreasonable searches versus the social interest in prison security. But this eliminates from the balance the very real private interests at stake.

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The preceding critique takes balancing on its own terms and examines how effectively the methodology identifies and "weighs" interests. What is so surprising is how rudimentary the process appears.<sup>236</sup> No system of identification, evaluation, and comparison of interests has been developed. The inventory of interests has largely been reduced to the individual's against the state's; weights are asserted, not argued for. A theory of interpretation created to bring realism to law and to limit subjectivity in constitutional interpretation seems more and more manipulative.

The problems that plague most balancing opinions, I believe, have severely damaged the credibility of the methodology. Perhaps the saddest example is the Court's decision in *Lassiter v. Department of Social Services*.<sup>237</sup> The issue in the case was whether the due process clause entitled Lassiter to counsel at the state's expense in a proceeding to terminate her parental rights. Writing for the majority, Justice Stewart constructed a double balance to answer the constitutional question: "The case of *Mathews v. Eldridge* propounds three elements to be evaluated in deciding what due process requires . . . . We must balance these elements against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom."<sup>238</sup>

Stewart concluded that the *Mathews v. Eldridge* part of this test fa-

and defendant share interest in exceptions to double jeopardy rule).

234. Pound, *supra* note 94, at 2.

235. See, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 695 (1972) (balancing public interest in news gathering against public interest in prosecuting crimes).

236. A German lawyer's critique of *Interessenjurisprudenz*—an early 20th Century German school of legal philosophy that urged balancing of the interests in statutory interpretation—is applicable here:

The fact that in the twenty years that have passed since [the] first publication on the subject, the Jurisprudence of Interests, despite the considerable number of its disciples, has not even advanced one step beyond a purely casuistic treatment. . . . [T]he general idea that legal rules should be established through the evaluation of interests is far from being a method; at best it is a program.

Isay, *The Method of the Jurisprudence of Interests: A Critical Study*, in *THE JURISPRUDENCE OF INTERESTS* 321 (M. Schock ed. 1948) (footnote omitted).

237. 452 U.S. 18 (1981).

238. *Id.* at 27.

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vored the parent's right to counsel: The parent's interest was strong, the state had a relatively weak pecuniary interest in informal proceedings, and the risk of erroneous deprivation was great.<sup>239</sup> He then weighed this conclusion against the presumption that an indigent receives appointed counsel only when her personal liberty is threatened. The result was a rule requiring an ad hoc balance in each case:

If, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak, it could not be said that the *Eldridge* factors did not overcome the presumption against the right to appointed counsel, and that due process did not therefore require the appointment of counsel. But since the *Eldridge* factors will not always be so distributed, and since "due process is not so rigid as to require that the significant interests in informality, flexibility and economy must always be sacrificed," neither can we say that the Constitution requires the appointment of counsel in every parental termination proceeding. We therefore . . . leave the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review.<sup>240</sup>

The opinion in *Lassiter* may simply demonstrate the difficulty of commanding a majority in a badly divided Court. (Who knows which Justice of the five-person majority insisted on which balance). But I fear it proves far more. The opinion reflects both the dominance of balancing in the contemporary judicial mind and its emptiness as a methodology. All of Stewart's balances seem largely irrelevant to the holding: that courts should decide a parent's right to counsel on a case-by-case basis. And that holding implicates a host of factors never considered by the Court, such as who will make the initial decision, what bias the decisionmaker is likely to have, and how well a court can—on a record prepared without counsel—review the decision of whether counsel was needed.<sup>241</sup> Although Stewart's opinion uses all the right words, in the end they are simply that: just words. No conviction, no belief in the justness of the result informs the opinion. Balancing has become mechanical jurisprudence. It has lost its ability to persuade.

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239. *Id.* at 27–31.

240. *Id.* at 31–32 (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 788 (1973)) (citation omitted).

241. *See id.* at 50–51 (Blackmun, J., dissenting).

## V. THE EXTERNAL CRITIQUE OF BALANCING

Perhaps a Hercules of a judge (or a well-programmed computer) could balance in a manner that overcomes the preceding "internal" critique. But balancing also implicates deeper questions about the role of the Court and the nature of judicial review. This section links these concerns with the earlier discussion to argue that balancing builds upon, and fosters, an inappropriate conception of constitutional law.

A. *The Role of the Court*

A common objection to balancing as a method of constitutional adjudication is that it appears to replicate the job that a democratic society demands of its legislature. The legislative aspect of balancing has become quite pronounced in a number of recent opinions that have openly explored the "costs" and "benefits" of constitutional rules and appealed to empirical evidence of the effect of constitutional doctrine on societal interests.<sup>242</sup> Such a methodology may be an appropriate model for common law adjudication. But balancing needs to be defended in constitutional interpretation where the decision of a court supplants a legislative decision.

What defense might be offered for an understanding of the role of the Court as replicating the legislative task? Some may view judicial balancing as a way to catch errors in the legislative calculations. Just as we do sums twice to check our addition, so we might want to rebalance interests through judicial review. But normally when our second sum is not the same as the first, we add again. Thus this defense must develop a theory that explains why we always accept the judiciary's calculation. Moreover, the structure established by the Constitution explicitly provides for an "addition-checker" in the form of bicameralism.

A better argument for the balancer is that the Court improves the balancing process by giving weight to interests that the legislature tends to ignore or undervalue. Under this view, the Court plays two important roles. First, it reinforces representation, ensuring that the interests of unpopular or underrepresented groups are counted and counted fairly.<sup>243</sup>

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242. See cases cited *supra* notes 198-202.

243. See J. ELY, *supra* note 116, at 88-104 (discussing representation-reinforcing role of Court).

A "footnote four" defense of balancing may seem paradoxical, given the current dominance of Dean Ely's view that the footnote is a source for process-based interpretive strategies. But the author of footnote four was an advocate of balancing, see *supra* text accompanying notes 100-104, and seems to have adopted a substantive reading of the footnote (that is, that the Court ought to give underrepresented groups a "plus" in the general balancing process). See *Minersville School Dist. v. Gობitis*, 310 U.S. 586, 605-07 (1940) (Stone, J., dissenting); Dunham, *Mr. Chief Justice Stone*, in MR. JUSTICE 63 (A. Dunham & P. Kurland eds. 1956) (Stone "clearly indicated that where tough-minded inquiry and weighing of competing values were required, he had no fear of the decision-making process or of the consequences of his decision."); Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1176-77 (1977).

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Second, it protects constitutional rights and interests that are sometimes forgotten in the hurly-burly of politics.<sup>244</sup>

Both of these “thumb-on-the-scales” claims are plausible. Legislators may have difficulty crediting the interests of minority groups to which they do not belong.<sup>245</sup> We might also be justifiably suspicious of the legislature’s evaluation of constitutional interests that conflict with popular governmental conduct. Thus the balancer may claim that her form of constitutional interpretation provides a procedural and a substantive<sup>246</sup> justification for judicial review.

While these arguments may point to troubling flaws in the legislative process, they do not alone establish a justification for the judiciary’s performance of the legislative task. The argument from undervalued interests might support a model of judicial review analogous to court review of administrative decisions: If a court determines that an agency has ignored or misevaluated relevant interests, it may order the agency to go through the decisionmaking process again. Similarly, a conclusion that the legislature has wrongfully ignored certain interests might justify judicial review in the form of a “suspensive veto”<sup>247</sup> and a “remand.”<sup>248</sup> But it does not warrant an evaluation and balancing of the interests by the court. Once the legislature has openly considered the values that the court tells it are at stake, what grounds are there for preferring a court’s subsequent determination of the balance?

A balancer might respond that it is improper to portray judicial balancing as duplicating legislative balancing. According to this view, a balancing approach attempts not to maximize social welfare or represent voters. Its primary focus is the Constitution. It simply insists that the Constitution not be interpreted in a vacuum and that courts be aware of the social context and impact of constitutional doctrine. The court that balances, the argument might run, is really searching for a reasonable understanding of the Constitution—one that harmonizes constitutional provisions and values with important governmental interests. The balancing court does not *replicate* the legislative function or *supplant* legislative

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244. See *Fullilove v. Klutznick*, 448 U.S. 448, 551 & n.27 (1980) (Stevens, J., dissenting); A. BICKEL, *THE LEAST DANGEROUS BRANCH* 23–28 (2d ed. 1986).

245. See R. DWORKIN, *LAW’S EMPIRE* 375 (1986); Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7–8 (1976).

246. See West, *In the Interest of the Governed: A Utilitarian Justification for Substantive Judicial Review*, 18 GA. L. REV. 469 (1984) (arguing that court may be able to make utilitarian calculation better than legislature or majority that values its interests too highly or undervalues other interests).

247. See Sandalow, *supra* note 243, at 1183–93.

248. See G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 17 (1982); Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 14–35 (1957).

judgments of good social policy. It *uses* the legislative act as a measure of social importance and thus as a basis for calculating the degree to which the constitutional interest should be "softened."<sup>249</sup>

I think that this is the balancer's best case, and it does indeed supply a role for the court distinct from those of the other branches of government. The judicial role might be described as: Protect and preserve all constitutional interests, taking into account the value that the other branches place on achieving other legitimate ends. But this description raises a deep, and generally unaddressed, problem. Even if the balancing court purports to accept the value that the legislature places on its own output, it cannot simply factor the legislature's determination into a constitutional calculus. It must first convert the constitutional value and the legislative value into a common currency. How does a court decide how "important" a legislative or administrative policy is? For example, why are a "city's aesthetic interests" sufficiently "substantial" to sustain a city ordinance prohibiting political posters on utility poles,<sup>250</sup> but "administrative convenience" not an adequate justification for requiring servicewomen (but not servicemen) to prove the dependency of their spouses to receive housing allowances?<sup>251</sup> At work here is some undisclosed scale of social value, one not obviously derived from the Constitution. Balancers must defend this inevitable aspect of balancing. They must suggest reasons why judgments assigning a social value to legislation are within the province and capacity of the courts.

### B. *The Conception of Constitutional Law*

For the balancer, constitutional law is comprised of principles discovered by weighing interests relevant to resolution of a particular constitutional problem. These interests may be traceable to the Constitution itself (free speech, federal regulation of commerce) or discoverable elsewhere (clean streets, law enforcement). Some interests are accorded great weight because society generally recognizes their importance, others because they are located in the Constitution. Indeed, one may understand the Constitution, from the balancer's point of view, as a document intended to ensure that judges (among others) treat particular interests with respect. It is an honor roll of interests.

Although this conception of law may have brought realism to the common law, it threatens to do real damage to constitutional law. Early critics of balancing were largely concerned about the impact of the methodology

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249. See C. DUCAT, *MODES OF CONSTITUTIONAL INTERPRETATION* 133-34 (1978) (contrasting legislative and judicial balancing).

250. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

251. *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion).

on the protection of constitutional rights.<sup>252</sup> And, as Ronald Dworkin has tirelessly argued, viewing constitutional rights simply as “interests” that may be overcome by other non-constitutional interests does not accord with common understandings of the meaning of a “right.”<sup>253</sup>

But the implications of balancing for constitutional law go far beyond strategic discussions about the best way to protect constitutional rights. (In fact, since the original critiques, balancing has proven to be a robust methodology for the creation and extension of rights). Balancing is undermining our usual understanding of constitutional law as an interpretive enterprise. In so doing, it is transforming constitutional discourse into a general discussion of the reasonableness of governmental conduct.

One can see this trend most clearly in opinions that define or describe a constitutional right and then weigh the right against competing state interests. Here, balancing appears as an extra step in constitutional interpretation. Once a court has done the hard work of explicating a constitutional provision through the usual methods of textual, precedential, and consequentialist reasoning, the result is subjected to another test—the weight of competing interests.

*Supreme Court of New Hampshire v. Piper*<sup>254</sup> provides an example. In *Piper*, the Court held that New Hampshire’s residency requirement for state bar admissions violated the privileges and immunities clause of Article IV. The Court reasoned that the privileges and immunities clause “was intended to ‘fuse into one Nation a collection of independent, sovereign States’ ”<sup>255</sup> and to “create a national economic union.”<sup>256</sup> This understanding of the clause leaves some room for state discrimination against nonresidents: denying access to trivial state opportunities (such as elk hunting)<sup>257</sup> does not threaten national unity; and requiring residency for certain political activities (such as voting and office-holding) is justifiable as a way to preserve the states as sovereign political communities.<sup>258</sup> Under this analysis, the Court concluded that the residency requirement for bar membership could not stand. Lawyering is important enough to

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252. See T. EMERSON, *supra* note 3, at 717–18; Frantz, *Reply*, *supra* note 3; Frantz, *Balance*, *supra* note 3. This argument has never gone of out style. See *Hudson v. Palmer*, 468 U.S. 517, 556 n.33 (1984) (Stevens, J., dissenting in part and concurring in part) (“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials . . .”) (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

253. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 194, 269 (1977); see also Thomson, *The Trolley Problem*, 94 *YALE L.J.* 1395, 1404 (1985) (adopting Dworkin’s view that “[r]ights ‘trump’ utilities”).

254. 470 U.S. 274 (1985).

255. *Id.* at 279 (quoting *Toomer v. Witsell*, 334 U.S. 385, 395 (1948)).

256. *Id.* at 280.

257. See *Baldwin v. Fish & Game Comm’n*, 436 U.S. 371 (1978).

258. 470 U.S. at 282–83 & n.16.

come within the purview of the privileges and immunities clause and not so closely related to the exercise of state sovereign power to justify discrimination against non-residents.

So far so good. But then came the inevitable intrusion of balancing:

The conclusion that [the residency requirement] deprives nonresidents of a protected privilege does not end our inquiry. The Court has stated that “[l]ike many other constitutional provisions, the privileges and immunities clause is not an absolute. The Clause does not preclude discrimination against nonresidents where: (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State’s objective.”<sup>259</sup>

The Court then considered the state’s reasons for limiting bar admissions to residents. These included ensuring that lawyers behave ethically, be available for court dates and pro bono work, and keep up with local rules and procedures. The Court ultimately concluded that none of these interests met the test of “substantiality” and that excluding nonresidents from the bar did not bear the necessary relationship to these interests.<sup>260</sup> What is not offered is any justification for the balance tacked on to the end of an otherwise sensible constitutional opinion. Why does the Court feel compelled to turn a constitutional judgment into a discussion of the reasonableness of the state regulation?<sup>261</sup>

Not all balancing opinions add the balance at the end. Many view the underlying constitutional principle itself in balancing terms. Thus, in procedural due process cases, the constitutional requirement is determined by comparing the weights of three interests.<sup>262</sup> Here the problem is that balancing does not require the Court to develop and defend a theoretical understanding of a constitutional provision. Under a balancing approach, the Court searches the landscape for interests implicated by the case, identifies a few, and reaches a reasonable accommodation among them. In so doing, the Court largely ignores the usual stuff of constitutional interpretation—the investigation and manipulation of texts (such as constitutional language, prior cases, even—perhaps—our “ethical tradition”<sup>263</sup>).

259. *Id.* at 284 (quoting *Toomer v. Witsell*, 334 U.S. 385, 396 (1948)).

260. *Id.* at 287.

261. Commentators, too, use balancing in this fashion. See, e.g., Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 165–68 (1975) (after penetrating analysis of meaning of equal protection, author asserts that his “group-disadvantaged principle” must be tempered to accommodate “considerations of total welfare”).

262. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

263. See *Hudson v. Palmer*, 468 U.S. 517, 558 (1984) (Stevens, J., dissenting in part and concurring in part).

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Balancing at its bleakest, to use Justice Brennan's phrase, is "doctrinally destructive nihilism."<sup>264</sup>

This revolt against theory is most troubling in cases that balance constitutional and non-constitutional interests. In these cases, the Constitution is viewed as a broom closet in which constitutional interests are stored and taken out when appropriate to be considered with other social values. Because the weight of the constitutional interest is usually assumed to be substantial, most of the Court's attention is focused on the competing state interests: How strong are they? Can they be achieved with less of an impact on the constitutional interest?<sup>265</sup> In a curious way, constitutional law goes on *next to* the Constitution.

These unfortunate consequences of balancing can be seen in *Tennessee v. Garner*.<sup>266</sup> Under Tennessee law, a police officer was authorized to use deadly force to prevent the escape of a person who he had probable cause to believe had committed a felony. Edward Garner, a fifteen year old eighth-grader, was fatally shot in the back of the head while fleeing with ten dollars and a stolen purse. Garner's father brought suit, claiming violation of the Fourth Amendment's protection against unreasonable seizures. The Court, through Justice White, applied a balancing approach. The Court's balancing rhetoric is worth quoting at length:

The intrusiveness of a seizure by means of deadly force is unmatched. The suspect's fundamental interest in his own life need not be elaborated upon. The use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment. Against these interests are ranged governmental interests in effective law enforcement. It is argued that overall violence will be reduced by encouraging the peaceful submission of suspects who know that they may be shot if they flee. Effectiveness in making arrests requires the resort to deadly force, or at least the meaningful threat thereof. "Being able to arrest such individuals is a condition precedent to the state's entire system of law enforcement."

Without in any way disparaging the importance of these goals, we are not convinced that the use of deadly force is a sufficiently pro-

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264. *New Jersey v. T.L.O.*, 469 U.S. 325, 369 (1985).

265. For example, in *New York v. Quarles*, 467 U.S. 649 (1984), the balancing metaphor, used in the name of the Constitution, seemed to divert our attention *from* the Constitution. The Court based its decision, carving out a "public safety" exception to *Miranda v. Arizona*, 384 U.S. 436 (1966), on the conclusion that "the need for answers to questions in a situation posing a threat to public safety outweighs the need for a prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." 467 U.S. at 657. As Justice Marshall noted in dissent, however, *Miranda* was "not a decision about public safety; it was a decision about coerced confessions." *Id.* at 684. The majority opinion says very little about the problem of coerced confessions which, after all, is the link between *Miranda* and the Fifth Amendment. See also *supra* notes 226-28 and accompanying text (discussing *Quarles*).

266. 471 U.S. 1 (1985).



ductive means of accomplishing them to justify the killing of nonviolent suspects. The use of deadly force is a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion. . . . Petitioners and appellant have not persuaded us that shooting nondangerous fleeing suspects is so vital as to outweigh the suspect's interest in his own life.

The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. The Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against such fleeing suspects.

It is not, however, unconstitutional on its face. Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.<sup>267</sup>

*Garner* demonstrates the limited role that constitutional analysis can play in the elaboration of constitutional law. The constitutional value of life is but one factor in a general policy discussion of proper police conduct. (It is hardly surprising that the opinion relies heavily on the ALI Model Penal Code).<sup>268</sup> While the Fourth Amendment is certainly *involved* in the case (by providing *Garner's* father a way into court), and the opinion undoubtedly states what the Fourth Amendment prohibits and permits, the decision does not seem to be *about* the Fourth Amendment. The analysis neither relies upon nor constructs a theory of the Fourth Amendment; it does not examine the purpose, scope or source of the protection against unreasonable seizures.<sup>269</sup> The state lost the case because it

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267. *Id.* at 9–11 (footnotes and citations omitted).

268. *See, e.g., id.* at 13–14, 16–17.

269. The result in *Garner* could have been reached through a non-balancing analysis of the constitutional provision. The use of deadly force against another person clearly constitutes a “seizure” of that person. Under the Fourth Amendment, probable cause is needed for a seizure when the purpose of the seizure is to hold the suspect for criminal investigation. The power to seize need not include actions beyond what is necessary to effectuate the purpose of the seizure. Indeed, this is consistent with the Fourth Amendment’s general limit on seizures. Shooting a fleeing felon dead destroys the purpose of the stop. Under this analysis, a broad statutory authorization to shoot fleeing felons cannot be constitutional.

But this does not end the analysis. Fleeing felons are also a concern because they may be dangerous to others. Police intervention in this circumstance may prevent harm. Police officers may take measures to prevent the occurrence of imminent harm. (We give the state this power in many ways, from passing speeding laws to permitting firefighters to knock down homes to prevent the spread of fire).

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could not show that shooting suspects is a “sufficiently productive means” of furthering its law enforcement interests.<sup>270</sup> (What grisly instrumentalism this is).

Does this transformation of constitutional law matter? Some might argue that balancing has made constitutional law more reasonable and accessible. But I believe that the transformation has important and troubling consequences. Constitutional law provides a set of preemptory norms—a checking power—that is basic to the American notion of a government of limited powers. Equally important, although less frequently noted, is constitutional law’s validating function. As Charles Black noted long ago, “one indispensable ingredient in the original and continuing legitimation of a government must be its possession and use of some means for bringing about a consensus on the legitimacy of important governmental measures.”<sup>271</sup> Constitutional cases provide a forum for the affirmation of background principles and for ratification of changes in those principles—changes the amendment process could only sporadically produce.

Balancing undermines the checking and validating functions of constitutional law. This is most apparent in opinions that adopt a legislative voice, openly weighing costs and benefits in order to maximize social welfare. If constitutional decisions and normal political decisions examine similar variables in similar ways, then constitutional answers ought not to “trump” non-constitutional answers; the constitutional process simply serves as an arithmetic “check” on the non-constitutional process. Nor can constitutional law perform its validation function if constitutional judgment is reached in the same manner as the legislative judgment. The Court’s agreement might only show that the Court and the legislature used the same calculator. These concerns are not alleviated even under the best account of balancing offered above (that a court does not replicate the legislative task but simply accommodates constitutional values with other social interests). That account supplies no basis for the authority or ability of a court to assign a value to the legislative output.

Claims that an interpretive strategy threatens the legitimacy of constitutional review are easy to make but hard to prove. More easily seen is the devastating impact that balancing has had on constitutional theory. Bal-

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When a police officer has good reason to believe that a person poses an imminent danger to another, the officer has a duty to prevent the harm and to protect the innocent. The seizure is reasonable, not because the benefits outweigh the harm, but because we expect the state to intervene to protect and preserve life. (Nor can the Fourth Amendment’s warrant clause sensibly apply.) Therefore, where the police officer has probable cause to believe that the suspect threatens to cause serious harm, he may prevent escape by using deadly force.

270. Furthermore, the Court offers virtually no explanation for its holding that deadly force may be used against dangerous fleeing felons. What interests were on the scale and what weight they were given remain a mystery.

271. C. BLACK, *THE PEOPLE AND THE COURT* 38 (1960).

ancing opinions give one the eerie sense that constitutional law as a distinct form of discourse is slipping away. The balancing drum beats the rhythm of reasonableness, and we march to it because the cadence seems so familiar, so sensible. But our eyes are no longer focused on the Constitution. If each constitutional provision, every constitutional value, is understood simply as an invitation for a discussion of good social policy, it means little to talk of constitutional “theory.”

Ultimately, the notion of constitutional supremacy hangs in the balance. For under a regime of balancing, a constitutional judgment no longer looks like a trump. It seems merely to be a card of a higher value in the same suit.

### C. *Objectivity and the Loss of Voice*

From the outset, balancing has attempted to supply a “scientific” method for infusing a dry (or blind) doctrinalism with knowledge of the world. In recent years—perhaps due to nagging criticisms about the problem of assigning weights—the Court has resorted with increasing frequency to the jargon of economics and policy science in an attempt to look non-wilful, scientific, and objective. As Professor Tribe has noted, “[p]art of the allure of efficiency curves and cost-benefit calculations is the illusion that . . . hard constitutional choices can be avoided . . . through the inexorable analytic magic of such equations.”<sup>272</sup> The result is that the heady realism that informed early balancing opinions is largely gone. Three-pronged tests, two-tier standards, and cost-benefit analyses litter the constitutional landscape, the petrified remnants of a once vital approach to law.<sup>273</sup> The reliance on “science” has troubling implications. Not only, as

272. Tribe, *supra* note 4, at 620.

273. See Nagel, *supra* note 8. This distinction between the early, pragmatic balancing cases and the more recent “scientific” cases may reflect two different views of “objectivity.” See Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332, 369–85 (1986) (contrasting “fundamental objectivity”—claim that legal answers correspond to extralegal, scientifically derived norm—with “group objectivity”—claim that legal answer is consistent with internal, shared standards of rationality that are generally followed).

This metamorphosis of balancing has not gone unnoticed on the Court. Concurring and dissenting Justices have frequently decried the pseudo-scientific nature of modern balancing. See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325 (1985):

All of these “balancing tests” [in the Fourth Amendment area] amount to brief nods by the Court in the direction of a neutral utilitarian calculus while the Court in fact engages in an unanalyzed exercise of judicial will. Perhaps this doctrinally destructive nihilism is merely a convenient umbrella under which a majority that cannot agree on a genuine rationale can conceal its differences.

*Id.* at 369–70 (Brennan, J., concurring in part and dissenting in part); see also *Hudson v. Palmer*, 468 U.S. 517, 549 (1984) (Stevens, J., concurring in part and dissenting in part) (“The Court’s . . . perception of what society is prepared to recognize as reasonable [possessory interests of prisoners] is not based on any empirical data; rather it merely reflects the perceptions of the four Justices who have joined the opinion that the Chief Justice has authored.”); *New York v. Quarles*, 467 U.S. 649, 681 (1984) (Marshall, J., dissenting) (“results of the majority’s [balancing] ‘test’ are announced with

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Professor Tribe points out, does a cost-benefit approach conceal important questions of principle, it also threatens the constitutive potential of constitutional law. American society addresses basic questions of social and political justice—such as the meaning of liberty, fairness, and equality—through the discussion of constitutional issues. Constitutional law directs our attention to the underlying premises of our governmental structure and forces us to consider whether we are, and wish to be, a society that permits or tolerates particular exercises of governmental power. In thinking about these questions, we discover and create—we constitute—our social world.<sup>274</sup>

Some may argue that a balancing approach furthers this constitutive process. If balancing is a natural and accepted form of reasoning for resolving difficult personal, social, or political questions, then perhaps balancing makes constitutional law more accessible: We can all engage in a discussion of whether we desire more law enforcement and less privacy, or more speech and less quiet. But while balancing may have this potential, it seems more often to have the opposite effect of distancing us from the discourse. Scientifically styled opinions, written to answer charges of subjectivity, make us spectators as the Court places the various interests on the scales. The weighing mechanism remains a mystery, and the result is simply read off the machine. Scientific balancing decisions are neither opinions nor arguments that can engage us; they are demonstrations.<sup>275</sup>

The balancers may respond that we are more than mere spectators because the process takes into account all of our interests. But such “virtual representation” (assuming that it exists) wholly misses the point. It attributes to “voice” a marketplace meaning: One speaks only to express exogenous, pre-existing preferences. This view fails to appreciate that the virtue of voice is the opportunity to explore and to create through interaction—not simply to register a private vote in a polling booth with the curtain pulled.<sup>276</sup>

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pseudo-scientific precision”).

274. See J.B. WHITE, *WHEN WORDS LOSE THEIR MEANING* 231–74 (1984); Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 *YALE L.J.* 1, 64–66 (1984); Tribe, *supra* note 4, at 595.

275. Professor Nagel has attributed similar shortcomings to the Court’s order “formulas” used in deciding constitutional questions. Nagel, *supra* note 8, at 190–97. Professor Michelman has recently argued that Justice O’Connor’s use of a balancing approach in *Goldman v. Weinberger*, 106 S. Ct. 1310, 1324–26 (1986) (dissenting), represents a commitment to “the Court’s and the country’s project of resolving normative disputes by conversation, a communicative practice of open and intelligible reason-giving, as opposed to self-justifying impulse and ipse dixit. . . . The balancing test, with its contextual focus, solicits future conversation . . . .” Michelman, *supra* note 108, at 34. Michelman’s praise of Justice O’Connor is more an attack on “objectivity” than a general defense of balancing. Indeed, the “scientific” balancing cases evidence a clear rejection of the kind of practical reasoning and judicial “self-government” that Michelman supports.

276. To be sure, the usual participants in a constitutive constitutional conversation are hardly representative of society at large. See Brest, *Interpretation and Interest*, 34 *STAN. L. REV.* 765,

One sometimes senses a Justice's discomfort at his or her "scientific" balancing effort. Occasionally, the Justice adds a final paragraph or two that suggest a different way of thinking about the constitutional issue in the case, paragraphs that typically get much closer to phrasing the question in terms that society recognizes as constitutional. Consider Justice Blackmun's dissent in *Lassiter*.<sup>277</sup> Blackmun spends pages purporting to show that the majority has weighed the interests improperly. Yet the strength of the dissent appears in his concluding statement, which says nothing about balancing:

[T]he issue before the Court . . . is whether [the petitioner] was given a meaningful opportunity to be heard when the State moved to terminate absolutely her parental rights. In light of the unpursued avenues of defense, and of the experience petitioner underwent at the hearing, I find virtually incredible the Court's conclusion today that her termination proceeding was fundamentally fair. To reach that conclusion, the Court simply ignores the defendant's obvious inability to speak effectively for herself, a factor the Court has found to be highly significant in past cases. I am unable to ignore that factor; instead, I believe that the record, and the norms of fairness acknowledged by the majority, compel a holding according counsel to petitioner and persons similarly situated.<sup>278</sup>

Are not the concerns that Blackmun identifies much closer to our conception of the constitutional protection of due process than a balancing of the individual and governmental interests?

Look also at Justice Powell's opinion for the Court in *Mathews v. Eldridge*,<sup>279</sup> the foundational case for modern due process balancing. After diligently describing the calculus and weighing the various interests, Powell finds that the balance tipped against the claimant who had requested a hearing prior to the termination of his Social Security disability payments. Yet he concludes his opinion with a paragraph that begins:

But more is implicated in cases of this type than ad hoc weighing of fiscal and administrative burdens against the interests of a particular category of claimants. The ultimate balance involves a determination

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770-71 (1982). And given current power relations in society, the discussion in such a "vital national seminar" may be graced with a brahmin lilt. But the solution is not to cut off debate by adopting a scientific technique for deriving answers, it is to expand participation.

277. *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 35-59 (1981) (Blackmun, J., dissenting).

278. *Id.* at 57-58 (Blackmun, J., dissenting) (citations and footnote omitted).

279. 424 U.S. 319 (1976).

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as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness.<sup>280</sup>

Powell then examines whether the procedures offer the beneficiary a meaningful opportunity to present his case. It is this paragraph—rather than the finely tuned balancing that precedes it—that goes to the heart of the case.

## VI. CONSTITUTIONAL LAW IN AN UNBALANCED WORLD

### A. *The Non-Ineluctability of Balancing*

It would be idle to criticize balancing if constitutional adjudication necessarily entails a weighing of interests. As I have tried to demonstrate above, constitutional history belies the claim that balancing is inescapable. Yet balancing has burrowed so deeply into everyday views of the Constitution that it often is regarded as the inevitable method for deciding a constitutional case. Let me examine two typical forms of this claim.<sup>281</sup>

#### 1. *Non-Absolutes Require Balancing*

The Court and commentators routinely remind us that constitutional rights and provisions are not absolutes.<sup>282</sup> Such statements are often followed by an appeal to competing interests, as if a non-absolutist position entails a balance.<sup>283</sup>

Exceptions to constitutional provisions, however, may be based upon considerations other than the weight of competing interests.<sup>284</sup> For one hundred years, the Court limited application of the seemingly absolute contract clause<sup>285</sup> by a number of principles that were not, at least on their face, grounded in a balancing of the interests.<sup>286</sup> History and inter-

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280. *Id.* at 348.

281. A third argument—that the lack of self-defining phrases in the Constitution necessitates balancing—is convincingly answered by Laurent Frantz. Frantz, *Reply*, *supra* note 3, at 732–38; Frantz, *Balance*, *supra* note 3, at 1433–34.

282. *See, e.g.*, Supreme Court v. Piper, 470 U.S. 274, 284 (1985) (“[I]ike many other constitutional provisions, the privileges and immunities clause is not an absolute.”) (quoting *Toomer v. Witsell*, 334 U.S. 385, 396 (1948)).

283. *See id.* (privileges and immunities clause does not preclude discrimination against nonresidents where “there is a substantial reason for the difference in treatment”); *American Communications Ass’n v. Douds*, 339 U.S. 382, 391–93 (1950); M. NIMMER, *supra* note 28, § 2.02; L. TRIBE, *supra* note 44, § 12-2, at 583 (“Any exclusion of a class of activities from first amendment safeguards represents an implicit conclusion that the governmental interests in regulating those activities are such as to justify whatever limitation is thereby placed on the free expression of ideas.”); Eule, *Laying the Dormant Commerce Clause to Rest*, 91 *YALE L.J.* 425, 442 (1982) (“It is unavoidable that courts, faced with application of nonabsolutist constitutional provisions, frequently must balance interests.”).

284. Frantz, *Reply*, *supra* note 3, at 750–53.

285. U.S. CONST. art. I, § 10.

286. *See, e.g.*, *Stone v. Mississippi*, 101 U.S. 814 (1879) (legislators cannot “bargain away” police power of state).

pretations of original intent have similarly limited application of the First Amendment, despite the constitutional phrase “no law.”<sup>287</sup>

The balancers succeeded with the “no absolutes” argument because they first used it against literalists. But there is plenty of room between literalism and balancing. As Professor Schauer has observed, “absolute in force is not the same as unlimited in range. A principle or right can be absolute when applied without being applicable to every situation.”<sup>288</sup> Although the balancers may have levelled telling blows at literalism, they did not, by that fact alone, establish either the necessity or desirability of a balancing alternative.

The Supreme Court’s opinion in *United States Steel Corp. v. Multistate Tax Commission*<sup>289</sup> nicely illustrates the way that constitutional provisions may be read “non-absolutely” without adopting a balancing approach. The case considered the reach of the rarely invoked compact clause, which provides that “[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State.”<sup>290</sup> A number of states had entered into a Multistate Tax Compact to facilitate determination of state and local tax liability of multistate taxpayers and to promote uniformity and compatibility in state tax systems. U.S. Steel, objecting to a proposed audit by the Multistate Tax Commission, brought suit to have the Compact declared unconstitutional on the ground that it had never been ratified by Congress.

The Court conceded that “[r]ead literally, the Compact Clause would require the States to obtain congressional approval before entering into any agreement among themselves, irrespective of form, subject, duration, or interest to the United States.”<sup>291</sup> But it rejected such an absolutist reading. Relying on precedent, history, the purpose of the provision, and the structure of the Constitution, the Court “reaffirmed” the rule that “application of the Compact Clause is limited to agreements that are ‘directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.’”<sup>292</sup> Because we live in balancing times,

287. “We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech.” *Frohwerk v. United States*, 249 U.S. 204, 206 (1919). Of course, libel laws were exempted from First Amendment scrutiny until *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

288. Schauer, *Speech and “Speech”—Obscenity and “Obscenity”: An Exercise in the Interpretation of Constitutional Language*, 67 *Geo. L.J.* 899, 903 (1979); see Frantz, *Balance*, *supra* note 3, at 1435–38 (discussing selective absolutism in First, Fifth, and Fourteenth Amendment jurisprudence).

289. 434 U.S. 452 (1978).

290. U.S. CONST. art. I, § 10.

291. 434 U.S. at 459.

292. *Id.* at 471 (quoting *New Hampshire v. Maine*, 426 U.S. 363, 369 (1976)).

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Justice Powell followed this statement with the comment that “[t]his rule states the proper balance between federal and state power with respect to compacts and agreements among States.”<sup>293</sup> But the opinion is decidedly not a balancing opinion. It does not set out the problem as one of competing interests, nor does it purport to quantify or compare the strength of state or federal interests. Applying the rule to the facts of the case, the Court concluded that because the Compact did not authorize the member states to exercise any powers that they could not exercise in its absence, the agreement did not impermissibly threaten federal supremacy.

The compact clause looks every bit as absolute as the First Amendment, yet the Court in *United States Steel* interpreted the provision to authorize gaping exceptions without adopting a balancing analysis. Of course, this analysis does not establish that the Court’s interpretive technique is preferable to a balancing approach. It should unsettle, however, the claim that balancing inevitably follows from a non-absolutist reading of the Constitution.

### 2. *It’s All Balancing*

A second claim for the inevitability of balancing contends that all thoughtful decisionmaking involves a balance. Faced with a choice, what else can a rational person do but measure the importance of the options against some common standard of evaluation such as “social good” or “justice”?<sup>294</sup> We may sometimes act on principles, the argument runs, but these are simply the products of earlier balances.<sup>295</sup>

In life and law, however, we often make decisions in ways that cannot be characterized as balancing. Many decisions based on notions of right and wrong, fairness, desert, love, and passion seem to have nothing to do with balancing. It is doubtful that one helps a friend because, on balance, such conduct is more rewarding than any other activity she could undertake at the moment. Nor is one likely to oppose racial discrimination because it is inefficient, or because the social costs of prejudice are far

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293. *Id.*

294. See, e.g., P. FREUND, ON UNDERSTANDING THE SUPREME COURT 27 (1951) (“No matter how rapidly we utter the phrase ‘clear and present danger,’ or how closely we hyphenate the words, they are not a substitute for the weighing of values.”); Shiffrin, *General Theory*, *supra* note 4, at 1249 (“[B]alancing is nothing more than a metaphor for the accommodation of values. Everyone balances . . . .”); Kauper, Book Review, 58 MICH. L. REV. 619, 626 (1960) (reviewing A. MEIKLEJOHN, *POLITICAL FREEDOM* (1960)) (“[T]he interpretation of the First Amendment in the context of a concrete case requires judgment in the identification and appraisal of the competing interests at stake.”).

295. Indeed, one advocate of balancing states that “balancing would seem to be implicit in an adversary system which inevitably contemplates at least two sides to every case.” Mendelson, *The First Amendment and the Judicial Process: A Reply to Mr. Frantz*, 17 VAND. L. REV. 479, 481 (1964).



greater than the individual benefits of being able to choose one's customers or tenants. Behind many of the most important decisions we make, the most important beliefs we hold, are judgments of principle that do not reduce to balancing. These judgments may be leaps of faith; they may be premises, not proofs. But they form the bedrock of our moral systems.

The same is true for some of our most important constitutional decisions. It is difficult to read *Brown v. Board of Education*<sup>296</sup> as based on a conscious, or unconscious, balancing of the interests. Of course, as Professor Wechsler has noted, there were competing interests at stake.<sup>297</sup> But the Court based its decision—as has society—not on the balance of those interests, but on the intolerability of racial discrimination.<sup>298</sup> *Gideon v. Wainwright*,<sup>299</sup> the case guaranteeing indigent defendants appointed counsel in felony prosecutions, did not purport to balance the interests. It is fundamentally unfair, said the Court, to make a person risk loss of liberty without someone trained in the law to help him present his case. Similar arguments may be made about the reapportionment cases,<sup>300</sup> *Griswold v. Connecticut*,<sup>301</sup> *Shelley v. Kraemer*,<sup>302</sup> *Loving v. Virginia*,<sup>303</sup> *Mapp v. Ohio*,<sup>304</sup> *Zobel v. Williams*,<sup>305</sup> *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>306</sup> and *Reed v. Reed*.<sup>307</sup> In each of these cases, important interests were in conflict. Each conflict was resolved, however, by a principle that neither derives from, nor calls for, a balance of competing interests.<sup>308</sup> Consider also the sources of the following fundamental consti-

296. 347 U.S. 483 (1954).

297. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31-34 (1959).

298. It is this fact that makes Wechsler's statement of the problem so difficult to understand. See Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

299. 372 U.S. 335 (1963).

300. *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

301. 381 U.S. 479 (1965).

302. 334 U.S. 1 (1948).

303. 388 U.S. 1 (1967).

304. 367 U.S. 643 (1961).

305. 457 U.S. 55 (1982).

306. 469 U.S. 528 (1985).

307. 404 U.S. 71 (1971).

308. Justice Harlan's opinions are typically cited as models of constitutional analysis and he is also often placed in the balancing camp. *But see* Farber & Nowak, *Justice Harlan and the First Amendment*, 2 CONST. COMMENTARY 425 (1985) (arguing that Harlan has been misrepresented as "ad hoc" balancer). Yet one of Justice Harlan's most famous opinions, his dissent in *Poe v. Ullman*, 367 U.S. 497, 522 (1961), although it purports to be a balancing opinion, is in fact nothing of the kind.

*Poe* involved a challenge by a married couple to a Connecticut statute that prohibited the sale of contraceptives. A majority of the Court voted to dismiss the case on justiciability grounds. Justice Harlan thought the Court should have reached the merits of the claim. In presenting his views on the constitutional issue, he persuasively argued for the recognition of the right of marital privacy by examining history, precedent, related constitutional provisions, and the consequences of accepting the state's position. Harlan stressed the sanctity of the home, the intimacy of the marital relationship, the intrusiveness of the statute, and the state's historical protection of the institution of marriage.

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tutional norms: states may not adopt protectionist regulations of commerce; a violation of the Fourteenth Amendment requires demonstration of an intent to discriminate; important protections in the Bill of Rights are incorporated through the Fourteenth Amendment against the States. Did these principles enter our constitutional law through a balancing process? Where, indeed, is the “balance” that establishes the power of judicial review?

Some might argue that even if some constitutional principles are derived without balancing, many difficult constitutional cases involve conflicts between such principles, and these conflicts can be resolved only by balancing. This conclusion, however, is clearly false. For example, one might characterize *Bakke*<sup>309</sup> as a case involving a fundamental conflict between Bakke’s interest in not being discriminated against on the basis of his race and a minority student’s interest in overcoming the effects of past discrimination. But this conflict can and ought to be resolved by constructing a theory of the Fourteenth Amendment—e.g., that the Amendment embraces a “colorblind” standard (hence Bakke wins) or that it was intended to help blacks achieve equality with whites (therefore Bakke’s “interest” does not flow from a proper interpretation of the Constitution).<sup>310</sup> To be sure, choosing between these conceptions would involve us in a fight about the meaning of the Fourteenth Amendment, but this is precisely what a difficult constitutional case ought to do.<sup>311</sup>

The balancer’s final resort is the argument that principles must at some point give way to competing interests. The First Amendment, it might be claimed, cannot protect a newspaper’s publication of the location of our ships at sea during wartime<sup>312</sup> or the right falsely to shout fire in a

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Although he recognized that there is no “mechanical yardstick” for the constitutional determination, *id.* at 544 (quoting *Irvine v. California*, 347 U.S. 128, 147 (1954) (Frankfurter, J., dissenting)), Justice Harlan made no attempt to weigh the state’s interest in defining and promoting morality. Instead he accounted for societal values in his description of the right. He viewed the marital right not simply as a right inhering in individuals and thus to be weighed against a governmental interest in regulation, but rather as a social value. The collapsing of the public/private distinction in the process of defining the right made subsequent weighing of the government’s interest unnecessary. Although Justice Harlan made clear that the right he identified would not pertain to laws sanctioning adultery, homosexuality, fornication or incest, these exceptions—demonstrating that there exists no absolute right to sexual privacy—did not flow from the state’s greater interest in preventing such activities. They were based on an historical analysis: While the state has “always and in every age . . . fostered and protected” the institution of marriage, “the law has always forbidden” these other sexual activities. *Id.* at 553.

309. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

310. *Cf. Raz, Reasons for Action, Decisions and Norms*, in PRACTICAL REASONING 128–33 (J. Raz ed. 1978) (many decisions based on “exclusionary reasons” which rule out lower-order “balance of reasons”).

311. *Cf. Thomson, supra* note 253 (discussing solutions to difficult moral questions in non-balancing terms).

312. *See New York Times Co. v. United States*, 403 U.S. 713, 726 (1971) (Brennan, J., concurring) (quoting *Near v. Minnesota*, 283 U.S. 697, 716 (1931)).

crowded theatre.<sup>313</sup> There are two responses here. First, the “exception” may best be understood not as resulting from a balance but as resting upon a principle internal to the constitutional provision. Thus, one could reasonably view the “ships-at-sea” exception as based not on a conclusion that military success is more important than the First Amendment, but rather upon an appreciation that the First Amendment, which presupposes a functioning political system, can mean nothing in a society that does not exist.<sup>314</sup>

This solution may appear too facile, and I am willing to concede for the sake of argument that not all exceptions can be explained as “internal” to the theory of the constitutional provision under review. The best example may be *Home Building & Loan Association v. Blaisdell*.<sup>315</sup> There, the Court apparently concluded that the importance of allowing the states to combat the ravaging effects of the Great Depression simply overrode the constitutional guarantees of the contract clause. Clever non-balancing arguments can be made to justify *Blaisdell*,<sup>316</sup> but I am willing to assume that it is a balancing opinion and, moreover, that it reflects a proper use of balancing. But to recognize a role for balancing in the extreme and rare case is not to demonstrate its validity as a mode of interpretation for the vast majority of constitutional cases. *Blaisdell* does not establish some kind of continuum of balancing; it demonstrates merely that the extreme case may invoke different principles than those under which we usually operate.<sup>317</sup>

313. See *Schenck v. United States*, 249 U.S. 47, 52 (1919).

314. We might well speak here of the right “running out.” That is, where the justification for, or basis of, the right no longer applies, the right should not be recognized. This “internal” argument is quite distinct from both the “external” evaluation of costs that balancing entails and other “external” limits imposed on constitutional provisions. For an elaboration of this analysis, see C. FRIED, *RIGHT AND WRONG* 9–10 (1978) (discussing boundaries of norms).

315. 290 U.S. 398 (1934).

316. The Court hinted at a justification for its ruling similar to the one I ascribe to the “ships-at-sea” exception: “The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worthwhile,—a government which retains adequate authority to secure the peace and good order of society.” *Id.* at 435.

317. This claim seems consistent with everyday practice. Take the following example. I promise to pick you up at the train station at noon. At 11:55 a.m., a friend breaks a leg and needs to be taken to the hospital. If I take her, I won’t get to the station until 12:30 p.m. Of course, I go to the hospital (even though I have no way of getting a message to you). One could say that implicit in my promise to pick you up is the possibility that some pressing need will command my attention at exactly the time the train arrives. But I won’t even go that far. I will assume that I agreed to get you come hell or high water and that I have decided to break the promise because of the unforeseen circumstance—because a broken leg “outweighs” a half-hour wait at the train station. This emergency situation does not suggest that I would have considered leaving you to watch the trains go by for any reason. I would not have calculated costs and benefits if someone else asked me to lunch, if there were a television show on at noon that I wanted to watch, or if I needed just thirty more minutes to develop a coherent theory of equal protection law. See generally C. FRIED, *supra* note 314, at 10 (“[T]he concept of the catastrophic is a distinct concept just because it identifies the extreme situations in which the usual categories of judgment . . . no longer apply.”).

A most troubling demonstration of this point is the Laffer Curve, the basis for supply-side econom-

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In sum, balancing is not inevitable. To balance the interests is not simply to be candid about how our minds—and legal analysis—must work. It is to adopt a particular theory of interpretation that requires justification.

### B. *Is Not Balancing Unreasonable?*

Balancing may appear inevitable, not because we *can't* think in non-balancing ways, but because it seems unreasonable not to take all the relevant interests into account in deciding an important question. A non-balancing approach, however, does not require a court to be blind to the consequences of constitutional rules or the social context in which constitutional questions arise.<sup>318</sup> It would be curious, to say the least, for a court to announce a rule to protect a constitutional value when empirical evidence demonstrates either that the value is not threatened or that the rule does not effectively protect the value. But this kind of attention to consequences is quite distinct from a methodology that evaluates the importance of the consequences in comparison to the underlying constitutional provision.<sup>319</sup>

In *New York Times Co. v. Sullivan*,<sup>320</sup> for example, the Court explored the likely impact that libel rules would have on political expression. While some have characterized *Sullivan* as a balancing case,<sup>321</sup> it clearly is not. The Court did not—as it has done in subsequent libel cases—balance First Amendment interests against interests in preserving reputation. It settled on a “malice” test (knowledge of falsehood or reckless disregard for falsity) because it deemed such protection of the press necessary to effectuate fully the purposes of the Amendment. Speech based on “knowing falsehood” and its close cousin “reckless disregard” are not protected by the decision because they are not types of speech that further First Amendment goals.<sup>322</sup>

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ics. Few people would doubt that a tax rate of 100% would dampen entrepreneurial spirit and a rate of 0% would stimulate it. But this tells us nothing about incentives for the rest of the possible brackets. Recent events seem to show that acting on a curve drawn between the end-points can produce unanticipated results, namely \$200 billion deficits.

318. Many non-balancing rules of constitutional law demand examination of the real world—e.g., the “intent” standard of equal protection law, *see* *Washington v. Davis*, 426 U.S. 229 (1976), and the anti-protectionist principle of commerce clause analysis, *see* *Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

319. Thus, there is much merit in Justice White’s attack on the formalistic reasoning of the majority opinion in *Bowsher v. Synar*, 106 S. Ct. 3181, 3205 (1986) (White, J., dissenting). But White’s “[r]ealistic consideration of the nature of the Comptroller General’s relation to Congress,” which revealed that “the threat to separation of powers conjured up by the majority is wholly chimerical,” *id.* at 3213, was not part of a balancing approach.

320. 376 U.S. 254 (1964).

321. *E.g.*, M. NIMMER, *supra* note 28, § 2.03.

322. A similar point may be made about the *Miranda* rule. *Miranda v. Arizona*, 384 U.S. 436 (1966). A court might well conclude, based on a realistic understanding of the nature of police interrogations, that a broad prophylactic rule is needed to ensure that the underlying right is adequately

Thus there is no basis for the notion that non-balancing approaches are necessarily formalistic or unconcerned with the social context of legal rules. But the balancer may have a further claim: if looking at *some* real world consequences is reasonable, why is it not more reasonable to look at *all* of them? Should not our judgment on the constitutionality of state libel laws turn, at least in part, on the damage that publication inflicts on reputation? Why would the non-balancer want to ignore state interests that compete with the constitutional value?

The problem here is that constitutional adjudication is not simply an exercise in reasonable decisionmaking. Although a wide range of interests might properly be noticed by legislative policymakers (or moral philosophers), they are not, by that fact alone, constitutional concerns. If we are interpreting the First Amendment, we need a theory of the Amendment that tells us what counts as a constitutional reason and what does not. To allow any "interest" to count simply because a rational policymaker might want to consider it in constructing a reasonable rule of conduct cannot be enough to render the interest "constitutional" without severely altering our usual understanding of constitutional interpretation.<sup>323</sup>

### C. *Alternatives*

At this point in the argument the balancer usually turns the tables. "If balancing is neither inevitable nor advisable, how *should* we read the Constitution? How would you decide *Roe v. Wade* or *Mathews v. El-dridge*? Here's a hypothetical: A terrorist announces that he has planted a bomb . . . ." My first response is that it is probably wrong to search for a single theory for understanding and interpreting the Constitution.<sup>324</sup> Certainly, our interpretive practice runs just the other way. There are a number of interpretive techniques that we bring to most constitutional questions: text, structure, precedent, consequences, history, intent, our "ethical tradition,"<sup>325</sup> notions of fundamental values. The Constitution is

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protected. But this attention to real world events and the likely consequences of a constitutional decision is markedly different from deciding *Miranda* by "balancing" Fifth Amendment rights against the interest in law enforcement.

323. This sad lack of theory is evident in the fact that the Court has not explained why balancing is permissible (or required) in some areas of constitutional law but not in others. For example, no one asserts that a defendant's Fifth Amendment right not to testify against himself could be "outweighed" in the case of a particularly serious crime. See *New Jersey v. Portash*, 440 U.S. 450 (1979). What distinguishes the Fifth from the First? The Court has never provided an answer.

324. Not surprisingly, scholars have disagreed about the single principle that underlies the Constitution. Compare J. ELY, *supra* note 116, at 87 (Constitution "overwhelmingly concerned" with procedural fairness in resolution of individual disputes and with ensuring broad participation in the "processes and distributions of government") with Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1732 (1984) ("prohibition of naked preferences . . . most promising candidate for a unitary theory of the Constitution").

325. *Hudson v. Palmer*, 468 U.S. 517, 558 (1984) (Stevens, J., concurring in part and dissenting

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a complex document with many different kinds of provisions drafted at different times by persons with different goals. A unitary theory of constitutional interpretation may be elegant, but it is likely to be a distinctly unrealistic approach to the document.

Second, for plausible alternatives to balancing, we need look no further than the case law. Although balancing has spread throughout constitutional law, many constitutional cases are decided each Term in non-balancing ways.<sup>326</sup> Indeed, balancing and non-balancing approaches exist side-by-side in many areas of constitutional law.<sup>327</sup>

The balancer, upon reflection, is not likely to disagree. However, she might now respond: “I never said balancing was the only way. My claim is simply that it is a useful, sensible way to answer some constitutional questions. Your burden is to show that *at every point* there are alternatives to balancing that are better ways of reading the Constitution.”

There may not always be a preferable alternative to balancing. One must approach cases and constitutional provisions one at a time. One must ask at each point whether there are other ways of describing and analyzing this constitutional question that do not raise the problems occasioned by balancing and that do not pose the additional troubling problems that balancing avoids. The point of this essay is to wake constitutional law out of its balancing sleepwalk and to compel courts to ask those questions.

We are so locked into balancing modes of thought that breaking free can be difficult. “Unbalancing” constitutional doctrine may seem like a throwback to archaic<sup>328</sup> or naive ways of thinking—ways that fail to appreciate the “complexity” of human affairs. But searching for new modes of thought (or rediscovering old ones) can be a liberating activity, one that can restore to constitutional law its rightful place as something more than a discussion of good policy. No longer need we fear that we really are just replicating the work of legislatures. We can give up feigned mathematical precision and objective constitutional science for serious theoretical investigations of the meaning of constitutional language and structure. We can

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in part).

326. For examples this past Term, see *Crane v. Kentucky*, 106 S. Ct. 2142 (1986); *Dow Chem. Co. v. United States*, 106 S. Ct. 1819 (1986).

327. Consider pairs of cases decided the same day interpreting (1) the First Amendment, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (no balance) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (balance), and (2) separation of powers doctrine, *Commodity Futures Trading Comm’n v. Schor*, 106 S. Ct. 3245 (1986) (balance) and *Bowsher v. Synar*, 106 S. Ct. 3181 (1986) (no balance).

328. It should be obvious, however, that there is nothing inherently conservative about non-balancing approaches. See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954); cf. Powell, *Parchament Matters: A Meditation on the Constitution as Text*, 71 IOWA L. REV. 1427, 1433–35 (1986) (an appeal to the constitutional text “has the capacity to incite radical and even revolutionary attacks on the legal status quo”).

begin again a lively discussion about the fundamental principles that we believe undergird our political system.

## VII. CONCLUSION

Severe problems beset balancing approaches to constitutional law. The Court, under any of the versions of a balancing metaphor, has not adequately explored the “mathematics” of balancing. As a way to avoid problems in calculation, it has generally—with little theoretical justification—adopted scaled-down equations that do not take account of all the possible interests. Furthermore, recognizing the difficulty of developing credible and external standards of evaluation, the Court has moved to even more stylized versions of balancing in an attempt to demonstrate “objectivity.”

Even if we were able to construct a set of magical scales that would address these internal criticisms of balancing, it is far from clear that we ought to allow the Constitution to be put in the balance. In earlier days, the global critique of balancing was often political. To the critics of the 1950's and 1960's, balancing was a technique for watering down constitutional guarantees. Today, balancing opinions can tip either way. Much of modern due process and equal protection law can be explained as the Court placing its finger on the scale on behalf of individuals and minorities. But rather than restoring balance to constitutional law, the easy resort to balancing threatens constitutional law. Balancing has turned us away from the Constitution, supplying “reasonable” policymaking in lieu of theoretical investigations of rights, principles and structures.

Constitutional law may not represent the search for truth or beauty, moral salvation or divine inspiration. But it is crucial for this political society to have a distinct way of thinking and talking about fundamental background principles of government—one that both connects up with, and pushes beyond past understandings. Constitutional law will have trouble helping to define the arena of politics if it is seen simply as an act of ordinary politics. This is not to suggest that constitutional law is not intensely political, rather that there is real value in seeing it as a different sort of politics.

The balancers have gained the high ground, at this point, by adverse possession. Balancing has attained legitimacy through the reputation of its early advocates and the passage of time. Moreover, if constitutional interpretation is ultimately a reflection of larger, deeper trends in social consciousness, we may now simply be deaf to the criticisms of balancing. It is deeply engrained in us to see law as a forum for competing interests and moral and legal choice as turning on an evaluation of the strength of those interests.

## Age of Balancing

Here, then, is the ultimate irony of balancing. Balancing was a liberating methodology at the outset. It took blinders off judges' eyes and let them openly take into account the connections between constitutional law and the real world. Preaching a pragmatic, realistic approach to constitutional law, it promised doctrine arrived at objectively and grounded in the facts of the society to which it applied. But balancing, whatever its merits as a way out of formalism, has itself become rigid and formulaic. It gives answers, but it fails to persuade.

Seventy years ago, Benjamin Cardozo wrote that “[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.”<sup>329</sup> Constitutional law is suffering in the age of balancing. It is time to begin the search for new liberating metaphors.

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329. *Berkey v. Third Ave. Ry.*, 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926); see Berlin, *Does Political Theory Still Exist?*, in *PHILOSOPHY, POLITICS AND SOCIETY* 19 (P. Laslett & W. Runciman eds. 1962), quoted in L. BOLLINGER, *THE TOLERANT SOCIETY* 23 (1986) (“The history of thought and culture is, as Hegel showed with great brilliance, a changing pattern of great liberating ideas which inevitably turn into suffocating straightjackets, and so stimulate their own destruction by new, emancipating, and at the same time, enslaving conceptions.”).