Boston College Law Review

Volume 29
Issue 3 *Number 3*

Article 2

5-1-1988

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Patrick M. McFadden, *The Balancing Test*, 29 B.C.L. Rev. 585 (1988),
http://lawdigitalcommons.bc.edu/bclr/vol29/iss3/2

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THE BALANCING TEST†

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The author expresses special thanks to Professors Alan Raphael and Michael Kaufman for reviewing an earlier draft of this article, to Andrew LeFevour, Thomas Cushing and John Saletta for their able research assistance, and to Shawn Mercer-Dixon for her dedicated secretarial support. Research funding during the summer of 1986 was provided by a Loyola University Summer Research Grant.

The "balancing test" is a new way to decide cases. It directs a judge to eschew the application of formal rules in deciding a case, and instead to balance the competing interests of the litigants (or the competing interests of society more generally), and to give judgment for the side with the weightier interests.[1] The test, by all measures, has become the *enfant terrible* of modern judging. A relative newcomer to American jurisprudence, it has already invaded dozens of areas of law, and its rapid growth in popularity is a cause for both wonder and concern. It is a cause for wonder because the test arguably represents a wholly new way of settling legal disputes, and it most certainly represents a new way of *writing* about them once they are decided. This is a cause for concern because the test wrecks the doctrinal furniture; it unsettles, and indeed overthrows, the systems of rules worked out by generations of previous judges. This may be a positive development, but only if we are satisfied that the newcomer is legitimate.

In its most elementary form, the balancing test directs a judge to balance the interests of the plaintiff against the interests of the defendant, and to give judgment for the litigant with the weightier interests. The simple structure of this method is perhaps its greatest virtue.[2] The judge is encouraged to step out from behind the intricate lattice of formal rule-based reasoning, and to confront squarely the real concerns of the parties to the litigation. In a more sophisticated version of the test, a judge weighs not only the circumstances of the individual litigants, but also the broader societal interests they represent. Thus, for example, in determining whether a particular police intrusion has violated the fourth amendment's injunction against unreasonable searches and seizures, the judge may balance the state's interest in public health and safety against the interest of individuals *generally* in personal privacy.[3] This sort of balance retains the test's essential simplicity, but takes into account the broader societal concerns that inform any judge's work. In this more sophisticated form, the balancing test has seen an explosion in popularity.

The test made a splashy debut in the late 1950s and early 1960s in a series of United States Supreme Court decisions regarding the first amendment rights of free speech and association.[4] The Court has since introduced the balancing test into its analysis of

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[1] There are actually many different types of balancing tests, and I will examine the distinctions between them in detail later in this Article.

[2] *See* Luizzi, *Balancing of Interests in Courts*, 20 JURIMETRICS J. 373, 376 (1980). See also *infra* text accompanying notes 226–34.

[3] *E.g.*, United States v. Place, 462 U.S. 696, 703–06 (1983); Dunaway v. New York, 442 U.S. 200, 210–14 (1979); Terry v. Ohio, 392 U.S. 1, 20–27 (1968).

[4] *E.g.*, Lathrop v. Donohue, 367 U.S. 820, 845 (1961) (plurality opinion); Scales v. United States, 367 U.S. 203, 261 (1961) (Black, J., dissenting) (characterizing majority opinion as balancing test); Konigsberg v. State Bar of California, 366 U.S. 36, 51 (1961); Wilkinson v. United States, 365 U.S. 399, 414 (1961); Barenblatt v. United States, 360 U.S. 109, 126 (1959).

other constitutional provisions,[5] and the states have followed this expansion in their own constitutional jurisprudence.[6] The balancing test has also become a method of *statutory* construction,[7] and a method for settling disputes when no statute or constitutional provision is implicated.[8] When judges have not created the test on their own, they have sometimes been directed to do so by federal and state legislatures.[9] By last year, courts had decided cases in over forty substantive areas on balancing test grounds. Its relatively recent appearance and rapid growth mark the balancing test as one of the most significant developments in judging practice in the twentieth century. It is time for a general evaluation.

The test has in the past engendered occasional flurries of critical interest. When the Supreme Court introduced the test to first amendment analysis in the late 1950s, some commentators asked whether it was a good thing for first amendment liberties,[10] and subsequent appearances of the test in new areas of law have generated additional comment.[11] These studies, however, have largely been confined to the question of whether the test promotes or damages the rights described under particular provisions of the federal constitution, although some scholars have examined the test across a substantial part of constitutional adjudication.[12] These are movements in the right direction, but our accumulation of experience with the test, both inside and outside the federal constitution, underscores the need for an even more comprehensive evaluation.

This Article has two aims. The primary aim is to describe and explain the phenomenon: to understand the structure of the balancing test, the nature of its challenge to

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[5] *E.g.*, Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) (freedom of religion); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (fourteenth amendment due process); Mackey v. Montrym, 443 U.S. 1, 10–19, (1979) (same); Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (same); Sosna v. Iowa, 419 U.S. 393, 406 (1975) (fourteenth amendment equal protection); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 440–44 (1978) (commerce clause); Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 370–72 (1976) (same); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (same).

[6] *E.g.*, Patchogue-Medford Congress of Teachers v. Board of Educ., 119 A.D.2d 35, 38, 505 N.Y.S.2d 888, 890 (1986) (search and seizure); State v. Bass, 320 N.W.2d 824, 829 (Iowa 1982) (speedy trial); People v. Bloyd, 416 Mich. 538, 550 & n.10, 331 N.W.2d 447, 453 & n.10 (1982) (search and seizure); Appeal of Portsmouth Trust Co., 120 N.H. 753, 757–58, 423 A.2d 603, 605–06 (1980) (due process); Can Mfrs. Inst., Inc. v. Minnesota, 289 N.W.2d 416, 419 (Minn. 1979) (commerce clause); New Jersey v. Szima, 70 N.J. 196, 201, 358 A.2d 773, 776 (1976) (speedy trial); Commonwealth v. Lee, 460 Pa. 374, 379, 333 A.2d 773, 776 (1975) (speedy trial).

[7] *See infra* notes 154–60 and accompanying text.

[8] *See infra* notes 185–90 and accompanying text.

[9] *See infra* notes 161–84 and accompanying text.

[10] *See, e.g.*, Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1449 (1962). Professor Frantz argued that "the 'balancing' test does not permit the first amendment to perform its function as a constitutional limitation. It virtually converts that amendment into its opposite. A prohibition against abridgement has become a license to abridge." *Id. See also* Mendelson, *The First Amendment and Judicial Process: A Reply to Mr. Frantz*, 17 VAND. L. REV. 479 (1964).

[11] Some recent examples include Redish & Marshall, *Adjudicatory Independence and the Value of Procedural Due Process*, 95 YALE L.J. 455, 470–74 (1986) (balancing due process claims under the fifth and fourteenth amendments); Note, *"Balancing on the Brink of the Chasm:" The Exigent Circumstances Exception and the Fourth Amendment's Categorical Balancing Test in* State v. Welsh, 1983 WIS. L. REV. 1023 (fourth amendment); *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 62, 62–71 (1982) (commerce clause).

[12] *See* Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987); Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022 (1978).

more traditional forms of legal reasoning, and the causes of its increasing popularity. The second aim is normative: to evaluate whether the test is a proper method of judging cases.

The balancing test represents a direct challenge to traditional rule-based reasoning. It proceeds on a set of assumptions about judging quite different from those long a part of American jurisprudence. Part I of this Article explores the nature of that challenge. There are actually several types of balancing tests, some more hostile than others to the old canons of judicial behavior. The challenge is important because the test is now a significant part of American judging. It has become tremendously popular over the past thirty years, and Part II traces that rise in popularity. This particular transformation in judging practice has been supported by a sturdy combination of precedent and modern thought, and its foundations are strong enough that the test is likely to grow in popularity for years to come.

This development would not be too alarming if the test were an unambiguous advance in the art and practice of judging. But it is not, and Part III of the Article explores the relative merits of balancing as a method of deciding cases. The balancing test is based on an attractive metaphor — the weighing of interests upon a scale of justice. It appears to describe with considerable candor how judges actually decide cases, and to be malleable enough in its operation so that all the special circumstances of particular cases may be taken into account. These are all colorable advantages, but the metaphor of the balance collapses when pressed into service as a method of deciding cases, and the test is more difficult to apply than it first appears. Serious questions can also be raised about whether the test endangers those fundamental liberties it is called upon to interpret, and whether the test unwisely blurs the separation of powers between the legislative and judicial branches. Its most serious flaws, however, are jurisprudential. The test fails to ensure that like cases will be treated alike, and it gives inadequate guidance about what future actions are permitted to the citizenry. On the basis of these difficulties I conclude that continued use of the test is ill-advised.

Part IV of the Article sets out my prescriptions, which follow straightforwardly from this evaluation: the test should not be expanded to new areas of law, and it should be withdrawn from areas that it currently dominates. In this last part I make some suggestions on how these prescriptions might be implemented.

I. The Balancing Test and Its Traditional Rival

There are many ways to decide a case. An English judge of the twelfth century might have given judgment for the winner of a trial by battle, or for one who succeeded in the ordeal of the hot iron.[13] In later centuries, oaths were given to prove a case, and the winner imperiled his soul if he lied.[14] In American practice of the late twentieth century, however, the options are more limited, and certainly less colorful. A judgment must be rendered and written justification given. Permissible forms of judgment and its rationalization are confined within a narrow range. But within that narrow range, the balancing test represents an important departure from traditional practice. To see that, it will help to begin by reviewing the traditional form of legal argument and opinion-writing, namely, the rule-based syllogism.

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[13] 2 F. Pollock & F. Maitland, The History of English Law 598–600 (2d ed. 1923); S.F.C. Milsom, Historical Foundations of the Common Law 38–39, 406–08 (2d ed. 1981).

[14] 2 F. Pollock & F. Maitland, *supra* note 13, at 600–01.

A. *The Rule-Based Syllogism*

As a matter of formal logic, every opinion may be characterized as beginning with the major premise, *if X, then Y,* where *X* stands for one or more legal facts — the existence of a valid will, a fraud in connection with the purchase or sale of securities, and so on — and *Y* for a disposition of the case — judgment for plaintiff, or judgment affirmed. For example: "If there is an enforceable contract, then Patience prevails." A statement that the legal fact exists serves as the minor premise: "The court finds that there was in fact an enforceable contract between Patience and Demetrius." The conclusion, the disposition of the case, then follows in syllogistic form: "Judgment for Patience (with costs)."

Viewed from this formal perspective, the legal opinion fleshes out, or elaborates, a syllogism. Legal argument, in turn, concentrates on two projects. The first is to formulate the major premise, that is, to frame the issue of the case. Which legal fact is determinative? Does the case turn on the existence of a valid will or whether a fraud occurred in connection with the purchase or sale of securities? The second project is to ascertain the minor premise, that is, to determine whether the appropriate legal fact does or does not exist.

Few legal arguments, of course, are quite so simple. Generally, the minor premise refracts into a series of supporting arguments. Whether there is a valid will, for example, depends on whether oral wills or holographs are recognized, and if not, whether the document in question satisfies all of the formal requirements of an attested will.[15] Whether there has been a securities fraud depends on the arcane learning of whether there has been a "purchase" or "sale" of a "security," whether the actions involved constitute a "fraud," and if so, whether they can be shown to have been "in connection with" such "purchase" or "sale."[16] But this additional complication does not threaten the underlying logic of legal argument. It is possible, in theory, to recast the full argument of an opinion into a group of related syllogisms, each nested inside the other, the conclusion for each interior argument or syllogism serving as a premise for a broader syllogism. Thus:

1.1: If there is a valid contract, Patience prevails.
  2.1: If there is consideration, there is a valid contract.
    3.1: If value passed from Patience to Demetrius, there is consideration.
    3.2: Value passed from Patience to Demetrius.
    3.3: There is consideration.
  2.2: There is consideration. (from conclusion 3.3)
  2.3: There is a valid contract.
1.2: There is a valid contract. (from conclusion 2.3)
1.3: Patience prevails.

Even this more complicated example over-simplifies the normal course of legal argument, and logical problems lurk among its premises and conclusions.[17] But no matter how

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[15] G.W. THOMPSON, THE LAW OF WILLS 47–53, 129–78 (2d ed. 1916); T.E. ATKINSON, HANDBOOK OF THE LAW OF WILLS 291–367 (2d ed. 1953).

[16] T.L. HAZEN, THE LAW OF SECURITIES REGULATION 438–512 (1985).

[17] Notice that major premises 1.1, 2.1, and 3.1 state necessary, but not sufficient, conditions for: Prudence's success, valid contracts, and consideration, respectively. The example assumes that no other good arguments can be made that Patience loses *despite* the existence of a contract or

complex the legal argument becomes, it traditionally has been thought possible to cast it in syllogistic form. Even if a court has not rendered its opinion in such form, we often take it to be the mark of a "good" opinion that it can be *recast* successfully in logical form.

This way of thinking about the nature of legal argument has obvious connections with the postulate that the law is, or should be, rational. Since the Enlightenment we have sought to rationalize our institutions, as well as our methods of inquiry, by subjecting them to the rigors of logic. Whether this Enlightenment project has run its course and should be abandoned is an important question for the twentieth century, but it is hardly surprising, given this history, that we should suppose that good law requires rationality, and that rationality can best be assured by subjecting its operations to the rigors of logic.

This logical, rule-based understanding of legal argument also has obvious connections with the history of common law pleading.[18] The ancient art of common law pleading sought to reduce a legal dispute to a single question of fact, the sort of question which might properly be posed to an assize, or later, a modern jury.[19] Syllogistic reasoning performed an important role in this system, for it provided the mechanism by which the case decision could be derived from the issue of fact isolated by the pleadings. By way of nested syllogisms, the resolved issue of fact is connected, logically and formally, to the disposition of the case. In the example given above, for instance, the nested syllogisms connect a single issue of fact — whether value passed from Patience to Demetrius — to the disposition of the case — Patience prevails. The syllogism, grounded on theories about what good law requires and on its peculiar usefulness in connection with the history of pleading, has flourished as the preferred mode of legal argument and opinion-writing.

The operation of any syllogism, however, requires propositions. And in the world of legal argument, those propositions are supplied by black-letter rules. Black-letter rules set the terms of the argument: they determine which premises are possible and which are not; they determine how, if at all, some premises will refract into subsidiary arguments.[20] It is thus proper, though perhaps a bit redundant, to describe our traditional method of legal reasoning as the working out of *rule-based* syllogisms.

This rule-based vision of legal argument and decision making is connected with more general thinking about the nature of law. It is traditional to characterize the law as a *corpus of rules* by which the social group is governed,[21] or, in more modern terms, to characterize the law as the *process* of applying a body of rules to the actions of men and women.[22] In either case, rules lie at the center of the law, and their manipulation at the center of legal process.

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consideration. For example, it assumes away any argument that Patience forged Demetrius' name on the contract, or that the contract terms were unconscionable.

[18] S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 42–44 (2d ed. 1981); 2 F. POLLOCK & F. MAITLAND, *supra* note 13, at 604–19; H.J. STEPHEN, PRINCIPLES OF PLEADING 150–52 (2d ed. 1901).

[19] 2 F. POLLOCK & F. MAITLAND, *supra* note 13, at 617–18.

[20] Black-letter rules constrain the terms of argument, though it is an open issue whether they constrain the judge's decision. *See* Lasky, *Observing Appellate Opinions from Below the Bench*, 49 CALIF. L. REV. 831, 832–35 (1961).

[21] *See, e.g.*, J.C. GRAY, THE NATURE AND SOURCES OF LAW § 191 (1909) ("The Law of the State or of any organized body of man is composed of the rules which the courts . . . lay down for the determination of legal rights and duties.").

[22] The notion of law as process has now become ubiquitous. Lief H. Carter, in his book on legal

These notions of law and legal process have defined the judge's work. Over sixty years ago, Roscoe Pound set out a classic model of deciding cases, a model grounded firmly on a rule-based, syllogistic view of law and legal process. The judge, said Dean Pound, is engaged in the following business:

> (1) Finding the facts, i.e., ascertaining the state of facts to which legal precepts are to be applied in order to reach a determination; (2) finding the law, i.e., ascertaining the legal precept or precepts applicable to the facts found; (3) interpreting the precept or precepts to be applied, i.e., ascertaining their meaning by genuine interpretation, and (4) applying the precept or precepts so found and interpreted to the case at hand.[23]

Steps (2) and (3) of Dean Pound's formulation — finding and interpreting the law — determine both the structure and substantive content of the final legal argument. That is, an exegesis of the rules helps to determine the syllogism's major premises. Step (4) completes the syllogism, and the judge renders the decision.

It is true that twentieth century legal philosophy is marked by discomfort with this picture of judging. We have wondered whether it overemphasizes the centrality of rules. We have doubted whether law-finding and fact-finding are really as distinct as the formula indicates, whether the order of the process is properly described or whether the process actually occurs at all.[24] But despite our misgivings, it is clear that this picture of judicial process represents a working orthodoxy among lawyers and judges. It is reflected in the way lawyers present their cases to the courts, and in the way judges write their opinions. In case after reported case, judges dutifully find the facts, discuss the law, and apply the law to the facts.

One remarkable aspect of traditional legal reasoning, and one which will help us to distinguish the balancing test, is its tendency to make legal judgment turn on *definitional* questions. A litigant's liability, or her legal rights, often depend on matters of classification: Is this document a "valid will"? Was the sale of stock "fraudulent"? For each relevant term a set of definitional requirements marks out what will count as a "valid will" or a "fraudulent" sale. To decide a case, a judge examines whether the action or document at issue qualifies as a member of a pre-determined, legally relevant classification.

Some sets of definitional requirements are obviously more rigid than others. For example, deciding whether a document is a "valid will" may be easier than deciding whether a sale of securities is "fraudulent," because the conditions attached to the phrase "valid will" — testamentary capacity, signature, two witnesses — are better settled than the conditions defining what sorts of behavior count as "securities fraud."[25] This feature is often described in terms of "formalism." Those legal concepts whose definitional

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reasoning, states the proposition succinctly, and with as much assurance about its self evidence, as is typical today. "Thus far I have deliberately used the word 'law' and the phrase 'legal process' interchangeably. Law is indeed a process, not a collection of rules." L. CARTER, REASON IN LAW 3 (2d ed. 1984).

[23] Pound, *The Judicial Process in Action*, 1 N.Y.L. FORUM 11, 11 (1955) (reordering and changing slightly a list that appeared thirty years earlier in Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 940 (1923)).

[24] Many of the attacks came from the "realist" school of jurisprudence, and continue to this day in modified form by adherents of the Critical Legal Studies movement.

[25] *Compare* T.E. ATKINSON, *supra* note 15, at 291–367 *with* T.L. HAZEN, *supra* note 16, at 438–512.

requirements are more rigid, and the areas of law in which they occur, are sometimes said to be "formalistic."[26] Similarly, a judge who treats concepts as having strict definitional content is also said to be "formalistic" (and the tone of this pronouncement is seldom laudatory). Whatever the *level* of formalism, however, the structure of most legal inquiry remains the same. It involves asking whether the action or document at issue qualifies as a member of a pre-determined, legally relevant classification.

B. *The Balancing Test*

The structure of the balancing test is quite different. It is arranged around neither a single question of fact, nor a single definitional issue, but rather around two or more *sets* of facts or interests, each set pointing to a different outcome in the case. The winning litigant is not determined by placing actions into legally relevant categories, but rather by the court determining which side's interests or facts are weightier.

The best way to introduce the methods and operations of balancing test analysis is to examine the test in action. I have chosen three cases which seem particularly useful for focusing on the similarities, as well as the differences, among cases that self-consciously utilize "balancing tests." Their analysis will lay the groundwork for the taxonomy of balancing I will then develop.

1. Three Case Studies

One of the earliest examples of a balancing test can be found in the 1947 United States Supreme Court decision of *Gulf Oil Corp. v. Gilbert*.[27] In *Gilbert* the Court sustained a district court's decision to dismiss an action on the grounds of *forum non conveniens*, the principle that, for reasons of judicial policy, "a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute."[28] The Court was first concerned with whether the *forum non conveniens* doctrine was available to federal courts under any circumstances. On this point the Court held that the existence of jurisdiction and venue "assumes that the court, having the parties before it, will apply all the applicable law, including, in those cases where it is appropriate, its discretionary judgment as to whether the suit should be entertained."[29]

Once the Court determined that the doctrine was available, Justice Jackson described how it should be applied. "Wisely," he said, "it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy."[30] By this statement, we should note, the Court moved the analysis away from traditional rule-based reasoning, which would be constructed upon just such a "catalogue of circumstances," that is, upon defined sets of conditions that would *require* the grant or denial of a *forum non conveniens* motion.

Rather, the decision in these cases "leaves much to the discretion of the court to which plaintiff resorts,"[31] and this discretionary judgment is a matter of balance. It

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[26] *See, e.g.*, Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 489 (1975) ("the insistent formalism of the law of wills is mistaken and needless").

[27] 330 U.S. 501 (1947).

[28] *Id.* at 507.

[29] *Id.* at 506.

[30] *Id.* at 508.

[31] *Id.*

involves weighing the litigants' private interests — the relative ease of access to sources of proof, the availability of compulsory process for unwilling witnesses, the cost of obtaining the attendance of willing witnesses, the possibility (and necessity) of viewing the premises, and so forth[32] — along with public interests — the impact of the case on congested court dockets, the local interest in having localized controversies decided at home, the interest in diversity cases being held in a forum familiar with the state law that must govern the case, and so forth.[33]

The Court thus set out a series of factors to weigh, each of which, when analyzed, may point to one court or another as the appropriate forum for litigation. The court's next step, presumably, is to tally the results to determine which forum is suggested by the most factors. This sort of evaluation — listing the factors which impinge on the decision, and analyzing each factor in order to determine which way it points in making a final decision — lies at the heart of balancing test analysis.[34]

The district court in *Gilbert* engaged in just this form of analysis, holding that the factors pointing away from the plaintiff's chosen forum were strong enough to overcome the presumption in his favor, and therefore granted the defendant's motion for dismissal.[35] The Supreme Court reviewed the district court's work and found it reasonable enough that it could not be considered an abuse of discretion.[36]

The next example of a balancing test represents a slightly different method of balancing, and also plays an important role in the history of the test. The case is *Barenblatt v. United States*, and it represents one of the first times that a Supreme Court majority used explicit balancing analysis to construe the United States Constitution.[37] Lloyd Barenblatt was a psychology instructor at Vassar College when the House Committee on Un-American Activities subpoenaed him as a witness in 1954. During his appearance before the Subcommittee, he objected generally to the Subcommittee's right to ask him questions about his religious and political beliefs, and in particular refused to answer five questions, including, "Are you now a member of the Communist Party?" and "Have you ever been a member of the Communist Party?"[38] For his recalcitrance he was cited for contempt of Congress, convicted of a misdemeanor, sentenced to six months imprisonment, and fined $250.[39] A series of appeals led him twice to the Supreme Court; its second decision is of interest to us here.

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[32] *Id.*

[33] *Id.* at 508–09.

[34] In the case of *forum non conveniens* analysis, however, the scales are tipped in favor of the plaintiff. Justice Jackson states that, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Id.* at 508. Thus, after evaluating each of the factors, one presumably holds for the plaintiff, denying the defendant's motion to dismiss, unless the factors pointing to an alternative forum greatly outnumber, or strongly outweigh, the factors pointing to the plaintiff's chosen forum. This might be called the "greedy butcher's" version of the balancing test, but it is a balance nonetheless.

[35] Gilbert v. Gulf Oil Corp., 62 F. Supp. 291, 294–95 (S.D.N.Y. 1945).

[36] 330 U.S. at 512. *See also* Koster v. Lumbermens Mut. Casualty Co., 330 U.S. 518 (1947) (companion case to *Gilbert*; balancing conveniences in a shareholder's derivative suit).

[37] 360 U.S. 109 (1959). *Barenblatt* was followed in short order by Konigsberg v. State Bar, 366 U.S. 36 (1961); *In re* Anastaplo, 366 U.S. 82 (1961); and Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961). Together these cases marked a decisive introduction of balancing test analysis to a constitutional provision, in this case, the first amendment. *See* Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1424 (1962).

[38] 360 U.S. at 114.

[39] *Id.* at 115.

Barenblatt contended that the Subcommittee could not compel his testimony because it was not authorized to ask the questions it did, because he was not adequately apprised of the pertinency of the Subcommitee's questions to the subject matter of its inquiry, and because the questions he refused to answer infringed rights protected by the first amendment.[40] It was only Barenblatt's third claim — that the congressional inquiry infringed his first amendment rights — that involved the Court in explicit balancing.

The Court began by noting that, "[t]he power [of Congress] and the right of resistance to it are to be judged in the concrete, not on the basis of abstractions."[41] For us, this remark has a double significance. First, we may take the comment that judgment should not be based on "abstractions" as a suggestion that *rules*, in standard rule form, are not the appropriate means by which to decide such a case. This statement thus performs the same function as the *Gilbert* court's statement that *forum non conveniens* doctrine "wisely" had not been reduced to a set of rules which would demand the grant or denial of the motion. As a general matter, the statement that rules are inappropriate to a decision often constitutes a court's first step toward adopting the balancing test. Second, the Court's opening statement evidences an interest in confining its decision to the circumstances of the particular case before it, its "concrete" facts. This is confirmed later in the opinion when the Court states, "[o]ur function, at this point, is purely one of constitutional adjudication in the particular case and upon the particular record before us, not to pass judgment upon the general wisdom or efficacy of the activities of this Committee."[42] This urge to confine the decision "to the facts" also presages the introduction of a balancing test.

The *Barenblatt* Court noted that a claim concerning the right to resist congressional interrogation, based on the first amendment, cannot always be sustained.[43] When it can be sustained is a matter of balance. "Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown."[44] The Court seemed to indicate that the private interests, the individual's rights of association and petition guaranteed by the first amendment, vary little from case to case. Thus, the Court stated that "[t]he critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness."[45] The Court noted that the public interest must be "compelling" in order to overcome the individual's constitutional rights.[46]

The Court then analyzed the public interest, which involved Congress's interest in questioning citizens on the subjects of the Subcommittee hearings. Finding that the Subcommittee's investigation was related to valid legislative purposes, and that its investigatory power could not be restricted simply because the hearing could be shown to be for "exposure" purposes only, the Court concluded that "the balance between the individual and the governmental interests here at stake must be struck in favor of the latter,

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[40] *Id.* at 116.
[41] *Id.* at 112.
[42] *Id.* at 125.
[43] *Id.* at 126.
[44] *Id.*
[45] *Id.* at 126–27 (quoting Watkins v. United States, 354 U.S. 178, 198 (1957)).
[46] *Id.* at 127.

and that therefore the provisions of the First Amendment have not been offended" by the Subcommittee's actions or by Barenblatt's conviction for contempt of Congress.[47]

We put aside the question of whether the Court struck the balance correctly,[48] and focus instead on the structure of its analysis. *Barenblatt's* use of balancing shares with the *Gilbert* opinion the fundamental structure of balancing tests: a delineation of factors to be considered and a call for weighing those factors in reaching the judgment. It differs from *Gilbert*, however, in the number and the nature of the factors to be weighed. In *Gilbert*, the Court listed several factors, each one of which could point toward one legal result or the other. In *Barenblatt*, the factors were fewer. There was, on the individual's side, the first amendment: freedom of association, and perhaps of speech, and the right to petition the government for redress. There was, on the government's side, its interest in having its questions answered. The first interest points to reversing the defendant's conviction; the second interest points to affirmance. Unlike *Gilbert*, the Court did not check each factor to determine which way it pointed — *Barenblatt* involved a stark *weighing* of one interest against another.

The factors to be balanced in balancing test analysis vary in content and number from test to test. Some tests, as in *Gilbert*, involve an undifferentiated list of factors, each one of which may point one way or the other in making the final decision; judgment is more or less a matter of counting the factors on each side of the balance. Some balancing tests, like that found in *Barenblatt*, are more simply structured, pitting two clearly antagonistic social policies (or constitutional restraints) against each other; judgment is less a matter of counting and more a matter of, well, judgment. Regardless of their differences, however, they share the *juxtaposition* of interests or factors (whether they be two or ten in number), and the process of evaluating those interests or factors head to head in order to determine which will prevail.

A third example of the test comes from *Delaware v. Prouse*, a 1979 Supreme Court decision on the permissibility of random highway stops to check for drunk drivers.[49] The Court began with the premise that a random vehicle stop constitutes a seizure, and thus, under the fourth and fourteenth amendments to the federal constitution, must be "reasonable." Reasonableness, in turn, is a matter of balance: the "permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."[50]

The Court then analyzed the interests involved and the weights to be assigned to those interests. This analysis was informed, but not determined, by past decisions.[51] How serious was the intrusion on individual rights? Quite serious. Indeed, little else is so serious in the relation between an individual and his government than a stop by one of its armed officers.[52] But Delaware's interest was important, too. The state had a strong

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[47] *Id.* at 134.

[48] *Cf.* Justice Black's dissent, *id.* at 144 (Black, J., dissenting).

[49] 440 U.S. 648 (1979).

[50] *Id.* at 654.

[51] As Justice White, writing for the majority, stated, "although not dispositive, these decisions undoubtedly provide guidance in balancing the public interest against the individual's Fourth Amendment interests implicated by the practice of spot checks such as occurred in this case." *Id.* at 656–57.

[52] *See id.* at 657.

interest in preventing carnage on the highways, caused in part by intoxicated drivers.[53] What swung the Court was the state's lack of legitimate interest in the *particular procedure* of spot checks. This *sort* of stop, the Court found, did not capture enough drunk drivers.[54] Consequently, "[t]he marginal contribution to roadway safety possibly resulting from a system of spot checks cannot justify subjecting every occupant of every vehicle on the roads to a seizure . . . at the unbridled discretion of law enforcement officials."[55] The Court's holding followed: random stops, made without articulable suspicion by the police officers involved, are unreasonable under the fourth amendment and are, therefore, unconstitutional.[56]

Just as in *Gilbert* and *Barenblatt*, the Court in *Prouse* first enumerated the factors which it must consider, and then evaluated those factors. Like *Barenblatt*, the balance in *Prouse* was simply structured: pitting the individual's interest (fourth amendment rights) against the state's interest (health and safety of its citizenry). Like *Barenblatt*, we know at the outset which factors will weigh in which party's favor. Unlike either the *Gilbert* or the *Barenblatt* Courts, however, the *Prouse* Court did not limit its holding to the facts of the case. *Prouse* ends with the statement of a rule — random highway spot checks to catch drunk drivers are unconstitutional — which presumably applies to all such spot checks, no matter which state or individuals are involved.[57] Thus, the balancing test can be used for more than one purpose: first, as in *Gilbert* and *Barenblatt*, to decide the case at hand and *only* the case at hand; and second, as in *Prouse*, to generate a *rule*, applicable to all like cases in the future.

In all three cases, however, the basic structure of the central argument is the same. Three steps are involved — announcing the factors to be balanced, weighing those factors, and announcing the victor. Other courts have replicated this mode of reasoning, or something like it, in thousands of cases.

2. A Taxonomy of Balancing

It will help, before proceeding any further, to set out with some care exactly what we mean by "balancing test," and to impose some order on the ways in which the test varies from application to application. The balancing test is based on the metaphor of the scales. The language used in the test — the "weighing" and "balancing" of elements — as well as the basic structure of the test — balancing elements "against" each other, or placing elements on "one side" and on the "other" — are clearly derived from the metaphor of the two pan scale. It is a powerful metaphor, so powerful that judicial talk of "weighing" and "balancing" is ubiquitous. Courts often speak loosely of "weighing" one consideration or another. To distinguish these highly informal cases of balancing, we will restrict the term "balancing test" to those cases in which the scales serve as the central metaphor, and which explicitly: 1) set a balance by describing the elements to be weighed and the legal effect of the outcome; 2) discuss those elements; and 3) declare the winner based on the results of the weighing procedure.

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[53] *See id.* at 658.

[54] *Id.* at 659.

[55] *Id.* at 661.

[56] *Id.* at 663.

[57] We will have more to say about this difference in a moment. *See infra* text accompanying notes 63–70.

Normally, a court that has reasoned in this fashion will describe its own work as constituting a "balancing test," but a number of courts have engaged in all three steps without doing so.[58] Explicit use of the *label* is not required. What *is* required is the court's use of the analytical steps outlined above. The definition of "balancing test" proposed here excludes all informal talk about "balancing" or "weighing" considerations. As we will see later, only when courts make balancing an explicit method of deciding cases, only when they make it a *test*, does it become an interesting juridical phenomenon.[59]

The form and structure of balancing tests are far from uniform despite their underlying similarities. We have already seen, in three examples from Supreme Court practice, that balancing tests vary in the number and nature of the elements to be weighed. One can draw a more important distinction, however, according to the purposes for which the balance has been struck. At least three such purposes exist. First, one can balance to ascertain the *facts* of a particular case. Second, one can balance to create a *rule* of law, as in *Delaware v. Prouse*. Third, one can balance solely for the purpose of deciding the case at hand, that is, to get a *result*, as in *Gulf Oil Corp. v. Gilbert* and *Barenblatt v. United States*. We will refer to these balances as fact-balancing, rule-balancing, and result-balancing, respectively.[60] They each present different challenges to traditional legal reasoning.

a. Fact-Balancing

In balancing to ascertain the facts of a particular case, judges and juries weigh the evidence presented to determine whether legally significant states of affairs exist: did the purported testator sign the will in the presence of two witnesses? What statements did the defendant make about the stock to the plaintiffs? Balancing of this sort turns on the probative value of the evidence introduced, and the relevant standards for judgment are veracity and credibility. Weights are "assigned" to each piece of evidence depending on the extent to which it is thought to represent accurately the world outside the courtroom.[61]

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[58] Some recent examples from the United States Supreme Court include Kuhlman v. Wilson, 477 U.S. 436, 447–48, 452–54 (1986) (reach of habeas corpus statutes determined by balancing interests; no use of label "balancing test"); United States v. Mechanik, 475 U.S. 66, 71–73 (1986) (balance of interests regarding reversal of conviction for grand jury improprieties; no use of label "balancing test"); Superintendent v. Hill, 472 U.S. 445, 454–56 (1985) (due process balancing; no use of label); Hudson v. Palmer, 468 U.S. 517, 527–28 (1984) (fourth amendment balancing; no use of label).

[59] *See infra* notes 192–96 and accompanying text.

[60] Other writers have proposed some of these same distinctions, but the nomenclature has varied. What I have called "rule-balancing," others have called "definitional" balancing; what I have called "result-balancing," others have called "ad hoc" balancing. *See, e.g.*, Aleinikoff, *supra* note 12, at 948. Professor Henkin, in *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022 (1978), offers a slightly different distinction when he speaks of "interpretative balancing" versus "balancing-as-doctrine." *Id.* at 1023–28. There are still other ways of dividing the world of balancing. Vincent Luizzi distinguishes what we might call "guided" and "unguided" balances, depending on whether the test leaves the court free to consider any interests it believes pertinent. Luizzi, *supra* note 2, at 377–85.

[61] Professor Wigmore devotes a chapter of his treatise on evidence to "Quantitative (or, Synthetic) Rules," rules that require "in specified situations, that a certain quantity of evidential material be provided." 3 H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2030 (1904); 7 WIGMORE, EVIDENCE § 2030 (Chadbourne rev. 1978). He describes systems in which "for some purposes, the

In a quite informal way, balancing to find facts goes on all the time. In discussing evidentiary matters, courts use the verbs "weigh" and "balance" a great deal. It is rarer, however, for a court to describe its or a jury's work as involving all three steps we have isolated as crucial to the balancing test, and rarer still for a court to label its method a "balancing test."[62] Nonetheless, "fact-balancing" in the strict sense does sometimes occur, and any reasonable taxonomy of "balancing tests" should include it. When it does appear, however, it presents very little challenge to traditional rule-based reasoning. There are many ways to describe the finding of facts, but in the case of conflicting evidence, one can hardly improve on a court's report that it has "weighed" the evidence involved, or "balanced" the testimony on each side. Issues of credibility and veracity are described by the metaphor of balancing as ably as by any other metaphor.

b. Rule-Balancing

The second type of balancing test is more problematic. Its purpose is to determine a rule of law. We recall that the Supreme Court, in *Delaware v. Prouse*, concluded its balancing analysis with a *rule* — that random highway stops to capture drunk drivers violate the federal constitution.[63] The Court intended this rule to apply not only to the case at hand, but also to all future similar cases. In this form of the test, courts typically weigh the cogency of the parties' doctrinal arguments or consider broader policy arguments in an effort to choose among competing formulations of an appropriate rule of law.

Our interest in this brand of balancing test varies with the nature of the elements to be weighed. For example, courts might weigh the strength of the parties' *doctrinal* arguments. That is, courts may be called upon to examine the arguments that a particular black-letter rule is appropriate or should be interpreted in a particular way, or that a proposed rule necessarily follows from earlier rules. In this sort of balance, the decision turns on fairly traditional considerations of legal persuasiveness. The relevant standards for judgment are primarily rhetorical. The court considers matters of logic and style, as well as the practical consequences of its choice, in determining which rule of law is "the better reasoned."[64]

As in the case of balancing to find facts, this sort of rule-balancing goes on all the time at an informal level. Judges often speak of "weighing" the plaintiff's arguments

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weight to be given to each witness' testimony was measured and represented in numerical values, even by counting halves and quarters of a witness." *Id.* at § 2032. Such systems, as he points out, were not well received in the common law courts, but they certainly represent an interesting attempt to quantify the weight of testimonial evidence.

[62] Because this sort of analysis goes on primarily at the trial court level, it does so beyond the range of a national reporter system that reports appellate decisions. Fact-balancing may well occur more frequently than the reporters indicate. Even so, balancing language does sometime appear. *See* Covington v. State, 386 A.2d 336, 340 (Md. 1978) (Eldridge, J., dissenting) (quoting from trial transcript of prior case: "It is a question of balancing the testimony of what I heard from these witnesses as against his [testimony]").

[63] *See supra* note 56 and accompanying text.

[64] This sort of balance is most obvious when a court is faced with a case of first impression for its own jurisdiction, but as to which sister jurisdictions have adopted different rules. The court is likely to review the arguments for both rules, and then decide that one of them is the "better reasoned" or "better in principle." *See, e.g.* Adrian v. Rabinowitz, 116 N.J.L. 586, 186 A. 29 (1936) ("American" v. "English" rule regarding landlord's duty to put new tenant in physical possession of leased property).

against the defendant's. More rarely does a court engage explicitly in the three steps here defined as part of a balancing test, and more rarely still does a court use the label. This variant of the test simply translates into balancing language the quite ordinary work of judging legal argument, and thus forms no direct challenge to traditional legal reasoning. When a court speaks of "balancing" the "weights" of competing legal arguments, it merely acts in the way we could also describe as deciding which litigant has "made the better case."

Rule-balancing becomes more troublesome if the elements to be balanced are *interests* rather than arguments. This is the form of rule-balancing the Supreme Court used in *Delaware v. Prouse*, when it weighed the state's interest in safe highways against its citizens' interest in personal privacy.[65] Through that balance the Court arrived at a rule prohibiting certain forms of police activity. The interests placed into balance can vary rather dramatically from case to case, from the most concrete — the personal interests of *this* plaintiff against the personal interests of *this* defendant — to the most abstract — the societal interest in health and safety against the societal interest in free speech.[66]

At the higher levels of abstraction, this mode of analysis has a familiar ring. It is what passes for "policy analysis" in most of our courtrooms, and, indeed, in most of our law school classrooms. Even so, balancing interests to construct a rule of law constitutes a special challenge to traditional legal reasoning. The point requires some explanation, because at first blush balancing interests in order to get a rule appears to operate safely within traditional notions of legal process. That is, the method can be understood as a useful tool in the service of Dean Pound's second assignment for judges, namely, finding law.[67] That this goal is achieved by balancing interests seems completely unexceptional.

But this method of creating a rule represents a substantive departure from historical methods of judicial rule-making. Traditionally, when a court found no rule of law to cover the case at hand it turned to similar rules, in similar cases, and argued by analogy,[68] or it attempted to determine a new rule by logical derivation from prior rules. In short, the materials out of which courts constructed new rules were *other legal rules*, and the tools of construction were deductive or inductive logic, more or less formally applied. In balancing interests to construct a new rule of law, however, the primary resources are not prior laws and logic, but the interests of the parties to the litigation or the interests of groups they are deemed to represent. To those interests the court applies neither induction nor deduction, but the mechanism of balancing.

This method of creating new legal rules has become so common that we no longer feel its antipathy with older practice, but when the method was first proposed early in this century, the challenge was obvious.[69] In a legal world thought properly to be dominated by rules and logic, it was heresy to suggest a method of judicial lawmaking

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[65] *See supra* notes 51–56 and accompanying text.

[66] The problems engendered by the malleability of interest analysis are taken up in Part III, *infra*.

[67] Pound, *The Judicial Process in Action*, 1 N.Y.L. FORUM 11, 11 (1955). *See supra* text accompanying note 23.

[68] *See, e.g.*, B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 31–50 (1921) (discussing the methods and problems of analogical reasoning, there called "the method of philosophy"); 2 J. AUSTIN, LECTURES ON JURISPRUDENCE 1036–50 (4th ed. 1873) (discussing analogical reasoning).

[69] *See* Gilmore, *The Age of Anxiety*, 84 YALE L.J. 1022, 1032–33 (1975) (Cardozo's confession in *The Nature of the Judicial Process* that judges sometimes "made law" by weighing social interests "was widely regarded as a legal version of hard-core pornography.")

which turned its face against rules and logic and suggested in their place interests and balancing. In the older ways of thinking, interests and balancing were a part of politics, not of the law, and its intrusion was cause for alarm. Today we are less worried by the "political" aspect of judicial lawmaking, and are thus less offended by the use of interests and balancing in deriving new rules of law. But our accession to the change does not obliterate its significance. Balancing interests to get a rule challenges the proposition that the law consists in rules logically derived and applied.

The challenge almost escapes notice. Not only have we become inured to the proposition that judicial lawmaking has "political" content, but the challenge, when presented, is short-lived. After all, the product of this sort of balance is a *rule*, in standard rule form. Once created, courts may apply, distinguish, and modify the new rule in just the same manner as a rule created in more traditional ways.[70] We work with the rule in future cases without necessarily referring to the circumstances of its birth. But short-lived or not, the challenge to traditional reasoning remains.

c. Result-Balancing

The third major type of balancing is distinguished, like the others, by its aim. In this variation, the product of balancing is neither a statement of fact nor a rule of law, but the disposition of the case, a legal result. In this connection we recall *Gulf Oil Corp. v. Gilbert*[71] and *Barenblatt v. United States*.[72] In *Gilbert* the Court used a balancing analysis to determine whether the *forum non conveniens* motion of a particular party in a particular case should have been granted.[73] Similarly, in *Barenblatt*, the Court used a balancing analysis to determine whether Lloyd Barenblatt was properly fined and sentenced to jail for contempt of Congress.[74] In both cases, the Court confined its decision to the case before it. The point of the balancing was to generate a result in the case at bar only.

The line between result-balancing on the one hand and rule-balancing on the other is sometimes hazy, and will often depend on the court's own statements about what it has done. The preliminary discussions may look the same in both sorts of balances: a court may state that it has balanced the state's interest against the individual's interests. If it goes on to explain that out of that balance it has created a rule governing the *type* of case at issue — as in *Delaware v. Prouse*[75] — the court has engaged in rule-balancing. If, however, it states that its decision affects only *the case at bar* — as in *Barenblatt v. United States* — the court has engaged in result-balancing. The court may not be clear about which it has done, and thus others, often future courts, must decide what happened. The classification of the balancing court's work as rule-balancing or result-balancing, whether settled by the balancing court itself or by others who follow afterward, will have dramatic effects on the future development of the area of law at issue. The "rule of

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[70] *But see* Aleinikoff, *supra* note 12, at 979–81 ("definitional" balances — what I call "rule-balancing" — are often unstable, and can be "undermined by new interests or different weights for previously considered interests"). Professor Aleinikoff states that "[b]alances are 'definitional' only if the Court wants to stop thinking about the question." *Id.* at 981.

[71] 330 U.S. 501 (1947). See *supra* notes 27–36 and accompanying text for a discussion of *Gilbert*.

[72] 360 U.S. 109 (1959). See *supra* notes 37–48 and accompanying text for a discussion of *Barenblatt*.

[73] *Gilbert*, 330 U.S. at 508.

[74] *Barenblatt*, 360 U.S. at 134.

[75] See *supra* note 57 and accompanying text for a discussion of the rule in *Prouse*.

decision" in a rule-balancing case is a rule of law, in traditional rule form, and future courts will apply that traditional rule. The "rule of decision" in a result-balancing case is *the balancing test itself* and future courts will strike new balances each time the issue arises.[76]

Result-balancing presents a serious challenge to the canons of traditional legal reasoning, and a more insistent challenge than the one presented by rule-balancing. Traditional, rule-based reasoning tends to make the disposition of a case turn either on the existence of a physical fact (e.g., did the defendant say the shares of stock were "a perfectly sound investment?") or on a question of definition or classification (e.g., does the defendant's statement that the shares were "a perfectly sound investment" constitute "fraud"?). In traditional reasoning, courts resolve such issues by examining what actually occurred, within the constraints of the rules of evidence, or by examining the meaning of a word. Result-balancing replaces all of that with a balance of interests. The disposition of the case no longer turns on the existence of a physical fact or on the meaning of a word, but on an evaluation of individual or social values.

As in the case of rule-balancing, this substitution leads to the complaint that the process renders legal decision making "political" or, perhaps, "legislative."[77] When a court balances interests, if even to decide solely the case at hand, it arguably introduces considerations inappropriate for judicial use. The courts, one might say, have no business weighing social interests. The complaint, as before, rests on a certain intellectual position. To take the complaint seriously, one must believe that it is bad for judges to turn from an investigation of worldly facts and word meanings, and to focus instead on social and political concerns. Views on this issue have changed over time, and consequently views on the propriety of result-balancing have also changed. But the challenge remains, regardless of whether one applauds the development.

This challenge, such as it is, becomes insistent in result-balancing. Once the method is introduced into an area of law, it asserts its presence again and again, in every future case of the same type. Thus *the rule of law*, in such an area, *is to balance*. Whenever the question arises, no matter how often, a balance must be struck.[78]

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[76] The "result" reached in result-balancing need not be the actual disposition of the case. That is, to qualify as result-balancing, a court's decision need not state that "plaintiff will prevail if *X* interests outweigh *Y* interests." Rather, it is enough that the result of the balance be any proposition, which, given the opinion's structure, determines the disposition. As we noted earlier, one may characterize a legal opinion as a group of nested syllogisms, the outermost one of which (the dispositive syllogism) begins with the major premise: *If X, then judgment for plaintiff. X* itself *may* be a balancing test, the court saying, for example, that *"if plaintiff's interests outweigh defendant's interests then judgment for plaintiff."* Or it may not. The dispositive syllogism may turn instead on a standard legal proposition — the creation of a valid will, for example, or the purchase or sale of securities — but the standard legal proposition is determined by balancing. Thus a court might say, *"if the search was reasonable, then judgment of the lower court must be affirmed; the search is reasonable if the state's interest in law enforcement outweighs the defendant's privacy interest."* Because of the logical structure of the opinion, the result of the balancing test determines the disposition of the case just as surely as if the entire case had turned on one grand balance. Because any opinion contains a number of syllogisms, each nested within the other, and because each syllogism depends on legal propositions potentially determinable by balancing, the test can appear in any number of places, more or less deeply embedded in an opinion's legal structure, and still affect the disposition of the case.

[77] *See infra* text accompanying notes 299–304.

[78] Although rule-balancing and result-balancing create similar challenges to traditional reasoning, result-balancing is by far the more insistent. We recall that rule-balancing tends to hide the challenge. Once the "offending" balance is struck and the rule created, the balance is forgotten.

Result-balancing offends traditional notions of legal process in another way. Courts explicitly limit their decision to the peculiar circumstances of the case before them. The results of such a balance are *ad hoc*, and indeed, this feature has led some commentators to call this version of the test "ad-hoc balancing."[79] Such a decision, one might say, is *unprincipled*. No doubt this appellation is warranted, but some doubt exists, of course, about whether this is a bad thing.

There is a long history of dispute concerning the extent to which a court may properly consider the peculiarities of the parties or their situations in rendering a decision.[80] The concept of the "rule of law," bolstered by Western democratic political theories, seems to require that laws apply as generally as possible: to *all* citizens, and as a second best, to *classes* of citizens, and in no case to citizens as individuals.[81] There is thus a resistance to drawing legal distinctions between persons beyond those which are absolutely necessary. This reticence is demonstrated, for example, by the extent to which laws intended to apply to one person or corporate body are disguised in language which speaks of classes and general principles. Illinois laws meant to provide specially for the city of Chicago, for example, are drafted to cover "any municipality with a population of 500,000 or more."[82] The federal tax laws are filled with special goodies cast in general terms.[83] The drive for laws of general applicability cuts against exceptions for the special case. The judge should make distinctions on only well-established grounds and avoid making new ones. There is, however, a contrary drive. A court wishes to do the right thing in the individual case. This is, in a fundamental sense, the court's job. And this drive may suggest that exceptions may be appropriate in the special case.

This is an old debate, settled first one way and then the other as the winds of jurisprudence shift from age to age. But two things are clear: 1) the "ad hoc" decision generally, and result-balancing specifically, take their stand on the side of the special case and against the general rule; and 2) this stand is *not* the one taken by what I have

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The rule takes on a precedential life of its own, and there need not be any further reference to the balance which gave it life. Result-balancing, in contrast, is harder to ignore.

[79] *See, e.g.*, Aleinikoff, *supra* note 12, at 948. I have avoided this label, and used instead "result-balancing," in order to maintain a consistent nomenclature distinguishing variants of the test by their respective aims, i.e., to find facts, to determine rules, and to arrive at legal results.

[80] *See generally* EQUITY IN THE WORLD'S LEGAL SYSTEMS (R. Newman, ed. 1973) (historical and comparative study of equity's place in legal systems); *see also* Newman, *Introduction*, in *id.* at 17 ("The difficulties which have been encountered throughout history in integrating equity and law stem in the last analysis from the presence in the law of goals which are in direct and perennial conflict; the goal of certainty and the goal of individual justice.").

[81] *See* R. LUCE, LEGISLATIVE PROBLEMS 532–617 (1935) (extended treatment of special legislation — its history and its evils — and calls for reform).

[82] *See, e.g.*, ILL. REV. STAT., ch. 24, para. 8-1-15 (1985); *id.* ch. 24, para. 11-102-1 ; *id.* ch. 24, para. 11-35-1.

[83] Special rules for depreciation, for example, are available for any project:

> [i]f it is a sports and entertainment facility which —
>
> (i) is to be used by both a National Hockey League team and a National Basketball Association team;
>
> (ii) is to be constructed on a platform utilizing air rights over land acquired by a State authority and identified as Site B in a report dated May 30, 1984, prepared for a State urban development corporation . . . .

Tax Reform Act of 1986, Pub. L. No. 99-514, § 204(a)(1)(F), 100 Stat. 1, 64. A little ink and paper might have been saved if the drafters had just named the facility outright. Generally speaking, the transition rules of the new tax act raise this homely art to breathtaking heights.

called "traditional legal reasoning." "Ad hoc" decision making, of course, is hardly confined to the world of balancing,[84] but the ad hoc nature of result-balancing, when combined with its "political" content and its incessant recurrence once introduced into an area of law, conjures up a potent challenge to older concepts of proper judging.

II. The Balancing Test and Its Exploding Popularity

Beginning with a general definition of the balancing test, Part I developed a simple taxonomy based on the goals courts seek to achieve by using the test. As noted in Part I, fact-balancing presents no major challenge to traditional legal reasoning.[85] Consequently, an increase in the use of fact-balancing lacks much juristic interest, except as it indicates a broader trend toward adopting the language of "scales" and "balancing" over older forms of judicial discourse. Rule-balancing[86] and result-balancing, however, are much more provocative, because they challenge the *status quo ante*, and these very forms of the test have seen a boom in popularity during the past thirty years. By the late 1950s these tests had appeared in only a handful of cases. By 1985, they had become the method of decision in over forty areas of constitutional, common law, and statutory adjudication. Last year alone the test appeared in more than five hundred cases in the federal and state judicial systems, and the numbers are rising.[87]

The growth of the test's popularity, while remarkable, is partly beside the point. Ultimately, we want to know whether judges should use the test at all, and the frequency of its use cannot change that evaluation. A bad idea, or a good one, is made no better or worse because it is popular. What the numbers do add, however, is a sense of urgency.

A. *Charting the Numbers*

No one who studies the law for very long can escape a sense that the use of balancing tests has increased. Quantifying that increase, however, is not so easy. Ideally, one should like to begin with a reasonable definition of the balancing test, in its rule-balancing and result-balancing forms, and record its appearances in every case reported from American courts. Such a project, however, would require examining hundreds of thousands of cases, and represents a plan of disabling magnitude. Fortunately, one can design less ambitious projects to establish the numerical increase in the use of the test, without damaging too severely the reliability of the numbers generated.

The answer lies in the use of computer-aided legal research. One may begin by addressing the inquiry "balancing test" to each federal and state court library of an electronic legal data base and count the cases in which the phrase "balancing test" appears. I conducted such a search and the results are tabulated on the accompanying chart. The chart aggregates the experience of all state courts, in column (2), and all

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[84] Blagg v. Fred Hunt Co., 272 Ark. 185, 187, 612 S.W.2d 321, 322 (1982) (implied builder-vendor's warranty of fitness for habitation developed on a case-by-case basis); Reynolds v. State, 368 So. 2d 596, 597 (Fla. Dist. Ct. App. 1978) (whether state eliciting testimony that defendant was silent after receiving Miranda warnings constitutes a "fundamental error" is determined on a case-by-case basis); Posey v. State Workmen's Compensation Commissioner, 157 W. Va. 285, 292–93, 201 S.E.2d 102, 106 (1973) (in worker's compensation claim, percentage of disability for a given injury is determined on a case-by-case basis).

[85] And neither does rule-balancing, when the elements to be weighed are legal arguments.

[86] Especially when the elements to be weighed are interests.

[87] *See* the accompanying chart.

federal courts, in column (3). The chart also separates, in column (4), the experience of the United States Supreme Court. The trends in all courts are clear.[88]

Obviously, a computer search for the phrase "balancing test" only roughly estimates the appearance of balancing as a method of legal reasoning. The search captures a few cases we would not consider examples of balancing, and misses a great many more that do use the test. On the whole, however, the rough estimates shown by this chart understate the actual incidence of balancing.[89]

The dramatic growth in judicial references to "balancing test," as demonstrated in the accompanying chart, primarily documents the dramatic growth in the use of result-balancing, the form of the test most challenging to traditional legal reasoning. This is because judges engaged in result-balancing are more likely to label their work a "balancing test" than when they engage in other sorts of balancing. The legal procedure this Article describes as rule-balancing, even if dutifully labelled a "balancing test" every time it is used, by nature appears only occasionally in the cases: the rule is remembered and cited in future cases; the test that gave it life is not. In the process of result-balancing, however, the balance is applied again and again to the facts of each new case. In that context, it is quite natural for judges to speak of applying a particular "test" to the facts involved, a "test" that involves "balancing." Consequently, most cases which refer to a "balancing test" involve result-balancing.

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[88] More refined computer searches were possible, and I attempted more complex search requests on a few data bases, but the more complicated searches were either no more informative than the simpler approach, or generated too many special problems of their own.

[89] For example, some courts, in describing the facts of the case, report that a police officer requested that a motorist suspected of driving while intoxicated take a "balancing test" by walking a straight line. *E.g.*, Zietz v. Hjelle, 395 N.W.2d 572, 573 (N.D. 1986); Charles v. State, 424 So. 2d 175, 187 (Ala. Crim. App. 1982); State v. Haze, 218 Kan. 60, 63, 542 P.2d 720, 722 (1975). The chart also includes cases in which a court specifically mentions a "balancing test" in order to reject its use, and cases in which the test is used in dissent. *E.g.*, Kleppe v. Sierra Club, 427 U.S. 390, 405–06 (1975) (majority rejected balancing test); American Fin. Serv. Ass'n v. Federal Trade Comm'n, 767 F.2d 957, 993 (D.C. Cir. 1985) (dissent employed balancing test); Hill v. City of Houston, 764 F.2d 1156, 1167–68 (5th Cir. 1985) (same).

Despite these problems of over-inclusion, a search for the phrase "balancing test" grossly understates the number of the test's appearances. The reason should be obvious. It is perfectly possible for a court to announce that it has balanced the social interests represented by one litigant against the social interests represented by the other, to strike the balance, and to declare a winner, without ever having used the words, "balancing test." Though we would have no trouble describing such a case as one that had employed the balancing test, it will not appear in the chart.

Estimating the *level* of understatement, however, is a precarious business. When a court does not use the phrase, "balancing test," it becomes arguable whether it has "really" used that method of analysis. Some cases are easy. Sometimes a court goes through all the motions without using the label "balancing test." But sometimes the court is less clear. Not only does it fail to use the label, but it also fails to delineate the steps I have defined as crucial to the test. There are, in short, many casual references to "balancing." Whether some or all of these should be counted as examples of the "balancing test" becomes a matter of judgment.

Even if we take a strict view of which cases qualify, and confine ourselves to cases that all but use the label, we find that the computer search for "balancing test" understates the use of the test by about half. I arrive at this estimation after conducting a series of searches aimed at capturing more cases in a few state and federal libraries (balance! PRE/6 interest!, weigh! PRE/6 interest!, for example). I read the cases generated to weed out those not explicitly using the test, and the number of remaining cases (i.e., good examples of the test) ran from two to three times the number of cases captured by searching the same library for "balancing test."

FEDERAL AND STATE COURT REFERENCES TO "BALANCING TEST"
(LEXIS DATABASES)
1955–1987

(1) Year	(2) State Courts	(3) Federal Courts	(4) U.S. Supreme Court	(5) Total
1987	268	236	10	504
1986	299	238	4	535
1985	253	201	13	454
1984	245	166	3	411
1983	189	195	9	384
1982	200	159	4	359
1981	169	157	5	326
1980	174	123	0	297
1979	169	108	3	277
1978	149	110	3	259
1977	99	101	3	200
1976	121	84	5	205
1975	105	75	1	180
1974	66	50	0	116
1973	55	74	3	129
1972	20	53	1	73
1971	9	23	1	32
1970	4	13	0	17
1969	6	7	0	13
1968	1	4	0	5
1967	4	4	0	8
1966	3	5	0	8
1965	3	2	0	5
1964	3	3	1	6
1963	1	0	0	1
1962	0	0	0	0
1961	1	7	6	8
1960	0	0	0	0
1959	0	1	1	1
1958	0	0	0	0
1957	0	0	0	0
1956	0	0	0	0
1955	0	0	0	0

Notes on the Columns

The search was BALANCING TEST W/1 TEST AND DATE = [year]; each column represents a different LEXIS database:

Column (2) — OMNI 2 database
Column (3) — COURTS database
Column (4) — US database
Column (5) — computed total of columns (2) and (3).

One should not make *too* much of these numbers, of course. The balancing test, strictly defined, is hardly ubiquitous. Five hundred cases each year do not constitute universal practice, and traditional legal reasoning is still the order of the day. But the trends indicate that the order may someday be reversed, and that the balancing test will become the method of choice.

B. *The Where and How of Balancing*

The dramatic growth in numbers suggests, but does not prove, that the balancing test has become a growing force in the art of judging. It could be, for example, that the

balancing test finds a home in only a few areas of law, and that, for reasons unrelated to the test, those areas of law are litigated with special frequency.[90] If the balancing test were attached to such active areas of law, but not to areas on decline, an increase in the incidence of the test would not be evidence that the test had increased in popularity. The more telling inquiry is to ask whether the balancing test answers more legal questions than it did before. It most emphatically does.

1. The Range of Balancing

We begin with an examination of state court experience, for it is there that the balancing test seems to have achieved its widest application. In Illinois, for example, the balancing test has been used to determine:

— whether a product is unreasonably dangerous;[91]

— whether a statute of limitations should be tolled until the plaintiff discovered, or should have discovered, the cause of action;[92]

— whether doctors have a duty to the general public to warn patients about possible effects of a particular drug;[93]

— whether a city may require alterations to existing buildings to promote health and safety;[94]

— whether a *forum non conveniens* motion prevails;[95]

— whether a criminal defendant has been denied a speedy trial;[96]

— whether an Illinois statute places an unreasonable burden on interstate commerce;[97]

— whether retroactive legislation can be enforced;[98]

— whether a public employee has been dismissed in a proper manner;[99]

— whether documents held by public officials should be released;[100]

— whether a government employee has been dismissed for improper reasons;[101]

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[90] The winds of litigation shift: today there are substantially fewer suits to enforce marriage contracts than in the 1800's, but a great many more products liability actions.

[91] Rucker v. Norfolk & W. Ry., 77 Ill. 2d 434, 437–39, 396 N.E.2d 534, 536 (1979).

[92] Knox College v. Celotex Corp., 85 Ill. App. 3d 714, 717, 407 N.E.2d 176, 179 (1980).

[93] Kirk v. Michael Reese Hosp. & Medical Center, 136 Ill. App. 3d 945, 953, 483 N.E.2d 906, 912 (1985).

[94] Rothner v. Chicago, 66 Ill. App. 3d 428, 433–34, 383 N.E.2d 1218, 1222 (1978).

[95] Wieser v. Missouri Pac. R.R., 98 Ill. 2d 359, 365, 456 N.E.2d 98, 101 (1983); Jones v. Searle Laboratories, 93 Ill. 2d 366, 372–73, 444 N.E.2d 157, 160 (1983).

[96] Illinois v. Makes, 103 Ill. App. 3d 232, 235–36, 431 N.E.2d 20, 23 (1981); Illinois v. Boyd, 88 Ill. App. 3d 825, 842–43, 410 N.E.2d 931, 944 (1980); Illinois v. Woods, 78 Ill. App. 3d 431, 437, 396 N.E.2d 1204, 1209 (1979); Illinois v. Valdery, 65 Ill. App. 3d 375, 377, 381 N.E.2d 1217, 1219 (1978); Illinois v. Adams, 59 Ill. App. 3d 590, 593–94, 375 N.E.2d 893, 896 (1978); Illinois v. Harflinger, 49 Ill. App. 3d 31, 34, 363 N.E.2d 875, 877 (1977); Illinois v. Sims, 47 Ill. App. 3d 215, 218, 361 N.E.2d 1153, 1154 (1977); Illinois v. Gooding, 21 Ill. App. 3d 1064, 1068, 316 N.E.2d 549, 552 (1974).

[97] Illinois v. Neville, 42 Ill. App. 3d 9, 15, 355 N.E.2d 179, 183–84 (1976).

[98] Sanelli v. Glenview State Bank, 108 Ill. 2d 1, 20, 483 N.E.2d 226, 234 (1985).

[99] Maas v. Board of Trustees, 94 Ill. App. 3d 562, 576, 418 N.E.2d 1029, 1040 (1981).

[100] Lopez v. Fitzgerald, 76 Ill. 2d 107, 118–19, 390 N.E.2d 835, 839 (1979); Oberman v. Byrne, 112 Ill. App. 3d 155, 165, 445 N.E.2d 374, 382 (1983).

[101] Griggs v. Board of Fire Comm'rs, 102 Ill. App. 3d 614, 618, 430 N.E.2d 188, 190–91 (1981); Lupo v. Board of Fire & Police Comm'rs, 82 Ill. App. 3d 449, 451, 402 N.E.2d 624, 626 (1980).

— whether evidence of a criminal defendant's prior convictions can be introduced at his trial;[102]

— whether a police roadblock was permissible;[103]

— whether a new rule announced by the court should be applied retroactively;[104]

— whether a particular police search was permissible;[105]

— whether a particular investigative act by the police constitutes a search or seizure;[106]

— whether Illinois driver's license suspension procedures violate due process.[107] There are others.[108]

New York appears to provide an even richer vein of balancing analysis. New York courts have used the test to determine:

— the level of support payments a father owes for a child born out of wedlock;[109]

— whether an estate creditor may force the administrator to set aside a sum of money to be used to satisfy a potential judgment against the estate;[110]

— whether an employee may be fired for a past history of psychiatric treatment;[111]

— whether shifting a prisoner from building to building violated his right to counsel;[112]

— whether a foreign divorce decree will be honored in the state of New York;[113]

— whether court records may be disclosed to a person not party to the original litigation;[114]

— whether the state may have access to grand jury minutes;[115]

— whether an attorney-priest may wear his clerical collar in court;[116]

— whether a husband may insist that his wife join his church before supporting her;[117]

— whether a particular church should be extended tax-free status;[118]

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[102] Illinois v. Graves, 142 Ill. App. 3d 885, 897, 492 N.E.2d 517, 526 (1986).

[103] Illinois v. Bartley, 109 Ill. 2d 273, 280, 486 N.E.2d 880, 883 (1985).

[104] Illinois v. Smith, 95 Ill. 2d 412, 421, 447 N.E.2d 809, 813 (1983); *see also* Illinois v. Tisler, 103 Ill. 2d 226, 246–47, 469 N.E.2d 147, 157–58 (1984).

[105] Illinois v. Batchelder, 107 Ill. App. 3d 81, 84, 437 N.E.2d 364, 367 (1982).

[106] Illinois v. Long, 99 Ill. 2d 219, 232, 457 N.E.2d 1252, 1257–58 (1983); Illinois v. Lippert, 89 Ill. 2d 171, 183–87, 432 N.E.2d 605, 610–12 (1982); Illinois v. Piper, 101 Ill. App. 3d 296, 303, 427 N.E.2d 1361, 1365 (1981).

[107] Illinois v. Honaker, 127 Ill. App. 3d 1036, 1038–39, 469 N.E.2d 1120, 1122 (1984).

[108] *See e.g.*, Illinois v. Martin, 80 Ill. App. 3d 281, 292, 399 N.E.2d 265, 274 (1979) (whether an informant's identity should be disclosed to the defendant in a criminal case).

[109] Ellen N. v. Stuart K., 88 Misc. 2d 280, 286–87, 387 N.Y.S.2d 367, 373 (Fam. Ct. 1976).

[110] *In re* Vasquez, 122 Misc. 2d 479, 484, 471 N.Y.S.2d 780, 784 (1984) (Sur. Ct.).

[111] John B. v. Rockville Centre, 113 A.D.2d 225, 233, 495 N.Y.S.2d 674, 679 (1985).

[112] Adams v. Meloni, 98 A.D.2d 956, 956, 470 N.Y.S.2d 199, 199–200 (1983) (memorandum opinion).

[113] Guillermo v. Guillermo, 43 Misc. 2d 763, 768–69, 252 N.Y.S.2d 171, 176–78 (Fam. Ct. 1964).

[114] Church of Scientology v. New York, 61 A.D.2d 942, 943, 403 N.Y.S.2d 224, 226 (1978) (memorandum opinion).

[115] *In re* District Attorney of Suffolk Co., 86 A.D.2d 294, 298–99, 449 N.Y.S.2d 1004, 1007 (1982).

[116] New York v. Rodriguez, 101 Misc. 2d 536, 544–45, 424 N.Y.S.2d 600, 606 (Sup. Ct. 1979).

[117] M.I. v. A.I., 107 Misc. 2d 663, 667, 435 N.Y.S.2d 928, 931 (Fam. Ct. 1981).

[118] New York v. Life Science Church, 113 Misc. 2d 952, 967–68, 450 N.Y.S.2d 664, 675 (Sup. Ct. 1982).

— whether a particular zoning variance should be granted;[119]

— whether a police informant's identity should be disclosed to a criminal defendant;[120]

— whether two criminal counts may be joined in one trial;[121]

— whether evidence improperly gathered by police may be admitted at trial;[122]

— whether a replevin statute that allows seizure of goods without a hearing is constitutional;[123]

— whether special court procedures for handling juvenile offenders are constitutional;[124]

— whether a first time offender should be released from custody;[125]

— whether custody of a child should be given over to his natural or adoptive parents;[126]

— whether prison conditions must be improved;[127]

— whether a public official can release the names and addresses of government employees.[128]

As might be expected, California courts do a lot of balancing, as do the courts of Kansas, Alabama, and Montana, four jurisdictions whose experience I surveyed with some care.[129] The test's popularity appears to be unaffected by

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[119] Campus v. Delany, 62 A.D.2d 990, 992, 403 N.Y.S.2d 308, 311 (1978) (memorandum opinion).

[120] New York v. Law, 78 Misc. 2d 897, 900, 358 N.Y.S.2d 655, 658 (Sup. Ct. 1974).

[121] New York v. Negran, 105 Misc. 2d 492, 493, 432 N.Y.S.2d 348, 349–50 (Sup. Ct. 1980).

[122] New York v. Wright, 104 Misc. 2d 911, 922, 429 N.Y.S.2d 993, 1001 (Sup. Ct. 1980).

[123] Consolidated Edison v. Pearson, 123 Misc. 2d 598, 599, 474 N.Y.S.2d 230, 232 (Civ. Ct. 1984).

[124] *In re* Edward W., 89 Misc. 2d 570, 574, 392 N.Y.S.2d 208, 212 (Fam. Ct. 1977).

[125] New York v. Dibono, 82 Misc. 2d 177, 180, 368 N.Y.S.2d 429, 432 (Crim. Ct. 1975).

[126] *In re* Daniel C., 115 Misc. 2d 130, 135, 453 N.Y.S.2d 572, 576 (Sur. Ct. 1982).

[127] Powlowski v. Wullich, 102 A.D.2d 575, 587, 479 N.Y.S.2d 89, 98 (1984).

[128] Goodstein v. Shaw, 119 Misc. 2d 400, 402, 463 N.Y.S.2d 162, 163 (Sup. Ct. 1983).

[129] Alabama: *See, e.g.*, *Ex parte* Stevens, 499 So. 2d 795, 796 (Ala. 1986) (per curiam) (speedy trial); *Ex parte* Bland, 441 So. 2d 122, 124 (Ala. 1983) (balancing prisoner's interests in retaining his "good time" versus the prison official's interests in institutional safety and correctional goals); *Ex parte* Alabama Oxygen Co., 433 So. 2d 1158, 1164–67 (Ala. 1983) (balancing the application of federal law versus state law).

Montana: *See, e.g.*, Miller v. Catholic Diocese, 728 P.2d 794, 796 (Mont. 1986) (establishment clause); State v. Kerns, 725 P.2d 1190, 1191 (Mont. 1986) (speedy trial); State v. Chapman, 679 P.2d 1210, 1215 (Mont. 1984) (balancing defendant's interest in preparing his defense versus government's interest in protecting the flow of informant information).

California: *See, e.g.*, Canaan v. Abdelnour, 40 Cal. 3d 703, 715, 710 P.2d 268, 275, 221 Cal. Rptr. 468, 475 (1985) (balancing character and magnitude of injuries to first and fourteenth amendment rights against state interest in promulgating rule in determining constitutionality of election regulations); Michelle W. v. Ronald W., 39 Cal. 3d 354, 360, 703 P.2d 88, 91, 216 Cal. Rptr. 748, 751 (1985) (weighing competing public and private interests in determining whether statutory presumption of paternity violated due process rights); Partee v. San Diego Chargers Football Co., 34 Cal. 3d 378, 382–85, 668 P.2d 674, 677–79, 194 Cal. Rptr. 367, 370–72 (1984) (weighing burden on interstate commerce against state's interest in regulating activity in determining whether state's antitrust laws applied to football teams); Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 434, 573 P.2d 443, 457, 143 Cal. Rptr. 225, 239 (1978) (existence of "design defect" and thus strict liability on product's manufacturer, depends on, *inter alia*, whether benefits of challenged design outweigh the risk of danger inherent in such design).

Kansas: *See, e.g.*, Kansas Gas & Elec. Co. v. State Corp. Comm'n, 239 Kan. 483, 488–89, 720

distinctions between states large and small, urban and rural, progressive and conservative.[130]

At the risk of losing the reader's attention, I listed *seriatim* a number of issues resolved by the balancing test in Illinois and New York. I deliberately avoided classifying them by subject matter, or according to whether they arose as a matter of constitutional law, statutory law, or common law. These distinctions will be made soon enough, but it is important to *demonstrate*, rather than merely to assert, that the balancing test has become the *modus operandi* in a stunning variety of cases. Those readers who sought to avoid this rhetorical ploy by skipping over the lists are urged to review them. These lists best convey both the test's popularity and the richness of its applications. The test is no longer confined, as it may have been in the early 1960s, to a handful of legal questions.

It would be misleading, however, to suggest that the test is likely to pop up just anywhere. The test has come to dominate some areas of law more rapidly than others. Federal constitutional law, for example, is an area rich in balancing. The test appeared early in United States Supreme Court first amendment decisions, and in subsequent practice, the Court has introduced the test to a number of other constitutional issues.[131] Consequently, a great deal of state court balancing is tied to particular provisions of the federal constitution, applied to the states by way of the fourteenth amendment, or to state constitutional provisions analogous to the federal provisions.

This reading of the matter, however, does not do the states justice. They have also adopted the test in areas wholly unrelated to federal constitutional law. State courts have used the test to decide issues of tort law,[132] conflicts of law,[133] family law,[134] civil procedure,[135] estates law,[136] taxation,[137] zoning,[138] and public access to documents,[139] as well as

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P.2d 1063, 1070–71 (1986) (approving balance of parties' interests in setting utility rates); Kansas v. Galloway, 238 Kan. 100, 106, 708 P.2d 508, 513 (1985) (speedy trial); Kansas v. Pink, 236 Kan. 715, 722, 696 P.2d 358, 365 (1985) (balancing factors to determine whether informer's identity should be disclosed to defendant); Crane v. Mitchell County U.S.D. No. 273, 232 Kan. 51, 57, 652 P.2d 205, 210 (1982) (due process).

[130] This is not surprising. As I will argue later (and as others have argued before) there is no reason to suspect that using a balancing test necessarily results in more conservative or liberal decisions than traditional analysis.

[131] Professor Aleinikoff has provided the best summary to date of the balancing test's entry into provision after provision of the federal Constitution. Aleinikoff, *supra* note 12, at 963–72. There he ably traces the growth of the test in the jurisprudence of the fourth amendment, procedural due process, the fourteenth amendment, the commerce clause, the first amendment, and a miscellany of other provisions.

[132] Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 434, 573 P.2d 443, 457, 143 Cal. Rptr. 225, 239 (1978); Rucker v. Norfolk & W. Ry., 77 Ill. 2d 434, 437–39, 396 N.E.2d 534, 536 (1979); Kirk v. Michael Reese Hosp. & Medical Center 136 Ill. App. 3d 945, 953, 483 N.E.2d 906, 912 (1985).

[133] Guillermo v. Guillermo, 43 Misc. 2d 763, 768–69, 252 N.Y.S.2d 171, 176–78 (Fam. Ct. 1964).

[134] Ellen N. v. Stuart K., 88 Misc. 2d 280, 286–87, 387 N.Y.S.2d 367, 373 (Fam. Ct. 1976); *In re* Daniel C., 115 Misc. 2d 130, 135, 453 N.Y.S.2d 572, 587 (Sur. Ct. 1982).

[135] Wieser v. Missouri Pac. R.R., 98 Ill. 2d 359, 365, 456 N.E.2d 98, 101 (1983); Jones v. Searle Laboratories, 93 Ill. 2d 366, 372–73, 444 N.E.2d 157, 160 (1983).

[136] *In re* Vasquez, 122 Misc. 2d 479, 484, 471 N.Y.S.2d 780, 784 (Sur. Ct. 1984).

[137] New York v. Life Science Church, 113 Misc. 2d 952, 967–68, 450 N.Y.S.2d 664, 675 (Sup. Ct. 1982).

[138] Campus v. Delany, 62 A.D.2d 990, 992, 403 N.Y.S.2d 308, 311 (1978).

[139] Lopez v. Fitzgerald, 76 Ill. 2d 107, 118–19, 390 N.E.2d 835, 839 (1979); Oberman v. Byrne,

issues of legal method and process, such as whether a court decision or statute should apply retroactively.[140] The states, in short, have done much more than simply follow federal precedent in areas where required to do so, or where analogies to federal precedent are compelling. They have extended the reach of the test to areas beyond the confines of federal interest, and are now just as likely to cite their own precedents for balancing as to cite federal court decisions.

There is no doubt, however, that state court judges often take their lead from their federal colleagues just as lower federal court judges take their lead from the justices of the United States Supreme Court. As *Barenblatt v. United States* illustrates, the Supreme Court began using a balancing test in first amendment cases during the late 1950s and early 1960s. Actually, the language of balancing, if not the test itself, appeared in first amendment cases several years before that time,[141] and throughout the immediate post-war period the Court, or some of its members in concurrence and dissent, began to recognize interest balancing as a legitimate method of judicial and legislative process. In particular, justices engaged in balancing to resolve commerce clause disputes,[142] and recognized that the balance of competing interests lay behind the work of Congress[143] and administrative agencies.[144] Vague references to interest balancing also appeared in Supreme Court cases dealing with capital punishment,[145] the division of powers between the executive and legislative branches,[146] procedural due process,[147] and antitrust law.[148] Perhaps the only justification for dating the balancing test's origins in the late 1950s and early 1960s is that Justice Black, in several dissents, derisively characterized the Court's first amendment work as a "balancing test" and the epithet stuck.

Nonetheless, by the late 1950s explicit balancing test analysis dominated only a handful of areas: *forum non conveniens* motion practice, some commerce clause analysis, and the newly arrived first amendment jurisprudence. In subsequent years, the Supreme

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112 Ill. App. 3d 155, 165, 445 N.E.2d 374, 382 (1983); Goodstein v. Shaw, 119 Misc. 2d 400, 402, 463 N.Y.S.2d 162, 163 (Sup. Ct. 1983).

[140] Sanelli v. Glenview State Bank, 108 Ill. 2d 1, 20, 483 N.E.2d 226, 234 (1985); Illinois v. Graves, 142 Ill. App. 3d 885, 897, 492 N.E.2d 517, 526 (1986).

[141] *See, e.g.*, Roth v. United States, 354 U.S. 476, 509–10 (1957) (Douglas, J., dissenting); International Bhd. of Teamsters v. Vogt, Inc., 354 U.S. 284, 290 (1957); Dennis v. United States, 341 U.S. 494, 524–26 (1951) (Frankfurter, J., concurring); SAIA v. New York, 334 U.S. 558, 562 (1948); United Pub. Workers v. Mitchell, 330 U.S. 75, 96 (1947).

[142] Cities Serv. Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179, 186–87 (1950); H.P. Hood & Sons v. DuMond, 336 U.S. 525, 564 (1949) (Frankfurter, J., dissenting); Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422, 443–45 (1947) (Douglas, J., dissenting); Freeman v. Hewitt, 329 U.S. 249, 253 (1946); Hill v. Florida, 325 U.S. 538, 547–48 (1945) (Frankfurter, J., dissenting).

[143] T.I.M.E. Inc. v. United States, 359 U.S. 464, 479 (1959) (Motor Carrier Act strikes balance); Carpenters Union, Local 1976 v. NLRB, 357 U.S. 93, 99–100 (1953) (Taft-Hartley Act strikes balance); Hooven & Allison Co. v. Evatt, 324 U.S. 652, 678–79 (1945) (Congress balances interests of U.S. and Phillipines regarding Phillipines' tariff status). *See also* Hickman v. Taylor, 329 U.S. 495, 497 (1947) (Federal Rules of Civil Procedure strike balance regarding work-product doctrine).

[144] NLRB v. Truck Drivers Union, 353 U.S. 87, 96 (1957) (NLRB rules strike balance); United States v. Rock Island Motor Transit Co., 340 U.S. 419, 434 (1951) (Interstate Commerce Commission strikes balance).

[145] Reid v. Covert, 354 U.S. 1, 44 (1957) (Frankfurter, J., concurring).

[146] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 609–10 (1952) (Frankfurter, J., concurring).

[147] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

[148] Schine Chain Theatres v. United States, 334 U.S. 110, 121 & n.10 (1948).

Court used the test to resolve claims concerning the permissibility of searches under the fourth amendment,[149] the requisites of due process under the fifth amendment,[150] the rights to a speedy trial, to confront witnesses, and to the assistance of counsel, as secured by the sixth amendment,[151] and the requisites of due process under the fourteenth amendment.[152] By sheer force of precedent, lower federal courts have taken up the charge, and used the test in those areas sanctioned by the Supreme Court.[153]

2. The Role of Balancing

The balancing test is most commonly employed as a method of constitutional interpretation, but it has also performed in many other capacities. The test has now become a method of *statutory* interpretation. This development is hardly surprising. What is good for reading a constitution is arguably good for reading statutes, too.

New York courts, for example, have employed the test to interpret statutes governing the amount of child support payments. The state's Family Court Act provides that parents support their children "according to their respective means," and directs the court to consider "all relevant factors" in setting the level of support.[154] The statute establishes five factors to be considered by the courts, including the parents' financial resources and the child's physical and emotional health. It should be no surprise that New York courts have come to refer to child support decisions as involving a balancing test.[155]

Similarly, New York's Mental Hygiene Law requires that no person "in all other respects qualified and eligible" shall be deprived of any civil right solely because that person received prior treatments for a mental disability.[156] In *John B. v. Rockville Centre*, the court read the statute as indicating that a balance must be struck between the employer's interest in capable employees and society's interest in encouraging treatment for mental illness.[157] Using this analysis, the court determined that the statute could not have been intended to preclude an employer police department from dismissing an employee whose past treatment revealed underlying alcoholism problems, making him unsuitable for the job.

A more aggressive use of balancing in statutory interpretation comes from Illinois. That state's general five-year statute of limitations provides that tort actions, as well as "all civil actions not otherwise provided for, shall be commenced within 5 [five] years next after the cause accrued."[158] Under traditional reasoning a cause of action sounding

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[149] Delaware v. Prouse, 440 U.S. 648, 654 (1979); Camara v. Municipal Court, 387 U.S. 523, 533 (1967).

[150] INS v. Lopez-Mendoza, 468 U.S. 1032, 1041 (1984).

[151] Morris v. Slappy, 461 U.S. 1, 14–15 (1983); Lassiter v. Department of Social Serv., 452 U.S. 18, 27 (1981).

[152] Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976). A detailed account of this expansion is beyond the scope of this Article. The best account appears in Aleinikoff, *supra* note 12, at 963–72.

[153] *See, e.g.*, Davis v. Page, 714 F.2d 512, 515 (5th Cir. 1983) (due process analysis carefully following the *Mathews v. Eldridge* balancing analysis).

[154] N.Y. FAM. CT. ACT § 413 (McKinney 1987).

[155] *See, e.g.*, Kathy G.J. v. Arnold D., 116 A.D.2d 247, 256, 501 N.Y.S.2d 58, 64 (1986) ("[A] fair balance must be struck, taking into consideration all relevant circumstances.").

[156] N.Y. MENTAL HYG. LAW § 33.01 (McKinney 1978).

[157] 113 A.D. 2d 225, 495 N.Y.S.2d 674 (1985).

[158] ILL. REV. STAT. ch. 110, para. 13-205 (1985).

in tort "accrued" when the tort was committed, but Illinois courts have interpreted the word "accrued" so that in some cases, "accrual" occurs later, when the plaintiff knew or should have known of his or her right to sue.[159] This has come to be known as the "discovery rule," and whether a court applies it in a particular case is determined by balancing. The rule applies when the hardship caused to the plaintiff, who had no idea a cause of action had "accrued" in the traditional sense, outweighs the increased difficulty of proof caused by "tolling" the statute.[160] I call this a more aggressive use of balancing because it introduces a new principle to the statute of limitations — a principle not suggested in any way by the statutory language. The court was not invited to balance by a statute that spoke of "factors" or "elements."

In addition, courts sometimes use the balancing test to *implement* statutes as well as to interpret them. That is, legislatures have sometimes demanded that courts balance interests or factors in reaching their decisions. Something of this mandate is evident in the New York child support statute noted previously, and many other statutes of this type exist at both the federal and state levels.

A particularly interesting example in federal law comes from criminal sentencing. Congress has listed the factors a judge must weigh in determining sentences for persons convicted of federal crimes: the nature and circumstances of the offense, the history and characteristics of the defendant, the need for the sentence imposed, the kinds of sentences available, and the need to avoid unwarranted sentencing disparities among defendants with similar records.[161] The statute explicitly directs judges to consult this list when determining the amount of fines to be imposed,[162] the possibility, length, conditions, and revocation of probation,[163] the imposition and length of imprisonment[164] and supervised release,[165] and whether to impose sentences concurrently or consecutively.[166]

Statutes also direct federal courts to examine a list of factors in setting damage awards against creditors, bill collectors, and others who violate consumer credit protection laws,[167] and in setting penalties against those who violate the Clean Air Act requirements.[168] Federal courts must also consider a list of statutory factors to determine what remedy shall be available against violators of the Interstate Land Sales Full Disclosure Act,[169] and to determine whether to punish an alien who has failed to leave the country after a deportation order.[170] In short, a wild mix of federal statutes requires judges to balance.

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[159] Rozny v. Marnul, 43 Ill. 2d 54, 70, 250 N.E.2d 656, 664 (1969); Knox College v. Celotex Corp., 85 Ill. App. 3d 714, 717, 407 N.E. 2d 176, 179 (1980).

[160] *Rozny*, 43 Ill. 2d at 70, 250 N.E.2d at 664; *Knox College*, 85 Ill. App. 3d at 717, 407 N.E.2d at 179.

[161] 18 U.S.C. § 3553(a) (1982).

[162] *Id.* § 3572(a) (referring to the factors of § 3553(a) and adding seven others).

[163] *Id.* § 3562(a) (possibility and length of probation); *id.* § 3563(b) (additional conditions of probation); *id.* § 3564(c) (early termination of probation); *id.* § 3565(a) (revocation of probation).

[164] *Id.* § 3582(a).

[165] *Id.* § 3583(c) (using selected factors from the list at 18 U.S.C. § 3553(a)).

[166] *Id.* § 3584(b).

[167] 15 U.S.C. §§ 1640(a), 1691(b), 1692k(b), 1693m(b) (1982).

[168] 42 U.S.C. § 7413(b) (1982).

[169] 15 U.S.C. § 15-1709(a) (1982).

[170] 8 U.S.C. § 1252(3) (1982). Other examples of statutes which direct courts to balance factors include: 10 U.S.C. § 906a(c) (1985) (list of factors in determining whether person convicted of

Many state statutes follow a similar pattern. In Illinois family law, for example, a statute directs the judge to divide a divorcing couple's property after "considering all relevant factors, including . . . the duration of the marriage, . . . any obligations and rights arising from a prior marriage of either party, . . . the age, health, station and needs of each of the parties" and eight other factors, none of which by itself is determinative.[171] A related statute mandates the analysis of six factors for setting the level of maintenance payments,[172] and five factors for setting the level of child support payments.[173] A list of factors is also used to determine the custody of minor children.[174] Illinois courts are also directed to consider sets of enumerated factors, and thus invited to balance, in a miscellany of other statutory areas, for example, in setting the level of damages for violations of the state's "Electronic Fund Transfer Transmission Facility Act,"[175] setting boundaries for public library districts,[176] and deciding whether to permit a minor's name change.[177]

Statutes direct California judges to consider sets of enumerated factors, and thus invite the courts to balance, when determining the proper level of child support payments,[178] and whether to order premarital counseling for minors who wish to marry.[179] California judges are further directed to consider groups of factors, and are thus invited to balance, in order to determine whether to appoint an attorney to represent an indigent client,[180] whether to order a judgment debtor to assign to his or her creditor the debtor's rights to certain future payments,[181] and whether to order a partition of real or personal property among co-tenants.[182] Similarly, Texas courts are directed to consider statutory lists of factors, and thus invited to balance, in order to determine the level of child support payments,[183] and to decide whether a particular item constitutes "drug paraphernalia" under the Texas Controlled Substances Act.[184]

It should be clear that state legislatures, like Congress, have been quite willing to direct their courts to balance "interests" or "factors" in making their decisions. It is not

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espionage in military tribunal shall be sentenced to death); F.R. CIV. P. RULE 19(b) (four factors in determining whether case should be dismissed for inability to join an indispensible party). It is worth noting that Congress has, with great frequency, also directed administrative agencies to balance or weigh a series of specified factors in reaching their decisions. A recent computer survey of the United States Code revealed approximately 300 instances of this sort of statutory mandate (Westlaw search of U.S. Code for "consider /p factor;" March 1987). Given this practice, it is perhaps a small step to direct federal judges to engage in the same sort of inquiry.

[171] ILL. REV. STAT. ch. 40, para. 503(c)(1)–(10) (1985).

[172] *Id.* ch. 40, para. 504.

[173] *Id.* ch. 40, para. 505.

[174] *Id.* ch. 40, para. 602, 602.1. Similar divorce laws can be found in other states. The Illinois provisions, like many other states', are derived from the Uniform Marriage and Divorce Act. *See* 9A U.L.A. 147 (1987). Because that Act uses this "analysis of factors" approach, its adoption in several states — Arizona, Colorado, Illinois, Kentucky, Minnesota, Missouri, Montana, and Washington — has extended the analysis to those states.

[175] ILL. REV. STAT. ch. 17, para. 1354(b) (1985).

[176] *Id.* ch. 81, para. 1002-12 (1985).

[177] *Id.* ch. 96, para. 1 (1985).

[178] CAL. CIV. CODE § 356 (West 1985).

[179] *Id.* § 4101.

[180] CAL. CIV. PROC. CODE § 285.4 (West 1985).

[181] *Id.* § 708.510.

[182] *Id.* § 872.710.

[183] TEX. FAM. CODE ANN. § 14.05 (Vernon 1985).

[184] TEX. REV. CIV. STAT. ANN. art. 4476-15 (Vernon 1985).

surprising, therefore, in the face of such statutory mandates, when courts begin to speak of these issues as involving a "balancing test."

Finally, courts have used the balancing test as a method of common law adjudication. We have already seen that federal courts apply a balancing test in deciding whether to grant a motion to dismiss based on a *forum non conveniens* claim. In such cases the court interprets no authoritative text, constitutional or statutory, by way of the test. Rather, the court uses the test to resolve an issue for which no statute provides guidance. Lower federal courts regularly apply the test in *forum non conveniens* practice and recently, in a well-publicized instance, the U.S. District Court for the Southern District of New York dismissed the Bhopal disaster litigation in favor of an Indian forum by invoking a balancing test.[185]

State courts seem to have surpassed the federal courts in their use of the balancing test in non-statutory areas. Not only do state judges balance in *forum non conveniens* cases,[186] but they balance in order to determine rights of access to public documents when no freedom of information act or similar statute is available,[187] whether a product is unreasonably dangerous and therefore subject to strict liability rules,[188] and whether there exists, in a particular case, a duty to warn about product hazards.[189] State courts have also invoked the test in cases where a statute is involved but does not directly answer the relevant question, as in deciding whether a zoning variance was properly granted or withheld.[190]

With literally thousands of balancing test cases spread throughout the federal and state reporters, this review cannot hope to be exhaustive. It does suggest, however, that the balancing test, mainly in result-balancing form, performs many functions in American judicial decision making: as a method of constitutional and statutory interpretation, as a method of analysis required by statute, and as a method of solving common law disputes when no statute is implicated. It is clear that judges, as well as legislatures, have found the test an attractive procedure for addressing a wide variety of legal issues. It is just as clear that this attraction, and the test's growing use, is largely a product of the post-war years.

C. *Why the Test is Popular*

1. A Note on the General Form of Explanation

The growing popularity of the balancing test is explained by a sturdy combination of precedent and modern thought. We begin by giving precedent its due. The imperatives of *stare decisis* encourage the replication of specific verbal formulae and methods of analysis. Even bad ideas are repeated. It should not surprise us then, in principle, that any legal concept grows and becomes popular over time.

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[185] *In re* Union Carbide Corp. Gas Plant Disaster, 634 F. Supp. 842 (S.D.N.Y. 1986).

[186] *See e.g.*, Miller v. United Technologies Corp., 40 Conn. Supp. 457, 515 A.2d 390 (Conn. Super. Ct. 1986); Mills v. Aetna Fire Underwriters Ins. Co., 511 A.2d 8 (D.C. 1986); Brummett v. Wepfer Marine, Inc., 111 Ill. 2d 495, 490 N.E.2d 694 (1986); Broukhim v. Hay, 122 A.D.2d 9, 504 N.Y.S.2d 467 (1986).

[187] Lopez v. Fitzgerald, 76 Ill. 2d 107, 390 N.E.2d 835 (1979); Oberman v. Byrne, 112 Ill. App. 3d 155, 445 N.E.2d 374 (1983).

[188] Rucker v. Norfolk & W. Ry., 77 Ill. 2d 434, 396 N.E.2d 534 (1979).

[189] Kirk v. Michael Reese Hosp. & Medical Center, 136 Ill. App. 3d 945, 483 N.E.2d 906 (1985).

[190] Campus v. Delany, 62 A.D.2d 990, 403 N.Y.S.2d 308 (1978).

The temptation is to skip this most obvious explanation for the growth of a legal technique or doctrine and to begin the explanation in social and historical terms. Commentators are likely, for example, to explain the growth of strict liability in tort or the resurgence of equal protection law as responses to changing economic or social relations.[191] This sort of explanation has its place, but not at the beginning of the analysis. In matters of legal doctrine we are wise to remember that a particular doctrine, or a particular verbal formulation of a rule, becomes popular because judges, one by one (or three by three or nine by nine), *decide to use it*. And the most common reason for that decision is *stare decisis*.

But this explanation, of course, is incomplete. It cannot account for the *first* creative act by which a new formulation is born. Furthermore, *stare decisis* does not explain why these ground-breaking opinions become *precedents*. As we all know, only some opinions are followed in later cases; others are reversed, or distinguished away, or relegated to a slow death of subsequent anonymity. Finally, *stare decisis* can explain only why a rule of law is replicated in cases in the same substantive area where it first appears. It does not explain why such a technique should come to dominate new areas, as the balancing test has done.

The answers to these questions involve the history of legal thought and, loosely speaking, social history. These are, of course, just the sorts of explanations I warned against earlier, but the warning was against moving *too soon* to these explanations. We are safe so long as we remember that they are secondary, that they are best understood as supplements to the primary explanation of *stare decisis*. It is in the further explanation of *that* cause, and in exploring its limits, that these other explanations become important.

2. The Birth of the Test

Currently, courts most commonly justify using the balancing test on the basis of precedent, either in a strict sense — a court finding itself obliged to invoke the test because a higher court has declared it to be the proper method of analysis — or in a weaker sense — a court finding itself persuaded by the analogy of other courts' use of the test in similar cases. Sometimes, however, a court introduces the test without relying on binding precedent or persuasive analogy, and it is on this phenomenon that we focus our attention.

When a court introduces a balancing test without relying on precedent or analogy, it is obviously involved in a creative act: the court creates and applies a method of decision making that did not appear in prior case law. The details of this creative act vary from case to case, but a general pattern does emerge. It involves a very special sort of case analysis.

The court commonly begins by tracing the development of the legal doctrine at issue, reviewing those cases in which the relevant rules and exceptions were first introduced. The court then characterizes that doctrinal development as a *process*, and more specifically, a process aimed at the balancing of competing social interests. The court does so even if the prior judges did not characterize their own work in this way. The *Barenblatt* case provides a good example.[192] There the Court reviewed prior cases and

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[191] *See, e.g.*, H. ABRAHAM, FREEDOM AND THE COURT 328–402 (4th ed. 1982); R. HARRIS, THE QUEST FOR EQUALITY 130–58 (1960); Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 382–85 (1951).

[192] Barenblatt v. United States, 360 U.S. 109 (1959).

concluded that, "[w]here First Amendment rights are asserted to bar governmental interrogation resolution of the issue *always* involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown."[193] The Court reached this conclusion even though not all of the prior cases explicitly used balancing language.

This is a special method of case analysis. Normally, when a court reviews prior cases, its project is to tease out the holdings of those prior cases and to reconcile them — in other words, to generate rules in traditional ways. The balance-creating court is engaged in a different project. When it reviews prior cases, it is engaged in *commentary*. The court steps back, as it were, to *recharacterize* the work of past judges, and to see that work in a new light.

There is nothing wrong with commentary, *per se*, but the creation of a balancing test elevates this commentary into a *working rule of law*. "In the past," the court might say, "we have really been balancing interests. In the future we will do so explicitly."[194] The court thus transforms an interesting suggestion about the nature of doctrinal development into doctrine itself.

This transformational step is problematic. It is one thing to describe a process; it is quite another to make that description a part of the process itself. Statements made *about* a process differ logically from statements made *in* a process. The distinction is important, and is relevant to a great many areas outside the law. In formal logic, for example, we are careful to distinguish comments or theories about the nature or limits of logical systems generally from the statements found in actual arguments or proofs. The difference is between metalogic and logic. In the philosophy of language we are careful to distinguish between statements made *about* language, the kind of statements made by writers as diverse as Chomsky, Tarski, and Wittgenstein, from statements made *in* a language, such as "please pass the salt." The distinction is between metalanguage and language. The two classes of statements differ logically because they are derived and justified on different grounds. They are proved true or false, proper or improper, valid or invalid, with reference to different sets of criteria for truth, propriety, and validity.[195] Because these statements stand on a different logical footing, the movement from one type of statement to the other requires a *transformation* from one way of speaking to another. Much more will be said about this transformation,[196] but for now, it is enough to note its existence and the issue it generates: creating the balancing test involves both a descriptive aspect ("In the past, courts have really been balancing interests"), and a prescriptive or operational aspect ("In the future we will explicitly balance interests"). The second statement does not follow from the first.

Not all courts that create balancing tests are so explicit in their reasoning. Some courts simply claim, without explanation, that balancing is appropriate for the case at hand.[197] In such a case it is risky to speculate about what convinced the court to create

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[193] *Id.* at 126 (emphasis added).

[194] *Cf. id.* at 127 ("In light of these [balancing] principles we now consider petitioner's First Amendment claims.").

[195] *Accord* Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955) (drawing distinction "between justifying a practice and justifying a particular action falling under it").

[196] *See infra* text accompanying notes 235–65.

[197] *See, e.g.*, American Communications Ass'n v. Douds, 339 U.S. 382, 399 (1950) ("When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgement of speech, the duty of the courts is to determine which

the test, though it is fair to suppose that (1) the court relied on other balancing test cases without referring to them; (2) the court relied on its own unstated analysis of past cases and determined that they really involve a balance of interests; or (3) the court relied on some other more general notion about the nature of judging. If the first or second explanation is right, silence on this point is simply a matter of judicial truancy, or perhaps incompetence. Judges must make clear the basis of their decisions. It seems clear from some of these "silent" cases, however, that the third explanation is right: that the court had in mind a *general description of judging* — that all judging involves balancing — and transformed that general description into an explicit method for deciding the case at hand.[198] The point may have seemed so obvious to the court that further explanation seemed unnecessary.

3. Why Now

The concepts of balancing and judging have been intertwined for thousands of years. The ancient Egyptians seem to have been the first to make the connection, and they were followed in their insight by the Greeks and the Romans.[199] Greek goddesses Themis and Dyke, and the Roman goddess Justicia, all seem to have carried scales.[200] Indeed, the use of a balance is a most attractive metaphor for judging. It is a bit of a puzzle, then, why judges waited so long — until the middle of this century — to flesh out the metaphor and make balancing an explicit means of deciding cases.

The creation and use of a balancing test, however, simply would not have been possible in earlier times. The test presumes that one may properly characterize the development of a line of cases, or the work of the courts generally, as involving a judicial calculus of interests. That is, the *descriptive* claim involved in the test's creation must be accepted as true, or at least unobjectionable, before a judge can transform that description into a working rule of law. Here lay the initial hurdle. It was not until the twentieth century that judging was conceived, as a matter of *legal theory*, to involve the balance of competing interests.

Earlier thinking did not permit such a view of the law or the judge's work. For American legal thought, Blackstone provides a good starting place. His *Commentaries on the Laws of England*, and the vision of law upon which that work is based, stands as a suitable icon for eighteenth century legal thought, and is especially pertinent here

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of these two conflicting interests demands the greater protection under the particular circumstances presented." (no case citations)); Rozny v. Marnul, 43 Ill. 2d 54, 70, 250 N.E.2d 656, 664 (1969) (balancing introduced without citation to past cases).

[198] Certainly many scholars believe that all judging involves balancing. *See, e.g.*, Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 624 (1982) ("Once it is acknowledged that the free speech interest must give way in [some situations] to a competing social interest, acceptance of at least *some* form of balancing process is established.") (emphasis in original); Henkin, *supra* note 12, at 1024 ("Exercise of judgment, including some balancing of underlying values and interests, pervades all constitutional interpretation . . . ."); Benditt, *Law and the Balancing of Interests*, 3 SOC. THEORY & PRAC. 321, 336 (1975) ("every situation calling for a decision will involve competing interests which can be weighed;" also argues that balance of such interests need not be determinative).

[199] Resnick, *Managerial Judges*, 96 HARV. L. REV. 374, 446 (1982).

[200] *Id.* at 446–48. *See also* Daube, *The Scales of Justice*, 63 JURID. REV. 109, 113–17 (1951) (Professor Daube, however, claims that the scales were not original equipment, but a later addition to Justicia's wardrobe).

because the American "reception" of English common law and English jurisprudence largely represents a reception of Blackstone.[201] Blackstone, and thus many early American thinkers, were proponents of natural law. They viewed law as composed of principles founded on practice and reason, principles more or less unchanging over time. The judge's role, in this view, was to discover those principles and apply them to the case at bar. Judicial decisions were not the law, but only *evidence* of the law, whose existence inhered in the principles themselves.[202] Judges discovered the law, mainly by examining ancient precedent, and such discovery emphatically did not involve weighing the social interests, or any other interests, propounded by the litigants. There was in fact no established vocabulary for this approach, literally no way to think in these terms. It is thus doubtful whether Blackstone, or any other thinker of that period, would concede, even at the highest level of abstraction, that judges were involved in the business of weighing individual or social interests.[203]

This way of thinking about the law and legal process sustained American jurisprudence for most of the nineteenth century. But new legal theories developed, and with them new theories about the proper role of judges. It distorts history only a little to say that Roscoe Pound is responsible for the balancing test. He argued with considerable success for an instrumental view of law — law whose whole *point* was to compromise competing social interests.[204] It follows, on such a view, that the judge's work must involve the balance of competing social interests, whether the judge knows it or not.

Other thinkers, of course, were involved, from Jhering in Germany to Corbin and Llewellyn in the United States.[205] Justices Holmes and Cardozo also played a role, as did judges Frank and Traynor in later years.[206] Although these judges and scholars shared no single view of the nature of law,[207] they shared a strong belief about what the law was not: it was not the static collection of rules and principles suggested by the natural law theorists. The law, rather, was a *process* (the details of which varied by writer), whose

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[201] Martin Golding points out that "an examination of [case] reports from 1787 to 1890 shows Blackstone to be the most cited writer in the various courts of the United States." Golding, *Jurisprudence and Legal Philosophy in Twentieth-Century America — Major Themes and Developments*, 36 J. LEGAL EDUC. 441, 442 (1986).

[202] This is, of course, a terribly rough sketch of Blackstone's thought and natural law. For more details the reader is directed to Blackstone himself. 1 COMMENTARIES ON THE LAWS OF ENGLAND 63–74 (1st ed. 1765–1769).

[203] *Cf.* Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95 (1986).

[204] *See, e.g.*, Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1 (1943); Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

[205] R. VON JHERING, DER ZWECK IM RECHT (1877) (English translation: IHERING, LAW AS A MEANS TO AN END (Husik trans. 1913)) (influenced Pound in his jurisprudential work). *See* Gilmore, *The Storrs Lectures: The Age of Anxiety*, 84 YALE L.J. 1022, 1034–35 (1975) (discussing Corbin's role in the changing intellectual climate of American jurisprudence). *See also* K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960).

[206] B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); O. W. HOLMES, THE COMMON LAW (1963); Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897). J. FRANK, COURTS ON TRIAL (1949); Traynor, *Badlands in an Appellate Judge's Realm of Reason*, 7 UTAH L. REV. 157 (1960).

These are only some famous names. We might rightly update the list by appending to it the *Association of American Law Schools, Directory of Law Teachers* (1986). I imagine that very few in that book would be offended by the claim that the law is rightly viewed in terms of its social functions.

[207] Justice Cardozo, for example, was highly critical of some major tenets of realist thinking. *See* CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 124–28 (1921).

ends lay outside the law itself. Rules and principles were the tools — the means, not the ends.[208]

Such a view, whether labeled instrumentalist, realistic or sociological, invites a new way of thinking about the work of judges. If law is a process, then judges are not so much *keepers* of the law — or its "depositories," as Blackstone described them[209] — but active participants in the law-making process. Dean Pound's special contribution was characterizing the legal process as the compromise of competing social interests.[210] The judge's role was thus to compromise or balance those interests. This sort of talk, upon which the balancing test depends, was inconceivable, or at least lay outside the range of polite jurisprudence, before the turn of the twentieth century.

Why, then, the delay? Once the description of judging in balance-of-interest terms became acceptable, it would have been perfectly natural to turn that description of judging into an operational procedure. Yet decades passed before judges began to create balancing tests in their written opinions. Why did the test not spring up immediately after its philosophical foundations were laid? The answer is simple. It is one thing to deliver a lecture or to write a law review article suggesting a new line of thought; it is quite another for judges, in their daily work, to take it seriously. When these ideas were first proposed, they were controversial and dangerous — the work of scholars and theoretically-minded judges.[211] The natural law tradition died hard, and it took about forty years for the legal revolution to wind its way from the academy to the bench, just about the time it took for its proponents to teach enough of their own students (who later became judges) that the bench is daily concerned with the compromise of social interests.[212]

Once the theoretical foundations were laid in the first half of the century, building commenced in the second. But few could have expected the boom, the jurisprudential Levittown, that followed. There were good reasons for reticence, good reasons for a judge to balk at explicitly balancing interests. For example, even if I agree with Duncan Kennedy that my major function as a law professor is to indoctrinate my students into

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[208] *See generally* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1780–1860 (1977) (arguing that instrumentalism was also the order of an earlier day).

[209] 1 W. Blackstone, COMMENTARIES *69.

[210] Dean Pound's article, *A Survey of Social Interests*, 57 HARV. L. REV. 1 (1943), is an unofficial handbook for balancing analysis.

[211] *See* Gilmore, *supra* note 205, at 1034.

[212] I borrow rather heavily, and rather obviously, in this explanation from the ideas of Thomas Kuhn. T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 144–59 (2d ed. enlarged 1970). Professor Kuhn explains scientific revolutions, what he calls "paradigm changes," in part as the result of shifting professional alliances:

> At the start a new candidate for paradigm may have few supporters, and on occasions the supporters' motives may be suspect. Nevertheless, if they are competent, they will improve it, explore its possibilities, and show what it would be like to belong to the community guided by it. And as that goes on, if the paradigm is one destined to win its fight, the number and strength of the persuasive arguments in its favor will increase. More scientists will then be converted, and the exploration of the new paradigm will go on. Gradually the number of experiments, instruments, articles, and books based upon the paradigm will multiply. Still more men, convinced of the new view's fruitfulness, will adopt the new mode of practicing normal science, until at last only a few elderly hold-outs remain.

Id. at 159. The lesson for us is pretty clear. The social interest view of law over time has captured the majority of legal thinkers. Only a few fuddy-duddy theorists remain.

a particular way of thinking about the world, to socialize them in a way that will permit them to operate efficiently and quietly in a corporate legal practice,[213] and even if I support that goal, I might still believe that the indoctrination would be less effective if made explicit, my performance less successful if its purpose were exposed. For tactical reasons I might choose indirection. Similarly, even a judge who is convinced that her work "really" involves the compromise of competing social claims might still believe that in the doing, in deciding cases that come before her, the better approach is to handle them on traditional, doctrinal terms. She might fear, for example, that a direct application of balancing would expose her to criticism as an "activist" judge, one who seeks to *make* law rather than simply to apply it, thereby usurping the legislative prerogative.[214]

What seems to have brought balancing out of the closet and into the hard light of day was the judicial desire for candor, the simple drive to tell the truth about judging, regardless of cost. The juridical revolution of the early twentieth century upset a lot of assumptions. One was the notion that rule-based opinions accurately reported how judges decided cases. Some of the most serious attacks were fueled by the work of psychologists, who appeared to demonstrate that deep and intransigent psychological forces determine an individual's actions. There appeared to be no reason to exempt judges from this observation.[215] If the opinions of judges did not report these forces, they hid part of the truth. About the same time, political scientists began to show that a judge's social status, and, more generally, her social values, shaped her decisions.[216] If her opinions did not report these factors, they hid part of the truth. Even sitting judges began to admit that decisions were sometimes affected by the judge's world view.[217] If the opinion did not report that influence, it hid part of the truth. The twentieth century had driven a wedge between making the decision and writing the opinion, and the scholars were content to drive it deeper. By mid-century, opinions had become something of a jurisprudential

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[213] Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982) (especially at 602–08).

[214] Balancing interests, as we noted before, has a legislative cast, and its public appearance in a judicial opinion is often thought inappropriate. Mark Tushnet brings the point out nicely in a recent article:

> A ritual is enacted whenever a nominee for a federal judgeship appears before the Senate Judiciary Committee as part of the confirmation process. One Senator will ask, "Do you intend to apply the law rather than make it?" . . . Nominees, some of whom ought to know better, play their part in the ritual by answering "Yes".

Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 781 (1983). They do so, in part, as Professor Tushnet points out, to pay homage to the notion of "neutral principles," to the idea that judicial decisions should be grounded on broad principles rather than on a particular judge's view of a particular case. *Id.* at 782.

[215] *See* J. FRANK, COURTS ON TRIAL 157–64 (1963).

[216] *See* Schubert, *From Public Law to Judicial Behavior*, in JUDICIAL DECISION-MAKING 1–8 (G. Schubert ed., 1963) (describing the new approaches of political scientists); B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 174–75 (1921) ("The spirit of the age, as it is revealed to each of us, is too often only the spirit of the group in which the accidents of birth or education or occupation or fellowship have given us a place. No effort or revolution of the mind will overthrow utterly and at all times the empire of these subconscious loyalties.").

[217] *See, e.g.*, B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 171 (1921). Justice Cardozo quoted, as "nearer the truth" regarding the importance of world views in judicial decision making, the words of President Franklin D. Roosevelt: "The decision of the courts on economic and social questions depend upon their economic and social philosophy." *Id.*

laughing-stock: clumsy, ex-post-facto rationalizations of decisions made on quite different, and perhaps disreputable, grounds.[218]

Reactions varied. The practical response was simply to ignore the phenomenon. Most lawyers and judges continued to argue cases and write opinions as if none of these issues had been raised, and rightly or wrongly the studied ignorance continues to this day.[219] Scholars, however, who had happily relieved themselves from the pressure of clients and cases, took the new learning more seriously. If opinions were in fact distorted reports of the decision, what could be done about the practice of opinion-writing? One canny group of thinkers tried to salvage the traditional forms of opinion-writing with the following argument: the opinion's purpose never had been to *report* the decisional process, but rather to *justify* the decision rendered. Thus, although the opinion may fail as a *report* of the decision making process, it succeeds well enough as a *justification* for the decision. The act of writing an opinion should be preserved because it serves as a check on judicial discretion by forcing judges to cast their decisions, however taken, in logical form.[220] By shifting the function of opinion-writing from report to justification, its legitimacy can be saved; we simply judge it on different grounds.

Others have been less optimistic. Once it is granted that the opinion is only tangentially related to the decision it reports, the opinion becomes a pretense, and *worse* than nothing because it misleads. Better that the judge simply give the decision and fall silent, rather than speak further and become involved in lies.[221]

One can view the balancing test as another attempt to restore the alignment between the reported opinion and the decision making process. If the rule-based opinion distorts the real decision process, one must *change how the opinion is written*. Although one can never describe with certainty the psychological and sociological imponderables that determine the judicial decision, perhaps it is close enough to the truth to confess that judges balance the interests of the parties before them. And if they do so openly, *on the face of the opinion*, one has restored, at least in part, the reportorial integrity of opinion-writing. Justice Holmes, for one, thought this sort of candor a matter of duty: "I think that the judges themselves 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

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[218] *See* F. COHEN, ETHICAL SYSTEMS AND LEGAL IDEALS 237 (1959) ("'Realistic jurisprudence' has sprung in great measure from the recognition that principles enunciated by courts as grounds of decision often represent nothing more objective than a resolution to use sanctified words wherever specified results are dictated by undisclosed determinants.").

[219] *Cf.* Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 565 (1983) ("The modern lawyer may wish to keep his formalism while avoiding objectivist assumptions. He may feel happy to switch from talk about interest group politics in a legislative setting to invocations of impersonal purpose, policy, and principle in an adjudicative or professional one.").

[220] *See* R. WASSERSTROM, THE JUDICIAL DECISION 12–38 (1961). Whether this is a meaningful check, that is, whether the requirement of writing a rule-based opinion actually precludes any decision based on other grounds is, of course, open to debate. *See* Lasky, *supra* note 20, at 834 ("It is a poor judge indeed who cannot write an opinion persuasive on its face; he need merely stand mute about principles that lead to an undesired conclusion and invoke a body of law that logically leads to a different one.").

[221] *Cf.* Lasky, *supra* note 20, at 844 (discussing growing trend of opinions that breed "suspicion that judicial opinions are masks to hide rather than lamps to disclose the operation of the judicial mind.").

ground and foundation of judgments inarticulate."[222] Judge Jerome Frank, for another, saw this candor as a matter of emotional maturity: "Cardozo [who let the cat out of the bag in *The Nature of the Judicial Process*], it would seem, has reached adult emotional stature. Unlike some of the other thinkers we have discussed, he is able to contemplate without fear a public which shall know what he knows."[223] More and more judges, it appears, have matured sufficiently to heed the moral call.

I have, of course, dramatized the story of jurisprudential angst. But it is clear from the cases that many courts use the balancing test in a confessional spirit. One finds in these opinions a sense of relief that finally the truth of judicial decision making can be told.[224] And this drive for candor, along with the doctrine of *stare decisis*, has spread the balancing test from area to area with remarkable speed.[225]

III. Evaluating the Test

A. *The Virtues of Balancing*

There are several reasons to suppose that the balancing test represents an advance in American jurisprudence. We will examine those reasons with some care before examining the contrary arguments. Although I conclude that the test is pernicious, that conclusion requires a careful defense in light of the test's virtues. It might be said, with some justification, that the balancing test is simple, descriptive, and just.

1. The Test is Simple

There is much to be said in praise of parsimony. It is a valuable sentiment to prefer the simple over the complex, and the sentiment has special virtue in the practice of judging. A simple opinion is clearer and more accessible to its readers. A simple opinion may be less prone to error: a court is forced to clear away the clutter of extraneous detail that might lead it and others astray. Reducing the whole of legal argument to a

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[222] Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 467 (1897).

[223] J. Frank, Law and the Modern Mind 237 (1930).

[224] *E.g.*, Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). Regarding dormant commerce clause cases, the Court observed, "[o]ccasionally the Court has candidly undertaken a balancing approach in resolving these issues, but more frequently it has spoken in terms of 'direct' and 'indirect' effects and burdens." *Id.* (citations omitted).

[225] Professor Aleinikoff tells a similar story in *Constitutional Law in the Age of Balancing*, 96 Yale L.J. 943, 952–63 (1987). We agree that the appearance of interest balancing in judicial opinions depended upon significant changes in legal philosophy, roughly characterized as the change from formalistic/natural law premises to instrumental premises. There are, however, two major points of departure in our analyses.

In part because I date the onslaught of explicit balancing language later than Professor Aleinikoff (he finds that balancing first appeared in the late 1930s and early 1940s, *id.* at 948, and I believe it did not become a force in judicial decision making until the late 1950s and early 1960s), I am under a special obligation to explain the delay, and in this I believe an institutional explanation is in order: it takes time for ideas to move from place to place. *See supra* note 212.

I am also especially concerned with the actual transition from theory to practice: why it was that judges began to translate legal philosophy into the daily work of opinion-writing. It is important to note (as Professor Aleinikoff does) the several calls, political and academic, for a pragmatic, instrumental jurisprudence. But this does not seem to explain enough — a judge might agree that "all judging is balancing" and still resist *writing opinions* in balancing form. Here, it seems to me, the drive for candor forms the crucial link in understanding the transition from theory to practice.

single variable (in this case, the interests involved) is an attractive masterstroke of synthesis.[226] If the balancing test is simpler than traditional legal reasoning, it might for that reason be preferred.

As we have seen, the balancing test involves only three steps — setting the balance, discussing the elements to be weighed, and declaring the winner.[227] Traditional legal reasoning, in contrast, can involve a Byzantine series of interrelated syllogisms. From this perspective, the balancing test looks simple. In practice, however, the test does not simplify those opinions in which it appears, because the balancing test does not replace the whole legal argument, but rather only one part: the resolution of the dispositive issue. The rest of the opinion — the court's judgment of what the dispositive issue is, and the judgment that the issue should be settled by balancing — follows traditional reasoning. For example, when a court balances to determine whether a particular police practice is "unreasonable," it has also determined that (1) the defendant's conviction in the court below can be sustained only if the evidence against him was properly admitted to trial; (2) the evidence was properly admitted to trial only if it was the fruit of a reasonable search and seizure; and (3) whether the search was reasonable is properly determined by balancing. Each step requires resort to traditional legal reasoning. The test's ability to simplify decision making and opinion-writing is limited by the extent to which it replaces traditional legal reasoning, and normally it replaces only a small part.

One may suggest that this still represents at least a small gain in simplicity, but even the hope of a small gain is questionable. We should compare the complexity of the balancing test with the complexity of that part of the argument it commonly replaces. As I noted in Part I, traditional legal reasoning tends to make legal argument turn on definitional questions — whether a document is a "valid will" or whether a sale of stock was "fraudulent" — and the judge's task is to determine whether a particular document or action qualifies as a member of that legally relevant classification.[228] It is not clear that the work involved in balancing interests is any simpler than the definitional or classificatory work it seeks to replace. To pick up on the example from the last paragraph, it is helpful to compare the use of the balancing test to determine whether a particular police practice is "unreasonable" — balancing the state's interest in its citizens' security against the individual's right to privacy — with the work of determining reasonableness in more traditional terms — asking, for example, whether the police had a warrant, and if not, whether any recognized exception to the warrant requirement was available. It should be clear that the rule/exception analysis need be no more complex than the work of balancing. Indeed, some balances can become quite complicated because they require the court to consider a long list of factors, as in *forum non conveniens* cases. The test's claim for simplicity can be sustained in only limited circumstances: when the balancing test constitutes the entire legal argument (or most of it), and when the test itself requires the balance of only a few interests.

In addition, the simple structure of the balancing test hides some very real difficulties in its application. This is especially apparent when the elements to be balanced are interests. Interest balancing requires that the judge decide *which* interests to balance, and the judge has several options. A first choice turns on the generality of the interests to be weighed. A judge might be concerned, for example, about the particular interests

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[226] *See* Luizzi, *supra* note 2, at 376.

[227] *See supra* text accompanying notes 27–57.

[228] *See supra* text accompanying note 25.

of the parties before the court. Will the plaintiff or the defendant be hurt most by the decision? Is one party more sympathetic than the other?[229] In contrast, the judge might *generalize* the interests of the parties, and thus weigh the social interests the parties are deemed to represent. A judge in a negotiable instruments case, for example, might worry about whether the interests of storekeepers outweigh the interests of bankers, rather than whether *this* storekeeper's interests outweigh *this* banker's. At a higher level of abstraction, the judge may be concerned with systemic or societal interests, asking, for example, whether all citizens' interests in the free flow of commerce outweigh the need for security in the banking system.[230] It is at this level of abstraction that a court can weigh the state's interests in the health and safety of its citizens against their collective interest in personal privacy, or weigh the state's interest in having its questions answered against the collective interest in freedom of speech and the right of association.

Once the appropriate level of generality is settled, the court must choose which interests at that level should be recognized and valued, and which should not.[231] In isolating these interests, it is still maddeningly easy to mistake levels of generality — to weigh, for example, a litigant's personal interests in the outcome of the case against broader social interests — with predictable results in favor of the broader social interests.[232] Once a court has determined all the "right" interests, the problem of weighing them against each other presents its own set of theoretical and practical difficulties.[233] Yale Kamisar has summarized some of these concerns regarding the use of balancing in certain fourth amendment cases:

> If one is supposed to "balance" the "competing interests" before deciding whether to apply the exclusionary rule, how does one do so without measuring imponderables or comparing incommensurables? How does one *balance* "privacy" (or "individual liberty" or "personal dignity," or call it what you will) against the interest in suppressing crime (or "law and order" or the "general welfare," or call it what you will)?
>
> How does one "balance" the interests in furthering an important governmental objective "against a constitutional statement that the government may not employ a certain means for the attainment of any of its objectives"? Inasmuch as "privacy" (or "individual liberty") and "efficiency" in the suppression of crime are *different kinds of interests*, how can they be compared

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[229] Although considerations of this sort might be thought inappropriate to the judicial office, the consideration of relative harm to the interests of the actual litigants themselves constitutes the accepted mode of analysis in settling many legal questions, such as whether a temporary restraining order should issue. *See* FED. R. CIV. P. 65(b).

[230] *See generally* Pound, *supra* note 210.

[231] Aleinikoff, *supra* note 12, at 977–79; Luizzi, *supra* note 2, at 391–92; Henkin, *supra* note 12, at 1048; Benditt, *Law and the Balancing of Interests*, 3 SOC. THEORY & PRAC. 331–34 (1975); Llewellyn, *A Realistic Jurisprudence — The Next Step*, 30 COLUM. L. REV. 431 (1930).

[232] It is this sort of mistake that might be attributed to the Supreme Court in *Barenblatt*, 360 U.S. 109 (Court arguably weighed interest in Congressional investigations against defendant's personal interest in not responding to questions). *Cf.* Pepper, Reynolds, Yoder, *and Beyond: Alternatives for the Free Exercise Clause*, 1981 UTAH L. REV. 309, 341–44 (in free exercise clause litigation, "[t]he level of generality at which interests are defined often determines the outcome").

[233] *See* Aleinikoff, *supra* note 12, at 972–76; Luizzi, *supra* note 2, at 391; Benditt, *supra* note 231, at 334–39; Patterson, *Pound's Theory of Social Interests*, in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 558, 570 (P. Sayre ed. 1947).

> quantitatively unless the judge has "some standard independent of both to which they can be referred"?[234]

Both proponents and opponents of balancing have worried about these problems. Whether they render the test unworkable, or less desirable than rule-based reasoning (which has its own set of theoretical and practical difficulties), it is clear that these problems keep the application of balancing tests from being a *simple* procedure.

Does the balancing test, then, have no claim to increased simplicity? It does in at least one respect. If one believes that courts really balance interests when they decide cases, regardless of whether their opinions acknowledge the fact, the balancing test is simple in its directness: a court which uses the test reports directly what it has done rather than engage in the complication, and perhaps duplicity, of "translating" its real decisional grounds — interest balancing — into other grounds — the rule-based syllogism. This argument assumes that the balancing test is a more accurate description of judging than the description suggested by the rule-based syllogism. It is to this assumption that we turn next.

2. The Test is Descriptive

In Part II of this Article I argued that the desire for candor, along with *stare decisis*, do much to explain why judges have adopted the test with such enthusiasm. Candor, however, is a good reason to adopt the balancing test only if (1) balancing is a good description of judging; and (2) candor is appropriate. We will examine these subsidiary claims in order.

a. Is Balancing a Good Description of Judging?

i. The Nature of the Inquiry

Do judges really balance interests when they decide cases? There is some evidence that they do: judges themselves have admitted it both in extrajudicial writings and in the balancing test cases themselves.[235] But this is not enough. This evidence shows (at most) that judges balance interests in *some* cases (and perhaps that some judges balance more often than others), but not that the practice is universal. The creation of the balancing test requires the stronger claim that judges *always* balance interests, whether they say it or not, and whether they know it or not. It is this stronger claim that justifies a court in recharacterizing a line of decisions as one that "really" involves balancing, even though the prior courts did not cast their decisions in those terms. If balancing were "really" only sporadic, the balancing test *introduces* a new method of reasoning rather than *exposing* the method actually used all along. This would be harmful to the

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[234] Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 646 (1983) (citations omitted) (emphasis in original).

[235] *See e.g.*, B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 120 (1921). Justice Cardozo stated: "I will not hesitate in the silence or inadequacy of formal sources, to indicate as the general line of direction for the judge the following: that he ought to shape his judgment of the law in obedience to the same aims which could be those of a legislator who was proposing to himself to regulate the question," by which Cardozo seems to mean weighing social interests.

test, because it takes a great deal of its force from its supposed congruence with the reality of judging.[236]

Obviously, the claim that balancing is a universal practice cannot be grounded in the case reports. If so, we would be forced to conclude that judges balance interests only when they report it in balancing test cases, and not otherwise. Nor can we ground the claim on judges' off-the-bench remarks. Judges have responded in all sorts of ways to the question of what it is they do when they judge. Some claim they are balancing,[237] while others claim they are hunching[238] or applying the rigors of logic,[239] and most think they are doing some things at one time and other things at another.[240] Furthermore, one need not believe any of it: all "first-hand" reports of balancing might be *wrong*. Judges have no monopoly on speculating about the nature of judging. Legal philosophers, political scientists, sociologists, and psychologists all have addressed the question and given answers of dazzling variety,[241] many of them distinctly at odds with judges' accounts of judging. In short, judges who report that they are balancing may actually be doing something quite different, and simply misunderstand the nature of their work.[242] If this seems unlikely, it is no more unlikely than the claim that sustains the balancing test: that balancing in fact goes on all the time and judges mistakenly believe they are doing something else, like applying syllogistic reasoning.

There is obviously something odd about the claim that "judges really balance interests." It looks like a statement of empirical fact, on the same order as the claim that judges eat pastrami sandwiches. But clearly it is not. If it were, we could settle the matter with a straightforward examination of how judges decide cases, or with a survey of how judges *report* that they decide cases. But proponents of balancing need not be dissuaded by the relatively small number of cases in which the process is actually reported, and critics of balancing need not be convinced that balancing occurs even in those cases that report it. Although the claim that "judges really balance interests" takes the form of a statement whose truth can be determined by empirical investigation, it is no such claim at all. Rather, the claim that "judges really balance interests" is philosophical, and must be defended or attacked by philosophical argument.

Labeling the claim "philosophical," or better yet, "conceptual," obviously changes our way of thinking about it. It is important at the outset, however, to see what this label

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[236] We might decide to use the test, of course, even if it were exposed as an innovation in judging rather than simply the product of judicial self-awareness. In that case, however, we would need other grounds to justify the innovation. Some of these grounds are suggested and discussed *infra* in the text accompanying notes 270–74.

[237] *E.g.*, B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 162 (1921); Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 467 (1897).

[238] *E.g.*, Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929).

[239] B. CARDOZO, *supra* note 237, at 31–38 (1921).

[240] *Id.* at 30–31.

[241] *See generally* C. SHELDON, THE AMERICAN JUDICIAL PROCESS: MODELS AND APPROACHES (1974) (surveying some recent social scientific approaches to the understanding of judging).

[242] *See* F. COHEN, ETHICAL SYSTEMS AND LEGAL IDEALS 238 (1959) ("A profound scepticism towards the adequacy of judicial introspection demands a reformulation of principles of judicial conduct, and in this work of reformulation a systematic analysis of the economic and social background, the moral presuppositions, and the psychological habits of thought of judges and other legal officials must play a governing role.").

does *not* entail. To call the claim "conceptual" is not to belittle it. On the contrary, the notion that judges balance interests has had an important influence in American jurisprudence, and, as this Article has attempted to establish, a decisive influence in the way judges actually handle a great many legal cases.[243] Furthermore, to call the claim "conceptual" is not to assert that it is beyond proof, that we can never "know" whether judges balance interests; concepts and conceptual argument can be right or wrong, and settled opinion may exist in conceptual argument as it does in any other field of inquiry. Finally, to call the claim "conceptual" does not mean that we eschew "the real world" in determining whether the claim is true or false. The truth of a conceptual claim depends, at least in part, on how that claim squares with observable facts about the world. In our case, for example, it would make a difference whether judges bitterly deny that they balance interests or unanimously agree to the proposition.

Whether judges "actually balance interests" depends on other related concepts: our beliefs about the general nature of judging, and even more broadly, the general nature of law. To put it bluntly, our willingness to believe that judges balance interests depends on our believing that the law is a process aimed at compromising competing social interests. If so, the statement that judges balance interests follows naturally. If not, the claim begins to look a little odd. It is very difficult, for example, to get from natural law postulates to a description of judging that involves the individual balance of social interests.

In general, therefore, our willingness to accept certain postulates about the true nature of law affects our willingness to accept a balancing account of judging. The former entails, or at least tends to prove, the latter.[244] The claim that "judges really balance interests" forms a *part* of a broader system of legal thought; it both supports and is supported by other concepts regarding the nature of law. In this, the claim that "judges really balance interests" is like a statement from a catechism, a catechism associated with a particular sect of jurisprudence.

I do not propose to settle the question of which general views of law are right and which are wrong. I do not propose to resolve issues that have occupied philosophers for at least two thousand years, and which continue to split scholars into competing camps in the twentieth century. Some views are congenial to balancing, and others are equally uncongenial. For every Pound[245] there is a Fuller;[246] for every Stone[247] there is a Black.[248] And if we do not settle the broader issues once and for all, at least we can understand their relation to the more specific claim of balancing. When a court, in creating a balancing test, claims that prior courts have actually balanced interests even though they do not report having done so, we must understand the claim as involving a statement of faith, the taking of a jurisprudential position.

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[243] *See supra* Part II.

[244] Sometimes, however, the relation is reversed. That is, one may believe that law concerns the compromise of competing social interests based on one's belief, otherwise established, that judges balance interests when they decide cases. The order in which the beliefs are accepted is unimportant. What is important is the relation between the ideas.

[245] *See* Pound, *supra* note 210.

[246] L. FULLER, THE MORALITY OF LAW (1964).

[247] *See, e.g.*, Southern Pac. R.R. v. Arizona, 325 U.S. 761 (1945).

[248] *See, e.g.*, Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 137–69 (1961) (Black, J., dissenting).

ii. The Balance as Metaphor

I have suggested that the claim that judges always balance interests turns on broader jurisprudential issues, and that those broader issues cannot be settled here. This does not mean, however, that we are left with no grounds at all upon which to judge the claim's validity. The validity of the balancing claim depends *only in part* on broader jurisprudential issues. It also depends on the extent to which we can square the picture of balancing with what we do know goes on in deciding cases. In other words, we can ask whether balancing is a good description of judging without having to settle the broader issues.

The picture of balancing does not describe judging as accurately as it first appears. The language of balancing takes many of its cues from the balancing scale, and although it may be natural to suppose that this venerable symbol of justice can be an effective metaphor for judging, our natural supposition is wrong. It is not clear that judges do anything so simple as to set one group of concerns against another, and if they do, it is not clear that they *balance* those concerns.

First, the balancing account of judging is too simple. Sitting judges have provided us with accounts of what they do when they judge.[249] None of them report a process so simple as setting one group of concerns against another. Indeed, most judges speak of a process so complex that it remains even for them something of a mystery; even Cardozo was baffled.[250] Out of the inquiries of philosophers, political scientists, sociologists, psychologists, and even physiologists, a new learning has emerged about judging that ranges from traditional jurisprudence to the physiology of the brain. In light of these developments, it is surely a mistake to believe that judging is so crude a process as placing one set of factors on one side of a balance and a competing set of factors on the other. Even if one is skeptical of the new learning, its very existence suggests a richness in the judging process that the simple picture of balancing fails utterly to capture.

One might reply that this objection to balancing misses the point. Balancing is a *metaphor* for judging, and like all metaphors, it has limits: it is meant to suggest a fruitful way of thinking about judging, not to establish a comprehensive description of judging that takes into account the variegated learning of sociology, psychology, and political science. The relevant choice is not between the metaphor of balancing and a full-blown account of judging, but rather between the picture of judging suggested by the balancing metaphor and the picture of judging suggested by traditional legal reasoning. As between these two pictures, the argument goes, balancing is superior.

The reply has a good deal of force, but it also undermines most of the balancing test's claim to descriptive accuracy. It concedes that balancing may be a poor description of judging; it just maintains that this description is better than another. But why should we settle for yet another inadequate account of judging, and, even if we accept it, why should we transform it into a method of deciding cases?

It turns out that balancing is not just a bad description of judging. It is abysmal, and we may rightly wonder whether it could be better than *anything* else. One way to evaluate the aptness of any metaphor is to check for correspondences between the metaphorical subject — here, judging — and the metaphorical predicate — here, bal-

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[249] *See supra* notes 237–40.

[250] B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 166–67 (1921).

ancing. The more numerous or profound the correspondences, the better the metaphor. Judged on these terms, balancing is a very bad metaphor for judging.

We first examine the metaphorical predicate. There are many sorts of scales, but the one here relevant is the scale constructed with beam arms of equal length, with balance pans suspended from each end of the beam.[251] Though a bit outdated as a method of measurement, the balance scale is used primarily to determine the weight of an object (not, by the way, to determine which of two objects or groups of objects is heavier). The item to be weighed is placed on one of the balance pans and a series of known weights is placed on the other. By trial and error the known weights are added and removed until the beam comes to rest in the horizontal, a determination often aided by a pointer. The weight of the object in question is then ascertained by adding together the values of the known weights in the opposite pan.[252] All of this is obvious, but it is useful to remind ourselves at the outset that the work of weighing an object on such a balance is quite different from the court's work when it hears the arguments of the litigants before it, reads the briefs, decides the outcome of the case and writes an opinion.[253]

How does this correspond with our metaphorical subject? Of course the use of a balance and the process of judging are similar in many ways. Using the balance and deciding a case both involve juxtaposing competing elements: the two objects on the scale and the two litigants in the courtroom. The balance also captures the dichotomous nature of legal judgment. As Professor Daube has pointed out, "[the] symbolism of the scales expresses a deep-rooted tendency to see no shades between black and white, to admit no degrees of right and wrong, to allow no distribution of loss and gain among several litigants, to send a party away either victorious or defeated."[254] In addition, the equal length of the beams of the balance and its rest position in the horizontal suggest equal treatment. They suggest that determining which object is heavier, or which litigant has made the better case, will depend solely on the attributes of the objects or the litigants themselves.

There the similarities end. At the most simplistic level, there are no judging analogues to the balance pans, the pointer, the razor edge, and the balance beam — nothing in the work of judging, or in the minds of judges, that corresponds with the physical features of the balance scale. This is not a trivial point. If we are to select a metaphor for the judging process, and especially if we intend to transform that metaphor into an operative rule of law, we should be careful about what we choose.[255]

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[251] A lengthy but valuable treatment of the scales appears in B. KISCH, SCALES AND WEIGHTS 26–78 (1965). Some of its history can be found in F. SKINNER, WEIGHTS AND MEASURES (1967).

[252] *See* KISCH, *supra* note 251, at 26.

[253] *See* J. WHITE, THE LEGAL IMAGINATION 57–64 (1973).

[254] Daube, *The Scales of Justice*, 63 JURID. REV. 109, 109 (1951).

[255] We might have chosen better. Let me suggest, in this regard, an alternative to the balancing test. It is called the "Soup Test." To apply the test, a court proceeds as follows. Each factor that the court considers in resolving the case is an "ingredient." Ingredients that point to judgment for the plaintiff are sweet. Ingredients that point to judgment for the defendant are bitter. The court then places all of the ingredients in the case, one by one, into a pot of boiling water. The pot is then simmered for three hours and the soup tasted: if it is sweet, judgment will be for the plaintiff; if it is bitter, judgment will be for the defendant.

The Soup Test is a better description of judging than the balancing test. In cooking soup the ingredients are mixed. This is a good reflection of judging, where the elements that go into a decision react with each other in complex ways. The balancing test, on the other hand, arbitrarily

There are more serious failures of correspondence between judging and balancing. The balancing scales operate mechanically; judging does not. The operator of the balance is relegated to the largely administrative tasks of placing the objects on the pans and noting the position of the beam; she has no say in the *outcome* of the balance. Once the beam has come to rest, very little room exists for rational disagreement over the correctness of the results.[256] The metaphor of the balancing scale thus suggests that the judge's duties are essentially administrative; she has no real say in the outcome of the case; the law is as it is, the facts are as they are, and judgment is given accordingly — mechanically and automatically. Once the judgment is rendered, there is little ground for rational disagreement about the outcome.

Although we may debate whether this forms a suitable ideal for judging, it fails miserably as an accurate *description* of judging. There is first no mechanical inevitability to the outcome of a case. Quite to the contrary, the decision is contingent. The decision is, in the relevant sense, *solely* within the discretion of the judge: as she decides the case, so it is decided. The judge is not at all like the balance operator. And once the case is decided, there is room for rational disagreement about whether the outcome was correct. The metaphor of the balance seriously misrepresents the nature of judging.

There is a general way to account for these differences between balancing and judging. What gives the balance scales its mechanical magic, what makes its operation automatic and its results immune from rational disagreement, is gravity. The results of the physical balance are deemed to be reliable (i.e., beyond rational dispute) only because we believe gravity to be constant, unchanging from place to place and from time to time. Without that belief we have no assurance that the balance will be true. Indeed, we are hard-pressed even to *understand* the scales' operation without some underlying conceptions about the nature of gravity and how it works. In judging there is no gravity, no constant force that acts on the "mass" of the litigants' arguments to determine which is more weighty or more deserving of victory, no force that we believe is changeless from place to place and from time to time. Consequently, judicial decisions are contingent, they can "go either way," and rational disagreement is possible about the correctness of any decision.

The problem is serious. The concept of gravity is *crucial* to the concept of balancing. Without it, we cannot make sense of the physical balance: we cannot understand why it works or why it is reliable. Unless an analogue to gravity can be found in the practice of judging, we cannot make sense of the claim that judges "balance" anything at all.

We might attempt to save the metaphor by constructing a judicial analogue to gravity. We call it the judge's "world view," her ordering of values both social and legal, her

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segregates pro-plaintiff and pro-defendant elements, and does not account for the fact that these elements may have a bearing on one another. Second, in cooking soup, the ingredients are allowed to simmer. This represents the time the court "mulls over" the case. The balancing test, if it really does work like a balance, works too quickly: the items are placed on the scales and the answer is known immediately. Real judgments rarely come so fast; in fact, judges sometimes speak of "stewing" over their decisions. As for physical correspondences, I suggest that a bubbling caldron of soup is closer to the picture we have of the brain than the picture represented by the scales.

[256] It is of course possible to question the integrity of the mechanism, but this sort of complaint can be settled by reference to standard procedures for assuring that the balance is true. (If it could not, then the whole procedure of weighing objects on a balancing scale becomes nonsense.) There may also be close cases in which it is hard to determine which way the beam is tilting. But the existence of close cases does not undercut the general observation that the results are unassailable.

beliefs about what is important and what is not. This is the force, we might say, that "acts upon" the arguments and interests in the case at hand and gives them different weights. This is the force that determines which arguments or interests are the weightier and determines the outcome of the case. But even this is not quite right. Unlike gravity, a judge's world view is personal; it can change from time to time and certainly from judge to judge.[257]

Although the scales are an ancient symbol for justice, using the scales is not at all like the practice of judging. The metaphor is not apt; it misleads us in important ways about the nature of the judicial process. If we were to evaluate the symbol of the scales by its usefulness as a metaphor for the judicial process, we would be forced to conclude that Justicia's carriage of the scales is an unfortunate accident of history.[258]

This obviously weakens the claim that judges really balance interests when they decide cases. It is not clear that they "balance" anything at all.[259] It appears that we can salvage this way of speaking about judging only if we refuse to take the metaphor seriously, only if we retreat to the position that the word "balance" serves merely as a synonym for "consider" or "take into account." When we say that judges "really balance interests," we mean only that judges consider or take into account the various interests of the parties and make their judgments accordingly.

Even this claim is problematic. It still implies universal practice. Indeed it must, or else a judge is not justified, at least for reasons of candor, in recharacterizing an old line of cases as one that "really" involves the consideration of competing social interests. It is true that judges sometimes consider the social interest claims of the parties before them,[260] but it is also true that they report considering other matters as well. Without putting too fine a point on it, many judges report that they consider the strength of the parties' legal arguments: whether the litigants have stated rules which the cases or the statute books support, and whether they have applied those rules in a logical way.[261] If we take these reports at face value, judges clearly do more than consider social interest claims, and the proposition that they actually do nothing but balance substantially distorts the work of judging.

A proponent of balancing might handle this contrary evidence in one of two ways. First, he or she may claim that judges are simply deluded when they report anything other than the consideration of social interests. There is some precedent for this attitude. Some commentators, especially from the social sciences, seem to take the position that judges in fact know almost nothing about what they are doing when they judge, and

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[257] The soup-making metaphor, on the other hand, avoids these disturbing failures of correspondence. Just as the judge in a law case plays an active role in the final judgment, so the cook plays an active role in the final judgment of whether the soup is sweet or bitter. Just as a legal judgment is subject to rational disagreement about whether it is right, a cook's determination on the taste of the soup is subject to rational disagreement. The general superiority of the soup cooking metaphor, of course, lies in this: we recognize that "tastes" vary; they are personal to the cook and can vary from time to time and from cook to cook. "Taste," in this sense, is much more like the judge's world view, which also can vary from time to time and from judge to judge. Gravity, upon which the balancing metaphor relies, does not vary, and so leads us to the wrong conclusions about the nature of judging.

[258] We might have been better advised (and certainly better served) to have imagined her with a spoon in one hand a kettle of soup in the other.

[259] It is much more likely, in fact, that they're cooking soup.

[260] *See* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

[261] That is what occurs in almost every reported opinion.

that their introspective reports should be handled with something like paternal condescension.[262] No serious proponent of balancing, however, seems to have taken this approach. Proponents more commonly claim that the consideration of interests does go on, but at a highly abstract level: *in essence*, judges balance these interests, no matter what form of mechanical reasoning they employ. The claim is thus derived from propositions about the general nature of law: because the law itself involves the compromise of competing social interests, the judge (who applies the law) must be involved in that same process of compromise.[263]

We now take stock of the original claim that "judges really balance interests." The claim is true, or at least defensible, only if we confine its meaning to the proposition that at some abstract level of analysis, judges consider social interests in making their decisions. Step by step we have had to weaken the claim because very little empirical evidence exists to support it. Although there are some similarities between judging and balancing,[264] the metaphor simply does not square very well with what we do know, and what judges report, about the process of judicial decision making.[265]

So weakened, the claim that "judges really balance interests" does not justify the creation of balancing *tests*. To see why, we recall that candor drives this part of the argument: judges, the proponent of balancing asserts, are really balancing social interests when they decide cases, and candor requires that they report openly what they are doing. The argument has a great deal of force if judges in fact *consciously* balance interests and report something else. That would be duplicitous. But if judges "balance interests" only in an abstract sense, by virtue of their general role in the scheme of lawmaking, there is no duplicity when they report the consideration of traditional legal arguments. Duplicity can exist only when there are *inconsistent* explanations for an actor's behavior: that which the actor reports, on the one hand, and that which the critic claims is the true explanation, on the other; candor may then be urged to support the report of the true explanation. But here, the balancing claim is so abstract that it is no longer inconsistent with the description of judging provided by the judges themselves. It can be true *both* that judges balance interests (in the abstract sense) and that they consider the strength of the parties' legal arguments (in an operational sense). If both can be true, then candor furnishes no reason to support one explanation over the other. In short, there is nothing for candor to correct.

b. Is Candor Appropriate?

Even if there were something to be "candid" about, candor may not be appropriate. Suppose that a proponent of balancing could show that judges sometimes balance interests in the stronger, operational sense of the phrase. That is, suppose the balancing proponent could show that judges sometimes consciously consider the social interest

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[262] *See* C. SHELDON, THE AMERICAN JUDICIAL PROCESS: MODELS AND APPROACHES (1974); F. COHEN, ETHICAL SYSTEMS AND LEGAL IDEALS 238 (1959).

[263] *See* Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 467 (1897).

[264] *See supra* note 254 and accompanying text.

[265] This means that support for the claim does in fact lie almost wholly in the philosophy of law. Its truth will depend on the truth of related philosophical concepts about the nature of judging and the nature of law. This observation does not necessarily discredit the claim that "judges balance interests — it *may* be a true statement in the philosophy of law — but it does destroy the claim's usefulness as a reason for creating a balancing test. *See* the following text.

claims of the parties, but fail to report it. These are at least the *sorts* of cases in which candor could be urged as a reason for different reporting. But candor is not necessarily a good reason. On the contrary, there are good reasons to believe that judges should *not* "tell the truth" in writing opinions.

Judges may write their opinions for many audiences: the parties themselves, their lawyers, the bar, law students, and sometimes even for the readers of the New York Times.[266] The opinion performs many functions: to settle the issues between the parties at hand, to justify the decision to the parties and to the other members of the audience, and to provide some guidance to others in the future.[267] It is not clear that any of these functions is well served by a report of what actually went on in the judge's mind.

Imagine an opinion in which the judge strives to report exactly what went on in her mind as she made her decision. An excerpt from a contracts case might look something like this:

> First I thought about the plaintiff's arguments. They seemed pretty good to me, especially the one about the failure of consideration. Boy, he's got the defendant there. And did you see the defendant's haircut? He looked like Moe from The Three Stooges. Anyway, it's been a long time since this court has struck down a contract for failure of consideration. I've seen George do it a couple times, but he's a neanderthal, for heaven's sake, so I'm a little reticent. On the other hand, I'm not a big fan of promissory estoppel. It's such a spongy doctrine and I'm no fan of Skelly Wright either. But I would like to get to Washington this year. Are there any conferences coming up? I've got to remember to ask my secretary when he gets back from lunch. . . .

Historians might occasionally find such an opinion of value, but most lawyers, even those who represent the litigants, would lose patience.

What is so odd about an opinion filled with accurate reportage? The answer is fairly clear: opinions are not read, literally, for a report of the decision, but rather for a demonstration of reasons for the decision.[268] We thus return to those scholars who have argued that a written opinion's function is to *justify* the decision, not literally to report the judge's mental processes while making the decision.[269] Exactly what was going on in the judge's mind is generally unimportant.

This point undercuts the usefulness of arguing that balancing actually goes on when judges decide cases. Even if it does, that is no reason (necessarily) for judges to use a balancing test. Candor is a virtue, but candor alone, in the sense of describing more accurately the actual thinking behind the decision, does not serve as a suitable basis for determining whether one method of opinion-writing is better than another. Reportorial accuracy is not the right criterion.

It might be helpful to summarize the points in this section. Many courts appear to have adopted the balancing test because of its claim to descriptive accuracy; that is, the courts have been persuaded (i) that judges "really" balance interests when they decide cases, and (ii) that candor requires that they report the procedures when they write their

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[266] *See* Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 813–14 (1961).

[267] *Id.* at 810–12.

[268] A candid opinion, of the kind just parodied, may provide reasons, but only haphazardly as they come to the mind of the decision maker. It may provide no reasons at all.

[269] *See* R. WASSERSTROM, THE JUDICIAL DECISION 12–38 (1961).

opinions. But both claims are highly problematic. The "descriptive" claim — that judges really balance interests — is primarily philosophical, and consequently its truth depends on our related beliefs regarding the true nature of law. If one does not adhere to the "right" jurisprudential view (i.e., that the law itself is the compromise of competing social interests), the claim that "judges really balance interests" is hard to sustain. Furthermore, even if one adheres to the "right" jurisprudential view, one is forced to acknowledge the striking inconsistencies between the concept of balancing and the work of the judge. Judicial decision making is much more complicated, and its results far less mechanical, than the metaphor of the balance suggests. It is not clear that judges "balance" anything at all.

The "descriptive" claim can be salvaged only by returning to philosophy — by asserting that judges necessarily consider competing social interests because they make law, and the law itself is concerned with that project. This, however, destroys the claim as a reason for changing the way opinions are written. If "balancing" is thought to occur only at an abstract level, by virtue of the judge's role in the law-making process, it can be true *both* that judges balance social interests *and* that they consider traditional legal arguments. Thus, when a court reports only the latter, it has engaged in no duplicity, and there is nothing for candor to correct.

Finally, we turned to the "prescriptive" claim — that candor is the appropriate criterion in deciding how one should write an opinion. This, too, is problematic. Judicial opinions filled with precise accounts of what the court was thinking as it reached its decision are of little value to us. Opinions are meant to justify, not literally to report, the decision rendered. If candor is not the right criterion, then even if we knew that our judges were balancing (in the strong, operational sense of the word), we would not necessarily demand that their opinions be *cast* in those terms.

The problems I have addressed in this section arise in the course of slipping too easily from an essentially jurisprudential proposition — that judges balance interests — to an operational one — that they should cast their opinions in the form of a balancing test. It is what I characterized in Part II as shifting between statements *about* a process to statements *in* a process, the shift from metalogic to logic, from metalanguage to language. The move is fraught with peril. In making such a move, the proponent of balancing is like the person who garners our assent (no doubt rightly) to the abstract proposition that "all men are brothers," but then suggests the operational or prescriptive proposition that intestate succession laws be modified so as to distribute a decedent's property to all inhabitants of the earth, per stirpes. The second proposition cannot follow from the first, because the claims are of a different logical order. They belong to different parts of discourse; they are from different language games. Nevertheless, it still might be a good idea to change our laws of intestate distribution, even if that reform does not follow logically from the proposition that all human beings are related spiritually. Likewise, the balancing test may be a good idea, even if its creation does not follow from the philosophical proposition that all judges balance.

3. The Test is Just

The balancing test gives judges the ability to consider all of the factors potentially relevant to a decision. The test's simple structure permits a freedom in adding or subtracting factors on each side of the balance as the cases demand. Although a balancing test can also become wooden — a single formulation of the test repeated so often that

the doctrine of precedent begins to preclude the addition or subtraction of new elements — the test's very structure makes it more supple than traditional legal reasoning. As Professor Louis Henkin has noted, "[b]alancing is highly appealing . . . . It refines the process of judicial review. It softens the rigors of absolutes, makes room for judgment and for sensitivity to differences of degree . . . . The flexibility it provides may have been an important ingredient in making judicial review work and rendering it acceptable."[270]

One can demonstrate the suppleness of balancing by considering a judge's options when faced with a hard case, a case in which the particular facts lead the judge to believe that a just decision requires a departure from precedent fairly construed.[271] In a field dominated by the balancing test, it is fairly simple to add more elements to the balance to account for the peculiar facts of the case at hand. Balancing tests often combine quite disparate factors in one formula, and the range of permissible elements is limited only by the informal logic of what could reasonably be considered as relevant. Once the new element or elements are added, the balance may legitimately be struck differently from prior balancing cases.

Even if a particular version of the balancing test has been repeated so often that *stare decisis* precludes the addition of entirely new elements, the test still provides flexibility because each application is limited to the facts of the case.[272] It is enough, for purposes of the test, to list the salient facts and interests on each side of the balance and to declare a winner; no single fact or interest need be isolated as decisive. Consequently, *any* factual difference between the old cases and the new one can, in theory, become a legitimate ground for striking the balance differently and lead legitimately to a different legal result.

The peculiar ease with which judges can distinguish away past balancing test cases, along with their ability to add new categories of interests when the need arises, makes it especially easy for balancing judges to handle the unusual case.[273] A court's options in a field dominated by doctrine and constrained by traditional legal reasoning, however, are less attractive. Faced with a situation that appears to require a departure from older rules, the court might attempt to create an exception, but this may not be easy. First, there is a presumption against the creation of exceptions: a rule too easily excepted is no rule at all. Second, the facts of the case may be peculiar enough that the exception the court recognizes patently covers only the case at hand. The court will then be criticized for deciding the case in an unprincipled manner. The court's other options, if it is to decide the case as it thinks right, are either disingenuous — by distinguishing away past cases on very narrow grounds — or dishonest — by concealing the real basis

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[270] Henkin, *supra* note 12, at 1047; *see also* M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 2.03 (1984) (conceding that ad hoc balancing may allow for greater justice in individual cases).

[271] To avoid possible confusion, I should point out here that my use of the phrase "hard case" differs from what Ronald Dworkin has called "hard cases." *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 81–130 (1977). Dworkin means cases in which "a particular lawsuit cannot be brought under a clear rule of law." *Id.* at 81. I mean cases where there *is* a clear rule of law, but where the judge wishes to find ways to avoid it.

[272] *See supra* text accompanying notes 79–84.

[273] This feature of balancing test analysis is not an unencumbered virtue. It means that balancing test cases have almost no precedential value. This means, in turn, that in areas dominated by the test citizens (and their lawyers) have fewer grounds upon which to plan future behavior. This negative aspect of the balancing test will be explored in more detail shortly. *See infra* text accompanying notes 316–23.

for the decision. In either event, critics will be quick to pounce. Now hemmed in on all sides, the court may very well decide the case as precedent "reasonably" dictates, and against its own judgment.[274]

Doctrinal reasoning has its costs. Principled exceptions cannot always be found in the cases that call for them. Some litigants are treated badly, and it is disingenuous to claim otherwise. This, one might believe, represents a loss in justice. A balancing test, in contrast, will seldom become so wooden in its application that it cannot legitimately take into account the special circumstances of the case at hand. Whether this is reason enough to adopt the test will depend on the test's disadvantages.

B. *The Vices of Balancing*

The balancing test has not escaped the critical attentions of scholars and judges. As the test has moved into area after area of the law, commentators have addressed themselves variously to its alleged defects. Certain lines of attack tend to be repeated, and this repetition suggests the existence of general problems with the test, problems that cut across the subject matter areas to which the test has been introduced.

Some of the problems we have already discussed. In the course of evaluating the test's claim to simplicity, we reviewed several practical problems in its use: the difficulties of finding the right interests, finding all of them, and balancing quite different types of interests.[275] In discussing the test's claim to descriptive accuracy, we reviewed several problems associated with turning a description of judging into a method of deciding cases. I hope I have generated grave doubts about whether judges in fact balance, and even if they do, whether that is a good reason to adopt the balancing test.[276] The next set of problems concerns the relationship between balancing methodology and other principles of our legal society — our fundamental liberties, our division of powers between the legislative and judicial branches, and our concepts of law and lawfulness.

1. A Political Critique: The Test and Fundamental Liberties

Commentators have sometimes criticized the balancing test because it endangers the central values of our liberal democratic political system. In the context of American law, this objection is almost always constitutional: the test, it is claimed, eviscerates the substantive protections provided by the constitutional provisions it comes to dominate. Over twenty-five years ago, Laurent Frantz put the point quite bluntly. "The balancing test," he stated, "assures us little, if any, more freedom of speech than we should have had if the first amendment had never been adopted."[277] Similar concerns have arisen in connection with other areas of constitutional law in which the balancing test has taken

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[274] The reporters are filled with opinions of this sort. They are not terribly easy to spot among majority opinions, for majorities often feel constrained to employ language intended to make the judgment appear inevitable. Concurring judges, on the other hand, are often a little more confessional in tone, making it clear that they would have liked to have held differently if statute or precedent had been a bit more yielding. *See, e.g.*, McLain v. Johnson, 129 Ariz. 307, 311–12, 630 P.2d 1039, 1043–44 (1981) (Contreras, J., specially concurring) (concurring in judgment striking down a purported will for failure to adhere to will formalities, but deeming the result "illogical" and calling for a "reappraisal" of the statutory requirements for will-making).

[275] *See supra* text accompanying notes 229–34.

[276] *See supra* text accompanying notes 235–69.

[277] Frantz, *supra* note 10, at 1443.

hold.[278] If this is true, courts might be well-advised to abandon the test, at least as a method of constitutional interpretation.

First amendment balancing has generated a great deal of commentary on this point, perhaps because the potentially harmful effects of the test are clearest there.[279] The first amendment speaks in forceful, uncompromising terms: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The words leave little room for interpretive maneuver; "no law" means no law.[280] The Supreme Court in fact used the balancing test in the late 1950s and early 1960s to soften the absolute proscription, to permit governmental activity that contravened the literal meaning of the amendment.[281] It did so, critics argued, by considering the amendment merely as a statement of a particular interest (the freedom of speech), which could be overcome by a sufficiently strong showing of countervailing interests, such as national security or the integrity of Congress's investigative powers.[282] One scholar suggested that the test destroyed any "hard core" of meaning in the amendment, and thus diminished the scope of fundamental liberties secured by the constitution.[283]

This use of the test, however, is an historical accident. Although the test arguably has been harmful to liberty, other harmful interpretive devices might just as easily have been employed. A literal reading of the first amendment is untenable, or at least has

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[278] *See, e.g.*, Redish & Marshall, *supra* note 11, at 472–74 (1986) (fifth and fourteenth amendments; in deciding what process is due, the Supreme Court's balancing test likely will find in favor of the governmental interest); Jacobs & Strossen, *Mass Investigations Without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks*, 18 U.C. DAVIS L. REV. 595, 631 (1985) (fourth amendment; methodology of balancing "markedly diminishes" fourth amendment protections); Elson, *Balancing Costs in Constitutional Construction: The Burger Court's Expansive New Approach*, 17 AM. CRIM. L. REV. 160, 161–62 (1979) (sixth amendment; citing with apparent approval but not adopting the claim that balancing confers on the Supreme Court the discretion to render constitutional rights a nullity); Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U.L. REV. 486, 516–17 (1976) (seventh amendment; application of balancing approach to determine whether a litigant has a right to jury trial constitutes "an effective judicial repeal of the seventh amendment").

[279] *See, e.g.*, the colloquy between Frantz and Mendelson: Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821 (1962); Frantz, *supra* note 10; Frantz, *Is the First Amendment Law? — A Reply to Professor Mendelson*, 51 CALIF. L. REV. 729 (1963); Mendelson, *supra* note 10. *See also* T. EMERSON, TOWARD A GENERAL THEORY OF FIRST AMENDMENT 53–56 (1967) (highly critical of ad hoc balancing in first amendment jurisprudence). *Compare* Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place and Manner Regulations*, 78 NW. U.L. REV. 937 (1983) *and* Baker, *Press Rights and Government Power to Structure the Press*, 34 U. MIAMI L. REV. 819 (1980) (critical of balancing) *with* Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U.L. REV. 1212 (1983) *and* Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915 (1978) (supportive of balancing).

[280] *See* Smith v. California, 361 U.S. 147, 157 (1959) (Black, J., concurring) ("I read 'no law . . . abridging' to mean *no law abridging*") (emphasis in original). Justice Black was to make the point again and again: "[t]he First Amendment says in no equivocal language that Congress shall pass no law abridging freedom of speech, press, assembly or petition." *Barenblatt*, 360 U.S. at 140–41 (Black, J., dissenting). *See also* Braden v. United States, 365 U.S. 431, 441 (1961) (Black, J., dissenting); Konigsberg v. State Bar of California, 366 U.S. 36, 60–61 (1961) (Black, J., dissenting); *In re* Anastaplo, 366 U.S. 82, 97–98 (1961) (Black, J., dissenting).

[281] *See, e.g.*, cases cited at note 4, *supra*.

[282] *See, e.g.*, Frantz, *supra* note 10, at 1438.

[283] T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 54 (1967).

been made untenable by a string of Supreme Court decisions upholding legislation curtailing some types of speech and associations.[284] Unless those cases are to be reversed, the Court must draw lines between permissible and impermissible government action. Any line it draws, upon any ground it wishes to draw it, will diminish fundamental liberties if the "proper" measure of liberty is "no law" at all infringing the freedom of speech. The real debate concerns the extent of permissible legislation, not the proper method of constitutional interpretation.

Seen in this light, the balancing test is merely the bearer of bad tidings, not their source. A court that believes itself constrained by precedent to depart from a literal or absolutist reading of the first amendment will inevitably create *some* limiting principle or principles. It thus might decide that "reasonable" restrictions are permissible, and then go on to define what is "reasonable."[285] Or it might, as the Supreme Court has done, set out certain classes of language that the first amendment does not protect, such as language that creates a "clear and present danger"[286] or language that constitutes "obscenity."[287] Abandoning the test will not stop the courts from fiddling with constitutional language apparently clear on its face.

Furthermore, it is not clear that a balancing approach will *always* weaken the law's protection of fundamental liberties. Balancing courts might value freedom of speech so highly, for example, that the free speech interest will almost never be outweighed by countervailing interests. In contrast, a constitutional proscription cast in rule form but shot through with carefully defined exceptions might provide less protection. Although, as a theoretical matter, the balancing test may destroy the "hard core" of meaning in the first amendment, as a practical matter the protection actually afforded citizens may not be diminished. We might be served as well by an army of balancing judges who value highly the freedom of speech.[288]

The claim that the balancing test drains constitutional protections of substantive content is strongest when, as in the first amendment, the protecting language appears to have readily ascertainable content in the first place. In such cases the test most obviously creates a chink in the armor of plain words. If the protective language is itself vague, however, the test becomes less objectionable on these grounds — no "plain words" set the "real" standard which the test can "balance away." In the case of vague protective language, the test threatens liberty only if the alternative methods of constitutional interpretation provide more protection than the test. The alternatives may or may not.

For example, the Supreme Court has used the test in fourth amendment cases to determine which searches and seizures are "unreasonable,"[289] in sixth amendment cases to determine which trials are "speedy,"[290] and in fourteenth amendment cases to deter-

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[284] *E.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) ("fighting words" not protected by first amendment); Cox v. New Hampshire, 312 U.S. 569 (1941) (time, place, and manner restrictions); Schenck v. United States, 249 U.S. 47 (1919) ("clear and present danger" exception).

[285] *See* Baker, *supra* note 279.

[286] *E.g.*, Schenck v. United States, 249 U.S. 47 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919); Abrams v. United States, 250 U.S. 616 (1919).

[287] *E.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Miller v. California, 413 U.S. 15 (1973); Roth v. United States, 354 U.S. 476 (1957).

[288] *But see* M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 2.02 (1984) ("overwhelming majority" of free speech cases to which ad hoc balancing has been applied comes out on side opposing freedom of speech).

[289] *E.g.*, Tennessee v. Garner, 471 U.S. 1 (1985); New Jersey v. T.L.O., 469 U.S. 325 (1985).

[290] *E.g.*, Barker v. Wingo, 407 U.S. 514 (1972).

mine what process is "due."[291] In these contexts, the test's relative harmfulness depends on the nature of the alternative methods for determining what is "unreasonable," "speedy," or "due." A court that determines whether a particular governmental intrusion is "unreasonable" by balancing the state's interests against the defendant's interests, might well strike a balance more favorable to the defendant than one guided by a purely historical analysis of what practices had in the past been accepted as reasonable.[292] Similarly, a court that determines whether a particular type of process is due in a criminal proceeding by balancing the state's interests against the defendant's interests, might well strike a balance more favorable to the defendant than one guided by a purely historical analysis of what sorts of process were commonly afforded defendants.[293] If the alternative to balancing test analysis in fourth and fourteenth amendment cases is historicism, the balancing test begins to look like a vanguard of modern liberty.

Of course, historical analysis is not the only interpretive method available to judges faced with questions concerning fundamental liberties, but the point is that the substantive effect of the test — whether it augments or diminishes individual liberties in a particular area of law — depends on whether the alternative analytical methods are relatively more progressive or regressive. As that factor changes, so too will our evaluation of the test's potential for harm.[294] There is nothing in the nature of the test, however, that *requires* it to threaten human liberty.

It is true, however, that the balancing test moves substantive law in a predictable direction. It has a *modernizing* effect. When the test is introduced into an area of law, it works a change in that law, and that change will likely reflect contemporary values. The older the law, the more dramatic the effect. Thus, when courts apply the test to the federal constitution, a product (largely) of the eighteenth century, it obviously tends to supplant the values of an earlier age with those of our own. Similarly, but less dramatically, when applied to statutes of more recent vintage, the balancing test will tend to replace the values of the age when the legislation was enacted with the latest views on

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[291] *E.g.*, Lassiter v. Department of Social Serv., 452 U.S. 18 (1981); Mathews v. Eldridge, 424 U.S. 319 (1976).

[292] *Cf.* Camara v. Municipal Court, 387 U.S. 523 (1967). In *Camara*, the Supreme Court made historical analysis *an element in a balancing procedure*, and held the challenged housing inspection scheme constitutional, in part because "such programs have a long history of judicial and public acceptance." *Id.* at 537. But this very element of historical acceptance has been questioned on theoretical and practical grounds. *See* Frank v. Maryland, 359 U.S. 360, 384 n.2 (1959) (Douglas, J., dissenting) (history of acceptance may be "history of acquiescence"); W. LaFave & J. Israel, Criminal Procedure 188–89 (1985) (because court has in fact overturned long-used procedures, this element in the balancing analysis "is deserving of little if any weight").

[293] *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522 (1975); Bloom v. Illinois, 391 U.S. 194 (1968); Gideon v. Wainwright, 372 U.S. 335 (1963) (all declaring historically accepted procedures unconstitutional, though not necessarily pursuant to a balancing test). Balancing was made the test for what process is due in Mathews v. Eldridge, 424 U.S. 319. Explicit balancing has in fact been used to provide procedures that were not traditionally available. *See, e.g.*, Ake v. Oklahoma, 470 U.S. 68 (1985); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978). In other cases, however, *Mathews* balancing has been used to sustain the constitutionality of procedures afforded individuals. *See, e.g.*, Hewitt v. Helms, 459 U.S. 460 (1983); Mackey v. Montrym, 443 U.S 1 (1979); Parham v. J.R., 442 U.S. 584 (1979).

[294] In fourteenth amendment due process litigation, for example, the balancing test is arguably more protective of due process rights than historicist analysis, but less protective than other conceivable methods. *See* Redish & Marshall, *supra* note 11, at 468–75.

good social policy. In this narrow sense, then, the balancing test has political content; it is more solicitous of current political views than of older views.

But this general trend to modernization tells very little about where, exactly, the test will move an area of law. The exact direction, in political terms, will depend upon the thinking of those who produced the law and its relation to current political thought. The winds of political thought change from age to age and from decade to decade. Thus, the effect of the test could be "liberal" if the law were born of a conservative age and modern thought on the issue were more liberal, or "conservative" if the law were born of a liberal age and current thought is conservative.

As a general matter, one could argue that the balancing test threatens fundamental liberties only if, *on the whole*, political thinking is more statist or authoritarian than in the days of the founders. This may or may not be true, but certainly the proposition is debatable.[295] And even if true, abandoning the balancing test would not go very far toward stemming the tide of governmental encroachment on individual liberties. Courts disposed to move the law in this direction can carry on the work with more traditional methods of constitutional interpretation.

There is a further difficulty in ascertaining the "political" content of the balancing test because the weight of the elements balanced in the test are affected by the world view of the judges who employ it.[296] Even if we could determine the values of an earlier age and compare them with our own, we have no assurance that the judges who actually employ the test today will share the values of the current age, and thus the balance actually struck and the decisions actually taken may be much different from the ones predicted on the basis of "current thought."[297] Balancing decisions out of step with the times, especially if they occur at the Supreme Court level, may move the law in directions we could not have anticipated merely by checking the *Zeitgeist*.

Because the test's substantive effects are almost impossible to predict ahead of time, it might be better to examine what has actually occurred. Such an investigation yields a mixed bag: sometimes the test has arguably respected individual liberty, and sometimes not.[298] A claim that the test *necessarily* results in diminished liberties, or in more conservative social policies, simply has not been established. Accordingly, it would be a mistake to accept or reject the test solely on the basis of its political ramifications.

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[295] *See, e.g.*, P. JOHNSON, MODERN TIMES (1983) (tracing the rise of collectivism in the twentieth century).

[296] *See supra* text accompanying note 257.

[297] As Justice Black stated, "[t]he application of [a balancing test] is necessarily tied to the emphasis particular judges give to competing societal values. Judges, like everyone else, vary tremendously in their choice of values. This is perfectly natural and, indeed, unavoidable." Konigsberg v. State Bar of California, 366 U.S. 36, 75 (1961) (Black, J., dissenting).

[298] Commentators disagree about whether balancing threatens freedom of speech. *Compare* M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 2.02 (1984) (arguing that most balancing cases hold against the speaker) *with* Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U.L. REV. 1212 (1983) (arguing generally that an "eclectic" or balancing approach can protect free speech interests). Courts have used balancing both to sustain and deny due process claims under the fourteenth amendment. *See supra* note 293. Similarly, balancing has both increased and decreased fourth amendment protection. *Compare* Camara v. Municipal Court, 387 U.S. 523 (1967) (balancing used to permit warrantless, less-than-probable-cause administrative searches) *with* Winston v. Lee, 470 U.S. 753 (1985) (balancing used to find intrusive surgical procedure unreasonable under fourth amendment).

2. An Institutional Critique: The Test and the Division of Lawmaking Powers

The test does have political ramifications of another sort. It appears to transfer to the judicial branch a method of decision making more properly reserved for the legislative branch. Balancing test opponents have often asserted that it is the *legislator's* task to balance the interests of social groups, and from that balance establish a rule of law to govern future behavior; judges are to take those rules and apply them as written, the balance already having been struck.[299]

It is risky to raise this matter to the level of constitutional law, to argue that a judge who balances interests violates the separation of powers between the coordinate branches of government. Our jurisprudence on the separation of powers has taken us beyond the analysis of an earlier age, when the Supreme Court appeared to ascertain, *a priori*, the proper scope of the coordinate branches of government, and guarded those boundaries against shifts in authority.[300] In such an age, one might have been able to argue that because the weighing of interests is "in its nature" legislative, or because it is a type of analysis historically the province of the legislative branch, courts should be prohibited from engaging in that method of deciding cases. But this way of thinking about separation of powers issues "has since been widely dismissed as indefensibly extreme and largely beside the point," and has been replaced by a more flexible analysis.[301] The concern that each branch stick to its own turf is still alive,[302] however, and even if modern courts are less likely to strike down an arrangement on separation of powers grounds, it is still useful to ask whether a court's use of the balancing test usurps prerogatives better left to the legislature.

There is, in fact, good reason to suspect that legislatures are better equipped to balance interests. Social interests are better balanced in a forum in which the participants represent social groups and speak to the issue in a representative capacity. The proponents and opponents may still prevaricate and exaggerate, but at least they do so on behalf of groups pledged to support them.

The legislature is a more natural forum for this sort of participation. The chairman of the AFL-CIO, by virtue of his chairmanship, speaks with some authority when he

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[299] This line of attack has been suggested by both judges and commentators. A small sampling: United States v. Havens, 446 U.S. 620, 634 (1980) (Brennan, J., dissenting) ("Ultimately, I fear, this ad hoc approach to [questions about applying] the exclusionary rule obscures the difference between judicial decision making and legislative or administrative policy making"); Oregon v. Mitchell, 400 U.S. 112, 206–07 (1970) (Harlan, J., concurring and dissenting) ("Where the balance is to be struck depends ultimately on the values and perspectives of the decisionmaker .... I fully agree that judgments of the sort involved here are beyond the institutional competence and constitutional authority of the judiciary .... They are pre-eminently matters for legislative discretion ...."); Elson, *supra* note 278, at 198 ("When the Court employs an expansive balancing approach, it substitutes its judgment of relative social value for that of the legislature. Principles of democratic government, however, require the Court to accept the value choice selected by lawmakers ...."); Henkin, *supra* note 12, at 1048 ("In some contexts, [ad hoc balancing] sets the court to doing ... what would seem emphatically to be the province or competence of the political branches — the weighing of competing societal interests and values.").

[300] *See, e.g.*, Kilbourn v. Thompson, 103 U.S. 168, 192 (1881) (holding that the House of Representatives did not have the power to punish an individual for contempt because that power "was *in its nature* clearly judicial") (emphasis added).

[301] L. TRIBE, AMERICAN CONSTITUTIONAL LAW 16 (1978).

[302] *See* Bowsher v. Synar, 106 S. Ct. 3181 (1986) (striking down portion of Gramm-Rudman-Hollings Act because execution of law was vested in officer answerable only to Congress, in violation of separation of powers doctrine).

testifies before Congress that a particular policy is good or bad for the interests of "labor." The duly appointed representatives of the American Textile Manufacturers Institute, by virtue of their position, speak with some authority when they claim that a particular proposal is good or bad for the interests of the textile industry. The *very act of representation* tends to confirm the representative's right to speak of social interests and to confirm the truth of the social interest claims that he or she makes.

Trial and appellate courts, in contrast, are less well suited places for representational argument. Generally speaking, individuals, not representatives of social groups, appear before courts.[303] And they do not normally *purport* to represent broader social concerns, only their own. Although it is not surprising that litigants faced with a balancing court become eager to show that their individual interests "really" implicate broader social interests, the question is whether the courtroom is the best forum for such claims. A courtroom is inappropriate precisely because those who appear there do not appear primarily in a representative capacity. There is no practical check on their claims, as there is on the claims of duly appointed or elected officials of defined social groups, the sorts of persons who appear in the legislative process.[304]

The consideration of social interests historically has been the province of the legislatures, and a simple analysis of the respective fora reveals the wisdom of this division. Whether the mismatch between the process and the forum is strong enough to claim that interest-balancing in the courtroom violates the separation of powers doctrine, the mismatch is strong enough to suggest that balancing is less well suited to the courthouse than it is to the statehouse.

3. A Jurisprudential Critique: The Test and the Nature of Law

The most troubling aspects of the balancing test are jurisprudential. We are not concerned now with the test's substantive, political effects — whether it moves doctrine to the right or the left — nor with its institutional effects — whether it moves power from the legislature to the judiciary — but with its effects on law generally. Here the balancing test reveals its most profound weaknesses. Simply stated, the balancing test (1) does not ensure, even in theory, that like cases will be treated alike, and (2) so muddies the areas of the law it comes to dominate that those governed by it are left without clear guidance about what behavior is permitted and what is not. For shorthand, we will call these critiques the problems of *consistency* and *clarity*, respectively.

The success of these critiques depends on the validity of two principles that underlie them: (1) that the law should treat like cases alike; and (2) that the law should be as clear as possible about what it permits and what it does not. These propositions are perhaps self-evident; certainly the contrary propositions, that the law should treat like cases differently, and that the law should *not* be as clear as possible, are a little absurd.

If a more subtle defense is required, we could begin by stating that the very idea of "law," the very idea of governance by rules, involves other related ideas about rule-making and rule-following. For example, it is hard to understand what "rules" *are* unless

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[303] Sometimes, of course, litigants appear in a representative capacity on behalf of larger groups. But we have special provisions for such actions, class actions, with special safeguards to ensure that the named litigant is indeed representative. FED. R. CIV. P. 23.

[304] *Cf.* Aleinikoff, *supra* note 12, at 984–86 (reviewing and criticizing possible defenses to the court's engaging in the legislative function of weighing social values).

we suppose that they are applied in certain ways (i.e., "consistently" and "equally"). If someone states that he is in charge of administering a "rule" (or law), but that sometimes he applies it and sometimes he does not, or that sometimes he applies it quite differently in different situations — *and could not explain when he applied it or why he applied it differently in different situations* — we would rightly suppose that either he does not understand the meaning of the word "rule" (or law), or that he was not applying a rule (or law) at all, but rather doing something else, such as expressing a personal preference or following a guideline. In short, bound up with the notion of "law" is the notion that laws be applied "equally" or "consistently"; like situations should be treated alike.[305]

Similarly, bound up with the notion of "law" is the notion that the rules laid down should be understandable. An unintelligible rule is no rule at all because an actor can "follow a rule" only if she understands its requirements.[306] If intelligibility is a virtue, it is a small step to the proposition that the clearer the law, the better.[307]

a. The Problem of Consistency

This first concern takes its cue from the observation that balancing test results are peculiarly subject to the world view of the judge who employs it. When the judge weighs the elements to be balanced, the weights will be assigned in accordance with the judge's view of what is important. Whether one interest or set of interests "outweighs" another quite straightforwardly depends on which of them the judge values more highly.[308]

In one sense, it is a bit hypocritical to object to this state of affairs. One can argue cogently that decisions based on the rule-based syllogism also are affected by the judge's world view. Logic does not determine how an issue will be framed, or what will count as the major and minor premises of the syllogistic arguments the court finally adopts. These decisions will be affected, at least in part, by what the judge believes to be the strongest legal argument, and that in turn will be affected by something we would call the judge's world view. All judging methods are so affected. The balancing test is unique in this regard, however, because of the strength of that influence. The judge's world view is *central* to the balancing test, in a way not true of the rule-based syllogism.

This point becomes clearest in the context of *criticizing* a balancing test opinion. When a judge has weighed the elements and declared a winner on the basis of which

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[305] In this paragraph I have moved cavalierly between talk of "rules," "laws," and "the law." This suggests a philosophy of law that begins with the proposition that law is a system of rules. On such an assumption, it makes sense to argue that the *notion* of "law" implicates certain understandings about *rules* and what they entail. But there is a great deal of debate, of course, about whether the law is a system of rules, or rather something else, like "what officials do about disputes," K. LLEWELLYN, THE BRAMBLE BUSH 3 (1960), or what the courts propound, GRAY, THE NATURE AND SOURCES OF LAW (1921). But even under different assumptions about "what the law is," the points in the text can be sustained. First, to the extent that the law, under any definition, involves the application of rules, the point still holds that consistency and clarity are desirable. Second, these points about consistency and clarity can be translated into the discourse of other philosophies of law. If, for example, the law is what officials do about disputes, one can still argue that officials should be consistent in what they do, and as clear as possible about what they intend to do.

[306] Lon Fuller has noted that "[t]he desideratum of clarity represents one of the most essential ingredients of legality." L. FULLER, THE MORALITY OF LAW 63 (1964).

[307] *See id.* at 63–65; J. BENTHAM, THE LIMITS OF JURISPRUDENCE DEFINED 195 (Everett ed. 1945) (types of unclarity).

[308] *See supra* note 297.

interests were weightier, a criticism of that opinion can proceed on only two grounds: first, that using a balancing test was inappropriate in the first place (which, because it begs the question, will be put aside for the moment), or that the balance was struck wrong.

But how can a balance be struck wrong? There seem to be only two conceivable sources of error: either the judge had the correct ordering of values, the "right" world view, and simply made a mistake in its application, or the judge had the "wrong" world view in the first place. Either is difficult to establish because judges seldom make explicit the underlying hierarchy of values (legal and social) which form the basis of their balancing test decisions. They do not, in short, make their world view known, and so it is impossible to judge whether it is "right" — and the problem is one of application — or "wrong" — and the problem is more deeply embedded.

The first line of criticism — right views, wrong application — can sometimes be sustained. In those unusual cases in which the court both states and successfully defends its hierarchy of values, one might discover a technical error: an admitted interest that the court overlooked in its analysis. The critic could then justifiably claim that the court got the application wrong (and the court, in such a case, might well agree).

The second line of criticism — wrong views — is almost impossible to establish, *even if the court is absolutely clear about the values that informed its decision.* A successful attack on the decision depends on the critic's ability to demonstrate that some other world view is *better* than the judge's. If she fails in such a demonstration, then her critique devolves into the claim that the judge's world view is simply different. In this work the critic is hampered by two related characteristics of world views: (1) they are regarded as highly personal; and (2) within a wide range, differences in world views among right thinking men and women are acceptable. Grounds on which to distinguish world views as more or less correct are hard to come by.[309] Consequently, a balancing test opinion can be subjected to cogent criticism only rarely, when the judge's world view departs radically from the accepted range of opinion about how values should be ordered.

It is easier to criticize an opinion that uses traditional legal reasoning. First, although many of the decisions a judge makes in setting up the legal syllogism are not determined by formal logic, the syllogism itself requires it. Consequently, one may examine and criticize the opinion on the basis of logical coherence. Unlike arguments about world views, logic is *not* regarded as highly personal, and differences among right thinking

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[309] When the issue is constitutional, it is sometimes possible to argue that the structure or history of the constitution demands a certain ordering of values. For example, because the first amendment is cast in such emphatic (or absolutist) terms, this means that the values of free speech should be "high" in any ordering of values. The project is to conscribe the range of acceptable world views more narrowly than would normally be the case. But there are real limits to this approach. The value of free speech may be high, but that still leaves much room for argument about how high, and about which values are higher. Because the courts have upheld statutes and governmental actions that infringe free speech, we must assume that some values *are* higher, at least sometimes. Which values, and when? There is thus a fuzziness in this form of argument even when the range of acceptable world views is circumscribed by constitutional structure or history. *Cf.* Aleinikoff, *supra* note 12, at 972–75 (describing the need for and the attempts to derive a common scale of values from some source other than the judge's personal preferences); Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703 (1980) (describing the need for and *attempting to develop* "a mutually consistent set of jurisprudential values and principles, ranked in importance, that fit the developing political system").

men and women are *not* acceptable. A criticism based on logic is much easier to sustain than one based on alternative world views.

Second, traditional legal reasoning often concerns problems of classification: whether a document is a "valid will" or whether a statement about a security constitutes "fraud."[310] It turns on the meanings of words. Consequently, a decision cast in traditional terms may be criticized for distorting those meanings. Not just any document constitutes a "will"; not just any action constitutes a "fraud." Words have limits and those limits form the basis of rational critique. Although word meanings are not absolutely rigid (and some are less rigid than others) they, unlike world views, are *not* personal and substantial differences among right thinking men and women are *not* acceptable. A criticism based on word meaning is easier to sustain than one based on alternative world views.

This argument is not motivated by a desire to make the critic's life easier, although as professional critic I am always interested in advancements of this sort. Rather, the possibility of cogent criticism acts as a check on the judge's range of permissible action. We properly seek to constrain judges with logic and word meanings, not out of some gratuitous urge to shackle those in positions of authority, but precisely because these constraints help to ensure that like cases are treated alike. If the same case were brought before different judges, the constraints of logic and word meaning help to ensure its similar treatment.

This is not to say that the same case, or two very similar cases, would not *in fact* be decided differently by two judges who employ traditional syllogistic reasoning. Our case law abounds with examples of this phenomenon. But in the world of traditional legal reasoning, we recognize this as a problem.[311] In contrast, because it is not only possible *but acceptable* for two judges to maintain different world views, it is also possible and acceptable for two balancing judges to reach different results *in the same case*. And if different judges, on principle, can decide the *same* case differently, there can be no assurances whatsoever that *like* cases will be treated alike.[312]

We now reach a remarkable point. If we take balancing seriously, as a legitimate means of deciding cases, we not only invite the possibility that different judges may treat the same case differently, we abandon the grounds upon which to consider this situation problematic. The internal logic of balancing is not offended by this state of affairs; different judges mean different world views, and different world views are acceptable.[313]

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[310] *See supra* text accompanying notes 25–26.

[311] One source of the problem is that aspects of traditional reasoning — selecting the relevant premises and finding particular facts — are not constrained by logic and the meanings of words.

[312] This objection might also be expressed by calling the working of the test *unfair*, to the extent that our concept of fairness in judicial decision making involves the notion that like cases be decided alike. Occasionally objections to the test have been cast in this language. I have avoided this approach because the word "fair" comprehends several related concepts in addition to (and perhaps not even including) the principle that like cases be treated alike. But however we may characterize the objection, the lesson is the same. We are wise to repudiate a method of judicial decision that, on principle, allows for different results in like cases.

[313] We could be assured of like results in like cases only if we could ensure that all judges maintained the same world view. This, of course, is impossible and undesirable as a practical matter, and efforts to enforce homogeneity would, no doubt, raise objections from the bench. Traditional legal reasoning does not require judicial unanimity of social outlook, and does not depend on it for the like treatment of like cases. It relies (albeit with only partial success) on the injunctions that judges operate within the constraints of logic and the meanings of words.

As a practical matter, we are warranted in eschewing any method of judicial decision making that permits, on principle, the different treatment of like cases. As a philosophical matter, we are warranted in questioning whether any such method constitutes the making of law.

b. The Problem of Clarity

The second jurisprudential concern has more obvious practical consequences. The balancing test so muddies the areas of law it comes to dominate that those governed by it are left without clear guidance about what behavior is permitted. Such a charge, if true, makes those laws difficult to obey, and difficult (and perhaps expensive) to take into account in planning.

One of the functions of a written opinion is to justify the decision to the litigants. A balancing test opinion, we assume, serves this function as well as other opinions. The interests are reviewed and weighed, the balance is struck, and one party is declared the winner: the litigants have their reason.[314] But an opinion also serves the function of providing guidance for future action. The opinion is not written solely for the parties to the case, but for a more general audience: the legal community and the public at large.[315] It is in this guiding function that balancing test decisions are particularly deficient.[316]

The test's failure to guide future behavior can be illustrated in the following way. Assume that a manufacturer plans to produce a new line of breakfast cereals and goes to her lawyer for advice on how to advertise them. The lawyer, based on an analysis of past cases, may give different sorts of advice. The first piece of advice is based on a traditional rule, along these lines: "Fraud in the description of a consumer good is prohibited." The second piece of advice is based on another rule, typical of balancing test analysis, along these lines: "Statements about a product are prohibited when the individual's interest in freedom of commercial speech is outweighed by society's interest in maintaining the integrity of the marketplace." The advice the lawyer generates from each type of rule might look something like this:

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[314] But this, of course, may not be "reason" of the type we normally expect in opinions, i.e., a justification. *See supra* text accompanying notes 266–69. It is a "reason" in the same way that "because I told you so" is a reason.

[315] Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 810–11 (1961). Whether the opinion *should* be used to guide the future actions of persons not parties to the case is a matter of some jurisprudential dispute. Some suggest that a case is decided only for the parties, and that its use by others, for other purposes, is inappropriate. This view could certainly find theoretical support in civil law adjudication. But it is a raw fact of the Anglo-American legal system that opinions *are* used by non-parties for guiding future behavior. To call this practice illegitimate is to make an interesting point, but one divorced from the working of the world.

[316] This criticism applies only to the test in its result-balancing form. Even if it is true that a judge has balanced to find *facts*, facts are themselves "good" for only the case at hand; that they offer no "guidance" for the future is beside the point, because we do not expect of a case that its facts will provide such guidance. When a judge has balanced to create a *rule*, that rule will provide the same level of guidance for the future as a rule created in the course of traditional legal reasoning. *But see* Aleinikoff, *supra* note 12, at 979–81 (the "false promise" of rule-balancing). It is only when the judge balances to get a *result*, when the "rule of the case" is to balance, that the problem of indeterminate guidance arises. Because result-balancing is the most popular version of the test, however, the critique applies to the test in its most important and ubiquitous form.

> 1) "Whatever you do, make sure to avoid fraudulent claims;" and
> 2) "Whatever you do, make sure, with respect to the claims you make for the product, that your right to describe the product in any way you please outweighs society's interest in the integrity of the marketplace."

Though each piece of advice is based on an apt description of the law, it is clear which piece of advice is more useful to the client. It is worth exploring the reason for this difference.

The first piece of advice is based on the concept of "fraud." It is based on a word that is part of the linguistic currency. That is, the word "fraud" appears frequently in spoken and written English, both in and out of the law. We can look it up in a dictionary. Thus, even if only one case had ever been decided in the area of product advertising — based on the analysis of whether "fraud" had occurred — or even if there were no cases at all and the rule was derived from a relevant statute, we would already know a great deal about which activities were prohibited in product advertising.

The second piece of advice, in contrast, rests on a determination that has no life outside of the law, and indeed, no life outside of the specific area of law it inhabits. There is no dictionary to consult, no sources of guidance other than the case (or perhaps statute) that gave it birth, along with other cases, if any, that have applied the test subsequently. Unlike a word, even a vague word like "fraud," the operative principle comes to us without a history, and thus without a predictable future.

That future, of course, can become clearer as more balancing cases are decided. At the beginning, with only one case decided, our guidance is limited to a general statement of the balance and the knowledge of how one court struck the balance. This is better than nothing because the one balance, as struck, will tell us what was important to one court on at least one occasion. Because of the nature of the test, however, we have no assurance that another court would find the same elements important, or that the addition or subtraction of any fact in the case will not cause the balance to be struck another way. As more cases are decided, as a series of balances are struck, the law will obviously become clearer: we will be able to make predictions about what elements will be weighed, and how important each element is with respect to the others. Lawyers and non-lawyers alike will be better able to anticipate how future balances will come out, and thus will be able to state with more confidence the status of the law.

Even so, the outcome of future balances will always be *less* predictable than the results from a rule-based system. A rule in traditional form starts out with an advantage. It is expressed in words that have a history of prior usage, both inside and outside the law. A balance begins at ground zero, and contains no similar clues to its future development. If we assume that subsequent case law equally clarifies both types of approaches, it is clear that the balancing test will seldom, if ever, make up its initial deficit in clarity.

It is enlightening, in this connection, to examine how lawyers, and judges themselves, analyze a line of cases dominated by a balancing test. We take for an example sixth amendment speedy trial decisions. The Supreme Court in *Barker v. Wingo*[317] announced that in order to determine whether a defendant was denied a speedy trial, a balance should be struck by weighing the length of the delay, the reasons for the delay, whether and how the defendant asserted the speedy trial right, and the amount of prejudice that the defendant suffered.[318] As more cases were decided, it soon became clear how dif-

[317] 407 U.S. 514 (1972).
[318] *Id.* at 530.

ferent lengths of delay are "weighed" against the government.[319] As more cases were decided, it became clear what reasons would excuse delay.[320] The judges considered prior cases in making their decisions and both prosecutors and defense attorneys became aware of the variables that determine speedy trial violations. In reviewing past cases, judges, attorneys, and commentators *began to develop rules*: seven month's delay is not generally prejudicial;[321] delay caused by defendants will weigh against them.[322] In short, courts began to transform the balancing test into a series of tentative rules or guidelines. These rules, however, cannot become official, because as a formal matter the *balance* is the only accepted decision making method. The rules remain unreliable because no one is *bound* by them: no judge can set them out in a way that makes them precedents and still maintain fidelity to the balancing test procedure.[323] Repeated balances invite this process of rule formation, but neither judges nor lawyers can give them the status of law.

The situation nicely demonstrates a natural inclination to derive something useful for guidance and prediction (the tentative, unofficial rules), out of something that is virtually useless for those purposes (the statement of the balance and the raw data of its results in later cases). The irony, of course, is that lawyers and judges attempt to formulate the very rules that the creators of the balancing test so carefully avoided. It is worth asking whether we might not be better off if judges took the bold step of formulating rules in the first place, rather than force future judges and practitioners to hobble along with unofficial and unreliable guidelines about what *may* be determinative in future cases. Certainly the ideal of clarity would be better served.

This does not mean that statements of law in standard rule form are free from doubt. Most reported cases are based on rule analysis rather than balancing analysis, and the growth in reported cases is evidence enough that rules in standard form do not end all legitimate doubt about what is permitted. Under both systems of reasoning there are close cases. The point, however, is that when cast in a traditional form, a rule's scope is generally clearer than when it is cast in balancing form.

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[319] *Id.* (five years "presumptively prejudicial"); United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850), 461 U.S. 555 (1983) (eighteen-month delay "quite significant"); United States v. Loud Hawk, 106 S. Ct. 648 (1986) (ninety-month delay "presumptively prejudicial"); United States v. Guerrero, 756 F.2d 1342 (9th Cir. 1984) (thirty-one-month delay presumptively prejudicial); Fitzgerald v. Jordan, 747 F.2d 1120 (7th Cir. 1984) (ten-month delay prejudicial); United States v. Garcia, 741 F.2d 363 (11th Cir. 1984) (three-and-a-half-month delay not presumptively prejudicial).

[320] Barker v. Wingo, 407 U.S. 514 (1972) (intentional delays weigh more heavily against government than unintentional delays); United States v. Loud Hawk, 106 S. Ct. 648 (1986) (delay because of interlocutory appeal, without bad faith, not weighed heavily against government); Mitchell v. Fairman, 750 F.2d 806 (7th Cir. 1984) (delay because of motion to suppress does not weigh against government unless unreasonable); United States v. Greene, 737 F.2d 572 (6th Cir. 1984) (delay because of defendant's fugitive status does not weigh against government).

[321] United States v. Lewis, 759 F.2d 1316, 1350 n.16 (8th Cir. 1985) (citing cases); United States v. Greer, 655 F.2d 51, 52–53 (5th Cir. 1981).

[322] *See, e.g.*, United States v. Greene, 737 F.2d 572 (6th Cir. 1984) (defendant's fugitive status undercuts delay claim).

[323] United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850), 461 U.S. 555, 565 (1983) ("Little can be said on when a delay becomes presumptively improper, for the determination necessarily depends on the facts of the particular case . . . we are not establishing a statute of limitations"); United States v. Lewis, 759 F.2d 1316, 1350 n.16 (8th Cir. 1985) ("we decline to specify a precise point at which delay becomes presumptively prejudicial").

In summary, the jurisprudential objections to the balancing test are based on the concerns of consistency and clarity. In any area of law the test dominates, there is less assurance that like cases will be treated alike, and the general scope of permissible action is less determinate, than would be the case if the law were created and applied in traditional fashion. This is bad for litigants, and bad for citizens who seek to conform their behavior to the rules of law. What is bad for litigants and citizens generally is bad for the law.

c. When Consistency and Clarity Don't Matter

Even if one agrees that balancing renders legal issues less certain in outcome, and provides little guidance regarding future conduct, not all areas of law are equally disabled by these vices. In some areas balancing's virtue, its particular sensitivity to the facts of the case at hand, might outweigh its vices. Criminal sentencing might serve as a useful example of this argument. In the federal system, Congress has established a system that calls for balancing, and in which courts regularly consider a disparate array of factors in deciding whether, and for how long, a convicted criminal will be incarcerated.[324] Arguably no aspect of a judge's duties is more appropriate for individualized decision making than the question of how long a particular defendant should be incarcerated for a particular crime.

Here the vices of balancing appear less debilitating. Although balancing makes it difficult to predict the precise dimensions of a criminal's sentence, the criminal is hardly in a position to complain about this state of affairs, and we are less likely, as a matter of public interest, to worry about the personal difficulties caused by this uncertainty. Likewise, the problem of too little guidance for future action is hardly an issue for the convicted criminal, and it is arguable that the amorphous guidance of balancing does no real disservice to the public interest either. Once it is certain that *some* punishment is due, some legal disability imposed, uncertainty in the actual terms of the imposition does little damage to the public interest that certain actions be punished, or that persons be deterred from engaging in those actions in the future. Intuitively this strikes us as true because the precise dimensions of a particular criminal sentence are not normally (or properly) taken into account in any legitimate planning activity.

I realize that in making this argument for the balancer I have made assertions, or implicitly made assertions, about proper theories of punishment and the nature of the public interest in criminal sentencing. It is not my project here to defend these assertions, but only to show that, given certain assumptions about crime and punishment, one can make out a reasonable case that balancing's virtues are particularly helpful and its vices particularly inconsequential. Generally, such a case might be made with respect to *any* area of law in which 1) predictability of outcome in particular cases is not of paramount importance, and 2) the subject matter involved is not an element in any legitimate planning activity.

The first problem for the balancer is that very few areas of law can be so described. It is almost always important for us to have some predictive ability regarding individual cases and almost always true that the subject matter involved is a proper element in somebody's planning. Criminal sentencing, given certain assumptions about crime and punishment, seems to meet both these criteria best, along, perhaps, with the process of

[324] 18 U.S.C. § 3553(a) (1982).

imposing civil fines. One might also suggest areas in which at least the second criterion seems to hold, such as property division and child custody disputes between divorcing spouses. An assessment of one's prospects for "victory" in such cases does not, or should not, play a role in any legitimate planning activity.

The second problem for the balancer, however, is more profound, and it involves the problem of consistency. With respect to certain areas like criminal sentencing or property division between divorcing spouses, we may be willing to sacrifice some level of predictability in individual cases, but the balancing test asks for more than that. It requires a tolerance for *general* or *systemic* unpredictability, a willingness to adopt a method of judicial decision making in which each case turns on the world view of the judge before whom the cause is heard, a decision that legitimately may vary from judge to judge and from day to day.

Even in areas like criminal sentencing or property division between divorcing spouses, we cannot sanguinely accept the proposition that like treatment of like cases is unimportant.[325] Indeed, in *no* area of law should we fail to demand, at least on principle, that like cases be treated alike, and thus in no area of law should we willingly adopt the balancing test. Tied up with the very concept of law is the notion that like cases be treated alike; the balancing test is simply lawless.

It may be urged, in response, that this objection hardly represents a "profound" difficulty for balancers. It is, rather, the height of academic folly to deprecate a method of decision making simply because it transgresses some philosophical notion about what the "law" entails. It is more misguided still to elevate that philosophical objection to such heights that it forecloses the adoption of the test even in those areas of law least harmed by its vices.

But this response undervalues the concept of law and the search for what that concept entails. The claim of "lawlessness" is a serious one, and it is made no less so because it depends on a lot of talk about what the law is or what the law ought to be. When vigilantes hang a guilty man, and we complain of "lawlessness," to what do we turn in defense of this claim but certain conceptions about lawful process and what it entails? (The guilty man has been hung; what other complaint could there be?) Some will scoff at these objections, of course, and will ride into the sunset to hang others. Naturally, arguments about the concept of law and what it entails will not ride with them. But those arguments will not disappear. They will stay back in town, there to haunt the homes and businesses that mark the frontiers of civilized life.

Our respondent, not wishing to play the part of the vigilante, might still argue that the balancing test has unimpeachable virtues; "lawless" or not, it is more supple than traditional reasoning in its ability to take account of the special case, and in its ability to respond openly to peculiar facts that may lead a court to believe that a proper decision requires a departure from prior law. In contrast, a court may not always be able to find a principled exception to accepted rules, and the constraints of traditional analysis may force the court into a disingenuous view of prior law, or perhaps worse, into holding against a party it rightly believes should prevail.

Here lies the heart of the argument on balancing, and how it is settled will depend largely on one's concept of justice. If justice depends on no single litigant being treated

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[325] Ironically, the relevant federal sentencing statute itself includes "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" as one of the factors to balance. 18 U.S.C. § 3553(a)(6) (1982).

unjustly, traditional legal reasoning exacts too high a price. If, however, justice depends on like cases being treated alike, and on laws setting out as clearly as possible what is permitted and what is not, then it is the balancing test that demands too much. Perhaps it contravenes the spirit of our age to suggest that justice can exist in the face of individual injustices, but it is exactly that conviction that sustains the case against the balancing test: it does too much harm to too many people to be justified on the ground that a few individuals may be harmed by its traditional rival.

IV. What is to be Done

Despite its weaknesses, the balancing test has become an important part of American legal process. Courts use it to find facts, to create rules, and to determine results, as well as to interpret constitutions, to construe statutes, and to resolve common law disputes. It has been created by judges both on their own initiative and at the direction of state and federal legislatures. The test has been growing in popularity, and its rate of growth appears to increase every year. It is no juridical flash in the pan.

It will be hard to control, and even harder to eradicate. Indeed, the test has become so important a feature of American law that a call for its removal sounds quixotic.[326] The test, however, did not spring up, full-grown and popular, overnight. It grew slowly, case by case and law by law. It can be eliminated in the same methodical way.

A. *The Prescriptions*

I have sought to evaluate the test solely in the context of judicial decision making. Whether the test is a good decision making method for executives and administrators, or for legislators, is another question. The normative part of this Article has sought to establish only that the test is, on the whole, a bad thing for judging. And not every form of the test is equally objectionable. Fact-balancing has escaped unscathed, and rule-balancing, while subject to many of the same objections as result-balancing, is frankly less important because it appears less often, and its subsequent history in the cases is less pernicious. I therefore address my prescriptions primarily to judges, for it is their use of the test that warrants caution, and specifically to their treatment of result-balancing, the most provocative version of the test.[327] The prescriptions are predictable, and can be stated simply:

(1) We should refrain from introducing the balancing test to new areas of law; and

(2) We should remove the balancing test from those areas of law it currently dominates.

The first prescription looks easy. It calls for restraint; it requires the judge to do nothing special at all. It is the *introduction* of the test that requires an affirmative act, the transformation of a particular description of past cases into a method of deciding future ones. Adherence to the *status quo* will result in the replication of traditional doctrine. A judge need only resist the urge to deviate from settled law.

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[326] Describing a colleague's work, Professor Shiffrin says, "[Professor Baker's] first canon is that balancing is to be either entirely avoided or pursued only at the highest levels of abstraction. Meanwhile, judges have been balancing in every significant area of human rights. To ask them now to change all that . . . is to abandon practice for theory." Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 Nw. U.L. Rev. 1212, 1248 (1983).

[327] My prescriptions also apply to legislators to the extent that the contemplated legislation directs judges to balance.

Ironically, however, such resistance will often take courage. First, the test will be especially attractive in the coming decades. It is still new enough to retain its claim as the latest, and presumably most sophisticated, development in the art of judging, yet it is old enough, and popular enough, to offer respectability and the safety of the herd. Second, the test will be urged in hard cases, those very cases in which the judge faces the unhappy prospect of deciding against a litigant with obvious claims to justice in order to preserve the integrity of a rule for which no principled exception can be devised. The balancing test is then most alluring, and its rejection requires a steady sense of its infirmities.

The difficulties in implementing the second prescription are more obvious. To remove the balancing test from an area it already occupies necessarily involves a departure from precedent. Somewhere in the history of the cases lies an opinion stating that the rule of law is to balance. The older the case, and the more often it has been cited, the more intransigent it will have become.[328] But that which is created by analysis may be removed in the same way.

One begins by reviewing the past balancing cases with an eye toward the unofficial rules and guidelines they have generated. We saw earlier that a line of balancing test cases leaves in its wake the several attempts of judges, lawyers, and commentators to create rules helpful in predicting and deciding future cases.[329] The jurisprudential trick is to raise these rules to an official status. The move might look like this:

> Although the courts have in the past addressed this issue as a matter of balancing, *see, e.g.*, [the original case and any subsequent appearances of the test], it is also clear that when [the determinative elements of past cases] are present, the courts have uniformly held [the results of past cases, in general form]. Thus the rule really seems to be [the new statement of doctrine in traditional rule form].

Courts can support the move back into doctrine by reviewing the balancing test's disadvantages — that it cannot assure that like cases will be treated alike, and that it has left the area of law at issue muddied and unclear — and citing to the literature.[330]

No court, so far as I can determine, has explicitly adopted this method of reconstructing balancing test cases, but judicial reticence is not hard to understand. Those of us who are suspicious of the test have not provided judges with an alternative. It is not enough simply to deprecate balancing. A judge may agree that balancing is ill-advised, and yet see no way to switch the method of analysis. It is not enough simply to call for a return to the *status quo ante*, to the rules as they existed before the test entered the

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[328] Sometimes the switch back to traditional doctrine can be accomplished without explicitly overruling prior cases. Whether this is possible will depend on how firmly the balancing test has been stated as a *rule*. Early in the Article I noted that the creation of a balancing test involves two steps, at least conceptually: describing the actions of past judges as the work of balancing, and transforming that description into a working rule of decision for future cases. But the strength of the second step varies from area to area. Sometimes the courts seem to have stopped at the descriptive phase, noting that past cases have involved a balance of interests, and determining that a like balance of interests will be used only *in the case at hand*. At other times, the courts seem to have taken the second step explicitly, announcing that in that case, *and in all future cases*, the rule of law is to balance interests. Once hardened into an explicit rule of law, a retreat to doctrine will require overturning the prior cases.

[329] *See supra* text accompanying notes 317–23.

[330] *See, e.g.*, the sources cited *supra* notes 231–34, 278, 299.

area of law under review. The law will have changed after years of balancing, and a bald return to earlier rules would require a court to reject outright an entire line of its most recent jurisprudence — surely an unreasonable request given our common understanding about the importance of precedent.

The method of reconstruction that I suggest is meant to address both problems. First, it is meant to demonstrate the basic mechanism — indeed, the very words — involved in returning to rule-based reasoning an area of law dominated by the balancing test. Once the mechanics are committed to paper, the switch back to rule-based reasoning looks much less subversive (as a jurisprudential matter) than we might otherwise have supposed.

Second, it should also be obvious that the method I suggest does *not* call for a return to the *status quo ante*. To the extent that there is wisdom in balancing, that wisdom can be captured when the law is transformed in the way I have suggested above. The method does not turn its back on the work of balancing, but rather *incorporates* it. Out of the *balancing* comes the new rules, and the new rules thus devised need not (though they may) look like the rules that existed before balancing took hold of the field. This aspect of the method should also alleviate some of our worries about adherence to precedent. If the method here suggested does involve overturning precedent ("we used to balance; we no longer balance"), it is of the most modest sort. The principles at work in that area of law are preserved and only the form in which they are stated has changed.[331]

All of this makes the judge's path easier, but perhaps not easy enough. Even with a model of how the deed is done, much work remains. As to each area of law dominated by balancing, someone must sift through past cases in search of underlying principles, common elements the presence or absence of which fairly can be said to have controlled the outcome in previous balancing cases. This is easier said than done. Faced with such a project on the one hand, and with simply rehearsing a balance on the other, it is no wonder that courts are inclined to the latter course. Even if a court were generally convinced, as a matter of good judging and good law, that balancing tests should be replaced by systems of rules, it might fairly believe that *in the present case* it can reach the same results by balancing as it would have reached by reconstructing the law on rule-based principles. By adhering to the balancing technique it saves itself from a time-consuming task filled with the potential for analytical errors and of little practical significance for the case at hand.

Here again, it rightly falls to those who question the wisdom of balancing to suggest the new lines, the rule-based lines, upon which the area can be reconstructed. When that groundwork is laid, judges might well show an increased interest in making the switch from balancing to rules.

I am supported (though not conclusively) in this prediction by some recent conversation between the United States Supreme Court and the law journals. Since the 1970 decision of *Pike v. Bruce Church, Inc.*,[332] the Supreme Court's work in dormant commerce clause cases has been sprinkled with talk of balancing. *Pike* is often cited for the proposition that a court reviewing the constitutionality of a state statute affecting interstate commerce must balance "the burden imposed on such commerce" against its "putative

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[331] There is, of course, a little more to it than that. The act of authenticating the "unofficial" rules will require placing some order on those rules, and in establishing that order, some substantive change will have taken place.

[332] 397 U.S. 137 (1970).

local benefits."[333] Although this "balancing test" does not form the exclusive means by which dormant commerce clause cases have been decided, it forms a basic item in the agenda for such analysis. As such, a majority of the Supreme Court applied it recently in *CTS Corp. v. Dynamics Corp. of America*,[334] holding that an Indiana corporate anti-takeover statute did not violate the commerce clause. In a concurring opinion, Justice Scalia rejected the use of *Pike*-inspired balancing, and did so in accord with an earlier analysis of dormant commerce clause cases by Donald H. Regan.[335] Professor Regan had argued forcefully that in this class of cases the Supreme Court "has been concerned exclusively with preventing states from engaging in purposeful economic protectionism. Not only is this what the Court has been doing, it is just what the Court should do. This and no more." Professor Regan thus isolated an underlying principle in the Supreme Court's treatment of dormant commerce clause cases, even in the face of decisions that spoke of balancing. At least one Supreme Court Justice was willing to accept the reconstruction, and to dispense with the balancing test in this class of cases.[336]

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[333] *Id.* at 142. There the Court said:

> Where the statute regulates evenhandedly 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. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, but more frequently it has spoken in terms of "direct" and "indirect" effects and burdens.

Id. (citations omitted).

[334] 107 S. Ct. 1637 (1987).

[335] Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986).

[336] Professor Regan's analysis goes a step or two further than the kind of analysis required to implement the reconstructive project I have outlined in this Article. My proposal requires only that a judge or commentator isolate the principles or unofficial rules that have developed in the course of balancing. The judge, under my proposal, then elevates those principles to a rule on the authority of better decision making. In contrast, Professor Regan, after isolating the operative principle — the prevention of purposeful economic protectionism — proceeds to make important descriptive and normative claims: 1) that judges have *really* been applying this principle when they say they are balancing; and 2) judges *should* apply just this principle rather than engage in balancing. He bases the second claim on standard constitutional grounds — by exegesis of the constitutional text.

These claims, if true, mean that: 1) a judge, following Professor Regan, can elevate the principle to the status of law as a matter of *candor*, ironically the reverse trick of balancing's creation in the first place: "we said we were balancing, but what we were *really* doing was applying a principle"; 2) a judge may further justify adopting the principle, not only on the authority of better decision making, but also on the requirements of the constitutional text itself. He thus provides two additional reasons for adopting the principle that would not have been available had he merely isolated the principle as one that seems to be decisive in past balancing test cases.

But, just as I am leery of the balancer's claim that despite opinions cast in rule form the courts *really* have been balancing, I am likewise leery of Professor Regan's descriptive claim that despite balancing language the courts have *really* been applying a principle. Likewise, Professor Regan's project of demonstrating that the constitutional text mandates using the principle and eschewing balancing is debatable. Perhaps Justice Scalia harbored the same doubts when he said of Professor Regan's work, "[i]f he is not correct, he ought to be." *CTS Corp.*, 107 S. Ct. at 1653 (Scalia, J., concurring in part and concurring in the judgment).

Whether Professor Regan is right in his descriptive and normative claims, the additional reasons he thereby generates for disposing of the balancing test and adopting the principle are not strictly required. The move away from balancing and back to rules is sufficiently justified on the grounds

It is not my purpose to defend or refute the substantive content of Professor Regan's analysis, to analyze whether the underlying principle that he stated fully captures the Supreme Court's past decisions in dormant commerce clause litigation. I intend, rather, to highlight the *point* of Professor Regan's project — to isolate a principle that informs an area of law governed in the past by balancing analysis — and the willingness of a Justice to reconstruct the law so that it will be governed in the future by that principle. In short, once the groundwork of isolating principles has been laid, the switch back to rules becomes much more likely.

B. *The Balancing Test as Half-Way House*

My second prescription — that we should remove the balancing test from those areas it currently dominates — relies on the malleability, or perhaps dynamism, of legal doctrine. The terms upon which cases are decided can change over time. An area of law can be moved from standard rule analysis to balancing test analysis and back again. A doctrine's passage through balancing test analysis can thus be viewed as one chapter in a longer history of development.

This developmental process raises an intriguing possibility for the balancing test. If its use is temporary, its advantages might be utilized and its disadvantages minimized in the following way. In areas of law so novel or complex that principled sets of rules are especially difficult to fashion, a court might introduce the test in order to encourage experimentation on a case-by-case basis. As this experience is accumulated, it is then appropriate to transform that experience into a set of rules, using a method like that suggested in my second prescription. We might suspect that this procedure will result in better rules than those concocted without the benefit of the balancing experience. The losses to systemic justice associated with the balancing test — inconsistency in application and muddied doctrinal waters — are confined to the short run; and in the long run, systemic justice is better served by creating better rules.

The temporary use of balancing test analysis arguably serves as an attractive alternative to the creation of an unwise rule. But this use of the test, of course, is only theoretical. Except for occasional judicial rumblings of the sort I described in the *CTS* case, no area of law, to my knowledge, has in fact been returned from balancing test analysis to standard doctrine. Unless a method of reconstructing balancing test analysis becomes accepted judicial practice, we must assume that an area's entry into the balancing test field is irrevocable.

Even if the process of reclaiming areas of law from balancing test analysis were to become more acceptable, there is still good cause to hesitate in adopting the balancing approach. Better methods of avoiding unwise rules are available. Perhaps the most common is to confine the worrisome decision strictly to its facts, or to a very narrow category of facts: if the rule is wise, future judges can adopt it in the name of precedent; if unwise, future judges can distinguish it away, and the case will have done little damage. Another method is to state a rule that turns on one of the venerable but generally vacuous coinages of jurisprudence: "fair" or "reasonable" or "good faith." A rule based on one of the broad terms gives courts a wide range of latitude in deciding future cases.

The reader may now rightly wonder how these methods could possibly represent an improvement over balancing test analysis. I argued that the test is fundamentally

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of better law and better decision making generally. What is important is to isolate (as Professor Regan has done) the underlying principle or principles that have informed past balances. Once that is done, the requisites of good law and decision making justify the move back to rules.

flawed because it gives less assurance that like cases will be treated alike and because it gives too little guidance for future conduct. An area of law, however, littered with opinions confined to their specific facts or stating principles based on "fairness" and "reasonableness" are likely to give no more assurance that like cases will be treated alike and no better guidance for future conduct. These sorts of rules are "rules" in name only. Because of their extreme narrowness, or extreme breadth, they offer few of the advantages of rule-based reasoning constrained by logic and the meanings of words.

The main reason for preferring a nominally rule-centered approach over a balancing test approach is that the former method permits a natural evolution of official subsidiary rules and balancing does not. Over time, decisions turning on "fairness," for example, will throw off a set of subsidiary rules about what counts as "fair" in certain factual circumstances. A court may determine that "fairness" in a particular context requires that defendants act toward plaintiffs in ways *x, y, and z*. A later court, faced with different sets of factual circumstances, may determine that conduct *x* may be replaced by conduct *a and b*. Later courts may refine the circumstances in which *a and b* are legitimate substitutes. At any one time in the developing doctrine of "fairness," however, it will be possible for a court (and lawyers) to summarize the work of past cases in rule form: the conduct required in this context is *x, y, and z*, with *a and b* standing as substitutes for *x* under certain (identifiable) circumstances. Furthermore, the statement of this rule does not require overturning earlier cases that have spoken more broadly, or more narrowly, of "fairness." Balancing test adjudication also throws off subsidiary guidelines and rules, but they can be turned into authoritative rules only by rejecting the explicit holdings of prior cases, i.e., the cases establishing that the rule of law is to *balance*. In addition, the analysis required in divining the underlying principles of prior balances is more difficult than traditional case analysis precisely because the prior balancing decisions were unfettered by rules and the limits of logic. For both of these reasons it is less likely, as a matter of fact, that balancing test analysis will be transformed to generate authoritative rules. The attractiveness of using the balancing test as a temporary way station in the development of doctrinal rules depends upon our ability to ensure that the test's use will *in fact* be temporary, but unless a method of reconstructing balancing test analysis becomes widely accepted, we do not have that assurance.

C. *A Final Word*

The prognosis for the balancing test is good. It is already a part of our law in dozens of substantive areas. *Stare decisis* will help to ensure that it stays there. If a reconstructive principle, along the lines of my second prescription, fails to attain wide acceptance, we can only expect its reign to continue in those areas it already dominates.

The test, in fact, is growing in popularity. The trend is to expand its influence, and reversing that trend will require judicial fortitude. The test's advantages are immediate — a promise of increased candor in the judging process and greater sensitivity to the difficulties of the individual case. The test's disadvantages are more distant and intangible — a reduced possibility of like cases being treated alike and poorer guidance for the future conduct of the citizenry at large. These are important concerns, but they tend to fall away in the crucible of having to decide the present case, a case that affects the flesh and blood litigants appearing before the court. The balancing test may well disserve the end of justice, but we should not be surprised to see it flourish.

BOSTON COLLEGE LAW REVIEW

VOLUME XXIX | MAY 1988 | NUMBER 3

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