The Paradox of Balancing Significant Interests

Stephen E. Gottlieb

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

Part of the Law Commons

Recommended Citation
Available at: https://repository.uchastings.edu/hastings_law_journal/vol45/iss4/6

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.
The Paradox of Balancing Significant Interests

by

Stephen E. Gottlieb*

Introduction

The original objective of examining the foundations of overriding government interests1 was to cut through the interpretive morass and reveal two truths. First, the balance between rights and interests needs to be radically restructured, regardless of which interpretive theory one employs. Second, partiality exists at the core of the constitutional theory of those who most loudly claim neutrality, and yet who refuse to bring rights and interests into an appropriate relationship.2

* Professor, Albany Law School. LL.B. 1965, Yale Law School; B.A. 1962, Princeton University. The author owes debts for helpful comments and suggestions to C. Edwin Baker, William Cohen, Sally Friedman, William E. Nelson, Byron A. Nichols, Theodore J. Stein, participants at a works-in-progress seminar at the 1993 AALS Constitutional Law Conference, participants at the Hastings Law Journal Symposium, and particularly to David Faigman and Vincent Bonventre, who discussed the project at length with me and took the trouble to give a close reading to a draft of this Article. I also want to express my appreciation for the work of my research assistant, Krishna K. Singh.

1. See Stephen E. Gottlieb, Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication, 68 B.U. L. Rev. 917 (1988) [hereinafter Gottlieb, Compelling Governmental Interests]; see also PUBLIC VALUES IN CONSTITUTIONAL LAW (Stephen E. Gottlieb ed., 1993) [hereinafter PUBLIC VALUES IN CONSTITUTIONAL LAW]. The Court has used the concept of public or “government” interests, sometimes described as “compelling,” to express social values which, in the Court’s view, justify constricting “private” rights. This Article argues in part that the Court’s view of interests is tragically incomplete.

Since my original article appeared, the notion of balancing rights and interests has come under increasing criticism and declining explicit judicial use. These developments appear to take the bite out of the original analysis, and frustrate attempts to focus attention on constitutional values, of which interests are one form of articulation, and on their implications.

In contrast to these developments, there now seems to be a trend toward increasing scholarly interest in balancing and in what are variously called overriding public values or compelling interests. And it remains true—despite criticism and declining explicit judicial balancing—that interests play an immense, though often unarticulated, role in constitutional analysis. Interests are allowed to enter and dominate constitutional law without being subjected to the scrutiny that claims of right are. Such a role for interests is generally unacknowledged in part because it appears to be inconsistent with many theories of constitutional law. Yet, in a variety of different vocabularies, interests find their way into virtually every theory of constitutional law. The failure to identify their presence only serves to protect their power. Moreover, the contest between interests and rights is not “neutral” and produces perverse results.

These concerns with the role that interests (or “public values” or “government interests”) and balancing play within the reality, though

---

3. See Gottlieb, Compelling Governmental Interests, supra note 1.
5. For an extended discussion of the implications of judicial language and a call for more direct communication, see Robert F. Nagel, Constitutional Cultures: The Mentality and Consequences of Judicial Review 104-05, 121-55 (1989).
6. See Louis Henkin, Infallibility Under Law: Constitutional Balancing, 78 Colum. L. Rev. 1022, 1046-49 (1978) (calling for an examination of interests); Richard H. Fallon, Jr., Individual Rights and the Powers of Government, 27 Ga. L. Rev. 343, 344-45, 360-61 (1993) (maintaining that balancing is embedded in our constitutional language). In view of our similar conclusions, the differences between my own and Fallon’s very interesting argument about the relationship of rights and interests requires a bit of clarification. My argument is, in part, the reverse of Fallon’s; in a functional jurisprudence, rights and interests are not necessarily defined by the constraints imposed by conflicts between them. That—in fact, though not in theory—is what happens in a formal jurisprudence. On the other hand, the interests and the rights we actually subscribe to instantiate the same underlying values. Finally, I believe my argument is somewhat more general. Accepting balancing as undefinable, I need not restrict my discussion of interests to a specific legal theory. Rather, my argument is premised on consistent applications of a variety of legal theories.
7. Fallon, supra note 6, at 347-60; see also Gottlieb, Compelling Governmental Interests, supra note 1, at 925-37.
not necessarily the rhetoric, of constitutional analysis are reflected in several related propositions, each of which is considered below.

First, many arguments about interpretation are logically irrelevant. An extensive literature has developed analyzing which theory of interpretation is preferable and whether any theory is sufficiently definite to provide answers. To the extent that these theories of interpretation are defined sufficiently to guide legal conclusions, an evenhanded application of them to interests, as well as to rights, would result in similar outcomes—cancelling many of the apparent differences in the outcomes of those theories. And yet, despite the potential for similar outcomes, those same theories continue to have a powerful impact on what gets scrutinized and assumed, and, as a result, how cases get decided.

Second, many arguments about balancing are irrelevant. The open texture or indeterminacy of balancing is illegitimate from positivist and liberal perspectives because balancing appears political. Open texture is assumed by realist and critical scholarship that treats all law as political. In the end, however, the choices actually available have little to do with decision-making procedure or whether balancing is too imprecise. Like the arguments about interpretation, the arguments about balancing are significant primarily as arguments about what gets scrutinized and what gets assumed without examination. The useful question is not psychological or procedural, but political and jurisprudential. The useful question asks: What “improves” the results?

Third, interests define values. Half a century ago, Roscoe Pound espoused the use of the term “interests” to focus attention on constitutional values. Today, constitutional values are a major area of scholarly debate. Interests, however, have been largely excluded from this discussion because of their judicial treatment. Values are crucial in constitutional law, yet courts and commentators have failed to explore the implications of a large body of the values that constitutional law protects. In fact, interests have a strongly “republican” and communitarian cast that, when applied to rights, expand liberties as much as they shape them.

This Article explores the way many reigning theories of constitutional interpretation have systematically excluded important and logi-

8. See infra Parts II-III.B.
cally inescapable matters from constitutional discourse. Part I analyzes the role of values in the recent Supreme Court case *Herrera v. Collins.* Parts II, III, and IV generalize the discussion by analyzing the structure of decision making. More specifically, Part II explores how the analysis of interests leads the implications of interpretive modes to converge, Part III explores the virtually inescapable role of interests, and Part IV explores the bias in the way interests have been used.

However, before we really get started, several caveats are in order. Historically, interests have been used to attack rights and hence threaten much constitutional theorizing. Thus, one important view is that constitutional analysis should focus on developing the meaning of constitutional provisions, not on explaining them away. Those subscribing to this view treat interests as improper detractors from constitutional law. Given the historic misuse of the concept of public interests, there is much to be said for that position. Indeed, despite a difference in analysis, my goals are similar. I am not trying to elevate interests; rather, I am trying to tame them. The United States Supreme Court does not tame interests when it stops writing about them; it merely hides them, making them even more powerful because, as hidden, they are not subject to scrutiny.

Similarly, I do not seek to sustain a separate identity for interests apart from rights; instead, interests which do not defend constitutional rights are illegitimate. I do not argue that interests should be balanced against rights in any specific fashion; instead, I argue that the balancing takes place whether we will it or not, with very important consequences. Although I argue that the deep structure of interests and rights is a common set of values, David Faigman's work certainly makes it clear that it matters how we describe the implementation of those values (*i.e.*, as interests or rights), and how we reconcile the two.

That leads to a final caveat. Interests can be weighed at many different "levels" of analysis and of generality. They tend to be described differently at each level. Some considerations may differ if we are asking about judicial role (which generates arguments about

11. See supra note 6.
whether we should "balance" or try to do something else) or about substantive justice (which generates arguments about specific outcomes). To focus on a single such level of analysis, however, risks obscuring common features and considerations. Analytically, the same considerations may affect the development of a rule, the interpretation of language, or the balance of justice in a single case.

This Article focuses on the common elements. It is an attempt to get beyond method and back to values because values are what the Constitution is about. An important step toward that end is to scrutinize interests under a microscope.

I. Herrera v. Collins

Leonel Herrera was executed while this Article was being drafted. Herrera may have been guilty of two murders, as a majority of the United States Supreme Court apparently believed. But no court held or required that Herrera have a hearing on evidence that had become available years after his trial and conviction. Although the Court left a small window open for reconsideration in a more egregious case, the majority wrote that executing a duly convicted person despite newly discovered evidence of innocence is constitutional so long as the appropriate procedures were used to convict him. These "appropriate procedures" did not make room for a hearing on newly discovered evidence of innocence.

Despite the recent academic debates, Herrera's execution did not depend on the Court's choice of interpretive modes, preferences for rules, or hostility to balancing. Rather, Herrera's fate was sealed by the values that did, and did not, seem important to the justices. Interests play a critical but minimally examined role in such value clashes.

The Court followed a doctrinal path toward what it treated as dispositive rules: "Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." Herrera was not understood by the Court to claim a procedural error. The Court did not

16. Id. at 870.
17. Id. at 873 (O'Connor, J., concurring). Texas barred motions for a new trial on newly discovered evidence made more than 60 days after judgment. Id. at 864.
18. Id. at 869-70.
19. Id. at 860-63.
20. Id. at 860.
interpret the Constitution to include any procedural requirement that a court consider newly discovered evidence of innocence.

But doctrine is hardly a straightjacket, especially for so novel a claim. The dissent easily identified other lines of cases stressing the cruelty of needless punishment and the Due Process Clause requirement of freedom from arbitrary and purposeless restraint.

Five members of the Court joined Chief Justice Rehnquist’s opinion, and Justice White concurred in the result. Of the five in the majority, Justices O’Connor and Kennedy made it clear in a concurrence that the constitutionally required response to a substantial claim of innocence was not settled for them. In dissent, Justices Blackmun, Stevens, and Souter concluded that an appropriate claim would raise constitutional requirements. By contrast, Justices Scalia and Thomas, the remaining members of the majority, denied any possibility of a constitutional requirement to consider evidence discovered after trial:

There is no basis in text, tradition, or even in contemporary practice (if that were enough), for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction.

Despite the conclusiveness of Scalia’s language, his preference for a textual interpretation does not have such clear results. The language of the due process and cruel and unusual punishment provisions could be interpreted as requiring judgment among competing considerations. If that is so, then textual interpretation might have to be applied to “public” interests as well as “private” rights. What in the text of the Constitution makes the finality of a conviction preeminent? If such finality is to be inferred from the efficiency of government, then the nature of efficient government might be inferred from the Preamble: “to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty.”

---

21. Id. at 876-77 (Blackmun, J., dissenting).
23. Id. at 871, 874 (O’Connor, J., concurring).
24. Id. at 876-79 (Blackmun, J., dissenting).
25. Id. at 874-75 (Scalia, J., concurring).
extinguished in order to save the time of a hearing. If the text can be interpreted with the liberality required to infer a strong public interest in finality, that same liberality supports even more strongly a right to a hearing on newly discovered evidence. Similarly, a narrower textualism that leads us toward narrower inferences about Herrera's rights would, by parallel logic, call into question the inferences that led to the value of finality.

Scalia, of course, tries to avoid the indeterminacy of language by confining it to tradition or contemporary practice.27 However, that approach itself is not implied by the language of the Constitution, but by Scalia's concern for constraints on judgment. Yet, similar questions can be raised about those interests or values. If the inference of a strong public interest in finality is proper, why not also an inference about accomplishing substantial justice? Put in that way, the outcome for Herrera would have been far more questionable than Scalia's neat categorization.

Despite its rule-driven language, the majority opinion in fact suggests an intuitive balance, favoring a public interest in finality over federal habeas review, as the foundation of its denial of relief: "Few rulings would be more disruptive of our federal system than to provide for federal habeas review of free-standing claims of actual innocence."28 Referring to the years since Herrera's trial and conviction, the Court added that "the passage of time only diminishes the reliability of criminal adjudications."29 A full discussion of the alternatives would make it clear that a flat rule of finality does not follow from the need for reliability as if by logical necessity.30 But the Court's intuitive balance favoring finality was essential to its conclusion. Without that value, it is unclear why Herrera's claim did not amount to a post-conviction procedural violation of the due process and cruelty provisions of the Constitution. Neither doctrine nor rule-driven categorization suffices to produce a convincing result.

The Herrera decision looks like a rule. But the Court's discussion of finality made sufficiently clear its resort to balancing. Indeed, that would have been almost inescapable. The Court treated Herrera's motion for a hearing to consider newly discovered evidence as a re-

29. Id. at 862. An alternative explanation is a judicial disinterest in the fate of prisoners.
30. Compare the Court's pithy but brusque discussion, id. at 862.
quest to review nonconstitutional error. It wrote as if this were a categorical decision. But what category should Herrera’s claim be placed in, and how, operationally and empirically, should it be handled? Herrera’s motion easily could have been treated as raising an issue of fundamental fairness under the Due Process Clause. The question of what process Herrera was due cannot be clearly separated—mentally, logically, or on the basis of precedent—from the question whether such a hearing, or the right to it, is important to the accuracy of the result. If those questions are inseparable, the categorization is a balancing act in masquerade.

There is no yardstick that allows the Court to evaluate the importance of Herrera’s life, multiply it by the likelihood of preventing a miscarriage of justice, and then compare that with the costs of the hearing in terms of time and money. Quantification of such values as life and justice would be crude at best and would surely omit many important factors. The judgment cannot be a mathematical conclusion; it is necessarily something of an ordering or a feeling. The judgment is not a balance in any sense that can be defined in order to replicate it procedurally and substantively. Surely, other people might reach similar results given similar information. There are cultural patterns that lead people to common conclusions. But there is no computerizable formula. The decision is based on the importance of the decision to constitutional values, but the process is undefined. Thus, it is unclear what is to be gained by describing the process as balancing.

However, something certainly is gained by specifying a process that includes information affecting the judgments people make. If categorization is defined to exclude the likelihoods of judicial error (i.e.,


34. See Ludwig Wittgenstein, Philosophical Investigations §§ 197-99, 201-02, 206-09, 217, 219, 242 (G.E.M. Anscombe trans., 3d ed. 1968); see also Klaus Krippendorff, Content Analysis: An Introduction to Its Methodology 130-31, 133 (1980) (explaining that content analysis requires that the different people employed to categorize must identify categories consistently, a standard known as reliability); Robert Philip Weber, Basic Content Analysis (Sage University Paper Series on Quantitative Applications in the Social Sciences, Series No. 07-049) (2d ed. 1990) (same).

the possibility that the courts in Texas convicted an innocent man) and if balancing is defined to include the possibility of such error, then the choice between them matters. Ultimately what matters is not what we call or label the process of decision, but what is included and whether formulas, however imprecise, are specified for taking account of the competing values (e.g., the burden of proof—analytically a "feel" or a "balance" or a "categorization," but one that orders the values).

Interests mattered a great deal to Herrera. If finality is the ultimate consideration, Herrera had to die—no doubt content in the knowledge that he was serving society by laying down his life. But if finality is a consideration because it serves the broader purposes of government, then the importance of finality must wax and wane with different circumstances. Furthermore, if the purposes of government include justice, welfare, and liberty, then the finality of a death sentence in the face of newly discovered evidence must rank quite low among considerations that serve the broader purposes of government.

Our handling of interests reveals how we define values. If interests are accepted at face value to trump rights, then both categorization and balancing mask a rigged game. For example, if the government interest in finality trumps the right to liberty, then it is irrelevant to explore whether significant costs would be imposed by a less strict rule. If, however, interests are analyzed in terms of the constitutional values they defend, they are more easily subordinated when their relationship to those values is tenuous, and more easily compared in magnitude to opposing values described as rights.

II. The Irrelevance of Interpretation

Modes of interpretation have far less relation to outcomes than the heated arguments about them would suggest. If properly applied, the results of conflicting modes of interpretation should converge. Some of that convergence may be pure happenstance. Some may be the result of common starting points in constitutional provisions. But there are further structural reasons why modes of interpretation, properly carried out, converge. Aspects of the common, implicit, deep evaluative structure will be addressed in Part III. This Part explores the logically convergent results of many conflicting theories.

As I have explained elsewhere, while the pedigree of asserted rights has been carefully screened in accord with reigning theories of

36. See Faigman, supra note 13.
37. See Gottlieb, Compelling Governmental Interests, supra note 1, at 917.
interpretation before they could be applied to controversies before the courts, interests have floated into opinions with little analytical rigor. If courts applied various theories of interpretation to interests in the same manner they do to rights, the results would potentially be very significant. Interests after all have been used to constrict rights, as finality limited, indeed terminated, Leonel Herrera’s rights, or as claims of national security have been used to limit rights to speak. If interests are less expansive, the scope of protected rights may expand. Thus, the preliminary question is whether the different interpretive canons affect the balance between rights and interests differently.

On a philosophical level, there should be a considerable difference among modes of interpretation. The paths of text, history, intent, results, or various versions of entitlement theory appear to diverge sharply. When one chooses an interpretive method and enters the analytical tunnel, she loses sight of the other cars. One would expect that if she arrives at the same destination as the other cars it would be by chance, subject only to the constraints placed by the relation of each path to some singular constitutional starting point.

However, if the same interpretive canon is used for interests and rights, the results should converge. Textualists will (or should) balk at the “unwritten” character of many interests, or definitions of interests, as well as rights. The employment of nontexual interests is clearest when the language implies judgment, and therefore implies the relevance of interests. The textualist should also balk when the need for judgment is real, but implicit and unacknowledged. And the textualist should balk at interpretive canons that apparently exclude the need for judgment, but are themselves based on just such judgments.

Naturalists will (or should) find both interests and rights expansive. This is particularly so to the extent that interests are in defense of rights, as are interests in life, health, safety, etc. Joshua DeShaney and Deborah Kircher asserted as rights what would elsewhere have been treated as interests (i.e., rights to the effective administration of the laws and police protection).

---

38. See, e.g., Barenblatt v. United States, 360 U.S. 109, 125-34 (1959); Fallon, supra note 6.
39. See Fallon, supra note 6, at 360-61.
42. See also Kate Stith, The Government Interest in Criminal Law: Whose Interest Is It, Anyway?, in Public Values in Constitutional Law, supra note 1, at 135.
Any consistent interpretive canon will treat rights and interests in the same way. The result is that the difference in outcomes of different interpretive canons will tend to cancel out as each moves toward a similar equilibrium of rights and interests.43

Further, on a practical level many modes of interpretation blend into one another because the ambiguities in the chains of reasoning tend to be filled culturally or intuitively. Instinctively we read philosophy into history and culture into philosophy. Courts explore diverse notions of "rights" to and "interests" in life, liberty, property, equality, and democracy both explicitly and instinctively. Indeed, the culture that forms the inarticulate basis for many of our judgments cannot be uniquely described at any moment. Like precedent, the culture not only reflects what has been, but its meaning for us is already beginning to react to what will be, further expanding the reservoir of interpretation.

Historical interpretation is so bedeviled with questions of prior context and translation to contemporary problems that it is virtually impossible to interpret historical actors without assuming that they would think like ourselves.44 "Representation-reinforcement" as urged by John Ely,45 and its original "preferred freedoms" model,46 are sufficiently open-textured with respect to crucial definitions that they are unable to exclude contemporary values on the critical question of what categories are permissible.47 Extra-textual interpretations invite large choices at their inception.48 And textualists cannot claim linguistic clarity in the important cases.49 Each major approach

43. See Gottlieb, Compelling Governmental Interests, supra note 1, at 966-69; Gottlieb, Overriding Public Values, supra note 4, at 10-13.
45. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87-103 (1980).
to constitutional decision making necessarily incorporates implicit prejudices under the rubric of a more sharply defined method emphasizing something else. These openings tend to make interpretive modes less important and values more so.

Frederick Schauer is of course correct that some provisions are not open to doubt in some contexts, and do not invite a breadth of ambiguous considerations. But all considerations are implicitly, if not explicitly, resolved—they either do or do not belong. Where and to the extent that the texture is open, values enter. Indeed, whether the texture is open is itself a judgment based in part on values held by the interpreter.

The question then is whether courts should articulate as many of the factors as possible which enter into their decisions or suppress some considerations in favor of intellectual shortcuts. In other words, is there an advantage to accepting at face value implicit and unarticulated (cultural or idiosyncratic) shorthand conclusions, or should the implications be teased out and subjected to analysis? There is, as Kathleen Sullivan has shown, a practical difference in the way that balancing and categorization work out. Since most, or perhaps even all, considerations are at least implicitly present, the difference between balancing and categorization has to do with which values are made explicit and which are left as unarticulated judgments.

To argue that interpretive modes are identical would be a mistake; I am not making that argument. Rather, I am arguing that they tend to converge and resemble each other more to the extent that

---


52. Implicit in that judgment is a theory of constitutional law. See Paul W. Kahn, The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell, 97 YALE L.J. 1, 4-5, 47-59 (1987).

53. See Kathleen Sullivan, Categorization, Balancing, and Government Interests, in PUBLIC VALUES IN CONSTITUTIONAL LAW, supra note 1, at 241; see also SCHAUER, supra note 50, at 77-78, 136-37, 191-96.

54. Using the Herrera case as an example, the difference is whether the Court is going to balance the interest in finality against process rights, or simply say no right exists, and in saying that condense the balance into a value judgment that a right does or does not exist.
implicit factors are teased out. The ultimate differences in outcome among interpretive approaches is not simply the result of different philosophical, cultural, and historical methods, but, to a large extent, the result of reflective and unreflective methods. That conclusion is reinforced by the debate over balancing, discussed in Part III.

III. The Irrelevance of Balancing

There is an extensive literature about whether balancing or categorization is preferable.\textsuperscript{55} There are important distinctions between ad hoc balancing for each individual case and balancing to derive rules.\textsuperscript{56} There are also important common features. Both involve a “weighing” or “judgment” among conflicting values, and most of the arguments apply to both, albeit in varying degree.

The pro and con positions themselves are largely categorical—one is preferable, the other lamentable. The foundations of the argument are philosophical. They deal with the role of judges in a democratic system.

The argument that balancing is not defensible is driven in part by the view that balancing is not possible.\textsuperscript{57} Even if individuals can balance for themselves, the process is so indeterminate that we have no good way to share a definition, or to reach determinate results.\textsuperscript{58} If we cannot define it, we cannot show people how to do it, and thus, we cannot use it. Claiming to balance is merely a cover for indefensible


\textsuperscript{56} See Henkin, supra note 6, at 1046-49.

\textsuperscript{57} Justice Scalia, in the language that titled this Symposium, has described balancing as “more like judging whether a particular line is longer than a particular rock is heavy.” Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

judicial discretion. These have been global arguments. Balancing is good or bad, satisfactory or dangerous.

If balancing is possible and defensible, then decision making can and should include compelling interests, public values, and a host of competing considerations. If balancing is impossible, then there is more reason to banish these competing considerations in favor of formalism via studies of usage and meaning, or to treat interests in a different noncomparative way.

The dispute over categorization and balancing is miscast for three reasons. First, the methods are not often determinative. Second, the methods can often be translated into one another. Third, as explored below, the dispute is miscast because the decision between balancing and not balancing is illusory. The only “real” decisions are when intuitive judgments, whether described as balancing or otherwise, should be allowed to enter the analysis, which assumptions should be articulated, and which should be left inchoate.

It is my purpose to decouple the various inquiries about balancing and interests. To do this, three issues must be considered. First, is it possible to balance? Second, what are the proper occasions for intuitive judgments which we often refer to as balancing? As I hope to show, the answer to the second issue need not depend on the answer to the first; whether we can build or calibrate a scale does not determine whether we should try to “weigh” values. Third, how are compelling interests to be interpreted? The third issue will be considered in Part IV.

A. The Problem of Balancing

This Subpart explores why balancing does not appear possible. It is important to clarify that balancing as used in this Article is not restricted to what the Court calls “balancing,” or even to the conscious articulation of competing values. Rather, balancing is used more


60. See Aleinikoff, supra note 55, at 1002-04; Scalia, Originalism, supra note 2; Scalia, Rule of Law, supra note 2.

61. Sullivan, supra note 1, at 241.

broadly to refer to logically similar reasoning processes, whether conscious or articulate, and at any level of analysis, that take competing values into account by treating some as more important (or as being more at stake) and others as less important (or as being less at stake).

Conversely, this broader understanding of balancing implies that the following argument is not an argument in favor of a particular formula. Rather, the following argument is meant to establish essential elements in processes of judicial choice, regardless of verbal formula.

"Balancing" is a term for a process in an opaque box that is undefined and undefinable, but is supposed to produce a right or best answer. We have tended to reserve the term for that mysterious process for situations when we cannot measure and compare competing considerations. If we had a way of quantifying all the appropriate inputs, and a way of comparing them, and a theory that told us how to do so, we would not call it balancing. Rather, it would be called something like "deriving the most cost-effective solution," or just "solving the problem." Some applications of decision engineering give us a best solution, and the balancing label seems unnecessary for them.

The attack on balancing has been driven by comparison to the standard created by the kinds of decision engineering that produce demonstrably correct answers by intelligible processes. Balancing

---

63. Balancing has long seemed a mystery. See Aleinikoff, supra note 55, at 976. But cf. JOHN S. CARROLL & ERIC J. JOHNSON, DECISION RESEARCH: A FIELD GUIDE (1990). Carroll and Johnson describe the use of a linear regression model "to pull the decision makers up by their own bootstraps":

The basic reason for this phenomenon is that the linear regression model is consistent in representing some of what the decision makers consider important. The model never gets confused, never makes wild guesses, never gets distracted by a novel piece of information, and never gets tired. Apparently, decision makers are inconsistent enough in following their own implicit rules that they do worse than their own models. Id. at 57. These results are based on a comparison of decisions that predict outcomes with rules that predict outcomes.


65. See supra note 57.

66. See Aleinikoff, supra note 55, at 976 ("To a large extent, the balancing takes place inside a black box"); see also Aleinikoff's comparison of balancing to alternative modes of decision making, id. at 1002-04, where he regards balancing as relatively fuzzy. SCHAUER, supra note 50, at 137-39, 149-55, argues that rules reduce decision-maker error, though his argument in favor of rules delves into many other facets of the difference between rules
appears to be a kind of magic or mystery, or worse, a whitewash for some less fair process. Lacking a way to balance, we should not use the metaphor or analyze its parts.

Each element of this quest for a demonstrable means to clearly superior solutions to constitutional conflict dissolves under the stress of complex reality. Putting aside the problems of collective decision making for multimember courts,\textsuperscript{67} in order for individuals to make rational decisions, they need to have the ability to predict the outcomes of decisions, the effect of those outcomes on their goals, and the effect of those outcomes on other competing goals.\textsuperscript{68} These tend to be quite difficult judgments.\textsuperscript{69}

Still more daunting, individually rational decisions require the individual to compare values, preferably by quantification but at least by rank ordering.\textsuperscript{70} But we have no good way of comparing the im-

and standards. \textit{See}, e.g., \textit{id.} at 158-62; \textit{see also supra} note 63. Tushnet, \textit{supra} note 55, at 1503-16, traces the attack on balancing to Hobbesian theory and the resulting question of who guards the guardians. In the case of judicial review the guardians are judges. The effort is to constrain them via limitations on their discretion. But the complexity of consequences and the inability to compare values and specify the level of generality at which issues should be compared without a guiding moral theory makes balancing hard to confine. Up to this point Tushnet's argument is both perceptive and convincing. Tushnet takes his argument about balancing a point further, however, and seems to go astray. He believes that "if we invoke some substantive theory of constitutional law to specify the level [of generality], we are no longer engaged in balancing." \textit{Id.} at 1514. He does not make it clear why balancing is not required within as well as between moral theories. Tushnet points to the choice of moral theory as a breach of neutrality, though, as I am sure he would agree, the very notion of neutrality among moral theories is itself internally inconsistent and no less controversial than the choice of a theory. Tushnet also claims that categorical analysis replaces balancing with "a formal substantive theory." \textit{Id.} at 1514-15. For reasons discussed below, I find it misleading to claim that balancing has been excluded from apparently formal rules.


\textit{See} Saks \& Kidd, \textit{supra} note 64, at 220-21 (discussing "[t]he three fundamental heuristics . . . [which cause people to err in their judgments]: representativeness, availability, and anchoring and adjustment"); \textit{see also} Nisbett \& Ross, \textit{supra} note 68 (discussing the source of error in human calculation); Ducat, \textit{supra} note 14, at 110 (objecting to "ultra-rational, comprehensive calculation[s]" because of the difficulties of judgment). Ducat's objection is not to the ambiguity of judgment but to the difficulty of solving problems at broad and complex levels. Thinking of balancing only in its ad hoc variety he equates it with incrementalism which he finds preferable to deciding among rules—a larger and more difficult decision. Ducat, \textit{supra} note 14, at 121-22.

\textit{See} Irving L. Janis \& Leon Mann, \textit{Decision Making: A Psychological Analysis of Conflict, Choice, and Commitment} 174-75 (1977) (stating that rational decisions require consideration of costs and benefits); James W. Loewen, \textit{Social Science
portance of consequences to different people. Indeed, when we speak of balancing, we are often speaking in a philosophically utilitarian mode.\textsuperscript{71} The fundamental problem with utilitarianism has been the impossibility of true interpersonal comparisons of benefits and harms.\textsuperscript{72}

For most of the issues debated, there is no scale that measures the quality of alternatives or even ranks results. Apples, oranges, Mozart, and Dali are incomparable. Without a common scale, balancing is not intelligible. It cannot be described, and can hardly be improved.

A group of scholars has argued that interests are, and should be, "unfocused" (to borrow Robert Nagel's phrase).\textsuperscript{73} However, vagueness in the weight, if not in the extent of interests, is not only inherent in balancing, but also part of the problem. Is it appropriate to incorporate interests into legal decision making without precision?

Efforts have been made to overcome the difficulty of making interpersonal comparisons of benefits and harms, and thereby provide some form of a social calculus. If a social calculus existed, balancing could occur in a nonmysterious way. Pareto criteria have been used in such an effort, but turn out to be largely insufficient.\textsuperscript{74} While the market reduces interpersonal values to exchange values, it reflects preexisting resource allocations, rather than directly measuring interpersonal values.\textsuperscript{75} Rank ordering is sometimes possible, but requires unanimity to bridge the interpersonal difficulty.\textsuperscript{76} Alternatively, some algorithm like "one person, one vote" might be adopted, but that is inappropriate for many problems because of the vastly dif-
ferring intensities of feeling and degrees to which people are affected.77 Each such algorithm is based on an independent value choice. The underlying personal values resist comparison.

Without a principled way to compare benefits and burdens, or a common yardstick to measure the way they are experienced by different members of society, balancing cannot be precisely described, and it is impossible to check whether it was correctly done (or even to define what might be "correct," for that matter).

These are powerful criticisms. They accurately reveal the distance between balancing and a form of logical thinking. These criticisms of course apply to any intuitive process for resolving a conflict of values. "Balancing" is just a special case, or name, for resolving these conflicts in a way that cannot be seen or defined.

Some distinguish intuition from balancing.78 Even if intuition is different, it is no less mysterious than balancing. Indeed, it is more mysterious. Balancing makes sense despite its difficulties. Choice reflects a comparison of values—"balancing." When faced with a choice, pick the better one. Intuition among competing alternatives, on the other hand, can be understood either as a current choice (balancing), as repetition of a past choice, or as yet another mystery like gut-feeling. The problem with treating intuition as repetition is that the situations are rarely identical. Thus, intuition must be either balancing or a mystery. So, take your pick.

Indeed, these criticisms also apply to other approaches that purport neither to balance nor intuit, but that do not provide a sufficiently precise yardstick to resolve contemporary controversies in part because of their levels of generality.79 David Faigman goes an important step further: He asserts the balancing method is under attack for a failure of substantive constitutional theory.80 If neutral principles could be identified, they would contribute to constitutional analysis in all modes of discourse.

Nevertheless, for all their insight, the global all-or-nothing arguments against balancing that we have been considering will turn out to be irrelevant if everything is balancing, nothing is balancing, or if the useful question about balancing is contextual so that balancing is

78. See Aleinikoff, supra note 55, at 945, 997-98.
79. Cf. id. (arguing that not all decisions "[i]n life and law" can be "characterized as balancing").
80. Faigman, supra note 13, at 648-55.
sometimes good and sometimes not, even in constitutional law. The next Subpart will consider the counterargument that in fact everything is balancing. It explores why balancing is inevitable.

B. The Alternative of Rules

Rules are designed to allocate decision-making authority, as well as to control discretion. With rules, instead of an undefinable opaque box, judges have a set of instructions that can be described reasonably well and can be applied in a sufficiently clear way that one can often check on the correctness of a particular judge's use of them.

Interests could play a role in the application of rules. But their role would appear to be very different. Judges would not “weigh” public interests but claim to “invoke” them. In *Herrera v. Collins* the Court seemed to invoke finality rather than weigh it. Interests invoked in the application of rules are described in a truncated or dichotomous fashion (finality was at issue for the majority in *Herrera*, not somewhat at issue). Nevertheless, interests may function inexplicitly and perhaps without conscious reflection (perhaps the majority did in some sense weigh finality).

Substantive rules simplify decision making by selecting which conditions or criteria will control and excluding others, or by prioritizing and sequencing issues for separate and perhaps definitive evaluation. Rules have the advantage of simplicity; people can handle them.

---

82. 113 S. Ct. 853 (1993).
83. *E.g.*, speaker's location on a street corner is a condition of the neutrality requirement.
84. *E.g.*, malice as a criteria for liability in libel, inequality as a criteria for liability in some interstate commerce cases and in discrimination cases.
85. This is common in remedial situations: *E.g.*, law must be considered before equity, chosen measures must be evaluated before proposed better solutions in discrimination and districting cases.
86. These rule forms should be compared with forms of what Herbert Simon described as “bounded rationality,” particularly “satisficing” and “elimination by aspects”—selecting an alternative because it meets stated criteria, regardless of whether a more complete analysis would show that other alternatives met the criteria better. *See Janis & Mann, supra* note 70, at 25-26, 31. Compare also with what March described as a “garbage can” model of decision making in which solutions look for problems. *See March, supra* note 68, at 5, 13, 294-99. Another form of selection by criteria is decision making by working backward. *See id.* at 270.
87. *See Janis & Mann, supra* note 70, at 22 (discussing suboptimizing); *March, supra* note 68, at 12-14 (discussing sources of complexity); Herbert A. Simon, *Alternative Visions of Rationality*, in *Judgment and Decision Making: An Interdisciplinary Reader,*
Accepting this argument for the moment, there are correlative disadvantages: by simplifying, rules inherently incorporate major losses, primarily of information and proportion.\textsuperscript{88} Consequences of greater and lesser import are either misjudged by a rule-driven process or the process is subverted by a covert balancing.\textsuperscript{89}

The argument for rules is sometimes buttressed by the assumption that rules will be corrected by other invisible processes. For example, people are often assumed to act rationally, or tend toward a statistical approximation of rational behavior, or it is assumed that over the long-term various “invisible hands” push people toward “correct” answers.\textsuperscript{90} Those assumptions sometimes help to model groups of decisions, but without helping to make the decisions themselves. If and to the extent that such a process theory is to work and provide a feedback loop to guide rulemaking, there must be a combination of normative and empirical work to evaluate the feedback and steer accordingly.\textsuperscript{91} I am not very optimistic that such mechanical processes

\textsuperscript{supra} note 64, at 102-05 (on human limitations in dealing with the complexity of decision making).

\textsuperscript{88} March wrote: “He [Herbert Simon] suggested that human beings develop decision procedures that are sensible, given the constraints, even though they might not be sensible if the constraints were removed.” \textit{March, supra} note 68, at 270. And he commented: “The search for intelligence in decision-making is an effort to rationalize apparent anomalies in behavior.” \textit{Id.} at 271.

\textsuperscript{89} \textit{See Schauer, supra} note 50, at 31-37, 207-12.

\textsuperscript{90} \textit{E.g.}, the common law, the market and private ordering, or the business judgment rule.

\textsuperscript{91} For a discussion of the unreliability of process models, see \textit{March, supra} note 68, at 9-12. March and Olsen wrote, “Organizations, and the people in them, learn from their experience. . . . If the information is accurate, the goals clear and unchanging, the inferences correct, the behavior modification appropriate, and the environment stable, the process will result in improvement over time.” James G. March & Johan P. Olsen, \textit{The Uncertainty of the Past: Organizational Learning under Ambiguity}, in \textit{March, supra} note 68, at 356.

As we have come to recognize the limitations on rational calculation, planning, and forecasting as bases for intelligence in many organizations, interest in the potential for organizational learning has increased. That interest, however, tends to underestimate the extent to which adaptive rationality is limited by characteristics of human actors and organizations. The authors “suggest a view of reality forming that emphasizes the impact of interpersonal connections within the organization and the affective connection between the organization and the participant on the development of belief, as well as the interaction between seeing and liking.” \textit{Id.}

Michael D. Cohen et al., \textit{A Garbage Can Model of Organizational Choice}, in \textit{March, supra} note 68, at 294, describe decision processes in an organization that “discovers preferences through action more than it acts on the basis of preferences,” \textit{id.} at 295, which “operates on the basis of simple trial-and-error procedures, the residue of learning from the accidents of past experience, and pragmatic inventions of necessity,” \textit{id.}, in which “[p]articipants vary in the amount of time and effort they devote to different domains,” and in which “the audiences and decision-makers for any particular kind of choice change
will work well. The diversity of normative inputs frustrates resolution of complex sociolegal issues. There are areas where this approach is most effective, but there is no reason to expect such invisible or automatic correctives to work better than explicit balancing.92

The fundamental arguments for rule-based decisions are that they protect the authority of the elected branches of government from overly active courts93 and eliminate judicial discretion.94 Rules do allocate decision-making authority between rule makers, including courts, and rule appliers. Nevertheless, allocation of decision-making authority is not unique to categorical rules. Decision-making authority can be and is allocated in balancing modes through burdens and presumptions.95 Thus, balancing modes do include tools to curb overly active courts.

The second claim for use of rules—to constrain judicial discretion—is based on a misunderstanding or simplification. This is true for two reasons. First, radical discretion is bound into the choice of what rules to announce and maintain. Thus, rules incorporate balancing a step deeper in the analytical regression.96 Second, balancing is ubiquitous within what we describe as rules—indeed, it is hard to capriciously." Id. In this situation they find a "garbage can" model of decision making in which "an organization is a collection of choices looking for problems, issues and feelings looking for decision situations in which they might be aired, solutions looking for issues to which they might be the answer, and decision-makers looking for work." Id. at 296. "[O]ne can view a choice opportunity as a garbage can into which various kinds of problems and solutions are dumped by participants as they are generated." Id.

"It is clear that the garbage can process does not resolve problems well." Id. at 323. They add, however, that "[m]easured against a conventional normative model of rational choice, the garbage can process does appear pathological, but such standards are not really appropriate. The process occurs precisely when the preconditions of more normal rational models are not met." Id. at 323. On their normative judgment about the process, see infra note 146.

92. March, supra note 68, at 8-12.
94. See Scalia, Rule of Law, supra note 2; see also Konigsberg v. State Bar, 366 U.S. 36, 63-64, 67-68, 75 (1961) (Black, J., dissenting); Barenblatt v. United States, 360 U.S. 109, 138-39, 143-44 (1959) (Black, J., dissenting). Black's objections were in part the reverse of Scalia's. Black worried that balancing was too weak a test that allowed the Court to avoid implementing constitutional restrictions. Scalia fears that balancing is too strong a test that allows the Court to impose its own will on the Constitution and the other branches.
95. See Neuborne, supra note 55, at 579-80. A corollary of reduced discretion is greater predictability or "certainty" for laypersons.
96. Categorization masks balancing (i.e., a determination about what is "satisfactory" or "good enough" to "solve the problem"). Balancing is inescapable in the development, reevaluation, and growth of rules and categories as well as in some applications. Moreover, sequential comparisons are inadequate substitutes for less constrained balancing. See Janis & Mann, supra note 70, at 21-41.
avoid. Categorization is often balancing; it requires deciding which category to put things in, and that is often done by noticing the consequences and deciding (often subconsciously) if they are tolerable, better, or worse than certain alternatives. Similarly, motives are discerned as an evaluation of how someone else would balance a particular set of competing pressures.

Formal categories can be manipulated by precise nonintuitive means, like the rules of logic, but human reasoning is rarely that airtight. Conflicting goals can be prioritized but the priorities will probably result from intuitive judgment. If the precise consequences of different rules of priority could be determined through a scientific

One can have rules for the creation of rules. It is not necessary to abandon judicial rulemaking in favor of ad hoc balancing or purely arbitrary pronouncements for all rule creation. But clearly there is a limit.


98. See Stephen E. Gottlieb, Reformulating the Motive/Effects Debate in Constitutional Adjudication, 33 Wayne L. Rev. 97 (1986); Margaret Jane Radin, Government Interests and Takings: Cultural Commitments of Property and the Role of Political Theory, in Public Values in Constitutional Law, supra note 1, at 69.

99. Decisions can also be reached by what psychologically feels like definition of language or direct recognition of similarities. See Simon, supra note 87, at 107-09. But directly matching categories to reality is not always possible. The ambiguities of all methods leave room for an intuitive process which we cannot now precisely define.

Moreover the price of making decisions according to purely formal criteria is exclusion of concern with the consequences of decision making. Those concerns can of course be incorporated in shaping rules, but then that decision was undertaken in a nonformal way, no doubt via balancing of some kind. For a related analysis of analogical reasoning, see Richard Warner, Three Theories of Legal Reasoning, 62 S. Cal. L. Rev. 1523, 1552-55 (1989) (specifying no basis for finding similarity).

The dispute between formalists and anti-formalists appears to be at the root of much of the balancing debate. In his justly praised analysis of balancing, Aleinikoff, supra note 55, at 947, 1005, correctly argues that balancing can be avoided but he appears to concur in rejecting formalism as well. He reconciles these positions by constructing a nonformalist, nonbalancing past. Id. at 949-52, 1001-02. In fact, despite his own anti-balancing rhetoric, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 430 (1819), balancing was very much part of the arsenal of Chief Justice Marshall, see id. at 419, 421, 432 (evaluating policy consequences to reach his conclusion). Other major figures of the early judiciary, including Chief Justice Taney and Justice Story, also used balancing. See, e.g., Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 547-48, 552-53 (1837); id. at 608 (Story, J., dissenting). But see id. at 605. On formalism and balancing, see also Gottlieb, Overriding Public Values, supra note 4, at 12-13.
analysis of data, the consequences would probably still have to be weighed intuitively in order to pick the appropriate rule. Reasoning by analogy does not alter that conclusion—a choice may be more like one alternative than another, but that is likely the result of a process of balancing values or consequences.

This multiple invasion of the intuitive scales of justice into the province of rules (as choice, categorization, and weight) is not accidental. Intuition is built into the very structure of decision making. Max Weber spelled out the limits of social science at the turn of this century, and the limits of philosophy were spelled out in the period of the enlightenment by Hume and others. At some point formal chains of reasoning end. Conclusions about values, about what is good and bad, require intuitive judgments. Any specific judgment about what is good for people logically can be made in a formal way but only on the shoulders of a preceding intuitive judgment. Balancing reflects those intuitive judgments in the context of conflicting goals. It is part of the process of social thought. Our only choice is to decide where in the process of reasoning it should be placed.

In turn, conflicting goals are built into constitutional law. It has not been part of the constitutional discourse either to read the Bill of Rights out of the Constitution or to eliminate judicial review entirely. Rather, those urging judicial restraint have been seeking greater respect for federalism and the separation of powers. But these goals conflict with other constitutional goals in at least some instances. Indeed, both federalism and the separation of powers have deeper purposes—among them “to secure the blessings of liberty to ourselves and our posterity.” Whatever rules one constructs out of those conflicting goals are necessarily the result of some process of judgment,

102. Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 Nw. U. L. Rev. 1212, 1249 (1983). Shiffrin remarked that “balancing is nothing more than a metaphor for the accommodation of values.” *Id.* Aleinikoff took issue with that claim by positing that a variety of other approaches differ from balancing, including analogical reasoning, multi-prong tests, and intuitive answers. Aleinikoff, *supra* note 55, at 945. Those alternative rules of decision may be formal, in which case they support Aleinikoff’s point, but they need not be. My disagreement with Aleinikoff is in part a product of my analysis of the logical structure of what he treats as alternatives to balancing, and in part a broader definition of balancing that incorporates logically similar operations in processes we describe by different names.
103. See, e.g., U.S. Const. amend. XIV.
104. U.S. Const. p1mb.
which is intuitive and may fairly (if only metaphorically) be described as balancing.

Among the other principles that the Court must respect are principles of democracy and human rights. Whatever may be said of John Ely’s elaboration of the democratic principle, Justice Stone was clearly correct in *United States v. Carolene Products* when he pointed out that respect for the legislature required by principles of democracy cannot hold true when the legislature attacks the fundamental processes on which democratic self-government is based. The tragic legacy of twentieth-century totalitarianism has been a renewed conviction that there are some things that no person, nation, or people is entitled to do, among them murder and mayhem. Luckily, these and other principles are already incorporated within our Constitution. In addition to the tragic meaning that the Holocaust has had for the Jews and others, it has spawned a revolution in both liberal and conservative twentieth century thought, as reflected in different ways by people like Ronald Dworkin, H.L.A. Hart, Robert Nozick and John Rawls. Thus, there are conflicting principles for courts to consider and there is no escape from the requirement of balancing at some point in the analysis.

Discretion, for all these reasons, is not unique to balancing or foreign to rules, and it can be shaped and limited in both contexts. The apparently formal alternative conceals or relocates the balancing without eliminating it, and reshapes what seems important in the balancing accomplished. What appear to be nonbalancing approaches are often simply bad balancing—unarticulated and unexamined intuitions about the balance of factors described as something else.

However, none of this analysis suggests that rules may not play an appropriate and productive part in judicial decision making. The constraint of rules is not always counterproductive. It is important

---

105. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977) (developing a “strong” theory of individual rights).
110. Rules or categories that leave no room for feedback and modification should quickly be discarded as perverse. See MARCH, supra note 68, at 8-12 (describing both the
to determine when the constraints help. The important issue, then, is not whether to balance (that much is inescapable), but how and at what stage in the process to balance.

C. Paradox

The arguments over balancing create a paradox. We cannot balance; the skeptics are right. And yet we balance all the time; the skeptics are wrong. Impossible. And interests are the football of that contest.

D. OK, So What’s “Really” Going On?

The objective of this Subpart is to transcend the rules-balancing argument, explore what works under what conditions, and make clear that fundamental values, of which interests are instances, are inherent in all modes of decision making.

We begin by trying to break down the metaphor of balancing.111 If it is not a metaphor, then it must be the case that we can ascribe values and make comparisons. It is important to know the extent to which that is true. There may be a continuum from problems that can be balanced in a describable and logical manner to problems that can be balanced only metaphorically and intuitively. All of the problems of rational decision making define this continuum. Moreover, it is not clear in principle that any problem that cannot now be balanced other than intuitively will always remain resistant to more precise modes of balancing. Thus, one objective is to try to push back the areas where there is no common scale on which to make comparisons. A second is to avoid losing important values in that effort. And a third goal is to define whatever it means to improve decision making where balancing must be intuitive.

If balancing is a metaphor, it is because we cannot ascribe values and make comparisons.112 In other words, we do not balance because we cannot. What we do is something else. But what we call balancing is affected by and includes calculations that are not adequately described as categorization, and are not explicitly taken into account by perversity of such rules and the resistance to changing rules that have been partially “successful”). Fundamentally, there are significant losses of information and misvaluation in "noncomparative" forms. See JANIS & MANN, supra note 70, at 21-41.

111. See Kahn, supra note 52, at 3 ("The concept of 'balancing' is itself both a metaphor and an abstraction.").

112. Weighing is clearly metaphoric for Janis and Mann. JANIS & MANN, supra note 70, at 144-45, 174-75.
such alternate strategies.\footnote{See Robert F. Nagel, Liberals and Balancing, 63 U. Colo. L. Rev. 319, 321 (1992).} That is why the metaphor survives even though efforts to define balancing founder over an undefinable intuitive or judgmental opaque box.

Efforts to escape to categorization founder over the same undefinable opaque box. The arguments against balancing attacked it for its undefinable intuitions and impressionistic judgments.\footnote{See supra text accompanying notes 63-80.} The arguments for rules are based on the clarity of reasoning rules offer.\footnote{See supra text accompanying notes 81-87.} Thus, both the critique of balancing and the preference for rules treat the inability to define the judgment process as unacceptable. But rules are based on and incorporate intuitive judgments, often the very balancing they were meant to replace.\footnote{See supra text accompanying notes 95-110.} Thus, both balancing and rules depend on intuitive judgments we do not know how to explain.

There is a third alternative to the rejections of both rules and balancing because of their intuitive foundations: accept the opaque box and try to improve its output.\footnote{But cf. Simon, supra note 87, at 97. Simon points out that optimizing subjective expected utility (SEU) requires or rather depends on a set of very subjective judgments to make the calculations even possible. \textit{Id.} at 101-02. Simon concludes that it is therefore impossible for decision makers actually to apply the SEU model. “I have already suggested what the principal reason is for this departure. It is that human beings have neither the facts nor the consistent structure of values nor the reasoning power at their disposal that would be required, even in these relatively simple situations, to apply SEU principles.” \textit{Id.} at 102-03. Based on that observation he moves to a behavioral alternative. \textit{Id.} at 103. The bounded rationality which Simon describes requires “some way of focusing attention,” \textit{id.} at 104, “a mechanism capable of generating alternatives.” \textit{id.} at 105, and ways to gather information and draw “inferences from these facts,” \textit{id.} These, of course, do not dispense with balancing in an opaque box. They only circumscribe the complexity of the judgments that are made. Simon locates intuition in a process of recognition of familiar circumstances. \textit{Id.} at 107-09.} I will refer to it as an output-focused approach. That effort would take two directions: (1) a non-normative exploration of what modes are possible, and (2) a normative exploration of what improves the process. To make the process better, perhaps we should accept the inaccuracy of human speech, and

\begin{footnotes}
\item[114.] See supra text accompanying notes 63-80.
\item[115.] See supra text accompanying notes 81-87.
\item[116.] See supra text accompanying notes 95-110.
\item[117.] But cf. Simon, supra note 87, at 97. Simon points out that optimizing subjective expected utility (SEU) requires or rather depends on a set of very subjective judgments to make the calculations even possible. \textit{Id.} at 101-02. Simon concludes that it is therefore impossible for decision makers actually to apply the SEU model. “I have already suggested what the principal reason is for this departure. It is that human beings have neither the facts nor the consistent structure of values nor the reasoning power at their disposal that would be required, even in these relatively simple situations, to apply SEU principles.” \textit{Id.} at 102-03. Based on that observation he moves to a behavioral alternative. \textit{Id.} at 103. The bounded rationality which Simon describes requires “some way of focusing attention,” \textit{id.} at 104, “a mechanism capable of generating alternatives.” \textit{id.} at 105, and ways to gather information and draw “inferences from these facts,” \textit{id.} These, of course, do not dispense with balancing in an opaque box. They only circumscribe the complexity of the judgments that are made. Simon locates intuition in a process of recognition of familiar circumstances. \textit{Id.} at 107-09.
\item[118.] See \textit{WITTGENSTEIN}, supra note 34, § 242, at 88e:
\begin{quote}
If language is to be a means of communication there must be agreement not only in definitions but also (queer as this may sound) in judgments. This seems to abolish logic, but does not do so.—It is one thing to describe methods of measurement, and another to obtain and state results of measurement. But what we call “measuring” is partly determined by a certain constancy in results of measurement.
\end{quote}
\end{footnotes}
simply examine what improves the process, without insisting that judges follow a particular mode of reconciliation. If they fail to do what they say they do, but achieve better results than when they work in a mode in which they can perform exactly as described, it may be preferable to let that be enough, and to assist the process. Still more is this so when we find that an undefinable process of judgment or intuition is an inescapable part of decision making, including both what we call balancing and much of what we call categorizing. In other words, this output-focused approach would jettison insistence that our mental process and our metaphors track each other. Whether they should can only be discovered, not preordained. The mind may not be capable of balancing, and legal issues may not be amenable to precise methods of problem solving. Nevertheless, the question is not whether these problems can be solved in a manner describable with precision, but rather, what is accomplished when judges do what appears to be intuitive, and can that process be improved.

Nor is it sufficient to observe how judges balance. We can be good Human positivist observers and discover the physical and psychological processes or the linguistic or hermeneutic ones, none of which will tell us whether judges doing the balancing should have given a different answer. Instead those researches reflect back to judges only what they do.

We might define the right answer as whatever people do, but that tells a decision maker nothing about what to do; it merely shifts the moral “ought” to an explanation for deference to fallible human judgment. It is an appropriate method for issues properly resolved by democratic procedures. We know, however, that popular beliefs do not reliably predict consequences or future satisfaction, and may not be acceptable with respect to the distributive consequences of decision

119. Carroll & Johnson, supra note 63, at 47-48, 67-68 (describing the success of decision models based solely on inputs and outputs in generating the actual rules of decision, although those models “don’t give us a detailed explanation of how decisions are made . . . [and] miss some important details of how the information is combined”).

120. See March, supra note 68, at 1-17; Janis & Mann, supra note 70, at 21-41.

121. March argues that decision making need not be evaluated on the basis of preexisting preferences, and that many decisions may turn out more defensible therefore. He also argues that preferences may be evaluated rather than assumed. That brings decision making back under scrutiny on the basis of an external standard. In this connection it is also necessary to explore the role of choice in a representative capacity or against external standards of justice and interpretation. Compare March, supra note 68, at 12-15, 253-89 (on choice) with Stephen E. Gottlieb, The Dilemma of Election Campaign Finance Reform, 18 Hofstra L. Rev. 213, 242-53 (1989).
making. Simple acceptance of popular belief is not an appropriate method for courts when their role is to insist that the people and their representatives adhere to constitutional limitations.

Nevertheless, what real people should do is limited by what they can do. Thus, we have to take a look at strategies real people actually use.

Still, it does not follow that the best real people can do is reflected by what they can describe so precisely that a computer or another person could replicate the reasoning and result without benefit of an undefinable process of judgment, or even without being playful. It is possible to evaluate and improve balancing even though it cannot be described precisely. To explore that possibility, this portion of the Article will examine research on decision making in the social sciences and then tie that back to the legal context.

1. The Standard for “Improvement”

Any effort to improve a process requires a standard. Here the social science literature confronts us at the outset with a serious difficulty. It is not entirely clear to what extent the social science exploration of decision making is based on a presumption of the benefits of greater information, and to what extent the studies measure the benefits from the decision maker’s perspective based on whether he or she subsequently regrets or implements the decision. A presumption is patently unhelpful. Regret and implementation are hardly satisfactory because of the normative difficulties they create.

Utilitarian theories based on maximizing pleasure and minimizing pain are most consistent with a standard that evaluates decision making by the resultant personal satisfaction and regret. But utilitarianism is more consistent with aggregation of the satisfaction and regret of all concerned than merely the decision maker’s unique perspective. Utilitarians would also object that subjective post hoc evaluations may be wrong. Kantian theories and other standards that impose external criteria require evaluation by direct measure of outcomes rather than individual satisfaction and regret. Because they have measured

---

123. See MARCH, supra note 68, at 267, 270.
124. See JANIS & MANN, supra note 70, at 21-80; MARCH, supra note 68, at 1-17.
125. See JANIS & MANN, supra note 70, at 147-58, 165, 379; MARCH, supra note 68, at 253-65.
126. See JANIS & MANN, supra note 70, at 10-11, 147-58, 165, 379.
127. Statistical comparison among processes may overcome that objection for short term calculations.
success by different standards, existing studies of decision making do not appear adequate to permit the evaluation of decision making from the perspective of any external observer or affected individual. It is possible that the proper mode of decision making may prove to be a function of whatever seems to be the proper perspective.

In addition, judicial decision making has to be considered in comparison with the decision making of the body being reviewed—legislature, agency, or other official. The scope of factors admissible in both utilitarian and Kantian modes of judgment will depend on somewhat different judgments about the extent to which the legislature or other body being reviewed can be presumed to have considered the proper factors. This too is an issue left without resolution in the empirical studies.

Finally, the standard for decision making cannot achieve "neutrality." Those standards each inherently incorporate different goals, whether they be a form of utilitarianism, a Kantian approach, or something else. And different decision-making techniques will prove better at satisfying one or another of those standards. Thus, data on the performance of different decision-making techniques will inevitably bear the stamp of the particular standard against which it was measured. As noted above, data based on the rather too common standard of the decision makers' subsequent satisfaction and regret fails to satisfy any of the common standards of value.

2. Performance of Decision-Making Modes

While these problems prevent conclusive results from present studies of the success or failure of decision-making techniques, there is still value in considering the studies. One group of scholars has elaborated a model of full consideration of factors in a balancing mode. The balancing mode is most directly reflected in the social science literature as "optimization":

Specialists on organizational decision making describe the optimizing strategy as having the goal of selecting the course of action with the highest payoff. Such a strategy requires estimating the

---

128. See generally Bruce A. Ackerman, Private Property and the Constitution 34-39, 44-56, 71-80, 103-10, 205-09, 234 (1977) (describing the relationship among judicial restraint, theories of justice, and expected behavior of decision makers being reviewed).
129. See Kennedy, supra note 2.
130. See Janis & Mann, supra note 70, at 174-75, 406-09.
comparative value of every viable alternative in terms of expected benefits and costs.\textsuperscript{131}

The balancing mode presents problems of comparability as described above. Its major advantage consists in asking decision makers to weigh considerations against each other, even though that weighing process is subjective, imprecise, and not definable.\textsuperscript{132} It is clearly the preferred method where the decision-making resources are available and the importance of the problems justifies a careful decision-making strategy.\textsuperscript{133}

In \textit{Herrera}, balancing was hardly unmanageable. The Court might have examined the burden of dealing with motions based on newly discovered evidence in those states that did not have the Texas rule preventing such motions. They might have considered the burdens that would have been imposed merely by finding the Texas rule a violation of due process. Hard evidence could easily have been generated, or simpler alternatives considered, or both. Instead, the Court considered burdens without reference to any evidence about the impact of this or any rule on Texas courts.\textsuperscript{134} It dismissed an alternate rule seriatim without examining the roots of due process in efforts to insure accurate decision making.\textsuperscript{135} Certainly, more could have been attempted.

By contrast, consideration of all the consequences can be unmanageable. In the notorious case of the Nazi march in Skokie, Illinois, such consideration could well have spun totally out of control as inter-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{131} \textit{Id.} at 21-22; see also \textit{MARCH, supra} note 68, at 1-2. Ducat, however, assumes that balancing approximates incrementalism because optimization is too difficult. \textit{DUCAT, supra} note 14, at 110, 121-22. See also the discussion of bounded rationality \textit{infra} at notes 137-139 and accompanying text.
\item \textsuperscript{132} See Faigman, \textit{supra} note 13; David L. Faigman, \textit{Reconciling Individual Rights and Government Interests: Madisonian Principles Versus Supreme Court Practice}, 78 VA. L. REV. 1521, 1579-80 (1992); \textit{MARCH, supra} note 68; \textit{JANIS & MANN, supra} note 70. Decision theory has also been developed to permit optimization in the face of uncertainty. \textit{See MARCH, supra} note 68, at 268-69. Another approach to balancing is described in \textit{CARROLL & JOHNSON, supra} note 63, at 47-48.
\item \textsuperscript{133} \textit{See CARROLL & JOHNSON, supra} note 63, at 63-64:

While psychologists have spent much effort attacking expected utility as an overly rational description of actual decision making, decision analysts interpret the attacks on the descriptive adequacy of the theory as a criticism of people for failing to "follow" the theory! Decision analysts take the prescriptive theory and human failings as evidence of a need for decision engineering.

The authors' approach is to improve rather than abandon rational decision making or optimization by mathematical modeling.
\item \textsuperscript{134} \textit{See Herrera v. Collins}, 113 S. Ct. 853, 861 (1993).
\item \textsuperscript{135} \textit{Id.} at 864-66 (although considering other aspects of due process history).
\end{enumerate}
\end{footnotesize}
acting personal feelings, statements, and behavior created a complex web of new realities in Skokie and beyond.\[136\]

The difficulties of balancing or "optimization" have also led scholars to define forms of "bounded rationality" in which various rules of thumb substitute for fully comparative weighing of alternatives.\[137\] This includes accepting either any means or the first means that meet stated criteria, or eliminating means that fail any stated criteria (described as "satisficing" in the literature), even though the selected alternative may turn out to produce much less benefit than those rejected or not considered.\[138\] This weakness develops because meeting or failing to meet criteria does not take account of how much the criteria may be met or missed, and how much the alternatives might exceed or fail the criteria.\[139\]

In Herrera, the Court considered only the potential burden on the courts. That, by itself, was too "disruptive" to be accepted although we have no idea from the case just how much disruption might have resulted and from what kind of relief. The Texas rule solved that problem. Its failure to protect Herrera was simply irrelevant.

Rules of thumb—for example, no new grounds for writs that would disrupt the courts—do not require balancing the entire panoply of possibilities that would have to be considered to define the optimum solution. But they do require balancing among more limited alternatives.\[140\] The disruption exceeded some implicit threshold in the

---


137. Difficulties include time, attention, scarce resources, and search costs. See March, supra note 68, at 3, 12-14.

138. See Janis & Mann, supra note 70, at 21-41; March, supra note 68, at 3-5, 272. Study of bounded rationality was spurred also by the failure of decision makers to reach optimal solutions. Bounded rationality is not optimal. See Simon, supra note 87.

139. As Simon has noted:

[R]ationality of the sort described by the behavioral model doesn't optimize, of course. Nor does it even guarantee that our decisions will be consistent. As a matter of fact, it is very easy to show the choices made by an organism having these characteristics will often depend on the order in which alternatives are presented.

Simon, supra note 87, at 106.

140. As Carroll and Johnson note, "[M]ost information processing—especially for high-level tasks such as decision making—is serial." Carroll & Johnson, supra note 63, at 72. The elimination by aspects model is an example of serial decision making. The authors note, however, that "[L]ower level cognitive tasks, such as identifying an object, are essentially parallel. Future work may both drastically alter the validity of the assumption
minds of the Herrera majority. Following Simon, we might call that more limited mode of balancing "bounded balancing." 141

The success of methods of bounded rationality has been measured against full optimization, in the context of limited information or ability to process it. 142 Social scientists have concluded from their studies that decision-making shortcuts are appropriate for relatively unimportant decisions, and fuller optimization is worth the time for major ones. 143 The research therefore places each technique in appropriate contexts rather than evaluating any technique globally. The success of techniques of bounded rationality defines an area in which such techniques are preferable. Their failures define an area in which fuller optimization is to be preferred. The research raises questions about the conditions in which fuller optimization is possible and when fuller analysis is preferable to misleading rules of thumb. Balancing, or optimization, as understood in the social sciences, is a meaningful process, with measurable benefits in both full and bounded versions. 144

that higher level tasks are serial, and provide new methods and models of parallelism." Id. at 89.

141. See id. at 80, 86-88 (describing balancing in a criteria driven system).

142. See Helmut Jungermann, The Two Camps on Rationality, in JUDGMENT AND DECISION MAKING, supra note 64, at 639 ("The theoretical point of reference is still the SEU model or some variant of it," i.e., planning for the optimization of outcomes by reference to initial preferences).

143. See, e.g., id. at 627, 633. Jungermann notes:
Strategies differ with respect to the cognitive effort required and the probability with which they lead to optimal solution (i.e., SEU maximizing, satisficing, elimination-by-aspects, coin flipping). Strategy selection is seen as contingent upon a (cost-benefit) compromise between the decision maker's desire to make the best decision and his or her negative feelings about investing time and effort in the decision making process.
Id. at 633-34. In other words, time and effort are the crucial variables. But cf. DUCAT, supra note 14 (rejecting optimization globally).

144. March points out that each form of rationality will work better than the others under the appropriate conditions. The options include calculated rationality, learned behavior, conventional behavior, revelation, intuition, imitation, and expertise.
Among all of these, only calculated rationality really uses conscious preferences of a current actor as a major consideration in making decisions. It is easy to show that there exist situations in which any one of these alternative techniques will make better decisions than the independent calculation of rational behavior by ordinary individuals or institutions. The superiority of learned or conventional behavior depends, in general, on the amount of experience it summarizes and the similarity between the world in which the experience was accumulated and the current world. The superiority of imitation depends, in general, on the relative competence of actor and expert and the extent to which intelligent action is reproducible but not comprehensible. At the same time, each form of intelligence exposes an actor to the risks of corruption. Imitation risks a false confidence in
Full optimization or balancing, when possible, fits comfortably within jurisprudential systems that compare conditions. Plainly that includes utilitarianism. Rights-based approaches and many interpretive approaches, however, also imply hierarchies of value. The choice of a truncated system of decision making instead of a fully comparative one can sacrifice those values as easily as an openly judgmental approach.

Different systems of values may require that we consider different factors, but they do not tell us whether noncomparative systems are better than judgmental ones. We are, as Arthur Leff once told us, all we have. We simply have no way of knowing a priori whether in fact one inadequate system of decision making will produce a better result than another inadequate system of decision making. We can only judge the results. The research that suggests satisfaction with fully comparative judgmental systems for important decisions does not necessarily imply that such systems will prove equally effective on the basis of criteria other than satisfaction with the decisions. But it certainly invites a look at the results. The fundamental question is the significance, under whatever criteria we prefer, of whatever may be left out or included.

If balancing cannot be categorically banished from the temple of justice, it is valuable to take a look at the major means of improve-

\section*{Notes and References}

the neutrality of the process of diffusion; calculated rationality risks a false confidence in the neutrality of rational argument; and so on.


145. See Coffin, supra note 55, at 28.

146. Empirical studies of organizational behavior have suggested that optimization is undermined by symbolic goals and by ambiguity about values that may be shaped by experience in partially Hegelian fashion. See MARCH, supra note 68, at 12-14, 269, 277. March also suggests that descriptive "theories of choice might subordinate the idea of rationality altogether to less intentional conceptions of the causal determinants of action" because many observations of behavior are not consistent with efforts to achieve pre-defined goals. Id. at 271; see also id. at 288. Although March believes that decision theorists have been too quick to impose means-end rationality on such decision makers, it is not clear whether his observations are appropriately applicable to judging. It is not clear, for example, that judges should have the freedom that private managers may have to decide that symbols are more important than implementation, or otherwise adopt nonrational or nonintentional conceptions of decision making. In law, this reflects in part the formalist-functionalist debate. After summarizing the social science debate, Jungermann commented, "The emphasis in [the criticisms of the rationality model] is less on demonstrating efficiency of human behavior than on studying more carefully under what conditions people show which kind of behavior." Jungermann, supra note 142, at 637.

The base of information made available to the decision maker can be clarified, simplified, or expanded. Although other approaches to decision making can be made to accept an expansion of information, more open-ended forms of balancing invite those improvements. Additional information is not always a blessing. Information without some guide to handling it can result in simple overload, and lead to a complete breakdown of rational decision making. Thus, it is not possible to claim that fully informed balancing is always better or worse than alternatives. The crucial issue is a question of technique: Do we have appropriate data and sufficient means to handle it? The answer is driven by experience as well as by our jurisprudential criteria. Forms of balancing prove satisfactory or unsatisfactory area by area. We perceive either that the area is an unforgiving morass or that we are competent to deal with it.

This conclusion, that balancing is more or less appropriate on the basis of apparent ability to handle the problems, is implicit in the fact that the studies of decision making ground their results on the perceived satisfaction with the decisions made and the implementation of those decisions. Good decisions are those the subjects of the studies discover they like. As noted above with appropriate caveats, subjective evaluation of decision making fits more comfortably with utilitarianism than with other philosophical principles, but it may prove implicit in very different approaches.

Another approach to improving the information base would be to improve the relationship of either inputs or results to real-world data. To say that values are present in a choice, more than merely symbolically, implies that there is a link to such data. The value of a decision is not clear without a reality check.

Beyond the information base, it may be possible to attack the measurement problem, or means of comparison. There are ways apples and oranges can be compared. We could examine their nutrients, for example, or their prices. The latter of course, partly reflects back

---

148. See Janis & Mann, supra note 70, at 11, 171-200.
149. Id. at 17, 205, 425-26.
150. See supra Subpart D.1.
151. See Sanford Levinson, Identifying the Compelling State Interest: On “Due Process of Lawmaking” and the Professional Responsibility of the Public Lawyer, 45 Hastings L.J. 1035, 1050-59 (1994) (arguing that the Attorney General has an obligation to improve the relationship of either inputs or results to real world data); see also Carroll & Johnson, supra note 63, at 57-61, 63-66; Saks & Kidd, supra note 64, at 221-30, 232-42.
to us our own fallible judgments. The former may rest on a humanistic ethos we might want to defend though surely it also leaves out issues of taste, color, and comfort. Judgment is ubiquitous and still undefinable. Only parts of the paradox can be pushed aside in this way. Still, in some domain for some range of issues, comparability is possible, and it should similarly be possible to harmonize and translate values described in the language of rights and the language of public interests.\footnote{152}

With respect to the rule of decision itself, constraints may be imposed in order to avoid predictable errors, much like the rules of evidence have been designed to keep from the jury information it seemed likely to misjudge. Burdens of proof and presumptions or rules reflect judicial shortcuts to protect against particular types of error. Social scientists have equivalent devices available in both truncated and optimization modes. For example, statistical degrees of confidence are manipulated to prevent errors of omission or commission.

For social scientists, modes of decision making will be chosen on the basis of the time and resources available to resolve the issues, and the costs associated with the method. Thus, shortcuts may be appropriate for less important decisions, optimization for more important ones.

Although we might specify when it would be better if people optimized fully rather than adopt some shortcut and vice versa, that decision will itself be based on an intuitive judgment in most instances because the cost of conducting a full examination of which decision process to use can be large. Nevertheless, some combination of fully informed and more expedited forms of decision making will almost certainly prove appropriate so that decisions are occasionally but not constantly reviewed.

3. The Role of Judgment, Balancing, and Undefined Decision-Making Processes

The analysis above leads to several conclusions:

\footnote{152. Researchers and decision makers have also sometimes found it helpful to clarify the implications of preferences by careful examination and organization in a “decision tree” or “value tree.” See Ward Edwards & J. Robert Newman, Multiattribute Evaluation, in Judgment and Decision Making, supra note 64, at 13, 18, 37. This is not the appropriate place for a critical analysis of the appropriateness of using mathematical tools to implement human preferences. In their General Introduction, the authors of Judgment and Decision Making suggest a mathematical method which, whatever its other virtues and problems, destroys many relevant comparisons by dividing by zero. Id. at 1-10.}
First, the opaque box has a role. An interpretive system without an opaque box is imaginary. That is reflected in the fact that current studies of decision making allocate a substantial role for the opaque box.

Second, the debate over balancing needs to be recast more contextually. We can push the limits of competence back. Studies of decision making do not support the claim for a single best technique. There are techniques for minimal effort and there are techniques for careful planning. The differences between rules and balances are matters of degree.

Third, the critique of balancing as optimization is in the failure to process information properly. The critique of rules as decision shortcuts is identical. The difference is not in the general accuracy or reliability or precision of the method, but in the information omitted and the occasions appropriate.

Fourth, interests have a role. There is no general rule that decisions improve as considerations are swept under the rug. Instead, the search is for ways to account for a richer tapestry of factors. Whether articulated or unarticulated, whether optimized or satisficed, whether used in the making of rules or in the application of principles, public interests are part of the judicial decision-making process. No doubt that is the way it should be.153

Fifth, the legitimacy of interests does not depend on a precise articulation of how they function in the balance. However the decision-making process is constructed or described, the value of interests will almost certainly be intuited. Precision is unavailable. Whether they "weigh" more or less than the constitutional rights to which they are opposed will be equally intuitive. But like the black box, they have a role to play. That role is rarely avoidable. As the black box functions despite the imprecision, interests have an impact on judgment despite intuitive evaluation. That they should have a role is the subject of Part IV.

IV. Translation of Values

This Article has been about missing links. The arguments about balancing and rules have been arguments about what should be considered. As it turns out, interests occupy an inescapable logical place in both systems. They have, however, been submerged by misconceptions about the reasoning process and by neglect. Once they are stud-

153. See Stith, supra note 42.
ied, a new set of inconsistencies becomes apparent. This Part is designed to demonstrate the important relationship of rights and interests as procedural terms for common values and the significance of that relationship.154

A. Disarray

Interests appear clearly communitarian.155 But on a philosophical level, the barrier between the individual and the society is incoherent within the Court's positivist jurisprudence. The state defines individual meaning, consent and coercion, intention and motive—all critical facets of what we take to be the individual side of that dichotomy.156 In a positivist framework, with its skepticism about moral claims, concepts, including public and private and individual and community, just are. There is no underlying reality or requirement. As a result the state suffuses and therefore confuses the distinction between public and private. The individual-state dichotomy is the central concept of the positivist notion of rights and interests but positivism cannot explain it.

Given the failure of the public-private distinction generally, it is not at all clear why we expect it to hold for interests and rights.157 In

---

154. In part, this is an effort to recover the realists' understanding of the relationships. See Pound, Judicial Decision, supra note 9; Mendelson, supra note 109.


I speak of the "government's side" only because it is the terminology used by the Court. In my view, this terminology itself is seriously misleading. The government is charged with protecting the privacy and security of the citizen, just as it is charged with apprehending those who violate the criminal law. Consequently, the government has no legitimate interest in conducting a search that unduly intrudes on the privacy and security of the citizen. The balance is not between the rights of the government and the rights of the citizen, but between opposing conceptions of the constitutionally legitimate means of carrying out the government's varied responsibilities.
fact the distinction has been under attack from both sides. Interests if valid at all serve public welfare and the public of course is composed of people, individuals. Rights similarly serve public goals. We all have an “interest” in a fair and accurate criminal justice system—not just the accused. We all have an “interest” in free expression, not just those censored.

The disarray of state action doctrine reflects this problem. The Supreme Court has tried and failed to make consistent use of standards for identification of state action that turn on whether the judiciary had to intervene, whether the government was involved in the enterprise, or encouraged the behavior, and whether the type of action was a traditional government function. It has exempted stat-

See also Aleinikoff, supra note 55, at 981; Coffin, supra note 55, at 28.

158. Compare T.L.O., 469 U.S. 363 n.5 (Brennan, J., concurring in part and dissenting in part) (arguing that the state has an interest in the protection of private rights) with Michael H. v. Gerald D., 491 U.S. 110, 145 (1989) (Brennan, J., dissenting) (complaining that the state interest had been used to define private rights).

159. Gottlieb, Overriding Public Values, supra note 4, at 7.

160. Stith, supra note 42.

161. See Akhil Reed Amar, The Bill of Rights as a Constitution, 100 YALE LJ. 1131, 1147 (1991); see also Pound, Survey, supra note 9, at 17.

162. Compare Shelley v. Kraemer, 334 U.S. 1 (1948) (holding that judicial enforcement by state courts of covenants restricting occupancy of real property to whites violates Equal Protection Clause of the 14th Amendment) with Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (holding that state liquor licensing was insufficient state action to implicate Equal Protection Clause of the 14th Amendment).

163. Compare Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (holding that state-created agency leasing property to restaurant owner binds restaurant owner with Equal Protection Clause of the 14th Amendment in case in which restaurant denied service to black man) with Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (holding that privately owned utility company's termination of service to household without hearing did not constitute state action even though state regulated the utility and approved the general tariff).

164. Compare Reitman v. Mulkey, 387 U.S. 369 (1967) (invalidating California constitutional provision that allowed owner of real property absolute discretion to deny rental or sale of property because it embodied a right to discriminate racially in state's basic charter) with Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) (upholding sale of private property to satisfy lien pursuant to state UCC provision because that sale was private action). Flagg has been severely limited by Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) (holding that peremptory challenges in federal district court that were illegally race-based had their source in state action) and Lugar v. Edmundson Oil, 457 U.S. 922 (1982) (holding that complainant states a cause of action when state authorized private creditors prejudgment attachment is procedurally defective).

165. Cf. Hudgens v. NLRB, 424 U.S. 507 (1976) (upholding right of privately owned shopping center agent to deny striking union members access to picket the center); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) (denying draft and war protesters the right to handbill in shopping center because the shopping center was not so open to public use to permit handbilling unrelated to the center's operations); Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968) (holding that state cannot forbid
utory or executive behavior or both when decisions seemed private and has made the state responsible for individual behavior that seemed public. No line divides the public and private spheres.

In other words, the entire balancing act has been organized around a false division that was weighted not only against "individual rights" but also against social needs. Interests have been cut off from the underlying values and turned into a menace by the truncated reading they have been given. And rights have been cut off from their purposes as well, thus seeming smaller and more selfish in the process.

In "legal" terms, the translation of rights and interests into a common language removes the barrier between them and entails the nourishment of rights by interests. Once the common individual and social roles of rights and interests are perceived, both are reshaped: Interests must account for individuals, and rights must account for society. That strengthens the humanitarian cast of both. The path is opened toward the common goal of a more decent place for all—that goal surely includes rights.

The ultimate purpose of exploring public interests is to use what have been deployed as antihumanistic weapons against themselves. That object is explored in the remainder of this Article.

B. So What?

Does the deconstruction of the public-private distinction and the cross-referencing of rights and interests matter? Of course it does. First, it uncovers the purpose of doctrine, which inevitably expands its

union from picketing public area fronting shopping center because of First Amendment infringement); Marsh v. Alabama, 326 U.S. 501 (1946) (treating actions of company owned town as government action).


169. Kahn has noted, "The denial of a distinction between rights and interests is an essential point in the realist tradition." Kahn, supra note 52, at 7 n.27.

170. See Gottlieb, Overriding Public Values, supra note 4, at 8-19, 136.
Instead of narrow claims to an interest in chasing criminals, we confront a broader basis in the protection of life, liberty, and property. Instead of a claim that such an interest can only be asserted by the state, we confront a redefinition that narrows interests in accord with those purposes. Rights are part of the world that interests protect. There is no interest in riding roughshod over civil justice.

Interests help to clarify and simplify other constitutional categories by allowing us to disaggregate them and deal directly with the values at stake rather than with derivative concepts that mask the issues. For example, unconstitutional conditions have been a problem because the Court has tied it to the categories of consent and coercion that do not make sense. We end up defining consent and coercion by what burdens people should have to endure. We could more simply and more appropriately define conditions as unconstitutional when they are unjustified—thus getting to the significant constitutional issues rather than being taken on the consensual tangent.

Similarly, state action has been a problem because the categories of public and private do not make sense—indeed, they are hard to distinguish. We have not found a simple way of defining either, and can hardly expect to because of the many conflicting circumstances that make private actions public and public actions private. We could simplify and structure this field, by defining state action as government behavior that is not required by a state obligation to allow individual liberty, or that is not authorized by an important public interest in allowing individual liberty. In other words, when the state acts to protect the liberties of individuals, those individuals are responsible for whatever harms they may cause and the state is not responsible for those harms. But if the individual cannot claim a liberty that the state was bound or permitted to respect, the state is responsible for its part in making the harm possible. Plainly the holding of Shelley v. Kraemer was that the state was neither required nor permitted to grant private landowners the power to exclude a race from property owner-


172. See Sullivan, supra note 97; Westen, supra note 156, at 569-93.

173. See Westen, supra note 156.

174. The issue of justification requires that one identify a controlling moral theory. As I have argued above, that task is unavoidable, but it is beyond the scope of this Article.

175. See Sullivan, supra note 97.

176. See supra notes 162-168.

177. 334 U.S. 1 (1948).
ship. It was a substantive holding, not a holding about whether the state or the signers of the restrictive covenant caused the harm.

State interests are the wedge that could allow us to glimpse and deal with the substantive issues that are rumbling beneath these unruly concepts. The state action concept is clarified by interests because the question becomes whether the values—expressed as they have been as interests and rights—require or forbid particular official behavior. Interests deconstruct the sterile concept of state action into the question of state obligation—the whole point of constitutional injunctions in the first place.

Instead of claims of right isolated from public purposes, the claims of right gain strength from those public purposes. As they share common purposes, the deposit of interests strengthens the foundations of rights—education, shelter, and life itself.

In other words, the communitarian power of interests coupled with the failure of the public-private distinction means that what has been established on the government side of the ledger as interests, should be available on the individual side of the ledger as rights, to protect people from public overreaching.

That puts the Court in a different light. When the Court’s decisions on education, equality, privacy, shelter, and life are viewed in this broader context, the partisanship of its vision is exposed. The interpretive issues that have dominated discussion for so long cannot explain the disparity in treatment of rights and interests. Interests are equally nontextual. But on opposite sides of that linguistic divide of rights and interests, the Burger-Rehnquist Court has treated equivalent values as dominant on one side and subordinate on the other. Thus, it is the Burger-Rehnquist Court that picks and chooses its beneficiaries nontextually and ideologically. We are left not with the value of public education but its value for some, not the right to life but the right to life only for the unborn, etc.

Consider Herrera again. Although Chief Justice Rehnquist offered a distinction between Herrera and other habeas cases in which the conservative block wrote about an actual innocence exception, concern about innocence has resonated in other decisions as well. Consider, for example, Justice Scalia’s language in County of Riverside v. McLaughlin:

---

178. See also Gottlieb, Overriding Public Values, supra note 4, at 8-9, 19.

One hears the complaint, nowadays, that the Fourth Amendment has become constitutional law for the guilty; that it benefits the career criminal (through the exclusionary rule) often and directly, but the ordinary citizen remotely if at all. . . . The common-law rule of prompt hearing had as its primary beneficiaries the innocent—not those whose fully justified convictions must be overturned to scold the police . . . . Hereafter a law-abiding citizen wrongfully arrested may be compelled to await the grace of a Dickensian bureaucratic machine, as it churns its cycle for up to two days—never once given the opportunity to show a judge that there is absolutely no reason to hold him, that a mistake has been made. In my view, this is the image of a system of justice that has lost its ancient sense of priority, a system that few Americans would recognize as our own.\footnote{180. \textit{Id.} at 71 (Scalia, J., dissenting).}

Taken together, the decisions exhibiting a concern for innocence suggested that the conservative block had little use for purely procedural requirements on behalf of patently guilty petitioners. Instead they suggested that the real issue that concerned them was substantive justice, both as a right, at least for Scalia in \textit{McLaughlin}, and as an interest in the cases restricting the writ of habeas corpus. Those concerns of course should have carried over to \textit{Herrera}. Instead the Court now says that rules, not justice, dominate. The inconsistency tells us that the block means neither. The only basis on which their opinions can be reconciled is a version of the adversary system played by the rules of Russian roulette—a game with losers.

\section*{Conclusion}

Interests are permanent features of the constitutional landscape. But by treating them as illegitimate, we have turned them into outlaws, pillaging and rampaging through constitutional civilization. Their misbehavior is unnecessary. The inconsistent treatment of interests and rights is not appropriate under any commonly used interpretive canons. The reflection of public values only in derogation of personal liberty is uncalled for by the Constitution. And the Court should be called to account for partiality that has no support in the text, history, or fundamental principles of constitutional law.