ARTICLE:

THE DUAL MODEL OF BALANCING: A MODEL FOR THE PROPER SCOPE OF BALANCING IN CONSTITUTIONAL LAW

Iddo Porat[*]

[*] Lecturer, Academic College of Law, Ramat Gan, Israel; B.A. (Philosophy), LL.B. 1999, Hebrew University, Jerusalem; J.S.M. 2001, J.S.D. 2004, Stanford Law School; Former clerk of Israeli Supreme Court Justice Dalia Dorner.

This Article is based on part of my J.S.D. dissertation at the Stanford Law School. I wish to express my deepest gratitude to Tom Grey, my dissertation advisor, for his invaluable guidance and support during the writing of the dissertation. I would also like to thank Barbara Fried and Kathleen Sullivan, who were members of my dissertation committee, for their insightful comments. Morton Horwitz, Richard Pildes, Jed Rubenfeld, the members of the Stanford Program of International Law, and the members of the NYU J.S.D. colloquium, all commented on earlier drafts of this research or shared with me their insightful ideas on balancing and I thank them for that.

Correspondence should be addressed to: iporat@mscc.huji.ac.il

ABSTRACT

One of the most pressing problems of current constitutional law in the aftermath of September 11 is *how* to balance constitutional rights and national security interests. No one however seems to pause and ask *should* we balance individual rights and national security interests and if so *when*. One of the reasons for this is the widespread acceptance of what I shall term in this Article, the *balancing consciousness*: the view that *every* problem can and should be solved through balancing conflicting considerations.

This Article demonstrates that the balancing consciousness is misleading. Not every problem can and should be solved through balancing conflicting considerations. Instead of the balancing consciousness, this Article argues for a *dual model*, which envisions *two* logical forms of decision-making—balancing and non-balancing. This model has far-reaching implication for constitutional adjudication.

The dual model is based on a distinction between two levels, or orders, of considerations: first-order considerations, and second-order considerations. The Article argues that constitutional rights can be divided between these two types of considerations, and that balancing between a constitutional right and a governmental interest is appropriate only when the constitutional right is of the first order, not when it is of the second order. Interestingly this insight, concerning the limited scope of balancing, was once acknowledged in constitutional jurisprudence, but has since been abandoned. This Article is therefore also a call for reinstalling the original scope of balancing as it was once installed in American constitutional law.

ARTICLE:

THE DUAL MODEL OF BALANCING: A MODEL FOR THE PROPER SCOPE OF BALANCING IN CONSTITUTIONAL LAW

We cannot know for certain the sort of issues with which the Court will grapple in the third century of its existence. But there is no reason to doubt that it will continue as a vital and uniquely American institutional participant in the everlasting search of civilized society for the proper balancing between liberty and authority, between the state and the individual.

—William H. Rehnquist,

The Supreme Court: How It Was, How It Is[1]

[There is a] nearly universal elite legal academic view that we could indeed resolve all situations where there is choice of norm by balancing conflicting considerations of one kind or another.

—Duncan Kennedy

From the Will Theory to the Principle of Private Autonomy[2]

---

[1] WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 319 (1987).

[2] Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form"*, 100 COLUM. L. REV. 94, 94-95 (2000).

CONTENTS

LIST OF TABLES

INTRODUCTION

One of the most pressing problems of current constitutional law in the aftermath of September 11 is *how* to balance constitutional rights and national security interests.[3] No one however seems to pause and ask *should* we balance individual rights and national security interests and if so *when*. One of the reasons for this is the widespread acceptance of what I shall term in this Article, the *balancing consciousness*: the view that every problem can and should be solved through balancing conflicting considerations. This view is shared by legal as well as non-legal thinkers and is supported by two appealing arguments. The first argument holds that every practical problem can be reduced, in principle, to the relative assessment of conflicting considerations for and against a course of action (e.g., the individual rights consideration and the national security interest consideration). The second argument holds that the only alternative to balancing is the creation of absolute or *unbalanceable* considerations. Since absolute considerations are untenable according to this argument (e.g. individual rights can never be absolute) it follows that balancing must apply to every decision.[4]

Despite the appeal of these two arguments, this Article demonstrates that the view that every decision can and should be solved through balancing is misleading. It shows that not every decision is reducible to a process of balancing conflicting considerations, and that, while the creation of absolute considerations is untenable, it is not the only alternative to balancing. Instead of the balancing consciousness, which envisions balancing as the only logical form of decision-making this Article argues for a *dual model* that envisions *two* logical forms of decision-making—balancing and non-balancing.

---

[3] *See, e.g., Searching for Balance: National Security's Threat to Civil Liberties,* Stanford Law School Panel held on January 2002; Robert N. Davis, *Striking the Balance: National Security vs. Civil Liberties*, 29 BROOK. J. INT'L L. 175 (2003); Meaghan E. Ferrell, *Balancing the First Amendment and National Security: Can Immigration Hearings be Closed to Protect the Nation's Interest?* 52 CATH. U. L. REV. 981 (2003); Jeffrey Rosen, *The Naked Crowd: Balancing Privacy and Security in an Age of Terror*, 46 ARIZ. L. REV. 607 (2004).

[4] *See infra* Part I (reviewing several manifestations of these two arguments).

The dual model is a synthesis of two theoretical paradigms, from two different fields—philosophy and law. The first paradigm, conceived by Oxford philosopher, Joseph Raz, establishes the main contours of the dual model and provides its principle terminology. The second paradigm, originated by Stanford law professor, Mark Kelman, enriches the understanding of the dual model and broadens it. The outcome is a new theoretical model, which I call the dual model. The dual model refutes the balancing consciousness, but does not refute balancing altogether. The main point of the dual model is the recognition that balancing is a special kind of decision-making, applicable only when certain conditions are present. Balancing is retained as a viable tool, but only at the price of limiting its scope.

What are the conditions for balancing, and what are the two logical modes that the dual model identifies? The two logical forms of decision-making conform to two logical forms of conflicts. A balancing decision applies only to conflicts between two valid or legitimate considerations of the same level (in Raz's terminology, *first-order* considerations). It does not apply to conflicts between a consideration of a higher level (in Raz's terms a *second-order* or *exclusionary* consideration) and a consideration of a lower level (first-order). When a higher-level consideration conflicts with a lower-level consideration, the decision is made by excluding the lower-level consideration completely from the balance, rather than by balancing.

When applied to the constitutional context, the dual model provides a tool for determining the applicability of balancing. The question in each constitutional case should be: what kind of conflict does the case present? Are both claims in the conflict—the constitutional rights claim and the governmental interest claim—first-order claims? Or, does one of the claims (the constitutional rights claim, presumably) function as a second-order claim, thereby totally excluding the governmental interest claim?

Reviewing several areas of constitutional law, this Article argues that the answer to this question is that constitutional cases present *both* types of conflicts. That is, some constitutional cases involve conflicts between two first-order

considerations, and others include conflicts between a second-order consideration and a first-order consideration. More specifically, some constitutional cases involve constitutional rights claims that are only first-order claims (actually constitutional *interests* claims), and others involve constitutional rights claims that are 'strong' second-order claims (*real* rights claims)—the nature of the conflict between the constitutional claim and the governmental interests changes accordingly.

The application of the dual model to constitutional law therefore reveals two distinct types of rights claims within constitutional law. The balancing consciousness confounds the two. Since the balancing consciousness holds that *every* conflict should be resolved through balancing, and that *every* right is balanceable, it fails to distinguish between first-order and second-order rights claims, and causes several distortions and analytical mistakes that haunt current constitutional law.

Interestingly, this analytical confusion was not always part of constitutional jurisprudence. A historical review shows that balancing was once properly assigned only to first-order conflicts, and that the current confusion within constitutional law was created at a certain point in time in American legal history and as a result of a certain events. This Article is therefore also a call for reinstalling the original meaning of balancing as it was originally developed in American constitutional law.

The article can be divided into two main sections. The first section, consisting of Parts I-III, refutes the balancing consciousness both generally and in constitutional law, and replaces it by the dual model. Part I presents the balancing consciousness, describes its two supporting arguments, and demonstrates some of the reasons for its widespread acceptance. Part II presents the dual model, starting from Raz's model and complementing it with Kelman's model. The combination of the two models creates a new model, the dual model, which refutes the balancing consciousness on both its supporting arguments. A possible objection to the model is reviewed as well as its main implications. Part III then moves on to apply the dual model to constitutional law. Starting with the right to free speech,

constitutional cases involving free speech are divided into cases involving free speech as a first-order interest and cases involving free speech as a second-order right. Part III then looks at two other constitutional areas, dormant commerce clause and equal protection, and shows that they can also be divided in the same way.

The second section of the article, consisting of Parts IV and V, employs the dual model to criticize central aspects of constitutional law in historical perspective. Part IV reviews the historical development of balancing in American constitutional law. It shows that balancing first appeared in American constitutional law when the progressives used it to criticize the notorious *Lochner*[5] Court. This Part argues that such a use of balancing, which I term *early balancing*, was consistent with the dual model and indeed associated balancing with the idea that some rights were only first-order interests. Early balancing also associated balancing, surprisingly, with judicial restraint. Only later, around the late 1930s, did balancing first appear in its modern form, in which it was associated with the rhetoric of rights rather than interests and with judicial activism rather than judicial restraint. This later form of the use of balancing, which I term *modern balancing*, is consistent with the balancing consciousness rather than with the dual model. It represents an unfortunate combination of rights rhetoric and balancing, and distorts the nature of constitutional conflicts by creating two major problems that still haunt constitutional law today.

Part V combines the historical review with the analytical discussion of the dual model to form a criticism of two major problems in current constitutional law. Using case studies from the same constitutional areas that were discussed in Part III (freedom of speech, the dormant commerce clause, and equal protection) this Part demonstrates that in each of these areas there are examples of the first-order manifestation of the right being confused with the second-order manifestation of the right (the *first-to-second order mix-up*) and examples of the second-order manifestation of the right being confused with the first-order

[5] Lochner v. New York, 198 U.S. 45 (1905).

manifestation of the right (the *second-to-first order mix-up*). That is, on the one hand we have cases in which a right-oriented balancing, distorts the same-level nature of a first-order conflict by suggesting that the constitutional rights consideration is somehow different in nature and elevated above the governmental consideration. On the other hand, we have a balancing-oriented attitude towards *real* rights that distorts the non-balanceable, second-order nature of some rights by suggesting that they are merely interests that must be balanced with the governmental interests that conflict with them. Modern Balancing and the balancing consciousness therefore create distortions of two opposite kinds: at times they unnecessarily *elevate* constitutional rights, and at other times they unnecessarily *lower* them, depending on the case and the type of right.

This Article offers a *theory* of balancing, portraying both the limits of balancing and its legitimate scope. In this it differs from most other critical essays on balancing, which tend to concentrate only on balancing's problems and deficiencies.[6] It also attempts a novel distinction between two historical periods of balancing, highlighting the fact that current balancing is different than its early predecessor.[7] Lastly, while partially motivated by issues concerning balancing that have arisen in the aftermath of September 11, this Article does not address those issues directly. Rather the reader is hopefully left with better analytical

[6] *See, e.g.*, Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L. J. 1424 (1962) (criticizing balancing in First Amendment law during the McCarthy era); Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L. J. 943 (1987) (criticizing balancing in constitutional law generally); Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L. J. 707, 724 (1994) (rejecting balancing as the leading model for constitutional interpretation); Cass Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV 779, 801-4 (1994) (arguing against balancing different kinds of valuations in the law); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767 (2001) (rejecting balancing in First Amendment interpretation).

[7] While there are several accounts of the history of balancing and of its origins (*See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 18-19 (1992); Aleinikoff, *id.* at 952-63,) no one, to the best of my knowledge, has ever argued that there are two different periods of balancing and that early balancing is different than modern balancing.

tools, and some historical perspective, to make up her own mind concerning the current balancing problems of the day.

I. THE BALANCING CONSCIOUSNESS

Balancing is one of the oldest and most familiar metaphors in Western culture.[8] The *physical* manifestation of the metaphor is the act of balancing the two sides of the scale.[9] The *mental* aspect of the metaphor is a decision-making method that requires contemplation of the relative importance or weight of two or more considerations in favor of or against a course of action.[10]

---

[8] *See, e.g.,* HENRY S. RICHARDSON, PRACTICAL REASON ABOUT FINAL ENDS, p. 166, n. 2 (1997) ("the metaphorical use of the terms 'weighing' and 'balancing' is well entrenched in Western culture—embodied, as it is, in the figure of *blind Justice*.") The earliest text to use the metaphor is also one of the earliest human texts ever. It is the Acadian epos, The Epic of Gilgamesh, which dates back to the third millennium B.C. The figure of Gilgamesh is introduced as: "He who… weighed [the apparent and the hidden] in the scales of wisdom". THE EPIC OF GILGAMESH, 27 (Tel Aviv, 1992, in Hebrew); *See* also the following overview of the use of the scales metaphor in ancient times in Dennis E. Curtis and Judith Resnik, *Images of Justice*, 96 YALE L. J. 1727, 1741, n. 32 (1987):

> The scales seem to have been used as a symbol of a decision-making device since earliest times. In the Egyptian 'Book of the Dead' (ca. 1400 B.C.), the soul of a dead person is shown being weighed in a balance. One pan holds a heart-shaped vase symbolizing all of the actions of the dead person; the other pan contains a feather, symbolizing Right and Truth. The Old Testament refers to scales: 'Let me be weighed in an even balance, that God may know mine integrity.' Job 31:6. Weighing as a symbol of Divine Judgment is also found in the Koran... In the Iliad, the gods weigh to foretell the results of human events: 'Then Jove his golden scales weighed up, and took the last accounts of Fate for Hector....' HOMER, THE ILIAD, ch. xxii, (R. Fitzgerald trans. 1974). In early Christian representations, the 'weighing of the soul' occurs in numerous Last Judgment scenes, often with Saint Michael holding the scales.

[9] *See* Curtis and Resnik *Id*.

[10] *See, e.g.,* JOSEPH RAZ, PRACTICAL REASONS AND NORMS 35 (2nd ed., 1999) (defining balancing in practical reason as "[resolving] conflicts [among different reasons for action] by the relative weight or strength of the conflicting reasons which determines which of them override the other.") The metaphor can allude to a broader scope of mental activity than decision-making. Balancing can be an operation that concerns any kind of deliberation, whether of deciding what to

A more detailed description of the decision-making method implied by balancing involves three stages. In the first stage, all the various considerations involved in the decision are identified. In the second stage, each is assigned a value or a weight according to its respective importance.[11] Finally, all considerations are put on the *scale* and weighed.[12]

Thus described, balancing appears to have become the predominant way to solve both legal problems and moral problems generally.[13] As the quote in the

---

do (practical reasoning), or forming a belief or opinion (theoretical reasoning.) Indeed one of the meanings of the verb to "balance" is simply to "deliberate" (THE OXFORD ENGLISH DICTIONARY vol. I, 894 (sec. ed. 1989)). However, for reasons of simplicity, this Article will concentrate only on deliberation concerning deciding what to do, which is a broad enough category as it is.

[11] Describing constitutional balancing according to the first two stages, Alexander Aleinikoff writes: "[b]y a 'balancing opinion' I mean a judicial opinion that analyzes a constitutional question by identifying interests implicated by the case and… assigning values to the identified interests." Aleinikoff, *supra* note 7, at 945.

[12] The third stage of balancing is sometimes omitted from the description since it is superfluous. Once the weights are assigned the outcome is already determined, and a further stage is unnecessary. A famous example of describing balancing according to all three stages, is Benjamin Franklin's letter to a perplexed friend:

> My way [of making difficult decisions] is, to divide half a sheet of paper by a line into two columns; writing over the one *pro* and over the other *con*; then, during three or four days' consideration, I put down, under the different heads, short hints of the different motives, that at different times occur to me, *for* or *against* the measure. When I have thus got them altogether in one view, I endeavor to estimate their respective weights… and thus proceeding, I find where the *balance* lies.

Benjamin Franklin in a letter to Joseph Priestley (quoted in ALEXANDER BAIN, THE EMOTIONS AND THE WILL, 424-5 (1865)) (emphases in original). The fascinating topic of the metaphor of balancing and its difficulties is not explored in this Article. For some philosophical accounts of this topic *see* ALF ROSS, ON LAW AND JUSTICE 280 (1958); John Plamenatz, *Interests*, 2 POLITICAL STUDIES 1, 5-6 (1958); Elijah Millgram, *Incommensurability and Practical Reasoning*, in RUTH CHANG (ED.), INCOMMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 151, 159 (1997).

[13] The prevalence of balancing in solving moral problems can be established only indirectly, through comments on prevailing moral conceptions. *See, e.g., infra* note 15 The prevalence of balancing in the law can be established also more directly. Professor Kahn, for example, found out that "the word 'balance' or 'balancing' does appear in 214 of the 473 cases decided in the last three

beginning of this Article conveys, the view that all conflicts can, and should, be resolved by balancing conflicting considerations—the balancing consciousness—has become "a nearly universal elite legal academic view."[14] It is further said to "reflect the general consciousness both among laymen and jurists."[15] What accounts for this phenomenon? There are two persuasive arguments, each supported by ideological underpinnings, that account for the balancing consciousness' prevalence both within the law and outside the law.

The first argument for the balancing consciousness is positive and I refer to it as the *reducibility argument*. It maintains that balancing is fundamental to every instance of decision-making. The second is negative, and I refer to it as the *anti-absolutist argument*. It maintains that balancing is unavoidable in every instance of decision-making. The reducibility argument holds that every decision can be reduced, in principle, to the assessment of the relative strength of the competing considerations involved in the decision.[16] The considerations that conflict may vary in their weight or type from one case to the other,[17] but the crucial point is

---

years [preceding 1987]." Paul W. Kahn, *The Court, the Community and the Judicial Balance: the Jurisprudence of Justice Powell*, 97 YALE L. J. 1, 3 note 14 (1987). Aleinikoff notes that "[e]very sitting Justice on the Supreme Court has relied on balancing [and] as a result, balancing now dominates major areas of constitutional law." Aleinikoff, *supra* note 7, at 964-65.

[14] Kennedy,*supra* note 2.

[15] ROSS, *supra* note 12,at 279 -80. It is worth quoting the passage in full: "A widely held view, which undoubtedly even better than Kant's formalism reflects the general consciousness both among laymen and jurists, declares that justice means the equal balancing of all the interests affected by a certain decision."

[16] *See, e.g.*, the following claim:

> When choosing a legal norm to cover a case, rational decision-making selects from the continuum of normative possibilities the one that best accommodates (balances…) the conflicting considerations as they play out more or less strongly in the fact situation of which the case is an instance… *[A]ny norm* can be looked at as the product of this kind of analysis, and assessed as such.

Kennedy, *supra* note 2, at 105 (describing modern legal thinking) (emphasis added).

[17] Kennedy, for example, divides the possible kinds of considerations that may conflict in a legal case into 'formal,' 'substantive' and 'institutional' considerations. Kennedy, *supra* note 2, at 95.

that no matter what the considerations are, *any* decision can ultimately be described as being based on a balance between at least two conflicting considerations. Justice Felix Frankfurter, for example, famously wrote: "the core of the difficulty is that there is hardly a question of any real difficulty before the court that does not entail more than one so-called principle." [18] And Duncan Kennedy writes that "[i]t never makes sense, when justifying a rule, to say this it is good because it promotes [one value or interest]. To make sense it must add: at an acceptable cost to [the opposite values or interest.]"[19]

The anti-absolutist argument for the balancing consciousness addresses the same insight from a *negative* perspective. Since every decision involves more than one consideration, no single consideration can, or should be given absolute importance. Balancing is therefore unavoidable since it stands in contrast to the creation of absolute considerations. In the realm of constitutional rights, this argument takes on the familiar form of rejecting the idea that rights can ever be absolute: "Balancing is problematic…*Yet*, the alternative to balancing seems much worse…[The alternative is] to create an absolute right…Few rights can or should be regarded as absolute."[20]

Both arguments for the balancing consciousness are founded on major schools of thought. The reducibility argument relies foremost on utilitarianism. According to utilitarianism one should always decide on a course of action that results in maximum utility. This ideology therefore supports the view that at the core of every moral (and rational) decision lies a process of balancing the pros and cons of a given course of action.[21] One of the modern offspring of

---

[18] FELIX FRANKFURTER, OF LAW AND MEN 43 (1956).

[19] Kennedy,*supra* note 2, at 113 (describing modern legal thinking).

[20] Erwin Chemerinsky, *Constitutional Scholarship in the 1990s*, 45 HASTINGS. L. J. 1105, 1116-17 (1994) (emphasis added).

[21] *See, e.g.*, the following utilitarian justification for balancing: "The goal of morality [is] to lessen the overall evil or harm in the world. [Therefore one must always] balance harms and benefits [and ask]: Is the harm involved in acting against the rule greater than the benefit to be attained by doing so?" BERNARD GERT, CHARES CULVER, AND K. DANNER CLOUSER, BIOETHICS: A RETURN TO

utilitarianism, economic analysis in the humanities and in the law, also supports the idea that every decision is reducible to balancing. Economic analysis teaches us to look at the costs of any course of action and to regard any decision as a trade-off between opposing considerations. The idea of putting a price tag on each course of action implies that every decision is reducible to *cost benefit* balancing.[22]

The anti-absolutist argument for the balancing consciousness relies on philosophical anti-absolutist movements, such as pragmatism and instrumentalism, which reject the idea of absolutes in morals, in practical reasoning and in law.[23] These movements espouse the view that human endeavor should concentrate on attaining pragmatic ends, not on the false search for absolute and immutable first principles or values. Balancing the interests affected by our decisions reflects such a pragmatic approach, while refusing to balance is embracing the false and unattainable ideal of absolute certainties. Justice Frankfurter is again the best legal representative of this ideology as it applies to balancing:

> [Absolute] rules would inevitably lead to absolute exceptions. [It is better to decide by] candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidean problems to be solved. [24]

The anti-absolutist argument is also backed by economic analysis as a mirror argument to its support for the reducibility argument. According to this line of

---

FUNDAMENTALS (1997), pp. 62, 86 and 254, cited in Henry Richardson, *Specifying, Balancing, and Interpreting Bioethical Principles*, 25 J. MED. & PHIL. 285, 294-95 (2000).

[22] For a critical review of cost benefit balancing *see* Henry S. Richardson, *The Stupidity of Cost Benefit Analysis*, 29 J. LEG. STUD. 971 (2000); For a general review of balancing and its relation to Law and Economics, *see* Martha C. Nussbaum, *Flawed Foundations: The Philosophical Critique of (A Particular Type of) Economics*, 64 U. CHI. L. REV. 1197 (1997).

[23] For a review of the connection between balancing and pragmatism both in morals and in the law *see* Aleinikoff, *supra* note 7, at 956-63; *see* also generally ROBERT S. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY (1982).

[24] Dennis v. United States, 341 U.S. 494, 524 (1951).

argument, the idea of non-balanceable absolutes is a false attempt to disregard the simple truth that every choice has a price. No matter how important a right or a value may be, it cannot be immune to balancing or to a possible trade-off with other values, since it necessarily has a price, and one cannot devote all one's resources to one value only.[25]

Finally, the ideology of pluralism and multiculturalism adds weight to the anti- absolutist argument for balancing. A pluralistic society is committed to the idea that different and conflicting world-views can co-exist within it.[26] Balancing can ensure that no one value gets absolute weight, and no other value gets totally rejected. Refusing to balance is therefore tantamount to intolerance and value monopoly.[27]

---

[25] *See, e.g.*, the following argument for balancing the value of human life:

> We cannot avoid trade-offs between the protection of human life and other goods such as economic growth, for we cannot reasonably devote unlimited resources to human life… by indefinitely expanding medical expenditures, police forces, and the like.

Elizabeth Anderson, *Practical Reason and Incommensurable Goods*, in RUTH CHANG (ED.), INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 90, 105 (1997) (describing prevailing economic analyses of values and goods).

[26] *See, e.g.*, Chief Justice Burger in Lynch v. Donnelly*:*

> In our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court.

465 U.S. 668, at 678 (opinion of Burger, C.J.).

[27] *See, e.g.*, the following description of balancing's qualities:

> [Balancing] aims to give voice to each interest by setting forth a rule that accommodates all of them. Ideally, that rule allows each interest its maximum realization consistent with recognition of and respect for other competing interests. [Balancing's] end is recognition and reconciliation, not exclusion.

Paul W. Kahn, *The Court, the Community and the Judicial Balance: the Jurisprudence of Justice Powell*, 97 YALE L. J. 1,9 (1987) (describing the philosophy behind Justice Powell's balancing).

II. THE DUAL MODEL THESIS

The two arguments mentioned in Part I—the reducibility argument and the anti- absolutist argument, —coupled with their ideological underpinnings, create a powerful case for the balancing consciousness—the view that balancing is fundamental to all decision-making and unavoidable in all cases of decision-making. This Part attempts to show that the balancing consciousness is misguided by presenting a new model for balancing—the dual model. The dual model is a synthesis of the works of two scholars: Joseph Raz and Mark Kelman.

A. Joseph Raz—Balancing and Levels of Reasons

Joseph Raz, in an important essay about practical reasoning,[28] describes a view which is very similar to the balancing consciousness. It is the view that "all practical conflicts of reasons are resolved by the relative weight or strength of the conflicting reasons which determines which of them overrides the other."[29] Raz terms this view in his essay, P1.[30]

What Raz then notices is that, contrary to the tenets of the balancing consciousness, or P1, not all kinds of conflicts are resolved through balancing. Raz presents three examples of conflicts in which the balancing norm does not apply.

The first example is the case of Ann. Ann returns home after a strenuous day at work and receives a phone call from a friend. Her friend recommends a certain investment, but says that Ann must decide that evening or the offer will expire. Although the proposed investment appears very promising, it is also very complicated, and the decision requires several hours of thorough investigation. Ann replies to her friend that she is too tired to make a rational decision on the merits of the case. Raz explains her position:

---

[28] RAZ, *supra* note 10

[29] *Id.* at 35.

[30] Raz formalizes this view as follows: "P1: It is always the case that one ought, all things considered, to do whatever one ought to do on the balance of reasons." *Id.* at 36.

> She is rejecting the offer not because she thinks the reasons against it override those in its favour [P1]… but because she has a reason [her fatigue] not to act on the merits of the case. This, she concedes is a kind of reason not recognized in P1, but that only shows that P1 is not valid.[31]

The second example is the case of Jeremy. Jeremy serves in the army and is ordered by his commander to confiscate a civilian van for military use. Jeremy's friend tries to convince him that confiscating the van would be wrong, because, on balance, confiscating the van would bring more harm than benefit. Jeremy rejects his friend's attempts and explains:

> [T]he order is a reason for doing what you were ordered regardless of the balance of reasons… Orders are orders and should be obeyed even if… no harm will come from disobeying them. That is what it means to be a subordinate. It means that it is not for you to decide what is best. You may see that on the balance of reasons one course of action is right and yet be justified in not following it.[32]

The third and final example is the case of Colin. Colin has to decide whether to send his son to an expensive and good school, or to a cheaper school of lesser quality. If he sends his son to the more expensive school, he will not be able to quit his job and write the novel he always wanted to write. In addition if he sends his son to the more expensive school, some of his friends will do the same, although they cannot afford to do so. However, Colin disregards both these considerations because he promised his wife that "in all decisions affecting the education of his son he will act only for his son's interests and disregard all other reasons."[33]

Raz's three examples show incidents of decision-making that do not follow the balancing consciousness. Had balancing been behind these practical decisions or conflicts they ought to have been decided by balancing all the relevant considerations and acting according to those that outweighed the others. However, Ann does not balance the considerations for and against the investment, because

[31] *Id.* at 37.

[32] *Id.* at 38.

[33] *Id.* at 39.

she is *tired*. Jeremy does not balance the considerations for and against obeying the order, because he thinks that this would contradict the idea of *being a subordinate*. And Colin does not balance some of the considerations for or against sending his son to an expensive school, because he *promised* to take into account only those considerations that pertain to his son's interests.

Raz's examples show the existence of special reasons and special conflicts that are not included in the balancing consciousness model. Ann's fatigue, Jeremy's position, and Colin's promise are not reasons for or against a course of action. Rather, they are *reasons not to take into consideration* some other reasons. They are *exclusionary reasons*, or *second-order reasons*: reasons to *exclude* some, or all, *first-order* reasons from the decision-making process. Such reasons do not concern the decision directly, but do concern the (first-order) *reasons* for the proposed decision. Ann's fatigue is a reason to exclude all the considerations for or against the investment. Jeremy's position is a reason to exclude all considerations for or against the confiscation (except for the order itself.) And Colin's promise is a reason to exclude all those considerations not relating to his son's interests.

The special thing about exclusionary reasons is that they are never simply balanced with other, *regular*, or *first-order* reasons. It is true, according to Raz, that when first-order reasons conflict, they are always balanced one against the other according to their respective weight or strength (P1). However, when an exclusionary reason and a first-order reason conflict, no balancing is pursued. Put differently, while it is true for first-order reasons that "they are comparable with regard to strength (i.e. that the relation *stronger than* or *of equal strength* [applies to them,])"[34] this is not true for second-order reasons that conflict with first-order reasons. In such conflicts, Raz claims, "the strength of the exclusionary reason is not put to the test. [Rather, the second-order reason] prevails by virtue of being a reason of a higher order." Raz therefore maintains: "there are two ways in which

[34] *Id.* at 43 (emphasis in original).

reasons can be defeated. They can be overridden by strictly conflicting reasons or excluded by exclusionary reasons."[35]

In conclusion, Raz's three examples disprove the balancing consciousness, P1, by claiming that the pattern of balancing, weight, and overriding does not reflect all possible logical patterns of decisions. In particular, it does not reflect the relationship between second-order/exclusionary reasons and first-order regular reasons. Raz's examples indicate at least three common types of exclusionary reasons that eschew balancing: temporary incapacity to form judgment, commands, and promises.[36] To this list Raz added: norms,[37] and rules.[38] Others have also added values and desires.[39] Taken together these types of reasons form an important part of the entire sphere of practical reasoning. "Despite the indiscriminate application of the terminology of 'weight,' 'strength,' 'overriding,' 'on balance,' etc.," Raz concludes, "we do in fact use different modes of reasoning to support different practical conclusions." [40]

Several clarifications to the above review of Raz's theory are in order:

1. Raz's theory is a descriptive or phenomenological theory, not a normative theory. That is, Raz's examples show that people do in fact regard some reasons as exclusionary reasons and therefore eschew balancing, not that they are justified in doing so. For example, Raz does not claim that Jeremy is right in viewing his commander's order as an exclusionary reason, and in refusing to balance the reasons for or against the order. Raz only claims that Jeremy (who exhibits common behavior) does in fact regard the command as an exclusionary reason and does in fact refuse to balance reasons for or against the order.[41]

---

[35] *Id.* at 40, 46 (emphasis added).

[36] The latter types of reasons are termed by Raz, "authority-based reasons," and the former, "incapacity based reasons." *Id.* at 47-8.

[37] *Id.* at 73.

[38] *Id.* at 142.

[39] *See infra* note 67

[40] *Id.* at 35,36, 204.

[41] *Id.* at 38.

2. In forming a second-order reason, one can use general balancing (unless there is another, higher-order reason that qualifies balancing at this level also). Thus, for example, Jeremy's commander can decide whether to give the order to Jeremy by balancing costs and benefits (i.e. first-order reasons). For Jeremy, however, such balancing is blocked, if he treats the command as a valid second-order reason. In addition, two second-order reasons can conflict in a particular case, and when they do, the conflict is resolved by balancing according to respective weights.[42]

3. Having an exclusionary reason does not make decisions easy. First, as mentioned above, a second-order reason may conflict with other second-order reasons. In addition, according to Raz, the scope of a second-order reason can be affected by "scope-affecting reasons." For example, in the case of Jeremy, the rank of the officer may function as a scope-affecting reason: "Jeremy may assign a greater scope to the orders of an officer of a higher rank. There will be fewer cases in which he would rely and act on his own judgment when it conflicts with an instruction given by a high-ranking officer, [rather than a low-ranking officer.]"[43]

4. The conflict between two first-order reasons is *incidental*, while the conflict between a second-order and a first-order reason is *logical*. Two first-order reasons may conflict in some cases, but in other cases they may not conflict. It all depends on the particularities of the case. However, a second-order reason will always conflict with the first-order reason it excludes. This is because the exclusion of the first-order reason is part of what it means to be that particular second-order reason. The first conflict is therefore incidental, while the second is necessary and logical.[44]

---

[42] *Id.* at 47.

[43] *Id.* at 46-47.

[44] *Id.* at 183.

B. Mark Kelman—Balancing and 'Costs'

We turn now to another essay that disproves the balancing consciousness. This essay, unlike Raz's, is couched within a specific legal context. Mark Kelman examines anti-discrimination litigation, specifically Title VII litigation concerning discrimination in the workplace, and The Americans with Disabilities Act (ADA) litigation, and notices two types of claims that are being brought under those statutes.[45] The first type of claim he terms *simple discrimination* and the second, *accommodation*.[46] A black job applicant that is not hired because the employer hates blacks has a claim against simple discrimination.[47] A disabled job applicant that is not hired because employing him requires costly adjustments to the workplace has a claim for accommodation.[48]

Current doctrine usually treats both these types of claims according to the same balancing logic, in which the evils of discrimination are balanced with the costs of curbing the discriminatory activity. However, like Raz, Kelman reaches the conclusion that *one* logical type of decision is not enough, and that the *two* types of claims call for *two* types of decision-making methods, only one of which is balancing. Why he thinks so is very interesting. Kelman argues that simple discrimination claims should not be balanced with other claims because accepting

---

[45] Mark Kelman, *Market discrimination and Groups,* 53 STAN. L. REV. 833 (2001). Earlier essays by Kelman apply a similar distinction. *See* Mark Kelman, *Concepts of Discrimination in "General Ability" Job Testing*, 104 HARV. L. REV. 1157, 1164-70 (1991); MARK KELMAN & GILLIAN LESTER, JUMPING THE QUEUE, 195-208 (1997).

[46] The term *accommodation* is based on its regular meaning in the legal literature. It is, however, formalized by Kelman as the discussion bellow will show.

[47] Kelman provides the following formal definition of the norm against simple discrimination:

> [E]mpowered market actors (i.e., employers, sellers of goods and services classed as 'public accommodations') are duty-bound to treat those putative plaintiffs with whom they deal (job applicants, employees, would-be buyers) no worse than they treat others who are equivalent sources of money.

Id. at 835.

[48] The formal definition of the accommodation claim is: "a claim to receive treatment from a defendant that disregards some (though not all) differential input costs." *Id.* at 836.

them does not *cost* anything in terms of other legitimate claims. Accommodation claims, on the other hand, do have costs and therefore have to be balanced with other claims. This view seems odd and counterintuitive—how could anything be costless? However, I believe it is correct, and furthermore that it represents a reason for accepting Raz's model in the area of anti-discrimination law: simple discrimination claims are exclusionary claims, while accommodation claims are only first-order claims.

The following will be an attempt to summarize Kelman's analysis by identifying five differences between simple discrimination claims and accommodation claims. An understanding of these differences will demonstrate that Kelman's distinctions are similar to Raz's. Furthermore, I will argue that the combination of Raz and Kelman's frameworks provides a new and improved *dual-model* for balancing.

1. The first difference between the two types of claims is that an accommodation claim has a limit—it must be *reasonable*—while a simple discrimination does not have such a limit. The accommodation norm requires only *reasonable* accommodation from employers in the workplace. For example, paying for a special elevator for the disabled might be reasonable, but buying an extremely costly machine to help a particular disabled worker might not. To every accommodation claim, therefore, the employer may answer that such a claim is unreasonable, and this answer would have to be evaluated according to the particularities of the case. The simple discrimination norm, on the other hand, is not limited in the same way. We do not require that employers not discriminate against black applicants *only when it is not reasonable to do so,* or only when the particularities of the case allows it. The norm against simple discrimination carries with it a much more categorical ban on discrimination, which is not subject to the test of reasonability.[49]

[49] *Id.* at 834-5. For a qualification of this claim *see infra* notes 56,57and accompanying text. This qualification applies also to the other four differences between simple discrimination and accommodation reviewed below.

2. Secondly, and obviously important for our purposes, an accommodation claim involves *balancing*, while a simple discrimination claim does not. A decision to accommodate a disabled person involves weighing the benefit from such accommodation versus its costs. Consider a law firm that is asked to provide an extremely expensive machine for a lawyer with a rare disability. Such a firm may not have enough money left to provide accommodation to another disabled lawyer employee, or to provide more leaves for employees with children, or to engage in more pro bono work that could benefit third parties, or even any money left at all, which would cause the employer to go bankrupt. The accommodation claim of the disabled person with the rare disability has to be balanced with all of these claims, and in this balancing analysis it might turn out that its cost is too high and this would be a reason to deny it. In simple discrimination claims, however, we do not typically engage in balancing. We do not weigh the value of a black job applicant to be free from discrimination against the cost to the employer in not being able to follow his racist inclinations. We also do not weigh the societal value of having a society without discrimination versus the societal cost in terms of the lost opportunities to discriminate. In simple discrimination cases we do not balance.[50]

3. Why do we not balance in simple discrimination cases? We do not balance because we regard the racist inclinations of the employer in such cases as *illegitimate* or *harmful* motivations that are objects of *abolition*, while we do not so regard the considerations of the employers in accommodation cases. This is the

---

[50] Kelman writes:

> The 'simple discrimination' norm establishes a strong entitlement, what rights theorists would consider a *side constraint* on the conduct of those who would violate the norm.… Claims of right by one plaintiff should not be balanced against competing claims by other plaintiffs seeking similar treatment…[or against] claims by defendants that it would be unduly costly to meet the plaintiff's claims … [or against] claims by non-participants in the suit that they are more worthy recipients of the 'resources' the defendant is expected to 'expend'.

Id. at 835.

third difference between simple discrimination and accommodation claims—the difference in terms of the *legitimacy* of the claims.

The interest of the employer in an accommodation case is to save money by not spending it on accommodating the disabled employee. It is not illegitimate *per se* and we would not want the employer to refrain from considering it in any future cases. The problem may lie not in its illegitimacy, but in the fact that it is given too much weight in the case, or, to put it differently, that it should be overridden by another more important consideration—the accommodation consideration. Simple discrimination cases, however, present a different problem. Since the racist employer's interest in following his racist ideology is illegitimate *per se*, there are no cases in which we would approve of him following them, and we would like them abolished altogether. The problem in simple discrimination cases does not lie in the fact that a consideration is given too much weight, or that it is overridden by another consideration, but in the fact that it is illegitimate.[51]

4. The fourth difference between Kelman's two types of anti-discrimination claims is that simple discrimination claims do not have *costs*, while accommodation claims do. How so? Satisfying an accommodation claim has a cost in terms of *real social resources*. The employer in the above example has to spend money on buying the special machine, and this in turn means that he would not be able to spend it on something else. Therefore, not all accommodation claims can be met, since they would necessarily conflict: paying for the special machine, means not paying for other machines.[52] Simple discrimination claims, however, have *no social cost* in terms of *real social resources*. There is no cost involved in abolishing simple discrimination of the kind of not hiring a lawyer

[51] Kelman writes:

> The non-accommodation defendant… attempts to retain (or save) real social resources… [that] are public and objective, and the desire to expend them completely socially legitimate.…On the other hand, the simple discriminator gains utility from acting on tastes that are ordinarily imperfectly fungible, private/subjective, and arguably illegitimate.

Id. at 854.

[52] "[T]hose seeking accommodation are making claims on real social resources that compete with all other social resource claimants; all such claims cannot be met." *Id.* at 837.

because she is black (unless one considers depriving people of opportunities to apply a racist ideology to be a cost.[53]) Therefore, *all claims* of simple discrimination can be met and they would not conflict with each other: We can satisfy the claims against simple discrimination of Jews and against simple discrimination of blacks and against simple discrimination of women, and those claims would not conflict.[54]

5. Finally, the fifth difference, which is an outgrowth of the fourth difference, concerns the economic attributes of the two types of claims. Since accommodation claims have costs, they can be described as *distributive* claims, or claims for *a share in a common budget*—be it the employer's budget, or the state's budget if the cost is born by the state. They can also be described as policy arguments for the allocation of money for an important goal, namely, integrating disabled people into society, or, improving their quality of life. Such claims compete in a zero-sum game with other valid claims over limited resources. However, simple discrimination claims are not distributive claims and they do not compete with other claims in a zero-sum game. They are not policy arguments for spending money. They are what are typically termed rights claims.[55]

As with Raz's scheme, some clarifications are in order. I will consider two such clarifications. First, Kelman does not argue that the norm against simple discrimination is absolute, in the sense that no consideration could ever be balanced with it. His claim is only that, once the decision has been made that discrimination is not allowed, a claim against simple discrimination does not regularly have to stand to the balance.[56] Secondly, Kelman needs to address the

---

[53] Such cost would be a "private" or "subjective" cost, but not a "public" cost, since racist ideology is publicly perceived as illegitimate. *See id.*, passage quoted in note 51 *supra.*

[54] *See id.* at 836.

[55] "The accommodation [claim is a] *distributive* claim … rather than a right." *Id.* at 837.

[56] This clarification is actually two clarifications. First, that balancing is allowed in the stage of formulating the right against simple discrimination. (Kelamn writes:

> The 'right' [against simple discrimination] is not, in my view, 'absolute' in its formation or initial articulation. That is to say, we cannot ascertain whether or not a party ought to have the right to be free from simple discrimination without engaging in conventional policy

issue of customers' preferences, which seems to show that avoiding simple discrimination does have a cost after all (e.g., if the employer would hire the black person, she would loose customers.) Kelman addresses this issue through the idea of vicarious simple discrimination: the customers are the ones engaged in simple discrimination. The employer is just the middleman between the customers and the employee.[57]

---

balancing, weighing the interests of potential defendants against those of rights claimants. But once that policy balancing is done, we establish a scheme of rights that does not demand case-by case balancing.

Id. at 835-6. *Compare* with Raz's clarification, according to which balancing is possible at the level of forming the second-order reason. *Supra* note 42 and accompanying text,) and secondly, that balancing a claim against simple discrimination is allowed under extreme circumstances, but not on a regular basis. (Kelamn writes:

> In the anti-discrimination context, for instance, one supposes that an employer might temporarily segregate workers in an otherwise impermissible fashion to avert severe racial violence, if no less rights-violative alternative were available… What differentiates this cost-benefit calculation from a typical cost-benefit calculation is simply that the defendant must prove that the costs of observing the conventional right in these contexts far outweigh the benefits before he is immunized from the duty to observe the right. It is also possible to argue that parties can invoke justification defenses only when trying to prevent harms that are in some fashion incommensurate with the benefits we expect from following ordinary practices… [I]n either case, claims of simple discrimination will not be routinely subject to balancing tests.

Id. at 836, note 7).

[57] Kelman wirtes:

> I have long claimed that customer preference cases are… simple discrimination cases. The employer, in essence, acts as an agent of customers. (The 'real' employer of a shoe salesman is the shoe store customer; the shoe store manager simply intermediates between customers and salesman.) An employer would, in essence, manifest the customers' impermissible market-irrationality if she were able to say that she refused to hire those that customers would not deal with, not because of her own market- irrationality, but because profits would decline if she hired an unpopular salesperson.

Id. at 848.

C. The Dual Model of Balancing—Raz and Kelman Combined

I propose that the five differences between simple discrimination claims and accommodation claims according to Kelman's analysis correlate with Raz's two orders of reasons. Recall that Raz defined a second-order/exclusionary consideration as "any reason to… refrain from acting for a reason."[58] Kelman's analysis shows that a claim of simple discrimination, or the anti-discrimination norm, functions just like an exclusionary consideration: it is a reason to exclude other reasons—discriminatory reasons, such as the interest in racial separation—from being acted upon in the workplace. Put differently, the anti-discrimination norm can be seen as a second-order promise not to take into account certain first-order considerations—i.e. discriminatory considerations—in making decisions in the workplace.[59] The accommodation claim, however, functions only as a first-order consideration. It is not a second-order consideration of a higher level, which makes some lower level reasons totally excluded. Rather, it is a regular reason that adds to the total balance of reasons in the case. It is one more consideration to be balanced with other valid considerations of the same level within the sphere of the workplace, according to its weight under the circumstances.[60]

However, Kelman's analysis does not merely follow Raz's analysis. It also provides new and rich insight into Raz's model, so that the two frameworks combined form an improved and powerful tool for analyzing balancing, which I call the dual model. Raz contributes the distinction between the two levels of reasons, while Kelman complements this description by enumerating the five

[58] RAZ, *supra* note 10, at 39.

[59] This promise would be a promise of the American society as a whole, instead of a promise of single person, as in Raz's example of Colin's promise.

[60] Another feature of the Razian analysis also applies to Kelman's analysis. The claims of the employer and of the employee conflict *logically* in simple discrimination (they would always conflict since it is always the case that the wish for racial separation conflicts with the norm against simple discrimination), while they only *incidentally* conflict in accommodation cases (it is not always the case that the wish to save money conflicts with the accommodation norm. This will only happen if the wish to save money results in not giving enough money for accommodation.)

differences between simple discrimination and accommodation cases as well as providing the vocabulary of *costs*, *distribution* and *allocation of resources*.

Kelman's analysis reveals that first-order reasons are actually appeals for the allocation of resources to an important goal. As appeals for resources, first-order reasons always have costs, and therefore always have to compete, at least in principle, with all other valid (first-order) claims for the same resources. Thus, they should be properly considered to be budgetary claims—claims which are, by nature, subject to reasonability and to balancing. But, continues Kelman's analysis, not all claims are budgetary claims for resources. Some claims rely on an earlier commitment to disregard other claims as illegitimate, or regard their abolition as costless. These are second-order reasons. Kelman's analysis, therefore, reveals both that first-order reasons are budgetary claims that have a cost, and also that second-order reasons are non-budgetary reasons, which are, by definition, cost free.

To demonstrate the combination of the two analytical schemes, consider once again Raz's example of Colin[61] analyzed in Kelman's terms. All the first-order considerations for and against sending Colin's son to the expensive school had *costs*. They all necessarily came one *at the expense* of the other in a *zero sum* game and were in fact *claims for resources*. For example, sending Colin's son to an expensive school would come at the expense of writing Colin's novel, because they both cost money and Colin has a limited amount of money. Similarly, Colin's son's interest in attending the expensive school can be described as a claim for *a share in Colin's budget*, or as a claim for the *allocation* of Colin's recourses, or as a claim that Colin *accommodate* his son's needs.

However, Colin's second-order reason—his promise to consider only his son's interests in making decisions regarding his son's education—is not a claim for resources. In fact it is not a claim at all, but a reason to exclude some other claims, namely those claims that do not relate to his son's interests, from being considered, or from being regarded as valid claims or costs. The promise itself is

[61] *Supra* note 33 and accompanying text.

therefore not reliant on limited resources, and accepting it does not cost anything. Rather, once the promise is in place, denying those considerations that are excluded by the promise is costless, since Colin has already decided that they should be disregarded.[62]

The following table summarizes the dual model distinction between first-order and second-order consideration, combining the schemes of Raz and Kelman.

Table 1: First-Order and Second-Order Considerations—Raz and Kelman Combined

	First-order considerations	*Second-order/exclusionary considerations*
1	Give reasons for or against a course of action.	Give reasons to exclude other reasons from being considered in making a decision for or against a course of action
2	Constitute claims for the allocation of societal resources.	Constitute claims to abolish illegitimate or invalid considerations.
4	Subject to balancing with other claims for resources, come at the expense of such other claims, compete with them over limited resources, not all claims can be met.	Not subject to balancing, not competing for resources, all claims can be met.
5	Distributive. Resemble claims for a share in a budget.	Not distributive. Resemble claims that a certain consideration should not be given any share in the budget, because it is invalid.
6	Conflict incidentally with other first-order reasons.	Conflict logically with the first-order reasons they exclude.

Before moving on to assessing the implications of the dual model, I would like to address a possible objection to the dual model. According to this objection, even a second-order/exclusionary consideration will have to be balanced at some point, if the costs of abiding by it are too high, or its consequences too extreme. If the costs of abiding by a promise, or a rule, or even the anti-discrimination norm, are too high, an exception to them will be found, and they will be balanced with

[62] *See* also *infra* notes 63 and 64 and accompanying text .

the first-order consideration that they are supposed to exclude. This goes to show that there is no real distinction between first-order and second-order considerations.

There are three possible replies to this objection. For purposes of brevity I only sketch these replies briefly, leaving their full elaboration to another opportunity. The first reply is that second-order/exclusionary considerations include within them also their exceptions. For example, the idea that a promise is a second-order/exclusionary consideration does not require absolute obedience to the promise. It requires only that those exceptions to the promise that are allowed would be found in the practice of promising itself.[63] The second reply is that, although in some extreme circumstances we might allow the balancing of a second-order/exclusionary consideration, under regular circumstances we would not allow such balancing. Promises and norms, such as the norm against simple discrimination, are second-order considerations since we do not regularly balance them with other considerations.[64] Finally, the third reply is that, while balancing a

[63] John Rawls makes a similar argument in one of his early essays:

> Is this [claiming that a promise should not be balanced] to say that in particular cases one cannot deliberate whether or not to keep one's promise? Of course not. But to do so is to deliberate whether the various excuses, exceptions and defenses which are understood, and which constitute an important part of the practice, apply to one's own case. Various defenses for not keeping one's promise are allowed… there may be a defense that the consequences of keeping one's promise would have been *extremely* severe… But this sort of defense, allowed by the practice, must not be confused with the general option to weigh each particular case on utilitarian grounds.

John Rawls, *Two Concepts of Rules*, 64 PHILOSOPHICAL REVIEW 3 (1955), reprinted in FREDERICK A. OLAFSON (ED.), SOCIETY, LAW, AND MORALITY 420 (1961), at 428-29. *Compare* with the following distinction between *internal* and *external* constitutional interpretation: "[T]he 'exception' may best be understood not as resulting from a balance but as resting upon a principle *internal* to the constitutional provision… That is, where the justification for, or basis of, the right no longer applies, the right should not be recognized. This 'internal' argument is quite distinct from… the 'external' evaluation of costs that balancing entails." Aleinikoff, *supra* note 6 at 1000.

[64] Consider the following example by Aleinikoff:

> I promise to pick you up at the train station at noon. At 11:55 a.m., a friend breaks a leg and needs to be taken to the hospital. If I take her, I won't get to the station until 12:30 p.m.

second-order/exclusionary consideration is possible, it would manifest a change in the *role* of the agent engaged in balancing. The balancer's role would change from that of an agent operating *under* the second-order norm, to that of an agent engaged in *changing* or *forming* the second-order norm. The distinction between the two kinds of considerations remains valid.[65] These three replies are interrelated, however, for the purposes of this Article, any one of them should suffice.[66]

> Of course, I go to the hospital (even though I have no way of getting a message to you). One could say that implicit in my promise to pick you up is the possibility that some pressing need will command my attention at exactly the time the train arrives. But I won't even go that far. I will assume that I agreed to get you come hell or high water and that I have decided to break the promise because of the unforeseen circumstance—because a broken leg 'outweighs' a half-hour wait at the train station. This emergency situation does not suggest that I would have considered leaving you to watch the trains go by for any reason. I would not have calculated costs and benefits if someone else asked me to lunch, if there were a television show on at noon that I wanted to watch, or if I needed just thirty more minutes to develop a coherent theory of equal protection law.

Aleinikoff, *supra* note 6, at 1000 n. 317. *See supra* note 56 (Kelman's second clarification) for the same argument concerning balancing the norm against simple discrimination.

[65] *Compare* with the following by Rawls:

> [I]f one holds an office defined by a practice then questions regarding one's actions in this office are settled by reference to the rules which define the practice. If one seeks to question these rules, then one's office undergoes a fundamental change: one assumes the office of one empowered to change and criticize the rules, or the office of a reformer.

Rawls, *supra* note 63, at 433.

[66] There is actually a forth reply to the objection to the dual model, which follows a Pragmatist line of justification. According to this reply, the dual model is valid, because it 'works'. That is, it provides a helpful set of tools in analyzing practical problems, and gives us a richer picture of practical problems than its balancing consciousness alternative. The test for this answer would be in the success of the application of the dual model to practical legal problems, which would be the aim of the rest of the Article.

D. The Implications of the Dual Model

What are the implications of this new dual model for balancing? Why have I taken the reader through all of Kelamn's and Raz's fine analytical distinctions? If the analysis is correct, its implications for balancing, both in terms of rejecting the balancing consciousness, and in terms of understanding the true nature of balancing, are quite far-reaching.

The first implication of the dual model is the rejection of both of the supporting arguments of the balancing consciousness. The reducibility argument is repudiated since not every decision is reducible to balancing. Every decision is reducible to balancing only if we were to assume a "flat" world, in which all considerations are first-order considerations. However, as Raz and Kelman demonstrate, many important considerations (rules, promises, and norms, such as the norm against simple discrimination) function as considerations of a different level. They are second-order considerations, and they should not be balanced with first-order considerations.[67]

The anti-absolutist argument is also partially repudiated by the dual model. This is an especially important point, since the anti-absolutist argument is an

[67] To the list of second-order considerations that defy a "flat" view of practical reason, one can also add *values*, and *valuations* (*See* Nussbaum, *supra* note 22; Sunstein , *supra* note 6; Richardson, *supra* note 22; Anderson, *supra* note 25 (all criticizing the law and economic movement by stressing the idea that certain values and valuations are incommensurable and that there must be a distinction between levels and types of values and valuations,)) and also *desires* (*See* Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, in his THE IMPORTANCE OF WHAT WE CARE ABOUT: PHILOSOPHICAL ESSAYS 11 (1988) (arguing that our desires are of two orders, first-order and second-order, and that this hierarchy between our desires is what makes us human, and accounts for us having free will.)) Finally, Aurel Kolnai argues against a "flattened" view of morals, criticizing "modern English-speaking" philosophers of the utilitarian school that they "reduce all value to 'needs' or 'desires' and their different 'intensities' and in their turn, I venture say, seek preposterously to evade the very concept or Hierarchy... They postulate a flattened world from which the presence of Verticality is all but wholly excluded" Aurel Kolnai, *The Concept of Hierarchy*, in his ETHICS, VALUE AND REALITY: SELECTED PAPERS OF AUREL KOLNAI 165 (1978).

argument that "balancers" place heavy reliance on.[68] The anti-absolutist argument holds that balancing is always inevitable since no consideration can be given immunity from balancing. Giving any consideration immunity from balancing means that all one's resources would have to be given to this one "unbalanceable" or "absolute" consideration. Kelman's framework combined with Raz's shows that this kind of argument can hold only with regard to first-order considerations and not with regard to second-order considerations. Only first-order considerations have costs and thereby compete with other first-order considerations over limited resources. Only for a first-order consideration would it therefore be true that not balancing it with other first-order considerations would make it absolute since it would mean diverting unlimited resources for its fulfillment.

However, second-order considerations do not have costs and do not come at the expense of other considerations. They do not compete in a zero-sum game, they are not affected by the fact that there are limited societal resources, and they can all be met. This is so because they are considerations for the exclusion of interests deemed altogether illegitimate and irrelevant in a particular case. As such they do not cost anything but rather express an earlier decision on costs.

The anti-absolutist argument is therefore misplaced with regard to an entire category of practical problems. As with the reducibility argument, it can hold only at the expense of limiting its scope. The supporting ideologies and arguments for the balancing consciousness—utilitarianism, pragmatism, economic analysis, and pluralism—are therefore misplaced with regard to second-order conflicts. When applied to second-order conflicts they simply misrepresent them, as if they were first-order conflicts.[69]

There is another implication of the dual model, which is just as important as the first. This implication relates to the *nature* of balancing itself. Balancing conflicts, the dual model tells us, have a specific character. They are budgetary conflicts; conflicts over limited resources; conflicts of considerations of the same

[68] *See, e.g.,* comment in text accompanying note 20 *supra*.

[69] *See infra* Part V.B documenting this distortion in constitutional law.

level, varying in weight but not in kind. We are thus provided with a rudimentary test for the appropriateness of balancing. In each case, we should ask ourselves, what is the nature of the conflicting considerations, and what is the nature of the conflict? Is this a conflict over resources? Can each claim be properly interpreted as a claim for the allocation of funds to a worthy cause, subject to reasonability? Or, can we identify one of the considerations as an exclusionary reason—a reason to reject some other reasons for action—and the conflict as a second-order conflict of considerations from different levels? Balancing would be appropriate only in the first kind of conflict.

III. THE DUAL MODEL APPLIED TO CONSTITUTIONAL LAW

Once the dual model is outlined and the balancing consciousness refuted, the next step is to apply it to constitutional law. This will be the task of this Part.

Constitutional conflicts traditionally involve a conflict between a constitutionally protected right and a governmental or public interest. Following the dual model, we must ask ourselves therefore in each case of constitutional conflict—what kind of conflict is this? Can it be properly interpreted as a *first-order* conflict over resources? Can both claims in the conflict—the constitutional rights claim and the governmental interest claim—be properly interpreted as two legitimate first-order claims fighting over a limited budget? Or, does one of the claims (the constitutional rights claim, presumably) function as a *second-order/exclusionary* reason, which totally excludes the other claim? Balancing is appropriate only in the first case. It should be rejected in the second.

This Part demonstrates that constitutional cases present *both* types of conflicts. That is, some constitutional cases involve first-order conflicts, and others involve second-order conflicts. Furthermore, for each particular right one must differentiate between cases in which it appears as a first-order consideration, and cases in which it appears as a second-order consideration. The discussion focuses first on free speech, distinguishing first-order free speech claims from second-order free speech claims. The discussion then moves on to analyze two

other constitutional areas according to the dual model—dormant commerce clause and equal protection—and refers to some other possible applications of the dual model in constitutional law.

A. Free Speech First-Order Claims

Consider a series of free speech cases in the 1940s that involved *indirect* limitations on speech and the regulation of *time, place and manner* of speech. In these cases, a governmental interest that was unrelated to the content of speech was the basis of regulation that imposed burdens on speech. For example, in *Schneider v. State*,[70] a governmental interest in keeping the streets of a city clean was the basis of a regulation that banned the distribution of handbills in the streets. This ban, although not directed at the content of speech, was an indirect burden on speech in that it restricted the place and the manner in which handbills could be distributed.

Similarly in *Kovacs v. Cooper*,[71] a governmental interest in maintaining quiet in the streets of a city was the basis of a regulation that restricted the operation of sound-trucks (trucks equipped with loudspeakers that were used to promote mayoral candidates). As in *Schneider*, this ban, although not directed at speech, resulted in an indirect burden on speech and a restriction on the time, place, and manner of speech by limiting the communication of ideas to certain designated uses. Finally, in *Cantwell v. Connecticut* [72] the governmental interest in maintaining the privacy of the home and in protecting homeowners from fraud led to a regulation that required special permits for door-to-door solicitation by a religious group thus limiting the group's ability to spread its message.

In all of these cases the Court applied balancing. The Court balanced the governmental interest with the interest in free speech, which is protected by the First Amendment. The balancing exercise determined which interest outweighed

[70] 308 U.S. 147 (1939).

[71] 336 U.S. 77 (1949).

[72] 310 U.S. 296 (1940).

the other, and whether the regulation reflected the proper balance between the two. Thus, in *Schneider*, the Court overturned the regulation banning the distribution of handbills, because it reflected an improper balance between two interests. The interest of free speech, the Court determined, outweighed the interest of street cleanliness.[73] A similar decision was made in *Cantwell* with regard to the interest in maintaining the privacy of the home.[74] In *Kovacs*, on the other hand, the regulation that banned speech from sound-trucks in the interest of maintaining quiet was found appropriate by the Court.

However, for our purposes, the importance of these cases is not in the particular balance struck in each one of them, but rather in the features that made them amenable to balancing in the first place—i.e., the fact that the free speech claims in all of these cases were first-order claims, and the conflict a first-order conflict.

Consider the conflict between the government's interest and the right to free speech in *Schneider*.[75] In this case, the interest of keeping streets clean conflicted with the interest of allowing speech in the form of handbills. This conflict has all the features of a first-order conflict between two first-order reasons as described by Raz. The cleanliness interest and the free speech interest are both valid interests applicable to the case. They conflict because of the special circumstances of the case, i.e., the fact that distributing handbills causes litter. And therefore a decision has to be made as to which is a more important or weighty consideration

---

[73] In *Schneider*, Justice Roberts writes:

> We are of opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it…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.

308 U.S., at 162-63. (Roberts, J. writing for the Court)

[74] The Court determined that the regulation was not "narrowly drawn to prevent the supposed evil" and laid a "forbidden burden upon the exercise of liberty protected by the Constitution." 310 U.S., at 307.

[75] See, *supra* note 70 and accompanying text.

in the case. In addition, choosing one interest will inevitably be at the expense of the other interests. In *Schneider*, the Court admitted that the city would have to put up with some additional litter in order that free speech be adequately protected.[76]

Consider now the analysis of the conflict in *Schneider* in terms of a claim for *accommodation* following Kelman's analysis. The free speech claim of the petitioners in *Schneider* can be regarded as a claim for the accommodation of speech. That is, they ask that the municipality of their city *allocate resources* so that they can have more speech—the municipality should bear the *costs* of cleaning the litter caused by the handbills so that the plaintiffs can express their messages. As such, the petitioners' claim in *Schneider* was not an absolute claim. It had to be *reasonable*. Hypothetically, if the petitioners' speech had created an abundance of litter that brought on exorbitant cleaning costs, the Court would not have accepted the petitioners' claim. The entire conflict can therefore be characterized as a budgetary conflict: both claims—the free speech claim and the cleanliness interest claim[77]—are valid claims that cost money. But, since there is a limited amount of money, a certain *distributive* decision has to be made, and this means balancing. By deciding for the petitioners, the Court indicated that in the special circumstances of that case it was reasonable to expect the municipality to pay for the accommodation of speech, thus stating that the way the city balanced the interests was unreasonable.

B. Free Speech Second-Order Claims

The previous analysis showed that certain free speech cases presented free speech as a typical first-order consideration. However, this description does not reflect all cases of free speech. Some of the most celebrated early cases of free

[76] "Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press." 308 U.S., at 162.

[77] The city's competing valid interest in the case was the interest in saving money, or the interest in spending its limited budget on other valid causes.

speech involved a free speech claim of a different nature. I am referring to cases that involved what is known as a *direct* impact on speech, or attempts to control the content of speech—i.e., to suppress some content or to allow only some content. This famous line of cases includes *Abrams v. United States*,[78] *Gitlow v. New York*,[79] and *Whitney v. California*,[80] in which government attempted to suppress anti-war and pro-socialist content of speech. Another line of free speech cases involved governmental attempts to suppress pro-communist content of speech in the 1950s and early 1960s.[81] Direct regulation of content was also involved in cases such as *Cohen v. California*,[82] and *Tinker v. Des Moines School District*[83] concerning anti-Vietnam-War content of speech. In the *Flag-Desecration* cases,[84] the Court dealt with regulations pertaining to the suppression of messages contemptuous of the American flag. Recent examples of direct impact on speech exist as well.[85]

What distinguishes these cases from the line of cases discussed in the previous section? They involve free speech as a second-order claim, and a

---

[78] 250 U.S. 616 (1919).

[79] 268 U.S. 652 (1925).

[80] 274 U.S. 357(1927).

[81] *See* American Communications Ass'n v. Douds, 339 U.S. 382 (1950); Dennis v. United States, 341 U.S. 494 (1951); Barenblatt v. United States, 360 U.S. 109 (1959); Konigsberg v. State Bar, 366 U.S. 36 (1961); Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1 (1961).

[82] 403 U.S. 15 (1971).

[83] 393 U.S. 503 (1969).

[84] Street v. New York, 394 U.S. 576 (1969); Smith v. Goguen, 415 U.S. 566 (1974); Spence v. Washington, 418 U.S. 405 (1974); Texas v Johnson, 491 US 397 (1989) and United States v Eichman, 496 US 310 (1990).

[85] To the list of cases involving *direct* impact on speech one can add also, R.A.V v. City of St. Paul, 505 U.S. 377 (1992). *See* Elena Kagan, *The Changing Faces of First Amendment Neutrality: R.A.V. v St. Paul, Rust v Sullivan, and the Problem of Content- Based Underinclusion*, 1992 S. CT. REV. 29, and Turner Broadcasting System, Inc. v FCC, 114 S. Ct. 2445 (1994). For additional cases *see* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996), at 427-8 n. 43, 45.

second-order conflict between the free speech norm and the governmental interest. Consequently they do not involve balancing.

In *Abrams,*[86] for example, the free speech interest conflicted with the government's interest in protecting against the harmful effects of anti-war opinions. Such a conflict (as interpreted by Holmes' famous dissent) has all the characteristics of a conflict between a second-order reason and a first-order reason. The free speech interest and the government's interest are not two valid interests that differ merely in their weight. Rather, the free speech interest is a second-order/exclusionary reason that totally excludes the government's interest in the case. Holmes interpreted the free speech norm as providing that "the ultimate good desired is better reached by free trade in ideas [rather than by allowing] persecution for the expression of opinions"[87] Such a free speech norm makes the government's interest in protecting against anti-war opinions totally invalid, rather than a consideration to be balanced with free speech.[88] The free speech interest is a (second-order) reason for the government not to act on the (first-order) reason that it disagrees with the defendants' creed. The objection to the petitioner's creed is not a consideration that is balanced with the consideration of free speech. Rather, according to Holmes, "no one has a right even to consider [the petitioner's creed] in dealing with the charges before the court."[89] Such consideration is therefore totally excluded as irrelevant to the case.

Consider now the analysis of the direct impact cases in terms of Kelman's analysis of claims against simple discrimination. Holmes' dissent in *Abrams* can be regarded as a repudiation of the discrimination of speech because of its anti-war content, (based on the idea that all opinions must have the opportunity to

---

[86] *Supra* note 78

[87] *Id.* at 630.

[88] *Compare* with the following from Justice Black: "The idea of 'balancing away' First Amendment freedoms appears to me to be wholly inconsistent with the view strongly espoused by Justices Holmes and Brandeis, that the best test of truth is the power of the thought to get itself accepted in the competition of the market." Konigsberg v. State Bar of Cal., 81 S. Ct. 997, 1013 (1961) (Justice Black dissenting).

[89] 250 U.S., at 629-30.

compete equally in the free market of ideas). The free speech principle, therefore, operates in Holmes' dissent as an anti-discrimination principle that absolutely forbids, rather than balances, a discriminatory motive against speech. And the free speech claim functions as a claim for abolishing the discriminatory behavior against speech, rather than as a claim for the allocation of resources for speech in order to accommodate the need for more speech.

The same analysis is true for the other cases of direct infringement of speech. If a certain law suppresses (either in its terms or in its application) only those acts of speech that express a communist point of view, as in the Cold War cases, this law is *discriminating* against a communist point of view.[90] And if a law favors only the messages that are conveyed by the American flag, as in the flag burning cases, it discriminates in favor of this particular content of speech.[91] The free speech anti-discrimination norm in these cases means the total exclusion of the interest behind the discrimination of the speech, rather than balancing it with the interest of free speech.

Direct impact on speech cases, such as *Abrams*, are therefore inappropriate subjects of balancing because they share the features of second-order conflicts as identified by the dual model. In cases of direct impact on speech, free speech is a

---

[90] Some of these cases involved regulation that was specifically addressed to the content of speech (*E.g., Dennis* involved the *Smith Act* of 1946 that made it a crime "… to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence." And *Douds* involved the Labor-Management Relations Act of 1947 that specifically targeted a political point of view by requiring officials of unions who wished to belong to the National Labor Relations Board to take oaths that they did not belong to the Communist Party. *See* cases cited *supra* in notes 78 and 81) while other cases involved a regulation that was facially neutral with regard to the content of speech, but was applied in a manner that singled out speech because of a specific content (for a comprehensive review see Kagan, *supra* note 85, at 456-472).

[91] *See* John H. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1501, 1506-7 (1975) (arguing that the anti-flag-burning regulations improperly "single out one set of messages, namely the set of messages conveyed by the American flag, for protection.")

second-order consideration—a consideration of a higher level that excludes other reasons for action, rather than being balanced with them.

In conclusion, the application of the dual model to free speech cases showed that *free speech is not one thing but two*. In some cases free speech is a first-order consideration, which can be termed the free speech *interest.* In other cases it is a second-order consideration, which can be termed the free speech *right*.[92] Each of these two types of cases follows a different type of logic—the first a balancing logic, and the second an exclusionary logic.

Did the Court follow this distinction? Did it balance only in first-order conflicts and exclude in second-order conflicts? While traces of this distinction are clearly evident in Court opinions of both types,[93] and sometimes even explicitly announced,[94] the general rhetoric in modern constitutional law is a balancing consciousness rhetoric that distorts this distinction.[95] That is, both cases are treated similarly; the solution to any conflict between free speech and a governmental interest is balancing.[96]

---

[92] *Cf.* Pildes, *supra* note 6, at 724 (1994) ("Rights are the means of defining the reasons for state action that are appropriate in a particular sphere.")

[93] *See* above passages from *Schneider* and *Abrams.*

[94] *See* the following by Jusice Haraln: "[Balancing is applicable only to] general regulatory statues, not intended to control the content of speech, but incidentally limiting its unfettered exercise." Konigsberg v. State Bar, 366 U.S. 36, 50 (1961) (Harlan, J. writing for the Court)

[95] *See, e.g.*, the following quote from Chief Justice Rehnquist: "We cannot know for certain the sort of issues with which the Court will grapple in the third century of its existence. But there is no reason to doubt that it will continue as a vital and uniquely American institutional participant in the everlasting search of civilized society for the proper balancing between liberty and authority, between the state and the individual" W. REHNQUIST, THE SUPREME COURT--HOW IT WAS, HOW IT IS 319 (1987).

[96] Professor Tushnet conveys this impression when he writes in 1985 that "a recent symposium on First Amendment theory is pervaded by comments that the balancing debate is over and that everyone knows that free speech law must be developed through the use of balancing". Mark V. Tushnet, *Anti Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502, 1531 (1985).

Before discussing how this came about, and what its implications are, let us consider further evidence with regard to the application of the dual model to other constitutional rights.

C. Dormant Commerce Clause and Equal Protection

This section will consider two further applications of the dual model to constitutional law and refer to some other possible applications. That is, it will show that several other constitutional rights have a dual aspect that has to be distinguished with regard to balancing. Such rights can generate either first-order claims for the allocation of resources to the right, subject to balancing, or second-order claims for the abolition of illegitimate governmental objectives, not subject to balancing.

1. The first area of constitutional law to be considered here is commerce clause jurisprudence. The dual model identifies the following two levels of commerce clause considerations. There is a first-order commerce clause consideration (that can be termed the *commerce clause interest*,) and there is a second-order commerce clause consideration (that can be termed the *commerce clause right*). The first-order commerce clause interest is the interest in having free commerce across state lines (it can be held either by a private commercial actor who wishes not to have her commerce burdened, or by Congress as a national interest in having free movement of goods between states).[97] The second-order commerce clause right is the right not to have trade restricted due to protectionist state motives. In other words, it is the right not to have trade restricted because of a state's wish to prefer local economic actors over foreign economic actors.[98]

[97] *See* Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1103-4 (1986).

[98] Donald Regan defines a protectionist purpose as "the purpose of improving the competitive position of local (in-state) economic actors, just because they are local, vis-à-vis their foreign (…mean[ing]… out-of-state) competitors." Regan, *supra* note 97, at 1094-95.

The interest of free commerce along state lines is a reason to act in the furtherance of a certain good (free interstate commerce) to the extent possible under the circumstances. It is limited by its nature, and subject to balancing with other valid interests. One cannot avoid having some limitations on trade across state lines, and abolishing such limitations necessarily comes at the expense of other important interests, such as preventing illegal smuggling, collecting taxes, and so on. It therefore functions as a first-order consideration only. However, the right against protectionist motives is a reason to totally exclude certain other reasons for action (protectionist reasons). The right against protectionist motives is not restricted in the same way as the interest in free interstate commerce. It is not balanced with, but rather totally excludes, those motives for governmental action that are based on protectionism. It therefore functions as a second-order/exclusionary right.

These two types of commerce clause considerations generate first-order commerce clause conflicts and second-order commerce clause conflicts. First-order commerce clause cases are cases involving a conflict between the (first-order) interest of free interstate commerce and another (first-order) interest. An example would be *Southern Pacific Company Co. v. Arizona*.[99] This case involved a law limiting the length of trains in order to avoid accidents associated with long trains. The law conflicted with the interest of free interstate commerce, because it imposed high costs on railroad companies operating trains that crossed state lines. Both the national interest of free interstate commerce and the interest in preventing accidents functioned as first-order interests in the case. They were both valid claims for the promotion of a certain good as much as possible under the circumstances. They both had costs in terms of other valid claims, and they incidentally conflicted in the case. The case was therefore a balancing case and the Court balanced the two considerations.[100]

---

[99] 325 U.S. 761 (1945).

[100] Justice Stone used balancing writing for the Court that the effect of the regulation was not enough to "outweigh the protection of the interest [of interstate commerce] safeguarded by the commerce clause." *Id.*, at 770.

Second-order commerce clause cases are cases involving the second-order/exclusionary anti-protectionist principle conflicting with the first-order/excluded interest in favoring local commercial actors over out-of-state commercial actors. Such a conflict would be a logical conflict, rather than an incidental conflict of costs and would be resolved by excluding the protectionist interest altogether, rather than by balancing. Arguably, many commerce clause cases are such cases.[101] An example is *Hunt v. Washington State Apple Advertising Commission*[102] in which a North Carolina statute forbade the use of certain grades of apples that Washington State apple growers were famous for. The Court's opinion reads like an accusation that this law was motivated by an illegitimate protectionist motive, and it invalidates the motive.[103]

2. The second area of constitutional law to be considered here is the Fourteenth Amendment's equal protection clause, and the constitutional principle of equality. The constitutional principle of equality can also be regarded as espousing two kinds of considerations: a first-order consideration in having as much equality in society as possible under the circumstances (the *equality interest*) and a second-order/exclusionary principle that totally excludes, rather than balances, discriminatory motives (the *equality right*).

The equality interest has several well-known manifestations in equal protection theory. It is sometimes referred to as the principle of substantive equality, and it includes the principles of accommodation, discussed in length earlier, and also the principle of affirmative action.[104] Both the principle of

---

[101] *See* Regan, *supra* note 97, at 1092: "in the central area of dormant commerce clause jurisprudence… the Court has been concerned exclusively with preventing states from engaging in purposeful economic protectionism."

[102] 432 U.S. 333 (1977).

[103] *See* Regan, *supra* note 97, at 1221-28, interpreting the Court's rhetoric as an anti-protectionist rhetoric. "The underlying concern with suppressing protectionism is perfectly visible to whoever will look."

[104] *See, e.g.*, Gary Goodpaster, *Equality and Free Speech: The Case Against Substantive Equality*, 82 IOWA L. REV. 645 (1997) (describing interpretations of the Fourteenth Amendment as

accommodation and the principle of affirmative action manifest the wish to promote equality in society among its different social groups. Both principles are, however, limited in nature, since they require social resources for their implementation, and since they would necessarily conflict with other valid social interests. The interest in promoting equality between black and white people, which stands behind affirmative action programs, might for example, conflict with the interest in meritocracy in education.[105] The interest in accommodation, discussed at length in Part II, may conflict with other societal interests that require resources.[106]

The second-order/exclusionary right against discrimination however, is not limited in the same way. The right against discriminatory motives is a reason to totally exclude discriminatory reasons for action. As such, it is not balanced with, but rather totally excludes, those motives for governmental action that are based on discrimination.

These two manifestations of the equality principle generate first-order equal protection cases and second-order equal protection cases. First-order equal protection cases are cases involving a conflict between the first-order interest of accommodation, or of affirmative action, and a governmental first-order interest. An example would be *University of California v. Bakke*.[107] In this case, the interest in promoting the equality of black people in American society conflicted with the interests of meritocracy, and also with the interest of the claimant, a white student, to be admitted to University. The interest of affirmative action, as well as the interest of meritocracy and the interest of the white student to be accepted to the University, functioned as first-order interests in the case. They

---

espousing substantive equality and a right to affirmative action, and arguing that such interpretations may conflict with the right to free speech).

[105] *See* generally Paul Brest & Miranda Oshige, *Affirmative Action for Whom?* 47 STAN L. REV. 855 (1995).

[106] *See supra* II.B especially the discussion of the second difference between accommodation claims and simple discrimination claims on page 19

[107] 438 U.S. 265 (1978).

were all valid claims for the maximal promotion of certain goods under the circumstances. They all had costs in terms of other valid claims, and they incidentally conflicted in the case. The case was therefore a balancing equal protection case. [108]

Second-order equal protection cases are cases involving the second-order anti- discrimination principle conflicting with a first-order/excluded interest in discriminating. Such a conflict is a logical conflict, rather than an incidental conflict of costs and is resolved by excluding the discriminatory interest altogether, rather than by balancing. Probably the most notable such case is *Brown v. Board of Education*.[109] The Court argued, in effect, that the separation between black and white students involved in the case, was motivated by illegitimate discriminatory motives, and that such motives should be totally invalidated, rather than balanced.[110]

Additional areas of constitutional law that can be interpreted according to the dual model include, the establishment clause,[111] the constitutional right to

---

[108] Since affirmative action plans are not motivated by illegitimate discriminatory motives, but rather by a legitimate motive of accommodation, persons badly affected by them do not hold a second-order right to exclude them. The harm caused by those plans to white students is analogous to the *indirect* harms, caused by regulations not aimed at speech, to those who's speech is being restricted. Such harm is a valid first-order claim that should be balanced against opposing first-order considerations, but it does not espouse a second-order right to totally exclude opposing considerations. *Compare* Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427 (1997).

[109] 347 U.S. 483 (1954).

[110] *See* Aleinikoff, *supra* note 7, at 998 (arguing that *Brown* is not a balancing case.) There is also another reading of the case, according to which it involves balancing. This reading is supported by certain passages in the Court's opinion. However, I will argue that these passages misrepresent the real reasoning in the case, and do not reflect the proper reading of the case. *See supra* note 176 and accompanying text.

[111] *Compare* Pildes, *supra* note 6, at 725-727, 750 ("the 'right' to freedom of religious conscience means that government may not act for the purpose of endorsing religion or religious sects.")

privacy,[112] the doctrine of unconstitutional conditions[113] the right to vote,[114] and the right to travel.[115]

IV. THE HISTORY OF CONSTITUTIONAL BALANCING

Part III proved the claim that all (or most) constitutional rights do in fact generate both first-order (balanceable) and second-order (non-balanceable) claims. Or, alternatively, that each right is (potentially at least) both a right and an interest. This Part addresses the second claim that was made with regard to constitutional balancing: the claim that current constitutional doctrine fails to differentiate between the two types of constitutional claims because of the balancing consciousness. Rather than proving this second claim directly, this Part first explains how this confusion came about through a historical review of balancing in American constitutional law. Once the historical background for the confusion is understood it will become easier to outline the exact manifestations of the confusion in current constitutional law, which will be the task of Part V.

A. Early Balancing

Balancing's origins are usually identified with the appearance of the progressive movement in American legal thought in the early 20th century and with some of its leading figures, such as Oliver Wendell Holmes, Roscoe Pound

---

[112] *Compare* Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989) (distinguishing between an interest in having maximal freedom from governmental intrusion into one's privacy, and the much stronger right not to have one's privacy restricted because of illegitimate governmental motives).

[113] *Compare* Pildes, *supra* note 6, at 736-742.

[114] *Compare Id.* at 741-745.

[115] *Compare* C. Edwin Baker, *Limitations on Basic Human Rights—A View From the United States*, in THE LIMITATION OF HUMAN RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 75, 82-4 (1986) (arguing that the "right" to travel is only affected if the regulation restricting travel is based on illegitimate motives.)

and Harland Fiske Stone.[116] In order to understand the role that balancing played in progressive thought and the exact use the progressives made of balancing one must understand the general agenda of progressivism in constitutional law.

Progressive jurisprudence in constitutional law was a reaction to late 19th century constitutional jurisprudence and to what is now known as the *Lochner* era.[117] The *Lochner* era Court notoriously interpreted the due process clause of the Fourteenth Amendment as banning almost any kind of governmental regulation of the market. It regarded any such regulation (setting maximum working hours in bakeries, for example[118]) as an unconstitutional abridgment of the right to contract, which is part of the liberty of the individual and therefore protected by the Fourteenth Amendment.

The progressives viewed such constitutional interpretation as an usurpation of judicial power. They accused the *Lochner* era Justices of "perverting" the words of the Constitution to suit their own free market ideology of laissez fair.[119] The progressives countered this accusation with the concept of balancing. The Court, they argued, interpreted constitutional rights as if they were unambiguous hard

---

[116] *See* HORWITZ, *supra* note 7, at 18-19 ("The emergence of balancing tests in numerous areas of the law is a prominent measure of the success of Progressive legal thinkers in undermining categorical thought"); Aleinikoff, *supra* note 7, at 948, 955 ("[B]alancing was a major break with the past, responding to the collapse of nineteenth century conceptualism and formalism…Oliver Wendell Holmes, the patron saint of all the various antiformalist schools, had fired the first salvos…Roscoe Pound broadened and deepened Holmes' attack"); Progressive balancing however is not one thing. One can distinguish two strands within progressive balancing, separating for example, Holmes' balancing from Pound's balancing. S*ee* Thomas C. Grey, *Molecular Motions: The Holmesian Judge In Theory And Practice*, 37 WM. & MARY L. REV. 19, 35-36 (1995).

[117] The era receives its name from the famous case, Lochner v. New York 198 U.S. 45 (1905), in which the Court repealed the New York Labor Law, which set maximum working hours in bakeries.

[118] *See Id.*

[119] *See* Justice Holmes' famous words in his dissent in *Lochner*: "[A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*... I think that the word 'liberty,' in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion"

and fast rules that totally banned governmental regulatory policies, while, in effect, such rights were only standards or policies that had to be balanced with conflicting governmental policies.[120]

"The great constitutional guarantees of personal liberty and of property… are but statements of standards," argued Justice Harland Fiske Stone, "they do not prescribe formulas to which governmental action must conform."[121] And Roscoe Pound, Dean of the Harvard Law School, wrote that it was only the ambiguity of the word "right" that allowed such rights as the right to contract to be interpreted as principles that are elevated above policy considerations. These "so called rights" argued Pound were but "individual claims, individual interests... on no lower plane [than the governmental policies that conflicted with them.]… There is a policy in the one case as much as in the other."[122] The standard for resolving constitutional conflicts, Pound concluded, must therefore be "a weighing or balancing of the various interests which overlap or come in conflict and a rational reconciling or adjustment."[123]

This review of progressive balancing shows that the progressives used balancing in a way that was consistent with the dual model. Balancing was used to indicate that certain rights claims—claims under the due process clause, for example—functioned, in effect, as first-order claims only, and not as *real* rights claims. Due process claims, for example, were claims for the maximal furtherance of one social goal, one policy (liberty of contract) subject to reasonableness, and to balancing with other social goals and policies (such as equality in the job market). Such first-order policies were not elevated above any other first-order

---

[120] *See* Aleinikoff, *supra* note 7, at 953.

[121] Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 23-24 (1936).

[122] Roscoe Pound, *A Survey of Social Interests*, 57 Harv. L. Rev. 1, 4 (1943) (the paper was originally presented in 1921) (emphasis added).

[123] *Id.* at 53.

policies. The pretence that they were so elevated, argued the progressives, was due only to the ambiguity of the term "right."[124]

Furthermore, the recognition that the matter was a matter of balancing led the progressives to the conclusion that balancing should be taken out of the hands of the Court altogether. How so? The Progressives argued that since the matter was a matter of policy, the Court should leave the matter completely to the legislative majority. This was another reaction to the jurisprudence of the *Lochner* era.

In the *Lochner* case, for example, the Court warned against subjecting constitutional rights, such as the right to the liberty of contract, to "the mercy of legislative majorities… [whenever there existed] the mere fact of the possible existence of some small amount of [damage to the public interest]."[125] The progressives, on the other hand, thought that legislative majorities were fully entitled to have rights such as the right to liberty of contract at their mercy, since such rights were properly characterized as general standards of policy, rather than higher-level hard and fast rules. Holmes, therefore, famously accused the Court in *Lochner* of interfering with "the right of the majority to embody their opinions in law."[126] Pound, as previously mentioned, argued that "there was as much policy in the one case as in the other" (referring to rights and governmental interests).[127] And the logical result of this line of argument to balancing was formulated by a latter day progressive Justice as follows: "[i]t is not our province to choose among

---

[124] *Compare* with Duncan Kennedy's similar description of the shift in private law jurisprudence in the 1940s: "One of the most striking developments of the 1940s was the transformation of the 'formalist' requirements of the will theory… into mere policies to be balanced within the larger analysis." Duncan Kennedy, *The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought*, 55 HASTINGS L.J. 1031, 1073-74 (2004).

[125] *Supra* note at 59 (Justice Peckham referring to the damage to the public interest in public health).

[126] *Id.* at 75.

[127] Pound, *supra* note 122.

competing considerations… [P]rimary responsibility for adjusting the interests… of necessity belongs to the Congress."[128]

Rather than the tyranny of the majority over rights the progressives were afraid of the tyranny of rights over the majority. The individual rights rhetoric, they argued, was the Court's tool in blocking the majority vote on issues of public policy. Balancing was the antidote—a way to uncover the mask of impartial and unfiltered interpretation of the Constitution and show that it was in fact filtered by the Court's own ideological balancing. Once the problem was identified as a first-order/balanceable conflict of policy, the progressives felt that the Court should leave the matter to the legislature, and not interfere with majoritarian balancing.[129]

---

[128] Justice Frankfurter in Minersville School Dist. v. Gobitis , 310 U.S. 586, 598 (1940), and Dennis v. United States, 341 U.S. 494, 525 (1951).

[129] *See* Grey, *supra* note 137, at 513-4 ("in Progressive jurisprudence… the policy dimension was integrated with a modest view of the role that… judges should play in the democratic lawmaking…The Progressive legislature had primary responsibility for making policy…; the main job of the Progressive… judges was to apply the rules laid down in legislation.")

The above analysis of progressive balancing may raise the following question. How is it, one may ask, that judicial balancing is so closely associated with the progressives if the only thing they did was expose it and argue against it? The answer is that judicial balancing is associated with progressive balancing in *private law*, rather than in constitutional law. In private law, progressives saw a way to justify balancing by the judiciary, which was consistent with their identification of balancing with first-order, policy-oriented conflicts. For in private law, unlike in constitutional law, it was often the case that the legislature did not balance, but simply left matters unresolved. When undecided matters came to the Court it had to fill in the gaps that the legislature left, and in doing so it was acting, in effect, as a legislator and was therefore justified in using balancing. Constitutional cases, however, presented no such gaps. They were concerned with the review of decisions already made by the legislator. Constitutional cases were not about filling legislative voids, but about setting aside legislative decisions, and this, according to the progressives, could not have been done through balancing. The association of the progressives with constitutional balancing is therefore wrongly based on their view on balancing in private law. (I thank Thomas Grey for this observation.) *Compare* Aleinikoff, *supra* note 7, 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;") Melville B. Nimmer, *The Right to Speak from* Times *to* Time*: First Amendment Theory Applied to Libel and Misapplied*

B. Modern Balancing and the Rise of the Balancing Consciousness

This initial use of balancing, which I term *early balancing,* however, soon shifted and balancing became associated not with anti-rights rhetoric and judicial restraint, but with the opposite—rights rhetoric and judicial activism. This new phase of balancing, which is ongoing, will be referred to as *modern balancing.*

Modern balancing first appeared in constitutional law relatively early. It occurred in a line of free speech cases starting in the late 1930s discussed above and identified as first-order free speech cases.[130] The *Schneider* case will be discussed here again since it is the best representation of the shift between early balancing and modern balancing and the emergence of the balancing consciousness. [131]

Recall that the Court in *Schneider* identified the problem presented by the case as a problem of balancing between free speech and the interest of cleanliness.[132] Knowing early balancing we would expect that once the case had been identified as a balancing case we would witness judicial claims such as the claim that the right is as much a policy as the conflicting interest, that the interest is on no lower plane than the right, and that the matter should be left to the legislature.[133] In the judicial rhetoric of *Schneider,* however, we find the exact opposite. The *Schneider* opinion opens with a declaration that is more representative of the *Lochner* era's rights rhetoric than of its progressive critics:

> This Court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. [Therefore,] mere legislative preferences of beliefs respecting matters of public convenience … [are] insufficient to justify [the invasion of free speech.] And so, as cases arise the

---

to Privacy, 56 CAL. L. REV. 935, 939 (1968) ("Such an approach [balancing] may well be desirable with respect to nonconstitutional issues—in fact, it appears to be basic to the common law system.")

[130] *See supra* notes 70- 72and accompanying text.

[131] Schneider v. State. 308 U.S. 147 (1939). *See supra* note 70 and accompanying text.

[132] *See Schneider Id.*

[133] *See supra* notes 121-128 and accompanying text.

> delicate and difficult task [of balancing the interest and the right] falls upon the court.[134]

Not only is the right to free speech not *lowered* to the status of a policy interest, as it was during early balancing, it is *raised* above "mere legislative preferences," so that a special burden is put on government to justify its invasion. Furthermore, the judicial deference is gone, and balancing is assigned squarely to the Court whenever the right of free speech is being implicated.

In terms of the dual model we have a problem. We find, on the one hand, rhetoric that is more consistent with a second-order/exclusionary interpretation of rights, certainly not with the idea of rights as same-level claimants for public resources. And, on the other hand, we find the actual decision made, as shown earlier, in terms of a first-order conflict—cleanliness and free speech are competing contenders for public resources and the matter is a matter of balancing.

In fact what we witness in *Schneider* is the emergence of modern balancing and the balancing consciousness in constitutional law. No longer is balancing identified only with the first-order conception of rights, as in the progressive era, but with *any* conception of rights, indeed with the conception of rights generally. In this new attitude towards balancing, balancing rights and interests has become the principal judicial task in constitutional law,[135] without distinguishing between first-order and second-order types of rights. The result is the application of both balancing and rights rhetoric across the board in all types of constitutional cases, which has characterized modern balancing ever since.

Why did this change in balancing take place? In the following I will briefly address this question. I propose that this change occurred as a result of the following sequence of historical events.

By the late 1930s the battle against the *Lochner* era Court and its ideology of economic laissez fair that first triggered the use of balancing was over. New Justices were appointed to the Court and the *new Court* stopped actively

---

[134] *Schneider*, at 153-4.

[135] *See, e.g.*, REHNQUIST, *supra* note 1.

protecting laissez fair rights, and adopted the balancing rhetoric of its critics.[136] However, by that time, a new set of problems had emerged. The European experience surrounding Nazi Germany and WWII brought the need to protect minority rights from the tyranny of the majority to the American consciousness. Rather than the minoritarian tyranny involved in free-market activism by the Court, the European experience stressed the danger of majoritarian tyranny over the civil and political rights of minorities.[137] A new rhetoric of rights emerged, but this time, rather than being opposed to the rhetoric of balancing, it converged with it. This was so, because the balancing rhetoric was already imbedded in the *new Court's* judicial worldview as part of its objection to the *old Court*. The result was thatthe use of balancing became identified with minority rights' struggles (such as the free speech struggle of Jehovah Witnesses, the black civil rights movement, and the free speech struggle of the Vietnam War protestors) despite of the fact that it was first designed to deal with majoritarian problems and was appropriate for such problems.[138]

---

[136] *See, e.g.,* MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE 76 (1998) ("The New Deal Justices, appointed by Presidnet franklin Delano Roosvelt all agreed on one point: that the so-called *Lochner* era was a disaster.")

[137] *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 and put the Progressive and Realist jurists whose theories neglected or seemed to undermine these values on the defensive…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".) *Compare* also with HORWITZ, *supra* note 7, at 247 ("post-war legal thought was powerfully shaped by efforts to square the Supreme Court decision in *Brown v. Board of Education* (1954) with the half-century-old, post-*Lochner*, Progressive commitment to judicial restraint.") The emphasis on minority rights was later strengthened by the emergence of the civil rights movement and the revival of rights-based moral and political philosophy in the early 1970s. *See* Grey, *Id.* at 505.

[138] The continued use of balancing in the post-New Deal era is best represented in the jurisprudence of Justice Felix Frnakfurter. *See* the discussion of Frnakfurter's use of balancing in the *Dennis* case, *supra* notes 157-167 and accompanying text.

This explanation therefore suggests a path dependency problem concerning balancing. Once the path of balancing was taken, the Court kept using balancing, despite changed circumstances which made its use problematic. The kinds of confusions that this path dependency led to are explored below.

V. THE TWO PROBLEMS OF MODERN BALANCING

Part III showed that constitutional rights generate both first-order (balanceable) and second-order (non-balanceable) claims. Part IV showed that *modern balancing* fails to differentiate between these two types of rights claims because of the balancing consciousness. This final Part of the Article will document the two major problems that this failure has generated within constitutional law.

Since the balancing consciousness fails to differentiate between first-order and second-order rights it results in the following two distortions. First, as already alluded to in the case of *Schneider*, the balancing consciousness misapplies second-order/rights logic to first-order/interest conflicts. That is, it *elevates* a first-order interest claim to the level of a second-order rights claim (the *first-to-second order mix-up*). It does so by treating an intra-level conflict between two first-order interests (the constitutional interest and the governmental interest), as an inter-level conflict, in which the constitutional interest is elevated above the governmental interest, and the governmental interest subjected to high burdens of proof, high levels of scrutiny and the like.[139] Secondly, the balancing consciousness also brings about the opposite, no less problematic, distortion; it applies first-order/interest logic, to second-order/rights conflicts. That is, it *lowers* an actual second-order rights claim to the level of a mere interest claim, by subjecting it to the logic of first-order balancing (the *second-to-first order mix-*

[139] In fact this distortion is the same distortion of which the progressives accused the *Lochner* Court– reading too much into the right. The only difference is that now it is done through balancing, and not through a more categorical judicial rhetoric, so that balancing is actually instrumental in supporting an inappropriate non-balancing solution.

up). Both distortions are omnipresent in constitutional law ever since the emergence of *modern balancing*. The following is a review of examples of both distortions in the three areas of constitutional law that were discussed in Part III—free speech, the commerce clause, and equal protection.

A. Confusing First-Order with Second-Order Rights claims (The First-to-Second Order Mix-Up).

1. Free Speech

Consider the *Schneider* case again,[140] and how the balancing consciousness distorted the conflict that it actually presented. The application of the dual model showed that in *Schneider* free speech was a first-order claim. There was no excluded or illegitimate consideration involved in the conflict (such as illegitimately targeting speech because of its content). The free speech claim amounted only to a claim for directing resources to speech by excusing the speech activity from anti-litter regulations and making the city pay for more cleaning. However, as shown earlier, the Court, stressing that free speech was a "fundamental personal right," placed the free speech interest at a higher position than the governmental interest, and stressed that "mere governmental preferences" were not enough to overcome free speech.[141] This created an unnatural distortion in the nature of the conflict in the *Schneider* case, and overstated the strength of the free speech claim that it involved.

The rights rhetoric mistakenly made the free speech claim involved in *Schneider* seem as if it were different in nature than any other claim for social resources to a worthy cause, and it portrayed the governmental decision as if it involved something different than a policy decision, or a budgetary decision, regarding the allocation of resources between speech and several other worthy societal values.

---

[140] *See supra* note 70

[141] *See supra* note 134 and accompanying text.

An example can illustrate this point. Think of a technology institute that created litter and also wished to be excused from anti-litter regulation, or an educational facility that created litter, or any other type of activity that we would want to encourage and also caused litter. Why should these activities be in an inferior position to a speech activity, such as distributing handbills, so that they could not equally compete for public resources in the form of excusing them from anti- litter regulations? Or, at least, why should the decision to excuse a speech activity from anti-litter regulation, and not these other socially important activities, be described as following from the fundamental right to free speech, rather than as a policy decision analogous to a decision about whether to sponsor a new Hyde Park so that there could be more speech, or to sponsor a new technology institute or school so that there could be more education or more science?

It seems, therefore, that the claim of free speech for higher status in cases such as *Schneider* emanates from cases such as *Abrams*, in which free speech is a second-order claim for abolishing illegitimate content-based restriction of speech. In such cases, as shown at length in Part III, free speech is indeed elevated above the conflicting interest of content based restriction of speech, because it is a second-order reason to exclude the illegitimate governmental reason altogether. But this special status is mistakenly applied, because of the coupling of the balancing consciousness and the rights rhetoric, to cases such as *Schneider*, in which speech is only a first-order reason for the allocation of resources.[142]

[142] Consider another hypothetical case to better illustrate the problems of overstating a first-order free speech claim. Suppose a case involved a filmmaker that was in debt and faced bankruptcy. He argues constitutional protection of his free speech right against applying bankruptcy law to his case, since bankruptcy would not enable him to finish his film. No one suspects that the bankruptcy laws were devised in order to curb the message in his film, which is of no concern to anyone in the case. His claim is therefore a typical first-order free speech claim. It is a claim that society pays for his speech, in this case filmmaking, by relieving him of debt. But, since rights-based balancing does not distinguish between first-order and second-order free speech claims, his case would be treated as a case of infringing the fundamental right to free speech. This would imply that especially strong justifications must be presented to justify his creditors collecting from the

This *first-to-second order mix-up* in *Schneider* also has implications in terms of the justifications for *judicial review*. The mischaracterization of the case as a second-order/rights-oriented case may inappropriately strengthen the justifications for judicial review in the case, since rights-oriented infringements seem to carry with them greater justifications for judicial review than policy-oriented cases.[143] The uncovering of the true nature of the case as a first-order/policy case, may suggest, therefore, that weaker justifications for judicial review existed in the case, than those that the Court portrayed.[144] It may even suggest that the case should not have been regarded as within the scope of the First Amendment at all.[145]

---

filmmaker—justifications which are different in their strength from justification for collecting debts from any other regular debtor. The rights rhetoric may even suggest that a creditor, who holds only a regular interest in getting his money back, should prove that his interest in getting his money back justifies the burdening of such a fundamental interest as speech.

Obviously his does not make sense. At the very least, one could say, that even if we would want a policy to have special debt reductions or tax reductions for people engaged in speech, this would not analytically follow from the idea of protecting the fundamental right to free speech. But, since modern balancing and the balancing consciousness do not differentiate between first-order and second-order speech claims, they do not give us the proper tools to show why the filmmakers' hypothetical claim should be properly disregarded.

[143] *See, e.g.,* the progressive view on judicial review, *supra* note 129 and accompanying text.

[144] John Ely, for example, seems to have suggested that cases of indirect regulation of speech, such as *Schneider,* which I identify as first-order cases, deserve a more lenient standard of review that direct regulation of speech, such as the Flag Desecration cases, that I identify as second-order cases. *See* Ely, *supra* note 91 *Compare* also with Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1256 (1995).

[145] Several First Amendment theorists have promoted interpretations of the First Amendment, which resemble the idea that first-order free speech cases are not free speech cases at all. Such are theorists which believe that the main concern of the First Amendment is the protection against message-based censorship, and that the main question in First Amendment law, should be whether such message-based censorship was the basis of the governmental regulation of speech. Non content-based regulations, time place and manner regulations, and indirect infringements of speech, such as the ones involved in *Schneider,* are, according to such analyses completely outside the scope of First Amendment protection. *See, e.g.,* 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

Note that such conclusions do not logically follow from the dual model's distinctions. The dual model only directs attention to the fact that the conflict should be properly regarded as first-order conflict and that the rights claim in the conflict should be properly regarded as a claim for the allocation of resources rather than as a typical rights claim. One may still hold the view that even in such policy oriented conflicts the Court is justified in interfering with the legislative balance. What one cannot do, however, is use justifications for judicial review that rely on second-order rights claims to justify judicial review in first-order rights claims.[146]

RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 75, at 80, 87 (1986) ("The right [of free speech] would not be a right to speak but a right to have the government not aim at suppressing speech… [Therefore] the government's use of a time, place or manner regulation [of speech] should not in itself be taken as a limitation on the right of speech. Rather, an abridgment or limitation occurs only if the restriction of expressive conduct is the government's purpose.") *See* also Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767 (2001) (arguing that regulations not aimed at the suppression of the content of speech are outside the scope of the First Amendment,) and Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 415 (1996) (arguing for the centrality of governmental purpose to suppress the content of speech, in First Amendment law.)

[146] *See* also discussion in the CONCLUSION. There is another possible interpretation of the *Schneider* case, which would allow judicial review based on second-order justifications after all. According to this interpretation, the *Schneider* case was not a first-order case but a second-order case, since the real aim of the regulation was not avoiding litter but targeting the message of the handbills. This interpretation relies on the fact that some of the claimants in the case were Jehovah Witnesses. The balancing/first-order language is, according to this interpretation, only a means to 'smoke-out' an illicit intent to curb the message of speech, hidden by the neutral language of the regulation. *See,* e.g., Burt Neuborne, *Notes for a Theory of Constrained Balancing in First Amendment Cases: An Essay in Honor of Tome Emerson*, 38 CASE WEST. RESERVE L. REV. 576, 582 (1988) ("I suspect that many judges, lacking hard evidence of motive, use [balancing] as evidentiary shorthand that generates a degree of doubt as to the censor's true motive… When a balancing court sets aside an anti-littering ordinance, it is often because it senses an unacceptably high level of risk that a political majority has proffered an asserted interest in clean streets as a pretext to limit disfavored or annoying speech."); *Compare* Rubenfeld *Id.* at 831-2 (arguing that *Schneider* involved message-based regulation); *Compare* Regan *supra* note 98(arguing for the 'smoking-out' function of balancing in commerce clause law). Such analyses of the 'smoking-out'

2. Dormant Commerce Clause

The first-to-second order mix-up is even more obvious in the area of the dormant commerce clause than in the free speech area. Consider the case of *Arizona* that was discussed in Part III.[147] The dual model identified the conflict in that case as a first-order conflict between safety and free interstate commerce—the Arizona regulation of standard length trains increased interstate commerce costs, but decreased safety risks. There was no indication of an illegitimate protectionist motive to prefer local train companies to out-of-state train companies in banning long trains in Arizona.[148] Nevertheless, if one examines the judicial rhetoric in the case, one finds that the Court subjected the interest of safety to special justifications that it had to overcome in order for it to defeat the commerce clause interest in the balance. It justified these special burdens by arguing that the commerce clause interest was a constitutional right and that therefore special justifications were needed in order for conflicting policies (such as safety) to overcome it.[149]

---

function of balancing do not contradict the dual model, but rather can be imposed on the model as an overlay.

[147] Southern Pacific Company Co. v. Arizona, 325 U.S. 761. *See supra* note 99 and accompanying text.

[148] Recall that the discussion in Part III.C distinguished between the first-order commerce clause interest, which is the interest in promoting swift interstate commerce, and the second-order commerce clause right, which was a right against protectionism of local industry over out-of-state industry.

[149] *See* 325 U.S. 770-71:

> The matters for ultimate determination here are the nature and extent of the burden which the state regulation of interstate trains… imposes on interstate commerce, and whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate commerce and its freedom from local restraints… are interests safeguarded by the commerce clause from state interference.

(Stone, J. writing for the Court).

However, once the first-order nature of the commerce claim in *Arizona* is realized, it is hard to see why the commerce clause interest should receive such *prima facie* higher status than other considerations, such as safety. After all, as a first-order interest in promoting the swift commerce between states, interstate commerce is burdened in numerous ways, most of them quite unproblematic (health inspections, drug trafficking inspections, even speeding laws, all burden the swift transport of goods between one state and another). Is it really the case that in all of these cases we would wish to grant a special status to the commerce clause interest, so that other interests, such as safety or health, would have to be especially strong in order to overcome it in the balance? Or, at the very least, should the question of which interest to promote be framed any differently than a question of policy, or a budgetary question of allocating resources? [150]

It seems therefore that, as in the area of free speech, a special status is inappropriately attributed to first-order commerce clause claims in cases such as *Arizona* as a result of confusing them with second-order commerce clause cases. In second-order commerce clauses cases the commerce clause claim is indeed elevated above the governmental interest. This is so, since the governmental interest in such cases is an illegitimate protectionist interest, which is totally excluded by the commerce clause interest. But, first-order commerce clause cases present claims of a different nature. They do not argue protectionist motive, but only seek to further the interest of swift interstate commerce. The coupling of the balancing consciousness and the rights rhetoric distorts this fact. [151]

---

[150] *See Id.* ("the determination [of the length of trains] is a matter of public policy") (Black, J. dissenting).

[151] *See* Regan, *supra* note 97, at 1128 ("When we say every producer ought to have access to all the country's markets, what we mean is just that he should not be shut out of any market by preferential trade regulations directed against him as a foreigner… If [a] law incidentally diverts some business to local producers, that is a matter of no constitutional significance."); *See* Bendix Autolite Corp. v. Midwesco Enters 486 U.S. 888, 897 (1988) ("The scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy.") (Scalia, J., concurring in the judgment. Expressing hostility towards judicial balancing in commerce clause jurisprudence, and preferring

As with free speech, the uncovering of a case as a first-order case may suggest that justifications for judicial review were overstated in the case and that balancing should be left to the legislature. It may also suggest that the case is of no constitutional concern at all.[152] Justice Black therefore concludes his analyses of the *Arizona* case by arguing: "the balancing of these probabilities, however, is not in my judgment a matter of judicial determination, but one that calls for legislative consideration."[153]

3. Equal Protection

The first-to-second order mix-up is also evident in the third area of constitutional law that was reviewed in Part III—equal protection. A good example for this mix-up is the famous *Bakke* case that was analyzed in Part III.[154] In this case, a white medical student claimed to hold a strong equal protection right against applying the affirmative action plan to his case. The Court agreed, and interpreted his claim as a high-status rights claim. Consequently the Court subjected the conflicting interest—the interest behind the affirmative action plan—to strict scrutiny.[155] However, the dual model analysis in Part III shows that *Bakke* involved only a first-order conflict between two, same-level considerations: the interest behind the affirmative action plan (a diverse student body, for example) and the conflicting interest that was burdened by the plan (meritocracy in higher education, for example). Bakke's claim therefore did not espouse illegitimate, animus-based simple discrimination against white people. It

---

instead a rule against facially discriminatory laws.)

[152] *See* Regan *Id;* Southern Pacific Company Co. v. Arizona ("The fact that grade crossing improvement [improvements associated with the move to shorter trains] may be expensive is no sufficient reason to say than an unconstitutional 'burden' is put upon a railroad even though it be an interstate road.") (Black, J. dissenting).

[153] 325 U.S. 794.

[154] Bakke v. California, 438 U.S. 265. *See supra* note 107 and accompanying text.

[155] *Id.* at 291 ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.") (Justice Powell casting the crucial fifth vote in a divided Court).

espoused only a policy consideration (meritocracy) that was burdened by the affirmative action plan. Therefore it should not have been accorded the same status as a simple discrimination (second-order) claim. In terms of judicial review, this realization is translated into arguments against the application of strict scrutiny to the case, or even against any judicial interference at all.[156]

In conclusion, the analysis of several first-order cases shows that the Court, because of the balancing consciousness and the rights rhetoric, applied a rights-oriented balancing to them that in fact confused them with second-order cases. The next section discusses the opposite problem caused by the balancing consciousness: the tendency of the balancing consciousness to level the conflict even when it should properly be treated as a conflict between a higher-level right and a lower-level interest.

B. Confusing Second-Order with First-Order Rights claims (The Second-to-First Order Mix-Up).

The second confusion caused by the balancing consciousness and the rights-rhetoric is just as problematic as the first—arguably even more so. It results when first-order analysis and balancing are applied to second-order/exclusionary rights. While the first problem was *elevating* a first-order interest to the status of a second-order right, this problem consists of *lowering* a second-order right to the level of a first-order interest (the *second-to-first order mix-up*). Here lies the danger of diluting an exclusionary right, and finding it easier to uphold illegitimate governmental considerations by balancing them rather than excluding them. In addition, the Court might understate the justification for judicial review since it would view the conflict as a policy conflict and not as an exclusionary conflict. An analysis of the three areas of constitutional law, as they relate to this

[156] *Compare* Rubenfeld, *supra* note 108 (arguing against subjecting affirmative action plans to strict scrutiny).

set of problems, follows. The discussions of free speech and equal protection are divided into two sections: confusions in rhetoric and confusions in the result.

1. Free Speech

1. Consider one of the infamous cases of the McCarthy era, *Dennis v. United States*,[157] which involved a conspiracy conviction against the leaders of the American Communist Party. This case, like other McCarthy era cases, was identified in Part III as a second-order case of direct infringement of speech.[158] Part III argued that the McCarthy era cases involved governmental attempts to suppress a certain political point of view, namely communism.[159] As such, they involved a conflict between a second-order free speech claim to completely exclude governmental intervention in the free market of ideas, and a governmental first-order interest in such intervention.

However, Justice Frankfurter concurring in the case, portrayed the conflict in different terms:

> Our judgment is thus solicited on a conflict of interests of the utmost concern to the well-being of the country [free speech and national security]. This conflict of interests cannot be resolved by a dogmatic preference for one or the other, nor by a sonorous formula which is in fact only a euphemistic disguise for an unresolved conflict. If adjudication is to be a rational process, we cannot escape a candid examination of the conflicting claims with full recognition that both are supported by weighty title-deeds.[160]

This passage shows that Frankfurter portrayed the conflict in the *Dennis* case as a typical first-order conflict between two same-level interests, rather than, as a second-order conflict between claims of two different levels. Both free speech and national security were portrayed as legitimate interests "supported by weighty

---

[157] 341 U.S. 494, 524 (1951).

[158] *See* cases cited in note 81 *supra.*

[159] *See supra* note 81 and accompanying text.

[160] *Id.* at 519.

title-deeds," with no "dogmatic preference for one or the other." Balancing was therefore, according to Frankfurter, the only rational choice.[161] Such characterization of the conflict mischaracterized the conflict and *lowered* the claimant's free speech claim in the case into a mere policy claim. Once the free speech is lowered to the level of a policy claim, it becomes much easier to arrive at the final problematic outcome of the case—upholding the conviction of the communist party leaders[162]

Confusing the case with a first-order free speech case further misrepresented the issue of the cost of allowing more speech and the non-absolute nature of free speech. In *Dennis* these costs were presumably the dangers ensuing from the communist message. Balancing was therefore argued to be inevitable unless free speech were to become an absolute value[163] giving people "unlimited license to talk."[164]

However, this argument too confuses between a first-order and a second-order claim. As the discussion in Part II and III showed the *anti-absolutist* argument is appropriate only with regard to first-order claims, not second-order claims. Second-order claims are not reliant on resources and costs, but rather *express an*

---

[161] *See Id.;* "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 confines of the judicial process." *Id.* at 525.

[162] It further diverted any attempt to portray the governmental motive as an illegitimate motive of suppressing speech, since, by definition, a balancing/ first-order solution implied that both interests in the conflict were legitimate.

[163] "Absolute rules would inevitably lead to absolute exceptions... 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 confines of the judicial process, than by announcing dogmas too inflexible for the non- Euclidian problems to be solved." *Id.* at 525.

[164] Quoting Justice Harlan in another case of the McCarthy era, Konigsberg v. State Bar 366 U.S. 36 (1961) "Throughout its history this Court has consistently recognized [that] constitutionally protected freedom of speech is narrower than an unlimited license to talk. [When] constitutional protections are asserted against the exercise of valid governmental powers a reconciliation must be affected and that perforce requires an appropriate weighing of the respective interests involved."

earlier decision on costs.[165] The second-order free speech norm in particular expresses an earlier decision to disregard some of speech's costs, i.e. those costs ensuing from allowing a free market of ideas. The argument that free speech has costs and has to be balanced, therefore, diverts attention from the claim that an earlier decision on costs has already been made by the free speech norm itself. Justice Black, dissenting in *Dennis,* makes a similar point:

> 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…"[166]

Dennis is therefore a case in which the balancing consciousness confuses a second-order right claim with a first-order interest claim. The second-order right claim is stripped of its special status as an exclusionary claim, because it is confused with cases in which it is only a first-order policy claim for resources. This second-to-first order mix-up is a mirror of the first-to-second order mix-up that was discussed earlier. In the former mix-up, the coupling of rights rhetoric with balancing caused a first-order claim to be given an inappropriate "dogmatic" preference [167] over a conflicting first-order claim. Here, the coupling of a balancing rhetoric with rights caused a second-order claim to be inappropriately reduced to the level of the conflicting claim, instead of being appropriately separated from it as a higher-level claim.

The historical explanation given earlier seems to give a good account of why this happened. Frankfurter was a latter day progressive who believed in the progressive legacy of rejecting absolutes and using balancing. However, Frankfurter applied anti-absolutism and balancing even when the conflict was no longer a conflict over economic laissez faire, as in the *Lochner* era, but a conflict over political speech suppression as in the *Dennis* case. The result was that his

---

[165] *See supra* note 69 and accompanying text.

[166] *Id.* at 580.

[167] *Compare* with Frankfurter's words quoted *supra* note 160 and accompanying text.

anti absolutism and balancing were misapplied to a second-order conflict, and the second type of mix-up was generated.[168]

Finally the second-to-first order mix-up also has implications in terms of justifications for judicial review. The mischaracterization of the case as a first-order case *understates* the justifications for judicial review in the case and makes judicial restraint easier in the face of quite obvious attempts at suppression of political speech. On the other hand, the uncovering of the true nature of the case as a second-order case of illegitimate governmental motive would lead one to the opposite conclusion. According to this analysis the Court must interfere and abolish illegitimate suppression of ideas if it is to be loyal to the second-order/exclusionary command of free speech. It cannot withhold its review in cases of claims of reasonable governmental balance, since the question is not a question of balancing at all, but of exclusion.[169]

2. Other free speech cases also involve the second-to-first order mix-up, but only in rhetoric, not in the result. This mix-up in rhetoric rather than in the result has a host of problems of its own. A good example is a case involving free speech in education. In *Board of Education v. Pico*,[170] a school board decided to remove nine books from the school library because of their "anti-American, anti-Christian [and] anti-Semitic" content.[171] The school board's removal of the books was quite obviously based on objections to the message in the books, and therefore appeared to involve an illegitimate message-based interference in the market of ideas. The Court therefore appropriately held that, under certain circumstances, such removal would violate the First Amendment.[172] However, instead of

---

[168] *See* the historical discussion in Part IV.B.

[169] This is therefore Justice Black's conclusion in *Dennis*: "So long as this Court exercises the power of judicial review of legislation, I cannot agree that the First Amendment permits us to sustain laws suppressing freedom of speech and press on the basis of Congress' or our own notions of mere 'reasonableness.'" *Id.* at 580.

[170] 457 U.S. 853 (1981).

[171] 457 U.S., at 857 (quoting the reasoning of the school board's decision).

[172] The Court remanded the case for further fact finding regarding the exact bases for the decision to remove the books. *Id.*, at 883 (plurality opinion of Justice Brennan.)

reasoning its decision by arguing that free speech made the school board's message-based censorship illegitimate and excluded, the Court argued that a balance had to be struck between free speech and the school board's interest. The children of the school, the Court argued, had a free speech interest to receive information and this interest had to be balanced with the school board's interest to inculcate community values to the children of the community. In this balancing act, the Court maintained, the free speech interest outbalanced and overrode the community interest.

Such balancing-oriented portrayal of the case misrepresented the real conflict in the case, and made it easier to criticize the judicial opinion. Why is it, one may ask, that the interest in inculcating community values was overridden by the children's interest in receiving information? How did the Court weigh the competing interests in order to arrive at this conclusion? Balancing gives a poor explanation the Court's decision. This is so, since the decision was actually based on an exclusionary logic, and not on balancing. According to this logic, the school board's interest was not overridden by speech, but was simply made irrelevant by speech. Free speech means that one cannot suppress certain ideas only because they contradict community values. Indeed, ideas that need protection most are those that contradict community values the most. Some damage to the inculcation of community values is therefore a cost, which is disregarded by an earlier decision on costs, expressed by the second-order free speech norm of the free market of ideas. As such it should not be balanced with free speech at all.

Although the case ended in a decision in favor of free speech, and therefore included only a mix-up in rhetoric, not in the result, its implications are not only rhetorical. For the outcome of the reasoning in rhetorical confusion cases, such as *Pico,* is a dilution of the analytical strength of the rights claim. Such dilution might invite real future infringements of the second-order right, as in the case of *Dennis*.

2. Dormant Commerce Clause

How does the second-to-first order mix-up present itself in the area of commerce clause jurisprudence? In this area, a second-to-first order mix-up would mean balancing a totally illegitimate protectionist motive, instead of absolutely excluding it. This could lead the Court to uphold regulations despite an illegitimate protectionist motive (confusion in result) or it could lead the Court to repeal the regulation, but justify it, inappropriately, in balancing terms instead of in exclusionary terms (confusion in rhetoric).

In the *Hunt v. Washington State Apple Advertising Commission*, discussed in Part III,[173] the Court was guilty of confusion in rhetoric. As argued earlier, a close reading of the case shows that the Court identified an illegitimate protectionist motive to prevent out-of-state competition. It therefore appropriately repealed the regulation. But instead of reasoning this repeal by saying that the commerce clause (second-order) interest completely excluded an illegitimate protectionist interest, the Court inappropriately reasoned it through balancing. It said that the interest in free interstate commerce overrode the legitimate interest of the state in regulating commerce.[174]

This confusion led to the same problems that were identified in free speech rhetorical confusion cases. The decision was poorly reasoned and its true nature distorted.[175] As in the area of free speech, this confusion was due to the balancing consciousness. The progressive influenced tendency of the balancing consciousness to view every decision as a policy conflict between two legitimate interests, has blurred the distinction between the two types of commerce clause claims and flattened anti-protectionist claims into being only first-order claims for more free interstate commerce.

---

[173] 432 U.S. 333 (1977). *See supra* note 102 and accompanying text.

[174] "We are confronted with the task of effecting an accommodation of the competing national and local interests." (Justice Burger, writing for the Court). Justice Burger consequently found that the national interest overrode the local interest. *Id.*, at 350.

[175] See Regan, *supra* note 97, at 1208 referring to the *Hunt* case: "the balancing language is only a veneer which has virtually nothing to do with the Court's effective decision process as revealed in the parts of the opinions where the cases are actually disposed of."

3. Equal Protection

Finally, in the area of equal protection and the right to equality, confusion between first-order and second-order claims would mean treating the second-order equal protection norm (the norm against simple-discrimination) as if it were only a first-order equal protection interest (the interest in furthering more equality or integration). Such confusion would dilute the strength of the second-order equal protection principle and mischaracterize it as if it were merely a policy claim that had to be balanced with other claims.

1. Let us look first at an example of confusion in rhetoric only. In Part III, the case that was discussed as the typical second-order equal protection case was *Brown v. Board of Education*. However, even in *Brown* there seems to be a confusion of the equal protection second-order claim—the claim to completely abolish discrimination based on race animus—with the equal protection first-order claim—the claim to further the integration of blacks into society. This confusion is evident in the passages of the opinion that refer to the psychological effects of desegregation on the self-image of black students and in the famous footnote 11.[176] Such passages may suggest that the Court viewed the case as a policy case, in which the costs of desegregation (such as the psychological effects of school segregation on black students) were balanced with the costs of integration and found to outbalance them. However, this first-order/balancing portrayal of the reasoning in *Brown* seems to mischaracterize the equal protection claim in *Brown*, and also the Court's own thought process. This is so, since it is quite evident that the Court could have found no empirical argument or policy argument to justify southern segregation in public schools. The actual idea behind

[176] *See Brown* 691-2: "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone… this finding is amply supported by modern [psychological] authority" The Court then cites several psychological studies to show psychological damage from desegregation, in the famous footnote 11, of the case.

the case (and the way it is publicly perceived) is that segregation amounted to discrimination and was therefore totally invalid and excluded.[177]

As in the areas of free speech and commerce clause, this confusion is due to the balancing consciousness. The balancing consciousness does not distinguish between the two types of equal protection claims, and subsequently lowers the second-order simple discrimination claim in *Brown* into a first-order claim for accommodation. Here too, this tendency of the Court can be explained by a progressive heritage. The progressive heritage of pragmatism and instrumentalism encouraged empirical, policy-oriented examination of every judicial problem.[178] However, even though this tendency was appropriate to first-order cases such as those involved in the *Lochner* era, it was inappropriate to second-order cases, such as *Brown.*

2. In *Brown* the second-to-first order mix-up was a mix-up in the rhetoric only, since the Court actually repealed the discriminatory regulation. Are there cases of equal protection, second-to-first order mix-ups in the result also? A recent equal protection case, *Boy Scouts of America v. Dale*,[179] may represent such a mix-up. The balancing rhetoric in that case allowed the Court to actually uphold and legitimize simple discrimination against homosexuals.

The *Boy Scouts* case involved a dismissal of an assistant scoutmaster due only to the fact that he was a homosexual. On its face, this appears to be a classic case of simple discrimination. The assistant scoutmaster was dismissed because of homophobic sentiments, which should have been totally excluded as illegitimate because of the second-order equal protection norm against simple discrimination. However, the Court, aided by the balancing consciousness, interpreted the case

---

[177] *See, e.g.,* Aleinikoff, *supra* note 7, at 998 arguing that *Brown* was based on the rejection of discrimination and not on balancing: "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."

[178] *See* Michael Heise, *Brown v. Board of Education, Footnote 11, and Multidisciplinarity*, 90 CORNELL L. REV. 279 (2005) (arguing that *Brown*—specifically footnote 11— contributed to law's increasingly multidisciplinary and empirical character).

[179] 120 S. Ct. 2446 (2000).

differently. By applying balancing, the Court channeled the decision into the terms of two competing legitimate interests. The Court found such legitimate interest on the side of the Boy Scouts in their interest to "expressive association." The Court held that "the forced inclusion of [the homosexual scoutmaster] would significantly affect [the Boy Scouts'] expression,"[180] and maintained that a balance should be struck between the "associational interest in freedom of expression… on one side of the scale, and the State's interest on the other."[181] Finally the Court found that the expressional interest overrode the State's interest, and ruled in favor of the Boy Scouts.

In terms of the dual model, this case represents the problematic lowering of a second-order claim to the level of a first-order claim. The claimant's second-order equal protection claim was lowered to the level of a first-order claim. Instead of excluding the Boys Scouts' interest altogether because of the equal protection norm, the Court balanced it with the equal protection norm, and finally found that it overrode that norm.

The *Boy Scouts* case is a good example of the problems of modern balancing for another reason as well. This case is not only a striking case of *lowering* the claimant's second-order claim to a first-order claim, it is also a case of *elevating* the respondent's first-order claim—the Boys Scouts' free speech claim—to the level of a second-order claim. It thus represents both problems of modern balancing, and is an appropriate case to conclude this discussion with.

Consider the Boy Scouts' free speech claim. Their claim was not a claim to abolish illegitimate message-based discrimination against their speech. This is so, since anti-discrimination regulations, such as the New Jersey law that banned the Boy Scouts' discrimination, were not motivated by any cognizable animus towards the Boy Scouts' message. The Boys Scouts could have advocated homophobic messages as much as they wanted. The only thing that these regulations banned was actual discrimination against homosexuals. In terms of the analysis in Part III, this means that the anti-discrimination laws affected the Boy

[180] *Id.* at 2455.

[181] *Id.* at 2456.

Scouts' speech only indirectly (by limiting their ability to express themselves through discrimination) or, alternatively, that the Boy Scouts' claim was a claim that society accommodate their expressive conduct by excusing them of the anti-discrimination principle.[182] The Boy Scouts could therefore show, at most, only a first-order free speech interest, to be excused from anti-discrimination regulation. As such their first-order interest should have been properly excluded by the second-order equal protection norm against simple discrimination. Instead it was elevated to the level of a second-order free speech claim, and subsequently it outbalanced the equal protection norm.

VI. CONCLUSION

The dual model argues for an important distinction between two types of constitutional claims and two types of constitutional conflicts—first-order and second-order claims and conflicts. It further argues that the idea that every constitutional conflict is about balancing—the balancing consciousness—fails to distinguish between these two types of claims and conflicts, and consequently distorts their nature.

The first implication of this analysis is that balancing in second-order/exclusionary conflicts, when the constitutional right is properly interpreted as a second-order consideration, which totally excludes the governmental consideration, is inappropriate. If one agrees that certain rights should be properly interpreted as totally excluding certain governmental interests, one must deny the possibility that the judicial task in protecting these rights is a task of balancing. Indeed the main fault of balancing in such cases is in distorting the nature of these conflicts. The balancing consciousness portrays such conflicts as conflicts between two legitimate interests, in which the problem is a problem of proportionality, while in effect the problem in such cases is the problem of the legitimacy of one of the interests—the governmental interest. Instead of

[182] *Compare* with the analysis of the *Schneider* case, according to which, the claimant's in *Schneider*, asked that their speech be accommodated by excusing them from anti-litter regulations.

concentrating on determining the conditions under which the governmental interest is legitimate, the balancing consciousness therefore pushes the decision-maker straight to the second stage of checking the governmental interest's proportionality, diverting attention from the question of legitimacy. Historical examples, such as the Court's record in protecting free speech during the McCarthy era, point at the dangers of this distortion. Current conflicts between national security and individual rights, may arguably present similar dangers.

The second implication of this analysis concerns first-order conflicts. Here, the identification of the case as a first-order conflict may not be conclusive regarding the question of balancing. One may hold, as the progressives did, that once the conflict is identified as a first-order conflict its solution is properly left to the legislature, and hence, that there should be no judicial balancing in constitutional law. That is, although the conflict is indeed a balancing conflict, it does not call for judicial balancing, but rather for legislative balancing. One may, however, hold a different view on this matter and still be loyal to the dual model. One may hold, for example, that the fact that a conflict is a first-order, policy conflict or a budgetary conflict does not make the Court's balancing in the case inappropriate. Or, one may hold, that the Court's balancing is appropriate only is some first-order conflicts and not in others. These determinations will depend on jurisprudential views regarding the proper role of the Court in the democratic framework, which are not discussed by the dual model. The dual model, however, clarifies the terms under which such determinations ought to be made.