Hard Cases and the (D)Evolution of Constitutional Doctrine

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Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.¹

[T]here are no easy cases in the Supreme Court.²

Two recurring themes in recent constitutional and jurisprudential scholarship are the prevalence of “balancing” in modern constitutional law, and the problem of how courts decide “hard cases.” In this Article, I examine the intersection of these two strands of thought in the phenomenon of cases which are “hard” because they involve a conflict between strongly protected individual rights and powerful societal interests. It is the thesis of this Article that these kinds of hard cases, though they occur very rarely in the real world, have had a profound and unfortunate influence on the formation of constitutional doctrine. In particular, concerns about hard cases have pushed the Supreme Court towards the inclusion of “outs,” or “safety valves,” in all areas of con-
stitutional doctrine, generally in the form of an exigent circumstances exception. Though such exceptions are not in themselves problematic, the way in which they have expressed themselves in doctrinal form has had systematic, negative consequences for the rest of constitutional law.

In the area of individual rights, which is the primary focus of this Article, the need to maintain a safety valve has been implemented through the formulation of "strict scrutiny" review. Under strict scrutiny, if a government has a sufficiently "compelling interest" and uses sufficiently well-tailored means to pursue that interest, it may infringe even core constitutional rights without violating the Constitution, and therefore without facing any consequences at all. This approach is profoundly troubling, at both a theoretical and a practical level. It has interfered with the ability of the courts, and of the Supreme Court in particular, to describe and define the individual rights protected by the Constitution with clarity and vigor, and thus has undercut the pedagogic and dialogic roles of the Court in shaping our constitutional culture. At a more practical level, the doctrine that the Court has created has left lower courts with almost no guidance, and so produced a jurisprudence of inconsistency and confusion. Furthermore, over time the ad hoc balancing methodology of the strict scrutiny test has tended to weaken individual rights, as courts become more and more likely, when faced with a strong claim of social need, to find the requisite exigent circumstances needed to narrow the definition of a right.

All of this suggests the need to reconsider the Court's approach to hard cases and, in particular, to reformulate its doctrine to prevent ad hoc exceptions from undercutting core constitutional rights. Hard cases, however, will not disappear. And their existence requires some allowance, because it is simply impractical and unrealistic to take the strong, "absolutist" position that in the case of conflict, societal interests must yield, no matter what the costs or the context. This Article concludes by proposing a preliminary solution to the problem of hard cases, which focuses on the judiciary's equitable discretion in the formulation of remedies for constitutional violations. It suggests that remedial discretion would permit courts to accommodate immediate, pressing social interests by refusing, sometimes, to enjoin constitutional violations, without distorting substantive constitutional rules. In addition, a remedial as opposed to a substantive solution to the dilemma of hard cases has the advantage that it may leave victims of constitutional violations with at least some, albeit limited, remedies. As such, a remedial approach to hard cases might produce a better compromise than the current, substantive approach between the desire for a clear, doctrinal ex-
position and protection of constitutional rights and the practical, societal need to trump certain rights in the face of exigency.

I. HARD CASES AND THE "AGE OF BALANCING"

A. Balancing

As many scholars, including notably Alexander Aleinikoff, have pointed out, constitutional law today is dominated by the phenomenon of "balancing." In other words, in much of constitutional law the judicial rule-of-decision requires courts to resolve claims of constitutional infringement by balancing, or weighing, the harm caused by an alleged constitutional violation against the strength of the reasons given by the state for pursuing the challenged course of action. In many areas of constitutional law, such as the dormant commerce clause, the balancing is explicit. In the area of individual rights, however, the story is more complicated. The Supreme Court's dominant "three-tiered" doctrine requires a reviewing court, facing a claim that the government has infringed a constitutionally-protected individual right, to first categorize the case based on the nature of the alleged infringement, and then to subject the governmental action to either "strict," "intermediate," or "rational basis" scrutiny, depending on the result of the categorization. Each of the levels of scrutiny in theory requires the reviewing court to determine whether the government has advanced a sufficiently powerful reason for its actions (the strength of the required interest, of course, rising with the level of scrutiny), and whether the means it has chosen are sufficiently narrow (with the tailoring requirement becoming progressively stricter with the level of scrutiny). If the answer to both questions is "yes," the action is upheld. Thus, at least as it is worded, the individual rights doctrine does not appear to incorporate a balancing methodology at all.


6. This statement must be qualified; in some narrow areas of individual rights jurispru-
In practice, however, reviewing courts are likely to turn to balancing in individual rights cases to determine whether the governmental action should be declared unconstitutional. Balancing tends to creep in at the point where courts must actually apply the relevant level of scrutiny. Indeed, the turn to balancing seems almost inevitable at this stage, given the impossibility of evaluating in the abstract the "strength" or "legitimacy" of a proffered governmental interest,7 as the Court's doctrine appears to require, and given the judiciary's institutional inability to assess the efficacy of the government's chosen means. These same factors make constitutional balancing inevitably ad hoc, meaning that there is no limitation or constraint on what interests may properly be considered on the governmental-interest side of the balance.

The prevalence of balancing also raises the question of what role the preliminary categorization plays in the Court's doctrine, since all three levels of scrutiny appear in practice to involve similar, "weighing" analysis. The answer is that the categorization process seems to determine how much weight to accord to the burden on the individual right when it is balanced against the claimed governmental interest at stake. Thus a court applying "strict" scrutiny will "tilt the balance" in favor of the individual rights claimant, while a court using "rational basis review" will tilt the balance in favor of the government.9 But ultimately, a comparison is still necessary.

One final caveat is in order here. The description of the Court's three-tiered doctrine as primarily a balancing methodology remains somewhat controversial because in practice, at least until recently, the categorization process tended to be decisive, at least with regards to strict and rational basis review. When engaging in strict scrutiny, courts accorded the individual right such great weight that essentially no governmental interest sufficed to justify an infringement, making strict scrutiny, in Gerald Gunther's oft-quoted words, "fatal in fact";10

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8. See id. at 321-23.
10. Gerald Gunther, In Search of Evolving Doctrine on a Changing Court: A Model for a
and with rational basis review, the individual right was accorded almost no weight, so that even the flimsiest governmental justification would suffice. This point is well taken; balancing is by no means the only mode of analysis employed by courts, even in the "tiers" of the current individual rights doctrine. Nonetheless, at least in principle, each of the tiers requires some examination of the individual right and governmental or societal interest at stake, and balancing is at least permitted to reviewing courts no matter what the level of scrutiny. Moreover, there is evidence that both the Supreme Court and lower courts have in recent years been more and more willing to engage in balancing even in the highest tier of scrutiny, and to uphold governmental actions which impinge on even central protections granted by the Constitution. Overall, balancing is sufficiently pervasive in current jurisprudence to be described fairly as the "dominant" methodology.

B. Hard Cases

This Article is concerned with one particular manifestation of balancing analysis, which is the ad hoc balancing used to resolve "hard cases" in which an individual rights violation is alleged. The concept of "hard cases" has long played a prominent role in the legal culture, in the form of the aphorism that "hard cases make bad law." The


14. Northern Sec. Co. v. United States, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting). Interestingly, it has also been noted repeatedly that easy cases can also make bad law.
origins of the phrase are unknown, but it can be traced back as far as the pleas of two English judges of the 1840s, Baron Rolfe and Lord Campbell,\textsuperscript{15} that hard cases not be allowed to make bad law (the phrase appears to have been in common usage even then). It was brought into the lore of the Supreme Court by the first Justice Harlan,\textsuperscript{16} and was stated most famously by Justice Holmes in the passage from the \textit{Northern Securities} case quoted at the beginning of this Article.\textsuperscript{17}

To understand why hard cases are said to make bad law, one must first appreciate what it is that makes a particular case "hard." As used in this Article, the term "hard cases" refers to cases where the law, meaning primarily the doctrine announced by the Supreme Court, appears to point strongly towards a particular result, and yet, because the result seems unduly harsh either to an individual or to society at large, it is unpalatable to the reviewing court. In the constitutional, individual-rights context, this most often occurs when a challenged governmental action seems to quite clearly infringe upon a well-established constitutional right, and yet the reasons given by the government for its actions are (or at least seem to the reviewing court to be) particularly strong or "compelling." These cases are not legally difficult, nor are they really factually difficult in the sense of involving unknown or unknowable facts; they are difficult for pragmatic, social, and generally extra-doctrinal reasons.\textsuperscript{18} This is the traditional understanding of what


15. \textit{See} East India Co. v. Paul, 13 Eng. Rep. 811, 821 (P.C. 1849) ("[I]t is the duty of all courts of Justice to take care, for the general good of the community, that hard cases do not make bad law"); Winterbottom v. Wright, 152 Eng. Rep. 402, 406 (Exch. 1842) ("Hard cases, it has been frequently observed, are apt to introduce bad law.").


17. \textit{See} \textit{Northern Sec.}, 193 U.S. at 400-01 (Holmes, J., dissenting). Holmes, of course, was concerned in \textit{Northern Securities} with "great cases" rather than hard cases, but for the purposes of this Article, the distinction is not an important one because it is the very factors that make a case "great" (political or public prominence, generally) that make it "hard," in the sense that the term is used in this Article.

18. It should be noted that this may not be the only example of a "hard" constitutional case in the relevant sense. It may be that, sometimes, doctrine or law points against finding a constitutional right, but the reviewing Court is strongly pulled, by moral considerations, hardship, or other policy concerns, towards the individual claimant. \textit{See}, e.g., \textit{Romer}, 116 S. Ct. 1620; \textit{Cleburne}, 473 U.S. 432; Plyler v. Doe, 457 U.S. 202 (1982). Though such cases are not central to my thesis, many of the same problems that arise with respect to the more traditional
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constitutes a "hard case," and appears to be the meaning intended by Justices Harlan and Holmes, as well as Baron Rolfe and Lord Campbell.19

This definition can be contrasted with the understanding of what constitutes a "hard case" that has dominated recent jurisprudential debates, which is a case that is legally difficult or indeterminate, because its result is not dictated, or even closely guided, by existing legal materials (including precedents) and/or interpretational theories. This appears to be the meaning intended by Ronald Dworkin in his important piece, Hard Cases,20 used by Frederick Schauer in his examination of Easy Cases,21 and by David Lyons in Justification and Judicial Responsibility.22 Such cases are hard because they test and expose the limits of legal methodology and reasoning, even if they are trivial in terms of practical consequences. As such, they are of obvious interest to jurists and other scholars, but perhaps of less interest to the rest of legal and general society.23 Of course, the distinction I draw between the different kinds of hard cases is not a sharp one. As I will discuss in more detail later,24 there are times when a case becomes legally hard because the intersection of a settled rule and an unpalatable result raises doubts about the rule itself. But in many instances the distinction is an important one, and indeed, it is my thesis that for the purposes of constitutional doctrine, it is a crucial one.

But why do hard cases make bad law? If by a "hard case" one means the Dworkin/Schauer paradigm of a case where legal materials fail, then it is hardly surprising that they produce "bad" law in the Dworkinian sense of rules which do not fit with the structure of the law as a whole. When the degree of difficulty rises, so of course does the rate of error. But that trivial point cannot be all that is meant by

hard cases can arise in this context, and they will be discussed to that extent.

19. See supra notes 14-17 and accompanying text.
22. David Lyons, Justification and Judicial Responsibility, 72 CAL. L. REV. 178, 178-81 (1984). Schauer does identify a category of cases where, even though clearly applicable rules dictate a result, "it may still be morally, socially, or politically hard . . . in the sense of hard to swallow," Schauer, Easy Cases, supra note 2, at 413, and Lyons notes the existence of "harder easy cases," where legal rules seem to yield a determinate answer, but the result is hard to justify because it is harsh, Lyons, supra, at 190-93; but neither focuses much, if at all, on these kinds of hard cases, which are my primary concern.
23. This is one of Schauer's primary points in talking about "easy cases." See Schauer, Easy Cases, supra note 2, at 399-402.
24. See discussion infra Part I.C.
the phrase "hard cases make bad law"; and furthermore, it is not clear that this concept of "bad law" has much meaning to those who accept modern arguments regarding the indeterminacy and contextuality of legal decisionmaking, especially in cases where legal materials give out.\textsuperscript{25}

The traditional aphorism makes a good deal more sense, however, if understood to refer to hard cases as I define them—cases which are "morally" hard, even if they apparently do not require difficult legal analysis. Under this understanding, the phrase "hard cases make bad law" is a plea to judges and other rulemakers not to deviate from, or to alter, clear and well-established rules because of the equities of a particular case. "Bad law" in this context is understood as the distortion or even the disregard of clear rules for the sake of a "just" result (or perhaps more accurately, a result that is acceptable to the deciding judge). This is certainly what Holmes meant by "bad law" in the quote from \textit{Northern Securities} at the head of this Article, and it appears to be what the Supreme Court meant in \textit{United States v. Mitchell},\textsuperscript{26} when it quoted Baron Rolfe's warning regarding hard cases to defend a seemingly unjust result in a tax case. That also seems to have been the original understanding of a "hard case" and "bad law" in the early English decisions which created the aphorism. In the earlier case, the famous \textit{Winterbottom v. Wright} decision denying relief to an injured coach driver on grounds of lack of privity of contract, Baron Rolfe makes his observation about hard cases in the course of noting that it was "no doubt, a hardship upon the plaintiff" that clearly established law left him with no remedy, even though he was lame by the negligence of the defendants.\textsuperscript{27} In the later case, \textit{East India Co. v. Paul}, Lord Campbell, after ruling that the plaintiff's breach-of-contract action must be dismissed on statute-of-limitations grounds, makes his comment about hard cases as a response to the great financial hardship imposed on the (Indian) plaintiff by the inequitable behavior of the defendants.\textsuperscript{28} Indeed, Lord Campbell goes so far as to comment that "[i]t would have been very satisfactory to" the court to be able to sustain the claim.\textsuperscript{29} In neither case was the law unclear—each court went out of its way to

\textsuperscript{26} 403 U.S. 190, 205 (1971).
\textsuperscript{27} Winterbottom v. Wright, 152 Eng. Rep. 402, 405 (Exch. 1842).
\textsuperscript{29} Id.
emphasize that the legal standards being applied were well-established and unambiguous—but rather it was the facts and equities that made the case "hard."  

The understanding that hard cases create bad law by encouraging courts to distort, or deviate from, a clear rule comports well with one understanding of the Rule of Law, and therefore suggests why such law, with its emphasis on case-by-case adjudication, is considered "bad." This is the idea, long dominant and still extremely powerful today, that the rule of law consists of a system of rules which are clearly stated, fixed in advance, and not altered or ignored during application. Under this view, clarity, predictability, and impersonality are the primary virtues and are also essential elements of the rule of law, because any other approach would constitute the "rule of men." Moreover, this concept of the law has some instinctual attraction. It seems the strongest possible bulwark against arbitrariness, prejudice, and whim. And as Frederick Schauer has pointed out, it is almost inherent in the very concept of a rule that it have some rigidity, even in the face of countervailing tugs, so that a rule sometimes leads a decisionmaker to a result that is not the same one as a consideration of all relevant factors might have produced.

Hard cases, however, challenge this view of the virtues of rules, because they seem to present the starkest possible contrast between what Schauer calls "rules" or "law" (and which Justice Scalia calls the "Rule of Law"), and our instinctual notions of equity or reasonableness. After all, one might ask, why should we adhere to the law if it is an ass? And if the law seems to require an unjust or socially unpalatable result, is it not an ass? There was a time when the answer to this dilemma seemed clear—the long-term social interest in clear, stable rules, the value of "neutral principles," and the general moral force of the law itself were enough to trump any short-term individual or social interest in deviation from well-established rules. Over time, however, as our faith in neutral principles and legal determinacy has withered,

30. Of course, in both cases, as in most instances where the "hard cases" aphorism is invoked, the courts claimed that they avoided making bad law by accepting necessary hardship as the lesser of two evils.
32. See Frederick Schauer, Formalism, 97 YALE L.J. 509, 535 (1988) [hereinafter Schauer, Formalism].
33. See Scalia, supra note 31.
this answer becomes a good deal less satisfying. If, at least in hard cases, law is politics and rules do not bind anyway, then the “rule of law” is no reason to ever decide such a case other than as one desires. The consequence, as Frederick Schauer has again put it, is that “[i]n many of the most important areas of American adjudication, the tolerance for the wrong answer has evaporated. [Instead, we] tailor the rule to fit the case.”

All of these forces have, not surprisingly, pushed the law in the direction of a particular methodology—balancing. Under an ad hoc balancing approach, an unpalatable result need never be tolerated, because the very factors that make the result unpalatable can be thrown into the balance and invoked to support the preferred result. In the area of individual rights and hard constitutional cases, this has taken the form in modern times of subjecting even governmental actions which appear to contravene core constitutional principles to “strict scrutiny,” and thus to balancing, rather than to simply declare them unconstitutional. The reason is (presumably) that balancing provides a safety valve in the event of a “hard case,” where the governmental and societal reasons for infringing upon an individual right are particularly strong (or in the language of the doctrine, “compelling”). This tendency began in the area of Equal Protection with the infamous Korematsu case upholding the internment of Japanese-Americans during World War II, and was extended (perhaps inadvertently) in more recent years to the First Amendment and to other areas of individual-rights jurisprudence. Even during the intervening period before tiered analysis spread beyond the Equal Protection area, the use of “balancing” was widespread, especially in First Amendment cases. This methodology has, to a substantial extent, simply been incorporated (with some “tilting”) into the current tiered framework.

Moreover, the history of balancing methodology in constitutional law tends to confirm that constitutional balancing generally, and the strict scrutiny “out” in particular, developed as an explicit response to “hard cases.” Korematsu was the epitome of a hard case: a challenge

38. See infra note 39.
to a government action which seemed flagrantly unconstitutional, and yet which, because of the wartime atmosphere, posed serious political and social problems for the Court. During the 1950s, balancing was prominent in the Court's review (and affirmance) of the Smith Act prosecution of Communist Party leaders, where again the Court was faced with seemingly clear First Amendment violations (at least by modern sensibilities), and yet perceived the cases to pose a fundamental conflict with the societal interest in national security. And though, as discussed above, the strict scrutiny "out" lay largely dormant for many years after Korematsu and the McCarthy era, in more recent years courts have found the strict scrutiny test satisfied in cases challenging content-based regulation of sexually explicit speech, governmental affirmative action, applications of taxation systems which burden religious exercise, restrictions on political speech in the electoral context, and applications of antidiscrimination laws which burden religious and associational rights. Again, in each of these instances, the courts seem to be confronted with facially unconstitutional state actions accompanied by strong societal interests in favor of permitting them.

39. See Dennis v. United States, 341 U.S. 494, 508-11 (1951) (plurality opinion); id. at 542-43 (Frankfurter, J., concurring in the judgment); see also Wilkinson v. United States, 365 U.S. 399, 413-15 (1961); Barenblatt v. United States, 360 U.S. 109, 126-28 (1959) (both upholding convictions arising from related McCarthyist congressional investigations of the Communist Party). These cases largely picked up on the approach, and conclusions of the World War I and 1920s "Red Scare" era cases affirming the convictions of dissidents, from many of which Justices Holmes and Brandeis dissented. See, e.g., Gitlow v. New York, 268 U.S. 652 (1925); Abrams v. United States, 250 U.S. 616 (1919); Debs v. United States, 249 U.S. 211 (1919); Schenck v. United States, 249 U.S. 47 (1919).

40. See supra notes 10-12 and accompanying text.


46. See, e.g., Recent Case, 110 HARV. L. REV. 1167, 1171 (1997) (in Wittmer, Judge Posner was "straining to break free from a constitutional straitjacket that would prohibit the
None of this is to say that the above cases are wrongly decided—some of them were almost certainly not. Nor is it to say that creating an “out” for hard cases is the only function performed by balancing. As I have noted elsewhere, in a vast range of other constitutional cases, balancing is an entirely appropriate, and indeed an inevitable, mode of substantive, constitutional analysis—particularly when only incidental burdens have been placed on constitutional rights, or when only marginal or peripheral rights are involved.\(^4\) Moreover, there are clearly times when even strict scrutiny is used as a form of substantive, interpretive analysis.\(^4\) What the above does indicate, however, is that historically, and in a substantial number of modern cases, balancing methodology, and especially strict scrutiny, appears to function as an “exigent circumstances” exception to otherwise clear and highly rights-protective constitutional rules; and that it is invoked in “hard cases” where a reviewing court sees a strong conflict between constitutional values and societal interests.

C. Definition and Justification

Until now, I have argued that in modern constitutional law, interest balancing is a primary, if not the dominant, mode of analysis, and that one manifestation of this methodology appears in the courts’ treatment of “hard” constitutional cases, where an individual’s claim of a constitutional right is found to conflict with strong societal interests. In such cases, balancing, generally in the form of “strict scrutiny” review, acts as a kind of “safety valve,” a constitutional exception for exigent circumstances. To fully understand the relationship between strict scrutiny and hard cases, however, it is important here to distinguish between two possible understandings of the function performed by constitutional scrutiny and, in particular, by “strict scrutiny” of facially invalid governmental actions.\(^4\) Such scrutiny might be understood in two quite

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\(^4\) See Bhagwat, supra note 7, at 351-56.

\(^4\) For example, in Burson v. Freeman, 504 U.S. 191 (1992), the Supreme Court appears to have used strict scrutiny to screen for illegitimate governmental motives in a free-speech case, upholding the speech restriction after concluding that no improper purposes had inspired the government action. See id. at 211-14 (Kennedy, J., concurring); Bhagwat, supra note 7, at 347.

\(^4\) I describe such actions as facially, or presumptively, invalid because by subjecting the governmental action to strict scrutiny, the reviewing court has necessarily found that the action appears to directly contravene the Constitution. See Bhagwat, supra note 7, at 339.
distinct ways: as either defining the limits of what the Constitution prohibits, or alternatively, as permitting an action even though the action violates the Constitution.\textsuperscript{50} The key distinction here is between definition and justification—or alternatively, between creating an exception and overriding a rule.\textsuperscript{51} One might describe a judicial decision that a particular governmental action survives strict scrutiny as a description of the scope of a constitutional right, and so a conclusion that the Constitution has not been violated. But one might also describe such a decision as a judicial conclusion that even though the action violates the Constitution, the judiciary will decline to prohibit the violation because of pressing societal needs—i.e., will find the violation to be “justified.” Interestingly, Justice Holmes appears to have held the latter view of the states’ “police power”: that the power, and the societal needs which underlie it, justify constitutional violations (though apparently by only state governments).\textsuperscript{52}

Some further clarification is needed here. When I say that strict scrutiny might be understood to “define” the scope of a constitutional right, I do not mean to suggest that this is the only, or primary, means through which rights are defined. To the contrary, the scope of constitutional rights is usually defined, as a preliminary matter, through other, generally interpretive methodologies, which are used to establish primary, constitutional rules. Without such rules, one would not know when strict scrutiny should be invoked in the first place. Moreover, a court (generally the Supreme Court) might engage in some form of balancing analysis in the process of choosing a rule and defining a right. This type of balancing—commonly known as “categorical” balancing—is quite distinct from strict scrutiny balancing, which in its definitional form is understood to define a right to include an internal, \textit{ad hoc} limit which is established by the governmental interest in a particular case. Put differently, strict scrutiny balancing defines the right itself in terms


of an *ad hoc* standard rather than in terms of a rule, however derived (including through a balancing process).\(^{53}\)

To illustrate these distinctions, consider *Korematsu*, where the Supreme Court upheld the federal government’s wartime internment of Japanese-Americans.\(^{54}\) The Court might have reached that result in three different ways. First, it might have held that the Equal Protection Clause, as an interpretive matter based on its history and purposes, simply did not forbid the government to imprison U.S. citizens based solely on their race. Perhaps the Court could have interpreted the Clause, on historical grounds, to protect only African-Americans; or perhaps it could have defined the Clause essentially out of existence, as it had previously done with the Privileges and Immunities Clause of the Fourteenth Amendment.\(^{55}\) In reaching any of these conclusions, the Court might have engaged in some balancing of interests, even though the resulting rule did not incorporate balancing. This would have been a truly interpretive decision, in the sense used above. Of course, the Court did not take this path for reasons that seem obvious; in fact, *Korematsu* is generally cited as establishing the contrary proposition, that the Equal Protection Clause *does* generally forbid the government to discriminate based on race. Second, the Court had the option of defining the equal-protection right as itself incorporating an *ad hoc* limit, so that the right is not violated if the government has a strong enough reason to discriminate based on race. This is the definitional use of strict scrutiny, and it is the path that the Court in fact did take.\(^{56}\) Finally, the Court could have adopted the approach, advocated by Justice Jackson in his dissent,\(^{57}\) of announcing a constitutional viola-

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53. As I discussed briefly above, see supra notes 47-48 and accompanying text, strict scrutiny does not invariably function as an entirely *ad hoc* form of analysis—in a few instances, it might perform a more interpretive function, for example as a screening test for bad motives. In most instances, however, it would appear that strict scrutiny is meant to, and does, serve as an *ad hoc* out. Also, I do not mean to suggest that the line between categorical and *ad hoc* balancing is a clear one—obviously it is not, as the Court’s obscenity decisions, among others, demonstrate. See, e.g., *Miller v. California*, 413 U.S. 15 (1973). Ultimately, however, some distinctions can be drawn here, based upon the degree of open-ended discretion that remains with the later decisionmaker who applies the rule (or standard) which emerges from the balancing process. With obscenity, the discretion is considerable. With child pornography, on the other hand, the discretion is extremely limited, making the Court’s approach in this area a good example of true, categorical balancing. See, e.g., *New York v. Ferber*, 458 U.S. 747 (1982).


55. See *The Slaughter-House Cases*, 83 U.S. 36 (1873).

56. See infra note 60 and accompanying text.

57. See *Korematsu*, 323 U.S. at 246-48 (Jackson, J., dissenting).
tion but refusing to use the judicial power to block the internment because of the weightiness of the government's asserted interests. This would have been the use of strict scrutiny as justification. Both of the latter two approaches would have involved *ad hoc* balancing analyses of the strict scrutiny variety, but the opinions would have read quite differently.

The contrast between the two understandings of strict scrutiny described above is not an inevitable one. As Mark Tushnet has pointed out in a slightly different context, one might adopt the "prudentialism dodge" of supposing that the Constitution, as an *interpretational* matter, always permits consideration of societal consequences, and so treat all justification as a matter of definition. As Tushnet further points out, however, this dodge is an unconvincing one, because it runs up against the very notion of constitutionalism by seeming to eliminate substantial, objective limitations on a decisionmaker's authority. Moreover, there is no indication in the Constitution that Congress or the other organs of the federal government are permitted to ignore, or "trump," the prohibitions of the Bill of Rights if the need is great enough, and the same is true with respect to the states and the Fourteenth Amendment (and presumably the Bill of Rights after incorporation). Rather, the "trumping" contemplated by the Constitution appears to run entirely in the other direction, against governmental authority.

The distinction between "definition" and "overriding" thus remains a viable one, and turns out to be of great importance in understanding the particular role of "hard cases" in constitutional law. It has not, however, been widely acknowledged. Rather, strict scrutiny has generally been described and understood, by the courts and the public, in the first, definitional sense. In the admittedly rare circumstances when strict scrutiny is found to be satisfied, the reviewing Court tends to describe its analysis as concluding that the Constitution has not been violated at all—i.e., that as a consequence of a pressing societal need, the individual right simply has not been infringed, no matter how it may appear from the point of view of the affected individual. Thus in *Korematsu*, the Court described its decision as finding the racial exclusion order under which Fred Korematsu was convicted to be constitutional, and within the powers of Congress and the military authorities.

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59. See *id.* at 10-11.
60. See *Korematsu*, 323 U.S. at 217-19 ("[W]e are unable to conclude that it was beyond
Indeed, Justice Frankfurter went out of his way to write a concurring opinion emphasizing that the Court's decision recognized the "constitutional legitimacy" of the exclusion. 61 Similarly, in Roberts v. United States Jaycees, the Court stated that it was upholding the application of Minnesota's gender discrimination laws to the Jaycees against a freedom-of-association challenge because "[t]he right to associate . . . is not . . . absolute," and "Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms." 62 In all of these cases, the Court is quite clearly defining the scope of the underlying right rather than excusing a constitutional violation. The Courts of Appeals decisions in Action for Children's Television v. FCC (ACT III) and Wittmer v. Peters also seemed to unambiguously conclude that because the government actions challenged in each case satisfied strict scrutiny, they did not violate the Constitution at all. 63

There are no doubt many cases in which balancing, including perhaps those involving strict scrutiny, is properly conceived as a mode of substantive, constitutional interpretation. 64 With respect to true hard cases as defined above, however, the standard understanding of the function of strict scrutiny is very peculiar. Hard cases are quintessentially cases where the law or doctrine seems clear and therefore leaves no room for interpretation, yet the seemingly mandated

the war power of Congress and the executive to exclude those of Japanese ancestry from the West Coast war area. . . . We uphold the exclusion order.").

61. Id. at 224-25 (Frankfurter, J., concurring).
64. See Action for Children's Television v. FCC (ACT III), 58 F.3d 654, 669 (D.C. Cir. 1995) (en banc), cert. denied, 116 S. Ct. 701 (1996) ("[t]he Constitution, however, permits restrictions on speech where necessary in order to serve a compelling public interest, provided that they are narrowly tailored"); Wittmer v. Peters, 87 F.3d 916, 921 (7th Cir. 1996), cert. denied, 117 S. Ct. 949 (1997) ("We hold [that the preference provided to a black job applicant] on the ground of his race was not unconstitutional.").
65. In particular, I have argued elsewhere that balancing is a proper, substantive mode of analysis when the government is acting in an area of only peripheral constitutional concern, or has imposed only an incidental, as opposed to a direct burden on a constitutional right. See supra text accompanying note 47; Bhagwat, supra note 7, at 351-56. Most truly hard cases do not, however, properly qualify for this kind of analysis, because they tend to arise in areas of core constitutional concern, such as racial discrimination or regulation of purely private, political speech. Indeed, that is one of the reasons why these types of cases are hard.
result is troubling. Moreover, the reasons why the result is troubling (in other words, the justification presented by the government for its actions) are generally quite unrelated to the constitutional values at issue—in Korematsu, concern about wartime security as opposed to equality principles;66 in Austin, concerns about "corruption or the appearance of corruption" in the political system as opposed to free speech values;67 in the Lee and Hernandez cases, concerns about the efficient functioning of the tax system as opposed to religious freedom;68 in Wittmer, concerns about the efficacy of a prison system as again opposed to equality principles;69 and in ACT III and Crawford, concerns about exposing children to sexually explicit materials as opposed to free speech values.70 Thus, describing such cases as involving definition of the scope of a right seems forced and ultimately unconvincing. Rather, in the context of such "hard cases" where the government seems to be contravening the core of a constitutional provision or rule, yet where the result remains in doubt, the concept of strict scrutiny must be understood as permitting a compelling government interest to override the Constitution.71 As the next section describes, the improper description and resulting misconception of such hard cases as involving definition rather than justification, especially by the Supreme Court, has had significant and unfortunate consequences for the development of individual-rights doctrine and the evolution of constitutional law, and more generally for our constitutional culture.

II. HARD CASES IN THE SUPREME COURT

The first part of this Article demonstrates that according to the modern Supreme Court, every constitutional right, no matter how fundamental, has a limit built into it, based on countervailing societal needs. The limit is a shifting one, one which varies depending on the

66. See Korematsu, 323 U.S. at 219-20.
69. See Wittmer, 87 F.3d at 919.
71. See, e.g., Schauer, Easy Cases, supra note 2, at 425-28 & nn.67-68 (recognizing that exigent circumstances or unusually strong reasons can always override rights, even when language is unusually clear).
judicial and public perception of those needs. The topic of this section is how and why the Court has been led to this conclusion, and what the practical consequences of this doctrinal approach have been for constitutional law and constitutional rights.

A. Doctrine and the Legal Culture

The above discussion indicates that hard cases, as defined here, have had a substantial impact on the formulation and modern understanding of constitutional balancing methodology—especially on strict scrutiny review—and, because of the modern dominance of such methodologies, on constitutional doctrine generally. Indeed, the historical role played by hard cases in the devolution of constitutional doctrine into unconstrained balancing has been central. This, however, is somewhat surprising. It is a characteristic of hard cases that they are unusual and rare. If they were not out of the ordinary, it would make little sense to talk about their special role in shaping law or in making “bad law.” Most “normal” cases do not raise the particular difficulties of hard cases, but rather involve the unexceptional application of settled principles, even if there is some uncertainty around the edges. Why, then, have hard cases played such a prominent role in the shaping of modern constitutional doctrine—why, in the words of Frederick Schauer, is it that “[c]ontemporary Constitutional theory has become mired in a fixation with the decision of hard cases?” The answer lies in a combination of the peculiar institutional character of the Supreme Court and in aspects of the wider legal culture.

The Supreme Court is a very unusual, perhaps unique court (unique, at least, within the American legal system). Indeed, in some ways it does not function as a typical court at all, but rather as a super-legislature for other courts. In an era in which the Supreme Court’s docket is almost entirely discretionary, in which it is able to review only a tiny fraction of the cases over which it has potential jurisdiction, and in which the primary importance of its decision in most cases is not so much the particular outcome as the mode of analysis it employs and requires lower courts to employ in the future, there is little resemblance between the typical dispute-settling functions of most courts in most cases and the work of the Supreme Court. One

72. Id. at 407.
73. See Scalia, supra note 31, at 1177.
manifestation of the uniqueness of the Court is in the nature of its docket. In selecting cases to review, the Court focuses on conflicts among lower courts and on "important question[s] of federal law." As a consequence, the Supreme Court's docket is made up disproportionately, indeed almost entirely, of hard cases. Many of those cases are hard in the Dworkinian sense of pushing the limits of established law, but many others are not; rather, they involve issues that have created a split of authority, or have become difficult because the result seemingly dictated by established doctrine and methodology was unpalatable to a lower court, or is difficult for the Supreme Court to accept.

The prevalence of hard cases in the Court's docket has a peculiar, distorting effect on the perspective of the members of the Court and thus ultimately on their opinions setting forth rules to be applied by lower courts. It is difficult to describe the dynamic of doctrinal formulation on the Court with any degree of precision, since we still lack any sort of a broad, convincing theory of how judges decide cases. However, common sense does suggest some consequences likely to flow from the domination of the Court's docket by hard cases, as well as other incentives facing members of the Court. The first and perhaps most important effect of the Court's docket seems to be a subtle change in the perspective of the Justices after they join the Court. Reading Supreme Court decisions, especially ones that are significant in terms of the formulation of constitutional doctrine, one gets the distinct impression that the authors of the opinions (for there is almost always more than one) see the legal world as full of, indeed dominated by, difficult cases, where judges must make delicate judgments about how to reconcile individual and societal interests. Even when upholding a

75. See generally Frank H. Easterbrook, Ways of Criticizing the Court, 95 Harv. L. Rev. 802, 805-07 (1982); Schauer, Easy Cases, supra note 2, at 409; Frederick Schauer, Giving Reasons, 47 Stan. L. Rev. 633, 646 (1995) [hereinafter Schauer, Reasons].
76. See Dworkin, supra note 20. Examples of such hard cases would include the abortion cases, and the privacy cases generally, as well as most of the difficult statutory interpretation and preemption cases that come to the Court.
77. This category includes what Justice Holmes in Northern Securities called "great cases," which are hard because they are politically prominent, rather than for doctrinal reasons. See Northern Sec. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).
claim of constitutional right, the opinions tend to acknowledge the strong reasons why the government acted as it did, and to suggest that the Court is struggling somewhat to determine the proper result in the case. From the point of view of the members of the Court, this perspective is an understandable one. Most of the cases they see are difficult ones, requiring subtle judgments. Taking a broader view, however, the Court’s perspective is a distorted one—most cases are not difficult, even most litigated cases, and if one expands one’s view to include potential disputes, what Schauer calls “legal events,” it becomes quite clear that most instances where legal rules must be applied certainly do not pose “hard” cases in any sense of the term.

This contrast between the legal world which the Court inhabits and the rest of the legal world creates a peculiar dynamic because in our system, the primary job of the Supreme Court, as discussed above, is to make rules and to create doctrine for other decisionmakers to follow. The Court, however, understandably tends to create doctrine suitable for the legal world which it inhabits, without much awareness of how those rules will operate in the rest of the legal world, the one occupied by lower courts (and other decisionmakers). The primary manifestation of this tendency is—of course—balancing. Edward Rubin and Malcom Freeley have postulated that the crucial motivation driving much judicial decisionmaking is the need to “integrate,” to reconcile a judge’s attitudes and preferences with her understanding of what doctrine requires. Balancing methodology provides an ideal way for members of the Court to achieve this integration by shaping doctrine to incorporate their attitudes and preferences. The consequence of balancing approaches is to create discretion in the decisionmaker, and it is not surprising that the Court is happy to create discretion in itself. More-

79. See, e.g., Reno v. ACLU, 117 S. Ct. 2329, 2346 (1997); United States v. Virginia (VMI), 116 S. Ct. 2264, 2279-81 (1996); id. at 2290 (Rehnquist, C.J., concurring); Texas v. Johnson, 491 U.S. 397, 418-20 (1989); id. at 421 (Kennedy, J., concurring). One notable exception to this tendency is the recent decision in Romer v. Evans, 116 S. Ct. 1620 (1996), where the Court gave essentially no nod to the motivations of the enacting popular majority.


81. Indeed, Supreme Court opinions are notable for the rarity with which they consider or discuss the ability of lower courts to apply and follow the doctrine that they are creating.

82. See Feeley & Rubin, supra note 78, at 2004-09.

83. See George C. Christie, An Essay on Discretion, 1986 Duke L.J. 747, 764-72; Scalla, supra note 31, at 1179-80 (arguing for rule-based methodologies as a form of judicial restraint, because they limit discretion and increase accountability). This point should not be overstated, of course—there are times when courts would rather not have discretion, so that they can disclaim responsibility for unpopular results, much like law professors and grades (I thank Evan
over, at the level of the Supreme Court, the open-endedness of such an approach does not seem overly problematic, because of the institutional requirement that a majority of nine justices, each picked following a lengthy and careful confirmation process, agree on a result. As a result, there is some confidence (whether or not justified) that when a particular preference commands a majority of the Court, it really does reflect a powerful, legitimate social interest shared by other branches of government rather than purely personal predilections. On a Court dominated, as the modern Court is, by political moderates, the pressure towards balancing is especially strong, since it permits the Court to avoid public criticism without creating a risk of sharply oscillating results.84

There are, of course, also costs associated with open-ended methodologies such as balancing. The most notable of these is the increased effort and cost required to apply a standard over a clear rule. From the Court's perspective, however, those costs are largely invisible, because they are borne primarily by the lower courts who apply the Court's doctrine to everyday cases; the Court, on the other hand, would have to put a great deal of effort into most of its cases anyway, given the prevalence of hard cases in its docket.85 Open-ended methodologies also increase discretion throughout the judiciary, and so reduce the Court's ability to control lower court decisions; but in an era of relative political homogeneity, at least within the federal judiciary, this may not be a serious concern for the Court.86 On the whole, therefore, the tendency of the Court to create ad hoc exceptions with a mind to the possibility of hard cases arising is understandable.

Both the historical roots of strict scrutiny, and the modern instances where strict scrutiny has been invoked to justify governmental infringements of rights, tend to confirm the above view of the dynamic created on the Court by hard cases. As noted above, strict scrutiny arose in the Equal Protection context, and balancing gained prominence in the First Amendment context. Both methodologies evolved in times of great stress, as a way for the judiciary to avoid condemning govern-
mental actions that were on their face extremely troubling—in the Korematsu case, to permit the race-based internment of Japanese-Americans, and in Dennis and the other McCarthy-era Act cases to permit criminal prosecution for nonviolent political advocacy. More recently, strict scrutiny has been invoked to permit burdens on religious, speech and associational rights for the sake of the strong societal interest in nondiscrimination, to uphold affirmative action programs in order to promote a variety of social interests, to permit the regulation of sexually explicit speech in order to protect children, to sustain applications of taxation systems which burden religious exercise in order to ease the efficient functioning of those systems, and to permit restrictions on political speech in the electoral context in order to protect governmental integrity and to facilitate the orderly regulation of elections. Many (though certainly not all) of these cases involved strong conflicts between seemingly unambiguous constitutional rights and strong societal interests. And in each instance, a decision for the government was made possible by the existence of the strict scrutiny “out” from otherwise applicable constitutional principles.

Hard cases have thus played an important role, especially in the Supreme Court, in the devolution of modern constitutional doctrine to incorporate ad hoc exceptions across the board. But truly hard cases are quite rare. Their influence in shaping doctrine, however, is magnified by another aspect of legal culture, one near to the heart of law professors: the prevalence of unrealistic hypotheticals in legal thinking and analysis. It is a mainstay of law school pedagogy, and (perhaps as a consequence) of legal argumentation, to formulate and test rules by

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considering how they would apply in hypothetical, and often unlikely or extreme, situations. This is one manifestation of the law's particular form of analogic reasoning, which has recently been praised as one of the strengths of the law as a discipline.92 In constitutional law, examples of "hard hypotheticals" which have shaped constitutional doctrine include Justice Holmes's famous example of a man "falsely shouting fire in a theater,"93 the invocation in Near v. Minnesota ex rel. Olson94 of the possibility that a newspaper might plan to publish the departure times of troop ships in time of war, and more recent suggestions that race-conscious actions might be justifiable to prevent a prison race-riot.95 In each of these instances, the "hard hypothetical" was invoked by the court to demonstrate that a claimed constitutional right must be limited by societal needs, or in the words of the Near Court, was "not absolutely protected."96 Indeed, in the Schenck case Justice Holmes invoked the "fire in a theater" example to justify affirming a conviction for what in our time would almost certainly be considered to be constitutionally protected political advocacy. In other words, like hard cases, hard hypotheticals have influenced the Court to incorporate exigent circumstances exceptions into its doctrine.

Moreover, this effect is unsurprising. It is in the nature of extreme hypotheticals to create doubts about even the clearest rules, because rules are necessarily imperfect and, at their boundaries, unclear. Furthermore, even the clearest, most well considered rule will at times create troubling or even unacceptable results, because a rule can never be formulated with all possible applications in mind.97 As Frederick Schauer has pointed out, however, it is inherent in the very concept of a rule, and of the rule of law, that rules will sometimes produce results different from what a decisionmaker would reach on her own if permitted to consider all factors without constraint.98 Such rigidity is defensible because it provides predictability and protects against bad

94. 283 U.S. 697, 716 (1931).
96. Near, 283 U.S. at 716.
97. See Aleinikoff, supra note 3, at 999-1000 (arguing that extreme hypotheticals cannot define analysis in normal cases); Schauer, Easy Cases, supra note 2, at 420-22, 426 n.68.
98. See Schauer, Formalism, supra note 32, at 535.
By incorporating "safety valves" and other forms of balancing in its rules, however, the Court has undercut the clarity of its rules and thereby sacrificed many of the values served by rules.

None of the above should be taken to suggest that hard cases, and hard hypotheticals, should never lead a court to reconsider its existing rules. To the contrary, it is implicit in the common law process of decisionmaking that courts learn from experience, and modify rules over time in response to new facts and perhaps even new hypotheticals. It is this flexibility of the common law process that is one of its strengths, and for these purposes, constitutional decisionmaking is in many respects a common law process. Furthermore, a court's discomfort with a result, or a court's sense that a rule is producing results inconsistent with society's long-term interests, is often a very powerful indicator that a rule is in need of revision. A classic example of this type of reasoning in common-law decisionmaking is Judge Cardozo's opinion in MacPherson v. Buick Motor Co., in which Cardozo rejected the longstanding rule that lack of privity of contract could be a defense to a tort cause of action. Interestingly, among the authorities distinguished by MacPherson is Winterbottom v. Wright, the classic English case which contained one of the leading statements of the "hard cases make bad law" idea. MacPherson supports the proposition that when a rule, such as the privity defense, repeatedly produces unpalatable results, it may be time to reconsider the rule itself rather than to simply go on applying the rule for fear of creating "bad law." Thus the common law decisionmaking process operates on the assumption that when there is a prevalence of hard cases, it may be time to consider altering a rule. In other words, instead of hard cases making bad law, perhaps it is bad law that is creating the hard cases.

Moreover, the existence of many hard cases might suggest the need to reconsider a constitutional rule as well as common law rules. There

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99. See id. at 543-45. Rigidity, and its cousin simplicity, can also be defended on more pragmatic grounds, as minimizing the overall costs of a legal system. See Richard A. Epstein, Simple Rules for a Complex World 30-42 (1995).
103. One of the best-known descriptions of this process of doctrinal reformulation can be found in another Cardozo opinion, Allegheny College v. National Chautauqua County Bank, 159 N.E. 173 (N.Y. 1927).
are clearly instances in which the Court has, and should, reconsider its constitutional doctrine in light of ongoing discomfort with the doctrine's consequences. Instances in which this has happened in the past include most obviously Brown v. Board of Education, as well as New York Times Co. v. Sullivan, West Virginia State Board of Education v. Barnette, and perhaps Griswold v. Connecticut. In more recent years, an area where courts have repeatedly deviated from general First Amendment doctrine is the regulation of sexually explicit speech, which might suggest the need to reconsider the application of that doctrine to such speech. In addition, the apparent willingness of several members of the Court, as well as some lower courts, to uphold affirmative action programs even under "strict scrutiny" might suggest the need to reconsider the Court's doctrinal approach in that area. Finally, the Court's recent Establishment Clause decision, Agostini v. Felton, permitting broader governmental funding of sectarian institutions, appears to reflect a similar pattern of repeated discomfort with results, leading to reformulation of doctrine. The Court's decision in Employment Division v. Smith, reducing the level of scrutiny accorded to neutral laws whose application substantially burdens religious exercise, also

104. 347 U.S. 483 (1954) (overruling the "separate but equal" rule permitting racial segregation of Plessy v. Ferguson, 163 U.S. 537 (1896)).
105. 376 U.S. 254 (1964) (applying First Amendment to private libel suit for first time).
106. 319 U.S. 624 (1943) (reversing a three year old decision and holding that the First Amendment protects the right of Jehovah's Witnesses to refuse to salute and pledge allegiance to the flag).
107. 381 U.S. 479 (1965) (finding, for the first time, an unenumerated constitutional right to privacy which protects the right of married couples to use and acquire contraceptives).
109. See Adarand Constr., Inc. v. Pena, 515 U.S. 200, 235-37 (1995); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 305-17 (1978); Wittmer v. Peters, 87 F.3d 916 (7th Cir. 1996), cert. denied, 117 S. Ct. 949 (1997). As I have pointed out elsewhere, it is clear that whatever the Court says, the strict scrutiny applied to benign race-conscious governmental action is not the same as the scrutiny applied to measures which harm minorities (which are essentially per se illegal), apparently because of the Court's discomfort with the consequences of applying a per se approach to affirmative action programs. See Bhagwat, supra note 7, at 341-43; see also Adarand Constr., 515 U.S. at 275 (Ginsberg, J., dissenting). This suggests the need to reconsider the doctrinal formulation which equates the two types of race-conscious measures.
111. See Employment Div. v. Smith, 494 U.S. 872, 878-82 (1990) (recounting repeated decisions upholding application of neutral laws which burden religious exercise). Indeed, Smith appears to present a perfect example of repeated judicial discomfort, as demonstrated in decisions sustaining governmental actions even under strict scrutiny, leading to reformulation of a
appears to fit this description.

Returning to an earlier point, however, a distinction must be drawn between justification and definition. It is true that sometimes discomfort with results will, and should, lead to reconsideration of how a constitutional right is defined, including narrowing of the definition of the right. But that cannot always be the case. For one thing, the discomfort must be ongoing. An isolated case or occasional instance of discomfort cannot be enough of a basis to reconsider a rule, for all of the reasons that hard cases are said to make bad law—permitting such easy reconsideration would eliminate most of the benefits of stability and predictability that rules provide. After all, it was not the occasional hardship created by the privity defense, but the repeated injustice it caused, that led to the *MacPherson* decision, and similarly with racial segregation and *Brown*. Unfortunately, the institutional structure of the Court makes it relatively ill suited to making this kind of judgment, because the Court does not see a broad range of "normal" cases involving unexceptional applications of existing rules—instead, its docket consists almost entirely of hard cases, where there is pressure to modify a rule.

More fundamentally, such reconsideration of the scope of a right must be a matter of interpretation, not *ad hoc* justification disguised as redefinition. Therefore, it must be based on an understanding of the underlying right and applicable constitutional principles, not purely on societal need. And it must produce a rule, rather than incorporate an unprincipled, *ad hoc* exception. Thus in *Agostini*, the Court concluded that the Establishment Clause, as a substantive matter, did not prohibit governmental aid to sectarian institutions if provided on nonreligious, neutral grounds. 112 And in *Employment Division v. Smith*, the Court held that neutral regulations of conduct which burden religious exercise do not constitute core constitutional violations, and so should not be subject to strict scrutiny (or indeed, any scrutiny at all—which is the problematic aspect of that decision). 113 One can also imagine a decision which concludes that sexually explicit speech merits a lesser degree of protection because of its tangential relationship to the purposes of the First Amendment. That is essentially the conclusion that the

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Court has reached with respect to obscenity, and an extension of that principle is quite conceivable. This type of analysis must be contrasted to the essentially ad hoc and unprincipled invocation of strict scrutiny to justify facially unconstitutional governmental actions because of an overriding societal need. For instance, the Court in *Korematsu* in no way interpreted the Equal Protection Clause; it merely ignored a violation. The Court’s decisions in *Dennis* and *Austin* (concerning the First Amendment), the Seventh Circuit’s *Wittmer* decision (concerning the Equal Protection Clause), and the D.C. Circuit’s *ACT III* decision as well as the Ninth Circuit’s similar *Crawford* decision (concerning the First Amendment) are other examples. In *Korematsu, Dennis,* and *Austin* there was no doubt that the core of underlying constitutional provisions were implicated (and seemingly violated) by the government’s action. In *Wittmer* (which involved affirmative action) and *ACT III* and *Crawford* (which involved sexually explicit speech), this point may be more contestable, but at least under the Supreme Court’s current doctrine, those cases also involved core constitutional concerns (i.e., were subject to strict scrutiny). Yet in each of these cases, the reviewing court permitted, essentially excused, a facially unconstitutional governmental action.

In most common law decisionmaking, the distinction between definition and justification may not be an important one. After all, most common law rules are not supposed to impose significant costs on society or affected individuals, and therefore one might think that repeated costs *should* lead to modification of a rule. Also, in such cases there is little reason to distrust the deciding judges’ instincts. Constitutional law, however, is different, because of its countermajoritarian aspect. The Bill of Rights and other individual-rights provisions of the Constitution were enacted specifically to prevent electoral majorities from acting as they desired at the expense of individuals, and were expected to impose costs on society. There is little doubt that the criminal justice system would be more efficient without the limitations of the Fourth and Fifth Amendments, and much socially harmful speech could be prohibited but for the First Amendment. Moreover, there is good reason to distrust even deciding judges’ instincts with regard to such issues, because judges, after all, are part of the society which has chosen to engage in actions which seemingly offend the Constitution.

Indeed, most judges are likely to have stronger ties to the decisionmaking elements of society than the typical citizen. In other words, judges are often part of the majority which the Constitution seeks to restrain. Therefore there will be an inevitable tendency for judges to permit a governmental action and to redefine a right, based on *ad hoc* balancing, in precisely those cases where constitutional protection is most needed—in cases where the majority’s feelings are strongest and the affected individuals most isolated, *Korematsu* and *Dennis* being obvious examples. Of course, even true, rule-based reinterpretation of rights, as opposed to *ad hoc* redefinition, poses some of the same dangers; but interpretational methodologies impose at least some constraints on courts, while *ad hoc* analysis is by its nature unconstrained. All of this assumes that legal methods in general, and doctrine in particular, do constrain judges at least to some extent in their decisionmaking, even when those constraints run against the judges’ own preferences—but I think that this is quite clearly the case, as any observation of actual judicial practice tends to confirm. The distinction between definition and justification therefore remains a crucial one in constitutional law, because the incorporation of unlimited, *ad hoc* exceptions into constitutional doctrine poses special, and especially pernicious, threats to the jurisprudence of individual rights. It is to those threats, to the practical problems created by the Court’s wholesale adoption of a strict scrutiny “safety valve,” that this Article will now turn.

B. Practical Consequences

The prevalence of hard cases and, perhaps more importantly, hard hypotheticals in the Supreme Court’s decisionmaking process has thus tended to create a doctrine which places a heavy emphasis on *ad hoc* balancing across the board and, in particular, incorporates “outs,” or safety valves, in the very definitions of essentially all constitutional rights. Specifically, through the adoption of strict scrutiny review,

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115. All of which suggests why I cannot entirely agree with Cass Sunstein’s argument in favor of judicial “minimalism” in the face of politically contentious issues. See Cass R. Sunstein, Foreword: Leaving Things Undecided, 110 HARV. L. REV. 4, 32-33 (1996) [hereinafter Sunstein, Undecided]. Certainly there are times when minimalism is an appropriate judicial technique, but just as clearly there are times when a strong statement of a clear legal rule is equally important. The trick, of course, is knowing which is which.

116. I say essentially because there is some indication in the Court’s opinions that certain restrictions on privacy rights, and on abortion rights in particular, are *per se* illegal rather than merely subject to strict scrutiny. See Planned Parenthood v. Casey, 505 U.S. 833, 874 (1992);
the recognition of an exigent-circumstances exception has become an integral part of the Court's individual rights doctrine, even in cases involving core constitutional infringements. But that does not necessarily imply that these hard cases are producing "bad law." Given the reality (which I acknowledge) that in times of great social stress or need, individual rights will at times be required, inevitably and sometimes arbitrarily, to yield, what is wrong with recognizing that reality in doctrinal form? The answer provided here to that question is a complex and admittedly controversial one. It lies in part in the important role played by clear doctrine as a judicial precommitment strategy which can constrain decisions at times of social stress, and lies in part in the special role played by the Supreme Court in shaping popular and political understandings of the scope of constitutional rights.

1. Predictability and the Rule of Law

The use by the Supreme Court of a broad, doctrinal, and ad hoc exception to most constitutional right claims as a tool to resolve "hard cases" is troubling for a number of reasons. To begin with, all of the general and well-known criticisms of balancing, and its enormous recent expansion in constitutional law, apply fully in this context. The most fundamental of these is Alexander Aleinikoff's point that the use of balancing undercuts constitutional law as a distinct discipline, which is and should be the special domain of the courts, because it transforms constitutional decisionmaking into just another form of policy analysis, with respect to which the courts have no special expertise. As such, balancing undermines the ability of the courts to speak with authority when opposing the will of electoral majorities. Admittedly, this criticism applies with more force to truly free-form constitutional balancing of the sort which characterizes intermediate scrutiny than the "weighted balancing" of strict scrutiny, but as strict scrutiny becomes more indeterminate over time, and less "fatal in fact," it too becomes subject to this critique.


117. See Aleinikoff, supra note 3, at 987-91.

118. See id. at 991, 1002; see also Louis Henkin, Infallibility Under Law: Constitutional Balancing, 78 COLUM. L. REV. 1022, 1048 (1978) (arguing that constitutional balancing forces courts to invade the province of the "political branches").

119. See supra Part IIA., for a discussion on intermediate and strict scrutiny.

Perhaps more significant than the critique of balancing based on legitimacy, however, is the argument that balancing analysis is in fact no analysis at all; it is simply a conclusion disguised as such. When engaging in balancing, a judge can explain what interests, in her view, weigh in favor of each possible conclusion, but she cannot explain why one set of interests is stronger than the other. That judgment is by its nature one of intuition, not capable of clear articulation. Which is not to say that this alone makes balancing illegitimate—it does not, because judgment is an inevitable part of legal decisionmaking. But it does suggest that balancing should not become the only, or the predominant, form of constitutional analysis. Giving reasons disciplines thought, and constrains decisionmakers from falling prey to prejudices or other inappropriate factors. One should therefore be extremely wary of over-reliance on a form of analysis which dispenses with the need to give reasons for a decisionmaker's ultimate conclusion.

Ultimately, however, perhaps the strongest general criticism of ad hoc balancing, including its particular manifestation as an exigent circumstances exception, is that it is necessarily an unpredictable mode of analysis because it is fundamentally indeterminate. In the typical case decided through balancing, the factors being weighed are generally incommensurable, in the sense that they implicate unrelated and incomparable social policies. As a result, a "balancing" court must rely on intuition to reach a final conclusion as to the proper "balance" in such a case. This means that, especially in close cases, the conclusion will depend entirely on the identity of the decisionmaker, even more than other modes of analysis, and so cannot produce any sort of a predictable jurisprudence. The practical problems created by unpredictability in law are well known, and are applicable to constitutional law as well as economic regulation. At a minimum, lack of predictability makes it difficult for nonjudicial actors, including individuals and governments, to plan and act with confidence and certainty. Beyond practical difficulties, however, a pervasive reliance on balancing analysis challenges the ideal of the Rule of Law in constitutional analysis. What exactly

121. See supra text accompanying note 47; Casey, 505 U.S. at 849.
123. See generally Symposium, supra note 3.
124. See Sunstein, Rules, supra note 85, at 996-1003.
125. See, e.g., Casey, 505 U.S. at 855-56; Sullivan, supra note 11, at 62-66; Sunstein, Rules, supra note 85, at 972-74.
constitutes "The Rule of Law" is an extraordinarily complex question, and far beyond the scope of this Article, but at a minimum, the concept of the "Rule of Law" seems to incorporate some notion of constraint, of rules fixed in advance which guide decisions and behavior. As such, predictability is an essential component of the rule-of-law ideal, because only if decisions are predictable are affected actors, including citizens and government officials, able to conform their conduct to known rules. Moreover, it is antithetical to the rule-of-law ideal that decisions, and therefore the content of the law, should turn on the identity of the deciding judge. Yet interest balancing as a form of analysis fails all of these requirements, because it is both unpredictable and subjective. Indeed, ad hoc exceptions in particular undermine the Rule of Law, because they undermine the very concept of what a rule is—in other words, rules which are qualified by ad hoc exceptions are not really rules at all. For reasons discussed in the previous section, the unpredictability created by balancing, and in particular by a doctrinal exception for exigent circumstances, may not be extremely troubling at the level of the Supreme Court. Institutional constraints are such that the Court is rarely likely to find such an exception, and when it does it is likely to be in cases where the societal concerns which trigger the exception truly are strong, and widely shared. Moreover, the rule-of-law concerns associated with balancing are substantially ameliorated at the Supreme Court level by those same procedural and institutional constraints; as Richard Fallon points out, one respectable understanding of the Rule of Law emphasizes procedures, institutions, and consensus rather than predefined rules. The story, however, becomes quite different when one leaves the lofty confines of the Supreme Court. Federal appellate courts operate primarily through panels of three judg-

127. See Fallon, supra note 31, at 3.
128. See Dorf, Prediction, supra note 126, at 681-85.
129. As Richard Fallon points out, it may not be necessary to conform with rule-of-law ideals that courts, and especially the Supreme Court, avoid unpredictable, standard-based reasoning. See Fallon, supra note 31, at 10, 53. However, what is important is that the rule produced by the Court at the end of its analysis yield predictable results, and the Court's current strict scrutiny test fails that requirement.
130. See Scalia, supra note 31; Schauer, Exceptions, supra note 51, at 897; Schauer, Formalism, supra note 32, at 535.
131. See supra text accompanying notes 83-84.
es (as do many state appellate courts), and trial court decisions are made by individual judges, rather than the nine-judge bench of the Supreme Court. Also, far less attention is given to the selection of lower court judges (especially state judges, many of whom are elected) than is given to the selection of the Justices. Furthermore, given larger dockets and resultant time pressures, there is little scope for lower court judges to form the types of deliberative judgments about the legitimacy and strength of societal interests advanced in a case which (ideally) characterize Supreme Court decisions. Instead, balancing in most courts largely consists of instinctual judgments about the relative values of an individual rights claim and a countervailing societal interest, and such judgments will, of course, be substantially influenced by the preexisting, often unconscious attitudes of the judges. As such, the use of balancing in lower court decisions (most of which are never reviewed by the Supreme Court) raises extremely serious rule-of-law concerns, and makes the use of balancing by lower courts much more problematic than at the Supreme Court level. Yet the Supreme Court’s current doctrine envisions, in fact mandates, that all reviewing courts engage in some balancing in almost all constitutional cases involving individual rights.  

At bottom, the Supreme Court’s current doctrinal structure fits badly with the institutional role of the Court as a creator of rules for other courts (and nonjudicial decisionmakers) to follow. As numerous commentators have pointed out, it is one thing for the Supreme Court to use indeterminate or standard-based reasoning to reach its own decisions, but it is quite another, and far more troublesome, thing for the Court to incorporate such analysis into the doctrine that others must apply, including especially the nonjudicial actors who must conform their actions to the requirements of the law.  


134. See *Christie*, supra note 83, at 774-78 (discussing the distinction between judges and other decisionmakers); *Fallon*, supra note 31, at 53; *Scalia*, supra note 31, at 1177-79; Frederi-
current approach fails to advance its primary institutional mission, which is to provide guidance to others. 135

2. Evisceration of Core Constitutional Rights

All balancing methodologies raise concerns about lack of predictability and rule-of-law values. There are, however, special concerns raised by the creation of an ad hoc, doctrinal exception, in the form of strict scrutiny review, to all constitutional claims. Strict scrutiny is triggered only when an extremely serious burden has been placed on a constitutional right, and in that context, the use of ad hoc analysis poses a special threat to constitutional values by introducing uncertainty and, ultimately, temptation into judicial decisionmaking. In other words, the current acceptance of balancing, even in cases involving fundamental constitutional principles, produces a tendency, in Holmes’s words a “hydraulic pressure,” 136 for exceptions which were designed to be limited to extreme circumstances, to expand over time, and to undermine even the core of the individual liberties protected by the Constitution.

As discussed above, one of the primary failings of balancing methodology in general is its failure to adhere to distinctly legal modes of analysis and, more generally, to dispense with analysis altogether in supporting its conclusions. In the context of “hard cases” and strict scrutiny, these tendencies play out in a particular way. The Court’s use of balancing analysis as its primary doctrinal tool in these kinds of cases permits it to avoid clear exposition of its underlying reasons and analysis, and therefore to avoid stating which of two distinct conclusions the Court is reaching when it upholds a challenged governmental action: either (1) that there is no constitutional violation at all because the plaintiff has claimed an overbroad right, and under the better constitutional interpretation the right has not been infringed at all; or (2) that the right does extend as far as claimed, and has been severely burdened, but the government’s action will nonetheless be permitted for reasons of social policy. As discussed above, 137 the first is properly an

135. Frederick Schauer has noted the remarkable degree to which modern constitutional law scholarship has ignored the lower courts, including especially their ability to follow the rules or standards established by the Supreme Court, at a great loss to clarity and understanding. See Schauer, Easy Cases, supra note 2, at 401 n.6.


137. See supra text accompanying notes 53-59.
interpretive exercise, while the second is an exercise in *ad hoc* policy
analysis, but under the current doctrine both are treated as occasions for
freeform balancing.

One might wonder what difference this makes, since in both in-
stances the claim of a right is being denied. The truth is that for a
particular claimant, it probably makes no difference at all. She loses,
and is unlikely to litigate again. But in the long run, because of the
doctrinal (perhaps the better term is rhetorical) differences between
them, the failure to distinguish between these two possibilities can have
substantial effects on the shape of constitutional law and therefore on
future decisions. In particular, the failure to distinguish between
definition and justification in strict scrutiny cases can, over the long
term, cause the systematic narrowing of core constitutional protections.

Some further explication is necessary here, of the particular dynam-
ic which can lead to a weakening of rights. Imagine a truly hard case,
one in which, under existing doctrine, an individual appears to have a
strong claim that the government is infringing upon his constitutional
rights, and yet the social interest in permitting the government to act as
it wishes is (or appears to the court to be) overwhelming. In the eyes
of a majority of the Court, *Korematsu* was such a case. The Court
might analyze the right at issue and conclude that it is not in fact im-
plicated, or that it is implicated only peripherally. This would be an
interpretive argument, such as the arguments for granting no, or only
limited, First Amendment protection to sexually explicit speech, or
for declining to strictly scrutinize certain legislative classifications under
Equal Protection principles. In this case, however, the Court does
not make such an argument, probably because it cannot plausibly do so
in light of its own precedents and other interpretive principles. Instead,
in response to the pressures created by such a case, the Court adopts a
definitional, doctrinal rule that the individual right at issue contains an
internal limit and does not oblige the government to bear the social
costs it faces in this case. The Court does not explain whether this

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138. For a somewhat distinct, but related argument that the difference between definition and
justification influences the type and rigor of review, see Sager, *supra* note 50, at 939-40.
strict scrutiny of classification harming the mentally retarded, but striking down legislation);
Vance v. Bradley, 440 U.S. 93 (1979) (age); Massachusetts Bd. of Retirement v. Murgia, 427
limit is specific to this type of social cost, and derives from the text and history of the right involved, or whether it is entirely ad hoc—suggesting therefore that it is the latter. This is the birth of strict scrutiny review, the “clear and present danger” test of the First Amendment, and other, related forms of balancing analysis. The majority of the Court, however, understands this limitation to apply only in the exceptional case, where the social claim is especially strong. Time passes. Now, a new case comes before a court (not necessarily the Supreme Court, though it might be). It also involves a strong rights claim. On the other side is a social claim that is not quite as strong as the previous one, but one that seems pressing at the moment, and has strong political significance—perhaps it is a priority of the current President, who may have appointed the deciding judge(s). A modern example might be the War on Drugs. Again, there is no plausible, truly interpretational argument for the government, but there is an exigency argument. Now, the court is able to defend permitting the government to abridge the individual right by invoking the doctrine of the previous decision to define the right involved narrowly. The original Court might not, indeed probably would not, have agreed to this particular application, but it is no longer around. And so the right begins to contract.

There are no doubt many cases that are legally difficult, “hard” in the Dworkinian sense, where political preferences and the passions of the moment will control decisions. The problem with ad hoc strict scrutiny, and other forms of balancing, is that they tend to convert even legally easy cases into hard ones, simply because they are hard in my sense of raising misgiving in the deciding judges. And that, in

143. An example of this process at work might be Simon & Schuster, Inc. v. Fischetti, 916 F.2d 777 (2d Cir. 1990), rev’d, 502 U.S. 105 (1991), where the Second Circuit upheld under strict scrutiny a New York statute requiring that earnings obtained by an accused or convicted criminal from books (or other speech) describing his or her crime be deposited in an escrow account for crime victims. The fact that the decision was reversed unanimously by the Supreme Court suggests that the “compelling interest” identified by the Second Circuit—preventing criminals from being unjustly enriched by their crimes—was not all that compelling after all, or at least did not constitute the kind of social emergency needed to uphold a law under strict scrutiny. For a judicial perspective that the process I have described is a plausible one, see Edwards, *supra* note 142, at 841-49.
144. See *supra* text accompanying notes 20-25.
145. As Justice Stevens put it in a different context: “Obviously, every test will produce
turn, makes it far easier for a court to implement its ideological preferences. Consider flag burning. Flag burning should be an easy First Amendment case. Flag burning is, after all, quintessentially expressive activity, and it is political expression at that. It is true that, technically, flag burning is "conduct," but it is conduct that is inherently and entirely expressive, even more so than marching in the streets. Moreover, unlike with, say, marching in the streets, the government has no neutral, nonideological, or non-speech-related reasons for regulating flag burning in particular (as opposed to neutrally regulating, for example, setting fires in public places). Yet when the issue came before the Supreme Court, four Justices—just one vote shy of a majority—were able to argue that flag burning did not merit constitutional protection. Flag burning is unquestionably a hard case in the sense that it tugs at extremely deeply held public sentiments which are shared by many judges. But it should not be a legally hard case if the First Amendment is to give any protection to unpopular political opinions. It is not the kind of case where upholding a claim of right threatens extraordinary costs to society at large. Yet it produced four dissents.

some hard cases, but the Court's test seems to produce nothing but hard cases." Board of Educ. v. Mergens, 496 U.S. 226, 280 (1990) (Stevens, J., dissenting).

146. Judge Edwards describes a process of judicial decisionmaking in "easy," "hard," and "very hard" cases, which is roughly consistent with my argument. See Edwards, supra note 142, at 856-59.

147. In the leading case to reach the Supreme Court, Texas v. Johnson, 491 U.S. 397 (1989), the defendant was prosecuted for burning an American flag during the 1984 Republican Convention, to protest the foreign policies of the Reagan administration. It is difficult to imagine an activity that is more clearly political expression.


149. Admittedly, the dissenters did not rely explicitly on strict scrutiny analysis to defend the flag-desecration laws, but rather on more explicit balancing (combined with some manipulation of content analysis). See Eichman, 496 U.S. at 323-24 (Stevens, J., dissenting). But it is difficult not to read the dissents, especially Chief Justice Rehnquist's dissent in Johnson, as at bottom a species of "compelling interest" analysis, where in his view the case was controlled by the overwhelming social interest in preserving the flag as a national symbol. See Johnson, 491 U.S. at 421-35 (Rehnquist, C.J., dissenting).

In the wake of the first flag-burning decision, Texas v. Johnson, Frank Michelman wrote an extremely interesting article about how civil libertarians should respond to the public pressure to reverse the decision. In essence, he argued that libertarians may be better off supporting a constitutional amendment to reverse the decision than a federal statute, because of the danger that if the statute is challenged, the Court might distort First Amendment doctrine. In particular, the court might expand the range of government interests that may limit speech rights, because of the public pressure to uphold the statute. See Frank Michelman, Saving Old Glory: On Constitutional Iconography, 42 STAN. L. REV. 1337, 1343-54 (1990). The argument has obvious parallels, and indeed is probably just one application of the concerns expressed in this Article regarding the long term effects of hard cases on constitutional law.
Another example of the current doctrine making an easy case hard is *Palmore v. Sidoti*. In *Palmore*, the Court was faced with the issue of whether a state judge properly transferred custody of a child from the mother to the father (who were divorced), because the mother had remarried a man of a different race. The state trial court had concluded that the best interests of the child would be best protected by awarding custody to the father because of the discrimination which the mother and her new husband would face from society. *Palmore* should be an easy case since to uphold the trial court’s result would require the judiciary to give force to, and implement, societal racism, which should be unthinkable. In fact, the Court ruled for the mother unanimously. Doctrinally, however, the case is quite difficult, because protecting the best interests of a child seems to qualify as the sort of “compelling” state interest which would permit discrimination by the state. In fact, the Court gave no clear response to this argument, other than to describe it as “impermissible,” but one might imagine another, less enlightened court taking the argument seriously. Finally, consider the famous *Pentagon Papers* case, *New York Times Co. v. United States*. There, the government was seeking an injunction, a prior restraint, from the judiciary to prevent the defendant newspapers (the New York Times and the Washington Post) from publishing a top secret governmental study of the Vietnam War, which the government claimed had been illegally obtained. The primary basis for the claim was that the disclosure of the information would seriously harm the nation’s war effort and foreign policy (a claim which, in retrospect, turned out to be vastly exaggerated). Again, given the strong, even fundamental First Amendment policy against prior restraints, this should have been an easy case. Yet the case produced three dissents—and this despite the (not surprising) paucity of proof that disclosure would cause actual harm to the country—because the caselaw regarding prior restraints, including notably the *Near v. Minnesota ex rel. Olson* case discussed above, had recognized an ad hoc exception to even the rule against prior judicial restraints. Like the flag burning cases and

151. *Id.* at 433. Frederick Schauer has suggested that the *Palmore* Court treated the case as an easy one “to make a point,” even though doctrinally the case clearly was not easy. *See* Schauer, *Easy Cases*, *supra* note 2, at 409 n.31.
152. 403 U.S. 713 (1971).
153. *See id.* at 714.
154. *See id.* at 718.
155. 283 U.S. 697 (1931). *See also supra* text accompanying note 94.
Palmore, the Pentagon Papers case was ultimately decided correctly—but with a slightly different Court it easily might not have been.

All of the above examples, and indeed the primary thrust of this Article, focus on particular areas of individual rights jurisprudence in which hard cases have created a potentially dangerous doctrine. It should be noted in passing, however, that the tendency of hard cases to undercut rights is clearly broader than the above discussion suggests. The most obvious example is the Fourth Amendment, where the remedial exclusionary rule converts almost every litigated case of an unconstitutional search into a hard case, by threatening to permit a criminal to go free “because the constable has blundered.”\textsuperscript{156} The result has been a systematic undermining of substantive Fourth Amendment law.\textsuperscript{157} Similarly, a number of scholars, including notably Randall Kennedy, have argued that the Court has narrowly construed the Equal Protection Clause as applied to racial discrimination by imposing a strict purpose requirement because of concerns about the societal, remedial consequences of reading the Clause more broadly.\textsuperscript{158} The particular examples cited most often are Milliken v. Bradley,\textsuperscript{159} where the Court sharply limited judicial power to order interdistrict school desegregation, and McCleskey v. Kemp,\textsuperscript{160} where the Court rejected an empirically powerful claim that Georgia’s death penalty system was racially biased. It is true that in the Equal Protection context the Court engaged in interpretive redefinition of the right, rather than incorporation of an \textit{ad hoc} exception; but as with the cases that created strict scrutiny and \textit{ad hoc} balancing, these were hard cases for social and political reasons, which led the Court to adopt a narrow, substantive doctrine. This, in turn, had the effect of curtailing rights in other contexts, where the consequences of protecting the right may not have been nearly as severe for society.

The argument I have set forth above, regarding the tendency of truly hard cases to engender \textit{ad hoc} exceptions which then expand to

\textsuperscript{156} People v. DeFore, 150 N.E. 585, 587 (N.Y. 1926) (Cardozo, J).
\textsuperscript{157} See Akhil Reed Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 799-800 (1994).
\textsuperscript{159} 418 U.S. 717 (1974). See also Sperling, supra note 158, at 1750.
\textsuperscript{160} 481 U.S. 279 (1987). See also Kennedy, supra note 158, at 1407-08.
undercut rights, bears obvious parallels to the famous debates between Justices Black and Frankfurter over the merits of balancing as a mode of analysis. And my criticisms echo Justice Black's concerns:

As is too often the case, when the cherished freedoms of the First Amendment emerge from this process [of balancing], they are too weightless to have any substantial effect upon the constitutional scales and must therefore be sacrificed in order not to disturb what are conceived to be the more important interests of society. [This case confirms Justice Black's opposition to balancing because it] shows that the balancing test cannot be and will not be contained to apply only to those 'hard' cases which at least some members of this Court have regarded as involving the question of the power of this country to preserve itself.161

Justice Black's argument in this passage is concerned with the danger that a particular, open-ended methodology, once adopted, cannot be confined to the situations for which it was envisioned, and therefore will over time produce unacceptable results in other cases. As such, it is at heart premised on the "slippery slope." As Frederick Schauer has discussed, however, "slippery slope" arguments have a particular form, and so must meet particular criteria if they are to be convincing.162 For one thing, a slippery slope argument assumes that the case in question—the case that establishes the questionable rule—is correctly decided.163 For reasons that I have touched on, and will discuss in more detail in the next section, I believe that this is correct with respect to truly hard cases: the individual right will and must yield. Second, a slippery slope argument assumes that there will be a transfer of authority from the rulemaker to other deciders.164 Again, that requirement is met, both because the Court's constitutional doctrine is implemented primarily by other judges, and because the composition of the Court changes over time. Finally, there must be some special, greater than normal danger that in the future mistakes will be made.165 Here, the role of future hard cases is crucial, because it is the social pressures that hard cases involve and the judicial misgivings they generate that

163. See id. at 365, 368-69.
164. See id. at 374-75.
165. See id. at 376-77.
create the requisite special danger. Thus, the use of strict-scrutiny balancing to resolve hard cases meets all of the prequisites for creating a serious "slippery slope" problem, with the consequent weakening of legal protections; and experience suggests that, at least with respect to core constitutional rights, this is precisely what has happened.

A caveat is in order here. It is not my position that balancing types of analysis, even ad hoc balancing, always weaken constitutional rights. It has been convincingly demonstrated that that is not the case—that balancing can often enhance rights, by permitting the courts a middle ground where full protection would be unmanageable. Where ad hoc balancing, in the form of exceptions, does pose a danger to rights, however, is in situations where core constitutional rights are at stake—such as the right to engage in political expression, the right to exercise one's religious rituals, or the right of racial minorities not to suffer official discrimination—where the government is seeking to directly burden the right, and where there are likely to be strong societal pressures against recognition of the right. The danger exists because these types of core rights are sufficiently fundamental to our system of government that they should not be required to bend with any frequency, but they are also of a sort that are likely to come under majoritarian pressure (which is why they need protection in the first place). Here, the costs of balancing exceed any benefits, because the extension of constitutional protection to these areas is not (or should

166. Schauer also notes that linguistic imprecision makes a slippery slope more likely, see id. at 370-72, and has specifically pointed elsewhere that for an exception to a rule to pose a "slippery slope" problem, it must not be implicit in the rule itself—i.e., it must be ad hoc. See Schauer, Exceptions, supra note 51, at 889-90. Ad hoc exceptions are, of course, ad hoc, and their open-endedness makes them the epitome of linguistic imprecision.

167. Elsewhere, while addressing the rules/standards debate more generally, Schauer has made the argument that the ultimate question posed by the choice between rules and standards is whether we can trust decisionmakers to override a rule sometimes, to avoid absurd results. Indeed, he uses the example of constitutional scrutiny to illustrate this point. See Schauer, Formalism, supra note 32, at 545. My answer is that when core constitutional rights are involved, the answer is no.

168. See Falgman, supra note 3, at 683-86.


170. For a more detailed discussion of when and where substantive balancing is not problematic in my view, see supra text accompanying note 47; Bhagwat, supra note 7, at 351-56.
not be) controversial.

My point is that clear rules make it more likely, and easier, for judges to make unpopular decisions in times of stress, and that in the area of core constitutional rights, this is a critical benefit. Vincent Blasi has made a similar argument with respect to the First Amendment, referring to the need for protection in "pathological times." Pathology, however, is not limited to free speech rights, as the eras of Jim Crow, the Japanese-American internments, and the persecution of Mormons during the 19th century demonstrate. Blasi, it is true, tends to deemphasize the role of doctrine in constraining pathology, but he does agree that doctrine has a role to play and, in particular, agrees that it should be strict, and should minimize the use of standards and other discretionary rules. Ultimately, however, Blasi believes that the strongest defense against pathology is the inculcation, in the public and in the political establishment, of constitutional values, including especially respect for individual rights. With this I do not disagree; but as I will now discuss, even here the Court's current approach to strict scrutiny has played a significant and negative role.

3. Education, Dialogue, and Constitutional Culture

Perhaps the most substantial problem with the modern Supreme Court's approach to hard cases relates to the expositional and dialogic roles of the Court in our political-constitutional culture. In thinking about constitutional law, and about the Supreme Court's decisions establishing the contours of that law, lawyers and legal academics tend to focus on the narrowly legal implications of those decisions—how particular disputes will be resolved, and how other courts will interpret and apply the Court's decisions. Many commentators have recognized, however, that the Supreme Court's exposition of constitutional law plays another, perhaps equally important role in our political system. In the modern world, the Court and its opinions are the source of

171. See Scalia, supra note 31, at 1180.
173. Cf. Reynolds v. United States, 98 U.S. 145 (1878) (Mormon's bigamy conviction upheld despite petit juror's admission that he formed an opinion as to the defendant's guilt prior to trial).
174. See Blasi, supra note 172, at 467-68, 474-75.
175. See id. at 467-68.
much of the public's understanding of the values and principles which are contained in the Constitution. Moreover, even other governmental officials, including state officials and members of the elected federal branches, tend to view the Court as the primary authority on constitutional values and constraints. As a consequence, the decisions and opinions of the Court do not merely decide cases, and do not merely establish rules for other courts and decisionmakers to apply, they also announce values and shape the public's understanding of the contents of our common constitutional culture, a culture which forms the core of the sense of political community that comprises the United States.

Cass Sunstein calls this the "expressive function" of constitutional law and the Court. Charles Fried talks about doctrine as telling a story about what the government may not do. However described, at bottom this role is an educative one. The Court and its opinions serve to instruct the rest of the country about what the Constitution means, and what it requires of them. What this further implies, however, is that the Court, by virtue of having claimed this preeminent role for itself, has a responsibility to articulate those values with clarity and vigor.

Of course, the Supreme Court is not the sole source of constitutional values, nor is its role in the constitutional culture purely an expositional one. Ideally, the Court is merely one participant (albeit, an especially authoritative one) in an ongoing debate or dialogue about constitutional values with the other political branches and with other interested actors, including the public and the press. But whether

176. The best modern example of the Court self-consciously exercising this authority is of course the joint opinion in Planned Parenthood v. Casey, 505 U.S. 833, 864-69 (1992). Another prominent example is Justice Brennan's opinion for the Court in Texas v. Johnson, 491 U.S. 397 (1989). Some would say that the modern focus on the Supreme Court as the sole source of constitutional understandings is unfortunate. See, e.g., Cass R. Sunstein, Constitutional Myth-Making: Lessons from the Dred Scott Case 22 (Occasional Papers from The Law School, The University of Chicago No. 37, 1996). I tend to agree, but that is another paper.


181. See Flores, 117 S. Ct. at 2165; Cooper v. Aaron, 358 U.S. 1 (1958).

182. See, e.g., Schauer, Easy Cases, supra note 2, at 403 (discussing the role played by the unlitigated provisions of the Constitution in shaping public attitudes).

183. See Owen M. Fiss, Foreward: The Forms of Justice, 93 Harv. L. Rev. 1, 14-15
understood as education or as dialogue, this aspect of the Court's function requires it to speak to the nation in terms that politicians and the public, most of whom are not lawyers, can understand.

It is in this respect that the current structure of strict scrutiny doctrine, and other ad hoc balancing, interferes with the ability of the Court to perform its educative, expressive function. As discussed above, the Court's current analytical methodology does not distinguish between instances where the Court is defining the scope of an underlying constitutional norm, and instances where it is justifying noncompliance with that norm because of exigent circumstances. The practical effect of the way the Court has formulated and applied its doctrinal "safety valve" is that the Court and the courts never, in clear and unequivocal language, describe and define the nature and extent of a protected constitutional right. Indeed, the Court's approach tends to undercut the very concept of a "right," by making all rights contingent on external, social factors. In other words, the Court's approach converts even the core protections of the Bill of Rights into mere preferences, to be adhered to when not too inconvenient. And that is a difficult story to tell with any force or moral authority.

Another way of stating the above point is to examine the relation-

(1979); Frank Michelman, Bringing the Law Back to Life: A Plea for Disenchantment, 74 CORNELL L. REV. 256 (1989). How important the role of the Court really is in contemporary moral debates is, of course, is hard to know, since as Michael Dorf points out, it is hard to prove a counterfactual. See Michael C. Dorf, Truth, Justice and the American Constitution, 97 COLUM. L. REV. 133, 177 (1997) (reviewing RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996) and DENNIS PATTERSON, LAW AND TRUTH (1996)). Like Dorf, however, I tend to agree that the role is an important one.

184. My colleague David Faigman has made a similar point, arguing that the Court has improperly conflated individual rights and governmental interests while engaging in balancing, rather than treating the two as distinct concepts existing in separate spaces. See Faigman, supra note 4, at 755-57. Faigman's work makes the important point that this conflation is not a necessary component of balancing, but rather is merely a result of the way this Court engages in balancing, a point with which I do not disagree. My concerns about balancing, at least in the strict scrutiny context, are based rather on its practical consequences and institutional implications.

185. One might think that the use of explicit interest balancing would enhance constitutional dialogue, by permitting the Court to speak in the same "language" as the elected branches. That assumes, however, that each of the branches should play the same role in shaping constitutional culture. In fact, however, the Court has no expertise in making ad hoc policy judgments. Its comparative advantage and special role is in articulating with clarity the constitutional values at stake; ad hoc analysis fails to do this well. Moreover, Alexander Aleinikoff has pointed out that for institutional reasons, courts tend to claim a false objectivity even when engaging in essentially ad hoc interest analysis, which in itself makes dialogue difficult. See Aleinikoff, supra note 3, at 993.
ship between the Constitution, the Court, and the other branches of
government. The primary function of the individual-rights granting
provisions of the Constitution is, of course, to prevent repression of
individual citizens by the majority-elected branches. The Court, as
the primary enforcer of those rights, stands as a bulwark against that
repression and, in its educative role, must operate as a voice against
oppression and injustice. Sometimes, indeed, a voice is all the Court is
able to be—for the first fifteen years after it was handed down, Brown
v. Board of Education was little more than a voice. But that alone
may be of significance in shaping moral debate, by enabling one side
of the debate to invoke the Constitution on its side.

If the Court is to be a voice against repression, however, it be-
comes essential that the Court not betray that role by legitimating re-
pression. This was the point of Justice Jackson’s famous dissent in
Korematsu, which argued that even if the courts could not, and perhaps
should not, interfere with the military’s internment of Japanese-Ameri-
cans, it absolutely should not legitimize those actions by affirming the
criminal conviction of a citizen who defied them.

The difficulty with the Court’s current recognition of ad hoc exceptions for social exigen-
cy, however, is that it does precisely that—it legitimates as constitu-
tional actions which on their face flatly violate the Constitution. In-
deed, the very existence of a “balancing test,” of ad hoc exceptions,
tends to legitimize, and therefore encourage, actions which infringe on
protected liberties—as Vincent Blasi puts it, legitimation can occur even
from “abstract ideas or concessions that add balance to a libertarian
tradition.”

The problem of legitimation is not limited to ad hoc exceptions.
Randall Kennedy has argued that the Court, by ruling in McCleskey v.
Kemp that Georgia’s racially biased death penalty system was constitu-
tional rather than limiting itself to concluding that no judicial solution
was possible, “miseducates the executives, legislators, constituents, and
other possible participants in the controversy.” Gene Sperling has

186. Which is not to say that rights do not serve other metafunctions, such as enhancing
deliberative democracy, or representation reinforcement. But, these functions are performed
indirectly by protecting individuals from majoritarian tyranny.

188. Blasi, supra note 172, at 482-83.
189. Kennedy, supra note 158, at 1416; see also id. at 1440 (citing Eugene v. Rostow, The
Japanese American Cases—A Disaster, 54 YALE L.J. 489 (1945); C. BLACK, THE PEOPLE AND
THE COURT: JUDICIAL REVIEW IN A DEMOCRACY 56-86 (1960) (discussing the legitimizing role
of the Court)).
made a similar point about the Court’s decisions limiting desegregation remedies. Finally, Lawrence Sager has argued that the Court’s use of merely intermediate scrutiny in reviewing gender classifications has tended to legitimate sex discrimination by suggesting that it is not a serious evil. The special concern raised by ad hoc exceptions as a form of legitimation, however, is that they legitimate pervasively, across the spectrum of factual circumstances and constitutional rights. As such, they create systematic incentives for government officials to concoct claims of exigency to support repressive actions, because as long as the claims are plausible, the relevant officials can argue honestly and convincingly, both to the public at large and to themselves, that they are acting consistently with the Constitution. In other words, they can claim the moral high ground. And this, in turn, seems likely to increase the incidence with which officials will be willing to impose burdens on even core constitutional liberties, to the detriment of individual citizens and of the ultimate goals that those liberties are designed to advance.

III. HARD CASES AND REMEDIES

Hard cases apparently do make bad law. And bad law, in turn, tends to create more seemingly hard cases, thereby making the problem worse than need be. Hard cases, however, cannot be avoided in any legal system, no matter how structured. Social emergencies will occur, as will periods of popular passion, and they both will inevitably influence government officials, including judges. The purpose of this part of the Article is to advance some thoughts on how hard cases might be handled within a workable system of constitutional jurisprudence, without creating too much bad law.

At bottom, the objection set forth above to the modern Supreme Court’s approach to hard cases and core constitutional rights is that it creates too much ad hoc discretion in judges, permitting them to ignore rights in the name of what appears to them (at the moment) to be pressing social needs. In particular, I have argued that it is a grave mistake to institutionalize that discretion in doctrinal form, both because of the tendency of doctrinal loopholes to expand over time, and because such a legal structure undercuts the ability of the Court, and

190. See Sperling, supra note 158, at 1743 n.8, 1754-55.
courts, to speak with clarity about basic constitutional values. The solution to these problems would seem to be to adopt a jurisprudence based more on clearly articulated rules and less on discretionary standards. What precisely the contours of those rules should be is an extremely large subject, worthy of extended consideration, and is not the subject of this Article. I posit, however, that whatever its specific contours, a rules-based jurisprudence is more likely to make "good law" than the current approach. The question that remains, and that is relevant to my thesis, is whether, and how, such a jurisprudence would address the problem of hard cases.

In arguing for a stronger emphasis on rules, what I am proposing here, for at least the core of constitutional law, is a return to a version of judicial formalism. It is not formalism as traditionally defined, in the sense of claiming (a false) objectivity or a pipeline to "truth"; but it is formalism nonetheless, in the specific sense that it aspires to make most constitutional decisionmaking, most of the time, as mechanical, and therefore as shielded from the prejudices of the moment, as possible. Formalism, however, has costs. Rigidity creates error, because it requires a decisionmaker to ignore relevant factors. Historically, the primary ameliorative to the costs of the rule-based system we call law was found in the traditions of equity and equitable discretion. I would propose that the solution (or at least a partial solution) to the conundrum of hard cases in constitutional law might also be found in that tradition.

In early England, equity as a system arose and gained prominence in response to the rigidities and errors of the common law. The chancellors had the power and the discretion to grant relief when none was otherwise available from the courts of law, and sometimes to prevent a legal action (e.g., by rescinding a contract) when enforcement would be unjust. Thus, traditionally, equity existed as a parallel, though ultimately only supplemental, system to the law, correcting injustice in case of need, but otherwise remaining silent. In modern times, however, especially in the modern United States following the procedural

192. I have made some beginnings in suggesting solutions elsewhere. See Bhagwat, supra note 7, at 338-51.
193. See Schauer, Formalism, supra note 32, at 543-44.
194. See id. at 535; Tushnet, supra note 58, at 17 & n.49.
196. See GARY L. McDOWELL, EQUITY AND THE CONSTITUTION 5-6 (1982); Schauer, Jurisprudence, supra note 34, at 847.
merger of law and equity, equity operates as a remedial system governing the availability of nonmonetary, coercive relief. Nonetheless, modern American equity retains many of its historical characteristics, including its status as a supplemental system rather than as a primary remedy and its essentially discretionary nature. Indeed, the United States Supreme Court has explicitly recognized the discretionary and flexible nature of equitable remedies.¹⁹⁷

Equity thus looks to the ideal of individual justice, in contrast to the ideal of rules which pervades the law—a distinction which can be traced back to Aristotle, who first explicated the basic differences between law and equity.¹⁹⁸ In light of equity’s traditional error-correcting function and its discretionary nature, one understanding of what equity does is that it in effect gives a decisionmaker some choice as to whether or not a rule should be applied to a particular situation.¹⁹⁹ In this respect, equitable discretion has obvious parallels to the ad hoc exceptions of modern constitutional jurisprudence, and indeed has been described by one commentator as a “safety valve” similar to others throughout the judicial system.²⁰⁰ Moreover, given equity’s focus on discretion and fact-specific justice, equity not surprisingly has long, and explicitly, incorporated a balancing methodology in determining what remedy to grant. This methodology—the “balancing of the equities” which guides the exercise of equitable discretion—is intended to be an ad hoc analysis, which takes into consideration all relevant factors in determining what a court should do.²⁰¹ Equity thus permits courts to grant relief, or to deny it, on an ad hoc basis. Indeed, the primary importance of equitable discretion and balancing today is in limiting or denying relief rather than in creating a right to judicial intervention, because judicial determination of the existence of rights tends to be governed by substantive law, rather than the remedial principles of equity.

¹⁹⁸. See McDowell, supra note 196, at 4-5; Scalia, supra note 31, at 1176; Schauer, Jurisprudence, supra note 34, at 847-48 & n.1.
¹⁹⁹. See Schauer, Formalism, supra note 32, at 517-18; Sunstein, Rules, supra note 85, at 958.
As such, equity again has obvious parallels to modern constitutional doctrine and its *ad hoc* exceptions.

Traditional principles of equitable discretion thus resemble modern constitutional analysis, both in terms of objectives (to achieve individual justice without creating excessive social cost) and methodology (the use of discretionary, standard-based analysis). The primary difference between these systems is that equitable discretion is, especially in modern times, primarily a remedial concept, while the Supreme Court's constitutional doctrine describes itself in substantive terms. In addition, in modern times the two systems are on opposite trajectories: constitutional balancing has steadily gained prominence and acceptance, while equitable "discretion" has been on the decline. This is not to say that equity has declined. To the contrary, the post-World War II era has seen an enormous increase in the availability of equitable relief in American courts, both injunctive and proscriptive. What has happened, however, with the increasing willingness of courts to grant equitable relief, is a concomitant decline in willingness to deny relief on discretionary grounds or to treat equitable relief as the exceptional form of relief rather than the rule. In constitutional law, this trend has reached the point where equitable relief has become the standard remedy for most constitutional violations, and one which is available essentially as a matter of right.

One commentator has suggested that the immediate impetus for these developments was the adoption in 1938 of the Federal Rules of Civil Procedure, which entirely eliminated procedural distinctions between legal and equitable relief, but that the causes can be traced back to Article III, which merges law and equity for the purpose of granting jurisdiction to the federal courts. The modern growth of equitable relief is certainly not an inherently bad development; indeed, it has many positive features. However, in practice, the increased availabil-

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202. See supra Part I.A.
203. See McDowell, *supra* note 196, at 92-94; Chayes, *supra* note 201, at 1292 ("[o]ne of the most striking procedural developments of this century is the increasing importance of equitable relief").
204. An excellent example of this unwillingness is the majority opinion in *Tennessee Valley Auth. v. Hill*, 437 U.S. at 194-95.
205. It is difficult to prove a negative, but even a casual survey of modern constitutional litigation suggests the ubiquity of equitable relief. A recent example of the Supreme Court affirming equitable relief without a second thought is *Reno v. American Civil Liberties Union*, 117 S. Ct. 2329 (1997), where the Court enjoined enforcement of the "Communications Decency Act."
207. See Gewirtz, *supra* note 201, at 598 & n.29 (arguing that the modern injunction is a
ity of equitable relief has been accompanied (perhaps inevitably) by a decline in judicial willingness to exercise discretion in the proper case to deny such relief. And in the context of hard cases, this development has deprived courts of an important option—to avoid imposing unacceptable social costs by limiting relief through the exercise of equitable discretion, and therefore without distorting substantive law. The solution to the problem of hard cases, and how they can be prevented from making bad law, may thus lie in a revival of remedial discretion in the courts, so that a court can recognize a constitutional violation and yet, when the social costs of relief seem overwhelming, refuse to enjoin it through the coercive mechanisms of the court.

Two questions arise in considering equitable discretion as a solution to the hard cases problem: first, what benefits are to be gained from the seemingly formalistic move of finding a legal right, yet denying a broad remedy? Second, would a system which regularly denied equitable relief to constitutional plaintiffs deprive victims of constitutional violations of any effective relief?

Taking the first question first: The primary consequence of a greater focus on remedial alternatives in hard cases is that hard cases will no longer generate quite as strong an impetus for courts to define rights narrowly to avoid social costs. In other words, it will shore up the slippery slope of *ad hoc* doctrinal exceptions by removing the need to create such (ever-expanding) exceptions in “substantive” law. The primary problem with the Court’s current approach to hard cases stems from the doctrine of *stare decisis*. Because the *ad hoc* exceptions created by the Court to deal with hard cases are stated in doctrinal terms and therefore themselves have precedential force, lower courts (as well as the Supreme Court) are bound to follow and apply them in all future cases involving the same area of law. Repeated application, in turn, leads to ever-growing expansion of those exceptions. The peculiar benefit of equity, however, is that it permits flexibility in individual cases without making precedent. As such, it permits a court to avoid unpalatable results without creating new law, and so without binding future courts to either a particular decision or even to a particular substantive analysis.

But, one might ask, if the bottom line is the same, what difference does it make whether one labels an *ad hoc* exception “remedial” or

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response to the inadequacy of other remedies to deter constitutional violations). For a discussion of the role of the various immunity doctrines in encouraging the use of equitable remedies in constitutional cases, see *infra* text accompanying notes 231-36.
"substantive"? After all, in some meaningful sense, granting a court equitable discretion to deny complete relief is no different from granting it discretion to take away a right. The answer is two-fold. First, labeling an exception as remedial, rather than substantive, makes a great deal of difference in terms of the expressive function of constitutional law, because in such a regime courts are able to describe the substantive contours of protected rights with much greater clarity.

Thus even if individual litigants gain no benefit, the political system as a whole might well benefit from a doctrine that more clearly distinguishes between substantive and remedial concerns. Moreover, as discussed above, there is some reason to hope that "hard cases," in which governmental actors burden constitutional rights and advance a plausible claim of great social need, will arise less frequently in a regime where substantive rights are more clearly articulated. It is, after all, more difficult for purely rhetorical reasons for a public official to defend an action that admittedly violates the Constitution, even if the courts will permit her to get away with it, than an action that the official can plausibly argue is consistent with the Constitution. The truth is that many purportedly hard cases turn out in retrospect not to have been hard at all, because the claimed social emergency was exaggerated or nonexistent—even though courts lack the institutional capacity or the independence to be able to tell the difference at the time. Indeed, many of the historic "hard cases," including Korematsu, Dennis, and the Pentagon Papers case, turn out to have been of this variety. Perhaps in at least some of those cases, or if not in these cases then in other, less emotionally charged "hard cases," government officials might have been less willing to act if they knew they would be required to publicly admit to violating the Constitution, and to explicitly ask the courts that they be permitted to continue to do so for reasons of public policy.

208. See Schoenbrod, supra note 200, at 628-29.
209. For similar arguments, see id. at 692-94; Gewirtz, supra note 201, at 672-73 ("[b]y candidly acknowledging that they are providing something less than a full remedy, courts leave the unfulfilled right as a beacon"); Sperling, supra note 158, at 1758-60; cf. Schauer, Formalism, supra note 32, at 546-47 (discussing the possibility that "presumptive formalism" might permit the courts to alter attitudes).
210. See supra at Part II.B.2.
211. This argument assumes that non-judicial, especially executive-branch officials will treat and interpret the Constitution differently from the judiciary, in choosing their courses of action. Indeed, it assumes that they will be willing at times to knowingly, and publicly, violate the Constitution. This, however, is probably a realistic assessment. See Blasi, supra note 172, at 512; see also Schauer, Occasions, supra note 134, at 730-31 (arguing generally that constitu-
Second, even without, or with only limited, equitable remedies available, the remedies available to plaintiffs in hard cases need not be entirely illusory. *Ex post* damages actions will remain an alternative in many cases, even if equitable relief is denied.\(^{212}\) And money damages, especially if nominal and punitive awards are permitted, can provide vindication and some compensation as well as significant deterrence of future violations.\(^{213}\) In addition, the scope of equity is not unlimited; under an equitable approach, certain alternatives are not available to the judiciary, including most notably affirmation of unconstitutional convictions. The *Korematsu* and McCarthy-era cases would not have turned out the same way under a remedial approach, even if the Court would not have enjoined either the Japanese-American internment or governmental investigations of the American Communist Party.\(^{214}\) And this seems entirely appropriate, since the state *should* be most tightly constrained by constitutional norms in the area—criminal prosecution—where it behaves most coercively.

Even if no effective judicial remedy will be available to some individuals in some hard cases, however, the remedial approach remains an attractive one. It leaves individuals no worse off than under a substantive balancing test, and it provides systemic benefits. And it is always possible (perhaps likely) that in at least some cases, nonjudicial officials will take it upon themselves, once a constitutional violation has been declared, to try and provide some remedy.\(^{215}\) Moreover, it would not violate Article III or the Constitution generally, or undermine the

212. Note that replacing equitable relief with money damages for some constitutional violations essentially changes protection of that right from a property rule to a liability rule. *See generally* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HArv. L. Rev. 1089 (1972). This is in fact the rule applied to takings of private property for a public purpose under the Fifth Amendment Takings Clause—the owner is entitled to compensation, but not to keep her property. There is no obvious reason not to extend that approach to other rights, under limited circumstances. It would seem that “hard cases,” where an individual-rights claimant stands in the way of a large public benefit (or threatens to create a large public harm), present precisely the types of significant transaction costs due to hold-out problems, for which Calabresi and Melamed feel a liability rule is in order.


214. Note that this is precisely the solution proposed by Justice Jackson in his *Korematsu* dissent. *See* Korematsu v. United States, 323 U.S. 214, 247-48 (1944) (Jackson, J., dissenting).


216. *See* Sperling, *supra* note 158, at 1742 & n.6 (inability to enforce a remedy does not negate a “case or controversy” for Article III purposes).
Rule of Law, for courts to recognize that sometimes no remedy might be available for a constitutional violation, Chief Justice Marshall's dictum in *Marbury v. Madison* notwithstanding.\(^{217}\) "[M]odern doctrine clearly refutes the notion that there is a constitutional right to a remedy for every constitutional violation."\(^{218}\) And as for the Rule of Law, a strong argument can be made that remedial discretion can, and has always been understood to, coexist comfortably with the Rule of Law, so long as it is exercised within set procedural boundaries and accompanied by a clear statement of reasons.\(^{219}\) Therefore, there are no insurmountable, theoretical objections to granting increased remedial discretion in constitutional cases.\(^{220}\)

The use of remedial discretion as a response to societal pressure is not entirely unknown in modern constitutional law, even though it has rarely been acknowledged. The classic example is, of course, Justice Jackson's *Korematsu* dissent.\(^{221}\) In addition, Cass Sunstein, among others, has pointed out that the history of the Court's desegregation decisions, including especially the contrast between the first and second *Brown* decisions,\(^{222}\) is an excellent example of the use of discretion by the Court to declare a right and to make a public point, but then to tailor relief to avoid political confrontation.\(^{223}\) *Brown I* was a classic

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\(^{217}\) *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162-63 (1803) ("The government of the United States has been emphatically termed a government of laws, not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

\(^{218}\) Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 313 & n.21 [hereinafter Fallon, Confusions]; see also id. at 337-39; Vazquez, supra note 213, at 1800-01.


\(^{220}\) Another possible objection to increased equitable discretion is that it devolves authority from appellate courts to trial courts, where most remedial discretion resides. See Tennessee Valley Auth. v. Hill, 437 U.S. 153, 213 (1978) (Rehnquist, J., dissenting); Wittmer v. Peters, 87 F.3d 916, 918 (7th Cir. 1996), cert. denied, 117 S. Ct. 949 (1997). This is certainly true, and it may be a valid criticism, but it should be noted that the balancing approaches which dominate the current doctrine also devolve authority downwards, generally from the Supreme Court to federal appellate courts; and that ultimately even "abuse of discretion" review is likely, as a realistic matter, to provide substantial appellate oversight over trial court judgments in constitutional cases.

\(^{221}\) See *Korematsu v. United States*, 323 U.S. 214, 242-48 (Jackson, J., dissenting); supra text accompanying note 57.


\(^{223}\) Sunstein calls this form of decisionmaking "minimalism," and advocates it as a means to encourage interbranch dialogue and public deliberation. See Sunstein, *Undecided*, supra note 115, at 50-51; see also Gewirtz, supra note 201, at 611-614; Schoenbrod, supra note 200, at 666-67.
example of a hard case, where the legal claims of the plaintiff black schoolchildren against the constitutionality of school segregation were extremely, even overwhelmingly strong (despite the existence of the contrary Plessy v. Ferguson precedent); but the social and political climate in the United States in 1954, and especially in the South, made the case an extremely hard one for the Court in practical terms, since the Court, and the federal judiciary generally, faced massive opposition to its decisions. The Court’s response was to clearly, and unanimously, announce in Brown I the unconstitutionality of state-enforced segregation and therefore to firmly enter the moral and political debate on the side of equality; but then in Brown II to announce the widely criticized “all deliberate speed” formula for remedial action, which delayed a political confrontation until the judiciary had at least the other branches of the federal government behind it. In pragmatic terms, a strong argument can be made that the Brown I/Brown II approach was a stunning success, both in its influence on the moral debate in this nation over Jim Crow, and in its pragmatic aspect of permitting a gradual and therefore effective solution to southern segregation. Of course, school desegregation is an unusual and extreme example of a hard case, since the southern “massive resistance” to the desegregation decisions is hardly the typical response of a government official to a constitutional command; but for exactly that reason it is in some ways a particularly effective case study of how hard cases need not distort substantive law.

It should also be recognized that the use of increased remedial discretion in the face of constitutional violations would not be the only instance in modern constitutional law in which the judiciary permits such violations to continue without judicial intervention. Standing doctrine, abstention, the political question doctrine, and the various “passive virtues” of which Alexander Bickel spoke all reflect a will-

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226. For a proposal to take a similar approach in a statutory context, see Tennessee Valley Auth. v. Hill, 437 U.S. 153, 211-13 (1978) (Rehnquist, J., dissenting) (arguing that lower federal courts have discretion to deny equitable relief even of acknowledged statutory violations, when “significant public and social harms” are threatened).
ingness on the part of the courts, for institutional reasons, to refuse to interfere with the other branches, and so to permit constitutional violations to continue. After all, if no violation was occurring, there would be no "virtue" in staying the judiciary's hand. Moreover, equitable discretion shares with the passive virtues the advantage that it avoids conflict and permits deference to political branches without legitimating unconstitutional actions by expressing judicial agreement with them.228

Another example of the Court's use of remedial discretion to avoid untoward social consequences can be found in the context of the Fourth Amendment and the Leon "good faith" exception to the exclusionary rule.229 Leon holds that evidence obtained in violation of the Fourth Amendment will not be excluded from a criminal trial if the police officers who seized the evidence were acting under the good faith belief that they had a valid warrant. In other words, Leon restricts the remedies available for Fourth Amendment violations in contexts where the Court feels that the social harm from granting exclusionary relief outweighs any benefits. Again, in principle (though perhaps not in practice), the Leon approach permits the courts to declare and even expand substantive rights without facing the grave social consequences which a broad remedial rule might create.230 And as with equitable discretion generally, the Leon rule would not appear to foreclose the possibility of money damages for Fourth Amendment violations.

One final note is in order here, regarding the relationship between equitable discretion and the various judge-made immunity doctrines limiting the availability of damages for constitutional violations, including the Eleventh Amendment immunity of states from suits for damages in federal court,231 the qualified and absolute immunity available to

228. See, e.g., Feeley & Rubin, supra note 78, at 2034 (discussing why the passive virtues encourage caution in changing substantive doctrine); J. Peter Mulhern, In Defense of the Political Question Doctrine, 137 U. Pa. L. Rev. 97 (1988) (describing the political question doctrine as a tool through which the courts are able to share interpretational authority with the other branches of government).


230. See id. at 924-25 (good faith exception to exclusionary rule need not prevent substantive Fourth Amendment law from continuing to develop).

231. See Hans v. Louisiana, 134 U.S. 1 (1890) (interpreting Eleventh Amendment to create a broad doctrine of state sovereign immunity in federal court); cf. Ex parte Young, 209 U.S. 123 (1908) (permitting certain injunctive actions against state officials to proceed despite the Eleventh Amendment). It should also be noted that the Eleventh Amendment may not bar damage remedies against states which are enforceable in state court. See, e.g., Hilton v. South Carolina Public Ry. Comm'n, 502 U.S. 197, 207 (1991) ("[W]hen . . . a federal statute does impose liability upon the States, the Supremacy Clause makes that statute the law in every State, fully
government officials in damages actions under 42 U.S.C. § 1983,232 and the lack of respondeat superior liability for local governments under the same provision.233 In combination, these doctrines place substantial, often insurmountable obstacles in the path of obtaining monetary relief for constitutional violations,234 but, perhaps perversely, place very limited obstacles in the path of equitable relief.235 By doing so, they may well have accelerated the movement towards making equitable relief the norm in constitutional cases. This alone may be good reason to reconsider at least some of these decisions, though further reasons can be found in the fact that a number of the decisions are badly reasoned and almost certainly incorrect.236 As long as these doctrines exist, however, they make it a great deal more difficult for courts to deny equitable remedies, even when a simple balancing of relevant factors might seem to argue against broad injunctive relief, because the effect of denying relief would be to leave a plaintiff with no remedy at all. Nonetheless, for all of the reasons stated above, the lack of alternative remedies should not, in appropriate, truly "hard" cases, prevent courts from exercising their equitable discretion properly, to deny relief which would impose great social harms.

Of course, an equitable approach to hard cases will certainly not solve all problems in this area, and in particular it cannot entirely prevent courts, in times of stress, from sacrificing rights to the passions of the day. Sometimes that will be for acceptable reasons—the Constitution is not a suicide pact,237 and some costs will inevitably be greater than a society is willing to bear.238 Sometimes, however, mistakes will be made, and discretion will be exercised inappropriately. But that is inevitable in a legal system which is administered byfallible women enforceable in state court." (citation omitted). The application and proper interpretation of the Eleventh Amendment in this context is, however, controversial. See generally Vazquez, supra note 213, at 1683 (discussion of competing interpretations of the Eleventh Amendment).


234. For a similar argument in the specific context of Fourth Amendment remedies, see Amar, supra note 157, at 812-16.

235. See, e.g., Ex parte Young, 209 U.S. 123.


238. See Blasi, supra note 172, at 512.
and men.

Judge Learned Hand once said:

I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.239

I think, however, that Judge Hand overstates his point. The approach proposed in this Article cannot itself prevent tyranny, but it may perhaps be a moderate step in the direction of permitting the courts to inculcate in the "hearts" of the nation's public officials, and in its citizens, the value of liberty.

CONCLUSION

Doctrine is a strange thing. For over half a century, legal academics have been arguing that doctrine is incoherent, manipulable, and manipulated, to the point where it imposes no constraints on courts and provides no guidance to the public. Yet at some level it is clear, given the amount of time that courts and academics devote to doctrine, that no one really believes the argument, at least in its extreme form. This was an article about doctrine, and its influence on legal decisionmaking. In it, I have argued that the willingness of modern constitutional doctrine to recognize ad hoc exceptions to even the most fundamental rights protected by the Constitution is deplorable. I have traced this aspect of the Supreme Court's jurisprudence to the phenomenon of "hard cases," which I define as cases where strong, clear legal rights come into conflict with strong, perhaps stronger, societal interests; and I have identified various untoward consequences that have flowed from the Court's treatment of hard cases, including the systematic undermining of core individual rights, and a weakening of the Court's ability to speak to the nation with clarity and authority about constitutional values. I have concluded by proposing a compromise solution to the problem of hard cases, centered on the wider use of equitable discretion

in hard cases. This solution would have courts deny equitable relief to constitutional plaintiffs when the balance of harms seems to require this, and therefore permit constitutional violations to continue, without weakening the substantive definition of rights in the process. Ultimately, however, all of this depends on a faith in doctrine and its ability to constrain judges, even in the worst of times and even against their own impulses. It is a faith which is not amenable to empirical testing or proof, but it is one which I, and I think most lawyers, maintain.