

BALANCING IN CONSTITUTIONAL LAW:
A SUGGESTED ANALYTICAL FRAMEWORK
APPLIED TO AMERICAN CONSTITUTIONAL LAW

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ABSTRACT

This dissertation suggests an analytical framework for the role of balancing in practical reasoning and applies it to American constitutional law. In addition it presents a historical review of the development of balancing in American constitutional law.

Balancing is a decision-making method that involves dividing a decision into competing considerations and assessing the relative strength or weight of each consideration. The main thesis in this dissertation is that this kind of decision-making method is suitable only to a distinct set of practical problems. It does not reflect decision-making as a whole. In particular, balancing is suitable only to conflicts between two valid considerations of the same level ('first-order' considerations). However, when a higher-level consideration ('second-order/exclusionary' consideration) conflicts with a lower-level consideration it should totally exclude it as invalid, rather than be balanced with it according to its respective weight.

This thesis is applied to American constitutional law in the following way: constitutional provisions can be interpreted as providing either first or second-order/exclusionary considerations for government. That is, they can be interpreted either as valid considerations that are on the same level as other valid governmental considerations, or as higher-level considerations that totally exclude some invalid, lower-level, governmental considerations. Balancing is applicable only if rights are interpreted according to the first interpretation.

The dissertation shows that, as a descriptive matter, courts interpret constitutional provisions according to both these interpretations, depending on the context, and apply balancing only when they interpret the right as a first-order consideration. The dissertation further shows that, as a normative matter, the choice between the two interpretations has substantial implications on the role of the Constitution and on the role of the Court. In particular, the claim that balancing should reflect the main understanding of the judicial role suggests a controversial normative position according to which the Court should be the final arbiter in conflicts between society's first-order interests.

Finally, the historical analysis in the dissertation suggests that a break occurred in the use of balancing in American constitutional law in the late 1930s, from an appropriate, first-order use to an inappropriate, second-order use.

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