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Measuring Constitutionality Transactionally

by

DAVID L. FAIGMAN*

Introduction

Balancing schemes are criticized as inherently flawed because they require courts to compare incomparable factors. According to its critics, the balancing metaphor founders because it fails to identify a common scale that can measure the disparate factors that compose majority will on the one hand and individual liberty on the other. Is it possible, a critic might ask, to weigh the individual's right to express herself by dancing in the nude against society's interest in regulating an activity it believes contributes to prostitution, drug abuse, and urban blight? Is it possible, as Justice Scalia queried and the present Symposium is dedicated to exploring, to compare the length of a line to the weight of a rock? But comparing lines and rocks seems incongruous only because they do not have any obvious connection. Government power and individual freedom, in contrast, are intimately connected through constitutional theory.

Balancers have failed to adequately answer the so-called apples and oranges complaint because they have been unable to specify a common denominator. The simple reason why proponents of balancing have failed in this endeavor is that no common denominator exists. But accepting this proposition does not compel the conclusion that balancers' attempts to reconcile individual liberties and government interests are wrong. Instead, this Article argues that proponents and opponents alike, blinded by the balancing metaphor, have been asking

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* Professor of Law, University of California, Hastings College of the Law.


the wrong question. Although no common denominator exists, liberty and government interests are intimately related. The challenge lies in describing that relationship.

Liberty and government power are independent factors; in fact, their independence is a basic component of our constitutional system.\(^3\) In other words, we are comparing apples and oranges when we attempt to reconcile liberty and government power. However, the fact that liberty and power are independent does not mean that they are unrelated or that they cannot be measured for purposes of comparison. The balancing equation has historically omitted the most important factor, the resultant. The factors of liberty and government power together define a third factor: constitutionality.

Consider the most famous equation in physics, \(e=mc^2\). This equation states that mass multiplied by the speed of light squared equals energy. Mass and the speed of light have no common denominator; they are independent factors that combine to define a third factor. The lack of a common denominator does not mean that they are unrelated or that their values cannot be described in "weighted" (i.e., numerical) units. To be sure, the relationship between liberty and government interests is not the multiplicative relationship that pertains to mass and the speed of light squared. Nonetheless, the relationship of liberty and government justifications to each other and to a third factor, constitutionality, can be described roughly in the form of an equation.

In an earlier article, I introduced a model of constitutional adjudication I referred to as "Madisonian Balancing."\(^4\) It offered a comprehensive strategy by which to integrate constitutional values and constitutional facts in a way that, first, would be consistent with the Constitution's foundational structure and, second, would provide judges with a framework in which to reconcile conflicting government interests and individual rights. This Article expands and modifies several essential aspects of my earlier work. First, as this Introduction indicates, I am no longer convinced that the balancing metaphor is useful in describing the inevitable comparison of liberty and government interests in constitutional adjudication. Instead, an equation or


algebraic model, which I will refer to as "Constitutional Modeling," more accurately portrays the relationship. In my earlier work, I described "constitutionality" as the common scale upon which both liberty and power could be assessed. I now understand "constitutionality" to be the third factor described by the two independent factors of liberty and power. Part I of this Article reviews the basic tenets of Madisonian Balancing and describes how Constitutional Modeling departs from it. Part II examines the implications and ramifications of describing constitutional adjudication in this algebraic fashion. Finally, Part III details my proposal to aggregate rights in constitutional adjudication.5 The government's justification for infringements of individual liberty should be measured on a transactional basis rather than, as is now done, on an amendment-by-amendment basis. A transactional perspective would require courts to account for the liberty or freedom infringed by a particular government action in its entirety. This focus would allow courts to account for the entire strength of the government's justification as well as the full value of individual liberty when deriving "constitutionality."

I. "Madisonian Balancing"

Although I have modified the metaphor, the premises underlying Madisonian Balancing not only remain viable, but actually fit Constitutional Modeling better. In fact, aspects of Madisonian Balancing were in conflict with my principal operating premise, which drew a strict division between defining liberty and reconciling that defined liberty with the government's justification. I too suffered the myopia induced by the balancing metaphor and wasted my efforts searching for the common denominator shibboleth. Nonetheless, the process I previously described as Madisonian Balancing offers a basis for adjudication that fully incorporates the foundational premises of the Constitution and offers precise guidelines to judges who must maneuver through the rocky shoals of constitutional adjudication.

Madisonian Balancing took as its starting point the fundamental dilemma endemic to American constitutional democracy.6 Constitutional Modeling also begins—indeed describes—this basic dilemma. On the one hand, democratic majorities have the power to rule as they desire, while, on the other hand, individuals enjoy certain rights that

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5. Id. at 661-64.
protect them from majoritarian interference in particular spheres. The two guiding principles of American constitutional democracy, the majoritarian principle and the liberty principle, stand in constant tension. Courts are called upon to resolve this tension, or "Madisonian dilemma," through constitutional adjudication by ascertaining and policing the boundary between these two spheres of power.7 Any error in ascertaining the boundary between the majority's right to rule and a minority's legitimate right to be free of such rule results in "tyranny." Whereas majoritarian interference with protected rights constitutes tyranny by the majority, denial of the majority's power to rule in spheres not specifically protected constitutes tyranny by the minority.8

Constitutional Modeling embraces a precise distinction between the power of the majority to act through democratic means and the freedom of the individual in specific spheres of behavior. As a consequence of the fact that government power and individual freedom are distinct principles, they can—indeed must—be defined and measured independently. This independence is necessitated by both constitutional theory (what I refer to as the Madisonian model9) and empirical expedience. As a matter of constitutional theory, it would be illegitimate to define individual liberty by virtue of the majority's reasons for acting. As Professor Robert A. Dahl has explained, to allow the majority to decide "whether the punishing of some specified act would or would not be tyrannical . . . is precisely what Madison meant to prevent, and moreover would make the concept of majority tyranny meaningless."10 If the Bill of Rights operates as a bulwark against tyranny, the majority's reasons for acting cannot define what actions constitute tyranny.11

Empirical expedience also requires independent calculation, if only to avoid sloppiness in the measurement process. Importing government interests into the definition of rights confuses the meaning of those rights for future cases. Because government interests are case-specific, incorporation of these considerations when defining rights

11. For an extended discussion of this argument from constitutional theory, see Faigman, Reconciling Individual Rights and Government Interests, supra note 3, at 1526-29.
will inevitably muddy the characterization of those rights.\textsuperscript{12} Power and freedom, while intimately related in American constitutionalism, are separate principles that must be described in isolation before they can be factored together.

Although the strict division between majority will and individual liberty is an essential component of Constitutional Modeling, I do not mean to suggest that majorities do not sometimes act for reasons aimed at protecting basic freedoms, for surely they do. But majoritarian benevolence toward individual freedom is still a "government interest," irrespective of the definitional source of that interest. Majorities obtain the power to effectuate freedoms contained in the Bill of Rights from the same sources that they obtain the power to pursue any legitimate government objective. For states, this power comes from the common-law police power and for the federal government it comes from the power-granting provisions, such as Articles I, II, and III of the Constitution.\textsuperscript{13} That the government interest echoes in the Bill of Rights might affect the weight the interest receives, but it does not alter its character. And even when such echoes sound, we should beware, for, as Justice Brandeis warned, "[e]xperience should teach us to be most on our guard to protect liberty when the government purposes are beneficent. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding."\textsuperscript{14}

The Court's role as expositor of the boundary between majoritarian will and individual freedom requires it to measure constitutional values in sundry real-world contexts. As a practical matter, the Court must define the values of the Constitution and apply them

\textsuperscript{12} The Court's proclivity for importing government interest analysis into rights definition occurs throughout constitutional adjudication and, therefore, most rights have been muddied by this treatment at one time or another. A particularly clear illustration of this practice is Kelley v. Johnson, 425 U.S. 238 (1976), in which the Court examined the constitutionality of a hair length regulation for policemen. Whereas Justice Rehnquist seemed to accept that the general citizenry might have a fundamental right over matters of personal appearance, he concluded that no such right existed when policemen were concerned. Because he found no fundamental right, he applied only rational basis review. But the fact that the petitioner is a policeman does not affect the existence of the right; it is part of the justification for infringing that right, if one exists. For an extensive analysis of the perverting effect this confusion of rights definition and government interest analysis has on constitutional analysis, see Faigman, Reconciling Individual Rights and Government Interests, supra note 3.

\textsuperscript{13} There are, of course, many power-granting provisions in the Constitution, including section 2 of the Thirteenth Amendment, section 5 of the Fourteenth Amendment, and so on. U.S. Const. amend. XIII, § 2 and amend. XIV, § 5.

\textsuperscript{14} Olmstead v. United States, 227 U.S. 438, 479 (1928) (Brandeis, J., dissenting).
under specific factual conditions. Unfortunately, neither the values nor the facts of constitutional adjudication are known with certainty. Thus, the Court must craft certain decisions under conditions of uncertainty. The Court brings essentially two methods to this task, one rules-based and the other standards-based.\(^\text{15}\)

Consider, for example, the extension of a law prohibiting all public nudity to nude dancing in adult theatres.\(^\text{16}\) Although there are a variety of ways to analyze the constitutionality of this law, most analysts begin with the question whether nude dancing falls within the category of “free speech” covered by the First Amendment.\(^\text{17}\) One argument might maintain that nude dancing is not speech at all, either because it is “conduct” and not “speech” or, alternatively, because it does not implicate the Free Speech Clause since, here, it is prohibited pursuant to a uniform law of general application.\(^\text{18}\) Under this view, nude dancing, like obscenity, falls outside the free speech category. This categorical method has the advantage of lending an air of certainty to constitutional adjudication. The disadvantage of rules-based approaches is that they are both under- and over-inclusive; not all “speech” is protected absolutely and much “expressive conduct” is indistinguishable from “speech.”

In contrast, a standards-based argument might maintain that nude dancing is covered by the Free Speech Clause, but the law's constitutionality depends on balancing the speech right against the government’s reasons for regulating nude dancing. This balancing method has the seeming advantage of accounting for the many subtle values implicit in the broad ambiguities within the constitutional text. The disadvantage with balancing tests is that they provide little guidance to, and put few restraints on, courts.

Constitutional Modeling offers a method of adjudication that incorporates elements of a rules-based approach, but assumes its main identity in the application of standards. It is a process that explicitly incorporates burdens of proof and the insights of presumptions in order to allocate the responsibility to articulate and demonstrate both the values and facts necessary to constitutional adjudication between


\(^{17}\) Id. at 2460 (finding that nude dancing is “within the outer perimeters of the First Amendment, though . . . only marginally so”).

\(^{18}\) See id. at 2463 (Scalia, J., concurring) (“[T]he challenged regulation . . . [is] a general law regulating conduct and not specifically directed at expression.”); see also Employment Div., Dept’ of Human Resources v. Smith, 494 U.S. 872, 885 (1990).
the parties.\textsuperscript{19} Constitutional Modeling incorporates evidentiary constructs to assign the obligation of identifying and defining constitutional values and of finding and substantiating constitutional facts. This process embraces a formalistic element: The initial process of evaluating the liberty interests in particular cases establishes the respective burdens of proof. This formalistic element provides guidance for the discretion inherent in the constitutional text. Constitutional Modeling prevents courts from engaging in a free-for-all assessment of the social or economic good, but also avoids the problems attendant with rigid categorical analysis; it allows a process of \textit{guided discretion}. Valuation of the liberty interest, it should be emphasized, is not rightspecific and represents the depth of the total liberty concern infringed by the government action.\textsuperscript{20} The modeler seeks to assess the full impact of a government action on liberty and factor it with the justification for that action in order to assess constitutionality.

Constitutional Modeling explicitly embraces two concepts from the trial process that are designed to allocate the risk of error in the very uncertain business of fact-finding, \textit{burdens of proof} and \textit{presumptions}.\textsuperscript{21} For present purposes, it is important to note that the burden of proof in evidence actually comprises two separate terms: the burden of production and the burden of persuasion. The burden of production refers to the placement of the initial burden on one of the parties to bring forward evidence sufficient for a reasonable fact finder to conclude that the pertinent fact is true. In civil cases, the party desiring to change the status quo normally bears the production burden, though this allocation may be reversed in order to effectuate some substantive policy. In criminal cases, the state nearly always bears the initial burden to come forward with sufficient evidence.\textsuperscript{22} The production burden thus refers to the judge's responsibility to measure the evidence to ensure that it is sufficient to permit the trier of fact to decide the matter.

\textsuperscript{19} This Part's discussion of the model relies heavily on the original description of the model of Madisonian Balancing in Faigman, \textit{Madisonian Balancing}, supra note 4, at 664-70.

\textsuperscript{20} The argument for aggregating rights is presented in Part III \textit{infra}.

\textsuperscript{21} Space does not permit a full discussion of the evidentiary use for these concepts, but the interested reader should consult my earlier work for a fuller examination. See Faigman, \textit{Madisonian Balancing}, supra note 4, at 658-60.

\textsuperscript{22} In criminal cases, the defendant will sometimes bear the burden to produce evidence sufficient to demonstrate an affirmative defense such as self-defense or incompetence to stand trial. See, \textit{e.g.}, Martin v. Ohio, 480 U.S. 228 (1987).
In contrast, the burden of persuasion refers to the confidence that the triers of fact must evince in their conclusion. The burden of persuasion is ordinarily borne by the same party who bears the burden of production; the plaintiff usually carries it in civil cases and the prosecution bears it in criminal cases. After all the evidence has been introduced, the trier of fact reaches a conclusion based on a standard of confidence (i.e., a preponderance of the evidence, clear and convincing evidence, or proof beyond a reasonable doubt). This spectrum, ranging from a tie-breaking standard to a standard requiring near certainty, reflects corresponding levels of concern over the consequences flowing from factual error. In most civil cases, the preponderance standard illustrates that although some tie-breaking mechanism is needed in these cases, the system is indifferent about the allocation of error between civil plaintiffs and civil defendants and, by custom, the law has favored the status quo. In contrast, the stringent beyond-a-reasonable-doubt standard illustrates the strong systemic preference favoring the defendant when mistakes are made.

The second concept Modeling borrows from the law of evidence is the presumption. Although a variety of evidentiary devices are labeled as presumptions, the only true presumption is the "rebuttable presumption." Two forms of the rebuttable presumption exist: One shifts the burden of production, and the other shifts the burden of persuasion. The basic principle behind the presumption is that proof of a basic fact or facts compels acceptance of a presumed fact, unless the opponent demonstrates by some quantum of proof that the presumed fact is otherwise. The production-shifting presumption provides that once the beneficiary of the presumption demonstrates the basic fact, the opponent bears the burden of producing some evidence disputing the presumed fact. The beneficiary of the production-shifting presumption, however, continues to bear the risk of nonpersuasion on the merits. In contrast, once the beneficiary of a persuasion-shifting presumption demonstrates the basic fact or facts, the opponent bears both the burden to produce evidence and the risk of nonpersuasion on the merits.


24. Id. § 342, at 578-79. Two other devices regularly labeled as presumptions are the permissive, or standardized, inference and the conclusive presumption. The former merely denotes a logical relationship between facts, such that knowing one fact increases the likelihood that another fact is true. The latter is a substantive rule of law whereby proof of one fact compels acceptance of a second fact; no amount of proof will suffice to rebut the presumed fact.
The intuitive connection between the constructs of the burden of proof and presumption and the Madisonian model is simple and direct. Because the Madisonian model slightly privileges majoritarian will at the systemic level, the initial burden of production falls upon the challenger of the majoritarian action. The challenger’s burden of production has two components. The challenger must demonstrate to the satisfaction of a reasonable court: (1) that the government action infringed some constitutional liberty; and (2) what the nature and scope of that liberty concern is. Once the challenger has met this production burden, the burden shifts to the state to justify the infringement. Whether this shift switches the burden of persuasion or merely switches the burden of production depends on the nature of the constitutional liberty infringed. The government’s burden has two components. The government must show: (1) the legitimacy and strength of its interest; and (2) the factual nexus between the government’s interest and the action taken to achieve that interest.

The evidentiary analogy supplies constitutional analysis with an array of standards by which to measure constitutional liberty and government interests when they conflict. Once the challenger has met her burden of production by showing that the government action has implicated the Constitution, the allocation and strength of the burden of proof depend on the nature and scope of the liberty concern. I propose four levels at which the challenger might demonstrate that the Constitution has been infringed: (1) marginally; (2) consequentially; (3) centrally; and (4) at its core. Infringements on the constitutional margins shift only the burden of production while those that are consequential, central, or at the core also shift the burden of persuasion, albeit at different standards.25

Infringements on the Constitution’s margins shift the burden of production to the state to explain how its action is related to a legitimate interest. Unlike the current rational basis test, the state truly bears the responsibility to articulate a legitimate interest as well as to demonstrate the nexus between its action and this objective. The challenger, however, bears the ultimate burden of persuasion to refute the legitimacy of the interest or, by empirical proof, the nexus between the interest and action. After the government has met its burden of production, the challenger bears the burden of persuasion, to show that, more likely than not, the government’s action is unconstitutional.

The three remaining categories of constitutional liberty shift the ultimate burden of persuasion to the government. Once the challenger has demonstrated the existence of a consequential liberty concern, the state must demonstrate that in light of the value of the interest, and the factual nexus between its action and that objective, its action is more likely than not constitutional. When a central liberty concern has been infringed, the state must show that its interest, and the factual nexus between its action and that objective, are clearly and convincingly constitutional. Finally, when a core liberty concern is infringed, the government is required to show that its interest, and the factual nexus between its action and that objective, are constitutional beyond a reasonable doubt.

This model of constitutional adjudication is graphically depicted in Figure A. Figure A illustrates the basic relationship between individual liberty and government justifications with the y-axis describing the levels of freedom and the x-axis describing the corresponding burden of proof placed on the government. Several important aspects of Figure A merit highlighting. Most notably, liberty and government interests are on separate axes, which is consistent with the premise that they are independent factors. In addition, where the divisions occur between types of freedoms along the y-axis as well as where they occur between government interests along the x-axis is a matter of substantive constitutional theory. Whether speech, therefore, is more fundamental than, say, reproductive freedom is not specified by this model; the model does, however, assume that different kinds of freedoms can be compared. Similarly, the slope of the line dividing the constitutional domain of government actions from the unconstitutional domain of government actions also depends on the decision maker’s substantive theory of constitutional law. Figure A merely describes the connection between liberty and government interests in the process of constitutional adjudication.

Modeling alters the focus of the balancing metaphor in important respects. Traditional balancing tests call upon courts, in a rather vague fashion, to compare the strength of the government’s interest to the value of a specific constitutional right. The tests, however, do not provide any mechanism by which this evaluation can be accomplished, nor do they account for the factual components inherent in the analysis. Modeling clarifies and specifies the elements of the test. First, it inquires into the nature and scope of the full constitutional infringement; and second, when evaluating the strength of the government justification, Modeling considers with what degree of certainty is it
known that the government's action achieves the articulated objective. This approach incorporates the common-sense idea that the value of facts must be discounted by the risk that they are false. For instance, a government justification such as the deterrent effect of capital punishment is stronger the more confident we are that such a connection exists. Within the tiers of Modeling, the court must assess the importance of the government interest as well as the likelihood that the action truly accomplishes that interest. Together, the answers to these two inquiries establish the strength of the government justification for valuation purposes.26

26. Although Constitutional Modeling was conceptualized in the context of the clash between individual rights and government interests, its insights apply to other constitutional contexts that require evaluation of competing interests. In Dormant Commerce Clause cases, for instance, the courts balance the state's interest in health and safety against the burden the legislation puts on interstate commerce. Just as in the context of individual liberties, in Dormant Commerce Clause cases the strength of the state's justification depends on how confident we are about the facts on which it is based.

Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981), provides a useful example. Iowa passed a law banning the use of 65-foot double tractor trailers on its highways. Iowa claimed, among other things, that the law was justified because the presence of longer trailers on Iowa roads would increase the number of deaths on Iowa roads. The truck company argued first that the larger trucks were at least as safe as the smaller ones and, second, that the reloading and rerouting necessitated by the Iowa law would burden...
The tools of the trial process provide a sensible method by which to regulate the process of proof (both empirical and normative) in constitutional adjudication. Yet, these tools are entirely procedural and merely assume the existence of a substantive foundation that will permit rational comparison of liberty and government power. The next Part considers whether such a foundation exists and examines whether such a foundation is strong enough to support the constitutional structure to be built upon it.

II. The Constitutionality Equation

As noted above, the principal complaint offered against balancing as a constitutional method is that there is no common scale on which to measure the disparate values inherent in the government's reasons for acting and the individual's right to be free of that action. This is commonly referred to as the apples and oranges complaint. In the constitutional context, the complaint is not that interests and rights cannot be compared as a theoretical matter, but rather that no single scale appears constitutionally mandated. In short, the balancing method is an unappealing option as long as the balancing mechanism itself cannot be specified.

Constitutional Modeling seeks to solve the apples and oranges complaint by accepting it. Accepting the apples and oranges complaint has two consequences that form the basis for Constitutional Modeling. First, liberty and government interests must be measured separately. Second, these independent factors describe a third factor, constitutionality. The relationship between these three factors is a fairly simple one. As the value of liberty and the strength of the gov-
ernment's justification both proportionally increase, constitutionality remains constant. Similarly, as both factors proportionally decrease, constitutionality remains constant. But as the government's justification increases and liberty remains constant or decreases, constitutionality increases. And finally, as liberty increases and the government's justification remains constant or decreases, constitutionality decreases. These premises describe a relationship that can be depicted very roughly by the following algebraic formula, in which \( C = \text{Constitutionality} \), \( G = \text{Government Justifications} \), and \( L = \text{Liberty} \):

\[
C = \frac{G}{L}
\]

This formula illustrates constitutionality as a function of liberty and government justifications in the way described above. It is an oversimplified illustration because in this form the equation depicts constitutionality increasing at a far higher rate than it decreases. The full mathematical description is somewhat more complicated.\(^{29}\)

Both government justifications and liberty can be separately graphed as predictors of constitutionality. (See Figures B and C, respectively.) Also, government interests and liberty can be graphed. (See Figure D.) As Figure B illustrates, when liberty is held constant government justifications positively predict constitutionality; and Figure C illustrates that when government justifications are held constant, liberty negatively predicts constitutionality. In other words, when liberty is removed from the equation, the greater the government interests, the more likely the action will be deemed constitutional. When government interests are removed from the equation, the greater the liberty concern, the more likely the action will be unconstitutional. When considered separately, therefore, government interests should be positively correlated with findings of constitutionality, whereas liberty should be negatively correlated with findings of constitutionality. These hypotheses, of course, are not particularly novel and should not be particularly controversial.

Figure D illustrates the assumption that government interests and liberty are, essentially, independent. In other words, there is no correlation between liberty and government interests. This hypothesis also should not be controversial, though it might seem so at first. For instance, the value of an individual's right of political expression does not depend on whether the government's suppression is based on avoidance of "a clear and present danger" or on an objection to the

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29. See infra note 30.
content of the message; the definition of the right is independent of the reasons the government might offer for infringing the right.

The mathematics of the relationship become somewhat more complicated when government justifications and liberty are factored together as predictors of constitutionality. In fact the graph now needed to illustrate the relationship must be rendered in three dimensions. (See Figure E.) A plane, rather than a straight line, predicts the best fit between the three variables.  

To be sure, the values attributed to liberty and government interests are largely subjective and will change from judge to judge.

30. In the simplest case, when you have one factor that predicts a second factor, the relationship can be defined as a straight line, \( y = a + bx \), where \( a \) is the \( y \) intercept and \( b \) is the slope. This relationship is described mathematically as follows: 
\[
C = \beta_0 + \beta_1 G + \beta_2 L + \beta_1 G \cdot L.
\]
This formula is a multiple regression equation for interactions in which \( \beta \) are the regression coefficients. See David G. Kleinbaum & Lawrence L. Kupper, Applied Regression Analysis and Other Multivariable Methods 180-82 (1978).

The regression coefficients are solved by the following formulas:
\[
\beta_1 = \frac{\Sigma (X_1 \cdot \mu_y) (Y \cdot \mu_y)}{\Sigma (X_1 \cdot \mu_x)}
\]
\[
\beta_0 = \mu_y - \beta_1 \mu_x
\]

See id.
Whether the right of reproductive choice, for instance, is more or less fundamental than the right to free political expression is not a question that has a definite, objective answer. Modeling is merely a method of constitutional adjudication; it is not a substitute for substantive value definition. But once a judge has assigned values to the respective factors, the scale should describe her judgments concerning the respective constitutionality of a range of government actions.\(^3\)

This means that the basic challenge of those who question whether we can compare the length of a line to the weight of a rock is testable. The empirically testable proposition that flows from Constitutional Modeling is that if people are given the opportunity to identify the value of different instances of liberty and different instances of government justifications, their intuitive judgments of constitutionality when these factors are presented together will be described as an interaction.\(^3\)

Although the values are subjective, in theory, the model

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31. The scale's predictive accuracy is an empirical question that I have yet to research. The reader, however, is invited to graph a series of government actions and determine for herself whether the scale captures her judgments of constitutionality.

32. See supra note 30.
should allow comparisons across constitutional contexts for specific individuals.\textsuperscript{33}

It should be emphasized that even though the values assigned to liberty and government justifications may be subjective, they are not arbitrary. For instance, few, if any, judges would rank artistic expression above political expression; disagreements about order of constitutional values is a matter subject to debate and persuasion. Moreover, these factors are not entirely subjective and normative. In most cases, the magnitude of the government's justification is a combination of normative and empirical factors. For example, consider a state regulation mandating fetal viability testing at twenty weeks. This statute is justified on the basis of the state's normative judgment that viable fe-

\begin{figure}
\centering
\includegraphics[width=\textwidth]{figure_d.png}
\caption{Figure D}
\end{figure}

\begin{itemize}
\item Individual Liberty
\item Government Justification
\end{itemize}

\textsuperscript{33} Because an individual's judgments of constitutionality can be ascertained, together with her valuations of liberty and government power, her general constitutional perspective can be represented graphically. The slope of the lines describing an individual's judgments of the degree of liberty at stake, the government's justifications, and her ultimate determination of constitutionality for specific constitutional problems should reflect her political outlook. For instance, someone who is strongly majoritarian should generate "constitutional curves" with very steep slopes, while someone who is less deferential to the majority will generate constitutional curves with less steep slopes.
tuses should be protected as well as the state's empirical belief that the prescribed tests will accurately identify viable fetuses.\textsuperscript{34} To be sure, a very strong normative purpose in some cases will offset a weak empirical basis just as a strong empirical basis will offset a relatively weak normative purpose. In the end, the overall persuasiveness of the government's justification—\textit{its value}—will be a function of both normative and empirical considerations.

Consideration of a specific constitutional context will help illustrate how Modeling ties individual liberty and government power together for comparative purposes. Perhaps in no other area is the complaint that the factors composing power and freedom are incommensurable more strongly voiced than in the abortion cases. These

\textsuperscript{34} See generally Webster v. Reproductive Health Servs., 492 U.S. 490 (1989).
cases present a dizzying array of rights and government interests. The right of reproductive choice has at least two possible sources in the Bill of Rights: the Due Process Clause and the Equal Protection Clause. On the other side of the equation, the two most often cited government interests are maternal health and the potential life of the fetus. In what manner can these disparate elements be described uniformly?

First, as noted above, rights and government interests must be evaluated independently. To begin with, in accordance with Modeling, the challenger of government action must define the nature of the liberty and specify its strength. This assessment is done, as described in detail below, on a transactional basis. Relying on both the Due Process and Equal Protection clauses, we might expect that the challenger could demonstrate at least a central liberty concern embraced by the Bill of Rights. The Constitution extends substantial protection from the state in matters of reproductive choice. If this protection is deemed a central liberty concern, the burden of persuasion shifts to the government to demonstrate clearly and convincingly that its action was justified.

The government's justification for a law infringing the liberty of reproductive choice depends on the specific context, and as more than one government interest combines to support some action, the measurement process becomes increasingly complicated. For instance, a parental consent provision for minors seeking abortions arguably has several objectives, including safeguarding maternal health, preserving the integrity of the family, and protecting the potential life of the fetus. When the government justifies its action with more than one of these interests, the Court must measure them together. In constitutional terms, it does not matter whether the government's action is supported by one very large interest or several small interests that add up to one very large interest. Although the mathematics are not precise, it is not an intuitively difficult calculation to perform. In fact, the Court has always done this addition.

In measuring whether the government's action clearly and convincingly "outweighs" the liberty concern, the Court uses the model of constitutionality. This model measures whether the governmental intrusion is justified in light of the strength of the liberty concern. This

36. See generally Faigman, Madisonian Balancing, supra note 4, at 691; supra notes 25-26 and accompanying text.
model permits specific comparisons. Consider, for example, the choices available for state legislators who wish to have parents participate in their daughters’ decisions regarding abortion. Lawmakers have a number of different schemes to choose from, ranging from a two-parent consent without judicial bypass requirement to a one-parent notification with judicial bypass provision. These alternatives can be rank-ordered relatively easily according to the normative strength and empirical support for the government’s scheme. On one end, the most justified alternative is the one-parent notification with judicial bypass requirement. Along the scale are one-parent consent without judicial bypass, two-parent consent with judicial bypass, two-parent notification without judicial bypass, and so on. Even though there might be some disagreement over where some particular scheme sits on the scale, it is not likely to be very great. Instead, substantial disagreement is likely to concentrate on what point a government regulation passes constitutional muster. Disagreement will center on where to draw the line of demarcation between the state and the individual, not on the existence of a single model that illuminates the choice.

Conceptually, under Constitutional Modeling the government’s interest in protecting the life of the fetus is not balanced against the woman’s right of reproductive choice. Instead, both the right and the interest are compared on separate dimensions of a single model describing constitutionality. The independently derived value of the liberty concern establishes the burden the government must meet to demonstrate that the infringement is justified. The government’s burden, therefore, is to advance and sufficiently support reasons to justify an intrusion into individual liberty that has already been defined.

Describing constitutional adjudication in modeling terms has the further advantage of accounting for the way constitutional decisions might actually be reached. A common assumption among law students, if not lawyers and scholars, is that judges reason backward from their conclusion to their premises. The balancing metaphor, however, depicts a process by which judges simply place liberty and government interests on some grand metaphysical scale and read the result. Mod-

37. It is important to again emphasize that the government’s offer of proof, its justification for infringing individual liberty, has two aspects: (1) the normative basis for the government action, and (2) the empirical nexus between the normative basis and the government action (i.e., as a factual matter, does the action accomplish the asserted purpose?). See Faigman, Madisonian Balancing, supra note 4, at 665.

38. Such a statutory requirement was held unconstitutional in Planned Parenthood v. Danforth, 428 U.S. 52, 72-75 (1976).
eling, however, describes a very different process. Because constitu-
tionality is a separate factor altogether, reasoning “backwards” in
constitutional cases does not violate the metaphor. Modeling presup-
poses that there is content to the factor of constitutionality that can be
understood and measured separately. A judge, therefore, might begin
with an intuitive judgment regarding the “constitutionality” of a chal-
_ lenged government action. Of course, judges are obliged to explain
the bases for their conclusions and to persuade the reader that those
conclusions are correct. This process of explanation and persuasion
involves close examination of liberty and government interests. It
would not be unusual for a judge to modify her intuitive assessment of
constitutionality _after_ conducting this close examination. Some opini-
ons, as it is sometimes said, simply “will not write.”39

Being able to describe the constitutional equation does not, how-
ever, solve the problem of determining where to draw the line be-
tween constitutional and unconstitutional government actions. All
might agree that a two-parent consent without judicial bypass require-
ment is unconstitutional while a one-parent notification with judicial
bypass is constitutional. But what about the difficult cases in be-
tween? On this question, the model can prescribe no solution. Mod-
eling is merely a process by which substantive value choices must be
made. It can only clarify the questions that must be asked—not give
answers. A method of constitutional adjudication can, at best, clarify
the terms of the debate. Ultimately, reasonable people will disagree
over the content of majority will and individual liberty. This debate
defines us as a society. By clarifying its terms, we can all understand
and contribute to it.

III. Aggregating Rights

As currently practiced, balancing suffers from a different apples
and oranges problem than was examined in the last section. Balanc-
ing schemes now compare aggregated government interests to individ-
ual freedoms on an amendment-by-amendment basis. In effect,
depending on how it is expressed, current balancing methods either
double-count government interests or they understate the depth of the
implicated liberty. A good illustration of this practice is _Bell v. Wolf-
ish_.40 _Wolfish_ involved, among other things, a challenge brought by

39. Alvin B. Rubin, _Does Law Matter? A Judge’s Response to the Critical Legal Stud-
40. 441 U.S. 520 (1979).
federal prisoners to the "publisher-only" rule that prohibited inmates from receiving hardcover books that are not mailed directly from the publisher. The Court recognized that the publisher-only rule implicated both the First and Fifth Amendments. The state justified the rule on the ground that it was needed to prevent contraband from entering the prison. In separate sections of its opinion, the Court found that the government's security need outweighed the prisoners' First Amendment right and that the government's security need outweighed the prisoners' right under the Fifth Amendment to not be deprived of their property without due process of law.

Amendment-specific balancing miscalculates the constitutional costs attached to the publisher-only rule. Suppose, for example, if such things could be measured, the First Amendment right implicated is valued at four constitutional units and the Due Process property right is also worth four constitutional units and there is no overlap in the values the two amendments protect. And suppose further that the government's interest in Wolfish could be quantified at six constitutional units. By dividing the rights and evaluating them separately against the reasons behind the regulation, the government's action passes scrutiny under conventional balancing. If the full effect of the constitutional infringement is assessed against the government interest, however, the action would be deemed unconstitutional.

To be sure, individual liberty and government interests do not lend themselves to precise mathematical description. Moreover, it must be emphasized, the cost in liberty of a particular government action does not equal the sum of the amendment-specific freedoms implicated; rather, liberty is the umbrella construct that judges must assess, and the amendments merely set forth those freedoms that gain shelter under that umbrella.

The failure to employ a transactional perspective seriously underestimates the injury to the individual. People do not suffer injury to their liberty in a compartmentalized, amendment-specific way. The conventional practice is something like calculating damages in torts one arm and one leg at a time; the damage assessment will be seri-

41. Id. at 527.
42. Id. at 550, 554.
43. Id. at 549.
44. Id. at 548-52.
45. Id. at 553-55.
46. This hypothetical also assumes that the units of measurement for liberty and government interests are the same. This assumption is not necessary to conduct the modeling discussed in Part II.
ously minimized by assessing the paralysis of each limb instead of taking into account the fact that the plaintiff is completely disabled.\footnote{In \textit{Wolfish}, the deprivation of property that occurred was different than other property deprivations, indeed much greater, because it involved books. And the First Amendment concern too was different than other First Amendment violations, because it involved the deprivation of property.} Constitutional analysis is currently conducted in a fashion closely resembling civil common-law causes of action. If a single set of facts establishes a cause of action under both tort law and contract law, for instance, the actions effectively are litigated separately. A civil litigant can respond with the same defense to both and prevail in both. Similarly, in constitutional cases, one set of facts might implicate several amendments and the government can use the same justification as a defense for infringements of each.

In the civil law context, the principal reason for multiple causes of action is the very different histories that inform tort and contract law. Tort and contract law evolved largely independently of one another and are usually concerned with fundamentally different sets of circumstances. Sometimes, however, torts and contracts theories converge as practitioners, scholars, or judges identify a set of circumstances that logically fit into both camps.

Interestingly, the nontransactional way of describing civil causes of action does not extend to the method of measuring civil remedies. A plaintiff who prevails on both tort and contract theories does not recover twice. Damages are always described in transactional terms. Although reconciling the perspective of the legal theory of causes of action and the legal theory of recovery is beyond the scope of this Article, the differences in outlook between the two theories might shed light on the constitutional question presented.

Several explanations might account for why causes of action embrace a nontransactional perspective while remedies are transactional. First of all, the independent traditions surrounding tort law and contract law evolved because the designers of these causes of action were concerned with matters that appeared unconnected. When a single principle lies at the bottom of two or more causes of action, we should expect them to converge in time and eventually become one. The conceptual unity of the injury for remedial purposes is obvious. In addition, the theoretical issue inherent in fashioning a cause of action is entitlement; under a particular set of circumstances, is the claimant entitled to recover from the defendant? At the remedy stage, however, the issue turns from entitlement to relief. A cause of action defines responsibility; in contrast, in calculating the remedy, the issue is not who but how much.

Many of the principles that contribute to a transactional perspective in civil litigation inhere in constitutional adjudication. Unlike the checkered history of causes of action in torts and contracts, constitutional adjudication, at least as regards infringements of individual liberty, stems from a single tradition and, therefore, should be conceptualized with a fullness and unity unknown in the civil context. Although the Constitution contains many particulars, its essential thrust, its core, contains but one object: safeguarding individual liberty within a majoritarian democracy. This is the single lens through which most constitutional adjudication must be viewed. Indeed, constitutional adjudication more closely resembles the remedy stage than the initial stage when a cause of action is stated. In constitutional cases, entitlement and responsibility are resolved initially in the determination whether the Constitution is implicated. Once a court begins to assess the relative values of pertinent constitutional factors, the only question remaining concerns whether the government's reasons justify the infringement. This issue is similar to the determination of an adequate remedy.
of property. The cost in liberty simply cannot be calculated without examining all of the consequences of the government action.

Evaluating the full cost in liberty is no more difficult conceptually than aggregating government interests, a computation the Court performs regularly. Just as with government interests, aggregation is not simply a matter of adding up amendments. Sometimes the cost in liberty caused by some government action that infringes one amendment will far outweigh the costs when such action infringes several amendments. The cost in liberty of some government action, therefore, is not affected by the number of amendments involved, but only by the depth of liberty at stake. Courts would continue to depend upon the constitutional text and other authorities to define liberty, but liberty would not be divided into narrow compartments and tabulated in a way that distorts its essential character.

The transactional perspective is hardly unknown to constitutional law. The need to account for multiple rights when calculating constitutionality has been recognized in a host of constitutional contexts. The most notorious of these is Griswold v. Connecticut,48 in which Justice Douglas, writing for the Court, identified the right of privacy as situated in the “penumbras” of the First, Third, Fourth, Fifth, and Ninth Amendments.49 Of course, the Court and commentators alike have criticized Griswold's unorthodox approach. But the alleged error of Griswold does not lay in its aggregation of rights, but rather in its failure to demonstrate that privacy could actually be found somewhere in the document. The criticism of privacy is that it does not exist in any amendment, not that it is illegitimate to locate it in several.

The concept of aggregating rights has influenced the Court’s analysis in other contexts. In Employment Division, Department of Human Resources v. Smith,50 for example, Justice Scalia, writing for the Court, expressly embraced the lesson that the nature of the review changes when government action infringes on more than one right:

The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.51

48. 381 U.S. 479 (1965).
49. Id. at 484.
51. Id. at 881.
The transactional perspective would not cut constitutional interpretation loose from its textual or historical moorings. Instead, the Court would continue to have to specify with particularity, and support with sufficient authority, the principles that compose individual liberty in particular cases. In *McCleskey v. Kemp*, for example, the Court rejected the petitioner's claim that Georgia's death penalty scheme, which research indicated discriminated on the basis of the race of the victim, violated the Eighth and Fourteenth Amendments. In classic style, the Court divided the two amendments and found the Georgia capital sentencing scheme constitutional as against each. A transactional perspective would not cut the Court loose to range freely through the constitutional firmament. The Court would still be obligated to identify the principles inherent in the Due Process Clause of the Fourteenth Amendment as well as the clause prohibiting cruel and unusual punishment in the Eighth Amendment. But the transactional approach would require that these principles be combined in order to obtain an accurate gauge of the injury suffered by the petitioner. Indeed, it is hard to imagine how the injury felt by the challenger could be suffered in any way other than in toto. Georgia's act of depriving Robert McCleskey of his life cannot be divided into its constituent parts, for only one feature has any relevance. He can only die once. His death sentence raises only one constitutional question: Did Georgia's capital sentencing scheme operate to deprive him of a protected freedom? To separate this question into its component parts reflects a basic miscomprehension of what liberty means.

In fact, large areas of the Court's constitutional jurisprudence are consistent with aggregating rights. For instance, implicit in the Court's selective incorporation of the Bill of Rights into the Fourteenth Amendment's guarantee of due process lies the insight that supports aggregation: Liberty has content that transcends the specific categories of the Bill of Rights. As Justice Cardozo emphasized in *Palko v. Connecticut*, determining that certain rights are incorporated "has been dictated by a study and appreciation of the meaning, the essential implications, of liberty itself." Despite our traditional myopia otherwise, liberty resists being cabined into discrete categories. The guiding principle of the incorporation doctrine itself contemplates a

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53. See id. at 291-99 (regarding Fourteenth Amendment); id. at 299-308 (regarding Eighth Amendment).
55. Id. at 326.
broader understanding. Only those rights are incorporated that “have been found to be implicit in the concept of ordered liberty.”56 This test requires the interpreter to transcend a crabbed, compartmentalized view of the Bill of Rights. We know, not from any reading of the text, that free speech is “fundamental,” but the right to a jury in a civil trial is not; yet the text of the Constitution states both rights equally emphatically. The content of the rights contained in the Bill of Rights comes from interpretations that transcend the document’s specific words. Justice Harlan eloquently repudiated a crabbed, compartmentalized approach to constitutional interpretation when he articulated the basis for protecting unenumerated rights in his dissent in Poe v. Ullman:57

[The Due Process Clause of the Fourteenth Amendment] is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.58 The same wisdom that permits recognition of unenumerated rights compels acceptance of aggregation of rights. If liberty is indivisible, with specific rights giving value to indefinite points along a single continuum, compartmentalization of government infringements of liberty is an exercise of judicial caprice.

The fundamental lesson of the Bill of Rights is that liberty is really just one freedom that is defined in various operational ways in that document; indeed, the Ninth Amendment, whatever its substantive content, emphasizes how the blanket of liberty is woven from a single thread. Professor Randy Barnett described how the Ninth Amendment contains this very lesson: “Liberty rights define a boundary within which individuals and associations are free to do as they wish. Because the ways by which this liberty can be exercised are unlimited, it is impossible to enumerate all the specific rights that people possess.”59 Liberty has a richness, complexity, and multiplicity that resists simple compartmentalization or specific enumeration. It is ex-

56. Id. at 325.
58. Id. at 543 (Harlan, J., dissenting).
pansive and must be compared against the equally expansive concept of government interests. The process of aggregating rights merely asks the ultimate constitutional question: To what degree has the challenged government action infringed liberty? A transactional approach would require that the government's purposes be measured against the individual's full liberty right.

A. Generality in the Procedure

Aggregation of rights clarifies the full constitutional costs of a particular government action. But it also potentially aggravates a traditional complication of constitutional adjudication, the problem of selecting the level of generality by which to analyze the liberty interest at risk. Two aspects of "generality" are pertinent in balancing cases. First, the balancing process itself occurs along a fairly wide spectrum, ranging from case-specific or "ad hoc" balancing to generalized or "definitional" balancing. And second, balancing methods must resolve the interpretive debate concerning the level of abstractness at which the right is conceptualized. The former aspect is inherent in the choice to use balancing methods, the latter is endemic throughout constitutional adjudication. Modeling confronts these two "generality" difficulties in the same way that balancing methods do. It should be noted, however, that these two generality concerns are largely independent of one another.

An example will assist the discussion. In Maryland v. Craig, the defendant complained that a Maryland law which permitted a child witness to testify via one-way, closed-circuit television violated his Sixth Amendment right to confront the witness. The purpose of the Maryland law was to protect child victims of sexual assault from the psychological trauma that might result from testifying in open court. Justice O'Connor, writing for the Court, rejected Justice Scalia's categorical argument that "confront" means face-to-face. Instead, O'Connor interpreted the Sixth Amendment to require trial courts to balance the psychological effects to the individual witness against the defendant's confrontation right.

This ad hoc balancing test presents several difficulties for the trial courts that must apply it. Obviously, one side of the balancing equa-

61. Id. at 842.
62. Id. at 852.
63. Id. at 844.
64. Id. at 855.
tion changes from case to case: the psychological trauma the witness is likely to experience. The other side, the liberty concern protected by the Confrontation Clause, is less easily gauged. In this ad hoc balancing, does a defendant who is accused of murder and potentially may be sentenced to death have a greater confrontation right than a defendant who is accused of attempted sexual assault, which carries a penalty of three to five years in prison? In applying an ad hoc balance, the Court requires, by definition, a case-by-case assessment of the government interests, defined here as the psychological trauma expected to be suffered by the witness. Intuitively, it would appear, balancing should require congruence between the levels of generality on each side of the scale.

In contrast to ad hoc balancing, we would expect that both the government's interests and individual liberty would be calculated generally in definitional balancing. New York v. Ferber\(^6\) nicely illustrates the definitional balancing context. In Ferber, the Court evaluated the constitutionality of a state regulation that prohibited child pornography. The Court balanced the class of child pornographers' free speech rights against the government's interest in protecting the class of children victimized by pornography.\(^6\) The same level of generality informed both sides of the balance.\(^6\)

In practice, however, courts regularly violate this symmetry by balancing a generalized or abstract factor on one side of the equation while the other side is described in concrete, case-specific terms. The cases following Maryland v. Craig illustrate how courts insist on a showing of a specific need for testimony via closed-circuit television, while, at the same time, not altering the necessary proof as the risk to the defendant's liberty changes. For example, in Spigarolo v. Meachum,\(^6\) the Second Circuit Court of Appeals upheld the Connecticut Supreme Court's holding that a trial court must find by clear and convincing evidence a compelling need to take testimony outside the presence of the defendant.\(^6\) The court did not intimate that this standard might change as the costs to the defendant increase or decrease. Symmetry in the balancing process might require proof beyond a rea-

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66. Id. at 763-64 (“[I]t is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.”).
67. Id. at 756-64.
68. 934 F.2d 19 (2d Cir. 1991).
69. Id. at 21.
reasonable doubt when a defendant is at risk of a life term or death, but only proof by a preponderance of the evidence when the penalty is relatively slight.

The practice of describing the factors on the two sides of the scales at different levels of generality is an effective rhetorical technique. As long as the defendant’s Sixth Amendment right is described abstractly, it is difficult to appreciate fully. When balancing, how can this abstract right possibly compare to the psychological trauma that the child witness might suffer if she testifies in the defendant’s presence? The comparison becomes easier to appreciate, however, when the defendant’s specific liberty is taken into account. A defendant confronting life imprisonment might have an overwhelming right to confront her accuser. This insight is an essential aspect of analyses of the right to counsel in the Sixth Amendment; this insight should extend to the right to confront witnesses in the same amendment. Descriptions can substantially affect perceptions. Generalized descriptions diffuse and thus minimize the value that might be attributed to the right or interest.

In fact, by failing to use the same level of generality on both sides of the balance, courts violate an essential premise of the method. If, in fact, a single scale describes the intersection of individual liberty and government interests, the factors must be measured in the same units. To do otherwise is akin to comparing the weight of an apple in ounces to the weight of an orange in grams. The comparison is possible, but a conversion table would be necessary to understand the result. Balancing, therefore, does not so much prescribe a particular level of generality along the spectrum from ad hoc to definitional, as it does require that the same level be used to describe the two principles of government power and individual freedom.

This aspect of balancing raises some potential difficulty for my proposed model. Foremost, unlike balancing methods, Constitutional Modeling does not require measurement on the same scale. Moreover, since government power and individual freedom are defined independently, there are good reasons to expect the level of generality to vary considerably from context to context. These two concerns will be considered in turn. First, although Modeling does not mandate a common scale, the equation nonetheless requires that a single perspective be applied. In much the same way as in balancing, incorporating different levels of analysis when defining the factors will inevitably skew the results. This requirement is a function of all algebraic expressions.
The second concern—that defining liberty and government interests separately will lead to different levels of analysis—assumes that, at least sometimes, the constitutional text specifies the level of generality. However, rarely, if ever, is the level of generality specified by the text. Instead, the level of generality is dictated by either the specific context in which the question arose or jurisprudential considerations dictating the need for a general rule or the necessity of case-by-case adjudications. These factors are tied to the specific transaction (or similarly occurring transactions). Hence, for Modeling purposes the resolution of the level of generality is not a function of the character of government power or the content of individual freedom, but rather is a function of the nature of the transaction being measured.

B. Generality in the Conceptualization of the Right

In *Michael H. v. Gerald D.*,70 Justice Scalia argued that rights should be defined at "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."71 He believed this approach offered the only nonarbitrary interpretive method available. Scalia's argument touched off a lively debate among members of the Court72 as well as among constitutional scholars.73 For example, Justice Brennan, dissenting in *Michael H.*, criticized the basic operating premise of Scalia's argument:

> In a community such as ours, “liberty” must include the freedom not to conform. The plurality today squashes this freedom by requiring specific approval from history before protecting anything in the name of liberty. . . . The document that the plurality construes today is unfamiliar to me. It is not the living charter that I have taken to be our Constitution; it is instead a stagnant, archaic, hide-bound document steeped in the prejudices and superstitions of a time long past.74

Constitutional Modeling does not specifically offer a solution to this debate, for the level of generality selected raises primarily substantive interpretive questions rather than procedural matters of adjudication. Nonetheless, adjudication through Modeling, and in particular the prescription of rights aggregation, necessarily touches this debate.

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70. 491 U.S. 110 (1989).
71. *Id.* at 127-28 n.6.
Professors Laurence Tribe and Michael Dorf challenge Justice Scalia’s claim to have discovered a means to avoid value choices in selecting a level of generality. In short, they contend that Scalia’s prescription to select “the most specific level” dictated by societal tradition fails because it is impossible to perform this procedure in a value-neutral fashion. More important to my thesis is Tribe and Dorf’s proposed alternative vision. They argue that because judges must generalize, they should select a level of abstraction that, first, is “connected to the constitutional text,” and, second, is supported by principles that fit both history and precedent.

It is significant that Tribe and Dorf begin their critique of Scalia’s proposal and ultimately rest their alternative vision on the excerpt quoted above from Justice Harlan’s dissent in Poe v. Ullman. They use Harlan’s statement that the Due Process Clause “is not a series of isolated points” to emphasize the interpolative and extrapolative character of interpretation. The lesson they draw from Harlan is that a “unifying principle at a higher level of abstraction” can be ascertained beyond the “set of specific liberties that the Bill of Rights explicitly protects.” This process of abstraction permits articulation of unenumerated rights that fit the history and precedent of rights specifically enumerated. In essence, specific unenumerated rights are identified as necessarily flowing from rights explicit in the Bill of Rights.

The present proposal embraces this meaning of the Harlan passage and takes it a step further. Because liberty “is not a series of isolated points,” it not only is manifested in certain unenumerated ways, but its measure cannot be ascertained except in its entirety. In selecting a level of abstraction when defining the individual liberty component of the balance, therefore, judges must consult history and tradition pertaining to the exercise of the full freedom threatened by the government action. Judges should articulate abstract principles around the complete context presented by a government action.

76. Id. at 1086. They also argue that “even if Justice Scalia’s program were workable, it would achieve judicial neutrality by all but abdicating the judicial responsibility to protect individual rights.” Id.
77. Id. at 1099 (“Like it or not, judges must squarely face the task of deciding how abstractly to define our liberties.”).
78. Id.
79. Id. at 1102.
80. Id. at 1068 (quoting Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).
81. Id.
Bell v. Wolfish, therefore, the query concerns the level of generality when the government deprives an individual of property protected by the First Amendment. This principle can range from the very specific (the right of a state prison inmate not to be deprived of hardcover books not sent by publishers) to the very general (the right of an individual not to be deprived of property that facilitates the exercise of free speech). The process of Modeling is agnostic regarding what level of generality is chosen; it mandates, however, that the level of generality be constructed at a transactional level of analysis. Liberty, as a whole, becomes the subject of definition, rather than a specific isolated right. Liberty cannot be seen well in a sketch of "isolated points"; it must be painted in full detail. Only then can freedom be fully guaranteed within a political democracy.

Conclusion

The principal complaint leveled against the balancing method is that, conceptually, it is impossible to truly weigh individual liberty against government interests. Such a comparison, critics complain, is like comparing apples and oranges or the length of lines to the weight of rocks. The search for the common denominator shibboleth, it turns out, is indeed futile because no common denominator exists. Acceptance of this insight, however, does not mean that judges should abandon a standards-based assessment of the weights of liberty and government interests. Although the relationship between these two fundamental principles of constitutional jurisprudence is slightly more complicated than a simple arithmetical comparison of weights, such a relationship can indeed be described.

Liberty and government interests are independent factors that can only be fully described through a third factor: constitutionality. As this Article explores, these three factors conform easily to algebraic expression. In contrast to the simple mathematical assumptions of balancing's critics, this model of constitutionality requires no common denominator. Recognition of the algebraic nature of constitutional analysis should promote a robust and well-delineated debate regarding the nature of individual freedom and the extent of government power.

Finally, in framing this debate, individual freedom must be defined at the same level of abstraction as government interests, that is, on a transactional basis. When measuring the constitutional costs associated with a government action judges should employ a method that considers the full liberty value implicated by that action, rather
than the crabbed, compartmentalized, amendment-specific approach that is now commonplace in constitutional adjudication. In effect, this method entails aggregation of rights. But only by viewing individual freedom through this inclusive lens can the full costs in freedom of a particular government action be seen. Without this lens, constitutional adjudication suffers from a myopia that blinds it to significant deprivations of individual freedom.