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From Interests-Based Balancing to Rights-Based Balancing: Two Models of Balancing in the Early Days of American Constitutional Balancing

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ARTICLE:

FROM INTERESTS-BASED BALANCING TO RIGHTS-BASED BALANCING: TWO MODELS OF BALANCING IN THE EARLY DAYS OF AMERICAN CONSTITUTIONAL BALANCING

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ABSTRACT

Balancing tests are ubiquitous in current constitutional law. This Article reviews the development of constitutional balancing over the first five decades of the 20th century and identifies the formation of two types of balancing during these years: interests-based and rights-based balancing. Since these two types of balancing are still present within current constitutional law, this review may also help to better understand balancing today.

The Article attempts to show how the early development of balancing in the early 20th century by legal Progressives such as Holmes, Pound and Cardozo, was related to their criticism on the jurisprudence of rights, and their emphasis on a jurisprudence of interests. Balancing meant for the Progressives that rights were lowered to the status of interests, and that the Court had to balance them with other interests, rather than use them as trumps against public policy considerations. Later, however, balancing was used hand in hand with a heightened rhetoric of rights. The Article attempts to place the change from interests-based to rights-based balancing in historical context (in the change from the Lochner era to the post Lochner era) and explain its meaning—mainly its correlation with judicial activism (rights-based) and judicial deference (interests-based) and its interrelation with the ideas of judicial formalism and anti-formalism. Finally the Article suggests that the original interests-based model may have been more adapt to the anti-formalist movement from which it sprang, and to the metaphor of balancing itself, than the later rights-based model.
FROM INTEREST-BASED BALANCING TO RIGHTS-BASED BALANCING: TWO MODELS OF BALANCING IN THE EARLY DAYS OF AMERICAN CONSTITUTIONAL BALANCING

But it was only the ambiguity of the term “right”… that made it possible to think of the decision in question in such a way… The “rights” of which Mr. Justice McKenna spoke… were individual wants, individual claims, individual interests.

— Roscoe Pound

The problem of “rights” is, after all, just the reverse side of the problem of power. And the meaning of the doctrine that there are no rights, but only “interests,” is that power has no limits.

— Laurent Frantz

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INTRODUCTION

Balancing tests are ubiquitous in constitutional law, whether in dormant commerce clause cases, First Amendment cases or Fourteenth Amendment cases. Slightly declining in use in the early 1990s, balancing tests are still extremely prevalent in current Supreme Court adjudication, almost as they were in the mid 1980s. Furthermore, balancing seems to be on the rise in constitutional courts worldwide.

Despite its prevalence, constitutional balancing is periodically the subject of hot debates, both inside and outside the Court, the most recent of which is set in the post-Sept. 11 era. In such debates, historical arguments are made to support

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1 Balancing tests dominate other areas of constitutional law as well, such as: Fourth Amendment; procedural due process analysis; contract clause; the privileges and immunities clause; the Fifth Amendment's protections against self-incrimination and double jeopardy; the Sixth Amendment's guarantees of a jury trial and a public trial; the Eighth Amendment's prohibition against cruel and unusual punishment; and separation of powers. For an extensive review of the ubiquity of balancing in all areas of constitutional law through the late 1980s see Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 YALE L.J. 943, 963-972 (1987).

2 According to a rudimentary survey which I conducted, see infra note 193, it appears that the use of balancing in Supreme Court adjudication declined in the early 1990s in comparison to the mid 1980s (in the years 1984-1986, 45% of all Supreme Court cases included balancing, while only 30% of all cases included balancing in the years 1993-1995) but has grown back in use in the late 1990s and early 2000s (36% of all cases included balancing in the years 2000-2002). Note however, that the commonness of balancing remains very high throughout these years (more than 30% of all Supreme Court cases even at the low point).

3 For an extensive survey of the increased use of balancing and proportionality tests in constitutional courts worldwide see DAVID M. BEATTY, THE ULTIMATE RULE OF LAW (2004). Beatty argues that “the judiciary [around the world] has constructed a working model of judicial review that relies, almost entirely on the concept of proportionality.” Id. at 159. See also infra note 204.


5 See e.g., recently, Ronald Dworkin, “It is Absurd to Calculate Human Rights According to a Cost-Benefit Analysis”, Comment on THE GUARDIAN, May 24, 2006 (arguing that “Politicians are pandering to an irresponsible media when they invoke the balance between liberty and security.”) For other examples of the current discourse on balancing in the post Sept 11. era, see, e.g., Robert
different views on balancing. This Article aims to contribute to the discussion on balancing by reexamining the historical record of early constitutional balancing. It traces central aspects of the history of constitutional balancing from its beginning in the late 19th century and early 20th century over three periods of time: in the writings and judicial opinions of the early Progressives (Holmes, Pound, Cardozo, and others) up until the late 1930s concentrating on their 14th Amendment substantive due process interpretation, in the Jehovah’s Witnesses First Amendment cases of the late 1930s and 1940s, and in the McCarthy era First Amendment cases of the 1950s and early 1960s. The selection of these sources is partly arbitrary, since balancing appears during these periods in other areas of constitutional law as well (especially, but not only, in commerce clause cases). The selection however is not wholly arbitrary, since the emergence of constitutional balancing is highlighted in these different periods by these cases or essays.

Tracing balancing over these three periods of time, this Article suggests that balancing went through two important changes correlating with two types or conceptions of balancing and interrelating with the ideas of formalism and anti-formalism.

The first change was a change from interests-based to rights-based balancing. The constitutional balancing of the early Progressives (up until the late 1930s) was interest-based, since it was part of the Progressive assault on the rights-based jurisprudence of the Lochner Court. The Lochner Court couched its economically conservative decisions in a strong rhetoric of individual rights, stressing the Court’s role in protecting rights from public interests. The Progressive assault on the Lochner Court used balancing to dismantle the preference of rights over interests by exposing rights as based on social interests, and portraying the entire legal sphere as a social mechanism of overlapping interests that had to be balanced one against the other. The Progressives, therefore, correlated balancing with an interest-based jurisprudence, and with an attack on rights. Starting in the late 1930s this aspect of balancing began to change. Balancing began to be used not as part of an assault against rights-based jurisprudence, but, on the contrary, as part of an extended protection of rights, which were now given extra weight within the constitutional balance.


8 See e.g. Mendelson, id. at 821 (arguing that the judiciary has always used balancing, either implicitly or explicitly, in First Amendment jurisprudence); but see Aleinikoff supra note 3 at 949 (arguing that balancing entered constitutional law only during the late 1930s). The recent debate over post Sept 11 balancing produced several new historical accounts of balancing in previous times of emergency. See David Cole, Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis, 101 Mich. L. Rev. 2565, 2590-92 (2003); Oren Gross, Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?, 112 YALE L.J. 1011, 1035-42 (2003); Christina E. Wells, Questioning Deference, 69 Mo. L. Rev. 903, 909-21 (2004) (recounting judicial responses to perceived threats in times of crisis, including the use of judicial balancing during such times).
The second change was a change from deferential balancing to activist balancing. This aspect of balancing followed (although not necessarily) form the first aspect. Since, according to the early Progressives, rights were only formalistic covers for judicial preferences among competing interests (mainly capital vs. labor), it followed that balancing should be placed back with the legislature, and the Court should show self-restraint. However, once the rights rhetoric entered into Progressive thought, during the post *Lochner* period, and rights were given new preference over public interests, it followed that is was for the Court to protect rights (albeit in a balancing rather than a formalistic manner) by making sure that the legislature gave rights their proper weight in the balance.

The result of these changes was the formation of two types of balancing, which I call *early balancing*, and *modern balancing*, according to their evolution in time, and also *interests-based* balancing and *rights-based* balancing, according to what I consider to be the main difference between them. Both types seem to be still present within current constitutional law, and the historical review may help distinguish between them and understand them.

In particular several important conclusions might be drawn out of this historical review. First, that the anti-formalist aspect of balancing is not sufficient to fully understand the balancing phenomenon. While the early balancers did associate balancing primarily with anti-formalism, one must also consider their attitude towards rights and towards judicial activism, and the same might apply to balancers today. The second conclusion is that there might be a distinction between balancing in private law and in constitutional law, since considerations of rights and of activism vary between the two spheres, so that anti-formalism in private law might produce different results than anti-formalism in the constitutional law. Finally the review suggests that different justifications may apply to the different types of balancing. The two types of balancing—interests-based and rights-based—must be evaluated separately. Such evaluation might turn out to be a contest on the question of which type of balancing is the “true” balancing, and which type of balancing is more in coherence with the anti-formalist movement? I suggest a beginning of an answer at the concluding Part.

In addition to the distinction between the two types of balancing this Article also suggests a historical explanation for the change from the one type to the other. The Article aims to place these changes in the context of the major constitutional shift that occurred in the late 1930s. The earlier developments of balancing are explained against the background of the attack on the *Lochner* Court, while the later developments are explained against the background of the post *Lochner* Court, and the new emphasis on the protection of civil and political rights, first appearing in the famous *Carolene Products* footnote. A third period—the McCarthy era—is also reviewed, and it exemplifies the culmination of the tension between pre- and post-*Lochner* Progressive balancing.

The Article has four Parts. Part I of the Article provides some preliminary distinctions and clarifications regarding the concept of balancing. Part II documents early Progressive balancing. It provides the general anti-formalist

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9 *See infra* note 124.
context of Progressive balancing; it shows the anti-formalist assault in the constitutional sphere, and then moves on to identify the two special traits of Progressive balancing in constitutional law: the interests-based aspect and the anti-activist aspect. This part also shows the difference between Progressive balancing in constitutional law and in private, and finally provides some exceptions to the interest-based and anti-activist model during this period.

Part III reviews the shift from early to modern balancing in the Jehovah’s Witnesses cases, showing the pro-rights and activist aspects of balancing in these cases, and Part IV reviews the Black-Frankfurter debate during the McCarthy-era, concentrating on the famous Dennis case. Finally, Part V provides a short review of balancing in later years, and gives tentative evaluations of the two types of balancing, drawing on an analytical framework for balancing that I developed elsewhere. This Part suggests that the earlier uses of balancing were more appropriate and helpful than the later ones.

I. PRELIMINARY DISTINCTIONS AND CLARIFICATIONS

A preliminary definition of balancing is necessary in order to review the history of constitutional balancing. That is to say, we need an initial test for what would count as a balancing-type argument, either in a legal opinion, or legal essay, and what would not. I will propose the following rather rudimentary definition: Balancing in law is an attitude that identifies the legal problem in a case as one of assessing the comparative strength, or weight, of two or more conflicting considerations, none of which is conclusive at the outset. This however requires further elucidation. The following clarifications and distinctions raise some of the issues involved in the definition of balancing, and reveal some of the choices and preferences of this Article. They also serve as an introduction to some aspects of balancing which would be highlighted in the article.

I begin by a clarification on semantics. In current constitutional law the identification of a balancing opinion might be an easier task than in earlier periods, simply since the term ‘balancing’ is used explicitly. But in some of the earlier periods reviewed in this article, the actual use of the word ‘balancing’ is


\[\text{11 Compare Joseph Raz, Practical Reasons and Norms 35 (2nd ed., 1999) (defining balancing in practical reason as “[resolving] conflicts by the relative weight or strength of the conflicting reasons which determines which of them override the other.”); Duncan Kennedy, From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s “Consideration and Form”, 100 Colum. L. Rev. 94, 96 (2000) (defining the “conflicting considerations model”, i.e. balancing, as one that “resolve[s] all situations where there is a choice of norm by balancing conflicting considerations of one kind or another.”); Aleinikoff, supra note 3 at 945 (defining a balancing opinion in constitutional law as “a judicial opinion that analyzes a constitutional question by identifying interests implicated by the case and... assigning values to the identified interests.”); Sullivan, supra note 3 at 61 (arguing that “[b]alancing requires the explicit articulation and comparison of rights or structural provisions, modes of infringement, and government interests. The outcome of a balancing test is not foreordained by any classification at the threshold”).}\]
much more scarce. Justice Holmes, for example, scarcely used the term ‘balancing’ in his writings, but is nevertheless regarded as one of the founders of the balancing methodology in American jurisprudence.

The first clarification is therefore that this Article identifies balancing in legal essays and judicial opinions, even when the word “balancing” does not appear, relying on related concepts and expressions that can indicate the presence of balancing. Among others, the following expressions will be viewed as possible placeholders for balancing during the periods reviewed in this article: weight or strength of interests; outweighing interests; accommodation of interests; choice among policies or interests; reasonableness; fitness to an end; distinction of degree; line drawing; and point in a line.

I sometimes highlight these substitutes for balancing when they appear in a citation. Using these words is, of course, not a sufficient test for the presence of balancing (as is indeed the use of the word “balancing” itself); they are brought here only as possible indicators for the use of balancing.

Secondly, alongside the different indicators for balancing, there are also different kinds of balancing, and the literature on balancing has attempted to distinguish between such kinds or categories. Professor Nimmer may have been the first to classify balancing into ad hoc vs. definitional balancing (that is, balancing that is made according to the particular circumstances of the case vs. balancing that is made once and for all, for all kinds of cases in a certain category). Several other classifications have been suggested since. Among them, Professor Kahn suggested distinguishing between “representative,” and “zero-sum” balancing (balancing that arrives at a compromise between contending interests, and balancing that rules categorically in favor of one interest and rejects

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12 Two of the rare appearances of the word balancing in Holmes’s writings are in his Privilege, Malice, and Intent, in Collected Legal Papers 122 (1920): “Here the balance is struck between the benefit of unfettered freedom to abstain from making the contract, on the one side, and the harm which may be done by the particular use of that freedom, on the other.” and in his opinion in Hudson County Water Co. v. McCarter 209 U.S. 349, 355 (1908) in which he wrote about the “boundary at which the conflicting interests balance” see also infra note 81 and adjoining text.

13 See e.g. Morton J. Horwitz, The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy 18 (1992) (arguing that Holmes was the first to use balancing in American jurisprudence).

14 See the Schneider case, infra note 134
15 See the Arizona case, infra note 146.
16 See the Gobitis case, infra note 153
17 See the Blaisdall case, infra note 130
18 See the Olmstead case, infra note 100
19 See Stone’s writings, infra note 93
20 See Cardozo’s writings, infra note101.
21 See Holmes’s writings, infra notes 49, 50.
the other). Kahn added a third distinction that he termed “administrative” balancing, which is balancing that emphasizes the quantitative nature of the balancing act. Professor Aleinikoff has suggested distinguishing between different kinds of balancing according to the kinds of considerations that are balanced, i.e., constitutional vs. non-constitutional, governmental vs. individual, and so on. In this Article I suggest adding another distinction to this list of kinds of balancing, the distinction between interests-based and rights-based balancing.

Thirdly, the more vexing distinctions are those that pertain not only to the kind of balancing, but to the identification of the process at hand as a balancing process at all or not, which goes back to the question of the definition of balancing. To be sure, there are times when we have a pretty good idea about whether a certain argument or opinion is a balancing argument or opinion or not. A judicial opinion that moves directly from the identification of the applicable rule to its application in the particular case would definitely not be a balancing opinion, while a judicial opinion that begins by identifying the different interests affected by the decision and moves on to compare them and evaluate their importance, would be. However, in less distinct cases, the question of identification becomes trickier.

Professor Grey, for example raises doubts as to whether “line drawing” decisions (such as some of Justice Holmes’s judicial decisions) are really balancing decisions. Although such decisions revolve around drawing a line between two competing considerations or policies, they might reflect an arbitrary line drawing, not one which is based on any rational conception of the underlying weights of the competing considerations, or even based on skepticism about the existence of such rational conception. Professor Kennedy on the other hand, views some “over-rational” manifestation of balancing, such as those that equate balancing with scientific-like social engineering, as not really balancing arguments. This is so, he argues, since they are not really reflecting the process of conflicting two policies one against the other, but rather the process of applying one single rational (maximization of social utility) to the case. Aleinikoff has a
similar view with regards to multi-pronged tests, and “totality of circumstances” approaches, which are sometimes regarded as balancing tests: to the effect that these tests are concentrated on the classification of events under one particular concept (i.e., answering the question: “is this a case of “taking”?”), rather than the contradiction of two conflicting policies (“what should override, the public interest or the right to property?”), they do not involve balancing.\(^{29}\) Tests which concentrate on exceptions for extreme circumstances, such as, the “clear and present danger” test for free speech are another point of contention with regards to their classification as balancing tests, as will be further discussed in the Article.\(^{30}\)

Although I will have something to say about some of the questions raised by these distinctions at the concluding part, the definition I suggested for balancing seems to include most of what is generally viewed as balancing decisions, and does not leave out Holmes’ balancing or Pound’s. My definition does, however, reject two conceptions of balancing which I would consider as all-encompassing conceptions, and therefore too general to be useful.

All encompassing conceptions of balancing come in two interrelated kinds. The first kind regards any kind of discretion, or deliberation, or choice between values, as espousing balancing.\(^{31}\) Under such conception, the question of the history of balancing becomes meaningless, since balancing would be as old as human reason and human deliberation, and, in law, as old as law itself. While there might not be a logical contradiction in such definition of balancing, it would render the discussion of this particular phenomenon not very interesting or distinct.

The second kind of all-encompassing conception of balancing is more limited, but still very large in scope; it regards all non-formalist, or pragmatist reasoning modes as involving balancing. This raises the issue of the relationship between balancing and anti-formalism, which would be a major theme in this Article. While, throughout the article, I will always associated balancing with anti-formalism (leaving to the very end the question of whether balancing can ever be formalist\(^{32}\)), I would not make a similar association from the other way around: that is, I would not claim that anti-formalism is always associated with balancing (or, to put it differently, that the only alternative to balancing is formalism\(^{33}\)).

\(^{29}\) Aleinikoff, supra note 6 at 945.

\(^{30}\) See infra note 114 and adjoining text, and the discussion in Part V, infra note 211 and adjoining text.

\(^{31}\) See, e.g., Wallace Mendelson arguing that “[b]alancing seems to me the essence of the judicial process.” Mendelson supra note 6 at 821; see also Shiffrin, The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment, 78 NW. U. L. Rev. 1212, 1249 arguing that “balancing is nothing more than a metaphor for the accommodation of values.”

\(^{32}\) See infra Part V.B.

\(^{33}\) Some versions of this conception of balancing are quite common, see, e.g. the following claim that the only alternative to balancing is absolute rights (i.e. a formalist conception of rights): (“Balancing is problematic… Yet, the alternative to balancing seems much worse… [The alternative is] to create an absolute right and therefore avoid the need for balancing.” Erwin Chemerinsky, Constitutional Scholarship in the 1990s, 45 HASTINGS. L. J. 1105, 1116-17 (1994). I have tried elsewhere to disprove the dichotomy between balancing and absolutism, relying on other grounds than in this article. See Porat supra note 10 at 1395, 1416.
Such conception of balancing seems to me to enlarge the scope of balancing too much, and to disregards a host of legal attitudes which are anti-formalist, but do not necessarily include balancing.\textsuperscript{34} We already mentioned Kennedy’s view that not all socially-based (and hence, anti-formalist) legal theories are balancing theories and Grey’s and Aleinikoff’s views that line-drawing, and multi-pronged tests (two other non-formalist traits) can be dissociated from balancing. Other potentially non-formalist attitudes that do not necessarily involve balancing are analogies, motive review, creative interpretation, and distinguishing precedent.\textsuperscript{35}

Finally there is the question of the metaphor of balancing. Balancing is after all a metaphor, alluding to a process of weighing on a scale.\textsuperscript{36} One could look for ways of defining balancing, based on the analysis of this metaphor. The point I would like to stress in this regard is that there is a certain duality within the balancing metaphor, which was referred to, previously, by several commentators.\textsuperscript{37} The way I see the duality is the following: the process of weighing on a scale can allude, first, to the aspect of comparing two objects. Secondly, it can also allude to the aspect of finding the weight of two or more objects. These are of course interrelated aspects, but the duality is in that the first aspect can allude to an intuitive process—comparison, evaluation, and so on; the second, can be interpreted in a more exact and scientific way—finding something objective in the things compared, analogous to the objectivity of weight. These two conceptions of balancing—the intuitive vs. the scientific, the subjective vs. the objective—seem to compete in the use of balancing, and can be borne in mind through the historical review of balancing.\textsuperscript{38}

\textsuperscript{34} For a definition of formalism see infra Part II.A.

\textsuperscript{35} Compare Cass Sunstein, Legal Reasoning and Political Conflict 13-35 (1996) (distinguishing between several forms of reasoning including deduction, analogy and balancing).

\textsuperscript{36} See D.E. Curtis & J. Resnik, Images of Justice, 96 Yale L.J. 1727, 1741 (fn 32) (1987) (discussing the origins of the metaphor of the scales in legal imagery.)

\textsuperscript{37} See e.g. Kahn supra note 23 at 3, (“The metaphor [of balancing] is ambiguous. It describes both a process of measuring competing interests to determine which is 'weightier' and a particular substantive outcome characterized as a 'balance' of competing interests.”) In what follows I refer to a somewhat different ambiguity in the metaphor, but there might be some interesting interrelations between the two.

\textsuperscript{38} It seems that whenever the concept of “weight” is taken more literally, we are getting closer to the objective and scientific aspect of balancing. In Part V I suggest that some aspects of rights-based balancing use the objective rather than subjective interpretation of the metaphor, see infra note 215 and adjoining text.
II. EARLY BALANCING—BALANCING IN PROGRESSIVE THOUGHT—THE EARLY 20TH CENTURY THROUGH THE LATE 1930S

A. General Background for Progressive Balancing: Balancing and Anti-Formalism

American constitutional balancing begins with the Legal Progressives—a group of outstanding jurists, operating mainly during the first three decades of the 20th century, and including such figures as Oliver Wendell Holmes, Benjamin Cardozo, and Roscoe Pound. The Progressives started using balancing, not only in constitutional law but in all areas of law, as part of their assault on the prevailing legal thought during the late 19th century and early 20th century, often called "Classical Legal Thought" or Categorical Legal Thought. Indeed Professor Horwitz suggests that “the emergence of balancing tests in numerous areas of the law is a prominent measure of the success of the Progressive legal thinkers in undermining categorical thought.”

Classical Legal Thought (or Classicism in short) was characterized among other things by its formalistic conception of the law. According to the Classicist formalist conception of law, law had three main characteristics: determinacy—legal conclusions could be arrived at with certainty and minimal discretion, systematization—law was based on a coherent and limited set of abstract principles, and autonomy—law was separate from other spheres such as society, politics and morals. Determinacy and systematization were arrived at by deriving legal conclusions in a deductive and logical way from the meaning of abstract and sometimes absolute concepts and rights. Autonomy was arrived at by finding these concepts and their meaning within the legal sphere, and independently of social conditions, morals and politics. This conception was aided

39 See Kennedy supra note 11 at 94 (arguing that the “conflicting considerations” model of legal reasoning, i.e., balancing, developed in American law in the late 19th early 20th century); Richard H. Pildes, Conception of Value in Legal Thought, 90 Mich. L. Rev. 1520, 1532 (1992) (“In legal practice…the emergence of the balancing test…began around 1910”). See also Aleinikoff supra note 3 at 955-958.
40 For general reviews of the Progressive movement see ROBERT S. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY (1982); HORWITZ, supra note 13..
41 See Duncan Kennedy, Towards an Historical Understanding of Legal Consciousness: The case of Classical Legal Thought in America, 1850-1940, 3 RES. L. & SOC’y 3 (1980).
42 See HORWITZ, supra note 13, at 17-18. Another term that was proposed in the literature is “Legal Orthodoxy” see Grey, Langdels’ Orthodoxy, supra note 27.
43 HORWITZ, supra note 13, at 18.
44 Two additional traits of Classical Legal Thought, in constitutional law at least, were its emphasis on natural rights and laissez fair economy, and its support for judicial activism see infra Part II.C.
45 See e.g., Richard Pildes, Forms of Formalism, 66 CHI. L. REV. 667, 608 (1999) (arguing that according to the formalist conception, right answers are “derived from the autonomous, logical working of the system”).
46 See e.g. NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 10 (1995).
by related legal emphases: an emphasis on categorical distinctions between different areas of law and different legal concepts, rather than distinctions of degree; an emphasis on absolute rather than relative rights and concepts; an emphasis on the essence and meaning of rights, rather than an emphasis on their social function.48

Balancing helped the Progressives criticize all this. First, balancing undermined the criteria of determinacy and system, and the related emphasis on absolutism, and categorization. Beginning as early as 1870 Oliver Wendell Holmes wrote that when “two rights run against one another… a line has to be drawn” and the decision must be based on “distinction of degree,” rather than on “logical deduction” from conceptions of absolute rights.49 Holmes thus advocated balancing-like line drawing between two competing considerations, rather than conceptual and abstract legal reasoning. This same use of balancing is evident also in Holmes’s later jurisprudence in which he stressed the importance of degree and continuum, sometimes termed “core and penumbra,” over clear-cut dichotomies and categories. For example, ruling on a case of taking, Holmes wrote: “The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but point in the line… or falls on the nearer or farther side”.

Balancing also helped in undermining the third formalist criterion—the criterion of autonomy. Balancing replaced the conception of law’s autonomy with the view of law as a means to a social end. Holmes wrote in his Path of Law that “Judges… have failed adequately to recognize their duty of weighing considerations of social advantage.”51 Cardozo similarly invoked a balancing attitude in this context when he wrote that legal decisions depend “largely upon the comparative importance or value of the social interest that will be thereby promoted or impaired.” And above all it was Roscoe Pound who wrote emphatically in favor of “weighing social interests,” and argued that “Law is an attempt to satisfy, to reconcile, to harmonize, to adjust… overlapping and often conflicting claims and demands.”52 Greatly affected by Von Jhering and the German Frei Recht movement,53 he sought to make law into the science of distinguishing the different interests that clashed in society and reconcile and harmonize them, rather than dwelling into the abstract meaning of rights in an

48 See Grey, id. See also HORWITZ, supra note 13, at 17-19, 198-199.
49 Holmes, Privilege, Malice, and Intent, supra note 12 at 122.
51 Oliver W. Holmes, The Path of Law, in his COLLECTED LEGAL PAPERS 184 (1920)
52 Pound A Survey of Social itersts
53 See JOHN M. KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY 330 (1992) (describing the origins of the conception of law as the arena for balancing conflicting social interests, as starting with August Comte, and Rudolf von Jhering); James E. Herget, and Stephen Wallace, The German Free Law Movement as The Source of American Legal Realism, 73 VA. L. REV. 799 (1989); compare Carl J. FREIDRICH, THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE 156-7 (1963) arguing that the Progressive’s adoption of German balancing involved a change in the original concept of balancing. Duncan Kennedy even seems to find some French influences on American balancing; Kennedy, supra note 11 at 108-9 (arguing that American balancing was influenced by the writings of the early 20th century French jurist, Rene Demogue).
autonomous legal sphere, described sarcastically by Von Jhering as the “heaven of legal concepts.”

B. Background for Progressive Balancing in Constitutional Law: Balancing and Anti-Formalism in Constitutional Law

The above characterization of the Progressive anti-Classicist and anti-formalist critique and the way balancing was integrated into it, was not restricted to a particular legal area. In constitutional law, however, the Progressive anti-formalistic attack and the use of balancing as part of it had a specific target. The Progressives identified the main manifestation of formalism in constitutional law (although not the only one\textsuperscript{55}) as the Classicist Court’s Fourteenth Amendment’s due process interpretation (the “substantive due process” doctrine) and the subsequent establishment of the doctrine of state police power, and vigorous protection of the rights to property and freedom of contract.\textsuperscript{56} These constitutional doctrines, which had substantially limited the ability of the state to put into force economic and social reforms, were conceived by the Progressives as based on a highly formalistic deduction from the meaning of rights, and as completely detached from social reality. These doctrines were given their most distinct form in the case which also gave its name to the entire period and to the constitutional jurisprudence of the Classicist Court during this period: \emph{Lochner v. New York} (and hence – the \emph{Lochner} period, and the \emph{Lochner} Court).\textsuperscript{57}

The following will show why the majority opinion in the \emph{Lochner} case was conceived as formalist, and how Holmes’ dissent in the case exemplifies the way the Progressives used balancing to attack formalism in constitutional law. However, the review will also suggest that formalism was not the only feature of the Classicist \emph{Lochner} Court’s jurisprudence that Progressive attacked. Understanding Progressive balancing in the particular area of constitutional law, therefore, requires the identification of two additional traits of Classicism in this sphere, and the way balancing responded to them also.

1. \emph{Lochner v. New York, and Classicist Formalism in Constitutional Law}

\textsuperscript{54} Rudolf Von Jhering, \emph{In the Heaven of Legal Concepts}, translated in \textsc{Morris R Cohen \& Felix S. Cohen, Readings in Jurisprudence and Legal Philosophy} 678 (1951).

\textsuperscript{55} Other areas of constitutional law which also gave rise to the anti-formalist critique were commerce clause, separation of powers and taxation \textit{see} \textsc{Craig R. Ducat, Modes of Constitutional Interpretation} 34 (1978).

\textsuperscript{56} Professor Horwitz writes that “the elevation of freedom of contract to the level of a sacred constitutional principle [became] the focal point of controversy.” (referring to the controversy between the Progressives and the Classicists) \textsc{Horwitz 33}.

\textsuperscript{57} 198 U.S. 45 (1905).
Lochner v. New York involved a New York law which restricted the working hours of New York bakers to a maximum of 10 hours per day and 60 hours per week. Justice Peckham, writing for the majority, held that the law infringed upon the freedom of contract between employer and employee (their right to agree to the number of working hours in a labor contract), which was “part of the liberty of the individual protected by the 14th Amendment.” The only permissible reasons for infringing upon this right, according to the Court, were a set of limited state interests, called state police powers, which included “safety, health, morals and general welfare of the public.” Peckham, rejected the state’s claim that the law was motivated by health concerns (protecting bakers’ health) and argued instead that the law was motivated by regulatory concerns (preventing workers’ exploitation and redistributing economic power) and therefore exceeded the police powers of the state, and improperly interfered with individual liberty and autonomy.

Peckham’s opinion reflected the traits of the formalist mindset in constitutional law in two central aspects. First, it deduced the decision as a matter of logical necessity from the meaning of legal concepts and rights, and irrespective of social facts and social reality. Secondly, it was a categorical and

58 198 U.S. 45 (1905).
59 See 198 U.S. at 45-6.
60 198 U.S. at 53.
61 Id. at 53.
62 The law was upheld by the court of appeals, as a law relating to public health. Safety, morals, and public welfare were regarded as irrelevant to the case. (The term "general welfare" was used in a limited sense, which was closely related to the regulation of health). Peckham argued that health concerns were already provided for by the other provisions of the statute. (Section 111 of the labor law, for example, provided that: "[a]ll buildings or rooms occupied as biscuit, bread, pie, or cake bakeries, shall be drained and plumbed in a manner conducive to the proper and healthful sanitary condition thereof, and shall be constructed with air shafts, windows, or ventilating pipes, sufficient to insure ventilation." Other provisions of the law required that a bakery room would be at least 8 feet in height, that there will be bathrooms and washrooms in bakeries and that bakers will not sleep at bakeries.) The long working hours themselves, argued Peckham posed no “more than the mere fact of the possible existence of some small amount of unhealthiness.” Id. at 59. Peckham further argued that baking, as opposed to mining for example, posed no special threat to health. “We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one.” Id. at 59.
63 See id. at 63-64 (“It gives rise to at least a suspicion that there was some other motive dominating the legislature than the purpose to subserve the public health or welfare... It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives... It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees (all being men, sui juris), in a private business, not dangerous in any degree to morals, or in any real and substantial degree to the health of the employees.”)
64 Id. at 57.
65 But see Thomas C. Grey, Judicial Review and Legal Pragmatism, 38 Wake Forest L. Rev. 473 (2003) (arguing that the Lochner decision shared only some of the formalist characteristics, mainly the autonomy of law and the declaratory view of adjudication, but lacked the characteristic of rule-like determinacy.)
66 The characterization of both parties to the labor contract as autonomous has been fiercely criticized as disregarding the social conditions at the time, under which workers were anything but
absolutist opinion. Peckham interpreted the right to individual liberty as absolutely protected (within its legitimate sphere) against any public policy interests. He did not interpret it, as we might today, as calling for its balance with other rights and interests, such as workers’ interests or social equality. To use Professor Kennedy’s words: “The two categories of right and power [referring to the freedom of contract vs. the public interest] could be spatialized as two contiguous areas. They most certainly do not come across as conflicting “interests” to be “balanced” within some imagined field of forces.”

Holmes’s short dissent in the case lambasted this kind of formalism using a balancing attitude. In words that would echo in numerous subsequent anti-formalist attacks, he wrote that “general propositions do not decide concrete cases,” and that “the Constitution does not enact Mr. Herbert Spencer’s social statics,” (referring to the economic theory of laissez faire). Holmes also maintained that the Court had “perverted” the meaning of the word “liberty” in the Fourteenth Amendment when it deduced from it, as if by logical necessity, the unconstitutionality of the New York labor law. According to Holmes, therefore, the Court reached its conclusion by preferring the interest of individual liberty (capitalism and laissez faire) over the conflicting interest of social equality (redistribution and state intervention in the market), both of which were equally imbedded within the general constitutional concept of liberty. As he wrote in his Path of Law: “behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds.”

autonomous to set the terms in a labor contract. See e.g., Pound Liberty of Contract, 18 YALE L. J. 454 (1909).

67 Kennedy, supra note 41 at 11. The opinion has also been interpreted differently to include balancing. According to such interpretation Justice Peckham balanced between the interest of individual liberty and the conflicting public interests, only to give preference to individual liberty over the public’s interests. See, e.g. Grey id. at 504 (arguing that Peckham’s decision was based on a proportionality test). This view can find support in the following passages from Peckham’s opinion: “It is a question of which of two powers or rights shall prevail,—the power of the state to legislate or the right of the individual to liberty of person and freedom of contract…The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.” However, it seems to me that such passages should be read together with the other passages of the opinion that were quoted above (see especially supra notes 62 and 63). Such reading shows that to the extent that Peckham was balancing, he was doing so only as a means of exposing the legislature’s motive as being unrelated to health, so that he could classify legislative action as outside the police power. Peckham was therefore engaged in a categorical and non-balancing form of reasoning after all. For a reading of Peckham’s opinion which is similar to mine see also Anleinikoff, supra note 3 at 951-2. Compare also with Richard H. Pildes, Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law, 45 HASTINGS L. J. 707, 713-14 (1994) (“[In] late nineteenth-century constitutional thought…the paradigm for constitutional adjudication was… the assessment of the state’s justifications for acting in light of the principles that defined the legitimate basis for state action in the particular sphere in question…”)

68 198 U.S at 75-76.
69 Holmes, supra note 51, at 190.
2. Two Further Traits of Classicism in Constitutional Law

Holmes therefore used a balancing framework in constitutional law, as part of his general anti-formalistic critique. However Holme’s balancing (and indeed Progressive constitutional balancing generally) did not respond only to the formalism of the *Lochner* Court. There were at least two additional traits of the Classicist *Lochner* Court, analytically separate from its formalism, to which Holme’s balancing responded. First, the *Lochner* Court had a strong emphasis on *individual rights*, based on a theory of natural rights. Secondly, the *Lochner* Court had an overtly *activist* judicial attitude.

The first Classicist trait in constitutional law that could be analytically separated from Classicist formalism was the vigorous judicial protection of individual rights that was based, in its turn, on a specific view of the role of the state in the market, and on notions of natural rights. Professor Horwitz writes that the Classicists perceived the rights of property and contract as concerned with “private transactions between private individuals vindicating their pre-political natural rights.” In these matters, continues Horwitz, the Classicists believed that “the state had no independent interest besides ensuring that the legal order was impartial and non-political.” This strong rights jurisprudence created a bias in favor of private economic interests, so that there was, in Pound’s words, “an individualist conception of justice, which exaggerates the importance of property and of contract [and] exaggerates private right at the expense of public right.” In Pekham’s majority opinion in *Lochner* one can find such natural rights overtones and restricted vision of state in the emphatic warning that unless the maximum hour limit were repealed “[t]he state… would assume the position of a supervisor, or pater familias, over every act of the individual.”

The second trait Classicist constitutional jurisprudence that could be separated from its formalism was its activism. Activism followed from the emphasis on individual rights, since in the face of what it conceived as the sacrifice of rights to public interests, the Court saw protecting individual rights from the legislature as part of its role. Peckham overturned the law in *Lochner* believing that it was his duty to protect individual liberty from "the mercy of legislative majorities." He further wrote in *Lochner* justifying his activism: “[t]his is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the state it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still

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70 Horwitz, supra note  at 10.
71 Pound supra note at 454, 457 (quoted in Horwitz at 34)
72 198 U.S. at 62. See also the opinion for the Court in Holden v. Hardy, 169 U.S. 366, 389 (1898) arguing that principles such as freedom of contract represented "immutable principles of justice which inhere in the very idea of free government."
73 Horwitz, supra note  at 10 at 59.
74 198 U.S. at 59.
remain: Is it within the police power of the state? And that question must be answered by the court.\textsuperscript{75}

The outcome was a fascinating judicial blend that characterized the Classicist \textit{Lochner} Court’s constitutional jurisprudence. The \textit{Lochner} Court was at once formalist and activist, at once conservative and pro-rights. It consistently and aggressively overturned economic and social legislative reforms (conservative and activist), not because it thought it had judicial discretion to do so, but, to the contrary, because it argued that it had no choice but to do so (formalist), since this was the only way it could stay loyal to its role as protector of constitutional rights (pro-rights).\textsuperscript{76}

Balancing was a reaction to this constitutional jurisprudence in all of its aspects. We have already seen how balancing was a reaction to the formalism of Classicist jurisprudence in constitutional law. The next section will show how balancing was a reaction to the pro-rights and activist traits of Classicist jurisprudence in constitutional law.

\textbf{C. The Two Special Traits of Progressive Balancing in Constitutional Law – Interests-Based and Anti-Activist.}

Beginning with Holmes’s dissent in the \textit{Lochner} case Progressive balancing in constitutional law became not only part of the anti-formalist attack, but also part of the attack on a jurisprudence of rights, replacing it with a jurisprudence of interests, and an attack on judicial activism, replacing it with judicial restraint.

For Holmes the realization came rather early that law was the product of a battlefield of interests, without the assuring rationality of absolute rights that could be protected at all times in a principled and politically neutral fashion.\textsuperscript{77} In \textit{Lochner}, as we have seen, he uncovered the pretence of the Court’s reliance on the right to individual liberty, as an interest-based maneuver. The decision was based on the economic interest in laissez faire economy and was falsely based on a deduction from the meaning of the right to liberty. In later decisions his line-drawing and emphasis on degree had the similar effect of lowering absolute rights to the status of balanceable interests and of rejecting a right-based, or natural rights-based, automatic preference for the right over the interest.

A good example is \textit{Hudson County Water Co. v. McCarter}\textsuperscript{78} in which Holmes, writing for the Court, used the language of balancing to uphold a New

\textsuperscript{75} Id. at 56-7.

\textsuperscript{76} See \textsc{Horwitz} supra note 13 at 5; \textsc{Summers} supra note 40 at 19. The above description of the \textit{Lochner} Court as cominging formalism, activism, and natural rights theory, is the usual conception. Lately, however, there has been suuprost to the view that one must separate between Calssicism in constitutional t law and Classicism in private law, and that the natural rights were. For my purposes however it is not essential to decide whether the \textit{Lochner} Court was actually based

\textsuperscript{77} See \textsc{Horwitz} supra note 13 at 127-130, placing this realization in Holmes’s thinking at the point when he relinquished his belief in the ability of custom to provide rationality in legal decisions. See also infra note 27 and accompanying text.

\textsuperscript{78} 209 U.S. 349, 355 (1908).
Jersey statute against claims that it “impairs the obligation of contracts, [and] takes property without due process of law”.\textsuperscript{79}

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the state. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but point in the line… or falls on the nearer or farther side. For instance, the police power can limit the height of building in a city, without compensation… But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and police power would fail.\textsuperscript{80}

The language is unmistakable. The right to property, although declaring itself to be absolute, is limited by considerations of policy, and is portrayed itself as a policy interest (“The boundary at which the conflicting interests balance” writes Holmes, referring to the boundary between the right to property and the public interest). Note also, the way the police power doctrine, which was for Peckham and other Classicists the embodiment of the idea of individual freedom from governmental intervention, is similarly lowered to the mere “limits set to property by other public interests.”

The second trait of Holmes’s balancing that followed from his attack on the jurisprudence of rights was the association of balancing with anti-activism and judicial self-restraint. Holmes’s famous anti-activist pronouncements starting from his assertion in \textit{Lochner} that the judge’s personal beliefs have “nothing to do with the right of the majority to embody their opinions in law,”\textsuperscript{81} and followed by his famous warning together with Justice Brandies against judicial review becoming “an exercise of the powers of a super-Legislature,”\textsuperscript{82} were a reasonable conclusion from his conception of law as a battleground of interests. Professor Horwitz makes this move explicit: “if law is merely a battleground over which social interests clash, then the legislature is the appropriate institution for weighing and measuring competing interests.” And he adds that “by the time \textit{The Path of Law} was written, the focus of Holmes’s Darwinism had shifted from courts to legislatures.”\textsuperscript{83}

Although Pound did not have Holmes’s “battlefield” inclination and was more optimistic regarding the rationality of the balancing process,\textsuperscript{84} he similarly sought to dismantle the uneven preference of individual rights over public policy interests, by exposing rights as based on interests. Troubled by what he saw as an

\textsuperscript{79} \textit{Id.} at 353. The statute was attacked on commerce clause grounds also.
\textsuperscript{80} \textit{Id.} at 355 (emphasis added).
\textsuperscript{81} 198 U.S. at 75.
\textsuperscript{82} Justice Brandeis and Justice Holmes, dissenting in Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 534.
\textsuperscript{83} HORWITZ \textit{supra} note 13 at 142.
\textsuperscript{84} See \textit{supra} note 28 and accompanying text.
exaggeration of “private right at the expense of public right” his project was to
canvas the entire legal scheme as a net of interests, divided between private
interests and public interests, all of which had to be balanced according to their
weight in order to fulfill maximum harmony and efficiency. This meant that there
was no qualitative difference between rights and interests, and private rights lost
their automatic preference over public interests.

In following passage from A Survey of Social Interests—Pound’s most
comprehensive article on balancing—Pound replies to Justice McKenna’s attempt
to protect the right of freedom of contract from legislative encroachments. Justice
McKenna claimed (like Peckham in Lochner) that there is a “menace in the…
judgment of all rights, subjecting them unreservedly to conceptions of public
policy.”

Undoubtedly, if certain legal rights were definitely established by the Constitution
there would be a menace to the general security if the Court… were to suffer a
state legislature to infringe those legal rights on mere considerations of political
expediency. But it was only the ambiguity of the term “right”… that made it
possible to think of the decision in question in such a way… The “rights” of
which Mr. Justice McKenna spoke were not legal rights in the same sense as my
legal right to the integrity of my physical person or my legal right to ownership in
my watch. They were individual wants, individual claims, individual interests,
which it was felt ought to be secured through legal rights or through some other
legal machinery… Thus, the public policy of which Mr. Justice McKenna spoke
is seen to be something at least on no lower plane than the so-called rights…
There is a policy in the one case as much as in the other.

The rights to property and freedom of contract were therefore only
“individual interests” that had to be balanced with public policy interests. Public
interests were “on no lower plane” than rights and there was “a policy in
the one case as much as in the other.”

Pound, like Holmes, also associated balancing with anti-activism as a result
his interests-based balancing. Rights, now exposed as based on policy interests,
were portrayed as standards rather than exact and absolute rules. Since they were
standards, the Court could not impose its legal solution on the case as if it
mathematically and uncontroversitely followed from the meaning of rights. The
most it could do is look for unreasonabiliness and arbitrariness in the application
of the standard, or, to put it differently, to look for unreasonabiliness and
arbitrariness in the legislative weighing and balancing of interests. Pound
continued:

[The Fourteenth Amendment is only] imposed as a standard on the legislator. It
sa[ys] to him that if he trenched upon these individual interests he must not do so
arbitrarily. His action must have some basis in reason. It is submitted that that
basis must be the one upon which common law has always sought to proceed, the
one implied in the very term “due process of law,” namely, a weighing or

85 Pound, supra note 1.
86 Arizona Employers’ Liability Cases, 250 U.S. 400, 439 (1919) (Justice McKenna
dissenting).
87 Pound, supra note 1 at 4 (emphasis added).
balancing of the various interests which overlap or come in conflict and a rational reconciling or adjustment.\footnote{Id. (emphasis added).}

The anti-activist tendency of balancing together with the view of constitutional rights as standards, rather than rules, reached its peak in the writings of later Progressives, such as Harlan Fiske Stone,\footnote{See infra note 93 and adjoining text. But see Stone’s changed (or modified) position in his Carolene Products footnote, infra note 124.} Felix Frankfurter\footnote{See infra Part IV.} and, most radically maybe, Learned Hand.\footnote{See e.g. Learned Hand’s view that the First Amendment is “too uncommunicative – too lacking in guidelines – to be treated as law.” Learned Hand, The Spirit of Liberty 177-8 (1952), quoted in Wallace Mendelson, On the Meaning of the First Amendment: Absolutes in the Balance, 50 Colum. L. Rev. 821, 826 (1963).} All three were devout adherents to balancing, and all were staunch anti-activists\footnote{But see, again, Stone’s changed (or modified) position in his Carolene Products footnote, infra note 124.} who placed balancing plainly in the field of the legislature rather than the judiciary. The following passage from Stone’s The Common Law in the United States, Published in the mid 1930s is a good example (using the term “reasonableness” as a placeholder for balancing):

There are, it is true, rules of this sort [“meticulous rules analogous to the rules of real property”] in both state and federal constitutions... But the great constitutional guarantees of personal liberty and of property... are but statements of standards... The chief and ultimate standard which they exact is reasonableness of official action and its innocence of arbitrary and oppressive exactions... \textit{They do not prescribe formulas to which governmental action must conform}... \textit{[They do not subject] government to inexorable commands imposed upon it} in another age. \textit{[They should]} enable government, in “all the various crises of human affairs,” to continue to function and to perform its appointed task within the bounds of reasonableness... \footnote{Harlan F. Stone, The Common Law in the United States, 50 HARV. L. REV. 4, 23-24 (1936) (emphasis added).}

This concept of balancing was further integrated into a Progressive strand of trust in the legislature and mistrust of the judiciary. This strand had both a more substantive side and a more contingent one. The substantive side of this trust in the legislature was the emphasis on the social sphere and on scientific and social progress – all of which are more naturally lead by the legislative and executive bodies than by the judiciary. (“The man of the future is the man of social science,” wrote Holmes). The more contingent side of this trust in the legislature and distrust of the judiciary was the fact that the progressive forces in American society were concentrated during this period in the political branches and the judiciary was, on the other hand, conservative and reactionary.

Whatever the reasons, Progressive balancing (or at least some of it\footnote{See infra section II.E “exceptions”.}) was part of a Progressive pro-legislative campaign, and this meant that balancing was more closely related to legislative methods, than to judicial methods.

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\footnote{Id. (emphasis added).}

\footnote{See infra note 93 and adjoining text. But see Stone’s changed (or modified) position in his Carolene Products footnote, infra note 124.}

\footnote{See infra Part IV.}

\footnote{See e.g. Learned Hand’s view that the First Amendment is “too uncommunicative – too lacking in guidelines – to be treated as law.” Learned Hand, The Spirit of Liberty 177-8 (1952), quoted in Wallace Mendelson, On the Meaning of the First Amendment: Absolutes in the Balance, 50 Colum. L. Rev. 821, 826 (1963).}

\footnote{But see, again, Stone’s changed (or modified) position in his Carolene Products footnote, infra note 124.}


\footnote{See infra section II.E “exceptions”.}
The outcome is what I call *early balancing, or interests-based* balancing. Much of the Progressive use of balancing in constitutional law was by way of uncovering the underlying balancing of interests behind the judicial opinions, only to preempt judicial balancing altogether (or restrict it substantially) and place balancing back with the legislature.

**D. Progressive Balancing in Private law**

Reading the arguments presented thus far, may raise the following objection: is there no place in which the Progressives called for the actual use of balancing by the judiciary? Could the Progressives have been associated with balancing strictly for opposing judicial balancing altogether? This section suggests that the Progressives did call for actual, active, judicial balancing, but mainly in private law, rather than in constitutional law.

The previous sections showed that the Progressives regarded balancing as a legislative tool, and discouraged judicial balancing. This line of reasoning led to the rejection of balancing in constitutional law. But it had quite different outcomes when applied to private law. According to this line of reasoning, if balancing is typically a legislative tool, the courts could and should use balancing when the courts are acting as placeholders for the legislature, i.e., wherever gaps existed in the work of the legislature that required creative judicial filling. The Progressives therefore called for active judicial balancing to fill in the gaps in private law legislation.

There are several reasons for the distinction between private law balancing and constitutional law balancing. First, in private law balancing, the legislature can always step in and change the balance, while in constitutional law it cannot. The democratic problem stemming from judicial balancing, which Progressives such as Holmes raised, is therefore much less acute in private law balancing than in constitutional law balancing.\(^95\) Secondly, balancing follows quite easily from the anti-formalist assumptions in private law, while it does not necessarily follow form the anti-formalist assumptions in constitutional law. Granted the anti-formalist assumption that the law is not a complete and unflawed system, it follows that applying the law in private law cases requires a further step of creative gap-filling by the judiciary at least in hard cases, which, in turn, requires policy-oriented balancing. However, no such further step is required in constitutional law, since admitting gaps in the Constitution may simply mean that the state is allowed to act and that the Court has no reason to overturn the decisions of the elected bodies of government.\(^96\) Thus, being anti-formalist in constitutional law could mean viewing rights as lax standards that do not proscribe formulas to the legislature—hence—judicial restraint and leaving

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\(^{95}\) For similar opinions see Aleinikoff, *supra* note 3, at 948 (“Such methodology [balancing] may be an appropriate model for common law adjudication, but balancing needs to be defended in constitutional interpretation where the decision of a court supplants a legislative decision.”) See also Nimmer, *supra* note 22 at 939 (“Such an approach [balancing] may well be desirable with respect to non-constitutional issues—in fact, it appears to be basic to the common law system.”)

\(^{96}\) I thank professor Tom Grey for this point.
balancing to the legislature; while, being anti-formalist in private law might mean seeing legislation and common law, not as a complete and unflawed system, but as consisting of gaps, which needed filling – hence it required gap-filling, active, policy-oriented, judicial balancing in private law.

Much of the heightened rhetoric of creative, judicial balancing by the early Progressives is therefore couched in the private law context, and justified by the incompleteness of the common law and of private law legislation, while much of Progressive balancing in constitutional law, remains deferential to the legislative balance.

The earliest manifestations of active judicial balancing date back to Holmes’s early writings, which concentrate on private law, rather than on constitutional law. In The Common Law Holmes argued that “judges as well as others should openly discuss the legislative principles upon which their decisions must always rest in the end, and should base their judgments upon broad considerations of policy.” And in 1899 Holmes wrote that judges must draw upon “legislative” considerations when they exercise their “sovereign prerogative of choice.” This creative and legislative-like balancing was justified (and also limited) in gap-filling terms in his later decisions. The following are two such examples, both of which are in non-constitutional contexts: in a 1917 decision Holmes wrote: “I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.” And in a later decision he wrote: “there is no body of precedent by which we are bound, and which confines us to logical deduction from established rules [we are therefore] free to choose between two principles of policy.”

Cardozo also regarded the proper place of creative balancing to be in the gaps of common law and legislation: “We must keep within those intersectional limits which precedent and custom and … common law have set to judge-made innovations. But within the limits thus set… the final principle of selection for judges as for legislators is one of fitness to an end,” and he advised judges to

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97 Indeed Professor Grey argues that Holmes developed his entire anti-formalist assault (and not only balancing) in the context of private law jurisprudence, and extended this assault to constitutional law only in his later thought. See Grey, supra note 65 at 473.

98 Oliver W. Holmes, Law in Science and Science in Law, in COLLECTED LEGAL PAPERS at 239.

99 Southern Pacific v. Jensen 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). The common law context of this assertion (and also Holmes’s limited conception of judicial creative balancing) is apparent from the sentences following those just quoted: “A common-law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court. No more could a judge exercising the limited jurisdiction of admiralty say I think well of the common-law rules of master and servant and propose to introduce them here en bloc.” Id. The decision is cited in Grey, supra note 84 at 35-36.

100 Olmstead v. United States 277 U.S. 438, 469 (1928) (Holmes J. dissenting). The decision is not based on constitutional grounds, but on what is termed today supervisory power: “I think . . . that apart from the Constitution the government ought not to use evidence obtained and only obtainable by a criminal act.” Id. at 470. Holmes then continued to declare his balancing choice in a very frank way: “we must consider the two objects of desire, both of which we cannot have… that criminals be detected, and that the Government should not itself foster . . . crime. . . . We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part” Id.

“get [their] knowledge just as the legislature gets it, from experience and study and reflection; in brief, from life itself.”\textsuperscript{102}

An articulate example of this concept of balancing in private law is provided by a passage from Harlan Fiske Stone’s lecture on the common law that was introduced before. In the part addressing private law, rather than constitutional law, Stone wrote:

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

This passage shows that in private law, unlike in constitutional law, Stone called for an explicit use of judicial balancing (weighing social and economic advantages). However, such balancing was justified by Stone by the acknowledgment that there always existed gaps in the law “lying between the command of statutes... and the restraints of precedent,” and that those gaps needed to be filled by the courts. When filling those gaps, courts are justified in using balancing. Moreover, they are required to use balancing. They should openly acknowledge that they are engaged in a legislative-like act of weighing social and economic considerations, and concede the fact that law is a means to an end, and not an end in itself.

The passage shows also one of the striking features of this kind of Progressive activist balancing in private law: its outspoken and unabashed creativity. This feature is especially striking in comparison to later kinds of balancing which invariably try to couch balancing in a more predictable, and principled manner, thus mitigating somewhat its creative nature.\textsuperscript{104} Another feature is the rule-like result of the balancing operation. Since balancing imitated legislative action, it produced judicial legislation, i.e., rules, which could then be applied in subsequent cases. There was therefore an emphasis on what Professor Nimmer termed later as “definitional balancing”, rather than “ad hoc” balancing.\textsuperscript{105}

\textsuperscript{102} Id. at 102-103 (emphases added)
\textsuperscript{103} Stone, supra note 93 at 20 (emphases added).
\textsuperscript{104} Compare with the following claim by Professor Grey: “contemporary judicial pragmatists tend not to sharply distinguish legislative from rule-driven decisions; rather they treat cases as lying along a spectrum from relatively easy to relatively hard, blending policy discussion with considerations of stability and doctrinal consistency in varying proportions” Grey, supra note 99 at 43-44.
\textsuperscript{105} See Nimmer, supra note 22, and the discussion in the adjoining text.
Finally, a clear example of the distinction between Progressive balancing in private and in public law is found in Pound's seminal essay, *Mechanical Jurisprudence*. In this essay, Pound listed the judicial manifestations of what he derogatively termed "mechanical jurisprudence." Pound distinguished between two manifestations of mechanical jurisprudence that represented two distinct judicial deficiencies in addressing the social changes of the time: “[F]ailure to respond to vital needs of present-day life” (the Court not being active enough, thus not responding to change) and “active operation that leads to the same conclusion” (the Court being too active, thus holding back legislative attempts to address change). His examples for the first deficiency are all taken from private law. The examples include: “inadequacy to deal with employer’s liability; the failure…to give us a uniform commercial law; the failure… to work out a reasonable…law of future interest in land; its breakdown in the attempt to adjust water rights in our newer states…; its inability to… protect… against [corporate] mismanagement and breach of trust.” As for examples of the second deficiency (deficiency of active operation), Pound provides two examples—both taken from constitutional law. The first example is that because of “[t]he manner in which the Fourteenth Amendment is applied… rules have been deduced that obstruct the way of social progress.” The second example suggests that “the Commerce Clause… has given us rules which, when applied to the existing commercial and industrial situation, are wholly inadequate.”

**E. Exceptions**

While activist balancing was used by the Progressives mainly in private law, and not in constitutional law, there were some manifestations of activist Progressive balancing in constitutional law as well. This section reviews several such manifestations, and suggests that some of them can be squared with the analyses suggested in the previous sections (either by being not really activist, or by being not really balancing), while others must be admitted as true exceptions, or precursors for the change in balancing.

First, some of the famous First Amendment cases, by the Progressive Justices Holmes and Brandies, are often categorized as balancing cases. These include *Abrams v. United States*, *Gitlow v. New York*, *Whitney v. California*, and *Schenck v. United States*, in which Holmes set his clear and present danger test. The clear and present danger test, so it is argued, is a balancing test, since

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107 Id. at 614-15.
108 Id. at 616-17. While Pound also points out examples of active mechanical jurisprudence outside constitutional law (in procedure and evidence), he does not cite examples of failure of the courts to be active in constitutional law.
110 268 U.S. 652 (1925).
111 274 U.S. 357 (1927).
112 249 U.S. 47 (1919).
113 See e.g. Horwitz, supra note 13, at 18 (including the clear and present danger test among the different balancing tests emerging in different areas of law after 1910).
it balances the dangers stemming out of speech with the right to free speech, and sets a standard for this balance: speech can only be overridden if its dangers are clear and present. However, there are also other interpretations of the clear and present test that support the view that it is not a balancing test after all. According to these interpretations, Holmes’s test set such a high bar for the infringement of speech that it effectively served as a categorical test, rather than as a balancing test that called for case-to-case balancing. In addition the language and conceptual apparatus of balancing is not very distinct in these cases, which is another reason not to classify them as balancing cases. And finally, the clear and present danger test was conceived during the 1950s and 1960s as directly opposed to a balancing test. Starting from the Dennis v. United States case, which replaced the clear and present danger test with a balancing test, and continuing with Judge Learned Hand’s criticism on the clear and present danger test as a “delusion of certainly” and an “over-simplified judgment” that is opposed to the unavoidable “weighing of values”. At least in the eyes of the contemporaries, Holmes’ clear and present danger test was, therefore, not a balancing test.

Secondly, Justice Brandies is sometimes associated with balancing because of his extensive use of social facts (his ‘Brandies briefs’ as a lawyer, which turned into judicial opinions full of social statistics and facts). However, the outcome of Brandies’ balancing is usually deferential, as in the early balancing mode, rather than activist. His factual reviews are usually intended to show that the legislation should be upheld and that rights rhetoric should not obfuscate social or economic legislation. In addition, Brandies also does not use the rhetoric of balancing very explicitly, and he is often absent from reviews of early uses of balancing.

Thirdly, there are some balancing constitutional opinions by Holmes (more distinctly involving the rhetoric of balancing than his First Amendment opinions), in which he seems to have used balancing actively, rather than only as a means to uncover improper balancing by the other Justices on the Court, as in Lochner. The leading such opinion is his opinion for the Court in Pennsylvania Coal Co. v. Mahon. In this case Holmes overturned a statue restricting the rights of mining, because it interfered too much with the rights of property and contract of the claimants. This case, which used a balancing attitude, should be regarded as a true exception to the early mode of balancing in constitutional law. However, even here, there is one characteristic of Holmes’s balancing that distinguishes it from

\[\text{114 See Rubenfeld, supra note 6, at 826-830. (“Despite appearances, the [clear and present danger test] cannot be understood as a balancing test. It should be understood rather as a test to determine whether an individual has intentionally used speech so closely and directly engaged with a particularized course of prohibited conduct that the individual may be treated as having participated in that conduct… He can be punished for that reason—and not because the harmfulness of his speech outweighs its benefits. The same line of thought explains the unprotectedness of an entire set of speech acts “brigaded” with prohibited conduct: agreements to commit unlawful acts (conspiracy), solicitations of unlawful acts, threats, and so on”) Compare also with the “hightened in practice but fatal in fact” One may also distinguish between a balancing opinion and a point in the line or how far is too far opinion. The second is less concerned with the comparison of two values, and more on the amount of damage created for one value.}

\[\text{115 341 U.S. 494 (1951).}

\[\text{116 LEARNED HAND, THE BILL OF RIGHTS 60 (1959).}

\[\text{117 260 U.S. 393 (1922).}
balancing opinions in current constitutional law. While Holmes’s opinion was based on balancing, he saw it as his duty to prevent future, ad-hoc balancing in similar cases, by creating a clear rule, something which later balancers did not put emphasis on.¹¹⁸

Two last exceptions are reviewed below. Pound seems to have called for active balancing in procedural due process review over administrative tribunals’ decisions.¹¹⁹ And finally, maybe the most notable use of balancing which is antithetical to the use I suggested above is in Zacharia Chaffee’s writings on free speech. These are the clearest examples of modern, active, and pro-rights balancing by a Progressive in the early balancing period, and they must be regarded as precursors for the type of modern balancing which later became common in constitutional law and will be reviewed below.¹²⁰

III. MODERN BALANCING—THE JEHOVAH’S WITNESSES CASES BALANCING—THE LATE 1930S THROUGH THE EARLY 1950S

In 1937 the formalist majority on the Court caved in to political pressure and the anti-formalists won. This meant that balancing entered with the entire anti-formalist apparatus into majority opinions of the Court. However, just at that time, another important change occurred. Just when an anti-formalist majority was consolidated on the Court, a new preference for certain rights (civil and political rights, and the rights of minorities) also appeared. This has had a curious effect on balancing. While the tool itself was retained, when applied in the new atmosphere of preference to civil and political rights, it had to be changed and adapted.

A. Historical Background

Two changes which occurred almost simultaneously, affected the use of balancing after the Lochner era. The first change was the change that ended the Lochner period: the change in the majority on the Court. The confrontation between the Court and the political system over social and economic reform reached its boiling point in 1937, when Roosevelt reacted by proposing his Court-packing plan. As a result, the Court changed course and stopped overturning

¹¹⁸ Holmes was also activist in expanding federal habeas corpus review of state criminal proceedings, which might also be seen as an exception to his deference in constitutional law, although the balancing rhetoric in these decisions is not as distinct. See Moore v. Dempsey, 261 U.S. 86 (1923); Frank v. Mangum, 237 U.S. 309 (1915).

¹¹⁹ See Roscoe Pound, Executive Justice, 55 Am. L.Reg. 141 (1907) (calling for increased judicial review of administrative tribunals, using terminology reminiscent of balancing).

¹²⁰ Zechariah Chafee, Jr., Freedom of Speech in War Time, 32 HARV. L. REV. 932, 958 n.85 (1919); Chaffee was influenced by Pound. Pound suggested the use of balancing in First Amendment in the following article, Roscoe Pound, Interests of Personality (pt. 2), 28 HARV. L. REV. 445, 454 (1915); See also Rabban, The First Amendment in Its Forgotten Years, 90 YALE L. J. 514, 588 (1981).
Roosevelt’s New Deal laws. The following years saw the further consolidation of a pro-New Deal majority on the Court, when new Progressive Justices were appointed to the Court. The judicial balance had therefore shifted, and now the majority on the Court had adopted the same Progressive views that had formerly been used to criticize the Court; it had also adopted the same methodological tools used in this criticism, including balancing.

However, only one year after the consolidation of the New Deal majority on the Court, another important change began to show its early signs. In 1938 Justice Stone wrote his famous Carolene Products footnote. In this footnote, Justice Stone argued that it was necessary to exercise “more exacting judicial scrutiny” when reviewing “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation” or “statutes directed at particular religious or national or racial minorities.”

Stones’ footnote, therefore, accorded civil and political rights and rights of minorities, a preferred position in the constitutional regime, and foreshadowed the levels of scrutiny review that characterized constitutional law in later years.

This new preference for civil and political rights was undoubtedly influenced by events external to the legal sphere, both abroad and at home. The totalitarian regimes of Germany and Italy heightened the concern over civil and political rights, and over the rights of minorities. Furthermore, internal minority struggles, including those of religious minorities, such as Jehovah’s Witnesses, and later, political and racial minorities, such as communists and blacks, brought the issues of civil and political rights further to the forefront of constitutional law.

However, this new attitude also stood in contrast to the former Progressive agenda. In particular, it stood in contrast to the interests-based and anti-activist agenda of the anti-Lochner Progressive jurisprudence. One could not hold

121 Any such characterization of historical changes is necessarily a simplification. For revisionist accounts of the 1937 constitutional crisis, that tend to emphasize continuity rather than change, see [ ].


123 See Aleinikoff supra note 3 at 954 (“A Court under fire may first respond by denying responsibility, by placing blame elsewhere—such as on the Constitution or the nature of the judicial role. When it becomes clear, however, that what is demanded is not an explanation for the bad news but rather a change in outcomes, the Court may start searching for new methods of interpretation. The famous 1937 shift was such a movement… The new form of opinion writing [referring to balancing] was more than a change in literary style; it reflected a new way of looking at constitutional law influenced by almost half a century of ferment in legal philosophy. By the mid-1930’s, the academy’s relentless mocking of the premises and performance of nineteenth century jurisprudence had taken its toll”)


125 See id.

126 See HORWITZ supra note 122 at 77.

127 See, e.g., Thomas C. Grey, Modern American Legal Thought, 106 Yale L.J. 493, 502-3 (1996) (“the Nazi and Stalinist use of… a subservient political judiciary… increasingly dramatized the centrality of due process and legality to liberal democracy… A new liberal rule of law agenda began to emerge as the Court signaled its willingness to expand the ideal of equal justice under law to society’s outcasts and underdogs, its “discreet and insular minorities”.) See also HORWITZ supra note 13, at 252 (arguing that during WWII the Justices on the Supreme Court “were clearly conscious of the need to articulate the differences between democratic and totalitarian values.”).
view that rights are only formalistic covers for interests, and that the Court should be deferential to the legislator, and also hold the view that the Court should strongly protect civil and political rights and rights of minorities from legislative encroachments.

Thus, exactly at the point when the Progressives had reached a majority on the Court, they had to face an important challenge to their set of beliefs. This challenge created the famous split in the Progressive movement over the issue of preferred position to rights and over judicial activism. Some Progressives remained loyal to a wholesale anti-activist and anti-rights position, as a lesson from the *Lochner* period, while others allowed activism in the protections of civil and political rights, and the rights of minorities. But what I would like to stress at this point is that this split was also a split over balancing. For, to acknowledge a preference for civil and political rights and the rights of minorities one had to either abandon balancing altogether, or change its meaning from the former interest-based and anti-activist type, which was created to criticize the *Lochner* era economic review. I suggest that this is exactly what happened in the Jehovah's Witnesses balancing cases. These cases represented the first use of a new type of balancing, which can be termed modern balancing, or rights-based balancing in which balancing was adapted to the post-Lochner era by becoming rights-based and activist, instead of interests-based and anti-activist.

**B. Rights-Based rather than Interests-Based**

The replacement of early balancing by modern balancing, in terms of the preference of rights over policy, is best illustrated by a comparison between two balancing cases: *Home Building & Loan Ass’n v. Blaisdell* (1934)\(^ {128}\) and *Schneider v. State* (1939).\(^ {129}\) The cases were decided only five years apart, yet *Blaisdell* belongs to the *Lochner* period while *Schneider* belongs to the Jehovah’s Witnesses period and uses modern balancing. *Blaisdell* is more precisely categorized as a transitional case. On the one hand, it belongs to early balancing, since its features are those of early balancing. On the other hand, unlike some of the earlier balancing cases, its balancing is in the majority opinion, while the formalistic and pro-rights rhetoric moves to the dissent.

In *Blaisdell* Chief Justice Hughes, writing for the majority, rejected claims that the Minnesota mortgage moratorium law—designed to relieve people affected by debt during the Great Depression—abridged the freedom of contract, which was protected by the Fourteenth Amendment and the contract clause of the Constitution. In rejecting claims that the moratorium law violated the claimant’s constitutional rights, Chief Justice Hughes employed a balancing approach. He argued that the freedom of contract must be balanced with the interest of public welfare:

> It is manifest that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational *compromise between individual*
rights and public welfare. The question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.\(^\text{130}\)

Chief Justice Hughes, therefore, treated the freedom of contract not as a higher plane individual right, but as an interest which is part of the “economic structure upon which the good of all depends.” As such it had to be balanced with the interest of public welfare and a “rational compromise” had to be reached. As a result of this characterization, Chief Justice Hughes arrived at the following test for the constitutionality of the mortgage moratorium law, which he maintained the law had passed: The law was constitutional if it addresses “the protection of a basic interest of society,” (such as the alleviation of the difficulties created by the depression) and was a reasonable way to address such an interest.\(^\text{131}\) Justice Sutherland’s dissenting opinion in the case represented the pro-rights and formalist attitudes that early balancing responded to. Justice Sutherland bemoaned the erosion of individual rights and liberties signaled by the majority opinion, and foresaw a slippery slope starting with the \textit{Blaisdell} case and ending with the destruction of individual rights altogether.\(^\text{132}\)

While \textit{Blaisdell} represented early, interests-based, balancing, the case of \textit{Schneider v. State} (1939)\(^\text{133}\) represented the shift to modern, rights-based, balancing. Written just a few years after \textit{Blaisdell}, \textit{Schneider’s} balancing is already set in a completely different context, and used in a completely different way.

\textit{Schneider} was the first case to use balancing explicitly in First Amendment jurisprudence. The case involved a city ordinance that limited the distribution of handbills in the streets of the city because they created litter. A member of the Jehovah’s Witnesses religious sect was convicted under those ordinances for distributing handbills on the street. Justice Roberts, writing for the Court, applied balancing when he argued that the “courts must weigh the circumstances and... appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.”\(^\text{134}\) At first blush, Roberts’ balancing test seems similar to Hughes’ test in \textit{Blaisdell} (appraising the reasonability of the measure vis-à-vis the importance of the public interest). A closer look into the reasoning, however, shows substantial differences.

Justice Roberts began his argument as follows:

This court has characterized the freedom of speech and that of the press as \textit{fundamental personal rights and liberties}. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It

\(^{130}\) 290 U.S. 398, 442.

\(^{131}\) \textit{Id.} at 443.

\(^{132}\) \textit{Id.} at 448 “He simply closes his eyes to the necessary implications of the decision who fails to see in it the potentiality of future gradual but ever-advancing encroachments upon the sanctity of private and public contracts.” (Sutherland J. dissenting)

\(^{133}\) See supra note 129.

\(^{134}\) 308 U.S. at 151.
stresses, as do many opinions of this court, the importance of preventing the
restriction of enjoyment of these liberties.135

As a result of this characterization of the rights, Justice Roberts arrived at the
following conclusion:

*Mere legislative preferences* of beliefs respecting matters of public convenience
... [are] insufficient to justify such [regulation] as diminishes the exercise of
rights so vital to the maintenance of democratic institutions...The public
convenience in respect of cleanliness of the streets does not justify an exertion
of the police power which invades the free communication of information and
opinion secured by the Constitution.136

These statements starkly contrast with Chief Justice Hughes’ early balancing
approach. While Hughes’ opinion stressed that rights have no immunity from
considerations of public policy, and indeed must be seen as part and parcel of
public policy, Roberts’ opinion stressed the exact opposite—that the right of free
speech is elevated above public interests.

Indeed, Justice Roberts’ opinion resembled the rights rhetoric of the formalist
Court, which was previously criticized by the Progressives, rather than the
Progressive writings themselves. Justice Roberts’ rejection of “[m]ere legislative
preferences of beliefs respecting matters of public convenience” resembled
the reasoning of Justice McKenna (“[t]here is a menace in the... judgment of all
rights, subjecting them unreservedly to conceptions of public policy”) rather than
Pound’s criticism (“[t]he ‘rights’ of which Mr. Justice McKenna spoke... were...individual interests ... There is a policy in the one case as much as in the
other.”137) It also resembled the reasoning of Justice Peckham in *Lochner* (“[t]here
must be more than the mere fact of the possible existence of some small amount
of unhealthiness to warrant legislative interference with liberty.”138) rather than
Holmes’s dissent in that case.139

However, while using the same robust rights rhetoric that characterized the
*Lochner* era Court, the *Schneider* case did not use the same formalist
methodology that also characterized the *Lochner* era Court, but a balancing
attitude instead. This was done in the following way: as a balancing opinion, the
*Schneider* opinion identified the problem in the case as one of conflicting
considerations (free speech versus cleanliness), and not as one that was
determined by the conceptual meaning of rights. Thus, it signaled itself as a
Progressive and anti-formalist opinion. However, in the balance itself, the opinion
did not equate the individual right with, or put it on the same plane as, the
governmental interest, as in early Progressive balancing. Instead, it separated
the right from, and gave it a preferred position over, the governmental interest.

What we witness in *Schneider* is therefore a new type of balancing, which is
adapted to a pro-rights attitude. Instead of protecting rights in a formalistic

135 *Id.* at 149-151.
136 *Id.* at 151, 163 (emphases added).
138 198 U.S. at 59.
139 See *supra* notes 64 and accompanying text.
fashion, as in the *Lochner* Court decisions, or attacking rights through balancing, as in the early Progressives jurisprudence, the *Schneider* opinion used balancing in the aid of protecting rights from public interests.

Finally, the balancing of the *Schneider* case led to another feature in connection with its pro-rights attitude. Giving certain rights a special status put a special burden on the government whenever encroaching on these rights. The Court therefore began to use terminology that stressed this special burden on the government. This terminology, which characterizes constitutional law to this day, included terms such as, “undue burden” upon the right, “compelling state interest,” “least restrictive means,” and “narrowly drawn means,” which were requirements imposed on government whenever it attempted to burden the right. These terms were usually absent during earlier uses of balancing, since they stood in opposition to the Progressives’ claim that rights should not be used to create “[overly strict] formulas to which governmental action must conform.”

Later cases of balancing that followed *Schneider* further illustrate the use of modern balancing. In *Cantwell v. Connecticut* (1940) (concerning door to door solicitation of money by Jehovah’s Witnesses) the Court required that the act in question be “narrowly drawn to prevent the supposed evil,” otherwise it would lay a “forbidden burden upon the exercise of liberty protected by the Constitution.”

In *Minersville School Dist. v. Gobitis* (1940) (a Jehovah’s Witness’s refusal to salute the flag) Justice Stone wrote in dissent that governmental goals could be secured through other means that “did not outweigh freedom of speech or religion.” Five years later, in the commerce clause case of *Southern Pacific Company Co. v. Arizona* (1945), Justice Stone asserted that the Court should determine “the... extent of the burden which the state regulations... impose on interstate commerce” and questioned whether the effect of the regulation was enough to “outweigh the protection of the interest safeguarded by the commerce clause.”

**C. Activist rather than Deferential**

Modern balancing gave rights a preferred position in the balancing process. This had obvious ramifications in terms of the Court’s role in the balancing process. If the balancing conflict was characterized as a conflict between a preferred individual right and a lower-level governmental interest, then it was for the Court, rather than for the legislature, to address the balance, in order to protect the individual right from legislative encroachments. Furthermore, balancing has gone from being perceived as a tool that was principally a legislative tool, used by...

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141 310 U.S. 296.
142 *Id.* at 307.
143 310 U.S. 586.
144 *Id.* at 603. Justice Stone applies in this dissent his theory of the preferred status for civil and political rights, by using modern balancing, rather than early balancing.
145 325 U.S. 761 (1945).
146 *Id.* at 770.
the judiciary to complement legislative work in private law, to being perceived as a tool that was principally a judicial tool, and used regularly by the courts in constitutional law also.

In *Schneider*, Justice Roberts wrote as follows:

> And so, as cases arise, the delicate and difficult task falls upon the Court to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.\(^{147}\)

First, this statement stresses that balancing is a task that “falls upon the Court,” thus indicating that the Court’s balancing is not subsidiary or complementary to the balancing performed by the legislature. Secondly, the decision characterizes balancing as a “delicate and difficult task.” Such characterization signals that it is a task suited for the judiciary rather than the legislature: only the judiciary could apply the kind of careful, levelheaded reasoning required by “delicate” and “difficult” balancing.\(^{148}\) Finally, there is an understanding that balancing would be required again and again “as cases arise” and that it would depend on the specific “circumstances” of the case.

Note that this new activist use of balancing was also different than active balancing in private law, which was described in Part II. For there, it was usually the case that balancing produced a rule, which required no further balancing in future cases. The logic behind such balancing was that the Court was functioning as a place-holder for the legislature, using balancing in a legislative and policy-oriented manner, whenever legislation and common law were incomplete. Here, on the other hand, the function of balancing was viewed as a typical judicial function, rather than a typical legislative function. The product of balancing, accordingly, was not the creation of a new rule, but a decision in the particular case. The distinction is not un-similar to the distinction that Professor Nimmer drew between ad hoc and principled balancing.

This new activist use of balancing can be summarized as follows: balancing is to be used by the Court in an ad hoc fashion, as cases arise, without creating specific rules that would make further balancing unnecessary.\(^{149}\)

Later balancing cases that followed *Schneider* further illustrated these activist features of modern balancing. In *Thornhill v. State of Alabama*,\(^{150}\) concerning the regulation of picketing, Justice Murphy quoted *Schneider* as saying that it is imperative that “when the effective exercise of these rights is claimed to be abridged the courts should 'weigh the circumstances' and 'appraise the

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147 308 U.S. at 151 (emphases added).

148 Although the same characterization could be used also for the opposite purpose. Justice Frankfurter characterized balancing as delicate, in order to argue that it should be done by the legislature. *See infra* the *Dennis* case

149 Several commentators have argued that such use of balancing results in the Court taking on the task of an administrative agency. *See Kahn,* supra note 23 at 18-25 (using the term “administrative balancing” to describe some of Justice Powell’s balancing), and Louis Henkin, *Infallibility Under Law: Constitutional Balancing,* 78 COLUM. L. REV. 1022, 1041 (1978) (using the similar term “regulatory” to describe the Court’s balancing in commerce clause cases: “the doctrine of balancing, and its ad hoc application, have taken hold as a dominant approach to commerce clause cases,” and consequently “the courts have become a kind of regulatory agency.”).

150 310 U.S. 88 (1940).
substantiality of the reasons advanced’ in the support of the challenged regulations.”151 Justice Murphy therefore also stressed that it is for the courts to balance and that they must do so whenever “these rights are abridged.” In the Jehovah’s Witnesses first flag-salute case, Minersville School Dist. v. Gobitis, 152 Justice Stone (in dissent which became the majority opinion in the second flag salute case) also emphasized that balancing was the function of the courts, and had to be done again and again whenever the right was burdened:

Where the performance of governmental function is brought into conflict with specific constitutional restrictions, there must, when that is possible, be reasonable accommodation between them so as to preserve the essential of both and it is the function of courts to determine whether such accommodation is reasonably possible.153

Finally, in the case of Martin v. Struthers154 a Jehovah’s Witnesses case concerning door-to-door solicitation, Justice Black explicitly acknowledged the Court’s activist balancing role:

We are faced in the instant case with the necessity of weighing the conflicting interests of the appellant in the civil rights she claims… against the interest of the community… In considering legislation which thus limits the dissemination of knowledge, we must ‘be astute to examine the effect of the challenged legislation’ and must ‘weigh the circumstances and . . . appraise the substantiality of the reasons advanced in support of the regulation.’ [quoting from the Schneider case]155


I end my review of early balancing with a short review of the famous Black-Frankfurter debate over First Amendment balancing during the McCarthy era (early 1950s through the early 1960s) which followed the Jehovah’s Witnesses cases period. The McCarthy era provided another encounter of the balancing method with minority groups’ rights claims. This time the minority group was not a religious minority as in the previous Jehovah’s Witnesses cases, but a political minority—members of the Communist Party and those holding Communist related views. This encounter produced one of the big debates in American law over the issue of balancing, in which Justice Hugo Black and Justice Felix Frankfurter stood on opposing sides.156 I suggest that placing this debate within

151 Id. at 96.
152 310 U.S. 586 (1940).
153 310 U.S. 586, 603.
154 319 U.S. 141 (1943).
155 Id. at
156 Justice Harlan was another participant in this debate which stood on the side of Justice Frankfurter. The major cases involved in this debate were American Communications Ass'n v. Douds, 339 U.S. 382 (1950); Dennis v. United States, 341 U.S. 494 (1951); Barenblatt v. United
the general development of balancing, and within the framework of the two types of balancing that were hitherto suggested, might help understand some of its aspects. It may furthermore show interesting similarities between the two opposing Justices on the issue of balancing.

A. The Rejection of Rights-Based Balancing and the Dennis Case

Both Justices Black and Frankfurter were Roosevelt nominees to the Court, and were therefore pro New Deal and Progressive Justices. They were both very much aware of the deficiencies of the *Lochner* Court’s jurisprudence, and they both incorporated Progressive legal thought and Progressive critique into their own jurisprudence, including, during their earlier judicial opinions, balancing. One might expect, therefore, that in the McCarthy era cases, which concerned the free speech and free association rights of a political minority, they would both use the new type of balancing that was developed in the Jehovah’s Witnesses cases; that is, that they would use rights-based and activist balancing as a way of reconciling Progressive balancing and anti-formalism, with the new preference for civil and political rights, and rights of minorities. However, during the McCarthy period, both Justice Frankfurter and Justice Black did not use balancing in the same way that it was used in the Jehovah’s Witnesses cases, as is evident in the central case of this period, *Dennis v. United States*.

*Dennis* concerned the indictment of the leaders of the Communist Party of the United States for conspiring and advocating the violent overthrow of Government. Frankfurter concurred in the result with Chief Justice Vinson’s majority opinion upholding the indictment, while Black fiercely dissented. In his majority opinion, Chief Justice Vinson used balancing. He cited the Jehovah’s Witnesses *Schneider* case, and endorsed the lower court’s balancing test, written by Judge Learned Hand. Hand’s test in that case, known also as the “Hand formula”, held that “[i]n each case [the courts] must ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.” Applying this test to the case, Vinson concluded that the interest of national security overrode the interest in free speech, and upheld the conviction of the leaders of the Communist party.

Frankfurter concurred in the result and also used balancing in his opinion. In a strong anti-formalist and pro-balancing passage he wrote: “the demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the

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158 See infra note 171 for a review of early cases in which Justice Black used balancing.

159 341 U.S. 494 (1951).

160 Id. at 497.

161 Supra note 157.

162 341 U.S. at 510.
confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.\footnote{Id. at 524-5.} However, the following passage shows that his balancing was different than Vinson’s in one crucial point: unlike Vinson’s it was coupled with judicial deference to the legislative balance. Frankfurter wrote:

But how are competing interests to be assessed? Since they are not subject to quantitative ascertainment, the issue necessarily resolves itself into asking, who is to make the adjustment? – who is to balance the relevant factors and ascertain which interest is in the circumstances to prevail? Full responsibility for the choice cannot be given to the courts… History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures. Primary responsibility for adjusting the interests which compete in the situation before us, of necessity, belongs to the Congress.\footnote{Id. at 525-26.}

Unlike Vinson, therefore, when Frankfurter identified the case as a balancing case, he did not go ahead and balance the conflicting interests himself. Instead he concluded, like Holmes and Pound before him, that “[p]rimary responsibility for adjusting the interests which compete in the situation… belongs to the Congress.”\footnote{See id.} Furthermore, Frankfurter asserted that the “competing interests… are not subject to quantitative ascertainment,”\footnote{See id.} thus contradicting Chief Justice Vinson’s endorsement of the Hand Formula, which was based on a quantitative ascertainment of probabilities. Frankfurter therefore did not use rights-based and activist balancing as in the Jehovah’s Witnesses cases, but rather early interests-based and deferential balancing, as in the writings of Holmes and Pound.

Justice Black’s dissent, on the other hand, represented an absolutist and literalist approach towards free speech that rejected the use of balancing altogether. The following passage from his dissent shows his literalist approach in the case:

Undoubtedly, a governmental policy of unfettered communication of ideas does entail dangers. To the Founders of this Nation, however, the benefits derived from free expression were worth the risk. They embodied this philosophy in the First Amendment’s command that “Congress shall make no law…abridging the freedom of speech, or of the press.”\footnote{Id. at 580.}
Both Black and Frankfurter, therefore, rejected modern rights-based balancing: Frankfurter rejected it by using early, interests-based, balancing, while Black rejected it by rejecting balancing altogether. The outcome was a fierce debate over balancing itself.

B. Suggested Explanations

But what lies behind this debate over balancing? Why did both Justices end up interpreting the Dennis case, and the cases that followed it, so differently despite the fact that they both agreed on the substantive issues in these cases (they both rejected McCarthyism\textsuperscript{168}), and they both rejected the Lochner era activist approach in economic review?

The previous Part showed the results of reconciling the conflict between balancing and the new preference for civil and political rights: the result was adapting balancing by making it rights-based. The Black-Frankfurter debate, I suggest, is the result of not reconciling this conflict. If one does not reconcile the conflict between balancing and the preferential treatment to rights one must choose between the two, which is what Justices Black and Frankfurter did: the one Justice chose preferential treatment to rights, while the other chose balancing and rejected the preferential treatment to rights.

For Frankfurter, cases such as Dennis presented the same dangers stemming from judicial activism as cases such as Lochner. The Court had to defer to the legislative balance in the latter cases just as it had to defer to the legislative balance in the former ones. And the right to free speech had to be lowered to the status of an interest, just as the freedom of contract had to, lest the Court fall back into Lochnerian formalism. Frankfurter therefore rejected the idea that some rights can be distinguished from others, by making them proper reasons for judicial activism. Coherence and following the lines of the early Progressives brought him to a wholesale deference to the legislative balance, unless the constitutional criterion left no room for interpretation.\textsuperscript{169}

Justice Black on the other hand saw a substantial difference between Lochner and Dennis. While in the former case the Court had to show deference to the legislature, in the latter it had to intervene. Activism in Dennis was very different than activism in Lochner, according to Black, and rather than representing a departure from Progressive logic, it followed from it. Maybe the best case for this claim is to be found in a contemporary commentator on the Black Frankfurter debate, Laurent Frantz:

\begin{quote}
[J]udicial deference to a legislative judgment, curbing the political right of minorities is hardly the same as the judicial restraint espoused by Justices Holmes and Brandies, which allows considerable latitude to legislative judgments on the need for economic reform. “Activism” in economic review narrows the range of popular choice by proscribing that there are certain legislative experiments which
\end{quote}

\footnote{\textsuperscript{168} Black’s rejection of McCarthyism is evident from his Dennis dissent. For Frankfurter’s rejection of McCarthyism See infra note 173.}

\footnote{\textsuperscript{169} See e.g.}
may not be attempted. “Activism” in libertarian review prevents a narrowing of the range of popular choice by preventing Congress from circumscribing that area of permissible discussion and advocacy which is the ultimate source of social change and legislative innovation. The historical evidence, far from suggesting that the two go together, indicates that they have always tended to be mutually exclusive.\textsuperscript{170}

Why, finally, did Black not adopt the modern type of balancing, as in the Jehovah’s Witnesses cases, which gave rights a preferred position in the balance? Black could have used balancing and retained the distinction between preferred rights and other rights. He could have done so by applying modern (rights-based) balancing only in cases that involved preferred rights, and applying early (interests-based) balancing in the \textit{Lochner}-type cases of social and economic rights. Indeed, a review of his earlier judicial record suggests that he did exactly that during the Jehovah’s Witnesses cases era of the 1940s.\textsuperscript{171}

It seems, however, reasonable to suggest that by the time the \textit{Dennis} case was argued it was clear to Black that balancing (including modern balancing) was not protective enough of the rights of minorities in times of a national security crisis and hostile public opinion. Once Black witnessed that the same tool (balancing) that had protected minorities’ rights in the Jehovah’s Witnesses cases, could be used during the McCarthy era, just as effectively, to protect governmental interests at the expense of minority rights, he decided to abandon balancing altogether in favor of a formalist protection of rights. He concluded his dissent therefore, by expressing the wish that: “in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.”\textsuperscript{172}

Finally another interesting observation seems to arise out of the analyses of the Black/Frankfurter debate in view of the history of balancing. On the issue of balancing, at least, despite of their fierce differences, they seem to have had a

\textsuperscript{170} Frantz, \textit{supra} note 2 at 1447.
\textsuperscript{171} During the Jehovah’s Witnesses cases era, Justice Black used balancing in at least two important cases. First, in the Jehovah’s Witnesses case of \textit{Martin v. Struthers} (1943) \textit{319 U.S.} 141 (1943) (involving the distribution of handbills by Jehovah’s Witnesses and a city ordinance that banned such distribution), Black wrote a typical modern balancing opinion, in which he quoted \textit{Schneider}, was activist, and gave free speech rights a preferred position in the balance. In another case, the \textit{Arizona} case quoted earlier, Black wrote an early balancing opinion, resembling very much Frankfurter’s early balancing opinion in \textit{Dennis}. I suggest that the latter case involved what he perceived to be economic regulation, and not preferred civil and political rights. He therefore objected to the replacement of the legislative balance with the judicial balancing, but not because of a formalistic interpretation of rights, like he did in his dissent in \textit{Dennis}, but because, like Frankfurter, he believed the balance should be left to the legislature. The \textit{Korematsu} case, \textit{Korematsu v. United States}, 323 \textit{U.S.} 214 (1944) (Black J. writing for the Court), is another balancing case by Justice Black, which pre-dates the McCarthy era. I suggest that it could also be classified as modern balancing. Despite of the fact that the result of the case was unfavorable to the protection of rights, the case is still cited today for the strict scrutiny test that it applies to the rights of racial minorities. Black famously wrote that “all legal restrictions which curtail the civil rights of a single racial group are immediate suspect” and should be given “the most rigid scrutiny.” \textit{Id.} at 216.
\textsuperscript{172} \textit{341 U.S} at 581
common enemy—modern, rights-based and activist balancing, espoused in the Dennis case by Chief Justice Vinson. We have seen how Frankfurter’s opinion was opposed to Vinson’s. However, Black’s warning against subjecting the First Amendment to “notions of mere “reasonableness” should be similarly seen as directed against Vinson’s modern balancing. After all, Frankfurter did not find the law effective or reasonable in itself. Frankfurter—believing in early, interests-based and deferential balancing—merely claimed that he had no authority to intervene in the case. It was Vinson who found the law reasonable on the merits using the Hand formula.

Thus, Justices Black and Frankfurter shared a similar distaste for modern, rights-based balancing, as part of their common Progressive heritage of mistrust of the judiciary. They both rejected rights-based balancing, and the idea that it was for the Court to balance the different interests in society, since they both found in such balancing the potential for abuse of judicial power, which characterized the Lochner era Court. They differed however in resolving this potential threat. Frankfurter sought to solve the problem of judicial excess by deferring to the legislative balance: the Court should leave balancing to the legislature. Black, on the other hand, seemed to defer to another kind of balance—the balance of the founding fathers that would be found in a literal and formalist reading of the Constitution.

173 Frankfurter openly criticized the law in a significant portion of his opinion See Id. at 553-56. After explaining why he will not repeal the law, or the indictment, Frankfurter wrote: “The wisdom of the assumptions underlying the legislation and prosecution is another matter. In finding that Congress has acted within its power, a judge does not remotely imply that he favors the implications that lie beneath the legal issues.” He then went on to cite from George F. Kennan’s article on the New York Times, “Where do You Stand on Communism?” (May 27, 1951): “If our handling of the problem of Communist influence in our midst is not carefully moderated—if we permit it, that is, to become an emotional preoccupation and to blind us to the more important positive tasks before us—we can do a damage to our national purpose beyond comparison greater than anything that threatens us today from the Communist side.”

174 Identifying Vinson’s opinion as a modern balancing opinion is in tension with the fact that Vinson opted for a deferential result in his ruling (he did not overturn the conviction) rather than activist one. However, it seems to me that the crucial point is not so much in the result as in the self-conception of the judicial role regarding balancing—whether the opinion reflected the idea that it is for the Court to balance (Vinson), or for the legislature (Frankfurter). This is also the reason why I classify another case that resulted in judicial deference—the Korematsu case in which the Court upheld the confinement of Japanese citizens in camps during the WWII—as a modern balancing case, and rights-based case. See supra note 171.

175 Black’s purported deference to the Constitution is manifest is his reference to the Founding fathers: “To the Founders of this Nation, however, the benefits derived from free expression were worth the risk.” 341 U.S. at 580. A modern day Justice that similarly claims to combine the rejection of balancing with formalism and literalism in the protection of rights is Justice Antonin Scalia. See infra
V. BALANCING TODAY: INTERESTS-BASED OR RIGHTS-BASED, AND WHICH IS BETTER?

In conclusion, the story of balancing is therefore also the story of the great schism in the Progressive movement in the post *Lochner* era. Coincidence had it, that exactly at the point when the Progressives had won a majority on the Court the new preferred position to civil liberties appeared on the scene of constitutional law. This created a split between the Progressives over the preferred position of civil liberties, which was also a split over balancing. For, to acknowledge a preference for civil and political rights, one had to either abandon balancing, or change its meaning from the former interest-based and anti-activist type, which was created to criticize the *Lochner* era economic review. Modern balancing in the Jehovah’s Witnesses cases was the adaptation of balancing in making balancing rights-based and activist. Justice Black abandoned balancing altogether in favor of judicial formalism and literalism in the protection of rights. Justice Frankfurter rejected the preferential treatment of rights and remained loyal to interests-based balancing and judicial self-restraint.

A. Historical Aftermath and Balancing Today

Following the Black-Frankfurter debate, balancing was viewed as inherently pro-government and conservative, and hence, mostly neglected in the late years of the liberal Warren Court. Most of the major constitutional decisions of the Warren Court did not use balancing rhetoric. These included *Brown v. Board of Education*, *Gideon v. Wainwright*, *The Reapportionment Cases*, *Griswold v. Connecticut*, *Shelley v. Kramer*, *Loving v. Virginia*, *Mapp v. Ohio*.

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176 See HORWITZ, supra note 122 at 68 (“As a result of this blatant misuse, the balancing test in civil liberties litigation deservedly acquired a bad reputation among liberal justices, and Warren Court opinions are filled with angry denunciation of its use.”); John H. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1490-91 (1975) (“[Balancing] was hardly the attitude of the Warren Court, at least in its later years. During [that period] the Court was making clear its dissatisfaction with a general balancing approach...”) See also Frantz supra note 6 at 1429 (“[w]here the compelled disclosure has dealt with Communism ... the balance has been struck in favor of the government.”).

177 347 U.S. 483 (1954). See Aleinikoff, supra note 3, at 998 (arguing that *Brown* and the cases cited in the following footnotes are not balancing cases: “Of course... there were competing interests at stake. But the Court based its decision—as has society—not on the balance of those interests, but on the intolerability of racial discrimination.”).


180 381 U.S. 479 (1965).

181 334 U.S. 1 (1948).

182 388 U.S. 1 (1967).

*Brandenburg v. Ohio*,184 and *Cohen v. California*.185 Some Warren Court decisions even expressed overt rejection of balancing.186

However, a renewed interest in balancing was evidenced towards the end of the Warren Court era, and by the early 1970s balancing was being used again in more and more cases.187 From the mid-1970s onwards the use of balancing grew exponentially, and balancing infiltrated into almost every area of constitutional law. So much so that by 1987 Alexander Aleinikoff termed the entire constitutional period “the age of balancing”188 and Paul Kahn wrote that “the word ‘balance’ or ‘balancing’ does appear in 214 of the 473 cases decided in the last three years,” referring to the years 1984-1986.189

By the late 1980s Justice Antonin Scalia had begun a judicial campaign against the use of balancing,190 corresponding to criticism on balancing in academia.191 This criticism appeared to have caused some decline in the use of balancing during the early 1990’s.192 However, despite of a certain decline in the use of balancing in the early 1990s, current constitutional jurisprudence is still loaded with the rhetoric of balancing and the use of balancing even appears to be increasing in the late 1990s and early 2000s.193

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186 See, e.g., Chief Justice Warren in his opinion for the Court in United States v. Robel, 389 U.S. 258, (1968): “it has been suggested that this case should be decided by ‘balancing’ the governmental interests… against the First Amendment rights... This we decline to do.” *Id.* at 268 n.20.
187 *Roe v. Wade* is commonly regarded as a balancing case.
188 This is in reference to Aleinikoff’s article, *Constitutional Law in the Age of Balancing*, *supra* note 3.
189 See Kahn *supra* note 23, at 3 n. 14. See *infra* note 193 for a followed up this survey for the years 1987-2002.
190 See, e.g., *Bendix Autolite Corp v Midwesco Enterprises, Inc*, 486 US 888, 897-98 (1988) (Scalia concurring) (criticizing the balancing test in dormant commerce clause cases, stating that it is "like judging whether a particular line is longer than a particular rock is heavy"). For a similar criticism on the Court see *Camps Newfound vs. Owatonna*, 520 US at 618-20 (Thomas dissenting) (arguing that the “balancing” methodology invites judgments based upon policy rather than text).
191 The leading criticism was in Aleinikoff’s 1987 article, Aleinikoff *supra* note 3, (arguing that “[b]alancing has turned us away from the Constitution, supplying ‘reasonable’ policymaking in lieu of theoretical investigations of rights, principles and structures.” *Id.* at 1004). See also Kahn’s article from the same year, Kahn *supra* note 23 (arguing that “[b]alancing cannot provide an adequate foundation for judicial review.” *Id.* at 5). Another example, albeit of a more moderate criticism on balancing, is a 1988 article by Judge Frank Coffin, Frank N. Coffin, *Judicial Balancing: The Protean Scales Of Justice*, 63 NYUL. REV. 16 (1988);
192 For an example of the notion that the use of balancing has declined in the early 1990s see, e.g., Stephen E. Gottlieb, *The Paradox of Balancing Significant Interests*, 45 HASTINGS L. J., 825 (1994) (“The notion of balancing rights and interests has come under increasing criticism and declining explicit judicial use.”).
193 In a rather rudimentary survey which I have conducted (on file with author), I attempted to follow up Kahn’s survey of the commonness of balancing in Supreme Court cases. Kahn found out that balancing appeared in 214 out of 473 cases in the years 1984-1986, i.e., in approximately 45% of the cases decided in these three years. According to my survey (I followed Kahn’s preference of not including per curiam cases in the survey, and also looked for the words ‘balance’ or ‘balancing’, I excluded irrelevant occurrences of those words, as in ‘account balancing’ for example.) this
Balancing today is therefore extremely prevalent in constitutional law, but what kind of balancing: interests-based or rights-based? It seems to me that one can find both types of balancing in the writings of current Justices and legal thinkers. The boundaries between the two types of balancing may have been blurred somewhat, but one can still identify today balancing that comes hand in hand with policy-oriented and interests-based argumentation, and balancing that comes hand in hand with a strong rhetoric of rights.

As for the first kind of balancing, a good example might be the writings of Judge Richard Posner. An advocate of balancing, Posner identifies himself as a follower of the early Progressives (especially of Holmes) and eschews a certain strand of rights rhetoric and moral theory of law, which he identifies mainly with Ronald Dworkin. Basing balancing on law and economics analysis is another aspect of his interests-based and policy-based balancing. Posner’s balancing seems therefore to belong to interests-based early balancing, since it is a tool for maximizing social interests, and for demystifying a heightened rights rhetoric, which is viewed as a cover-up for moral and political predispositions.

On the other hand, Ronald Dworkin can be considered a rights-based balancer. This claim might come as a surprise to those relying on Dworkin’s early work in which he rejected the balance of rights against interests, and argued that rights should be taken seriously as trumps for social utility considerations. Percentage has steadily dropped in the following years, so that in the years 1987-1989, 42% of the cases included balancing (184 out of 432 cases) in the years 1990-1992, 37% of the case included balancing (133 out of 357) and in the years 1993-1995, 30% of the cases included balancing (90 out of 292 cases). However there is a certain rise in the use of balancing in the years 1996-1999, with 35% of the cases including balancing (90 out of 252 cases) and 36% in the years 2000-2002 (86 out of 236 cases). The results seem to correspond to the idea that the criticism on balancing in the late 1980s and early 1990s caused a decline in the use of balancing in Supreme Court adjudication. The results however show that the commonness of balancing, even during the early 1990s, remains very high (over 30%) and that there might be some renewed emphasis on the use of balancing in the late 1990s and early 2000s. Finally, the survey is only a rough estimation of the commonness of balancing. It does not distinguish between cases in which balancing appears in more than one opinion, and those in which it appears only in one opinion, and between types of balancing and different kinds of rights that are being balanced. Furthermore, there are considerations which are not accounted for in the survey. For example, during the period surveyed the total number of Supreme Court cases decided each year has declined dramatically, almost in half (interestingly corresponding to the decline in the use of balancing). Although the survey compares the percentage of balancing cases of the total number of cases, a decrease of the total number of cases might also have some indirect effect on the commonness of balancing.

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194 This is especially true with regards to the self-restrained aspect of early balancing, which seemed to have almost disappeared after Frankfurter’s balancing.


196 Posner has edited The Essential Holmes (1997) with an introduction. He has elaborated his conception of Pragmatism in several books, including, lately, Law, Pragmatism and Democracy (2003).

197 Posner has had an extensive debate with Dworkin over the relevance of moral theory to law. For an example see Richard Posner, The Problematics of Moral and Legal Theory (1999) (arguing that moral philosophy is of little use to lawyers and judges).

198 See Ronald Dworkin, Taking Rights Seriously (1977) at 198: “The metaphor of balancing the public interest against personal claims is established in our political and judicial
However, even in his early work, Dworkin does not reject balancing altogether, and much of his rights-theory, especially in his later work, can be interpreted along the lines of the Jehovah’s Witnesses cases balancing—i.e., balancing with a strong preference for rights in the balance and a high bar for the infringement of rights.

Identifying the two types of balancing in the workings of current Supreme Court Justices seems even more precarious than identifying them in the writings of current legal thinkers. I will leave this to the reader therefore. However, I will attempt a categorization of two Justices of the 1970s and 1980s according to the two types of balancing: Justice William Brennan and Justice Lewis Powel. Justice Brennan’s emphatic rights-jurisprudence and activist judicial protection of rights, together with his anti-formalism and use of balancing, seem to place him squarely within the rights-based balancing model. Justice Powel’s balancing, however, seems to have a mixed tendency of interests-based and rights-based balancing. His use of balancing tends towards the interests-based model in his multi-pronged and fact intensive balancing reviews. However, his jurisprudence is also couched in the rhetoric of rights, and assigns the same moral significance to the separation of rights from policy that differentiates it from the early Progressives’ use of balancing. His balancing can therefore represent a combination of the two types of balancing, albeit leaning towards the rights-based model.

Finally, constitutional balancing is also an international phenomenon. In the community of international constitutional scholars and Justices, I would like to mention two figures which are prominent balancers. Both seem to use the rights-based model of balancing: Canadian law professor, David Beatty, and the recently retired President of the Supreme Court of Israel, Aharon Barak. David Beatty is a leading international advocate of proportionality and balancing tests. His extensive review of the use of these tests in the constitutional courts of India, Germany, Canada and other countries, stands both as a testimony to their worldwide prevalence, and, according to Beatty, as a sign of their crucial role in constitutional thinking. His view of proportionality is however closely related to

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rhetoric, and this metaphor gives the model both familiarity and appeal. Nevertheless, the model is a false one,” and also at 199 n. 1: “We must treat the violations of dignity and equality as special moral crimes, beyond the reach of ordinary utilitarian justifications.” See also, recently, Ronald Dworkin, “It is Absurd to Calculate Human Rights According to a Cost-Benefit Analysis”, Comment on THE GUARDIAN, May 24, 2006 (arguing that “Politicians are pandering to an irresponsible media when they invoke the balance between liberty and security.”)


200 See e.g. Powell’s balancing test in Mathews v. Eldridge, 424 U.S. 319 (1976) (concerning the procedural due process requirements that attach to the termination of social security disability benefits). Powell even relies on Richard Posner’s writings to arrive at an economically based balancing test. Id. at

201 See especially Powell’s balancing test in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 292-93 (1978) (concerning the equal protection clause and affirmative action in university admissions programs.)

202 See DAVID M. BEATTY, THE ULTIMATE RULE OF LAW (2004) (reviewing proportionality and balancing tests worldwide, and arguing for proportionality as the preferred mode of constitutional construction)
his conception of a new constitutional order based on rights and on active judicial review, and is a far cry from the anti-rights and deferential tendency of the early Progressives. Aharon Barak is one of the most influential constitutional writers in the international sphere. Barak relies heavily on balancing, while, like Beatty, advocating judicial activism, and couching his jurisprudence in a strong the rhetoric of rights.203

Balancing today, therefore, includes both rights-based and interests-based manifestations. However, as even the short list of abovementioned examples seems to show, the rights-based version of balancing has become much more prevalent than the interests-based version. Indeed balancing tests, as well as proportionality tests, have become inseparable from, and a leading characteristic of, the global post-WWII phenomenon of a rights culture and of constitutionalism.204 In historical perspective, as this Article attempted to show, this is almost ironic, since balancing was first devised as an attack on rights.

B. Evaluation and Anti-Formalism

Finally, I would like to address two questions regarding the two types of balancing: the question of evaluation (i.e., “which of the two types of balancing is better?”) and the question of coherence with anti-formalism (i.e. “which of the two types of balancing is more anti-formalist?”)

Evaluating a legal mode of reasoning, such as balancing, is a tricky enterprise. One can evaluate modes of reasoning according to different criteria. In particular one can evaluate them according to the substantive results they produce,205 or according to their coherence, transparency, rigor, and so on. I will concentrate on a third criterion: a functional criterion. That is, the question that I would pose would be how well the balancing tool and the balancing metaphor are adapted to the ends for which they were used, in each of the two types of balancing.

According to such functional criterion it seems to me that early, Progressive, interests-based balancing fares better than modern, rights-based balancing. In Part I, and also elsewhere, I argued that one of the main traits of the balancing metaphor is that it indicates that the considerations that are implicated in a certain decision are on the same level.206 That is, they are considerations that can be

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203 See AHARON BARAK, JUDICIAL DISCRETION 6 (Yadin Kaufman trans., 1989); Aharon Barak, A Judge on Judging: The Role of a Supreme Court in a Democracy, 116 HARV. L. REV. 16 (2002); William J. Brennan, Jr., The Constitution of the United States: Contemporary Ratification, 27 S. TEX. L. REV. 433 (1986) (Brennan delivered this material as an address at Georgetown University Law Center on October 12, 1985.).

204 See generally DAVID M. BEATTY, THE ULTIMATE RULE OF LAW (2004) (describing the global spread of proportionality and balancing tests as the ultimate aid in the protection of rights); see also ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE (2000) (reviewing constitutional judicial review in Europe and the development of post WWII rights culture).

205 Kathleen Sullivan in particular has suggested that balancing has had a mixed record with regards to the substantive results that it produced—at times liberal and at times conservative decisions. See Sullivan The Supreme Court, 1991 Term, supra note 6.

206 See supra note 36-38 and adjoining text. See also Porat, The Dual Model of Balancing, supra note 10 at
weighed somehow on a common scale, or that can be compared on the same plane. In other words, it alludes to considerations that vary in weight, but not in kind. The early Progressives, using interests-based balancing, made use of this trait of the balancing metaphor. This is so, since they used balancing in order to show that some considerations that were purportedly of a different kind or one lying on a higher plane (rights, or some of them) than the other (interests) were actually of the same kind, and on the same plane as other considerations (interests).

Interests-based balancing was therefore effective for the purpose for which it was used. It portrayed judicial problems as analogous to the weighing of the pros and cons of different policy considerations, rather than as analogous to deducing conclusions from principles, and applying them to the case. The anti-rights and interests-based aspect of Progressive balancing therefore seems to me to be something that is closely related to the balancing metaphor itself. Just using the metaphor, we almost instinctively direct our solution-searching gaze into the realm of comparative strength and weight, rather than differences in logic, and differences in kind and therefore into the realm of interests rather than the realm of rights. One interesting indication for this might be the tendency to speak of “constitutional interests” rather than “constitutional rights,” whenever we use balancing.

However, when balancing shifted from early to modern balancing it became a tool in the aid of distinguishing rights from interests, rather than equating them to interests. It seems that the balancing metaphor and the balancing tool are at least in some tension with such a use. If one understands balancing as a tool which is adapt to distinctions of degree and to the comparing considerations on the same plane, than it stands in contradiction to the idea that rights are distinctly separate from and elevated above policy considerations and interests.

It is true that balancing can be squared with the idea of rights, and the way to do this, which was first introduced in the Jehovah’s Witnesses cases, is by giving an extra-weight to the rights considerations in the balance—a thumb on the scale in favor of the right. However, this is not as good as saying that the right is somehow on a different plane than the interest, which is something that Black learned during the McCarthy era. Extra-weight can be overcome if we portray the interest in grave enough terms, and the reasoning maneuvers needed in order to do this seem more easily achieved, than if we had a more formal test for protecting the right.207 A Justice has an easier time with balancing than with distinguishing a precedent, or discussing the logic, or even the text of the right.

207 See e.g. Ely, supra note 176 at 1501: “[B]alancing tests are simply not the staff on which reassurance can confidently be built.”; C. Edwin Baker, Limitations on Basic Human Rights – A View From the United States, in ARMAND DE MISTRAL ET AL (EDS.), THE LIMITATION OF HUMAN RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 75, at 80, 87 (1986) at 91: “[with balancing only, judges] are left without any clear analyses with which to resist the same sway of unreasoned passion that influences the non-judicial official to adopt or impose limitations [on rights]”; Mark Tushnet, The Universal and the Particular in Constitutional Law: an Israeli Case Study, 100 COLUM. L. REV. 1327, 1345 (2000): “Liberal constitutionalism is in serious trouble if it depends on having judges whose sensitive balancing of competing interests produces liberty-favoring decisions.”
More importantly, extra-weight does not capture a distinction of kind but only a distinction of degree. Weight in particular can never stand for principle. It might be the outcome of principle, but it cannot generate it or replace it. If we wish to justify the protection of rights in a principled manner, as in the Carolelene Products footnote, even modern-balancing, with extra-weight to the right, is not the ideal tool.

Along these lines, there might be an important difference between accepting a principle with exceptions for highly costly outcomes, and balancing two considerations, but giving extra-weight to one of them. This is so, since the extra-weight version does not give us any principle, and therefore allows the principle (which is usually there nonetheless) to be either not pronounced or even overcome by the weight of the contending interest. The clear and present danger test for free speech, I think, is a test of the first kind. The idea that a free market of ideas should be protected, but that free speech can be overridden when there is clear and present danger (for example, if someone cries “fire!” in a crowded theatre), sounds to me more like a principle (free market of ideas) with exceptions for extreme cases (clear and present danger) than a balancing test between free speech and public security, with extra-weight given to free speech, which, in and of it self, says nothing about the principle behind free speech.

The second question, that I wish to address here, is the question of coherence with anti-formalism. Here too, it seems to me that the rights-based model of balancing faces some difficulties which the interests-based model does not.

One attempt at capturing these difficulties is in the claim that interests-based balancing was an external mode of legal reasoning, while, rights-based balancing was an internal mode of legal reasoning. Balancing for the early Progressives (for some of them at least) was an external mode of reasoning. This is not to say that it was not legal in the sense that its was completely alien to legal reasoning, but it was this part of legal reasoning in which one could openly acknowledge the lack of clear guiding rules.

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208 This argument needs a more full elaboration to defend it. However, as a concise defense for the argument see the following by Laurent Frantz:

“[O]n what basis is it possible to say that one interest “weighs” more or less [than the other]… – unless the judge can refer to some principle that tells him that some claims are more legitimate or more important than others? If there is such a principle, would not the judge give us a better account of his process of decision if he told us what he conceives the principle to be, and how it relates to the Constitution, and why he thinks the facts present it – instead of using it as an unstated premise for regarding one “interest” as “weightier” than the other?”

209 See supra note 124. I regard Ely as attempting such principled protection of rights that relate to the democratic process in his theory of judicial review in JOHN H. ELY, DEMOCRACY AND DISTRUST (1980).

210 Of course one can opt for another view, according to which rights should not be protected in a principled manner. That is, they are not distinct from interests, but rather represent especially important interests. It is not essential for my argument to decide between these two rights-conceptions. My contention is only that whenever balancing is used for the purpose of the first (principled) conception, it is at tension with that conception.

211 Compare to my discussion of the clear and present danger text supra note 114 and adjoining text.

212 See the discussion of the gap-filling nature of balancing in private law, supra Part II.D.
two conflicting principles, in which one had to draw a line not based on clear-cut logic, or precedent. The Realist movement, which followed the Progressive movement, directed the anti-formalist critique into two opposing directions. On the one hand it was more extreme, not allowing even the core of the principle—those safe-havens of clear cut cases, in which balancing was excluded—to exist. On the other hand it also changed the meaning of balancing.213

Since Realism turned balancing into the omnipresent mode of reasoning, it also necessarily tamed it and brought it inside the legal sphere. For, if one had to decide cases and rationalize them, and all one had was balancing, this meant that balancing could not keep its rogue, external, and legislative-like nature. It had to be reasoned, and rationalized, as if it followed from preexisting legal principles, and become internally “legal”—in a way - formal.214

Thus, the difference between early and modern balancing is that modern balancing, with its rights-based tendency and its “legal taming” of balancing, had much more pretence for principle, or, to put it differently, was much more pressed to reconcile balancing with principle, and this made it, in turn, at tension with one of the main aspects of anti-formalism.

In conclusion, the balancing attitude which sprang out of Progressive thought (again this reflects only some of Progressive thought, especially Holmes) was the realization that some cases had to be determined without clear guidelines and had to be based on judicial assessment of the relative worth of conflicting policy considerations. Balancing therefore indicated the kind of judicial problem that the judge faced—the problem of making decisions without clear-cut guidelines. Later strands of balancing, especially the rights-based ones, sought to use the concept of balancing to indicate the kind of solution to the legal problem, rather than only the problem itself. How to solve a legal problem? Balancing gave an answer: identify the conflicting rights and interests, find their objective weight, and see which overcomes the other.215 Of course, this could not be done mathematically, but it could nonetheless be done. Balancing became another legal apparatus, which could be applied to solve legal problems, rather than a metaphor that shows the special nature of some judicial problems. In that, modern balancing opinions, including maybe many balancing opinions of today, are less pragmatist that the early Progressive balancing opinions—in a way, their balancing is almost formalist.

213 I have not addressed the Realist movement until this point, since the Realist movement as such, did not have a distinct saying on the issue of balancing. I address Realism here only for the known characterization of Realism as obliterating rule-determinacy (and hence, non-balancing enclaves) altogether from legal thought. See e.g. Karl L. Llewellyn, Some Realism about Realism, in JURISPRUDENCE: REALISM IN THEORY AND IN PRACTICE 42, 70 (1962).

214 Note that a policy decision, or a decision based on compromise is not necessarily non-rational. It can be explained, reasoned, and justified. But it is nevertheless a non-principled decision, at least in that its outcome cannot be predicted beforehand; otherwise it would not be based in any real sense on compromise, but on logic or principle.

215 I referred to a similar distinction between the objective and subjective meaning of the balancing metaphor in Part II supra note and adjoining text.
VI. CONCLUSION

Balancing has become so prevalent in current constitutional law that it is almost odd to think of it as having a history. This article, however, attempted to show that it is important to think of balancing in historical context. Situating balancing in historical context one learns that those who once advanced the idea of balancing in constitutional law, did it for reasons that were quite different than, and even antithetical to, the reasons given for balancing in later periods. Balancing, therefore, presents the interesting case of a methodological tool that was devised to address a specific set of circumstances, but was later used to address a completely different set of circumstances. The question now is, has balancing remained effective as a methodological tool when applied to this new set of circumstances? This article raises some doubts as to whether it has.