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Two discourses of balancing: the origins and meaning of "balancing" in 1950s and 1960s German and U.S. Constitutional Rights Discourse

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Citation
Bomhoff, J. A. (2012, September 25). *Two discourses of balancing: the origins and meaning of "balancing" in 1950s and 1960s German and U.S. Constitutional Rights Discourse*. Retrieved from https://hdl.handle.net/1887/19852

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Author: Bomhoff, Jacobus Adriaan
Title: Two discourses of balancing : the origins and meaning of "balancing" in 1950s and 1960s German and U.S. Constitutional Rights Discourse
Date: 2012-09-13

Two Discourses of Balancing

Two Discourses of Balancing

The Origins and Meanings of 'Balancing' in 1950s and 1960s German and U.S. Constitutional Rights Discourse

PROEFSCHRIFT

ter verkrijging van
de graad van Doctor aan de Universiteit Leiden,
op gezag van Rector Magnificus prof. mr. P.F. van der Heijden,
volgens besluit van het College voor Promoties
te verdedigen op dinsdag 25 september 2012
klokke 15.00 uur

door

Jacobus Adriaan Bomhoff

geboren te Gouda in 1978

Promotiecommissie:

Promotores:	prof. dr. J.H. Gerards (Radboud Universiteit Nijmegen) prof. dr. M.V. Polak
Overige leden:	prof. dr. J.H. Nieuwenhuis prof. F. Schauer (University of Virginia School of Law, Charlottesville, USA) prof. dr. W.J. Zwalve

Andrejke s láskou

"Die Rechtsprechung zu den Grundrechten und deren Dogmatik sind in den letzten Jahren so sehr von der Theorie der Abwägung dominiert worden, dass weder deren vielfach unausgesprochen gebliebenen Voraussetzungen noch dogmatische Alternativen überhaupt Konturen gewinnen konnten".

Karl-Heinz Ladeur, *Kritik der Abwägung in der Grundrechtsdogmatik*, 2004

"Over the past few decades, with little justification or scrutiny, balancing has come of age. (...) Without a pause, our minds begin analysis of [constitutional law] questions by thinking in terms of the competing interests. Before we have time to wonder whether we ought to balance, we are already asserting the relative weights of the interests. Constitutional law has entered the age of balancing".

T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 1987

"[European] Continental legal theory is uncannily 'other' for an American, perhaps because just about everything in our legal culture is present in theirs, often translated word for word, but nothing seems to have the same meaning".

Duncan Kennedy, *A Critique of Adjudication (fin de siècle)*, 1997

"As everyone knows, there is no expression more ambiguous than the word 'formal' and no dichotomy more ambiguous than the distinction between form and content".

Max Weber, *Critique of Stammler*, 1907

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Acknowledgments

This thesis is built on the idea that all legal language comes with baggage, and that simply trying to uncover – or, stubbornly continuing on metaphorical paths once broached: to unpack - such preceding layers of meaning is an important exercise.

All legal scholarly work too, comes with baggage. And the appearance of this dissertation is a wonderful occasion to thank all those who contributed along the way.

A number of people played important roles in the search for a topic for this dissertation. I am grateful to Martijn Polak for introducing me to the field of private international law, which I hope to continue thinking about for a long time to come, but also for the generosity with which he created space for me to follow other interests. Janneke Gerard's arrival in Leiden from Maastricht led to a series of wonderful lunches at which a shared interest for American legal thinking in relation to constitutional adjudication came to light. I remain very grateful for her initial enthusiasm and for her continued commitment to a project that, over the years, changed considerably in approach and argument. With Felix Ronkes Agerbeek, then also at Leiden University, I went on a memorable one-day trip to Paris (including an irresponsible all-night drive back), so we could have dinner with two professors we both greatly admired: Annelise Riles and Mitch Lasser, both of Cornell Law School. At this dinner, professor Lasser kindly remarked that my idea of doing a comparative study of 'balancing' sounded interesting, but inquired casually if I had thought about whether I would study balancing as something judges *said they were doing* or as something *I thought they actually did*. I had not, and this simple question has been the impetus for much of what figures in the pages that follow.

A number of debts were incurred during, and before, the period of writing this dissertation. For their encouragement and support, I am grateful to my parents. I look back fondly on many dinner-table discussions with them and with my sister, Manja, who now holds a doctorate in Anthropology, and who has always stimulated me to ask whether things might not be more complicated than they seem. Visits to the house of the late professor Schermers and his wife, Mrs Nypels-Tans, will always be the dominant image in my mind of studying law in Leiden. I remain particularly grateful for the way professor Schermers took our cohort of fledgling jurists seriously, and for his insistence that, naturally, a doctoral degree should be the ambition of every lawyer. In the early years of research for this project, many colleagues made the Leiden Law Faculty a stimulating and fun place to work. I mention in particular Antoine Buyse, Anne Meuwese, Caspar van Woensel, Christophe Hillion, Mielle Bulterman and Rick Lawson. My *paranimfs*, Peter Kugel and Jan Kleinheisterkamp, have been supportive – and tolerant - for a very long time; they will be particularly glad to see this dissertation completed, if only because now our conversations can move on.

I am very grateful to professors Nieuwenhuis, Schauer and Nieuwenhuis for reading the final manuscript. Special thanks are due to professor Frederick Schauer for his willingness to travel to Leiden from the United States in order to participate in the public defense.

No one has contributed more to the completion of this project than my wife, Andrea (and, in ways they will not understand for some time to come, our children, Emma and Matthias). Andrea's patience and encouragement have been nothing short of angelic and this work is, of course, dedicated to her.

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PART I

QUESTIONING A 'GLOBAL AGE OF BALANCING'

CHAPTER 1

INTRODUCTION

1.1 THE LOCAL MEANING OF BALANCING

1.1.1 Introduction

This thesis presents a comparative and historical investigation of the origins and meaning of one of the central features of contemporary Western legal thought and practice: *the discourse of balancing* in constitutional rights adjudication. The aim will be to uncover what invocations of weighing rights, values or interests, in case law and in academic commentary, *mean* to legal actors within different legal epistemic communities.

The background to this project consists of a puzzle to which currently dominant approaches in this field do not, it is submitted, provide a satisfactory answer. This puzzle itself arises out of a clash between two narratives that figure prominently in comparative constitutional legal scholarship of the past decades. This introductory Section briefly explains what is at stake in this clash – and therefore what is at stake in trying to understand the meaning of balancing -, as an introduction to the more detailed presentation of the research project that occupies the remainder of this Chapter.

1.1.2 Balancing and the assumption of similarity

The first strand of this puzzle stems from the following familiar story. Constitutional law practice and theory in Europe, the United States and elsewhere have, for some time now, been dominated by the discourse of balancing.[1] References to the need for a weighing of rights, values or interests figure centrally in case law, in particular in the field of constitutional rights adjudication. In academic literature, commentators turn to the theme of balancing as a favoured lens for doctrinal critique and as a common focal point for more general theoretical discussions of law and adjudication. Most comprehensively, balancing's centrality emerges from the way in which, in recent decades, the conceptual vocabulary and the imagery of weights and proportions have come to be invoked as essential elements of locally held 'self-images' of constitutional legal thought and practice.

Comparative legal scholars have seized upon the discourse of balancing, and in particular on its role in constituting these self-images, as an organizational tool for their investigations. If local legal actors see the extent to which, and the ways in which, their courts 'balance' as emblematic for their own systems, so the argument goes, then comparative studies can use the language of balancing to frame similarities and differences among these systems. A crucial, though normally unstated, assumption

[1] While this observation holds true for many liberal democratic legal systems outside Europe and North-America, this thesis focuses specifically on Germany and the United States. The reasons for this limitation, and the extent to which German theory and practice can be treated as representative for broader experiences in European legal thought and practice are discussed *infra*, s. 1.7 and 1.9. Further references in support of the claims made in this Section are given in subsequent parts of this Chapter. Definitions of the 'discourse of balancing' and the 'language of balancing' are given *infra*, s. 1.9 and in Chapter 2.

underlying these studies, is the idea that the language of balancing has *the same meaning* wherever it surfaces. If it did not, observations based on the incidence of this language as well as comparative conclusions framed using this language would clearly become unstable. Comparative lawyers are happy to concede that courts do not balance 'in the same way' in all systems. They also admit that balancing is accompanied by, or encased within, different elements and structures in different settings. Balancing is, for example, commonly discussed alongside 'proportionality' in Germany and other European jurisdictions, but not in the U.S.[2] And they agree that the reception of balancing is not the same everywhere - despite its widespread invocation, explicit judicial balancing has long been subject to criticism in the U.S. of a kind and intensity that is much rarer in Europe and elsewhere, for instance. But the overall assumption remains that the language of balancing itself – the direct invocation of a weighing of rights, interests or values – has the same basic significance wherever it surfaces.

This 'assumption of similarity' has dominated comparative work on balancing for almost a century, since the first comparative studies of the earliest references to balancing and weighing in academic legal literature in France, Germany and the United States.[3]

1.1.3 The formal *vs.* substantive opposition

The second strand of the puzzle is the following. Studies comparing general styles of legal reasoning in Europe and the United States have, for much of this same period, placed their faith in a 'formal *vs.* substantive' dichotomy in order to frame salient differences. The syllogistic mode of reasoning of the French *Cour de cassation*, and the efforts by the German Pandectists and their successors to build a logically-formal coherent system of law have long been taken as favourite examples to ground the argument that legal reasoning in Continental Europe as a whole is more 'formal' - or 'formalistic', or 'legalistic' - while legal reasoning in the U.S. would be more 'pragmatic', 'policy-oriented', or 'substantive'. The dominant argument in this field has long been that while both American and Continental European legal thought were strongly formalist in orientation at the end of the nineteenth century, American legal reasoning has since been subjected to a devastating - 'virulent', in Duncan Kennedy's depiction - Realist critique that has unmasked formalism as "merely a kind of veneer".[4] While legal thinking in Europe, notably in Germany, was at one time, early in the century, in thrall of a very similar line of critique, attacks on legal formality simply have never had the same long-term impact on mainstream European jurisprudence as they had in the U.S.

[2] *Cf.* Vicki Jackson, *Being Proportional about Proportionality*, 21 CONST. COMMENT. 803 (2004).
[3] Examples of these views are given in Chapters 3 and 4.
[4] *Cf.* Annelise Riles, *The Transnational Appeal of Formalism: The case of Japan's Netting Law*, STANFORD/YALE JUNIOR FACULTY FORUM RESEARCH PAPER 2000, Nr. 3, 5, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=162588 (last accessed: 20 June 2012).

The rise of constitutional judicial review under post-War constitutions and in European fundamental rights law, this story goes, has placed this long established mark of difference in question. In their decisions on national constitutional and European rights, it is argued, leading courts in Europe have adopted a style of reasoning that is surprisingly and radically open-ended and pragmatic - in short: *informal* – and less legalist. "A common cliché has it that legal systems from the common law tradition produce case law, while so-called continental legal systems strive for codification and a more systematic jurisprudence", Georg Nolte writes, for example, in a 2005 comparative study of European and U.S. constitutionalism. "*The question, however, is whether the opposite is not true for today's constitutional adjudication*".[5] Nolte goes on: "In its freedom of expression case law, for example, the U.S. Supreme Court strives to develop 'tests' that are on a similar level of abstraction as legislation. (…) The European Court of Human Rights and the German *Bundesverfassungsgericht* (Federal Constitutional Court, FCC) on the other hand, typically insist on a balancing of 'all the relevant factors' of the case", following an approach to constitutional adjudication that is, overall, "less rigorous" than that found in the U.S.[6] Where European legal reasoning – even European legal culture as a whole – had long been significantly more formal than its U.S. counterpart, contemporary constitutional rights adjudication, this narrative goes, shows an abandoning or at least a significant modification of this longstanding emblematic difference.

1.1.4 A puzzle: Balancing, formality and faith in law

As the quotation from Georg Nolte illustrates, these two stories – of the uniform meaning of the discourse of balancing, and of the deformalization of post-War European legal reasoning in the constitutional rights context – are intimately related. It is precisely *the reliance on balancing*, by courts like the FCC or the European Court of Human Rights, that is seen to qualify their outlook as pragmatic or informal. The turn towards balancing and proportionality reasoning by European Courts and other courts outside the U.S., is read as a turn away from legal formality - a turn away from reliance on legal rules, from 'rigour' in legal thinking, and, expressed in the broadest terms, from *legalism* as an

[5] Georg Nolte, *European and US Constitutionalism: Comparing Essential Elements*, in: EUROPEAN AND US CONSTITUTIONALISM 17-18 (Georg Nolte, ed., 2005), emphasis added. For the same argument by an American scholar, see Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST L. REV. 473, 474 (2003) ("For a long time, the United States was the only legal system with a flourishing institution of constitutional judicial review. And, according to conventional wisdom, the general style of legal thought in this country has long been more pragmatic, or less formalistic, than in other systems. Over the last half-century, other legal systems have taken up judicial review, and now seem themselves to be moving away from traditionally more formal approaches to law").
[6] *Ibid.*, at 18. For a classic Geman statement, see Ernst Forsthoff, *Die Umbildung des Verfassunggesetzes*, in RECHTSTAAT IM WANDEL 145ff (1959) ("*Die Entformalisierung der Verfassung wirkt … umso erstaunlicher, als die geistige Gesamtentwicklung … zur Formalisierung und Abstraktion tendiert*" – "The deformalization of the constitution is all the more surprising since general intellectual development tends to move in the direction of formalization and abstraction").

attitude.[7] Conversely, it is the U.S. Supreme Court's alleged preference for 'rules' and its encasement of balancing in the form of 'tests' that makes its constitutional rights reasoning more formal. The combination of these two stories, it seems, can support only one conclusion: *balancing and legal formality are antithetical*.

It is no exaggeration to say that this conclusion is part of the dominant American view in this area, with broad influence elsewhere.[8] The idea of constitutional law 'in an age of balancing', to cite a well known and influential general assessment of American constitutional law from the late 1980s, is very much the idea of law in an age of lost faith in legal formality; of a loss of faith brought on by successive waves of Realist and Critical critiques of the work of courts. Adjudication, on this view, can be no more - and is no more - than a pragmatic, *ad hoc*, instrumentalist approach to deciding cases, and the courts' rhetoric of balancing is the prime expression of this realization.

This basic view has been projected onto developments *outside* the United States. The following assessment of proportionality review in non-U.S. courts, by Yale Law School's Paul Kahn, is illustrative of this perspective to such an extent that it is worth quoting at length:

> "[J]udicial review in the Israeli Supreme Court is an endless deployment of proportionality review. Proportionality is nothing more than the contemporary expression of reasonableness. (…) Reasonableness requires first a specification of the right at issue (…) and second the balancing against that right of the government's interest (…). The Israeli Court is not alone in finding its own voice in the expression of reason in an all-things-considered judgment. Proportionality review is central, for example, to the Canadian Supreme Court's jurisprudence. (…) *Proportionality is the form that reason will take when there is no longer a faith in formalism* (…). As long as belief in a formal science of law is strong, the reasoned judgments of a court look different from the 'all things considered' judgments of the political branches. When reasonableness replaces science, however, the work of a court looks like little more than prudence".[9]

Kahn here writes about proportionality, but he sees balancing as part of proportionality analysis, and so do the courts to whose case law he refers. The proportionality tests of the Israeli and Canadian Supreme Courts, as those of many other high courts outside the U.S., are very much balancing tests. Proportionality, reasonableness, prudence, 'all things considered judgments', and balancing all embody, therefore, in Kahn's view, *the form that reason will take when there is no longer a faith in formalism*. This 'loss of faith' qualification, of course, fits snugly with the American story

[7] On the intimate connection between legalism and the idea of legal formality, see, *e.g.*, JUDITH N. SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS 33-34 (1964); Franz Wieacker, *Foundations of European Legal Culture*, 38 AM. J. COMP. L. 1, 23 (1990). In all of its common meanings, legalism – as rule following, logical deduction, belief in the (semi)-autonomy of law, *etc.* – is essentially similar or even identical to the idea of legal formality. The two terms will be treated as synonymous here. See further *infra*, s. 1.6 and s. 2.4.
[8] For a recent example, see Miguel Schor, *The Strange Cases of Marbury and Lochner in the Constitutional Imagination*, 87 TEX. L. REV. 1463, 1488 (2009) ("Courts around the globe have turned *away from formalism* and *towards proportionality analysis or balancing tests*", emphasis added).
[9] Paul W. Kahn, *Comparative Constitutionalism in a New Key*, 101 MICH. L. REV. 2677, 2698-2699 (2003).

in which balancing and the rise of scepticism – the more familiar designation of the loss of faith - in law are intimately related.

But when developments in other countries than the U.S. are taken into account, a problem emerges: the loss of faith narrative very clearly *does not work*. The available evidence overwhelmingly suggests that legal systems outside the U.S. are experiencing something like *the exact opposite* of an American-style surge in scepticism about law and judicial institutions. Part of this thesis is concerned with showing that this is the case for German law in particular, and Chapters 3, 4, 5 and 8 will discuss many examples of scholars and judges committed to-, holding out aspirations for-, and expressing faith in law, legal doctrine and judicial institutions. But the evidence against a sceptical turn outside the U.S. is much broader. The embrace of supra-national systems of law and adjudication, for example, but also the fundamentally constructive nature of much doctrinal criticism, in many of these systems, are telling signs of a pervasive "*faith in and hope for law*".[10] By way of support for the preliminary case that there may indeed be a decisive difference on this point between the U.S. and other Western legal systems, consider this comparative assessment of contemporary legal developments by another prominent American legal scholar, Richard Pildes, written at around the same time as Paul Kahn's observation on the loss of faith:

> "[W]e are living at a moment when the turn to legalism … has blossomed across the domestic legal systems of [countries outside the U.S]. *It is quite intriguing – and enormously significant … - that the attachment to legalism and judicial institutions outside the United States is reaching this peak in the same period in which within the United States there has been general and increasing scepticism about judicial institutions* (…). These domestic transformations are particularly noteworthy because the United States historically has been organized around a culture of legal rights, and a central role for legal institutions (…), more so than any other Western democracy".[11]

[10] Duncan Kennedy, *Comment on Rudolf Wiethölter's 'Materialization and Proceduralization in Modern Law', and 'Proceduralization of the Category of Law'*, 12 GERMAN L.J. 474, 480 (2011 reprint, originally 1985). *Cf.* also Reinhard Zimmermann, *Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science*, 112 L.Q.R. 576, 583 (1996) (contrasting American skepticism with European – Continental and English – faith in law as an autonomous discipline); Ming-Sung Kuo, *From Myth to Fiction: Why a Legalist-Constructivist Rescue of European Constitutional Ordering Fails*, 29 OXFORD J. LEGAL STUD. 579, 581 (2009) ("faith in the neutrality and autonomy of the law … rests on a shared epistemic form that holds the European legal professional community together"). One important expression of this faith is the turn to supra-national law and judicial institutions, which is strongly supported in, for example, Europe, but not at all in the United States. For European law, see, *e.g.*, DANIEL R. KELEMEN, EUROLEGALISM 240ff (2011). For a case-study on legal doctrinal scholarship, see, *e.g.*, Chaim Saiman, *Restitution in America: Why the US Refuses to Join the Global Restitution Party*, 28 OXFORD J. LEGAL STUD. 99, 99ff (2008) ("In the past generation, restitution law has emerged as a global phenomenon. (…) In contrast, in the United States, scholarly interest in restitution … is meagre. (…). I argue that [restitution discourse outside the US] is *largely a product of pre- or anti-realist legal thought which generates scepticism within the American academic-legal establishment* (…)" (emphasis added).
[11] Richard H. Pildes, *Conflicts between American and European Views of Law: The Dark Side of Legalism*, 44 VA. J. INT'L L. 145, 147ff (2003).

Both these statements – on *balancing as anti-formality* and on the *'turn to legalism' in legal systems outside the U.S.* – represent widely held views. They are also, quite obviously, very difficult to reconcile. If the turn to balancing and proportionality really does signal a loss of faith in law, and if this turn is pervasive in systems other than the United States, these legal systems cannot simultaneously be experiencing a moment of peaking attachment to legalism.[12] Balancing and proportionality are key components of many domestic and supra-national legal systems in which the relevant actors – judges and scholars first and foremost – time and again demonstrate a commitment to law, that is radically at odds with the scepticism that pervades American legal discourse. If balancing is, in a very basic sense, *anti-law*, as Kahn and many others see it, how would that be possible?

Further tangles to this basic puzzle of how a 'turn to legalism' and a 'turn to balancing' can go hand in hand are now quick to surface. Is it really plausible that legal cultures with a long tradition of high formalism and of attachment to legal doctrine and legal 'rigour', like those in Continental Europe, would suddenly have abandoned these long-held views? If so: did lawyers in these systems retain their belief in legal formality in other areas of law, but abandon it completely in the field of constitutional rights adjudication, where balancing now dominates? Or has legal formality been entirely 'disenchanted', and have German judges and legal scholars, to use the most striking example, really 'replaced legal science' and centuries of conceptual refinement with mere reasonableness and prudential reasoning? If so, it might be asked, why does private law adjudication and scholarship in European countries, like Germany, still look so very different from American legal theory and practice? Why, come to think of it, do German and European *constitutional* law scholarship still look so very different from their U.S counterpart?

On the American side, too, matters do not quite fit. Granted, the idea of balancing as anti-law, or anti-formality, could still hold in this setting. But if there really has been a comprehensive loss of faith in formal attributes of law and legal reasoning, why would American courts and commentators still bother to encase balancing-based reasoning within the confines of strict rules and multi-part tests? Surely these elaborate legal constructs, designed specifically to damn in the most pernicious aspects of balancing, must signal some remaining commitment to law and legal formality?

[12] At least not to 'legalism' in any of its conventional meanings - the meanings on which observations like Richard Pildes's and of authors like those cited in fn. 7 rely.

1.1.5 Argument and project

The central argument of this thesis consists of a two-part answer to this set of questions. First: *Balancing does not mean the same thing everywhere*. And second: Analysing these different meanings reveals that *the opposition between balancing and legal formality does not hold in all contexts*, or, more precisely, that the relationship between balancing and legal formality and its opposites varies among different settings. The project undertaken to support this argument is a comparative and historical investigation of the local meaning of the discourses of balancing in German and U.S. American constitutional legal thought and practice, through the lens of legal formality and its opposites. The language of balancing and its surrounding discourse, it will be argued over the course of the following Chapters, have *very different* connotations in Europe and in the U.S. These different 'local meanings', in turn, *do not* allow for a simple conclusion that European adjudication styles have become 'pragmatic', 'policy-oriented' or 'informal' in the sense these terms are commonly understood in (American) legal writing. Not only 'balancing' itself, but also the organizing terms 'formal' and 'substantive', it will be claimed, mean different things in these different settings.

This project has a number of basic features. As a study of discourse, it focuses on judicial references to balancing, on judicial and academic debates surrounding these judicial references, and on debates on broader constitutional legal issues conducted in balancing language. The German and U.S. legal systems are selected because it was in these systems that, at more or less the same time in the late 1950s, courts first began to discuss constitutional rights issues in balancing terms, following earlier virtually simultaneous invocations of balancing in legal debates of the early twentieth century. In order to nuance the two narratives outlined above and their conclusions, the investigation will track as closely as possible the classic balancing debates in U.S. and German legal thought – that is: those judicial decisions and academic discussions on which they were founded in the first place. In its comparative dimension, this study is built around the idea of a constant dialectic between internal and external perspectives for comparison. In its 'internal' mode, the investigation approaches the discourses of balancing in the two different settings as much as possible on their own terms, studying the issues local actors deem important and following local debates where they lead. The 'external' dimension, on the other hand, attempts a systematic comparison of these discourses, structured around a common grid of 'formal' and 'substantive' elements in legal reasoning and their interaction. This dialectically comparative analysis should make it possible not only to look at balancing through a formal/substantive lens, but also to reappraise the formal/substantive dichotomy through the prism of the diverse local characteristics of balancing discourse.

It cannot, ultimately, be surprising that the two themes of balancing and of the formal/substantive dichotomy are so closely intertwined. Jumping ahead in the analysis,

one conclusion from the study of judicial and academic discussions of balancing in different settings has to be the extraordinary, possibly unique, capability of the language of balancing to mean all things to all people.[13] In large part, this multiplicity of meanings rests precisely on the many different ways balancing is seen to lie at the intersection between the formal and substantive dimensions of legal reasoning. Balancing can stand both for intuitive reasoning that is unusually formal, and for formal legal reasoning that is unusually open. Balancing can be both an admission of the limitations of formal legal analysis, and an attempt to stretch formal legal reasoning as far as it can go. Balancing can be both principle and policy, conceptual synthesis and pragmatic compromise. Balancing, it will be argued in the final Chapter of this study, can form the centrepiece of a mode of reasoning that 'substantivizes' its formality, and of a discourse that is in an important sense 'formally substantive'.[14] When what is emblematic for legal reasoning in different settings is not so much the fact *that* it combines both more formal and more substantive elements, *but how it does so*,[15] studying the discourse of balancing opens a uniquely privileged vantage point from which to analyse and compare what legal reasoning, within these settings, to a large extent, is all about.

[13] In this, the language of balancing and proportionality is, in contemporary constitutional legal reasoning, perhaps rivalled only by the language of equality. *Cf.* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

[14] Reliance on inexistent or inelegant terminology has plagued this area of research before. See ROBERT S. SUMMERS & PATRICK S. ATIYAH, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 30 (1987) (coining what they call the 'ugly word' of 'substantivistic reasoning'). On these terms, see *infra*, s. 1.6 and Chapter 2.

[15] *Cf.* MITCHEL DE S.-O. L'E. LASSER, JUDICIAL DELIBERATIONS. A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 155 (2004). See also SUMMERS & ATIYAH (1987), at 410 (arguing that "the mix of the formal and the substantive" is very different as between English and American legal reasoning).

1.2 THE CENTRALITY OF THE DISCOURSE OF BALANCING

Courts in much of the Western world often use very similar sounding balancing-related language in their decisions in constitutional or fundamental rights cases.[16] In the second half of the twentieth century, the U.S. Supreme Court[17] and the Supreme Court of Canada,[18] the German FCC,[19] the European Court of Justice[20] and the European Court of Human Rights,[21] to list a number of prominent examples in Europe and North America, have all come to regularly invoke the need to balance rights, interests or values when dealing with fundamental rights cases.[22]

This same language – the language of balance and weight – figures heavily in constitutional legal scholarship within these systems. Primarily in response to judicial references of the kinds cited above, legal scholars have over the past sixty years developed a wealth of doctrinal commentary and critical evaluation, mostly consisting of

[16] A note on sources: Discussion in this thesis will be largely limited to constitutional adjudication practice and theory in the U.S. and Germany. This means that few sources from outside these jurisdictions and areas of law will be cited, with some notable exceptions (in particular a brief discussion of French materials and of German private law legal theory in Chapter 3). Works in Dutch on the role of balancing in law that will not be cited separately but which have provided inspiration for the project undertaken here, include JANNEKE H. GERARDS, BELANGENAFWEGING BIJ RECHTERLIJKE TOETSING AAN FUNDAMENTELE RECHTEN (2006) (judicial balancing in fundamental rights cases); Jan M. Smits, *Belangenafweging door de rechter in het vermogensrecht: een kritische beschouwing*, RECHTSGELEERD MAGAZIJN THEMIS (2006) 134 (judicial balancing in private law); ROEL DE LANGE, PUBLIEKRECHTELIJKE RECHTSVINDING (1991) (role of balancing and proportionality in public law adjudication).

[17] See the examples discussed in Chapters 6 and 7.

[18] See, *e.g.*, SCC *R. v. Oakes*, [1986] S.C.R. 103 (stating that in all rights cases under the Charter "courts will be required to balance the interests of society with those of individuals and groups"). For a discussion of the role of balancing by a former Justice of the Supreme Court of Canada, see Gerard V. La Forest, *The Balancing of Interests under the Charter*, 2 NAT'L J. CONST. LAW 113 (1992).

[19] See the examples discussed in Chapters 4 and 5.

[20] The ECJ most commonly refers to a principle of proportionality, but views this principle as encompassing a process of 'balancing'. *See*, *e.g.*, Case C-169/91 *Council of the City of Stoke on Trent and Norwich City Council v. B & Q plc* [1992] ECR I-6635, par. 15 ("Appraising the proportionality of national rules … involves weighing the national interest … against the Community interest"). For discussion by a former Advocate-General of the Court, *see* Walter van Gerven, *The Effect of Proportionality on the Actions of Member States*, in: THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE 42ff (Evelyn Ellis, ed., 1999) (discussing proportionality as "a complex balancing test"). The ECJ also regularly refers to the need for a 'fair balance' between community freedoms and human rights. See, *e.g.*, Case C-112/00 *Schmidberger Internationale Transporte und Planzüge v. Austria*, 2003 ECR I-5659, par. 82.

[21] See, *e.g.*, *Sunday Times v. The United Kingdom*, 2 EHRR 245, par. 6 (1979). The notion of a 'fair balance' is central to large swathes of the Strasbourg Court's case law. *See*, *e.g.*, *Soering v. The United Kingdom*, 11 EHRR 439, par. 89 ("[I]nherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights").

[22] Similar observations can be found in the fundamental rights case law of supreme and constitutional courts in numerous other countries, including Israel, South Africa, India and Japan. For the Supreme Court of Israel, see *e.g.* Aharon Barak, *The Role of the Supreme Court in a Democracy*, 33 ISR. L. REV. 1 (1999). The Constitutional Court of South Africa has consistently held that analyzing governmental actions allegedly impairing fundamental rights "involves the weighing up of competing values, and ultimately an assessment based on proportionality". *State v. Makwanyane*, 1995 (3) SALR 391, 436 (South Africa). For discussion of all these systems, see David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 692 (2005). On India, see further P. ISHWARA BHAT, FUNDAMENTAL RIGHTS: A STUDY OF THEIR INTERRELATIONSHIP 12ff (2004).

intricate lessons for courts on when and how (not) to balance.[23] The deluge in this kind of scholarship has been such that by 1965 already – the early date is noteworthy -, it was felt by a noted American commentator that "[s]o much has been written on the subject that the writers, ..., have no doubt told us more about balancing than we wanted to know".[24] Balancing's position within legal scholarship, however, extends far beyond doctrinal commentary. Commentators have come to invoke the theme of balancing as a common focal point - a *trope* - for more abstract, theoretical discussions of law and adjudication generally. A range of influential post-War thinkers, from Ronald Dworkin to Jürgen Habermas, have all turned to the phenomenon of explicit judicial balancing to frame their arguments on the nature of law, rights and adjudication.[25] In work of this kind, the theme of balancing becomes a favoured *lens*, or a prism, through which local actors observe their own constitutional law practices and understandings.

In recent decades, building on these references to balancing in case law and scholarship, a subtle transformation in perspective has taken place within many legal systems and cultures. Balancing is now often seen no longer as merely *a phenomenon within* constitutional adjudication, or as *a lens through which* to study constitutional law – or even as possibly the most important lens through which to do so -,[26] but as *an emblematic characteristic of constitutional law itself*. In many Western jurisdictions, it has become increasingly common to invoke the language of balancing as an essential element of the 'self-image' of constitutional legal thought and practice.[27] Balancing, in this perspective, is part of what *defines* a particular constitutional legal system, culture or epoch for its inhabitants. Indications of this new perspective abound. American constitutional law, for example, has been said to find itself in *an age of balancing*.[28] The arrival of balancing tests, according to another American observer, heralded "*the beginning of modernism* in American legal thought".[29] In German legal writing, balancing is seen as a new '*Rechtsparadigma*' – a paradigm of law –,[30] or a new '*Staatsgrundkonzeption*' – a conception of the foundations of the State (predictably: a 'balancing State').[31] And in Europe as a whole, according to a noted political scientist, 'proportionality balancing' has emerged as a "*master technique of judicial governance*".[32]

All these references to the language of balancing – its invocations in case law and doctrine, but also as part of the imagery that legal actors use to make sense of their own constitutional law beliefs and practices - make up *the discourse of balancing* in contemporary constitutional law.[33] The project undertaken in this thesis is a comparative investigation of the meaning of this discourse at its origins.

1.3 BALANCING AND COMPARATIVE LAW

The centrality of the language of balancing extends to the discipline of comparative law, where it has emerged as an important organizational tool for comparative constitutional legal scholarship. In this context, this language generally figures in one of two principal ways: to voice ideas of universality or convergence, and as a marker of salient contrasts.

[23] The volume of this scholarship, even merely within German and U.S. legal writing on constitutional law, is immense. For a minute sample from German literature, see, *e.g.* PETER LERCHE, ÜBERMAß UND VERFASSUNGSRECHT (1961); Eberhard Grabitz, *Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Bundesverfassungsgerichts*, 98 AÖR 568 (1973); BERNHARD SCHLINK, ABWÄGUNG IM VERFASSUNGSRECHT (1976); HARALD SCHNEIDER, DIE GÜTERABWÄGUNG DES BUNDESVERFASSUNGSGERICHTS BEI GRUNDRECHTSKONFLIKTEN (1979); Fritz Ossenbühl, *Abwägung im Verfassungsrecht*, (1995) BVBL 904. For a sample of such writings from the U.S., see the sources cited in T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

[24] Kenneth L. Karst, *The First Amendment and Harry Kalven: An Appreciative Comment on the Advantages of Thinking Small*, 13 UCLA L. REV. 1, 22 (1965).

[25] Dworkin describes 'the balancing metaphor' as 'the heart of the error' of the U.S. Supreme Court's model of rights in TAKING RIGHTS SERIOUSLY 198 ff (1977). For Habermas, judicial balancing mocks the 'strict priority' that ought to be accorded to fundamental rights and leads to arbitrariness in adjudication. *See* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS (W. Rehg, trans.) 256-259 (1996). For a discussion of Habermas's position, see Steven Greer, *'Balancing' and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate*, 63(2) C.L.J. 412 (2004). Other notable discussions include JOHN HART ELY, DEMOCRACY AND DISTRUST. A THEORY OF JUDICIAL REVIEW 105ff (1980) (discussing balancing in U.S. Supreme Court decisions on free speech); RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003) (balancing as part of a 'pragmatic' approach to adjudication).

[26] "Before we have time to wonder whether we ought to balance", Alexander Aleinikoff writes, "we are already asserting the relative weights of the interests". See Aleinikoff, *Age of Balancing* (1987), at 972. *See also* Grégoire C.N. Webber, *Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship*, 23 CAN. J. L. & JURISPRUDENCE 179, 180 (2010) ("It strikes me that we have come to see constitutional rights only through the prism of proportionality and balancing and now fail to grasp the possibility that alternative modes and methods of rights-reasoning are even possible").

[27] For the notion of 'self image' or 'self portrait', *see* Mitchel de S.-O.-l'E. Lasser, *Judicial (Self-Portraits): Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325, 1344 (1995) (referring to a "greatest common denominator" perception as held by actors from "the legal profession" within the relevant legal system).

[28] Aleinikoff, *Age of Balancing* (1987).

[29] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 131 (1992).

[30] See Karl-Heinz Ladeur, *Abwägung als neues Rechtsparadigma? Von der Einheit der Rechtsordnung zur Pluralität der Rechtsdiskurse*, 69 ARSP 463 (1983). For a similar identification in U.S. legal thought, see KENNEDY (1997), 324. Kennedy writes that after World War Two, "balancing became a paradigm for constitutional decision in one area after another".

[31] See WALTER LEISNER, DER ABWÄGUNGSSTAAT 20, 174 (1997). Leisner writes: "It is clear that more has to be seen in proportionality and balancing than mere isolated searches for justice in individual cases: Behind these notions stands a conception of the foundations of the State". Leisner's views are by no means uncontroversial, see *e.g.* Arno Waschkuhn and Alexander Thumfart, *Die Mahnungen und Vereinfachungen Walter Leisners* (Online Review of *Der Abwägungsstaat* and other books), at: www.staatswissenschaft.de/pdf/LEISNER%20Rez.pdf (last accessed 2 December 2011). Further German references: See, *e.g.*, Donald P. Kommers, *Germany: Balancing Rights and Duties*, in: INTERPRETING CONSTITUTIONS 161 (Jeffrey Goldsworthy, ed., 2006); SCHLINK (1976), 13 (describing efforts by the FCC to find, in balancing, 'the key' to the methodology of constitutional law). For an effort to link a form of judicial balancing to "the essential structure of American constitutional democracy", see David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 NW. L. REV. 641, 642 (1994).

[32] ALEC STONE SWEET, THE JUDICIAL CONSTRUCTION OF EUROPE 243-244 (2004).

[33] *Cf.* Webber, *Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship* (2010), 179 ("The current stage of the history of thought in relation to constitutional rights scholarship and jurisprudence is engulfed by the discourse of balancing and proportionality").

1.3.1 Balancing and universality

Studies of the first kind, in their most ambitious guises, invoke notions of descriptive or normative universality for balancing. Balancing, in these views, is either or both a universally valid description of what 'actually happens' in constitutional adjudication, and/or a universally desirable ideal for what should happen. One early study of this kind, for example, claimed that "[j]ustices everywhere, who have the responsibility of deciding constitutional controversies, know that their task involves the identification and balancing of competing societal interests",[34] before going on to list examples of the recognition of the 'inevitability' of balancing in case law and literature from a wide range of systems, including from the U.S., Canada and Germany. More recently, the Canadian scholar David Beatty has posited that the principle of proportionality - which for him encompasses a notion of balancing -[35] is "an integral, indispensable part of every constitution".[36] Using reasoning and doctrines that are, strikingly, "virtually identical", balancing courts in different systems in Beatty's view are doing no more than explicitly recognizing this universal principle.[37]

Other commentators, still within this broad similarity-focused framework, have described the spread of references to balancing not in terms of 'inevitability' or universal normative appeal, but from a more dynamic, political science oriented perspective, as part of a contemporary 'globalization of legal thought',[38] or a 'judicial globalization'.[39] "Over the past fifty years", Alec Stone Sweet and Jud Mathews have recently written in this vein, "proportionality balancing … has become *a dominant technique of rights adjudication* in the world".[40] Similarly, Thomas Grey has argued that the broad formulation of post-1945 constitutional rights guarantees and the influence and prestige of the European Court of Human Rights and the European Court of Justice, have helped spread a "policy-oriented pragmatic *style of adjudication*" throughout Europe and beyond.[41] The core of this new judicial pragmatism, in Grey's view, consists of "purposive reasoning, balancing and proportionality".[42] Duncan Kennedy, finally, has argued that 'balancing of conflicting considerations' is part of the 'conceptual vocabulary' and a 'characteristic argument' for a '*globalization of legal thought*' that has, from origins in US law, conquered the world following 1945.[43]

[34] CHESTER JAMES ANTIEAU, ADJUDICATING CONSTITUTIONAL ISSUES 125 (1985). *See also* Chester James Antieau, *The Jurisprudence of Interests as a Method of Constitutional Adjudication*, 27 CASE WESTERN RES. L. REV. 823 (1977).
[35] *See e.g.* DAVID M. BEATTY, THE ULTIMATE RULE OF LAW 163-164 (2004).
[36] BEATTY (2004), esp. 162-163.
[37] DAVID M. BEATTY, CONSTITUTIONAL LAW IN THEORY AND PRACTICE 15-16 (1995).
[38] Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 19 (David Trubek & Alvaro Santos, eds., 2006).
[39] Grey, *Judicial Review and Legal Pragmatism* (2003), 484.
[40] Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72 (2008) (emphasis added).
[41] Grey, *Judicial Review and Legal Pragmatism* (2003), 484-485.
[42] *Ibid.*, 486.
[43] Kennedy, *Three Globalizations of Law and Legal Thought* (2006), 21-22.

1.3.2 Balancing and contrast

Comparative scholarship of a second variety, on the other hand, takes up the language of balancing to *frame contrasts* between legal systems. Studies in this vein build on to assumption that differences in the ways legal communities *do*, or *do not*, use balancing-based language matter, and that analyzing these differences is a suitable way to go about framing salient points of comparison between legal systems and cultures.

The main thrust of these studies has been to compare U.S. constitutional adjudication to experiences in Canada, Europe - with Germany as a main example - or elsewhere. Kent Greenawalt, for example, has compared U.S. and Canadian freedom of expression adjudication by asking whether courts use a 'balancing' approach in which they "openly weigh factors", or a 'conceptual' approach, relying on "categorical analysis".[44] Greenawalt concludes that, in this area, "[t]he Canadian Supreme Court is developing a distinctive balancing approach … and avoids relying as much upon categorical analysis as do U.S. courts".[45] Frederick Schauer has similarly contrasted different approaches to freedom of expression adjudication through a balancing lens writing, "there is a view, widespread in Canada, in Europe and in South Africa [and elsewhere], that American free-speech adjudication is obsessed with categorisation and definition. Under this view, American free speech adjudication disingenuously … masks the difficult weighing process that the Canadian, European and South African structure both facilitates and makes more transparent".[46]

1.3.3 A global community of balancing discourse?

These two approaches, while coming to very different substantive conclusions, proceed on the basis of the same methodological assumption. In both, it is tacitly taken for granted that the various discourses of balancing in different legal systems and cultures can be amalgamated into an overarching 'community of discourse'.[47] This term was coined by Mirjan Damaška in his '*The Two Faces of Justice and State Authority*' to describe the presence of a common conceptual vocabulary in comparative law - a language system

[44] Kent Greenawalt, *Free Speech in the United States and Canada*, 55 L. & CONTEMP. PROBS. 5, 5-10 (1992)
[45] *Ibid.*, 32. See also Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409, 430 (2003) ("the Supreme Court of Canada relies on standard and balancing approaches in decision-making more so than the U.S. Supreme Court"); Donald L. Beschle, *Clearly Canadian? Hill v. Colorado and Free Speech Balancing in the United States and Canada*, 28 HASTINGS. CONST. L.Q. 187, 187-188 (2001) ("Much of the debate concerning proper methods of constitutional interpretation can be seen as a clash between those advocating adherence to absolute principle, and those contending that constitutional decision making must e a process of balancing competing interests. (…) One way to examine the differences between the balancing and anti-balancing approaches is to compare the experience of Canadian courts … with the analogous work of the United States Supreme Court in its constitutional cases").
[46] Frederick Schauer, *Freedom of Expression Adjudication in Europe and America: A Case study in Comparative Constitutional Architecture*, *in* EUROPEAN AND US CONSTITUTIONALISM 49, 50-51 (Georg Nolte, ed., 2005).
[47] MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY 67 (1991).

intelligible to actors from within different systems and cultures, and intelligibly applied in comparative descriptions of these systems and cultures.[48] In this specific sense, both the 'similarity' and the 'contrasts' focused approaches locate themselves within a 'global age of balancing', where even those wanting to emphasize differences between legal systems find themselves having to rely on this unifying language to make their point.[49] The language of balancing, within this global community of discourse, is simply 'the way we talk now' in comparative constitutional law.[50]

As Damaška himself warned, however, there is always a real danger that any semblance of such a 'community of discourse' might lack substance and could be, in fact, "mainly a rhetorical achievement".[51] Awareness of this danger opens up a host of fascinating questions for comparative constitutional legal research. Can it actually be assumed that all these courts and lawyers referring to balancing and weighing do in fact mean the same thing, and that they are understood in the same way by their audiences? Is balancing as a shared focal point for debates on the nature of rights, law and adjudication really as shared and common as it appears to be, once the boundaries of individual legal systems are crossed? What sorts of distortions are likely when legal actors accustomed to understanding their own systems through a balancing prism look outside, at the practices and understandings of others?

These questions have so far largely escaped sustained academic attention.[52] They all raise the fundamental question of how the discipline of comparative law should engage with the pervasiveness of the language of balancing in constitutional adjudication and critique.

[48] *Ibid.*

[49] In the same way as that, in the domestic setting, those wanting to criticize the work of courts or other academics find themselves having to rely on the very language they object to.

[50] *Cf.* Mark van Hoecke & Mark Warrington, *Legal Cultures, legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law*, 47 INT'L & COMP. L.Q. 495, 530 (1998) (discussing the ambition long cherished by comparative lawyers "to develop some neutral framework, some common language with which several legal systems could be described in a way accessible to (…) lawyers belong to any one of those legal systems").

[51] DAMAŠKA (1991), 67-68.

[52] Recent studies have emphasized the idea that balancing and proportionality will often "*co-exist* with attention to historically specific aspects of national constitutions" or that "*the way in which balancing is done* will differ depending on a society's history and expectations concerning the relative importance not only of individual rights and social interests, but also of the role of courts and legislatures". See Vicki Jackson, *Being Proportional about Proportionality* (2004), 810 and Beschle, *Free Speech Balancing in the United States and Canada* (2001), 189 (emphasis added). See also Moshe Cohen-Eliya & Iddo Porat, *The Hidden Foreign Law Debate in Heller: The Proportionality Approach in American Constitutional Law*, 46 SAN DIEGO L. REV. 367, 372 (2009), and Dieter Grimm, *Proportionality in Canadian and German Jurisprudence*, 57 U. TORONTO L.J. 383 (2007). These studies do not, however, discuss the idea that balancing *itself* might mean different things in different settings.

1.4 BALANCING AS PROCESS AND AS DISCOURSE

1.4.1 Conflating discourse and process

Judicial decision making can be analysed along a range of different dimensions.[53] There is, first of all, the internal, mental dimension in which decisions are actually made – what could be called the psychological element in deciding. This psychological dimension will not figure in what follows. A second dimension consists of the *rational reconstruction* or conceptualization of this process of decision, through the use of abstract argument forms. This dimension might be called the *analytical* or *heuristical* dimension of judging.[54] Third, there is the external dimension of the *justification* of decisions through publicly stated reasoning. This dimension might be called the 'rhetoric' of judicial decision making, so long as it is recognized that rhetoric in this sense refers not to stylistic flourishes, but to the basic idea that the imperative of legitimization requires judicial reasoning to be convincing to a particular audience. Finally, there may also be an element of *collective deliberation* or negotiation on multi-member courts. This thesis leaves aside the first and fourth of these dimensions – for the analysis of which traditional legal scholarship is comparatively ill-equipped – and refers to the second and third dimensions as 'process' and 'discourse'.[55]

Judicial and academic discussions of balancing are commonly triggered by *discourse*; by the incidence of words like 'balancing', 'weighing', or in some cases 'proportionality', and their derivations, in constitutional case law and commentary. In these discussions, what initially makes a judicial opinion a 'balancing opinion', or what characterizes a court as a 'balancing court', is the occurrence of a peculiar form of legal language; an explicit reference to balancing or weighing.[56] 'Balancing', in these approaches is, at least initially, something judges '*say they do*'.[57]

Despite this initial reliance on language, however, the ultimate concern of these studies and discussions is overwhelmingly with balancing as *an analytical construct*; something that judges and lawyers '*are thought to actually do*'. This preoccupation with the

[53] This scheme builds on binary divisions between decision and justification, in RICHARD WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION (1961); J.H. Nieuwenhuis, *Heuristiek en Legitimatie van het Rechterlijk Oordeel*, 1976 RM THEMIS 494 (1976). See also NEIL MACCORMICK & ROBERT S. SUMMERS, INTERPRETING STATUTES: A COMPARATIVE STUDY 16-18 (1991) (distinction between the 'psychological' dimension of deciding and the 'public façade' of judicial reasons); John Bell, *The Acceptability of Legal Arguments*, in: THE LEGAL MIND: ESSAYS FOR TONY HONORÉ 49 (Neil MacCormick & Peter Birks, eds., 1986) (idem). Not included in these schemes are preliminary questions (*e.g.* the selection processes by which cases come up for decision) and post-decision issues (*e.g.* questions on compliance with decisions).

[54] On rational reconstruction, see e.g. NEIL MACCORMICK, RHETORIC AND THE RULE OF LAW: A THEORY OF LEGAL REASONING (2005).

[55] The fourth dimension *is* included to the extent that fellow judges are contained within the relevant audience for which judges frame their public reasons.

[56] A 'balancing reference' will be defined here as any invocation in judicial or legal academic writing to balancing, weighing, scales, or any derivations from these terms. See further *infra*, s. 1.9.

[57] Or, of course, something that academic commentators *say* judges do.

'analytics' of balancing - or 'balancing as process' - has a long tradition. It characterized the first discussions of judicial balancing, in the work of early twentieth-century scholars in Western Europe and North America, who saw balancing as a *process* of adjustment and calibration between opposing social interests,[58] and as *a method of lawfinding*,[59] and continues to this day.[60] In modern studies, balancing is a "method of constitutional interpretation",[61] balancing and proportionality are "doctrines" relying on certain similar "thought processes",[62] "proportionality balancing" is an "analytical procedure" and a "technique of rights adjudication".[63] Despite their initial focus on language, it is with the implications of this 'procedure', of this 'technique', for decisions in concrete cases, for the institutional position of the judiciary, *etc.*, that studies of balancing are ultimately concerned.[64]

In a methodological move that generally remains unarticulated, investigations of balancing and proportionality *conflate* these two dimensions of discourse and process. They seize upon the incidence of a particular form of legal language as the manifestation of an underlying form of activity—an analytical practice conceptualized as a process of weighing conflicting interests, values or principles. This conflation of discourse and process relies on two component assumptions: (1) an initial assumption that the discourse of balancing will always signal a particular underlying analytical process; and (2) a subsequent assumption that what matters about the language of balancing *is* this underlying analytical process. Together, these two assumptions will be referred to here as '*the discourse/process conflation*'. Balancing references are taken as reliable indicators of the presence of an underlying analytical process. Once they have served this role, scholarly attention quickly shifts to this purportedly underlying process itself and to *its* implications, for constitutional practice, theory and culture. Balancing's discursive dimension disappears from view.

This thesis argues that this conflation of discourse and process and its attendant neglect for balancing's discursive dimension in comparative law is seriously problematic, and should be replaced with an approach that takes balancing as discourse seriously, as its primary object of research. The main reasons for proposing this alternative approach stem from considerations of comparative law methodology, and are related to problems of identifying and interpreting balancing in foreign constitutional law. The following Paragraphs discuss these problems in turn.

[58] Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 4 (1943). For an early manifestation of this view in the context of American constitutional rights adjudication, *see* Zechariah Chaffee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 960 (1919) (referring to balancing as a 'method' of constitutional adjudication).

[59] See*, e.g.* PHILIPP HECK, BEGRIFFSBILDUNG UND INTERESSENJURISPRUDENZ 120 (1932 book, translated in THE JURISPRUDENCE OF INTERESTS 108-09 (Magdalena Schoch & Lon L. Fuller eds.*,* 1948) as *The Formation of Concepts and the Jurisprudence of Interests*) (1932) (citations are to the translation, unless otherwise indicated).

[60] For references to balancing as process, to be carried out by judges, in commentaries on mid-Century constitutional adjudication, *see, e.g.* Roman Herzog, *Kommentar zu Art. 5 Abs. 1-2*, *in* GRUNDGESETZ: KOMMENTAR No. 250 ff (Theodor Maunz, Günter Dürig, Roman Herzog, Rupert Scholz eds., 1968) (cited as 'Herzog, in MAUNZ-DÜRIG-HERZOG-SCHOLZ'). For a contemporary comparative reference, see Ulrich Scheuner, *Pressefreiheit*, 22 VVDStL 1, 55 (1965) (claiming that the "method of balancing" was being used in freedom of expression adjudication in both Germany and the U.S.).

[61] Aleinikoff, *Age of Balancing* (1987), 944.

[62] Cohen-Eliya & Porat, *The Hidden Foreign Law Debate in Heller* (2009), 385.

[63] Stone Sweet & Matthews, *Proportionality Balancing and Global Constitutionalism* (2008), 72.

[64] This holds even for those who think that balancing is 'empty' in analytical terms. See on this line of argument *infra*, s. 4.3.

1.4.2 The discourse/process conflation and the identification of 'balancing'

Studies relying on the discourse/process conflation face difficulties when trying to identify what counts as balancing in a foreign system. These difficulties will arise whenever the incidence of an analytical process of balancing *is not* accompanied by the language of balancing, or *vice versa*. This could happen in three main categories of cases. First, any time judges are silent on their methods. Second, whenever they use alternative terminology - such as 'means/ends rationality', a 'least restrictive means test', 'strict scrutiny',[65] *Optimierung*—optimalization—, or *praktische Konkordanz*—practical concordance[66] - which is locally seen as equivalent to balancing but is unfamiliar to the foreign observer. And third, whenever they use balancing terms, but these terms are understood locally, in the specific instance of their use, to refer to some form of decision making that is distinct from that which is usually designated by balancing language. It is these scenarios that produce observations such as those found in German academic literature to the effect that the Federal Constitutional Court arrived at its decision in a particular case "*ohne eigentliche Abwägung*"—"without any *real* balancing",[67] or references such as those found in U.S. scholarly literature to a Supreme Court justice who is "a balancer who seldom uses the word".[68]

The crucial point to be made is that it is impossible *a priori* for a comparatist to exclude either the possibility that local legal actors are using alternative terminology as real substitutes for the language of balancing, or that they understand such terms to have a meaning that is fundamentally different. Similarly, comparative scholars cannot know beforehand whether the language of balancing is always used with the same basic connotations, or whether it may refer to a range of different conceptualizations of decision making. In fact, the comparatist does not even know beforehand whether questions on the relationships between alternative terms and balancing as process, and between balancing terminology and alternative decisional processes, are even 'live issues' for the legal system in question. These questions may be highly controversial, but they could also be hardly recognized and debated at all.

[65] See, *e.g.*, Stone Sweet & Matthews, *Proportionality Balancing and Global Constitutionalism* (2008), 72 (arguing that 'proportionality balancing' is "akin to strict scrutiny").

[66] On these terms see further below, Chapters 4 and 5.

[67] SCHLINK (1976), 20-21. For a similar observation in the Canadian context, see Lorraine E. Weinrib, *The Supreme Court and Section One*, 10 SUP. CT. REV. 469, 501 fn.72 (1988) ("The metaphor of 'balancing' occurs frequently in the judgments [of the Canadian Supreme Court], but was *actually applied* only in [one specific case]", emphasis added).

[68] Kenneth L. Karst, *The First Amendment and Harry Kalven: An Appreciative Comment on the Advantages of Thinking Small*, 13 UCLA L. REV. 1, 24 (1965). The reference was to U.S. Supreme Court Justice Brennan.

The most pressing example in this area has to be the issue of 'proportionality'; a term that has already figured in some of the quotations cited earlier.[69] Proportionality is often discussed alongside balancing, both by courts and in academic literature,[70] and is generally seen as similar to - or even more commonly: as encompassing - balancing as an analytical process.[71] But there are also clear indications of difference, both within and among systems. In both Canadian and German jurisprudence, for example, clear efforts can be found to distinguish proportionality from a "free-wheeling balancing process".[72] And while the concept of proportionality dominates constitutional practice and theory in Germany and Canada, where it counts as one of the overarching general principles of constitutional adjudication, it only surfaces in very specific contexts in U.S. constitutional law, where no such general concept seems to exist.[73] Given these differences, it is not easily determinable *a priori* to what extent 'proportionality' decisions should be compared with 'balancing' case law.[74]

[69] For another example in the American context: the U.S. Supreme Court has sometimes referred to a need to "weigh the circumstances" (*see*, *e.g.*, USSC *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939), discussed below, in Chapters 6 and 7. It is not immediately clear whether such cases should be included in a 'balancing' sample, on the ground that the basic similarity in the use of the balancing metaphor warrants comparison, or whether the difference between 'circumstances' and 'rights' and 'interests' should rather be taken to signal a crucial difference that should not be repressed.

[70] See, *e.g.*, SCC *R. v. Oakes*, [1986] S.C.R. 103, par. 70 ("Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups"). For the European context, see, *e.g.*, Jeremy McBride, *Proportionality and the European Convention on Human Rights*, in THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE 23, 24 (Evelyn Ellis, ed., 1999) (arguing that "it is undoubtedly the need for balancing … which has necessitated resort to the concept of proportionality").

[71] *E.g.* ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 67 (Julian Rivers, trans., 2004) (balancing as third step in proportionality test). But see, *e.g.*, Grey, *Judicial Review and Legal Pragmatism* (2003), 505 (proportionality does not require balancing).

[72] For an early analysis making this point in the Canadian context, see Weinrib, *The Supreme Court of Canada and Section One of the Charter* (1988), 479. See also *ibid.*, at 500 (arguing that the Court's "singular" reference to balancing in *Oakes* is "at odds" with the gist of its own approach to proportionality).

[73] See, *e.g.*, Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L.J. 383, 384 (2997) U.S. constitutional doctrine often reasons on the basis of the purpose of governmental action and the impact of governmental action on individuals, either in combination or separately. But this reasoning is not developed as 'proportionality test' (and not labelled as such). See, *e.g.*, Richard J. Fallon, *Implementing the Constitution*, 111 HARV. L. REV. 54 (1997) (discussing 'balancing tests', 'effects tests', 'purpose tests' and 'aim tests' in constitutional jurisprudence, but not mentioning proportionality).

[74] For an affirmative view, see, *e.g.*, David Beatty, *Protecting Constitutional Rights in Japan and Canada*, 41 AM. J. COMP. L. 535, 544 (1993) (viewing American constitutional doctrines as "simply the balancing and proportionality principles by other names"). The relationship between balancing and proportionality is a live issue in many systems. See e.g. van Gerven, *The Effect of Proportionality on the Actions of Member States* (1999), 49 (referring to the way many French commentators see the French administrative law notion of a '*bilan-coût-avantages*', which turns involves balancing between public interests, as a different concept from proportionality). See also Eric Engle, *The History of the General Principle of Proportionality: An Overview*, Working Paper July 2009, WILLAMETTE J. INT'L L. & DISPUTE RES. (forthcoming), available at http://ssrn.com/abstract=1431179 (last accessed 20 June 2012).

1.4.3 The discourse/process conflation and functionalism

The discourse/process conflation as applied to the study of balancing can be seen as the operationalization of 'the functionalist method' in comparative law; an approach that has long been "the focal point of almost all discussions about the field of comparative law".[75] As such, this particular methodological move is not only informed by functionalism's rich legacy, but also subject to its recognized weaknesses. This Paragraph explains the implications of this connection.

'Functionalism' is a term with many meanings. A common thread, however, is that approaches within the functionalist tradition take as their basic premise some version of the idea that "the problems of justice are basically the same in time and space throughout the world".[76] In Zweigert and Kötz's canonical formulation, from a functionalist perspective "the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results".[77] Using these universal problems as constants, comparatists working in the functionalist tradition seek out for comparison the range of 'solutions' different legal systems have come up with.[78] References to balancing and proportionality in constitutional adjudication, from a functionalist perspective, would be manifestations of such a solution to a common problem. The task of the comparative lawyer would be to find out what this common problem is, and how these specific solutions work. The focus, in other words, is quite naturally on what balancing and proportionality *do*; on what their analytical structure can contribute to solving the problem at hand.

An important reason for why functionalist thinking has exercised such a powerful hold over comparative investigations of balancing, may be found in the fact that the two themes are closely related in their historical and theoretical foundations. In terms of intellectual history, functionalism as an approach to comparative law on the one hand, and the very idea of judicial balancing on the other, share the same origins: the German school of *Interessenjurisprudenz* and America's proto-Realist Sociological Jurisprudence in the early decades of the twentieth century, both of which are discussed in more detail in Chapter 3.[79] It was these scholars' understanding of law as dealing with a number of

[75] Ralf Michaels, *The Functional Method*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 339, 340 (Mathias Reimann & Reinhard Zimmermann, eds., 2006). See also Vivian Grosswald Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law*, 46 AM. J. COMP. L. 43, 66 (1998); David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 UTAH L. REV. 545, 588 (1997); Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411, 428 (1985) (referring to comparative functionalism as "the modern paradigm" among the "dominant paradigms in comparative law"); Konrad Zweigert & Hein Kötz, AN INTRODUCTION TO COMPARATIVE LAW 34 (Tony Weir, trans., 3rd ed. 1998) ("The basic methodological principle of all comparative law is that of *functionality*") (emphasis added).

[76] Hessel E. Yntema, *Comparative Legal Research: Some Remarks on 'Looking out of the Cave'*, 54 MICH. L. REV. 899, 903 (1956).

[77] ZWEIGERT & KÖTZ (1998), 34.

[78] *Cf.* Frankenberg, *Critical Comparisons* (1985), at 438.

[79] Philip Heck, the leading German representative of the *Interessenjurisprudenz*, for example, noted how his conception of 'interests' reduced differences between legal systems and allowed for easier comparison. See PHILIP HECK, BEGRIFFSBILDUNG UND INTERESSENJURISPRUDENZ 133 (1932).

conflicting private and social interests that forcefully suggested a depiction of the judge's - and the legislator's - task as involving a balancing of these interests. That same insight - law as a mechanism for dealing with conflicting interests -, however, also provided the theoretical underpinnings for functionalism as an approach to comparative law. By insisting on law as an abstract, in a sense 'empty', mechanism of conflict resolution, functionalist comparatists could relegate all contingent elements of context to the 'interests' to be regulated.[80] Comparative law as such, then, in the words of one early commentator, was nothing more than a "necessary supplement and continuation of the jurisprudence of interests".[81]

Two main weaknesses of functionalist perspectives generally affect reliance on the discourse/process conflation in particular. The first of these is the risk that in trying to identify a stable analytical process of balancing underlying foreign legal materials, comparative scholars may in fact be projecting experiences and understandings from within their own legal systems. That is; they may be too quick to assume that the analytical process underlying foreign references to balancing will be the same, or similar to, the analytical process signalled by balancing references in their own legal system. This problem may be called the risk of homeward bias. Common depictions of balancing as a solution to a supposedly 'ubiquitous' counter-majoritarian dilemma, for example, or as an answer to an allegedly 'inevitable' problem of the relativity of rights, are inherently suspect on this ground.

A second relevant weakness may be called that of the 'one-dimensionality of meaning'. This label refers to the idea that balancing's underlying analytical structure - assuming that such a structure could be identified by the comparative lawyer - may only constitute a very small part of the meaning of the language of balancing in a particular setting. Balancing may, in fact, be much more than simply a process of decision making cast in a particular analytical form. Directing all efforts of inquiry at this analytical structure risks closing-off many important questions that may be much more revealing as to the actual role played by balancing in a foreign legal system.[82]

[80] See, *e.g.*, Otto Kahn-Freund, *Comparative Law as an Academic Subject*, 82 L.Q.R. 40, 51 (1966) ("the satisfaction of felt needs of society through the law is, in my submission, the cardinal subject of all academic legal studies"). *Cf.* Frankenberg, *Critical Comparisons* (1985), 434fn78 ("only with the rise of *Interessenjurisprudenz* and sociological jurisprudence has functionalism become the dominant paradigm of comparative legal research"). It is difficult to causally attribute the dominance of functionalism to *Interessenjurisprudenz* and sociological jurisprudence; very little comparative legal research, other than 'comparative legislation', had been carried out before these movements gained force. The fact that they share the same intellectual origins remains true, though. *See also* David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance* (1997), 589fn73.

[81] Max Rheinstein, (1931) 60 JW 2897, 2899 (Book Review). Cited and translated in Michaels, *The Functional Method* (2008), 349fn36.

[82] This problem was recognized early on. One of the – perhaps even *the* – very first comparative discussions of 'interest balancing' in law, a 1922 article by a French lawyer in an American journal, observed: "To say that law is a mere balancing of interests involves the postulate that the legal system is an impartial, impassive receptacle in which more or less automatic reactions take place. But, as a matter of fact, we know that the legal machinery of a given society is very much like a living body with its reactions, its currents, its temperaments, its prejudices; that it is extra-sensitive to certain things, blind to others. When reality is presented to the legal eye, it is as much distorted as it is to the human eye". See Pierre Lepaulle, *The Function of Comparative Law*, 35 HARV. L. REV. 838, 845 (1922). LePaulle, who studied at

1.4.4 A 'minimally functionalist / maximally internal' method of comparison

The debates over functionalism's merits and weaknesses can be recast as a dispute between the attractions and faults of 'external' and 'internal' perspectives of comparison. Functionalism, adopting a predominantly *external* point of view, observes legal systems and institutions through a common lens of problems and solutions. Functionalism's critics, on the other hand, argue for an *internal* approach that aims to understand and describe foreign legal systems "in the way that each describes itself to itself".[83] Of course, this binary opposition has to be nuanced. Many functionalist approaches, for example, clearly do go beyond a mere analysis of universal, abstract 'problems' and doctrinal 'solutions', and refuse to reduce law to a context-less "formal technique of conflict resolution", as its critics assert.[84] Such approaches often do invoke a broader range of elements of comparison, such as 'styles' of law and decision making, precisely in order to come to representation of foreign legal institutions that would be recognized by foreign participants. At the same time, it is well recognized that it is simply impossible to undertake comparative legal studies from a *fully internal* point of view.[85] In setting up comparative projects and in reporting comparative conclusions – in the actual *process of comparing*, that is -, reliance on a conceptual framework that is in some way external to the systems studied is unavoidable.

Cognizant of the inherent attractions and weaknesses of both the external and internal points of view, this thesis follows a method that explicitly aims to combine functionalism's external perspective – in the form of a common central problem and a common conceptual grid -, with a 'maximally internal' point of view, attuned to the potentially limitless range of meanings attributed to both this problem and to balancing as its solution by local participants.[86] The heart of this approach, described in more detail below and in Chapter 2, is the idea that the meaning of balancing as discourse can be captured in terms of the contribution this discourse is locally understood to make to the legitimization or critique of the exercise of judicial power.

Cornell and is said to have been the first foreigner to receive an SJD from Harvard, commented on Pound and sociological jurisprudence rather than on continental European theory and the contributions of the *Interessenjurisprudenz*. More recent critics have argued, in similar vein, that functionalist approaches are interested only in "the fact of a solution, and not the ideas, concepts, or legal arguments that support the solution", (George P. Fletcher, *The Universal and the Particular in Legal Discourse*, 1987 B.Y.U. L. Rev. 335, 335 (1987)), and that "the functionalist dismisses as irrelevant or does not even recognize that law also produces and stocks interpretive patterns and visions of life" (Frankenberg, *Critical Comparisons* (1985), 437-438).

[83] Catherine Valcke, *Reflections on Comparative Methodology: Getting Inside Contract Law*, in PRACTICE AND THEORY IN COMPARATIVE LAW (Maurice Adams & Jacco Bomhoff, eds., 2012). See also John C. Reitz, How to Do Comparative Law 46 AM. J. COMP. L. 617, 628ff (1998), and William Ewald, *Comparative Jurisprudence (I): What was it Like to Try a Rat*, 143 U. PA. L. REV. 1889 (1995).

[84] Frankenberg, *Critical Comparisons* (1985), 437.

[85] *Cf.* Valcke, *Reflections on Comparative Methodology* (2012).

[86] Inspiration for the attempt to build on the work of both "functional comparatists and students of culture" (emphasis added) has been found in Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICH. J. INT'L L. 1003, 1011 (2006).

1.5 LOCAL MEANING AND LEGITIMACY

Through their conflation of process and discourse, as argued above, the dominant approaches to the study of balancing in comparative constitutional law have largely closed off a wide range of significant questions concerning one of the most visible trends in global contemporary constitutional law. Furthermore, the risk that comparative scholars, in construing balancing as process, may unwittingly project their domestic experiences onto foreign systems, means there is a real danger that answers obtained to the questions that these approaches *do* ask might be flawed.

This thesis proposes a new direction for the comparative study of judicial balancing in constitutional adjudication. Rather than seeing terms like 'balancing' and 'weighing' merely as the reflection of a fixed, stable underlying analytical process, the aim is to engage directly with this language and with the discourse to which it is central. Based on a close comparative reading of judicial opinions and academic commentary in the field of constitutional rights adjudication, the project for this thesis is a comparative investigation of *what the discourse of balancing means to its local participants*. That meaning may, of course, consist of a direct association with a fixed, stable underlying analytical process – a potential finding that this approach expressly leaves open. But it is also possible such a connection is not recognized in a particular setting, or that the meaning of balancing stems rather from very different associations.

References to balancing in judicial opinions or academic legal writing, it will be argued in Chapter 2, figure in a context of legal argumentation. Judges and writers referring to balancing or weighing do so in order to argue for or against a particular legal position, a specific exercise of public authority or a certain understanding of the role of law and courts in society. In effect, from an external point of view, the most basic, neutral answer to the question of 'what balancing *is*,' is simply: 'a form of legal argument'.[87] This thesis aims to uncover how different legal communities construe the meaning of this specific feature of legal argumentation. Just like in ordinary language, this meaning will be governed by the rules, or the 'grammar', of legal discourse prevalent locally.[88] The assumption is that by uncovering relevant parts of this local grammar — such as the range of alternative argument forms available, the criteria used for the evaluation of arguments, and the typical forms of debate that these arguments are used in — comparative scholarship may be able to establish what role balancing references play in the local context of legal argumentation. The role of balancing references as legal arguments and, in broader terms, the relative contribution the discourse of balancing is understood to make to either the legitimization or the critique of the exercise of judicial power in constitutional rights adjudication,[89] will be studied here as constituting *balancing's 'local meaning'*.[90]

The advantage of this alternative perspective, it is submitted, is that the nature of balancing's contribution — the ways in which balancing is taken to be relevant, its success or failure as a legitimizing argument, even the very analytical structure of balancing itself — can be left open as questions for the foreign system to answer. From this viewpoint, it is possible that the language of balancing may not always and everywhere signal the same underlying analytical process. Or that, even if similar processes are involved, they will come with fundamentally different implications in different settings. Rather than having to identify a specific, uniform structure and function for balancing as doctrine beforehand, this alternative approach asks *why this particular court and its audience* see the need to balance -whether it is because they feel that this is what the protection of a particular fundamental right or perhaps the task of judges in a democracy is *fundamentally about*, or whether it is because judges *cannot agree on anything more* than that some sort of accommodation between individual and societal interests is important, *etc. etc.* -[91], and analyses the answer in the context of locally prevalent ideals of legitimacy.

[87] The same, of course, holds for proportionality, and for all other elements of legal discourse. It is important to note that it is irrelevant, from the perspective of this study, whether local participants in the discourses surrounding constitutional adjudication *themselves* see balancing in this way. 'Balancing as argument' is merely a way of unlocking the meaning of the discourse of balancing. If local disputants see balancing as a clear analytical structure with a fixed function, then *that* may be the local meaning of balancing as argument. The crucial point, however is that this has to be a question rather than an assumption.

[88] *Cf.* Jack M. Balkin, *The Promise of Legal Semiotics*, 69 TEX. L. REV. 1831, 1845 (1991).

[89] See on this form of relativity, MACCORMICK & SUMMERS (1991), 5; SUMMERS & ATIYAH (1987), 31 (suggesting that legal arguments should be evaluated "according to the criteria properly employed by the legal system in question"). A somewhat similar approach can be found in Bell, *The Acceptability of Legal Arguments* (1986).

[90] *Cf.* Annelise Riles, *Wigmore's Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT'L L.J. 221, 241 (1999).

[91] See, *e.g.*, Justice Brennan of the U.S. Supreme Court in *New Jersey v. T.L.O.* 469 U.S. 325, 369-371 [1985] (claiming that balancing is no more than "a convenient umbrella under which a majority that cannot agree on a genuine rationale can conceal its differences"). *Cf.* also the difference between 'grand' theory and 'little' theory as described by, *e.g.*, MARK V. TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988). Balancing could figure in - or be - either. Balancing may also be part of pragmatism or of minimalism as approaches to constitutional adjudication, as discussed further in Chapters 7 and 8. See for discussion Grey, *Judicial Review and Legal Pragmatism* (2003); CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT (1996).

1.6 BALANCING, THE FORMAL AND THE SUBSTANTIVE

The proposal, then, is to study balancing's local meaning by finding out, first what '*good legal reasoning*' looks like in the eyes of relevant audiences in different settings, and then by assessing balancing-based reasoning *by reference to those standards*.[92] In many cases, precisely because of balancing's centrality, explicit assessments on these criteria will be available locally. But even where they are not, comparative scholarship in this mode should be able to faithfully (re)construct the ways in which, and degree to which, a foreign audience would have been likely to view balancing-based reasoning as a legitimizing form of legal argument, using that audience's own legitimacy criteria. In both cases, such comparative work adopts what might be called a 'maximally internal' perspective';[93] one that adheres as much as possible to local criteria for good legal reasoning, and to local assessments on the basis of those criteria.

As Chapter 2 will argue in more detail, however, reliance on local standards and assessments will have to be mediated by other methodological steps, if a practicable and rigorous method of comparison is to be constructed. This is because while comparison may be maximally internal, it cannot be *fully* and exclusively internal. There is, first, an obvious problem of selection. In practical terms, as the local range of relevant standards and attributes of 'good legal reasoning' is potentially limitless, it will simply be impossible for comparative scholarship to construct a comprehensive sense of the relative legitimizing contribution of a particular argument form like balancing. Equally significant is the problem of comparability. If each system is described, analysed and evaluated purely in its own terms, no basis would exist for comparison.[94] Balancing-based reasoning would simply be acceptable for 'some reasons' and criticized for 'other reasons' in system X, and would be acceptable and rejected for potentially entirely different sets of reasons in system Y. What is needed, therefore, is some form of 'common conceptual grid' on which the standards for good legal reasoning prevalent in the different systems to be studied may be mapped, and by reference to which mutually intelligible and comparable conclusions as to balancing's legitimizing force may be framed.

As was suggested in the outline of the basic puzzle behind this comparative project, in Section 1.1, this thesis derives its conceptual grid for comparison from a

[92] The term ´balancing-based reasoning´ is used here to designate a mode of discourse, not an analytical model, in keeping with the general approach set out earlier. ´Balancing-based reasoning´ will simply be shorthand for modes of legal argument that explicitly invoke terms like balancing or weight.

[93] The 'maximally internal – minimally functionalist' method of comparison is developed below, in Chapter 2. For an illuminating overview of the basic positions of internal and external viewpoints for comparison, see Valcke, *Reflections on Comparative Methodology* (2012); Catherine Valcke , *Comparative History and the Internal View of French, German and English Private Law*, 19 CAN. J. L. & JURISPRUDENCE 133 (2006).

[94] Apart from at the very basic, 'minimally functionalist' level at which it is claimed that *all* balancing discourse makes some contribution to either the legitimization or the critique of the exercise of judicial power. This, however, is strictly speaking an assumption, rather than a finding, of the comparative model used here. For more discussion, see *infra*, s. 2.2.

conceptual antinomy between legal formality and its opposites – described here in shorthand as the formal *vs.* substantive opposition. There are four main reasons that support the choice of this particular conceptual framework. The first, quite simply, is that it is instrumental towards solving the mystery set out in Section 1.1. This was the puzzle of how to reconcile observations of a 'turn to legalism' with those of a 'turn to balancing'. A second reason, closely related to the first, lies in the nature of the materials to be studied: the nature of the discourse of balancing itself. Legal debates *on* balancing and *in terms of* balancing, it will be shown, are commonly conducted in the vocabulary of the formal *vs.* substantive opposition. Understanding this vocabulary will therefore have to be part of any attempt at understanding the meaning of balancing itself. A third reason is that prominent earlier comparative studies of differences in legal reasoning as between the U.S. and Europe have turned to precisely this same opposition as their organizational framework. There are, in other words, useful examples of how such studies might work, and of what kinds of results they might yield. The final reason in a sense encompasses and sustains all the preceding ones and stems from the intimate connection between the formal *vs.* substantive opposition itself and questions of the legitimacy of law and legal reasoning.

This Section briefly explains and illustrates the second and third of these reasons – the relationship between balancing and the formal *vs.* substantive dichotomy, and the example of earlier comparative studies. The last reason – the connection between the formal vs. substantive opposition and the question of legitimacy – is discussed in much greater detail in Chapter 2, where the comparative approach for this thesis is set out.

1.6.1 The formal, the substantive, and balancing

One set of connections between the two themes of balancing and of formal *vs.* substantive could be called 'bottom-up' because they arise from the materials that make up the discourse of balancing itself. As will be shown primarily in Chapters 3 to 7, discussions of balancing almost invariably invoke the categories of legal formality and its opposites for analysis, critique or support. The discourse of balancing, to a very large extent, simply *is* the discourse of form and substance. It is a discourse that continually opposes familiar categories such as legal certainty *vs.* flexibility; stability *vs.* adaptation; rules *vs.* standards; 'excessive abstraction' *vs.* 'realistic' adjudication; the rule of law *vs.* 'khadi justice'.[95] And it is a discourse that itself continually invokes technical terms such as formalism, instrumentalism, particularism and pragmatism and their derivations. Engaging with what local participants say about balancing and in terms of balancing, therefore almost invariably means engaging with how they talk about legal formality and its opposites. Not only that, but as Chapter 8 aims to show, understanding the formal *vs.* substantive opposition itself increasingly requires attention to the discourse of balancing,

[95] Examples are mentioned throughout Chapters 3 to 7.

as balancing has become, in many systems, on of the most prominent sites where legal formality and its opposites clash.

This 'bottom-up' connection between balancing and form *vs.* substance also has a historical dimension. A common legal-historical argument associates the rise of balancing in jurisprudential thinking and case law with the arrival of new 'eras' in law, and understands these eras themselves in the terms of legal formality and its opposites. This holds both for the period of the first invocations of balancing in legal literature and case law of the early decades of the twentieth century – discussed in Chapter 3 -, and for the first references to balancing in fundamental rights case law in the late 1950s and early 1960s – discussed in Chapters 4 to 7. For the first of these periods, Alexander Aleinikoff, in his influential article on the '*Age of Balancing in American Constitutional Law*', exemplifies this line of reasoning when he argues that "balancing was a major break with the past, responding to the collapse of nineteenth century conceptualism and formalism".[96] For the second period, the rise of balancing and 'proportionality balancing' has been seen as the diffusion of a "master technique of judicial governance", or even as part of a 'post-War paradigm' of constitutional law.[97]

U.S. American writers have long associated the advent of balancing with the coming of a new 'sociological', 'realist', or simply 'modern', jurisprudential age.[98] Those scholars who have broadened their outlook to take developments outside the U.S. into account, have tended to claim that this perspective is valid also for other legal systems. For them, the rise of balancing can be seen as emblematic for a global paradigmatic shift in legal thinking and practice - a true 'globalization' of a new form of law.[99] Part of what this thesis aims to do is to verify whether this account of balancing as a clear break with a jurisprudential tradition of conceptualism and formalism, an account with canonical status in the U.S., is in fact equally valid for what happened elsewhere, notably in German law. Chapter 8 will return to this theme and argue that German balancing jurisprudence presents much more continuity with earlier 'ages' in law than these standard American views would seem to allow for.

[96] Aleinikoff, *Constitutional Law in the Age of Balancing* (1987), 949. See also HORWITZ (1992), 33ff. See further *infra*, Chapter 3. The reverse is also true, in the sense that 'formalism' is often defined in terms of an 'absence of balancing' and a reliance on deductive logic seen as in direct opposition to 'balancing'. See, *e.g.*, Mathias Reimann, *Nineteenth Century German Legal Science*, 31 B.C. L. REV. 837, 894 (1990) (German legal science was "formalist in its definition of law that excluded substantive considerations and in its adherence to deductive logic").

[97] STONE SWEET (2004), 243-244; Lorraine E. Weinrib, *The Postwar Paradigm and American Exceptionalism*, in THE MIGRATION OF CONSTITUTIONAL IDEAS 84 (Sujit Choudhry, ed., 2006) (Weinrib's historical argument concerns non-U.S. systems, but she argues that adoption of a similar model is no longer unthinkable in America).

[98] See, *e.g.*, HORWITZ (1992); Aleinikoff, *Constitutional Law in the Age of Balancing* (1987).

[99] See, *e.g.*, KENNEDY (1997), 324ff; Grey, *Judicial Review and Legal Pragmatism* (2003); Schor, *The Strange Cases of Marbury and Lochner in the Constitutional Imagination* (2009).

1.6.2 The *comparative* dimension: The formal and the substantive in comparative studies of law and legal reasoning

There are important antecedents in the literature for the use of a formal *vs.* substantive antinomy for the comparative study of law and legal reasoning in the U.S. and in European legal systems. These studies are based on the idea that actors within different legal systems will differ in their understanding of this antinomy and on the way it should be resolved, and that these different understandings will be in some way typical or emblematic for the legal systems and cultures concerned. Two prominent examples of this line of reasoning are Summers' and Atiyah's comparative study of '*Form and Substance in Anglo-American Law*', and Mitchel Lasser's comparison of judicial reasoning at the French *Cour de cassation* and the U.S. Supreme Court. Both of these projects provide important insights into what a comparative U.S. / German investigation of 'balancing' in terms of formal and substantive might look like.

(1) Summers' and Atiyah's primary thesis is that "the American and the English legal systems, for all their superficial similarities, differ profoundly: the English legal system is highly 'formal' and the American highly 'substantive'".[100] They find that "substantive reasoning is used far more widely than formal reasoning in the American legal system", while the reverse is true for the English system. What matters, in their view, is not *the fact that* English and American law both rely on both substantive and formal reasons, but *in what proportions* they do so.[101] As they write in their conclusion:

> "Of course no legal system can be viable without incorporating or otherwise relying upon substantive reasoning, and England is no exception. At the same time, the American system must and does rely significantly on formal legal reasoning. But *the mix of the formal and the substantive in the two systems is very different*".[102]

This difference, in their view "reflects a deep difference in legal style, legal culture, and more generally, the visions of law which prevail in the two countries".[103] Summers' and Atiyah's project, therefore, is a clear example of the use of a formal *vs.* substantive opposition to bring to light pervasive and emblematic differences in legal reasoning between different systems.

(2) Mitchel Lasser's work relies on a spectrum of formal *vs.* substantive to uncover the particularities of French and U.S. American judicial reasoning. In contrast to

[100] SUMMERS & ATIYAH (1987), 1, 2-3 (arguing that it is "hardly possible to imagine a legal system which does not in practice require both sorts of reasoning; indeed both are inherent in any viable conception of law"). See also Robert S. Summers, *The Formal Character of Law*, 51 CAM. L.J. 1302 (1992).

[101] *Ibid.*, 2ff.

[102] *Ibid.*, 410 (emphasis added).

[103] *Ibid.* (emphasis in original).

Summers' and Atiyah's focus on comparing the relative importance of the formal and the substantive elements in each system, Lasser looks rather at (a) the ways in which, and sites at which, the formal and the substantive are combined, integrated or juxtaposed in each system, and (b) differences in local understandings of what counts as substantive or formal reasoning. On the first point, Lasser uses very similar language as Summers and Atiyah, but adds a crucial twist:

> "What really matters is not so much that both [the French and the American] systems deploy both types of discourse (can one even really imagine a contemporary, Western democratic legal system that would not?), but how they do so. This nuanced analysis stresses that the American judicial system combines the two discourses in one and the same place, while the French system bifurcates them, doing all in its power to segregate them into separate discursive spheres."[104]

The ways in which each system combines or segregates its formal and substantive dimensions, in Lasser's view, correspond to an underlying 'problematic' which *typifies* that system. As he writes of the American system, its 'formalization of the pragmatic' – Lasser's way of describing its peculiar way of combining formal and substantive modes of reasoning -, "may well be *the defining trait of American judicial discourse in general*".[105]

Lasser also raises a second issue; that of potential differences in local understandings of formal and substantive. This calls for some explanation. First, although Lasser does not, strictly speaking, define legal formality, his positioning of French and American judicial reasoning on a sliding scale ranging from "more formal" to "more open-ended" shows the influence of a framework based on the antinomy between legal formality and its opposites. Second, Lasser uses the labels 'more formal' and 'grammatical reading' on the one hand, and "more open-ended" and "hermeneutical reading" on the other, to avoid having to rely on contingent meanings of narrower terms like 'deductive argument' and 'nondeductive argument', or 'formalism' and 'policy'.[106] It is not at all clear, Lasser argues, that different local audiences will view these contingent – and possibly parochial – terms and categories in the same way. Finding out what each relevant audience exactly *does* understand by formality and its opposites should, therefore, allow for "a thicker description of the foreign legal system".[107] In Lasser's work too, therefore, the lens of legal formality and its opposites is used to uncover what is

[104] LASSER (2004), 155. See also Mitchel de S.-O.-l'E. Lasser, *Do Judges Deploy Policy?*, 22 CARDOZO L. REV. 863, 894 (2001) ("It is not enough to note that French, American, and ECJ judges deploy discourses of deduction and of policy [stand-in terms for formal and substantive reasoning, on which more below]. Rather, the analysis must be refined to the point of identifying, for example, what kinds of nondeductive discourse each system produces, and in what contexts such discourses are deployed").
[105] *Ibid.*, 251.
[106] Lasser, *Do Judges Deploy Policy* (2001), 896-897. The congruence between the use of these various terms and the definitions of formal and substantive adhered to here is clear from various passages in Lasser's work. See, e.g., *Ibid.*, at 894-895 ("If 'policy' is defined broadly, and thus used as a merely descriptive term for nondeductive arguments, then American, German, French, and ECJ legal discourses are all composed of some conglomerate of deductive and policy elements. [They] therefore reveal themselves to be historically and culturally contingent variations on the same basic combination of formalist [deductive] and hermeneutic [policy-oriented] reading", last two brackets in original).
[107] *Ibid.*, 896-897.

distinctive about legal reasoning in different systems; in his case the French and the U.S. American systems.

1.6.3 (Relative) formality, (relative) autonomy and legitimacy

It is not surprising that influential comparative studies like those just cited should opt for the formal *vs.* substantive dichotomy as their principal lens. As Chapter 2 will argue in greater detail, this is a particularly useful way of looking at legal reasoning precisely because managing the simultaneous presence of formal and substantive elements in legal reasoning is a problem facing legal actors in all Western legal systems. Chapter 2 will relate this problem to the idea of legitimacy, by way of the notion of 'the relative autonomy of the juridical field'. Law, it will be argued, *in order to qualify as law* has to be somewhat autonomous, somewhat closed-off from other sources of value, such as morality, social relations, economics, *etc.* In short, law, by definition, as a normative ideal, and by experience, is and has to be *somewhat formal*. But at the same time, law, *in order to be acceptable* as law, cannot be fully autonomous or closed-off in this sense. This problem of how to maintain law's relative formality pervades legal discourse in Western legal systems. Its status of a *common problem* to be solved according to *local standards* (*How* formal? *In what way* formal?) and using *local means*, makes it a useful point of reference for the comparative study of legal discourse.

1.7 ORIGINS

For all its present day global pervasiveness, the discourse of balancing in constitutional rights adjudication has remarkably concentrated origins, exploding onto the constitutional scene, as it were, in Germany and the U.S. in very similar circumstances, at almost exactly the same time. Balancing first explicitly surfaced in a handful of major decisions of the German Federal Constitutional Court and of the U.S. Supreme Court of the late 1950s and early 1960s. The synchronicity is striking; the FCC's first major 'balancing' decision, in the *Lüth* case, dates from 1958, while a veritable 'balancing war' erupted on the U.S. Supreme Court over cases decided between 1959 and 1961.[108] In both cases, balancing was first discussed in the area of free speech adjudication, but quickly spread – as lens, if not quite so clearly as doctrine - to other areas of constitutional law.[109] A final point of commonality is that in both settings, these first discussions of balancing in constitutional law self-consciously relied on earlier theoretical work on balancing. This earlier work was again carried out virtually contemporaneously, in the first decades of the twentieth century, by scholars of the *Interessenjurisprudenz* in Germany and by adherents of Sociological Jurisprudence in the U.S.

[108] See Chapters 4 and 6.
[109] See Chapters 4 and 6.

The two great parallel debates on the nature, virtues and flaws of balancing that ensued from the early Supreme Court and FCC cases of the late 1950s and early 1960s form the main area of comparative investigation for this thesis (Chapters 4 to 7).[110] This investigation will be grounded, just as these original debates themselves, in a comparative study of the earlier phase in balancing's genealogy in the *Interessenjurisprudenz* and Sociological Jurisprudence (in Chapter 3, and throughout Chapters 5 and 7).

There are a number of reasons for taking a historical approach to the discourse of balancing generally, and for taking this particular approach specifically. In general terms, a historical investigation fits well with the main aim of trying to 'unpack' balancing's meaning. All legal language comes with baggage from its earlier uses.[111] Even if the earlier debates in which it was used were unfortunate and misconceived in present eyes, they are still highly influential for what this language stands for today,[112] informing the associations made – wittingly and unwittingly - by contemporary speakers and listeners. Secondly, there seems to be a special sense in which historical awareness is lacking when it comes to discussions of balancing. Time and again, when reading contemporary debates on balancing *vs.* 'absolutes', on rules *vs.* standards, on incommensurability and irrationality, *etc.*, one is struck by the extent to which these discussions revisit older controversies, not uncommonly rephrasing points first made long ago. In part, this may have to do with images of balancing and proportionality as timeless abstractions that judges and scholars implicitly adhere to, or even seek to promote, as part of their legitimizing appeal. Whatever the causes, the result is a situation in which an investigation of these earlier debates, in their original settings, may have some value.

The main reason for a comparative-historical investigation of precisely these two sets of debates is their central position at the origins of contemporary balancing discourse. German ideas on balancing, later often amalgamated into a proportionality-framework but largely originating in these early discussions (which did not mention 'proportionality'), have exercised an enormous influence on constitutional rights practice around the world.[113] While the specifics of U.S. style constitutional adjudication have not been widely copied, U.S. American legal culture as such has been seen as influential to

[110] The 'comparability' of these debates is discussed in more detail in Chapter 4, Section 4.1.
[111] *Cf.* for this point, made with reference to balancing, Frederick Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1284, 1285fn9 (1984).
[112] *Ibid.* Schauer argues with regard to the American balancing debate of the 1950s and 1960s that "[t]he language [of balancing] has acquired so much baggage from its previous usages that it blocks us from appreciating the ways in which today is different from yesterday". That may very well be true, and it may be that an excessive focus on the intricacies of 'balancing' may block real progress when it comes to the important and messy business of understanding what is at stake in constitutional rights adjudication. At the same time, however, this baggage is still real, and its present day impact – unfortunate though it may be in some cases – cannot easily be ignored.
[113] See, *e.g.*, MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 18 (2008); Stone Sweet & Mathews, *Proportionality Balancing and Global Constitutionalism* (2008)

the point of 'hegemony' over the second half of the twentieth century.[114] In these two distinct but parallel senses, both German and American constitutional practice and theory have been important sources of influence for contemporary constitutional adjudication around the world.

A final reason for looking specifically at these two sets of debates stems from this thesis' broader project of trying to pierce the veil of similarity that shrouds contemporary balancing discourse. The idea that the language of balancing will mean more or less similar things wherever it is used – an idea that, as was shown above, dominates contemporary thinking about balancing – does in fact itself go back to these early discussions. On various occasions throughout the twentieth century, commentators have referred to the 'basic similarity' between *Interessenjurisprudenz* and Sociological Jurisprudence, and later between the FCC's and the U.S. Supreme Court's uses of balancing in constitutional rights decisions.[115] Showing how, in fact, both these earlier episodes, for all their remarkable similarities, are also characterized by crucial differences, will be an important step towards dismantling overbroad claims for a global age of balancing today.

1.8 OUTLINE

This thesis proceeds as follows. Part I continues in Chapter 2, with a methodological discussion on understanding and comparing balancing as discourse. This Chapter engages with the notion of the 'meaning' of balancing, and sets out an approach towards investigating how local communities construct the meaning of legal argument forms, like balancing, by way of the role they are understood to play in the legitimization of the exercise of public power. The Chapter also looks at how this notion of meaning, once elaborated, may be systematically compared across legal systems and cultures.

The comparative historical study of balancing debates occupies Part II (Chapters 3) and Part III (Chapters 4 to 7). Part II compares Germany's *Interessenjurisprudenz* movement with Sociological Jurisprudence in the U.S., while briefly discussing their common foundations in the work of the French scholar François Gény. In Part III, two sets of two subsequent chapters each discuss the debates surrounding balancing in the constitutional rights case law of first the German FCC and then the U.S. Supreme Court. After a common introduction to this Part in the first Section of Chapter 4, the approach is the same for both settings. In each case, a first Chapter (Chapters 4 and 6) presents an overview of the relevant balancing opinions and their reception by judges and in

[114] See, *e.g.*, Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOB. L.ST. 383 (2003); Duncan Kennedy, *Two Globalizations of Law and Legal Thought*, 36 SUFFOLK U. L. REV. 631, 635 (2003) (referring to the U.S. as the "hegemonic site of production" of global legal consciousness from 1950 onwards). Kennedy refers to the period between 1900 and the 1930s as dominated by French legal thinking. Chapter 3 of this thesis briefly discusses the debt of both the German *Interessenjurisprudenz* and Sociological Jurisprudence to some of these French ideas.
[115] See *infra*, s. 4.1.

academic commentary, focused on the role balancing was perceived to play as a legal argument. A second Chapter (5 and 7) then aims to distil a contemporary 'local meaning' of balancing discourse. In both cases, the approach taken attempts to follows the historical materials where they lead, in order to uncover the various strands of thought that made up balancing's local meaning. So, for example, the Chapters on Germany discuss work published by Rudolf Smend in the late 1920s, at the time of the Weimar Republic, as highly relevant to the way balancing was perceived in constitutional rights adjudication under the 1947 Basic Law. Similarly, the Chapters on the U.S. look at the writings of Zechariah Chafee on freedom of expression of the 1920s, for example, in order to understand how balancing was perceived in post-war constitutional rights adjudication. In both settings, too, while the focus will be on freedom of expression adjudication as the prime site in which the discourse of balancing was developed, materials from other areas – other constitutional rights, or theories of judicial review generally, for example – will also be discussed wherever relevant for balancing's local meaning. On this point, too, the criterion for selection is the extent to which local, contemporary participants saw these other areas as part of the same 'balancing debate' and thus as relevant to balancing's local meaning.

Part IV consists of Chapter 8, *Two Paradigms of Balancing*. This Chapter extrapolates from the historical investigations in earlier Chapters to construct two 'paradigms' of balancing. These two models are generalized, idealized complexes of ideas that aim to summarize and emphasize typical features of the 'German' and the 'U.S. American' *ways of balancing*.[116] The remarkable durability of these models over the course of the past century, it will be argued, makes it likely that they will continue to inform much of our own thinking about this central but enigmatic feature of constitutional rights adjudication for some time to come.

1.9 SCOPE, TERMS, DEFINITIONS

Terms and categories used are defined at the points where they are first discussed, most notably in Chapter 2. This final introductory Section gives a short overview of the most important concepts. Before introducing the relevant definitions, however, a brief preliminary point is in order. As the main objective of large parts of this thesis is to reconstruct and interpret historical debates, it will often be necessary to adopt the terms and analytical categories adhered to by local participants in the relevant context. Judges and writers, it will be seen later, refer to balancing as being everything from a very specific adjudicatory technique of relevance only to a small subset of cases involving one particular constitutional right – say freedom of expression -, to a general philosophy of all of constitutional rights law, or even of adjudication generally, and as

[116] *Cf.* for the expression 'ways of law', Robert A Kagan, *European and American Ways of Law: Six Entrenched Differences*, in EUROPEAN WAYS OF LAW: TOWARDS A EUROPEAN SOCIOLOGY OF LAW 41 (Volkmar Gessner & David Nelken, eds., 2007).

anything in between. To the extent possible, the discussions below aim to indicate what views of balancing are adhered to, but in the context of summaries of debates between multiple participants this is not always easily, or fully consistently, done. With history's limitations on definability in mind, this thesis adheres to the following terminology and delimitations of its scope.

1.9.1 Terms and definitions

The atomic unit for this research project is the *balancing reference*. This term will be used to indicate any use of the terms 'balancing, 'weighing', 'fair balance', 'weight', *etc.* and their derivations in a judicial opinion or a piece of academic writing. The *language of balancing* (or *vocabulary of balancing*) denotes all these types of balancing references, including related terms directly surrounding them, most notably: indicators of the parameters to be weighed (rights, interests, values, *etc.*), the modalities of weighing (*ad hoc*, abstracted, *etc.*), or desirable outcomes ('fair', 'reasonable', *etc.*). The term *legal discourse*, as discussed further at the outset of Chapter 2, is used to refer to the texts of 'official' judicial discourse and academic commentary, and to the language systems and associated belief systems of distinct, elite legal communities that these texts embody. While the scope of legal discourse, as studied here, is clearly broader than merely judicial texts, the emphasis will, throughout most of this thesis, be on judicial decisions in (constitutional rights) adjudication and on academic discussion *relating to* these judicial decisions. The *discourse of balancing* is any part of this broader legal discourse that either relies heavily on the vocabulary of balancing in discussing matters pertaining to (constitutional) adjudication, or that discusses balancing in the context of (constitutional rights) adjudication. The term *balancing as argument* is used to cover two basic senses. A narrow sense refers to the invocation of the vocabulary of balancing in support (or as critique) of a particular outcome in a particular case. A broad sense refers to the invocation of this language in support (or as critique) of any more general proposition or theory in the context of (constitutional rights) adjudication (a theory of constitutional rights, of freedom of expression, of the task of the constitutional judge, *etc.*).

1.9.2 Scope

In terms of its scope, the investigation attempts to accommodate and follow the breadth of the claims made in the historical debates studied. This means that for Chapter 3, the focus is on the meaning of the discourse of balancing in general theoretical and methodological academic writing on law and adjudication in the early decades of the twentieth century. The relevant materials pertain predominantly to private law method in Germany, and to constitutional adjudication in the U.S. Chapters 4 to 7, by contrast, investigate the meaning of the discourse of balancing in the context of mid-century constitutional rights adjudication by the German Federal Constitutional Court and the

U.S. Supreme Court. The case study for these Chapters, as mentioned earlier, is adjudication on the freedom of expression, but the relevant debates often go beyond this context, sometimes stretching out to cover all of constitutional rights adjudication, or even all adjudication. Uncertainties and controversies over the appropriate level of abstraction on which to analyse balancing, as they emerge from the relevant debates, will themselves be questions for discussion. Chapter 8, finally, constructs a set of balancing paradigms on the basis of the materials covered in the preceding Chapters. The scope of validity claimed for these paradigms is discussed at the outset of that Chapter.

There are obvious and not-to-be-ignored problems of demarcation and congruence between the subject matters of these different Chapters. It is not a given that, say, early twentieth-century U.S. writing on constitutional method can usefully be compared with 1960s German judicial opinions. Or that early twentieth-century German academic discussions in the field of private law would have any relation to late 1950s U.S. Supreme Court first amendment case law. The Chapters that follow aim to show that such comparisons can indeed be made, and can be made meaningfully, following the connections and lines of inspiration that the scholars and judges involved *themselves* have been making over the past 90 or so years. If the aim is, as it is for this thesis, "nothing more grandiose than the desire to develop a sense of what is *important in*, and/or *characteristic or typical of*, and/or what is *meaningful about*" the discourse of balancing in U.S. and German constitutional legal thought and practice,[117] then following the materials where they lead, warts and all, has to be an appropriate, perhaps even the only feasible, starting point.

[117] *Cf.* LASSER (2004), 362 (emphasis in original).

CHAPTER 2

COMPARING BALANCING AS DISCOURSE

2.1 INTRODUCTION: COMPARING THE MEANING OF BALANCING AS LEGAL DISCOURSE

2.1.1 Project

References to balancing, in judicial opinions or academic legal writing, figure in a context of legal argumentation. Judges, legal scholars and academics invoke the language of balancing when arguing for, or against, a particular legal proposition, or a broader understanding of law and of the appropriate role for courts. The most basic, neutral answer to the question of 'what balancing *is*', therefore, must be simply: a 'form of legal argument' and, as such, 'a feature of legal discourse'.[118] One guiding theme for this thesis is that comparative investigations of balancing and proportionality in constitutional law should, to a much greater extent than is currently common, engage directly with this quality of balancing as argument and as discourse. This Chapter begins this project by setting out components of a method for investigating and comparing the local meaning of the discourse of balancing in German and U.S. law.

Comparing local meanings of balancing raises some difficult questions of comparative method. These questions are discussed briefly in Section 2.1.2 and further throughout this Chapter. The solution to these difficulties is sought in a series of methodological choices outlined in Sections 2.2 to 2.5 These choices, collectively referred to as the 'minimally functionalist – maximally internal' mode of comparison, are not meant as a rigid methodological framework, but rather describe the general outlook that informs the comparison undertaken in Chapters 4 to 8.[119] With that *caveat* in mind, the general approach outlined here consists of two principal components. First, strategic reliance on shared general characteristics of legal discourse in Western systems. And second, changes in perspective between 'internal' and 'external' points of view at different levels of abstraction throughout the comparative project, centred on the notion of 'legitimizing strategies'. The overall goal for these steps is to be able to elaborate meanings for legal discourse, including balancing discourse, that are simultaneously true to each system individually and amenable to comparative study along a common conceptual grid.

[118] The relevant terms are defined *infra*, s. 2.1.5.

[119] Chapter 3 does not look at the discourse of balancing in the constitutional rights adjudication context of the 1950s and 1960s (as do subsequent Chapters), but at an earlier installment of balancing debates in general legal theory (see *supra*, s. 1.7). While the comparative method outlined in this Chapter is geared specifically towards the (constitutional) adjudication context, the methodological outlook described here also informs, in part, the approach taken in Chapter 3.

2.1.2 'Comparing local meanings': The 'internal perspective' and comparability

'*Comparing local meanings* of balancing' is a deceptively simple phrase that conceals some of the most pervasive tensions and debates in comparative law methodology. On the one hand, the idea of a 'local meaning' of balancing requires taking what in comparative law literature is often called an 'internal perspective' – a perspective that tries to render foreign legal systems "in their own terms", as lived by local participants.[120] That, in fact, is part of what this thesis aims to do: to uncover what balancing means to German legal audiences in Germany and to American legal audiences in the U.S. But the project of comparison, on the other hand, requires taking a view that is by definition broader than any one of the systems to be compared. This can be seen particularly clearly with regard to the initial stage of the selection of objects of comparison and for the stage of actually drawing comparisons between findings in individual systems.[121] With regard to the former; choosing 'balancing' as one's object of comparison, by itself, implies a viewpoint that is in some way external to both German and U.S. American law. The hope is that the 'discourse of balancing' as defined here will encapsulate a meaningful, coherent legal phenomenon for both these settings, but there is no way to be sure. Part of what in one setting is considered as belonging to the phenomenon of 'balancing' may accidentally be left out; materials not locally considered part of balancing proper may inadvertently be included; and it may even be that 'balancing' does not, after all, constitute a coherent conceptual category in one or either system. Defining balancing as discourse rather than as process – *i.e.* looking simply at manifestations of words like 'balancing' and 'weighing' -, of course, is intended precisely to minimize these risks of misperception, as was discussed in Chapter 1.[122] But these risks cannot be completely avoided.[123] With regard to the latter point – the comparison-stage of research -, similar difficulties appear. Rendering foreign legal systems entirely in their own terms, as the internal perspective aims to do, leaves very little space for relating these terms to experiences elsewhere. Objects of comparison, such as the German and U.S. discourses of balancing, can only be meaningfully compared with regard to some standard, or on some axis. That standard itself will have to be common to both systems and can therefore never be entirely 'internal' to either system.

A 'comparison of local meanings', therefore, demands a trade-off between 'internal perspective' and comparability. In order to negotiate this trade-off, the goal for this Chapter will be to develop an approach that is *maximally*, not fully, internal, and that retains sufficient commonality to ensure comparability. This approach will consist of two components: reliance on common characteristics of legal discourse in Western legal systems, and an elaboration of 'legitimizing strategies'.

[120] *Cf.* Catherine Valcke, *Comparative History and the Internal View of French, German, and English Private Law*, 19 CAN. J. L. & JUR. 133, 133 (2006).
[121] *Cf.* Catherine Valcke, *Reflections on Comparative Methodology: Getting Inside Contract Law*, in PRACTICE AND THEORY IN COMPARATIVE LAW (Maurice Adams & Jacco Bomhoff, eds., 2012).
[122] See *supra*, s. 1.4.
[123] And in any event, the definition 'balancing *as discourse*', is of course itself external to both German and U.S. law; in neither system is this the dominant view of balancing, as should become clear from the discussions in Chapters 4 to 7.

2.1.3 Common characteristics of legal discourse as foundations for comparative analysis

The first component of the 'minimally functionalist – maximally internal' approach to comparison builds on the assumption that legal discourse in all Western legal systems shares a set of common fundamental characteristics. The basic idea is that if it can be shown that legal discourse in different systems will be fundamentally similar in some of its elemental traits, then these similarities can be used to frame any particular differences in the meaning of specific features within that discourse, such as balancing. This assumption of commonality of fundamental characteristics, in turn, is grounded upon the suggestion, developed in socio-legal literature, that law – or the 'juridical field', as many sociologists would call it – has its own internal logic: "the internal logic of juridical functioning".[124] This Chapter suggests that comparative legal scholarship should try to make strategic use of knowledge of this internal logic. This will involve reliance on the basic notion that foreign judges and lawyers, however foreign their practices and their language may seem, will still be *judges and lawyers aiming to 'do law'*. If the discourse of balancing, like all legal discourse, is part of 'doing law', and if 'doing law' – 'juridical functioning', quite literally - looks similar in different systems, then this discourse will itself, at a high level of abstraction, be similar in different systems. It is this basic similarity that can anchor systematic comparative study of balancing's meaning.

Sections 2.2 to 2.4 present three fundamental common characteristics of legal reasoning in Western systems. Each of these characteristics provides the foundation for one particular methodological move towards understanding the meaning of balancing. The first of these is the idea that the meaning of all legal reasoning in any given system will be informed by an overriding background objective of legitimization. The meaning of any specific form of argument in that system, therefore, can be defined and studied as the contribution this argument is locally understood to make to either the legitimization or the critique of the exercise of public authority under law. The second is built on the basic assumption that the meaning of elements of legal discourse will always be relative to that of other elements. This means that an argument's contribution to legitimization - it's 'legitimizing force', in slightly esoteric but still meaningful terms - will always be a relative contribution, which can only be understood in relation to locally available standards, and by comparing different argument forms within a particular system. And the third is the suggestion that these relative contributions to legitimization can be framed in terms of a formal/substantive opposition. Here, the assumption is that actors in all Western legal systems are faced with the same basic dilemma of managing their

[124] Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS. L.J. 814, 816 (1987).

system's relative autonomy and 'closedness' - its relative formality – according to local standards and using local means. The legitimizing force of any particular individual feature of legal discourse, such as balancing, can be understood therefore, at least in part, through the contribution this element is locally seen to make to the management of this relative formality.

2.1.4 Mediating internal and external perspectives: 'Master ideals' and three 'legitimizing strategies'

The second component of the 'minimally functionalist – maximally internal' approach is the idea that the required trade-off between 'internal perspective' and comparability is most effectively addressed iteratively, by way of a series of mediating steps throughout the comparative project. Throughout these steps, the goal is to relate common abstract concepts to local understandings. The discussion below does this, first, for the shared ideal of 'strongly legitimizing reasoning', in the form of 'master ideals'. These 'master ideals' are local interpretations of the universal legitimization problematic, as they were adhered to in the relevant settings – German and U.S. American law – at the relevant time. Second, in Section 2.5 common patterns in the local understandings of and answers to the legitimization problematic are grouped into three broad tendencies called 'legitimizing strategies'. Each of these strategies encompasses a range of conceptual understandings, associated rhetorical forms and typical moves of reasoning, which together make up the 'discursive environments' within which the meaning of specific elements of legal discourse, such as balancing-based reasoning, will have to be located. The nature, content and function of these 'legitimizing strategies' are discussed in more detail in Section 2.5.

2.1.5 Operative terms: 'Legal discourse' and 'meaning'

Throughout the following discussions, the term 'legal discourse' will be used to refer to the texts of 'official' judicial discourse and academic commentary, and to the language systems and associated belief systems of distinct, elite legal communities that these texts embody.[125] The relevant legal communities for this study consist of lawyers active in the "higher reaches" of the legal system "where the learned tradition is propounded".[126] This means primarily judges at higher – predominantly supreme and

[125] *Cf.* William W. Fisher III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 STAN. L. REV. 1065, 1068 (1997). For the distinction between 'official' and 'unofficial' judicial discourse, see MITCHEL DE S.-O. L'E. LASSER, JUDICIAL DELIBERATIONS. A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 156 (2004).

[126] *Cf.* Marc Galanter, *Why the Haves Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOCIETY REVIEW 95, 147 (1974).

constitutional – courts, and scholarly commentators.[127] The discourse of balancing is a subset of legal discourse, which consists of judicial and academic discussions *of* balancing or *in terms of* balancing, in the constitutional rights context. The 'meaning' of this discourse will be defined here as the significance attributed to balancing references by the relevant local elite legal communities. Meaning, in this sense, is not simply a question of authorial intent, but of construction within interpretive communities.[128] The 'community' dimension implies that the meaning of balancing will by definition be a *local* meaning.

2.2 THE 'LEGITIMIZATION PROBLEMATIC'

2.2.1 A first common characteristic: The 'legitimization problematic'

2.2.1.1 Introduction: Legitimacy as a common problem

As explained above, the basic claim advanced in this Chapter is that legal discourse within different legal communities has a number of peculiar common characteristics that can be relied upon as the foundations of a comparative project. In order to uncover these characteristics, it is helpful to begin with that specific part of legal discourse that is found in the published reasoning of courts. This official *judicial* discourse is typically central to legal discourse more broadly, if not in terms of volume then at least in terms of broader impact. The first principal characteristic of judicial reasoning is the omnipresence of the basic demand that courts in liberal democracies should, in principle, offer publicly stated reasons for their decisions whenever they exercise power in order to settle social, political or moral controversies.[129] "Adjudication almost always brings about the exercise of force", it has been observed. "It is therefore a practice and institution ripe for justification and that must entail, at the very least, some account of the reasons for the act or acts of force".[130] Publicly stated reasoning, in short, is a necessary condition for the legitimacy of the exercise of judicial power, which is itself an overriding objective within the legal order.[131]

[127] The level intended here should be situated between Thomas Grey's notion of 'working legal thought' and common notions of 'legal theory' or jurisprudence. See Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST L. REV. 473, 478 (2003) (defining 'working legal thought as "the cluster of attitudes and approaches to law that lawyers take on during their apprenticeship, and then actually manifest in their work as practitioners, judges, teachers, and doctrinal commentators").

[128] *Cf.* Walter Sinnott-Armstrong, *Word Meaning in Legal Interpretation*, 42 SAN DIEGO L. REV. 465, 475 (2005); Peter Goodrich, *Europe in America: Grammatology, Legal Studies, and the Politics of Transmission*, 101 COLUM. L. REV. 2033, 2053 (2001) (defining 'the question of meaning' as involving construction by author and audience within a discourse).

[129] See, *e.g.*, William Lucy, *Adjudication*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 206, 220 (Jules L. Coleman, Scott Shapiro, Kenneth Einar Himma, eds., 2002).

[130] *Ibid.*

[131] See, *e.g.*, LARRY ALEXANDER & EMILY SHERWIN, DEMYSTIFYING LEGAL REASONING 10 (2008) ("settlement (…) is not simply choice of a solution. It entails reasoning, by which we mean conscious, language-based deliberation about reasons for the choice ultimately made. (…). [b]ecause the authority's task is to settle what the community's values require in practice, its conclusions must be susceptible to *justificatory argument*", emphasis added); FRIEDRICH MÜLLER, NORMSTRUKTUR UND NORMATIVITÄT 209

There is little consistency in the precise terminology used by commentators and courts to describe these claims. The most commonly invoked terms are justification and legitimization (or legitimation), with justification typically referring to decisions in particular cases and legitimization to institutions or practices. What matters for the methodological project outlined here is the underlying general expectation that courts are to give public reasons of some quality for their decisions. These reasons will have to support not merely the substantive outcome in the individual case at hand (justification), but also, more generally, the exercise of judicial power in a particular way in certain types of cases and, in the specific context of this project, the existence and functioning of a particular system of judicial protection of constitutional rights (legitimization).[132] In this thesis, this posited and observed need for justification and for legitimization will together be referred to as 'the legitimization problematic'.

2.2.1.2 The 'legitimization problematic' and the meaning of legal arguments: The concept of 'legitimizing force'

Two further claims can be built upon the premise of the 'legitimization problematic'. The first is that if it is true that justification and legitimization require publicly stated reasoning, it can be assumed, conversely, that the meaning of this reasoning will be conditioned by this legitimizing role. The meaning of all arguments used by judges in their decisions, in other words, can be understood not only in terms of their role in, for example, upholding a particular interpretation of a specific legal rule in a specific case, but ultimately also as reflective of a particular underlying conception of the appropriate roles for law and judges. This is because whenever a court invokes an argument based on a balancing of interests or values, or on reasoning by analogy, or on legislative history, *etc.*, they are, necessarily, maintaining that it is *appropriate* for a court in this specific situation to be relying on this particular form of argument; that this argument is part of the range of *acceptable* arguments in this situation.[133] The range and weight of the reasons that are locally seen as supporting the use of this argument to justify the exercise of public authority in the name of law – the reasons underlying this argument's acceptability, that is – will be referred to here as that argument's 'legitimizing force'.[134] So, for example, the legitimizing force of an argument based on the drafting history of a constitutional provision might be based on the local understanding that such an argument is seen as helpful in sustaining the stability of a constitutional settlement. But it might also be based rather on the view that use of this argument promotes an image of judging as a textually bound activity, or on both these background reasons simultaneously, or on yet another reason. Similarly, an argument by way of analogy from precedent might derive its legitimizing force from the fact that it that it fits a traditional image of the adjudicatory function, from the fact that it might be seen as conducive to prudent, incremental decision-making, from a belief in a strong logical internal structure of this type of argument, *etc.*[135] Part of the project for the following Chapters is to find out on what grounds the legitimizing force of balancing-based reasoning is grounded.

Legitimizing force, in this sense, is essentially a sociological concept of acceptance, but one with a very particular relevant *legal* constituency; the community of academic legal scholars, leading lawyers and judges at higher courts.[136] Its suitability for comparative legal studies lies in the fact that the range and nature of the relevant reasons for using a specific argument can be left open as a contingent question for the local legal system to answer – and for the comparative lawyer to discover.

2.2.1.3 From judicial discourse to legal discourse

In a second step, the relevance of this initial claim – *i.e.* that the meaning of every individual argument used by judges can be understood in terms of that argument's 'legitimizing force' – can be extended to *all* legal discourse in the sense defined above.

(1966) (referring to "*rechtsstaatliche Begründungszwang*" – the duty to give reasons, as imposed by the 'rule of law'). On the 'justificatory function' of legal argumentation, see NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY 12ff (1978); H.L.A. HART, THE CONCEPT OF LAW 205 (1961) (calling attention to "the concern to deploy some acceptable general principle as a reasoned basis for decision" that could make decisions "acceptable as the reasoned product of informed impartial choice".).

132 See, *e.g.*, Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 824 (1999) ("features of legal reasoning are more than just the means through which courts arrive at decisions; they define and constitute the institutional identity of courts"). See for simultaneous use of both concepts: John Bell, *The Acceptability of Legal Arguments*, in THE LEGAL MIND: ESSAYS FOR TONY HONORÉ 46 (Neil MacCormick & Peter Birks, eds., 1986) (referring to "legitimate justification").

133 *Cf.* PHILIP BOBBITT, CONSTITUTIONAL FATE 6-8 (1982); & Bell, *The Acceptability of Legal Arguments* (1986), 45-46.

134 The legitimizing force of a legal argument is defined here as the broadest set of reasons supporting the use of this argument to justify the exercise of judicial authority to settle social controversies. The legitimizing force of a particular legal argument, in this definition, is a function of the *degree to* which – and *ways in* which - such an argument is locally seen as supportive of a court's exercise of power. One important model for the approach developed here is Robert Summers' concept of the 'justificatory force' of reasons, as offered in judicial opinions. See Robert S. Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common Law Justification*, 63 CORNELL L. REV. 707, 716fn25 (1978) ("The concept of justificatory force, as I use it here, is roughly equivalent to the 'essential strength of a reason.' The degree of a reason's justificatory force is the reason's most important attribute"). Summers also explicitly leaves open the question of "the nature of the concept of 'justificatory force', and how it differs from mere persuasiveness on the one hand, and logical validity on the other". (at fn. 10). See, *e.g.*, Philip Bobbitt, *Is Law Politics?*, 41 STAN. L. REV. 1233, 1239 (1989) (Book Review) (arguing that 'social consensus' on the institution of constitutional judicial review is maintained "by the legitimizing force of the various forms of constitutional argument"). *Cf.* also the idea of the 'justificatory role' for various types of legal argument in Michael J. Perry, *Authority of Text, Tradition, and Reason: A Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 551 (1985).

135 It should be noted that the use of legal arguments for the *contestation* of legitimacy of the exercise of public power by the judiciary can be used in the exact same way.

136 Legitimacy, in this sense, is also an *abstract* concept with a *local* audience. For an application of this idea, see Bell, *The Acceptability of Legal Argument* (1986), 46. On the distinction between legitimacy as a sociological and a legal concept, see Richard .H. Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005). It is important to note that although publicly stated reasons of a certain quality are a *necessary* condition for legitimacy, they may not be *sufficient*. Two particular other dimensions of 'legitimacy' are largely left out of this research project: (1) institutional legitimacy (deriving from the institutional features of the constitutional adjudication process), and (2) output legitimacy (depending on the acceptability of the results of constitutional adjudication to other constitutional actors and to the public more broadly).

This second claim holds that the project of legitimization within judicial discourse, in effect, has a 'radiating effect' that influences the meaning of all elements of legal discourse within a jurisdiction. To the extent that any element of this discourse can be qualified as an argument, that is, it will always be possible to trace its significance to the objective of the legitimization of law and of the exercise of public authority in its name.[137] Naturally, the intensity of the connection between the use of a particular argument and the overarching project of legitimization will vary from case to case. In some instances – *e.g.* a submissions to a court on a technical point of law – the connection might be relatively weak; in other cases – *e.g.* an academic commentary on a controversial Supreme Court decision, or a dissenting opinion – it is likely to be very strong. Comparative investigations should, of course, be aware of these varying degrees of directness, and it may be necessary, in some comparative projects, to limit the scope of the relevant 'legal discourse' to that occurring within a subsection of the communities mentioned above.[138] But, in principle, the question of 'legitimizing force' will always be *a* dimension - though not the only dimension - of the role of *any* argument in law.[139] It could therefore always, in principle, be used as a key to that argument's meaning.[140]

2.2.1.4 Studying the meaning of debates: The example from intellectual history

The claims outlined above reflect a view of legal discourse as, in one sense, one big debate on legitimacy. One good reason for adopting this perspective is that scholarship in another discipline that is also centrally concerned with discourse and debate, the field of intellectual history, has in fact pioneered very similar ideas. This paragraph sets out the relevant parallels.

[137] Legal sociologists have forcefully criticized use of the concept of 'legitimation' on the grounds that it allegedly requires the unrealistic assumption "that every element of a legal system contributes to the maintenance of the whole system". See Allan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WISCONSIN L. REV. 379, 422 (1983). No such an all- encompassing assumption is advocated here, merely the much more limited premise that all elements of legal discourse (in the sense defined above) will, at some level, be interpreted by local audiences as either serving to uphold or as critiquing the legitimacy of the exercise of public power by the judiciary, or at least that such a reading will give a reasonably accurate depiction of legal discourse in a particular system to an outside observer.

[138] The analysis in Chapters 4 to 7 focuses overwhelmingly on judicial opinions at highest courts and at academic discussions on constitutional rights adjudication. The presence of the legitimization problematic is likely to be acutely felt in most of the legal discourse in these spheres.

[139] This point can be illustrated by imagining the insertion of a clearly 'illegitimate' form of legal argument in a legal exchange. Referring to an individual's hair colour, for example, would be problematic – in different ways and in different degrees, but still – at *all* levels and in *all* branches of legal discourse, be they judicial, academic, practical, journalistic, *etc*. For a similar example see BOBBITT (1982), 6 (noting that these arguments are "not part of our legal grammar").

[140] For an elaboration of this same point on a higher level of generality, see Paul W. Kahn, *Freedom, Autonomy, and the Cultural Study of Law*, 13 YALE J. L. & HUMANITIES 141, 145 (2001) (claiming that "the character of knowledge claims within the legal order is a function of [the] need for legitimacy").

Intellectual history is widely seen as a discipline united in the study of the 'history of meaning'.[141] One prominent strand of methodological work within this discipline is the so-called 'contextualist' approach propagated by J.G.A. Pocock and Quentin Skinner, among others.[142] For these historians, the meaning of texts is crucially dependent upon their intellectual and linguistical context. Relying in part on structuralist linguistics - discussed in more detail in the next section -, they define context as "the system of words and concepts" within which the relevant "community of disputants" moved at the relevant time.[143] These systems – of language and belief - are called discourses, and it is the task of intellectual historians to write their histories, and the histories of the debates in which they figure.[144]

The distinctive contribution of contextualist approaches to intellectual history lies not only in their focus on writing histories of debates,[145] but also in their methodological assumption that the characteristics of the *kinds of debates* within different communities at different times will provide essential clues for the historian's understanding of the meaning of individual contributions. J.G.A. Pocock's work on the history of political thought, in particular, builds on this assumption. For Pocock, political discourse consists of "a variety of language games" which arise over time and which are "specialised to perform rhetorical and paradigmatic functions related to the conceptualisation and conduct of politics".[146] It is this understanding that the relevant historical materials must be seen in function of the contribution contemporary audiences expected them to make to a specific project of the 'conceptualisation and conduct of politics' that, in the contextualist approach, provides the key to reconstructing their meaning. Pocock himself, in fact, has specified these functions of political debate by reference to the concept of legitimization, also called 'legitimation', discussed above. In his 1962 essay on '*The History of Political Thought*', for example, he set out the task for historians of political discourse as requiring the study of

> "what *modes of criticizing or defending the legitimacy of political behaviour* were in existence, to what symbols or principles they referred, and *in what language and by what forms of argument* they sought to achieve their purpose".[147]

[141] See, *e.g.*, John E. Toews, *Intellectual History after the Linguistic Turn: The Autonomy of Meaning and the Irreducibility of Experience*, 92 AM. HIST. REV. 879, 881 (1987).

[142] Elizabeth A. Clark, HISTORY, THEORY, TEXT: HISTORIANS AND THE LINGUISTIC TURN 138ff (2004).

[143] Fisher, *Texts and Contexts* (1997), 1068; J.G.A. Pocock, *The Reconstruction of Discourse: Towards the Historiography of Political Thought*, 96 MODERN LANGUAGE NOTES 959, 960, 975 (1981) (referring to a 'scheme or structure' and to 'communities of disputants'). On Pocock's reliance on structuralist linguistics, discussed in the next Section, see CLARK (2004), 139.

[144] See, *e.g.*, Pocock, *The Reconstruction of Discourse* (1981), 975; Fisher, *Texts and Contexts* (1997), 1068 ('What fascinates [contextualist historians] is how the conversations among members of [a particular community] were organized and bounded by a set of common assumptions of which the members themselves often were not even aware').

[145] See, *e.g.*, Pocock, *The Reconstruction of Discourse* (1981), 975 (defining the intellectual historian's project as 'reconstituting the languages in which political discourse has been conducted in the past').

[146] *Ibid.*, 974.

[147] J.G.A. Pocock, *The History of Political Thought: A Methodological Inquiry* (1962), in J.G.A. POCOCK, POLITICAL THOUGHT AND HISTORY: ESSAYS ON THEORY AND METHOD 3, 16 (2009) (emphases added).

Contextualist intellectual history, in a sense, instrumentalizes the requirement of legitimization in order to ground the study of the meaning of historical political debates. Parallels with a comparative project on the meaning of legal arguments such as 'balancing' are easy to see. Elaborating histories of debates is similar to comparing debates in different localities. Just like political discourse, legal discourse is a collection of various modes of criticizing or defending the legitimacy of the exercise of public authority. Legal debates, too, are conducted in particular 'languages', by way of 'specific forms of argument' and by reference to certain 'symbols or principles'. , as in contextualist intellectual history, it should be possible to understand foreign uses of these specific forms of argument in light of the legitimizing function of legal discourse generally.

2.2.2 Legitimacy in context

2.2.2.1 Introduction: Local 'master ideals' for judicial reasoning

The concept of legitimacy plays a crucial role as an assumption underlying the minimally functionalist model for comparison. Legitimacy, in its basic, thin sense of the acceptability of claims of obedience by institutions – their "*worthiness of recognition*", in Habermas' terminology –,[148] can fulfil this role precisely because it is a central concern, in some form or other, in all modern systems of constitutional rights adjudication. How strongly this concern is felt, however, and what it is seen to demand, may differ markedly as between systems. This Section aims to mediate between these abstract and contextualized understandings of the legitimization problematic.

The legitimacy question came to be particularly acute within both the German and U.S. constitutional systems precisely at the time when the discourse of balancing made first its mark in constitutional rights adjudication – from the mid 1950s to the early 1960s. For Germany, this was simply because it was during this period that the Federal Constitutional Court first had an opportunity to develop a constitutional (rights) jurisprudence.[149] In the U.S. the ascendancy of the question of the legitimacy of constitutional judicial review in the late 1950s-early 1960s can be traced to the aftermath of the historic 1954 *Brown v. Board of Education* desegregation decision and, at least within the legal academy, to the impact of Judge Learned Hand's influential and severely critical *Holmes Lectures* of 1958.[150]

These references to particular historical conditions suggest that whilst the general idea of a requirement of legitimacy can be taken as a constant, the nature of the demands this requirement is seen to make of the legal reasoning of participants may clearly vary as between settings and periods. Edward White has made this point for the American context, sketching the contrast between the "overriding continuity" and "consistency over time" of the expectation that judicial reasoning should be legitimizing, and the changing "quite different perceptions" about the ways in which that expectation could be met.[151]

This Section looks at the local perceptions of the demands of legitimization that were prevalent at the relevant times for this study within the German and U.S. legal systems. General statements of these perceptions will be referred to here as 'master ideals' for legitimate judicial reasoning.

2.2.2.2 Master ideals for constitutional adjudication in late 1950s – early 1960s German jurisprudence

Looked at from a comparative perspective, the 'master ideals' for constitutional interpretation as formulated in German constitutional practice under the Basic Law show a remarkable degree of homogeneity – no doubt in part as a reflection of the "relative stability and acceptability" of constitutional judicial review in post-War Germany.[152] Two of the most influential figures to have formulated such ideals are Gerhard Leibholz and Konrad Hesse. This Section summarizes their visions for legitimate constitutional interpretation.

Gerhard Leibholz (1901-1982) was a legal scholar and a Justice at the German Federal Constitutional Court from its founding in 1951 till his retirement in 1971. Widely considered as one of post-War Germany's most distinguished judges and legal thinkers,[153] his views are of particular interest to this study because of his position as an influential member of the Constitutional Court during the period in which the foundations of its balancing jurisprudence were laid. Leibholz described his ideal for the judicial role in a contribution written for an international audience, at the end of his judicial career:

> "If the world as it is, *i.e.*, political reality, is left out of account by the law, the lawyer becomes detached from life, from reality, and so from the law itself. If the value of the legal rule is overlooked because of an uncritically extended theory of the normative force of fact, the choice in favour of the ever-changing forces behind constitutional reality destroys the dignity and authority of the law. It must be the task of the constitutional

[148] HABERMAS (1979) 178-179 (emphasis in original).
[149] See further the Introduction to Part III, *infra*, s. 4.1.
[150] See BOBBITT (1980), 698 (emphasis added). Herbert Wechsler's call for 'neutral principles of constitutional law', which will be discussed later for its relevance to balancing's local meaning, was formulated initially as a direct response to Learned Hand's lectures. See further *infra*, s. 7.2.2.2.
[151] G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION viii (2007).
[152] *Cf.* Donald P. Kommers, *Germany: Balancing Rights and Duties*, in INTERPRETING CONSTITUTIONS. A COMPARATIVE STUDY 161, 214 (Jeffrey Goldsworthy, ed., 2006). This relatively high degree of acceptance is found also in other 'modern' systems of constitutional judicial review in Europe, notably in the countries of Central and Eastern Europe. See WOJCIECH SADURSKI, RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST COUNTRIES OF CENTRAL AND EASTERN EUROPE xiiiff (2005).
[153] See, *e.g.*, the review of his book '*Strukturprobleme der Modernen Demokratie*', in 23 MOD. L. REV. 115, 115 (1960).

lawyer to reconcile rules of law and constitutional reality in such a way that the existing dialectical conflict between rule and reality can be removed as far as possible by creative interpretation of the constitution without doing violence thereby either to reality in favour of the rule, or to the rule in favour of reality".[154]

Konrad Hesse (1919-2005) studied with the 'father of the Basic Law', Rudolf Smend, in Göttingen and was a law professor himself before becoming a judge at the Constitutional Court in 1975.[155] Hesse was particularly influential as the author of a leading textbook on the Basic Law, '*Grundzüge des Verfassungsrechts*', of which the first edition appeared in 1967. In his '*Grundzüge*', he described the task of interpreting the Constitution as follows:

> "The challenge for constitutional interpretation is to find the constitutionally 'correct' answer in a rational and verifiable manner, and to justify this answer in a rational and verifiable way so as to create legal certainty and predictability". "The nature of constitutional interpretation is *Konkretisierung* – concretization. That which, as content of the constitution, is not yet unequivocal should be determined under reference to the social reality that is to be regulated. To this extent, judicial interpretation has a creative character; the content of the interpreted norm is only fully determined in its interpretation".[156]

Time and again, Hesse is at pains to point out that 'concretization' involves a dialectical interplay between on the one hand the 'content' or the 'normative context' of a constitutional norm, and on the other hand 'social reality', or "the particularities of the individual social relations" at issue.[157] This idea of interplay between law and social reality, or between the formal and the substantive, is also clearly present in Leibholz's depiction cited above.

2.2.2.3 Master ideals for constitutional adjudication in late 1950s – early 1960s American jurisprudence

While the American judicial tradition is rich in reflections by judges on the nature of their work, no overall representative statements seem to be available for the crucial period of the late 1950s and early 1960s; the period during which balancing became a central jurisprudential concern. The Court of that time, as Edward White has noted, was characterized by several powerful individuals, such as Justices Frankfurter and Black,

[154] Gerhard Leibholz, *Constitutional Law and Constitutional Reality*, in FESTSCHRIFT FÜR KARL LOEWENSTEIN 305, 308 (Henry Steele Commager, ed., 1971), quoted in Brügger, *Legal Interpretation* (1994), 410-411.
[155] Smend's work and its relevance for the meaning of balancing in German constitutional law is discussed *infra*, s. 5.2.2.4.
[156] KONRAD HESSE, GRUNDZÜGE DES VERFASSUNGSRECHTS 21, 25 (8th ed. 1975, 1st ed. 1967).
[157] See, *e.g.*, HESSE (1975, 1967), 19. See also Brugger, *Legal Interpretation* (1994), 398 (describing concretization as "a dialectic process of creatively determining results in conformity with, but not determinable by, the Constitution" and citing Hesse as the most influential proponent of this idea). On 'concretization' see further *infra*, s. 5.3.3.2.

who stood "in trenchant opposition or uneasy coexistence".[158] During this time, "[n]o theory of constitutional interpretation or judicial performance captured the Court; instead much of its energy came from a clash of competing jurisprudential attitudes".[159] Given this pervasive clash of views on the Warren Court, this Section will take an indirect approach and present both an *earlier* judicial ideal with a lasting influence, and a representative *academic* statement of the ideals for judicial performance from the late 1950s.

Benjamin Nathan Cardozo (1870-1938)'s book *The Nature of the Judicial Process* has been read as an enduring statement of the ideals for judicial reasoning ever since its publication in 1921. "Perhaps a few, but at best a very few, judges had as keen an insight into the peculiar rôle of the judge in the American scheme", Felix Frankfurter, later a Supreme Court Justice himself, wrote of Cardozo in an obituary assessment in 1939.[160] Cardozo's perspective was heavily influenced by his reading of German and French legal writers. In *The Nature of the Judicial Process*, Cardozo commented on Rudolph von Jhering's "great contribution" to the theory of jurisprudence, which had been the "conception of the end of law as determining the direction of its growth".[161] This 'teleological conception' meant for Cardozo that the 'juristic philosophy of the common law' had to be "at bottom the philosophy of *pragmatism*".[162] Expounding this pragmatic philosophy, Cardozo wrote:

> "Its truth is relative, not absolute. The rule that functions well produces a title deed to recognition. Only in determining how it functions we must not view it too narrowly. We must not sacrifice the general to the particular. We must not throw to the winds the advantages of consistency and uniformity to do justice in the instance".[163]

For Cardozo, deciding cases required adopting a pragmatic stance with regard to pragmatism itself. Judging, for him, meant mediating, between "the subjective or individual and the objective or general conscience", between "the subjective mind" and "customary practices and objectified beliefs, by way of a "constant and subtle interaction between what is without and what is within".[164] He summed up his ideals for judicial performance as follows:

> "My analysis of the judicial process comes then to this, and little more: logic, and history and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or

[158] G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION (1976, 3rd ed. 2007), 268. The opposition between these individuals will figure heavily in the account of balancing in Chapters 6 and 7.
[159] *Ibid.*
[160] Felix Frankfurter, *Mr. Justice Cardozo and Public Law*, 52 HARV. L. REV. 440, 440 (1939). Frankfurter's position on balancing is discussed below, in Chapters 6 and 7.
[161] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 102 (1921).
[162] *Ibid.*, 102 (emphasis added), referring to Roscoe Pound. Pound's work is discussed in Chapter 3.
[163] *Ibid.*, 102-103.
[164] *Ibid.*, 110-111.

> value of the social interests that will be thereby promoted or impaired. One of the most fundamental social interests is that the law shall be uniform and impartial. (...) Therefore in the main there shall be adherence to precedent. There shall be symmetrical development (...). But symmetrical development may be bought at too high a price. Uniformity ceases to be a good when it becomes uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against the social interest served by equity and fairness or other elements of social welfare".[165]

Arguably the leading academic commentator on the work of the Supreme Court during the late 1950s and early 1960s was Harvard Law professor Henry M. Hart (1904-1969).[166] In a 1959 conference contribution, Hart summed up his views on the tasks of the judiciary as follows:

> "There is, first of all, the task of developing the fundamental body of constitutional principle which is necessary for the guidance of both official and private conduct and for the sound interpretation of enactments and decisional doctrines. There is, secondly, the task of keeping the underlying body of the unwritten law alive and growing, and not only rationally consistent with itself but rationally related to the purposes which the social order exists to serve".[167]

Central themes in Hart's judicial philosophy were the question of the limitations to institutional competence of the judiciary; the duty for judges to give 'sound' reasons for their opinions in cases that they did decide; the idea that sound reasons should be reasons of 'principle' rather than expedience; and the idea that adequate judicial reasoning would stem from a "maturing of collective thought" rather than from the ideas of single individuals.[168] Hart summed up his vision of what the Supreme Court should do in his famous 1958 *Harvard Law Review Foreword*. Judicial opinions that consisted either of mere *ipse dixits* or of rehearsals of legal technicalities, he wrote,

> "lack the underpinning of principle which is necessary to illumine large areas of the law and thus to discharge the function which has to be discharged by the highest judicial tribunal of a nation dedicated to exemplifying the rule of law not only to itself but to the whole world. Only opinions which are grounded in reason and not on mere fiat or precedent can do the job which the Supreme Court of the United States has to do. (...) Only opinions of this kind can carry the weight which has to be carried by the opinions of a tribunal which, after all, does not in the end have the power either in theory or in practice to ram its own personal preferences down other people's throats. Thus, the Court is predestined in the long run not only by the thrilling tradition of Anglo-American law but also by the hard facts of its position in the structure of American institutions to be a voice of reason, charged with the creative function of discerning afresh and articulating and developing impersonal and durable principles of constitutional law (...)".[169]

[165] *Ibid*., 112-113, citing PAUL VANDER EYCKEN, METHODE POSITIVE DE L'INTERPRÉTATION JURIDIQUE 59 (1907) and EUGEN EHRLICH, DIE JURISTISCHE LOGIK 187 (1918).

[166] Henry Hart co-wrote the two most influential textbooks of this era: '*The Legal Process*' (with Albert Sacks) and '*The Federal Courts and the Federal System*' (with Herbert Wechsler). See on the influence of the latter book, *e.g.*, Michael Wells, *Who's Afraid of Henry Hart?*, 14 CONST. COMMENT. 175, 175 (1997) ("No law book has enjoyed greater acclaim from distinguished commentators over a sustained period than has Hart & Wechsler's 'The Federal Courts and the Federal System'"). See further *infra*, s.7.2.2.1.

[167] HENRY M. HART, LEGAL INSTITUTIONS 42-43 (1959), cited in Wolfgang Friedmann, *Legal Philosphy and Judicial Lawmaking* 61 COLUM. L. REV. 821, 835-836 (1961).

[168] Henry M. Hart, *The Supreme Court 1958 Term: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 100 (1959). See for discussion Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601, 637ff (1993).

[169] Hart, *The Time Chart of the Justices* (1959), 99.

[170] For examples from the American and the German contexts, relied upon in the project on 'balancing', see, *e.g.*, Richard H. Fallon, *Implementing the Constitution*, 111 HARV. L. REV. 54, 67 (1997) ("As the [U.S.] Supreme Court confronts the task of shaping constitutional doctrine, many kinds of test are available to it"), and In the German context, see, *e.g.*, Gerd Roellecke, *Prinzipien der Verfassungsinterpretation in der Rechtsprechung des Bundesverfassunggerichts*, in BUNDESVERFASSUNGSGERICHT UND GRUNDGESETZ II 23 (Christian Starck, ed., 1976). The question to what extent actors within the relevant system do indeed perceive a possibility of choice may itself show variations across systems and cultures.

2.2.3 Interim conclusion

Justification and legitimization through published reasons clearly reflect a shared normative necessity for Western legal systems such as the German and the U.S. American. In both settings, this objective came to be felt particularly acutely at precisely the time studied in Chapters 4 to 7. This suggests that the legitimization problematic may be an especially useful 'way in' for the reconstruction of local meanings of legal discourse. In addition; even a cursory reading of the 'master ideals' cited above reveals considerable overlap; consider, simply by way of illustration, the parallels between Konrad Hesse's invocation of judicial creativity and respect for legal certainty, and Henry Hart's references to the "creative function" of judging and the role of "impersonal and durable principles". These parallels will prove useful in systematizing local understandings of, and responses to, the legitimization problematic in the form of 'legitimizing strategies', discussed in Section 2.5.

2.3 LEGAL DISCOURSE AND RELATIVITY

2.3.1 A second common characteristic: The 'choice' premise

A second major characteristic of legal discourse in Western systems is the widely shared understanding that legal actors will have *some degree of choice* with regard to the specific arguments they use in defending and challenging legal outcomes and exercises of public authority.[170] This understanding will be referred to here as 'the choice premise'. This premise does not claim that legal actors and their audiences need to perceive the possibility of choosing between different forms of reasoning to the same extent in every individual case, in every system, or at every time. In some settings, some otherwise familiar forms of argument may effectively be 'off-limits', while others may be dominant

to the point of hegemony. What is suggested is merely an understanding that legal arguments are conventions upheld by participants in legal discourse, and that the argumentative landscape of a given legal system might, therefore, 'look different' if participants made different choices.[171]

Again, the implications of this premise are most easily seen in the context of *judicial* discourse, but are valid more broadly. Because judges *must* justify their decisions through explicit reasoning, and because, in this process, they will generally have a choice as to what arguments to use, any argument's correctness, usefulness, appropriateness, or any other normative qualification that a local interpretative community uses, will always have to be understood as *relative* to that of other forms of argument and to other elements of legal discourse. This basic relativity of meaning, it is argued, pervades all uses of legal arguments, not only by judges but also by other participants in legal discourse.

2.3.2 The relational character of meaning: Structuralism

The relational character of meaning is a hallmark of 'structuralist' conceptions of discourse. Structuralism, in this connection, denotes the basic view, originating in Saussurian linguistics, that language is "a system of interdependent terms in which the value of each term results solely from the simultaneous presence of the others".[172] The structuralist perspective holds that linguistic communities actively construct the meaning of words, on the basis of a "shared system of signification" – a grammar -, by *contrasting* them with other words in use within the same language.[173]

Structuralist insights have also been invoked in the study of legal discourse. In these projects, legal argumentation is understood as a "system of signs, which creates meaning within a culture".[174] Intriguingly, this semiotic perspective has, so far, only played a limited role in comparative legal studies. Structuralist ideas have been invoked in comparative law, but generally to support the perspective of a uniform, unifying conceptual structure underlying all legal systems, rather than the crucial complementary perspective of *locally variable* legal 'grammars'.[175] It is this second dimension that this

[171] *Cf.* BOBBITT (1984), 6ff.

[172] FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS 114 (W. Baskin trans., 1959) (originally published 1916).

[173] See among many other sources Thomas C. Heller, *Structuralism and Critique*, 36 STAN. L. REV. 141, 142 (1984); J.M. Balkin, *A Hohfeldian Approach to Law and Semiotics*, 44 U. MIAMI L. REV. 1119, 1121 (1990). For an influential application of these insights in legal scholarship see MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT xx-xxi (2005) ("In structural linguistics, the meaning (signified, *signifié*) of an expression (signifier, *signifiant*) is established by a network of binary oppositions between it and all the other surrouding expressions in the underlying language. (…) In a sense, expressions are like holes in a net. Each is empty in itself and has identity only through the strings which separate it from the neighbouring holes. (…) Meaning is *relational*") (emphasis in original).

[174] See, *e.g.*, J.M. Balkin, *The Promise of Legal Semiotics*, 69 TEX. L. REV. 1831, 1845 (1991). Other prominent examples can be found in the work of Duncan Kennedy and David Kennedy.

[175] Most notably in Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 1, 343 (1991). For a different assessment of the relevance of structuralist thought in comparative law, see Ugo Mattei, *Comparative Law and Critical Legal Studies*, in THE OXFORD HANDBOOK OF COMPARATIVE

Chapter seeks to exploit. The assumption is that the meaning of particular elements of legal discourse will be governed by a locally relevant legal 'grammar'. This image of grammars is also helpful as an illustration of the difference/commonality trade-off discussed earlier. Local legal grammars will differ from each other, but, as grammars – and especially: as grammars within the broad family of Western legal systems - they can be assumed to exhibit some common basic characteristics.

A structuralist approach to legal discourse, then, holds that individual legal arguments do not have an essence; that they do not necessarily and stably refer to any particular underlying concept, logical structure or method of reasoning, but that, rather, their meaning will depend on their relationship of difference to other elements of legal discourse.[176] It is this basic structuralist insight that underlies the critique of the 'process/discourse conflation' set out in Chapter 1. This Section discusses how this same idea can help ground an alternative approach to the comparative investigation of the meaning of balancing through reliance on three key dimensions of these local 'grammars' within which its meaning will have to be situated.

2.3.2.1 Relativity and alternative forms of argument

The first of these dimensions is relativity of meaning *vis-à-vis alternative forms of argument*. On a most basic level, any argument's force is relative in the sense that it may be, in actuality or hypothetically, counteracted by other types of argument. MacCormick and Summers adopted this notion of relativity in their comparative study of legal reasoning when they asked, for a range of different forms of legal reasoning, "[w]hat is the relative force of [this specific type of argument] when in conflict with other arguments?".[177] Similarly, an argument's meaning is relative to that of alternatives that could have been used to support the same result. By using one particular form of argument, legal actors are, in an obvious but still significant way, *not using* any of a number of potentially available alternative forms of argument. Both the nature of these available—but unused—alternatives and the reasons for choosing precisely this specific form of argument over its alternatives are themes of particular significance to the question of meaning.

LAW 815 (Mathias Reimann & Reinhard Zimmermann, eds., 2006). For an application of structuralist ideas in a comparative analysis of French and American legal discourse, see DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION – *FIN DE SIÈCLE* (1997). But for a critique of this approach as not realizing its full potential, see Mitchel de S.-O.-l'E. Lasser, *Do Judges Deploy Policy?*, 22 CARDOZO L. REV. 863 (2001).

[176] See Balkin, *The Promise of Legal Semiotics* (191), 1845. See also Jeremy Paul, *The Politics of Legal Semiotics*, 69 TEX. L. REV. 1779, 1782 (1991).

[177] NEIL D. MACCORMICK & ROBERT S. SUMMERS, INTERPRETING STATUTES: A COMPARATIVE STUDY 5 (1991).

2.3.2.2 Relativity and standards for evaluation

Secondly, the local meaning of a form of argument depends on the nature of the particular *standards* local actors maintain for assessing the appropriateness and strength of legal arguments. Put differently, the "set of criteria against which the acceptability of legal arguments can be judged" implicit in Tony Honoré's notion of canons of legal argument, will always be a *locally prevalent* set of criteria.[178] A good way to ground this assertion is by returning to the central ideas of 'justification' and 'legitimization'. Justification and legitimization, in a very general sense, entail the provision of reasons that are capable of convincing others – (intersubjective) *justification* - so as to increase the acceptance of certain institutions or practices - *legitimization*. Both ideas presuppose a particular community for which the relevant argumentation is offered; a community of individuals to be convinced (justification) and of individuals subject to the practices or institutions defended (legitimization). It is, after all "*in relation to an audience* that all argumentation is developed".[179] Jürgen Habermas has argued for this perspective by pointing to the 'pragmatic nature' of the 'notion of an argument'.[180] This theoretical perspective, too, is deeply influenced by the importance of the need to satisfy *local demands* placed on argumentation in order to convince *local audiences*.

2.3.2.3 Relativity in multiple directions

Thirdly, and finally, the relational nature of the meaning of legal arguments has to be seen as playing out on multiple axes. Any individual argument can be compared with a number of different alternatives, and can be preferred over – or rejected in favour of – these alternatives on a number of different grounds. The meaning of that form of argument, in terms of its 'legitimizing force', will have to take as many as possible of these different underlying relations of preference into account.

The next Paragraph will give examples for all these three dimensions of relativity.

2.3.3 Comparison within systems: The example of reasoning by analogy

Taken together, what these three dimensions of the relational nature of meaning show is that comparison *within* legal systems will be essential in the elaboration of meanings of legal argument that can be compared *among* legal systems. An illuminating practical example of what this internal comparison entails can be found in Cass Sunstein's analysis of reasoning by analogy in American law.[181]

In his 1993 article *On Analogical Reasoning*, Sunstein explicitly proposes "to try to get a better sense of analogical reasoning *by comparing it* with five other forms of reasoning that have a prominent place in law".[182] In the course of this comparison, Sunstein notes, among other things, the following three important characteristics of reasoning by analogy in law. First, analogical reasoning is thought to operate "at a low or intermediate level of abstraction".[183] Secondly, this form of reasoning has a beneficial "comparative lack of ambition",[184] in the sense that it "allows people who diverge on abstract principles to converge on particular outcomes".[185] And thirdly, reasoning by analogy is "often silent or unhelpful on the question of social consequences" of judicial decisions,[186] because it looks 'backwards' – to earlier decisions – rather than forwards.

Sunstein's analysis was especially helpful in designing the inquiry into the meaning of balancing. For one, it shows how one can ask a whole range of different questions about legal arguments, not just traditional legal theory ones such as "How many steps are there to reasoning by analogy (or balancing)?", or "How reliable is the logical inferential structure of reasoning by analogy (or balancing)?".[187] But more generally, Sunstein's approach is a useful illustration of how an approach based on legitimizing force and relativity of meaning might work in practice. He provides a view of the range of important acceptable arguments in the relevant jurisdiction - analogical reasoning and the five 'prominent' alternative arguments – that can be relied upon for the study of other types of argument in the American context. He shows what sorts of evaluative criteria American legal audiences might consider important for the legitimizing force of arguments, such as "Is use of this argument conducive to obtaining agreement?", and "Is this argument sufficiently sensitive to the social consequences of legal decisions?". And he starkly reveals not only the basic relativity of the meaning of arguments – consider analogical reasoning's apparent 'comparative lack of ambition' -, but also the fact that this relativity plays out in multiple directions and with regard to multiple alternatives. Analogical reasoning may be preferred over – or rejected in favour of – a number of alternative argument forms, for a number of different reasons. For example, both a judge who objects to openly consequentialist reasoning in law, as well as

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178 Bell, *The Acceptability of Legal Argument* (1986), 51. Further theoretical support for this approach can be found in the work of Jürgen Habermas and Chaim Perelman. See JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg, trans., 1998), and CHAIM PERELMAN, THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT (1963).

179 Chaim Perelman & Lucie Olbrechts-Tyteca, *The New Rhetoric*, in CHAIM PERELMAN, THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT 134, 138 (John Petrie, transl., 1963) (emphasis in original).

180 HABERMAS (1998), 227.

181 Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993); CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT (1996).

182 Sunstein, *On Analogical Reasoning* (1993), 749. See also at 781ff (emphasis added).

183 *Ibid.*, 746.

184 *Ibid.*, 790.

185 *Ibid.*, 791.

186 *Ibid.*, 758.

187 The fact that these questions are *not* discussed in Sunstein's project is relevant in and of itself. The fact that Sunstein spends little time wondering about, for example, the internal inferential structure of analogical reasoning - the question of the 'logical validity' or reliability of conclusions drawn from analogical arguments – emphasizes again the need for an approach to the meaning of legal argument that is able to track locally relevant questions. Other important studies of analogical reasoning, to stay with this example, show that this dimension of 'logical validity' or reliability too, is best seen as a matter of construction within interpretive communities rather than an essential characteristic of the argument itself. See notably Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923 (1997).

one who prefers to avoid adopting overly broad general theories as the basis for her decisions, may have important reasons for favouring the adoption of analogical argumentation in their reasoning. The substance of these reasons, however, will be very different and may, in some cases, even be internally contradictory. There are, in other words, many different ways of saying what a particular argument *is (or is not) about*, and it seems that at least a number of these different perspectives will have to be taken together to present any kind of comprehensive description. It is the combination of all these relationships of precedence that make up (one prominent local view of) analogical reasoning's local American meaning.

2.4 LEGAL DISCOURSE AND RELATIVE FORMALITY

2.4.1 A third common characteristic: The 'relative autonomy of the juridical sphere' as an empirical claim and as a normative ideal

There is overwhelming evidence for the proposition that actors in all Western legal systems are faced with some variant of a basic dilemma of managing these systems' *relative autonomy*. This relative autonomy of the juridical sphere is not only descriptive statement valid for all Western legal systems, but also, crucially, a normative ideal intimately connected to the idea of legitimacy.

Support for the descriptive validity of 'relative autonomy' as a fundamental characteristic of Western legal systems comes from legal history and the sociology of law. In his influential account of the history of the 'Western legal tradition', for example, Harold Berman lists as his first 'principal characteristic' of this tradition the fact that "[a] relatively sharp distinction is made between *legal* institutions (including legal processes such as legislation and adjudication as well as the legal rules and concepts that are generated in those processes) and *other* types of institutions".[188] Franz Wieacker, in his description of the foundations of 'European legal culture', points to the centrality of 'legalism', which he describes as "the need to base decisions about social relationships and conflicts on a general rule of law, whose validity and acceptance does not depend on any extrinsic (moral, social, or political) value or purpose".[189] This idea of "the separation … of the legal system from other social rules and sections (such as religious tenets, moral imperatives, custom, and convention", for Wieacker, "distinguishes European civilization from that of other high cultures".[190]

In the sociology of law, the manifestations of the shared belief in the autonomous dimensions of law are often referred to as 'legalism'. In Lawrence Friedman's account, 'legalism', by which he means a type of reasoning based on formal

[188] HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 7-8 (1983). (emphasis in original).
[189] Franz Wieacker, *Foundations of European Legal Culture*, 38 AM. J. COMP. L. 1, 23 (1990).
[190] *Ibid*., 24.

logic "within a closed system of legal rules and concepts", "is a feature which can and does appear whenever certain conditions prevail in a legal system – the duty to decide; the duty to give reasons; a closed canon of principles or rules; legal functionaries whose roles do not legitimately allow for the making of law".[191]

Friedman's depiction closely matches the 'legitimization problematic' and 'choice' premise – the 'duty to give reasons', chosen from among 'a closed canon of principles or rules' -, outlined earlier. In this way, his description of autonomy or 'closure' as a shared feature of Western legal systems is also a description of a normative ideal shared by these systems.[192] Law, in order to qualify as law, in order to legitimately stake any claim to obedience in the Western tradition, has to be to some degree separate from morality, economics, religion, subjective preferences of individuals, or other sources of conceptions of value.

At the same time, however, law, in order to be acceptable and to have any hope of functioning somewhat effectively in modern societies, cannot be completely severed from the extra-juridical world. At issue is therefore not merely the one-sided pursuit of law's autonomy, but also, in the words of one of the participants in the balancing debates in Germany; a permanent struggle to reconcile a "*Gerechtigkeitspostulat*" *and* a "*Rechtssicherheitspostulat*" – the commands of individual justice and of legal certainty.[193] The intimate connection between the idea of legitimacy and these two conflicting goals is reflected in a range of familiar tropes, going back at least to Aristotle's classic dilemma - "enactments must be universal, but actions are concerned with particulars" -,[194] and including famous common dystopian visions, such as the purely individualized judgment of Max Weber's and Roscoe Pound's '*khadi*' judge, or the cult of logic decried by Otto Von Gierke's "lifeless abstractions" and Pound's "mechanical jurisprudence".[195]

On a high level of abstraction, one unified basic view of what 'good', or 'strongly legitimizing', legal reasoning should look like underlies all these visions. This view holds that whatever other functions legal reasoning may have to fulfill in different legal systems and in concrete cases, and whatever other dimensions 'legitimacy' may locally be seen to require, legitimacy will always at least entail successful negotiation of dilemmas related to the relative autonomy of the juridical sphere. Law will have to be, simultaneously, somewhat separate from morality, economics, religion, subjective preferences, or other sources of conceptions of value, and somewhat open to many of these very same factors.

This view of legitimacy, of course, has direct implications for the understanding of the legitimizing force of individual legal arguments. The legitimizing force of elements

[191] Lawrence M. Friedman, *On Legalistic Reasoning – A Footnote to Weber*, 1966 WISCONSIN L. REV. 148, 161, 170 (1966).
[192] On the connection to legitimacy, see also Wieacker, *Foundations of European Legal Culture* (1990), 24.
[193] Peter Schneider, *Prinzipien der Verfassungsinterpretation*, 20 VVDStRL 1, 30 (1963).
[194] ARISTOTLE, POLITICS, 2.8, 1269 a 11-12. Aristotle's observation is cited by, among many others, Justice Benjamin Cardozo and Judge Learned Hand in the U.S. (see BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 19 (1924); Learned Hand, *Thomas Walter Swan (Comments)*, 57 YALE L.J. 167, 170 (1947-1948). See for further discussion Jerome Frank, *Modern and Ancient Legal Pragmatism*, 25 NOTRE DAME L. REV. 460, 480 (1949-1950).
[195] On Weber and Pound, see further *infra*, Chapter 3. For Von Gierke, see JAMES Q. WHITMAN, THE LEGACY OF ROMAN LAW IN THE GERMAN ROMANTIC ERA: HISTORICAL VISION AND LEGAL CHANGE 230-231 (1990).

of legal discourse can now be defined – at least in part - in terms of the contribution this element is seen to make to the resolution or negotiation of these dilemmas of relative autonomy.

2.4.2 (Relative) autonomy, (relative) closure, and (relative) formality

At least since the work of Max Weber, it is common to refer to this idea of (relative) autonomy as law's (relative) formality, and to label approaches to law that emphasize this formality, either descriptively or normatively, 'formalism'. Weber himself argued that "[l]aw … is 'formal' to the extent that … only unambiguous general characteristics of the facts of the case are taken into account". Weber contrasted this understanding of formality with both 'substantive irrationality' (decisions "influenced by concrete factors of the particular case as evaluated upon an ethical, emotional, or political basis rather than by general norms"), and substantive rationality (the injection into legal reasoning of "ethical imperatives, utilitarian and other expediential rules, and political maxims").[196] While Weber's conceptual scheme is famously opaque and to some extent both internally overlapping and incomplete,[197] it is submitted that the idea of closure and autonomy is evident in his definitions of 'formality' as limiting the grounds of decision, and 'substantive' as opening them up. Morton White, writing in the United States in the 1940s, described a "revolt against formalism" across a number of societal domains in very similar terms, as an act of "*reaching out*" to history, culture, life and experience.[198]

In both these classical conceptions, the idea of formality as autonomy, closure or exclusion is clearly visible. Among more recent discussions of formalism and formality, Frederick Schauer equates formalism with the rejection of 'particularity', or the individualized context in which legal decisions are made, and with "screening off from a decisionmaker factors that a sensitive decisionmaker would otherwise taking into account".[199] In his depiction, formalism is essentially equivalent with 'ruleness', which is itself presented as synonymous with, in Schauer's terms, 'closedness'.[200] The emphases placed on abstraction, system, logic, 'ruleness', *etc.*, in definitions of formalism, can all be understood as promoting, in different ways, the autonomy, the 'self-containdness' of the juridical sphere, and the 'closed-endedness' of legal reasoning.[201]

Following this tradition, the category of 'legal formality', and the terms 'form' and 'formal', will be used in this thesis to describe all those elements within, and all characteristics of, legal reasoning that are understood by the local interpretative community to seek to uphold or maximize law's autonomy.[202] In all these instances, legal formality, as 'closedness' and autonomy, can be understood through its opposition to different forms of 'openness' to the extra-juridical, whether in terms of particularism, instrumentalism, 'policy-reasoning', contextualism or otherwise. All these manifestations of 'openness', or 'open-endedness', will be labelled 'substantive' throughout this thesis.[203]

2.4.3 Legal formality and its opposites: Multiple meanings

While it is possible to point to recurrent themes in these definitions of legal formality – autonomy, closure, constraint, exclusion –, it is certainly also true that the meaning of formality in law has always been vigorously contested.[204] Much of the jurisprudential attention devoted to the theme of legal formality over the past century or so has been concentrated on the concept of 'formalism'. Leading analysts of formalism, such as Hans Kelsen and H.L.A. Hart, have long complained that unambiguous definitions of this term – generally used in a pejorative sense - were lacking.[205] This

[196] MAX WEBER, MAX WEBER ON LAW IN ECONOMY AND SOCIETY 63-64 (Max Rheinstein ed., Max Rheinstein & Edward Shils, trans. 1954) (originally published 1925). Weber's typology of formality and (ir)rationality in law has occasioned an enormous literature. For an assessment that brings out the 'exclusionary' character of Weber's formality in the sense described here, see David M. Trubek, *Reconstructing Max Weber's Sociology of Law*, 37 STANFORD L. REV. 919, 930-931 (1985) (Book Review) ("All formality in law, Weber tells us, involves the explicit avoidance of value-choice. (…) The introduction of 'substantive' ends into the legal order, Weber suggested, will inevitably lead to particularistic decisions")

[197] For discussion, see Trubek, *Reconstructing Max Weber's Sociology of Law* (1985), 925 (referring to the "immense difficulty" of the analysis in Weber's work); ANTHONY M. KRONMAN, MAX WEBER (1983). That said, it is submitted that the connection between formality and ideas of closure and autonomy is a clear thread running through his work.

[198] MORTON WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM 12-13 (1949) (emphasis added).

[199] Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988).

[200] *Ibid.*, 536-537.

[201] For further examples of the relationship between 'closure' and legal formality, see Martin Stone, *Formalism*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 150, 170ff (Jules L. Coleman, Scott Shapiro, Kenneth Einar Himma, eds., 2002). Stone describes seven varieties of the charge of formalism, each of which can be related to some form of exclusion or closure. They are: formalism as: (1) non-reductive reasoning from concepts (exclusion of considerations not related to the nature of these concepts); (2) understanding of law through attention to 'form' (exclusion of "regard for the detailed findings of history, sociology, anthropology, and so on" insofar as they pertain to law); (3) failure to decide legal cases in light of social policy (exclusion of "background reasons"); (4) assertion that law can be applied without 'interpretation' (exclusion of interpretive freedom and hermeneutic principles); (5) belief that "all cases are legally regulated" (exclusion of recourse to 'extra-legal' considerations); (6) assertion that legal validity is content-independent (exclusion of "moral or political arguments" for law's validity); (7) denial of idea that law is instrument of social policy (exclusion of instrumentalist reasoning). See also HART (1961), 129 ("The vice known to legal theory as formalism or conceptualism consists in an attitude to verbally formulated rules which both seeks to *disguise and minimize the need for ... choice*") (emphasis added).

[202] *Cf.* Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field* (1987), 814 (arguing that formalism "asserts the autonomy of the juridical form in relation to the social world", and that formalist jurisprudence "sees the law as an autonomous and closed system"). See also NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 48 (1997) (citing Oliver Wendell Holmes' use of the term 'formal system' to describe a "closed system of existing precedent).

[203] *Cf.* LASSER (2004); Lasser, *Do Judges Deploy Policy?* (2003), 894 for use of the term 'open-ended' and discussion of its advantages over more culturally loaded terms such as 'policy'. See also Katherine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 862 (1990).

[204] The continued mentioning of the different relevant terms – formality, autonomy, closure, constraint, *etc.* – alongside each other in the discussion here, is a reflection of these very ambiguities. This parallel use is justified, it is submitted, by the need to convey the full range of - and potential nuances within - what is intended.

[205] "Most lawyers who rush to make the charge of formalism are at a loss when asked for a more precise definition of the characteristic", H. Kelsen, *Legal Formalism and the Pure Theory of Law* (1929), translated in

problem continues to haunt understandings of formalism, and therefore of legal formality.[206] It is common for discussions of formalism to invoke more detailed terms such as textualism or conceptualism, and descriptions of characteristics of legal reasoning such as an (excessive) reliance on deductive reasoning, the denial of interpretative choice, or the purposive limitation of interpretative choice. Writers commonly describe as 'formal' or 'formalist' such traits as (over)reliance on 'rules' and 'categories'; [207] ('mechanical') reasoning on the basis of (overly) abstract 'concepts' within an overarching system;[208] the denial or purposive limitation of interpretative choice;[209] or the treatment of law as "identifiable without any reference to the content, aim, and development of the rules that compose it".[210]

The same is true for formality's perceived opposites. In a sense, while formality and formalism have too many meanings, terms like substantive, 'substantivism', or 'substantivizing' seem to have *too few* – not even the beginning of a coherent definition of 'the substantive' in law seems to be available.[211] Especially once technical terms are introduced, it becomes clear not only that many of the relevant concepts have multiple possible opposites, but also that the overall terminological architecture required to fit in these opposites shows significant, potentially revealing, gaps.

Both these dimensions can be illustrated through the following Table, which lists some of the relevant antinomies to legal formality, italicizing inexistent or infrequently used terms:

Formal	Substantive, Instrumental, Pragmatic, Contextual, Particular,
Formalism	*Substantivism?*,[212] Instrumentalism, Pragmatism, Contextualism, Particularism,
Formalizing	*Substantivizing?*, Instrumentalizing, *Pragmatizing?*, Contextualizing, Particularizing,
Formality	*Substantivity?*,[213] *Substantiveness?*, Instrumentality, *Pragmaticality?*,[214] Contextuality, Particularity

It is important to emphasize that this Table 'works' in both directions, in the sense that not only are instrumentalism, pragmatism, *etc.* all possible opposites to formalism, but also that when looking for opposites to instrumentalism or pragmatism, formalism is generally the main, or even only, candidate (apart from such obvious, but unhelpful, possibilities such as *anti*-instrumentalism). While this table may superficially seem to indicate coherence and uniformity on the left and chaos on the right, it is important to emphasize that the structuralist idea of the relativity of meaning, discussed earlier in this Chapter,[215] suggests that, given the uncertainties among its potential opposites, the meaning of 'formal' and its derivations must also be seriously ambiguous.[216]

2.4.4 Legal formality and its opposites: *Local* meanings and *common* elements

If formality and its opposites are, in principle, capable of having multiple meanings, then detailed attention to their local significance will be especially important. It matters a great deal for the meaning of 'formalism', for example, whether its predominant opposite is seen locally as 'instrumentalism' or rather as 'particularism'. It is significant whether the greatest threat to law's autonomy is seen to be the intrusion of policy objectives, moral considerations, excess particularity or some other 'substantive' factor – or, conversely: which of these factors local actors think should be allowed to make inroads into law's relative autonomy, and to what extent they think so, and why. The broader context for these terms is also important. This is the case especially where the relevant term is associated with a 'school' or a 'tradition' in legal thinking. In the

WEIMAR: A JURISPRUDENCE OF CRISIS 81 (Arthur J. Jacobson & Bernhard Schlink, eds., 2000); "It is very hard to give an exact definition of the word 'formalism'", WHITE (1949), 12-13 ("What precisely is it for a judge to commit this error, to be a 'formalist', 'automatic', a 'slot machine'? Curiously enough the literature which is full of the denunciation of these vices never makes this clear in concrete terms"); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 563, 610 (1957).

[206] *Cf.* Schauer, *Formalism* (1988), 509; Robert S. Summers, *How Law is Formal and Why it Matters*, 82 CORNELL L. REV. 1165 (1997). By way of illustration: One of the key works referenced *supra*, s. 1.6.1, as an example of a historical narrative linking the demise of legal formality to the rise of balancing, Morton Horwitz's controversial but influential *'The Transformation of American Law - II'*, was said by one prominent reviewer to contain "seven or maybe nine, depending on how one counts" different uses of the term formalism. See Robert W. Gordon, *The Elusive Transformation*, 6 YALE J. L. & HUMANITIES 137, 154 (1997(Book Review).

[207] See further *infra*, Chapters 2, 3 and 8. For a concise overview of these and other descriptions, see Schauer, *Formalism* (1988); Summers, *How Law is Formal and Why it Matters* (1997).

[208] *Cf.* Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 1000 (1988) ("Formalism … is avowedly and unabashedly conceptual in two respects. First, the components of form are conspicuously manifested in the concepts through which a coherent legal system is organized. Second, the forms are themselves the most abstract concepts that bear upon the intelligibility of juridical relations").

[209] *Cf.* Schauer, *Formalism* (1988).

[210] JUDITH N. SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS 33-34 (1964).

[211] By way of illustration: (1) Weber's definition of formality, while certainly ambiguous, is much more precise than the mere 'list' of factors he provides for 'substantive rationality'. (2) In his '*Two Types of Substantive Reasons*', one of the few jurisprudential works to directly address this issue, Robert Summers lists appeals to "moral, economic, political, institutional, or other social considerations" as instances of 'substantive reasons', before noting: "Although a more precise definition could be formulated, there is no need to do so here. Judges already have a working familiarity with the notion of a substantive reason as distinguished from a reason based on prior legal authority", see Summers (1978), 710fn3.

[212] 'Substantivism' is a term mostly used in the areas of conflict of laws and legal ethics. In the legal reasoning context, 'substantivism' is used by Robert S. Summers, *The Formal Character of Law*, 51 CAM. L.J. 1302 (1992). The term is not commonly used in opposition to formalism in legal reasoning.

[213] 'Substantivity' is sometimes used (see, *e.g.*, Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 618 (1986)), but is clearly not as common as formality, and is generally left undefined. On 'open-endedness' as an opposite to 'formalism', see, *e.g.*, Frederick Schauer, *Formalism* (1988), 509; LASSER (2004). See also *supra*, s. 1.6.2.

[214] "Pragmaticality" was once used by U.S. Supreme Court Justice Blackmun in a dissenting opinion in USSC *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 762 (1975), but is clearly not a generally accepted term of art.

[215] See *supra*, s. 2.3.

[216] Discussed further *infra*, s. 8.2.

above scheme, this is the case especially for pragmatism in the U.S. setting, but formalism and instrumentalism too are associated with broader trends in legal thought (particularism and contextualism much less so).[217] All the associations that local judges and lawyers are likely to make in relation to these concepts make up the local meaning of legal formality and its opposites. As with legitimacy, discussed earlier, it is precisely this combination of local variation and basic commonality that makes the formal *vs.* substantive opposition so useful for the comparative study of legal argument.

2.5 THREE LEGITIMIZING STRATEGIES

2.5.1 Introduction: Situating the formal *vs.* substantive opposition

The local meaning of balancing as discourse, it has been argued, can be understood as the relative contribution balancing is locally seen to make towards the legitimization of judicial authority (or to its critique); with legitimacy itself understood as the successful management of the formal *vs.* substantive opposition in law, according to local standards and using local means. This definition of balancing's meaning has been constructed as a partial answer to the basic question of how to negotiate the trade-off between the benefits and limitations of the internal perspective on foreign legal systems: the choice between particularity and commonality. As such, this definition is a first step in the 'minimally functionalist – maximally internal' approach to comparison that this thesis aims to develop and implement.

A second step in relating shared abstractions to local manifestations will be undertaken in this Section with regard to local understandings of and responses to the formal *vs.* substantive opposition, by way of the concept of 'legitimizing strategies'. These strategies are groupings of broad tendencies in local understandings of, and responses to, the legitimization problematic, organized along the lines of the formal *vs.* substantive opposition. Their nature, function and content are explained below.

2.5.2 'Legitimizing strategies'

One of the insights of the structuralist study of legal reasoning has been the idea that legal discourse is significantly less varied in form and substance than ordinary language. "Lawyers, judges, and legal commentators" typically "employ a relatively small handful of argument forms" to justify choices for specific legal doctrines or for broader conceptions of the roles of law and courts.[218] In many different areas of law and in a

[217] By way of example from the German context: '*konkretisierung*' is here a term of art in a way that concretization in English is not. See further *infra*, s. 5.3.3.2.
[218] Balkin, *Promise of Legal Semiotics* (1991), 1835. See also, *e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1713, 1708 (1976) ("My assertion is that the arguments lawyers use are relatively few in number and highly stereotyped.").

nearly endless variety of factual situations, the debates engaged in by legal actors, and the "basic styles of argument" used in these debates, show striking similarities and recurrent patterns.[219]

This suggestion has been broadened into the idea that law and legal thought generally are structured around a limited set of basic 'axes of opposition';[220] a small number of recurring fundamental themes that resurface, and dominate discourse, in different areas of law. The concept of 'axis of opposition' is especially useful for the comparative study of legal discourse. For one, it reflects the basic idea that the meaning of elements of legal discourse, like balancing, is likely to be influenced by the kind of debate they figure in – an idea also reflected in the 'contextualist' approach to intellectual history, discussed earlier. In addition, the identification of recurrent dilemmas and patters of discourse can be used for analytical purposes of selection and organization.[221] Focusing on debates that surface frequently is an efficient way of capturing an important part of the local meaning of legal arguments.

This Section takes the dilemma of law's relative formality, as described previously, as a central 'axis of opposition' along which elements of legal discourse may be organized. General tendencies within legal discourse to promote one or other extreme of this axis, or to mediate between oppositions, will be referred to here as 'legitimizing strategies'. Each of these strategies comes with their own distinctive vocabulary, rhetorical forms and standard arguments. These 'discursive environments', it is claimed, are a crucial element in the understanding of the local meaning of a particular form of reasoning, such as balancing,

The concept of 'legitimizing strategies', as it is used here, fulfils four closely related functions. The strategies embody, firstly, more detailed understandings of what counts as strongly legitimizing reasoning in a given setting than can be conveyed through the overarching concept of 'master ideals'. In particular, they highlight the conflicting approaches towards legitimization that any single, coherent 'master ideal' cannot bring to the fore. Secondly, they are intended to show that legitimization (and of course contestation) in legal reasoning take place at a range of 'levels' situated between on the one hand the wholesale defense of an entire legal or judicial order, and on the other the use of individual argument forms in specific cases. All these intermediary levels of generality, where actors aim to defend the use of a particular doctrine, or a specific conception of a fundamental right, for example, as part of their overall legitimization project, are encompassed by the notion of 'legitimizing strategies'. Thirdly, they mediate between the external perspective of the abstract common understanding of legitimacy and the internal perspective of the local 'master ideals' for strongly legitimating legal reasoning. And finally, in their nature as 'strategies', they are intended to mediate between the '*ends*' of legitimization – the ideals, hypothesized and situated of the legitimization problematic and the 'master ideals' - and the '*means*' of legitimization – the

[219] Jack M. Balkin, *The Hofeldian Approach to Law and Semiotics*, 44 U. MIAMI L. REV. 1119, 1131 (1990).
[220] *Cf.* Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS L. REV. 1, 48 (1986).
[221] *Ibid.*, 1134 (suggesting analytical benefits from a semiotics-based approach).

various forms of legal reasoning, including balancing, that may locally be thought to contribute to those ends.

2.5.3 'Formal-universalizing', 'substantive-contextualizing' and 'mediating-integrative' legitimizing strategies

The intimate relation between the legitimization problematic and the dilemma of the relative autonomy of the juridical sphere has been described above, in Section 2.4. It is important to note that this relationship is evident not only for this shared abstract understanding of legitimacy but also for the situated 'master ideals' for strongly legitimizing judicial reasoning set out in Section 2.2. The ideals for judicial activity as presented by actors from within the German and American systems, although expressed in slightly different language, were all constructed around a series of binary oppositions related to the ideas of closure and openness. This was true for Leibholz's tension between "the world as it is" (openness) and "the value of the legal rule" (closure and autonomy); Hesse's clash between "social reality" (openness) and "legal certainty and predictability" (closure and autonomy); and Cardozo's appeals to both "the advantages of consistence and uniformity" (closure and autonomy) and the desire "to do justice in the instance" (openness). Unsurprising though it may be, this substantiation of the role of this dilemma for the concrete contexts to be studied in the Chapters below is still an important step.

This study therefore relies principally on the vocabulary of formal and substantive in order to identify three broad sets of legitimizing strategies that can be detected in constitutional legal discourse. They are: (1) strategies designed to close-off or constrain[222] argumentative freedom, to uphold the autonomy of the juridical field, and to enhance the case-transcending, context-transcending or judge-transcending elements in adjudication (here called *formal-universalizing strategies*);[223] (2) strategies intended to amplify adjudication's sensitivity to extra-juridical factors, such as circumstance, context, purpose and practical reason (here called *substantive-contextualizing strategies*),[224] and; (3) strategies attempting to mediate between, or to integrate, the formal and the substantive, the particular and the universal, context and abstraction, openness and closure, *etc.* (here called *mediating-integrative strategies*).

For each strategy, the discussion below will pay special attention to typical argument forms and associated rhetorical moves. This way, the discussion of legitimizing strategies will serve as a systematized introduction to many of the key themes, vocabularies – and even some of the key participants – that figure in the debates covered in Chapters 3 to 8.

[222] For the language of constraint in the context of balancing, see, *e.g.*, Frederick Schauer, *Balancing, Subsumption, and the Constraining Role of Legal Text*, 4(1) LAW & ETHICS OF HUMAN RIGHTS 34 (2010). See also, critically, Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986).
[223] The reasons for adding the element of 'universalization' to the overarching label are set out *infra*, s. 2.5.4.5.
[224] The reasons for adding the element of 'contextualization' to the overarching label are set out *infra*, s. 2.5.5.

2.5.4 Formal-universalizing Strategies

2.5.4.1 Introduction

Formal-universalizing strategies are intended to maximize the autonomy of the juridical order. They are understood by participants to minimize the impact of extra-juridical 'background reasons',[225] and the influence of case-specific or judge-specific elements in judicial reasoning, and correspondingly to enhance case-transcending, context-transcending or judge-transcending elements. In various ways, these strategies seek to *close-off* judicial argumentative freedom. When used in critical mode, many of the charges associated with these strategies combine criticisms with respect to the *input* and *process* stages of decision making – such as ideological bias, intuitionism, irrationality and subjectivism –, with critiques of the *outcome* of decisions taken in this way – '*ad hocery*', inconsistency, '*khadi*-justice', legal uncertainty and threats to fundamental values such as democracy and the rule of law. A characteristic mid-century example of these charges can be found in Wolfgang Friedmann's summary of American constitutional scholars' insistent warnings "against the infusion into the process of judicial reasoning of too much ideology – or perhaps too much intuition – at the expense of the logical consistency that principled reasoning, consistent application of precedent and awareness of the separation of the tasks of the legislature and the judiciary are said to produce".[226] Such complaints and warnings are typical examples of what is meant under this heading.

2.5.4.2 Formalism and 'formal legal rationality'

One way of grouping many of these strategies together is under the broad label of formalism. At the heart of this notion, in Frederick Schauer's definition, "lies the concept of decisionmaking according to rule".[227] Schauer's description goes on to explain formalism's *modus operandi* - and its perceived weakness: "Formalism is the way in which rules achieve their 'ruleness' precisely by doing what is supposed to be the failing of formalism: *screening off* from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account".[228]

[225] *Cf.* FREDERICK SCHAUER, PLAYING BY THE RULES 109ff (1993).
[226] Friedmann, *Legal Philosophy and Judicial Lawmaking* (1961), 835.
[227] Schauer, *Formalism* (1988), 510.
[228] *Ibid.* (emphasis added). See also Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 8fn20 (1986) ("legal doctrine is 'formal' insofar as it sorts out cases according to one or a few highly general features (…) and in that sense abstracts cases from their concrete contexts (…)"). See also Duncan Kennedy, *Legal Formality*, 2 J. LEG. STUD. 351 (1973); Cass R. Sunstein, *Must Formalism be Defended*

The classic exposition of formally legitimizing legal reasoning is Max Weber's concept of 'formal legal rationality', which he defines as the "logical analysis of meaning".[229] One central element in Weber's conception is the idea of an inferential structure to validly relate legal conclusions to premises. Formality's 'ruleness', in Schauer's terminology, is therefore seen to lie in its internal logical structure. This form of reasoning is exemplified by the inferential structure of the syllogism, or deductive reasoning. Reasoning by analogy, too, is often thought to incorporate some kind of inferential scheme, and could therefore be said to have some degree of formal legitimizing force.[230] One relevant question for the meaning of balancing could therefore be the extent to which local participants judge this form of reasoning to have an inferential structure that is dependable in any comparable way.[231]

The 'ruleness', or compulsion of formal legitimizing strategies can, however, also come from sources external to the argument's logical structure. There may, for example, be powerful jurisprudential conventions that are understood to 'discipline' particular forms of reasoning. Again in the context of reasoning by analogy, for example; if it is understood that analogical arguments in law are constrained through "the application of trained, disciplined intuition" by lawyers, then they might, on that basis, be seen as offering a significant degree of formal legitimizing force.[232] Some further examples of this 'disciplining' kind of legitimization are discussed further below, under the heading of 'universalization'. They may also be seen as falling under the headings of 'substantive' legitimization in the Weberian sense, and of 'dialectical' reasoning – a subheading of 'mediating/integrative' strategies, discussed below.[233] The study of the meaning of balancing should be attentive to similar forms of external constraint and compulsion.

Empirically?, 66 U. CHI. L. REV. 636, 638 (1999) ("Thus understood, formalism is an attempt to make the law both *autonomous*, in the particular sense that it does not depend on moral or political values of particular judges, and also *deductive*, in the sense that judges decide case mechanically on the basis of preexisting law", emphasis in original).

[229] WEBER (1925, 1954), 63.

[230] Brewer, *Exemplary Reasoning* (1996), 965 (emphasis in original). (describing "analogy warranting rules" as rules that state "a *logical relation* between those characteristics of compared items that are known to be shared and those that are inferred").

[231] For a discussion of precisely this question – and affirmative answer – see Robert Alexy, *Discourse Theory and Fundamental Rights*, in ARGUING FUNDAMENTAL RIGHTS 15, 26 (Agustín José Menéndez & Erik Oddvar Eriksen, eds., 2006).

[232] Charles Fried, *The Artificial Reason of Law or: What Lawyers Know*, 60 TEX. L. REV. 35, 57-58 (1981)

[233] These 'disciplining' forms of reasoning also show some fit with 'substantive rationality' in Weber's scheme, although the division is not clear and it may be that 'rationality' (as opposed to 'irrationality') is the operative distinction here (rather than the 'formal' / 'substantive' opposition). See, *e.g.*, WEBER (1925, 1954, 205ff (discussing substantive rationality in law: "this type of legal education is bound by tradition. Its casuistry, …, is formal in the special sense that it must maintain, through re-interpretation the practical applicability of the traditional, unchangeable norms to changing needs. But it is not formalistic in the sense that it would create a rational system of law (…). [It involves] no logical systematization …"), cited in KRONMAN (1983), 77. See also at 92-93 (disciplined, 'priestly', law-making "is both rule-governed and hence formal …, and yet strongly oriented toward extra-legal goals"). On dialectical rationality in law, see *infra*, s. 2.5.6.3 and s. 4.3.2.2.

2.5.4.3 Vocabularies and rhetoric

Formalist perspectives on law and adjudication come with their own distinctive vocabularies, rhetorical forms and aggregated 'legal aesthetics'.[234] In Pierre Schlag's description, for example, formalist legal discourse is characterized by "bright-line rules, absolutist approaches, and categorical definitions".[235] Other tropes frequently used to express similar ideas are the imagery of binary divisions ('in/out', 'left/right', 'black/white'),[236] and the warning sign of the 'slippery slope'.[237] Strategies of closure and constraint also rely heavily on casting judicial decisions as flowing 'logically' from rules contained in legislation or precedents, if at all possible by a process of deduction, or else by analogical reasoning.[238] This means that it may be expected that discourse associated with these strategies will make frequent use of the language of *logic* and the vocabulary of *compulsion*.[239] All these rhetorical forms, finally, are offered in service of overriding ideals such as stability of the legal system, and of predictability, uniformity and coherence of judicial decisions; ideals that are also likely to show up explicitly in discourse within this mode.[240]

2.5.4.4 Historical tendencies and schools

The – abstract, analytical - label of 'formalism' is often associated with actual historical tendencies in legal thought and styles of adjudication during specific periods. The jurisprudential positions of the *Pandektenwissenschaft* and the *École d'exégèse* in Germany and France, and Classical Legal Thought, or Classical Orthodoxy, in the U.S., especially, were and are widely seen as the embodiment of certain core tenets of 'formalism'.[241] Currents in legal thought during later times, such as the Post-war revival of natural law in Europe and in the U.S., or, not surprisingly; the American 'New Formalism' movement of the 1990s, are also, to varying degrees, closely linked with the formalist label. Aristotle's dilemma, Schauer's definition and descriptions such as Schlag's, from the perspective of this study, are especially useful in showing how a family of underlying ideas – overcoming contextualized, particularist decisionmaking through rules, achieving closure and promoting compulsion and constraint – can encompass many of these diverse phenomena.

[234] *Cf.* Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1051 (2002).

[235] *Ibid.*

[236] *Cf.* Marie-Claire Belleau, *The Juristes Inquiets: Legal Classicism in Early Twentieth-Century France*, 1997 UTAH L. REV. 379, 409 (1997). Further examples of such binary divisions are discussed below, in Chapters 3, 5, 7 and 8.

[237] *Cf.* Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985).

[238] See the examples discussed in Chapters 3, 4 and 5.

[239] *Cf.* Friedmann, *Legal Philosophy and Judicial Lawmaking* (1961), 823 (referring to "recent writings on juristic logic" as "an almost desparate attempt to eliminate the ideological element" in the judicial process).

[240] Schlag, *The Aesthetics of American Law* (2002), 1055. It should be noted that these statements are all partial reflections of the master ideals set out above.

[241] See Chapter 3

2.5.4.5 Universalization

Because the 'formalism'-label is so commonly associated with the specific set of historical jurisprudential tendencies just mentioned, however, it is important to point out that the strategies referred to here in general terms as compulsive, constraining and context-transcending, need not fall within the ambit of 'formalism' as traditionally understood. This broader dimension is intended by the added designation of 'universalizing'-strategies. The combined heading of 'formal-universalizing' strategies, then, is meant to capture the whole range of constraining, context-transcending techniques and rhetorical modes, not all of which are generally associated with 'formalism' in a classical sense.

Examples of such techniques abound. Many varieties are concerned with constraining the input for judicial decision making. Taking this input to be fundamental rights that are in some way absolute is one way of overcoming particularity and context.[242] Insisting that decision makers should be categorically prohibited from taking certain factors into account when dealing with individual cases (Joseph Raz's 'exclusionary reasons'),[243] or that judges should not follow their individual preferences but should look at "external criteria, found in the conditions required for successful group living" (Lon Fuller) or the "maturing of collective thought" (Henry Hart), too, are examples of attempts to transcend the particular circumstances of individual cases and the predilections of individual judges.[244] Other varieties might be more concerned with the process of legal reasoning and insist on general rules for the conduct of deliberations (Robert Alexy's theory of legal argumentation, for example).[245] References to 'principled decision making' too,[246] can often be read as an indication of a wish to go beyond the specifics of individual cases and the predilections of individual judges.[247] In Herbert Wechsler's canonical formulation, deciding cases by reference to 'neutral principles' means deciding "by standards that transcend the case at hand".[248] Such general, neutral principles, in Wechsler's vision, are antithetical to "*ad hoc* determinations of (...) narrow problems".[249] This particular brand of formal-universalizing strategy will be discussed in more detail in Chapter 7.

[242] Examples are discussed in Chapters 5, 6 and 7.
[243] JOSEPH RAZ, PRACTICAL REASON AND NORMS 73 (1975).
[244] Lon L. Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376, 379 (1946).
[245] See, *e.g.*, ROBERT ALEXY, THEORIE DER JURISTISCHEN ARGUMENTATION (1978).
[246] For an intellectual history of the idea of 'principled decision making', see Duxbury, *Faith in Reason* (1993). See also *infra*, s. 7.2.2.2.
[247] *Cf.* Fuller, *Reason and Fiat in Case Law* (1978), 378. But see *infra*, s. 2.5.6.3 on the intermediary status of principles.
[248] Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 17 (1959). On the influence of Wechsler's essay, see Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982 (1978), and further *infra*, s. 7.2.2.2.
[249] Wechsler, *Neutral Principles* (1959), 31. See also the formula from Hart & Sacks', '*The Legal Process*', quoted in Duxbury, *Faith in Reason* (1993), 662 (the judge is "obliged to resolve the issue before him on the assumption that the answer will be the same in all like cases").

2.5.4.6 Sociological concepts of legitimization

It should be re-emphasized that these strategies of closure, constraint, or universalization, like all other legitimizing strategies discussed here, are sociological concepts. That is to say that their force is dependent on beliefs and practices within the relevant interpretive community. Therefore, if the members of a particular legal culture *believe* that a deep connection exists between, say, deduction and legal justification, then syllogistic reasoning will have a high degree of (internally formal) legitimizing force.[250] If, conversely, 'logically formal rationality' has been to some degree "disenchanted", then the legitimizing force of this type of argument will be correspondingly lower.[251] Similarly, drawing on the example of the study of analogical reasoning cited earlier; if members of the local interpretive community do not believe in 'analogy warranting rules' or any equivalents, but see analogical reasoning rather as a "phantasm" devoid of rationality,[252] the formal legitimizing force of this type of argument will obviously be low. The same, it will be argued later, holds for the legitimizing force of balancing as argument.

2.5.5 Substantive-Contextualizing Strategies

2.5.5.1 Introduction

This Section groups together as substantive-contextualizing strategies all approaches designed to *open-up* judicial reasoning, to "context, judgment, and community";[253] to particulars and substantive ideals – in short: *to substance*. Among contributions advocating these strategies, *particularism* serves as common denominator for a range of virtues such as reasoning at lowered levels of abstraction,[254] attention to context and individual circumstances,[255] 'thinking small',[256] deciding 'modestly' and

[250] *Cf.* Brewer, *Exemplary Reasoning* (1996), 997.
[251] 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, 1042 (2003). Kennedy writes: "[The question of validity] is a question of the meaning of the existing norm system - but only because that is the historically current mode of legal thought, namely [logically formal legal rationality, or LFR]. This question has a completely different meaning, or no meaning at all, in other systems and in other periods".
[252] For this qualification in the American context, see Larry Alexander, *Bad Beginnings*, 145 U. PA. L. REV. 57, 87 (1996).
[253] Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1334-35 (1988). Farber lists intuitionism, pragmatism, prudence, institutionalism and practical reason as united in this goal.
[254] *Cf.* Courtland H. Peterson, *Particularism in the Conflict of Laws*, 10 HOFSTRA L. REV. 973, 978 (1982) ("American law in this century, abetted if not inspired by changing methodologies in American law schools, has seen an incremental but nonetheless dramatic movement towards acceptance of lowered levels of abstraction. (…) On its face this movement has been highly particularistic in character (…").
[255] *Cf.* Schauer, *Harry Kalven and the Perils of Particularism*, 56 U. CHI. L. REV. 397, 398-399fn3 (1989) ("A focus on contextualism, particularism, and case- specific common law method seems to be an increasingly important (…) way of looking at First Amendment issues").

'incrementally',[257] eschewing the 'imperialism' of so-called 'objectivity',[258] and moving away from 'general theories' in favour of more 'localized knowledge'.[259] Other frequently invoked labels are those of *pragmatism*, *instrumentalism* – in a broad sense of legal reasoning based on purpose -, and appeals to '*substantive reasons*' and to *practical reason*. The rallying cry of these approaches has long been Justice Holmes's famous aphorism that "general propositions do not decide concrete cases"; and that decisions will, therefore, depend "on a judgment or intuition more subtle than any articulate major premise".[260]

These two dimensions of 'contextual', or 'particular', and of 'substantive' - in the sense of 'purposive' or of 'related to extra-legal goals' -, are conflated in Weber's use of the term 'substantive'. In his scheme, the crucial distinction is rather between *substantively rational* and *substantively irrational* legal reasoning. Substantively rational reasoning, in Weber's terminology, is reasoning on the basis of general norms of "ethical imperatives, utilitarian and other expediential rules, and political maxims, all of which diverge from the formalism of … logical abstraction".[261] Legal reasoning is substantively irrational when decisions are "influenced by concrete factors of the particular case as evaluated upon an ethical, emotional, or political basis rather than by general norms".[262] As mentioned in Chapter 1, these terms do not strictly speaking define substantive, but they do give a clear picture of many of the central elements. They may be followed with two important caveats. First, Weber's predicate 'irrational' does not mean that particularistic or heavily contextualized legal reasoning cannot locally be understood to have a strong legitimizing force. And second, Weber's substantive rationality has an important dimension of ruleness, and therefore of formality in the scheme as followed here.[263]

2.5.5.2 Pragmatism, instrumentalism and Sociological Jurisprudence

The primary example, both in chronological terms and in terms of broader influence, of a current in legal thinking closely related to ideas of particularity, context and openness is pragmatism. In intellectual histories of American jurisprudence, pragmatism is generally traced back to the philosophical writings of William James and

[256] Kenneth L. Karst, *The First Amendment and Harry Kalven: An Appreciative Comment on the Advantages of Thinking Small*, 13 UCLA L. REV. 1, 1, 11-12 (1965) (describing demands for "realistic and particularized justifications" for invasions of constitutionally protected rights).
[257] Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996).
[258] Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Michelman, *Traces of Self-Government* (1986).
[259] Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212 (1994). See also JEROME FRANK, LAW AND THE MODERN MIND 6-7 (1930) ("Much of the uncertainty of law is not an unfortunate accident: it is of immense social value").
[260] USSC *Southern-Pacific v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes J., dissenting). Holmes himself did believe in the importance of constraining particularism through conceptualism and doctrine. The main body of his work, therefore, would be more appropriately classified as 'mediating/integrating'.
[261] WEBER (1925, 1954), 63ff.
[262] *Ibid.*, 63.
[263] *Cf.* WEBER (1925, 1954), 205ff; KRONMAN (1983), 77ff.

John Dewey, among others, at the beginning of the century.[264] For these Pragmatists with a capital 'p', all thinking was "contextual and situated", rather than abstract and generalized.[265] Moral choices especially, these philosophers asserted, should be seen as each having a unique character.[266]

Elements of this philosophical pragmatism influenced the jurisprudential outlook of Holmes, Pound and the Sociological Jurisprudes in the first decades of the century.[267] Roscoe Pound, in his famous 1908 article critizing *'Mechanical Jurisprudence'* (discussed in detail in Chapter 3), wrote:

> "The sociological movement in jurisprudence is a movement for pragmatism as a philosophy of law; for the adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles; for putting the human factor in the central place and relegating logic to its true position as an instrument".[268]

Sociological Jurisprudes, in Pound's description, "urge that legal precepts are to be regarded more as guides to results which are socially just and less as inflexible molds".[269] One of the 'cardinal points' of their doctrine was that it would be better to "work out such rules as may clearly govern *particular facts or relations* without being over-ambitious to lay down *universal propositions*".[270] The same ideas can be found in the contemporaneous work of Eugen Ehrlich in Germany, who called for a study of 'living

[264] This – American – connection is somewhat controversial. Compare Robert S. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought: a Synthesis and Critique of our Dominant General Theory about Law and its Use*, 66 CORNELL L. REV. 861, 862 (1981) (referring to 'pragmatic instrumentalism' as the "only indigenous [U.S.] theory of law", with Albert Kocourek, *Libre Recherche in America*, in RECUEIL D'ÉTUDES SUR LES SOURCES DU DROIT EN L'HONNEUR DE FRANÇOIS GÉNY II 459, 463 (1934) (claiming that "[t]he philosophy of pragmatism is as well understood in Europe and America", and noting that this factor can be left out of consideration when discussing differences between European and American legal thought). See also KARL LARENZ, METHODENLEHRE DER RECHTSWISSENSCHAFT 46 (6th ed., 1991) (referring to Rudolf von Jhering's work as a "'*pragmatische*' Jurisprudenz", quotation marks in original). This thesis follows the argument that the philosophy of pragmatism did have some distinct impact in U.S. legal thought. See, *e.g.*, the quotation of Robert Ludlow Fowler - "The greatest contribution of American thought to the philosophy of the world is that known as Pragmatism. It is highly probable that the great American philosophy of law will grow out of a modified pragmatism" -, in Roscoe Pound, *The New Philosophies of Law*, 27 HARV. L. REV. 718, 731 (1914). See also *infra*, s. 8.3.
[265] Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 798 (1989).
[266] *Cf.* JOHN DEWEY, RECONSTRUCTION IN PHILOSOPHY 132 (1920), cited in Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1600 (1990) (referring to "Deweyan particularism", at 1601). See also Lon L. Fuller, *Legal Fictions*, 25 ILL. L. REV. 877, 879 (1930) ("American Pragmatism has always insisted upon the importance of details and the dangers of generalities").
[267] *Cf.* Summers, *Pragmatic Instrumentalism* (1981), 862 ("Philosophical pragmatism, sociological jurisprudence, and certain tenets of legal realism coalesced to form America's only indigenous theory of law"). In the course of the 1980s, in part under influence of new developments in philosophical pragmatism, elements of pragmatism again became popular within American legal thought. See, *e.g.*, Farber, *Legal Pragmatism and the Constitution* (1988), 1334-35 (noting a recent "movement away from grand theory").
[268] Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 609-610 (1908). Pound's work is discussed further *infra*, s. 3.3.4.
[269] Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 489, 516 (1912).
[270] Pound, *Mechanical Jurisprudence* (1908), 608 (emphasis added). See for a later summary Summers, *Pragmatic Instrumentalism* (1981), 864 (highlighting pragmatism's emphasis on "the primacy of context in arriving at law's ends and means, stressing time, place, circumstance, and particular wants and interests rather than ideology, abstract theory [and] principle").

law', through a focus "*zunächst auf das Konkrete, nicht auf das Allgemeine*" – first on the concrete, not on the general.[271]

2.5.5.3 Case-specificity, judge-specificity

Pragmatism's call for attention to context and particulars, sometimes coupled with insistence on the importance of the personal qualities of individual deciders – judges -,[272] has been reflected in various strands of jurisprudence, both in Europe and in the U.S. In terms of 'Schools', on the Continent, the School of 'Free Law' – the *Freirechtsschule* – advocated decisions made "in light of *concrete evaluations* rather than in accordance with formal norms".[273] Some Legal Realists in the US argued that cases should be decided upon consideration of what the deciding judge would consider to be "just and fair under the particular circumstances which happened to be present".[274]

A number of additional themes in legal thinking throughout the twentieth century also exhibit pragmatism's earlier focus on particulars and context.[275] Among these, instrumentalism, as a jurisprudential outlook, is especially polyvalent and hard to define.[276] If instrumentalism does have a central meaning, however, it is that of law as tool, as a means to an end.[277] Using law instrumentally will normally depend on particularity and context. How else can one evaluate the likely costs and benefits of proposed interpretations than through close attention to "the particular details of problems and to the effects of the solutions"?[278] Many versions of the similarly ambivalent, and possibly even broader, label of consequentialist reasoning too, depend on the evaluation of potential outcomes in individual cases.[279] In Post-War Europe, finally, the influential jurisprudence of 'topics' (*Topische Jurisprudenz*), popularized by Theodor Viehweg has been characterized by a sceptic stance towards legal dogmatics

[271] EUGEN EHRLICH, GRUNDLEGUNG DER SOZIOLOGIE DES RECHTS 405 (1913).
[272] Eugen Ehrlich, *Judicial Freedom of Decision: Its Principles and Objects*, in SCIENCE OF LEGAL METHOD: SELECT ESSAYS BY VARIOUS AUTHORS 65, 73, 75 (1917) ("There is no guaranty [*sic*] of justice except the personality of the judge"; "Each application of a general rule to a particular case is necessarily influenced by the personality of the judge who makes it" [*sic*]).
[273] MAX WEBER, MAX WEBER ON LAW IN ECONOMY AND SOCIETY 309 (Max Rheinstein ed., Max Rheinstein & Edward Shils, trans. 1954) (1925). See also Clarence Morris, *Law, Reason and Sociology*, 107 U. PENN. L. REV. 147, 155 (1958).
[274] Hutcheson, *The Judgment Intuitive: The Function of the Hunch in Judicial Decision*, 14 CORNELL L. Q. 274, 283 (1928).
[275] Feminist legal thought is a prime example. Feminist jurisprudence shares pragmatism's "commitment to finding knowledge in the particulars of experience" and a preference for "concreteness, situatedness [and] contextuality". See Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L REV. 1699, 1706 (1990).
[276] See, *e.g.*, Vermeule, *Instrumentalisms* (2007), 2113 ("there is no such thing as 'instrumentalism'. There is only a variety of instrumentalisms, offered in different theoretical contexts for different purposes"; and at 2114: "instrumentalism is intrinsically plural").
[277] Instrumentalism as an outlook is closely connected to pragmatism. See, *e.g.*, the reference to the pragmatist philosopher William James in Pound, *Mechanical Jurisprudence* (1908), 608: "in the philosophy of today, theories are 'instruments, not answers to enigmas, in which we can rest'").
[278] Minow & Spelman, *In Context* (1990), 1610. See also at 1598-99 ("justice is more likely to be served when judges attend to the specific contexts in which their judgments are rendered").
[279] *Cf.* Vermeule, *Instrumentalisms* (2007), 2115.

(*Systemskepsis*) and an insistence on 'problem-thinking' led by the facts of individual cases.[280]

2.5.5.4 Institutional conditions and societal implications

Arguments in favour of situated, particularized legal reasoning have also been developed with reference to the institutional conditions and societal implications of judicial decision making, especially in the context of modern pluralist societies. In the U.S., Cass Sunstein, in particular, has warned of the dangers of reasoning and deciding on high levels of generality.[281] As Sunstein explains, judges in pluralist societies may find it more difficult to agree on, and to obtain popular assent for, broad statements of law. In such a setting, "when closure cannot be based on *relative abstractions*, the legal system is often able to reach a degree of closure by focusing on *relative particulars*".[282] In the German context, Karl-Heinz Ladeur and others have argued that Western societies have become too diverse and too complex for an approach to law based on formality and 'general decisions'.[283] The 'pluralization' (*Pluralisierung*) prevalent in these societies can only be accommodated through particularized, 'situational arrangements of values' ('*das situative Arrangement von 'Werten*') supported by a 'flexible, informal' conception of law ('*flexibeles informelles Recht*').[284] Even if judges, in these complex societies, were to be able to agree on broad, general statements of law, such statements would be unlikely to be adequate. In Sunstein's view "[a]ny simple, general, and monistic or single-valued theory of a large area of law", for example that of free speech, "is likely to be too crude to fit with our best understandings of the multiple values that are at stake in that area".[285]

2.5.6 Mediating-integrative strategies

2.5.6.1 Introduction

In addition to perspectives predominantly advocating either increased formality/universality or attention to the substantive, American and European legal thought also show distinct lines of contributions that emphasize the importance of *mediating* between, *integrating*, or even *transcending* these two sets of opposite approaches and values. In many ways, these approaches are most directly aligned with the 'master ideals' mentioned earlier. The central idea of these contributions is, as a leading mid-

[280] THEODOR VIEHWEG, TOPIK UND JURISPRUDENZ: EIN BEITRAG ZUR RECHTSWISSENSCHAFTLICHEN GRUNDLAGENFORSCHUNG (1953). For critique, see KARL LARENZ, METHODENLEHRE DER RECHTSWISSENSCHAFT 142 (3rd ed., 1975).
[281] SUNSTEIN (1996), 35-48.
[282] Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1737 (1995) (emphasis added).
[283] Karl-Heinz Ladeur, *Abwägung – ein neues Rechtsparadigma?*, 69 ARSP 463, 473 (1985).
[284] *Ibid.*, 472-473.
[285] SUNSTEIN (1996), 43.

century American commentator on the First Amendment has put it, the insistence that "the generalizing and particularizing elements in any intellectual activity must always join forces if they are to be effective. To think without facts is as ineffectual as to think without principles".[286]

2.5.6.2 Stability and change, legal certainty and social responsiveness

Two of the earliest American authors to deal prominently with this theme of mediation between extremes are Benjamin Cardozo and Roscoe Pound.[287] One dichotomy both authors refer to frequently is between stability and legal certainty on the one hand and flexibility and change on the other. For Pound, the opposition was fundamental. "All thinking of law", he wrote, "has struggled to reconcile the conflicting demands of the need of stability and of the need of change".[288] Cardozo devoted his book *The Growth of the Law* (1924) to precisely this problem. Because, for Cardozo, there was "danger in perpetual quiescence as well as in perpetual motion", it was clear that "a compromise must be found".[289] To achieve this, Cardozo turned to the formalizing-universalizing effect of invocations of 'principle', alluded to earlier. Cardozo's subsequent suggestion, that what was needed was a 'principle of growth', is an ingenious attempt to simultaneously capture the benefits of formality and stability, and those of flexibility and change.[290] While the law changes – grows, in Cardozo's terms –, the principle directing this growth remains stable. Pound, for his part, argued for "reason and juristic science [to] cooperate with judicial experience in discovering and defining the general standards which are to be applied liberally according to the circumstances of each case".[291] This combination of 'general standards' to be applied to 'the circumstances of each case', too, is an explicit attempt to mediate between what are seen as the conflicting goods of generality and particularity.

Another, related, important dichotomy for both Cardozo and Pound, is between the legal certainty and uniformity associated with systematic, self-referential, conceptual legal thinking, and the social responsiveness of more open, teleological forms of reasoning. Again, the solution advocated by both authors is a compromise, found this time by translating the benefits of either side of the opposition – stability *vs.* responsiveness – in a way that makes them commensurable. Pound's solution is to frame attention to the circumstances of *individual* cases as a *social* good. He argues that judicial

[286] Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 251 (1961). Meiklejohn's position in the 'balancing *vs.* absolutes' debate on the First Amendment will be discussed below, in Chapters 6 and 7.
[287] For Pound, see also *The Theory of Judicial Decision*, 36 HARV. L. REV. 940, 940-942 (1923) (discussing the 'deciding' and 'declaring' functions of the Anglo-American judiciary).
[288] Roscoe Pound, *The Progress of the Law: Analytical Jurisprudence*, 1914-1927, 41 HARV. L. REV. 174, 174 (1927).
[289] CARDOZO (1924), 17.
[290] *Ibid.* See also at 63 (principle of growth as a "rationalizing process").
[291] Roscoe Pound, *Theories of Law*, 22 YALE L.J. 114, 149-150 (1912). Pound also distinguishes between different areas of law in which the relative emphasis on 'rule' or 'discretion' could be different.

decisions cannot ignore a case's "special aspects and exclude all individualization in application without sacrificing the social interest in the individual life".[292] Cardozo, for his part, translates the ideals of *legal certainty* into those of *social welfare*, arguing that "[e]ven if it be true that social welfare is the final test, certainty and order are themselves constituents of the welfare which it is our business to discover".[293]

2.5.6.3 Reasoning and dialectics, principles and rights

Since the Second World War, three of the most influential sets of mediating strategies, in both Europe and the US, have been those of the working out of standards for *practical reasoning* and public deliberation, the promotion of *'principled' legal reasoning* as a standard for the justification of decisions,[294] and the rise of fundamental rights reasoning.

(1) The 'rediscovery' of practical reason is a dominant theme in legal thought from the 1960s onwards, primarily in Europe but with a distinct impact on American thinking.[295] A number of influential theorists, from Chaim Perelman in Belgium to Josef Esser and later Robert Alexy in Germany, have been concerned with developing 'new' norms for deliberation about normative problems. Rejecting as 'dogmatic' attempts "to confine the term reasoning to logical demonstration",[296] these scholars, in different ways, tried to make reasoning about individual cases subject to general norms. For Perelman, generality and particularity could be combined through a resurrection of the Aristotelian concept of 'dialectical reasoning' and the insistence on interpersonal agreement as a criterion for validity and truth.[297] Esser, for his part, advocated mediation between the normative intuitions of individual judges and the general values held by the communities in which they function.[298] The influence of these ideas can clearly be seen in work by German constitutional legal scholars of the early 1960s which calls for the need to "judge

[292] ROSCOE POUND, PHILOSOPHY OF LAW 53 (1943).
[293] CARDOZO (1924), 79. *Cf.* G.K. CHESTERTON, ORTHODOXY 50 (1908) ("Pragmatism is a matter of human needs; and one of the first of human needs is to be something more than a pragmatist").
[294] The two currents are intimately related. See, on the role of Ronald Dworkin in promoting one strategy (principles) and, thereby, in provoking thinking about the other (practical reasoning), Neil MacCormick, *Contemporary Legal Philosophy: The Rediscovery of Practical Reason*, 10 J. LAW & SOC'Y 1, 9 (1983).
[295] For the term 'rediscovery', see *Ibid.*, at 1, who calls this "the most exciting development" in legal theory of the 1960s and 1970s. See also Marijan Pavcnik, *Legal Decisionmaking as a Responsible Intellectual Activity: A Continental Point of View*, 72 WASH. L. REV. 481, 481 (1997) (dialectical reasoning has been at the forefront of European thinking about legal argumentation).
[296] H.L.A. Hart, in his *Preface* to the English translation of Perelman's essays in PERELMAN (1963), x.
[297] For Aristotle, dialectical reasoning was concerned with combining general laws and particular experiences in practical reasoning.
[298] ESSER (1970), Ch. 5. Esser argued that judges should try to mediate between abstract dogmatics and 'Fallkonfrontierung' – engagement with individual cases. See ESSER (1970), 114. See on Esser also LARENZ (1975), 132. See also the Review by L. V. Prott, *Updating the Judicial 'Hunch': Esser's Concept of Judicial Predisposition*, 27 AM. J. COMP. L. 461, 465 (1978) ("Far from indulging in the excesses of the *Freirechtsschule*, [Esser] has stressed the importance of doctrine in guiding the judge and in enabling himi to reconcile the preferred solution with the existing body of law. (...) This balancing of legal doctrine and judicial pragmatism, and the attribution of a fitting place to each in the legal system, makes Esser's work very attractive").

the particular in light of the general, and vice-versa",[299] or for a give-and-take between system and particularity.[300]

This leaves two broad, related mediating/integrative strategies of the Postwar period to be discussed. These are the promotion of principled decision making and the rise of fundamental rights reasoning. Where these fundamental rights are understood *as* principles, as in much of mainstream Western legal literature, the two approaches show their overlap most clearly.

(2) Calls for 'principled' adjudication are a hallmark of American and European constitutional legal writing since the Second World War. These calls show an extraordinary diversity, but many share an important 'mediating' trait in that they emphasize both individualized consideration for cases and general rules, to follow from and inform such consideration. In the same way, many advocate both judicial creativity as well as the bounded nature of the judicial function. One of the most influential American writers to defend principled reasoning, Henry M. Hart, wrote in this vein (in the late 1950s) that the role of the US Supreme Court was to fulfil "the creative function of discerning afresh and of articulating and developing impersonal and durable principles of constitutional law".[301] In combining individual creativity in decision making with impersonal constraints on that decision making, Hart's principles are a primary example of an integrative approach to legal reasoning.

(3) Finally, many varieties of modern rights thinking have strong mediating/integrative characteristics. Of these theories, Ronald Dworkin's probably has been the most influential.[302] By insisting on a single 'right answer' for every individual case, Dworkin charges his Herculean judge with the particularistic task of taking all relevant circumstances of each case into account. However, by simultaneously promoting a difference in kind between reasons of 'policy' and those of 'principle', and through an understanding of 'rights' as reasons that may 'trump' competing considerations, Dworkin's approach clearly contains elements that attempt to avoid "extreme particularism".[303]

2.5.7 Interim conclusion

The 'legitimizing strategies' just outlined are systematized forms of some basic types of 'moves' made in legal discourse in order to satisfy local 'master ideals' for strongly legitimizing judicial reasoning. These moves can be carried out on varying levels of generality – from defences of a particular conception of the constitutional legal order as a whole, via more detailed understandings of the role of courts or of particular areas of law, to choices for a specific interpretation of an individual norm. These strategies constitute the discursive environments within which the means used for their implementation – individual elements of legal discourse, like balancing-based reasoning – will take on meaning. As such, the concept of legitimizing strategy is meant to mediate between external (systematization) and internal (local 'master ideals') perspectives; between high ('master ideals') and lower (specific debates and arguments) levels of generality, and between the ends (again: the 'master ideals') and the means (specific concepts and arguments, like balancing) of legitimization.

2.6 CONCLUSION

This Chapter has approached the study of the meaning of balancing as discourse as an investigation of the 'legitimizing force' of balancing as argument. The legitimizing force of any legal argument is the contribution this argument is locally understood to be able to make to the justification of judicial decisions and to the legitimization of the institution of constitutional judicial review. This force, it has been argued, is inherently relative, contingent and multi-dimensional. It is *relative* to that of alternative arguments and counter arguments; *contingent* because assessed on the basis of locally prevalent criteria; and *multi-dimensional* in the sense that there is a variety of reasons that legal actors may have in any given situation for using or rejecting a particular form of argument.

The concept of legitimacy forms the linchpin in the comparative project undertaken here. Legitimacy, and its derivative 'legitimizing force', can fulfil this function because of its dual nature as a shared abstract ideal and a local set of specific demands. These two dimensions form the basis for a method of comparison that moves between different levels of abstraction, internal and external perspectives, and the analysis of ends and means of legitimacy. Beginning with a highly abstract, external understanding of legitimacy in terms of the formal *vs.* substantive opposition, the scheme moves through broad, local understandings of the requirements of legitimacy ('master ideals'), to systematized, disaggregated renditions of the basic components of these ideals and the ways in which they may be satisfied ('legitimizing strategies'). The resulting conceptual grid distinguishes three different types of legitimizing strategy: *formal-universalizing*, *substantive-contextualizing*, *mediating-integrative*. These categories and their surrounding debates and terminology will serve as the basis for the detailed case studies of balancing in constitutional rights reasoning in Chapters 4 to 7, and for the construction of two paradigms of balancing in Chapter 8.

[299] Schneider, *Prinzipien der Verfassungsinterpretation* (1963), 39 ("*das Besondere im Licht des Allgemeinen, und auch umgekehrt, zu deuten*"). For further discussion, see *infra*, s. 4.3.2.
[300] Ehmke, *Prinzipien der Verfassungsinterpretation* (1963), 56. The work of Jürgen Habermas in Germany and Frank Michelman in the U.S. is heavily concerned with this theme. For a comparative analysis, see Stephen M. Feldman, *The Persistence of Power and the Struggle for Dialogical Standards in Postmodern Constitutional Jurisprudence: Michelman, Habermas, and Civic Republicanism*, 81 GEO. L.J. 2243 (1992-1993).
[301] Hart, *The Time Chart of the Justices* (1959), 99.
[302] *Cf.* RONALD M. DWORKIN, A MATTER OF PRINCIPLE (1985).
[303] *Cf.* Frederick Schauer, *The Jurisprudence of Reasons*, 85 MICH. L. REV. 847, 867 (1987) ("Dworkin's jurisprudence (...) is not a jurisprudence of particulars").

PART II

GENEALOGIES 1: CONCEPTS AND INTERESTS

CHAPTER 3

BALANCING'S BEGINNINGS

3.1 INTRODUCTION TO PART II

Between roughly 1900 and 1930, academic lawyers and judges in both the United States and in Europe began describing law and lawmaking in terms of *balancing* and *weighing* of *interests*. Both in the United States and in Europe, this new perspective arose out of a critique of apparently very similar orthodoxies: the formalism and conceptualism of 'classical legal thought'. In the U.S., this classical model consisted of a combination of 'Langdellian' legal science in private law and the *laissez-faire* constitutional judicial review that is seen to have culminated in the *Lochner*-period.[304] In Europe, classical orthodoxy was the '*Pandektenwissenschaft*' of Puchta and Windscheid and the '*Begriffsjurisprudenz*' – the 'jurisprudence of concepts' –[305] in private and public law more generally. The balancing-based alternative was developed by François Gény in France, Philipp Heck and his fellow members of the school of *Interessenjurisprudenz* ('Jurisprudence of Interests') in Germany and Roscoe Pound and other 'Sociological Jurisprudes' in the United States.[306]

Both in criticizing classical legal thought and in developing alternative visions, including those turning on balancing, American scholars drew heavily upon Continental ideas.[307] These interrelationships have led many later commentators – and contemporary participants - to emphasize commonalities in classical orthodoxy itself, in its critiques and in the projects for its replacement. With regard to similarities between German and U.S. classical orthodoxies, Lon Fuller commented in the late 1940s on how Harvard Dean Langdell's thought and method resembled "in striking measure those of his German counterpart, Windscheid," in the sense that "both practiced a peculiar geometric brand of legal reasoning" and "postulated a gapless system of pre-existing law, from which the solution for every new case could be obtained by deduction".[308] As to the critique of this

[304] USSC *Lochner v. New York*, 198 U.S. 45 (1905), discussed further *infra*, s. 3.2.5. 'Langdellian' legal science is named after Professor Christopher Columbus Langdell, first Dean of Harvard Law School, who is generally seen as the founder of, and archetype for, formal conceptual legal analysis in the US. See Thomas C. Grey, *Langdell's Orthodoxy*, U. PITT. L. REV. 1 (1983); NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 11 (1995).

[305] For this translation, see Philipp Heck, *The Formation of Concepts and the Jurisprudence of Interests* (1932) in THE JURISPRUDENCE OF INTERESTS 102 (Magdalena Schoch, ed., 1948). Roscoe Pound (POUND (1959), 91) translates Jhering's '*Begriffsjurisprudenz*' as "jurisprudence of conceptions".

[306] The term '*Interessenjurisprudenz*' first appears in Philipp Heck's 1905 article '*Interessenjurisprudenz und Gesetzestreue*', 1905 DJZ 1140 (1905) ('*The Jurisprudence of Interests and Fidelity to Law*'). For an overview of 'sociological jurisprudence' in the U.S., see G. Edward White, *From Sociological Jurisprudence to Legal Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972). Although the overall focus of this Thesis is on constitutional methodology, much of the materials used for the European side of the story told here are taken from private law, due to the general absence of constitutional adjudication and theory materials from the relevant period. This Chapter will argue that this fact in itself is highly significant for current understandings of constitutional judicial method.

[307] The influence of continental writings on American jurisprudence of this period is an under-analysed theme. For a helpful overview, see James E. Herget & Stephen Wallace, *The German Free Law Movement as the Source of American Legal Realism*, 73 VA. L. REV. 399 (1987); James E. Herget, *The Influence of German Thought on American Jurisprudence, 1880-1918*, in THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD 1820-1920 (Mathias Reimann, ed., 1993); WOLFGANG FIKENTSCHER, METHODEN DES RECHTS IN VERGLEICHENDER DARSTELLUNG, BAND II: ANGLO-AMERIKANISCHER RECHTSKREIS (1975). None of these contributions devote any extended attention to the topic of balancing.

[308] Lon L. Fuller, *Introduction*, in THE JURISPRUDENCE OF INTERESTS xix (Magdalena Schoch, ed., 1948).

classical orthodoxy, one of the key participants in the early debates, Roscoe Pound himself, by 1913 observed "[a] reaction from the (…) jurisprudence of conceptions" that had been "in progress the world over".[309] And with regard to the balancing-based replacement project, finally, the German *émigré* professor Wolfgang Friedmann, wrote early on of a "strikingly similar development of an *Interessenjurisprudenz* by American lawyers against the background of a very different legal system".[310] It is this long tradition of emphasis on similarities that forms the backdrop to the study undertaken here.

This Chapter begins the genealogical project set out in Chapter 1 with a comparative investigation of *balancing's beginnings* – its intellectual origins and early critiques. Specifically, the Chapter aims to qualify the longstanding view that both classical orthodoxy and the balancing-based replacement project in German and U.S. legal thought were essentially similar. This argument is developed through a comparative historical analysis of the emergence of one mode of legal discourse – the 'free scientific research' of Gény and the balancing of interests of Heck, Pound and others – as part of a critique of, and as an effort to replace, another – the discourse of deduction and categorization of Classical Legal Thought.[311] While American studies have long framed this transition as a wholesale *replacement* of the formalism of Classical Legal Thought by a balancing-oriented 'Realist' modernity, this Chapter argues that such a narrative distorts developments in Europe, while in addition failing to account for some important vestiges of classically-inspired thinking in modern U.S. legal thought.

In summary form, the argument of this Chapter is that American legal scholars (and some judges) took the methods of French and German *private law scholarly critique* and turned it into a *critique of American constitutional adjudication*. In this process, they modified the original European ideas, most notably those of François Gény. In doing so, they laid the foundations for an intellectual association between method and substance that has exercised a pervasive influence in American legal thinking throughout the twentieth century.

The Chapter proceeds as follows. Section 3.2 briefly discusses late nineteenth century classical legal thought and its associated formalist methodologies of 'subsumption' – or 'deduction' - and 'categorization' for France, Germany and the U.S. This Section argues that a complex set of factors including, primarily, the presence of constitutional judicial review in America meant that formalism assumed a fundamentally

[309] Roscoe Pound, *Justice According to Law*, 13 COLUM. L. REV. 696, 708 (1913); Duncan Kennedy & Marie-Claire Belleau, *François Gény aux États-Unis*, in FRANÇOIS GÉNY, MYTHE ET RÉALITÉS 304 (Claude Thomasset, Jacques Vanderlinden & Philippe Jestaz, eds., 2000) (noting 'remarkable' similarities in the critique of classical orthodoxy as between France and the U.S.).

[310] WOLFGANG FRIEDMANN, LEGAL THEORY 336 (1st ed. 1944, quotation from the 5th ed. of 1967). See also Wolfgang Friedmann, *Legal Philosophy and Judicial Lawmaking*, 61 COLUM. L. REV. 821, 828 (1961) ("A comparative analysis of the thought of common law jurists such as Pound and Cardozo with that of Continental jurists such as Gény or the German representatives of '*Interessenjurisprudenz*', … reveals striking similarities"); CHESTER JAMES ANTIEAU, ADJUDICATING CONSTITUTIONAL ISSUES 123-124 (1985) (discussing 'balancing' in the work of Von Jhering, Holmes and Pound).

[311] The terms 'deduction' and 'subsumption' (syllogistic reasoning) are used mostly in Europe, while American debates focus on 'categorization'.

different significance there, as compared to its meaning in Europe. In short, the argument is that because of the uses to which it was put, the charge of excessive legal formality became much more closely associated with politics in the U.S. than in Europe. Section 3.3 describes the different projects to replace classical methodology by balancing-based approaches that were advocated in France, Germany and the U.S. The focus in this Section is on Germany and the U.S., but some attention will be paid also to François Gény in France, whose work was a seminal source of inspiration for later American authors. This Section shows that balancing too was, from the very beginning, associated much more closely with political views in the U.S. than in Europe. Section 3.4 elaborates upon the theme of the relationship between legal method and substantive values, setting the scene for the second instalment of 'balancing genealogies' in Chapters 4 to 7. Section 3.5 concludes.

3.2 'THE JURISPRUDENCE OF CONCEPTS': CLASSICAL ORTHODOXY AND 'THE NON-BALANCING PAST' IN EUROPE AND THE U.S.

3.2.1 Introduction

At its origins, in both Europe and the U.S. the jurisprudence of balancing was a jurisprudence of critique and replacement. Heck, Pound and others formulated their 'jurisprudence of interests' to a large extent through opposition with an allegedly theretofore dominant and fundamentally flawed alternative model: the 'jurisprudence of concepts', or '*Begriffsjurisprudenz*'. One early meaning of the jurisprudence of balancing, then, has to be simply '*not* the jurisprudence of concepts'.[312] Understanding this meaning of balancing in these early debates, therefore, requires study of what these protagonists understood this 'jurisprudence of concepts' to be, and what they saw as its major shortcomings.

This earlier mode of jurisprudential thinking has been analysed in great depth by authors such as Duncan Kennedy, Neil Duxbury Thomas Grey, Morton Horwitz and Robert Gordon for the U.S., and Franz Wieacker, Michael Stolleis and Karl Larenz for Europe, and especially Germany.[313] Many of these writers have commented on the difficulties in adequately capturing the prevailing 'legal consciousness' of a period more

[312] *Cf.* JOHANN EDELMANN, DIE ENTWICKLUNG DER INTERESSENJURISPRUDENZ 59 (1967).

[313] See DUXBURY (1995); Grey, *Langdell's Orthodoxy* (1983); Thomas C. Grey, *Modern American Legal Thought*, 106 YALE L.J. 493 (1996) (Book Review); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY (1992); Robert W. Gordon, *The Elusive Transformation*, 6 Yale J. Law & Humanities 153 (1994) (Book Review); Duncan Kennedy, *The Rise and Fall of Classical Legal Thought* (Unpublished manuscript, 1975); Duncan Kennedy, *Three Globalizations of Law and Legal Thought*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL (David Trubek & Alvaro Stantos, eds., 2006); MICHAEL STOLLEIS, GESCHICHTE DES ÖFFENTLICHEN RECHTS IN DEUTSCHLAND 2: STAATSRECHTSLEHRE UND VERWALTNUGSWISSENSCHAFT 1800-1914 (1992); FRANZ WIEACKER, A HISTORY OF PRIVATE LAW IN EUROPE (transl. Tony Weir, 1995); KARL LARENZ, METHODENLEHRE DER RECHTSWISSENSCHAFT (6th Ed. 1991).

than a century ago. Social and political conditions were obviously very different. And modern observers view classical legal thought through various layers of intermediary periods, each with their own perspective on the past. In the words of Robert Gordon, "late-nineteenth-century American legal thought has proved maddeningly elusive to historians' attempts to chase it down, especially since we are used to seeing it through the eyes of Progressive critics inclined to hostile caricature".[314] Similar observations have been made with regard to Continental jurisprudence, where the derisory term '*Begriffsjurisprudenz*' originates in fact with its critics.[315] Not surprisingly, more recently a revisionist line of scholarship has begun to argue that classical orthodoxy was never, in fact, all that different from later jurisprudential thought.[316]

This Section does not attempt to uncover the 'true nature' of classical orthodoxy – treated here as synonymous with the jurisprudence of concepts - as a historically accurate mode of jurisprudential thinking. The aim is merely to highlight two dimensions of the relevance of the jurisprudence of concepts for the study of the meaning of balancing.

(1) The first of these is what could be called *'the balancer's view'* of the jurisprudence of concepts: the detailed understanding that German and American propagators of balancing developed of the nature of classical orthodoxy, as a background to their own methodological proposals. In a sense, it is precisely Heck's *Begriffsjurisprudenz* and Pound's 'mechanical jurisprudence' that this study is interested in, even if neither perspective were to be entirely historically accurate.[317]

(2) The second dimension of relevance is the way in which classical orthodoxy has become the foundation for *the conceptual vocabulary of legal formality* and its opposites; the vocabulary that is used in turn, here and elsewhere, to frame understandings of balancing itself. Ever since Max Weber took the German Pandectists as the main illustration for his ideal type of formal rationality in law, the legal worldview ascribed to mid- and late nineteenth century lawyers and the conceptual terminology of formality and formalism have been inseparably linked.[318] Both the language of balancing itself, then, but also the discourse of formal and substantive in law cannot be understood without an exploration of the received understanding of the jurisprudence of concepts.[319]

3.2.2 The ideal of 'scientific law'

The 'classical view' of classical orthodoxy, in both Germany and the U.S., is that of a closed, 'gapless', system from which it was possible, in every concrete case, "to derive the decision from abstract legal propositions by means of legal logic".[320] As mentioned earlier, this mode of thinking has been referred to, derisively, as "mechanical jurisprudence",[321] or 'the jurisprudence of concepts'. In the terminology of its adherents, however, the favoured designation was the ideal of 'scientific law'.[322] It is this particular mode of legal thought, both in its U.S. and German variants, which has long been seen as most closely approximating the ideal type of legal formality.[323]

Several dynamics came together to promote the ascendancy of 'scientific law'.[324] Some of these were broadly shared as between France, Germany and the U.S., others were specific to just one or two of these jurisdictions. All these settings faced somewhat similar educational demands of the rise of systematic academic legal instruction.[325] Shared too, was a strong desire on the part of legal scholars for their field to be seen as on a par with other academic disciplines.[326] But perhaps the dominant impetus was the ideal of lawyers and judges as *a-political actors*.[327] The second half of the nineteenth century was a

314 Gordon, *The Elusive Transformation* (1994), 155. See also Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 950 (1988) ("Formalism is like a heresy underground, whose tenets must be surmised from the derogatory comments of its detractors").

315 *Cf.* Vivian Grosswald Curran, *Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology's Impact on Substantive Law*, 35 CORNELL INT'L L.J. 101, 157 (2001) ("The characterization of positivism as reserving a purely mechanical role for the judiciary was a caricature of legal positivism invented by the German free law movement"). See also LARENZ (1991), 49. For an extended discussion of the many different images of conceptual jurisprudence as '*Gegenbild*' – counter-image – for modern legal thinking, *see* HANS-PETER HAFERKAMP, GEORG FRIEDRICH PUCHTA UND DIE 'BEGRIFFSJURISPRUDENZ' 463 (2004).

316 BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING (2010). See also Edward Rubin, *The Real Formalists, the Real Realists, and what they tell us about Judicial Decision Making and Legal Education*, 109 MICH. L. REV. 863 (2011) (Book Review).

317 *Cf.* ELLSCHEID (1974) 10 (reconstruction of the "technical jurisprudence of concepts" by jurisprudence of interests-scholars was a useful "ideal type").

318 *Cf.* MAX WEBER, MAX WEBER ON LAW IN ECONOMY AND SOCIETY 64 (Max Rheinstein ed., Max Rheinstein & Edward Shils, transl. 1954) (1925).

319 *Cf.* Grey, *Langdell's Orthodoxy* (1983), 3 ("classical orthodoxy is the thesis to which modern American legal thought has been the antithesis").

320 WEBER (1925, 1954), 64; WIEACKER (1995), 343ff; ROSCOE POUND, JURISPRUDENCE I 91ff (1959).

321 Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

322 Grey, *Langdell's Orthodoxy* (1983), 5.

323 WEBER (1925, 1954). See for the U.S., *e.g.*, Grey, *Langdell's Orthodoxy* (1983), 11 ("The [orthodox] system was doubly formal. First, the specific rules were framed in such terms that decisions followed from them uncontroversially when they were applied to readily ascertainable facts. Thus, classical orthodoxy sought objective tests, and avoided vague standards (…). Second, at the next level up one could derive the rules themselves analytically from the principles". See also *Ibid.*, at 32: "What was the special appeal of classical orthodoxy in late nineteenth-century America? The natural place to start is with its promise of universal formality – 'every case an easy case'"). WIEACKER (1995), 343 ("scholarly legal positivism is juristic formalism").

324 Although any clear causal determination is impossible. *Cf.* Grey, *Langdell's Orthodoxy* (1983), 39 (referring to "a converging network of demands – political, spiritual, professional and educational – that defined the situation of late nineteenth-century American legal thinkers"); Max Rümelin, *Developments in Legal Theory and Teaching During my Lifetime* (1930), in THE JURISPRUDENCE OF INTERESTS 14 (Magdalena Schoch, ed., 1948) (acknowledging difficulty in determining where this particular mode of reasoning came from).

325 For Germany, see, *e.g.*, WIEACKER (1995), 346ff (noting also, at 349 the relationship between legal education and the institution of a uniform legal culture throughout the German lands); Rümelin, *Developments* (1930). For the U.S., see, *e.g.*, Grey, *Langdell's Orthodoxy* (1983); DUXBURY (1995), 14ff.

326 For the U.S., see, *e.g.*, Duxbury (1995), 15 (library as laboratory); HORWITZ (1992), 13ff. For Germany, see, *e.g.*, Rümelin, *Developments* (1930), 7 (Pandecticist scholars regarded alternative approaches "*unscholarly* amateurism and subjectivism", emphasis added); WIEACKER (1995), 295ff; STOLLEIS (1992), 331.

327 See, *e.g.*, Rümelin, *Developments* (1930, 14 "This conceptualistic method in all its various forms can, ..., be traced back to a more or less conscious desire for certainty and objectivity, or to the jurists' endeavor to create at least the appearance of certainty and objectivity". "Jurists are inclined to be afraid of value judgments, which are always colored with a certain amount of subjectivity; at least they are loath to pronounce such evaluations openly, since they invite the criticism of the interested parties or groups to a much higher degree than do genuinely or apparently logical deductions"

period of rapid change for all Western societies, subject as they were to the forces of industrialization and the accompanying urbanization and growing social and economic inequalities.[328] It was in these turbulent times that expectations arose in the U.S. that law could perhaps "provide a non-political cushion or buffer between state and society",[329] and in Germany, that the creation of a "strictly juristic method" could mediate "the tension between reactionism and liberalism" after the 1848 Revolutions in Europe.[330] Both in Europe and in the United States, the elaboration of a 'scientific' legal sphere that would be separate from politics became a prime preoccupation of legal scholars.[331]

Legal thinkers sought "an autonomous legal culture", "a system of legal thought free from politics",[332] the idea being that if little else could be agreed upon, law at least could provide an objective, apolitical, neutral – in short: scientific – way of solving conflicts.[333] Law had to be "a sophisticated scheme for the coordination of increasingly complex private affairs" that would obviate the need to get "involved in the political battles of its time".[334] In the words of Robert Gordon, to these classical lawyers, "the common law [in the US] (…) added up to a natural framework of ground rules, supposedly completely neutral among competing interests".[335] And industrialization and capitalism's progress made sure that, more so than ever before, there were a great number of these competing interests around.[336]

3.2.3 Conceptual jurisprudence

Understandings of the *content* of conceptual jurisprudence, both classic and more modern, do show striking similarities as between Europe and the U.S. This is true, in particular, for reliance on the terminology of legal formality. Both these two dimensions

[328] For the United States, see, *e.g.*, ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 68ff (4th Ed., Revised by Sanford Levinson, 2005). The U.S. had to cope with the additional trauma of a devastating civil war in its immediate past (1861-1865) and with the pressures of mass immigration

[329] Horwitz (1992), 9. See also Charles C. Goetsch, *The Future of Legal Formalism*, 24 AM. J. LEGAL HIST. 221, 254-255 (1980) ("The real question, then, is why did legal principles have such enormous operative power during the late nineteenth century? The answer is apparent when one views formalism as a reaction to the pervasive skepticism of post-Civil War American society. (…) [T]he true significance of legal formalism is that it provided a system of thought elite lawyers could sincerely believe in and utilize to guide their response to every legal situation").

[330] MICHAEL STOLLEIS, PUBLIC LAW IN GERMANY, 1800-1914 266 (2001). For France, see, *e.g.*, Marie-Claire Belleau, *The Juristes Inquiets: Legal Classicism in Early Twentieth-Century France*, 1997 UTAH L. REV. 379 (1997); ANDRÉ-JEAN ARNAUD, LES JURISTES FACE À LA SOCIÉTÉ (1975).

[331] *Cf.* Pound, *Mechanical Jurisprudence* (1908).

[332] HORWITZ (1992), 10; STOLLEIS (1992), 331 (referring to the "*konsequente Reinigung des juristischen Denkens von nichtjuristischen Elementen*"). This purported autonomy soon became a chief source of critique. See, *e.g.*, POUND I (1959), 91 ("All of the nineteenth-century schools are subject to a common criticism that they sought to construct a science of law solely in terms of and on the basis of law itself").

[333] *Ibid.*, 119. The dimension of legal certainty and predictability was, of course, instrumental in this regard.

[334] Mathias Reimann, *Nineteenth Century German Legal Science*, 31 BOSTON C. L. REV. 837, 893 (1990).

[335] Gordon, *The Elusive Transformation* (1994), 140.

[336] *Cf.* Kennedy, *Legal Consciousness* (1980), 7 (writing that the context of Classical Legal Thought was "the first protracted period in America of the kind of economic and class conflict that had characterized the Western European countries during the period of rapid industrialization"). See for the situation in France: Belleau, *Les Juristes Inquièts* (1997), 381.

– of overall similarity in general, and of formal nature in particular - owe a lot to the influence on both sides of the Atlantic of the work of Max Weber. After having introduced his famous ideal typical categories of formal and substantive (ir)rationality in law in his *Wirtschaft und Gesellschaft*, Weber turned to a depiction of the 'formal qualities' of 'present day' German legal science.[337] Its formality, Weber argued, stemmed from its adherence to five postulates:

> "first, that every concrete legal decision be the 'application' of an abstract legal proposition to a concrete 'fact situation'; second, that it must be possible in every concrete case to derive the decision from abstract legal propositions by means of legal logic; third, that the law must actually or virtually constitute a 'gapless' system of legal propositions, or must, at least, be treated as if it were such a gapless system; fourth, that whatever cannot be 'construed' legally in rational terms is also legally irrelevant; and fifth, that every social action of human beings must always be visualized as either an 'application' or 'execution' of legal propositions, or as an 'infringement' thereof".[338]

Later understandings have either seized on Weber's description directly, or have used very similar imagery to describe the animating ideas of the jurisprudence of concepts. In the U.S., for example, "the heart of classical theory" is said to have been "its aspiration that the legal system be made complete through universal formality, and universally formal through conceptual order".[339] In Germany, Philipp Heck himself in fact referenced Max Weber in a footnote when speaking of the "*formallogische Subsumption*" that he saw as characteristic for the *Begriffsjurisprudenz*.[340] And a prominent later commentator, Franz Wieacker, describes the nineteenth century conception of 'law as a positive science', as adhering to the assumptions that a legal system is necessarily "a closed system of institutions and rules, independent of social reality", within which all that would be needed to make a correct decision in any case would be "the logical operation of subsuming the case" under a general doctrinal principle".[341]

3.2.4 Conceptual jurisprudence in Germany: Heck's *Begriffsjurisprudenz*

What, then, was the precise nature of the critique of conceptualism from which Philipp Heck and others developed their jurisprudence of interests (*Interessenjurisprudenz*), to be discussed later? The term *Begriffsjurisprudenz* did not originate with Heck; it was von Jhering who first used it in his 1884 pamphlet '*Scherz und Ernst in der Jurisprudenz*'.[342] And

[337] WEBER (1925, 1954), 64

[338] *Ibid.*

[339] Grey, *Langdell's Orthodoxy* (1983), 11 (for Grey's indebtedness to Weber's analysis, see *Ibid.*, at 6fn19).

[340] PHILIPP HECK, BEGRIFFSBILDUNG U INTERESSENJURISPRUDENZ (1932 German original), 91.

[341] WIEACKER (1995), 342-344; STOLLEIS (1992), 331 ('*Begriffspyramide*').

[342] Rudolf von Jhering (1884) (describing the 'error' in contemporary jurisprudence of leaving the practical ends of law out of consideration as irrelevant and of purporting to find law's value and purpose solely in its own internal logical thinking).

other European writers had criticized the "obsession of abstract concepts" and ignorance of the "requirements of practical life" before, notably François Gény in his '*Méthode d'Interpretation*' of 1899.[343] But Heck did more than many others to expound and popularize these ideas.[344] In particular, Heck coined the influential term '*Inversion*' to capture what he saw as the heart of the error of conceptual jurisprudence.[345] In his 1909 article entitled '*What Is This Conceptual Jurisprudence Which We Fight Against?*', Heck described as '*Inversionsverfahren*' "that tendency in jurisprudence which treats general juristic principles as the foundation of those legal propositions of which they themselves are in fact a distillation".[346] In later work, Heck summarized his critique as follows:

> "The older school, the Jurisprudence of Concepts, confined the judge to a function of subsuming facts under legal concepts. Accordingly, the legal order was thought of as a 'complete' system of legal concepts, a system which was conceived as a deductive or analytical system. From general concepts there resulted special concepts; from concepts there resulted, by logical deduction, the legal rules applicable to the facts. (…) Thus the supremacy of logic was a generally recognized principle in jurisprudence".[347]

The 'orthodox school', Heck wrote, upheld the theory of the 'dogma of cognition', which confined judges to a purely cognitive – that is to say: not evaluative – role. Echoing Roscoe Pound, Heck noted that the judge was "to be regarded as an automaton, … not concerned with the question whether his decision was just from the point of view of its effects on human affairs".[348]

A number of aspects of the *Interessenjurisprudenz* scholars' framing of the *Begriffsjurisprudenz* are particularly noteworthy.

(1) First, the object of critique is clearly a jurisprudential 'School' - an academic tendency to promote a particular vision of legal reasoning and adjudication, and not so much the form and content of actual judicial decisions. This can easily be observed from

[343] FRANÇOIS GÉNY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF (1899), nrs. 171 and 172, p. 23 and 26 (Number references are to the French 1899 original. Page number references are to the English translation in SCIENCE OF LEGAL METHOD (Ernest Bruncken & Layton B. Register, eds., 1921)

[344] See in particular: Philipp Heck, *Was ist diejenige Begriffsjurisprudenz, die wir bekämpfen?*, 10 DJZ 1456 (1909); PHILIPP HECK, DAS PROBLEM DER RECHTSGEWINNUNG (1912). See on Heck's role HAFERKAMP (2004), 84ff.

[345] *Ibid.*, 84. See also EDELMANN (1967), 31ff.

[346] Heck, *Was ist …?* (1909), 1456, cited in EDELMANN (1967), 31-32. See also Heck, *Formation of Concepts* (1932), 107 ("what we … oppose is … the method of deducing new legal rules from classificatory concepts").

[347] Heck, *Formation of Concepts* (1932), 102-103. At 103 Heck cites Max Weber's depiction of formal legal science. See also Philipp Heck, *The Jurisprudence of Interests* (1933), in THE JURISPRUDENCE OF INTERESTS 31, 33-34 (Magdalena Schoch, ed., 1948) See also Rümelin, *Developments* (1930), 9 ("We may describe this method briefly by saying, in Stammler's words, that 'it treated concepts which are nothing but reproductions of historically given material, as pure concepts such as the concepts of mathematics'. This fallacious method resulted in another error: owing to the mistaken view of the nature of concept-formation, scholars disputed about problems of formulation as if they were problems of cognition").

[348] Heck, *Jurisprudence of Interests* (1930), 37.

the overwhelming predominance of scholarly – rather than case law – examples in the *Interessenjurisprudenz* scholars' work.[349]

(2) Secondly; the *Begriffsjurisprudenz* was looked at by its critics primarily as a private law phenomenon, associated with the Pandectist scholarship of Georg Friedrich Puchta, Rudolf von Jhering (until his famous conversion) and Bernhard Windscheid.[350] To be sure, Heck does note by the early 1930s that "[a]t present it is the sphere of public law in which the old controversy [over conceptual jurisprudence] is discussed most heatedly".[351] And public law did have its influential proponents of conceptual jurisprudence in Carl Friedrich von Gerber (1823-1891) and Paul Laband (1838-1918), who, it should be said, first made their mark in private law and legal history respectively.[352] But notwithstanding Heck's passing references to the relevance of the public law context, his focus, and that of other *Interessenjurisprudenz* writers like Max Rümelin, Heinrich Stoll and Rudolf Müller-Erzbach is very firmly on conceptual jurisprudence in private law.[353] Taking these first two points together, it could be said that the typical target for dismissal as '*Begriffsjurisprudenz*' was an academic, dogmatic exposition of a technical private law problem.[354]

(3) Thirdly, as to the content of the *Begriffsjurisprudenz* as envisaged by its critics, a number of points of emphasis emerge that will be relevant for the purpose of comparison with the American understanding of classical orthodoxy, presented below. From this comparative perspective, it seems the German critics were concerned in particular with the elements of *system*, *subsumption* and an *idealist conceptualism*. The emphasis on system is evident from the way in which the clash between the conceptual jurisprudes' "dogma of the gaplessness of the legal order" on the one hand,[355] and the critics' insistent focus on the problem of legislative 'gaps' – '*Gesetzeslücken*' – and judicial systematic 'gapfilling' – "*Lückenergänzung aus dem System*" – on the other became a central

[349] *Ibid.*, 40 (commenting favourably on the *Reichgericht*'s performance, with references). On this further: PETER SPEIGER, INTERESSENJURISPRUDENZ IN DER DEUTSCHEN RECHTSPRECHUNG 12ff (Unpublished Doctoral Thesis, Freiburg 1984) (on file). Speiger mentions Müller-Erzbach's 1929 article '*Reichsgericht und Interessenjurisprudenz*' as the first "intensive" examination of the role of the jurisprudence of interests in the case law of the Supreme Court (at 16), and states that Heck only "briefly" discusses Supreme Court case law in his 1914 article '*Gesetzesauslegung und Interessenjurisprudenz*' (at 12).

[350] WIEACKER (1995), 279ff, 341ff. On the even earlier influence of Christian Wolff, see *Ibid.*, at 253ff (qualifying Wolff as "the true father of the *Begriffsjurisprudenz*", at 255).

[351] Heck, *Formation of Concepts* (1932), 104.

[352] See, *e.g.*, STOLLEIS (1992), 330ff, 341ff.

[353] Heck, *Formation of Concepts* (1932), 105 (announcing focus on private law, and stating that, in any event, "the problem of public law method cannot be isolated from the problem of private-law method"). Francois Gény, in France, also focused heavily on private law method. See, *e.g.*, GÉNY (1899), nrs. 171-172, p. 23 and 26. The most important propagator of an *Interessenjurisprudenz* approach in German *constitutional law theory* was Heinrich von Triepel. See MICHAEL STOLLEIS, GESCHICHTE DES ÖFFENTLICHEN RECHTS: 1914-1945 172 (1999).

[354] Heck's earliest work critical of positions taken by conceptual jurisprudence concerned life insurance and third parties (1890, cited in EDELMANN (1967), 75), and private international law (see Heck, *Formation of Concepts* (1932), 128). See also his '*Habilitation*' of 1889 (cited in Edelmann, at 73).

[355] *E.g.* Reimann, *Legal Science* (1990), 882 (referring to the conceptualists' "assumption of the perfection and inherent completeness of the system"); Ernst Stampe, *Rechtsfindung durch Interessenwägung*, 1905 DJZ 713, 713 (1905) (referring to the conceptualists' "*Dogma von der Lückenlosigkeit der Rechtsordnung*")

site of controversy.[356] The role of subsumption, or syllogistic reasoning, is clear from the contrast between the conceptual jurisprudes' faith in the power of deductive logic,[357] and the *Interessenjurisprudenz* scholars relentless framing of their critique in terms of a logical error of reasoning. Heck, to be sure, blames the conceptual jurisprudes for doing something he thought was *wrong* (they ignored "the requirements of practical life").[358] But his critique assumes special vigour when he accuses his opponents of trying something he presents as *logically impossible*.[359] This focus on faulty logic fits well with the nature of the critique as directed primarily at fellow legal academics, and the importance of ideas of system just alluded to. Finally, the label of idealist conceptualism is meant to evoke the extent to which the positions of the *Begriffsjurisprudenz* were philosophically grounded in broader German intellectual currents.[360] Conceptual jurisprudence had its foundations in the Historical School in German legal thought, of which the main figures were von Savigny and Puchta. Von Savigny's work advocated a philosophical and logical treatment of law as a 'system', drawing on Kant's formalist epistemology.[361] Puchta's elaborated his 'genealogy of concepts', the foundation of conceptual jurisprudence in Germany, under the influence of Hegel's theory of history.[362] Other philosophical sources for conceptual jurisprudence were scholasticism and natural law.[363] This philosophical background will be important when the German jurisprudence of concepts will be compared with its American variety - 'mechanical jurisprudence' – below.

3.2.5 Conceptual jurisprudence in the United States

In formulating his critique of the 'jurisprudence of conceptions', or 'mechanical jurisprudence', as he came to call it, Roscoe Pound drew heavily upon the work of European writers, notably François Gény and Raymond Saleilles in France and von Jhering and a host of later authors in Germany.[364] An important question, raised but not answered in the literature, is the extent to which Pound and other American critics 'distorted' the French and German critiques, and, more broadly, whether the critique of conceptualism had the same meaning in the American context as it had in Germany and France.[365] Answering that question requires a closer look at these critics' image of conceptual jurisprudence in American law.

Formalist legal science in late nineteenth century America, in its received understanding, has come to be seen to have consisted of two components: '*Langdellian*' legal science in the university law schools, and *laissez-faire* constitutionalism in the courts.[366]

3.2.5.1 'Langdellian legal science'

Langdellian legal science was a professional and educational project epitomized in the propagation of the 'case method' by the first Harvard Law Dean, Christopher Columbus Langdell. Langdell's method was based on the idea that the study of law could be rendered more 'scientific' if it were approached through the identification, classification and arrangement of a limited number of overarching basic principles.[367] Thomas Grey has summarized the enterprise as follows:

> "[T]he heart of classical theory was its aspiration that the legal system be made complete through universal formality, and universally formal through conceptual order. A few basic top-level categories and principles formed a conceptually ordered system above a large number of bottom-level rules. The rules themselves were, ideally, the holdings of established precedents, which upon analysis could be seen to be derivable from the principles. When a new case arose to which no existing rule applied, it could be categorized and the correct rule for it could be inferred by use of the general concepts and principles (…)."[368]

Even this short description makes clear the great extent to which Pandectist scholarship and Langdellian legal science overlapped, notwithstanding the vast differences in legal source materials in the two legal systems concerned. Beyond Langdell's educational project, American scholarly writing on the common law in the second half of the 19th century in general became, gradually, "more integrated, systematic, general and abstract".[369] The resulting "reorganization of legal architecture" was intended

356 See, *e.g.*, Heck, *Jurisprudence of Interests* (1933), 37. Heck at one point defines his method as "the methodical use of the analysis of interests in order to fill gaps in the law" (Heck, *Formation of Concepts* (1932), 125fn16). For analysis, see WIEACKER (1995), 344ff; EDELMANN (1967), 35ff. On the continued importance of the idea of 'system' in German (private law) legal thinking, see, *e.g.*, HELMUT COING, ZUR GESCHICHTE DES PRIVATRECHTSSYSTEMS 28 (1962); CLAUS-WILHELM CANARIS, SYSTEMDENKEN UND SYSTEMBEGRIFF IN DER JURISPRUDENZ (1969).

357 *E.g.* Reimann, *Legal Science* (1990), 894. For public law, *see e.g.* C.F. v. GERBER, GRUNDZÜGE EINES SYSTEMS DES DEUTSCHEN STAATSRECHTS viii (2nd ed., 1869) (referring to the primordial value of "*sichere juristische Deduktion*" – "secure juristic deduction").

358 Heck, *Formation of Concepts* (1932), 103.

359 *E.g.* Heck, *Jurisprudence of Interests* (1933), 39-40 ("The formula which condenses a certain number of existing legal rules cannot be made to yield new rules. (…) The method of operating with formulas is a magic charm which helps only those who believe in it"); WIEACKER (1995), 345 (referring to Heck's contempt for 'subsumption machines').

360 *Cf.* POUND I (1959), 63 (discussing German 'metaphysical' and English 'analytical' foundations).

361 *Cf.* WIEACKER (1995), 293ff, 343ff (noting that the premiss of conceptual jurisprudence was "rooted in the epistemology of formal idealism, … that if a scientific rule is conceptually logical and fits into the system then it must be right").

362 *Ibid.*, 316ff; HAFERKAMP (2004), 88 (on the philosophical foundation of Puchta's work, as noted by Heck and Rümelin).

363 Rümelin, *Developments* (1930), 9.

364 Extensively: POUND I (1959), 91ff; Pound, *Mechanical Jurisprudence* (1908), 610.

365 Belleau, *Les Juristes Inquièts* (1997), 424.

366 *Cf.* DUXBURY (1995), 11.

367 *Ibid.*, 14. HORWITZ (1992), 12ff. See also Kennedy, *Legal Consciousness* (1980), 8 ("Classical legal thought was an ordering, in the sense that it took a very large number of actual processes and events and asserted that they could be reduced to a much smaller number with a definite pattern"

368 Grey, *Langdell's Orthodoxy* (1986), 11.

369 HORWITZ (1992), 12, 14-15 ; N. E. H. HULL, ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE 33 (1997).

"to erect an abstract set of legal categories that would subordinate particular legal relationships to a general system of classification".[370] Langdell himself famously wrote that within these abstract, logical schemes "the purposes of substantial justice" were "irrelevant"; an observation that earned him the predicate "world's greatest living theologian" from Oliver Wendell Holmes.[371] Holmes himself was one of the very earliest writers to warn against this line of thinking, writing by 1879 that, fortunately still, the law was generally administered "by able and experienced men, who know too much too sacrifice good sense to the syllogism".[372] Roscoe Pound was to take a much less charitable perspective in his later work on '*Mechanical Jurisprudence*', discussed below.

3.2.5.2 Pound's 'mechanical jurisprudence'

Formalism in turn-of-the-century American law, however, was understood to encompass more than this 'scientification' of legal education and scholarship,[373] and it is here, in part, that major differences with German developments originate. In a highly creative and extremely influential intellectual move, Roscoe Pound and others – notably Supreme Court Justice Oliver Wendell Holmes – aligned their legal doctrinal critique of the formalism of classical orthodoxy along the lines of Langdell's legal science with a substantive, political or ideological critique of the content of court decisions on constitutional rights.[374] This alignment did not come about at once, but its result was a new understanding of the relation between legal doctrine and political ideology that has influenced American law ever since.

Pound's critique of the uses of classical orthodoxy in the courts started out in broadly similar terms as that of his German and French counterparts. In a 1905 *Columbia Law Review* article, for example, he complained that formerly flexible equitable principles were "becoming hard and fast and legal" and that the common law, as a result, was in danger of loosing its "quality of elasticity".[375] Pound's examples may have been predominantly court decisions rather than scholarly writings,[376] but they did concern the same private law problems that preoccupied his European colleagues. Later that same academic year, however, Pound's critique took on a new focus. "It cannot be denied that there is a growing popular dissatisfaction with our legal system", he wrote; "[t]here is a feeling that it prevents everything and does nothing".[377] A fundamental reason for this

[370] HORWITZ (1992), 14.
[371] Grey, *Langdell's Orthodoxy* (1986), 4.
[372] Oliver Wendell Holmes, *Common Carriers and the Common Law*, in COLLECTED WORKS III 75 (Sheldon M. Novick, ed., 1995).
[373] *Cf.* ROBERT S. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 27 (1982) ("Formalism was not confined to legal educators [like Langdell]; judges were guilty of it too").
[374] *Cf.* Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST L. REV. 473, 477 (2003) (calling this alignment "a creative act").
[375] Roscoe Pound, *Decadence of Equity*, 5 COLUM. L. REV. 20, 24, 33 (1905).
[376] This difference will be important in what follows. For support, see, *e.g.*, Duncan Kennedy & Marie-Claire Belleau, *François Gény aux États-Unis* (2000), 309 ("*Dans le contexte américain, le formalisme était une pratique plus jurisprudentielle que doctrinale*").
[377] Roscoe Pound, Do We Need a Philosophy of Law?, 5 Colum. L. Rev. 339, 344 (1905).

growing public unease, in Pound's view, was the fact that the legal system exhibited "*too great a respect for the individual*, and for the intrenched [*sic*] position in which our legal and political history has put him, *and too little respect for the needs of society*, when they come in conflict with the individual, to be in touch with the present age".[378] This basic issue was also raised in the work of European writers, who called it '*la question sociale*' and who also linked it to questions of legal method. This happened notably in France, where the need for a new perspective was felt earlier than in Germany due to the age of the *code Napoléon*.[379] But while in Europe writers took their main examples from private law doctrine – employment contracts, liability for industrial accidents, *etc.* -, the institutional set-up in the U.S. furnished striking illustrations also in constitutional law. Pound relegated typical private law examples to his footnotes, and took the most contentious contemporary issue in constitutional law as his prime example. As he wrote in the article just cited: "A glance at one of the [case law] digests will show us where the courts find themselves to-day. Take the one subheading under constitutional law, 'interference with the right of free contract,' and notice the decisions".[380] Pound went on to cite series of cases striking down on constitutional grounds various pieces of legislation intended to protect employees. He did not yet include the case decided in the U.S. Supreme Court on 17 April that year that would shortly afterwards become the main focus for the critique of classical orthodoxy: *Lochner v. New York*.

In *Lochner*, the U.S. Supreme Court invoked the constitutional right of freedom of contract to invalidate legislation enacted by the State of New York on the maximum working hours for bakers.[381] The line of decisions culminating in *Lochner* – including such famous earlier decisions as *Allgeyer v. Louisiana* (1897) - was criticized at the time by other scholars for its reactionary obstruction of progressive legislation. It was Roscoe Pound, however, building on Justice Holmes, who added a decisive new element: these decisions were not simply wrong, they were wrong because they were overly conceptualistic. The steps by which Pound came to frame his critique of these constitutional law decisions in the terms of a critique of conceptual jurisprudence can be traced through his writings, where a critique of an individualistic bias in the common law gradually becomes aligned with a critique of excess abstraction and reliance on deductive reasoning. The two themes are joined in very general terms early on, in his 1905 article just cited, when Pound wrote: "the common law knows individuals only. (…) But today the isolated individual is no longer taken for the center [*sic*] of the universe. We see now that he is an abstraction …".[382] By 1908, both the 'individualist' and the 'abstraction' elements are discussed in somewhat more depth, in his famous article on '*Mechanical Jurisprudence*', of which the title by itself clearly shows a desire to emphasize conceptualist flaws in juristic reasoning:

[378] *Ibid.*
[379] WIEACKER (1995), 456; STOLLEIS (2001), 359ff (2001) (notably on von Gierke). On some of the key figures in France, see Christophe Jamin, *Demogue et son Temps: Réflexions Introductives sur son Nihilisme Juridique*, 2006 R.I.E.J. 5 (2006).
[380] Pound, Do We Need a Philosophy of Law? (1905), 344.
[381] 198 US 45, 75 (1905).
[382] Pound, *Do We Need a Philosophy of Law?* (1905), 346.

> "The manner in which [the relevant constitutional clause] is applied affords a striking instance of the workings to-day of a jurisprudence of conceptions. *Starting with the conception* that it was intended to incorporate [the social Darwinist text] Spencer's Social Statics in the fundamental law of the United States, *rules have been deduced that obstruct the way of social progress*. The conception of liberty of contract, in particular, has given rise to rules and decisions which, tested by their practical operation, defeat liberty".[383]

Pound's reference to Herbert Spencer's book '*Social Statics*' can easily be understood: Justice Oliver Wendell Holmes had used precisely this reference in his landmark dissenting opinion in the very recent *Lochner* case, which Pound cites. At the same time, however, bringing in this line of anti-social Darwinist reasoning places significant strain on Pound's anti-conceptualist argument. Terms like 'conception', 'deduction' and disregard for 'practical operation' all figure in the quotation, which reads *virtually* like a standard denouncement of *Begriffsjurisprudenz*. But on closer inspection the real role of each of these terms and, especially, of the connections between them, seem more rhetorical than substantive. It is perhaps not surprising, therefore, that Pound, shortly afterwards, appears to backtrack somewhat in his efforts of trying to connect his critiques of excess individualism and abstraction (conceptualism). In his major article on '*Liberty of Contract*' (1908-1909), the two strands are simply presented alongside each other, without any real effort to connect them:

> "In my opinion, the causes to which we must attribute the course of American constitutional decisions upon liberty of contract are … : (1) The currency in juristic thought of *an individualistic conception of justice*, which … exaggerates private right at the expense of public right ….; (2) what I have ventured to call on another occasion a condition of *mechanical jurisprudence*, a condition of juristic thought and judicial action in which deduction from conceptions has produced a cloud of rules that obscures the principles from which they are drawn, in which conceptions are developed logically at the expense of practical results and in which the artificiality characteristic of legal reasoning is exaggerated; (3) the survival of purely juristic notions of the state and economics and politics as against the social conceptions of the present (…)"[384]

Conceptualism is here framed, once again, in terms familiar to his European contemporaries, and presented *alongside* individualism as one of the main causes of dissatisfaction with constitutional decisions. By then, however, the decisive link between conceptualism and conservative politics, and therefore between judicial method and political ideology, had already been made.[385]

[383] Pound, *Mechanical Jurisprudence* (1908), 615-616 (footnotes omitted, emphases added).
[384] Pound, *Liberty of Contract* (1909), 457 (emphasis added). Pound does not comment on the relationship between – or the relative importance among – his several relevant factors.
[385] See further *infra*, s. 3.4.1 and Chapter 8.

3.2.6 Provisional appraisal: Two classical orthodoxies and their significance

The classical orthodoxies described above will only be compared and contrasted in detail below, in Section 3.4.1. It may, however, be opportune to briefly announce two important observations to be made later; one on the relevance of the accounts set out above, and one on a potentially salient difference between them.

(1) First, on the question of relevance, it will be seen later on that the reason why the story of how Pound and others came to define conceptual jurisprudence matters because the story of Langdell and *Lochner* – their two chosen targets – is so central to the subsequent development of American legal thought. "The basic plot line of American legal modernity", Thomas Grey has written, "has been drawn from the responses to Langdell and *Lochner*".[386] The precise implications of this observation will be discussed later, but it may serve for now simply to justify the detailed exposition of Roscoe Pound's joinder of the two themes in the preceding Section.

(2) Secondly, on the issue of difference, it will be argued later that within the broad similarities in the conceptual jurisprudence identified by German and U.S. scholars, the German model of *Begriffsjurisprudenz* focused more on the idea of *deduction* within a pyramid of concepts, whereas the American version is centred rather on classification and *categorization* of cases through binary divisions. While both elements clearly figured in both the German and the U.S. understandings – categorization was clearly important in Europe; Pound's analysis set out above deals with the abuse of deduction -, it still seems fair to conclude that European conceptual jurisprudence is best exemplified in *the syllogism*, whereas its American counterpart is best captured in the idea of *the category*. This suggestion, too, will be discussed in more detail below.

3.3 BALANCING OF INTERESTS IN EUROPE AND THE US: SIMILARITIES AND DIFFERENCES

3.3.1 Introduction

This Section traces the intellectual history of the rise of balancing in German and American legal reasoning during the first decades of the twentieth century. While the broader intellectual trends of the period – the rise of teleological reasoning, 'sociological jurisprudence', Realism – have often been described before, an extended comparative investigation of the position specifically of balancing-based reasoning with regard to these broader developments seems lacking. In addition; while the genealogy of balancing has been elaborated in extensive fashion in the United States, where the idea of a twentieth-century "triumph of the balancing test",[387] is part of mainstream contemporary

[386] Grey, *Modern American Legal Thought* (1996), 495.
[387] HORWITZ (1992), 131.

constitutional legal vocabulary, this American history accords little attention to European precursors of some key ideas.[388]

The focus in this Section is on the German *Interessenjurisprudenz* and Roscoe Pound's Sociological Jurisprudence. As between these two movements, there is very little direct acknowledgement of influence. The German scholars did not cite Holmes or Pound, and Pound's work contains only a very few references to Heck and other *Interessenjurisprudenz*-scholars. By contrast, Pound seems to have relied heavily on the work of François Gény, whose *Méthode* he had surely read. Because of this influence, and because Gény was in fact one of the very first – if not *the* first – major European jurist to invoke the idea and language of balancing, this Section begins with a short depiction of his work.[389]

3.3.2 Balancing and the critique of classical orthodoxy in France: The '*libre recherche scientifique*' of François Gény

In turn-of-the-century European legal thought, one central problem facing jurists, as described earlier, was that of 'gap-filling'; making sure written law could maintain its coherent and complete character when faced with new problems. The fact that French law rested on an ageing civil code meant that the problem of 'gap-filling' was felt earlier and more acutely there than elsewhere.[390] One of the earliest, and certainly one of the most prominent, writers to engage with this problem was François Gény, who published his book '*Méthode d'interprétation et sources en droit privé*' in 1899.[391] Gény acknowledged that, due to the inherently incomplete nature of the written law contained in the *code civil*, there would always come a point "where the Court can no longer rest secure on a formal rule but must trust to his [*sic*] own skill in finding the proper decision".[392] The method to be applied by the judge, according to Gény, would have to be "free decision on the basis of scientific investigation" (*libre recherche scientifique*).[393] Announcing themes that would be echoed by Roscoe Pound a decade later, Gény asked lawyers to "study social phenomena", called for judicial decisions according to the "actual facts of social life" and warned against letting the "needs of actual life" be sacrificed "to mere concepts".[394]

But beyond these well-known general themes of the critique of the conceptualism and formalism of classical legal thought, Gény specifically invokes balancing as part of his method of 'free scientific research'. In a Section on '*The Principle of Equilibrium of Interests*',[395] Gény writes:

> "the science of administrating the law could not do better than frankly to adopt, where the formal sources of law are silent, this method: to seek the solution of all legal questions, which necessarily grow out of the conflict of various interests, by means of an accurate estimating of the relative importance and a judicious comparison of all the interests involved, with a view to balancing them against each other in conformity with the interests of society".[396]

A number of observations are relevant with a view to the comparison with American and German legal thought conducted here.

(1) First, it is important to note that Gény sought the examples for the application of his new method in private law, writing, for example: "how can the legal maxims applicable to such matters as the secrecy of confidential letters, the ownership of letters sent, or the right to use a family name (…) be satisfactorily and equitably applied except by balancing all the interests involved one with the other?"[397] Only at the very end of his discussion of 'free decision on a scientific basis' does Gény suggest that his method could be more broadly applicable to "certain other problems that cannot be solved along traditional lines" and that "bring into play even more directly certain moral and economic interests which our written laws do but very little to balance against each

[388] See for example the reviews of the 1948 Fuller/Scoch translation project of German works from the School of *Interessenjurisprudenz*. In his Review, Albert Ehrenzweig wrote: "Among foreign authors almost completely ignored in English and American jurisprudence are the representatives of the German school of 'Interessenjurisprudenz'". Ehrenzweig, *Book Review*, 36 CAL. L. REV. 502 (1948). There has, more recently, been some attention for the influence of the German Free Law School on American Legal Realism (*Cf.* Herget & Wallace, *The German Free Law Movement* (1987). Free Law and *Interessenjurisprudenz* should, however, be kept separate, as the description below will suggest.

[389] The intriguing question of the extent to which *Interessenjurisprudenz*-scholars like Heck also leaned on Gény is not easy to answer. I have not been able to find any direct references in the main contemporary German works, nor in later assessments of the School. It is likely that Heck himself may have felt that he was engaged in quite a different project, even assuming that he was aware of Gény's work. This, in part because some of Heck's early writing in fact predates Gény's work by more than a decade. One might add that the impression given by some of Heck's methodological expositions, at least to this reader, is of a writer who jealously guards what he clearly regards as, to a large extent, his personal intellectual legacy. More generally, those relatively few works that do assess lines of influence in this field offer contested and sometimes problematic views of the relevant links. See, *e.g.*, the seminal article by Hermann Kantorowicz, *Some Rationalism About Realism*, 43 YALE L.J. 1240, 1241ff (1934). Kantorowicz sees von Jhering as the 'fountain-head' of both (1) a 'free law school', "developed in France by Geny and his many followers, in Germany … by men like Ehrlich …" and with "apparently no adherents [in the U.S]"., and (2) a 'sociological movement', "headed in Germany by Ehrlich, Heck … and … Max Weber; in America by Mr. Justice Brandeis Mr. Justice Cardozo and Dean Pound". The grouping together of, on the one hand, Ehrlich and Pound and on the other hand Philipp Heck under one label of 'sociological', does not, optimally, it is submitted, capture the core of Heck's methodological concerns, as will be explained below. At the same time, separating Gény and Pound may underestimate the vital links between their lines of work.

[390] *Cf.* Wieacker (1995), 456.

[391] Gény has been said both to have eclipsed his contemporaries and to have been representative of broader trends in legal thinking. This renders his work particularly suitable for the comparative analysis conducted here. See Arnaud (1975), 121-122.

[392] GÉNY (1899), nr. 155, p. 2.

[393] *Ibid.*, nr. 155, p. 5.

[394] *Ibid.*, nr. 155ff, p. 15, 9 and 11. See also nr. 171, p. 26 ("the obsession of abstract concepts").

[395] *Ibid.*, nr. 173, p. 35.

[396] *Ibid.*, nr. 173, p. 38 ("*[N]otre interprétation scientifique ne saurait mieux faire, dans le silence des sources formelles, que de s'orienter très franchement de ce côté: chercher à resoudre les questions juridiques, qui se ramènent tous à des conflits d'intérêts, par une exacte appreciation et une judicieuse comparaison des interest en presence, en visant à les équilibrer conformément aux fins sociales*"). See also p. 24-25, p. 35-36 and nr. 174, p. 42 ("Briefly put, we always come back to an attempt to establish an equilibrium between interests that are contending with each other or seem to be inconsistent.").

[397] *Ibid.*, nr. 173, p. 37.

other".[398] Gény mentions the regulation of industrial production and mining laws as examples of areas to which his method could profitably be applied. But by the time these regulatory, public law subjects are introduced, Gény finds he "must make an end of [his] observations".[399]

(2) Secondly, within this private law context, it is fair to say that there was a distinct substantive edge to Gény's methodological critique and suggestions.[400] Gény can be situated among a group of contemporaries later labelled '*les jurists inquiets*' or '*les vigiles*';[401] a number of scholars concerned to adapt private law legal doctrines and techniques to rapidly evolving social conditions.[402] What Gény and these other writers were interested in was mainly the *safeguarding* of the '*édifice juridique*' – the main structures of the classical system – in the face of social pressures.[403] Their aim was not so much social 'reform' – and certainly not 'socialist' reform -,[404] but rather to "preserve the existing social equilibrium by adapting, and in some cases abandoning, legal classicism".[405]

(3) These last quotations lead to a third observation which is that, although these methodological innovations did have a substantive, or even political, edge to them, this dimension was at the same time rather limited in its ambitions, in particular when compared to Roscoe Pound's (*Gény*-inspired) proposals, as will be argued later.[406] This is true in a number of different ways. One dimension is what has been called '*le compromis Gény*'; the idea that the new flexibility allowed to judges according to Gény's method would go hand in hand with a denial of the formal status of 'source of law' to judicial decisions and academic writing.[407] In this way, it was thought, the structural impact of Gény's methodological innovations on the body of '*le droit*' would remain minimal. And secondly, while Gény and others (Salleiles, notably) called for a greater correspondence between law and social life, they tended to take as their baseline prevailing social conditions rather than some ideal conception of social good. 'The social' as a point of reference, in Gény's work, is a non-ideological,[408] 'naturalist' idea.[409] When Gény called for law to pay more attention to its social effects, he generally meant having regard for "the requirements of practical life" and for "the conditions under which modern society lives".[410] But these factors are introduced in a neutral, dispassionate way – perhaps

398 *Ibid.*, nr. 176, p. 46.
399 *Ibid.*
400 On the relationship between methodological critique and substance in Gény's work, see Kennedy & Belleau, *François Gény aux États-Unis* (2000).
401 ARNAUD (1975), 122-124.
402 *Ibid.*, 122ff; Belleau, *Juristes Inquièts* (1997), 381ff.
403 See ARNAUD (1975), 122, quoted and translated in Belleau, *Juristes Inquièts* (1997), 383-384fn9. Arnaud refers to Beudant, Labbé, Bufnoir, Saleilles, Hauriou and Duguit, "*pour ne citer que les très grands*".
404 On these jurists' fear of socialism, see ARNAUD (1975), 122 ("*la crainte d'un danger 'socialiste'*"), quoted and translated in Belleau, *Juristes Inquièts* (1997), 383-384.
405 *Ibid.*, 383.
406 *Ibid.*, 383-385 (on the 'timid' nature of Gény's proposals); FIKENTSCHER (1975), 212 (on the careful nature of Gény's work).
407 *Cf.* Kennedy & Belleau, *François Gény aux États-Unis* (2000), 297.
408 *Ibid.*, 300-301.
409 *Cf.* Wieacker (1995), 456.
410 GÉNY (1899), nr. 171 and nr. 175, p. 26 and nr. 175, p. 45.

significantly - as '*données*', or 'givens'.[411] And while Gény writes that "one must obviously take into account both the social and the individual interests involved" in any case, he simultaneously makes it clear that, when it comes to the public interest, there can be no question of "a set of interests really distinct from … what are properly private interests".[412] In fact, the principal kind of substantive reform that the *Méthode* advocates is simply more flexibility in business transactions.[413] It is no wonder, then, that Wolfgang Fikentscher, in his monumental comparative study of legal method, calls Gény the "least politically interested" and the "purest jurist" out of the group Gény, Holmes and von Jhering.[414]

(4) A final observation relates all of the foregoing to the topic of balancing. While the methodological and substantive elements in the Gény's critique are undoubtedly closely connected,[415] it is not so clear that this is the case specifically for the 'balancing' element in his proposals. Or, put more generally; the status of balancing itself within Gény's overall methodological (and substantive) project is not entirely clear. The *Méthode* is, in its critical aspect, concerned above all with the identification of the 'abuse' of deductive reasoning and of the fallacies of exclusive reliance on literal readings of the antiquated provisions of the *code civil*.[416] Its constructive contributions consist principally of a plea for the toleration of a wider range of sources for judicial lawfinding and of greater flexibility in legal reasoning generally.[417] But neither the ideas of 'balancing' nor of 'interests' seem particularly central to what Gény was criticizing and proposing. Despite their prime position in the general statement of his methodological ideals, the language of balancing of interests hardly figures at all in the many *concrete examples* given throughout the *Méthode*.

This final observation is relevant for the comparison with the work of American jurists, to be described further on. Gény's work was immensely influential in the U.S. Karl Llewellyn wished out loud that his analysis of judicial method would have been "almost" as successful as "Gény's simple and glorious formula for handling the Code", and the émigré professor Hermann Kantorowicz confessed: "I would give everything I have done, and more to have written [Gény's] *Méthode*".[418] However, as will be seen later, these American jurists inspired by Gény's work have tended to evaluate precisely the element of balancing to a fundamental position that seems incongruent with the relatively incidental role it played in Gény's own thought.

411 See ARNAUD (1975), 125. See also Jamin, *René Demogue et son Temps* (2006), 9-10 (on the search for a solution "*conforme à la nature des choses*").
412 GÉNY (1899), nr. 171, p. 25. In stark contrast with what Roscoe Pound was to write later (see *infra*, s. 3.3.4), Gény even argues that when it comes to 'public order' there can be no question of "a set of interests really distinct from … what are properly private interests".
413 Gény (1899), nr. 171, p. 26-27.
414 FIKENTSCHER (1975), 212.
415 *Cf.* Jamin, *René Demogue et son temps* (2007), 7ff.
416 *Ibid.*, 13.
417 *Cf.* Belleau, *Juristes Inquièts* (1997), 411.
418 *Cf.* Shael Herman, *Book Review*, 27 AM. J. COMP. L. 729, 732 (1979). See also Kennedy & Belleau, *François Gény aux États-Unis* (2000), 306 ("probable" influence of Gény on Roscoe Pound). But see FIKENTSCHER (1975), 234 (German *Zweck-* and *Interessenjurisprudenz* more influential in the U.S.).

3.3.3 The Jurisprudence of Interests in Germany: *The Interessenjurisprudenz*

In Germany, 'balancing of interests' was the main theme of the School of *Interessenjurisprudenz*, of which Philipp Heck, Ernst Stampe, Max Rümelin, Heinrich Stoll and Rudolf Müller-Erzbach were the main figures. As many of these figures taught at the University of Tübingen, the inner core of the *Interessenjurisprudenz* movement is sometimes also called the 'Tübingen School'.[419] This Section focuses on Philipp Heck, whose influence on the science of legal method generally, Karl Larenz has said, "is almost impossible to overestimate".[420]

The School of *Interessenjurisprudenz* has to be situated as an extension of Jhering's emphasis on teleology in legal method, and as a critique of both the classical orthodoxy of the *Begriffsjurisprudenz* and of the contemporaneous, more radical critique of the *Freirechtsschule*.[421] As for Gény, the point of departure for the German *Interessenjurisprudenz* was the problem of 'gap-filling' in law.[422] Against the "dogma of the gaplessness of the legal order" and its associated method of subsumption of facts under norms, the new critics proposed "sensible lawfinding by judges" through "social weighing" and "comparative valuation of colliding interests", Ernst Stampe wrote in 19095.[423] Heck himself even defined *Interessenjurisprudenz* as "the methodical use of the analysis of interests in order to fill gaps in the law".[424] In order to distinguish his own project from Jhering's teleological revolution and to carve out a distinct place for *Interessenjurisprudenz*, Heck made a distinction between what he called the 'genetic theory of interests' (the recognition that diverse interests are at the basis of existing legal rules) that Jhering had already elaborated, and the 'productive theory of interests' (the active use of the analysis of interests in the judicial development of the law) that he thought was his own contribution.[425]

Again, it may be useful to list a series of primary characteristics of the work undertaken by the *Interessenjurisprudenz*-scholars.

[419] *Cf.* WIEACKER (1995), 453; EDELMANN (1967), 91ff. Intellectual portraits of Philipp Heck and Max von Rümelin are contained in LEBENSBILDER ZUR GESCHICHTE DER TÜBINGER JURISTENFAKULTÄT (Ferdinand Elsener, ed., 1977).
[420] Larenz (1991), 49. See also Cahn, *Book Review*, 1948 ANN. SURV. AM. L. 915, 921 (1948) ("The chief German exponent of *Interessenjurisprudenz* is Philipp Heck"). Heck's work is of particular interest for the project undertaken here because of the way in which his later (early 1930s) writings give an overview of the main lines in the development of the *Interessenjurisprudenz*.
[421] See, *e.g.*, Heck, *Formation of Concepts* (1932), 108-109 ("The fight against the Jurisprudence of Concepts is the starting point and one of the main contents of our doctrine (…). Our second front is directed against the theory of 'Free Law'").
[422] *E.g.* PHILIPP HECK, GROßE AVEREI 589 (Habilitation, 1899), 589, cited in EDELMANN (1967), 73; Heck *Jurisprudence of Interests* (1933), 40 ("the modern trend in legal thinking refuses to confine the judge to a mere cognitive function and rejects the method of filling gaps in the law by means of classificatory concepts" and "the (…) truth is that our laws are inadequate, incomplete, and sometimes contradictory"); WIEACKER (1995), 453.
[423] Ernst Stampe, *Rechtsfindung durch Interessenwägung* (1905), in INTERESSENJURISPRUDENZ 24-26 (G. Ellscheid & W. Hasemer, eds., 1974).
[424] Heck, *Formation of Concepts* (1932), 125fn16.
[425] *Ibid.*, 125-126.

(1) The *Interessenjurisprudenz* was very much a private law project. All notable *Interessenjurisprudenz*-scholars were private law professors, who took their examples from private law problems.[426]

(2) The challenge of 'gap-filling' was central to the *Interessenjurisprudenz*-scholars' preoccupations; both to their critique of conceptual jurisprudence, as noted earlier, but also to their balancing-based replacement project. Heck's earlier methodological studies, '*Das Problem der Rechtsgewinnung*' (1912) and '*Gesetzesauslegung und Interessenjurisprudenz*' (1914) were largely devoted to this specific problem.[427] As against the automatic '*Lückenergänzung durch Konstruktion*' – the filling of gaps through conceptual construction, or the '*Inversionsverfahren*' mentioned earlier –, Heck proposed a more creative role for judges, granting them the necessary space for an '*Eigenwertung*',[428] or an independent evaluation.

(3) At the same time however - and here the *Interessenjurisprudenz* took issue with the more radical *Freirecht*-scholars - the scope for judicial freedom had to remain strictly limited. Heck's favourite image, which was to become an influential motto, was of the judge as a '*denkender Gehorsam*' - a judge who approaches the law both thoughtfully and obediently.[429] It is significant that the first mention of the term '*Interessenjurisprudenz*' is in an article by Heck of which the full title is '*Interessenjurisprudenz und Gesetzestreue*', or '*The Jurisprudence of Interests and Fidelity to Law*' (1905). Looking ahead to the comparison with Sociological Jurisprudence in the U.S., it is also significant to point out that the theme of judicial fidelity to constitutional law was not recognized as a distinct issue in German law of the time.

(4) Viewed as a contribution to the "practical art of decision-making", it can be seen that both the elements of 'balancing', or 'weighing', and of 'interests' were important to the *Interessenjurisprudenz* project. The idea of weighing-up two competing claims was the practical embodiment of the suggestion that what judges really should be doing was to give expression to precisely such trade-offs already contained in legislation. "Our starting-point", Heck wrote, "is the consideration that the legislator intends to delimit human interests according to value judgments, and that it is the function of the judge to effectuate this ultimate aim by his decisions of individual cases".[430] Whenever these original value judgments are not explicitly expressed for the concrete situation at hand, "the judge must proceed to fill the gap by weighing the interests concerned".[431] As for 'interests', Heck chose this concept over that of alternatives such as '*Rechtsgut*' and

[426] *Cf.* Rudolf Müller-Erzbach, *Reichsgericht und Interessenjurisprudenz*, in REICHSGERICHTFESTGABE II 161, 161ff (1928) (discussion exclusively of private law cases). See also Helmut Coing, *Bentham's Importance in the Development of Interessenjurisprudenz and General Jurisprudence*, in JEREMY BENTHAM: CRITICAL ASSESSMENTS I 302 (Bhikhu Parekh, ed., 1993) ("*Interessenjurisprudenz* is emphatically a method suited to private law").
[427] See also HECK (1932), 91ff.
[428] *Ibid.*
[429] *Ibid.*, 107. Translated as "intelligent obedience" in Heck, *Formation of Concepts* (1932), 178 (translation Schoch). See also *Ibid.*, 180 (whenever there is a 'gap' in the law, the judge must "be guided primarily by the value judgments of the legislator and secondarily by an evaluation of his own"). Heck's formula is cited, *e.g.*, by WIEACKER (1995), 455.
[430] Heck, *Formation of Concepts* (1932), 178.
[431] *Ibid.*, 180.

'*Wert*' because he thought it permitted "the finest dissection" in conceptual terms,[432] and because of its clear recognition in social life and everyday parlance.[433]

(5) The *Interessenjurisprudenz*-scholars had a rather modest image of what they were trying to do. Their primary concern was to offer practical guidance to judges on how to make a '*vernünftige Interessenabwägung*' – a sensible balancing of interests.[434] The *Interessenjurisprudenz* saw itself as "an introduction to the practical art of decision-making" rather than as a "philosophy of law".[435] In Wieacker's view, it is precisely because of this "unassuming stance" that the jurisprudence of interests has been able "to make a major contribution to practice and enlist a major following among both writers and practitioners".[436]

(6) Tying in with the idea of 'modesty' just alluded to, one crucial element of the new method for the *Interessenjurisprudenz*-scholars was the affirmation of its strict neutrality. Heck wrote:

> "The method of the Jurisprudence of Interests derives its principles solely from the experience and needs of legal research. It is not based on any philosophy nor modelled after any of the other sciences. This is what I term 'juridical autonomy'".[437]

This assertion of neutrality – what Heck calls 'juridical autonomy' - is a dominant, recurrent theme in the writings of the *Interessenjurisprudenz* scholars. The Jurisprudence of Interests, was a "pure theory of method", "not a theory of substantive values", and "entirely independent of any ideology".[438] In this sense, the school of *Interessenjurisprudenz* remained clearly within the traditional European paradigm of "strictly juristic method".[439] As Philipp Heck wrote in 1932:

> "We do not dream of dictating to the legal community which interests it must protect in preference to others. We want to serve all the interests which the legal community holds worthy of protection at a given time".[440]

In part, the *Interessenjurisprudenz* took its valuations from the same naturalistic perspective as Gény and his contemporaries in France.[441] But, more than these French writers, Heck's main aim was in fact to bring out valuations *already inherent in the body of the law*; the radiating effect of value judgments - the '*Fernwirkung gesetzlicher Werturteile*' - laid down by the legislator for other cases to which the situation under review could be seen as in some way analogous.[442]

This asserted neutrality assumed special significance in the context of the '*Rechtserneuerung*' (law reform) under post-1933 National-Socialism. Heck himself, for one, thought that his method would be ideally suited to support the implementation of the new National-Socialist ideals in law. In his 1936 article '*Die Interessenjurisprudenz und ihre neuen Gegner*' (*The Jurisprudence of Interests and its New Enemies*), Heck wrote that his method was uniquely suitable for the legal reform required by National-Socialism.[443] By 1936, however, the Jurisprudence of Interests had come under heavy fire from rival scholars – hence the defensive title of Heck's article. The main charge of critics such as Julius Binder was that of liberal individualism.[444] As Bernd Rüthers summarized in his post-war analysis '*Die unbegrenzte Auslegung*' (*Boundless Interpretation*), Heck's critics thought that "the representatives of the Jurisprudence of Interests would not, as children of nineteenth century liberal thought, be able to see the relationship between individual and collective interests in any other way than as in a conflict calling for an equalization".[445] The whole idea of individual interests as opposed to social or collective interest was strange to the new National-Socialist ideology.[446]

Mere insistence on the neutrality of his method could not save Heck and his method, as neutrality itself was seen as "characteristic for a bygone era".[447] This is why in his 1936 article, Heck, although careful to maintain the separation between philosophy and legal method, did suggest that he had always seen individual interests as worthy of protection only because of the fact that they were simultaneously social interests.[448] This limited substantive adjustment, however, could not, much to Heck's evident regret, save his method from the criticisms of liberalism and individualism.

3.3.4 Balancing of Interests in the United States: Roscoe Pound's 'Sociological Jurisprudence'

The genesis of balancing of interests in the United States can to a large extent be told through the figures of Oliver Wendell Holmes and Roscoe Pound. For Holmes, a

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[432] *Ibid.*, 138.
[433] *Ibid.*, 130ff, 136.
[434] *Cf.* EDELMANN (1967), 73.
[435] WIEACKER (1995), 455.
[436] *Ibid.*
[437] *Ibid.*, 120.
[438] *Ibid.*, 110, 123 (protesting against the characterization of the *Interessenjurisprudenz* as animated by a "materialistic philosophy of life"), 129 (offering biographical sketches to show that "neither Jhering nor Rümelin nor myself was subject to any nonlegal influences in developing our theory"). See on the idea of neutrality also WIEACKER (1995), 455, remarking that the Jurisprudence of Interests could not offer "a suprapositive reason for preferring one competing interest over another" and arguing that the school saw itself more as "an introduction into the practical art of decision-making" than as a "philosophy of law".
[439] *Cf.* STOLLEIS (2001), 266. As mentioned above, Stolleis attributes the desire for a neutral, strictly juristic method in public law to the failure of liberal constitutionalism after 1849. See also the discussion of the autonomy and neutrality of Classical Legal Thought, *supra*, s. 3.2.2.
[440] Heck, *Formation of Concepts* (1932), 123.
[441] *Cf.* WIEACKER (1995), 453ff.
[442] *Cf.* Heck, *Formation of Concepts* (1932), 180. Heck draws an explicit connection between his method and reasoning by analogy. *Cf.* EDELMANN (1967), 73; LARENZ (1st ed., 1960), 129ff.
[443] Philipp Heck, *Die Interessenjurisprudenz und ihre neuen Gegner*, 22 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 129, 131 (1936).
[444] *Ibid.*, 173ff.
[445] RÜTHERS (1968), 271.
[446] *Cf.* FRANCIS G. SNYDER, THE EUROPEANISATION OF LAW: THE LEGAL EFFECTS OF EUROPEAN INTEGRATION 55 (2000) (on Heck's "interest pluralism" and its incompatibility with Nazi ideology).
[447] RÜTHERS (1968), 271.
[448] Heck, *Die Interessenjurisprudenz und ihre neuen Gegner* (1936), 175. Heck also pointed to his work in legal history, in which he had emphasized the position of individuals as members of classes ('*Stände*'), at 174-175.

perception of the centrality of balancing arose out of an acute appreciation of the many new kinds of conflict - between economic competitors, between capital and labour, *etc.* – that characterized industrial society; conflicts that precluded traditional all or nothing approaches and called for what he labelled "distinctions of degree".[449] As early as 1881 for example, in *The Common Law*, Holmes found "the *absolute* protection of property … hardly consistent with the requirements of modern business".[450] The same realization, that legal claims in conflict permitted only decisions based on distinctions of degree, led Holmes to formulating, in an 1894 essay on labour law, what Morton Horwitz has called the first "fully articulated balancing test" in American legal theory.[451]

Holmes was not part of any social progressive movement and his invocation of the need to balance interests was part only of a project of revealing the inadequacies of prevalent legal method, not of any political program for social reform.[452] That 'balancing of interests' would later be put to this use, is foreshadowed in another of the earliest explicit references to balancing in American legal literature; a reference that is emblematic for many later discussions to such an extent that it is worthwhile to discuss it at some length.[453]

In an 1895 *Comment* in the *Yale Law Journal*, an anonymous commentator criticized an 1894 Illinois Supreme Court decision that struck down a law forbidding women in factories to work more than eight hours a day; a decision representative of many state and federal decisions of the period, which similarly invoked the right to

[449] Holmes was to repeat this theme of 'distinctions of degree' decades later in his constitutional jurisprudence. See, *e.g.*, his dissent in USSC *Panhandle Oil v. Mississippi ex rel. Knox*, 277 U.S. 218, 223: "In [Marshall's] day, it was not recognized as it is today that most of the distinctions of the law are distinctions of degree" (cited in T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 954 (1987). On the relationship between social controversy and the attack on classical legal thought, see HULL (1997), 35 ("against the bedrock of formalism flowed higher and higher tides of social and economic controversy"). See also Kennedy, *Legal Consciousness* (1980), 7 writing that the context of Classical Legal Thought was "the first protracted period in America of the kind of economic and class conflict that had characterized the Western European countries during the period of rapid industrialization". Central issues in Kennedy's view were "the concentration of industry and finance combined with 'cut-throat competition'; the struggle between the farmers and the railroads; the struggle between unions and employers over working conditions and wages; and the relation of state to federal governments in the regulatory process".

[450] Cited in HORWITZ (1992), 129.

[451] *Ibid.*, 131. See also Oliver Wendell Holmes, *Privilege, Malice and Intent*, 8 HARV. L. REV. 1, 3 (1894) ("But whether, and how far, a privilege shall be allowed is a question of policy. (…) When the question of policy is faced it will be seen to be one which cannot be answered by generalities, but must be determined by the particular character of the case (…). I do not try to mention or to generalize all the facts which have to be taken into account; but plainly the worth of the result, or the gain from allowing the act to be done, has to be compared with the loss which it inflicts."). Holmes' analysis was repeated, in the same context and almost literally, in 1930 by Bowes Sayre: "one or the other of the opposing interests must give way; which one it will be must depend in the last analysis upon a nice balancing of the interests concerned. There is no other way. No rigid formula or precise definition can possibly spell out the solution; the actual decision must inescapably depend upon policy". See Francis Bowes Sayre, *Labor and the Courts*, 39 YALE L. J. 682, 693 (1930). This statement suggests that Holmes' perspective had not yet become fully orthodox by the late 1920s.

[452] See for example the charge in *Privilege, Malice and Intent* that "decisions for or against the privilege (…), often are presented as hollow deductions from empty general propositions". Holmes 1895, p. 3.

[453] Based on a Hein Online periodicals search. Excluded from the search for early balancing references are those to 'balancing probabilities', 'balancing the evidence' and the like.

freedom of contract in order to strike down protective legislation.[454] The Illinois court held that protecting the women *themselves* could not justify the legislation and that protection of *anyone else* or of the *public interest* was not at issue. For the anonymous reviewer, however, the case did not turn on protection of the women themselves, but on protecting society against "the harm that may be entailed on posterity – to weakness that may strike at the very life of the State". This public or social harm was evident, the commentator wrote, from lower birth rates for factory workers. The reviewer concluded:

> "The whole question seems to involve a balancing of public policy over against the right to contract, and the court has decided in favor of the latter".[455]

The *laissez-faire* constitutionalism of the freedom of contract doctrine, on stark display in this Illinois decision and a range of other decisions leading up to Justice Peckham's majority opinion in *Lochner v. New York* at the Supreme Court in 1905 - an opinion from which Justice Holmes dissented - was Roscoe Pound's main object of attack in the first decades of the twentieth century, in particular in his articles '*Mechanical Jurisprudence*' and '*Liberty of Contract*' of 1908-1909, both cited earlier. Part of this attack echoed the theme of the anonymous *Comment* just cited: if courts would only look at social reality and take all the facts into consideration, they could not possibly come to the conclusions they actually reached. Attention to actual social data - on birth rates for female factory workers in the Illinois case, for example, or on the quality of bread produced by bakers working overly long hours in *Lochner* – would make it impossible to hold, as courts regularly did, that "the interest of the public" was not "in the slightest degree affected" by social legislation.[456] This theme of attention to real world consequences of judicial rulings led Pound to issue his famous call for a 'Sociological Jurisprudence'; a "movement for the adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles".[457] In issuing this call, Pound cited Continental European legal theory in support, referring in particular to Jhering's work on "superseding [the] jurisprudence of conceptions (*Begriffsjurisprudenz*) by a jurisprudence of results (*Wirklichkeitsjurisprudenz*)".[458] It was this same critique, it was noted above, which stood at the basis of the development of alternatives – some involving balancing – on the Continent. Pound, however, added a number of crucial elements to his conception of 'Sociological Jurisprudence' and balancing. It is these elements that place the genesis of balancing in the U.S. in a very particular light.

For Roscoe Pound, 'sociological jurisprudence' was intimately tied up with both a 'new' worldview and, related, a 'new' ideal of justice. The new worldview sought to

[454] Illinois Supreme Court, *Tilt v. Illinois*, May Term 1894. The exact number – or proportion – of cases striking down social legislation is disputed. See BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 27ff, 67ff (2009).

[455] *Comment*, 4 YALE L.J. 201 (1895). The case is not discussed, nor is the *Comment*, in Pound's *Liberty of Contract* (1909), even though that piece refers to several Illinois decisions from the same period.

[456] USSC *Lochner v. New York*, 198 US 45, 75 (1905).

[457] Pound, *Liberty of Contract* (1909), 464; Pound, *Mechanical Jurisprudence* (1908), 609-610.

[458] Pound, *Mechanical Jurisprudence* (1908), 610 (translation in original).

replace "an abstract and unreal theory of State omnipotence on the one hand, and an atomistic and artificial view of individual independence on the other" with a realistic assessment of "the facts of the world with its innumerable bonds of association".[459] This awareness of increased interdependence had to be combined with a transition towards a new form of justice. For the latter, Pound set out the required transformation in his 1912 paper *Social Justice and Legal Justice*:

> "It has been said that our *legal idea of justice* is well stated in Spencer's formula: 'The liberty of each limited only by the like liberties of all'. Compare this with Ward's formula of *social justice*: *the satisfaction of everyone's wants so far as they are not outweighed by other's wants*".[460]

The theme of 'balancing of interests' that Pound was to develop in the 1920s has to be seen fully in function of these ideas on social justice and his project of progressive reform.[461] The bulk of these views are set out in his 1921 paper '*A Theory of Social Interests*'.[462] The paper begins with Pound's individualist critique of classical method. "From the seventeenth century to the end of the nineteenth", Pound wrote, "juristic theory sought to state all interests in terms of individual natural rights".[463] During this time, "social interests were pushed into the background".[464] This meant that while "the books are full of schemes of natural rights (…) there are no adequate schemes of public policies".[465] At the time of writing, however, in Pound's view "pressure of new social interests" was giving courts pause and led them to cast doubt upon their traditional methods.[466]

These new difficulties, and the way the defects of the traditional approach played out in Pound's view can be illustrated on the basis of the Illinois decision and *Comment* cited above. The court's decision, on this view, was evidently defective in that it considered only the individual 'natural right of freedom of contract', entirely neglecting any possible effect on other individuals or on society at large. The reviewer's real-life-aware, data-sensitive, 'balancing' approach was, from this perspective, an important step forward. But even the suggested alternative in the *Comment* revealed an important weakness. Merely replacing *categorical analysis* of the outer limits of natural rights by a *relative approach* turning on 'weighing' or 'balancing' was not enough. Because, Pound wrote, even if a court were to engage in 'balancing', framing the relevant conflict as between an individual *right* on the one hand and a mere social *policy* on the other was liable to determine the outcome in advance.[467] It was in this context that Pound

[459] *Ibid.*, 609, citing Figgis.
[460] Roscoe Pound, *Social Justice and Legal Justice*, 75 CENT. L.J. 455, 458 (1912) (emphasis added).
[461] It is significant that Pound's earlier writings, in particular *Mechanical Jurisprudence* and *Liberty of Contract*, contain little or no reference to balancing of interests.
[462] Reprinted in 1943 as Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1 (1943). Citations are to the 1943 Reprint.
[463] *Ibid.*, 5.
[464] *Ibid.*
[465] *Ibid.*, 7.
[466] *Ibid.*, 12.
[467] *Ibid.*, 2. Pound himself defended the courts' mistrust of general notions of 'policy', referring to a "vague conception of 'policy', of which courts and lawyers are rightly mistrustful, since the policies are largely ill-defined and in their application have been felt to leave too much scope for the personal equation of the particular tribunal" (*Ibid.*, 12).

formulated a crucial warning, often repeated later: "when it comes to weighing or valuing claims (…) *we must be careful to compare them on the same plane*".[468] This 'same plane' Roscoe Pound found in the concept of 'interests'.

The central role that 'balancing of interests' played in Pound's progressive reform project can now be assessed.[469] On the one hand, *balancing* was the expression of the new worldview, already touched upon by Holmes, that emphasized interdependence over absolutism and individualism, and questions of degree over categorical boundaries. On the other hand, the concept of *interests* was instrumental in mediating between individual 'rights', which had always been judicially protected, and 'policies', which had not. The concept of 'interests' allowed for evaluation and comparison to be carried out "on the same plane". This it achieved primarily through a *revaluation* of the social and a corresponding *relativization* of the individual.

The analysis in '*A Survey of Social Interests*' and in Pound's other writings of the same time are revealing for his instrumental use of the new conception of balancing of interests. Once the theme of balancing was introduced, Pound had little interest in elaborating its structure or nature. Pound's papers contain little or no helpful guidance for judges on how to 'balance'.[470] Much more important for him was his project of drawing attention to the multitude of important 'social interests' and to their neglected weight in contemporary case law; the elaboration of "adequate schemes of public policies" as he had put it. Once these interests were "listed, labeled [*sic*], classified, and illustrated", Edmond Cahn observed later, "Pound and his school seem ready to adjourn".[471] "In short", Cahn concluded, "the Anglo-Saxon school stands halted at the threshold of the theory of values (axiology). Meanwhile, in Germany, the preoccupation of *Interessenjurisprudenz* was less with listing and taxonomy and more with the techniques of adjudication".[472]

Pound was certainly no socialist reformer, and he became less enamoured of progressive ideas over the span of his career. But because the legal orthodoxy he was concerned with in this early period – constitutional adjudication, primarily in the field of health and safety regulation – was, fairly uniformly, so much more socially conservative than what he and other Progressives desired, it was unavoidable that the call for a more

[468] *Ibid.*, 2. (emphasis added). Repeated, *e.g.*, in Charles Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755 (1963).
[469] A project that, it should be said, held out more hopes for legislative reform than for beneficial judicial intervention. The ideals of progressive reform were broadly shared among those who followed Holmes' and Pound's methodological critique. *Cf.* Robert S. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought: A Synthesis and Critique of our Dominant General Theory About Law and its Use*, 66 CORNELL L. REV. 861, 915 (1981) ("most of the instrumentalists were reformers. Some were even zealous reformers …").
[470] See, *e.g.*, Pound, *Survey of Social Interests* (1943), 35, calling simply for "a reasoned weighing of the interests involved and a reasoned attempt to reconcile them or adjust them".
[471] See also Cahn, Book Review (1948), 921 ("[O]nce the interests are listed, labeled, classified, and illustrated, Pound and his school seem ready to adjourn. (…) In short, the Anglo-Saxon school stands halted at the threshold of the theory of values (axiology). Meanwhile, in Germany, the preoccupation of *Interessenjurisprudenz* was less with listing and taxonomy and more with the techniques of adjudication").
[472] *Ibid.*

reality- or society-aware *sociological* jurisprudence would be equivalent to a call for a more *social* jurisprudence. In this sense, Pound saw balancing of interests as a way to make "inroads into (…) individualism", in just the way the old equity jurisprudence had done for the common law.[473] And just as Pound and the other proto-Realists had ascribed (conservative) political dimensions to the legal method they criticized, as described above, they sought to employ the method they suggested as a replacement – balancing of interests – for their own political project of progressive reform. When, by the late 1920s, Pound became much less sympathetic to the cause of reform,[474] his identification of connections between conceptualism/formalism and reactionary politics on the one hand and of sociological jurisprudence/balancing and progressive politics on the other hand was already available to be taken up by the legal realists, with whom Pound famously fell out, and their successors.

3.4 APPRAISAL: CLASSICAL ORTHODOXY & BALANCING, LEGAL METHOD & POLITICS

Throughout the previous Sections, a number of differences between the classical orthodoxies and their replacements, involving balancing, in German and U.S. American legal thought have already been alluded to. This concluding Section presents an overview, expanding on those themes most relevant to the discussion of balancing in mid-century rights adjudication, in Chapters 4 to 7, and to the analysis of legal formality and its opposites, in Chapter 8.

3.4.1 Two classical orthodoxies and their critiques

Both in Europe and in the U.S., the classical legal thought of the late nineteenth century was conceived of as a "natural framework of ground rules, supposedly completely neutral among competing interest".[475] And although this supposedly neutral system has been found to cover for substantive preferences – for individualism, stability and legal certainty – in both Europe and the U.S.,[476] the extent to which he methods of classical orthodoxy came to be associated with broader political preferences – the *linking of method and substance*, or, as will be argued further in Chapter 8: *of formality and substance* - was much greater in the U.S. than in Europe.

This paragraph describes two important overlapping differences between the understandings and critiques of classical orthodoxy in German and U.S. legal thought that help support this claim. They can be summarized as follows. First, there were real

[473] *Cf.* Pound, *Liberty of Contract* (1909), 482.
[474] *Cf.* Kennedy & Belleau, *François Gény aux États-Unis* (2000), 311.
[475] See Gordon, Elusive Transformation (1994), 140-142.
[476] *Cf.* Kennedy, *Legal Consciousness* (1980) 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 , 1033ff (2003).

differences in the nature of the dominant manifestations of classical orthodoxy in the U.S., Germany and France, relating in particular to the use of 'categorization' as a principal conceptual tool. And second, in addition to these real differences, there is the legacy of Roscoe Pound's imaginative and immensely influential explicit linking of the methods of classical orthodoxy to conservative politics, when compared to the absence of this connection in German legal thought.

3.4.1.1 The uses and manifestations of classical orthodoxy: Subsumption & categorization, Public and private power

A primary concern within classical orthodoxy was the portrayal of adjudication as a neutral, objective process carried out by judges bound to the law. Conceptual reasoning was essential to upholding this image. As Philipp Heck himself wrote, this type of reasoning – falsely - allowed the judge to feel "relieved of all responsibility. Like Pilate he may wash his hands and calmly declare: 'It is not my fault, it is the fault of the concepts'".[477] But while this general depiction of conceptual reasoning is valid for legal thought both in Germany (and France) and the U.S., there were important differences in operation and impact as between the two versions.

(a) Subsumption and categorization

One of these differences relates to the distinction between *subsumption* and *categorization* as manifestations of conceptual jurisprudence. Subsumption, or reasoning by deduction from abstract concepts, was the primary target of German and French critics of conceptual jurisprudence, who disparaged the classics' efforts to uphold the image of gapless pyramidal systems of law.[478] In the U.S., by contrast, in the absence of any major codification of private law, questions of system, deduction and 'gaplessness' were much less relevant to legal scholars and judges. Instead, the main emphasis was on another 'tool' of classical orthodoxy: categorization. For Morton Horwitz, the idea of categorization – the "clear, distinct, bright-line classifications of legal phenomena" – "captures the essential differences between the typical legal minds of nineteenth- and twentieth-century America" better than anything else.[479]

It is important to note that this difference is one only of emphasis and of *relative* prominence. Subsumption and categorization both turn on the idea of 'definition' and invoke a reasoning process that classifies cases as lying either within or outside the scope of a particular concept, rule or category. Categorization and bright-line demarcation clearly played a significant role in European legal thought. As Marie-Claire Belleau has written, "[b]inary, on/off structures" were favoured in French legal thought "because

[477] *E.g.* Heck, *Jurisprudence of Interests* (1933), 40.
[478] *Cf.* Wieacker (1995), 343.
[479] Horwitz (1992), 17.

such structures helped maintain the illusion of the complete logical determination of the system".[480] Meanwhile, subsumption did play an important role in the American context, where nineteenth-century legal thinking had gradually become "more integrated, systematic, general and abstract". [481] In particular, Roscoe Pound's critique of the Supreme Court's constitutional right jurisprudence, discussed earlier and revisited in the next paragraph, was principally a critique of the abuse of deduction, very much along French and German lines.

These important *caveats* notwithstanding, it does seem fair to say that the typical European continental manifestations of conceptual jurisprudence are *syllogistic reasoning* and the idea of *the system*, while in the U.S. setting they are *categorical reasoning* and *the 'bright-line rule'*. This difference in emphasis is important, for at least two reasons. One of these relates to the specific way in which categorization has been used in U.S. law, and is discussed below under (b). On this point the argument is simply that the greater prominence of categorization in U.S. law generally also made this specific use more likely. The other reason, however, relates directly to the difference between syllogistic reasoning and categorical reasoning.

While these two modes of conceptual jurisprudence have much in common, they are also different in that they rely on understandings of legal formality that are subtly different in emphasis, in ways discussed more fully in Chapters 7 and 8. Categorization relies upon - and may be the manifestation of – what may be called a *formality of choice*. A judge, or a lawyer more generally, may choose to take a categorical approach to a particular legal problem or an area of the law. That approach could then easily co-exist with more 'gradualist' approaches to neighbouring problems or doctrinal areas. The two approaches may even be combined within one overarching, multi-part 'test', as discussed further in Chapters 7 and 8. Syllogistic reasoning and system building, by contrast, rely upon – and are the expressions of – an understanding of legal formality that is much more comprehensive. While many shades of nuance obviously are possible, reasoning by deduction and system building are not as easily seen as conceptual tools available for use and for combination with other approaches. To sustain jurists' commitment to system building, the system that they work towards has to be, at a minimum, reasonably comprehensive and complete, at least in aspiration. If 'less systematic' parts of the law were to persist, that would seem likely to be because of neglect or conceptual failure, rather than by design. Similarly, syllogistic reasoning either is able to sustain faith in the outcomes of legal decision making, or it is not. This is not to say that, as an empirical matter, legal systems will either be fully systematized and exclusively reliant on syllogistic reasoning, or have no place for system and subsumption – that clearly would be an indefensible claim. The argument is rather that the kind of commitment involved in system building and in deductive reasoning from concepts, is less easily conceived off as

[480] *Cf.* Belleau, *Juristes Inquièts* (1997), 409.
[481] HORWITZ (1992), 12ff. Increasingly, the principal conceptual units employed were no longer functional categories – contracts for insurance, loans, transportation etc. – but a limited number of 'fundamental principles' of the common law, such as will, fault and property *Cf.* Grey, *Langdell's Orthodoxy* (1983), 5, 36; HULL (1997), 33.

a commitment that can be turned on or off at will. Categorization as a legal technique, by contrast, seems much more easily able to sustain such a commitment, even if it is used selectively, openly instrumentally, and in conjunction with other approaches. Put differently: it is much easier to believe in categorization only some of the time, than in reasoning by deduction only some of the time. Chapter 8 elaborates upon this difference, claiming that such a choice-based, instrumentalist understanding of legal formality is in fact characteristic for American legal thought, and that, at the same time, a more comprehensive, all-or-nothing conception of legal formality is typical for continental European legal thought.

(b) Public and private power

Categorization may have been more prominent in U.S. law than in Europe, but categorical, binary solutions played a significant role on both sides of the Atlantic. In both settings, it was not merely the practice of categorization that was important, the *content and nature* of the categories and concepts employed also had a crucial role to play. Categorical, binary solutions also found favour because of their proximity to prevailing worldviews and views on the function of law. As Mathias Reimann has written, based on views of law and society propagated in Germany by Von Savigny:

> "Law served only to limit private spheres of freedom in such a way that these spheres could coexist in a society. Its concern was not to find the true idea of justice, or to be fair to the parties under the particular circumstances of the case. It drew only the 'invisible line' at which one individual's freedom had to end because another one's began".[482]

This worldview allowed classical jurists to view adjudication as "an objective task of drawing lines or categorizing actions as though they were objects to be located in the spatial map of spheres of power". [483] However: although this relationship between categories and boundaries of power can be found both in Europe and in the U.S., it assumed a dramatically different meaning in the latter setting. In Europe, the boundaries of power envisaged were boundaries to the power of private individuals, asserted against their neighbours through regimes of contact, property or tort law. German examples of demarcation-issues concern questions such as "the right of the owner of a business *to enjoin a [private] person* interfering with his trade or business".[484] In France, Gény called for a more flexible approach to the determination of the 'meeting of wills' requirement as a boundary to the freedom of contract,[485] so that in some cases one-sided promises might

[482] Reimann, *Nineteenth Century German Legal Science* (1983), 857. Reimann invokes Von Savigny's notion of "*unsichtbare Gränze*" for this conception of law.
[483] Kennedy, *Legal Consciousness* (1980), 12.
[484] Rümelin, *Developments* (1930),12ff (emphasis added). See also, *e.g.*, Heck, *Jurisprudence of Interests* (1933), 42ff; Müller-Erzbach, *Reichsgericht und Interessenjurisprudenz* (1929), 163ff (rights of third parties under a contract).
[485] GÉNY (1899), nr. 171 and 172, p. 23 and 26.

be held binding: an innovation unthinkable in the theories of classical orthodoxy, but of practical value for business.[486] In the U.S., however, it was not only the power of individuals that had to be demarcated, but, crucially, also *public power* - the power of government institutions. Here, the crucial question was: "[t]o what extent may occupations or businesses (…) be made *subject of [government] regulation* under our American constitutions?".[487] The answers to this type of question may have been similarly categorical in nature - businesses that were "purely and exclusively private" could not be regulated, whereas businesses that were "affected with a public interest" could.[488] But their implications were much more politically sensitive than the French or German fine-tuning of the law of obligations, important as those innovations were.

This distinction, between these demarcations of private and of public power, is an under-analysed theme in the literature. Some commentators focus merely on the public power dimension, to the exclusion of the issue of the demarcation of private power. For them, classical orthodoxy simply "strictly separated the legal universe into spheres of private (market) and public (state) action".[489] Other leading authors, on the other hand, mention both the public and private dimensions, but seem to conflate them. This, for example, is Duncan Kennedy's early depiction of 'classical legal thought':

> "The premise of Classicism was that the legal system consisted of a set of institutions, each of which had the traits of a legal actor. Each institution had been delegated by the sovereign people a power to carry out its will, which was absolute within but void outside its sphere. The justification of the judicial role was the existence of a peculiar legal technique rendering the task of policing the boundaries of spheres an objective, quasi-scientific one".[490]

The institutions Kennedy refers to are individuals and corporations as well as governmental organizations. Each of these actors was thought to possess a power that was "absolute within but void outside" a certain sphere of action. But while this view has been very useful in stressing similarities between European and U.S. American classical orthodoxy, it risks obscuring the crucial difference between the demarcation of private power among individuals and that of the limits of public power, or, put differently: between demarcating the liberty of individuals *vis-à-vis* other individuals or in relation to their government.[491] The added dimension of 'public power' means that categorization, as a cornerstone of classical orthodoxy, had a very different, much more political, original meaning in the US than it had in Europe.

This original significance is of continued relevance for modern invocations of categorical or 'rule-based' approaches to constitutional law, and therefore for balancing itself, following the structuralist contrast-focused method for the study of meaning outlined in Chapter 2. This historical background, in which demarcation of public power and individual liberty from government have always been important functions of categorization, shines a new light on pervasive American fears of "balancing away" fundamental rights protection, on the repeated efforts to create 'bright-line rules' in many different areas of constitutional law,[492] and on explicit calls to "*reclaim* the methodology of late nineteenth-century legal thought" as a way to get out of "the conundrums of balancing".[493]

3.4.1.2 Roscoe Pound and the linking of method and substance

In German (and in French) legal thought, the critique of classical orthodoxy was predominantly a *private law* project. In the U.S., this critique quickly assumed *constitutional significance* through the guarantee of the 'freedom of contract' in the Bill of Rights, and its interpretation by the U.S. Supreme Court. In addition: in German (and French) law, the critique of classical orthodoxy was primarily an *academic* project, while in the U.S. the main target of criticism was the *judiciary*, in particular for its constitutional decisions of the kind just mentioned. The background to these differences is easy to see. A 'political' role was thrust upon law in the U.S. much earlier than anywhere else. Law and legal method in the U.S. had to face questions concerning constitutional judicial review - of rights clauses and of federation-state relationships - that were unknown in Europe. As Thomas Grey has written: "The most distinctive feature of American law has been its

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[486] *Ibid.*, nr. 172, p. 32.
[487] John B. Cheadle, *Government Control of Business*, 20 COLUM. L. REV. 550, 558 (1920) (emphasis added). See also the majority opinion in *Lochner v. New York*.
[488] USSC *Munn v. Illinois* (1876) 94 U.S. 113, 124. The categorical, deductive nature of Chief Justice Waite's approach is evident throughout his analysis: "This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine *what is within and what without its operative effect*", 94 U.S. 113, 125 (emphasis added). The *Munn*-criterion was also operative in *Lochner v. New York* - the bakers' case - in which it was held that "the interest of the public [was] not in the slightest degree affected" by the governmental regulation at issue (at 57). Cheadle's critique: "surely as a matter of fact and economic experience we are finding that business is largely *interdependent* – so much so that it is difficult to conceive of a business that deals at all with the public and yet is 'purely and exclusively private'" (at 546, emphasis added). For another typical example, see, *e.g.*, the distinction between 'questions of law' and 'questions of fact' that was important for determining to what extent the findings of administrative agencies would be scrutinized by courts. *Cf.* E.F. Albertsworth, *Judicial Review of Administrative Action by the Federal Supreme Court*, 55 HARV. L. REV. 127 (1921). This problem too was taken as a point of departure for critique and reform: "it will be pointed out that what the Court is really doing, consciously or unconsciously, and what is should do, is balancing the various individual and social interests involved. For the problem is far too deep to be solved by stating that a particular case involves a question of fact or one of law (…)" (*Ibid.*, at 128).
[489] Gordon, *Elusive Transformation* (1994), 142.
[490] Kennedy, *Legal Consciousness* (1980), 7.
[491] It is important to note that even questions more directly focused on by *European* critics of classical orthodoxy, such as the inequality of bargaining power between employees and employers stemming from a formalist emphasis of 'autonomy of will', quickly assumed *a public dimension* in the U.S., simply because they arose in the context of judicial review of legislation. See, *e.g.*, USSC *Adair v. United States*, 208 U.S. 161, 175 (1908) (per Justice Harlan) ("In all … particulars, the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract, *which no government can legally justify in a free land*", emphasis added). Harlan's approach prompted Roscoe Pound to remark: "Jurisprudence is the last in the march of the sciences away from the method of deduction from predetermined conceptions". Pound, *Liberty of Contract* (1909), 464.
[492] See further Chapters 6 and 7, and Chapter 8.
[493] Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 712 (1994) (emphasis added).

deep involvement with American government and politics, and as a result, legal theory in America has always had inescapable political implications".[494]

These 'inescapable implications' resonated in academic legal writing. In his famous 1911-1912 article on *The Scope and Purpose of Sociological Jurisprudence*, Roscoe Pound observed that "the jurists of whom Jhering made fun [in Europe] (…) have their counterpart in American judges".[495] In retrospect, it seems that a crucial point about this remark is not the similarity between Europe and the U.S. that Pound observed, but the generally overlooked difference between 'jurists' - scholars – on the Continent and 'judges' - officials with power – in the U.S. This difference matters, because it is through these judicial decisions, notably those of *Lochner* – the bakers' working hours case - and its progeny, that the perceived vices of classical orthodoxy have become part of received constitutional law wisdom in American legal thought. *Lochner*'s significance to modern American law has already been mentioned, but may be emphasized again here. The need to avoid "*Lochner*'s error" has long been seen as a "central obsession"[496] in American legal thought.[497] It was Roscoe Pound, building on Justice Holmes' dissent, who first identified this 'error' as stemming directly from classical orthodoxy's conceptualism and formalism, by way of the steps outlined earlier, in Section 3.2. Construing this connection between the *Lochner* Court's political conservatism and conceptualist/formalist jurisprudence was a creative act,[498] because the conceptualist or formalist nature of this decision and many other similar ones is not obvious, and certainly not immediately so.[499]

[494] Grey, *Modern American Legal Thought* (1996), 510.
[495] Roscoe Pound, *Scope and Purpose of Sociological Jurisprudence II*, 25 HARV. L. REV. 140, 146 (1911). See also part III, 25 HARV. L. REV. 489, 502 (1912) ("[I]t is true of the codes of Continental Europe, as of our Anglo-American common law, that their abstractions, proceeding upon a theoretical equality, do not fit at all points a society divided into classes by conditions of industry. Much of what has been written in Europe from this standpoint might have been written by American social workers".
[496] Gary D. Rowe, *Lochner Revisionism Revisited*, 24 LAW & SOC'Y INQUIRY 221, 223 (1999). See also David E. Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1 (2003).
[497] Prominent examples are John Hart Ely, who elaborated his theory of constitutional review in *Democracy and Distrust* specifically in order 'to find a way of approving *Brown* while disapproving *Lochner*'. See JOHN HART ELY, DEMOCRACY AND DISTRUST 65 (1980), and Cass R. Sunstein, *Lochbner's Legacy*, 87 COLUM. L. REV. 873, 873 (1987) ("Constitutional law tends to define itself through reaction to great cases. (…) [F]or more than a half-century, the most important of all defining cases has been *Lochner v. New York*"). See also Grey, *Modern American Legal Thought* (1996), 495ff.
[498] *Cf.* Grey, *Judicial Review and Legal Pragmatism* (2003), 477.
[499] There are numerous statements in the majority opinion of Mr. Justice Peckham that sound very different from what would be expected of a 'typically conceptualist', or 'mechanical' judgment. Consider the following passages: "I take it to be firmly established that what is called the liberty of contract may, within certain limits, be subjected to regulations designed and calculated to promote the general welfare (…) 'The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import', this court has recently said, 'an absolute right (…)'". In fact, parts of the opinion read much like a typical 'proportionality' analysis, familiar in many European jurisdictions: "If the end which the legislature seeks to accomplish be one to which its power extends, and if the means employed to that end, although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the court cannot interfere" 198 U.S. 45, 67ff. Justice Holmes' major argument in dissent was that the majority decided the case "upon an economic theory which a large part of the country does not entertain", adding the reference to "Mr. Herbert Spencer's Social Statics". It is true that, a few lines later in his opinion, Holmes, J., offers his famous anti-formalist aphorism that "[g]eneral propositions do not decide concrete cases", but, intriguingly, he does so not in critique of the majority, but by way of a *caveat* to accompany his own general statements for this area of the law ("General propositions do not decide concrete cases. (…) But I think that the proposition just stated, if it is accepted, will carry us far toward the end") 198 U.S. 45, 75ff. See however *infra*, s. 3.4.1.1 on the 'mechanical' aspects of at least one key criterion relied upon by the *Lochner*-court.
[500] H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 611fn39 (1957). Another telling argument against Pound's formalist reading of *Lochner* comes from another prominent outsider. In his influential book '*Le Gouvernement des Juges et la Lutte contre la Législation Sociale aux États-Unis*' (1921), the French scholar Edouard Lambert analysed and criticized the conservative anti-regulatory case law of the U.S. Supreme Court for a French legal audience. Intriguingly, nothing in his critique of these decisions turns on their excess formalism or conceptualism. See LAMBERT (1921).
[501] *Cf.* CARDOZO (1921), 66-67.
[502] *Cf.* ELY (1980), 65.

It was, perhaps not surprisingly, a relative outsider to American law, H.L.A. Hart, who offered an early critique of the connection, writing that while *Lochner* might have been "a wrongheaded piece of conservatism", there simply was "nothing mechanical about it".[500] Regardless of the merits of Pound's identification of *Lochner* and the 'vices' of classical orthodoxy, however, the connection quickly assumed canonical status, and allowed progressive jurists to point out a single "Demon of Formalism" against which all their criticisms could be directed.[501] The *Lochner* line of decisions ultimately led to the crisis over New Deal legislation and to Roosevelt's infamous court-packing plan. Since that time, much of American constitutional scholarship can be structured around the basic question of why *Lochner* was wrong and certain later controversial decisions – authors usually choose either *Brown v. Board of Education* or, less often, *Roe v. Wade* – were right.[502] The *Lochner*-episode has, in this way, perpetuated the relevance of classical orthodoxy to understandings of modern American constitutional law in general.

3.4.2 Balancing and interests

Summarizing observations on balancing can be shorter at this stage, as most of the material for the construction of two paradigms of balancing discourse is obviously still to follow. This short Section offers two interim conclusions: on differences in relative importance of, and interpretation of, different elements of balancing discourse, and on differences in the ways in which, and extent to which, issues of legal method involving balancing came to be associated with questions of substance.

(1) On the first point, the descriptions above present important reminders of the multiple possible meanings of the language of balancing. Outwardly very similar terms figure in the writings of Gény in France, Heck and others in Germany, and Pound in the U.S. But in French legal thought, the idea of balancing of interests, even though it surfaces at a prominent position in Gény's methodological proposals, was not in fact all that central to broader projects of juridical reform, which focused more on judicial societal awareness and on theories of sources of law. In Roscoe Pound's project, the idea of balancing was subordinate to the focus on 'interests', notably social interests. In German legal thought, finally, both the elements of balancing and interests were important, and were promoted jointly as a more suitable adjudicatory technique.

(2) On the second issue – the relationship between legal method and substance – , too, there were important differences between the systems studied above. In the U.S.,

the connection between legal method and politics, which critics had attributed to categorization and other elements of classical orthodoxy, in a sense continued in the age of 'the triumph of the balancing test'. This time, however, it was a conscious effort on the part of the Social Progressives to employ legal method for purposes of (moderate) political reform. Pound himself, as Edward White has written, had a conception of "judicial decision-making as part of [a] larger project of social engineering".[503] Balancing of interest, in this project, became a Progressive legal "device"[504], used in furtherance of a levelling between rights and social policies. Through the introduction of the concept of interests, the Progressives hoped to be able to devalue individual rights, which they thought had received excessive judicial protection, and to revalue social policy, which they thought had been neglected.

This connection between balancing as method and substantive preferences was largely absent in Europe. In France, as discussed above, this was partly because the reform effort, in so far as it related to substance, was on the whole less ambitious than in the U.S., and partly because the specific idea of balancing did not play a major role in whatever substantive and methodological reform was proposed. In German legal thought, finally, this was because the *Interessenjurisprudenz* purposefully sought to present itself as a neutral, apolitical juridical method. Heck did not choose the concept of 'interests' in order to equalize conflicts between individual constitutional rights and broad social policies, but because he felt it offered the greatest scope for conceptual precision, and because it fit with common parlance. In stark contrast with Roscoe Pound's socially-oriented proposals for balancing in the U.S., Heck and the other members of the *Interessenjurisprudenz*-school were later even charged with promoting excessive *individualism* through their use of balancing of interests; a charge that Heck vigorously denied. Clearly the idea that balancing of interests and more socially progressive outcomes would be related did not form part of the understanding of the *Interessenjurisprudenz*, nor of its critics. This means that three radically different predictions for the relation between balancing and substantive outcomes can be identified: balancing of interests would promote social values (Pound), balancing would be completely substantively neutral (Heck), and balancing would foster individualism (Heck's critics).

[503] White, *From Sociological Jurisprudence to Realism* (1972), 1010.
[504] *Cf.* Gordon, *Elusive Transformation* (1994), p. 148.

3.5 CONCLUSION

In both Europe and the U.S. a nineteenth-century classical orthodoxy dominated by conceptual reasoning was followed by influential proposals of reform that, more or less prominently, incorporated ideas of balancing of interests. But the precise content and reception of these broadly similar movements were very different between the two settings.

In the U.S., classical orthodoxy's main methodological devices – categorization, and syllogistic reasoning from general constitutional rights clauses -, were given additional substantive meanings by its critics – meanings they largely lacked in European legal thought. At the same time, these American critics propagated balancing of interests as part of a substantive project of social reform. Understanding both balancing and its 'opposites' to have political implications, then, has a long tradition in American legal thought. Both these elements are largely missing from German (and French) thinking.

The original American meaning of categorization, with its emphasis on the preservation of individual liberty *vis-à-vis* governmental regulation, lies at the basis of a dominant feature of contemporary American constitutionalism: the recurrence of 'formalism' as an important *positive* theme in adjudication and legal theory.[505] Building on a historical heritage of the uses of categorical reasoning to demarcate the limits of public power in relation to individual liberty, 'neo-formalist' writers, Justice Scalia of the U.S. Supreme Court perhaps most prominently among them, reject any negative connotations of the term 'formalism', proclaiming instead: "Long live formalism (…) It is what makes a government of laws and not of men".[506]

It is crucial to note that this favourable view on categorization, and on legal formality more broadly, is decidedly an *anti-balancing* perspective. There is, in American jurisprudence, a pervasive fear of the 'balancing away' of constitutional rights protection. This fear is manifested in repeated efforts to uphold rights as 'absolutes', to protect 'inviolable cores' of rights, or to create 'bright-line rules' in areas as diverse as freedom of expression or search and seizure. Many examples of these lines of reasoning will be discussed in Chapters 6 and 7. Most strikingly, some prominent writers, like Richard Pildes, go so far as to voice explicit calls to "reclaim the methodology of late nineteenth-century legal thought" as a way to get out of "the conundrums of balancing".[507]

[505] See further *infra*, s. 7.3.
[506] ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 25 (1998). See for further examples: Weinrib, *Legal Formalism* (1988); Schauer, *Formalism* (1988); FREDERICK SCHAUER, PLAYING BY THE RULES (1993).
[507] Pildes, *Avoiding Balancing* (1994), 712. The broader relevance of formalism and its alleged demise to an understanding of modern constitutional controversy in the U.S. has been well captured by Charles Goetsch, who wrote: "The current incarnation of [the] ongoing conflict between the principle and fiat approaches to judicial decision-making is the direct result of the disintegration of late nineteenth-century legal formalism (…). By examining the sources, motivation, development, dynamics, and disintegration of legal formalism, we will be better equipped to answer such fundamental questions as (…) what role, if any, should judicial intervention have in our system of government" (Goetsch, *The Future of Legal Formalism* (1980), 256).

The relationship between balancing and formalism is important to this thesis's project. For one, within the structuralist approach set out in Chapter 2, understanding the meaning of *anti*-balancing, or of what is seen as a "*non-balancing past*", will be crucial to understanding the meaning of balancing itself. But beyond that general relevance, the Pildes quotation just cited also sets up a very specific and intriguing puzzle. If balancing and "nineteenth-century" formalism are diametrical opposites in the typical U.S. understanding, how is it possible that by far the most significant analysis of the idea and practice of balancing in German constitutional rights adjudication of the past decades starts out by expressly proclaiming to be part of "the great analytical tradition of conceptual jurisprudence"?[508] The question raised by this striking contrast between these two ideas – *balancing vs.* 'nineteenth-century legal thought', and *balancing as* 'nineteenth-century legal thought' -, may serve as a useful starting point and background query for the discussion of balancing in mid-century constitutional rights adjudication in Germany and the U.S that is to follow in the next set of Chapters. It is also a question to which the final Chapter of this thesis aims to provide an answer.

[508] ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 18 (2004). The German original purposefully uses the loaded historical term '*Begriffsjurisprudenz*' (at 38).

PART III

GENEALOGIES 2: PRINCIPLE AND POLICY

CHAPTER 4

BALANCING IN GERMAN FREEDOM OF EXPRESSION JURISPRUDENCE OF THE LATE 1950S– EARLY 1960S

4.1 INTRODUCTION TO PART III

4.1.1 Aims and set-up of this Part

This Chapter and the three Chapters that follow it continue the project of discovering local meanings of balancing discourse in Europe and the U.S. through the construction of genealogies. Specifically, the Chapter charts the rise of balancing as a prominent feature within constitutional rights adjudication in Post-War Germany and the U.S. The aim is to unearth the "*zugrunde liegende Vorstellung*",[509] the underlying general image, the pervasive associations, the aspirations held out for and critiques raised against balancing, by judges, primarily of the *Bundesverfassungsgericht* (Federal Constitutional Court, FCC) and of the U.S. Supreme Court and by communities of constitutional legal scholars and commentators in the U.S. and Germany.

This Part approaches the elaboration of the local meaning of balancing discourse through a case study focussed on freedom of expression adjudication and theory. Freedom of expression, guaranteed by article 5 of the Basic Law - the '*Grundgesetz*' (GG) - in Germany and by the First Amendment to the Constitution in the U.S., occupies a usefully central position in constitutional discourse in both settings. Not only does this guarantee lie at the heart of many of the most prominent debates on the role of balancing in constitutional adjudication during the first decades after the Second World War; it is also, during that same period, the focal point for many discussions about constitutional interpretation generally.

As in the previous Part, the aim of this instalment of the genealogies is to show the fundamentally different meaning that similar language has had in Germany and in the U.S. Throughout this Part, it will be argued that where American balancing discourse is characterized by pervasive antinomies, especially between pragmatism, or 'policy', and principle, balancing in the German constitutional landscape embodies one of modern constitutionalism's most important and successful efforts at *overcoming* antinomies. While American constitutional law continuously draws fundamental distinctions between pragmatic action and reasoned deliberation, between policy and principle and between the substantive and the formal, always relegating balancing firmly to one side of these dichotomies, German constitutional law has managed to a large extent to fuse these elements, adopting balancing as the main vehicle to cast the pragmatic as reasoned, policy as principle and the substantive as formal.

The following Sections of this Introduction present the outline of the comparative case study in more detail. Many of the general difficulties that face a comparative analysis of this kind have already been discussed, in Chapter 2. Two additional complications, however, require special attention.

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[509] *Cf.* Peter Badura, *Verfassung, Staat und Gesellschaft in der Sicht des Bundesverfassungsgerichts* ('*Verfassung, Staat und Gesellschaft*'), in: BUNDESVERFASSUNGSGERICHT UND GRUNDGESETZ: FESTGABE AUS ANLAß DES 25JÄHRIGEN BESTEHENS DES BUNDESVERFASSUNGSGERICHTS II 2 (Christian Starck, ed., 1976) (with regard to the constitution as a whole).

(1) First, part of the argument developed here is that in Germany, to a much greater extent than in the U.S., balancing in constitutional law lies at the *confluence* of a number of strands in legal thought. While balancing discourse in the U.S. during this period was most often animated by pragmatic concerns – a breakdown in familiar conceptual categories, confrontation with new types of cases, *etc.* -, or by doctrinally *'local'* considerations specific to freedom of expression law, in German constitutional discourse 'balancing' is where many of the most important ideals and perspectives relevant not only to freedom of expression, but also to the nature of constitutional rights, the task of courts and the constitution as a whole came together. Balancing, in German constitutional law, is where many strands of legal and constitutional thought intersect.

This difference presents obvious difficulties for comparisons of the two systems. Whereas for the U.S. a discussion of free speech case law and commentary may be largely sufficient to present a representative picture of balancing's local meaning, such a selective approach will likely not be adequate for the German situation, where understanding balancing as predominantly a free speech law phenomenon would present a distorted picture. The approach chosen here will be to follow, as much as possible, the relevant debates and their contexts.[510] Every effort will be made to present balancing *as it was discussed* – whether as part of free speech law, constitutional rights law, constitutional law generally, or even 'law' as a whole. But it is important to note at the outset that the precise nature of these associations is not always clear from the relevant texts – and may not have been clear to the authors involved.

(2) Secondly, it seems that in Germany, again to a much greater extent than in the U.S., an important *post-hoc* rationalization effort has taken place, in particular involving the concept of proportionality, to reframe the meaning of balancing. This dominant rationalizing perspective makes recapturing the original significance of balancing discourse and unearthing its '*bricolage*'-like origins more difficult for Germany than for the U.S., where historical origins remain much more relevant to current practices. Again, the aim will be to capture original meanings rather than later interpretations. The great majority of the sources used, therefore, will be drawn from contemporary material.

This Part consists of four Chapters: two each devoted to Germany and the U.S. After a common Introduction for the whole of Part III (the remainder of this Section), Chapter 4 first presents an overview of the post-War development of German free speech jurisprudence (Section 4.2). While this overview consciously adopts the lens of balancing discourse to frame relevant developments, it will also present the argument that contemporary participants themselves came to view free speech case law – and in fact much of constitutional law generally – from this specific perspective. Moving from the Federal Constitutional Court's pronouncements to academic literature, Section 4.3 distils a number of important lines of critique of the FCC's balancing language in its seminal decisions, beginning with the 1958 *Lüth* case. This Section develops an assessment of the Court's balancing discourse on the basic of local criteria, following the model set out in Chapter 2. Chapter 5 then presents two strands of thought that make-up much of balancing's local meaning in German constitutional discourse: those of the 'material' constitution (Section 5.2) and of the 'comprehensive' constitutional order (Section 5.3).

Chapters 6 and 7 follow a very similar approach for the U.S. In summary form, they proceed as follows. Chapter 6 presents the pertinent 'balancing opinions' and distinguishes and analyses a number of important lines of argument in their reception among judges and academics. Chapter 7 again develops two main themes that are central to balancing's U.S. local meaning. They are the clash between instrumentalism as an approach to understanding adjudication and competing perspectives as to the proper justification of judicial decisions (Section 7.2), and the persistent role of a 'definitional tradition' in American legal thought (7.3).

4.1.2 Comparing balancing in U.S. and German constitutional legal discourse on freedom of expression of the late 1950s – early 1960s

4.1.2.1 The advent of balancing in free speech jurisprudence

In the late 1950s and early 1960s both the German FCC and the U.S. Supreme Court, as well as commentators in their two jurisdictions, began to use the language of balancing in adjudication of, and commentary on, constitutional rights cases. In both systems, freedom of expression was the first area in which this new language appeared. In Germany, this development began abruptly and decisively with the Court's unanimous 1958 *Lüth* decision.[511] In the U.S., different Justices of the Supreme Court gradually started to refer to balancing in their opinions in First Amendment cases of this period: from a lone concurrence by Justice Frankfurter in the 1951 case of *Dennis v. United* States, to a five-Justice majority in a number of cases between 1959 and 1961.[512]

It is striking how quickly and how completely 'balancing' came to dominate discussions on freedom of expression adjudication in this period – a process that will be described below.[513] As a preliminary matter, however, it is important to note a number of characteristics that these debates shared.

(1) First, judges and commentators in both systems apparently approached these discussions on a widely shared understanding that balancing actually *'was something'*. That is; they generally seem to have held the view that the language of balancing, in these free

[510] As announced *supra*, s. 1.8.

[511] BverfGE 7, 198 [1958]. For English discussions of *Lüth*'s influence, see, *e.g.* Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247 (1989); Peter E. Quint, *A Return to Lüth*, 16 ROGER WILLIAMS U. L. REV. 73 (2011).

[512] USSC *Barenblatt v. United States*, 360 U.S. 109 (1959); USSC *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961); USSC *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1 (1961).

[513] It is important to note that 'dominate the debates' is not the same as 'dominate freedom of expression law'. There was – and still is – a large amount of controversy in U.S. legal literature on whether 'balancing' was ever an adequate depiction of the Supreme Court's dominant approach to freedom of expression adjudication. See further *infra*, s. 6.1.

speech opinions but later also in other contexts, referred to a discrete and in some way coherent set of practices and ideas that could cogently be discussed and contrasted with alternatives. This can be seen from manifold references to balancing as a 'method' or 'approach' that could be 'used' or 'employed'. It can also be gleaned from the many references to balancing as a *new* phenomenon in FCC and Supreme Court adjudication. These courts' balancing language was generally taken to represent the incidence of practices and ideas within constitutional adjudication that had not been present in the same way at earlier times. Of course, the nature of these practices and ideas, and therefore the precise meaning of balancing language, was the object of strong disagreement.

(2) Secondly, most of these same judges and commentators apparently believed that different positions on the use of balancing *mattered* in one or more ways.[514] For many, the use of balancing language correlated significantly with outcomes in concrete cases. For others, the main relevance of views on balancing lay beyond the outcome of specific cases, and could be discussed even in the face of substantive agreement on these outcomes. Again; the extent to which the use of balancing provoked outcomes or had wider reverberations were important issues for debate, but that there was some relevance to discussing balancing seemed to be largely beyond doubt.

(3) Finally, not only could balancing be discussed cogently and meaningfully; debates on balancing quickly became *focal points* for a whole range of controversies with regard to freedom of expression, constitutional interpretation generally, or even the task of courts in democracies. In both settings, particular takes on balancing rapidly became associated with specific views on a number of other topics. Conversely, positions on other issues were given their discrete correlates with regard to balancing. This meant that, before long, controversies on issues far removed from the details of particular substantive areas of law were being fought out in the language of balancing. Again, however, the ways in which views on balancing came to be associated with broader positions in constitutional law, seems to have differed as between the two systems. Detailing these various connections will be one of the main tasks for the Chapters in this Part.

[514] *E.g.* Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1432 (1962) ("The one thing which appears to emerge with reasonable clarity is that 'balancing' has become the central first amendment issue").

4.1.2.2 Foundations: The First Amendment and Art. 5 Basic Law

The textual foundations for the protection of expression in the U.S. and in Germany are at once highly similar and utterly different. The First Amendment to the U.S. Constitution, on its face, famously appears to *forbid any kind of limitation* of the freedom to speak, providing:

> "Congress shall make no law abridging the freedom of speech".

Art. 5 GG, on the other hand, in its paragraph 2, would seem to *allow virtually any kind of limitation*,[515] providing:

> "1. Everyone has the right to freely express and disseminate his opinion (...). The freedom of the press and the freedom of reporting through radio and film are guaranteed (...)"
> "2. These rights find their limits in the rules of the general laws, the statutory provisions for the protection of youth, and in the right to personal honour".[516]

In a sense, then, both provisions are worded in absolute terms. The First Amendment, on its face, providing for unqualified protection, and Art. 5 allowing unqualifiedly for limitation by way of '*general laws*', in addition to limitations specifically for the protection of youth and personal honour.[517] So, while the art. 5 GG *does* explicitly provide for the possibility of limitation of the right and mention two specific limitation grounds - youth and 'personal honour' -, to interpret the provision as seeming to provide "a set of scales" and thereby necessitating some kind of weighing process,[518] clearly reads more into the text than is warranted. The German and U.S. provisions are, in fact, 'similar opposites' in their apparent absoluteness.

This similarity in the textual backgrounds to freedom of expression adjudication has a particular relevance for the study of the development of balancing. Most importantly: neither the U.S. nor the German guarantee offers *a clear textual basis* for an explicit weighing of competing values or interests. Neither provision in fact offers an indication of *any kind of relationship or comparison at all* - whether expressed in terms of balancing or otherwise - between the nature or value of expression on the one hand and the nature or value of its limitations on the other. Neither wording on its face suggests

[515] Remarking on the *apparently* exceedingly weak wording of Art. 5 Basic Law from an American perspective: Herbert Bernstein, *Free Press and National Security: Reflections on the Spiegel Case*, 15 AM. J. COMP. L. 547, 547ff (1967).
[516] Translation in DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 360 (1997).
[517] On the difference, see, e.g., MARTIN KRIELE, THEORIE DER RECHTSGEWINNUNG 228 (1967). In the remainder of this study, the specific limitations 'for the protection of youth' and the 'right to personal honour' will not be examined. This is in conformity with most German discussions of Art. 5 Basic Law, which make a clear distinction between the different limitation grounds of the 'general laws' on the one hand, and the protection of youth and honour on the other.
[518] KOMMERS (1997), 361.

that speech may only be limited in favour of goals of a certain weight or importance, or that a particular expression itself needs to attain a certain worth before it can trump competing legislative goals. The text of the First Amendment *does not* say "abridge if you must, but try to keep it reasonable",[519] and a literal reading of article 5 GG *does not* make protection of expression dependent on "a balancing comparison" – "*abwägenden Vergleich*" - between the fundamental right and other relevant values or interests.[520]

The interesting aspect of this textual comparison is not the fact that some form of qualification or limitation of the – seemingly unlimited - right to freedom of expression occurred in the U.S. and that some qualification or limitation was imposed upon the – seemingly unlimited - restricting clause of the "*allgemeine Gesetze*" in Germany. Neither unqualified protection of expression nor unqualified abridgement of expression is tenable on any generally accepted theory of freedom of expression.[521] Some degree of circumscription or qualification was inevitable for the foundational provisions in both systems. What makes the comparison salient is that in these processes of limitation very similar language came to be used: the language of balancing. This linguistic similarity raises the question of to what extent actors in the two systems used this language to convey similar things.

4.1.2.3 Freedom of expression adjudication as a case study

The domain of freedom of expression has a number of characteristics that render it especially suitable for a comparative case study into the development of balancing discourse in constitutional rights adjudication in Germany and the U.S. The most important of these attributes are discussed briefly in this Section.

(a) The centrality of freedom of expression

First, freedom of expression is largely representative for rights adjudication practice and theory generally, because of the central position the guarantee occupies in both systems. Freedom of expression is locally perceived to be among the most significant, and therefore most thoroughly analysed, rights in both the German and the U.S. constitutional orders. One telling sign of its prime position can be found in the *Lüth* decision, where the German FCC invoked Benjamin Cardozo's characterisation of freedom of speech as "the matrix, the indispensable condition of nearly every other form of freedom", to hold up its own free speech guarantee as "*in gewissem Sinn die Grundlage jeder Freiheit*".[522] While freedom of expression may not occupy the absolutely paramount

[519] Frantz, *The First Amendment in the Balance* (1962), 1449.
[520] Hans H. Klein, *Öffentliche und private Freiheit: Zur Auslegung des Grundrechts der Meinungsfreiheit*, 10 DER STAAT 145, 152-153, 162 (1971).
[521] *Cf.* KRIELE (1967), 228-229.
[522] BVerfGE 7, 198; 208 [1958] ("in a certain sense, the foundation for all freedom").

position within constitutional imagination in Germany as it does in the US, the right nonetheless is central to both constitutional orders.[523] This centrality means that the issues relevant to freedom of expression cases are likely to be, at least to some extent, representative for the issues facing constitutional rights adjudication more generally. As Ulrich Scheuner put it a few years after the *Lüth* decision, "*Art. 5 GG führt mitten hinein in Grundfragen der Verfassungsinterpretation*".[524] Studying freedom of expression guarantees therefore means confronting central dilemmas of constitutional interpretation.

(b) The 'comparability' of freedom of expression

Second, freedom of expression is a particularly suitable area for comparison of the nature of fundamental rights protection between constitutional orders.[525] Most other rights commonly guaranteed in constitutions, such as freedom of religion, privacy, or certain social rights, depend to a much greater extent on divergent philosophical foundations or local institutional arrangements. Germans pay taxes that go directly to a range of religious institutions, for example; an institutional arrangement that would be inconceivable under the Establishment Clause of the First Amendment in the U.S. Edward Eberle has shown that constitutional protection of privacy is inspired more by considerations of 'dignity' in Germany and by concerns for 'freedom' in the U.S.[526] The '*Sozialstaat*' dimension plays a role in German constitutional jurisprudence that is utterly different from anything seen in U.S. constitutional arrangements. Freedom of expression, by contrast, is grounded on much more similar philosophical and broader normative foundations in the two systems. It will be seen below that a thoroughly comparable set of traditional arguments supports protecting freedom of expression in Germany and in the U.S. It is true that particular conceptions of freedom of expression may demand extensive control over institutional set-ups; think of the protection of media-pluralism, which is a constitutional task for government in some countries (*e.g.* Germany) in ways unfamiliar in others (*e.g.* the U.S). But even where such conceptions are prevalent, large areas remain in which the guarantee of freedom of expression is an essentially negative right, focused on the absence of interference by public or private actors. On the whole, therefore, it seems that freedom of expression is one of the more 'comparable' constitutional rights.

[523] In the *Lüth* case, the FCC also found that freedom of expression was "absolutely foundational" – "*schlechthin konstituierend*" – for liberal-democratic constitutional orders (*Ibid.*).
[524] Ulrich Scheuner, *Pressefreiheit*, 22 VVDStRL 1, 34 (1965) ("Art. 5 Basic Law leads us directly into foundational issues of constitutional interpretation"). Art. 5 GG features prominently in many commentaries on constitutional interpretation. See, *e.g.*, PETER HÄBERLE, DIE WESENSGEHALTGARANTIE DES ART. 19 ABS. 2 GRUNDGESETZ 31ff (1962).
[525] *Cf.* RONALD KROTOSZYNSKI, THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE xiv (2006).
[526] EDWARD J. EBERLE, DIGNITY AND FREEDOM: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES (2002).

(c) The 'novelty' of freedom of expression

Third, coming closer to the specific topic of this study, there is a sense in which constitutional rights adjudication specifically of the late 1950s and early 1960s, especially on freedom of expression, is a particularly suitable topic for comparison between the U.S. and Germany. In both systems, courts and commentators of the time were under an acute impression that they were dealing with problems that were to a large extent new to constitutional law. In Germany, one reason for this understanding was that constitutional rights had played only a marginal role in pre-War adjudication. Therefore, even though Art. 5 Basic Law took most of its wording from the corresponding article in the Weimar constitution, most questions on the interpretation of the relevant terms were in fact new to courts.[527] In addition, post War German society and its constitutional arrangements presented a large number of genuinely new questions generally; on the place of individual dignity and the other fundamental rights in the Basic Law, on the social state, on pluralism *etc.* "Since the Bonn Constitution", Adolf Arndt wrote in 1966, "we are faced with conflicts between norms that cannot be dealt with through the traditional juristic techniques".[528] The U.S. Constitution's First Amendment was obviously much older than any comparable German provision. But even in the U.S., freedom of expression adjudication started only in earnest during - and especially immediately after - the First World War.[529] And there too, a pervasive feeling was that courts after the second war were faced with problems that had not troubled their predecessors. The judges of the earliest First Amendment cases, Harry Kalven wrote in 1967, had had it "much easier" than those of the 1950s and 1960s.[530] "They were not asked to test classic notions of freedom of speech against group defamation, labor picketing, obscenity, congressional committees, sound trucks, public issue picketing, sit-ins, or that large array of direct and indirect sanctions imposed upon the domestic Communist movement".[531] As another contemporary commentator put it, "the basic theory underlying the legal framework [of speech protection] has remained substantially unchanged since its development (…) but the conditions under which it must now be applied have greatly altered".[532]

[527] The connections to Weimar-era thinking on freedom of expression are discussed in detail *infra*, s. 5.2.2.
[528] Adolf Arndt, *Zur Güterabwägung bei Grundrechten*, 1966 NJW 871, 871 (1966) ("*Seit dem Bonner Grundgesetz (…) kommt es zu Normenkollisionen die sich mit den herkömmlichen Mitteln nicht lösen lassen*").
[529] *Cf.* William J. Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 1ff (1965), 1; THOMAS I. EMERSON, TOWARDS A GENERAL THEORY OF THE FIRST AMENDMENT 877 (1963); GEOFFREY STONE, PERILOUS TIMES (2004). For a contemporary German reference to the novelty of the cases of the World War One period, see KRIELE (1967), 229.
[530] Harry Kalven, *Upon Rereading Mr. Justice Black on the First Amendment*, 14 UCLA L. REV. 428, 429 (1967) ("Contemporary free speech issues are strikingly different from those that faced Holmes and Brandeis, Chafee and Meiklejohn"). See also HARRY KALVEN, A WORTHY TRADITION (Jamie Kalven, ed., 1988), at xiv in the *Editor's Introduction*.
[531] *Ibid.*
[532] THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 5 (1970). See also Kalven, *Editor's Introduction* (1988), xv (noting that as of 1974, more than 50% of all FA decisions dated from after 1959).

(d) Freedom of expression and balancing

Finally, even more directly related to the topic of this study; freedom of expression is, again in both settings, largely representative for discussions about balancing specifically, and for debates on the connections between balancing and broader themes of constitutionalism and constitutional adjudication in particular. As mentioned above, freedom of expression was the first area of constitutional law in which balancing discourse came to the fore. More importantly, however, it was also the area in which debates on the use of balancing became *most intense*. So, for example, Charles Fried, in an early commentary on balancing in U.S. Supreme Court case law, wrote: "it is particularly in respect to claims involving constitutional protections of freedom of speech (…) that controversy about the appropriateness of proceeding by a 'balancing of the interests' has been most heated and most in need of analysis".[533] For somewhat different reasons, the same is true for Germany. There, the balancing approach set out by the FCC in the *Lüth* case quickly became a model for adjudication on other constitutional rights as well.[534] The fact that this approach originated in a freedom of expression case assured this area of the focus of scholarly attention to balancing.

4.1.2.4 The intellectual history of U.S./German comparisons, in particular in the area of freedom of expression

As the previous Chapter illustrated, the pre-War period saw a widespread interest among American writers in European legal scholarship. The work of American scholars like Roscoe Pound is studded with references to the writings of a wide range of German and French authors on legal method and legal theory.[535] This current of ideas from Europe to the U.S. continued throughout the 1930s and much of the 1940s, facilitated, during most of this period, by the many *émigré* professors from Germany who took up positions at various American law schools after 1933.

By the late 1950s, when this Chapter takes up the story of balancing, the position had changed markedly. The dominant flow of ideas now clearly went the other way. Many of the *émigré* professors had by now retired, leaving American audiences without their primary source of introduction and translation. In addition, although it is difficult to find explicit expressions of this idea, it is possible that German law and legal theory were seen as having been 'tainted' by the experiences of fascism and Nazism. On the German side, however, the 1950s and 1960s reveal a large number of efforts to look at the U.S., the "*Mutter aller judiziellen Verfassungssysteme*",[536] for inspiration in working out the details of

[533] Charles Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755, 757 (1963).
[534] *Cf.* BERNHARD SCHLINK, ABWÄGUNG IM VERFASSUNGSRECHT 13ff (1976).
[535] Though there are not many references to *Interessenjurisprudenz* scholars specifically. See *supra*, s. 3.3.1.
[536] KRIELE (1967), 228 ("the mother of all systems of constitutional adjudication").

the new constitutional order of the Basic Law.[537] One of the topics German scholars showed particular interest in was American freedom of expression law. Not only were individual Supreme Court decisions on free speech commented upon in German journals,[538] German authors also were intimately familiar with the main general doctrinal constructs that featured in First Amendment law, such as the "bad tendency test",[539] the "preferred freedoms doctrine", and, especially, the "clear and present danger test" ("*clear-and-present-danger-Klausel*" or –"*Formel*").[540]

Within this general topic of freedom of expression, German authors were especially interested in the use of balancing by the Supreme Court in its First Amendment decisions. Take for example the lectures by Ulrich Scheuner and Roman Schnur on freedom of the press at the 1963 Annual Assembly of the Association of German Constitutional Law Scholars; two lectures that will be discussed extensively below.[541] When discussing the FCC's 'new' approach of "*Wertabwägung*" – "balancing of values" - in the *Lüth* decision, Scheuner is quick to point out that "this method of balancing (…) is also used in America", referring to balancing references in opinions by Justices Frankfurter and Douglas.[542] In a second contribution, Roman Schnur, a critic of the *Bundesverfassungsgericht*'s approach to Art. 5, expresses bewilderment at the fact that the U.S. Supreme Court would give up its "by now sufficiently concretized clear-and-present-danger test in favour of a balancing of interests that can be manipulated at will".[543] References such as these show clearly that during this period, the prevalent view among German scholars working in the area was that balancing language in U.S. constitutional law and balancing language in the decisions of the FCC referred to *very similar*, if not basically identical, practices and ideas.[544] This observation is an extension to one made in the previous Chapter: that comparatists seized on similarities in the language of balancing in the work of the *Interessenjurisprudenz*-scholars and the Sociological Jurisprudes in the 1930s to claim that these schools, too, were substantially alike.

These claims are relevant to both the feasibility and the relevance of the project undertaken here. The durable conviction that similarities in balancing language stood for similarities in underlying practices and ideas provides a supportive precedent for the idea that the discourse of balancing is sufficiently cohesive to serve as an object of comparative inquiry. That would make the project undertaken here feasible. That same persistent focus on similarities, coupled with the differences between German and U.S. ideas and practices observed in the previous Chapter, however, also indicates that it might be worthwhile to see whether the *Bundesverfassungsgericht* and U.S. Supreme Court and their respective commentators did in fact mean the same thing when they spoke of balancing. That, in turn, would be a first step in making this project relevant.

[537] See, *e.g.*, Christian von Pestalozza, *Kritische Bemerkungen zu Methoden und Prinzipien der Grundrechtsauslegung in der Bundesrepublik Deutschland*, 2 DER STAAT 425 (1963) (extensive references to U.S. literature and case law); PETER LERCHE, ÜBERMAß UND VERFASSUNGSRECHT 229fn277 (1961) (*idem*).
[538] *E.g.* Richard Schmid, *Ein Neues Kommunisten-Urteil des Supreme Court*, 1958 JZ 501 (1958).
[539] *E.g.* Ridder, in NIPPERDEY-SCHEUNER II (1954), 287.
[540] *E.g.* LERCHE (1961), 229.
[541] Published in 22 VVDStRL (1965).
[542] Scheuner, *Pressefreiheit* (1965), 55 ("*[Diese Methode der Abwägung] findet auch im amerkanischen Gebrauch*").
[543] Roman Schnur, *Pressefreiheit*, 22 VVDStRL 101, 135 (1965) ("*die Preisgabe der inzwischen hinreichend konkretisierten clear-and-present-danger-Formel zugunsten der beliebig manipulierbaren Formel von der balance-of-interests*". See also at fn90 ("*Übergang zur Interessenabwägung*"). But see Häberle (1962), 39fn225 on 'clear-and-present-danger' *as* a balancing test.
[544] *E.g.* HÄBERLE (1962), 39fn225 ("*Die Anwendung des Grundsatzes der Güterabwägung (...) ist keine Besonderheit der deutschen Verfassungsauslegung. In der Schweiz und in den USA werden Inhalt und Grenzen der Grundrechte durch Güterabwägung ermittelt*").

4.2 BALANCING IN THE EARLY FREEDOM OF EXPRESSION CASE LAW OF THE *BUNDESVERFASSUNGSGERICHT*

4.2.1 'Balancing' in *Bundesverfassungsgericht* decisions: 1958 – ca. 1976

The main elements of German free speech jurisprudence can be found in decisions of the FCC from a period of less than two decades, between the *Lüth* decision (1958) and, somewhat more arbitrarily, the decision in the *Deutschland Magazin* case (1976). Leading cases from this period cover such diverse situations as claims in tort between individuals, claims against the media for intrusion in private lives and complaints against police interference in the media. The themes the Court was asked to deal with concerned some of the most politically contentious issues of the day, including the country's Nazi-past, relations to the DDR and military preparedness in the context of the Cold War.

4.2.1.1 From Lüth (1958) to Der Spiegel: The development of a general 'balancing' discourse

(a) Lüth (1958): "Es wird deshalb eine 'Güterabwägung' erforderlich ..."[545]

Before the FCC had even handed down its opinion in the case, *Lüth* was already set to become a touchstone of German constitutional law. For the first time under the 1949 Constitution, the Court was asked to rule on the scope of the right to freedom of expression.[546] In addition, the Court was, also for the first time, faced squarely with the issue of the extent to which constitutional rights had an influence on private law relations - the vexing question of "*Drittwirkung*", or third-party effect. The actual opinion added further novelties; the Court proclaimed the idea that the Constitution embodied an "objective value order", emphasized the social dimension in (individual) constitutional rights, and introduced the concept of "*Wertabwägung*" – balancing of values - to solve clashes between competing constitutional goods. It is, of course, this last element this thesis is particularly interested in, but the analysis below will show that the Court's balancing language can hardly be understood in isolation from these other facets of the *Lüth* opinion.

In 1950, Erich Lüth, at the time Chairman of the Publications Office of the City of Hamburg, gave a lecture before members of Germany's motion picture industry. In his lecture, Lüth called for a boycott of a new film by Veit Harlan, a film director who, during the fascist-era, had produced a strongly anti-semitic film (*Jud Süss*). Lüth was afraid that Harlan's re-emergence as a director would stain Germany's image abroad and would complicate efforts to rebuild relations between Christians and Jews; a cause he himself was particularly closely involved in. The producer and distributor of Harlan's new film brought an action against Lüth on the basis of art. 826 of the Civil Code, claiming that his call for a boycott was a tortious act – an "*unerlaubte Handlung*". The civil law courts found against Lüth and ordered him to refrain from promoting any further boycott of Harlan's film. Lüth then filed a "*Verfassungsbeschwerde*" – an individual constitutional complaint – with the FCC.

The Court began by noting that "without a doubt, the primary purpose of the basic rights is to safeguard the sphere of freedom of the individual against interferences by public authorities". At the same time, however, it had to be recognized that "the Constitution, which does not want to be a value-neutral order, has, in its Part on Fundamental Rights, erected an objective value order". "This value system, at the core of which is the dignity of the personality of the individual developing freely within the social community, has to be understood as a foundational constitutional decision for all areas of law". This meant that the ordinary courts would have to test, in each case, whether the applicable rules of private law are influenced by constitutional concerns.

Finding freedom of expression "immediately constitutive" [547] – '*schlechthin konstituierend*' – for a liberal-democratic constitutional order, the Court insisted that limitations to this freedom, in the form of the '*allgemeine Gesetze*' mentioned in art. 5, should be interpreted in such a way as to guarantee that the "special value" – "*besondere Wertgehalt*" - of the right remained in tact. The way to achieve this was to understand the 'general laws' and the freedom of expression as mutually limiting and constitutive of each other's meaning – a "*Wechselwirkung*" – a dialectic - between right and limitations. The Court concluded that "it has to be" within its competence to uphold the specific value of this right *vis-à-vis* all public authorities, including the ordinary courts, "in order to achieve the equilibration that the constitution desires" – "*den verfassungsrechtlich gewollten Ausgleich*" - between the opposing tendencies of the basic right and the limiting 'general laws'. This brought the FCC to the following interpretation of the scope of freedom of expression:

> "the expression of opinions is as such, that is: in their purely intellectual effect, free; if however [this expression violates] the another individual's rights, the protection of which deserves precedence over the protection of the freedom of expression, then this interference will not be allowed simply because it was committed through the expression of an opinion. A balancing of values – '*Güterabwägung*' – becomes necessary: the right to the expression of opinions must recede when it infringes protection-worthy interests of another of a higher rank. Whether such overbearing interests of another are present, is to be determined on the basis of all the circumstances of the case".[548]

The Court found that freedom of expression will have to be "weighed especially heavily" when engaged in, "not for the purpose of a private dispute, but in the first place as a contribution to the formation of public opinion". In conclusion:

[545] "A balancing of values therefore becomes necessary ...", BVerfGE 7, 198; 210 [1958].
[546] *Cf.* Herzog, in MAUNZ-DÜRIG-HERZOG-SCHOLZ (1968), nr. 248-249.
[547] Translated in EBERLE (2002), 209.
[548] BVerfGE 7, 198, 210-211 [1958].

> "the private-law judge is required to weigh, in every case, the significance of the right against the value of the interest – '*Rechtsgut*' – protected by a 'general law'. This decision can only be made upon a comprehensive analysis of the individual case, taking all relevant circumstances into account. An incorrect balancing – '*unrichtige Abwägung*' – can violate the basic right and sustain a constitutional complaint to the Federal Constitutional Court".[549]

On the merits of the case, the Federal Constitutional Court decided that the private-law courts had "misjudged the special significance that attaches to the basic right to freedom also where it comes into conflict with the private interests of others". Factors that the Court found particularly relevant were the fact that the speech in question concerned a matter of public interest and that Lüth had spoken out of 'pure motives'.[550]

(b) 'Plakaten' (1958) & Schmid-Spiegel (1961): "Nach den dort entwickelten Grundsätzen ..."[551]

The *Lüth* opinion quickly became a standard reference in free speech decisions and an authoritative point of departure for freedom of expression law generally.[552] The Court decided another case on art. 5 GG on the same day as *Lüth*, under reference to "the principles developed there" (the *'Plakaten'-Urteil*), [553] and confirmed *Lüth*'s preeminence in its 1961 *Schmid-Spiegel* decision.[554] These two decisions quote important elements of *Lüth*'s approach to freedom of expression, in particular the idea of relativity or dialectic – '*wechselwirkung*' - between the right and its limitations *('Plakaten')*, the suggestion that the particular *use* made of a constitutional right determines that right's 'weight' in relation to competing interests *('Plakaten'* and *Schmid-Spiegel*), [555] and the insistence that lower courts take all competing values and interests into consideration (*Schmid-Spiegel*).

In the *'Plakaten'* case, the constitutional complaint of a tenant who had wanted to affix election posters to his apartment's window but had been prevented from doing so by his landlord, was rejected. Following the *Lüth* model, the Court approached the case both as a conflict between two constitutional rights in the abstract - the right to property and the right to freedom of expression -, and as a clash between the opposing interests of the individual landlord and tenant in the concrete circumstances of the case. On the

[549] BVerfGE 7, 198, 229 [1958].
[550] BVerfGE 7, 219, 219; 229 [1958].
[551] "On the basis of the principles developed [in the *Lüth* case] ...", BVerfGE 7, 230; 234 [1958].
[552] On *Lüth*'s general importance, see Ernst W. Böckenförde, *Zur Kritik der Wertbegründung des Rechts*, in RECHT, STAAT, FREIHEIT, 87 (1987) ("*eine epochemachende Entscheidung*").
[553] BVerfGE 7, 230; 234 ('*Plakaten*') [1958].
[554] BVerfGE 12, 113; 124 (*Schmid-Spiegel*) [1961]. See also, *e.g.*, Karl August Bettermann, *Die allgemeinen Gesetzen als Schranken der Pressefreiheit*, 19 JZ 601, 601 (1964); Herzog, in MAUNZ-DÜRIG-HERZOG-SCHOLZ (1968), nr. 250-251; Bernstein, *Reflections on the Spiegel case* (1967), 553
[555] In *Schmid-Spiegel*: with qualifications. See BVerfGE 12, 113; 127-129 [1961].

side of the tenant, the Court looked at the background to the expression ('not prompted, but out of own volition'), at its form ('unconventional'), and at the possible effects of restraint ('not substantial').[556] A decisive factor in favour of the landlord, the Court found, was that he had acted, not to protect his own "formal powers as an owner", but in the interest of protecting domestic peace between the tenants.[557]

The *Schmid-Spiegel* case concerned a row, fought out in public, between a judge and the journal *Der Spiegel*, in which the journal accused the judge of harbouring communist sympathies, and the judge countered by likening *Der Spiegel*'s political reporting to pornography. When convicted of defamation in the lower courts, the judge filed a constitutional complaint. The *Bundesverfassungsgericht* found that the criminal courts had focused exclusively on the interests of the journal and its editors and had neglected to take into account the 'immanent value' of the expression of opinion. Through this neglect, they had violated the "value judgment" – "*Wertentscheidung*" – incorporated in art. 5 GG.[558]

Although these decisions did not repeat *Lüth*'s general statements on the need for balancing, their references to the earlier decision, the overall tone of their language – "*Wertentscheidung*", "*Güterabwägung*", "*Gewicht*" –,[559] coupled with an approach explicitly focused on clashes between opposing values and interests, contributed to a perception that *Lüth*'s "balancing of values and interests" should be taken as embodying the Court's overall take on freedom of expression.[560]

4.2.1.2 From Der Spiegel (1966) to Deutschland Magazin (1976)

(a) 'Der Spiegel' (1966): "mit Hilfe der in der … Rechtsprechung des Bundesverfassungsgerichts entwickelten Güterabwägung"[561]

The 1966 *Spiegel* case still is one of the most controversial cases of the Court's early history, producing its first published minority opinion.[562] Beyond the general controversy surrounding the decision the case also marks an important transition point in the genealogy of constitutional balancing. In the published decisions and in commentary of the time, one finds simultaneously a decisive endorsement of the validity of the *Lüth* approach - and an extension of balancing to all areas of freedom of

[556] BVerfGE 7, 230; 236 [1958].
[557] BVerfGE 7, 230; 237 [1958].
[558] BVerfGE 12, 113; 126-128 [1961].
[559] See also REINHOLD ZIPPELIUS, WERTUNGSPROBLEME IM SYSTEM DER GRUNDRECHTE 15 (1962) (noting that the Court "solved" the conflict in the *'Plakaten'* case on the basis of "the principle of interest-balancing").
[560] See for example ZIPPELIUS (1962), 47 (reading both decisions in terms of "*Güter- und Interessenabwägung*"). But see, *e.g.*, SCHLINK (1976), 21 ('*Plakaten*' decided "*ohne eigentliche Abwägung*" – 'without a real balancing'), and 25-26 (discussing *Schmid-Spiegel* as in part rejecting and following *Lüth*).
[561] BVerfGE 20, 162; 187 ('*Spiegel Urteil*') [1966] ("with the aid of the balancing of values developed in the case law of the Federal Constitutional Court").
[562] BVerfGE 20, 162 [1966].

expression adjudication -, and clear indications that the *Lüth* vision of balancing was coming under increasing pressure.

In October 1962, the magazine '*Der Spiegel*' published an article on the German army's preparedness for military conflict with the Soviet-Union. The article listed detailed overviews of the military capabilities of Germany and several other NATO member states and concluded that the West German government was responsible for "completely inadequate preparations".[563] The government reacted to the article by instituting criminal proceedings against the editor and several publishers of the journal and by carrying out an extensive search at the journal's premises, during which a substantial amount of documents were seized. Upon a constitutional complaint by the publisher, the FCC, in a split decision, held that this search and seizure did not violate the guarantee of freedom of the press in art. 5 GG.

The Court observed that the freedom of the press 'carried within it' the possibility of 'conflict with other constitutionally protected values', in the form of rights and interests of other individuals, as well as those of groups and of society as a whole. Both national security and freedom of the press being "*Staatsnotwendigkeiten*" – constitutional essentials -, the task for the Court was to balance, in the individual case, "the dangers to the security of the country that may arise from publication (...) against the need to be informed of important occurrences even in the area of defense policies".[564] Because governmental interference with a particular publication is likely to have a chilling effect on press freedom generally,

> "there exists an inescapable conflict between the interests of criminal prosecution and the protection of press freedom; a conflict that has to be solved with the aid of the balancing of values – '*Güterabwägung*' - developed in the case law of the Federal Constitutional Court".[565]

Applying these principles to the case at hand, the 'majority',[566] on the basis of a "*sachliche Wertabwägung im Einzelfall*" – a "substantive balancing of values in the individual case" -, found that the prosecution and the lower court had correctly judged the search and seizure to be both a *suitable* and a *necessary* response to the threat caused by the publication.[567]

[563] Quoted and translated in Bernstein, *Reflections on the Spiegel case* (1967), 555.
[564] BVerfGE 20, 162; 185 [1966], translated in Bernstein, *Ibid.*
[565] BVerfGE 20, 162; 187 [1966] (own translation).
[566] The Court was evenly split (4-4). On the basis of Art. 15, Para. 2 of the Law on the Federal Constitutional Court, no infringement of the Basic Law could be declared in the case of an equal division.
[567] BVerfGE 20, 162; 213-214 [1966].

(b) Entrenchment: "die gebotene Abwägung ..."[568]

With its multiple references to the *Lüth* opinion and to the language of "*Güterabwägung*" and "*Wertabwägung im Einzelfall*", the *Spiegel* decision was an important step in the entrenchment of the *Lüth* balancing approach to freedom of expression issues. The fact that the decision explicitly extended this approach to freedom of the press and the fact that majority and dissenters agreed on the centrality of balancing, contributed to a reading of the case as laying down a general method for the adjudication of freedom of speech issues.

The entrenchment of the *Lüth* decision's balancing approach in the course of the 1960s can, in particular, be gleaned from two factors. First, it became common for the ordinary – criminal and civil – courts to explicitly formulate their own treatment of free speech issues in terms of a balancing of values and interests, giving effect to the FCC's general instruction in the *Lüth* case that the ordinary courts balance in each case the value of freedom of expression against competing values and interests.[569] In the *Spiegel* case itself, for example, the highest criminal court, the *Bundesgerichtshof*, explicitly framed its decision with respect to the permissibility of the criminal-procedural measures predominantly in terms of a "*Güterabwägung*".[570] Second, the constitutional complaints of individuals increasingly came to be cast in the form of objections against the balancing undertaken – or omitted – by the ordinary courts.[571] Again, the *Lüth* decision, with its warning to other courts that a "wrong balancing" in and of itself could infringe the right to freedom of expression, lay at the basis of this development.[572]

Both trends were on display in a 1969 case that, once again, presented the FCC with the issue of a call for a boycott – the fact pattern at issue in the original *Lüth* case.[573] A major publishing house, the well-known *Springer Verlag*, had called on its distributors to boycott a much smaller journal, *Blinkfüer*, because of this journal's publications of DDR television programming schedules. Springer threatened its agents and distributors with a 'revision' of their relationship to the publishing house in case of non-compliance with the call. The discourse of balancing dominated the whole trajectory of the case. The *Bundesgerichtshof* found that it had to balance Blinkfüer's interest in carrying on its business with Springer's right to freedom of expression.[574] Blinkfüer then specifically complained that the court's balancing was improper; its own right to freedom of the press had been left out of consideration while interests not relevant to the dispute had been taken into

[568] ("the required balancing"), BVerfGE 20, 162; 189 [1966]. See also BVerfGE 25, 256; 261 (*Blinkfüer*) [1969] ("*die vorzunehmende Güterabwägung*" – "the balancing that needs to be undertaken").
[569] BVerfGE 7, 198; 229 [1958].
[570] BVerfGE 20, 162; 184-185 [1966].
[571] See, *e.g.*, BVerfGE 12, 113; 120 ('*Schmid-Spiegel*') [1961].
[572] BVerfGE 7, 198; 229 [1958].
[573] BVerfGE 25, 256 (*Blinkfüer*) [1969]. For a discussion of the *Blinkfüer* case, see Klein, *Öffentliche und Private Freiheit* (1971), 145ff.
[574] BVerfGE 25, 256; 261 [1969]. See also Schlink (1976), 25 (noting that the *Bundesgerichtshof* had specifically tried to follow the FCC's *Lüth* decision).

account.[575] The FCC agreed, finding that the *Bundesgerichtshof* had both given too much weight to Springer's right to freedom of expression and too little to Blinkfüer's right to freedom of the press.[576]

(c) Strains and questions

While the *Spiegel-Urteil* may have offered the definitive confirmation of the Court's line on balancing, the decision also clearly showed the first important limitations to the model announced in *Lüth*.[577] One important question raised by the *Spiegel* case is what to do with the *Lüth* approach in cases that did not principally involve conflicts between two individuals. Both *Lüth* and *'Plakaten'* had, of course, concerned claims in tort. And *Schmid-Spiegel*, while a criminal law case, also involved a defamation-type action the facts of which concerned individuals.[578] The *Spiegel* decision was the first time the balancing model had to cope with predominantly 'public' or societal interests like public security and criminal procedure.

This new setting had implications not only for the kinds of interests and values the Court's approach was supposed to accommodate, but also for conceptual understandings of that approach itself. Pre-*Spiegel*, commentators could maintain that the 'private' setting of the relevant free speech cases might have contributed to the Court's resort to balancing, or even that the basis for the Court's balancing did not lie in constitutional law at all, but within the relevant private law norms on defamation (*Lüth*) or on property (*'Plakaten'*).[579] After the *Spiegel* decision, maintaining that what the Court did was somehow private law balancing in a constitutional context rather than a method emanating directly from constitutional law itself - a "*verfassungsimmanentes Prinzip*" -,[580] became much more difficult. A place now definitely had to be found for balancing within the confines of constitutional law.

Secondly, and most problematically, the *Lüth* line offered very little guidance as to what lower courts actually were to do in concrete cases and as to what the FCC's review of decisions of other courts would look like. If an inferior court did not refer to a balancing of competing interests, would that *by itself* render its decision constitutionally infirm?[581] If a lower court did balance explicitly, how would the FCC review its decision? Would the Court undertake a *de novo* weighing of its own, or invalidate only those

[575] BVerfGE 25, 256; 261 [1969].
[576] BVerfGE 25, 256; 263ff [1969]. For an English translation of parts of the decision, see KOMMERS (1997), 372-374. On the role of balancing in the *Blinfüer* decision, see *Ibid.*, at 375 ("the court sees its task as one of balancing interests").
[577] See, *e.g.*, Bernstein, *Reflections on the Spiegel Case* (1967), 561 ("it is submitted that the *Spiegel* case may well be read to mark a serious crisis in the development of the doctrine enunciated in the *Lueth* case a decade ago").
[578] *Ibid.*, 560.
[579] *Cf.* Bettermann, *Die allgemeinen Gesetze* (1964), 608.
[580] *Cf.* FRIEDRICH MÜLLER, NORMSTRUKTUR UND NORMATIVITÄT 211 (1966) (referring to balancing).
[581] *Cf.* Bernstein, *Reflections on the Spiegel case* (1967), 560 (referring to "the fundamental problem of what the Court should do in cases in which an inferior court has not engaged in the kind of balancing of interest that *Lueth* [*sic*] requires").

outcomes that were manifestly unsound? In the vocabulary of U.S. constitutional discourse; the *Lüth* line of decisions contained virtually no information as to the appropriate standard of review. It was in particular this last problem that was to trouble the Court in the decade following the *Spiegel* case.

(d) Mephisto (1971), Lebach (1973), and Deutschland Magazin (1976)

The *Blinkfüer* case takes analysis of the FCC's free speech jurisprudence to the end of the 1960s. The leading cases of the years that followed show both change and continuity relative to the approach set out in *Lüth* and its progeny. In terms of change, the Court began to insist in cases of the early 1970s on the limited nature of its review of the decisions of the ordinary courts. In *Mephisto*, for example, the 'majority' wrote: "The FCC, by its nature as a remedial court, is not competent to put its own valuation of the individual case in place of the ordinarily competent judge".[582] This more deferential approach had as its result, most notably in the *Mephisto* and *Lebach* decisions, that the decisions of the ordinary courts were upheld. In both these cases, the freedom of expression lost out in the clash with rights of personal integrity and reputation.[583] This approach was not uncontroversial. In the *Mephisto* case, for example, Judge Stein wrote a dissenting opinion in which he emphasized the duty of the FCC to "verify independently" whether the civil courts had properly carried out "the required balancing".[584]

Much, however, also stayed the same in these cases, with the Court continuing to frame the analytical framework for freedom of expression in terms heavily reliant on the language of balancing. In *Mephisto*, the 'majority' described its task as "to decide whether the [lower] courts, in the balancing … that they have undertaken, have respected the relevant principles".[585] And in *Lebach*, the Court was similarly explicit in its references to the need for a "*Güterabwägung im konkreten Fall*" – a balancing of values in each specific case.[586] In its decision in '*Deutschland Magazin*' (1976), the FCC shifted away from the more deferential position taken in *Mephisto* and *Lebach*, adopting a flexible position whereby the intensity of review would itself be dependent on "the severity of the encroachment upon a basic right".[587] The language of balancing remained dominant throughout this decision, and those that followed it and that similarly adopted this flexible approach to the intensity of scrutiny.[588] In fact: in now proclaiming that not only the scope of constitutional rights themselves but also the *scope of review* of infringements of these rights were matters of relative weight and importance, the FCC arguably gave

[582] BVerfGE 30, 173; 197 ('*Mephisto*') [1971]. The decision was 3-3, which meant the ordinary court's decision was upheld. For a discussion of the case in English, see KROTOSZYNSKI (2006), 104ff.
[583] *Cf.* KOMMERS (1997), 377ff; Quint, *Free Speech and Private Law* (1989), 302ff.
[584] BVerfGE 30, 173; 200 [1971].
[585] BVerfGE 30, 173; 195 [1971].
[586] BVerfGE 35, 202; 221 (*Lebach*) [1973].
[587] BVerfGE 42, 143; 148 (*Deutschland Magazin*) [1976] ("*die Intensität der Grundrechtsbeeinträchtigung*", as translated in KOMMERS (1997), 378.
[588] See, *e.g.*, BVerfGE 66, 116) (*Springer/Walraff*) [1984].

even greater prominence to the language and imagery of constitutional balancing in free speech law.

4.3 CONTEMPORARY CRITIQUES OF THE *LÜTH* LINE ON BALANCING

While *Lüth* clearly proved profoundly influential for the development of freedom of expression adjudication and for constitutional rights adjudication more broadly, the decision and the balancing language it employed also quickly came under fire from critics. Some of the main lines in these writings are discussed below, organized by their views on the nature and scope of balancing and by the content of their critique. A first Section distinguishes three important sets of views on what balancing was: mere language, part of a philosophy or theory of constitutional law, or a particular mode of (legal) reasoning. A second Section distinguishes critiques of the legitimizing force of balancing according to the standards for legal reasoning they adhered to. This Section follows the model of formal, substantive and 'mediating' legitimizing factors or strategies, set out in Chapter 2. One important area of focus in this Section will be the ways in which shifts in the relative prominence of these ideals for legal reasoning precisely at the time of the first manifestations of balancing in FCC case law affected its meaning.

It should be noted at the outset that the analysis below sees balancing not as confined to freedom of expression adjudication, but as central to all of the FCC's rights case law. As will become clear later on, this approach simply follows the view of the FCC itself and of most contemporary authors, who analysed, criticized and defended balancing in similarly broad terms.[589]

4.3.1 The nature and scope of balancing

A first way to distinguish among contemporary interpretations of the FCC's *Lüth*-line of decisions is according to the position commentators took on the question of what balancing, in FCC case law, *was*. This Section discusses three important perspectives. First, the idea that the FCC's balancing's language did not in fact reflect the Court's actual approach in the relevant cases. Second, the idea that balancing had to be seen, at least in part, as an element of - and therefore had to be analysed and criticized at the level of - overarching theories of constitutional law. And third, views of balancing as simply a method of legal interpretation or of legal reasoning, to be analysed and criticized primarily as one of a range of available such methods. In short, these are the perspectives of balancing as just language, balancing as constitutional theory, and balancing as legal reasoning. As will be seen below, these perspectives showed considerable overlap. For one: the 'levels' of constitutional rights theory – nr. (2) - and of legal (constitutional) interpretation and argumentation – nr. (3) – were and are closely intertwined. Also; those arguing that the FCC's balancing language did not reflect underlying methods generally had an idea of 'real' balancing in mind, which they might defend or critique on grounds of constitutional theory – nr. (2) – or standards for legal reasoning – nr. (3). There were, however, differences in emphasis, which this Section aims to elucidate. A subsequent Section will discuss the third level – the legitimizing force of balancing as interpretation or legal reasoning – in more detail.[590]

4.3.1.1 Language and method: "Ohne eigentliche Abwägung"[591]

A first line of criticism concerned the role *the language* of balancing played in the *Lüth* decision, and the role it came to play in later cases. The core of this critique was that this language of value- and interest balancing did not adequately reflect the Court's underlying analytical approach. Representative of this category is a 1966 article by Adolf Arndt entitled '*Zur Güterabwägung bei Grundrechte*'.[592] "Since the *Lüth* decision", Arndt wrote, "the formula that conflicts between norms can only be solved through balancing (...), has become commonplace".[593] This reception of the *Lüth* decision, however, was, in Arndt's view, the hallmark of a "false cult of precedent": "a few standard phrases are cited as ritual incantations, while the decision itself is not actually read". "The magical catchword – '*Zauberflosskel*' –of 'balancing'", Arndt argued, "is at least partially to blame for this".[594] Other authors have echoed this critique, arguing that the FCC arrived at many of its self-proclaimed balancing decisions, in a sense, "*ohne eigentliche Abwägung*" – "without any real balancing".[595]

From the perspective of this thesis, as set out in Chapters 1 and 2, it is reliance on the language of balancing itself that makes any argument a 'balancing' argument, or any decision a 'balancing' decision. But the fact that local observers saw some of the reasoning in these cases as 'not really' balancing is highly significant for the understanding of this argument's local meaning. Different authors, naturally, had varying understandings of what 'real' balancing was, and whether such 'real' balancing would be a legitimate form of reasoning. One line of argument was the claim that in *Lüth* itself and in *'Plakaten'* and other later decisions what had actually decided the case was a valuation of the quality of the use made of constitutional rights by different individuals; the fact

589 See also *infra*, s. 4.3.1.

590 Note: One 'level' of analysis largely absent from German legal thought is that of balancing 'as Art. 5 Basic Law doctrine', in the American sense of balancing 'as First Amendment doctrine', which was pervasive in the U.S. at the time studied. See further *infra*, s. 6.4.2.1.

591 "Without any real balancing"

592 Arndt, *Zur Güterabwägung bei Grundrechte* (1966), 869 ("On Balancing and Fundamental Rights").

593 Ibid., 871.

594 Ibid. See also Schnur, *Pressefreiheit* (1965), 122-123 ("*Allgemeine Formeln können nicht zur Antwort verhelfen*", which could be translated by way of the Holmesian aphorism that general propositions do not decide concrete cases) and 127 (speaking of the '*Leerformel*' – the empty formula - of interest balancing).

595 SCHLINK (1976), 20-21. See also 24-25 and 27-28 for a similarly ambivalent analysis of *Schmid-Spiegel* and *Blinkfüer*. See also KOMMERS (1997), 401 (arguing that while the *Spiegel* decision "reaffirmed the validity of the balancing test set forth in *Lüth*", the Court in the *Spiegel* case curiously "*did not employ* a balancing analysis", emphasis added).

that Erich Lüth spoke out of "pure motives" and on a topic of public concern,[596] or the fact that the landlord in *'Plakaten'* acted to "keep the peace" rather than to protect his formal powers as an owner.[597] In Bernhard Schlink's view, such evaluations of the use made by individuals of the rights accorded to them by the Basic Law, was a "folly".[598] And for Arndt, distinguishing among freedom of expression cases on the basis of whether the rights-claimant had engaged in a 'proper' use of his rights, was "the beginning of the end" for this freedom.[599] These critiques show that - whatever else balancing should be and however else it should or should not be used -, judicial weighing in constitutional law should definitely not include a '*Gebrauchsbewertung*' - the valuation of the relative worth of the use of constitutional rights. Of course, even among authors taking this common line, different views prevailed. Arndt proposed a more careful *definition* of the boundaries of fundamental rights, in place of the Court's particularized, use-sensitive weighing of private interests in all cases. A weighing of abstract values should be reserved as a remedy of last resort for cases of inescapable conflict between constitutional provisions.[600] In Schlink's view, however, the FCC should not purport to weigh values within a natural law-based value system, but should in fact employ a balancing-like 'means-ends control' of legislation following a 'proportionality' model.[601] Karl August Bettermann, finally, argued that the language of constitutional value balancing in *Lüth* obscured what the Court was really doing: relying on *a purely private law weighing* of the interests of claimant and defendant. Such private law calibration of interests could not, however, determine the boundaries of a constitutionally guaranteed right such as the freedom of expression, so that these boundaries would have to be elaborated using an alternative approach.[602]

What is striking about these critiques is the effort they make to read the FCC's decisions in ways that are clearly not in conformity with the Court's explicit reasoning, but that retain the language of balancing. Balancing as *ultimum remedium* (Arndt); a view of "*Abwägungsprobleme als Probleme von Zwecken und Mitteln*" rather than as involving assessments of "*Werten, Gütern, Rechten und Freiheiten*" (Schlink); or balancing as 'private law' interest-calibration (Bettermann), are all very different from the FCC's explicit and continued invocation of value- and interest balancing. This tendency to reframe the FCC's balancing approach - to accommodate the language of balancing but to recast its

[596] See *supra*, s. 4.2.1.1.
[597] *Ibid.*
[598] SCHLINK (1976), 22 (the "*Folie der Grundrechts-gebrauchsbewertung*").
[599] Arndt, *Zur Güterabwägung bei Grundrechte* (1966), 872ff.
[600] Ibid. "Before the Court should come to some kind of 'balancing'", Arndt wrote, "it should first assess whether, in the circumstances of the case, a protected legal value is actually threatened. (...) Balancing remains as a last resort – it should never be anything else – to ensure that the legal order remains free from internal contradictions".
[601] SCHLINK (1976), 192ff, 198ff.
[602] Bettermann, *Die allgemeinen Gesetze als Schranken der Pressefreiheit* (1964), 604ff (arguing for a 'definitional' approach along the lines of earlier, Weimar-era, perspectives, discussed *infra*, s. 5.2.2.2). On this view, a '*Güterabwägung*' would, in normal circumstances, be "neither necessary nor permitted". Only in cases involving penal provisions applicable only to the press and in private law cases in which the relevant private law norm itself required some form of 'weighing' would balancing be required and allowed.

meaning - was a common feature among critical scholarly contributions of the time, and will be encountered again below.

4.3.1.2 Balancing and theories of constitutional (rights) law

A second important view of balancing was as the prime manifestation of a particular underlying theory of the constitution: the theory of 'material constitutionalism', or of the constitution as a 'value order'. Within this perspective, the analysis and evaluation of balancing had to take place, at least in part, at the level of this underlying constitutional understanding: critiques of balancing had to be critiques of constitutional theory and philosophy.[603] The content of 'material constitutionalism' specifically and its relevance to balancing are discussed in greater detail in Chapter 5. The purpose of this Paragraph is rather to illustrate the operation of critiques of balancing on the level of constitutional (rights) theory.

Particularly strong attacks on the rationality of the idea of the constitution as a system of values - can be found in the works of Ernst Forsthoff and Ernst-Wolfgang Böckenförde.[604] "Until now", Böckenförde wrote in the mid-1970s, "neither a rational foundation for values and the existence of a value order as such, nor an epistemologically and dialectically rational system for the preferential ordering and balancing of values has been forthcoming".[605] The Court's thinking in terms of values "does not deliver an overarching, rationally verifiable argument for the foundation of values and for their position on a scale. Again and again, we are left with mere assertions".[606] Balancing then, for Böckenförde, not only cannot assist in the determination of the relative importance of competing values, but also, and importantly from the perspective of balancing's force as form of argument; it cannot help in the justification of statements on the relative worth of values.

Probably the most influential early critique of the constitutional philosophy underlying adjudication under the Bonn Constitution came from Ernst Forsthoff. In a series of articles that appeared in the late 1950s and early 1960s, Forsthoff, at the time one of Germany's leading constitutional and administrative law scholars, warned that the methods of the FCC put the constitutional order in danger of "dissolution", or even "decomposition" - '*Auflösung*'.[607] In Forsthoff's view, the Court's approach based on

[603] 'Material constitutionalism' is discussed in more detail *infra*, s. 5.2.2.
[604] Ernst W. Böckenförde, *Grundrechtstheorie und Grundrechtsinterpretation*, 27 NJW 1534 (1974); Ernst Forsthoff, *Die Umbildung des Verfassunggesetzes* (1959), in RECHTSTAAT IM WANDEL 130, 144, 151 (2nd ed., 1976); Ernst Forsthoff, *Zur Problematik der Verfassungsauslegung* (1961), in RECHTSTAAT IM WANDEL 153, 167-169 (2nd ed., 1976); Ernst Forsthoff, *Der introvertierte Rechtsstaat und seine Verortung* (1963), in RECHTSTAAT IM WANDEL 175, 182-183 (2nd ed., 1976).
[605] Böckenförde, *Grundrechtstheorie und Grundrechtsinterpretation* (1974), 1534 ("*es ist bisher weder eine rationale Begründung für Werte und eine Wertordnung überhaupt noch ein rational erkenn- und diskutierbares Vorzugssystem zur Bestimmung der Rangfolge von Werten und einer darauf aufbauenden Wertabwägung ersichtlich*").
[606] Ernst W. Böckenförde, *Zur Kritik der Wertbegründung des Rechts*, in RECHT, STAAT, FREIHEIT 67, 85 (1987) ("*Es bleibt stets bei der bloßen Behauptung*").
[607] *E.g.* Forsthoff, *Die Umbildung des Verfassungsgesetzes* (1959), 150. Forsthoff had been a student of Carl Schmitt; Roman Schnur, who is also cited in this Chapter and the next, was a student of Forsthoff's.

"value analysis and value balancing" was no longer a "legal method" – "*juristische Methode*" –, but had to be located within the realm of the humanities – "*geisteswissenschaftliche Methode*".[608] In an oft-quoted admonition, Forsthoff wrote: "legal science destroys itself when it does not adhere stringently to the position that legal interpretation is the determination of the correct deduction in the sense of syllogistic reasoning".[609] An understanding of the Basic Law as a 'value system' would replace "logical, replicable procedures of the application of law" by "valuations which are only comprehensible from the mentality of the appraiser".[610] Therefore, by pursuing a "*geisteswissenschaftliche*" approach, including the balancing of values, instead of the traditional rules of interpretation, the FCC put philosophy and its own ideology – "*Standesideologie*" - in the place of law and legal method, leading to a potentially devastating loss of "legal rationality".[611]

Forsthoff's theses formed the object of heated discussion in the course of the 1960s.[612] Although many commentators thought that the remedies Forsthoff proposed for the ills he observed – a return to the classical Savignian rules of interpretation – were anachronistic and impracticable,[613] many were inclined to agree at least in part with his general diagnosis.[614] Forsthoff's call for methodologically pure, disciplined thinking in legal theory and adjudication certainly struck a cord with many of his contemporaries.[615] From the perspective of this study, his contributions are particularly relevant as an example, on a high level of abstraction, of efforts to cast balancing as 'outside the realm of the legal', and as such illegitimate as such, in all its manifestations, for the FCC to engage in.

In both Böckenförde's and Forsthoff's perspective, the two 'levels' of constitutional theory and of legal reasoning – nrs. (2) and (3), above - are intimately related. On the one hand, balancing as a mode of constitutional reasoning *cannot be* rational because the constitutional theoretical complex of which it is a part lacks rational foundations. Simultaneously, however, the rationality of the constitutional complex *itself* is under threat because of the mode of reasoning employed. Remedies for balancing's flaws, on these views, will have to operate on both levels to be effective.

608 Forsthoff, *Die Umbildung des Verfassunggesetzes* (1959), 135-138. '*Geisteswissenschaftlich*' is sometimes also translated as 'idealist'.
609 Forsthoff, *Die Umbildung des Verfassungsgesetzes* (1959), 135. Cited, *e.g.*, in JOSEF ESSER, VORVERSTÄNDNIS UND METHODENWAHL 165fn56 (1970).
610 Forsthoff, *Der introvertierte Rechtsstaat und seine Verortung* (1963), 182.
611 Forsthoff, *Die Umbildung des Verfassungsgesetzes* (1959), 144ff.
612 *E.g.* Alexander Hollerbach, *Auflösung der rechtsstaatlichen Verfassung?*, 85 AÖR 241 (1960); KRIELE (1967), 47ff; von Pestalozza, *Kritische Bemerkungen* (1963), 434.
613 *Cf.* KARL LARENZ, METHODENLEHRE DER RECHTSWISSENSCHAFT 149 (1st ed., 1960, 3rd ed., 1975). Interestingly, Forsthoff himself thought that "*Wertanalyse*" and "*Wertabwägung*" were an anachronistic remnant from the Weimar era (see '*Zur Problematik der Verfassungsauslegung*, 169). On the Weimar-roots of 'balancing of values', see *infra*, s. 5.2.2.
614 *E.g.* Hollerbach, *Auflösung der rechtsstaatlichen Verfassung?* (1960); KRIELE (1967); Horst Ehmke, *Prinzipien der Verfassungsinterpretation*, 20 VVDStRL 53, 64 (1963).
615 *E.g.* Hollerbach, *Auflösung der rechtsstaatlichen Verfassung?* (1960), 254fn74.

4.3.1.3 Balancing as legal reasoning or interpretation

A third group of critiques focused on balancing's shortcomings specifically as a form of legal reasoning. Of course, commentators voicing these critiques would normally formulate their views on the basis of *some* underlying constitutional philosophy. So again: it is impossible to fully separate the two perspectives. But there were important differences in emphasis between those writers that focused their attacks on the theoretical foundations – Forsthoff, Böckenförde and others - and those that focused on argumentative and interpretive technique - discussed in this Paragraph. In the context of freedom of expression, for example, Hans Klein wrote that the differences in the importance attached to the right of free expression as between the *Lüth* and *Blinkfüer* boycott cases, were impossible to justify "on the basis of criteria that are equally accessible to everyone, rational and therefore binding".[616] Instead of offering a rationally secure argument, the FCC's balancing approach turned all such questions of weight and importance into "matters of taste" – "*Fragen des Geschmacks*";[617] a qualification confirmed, for Klein, by the fact that the FCC's First Senate itself could not agree on the weight to be accorded to freedom of the press in the *Spiegel* case.[618] A similar attack on balancing's rationality as a mode of argument is contained in Friedrich Müller's 1966 book '*Normstruktur und Normativität*' – '*Normativity and the Structure of Norms*'. In Müller's view, the idea of balancing was "*hermeneutisch fragwürdig*" – "hermeneutically questionable".[619] In the absence of guidelines as to how competing goods could be "rationally identified and valuated in a replicable, truly inter-subjectively debatable way",[620] a balancing decision could hardly amount to more than a mere proposition.[621] Balancing, on this view and because of its irrational character, cannot fulfil the "*rechtstaatliche Begründungszwang*" – the fundamental duty for courts to justify their decisions.[622]

What these and other similar contributions have in common is their view of balancing as an *empty* idea and/or as an *irrational* form of argument. On this view, courts may purport, aim and believe to be employing balancing as a standard for constitutional adjudication, but, since this formula is in fact devoid of any guiding power – "*kriterienlos*" -,[623] what these 'balancing judges' actually do, is follow their own convictions or some other standard inappropriate to constitutional rights adjudication.

There seem to have been two main varieties of this form of criticism. On one view, balancing's lack of content meant an unwarranted departure from conventional *legal method*; on the other, the emphasis was on balancing as lying outside the realm of *rational*

616 Klein, *Öffentliche und Private Freiheit* (1971), 154-155.
617 *Ibid.*
618 *Ibid.*
619 MÜLLER (1966), 208.
620 *Ibid.*, 211.
621 *Ibid.*, 209 ("*kaum anders als affirmativ*").
622 *Ibid.*, 209.
623 *Cf.* Böckenförde, *Zur Kritik der Wertbegründung des Rechts* (1987), 81.

argument. In both cases, what was objected against was the fact that balancing did not exercise any independent constraining force – in terms of the rules of legal doctrine or through the rules of rational argumentation – on the personal preferences of the individual deciding judge. Where, as in many contemporary German perspectives, legal method and the standards of rationality are held to overlap, the charge is substantively identical.[624] On either view, balancing is illegitimate as a mode of arguing in constitutional rights adjudication.

Two examples of the view that balancing is 'empty' or irrational, are Von Pestalozza's seminal article '*Kritische Bemerkungen zu Methoden und Prinzipien der Grundrechtsauslegung*' ('*Critical Remarks on the Methods and Principles of the Interpretation of Constitutional Rights*', 1963) and Schnur's lecture on freedom of the press, mentioned above (1963, published in 1965).[625] For Von Pestalozza, balancing is "a circular argument", a "tautology" and an "empty formula" – a "*Leerformel*".[626] "The principle of balancing", in Von Pestalozza's view, "is merely a shell, to be filled with substantive criteria".[627] Schnur argues along very similar lines that "general formula's cannot bring answers", and that "to balance, one needs units of measurement"; substantive criteria that the formula of balancing itself cannot provide.[628]

4.3.2 Critiques of the legitimizing force of balancing as interpretation

For Schnur and Von Pestalozza and the other writers just cited, balancing's emptiness and irrationality as a method distinguishes it from what courts *should* be doing with regard to the Constitution. And that, in the most general terms would be to *interpret* it - with 'interpretation' equalling both 'legal method' and (legal) rationality. This charge is also visible in the work of commentators like Forsthoff and Böckenförde who, as has been seen, combined their attacks on balancing as an irrational form of argument with their critique of balancing as the implementation of a misguided theory of the constitution.

Within this broad range of critiques, commentators adhered to different understandings of what good legal interpretation or argumentation should look like. A second step in uncovering the significance of 1960s critiques of balancing, therefore, is to analyse these various understandings of the legitimizing force of legal argument. The content of these definitions, the kinds of *'rational' alternatives* suggested for balancing, and the answer to the questions of whether legal reasoning *can ever be rational at all*, are important indicators of balancing's local meaning.

In Chapter 2, several elements of the 'legitimizing force' of legal arguments were related to ideas on rationality in law. Max Weber's formal legal rationality was presented

[624] The extent to which these domains are thought to overlap is contingent.
[625] Von Pestalozza, *Kritische Bemerkungen* (1963); Schnur, *Pressefreiheit* (1965).
[626] *Ibid.*, 448. Von Pestalozza is especially critical of the fact that balancing reasoning does not itself provide an '*Abwägungsmaßstab*' (at 447).
[627] *Ibid.*, 449.
[628] Schnur, *Pressefreiheit* (1965), 122-123.

as an archetypical instance of 'formal-universalizing' legitimizing strategies. Weber's substantive rationality and irrationality were discussed as 'substantive-contextualizing' strategies. And 'dialectical' or 'topical' models of legal reasoning were identified as instances of 'mediating-integrative' legitimizing strategies. This Section places these understandings alongside early 1960s German debates on the rationality of balancing in constitutional adjudication.

4.3.2.1 Legitimizing force and legal formality

Forsthoff's views, discussed above, offer the archetypical mid-century example of a balancing critique turning on classical, Weberian formal rationality. For Forsthoff, the constitution has an "unideologically-rational" structure that allows for answers to concrete problems to be "deduced" from its overarching complex, in a way that is "*logisch nachvollziehbar*" – "logically replicable".[629] With this statement, Forsthoff aligned himself with a distinguished tradition within German constitutional law where, in the second half of the Nineteenth Century, towering scholars like Von Gerber and Laband had argued that the object of constitutional law scholarship had to be the development of a conceptual system that could function as the basis for "secure juridical deduction" – "*sichere juristische deduction*".[630] As was mentioned in Chapter 3, it was an idealized form of this understanding in private law scholarship that Weber took as the starting point for his conception of formal legal rationality.

Forsthoff's analysis is a rare example of an explicit assessment of the FCC's balancing approach on the orthodox standards of formal legal rationality – the ideal of "correct subsumption in the sense of a syllogistic argument".[631] And, as mentioned above, Forsthoff clearly found the FCC's approach wanting, arguing that it was in urgent need of an "equivalent for the disciplining effect" of that found in the traditional rules of interpretation.[632] Although Forsthoff's comprehensive critique of the FCC's methods in terms of the "deformalization of the constitution" was rare, numerous authors shared his concerns about allegedly excessive particularity in FCC balancing case law. For these commentators, the FCC had erred primarily in combining an abstract weighing of values with a particularistic balancing of interests in the individual case.[633] Perhaps the most prominent author taking this line was Roman Herzog. Herzog conceded that balancing between competing goods on some abstract level was generally "*unumgänglich*" – "unavoidable" -,[634] but attacked the individualized nature, or the particularism, of the

[629] Forsthoff, *Der introvertierte Rechtsstaat und seine Verortung* (1963), 178-182. See Forsthoff, *Die Umbildung des Verfassungsgesetzes* (1959), 151 for a discussion of Weber. On Forsthoff's call for a return to 'classical hermeneutics', see also Peter Schneider, *Prinzipien der Verfassungsinterpretation*, 20 VVDStRL 1, 3 (1963).
[630] See, *e.g.*, VON GERBER, GRUNDZÜGE EINES SYSTEMS DES DEUTSCHEN STAATSRECHT viii (2nd ed., 1869), viii, cited in Schneider, *Prinzipien der Verfassungsinterpretation* (1963), 37.
[631] Forsthoff, *Die Umbildung des Verfassungsgesetzes* (1959), 135.
[632] *Ibid.*, 138.
[633] See, *e.g.*, Herzog, in MAUNZ-DÜRIG-HERZOG-SCHOLZ (1968), nr. 252ff; Bettermann, *Die allgemeinen Gesetze* (1964), 602ff.
[634] Herzog, in MAUNZ-DÜRIG-HERZOG-SCHOLZ (1968), nr. 252.

Court's balancing.[635] Herzog's commentary on Art. 5 GG describes his objection to the fact that balancing in the *Lüth* case "does not play out in the form of an abstract balancing of abstract legal values, but has been 'developed' by the Court into a balancing in the individual case, (...) [There is no longer] a balancing of legal values – '*Güterabwägung*' -, but rather a balancing of the opposing interests of two individuals – '*Interessenabwägung*"'.[636] Arguments against this form of '*Güterabwägung im Einzelfall*' were, in particular, the threat posed to legal certainty and the predictability of constitutional law, and the arrogation of power implicit in the judicial *ad hoc* evaluation of State action.[637] Instead of the Court's particularized balancing in light of all the circumstances of the case, Herzog pleaded for a more structured approach that would proceed in two steps. In a first stage, the Court should only look at the value of the competing '*Rechtsgüter*' in the abstract. A second step should then take into account what Herzog called the "*Gefahrenintensität*" – the degree to which the abstract value was threatened in the circumstances of a particular case.[638] As Herzog wrote, such a phased review of '*Schutzgut*' and '*Gefährdungsgrad*' – the value to be protected and the severity of the threat -, would mean drawing upon the "principle of necessity"– "*Erforderlichkeitsprinzip*" –, familiar from other areas of constitutional jurisprudence, in the process of free speech balancing.[639]

Roman Herzog's work, then, in part entails an effort to discipline judicial balancing through a framework of 'steps' or 'stages'. In this sense, it can be seen as a precursor to the writings of later authors who increasingly came to see balancing as part of a broader three-step proportionality model.[640] To the extent that these 'steps' or 'stages' are intended to regulate judicial evaluations, they are operationalizations of ideals of legal formality. That is true also for Herzog's emphasis on the need for weighing on a higher plane of abstraction, in the earlier part of his proposals.

[635] *Cf.* Scheuner, *Pressefreiheit* (1965), 82 ('*individualisierende Güterabwägung*').
[636] Herzog, in MAUNZ-DÜRIG-HERZOG-SCHOLZ (1968), nr. 252. See, in addition to the sources cited by Herzog, LERCHE (1961), 150 (citing Forsthoff); Klein, *Öffentliche und private Freiheit* (1971), 151; Bettermann, *Die allgemeinen Gesetze* (1964), 601-602. When the Court in *Lüth* required an evaluation "on the basis of all the circumstances of the case", Bettermann wrote, it put "casuistry and *ad hocery* in the place of constitutional interpretation".
[637] *Ibid.* See also LERCHE (1961), 150 (arguing that the '*Gesetzesvorbehalt*' of Art. 5 GG has become an '*Urteilsvorbehalt*').
[638] Herzog, in MAUNZ-DÜRIG-HERZOG-SCHOLZ (1968), nr. 267. For an earlier effort in this direction (in the field of private law), see Heinrich Hubmann, *Grundsätze der Interessenabwägung*, 155 ACP 85, 110ff (1956) (under the headings of '*Interessennähe*' and '*Interessenintensität*').
[639] Herzog, in MAUNZ-DÜRIG-HERZOG-SCHOLZ (1968), nr. 267. This last element, though not the abstract balancing of Herzog's first stage, is shared by SCHLINK (1976), 198ff.
[640] *Cf.* Fritz Ossenbühl, *Abwägung im Verfassungsrecht*, 1995 DVBL. 904, 905 (1995). On this transformation further Schlink (1976), 59ff, 143ff. On the relationship between balancing and proportionality, see also ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (Julian Rivers, trans., 2002).

4.3.2.2 Legitimizing force, discipline and 'dialectical rationality'

Roman Herzog's two-step approach can be seen as an attempt to bring 'discipline' to balancing-based reasoning. As such, his work fits among the views of a broad group of commentators who similarly criticized the FCC for leaving its balancing approach unstructured, inconsistent and unclear in its actual operation. The background to these critiques was an acknowledgment – or even an enthusiastic embrace – of the idea that explicit balancing was going to remain a fixture of the Court's practice, and a recognition that the task of constitutional scholarship should therefore be to help improve the Court's methods.

These critiques are interesting primarily for two points: for what they say about how constitutional scholars viewed their own relationship to the Court, and for the content of the actual proposals.

(1) With regard to the first issue; a pervasive, double sided theme within the relevant debates of the 1960s was that (a) a form of malaise in the *scholarship* of constitutional interpretation was, at least partly, to blame for defects in the Court's approach, and (b) improvement in scholarly work on constitutional interpretation could make a real contribution towards better decisions. The weaknesses in the Court's balancing approach were understandable, wrote Friedrich Müller in 1966. After all, "*Die Theorie hat der Praxis bisher kaum verwertbare Hinweise (…) gegeben*" – theoretical scholarship had not offered sufficient assistance to the courts.[641] What was needed was "*hermeneutische Präzisierung*" - hermeneutical clarification and sharpening -, to be offered, naturally, by academics.[642] These two convictions help explain why many authors asked for their contributions to be understood "not as criticism of the Court, but as a call to persevere in efforts to create a consistent, convincing constitutional dogmatics – '*Verfassungsdogmatik*"'.[643] The quest, to be led by scholars, is to develop methods of interpretation that are "theoretically-scientifically secure".[644] This conception puts a gloss on the contributions of scholars intended to discipline or structure the FCC's balancing approach in that it implicitly accepted the standards of "*juristischer Wissenschaftlichkeit*" – the scientific standards of the scholarly community - as relevant to the evaluation of the Court's work.

(2) With regard to the second point – the content of these critical-supportive scholarly proposals –, an important and widely shared trend in legal scholarship of the late 1950s and early 1960s was a turn towards the standards of 'dialectical reasoning' as ideals for legal argumentation. Rather than relying on the analytical structure of 'steps' or

[641] MÜLLER (1966), 211.
[642] *Ibid.*, 212. See also KRIELE (1967), 17 ("*Alles, was dazu nötig ist, ist eine Methodenlehre...*").
[643] Roellecke, *Prinzipien der Verfassungsinterpretation* (1976), 24. See also at 49 ("*Das Gericht spiegelt nur die Ergebnisse der wissenschaftlichen Methodendiskussion wider*"). See also Ehmke, *Prinzipien der Verfassungsinterpretation* (1963), 59 (blaming not the Court's approach to concrete cases, but "*die Methodenauffassung unserer herkömmlichen Auslegungslehre*").
[644] Schneider, *Prinzipien der Verfassungsinterpretation* (1963), 15.

'stages' of the kind proposed by Herzog, these approaches sought to discipline legal reasoning by way of an invocation of certain 'rules' for rational deliberation and interpersonal agreement.[645] It is this project, and its implications for the meaning of balancing, that will be discussed in the remainder of this Paragraph.

(a) The project and standards of dialectical reasoning in law

By the early 1960s, the ideal of formal rationality in law as espoused by Ernst Forsthoff, had come under increasing pressure.[646] In the course of the 1950s, a number of writers, in particular the private law scholar Theodor Viehweg in Germany and the philosopher Chaïm Perelman in Belgium, had been concerned with the rehabilitation of Aristotle's model of 'dialectical argumentation', described in *The Topics*, as a normative basis for legal reasoning.[647] Virtually simultaneously, another professor of private law, Josef Esser, undertook a large-scale comparative study of common law adjudication to argue, in very similar Aristotelian terms, for an understanding of private law jurisprudence as a 'practical' discipline.[648] The philosopher Hans Georg Gadamer, finally, also using classical sources, redirected attention to 'practical reason' and to the importance of "*Vorurteile*" – literally "prejudgments", convictions already held – for deciding normative questions.[649] What these efforts had in common was a rejection of the formal-logical quality of (legal) reasoning;[650] an opening-up of legal argumentation to new sources of input beyond norms, including, primarily, 'principles' and common understandings and conventions – 'ενδοξα' -[651], a new emphasis on legal argumentation as a practical,[652] dialectical discipline aimed at *convincing* rather than at *proving*.[653]

[645] This rule-based character also implies a formal dimension. See for the relevant definitions *supra*, s. 2.4 and 2.5.4.

[646] For such an assessment in the constitutional law context, see, *e.g.*, the opening lines of Kriele's '*Theorie der Rechtsgewinnung*': "The classic conception in German constitutional legal thinking of the nature of 'juristic method' in general and of the nature of constitutional interpretation more specifically that is still prevalent, is so alien to the new realities of constitutional adjudication that it is in real danger of making impossible demands". KRIELE (1967), 5.

[647] *Cf.* Chaim Perelman & Lucie Olbrechts-Tyteca, *The New Rhetoric* (1958), in THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT (1963); THEODOR VIEHWEG, TOPIK UND JURISPRUDENZ (1953).

[648] JOSEF ESSER, GRUNDSATZ UND NORM NORM IN DER RICHTERLICHEN FORTBILDUNG DES PRIVATRECHTS (1956). Esser's source of inspiration was primarily common law adjudication (see, *e.g.*, Ehmke, *Prinzipien der Verfassungsinterpretation* (1963), 55). But Esser also made frequent reference to Aristotelian ideas and terms, notably at 48 (qualifying '*Interessenjurisprudenz*' as 'topical' jurisprudence) and 53 (referring to the Aristotelian term ενδοξα, to designate generally accepted opinions).

[649] HANS-GEORG GADAMER, WAHRHEIT UND METHODE (1960).

[650] *E.g.* LARENZ (1st ed., 1960), 136; LARENZ (3rd ed., 1975), 139 (on Viehweg). On Gadamer's critique of Cartesian logic, see, *e.g.*, DONATELLA DI CESARE, GADAMER: EIN PHILOSOPHISCHES PORTRÄT 112 (2009).

[651] ESSER (1956), 53; KRIELE (1967), 106. '*Endoxa*' are 'generally accepted opinions'; '*Topoi*' are 'common places'.

[652] See VIEHWEG (1953), 85 (on the link between jurisprudence and problem solving).

[653] Note that the term 'dialectical' appears in at least three different meanings in the relevant works: (1) a dialectical relationship between 'pre-positive' content and 'posited' form, *e.g.* in LARENZ (1st ed. 1960), 131; (2) a dialectical relationship between major and minor premise in syllogistic reasoning, *e.g.* in von Pestalozza, *Kritische Bemerkungen* (1963), 426; (3) the dialectical nature of legal argumentation in the sense used by Viehweg, Esser and others. In yet a fourth sense, the term 'dialectical' was used to characterize the relationship between constitutional rights and their exceptions, *e.g.* in KOMMERS (1997), 415-416 (quoting Helmut Steinberger, 1983).

In the early 1960s, just a few years after the FCC's *Lüth* decision, a number of public law scholars began to tap the work of these private law thinkers and philosophers to develop a new conception for the rationality of constitutional legal reasoning. Thus, in 1961, when the German Association of Constitutional Law Scholars met in Freiburg for their annual assembly to discuss '*Priniciples of Constitutional Interpretation*' – the first time this prominent body discussed constitutional interpretation *in plenum* since the *Lüth* decision - dialectical rationality and topics stood at the centre of attention. Both main lectures on this theme, in effect, were largely concerned with this specific project.[654]

Obviously, the different constitutional scholars differed in their emphases and interests, but a number of important main themes can be distinguished. These themes concern the *object* or *purpose* of legal interpretation, its *input* and *process*, and its *evaluation*.

(1) The purpose of legal reasoning, in the new views, was the "*Aktualisierung*" – "actualization" – and "*Konkretisierung*" – "concretization" – of legal norms. [655] *Concretization* meant determining the content and "the reality" of norms anew in each case, "bound by particular rules of art, certainly, but always with the aim of *actuality*";[656] an aim of bridging the gap between past and present, between legislative ideal and social reality.

(2) With regard to the 'input' of legal reasoning, the new theories brought a revaluation of the importance of the position and views of those individuals that decide legal questions. Referring to Gadamer, Viehweg and Esser, Christian von Pestalozza argued, for example, that in constitutional law too, interpretation was influenced "by the particularities of the interpreter".[657] Rather than neglecting or minimizing the importance of the predispositions of judges, constitutional scholars should acknowledge that the "*Vorurteil*" was "*essential* to interpretation".[658] Also on the input side, scholars began to argue that constitutional law, like private law, had a "*topische Grundstruktur*"; an "open" structure in which multiple "*interpretationsgesichtspunkte*" – "perspectives of interpretation" - such as values, legal goods and principles all had a role to play.[659]

(3) This re-appreciation of the outlook and position of the interpreter and the widening of the range of permissible 'input' materials to include values and "*Rechtsgüter*" went hand in hand with changes in the understanding of the *process* and *evaluation* dimensions of legal reasoning. As it was put in the 1961 Freiburg lectures, legal interpretation "as a process of thought", while clearly not entirely irrational, could no

[654] The papers on '*Prinzipien der Verfassungsinterpretation*' by Schneider and Ehmke (published in 1963). See also von Pestalozza, *Kritische Bemerkungen* (1963), 427ff (referring to Gadamer, Esser and Viehweg); Scheuner, *Pressefreiheit* (1965), 38fn111.

[655] *E.g.* von Pestalozza, *Kritische Bemerkungen* (1963), 427-428. The idea of '*Aktualisierung*' was introduced most prominently by Gadamer (see GADAMER (1960), 307). See also LERCHE (1961), 229-230; MÜLLER (1966), Chapter XIV. ('*Zur Konkretisierung und zur Verfassungstheorie der Grundrechte*'); KARL ENGISCH, DIE IDEE DER KONKRETISIERUNG IN RECHT UND RECHTSWISSENSCHAFT UNSERER ZEIT (1953).

[656] Von Pestalozza, *Kritische Bemerkungen* (1963), 427-428 (emphasis in original – '*Aktualität*').

[657] *Ibid.*, 429-430.

[658] *Ibid.*, 432.

[659] Ehmke, *Prinzipien der Verfassungsinterpretation* (1963), 62, 61-71.

longer be seen as "entirely within the domain of the 'rational'" either.[660] "Logically compelling conclusions" in the traditional sense were only available "to a very limited extent in jurisprudence generally and in constitutional law specifically".[661] Not the traditional exigencies of logical demonstration, therefore, but the "*Überzeugungskraft*" – "convincing power" – of a particular form of argumentation should determine its value;[662] to be assessed, not by the *Bundesverfassungsgericht* itself, but by a "consensus of all rational and reasonable individuals".[663] "The demands from the perspective of rationality", then, could be summarized "under the maxim of "optimally susceptible to discussion" – "*maximaler Diskutierbarkeit*".[664] The classical views of "*Subsumtions-positivismus*" had forced legal decision making to face an unrealistic and unattractive alternative: legal reasoning was *either* fully rational and conclusive, *or* it was "left hopelessly in the hands of arbitrariness and convenience".[665] In place of these outdated views, the topical theories of law put a criterion of "justifiable on methodologically acceptable grounds that are susceptible to rational deliberation".[666]

(b) General acceptance of the standards of dialectical reasoning in constitutional jurisprudence

With the advent of this dialectical turn in German constitutional scholarship came the potential for a considerable broadening of the range of criteria for the evaluation of the rationality of constitutional legal reasoning. A number of gradations now were available, ranging from Forsthoff's extremely demanding "*logisch nachvollziehbar*", via "*kontrollierbar*" – verifiable -,[667] to "*diskutierbar*" –debatable in a fair and orderly manner among independent individuals. Both the reception of these 'new' dialectical standards of legal rationality generally and the evaluation of constitutional balancing on the new standards are important indicators of balancing's contemporary local meaning. Knowing to what extent the dialectical theories came to be accepted – and for what reasons – gives an indication of the sort of criteria for legal reasoning local audiences applied to the evaluation of the FCC's balancing approach. And finding out how contemporary authors did in fact evaluate balancing on these criteria offers insight into their understanding of balancing's overall legitimizing force.

On the whole, it seems that the main tenets of the topical/dialectical theories found fairly widespread acceptance among constitutional lawyers. It has been remarked that the original 1961 Freiburg lectures met mostly with "*abwartende Zurückhaltung*", or

[660] Schneider, *Prinzipien der Verfassungsinterpretation* (1963), 34 ("*sich als Denkvorgang nicht ganz ins Rationale auflösen lasse*").
[661] Ehmke, *Prinzipien der Verfassungsinterpretation* (1963), 71.
[662] *Ibid.*, 71. See also Schneider, *Prinzipien der Verfassungsinterpretation* (1963), 35.
[663] *Ibid.*, 71 ("*der Konsens aller 'Vernünftig- und Gerecht-Denkenden'*").
[664] Schneider, *Prinzipien der Verfassungsinterpretation* (1963), 35.
[665] KRIELE (1967), 54.
[666] *Ibid.*, 54 ("*daß sich die Meinung durch methodologisch akzeptable Gründe rechtfertigen läßt. Methodisch akzeptabel sind aber nur Gründe die rational diskutierbar sind*").
[667] *Cf.* MÜLLER (1966), 209.

reticence,[668] and certainly commentators differed in the extent to which – and the reasons for which – they embraced the new ideas. But many influential authors did take up at least part of the dialectical theorists' suggestions. "*Verfassungsinterpretation ist Konkretisierung*" wrote Konrad Hesse, a onetime judge of the FCC in his widely used textbook on constitutional law.[669] In the absence of a logical-axiomatic closed system, constitutional reasoning could only be "topical" and directed at providing "convincing justifications" for decisions.[670] Similarly, in a contribution on '*Principles of Constitutional Interpretation*', published in the *Festschrift* for the FCC's 25th anniversary, professor Gerd Roellecke took as his starting point the observation that the relevant question in assessing the Court's decisions was whether its reasoning was "*plausible*". The object of constitutional interpretation, on the whole, was to obtain "*Zustimmung*" – assent, and what mattered, therefore, was whether the Court's argumentation was "*überzeugend*", or convincing.[671]

Roellecke's article is particularly revealing because of the way it identifies balancing itself as a '*topos*' – the "*Güterabwägungstopos*".[672] His contribution thus provides a link to the issue of the evaluation of balancing on topical/dialectical standards. And on this issue too, Roellecke's views are largely representative. Since, while many commentators found some place for the standards of dialectical rationality in constitutional legal reasoning, most of them went on to *condemn* the FCC's balancing precisely as failing to live up to these new standards. Put most succinctly; the Court's balancing decisions, such as *Lüth*, simply "did not convince".[673]

Among those commentators who broadly accepted the relevance and appeal of 'dialectical' or 'topical' standards of legal reasoning, three principal types of assessment of balancing can be distinguished. Some largely *accepted* the FCC's balancing's approach on these standards; some used these standards to *object* to the FCC's balancing; and some *reframed* the FCC's balancing approach in the terms of dialectical reasoning.

(c) Balancing and dialectical reasoning (I): Acceptance of the FCC's balancing approach

A rare *positive* evaluation of balancing in terms of dialectical reasoning can be found in Ulrich Scheuner's 1963 lecture on freedom of the press. "The insight that the application of legal norms does not depend solely on logical deduction, but that the concretization of general norms constantly requires supplementary valuations", Scheuner argued, "points to the importance of balancing the relevant ethical principles as well as

[668] *Cf.* KRIELE (1967), 115.
[669] KONRAD HESSE, GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND (1st ed., 1960, 19th ed., 1993) (references are to the 1993 edition), nr. 60.
[670] *Ibid.*, nr. 67. See also nr. 61ff on the importance of the '*Vorverständnis*' (citing Gadamer and Viehweg).
[671] Roellecke, *Prinzipien der Verfassungsinterpretation in der Rechtssprechung des Bundesverfassungsgerichtes* (1976), 23, 29.
[672] *Ibid.*, 29.
[673] *Ibid.*

the social interests concerned in the interpretation of fundamental rights".[674] If the Court were to hide behind "the old logical-systematic method, in those cases in which its boundaries are overstepped", this would merely "amount to self-deception".[675] Scheuner was, therefore, glad to observe "a clear commitment to the modern methods of interpretation" in the case law of the FCC, and in particular in the Court's balancing approach. [676] It is clear from Scheuner's lecture that the 'modern methods of interpretation' he refers to, are the dialectical/topical theories just discussed.

(d) Balancing and dialectical reasoning (II): Rejection of the FCC's balancing approach

Most commentators, however, found the Court's balancing wanting on the new standards. Scheuner's co-referent at the 1963 Saarbrücken Meeting, Roman Schnur, for example, argued that the Court's balancing in case like *Lüth* led to decisions that were "no longer rational", in the sense of "controllably linked to the Constitution".[677] Schnur, like many others, drew a strong distinction between reasoned "*Auslegung*" – interpretation – on the one hand, and the use of "*Leerformeln*" – empty formula – like balancing on the other. In the latter case, instead of following a rational process of deliberation, decision making was reduced to a "*Wettlauf*", a competition or a shouting match, between parties, with the court cutting off the formulation of their claims at an arbitrary moment, by way of an "abrupt" decision.[678] Such a brusque ending was contrary to the rules for inter-subjective deliberation that were central to the new theories of rationality in law.

In another article on freedom of expression of a few years later, Hans Klein similarly attacked Scheuner's plea for "*individualisierende Güterabwägung*", using the dialectical criteria of rationality.[679] If one compared the Court's reasoning in *Lüth* and *Blinkfüer* - the two boycott cases -, Klein argued, "it was not demonstrable, on the basis of criteria equally susceptible to all that are rational and therefore binding" why freedom of expression was, or was not, given precedence over competing values and interests.[680] In Klein's work again, an acceptance of the dialectical theories' new criteria for the rationality of legal reasoning was combined with a *rejection of balancing* on precisely the criteria suggested by these theories.[681]

[674] Scheuner, *Pressefreiheit* (1965), 55 ("*Aus der Einsicht daß Anwendung rechtlicher Normen in Ausführung und Rechtsprechung nicht allein auf logischer Ableitung beruht, ..., ergibt sich die Bedeutung, die der Abwägung der beteiligten ethischen Prinzipien wie auch der Beurteilung der mitsprechenden sozialen Interessen in der Grundrechtsinterpretation*", citing Esser, at 60-61).
[675] *Ibid.*, 61-62.
[676] *Ibid.*, 61 ("*Ein klares Bekenntnis zu den modernen Auslegungsmethoden ...*"). See also at 38 (arguing that constitutional law especially is in need of 'topical' interpretation).
[677] Schnur, *Pressefreiheit* (1965), 127-128 ("*eine rational, d.h. an der Verfassung … überprüfbare Entscheidung*").
[678] *Ibid.*, 128 ("*unvermittelt*").
[679] Klein, *Öffentliche und Private Freiheit* (1971), 154.
[680] *Ibid.*, 155 ("*an Hand jedermann gleichermaßen einsichtiger, rationaler und darum verbindlicher Kriterien*").
[681] The term 'new' can be used with some justification, as the dominant understanding at the time was that the theories of Viehweg and Esser did indeed represent a 'new' phase in the understanding of legal reasoning.

Outside the immediate context of freedom of expression one can find similar assessments. A prominent example is Friedrich Müller's wide-ranging 1966 study on the structure of constitutional norms. For Müller, the central question with regard to constitutional balancing was "how the goods to be balanced may be rationally described and valuated in a verifiable and truly inter-subjectively debatable way".[682] Müller's criterion of "*potential for inter-subjective deliberation*" was clearly inspired by the scholarship on new forms of rationality. And it was on this criterion that Müller found the Court's balancing deficient. The FCC's balancing was "*kaum kontrollierbar*" – "virtually unverifiable". The Court's decisions were proclaimed in a way that was "*kaum anders als affirmativ*" – "scarcely different from merely propositional". Balancing decisions, in short, did not rest on rational deliberation, but merely posited "*ein Wort ... gegen ein anderes Wort*".[683]

(e) Balancing and dialectical reasoning (III): Recasting the FCC's decisions in 'practical' terms

Many commentators, then, *rejected* the Court's balancing on the new criteria. The FCC's balancing was *not* seen as conducive to rational dialectical discussion, or as increasing the 'potential for inter-subjective deliberation'. It did nothing or very little, in these writers' views, to augment the '*Überzeugungskraft*' – the convincing power - of the Court's decisions.

This summary conclusion is particularly interesting given how easy it is to think *in the abstract*, as an outside observer, of ways in which the standards of dialectical rationality and balancing-based discourse might be intimately related. Ideas of balancing and understandings of dialectical or topical reasoning could, at least in theory, refer to very similar things. Balancing might be taken to open up judicial argumentation to the broader range of input – principles, shared convictions, *etc.* - that the dialectical scholars were keen on promoting. And an understanding of legal reasoning as aimed at *convincing* rather than at proving could, again in theory, point specifically to balancing-based reasoning as an alternative to syllogistic demonstration and as a way to openly and dispassionately consider conflicting viewpoints.

These intuitive connections may explain a second important line in the literature: contributions that, while critical of the FCC's *Güter-* and *Wertabwägung* as too formal, sought to *recast* the Court's balancing reasoning in terms closely aligned with the standards of dialectical reasoning. Authors writing in this vein made an effort to read into the Court's decisions an idealized form of balancing that would match the dialectical rationality criteria they espoused. Gerd Roellecke, for example, was one of the authors who criticized the FCC's *Güterabwägung* as a throwback to the nineteenth-century

[682] MÜLLER (1966), 211.
[683] *Ibid.*, 209.

formalism that the *Interessenjurisprudenz* had fought so vehemently against.[684] But he also argued that, on a different reading, the "*Güterabwägungstopos*" could function as a "*legitime Argumentationsfigur*".[685] What was problematic, was the "apocryphal use of what are, as such, appropriate forms of argument" in the FCC's decisions, not the invocation of balancing *per se*.[686] The most influential attempt to reframe the Court's balancing in a way that would fit the standards of dialectical reasoning came from Konrad Hesse, later himself a long-time member of the Federal Constitutional Court (1975-1987).[687] In his textbook on the Basic Law, Hesse adopted the basic tenets of "topical reasoning" as the foundations for his approach to constitutional interpretation – an approach he labelled as "*Konkretisierung*".[688] One of the relevant '*topoi*', or "*Konkretisierungselemente*", for the Court to consider when "solving problems", according to Hesse, was "*das Prinzip praktischer Konkordanz*" – the principle of "practical concordance" or "mutual accommodation".[689] Hesse's descriptions of 'practical concordance' as requiring the "establishment of a proportional correlation between individual rights and community interests" and as aimed at the "optimization" of competing values, are in fact very close to descriptions often used for balancing.[690] Hesse is at pains, however, to distinguish his proposal from the balancing of legal goods and values found in the case law of the FCC. What he describes as "overly hasty *Güterabwägung*" and "abstract *Wertabwägung*", in his view risk promoting one value at the expense of others in ways that would undermine the fundamental unity of the constitutional order.[691] Interestingly, Hesse does not, in the relevant sections of his *Grundzüge des Verfassungsrechts*, offer any examples of how the Court's 'overly formal' approach to balancing has actually produced such one-sided results.[692] He also does not deal in any explicit way with the fact that most of the Court's *Güterabwägung* decisions in fact, as was seen above, incorporated elements of a highly particularistic *Interessenabwägung*.[693]

[684] *E.g.* Roellecke, *Prinzipien der Verfassungsinterpretation* (1976), 38. See on the *Interessenjurisprudenz* further *supra*, Chapter 3.
[685] *Ibid.*, 29-30 ("a legitimate argument form").
[686] *Ibid.*, 30.
[687] HESSE (1st ed., 1967).
[688] *E.g.* HESSE (8th ed., 1975), pp. 22-26.
[689] HESSE (19th ed., 1993), nr. 67 and 72. For a discussion in English of Konrad Hesse's contributions, see T. Marauhn and N. Ruppel, *Balancing Conflicting Human Rights: Konrad Hesse's Notion of 'Praktische Konkordanz' and the German Federal Constitutional Court*, in CONFLICTS BETWEEN FUNDAMENTAL RIGHTS 273 (Eva Brems, ed., 2008).
[690] HESSE (19th ed., 1993), nr. 318 (translated in Marauhn and Ruppel, *Balancing Conflicting Human Rights* (2008), 280ff).
[691] HESSE (19th ed., 1993), nr. 72.
[692] The themes of reconciliation and accommodation are central in FCC case law, as Chapter 5 will argue in more detail. The relevant question at this stage is whether such accommodation is only possible within Hesse's model (as he assumes) or whether the Court might be able to couple its formal understanding of value balancing with the practical dimension of accommodation. For more discussion, see *infra*, s. 5.3 and s. 8.4.
[693] See *supra,* s. 4.2.

4.3.2.3 Legitimizing force and 'the substantive' in law

Using the idea of the 'substantive' in law to analyse contemporary evaluations of balancing's legitimizing force is complex. This is in part because, as was shown in Chapter 2, the idea of the 'substantive' covers so many different elements, and in part because of the overlap with elements discussed under the previous headings. Some additional observations may, nevertheless, be useful. They aim to highlight, first of all, two dimensions of the substantive that were relatively marginal in contemporary German constitutional legal thought. These were: pragmatist and instrumentalist ideals for decision making (in a sense: the substantive and 'process') and the critique of the threat of relativization of rights through balancing (the substantive and 'outcomes'). By contrast, two dimensions of the substantive in law that were of profound relevance to balancing's local meaning both concerned 'input': the nature and range of factors considered appropriate as material for judicial decision making. These were: particularity and context-sensitivity and the role of 'values' within the theory of 'material constitutionalism'. Both will only be mentioned here, and will be discussed in greater detail in Chapter 5.

(1) Out of the range of 'substantive-contextualizing' dimensions of legitimizing force distinguished in Chapter 2, ideas of 'pragmatism' and 'instrumentalism' were marginal in German constitutional legal thought and practice of the time. This point will be discussed in more detail in Chapters 5 and 8. It will be argued there that balancing, in its German setting, was not commonly seen in terms of 'pragmatic compromise' or of 'instrumentalist' reasoning – at least not in the typically U.S. American sense of 'pragmatic' and 'pragmatic instrumentalism.[694] There is little or no talk of balancing 'costs and benefits', and no - or hardly any - discussion of balancing in terms of 'policy' jurisprudence.[695] Instead, balancing is generally pursued as a method of constitutional interpretation that aspires to juristic standards of reasoning, and that is meant to lead to a single 'correct' answer. Balancing, in an expression discussed later, is something that "*the Constitution demands*";[696] not something that can be resorted to at will.

(2) One critique of balancing with substantive overtones that did have *some* traction in contemporary debates, was the fear of the *relativization* of constitutional rights through explicit judicial weighing. "Ever since the principle of balancing has been introduced to determine the boundaries of constitutional rights", Peter Häberle observed in 1962, for example, "it has been confronted with the charge of relativization".[697] This fear, however, was hardly a dominant theme at the time. One reason was the fact that the FCC placed its balancing approach firmly within the confines of a 'value order' that was

[694] See *supra*, s. 2.5.5.2 and *infra*, s. 7.2.1.3.
[695] See *infra*, s. 8.3 and 8.4. A notable exception is SCHLINK (1976).
[696] BVerfGE 7, 198; 209. See *supra*, s. 4.2.
[697] HÄBERLE (1962), 39. See also Ridder, *Meinungsfreiheit*, in Neumann-NIPPERDEY-SCHEUNER, GRUNDRECHTE (1954), 282 (arguing that the position of Rudolf Smend, one of the main Weimar-era sources for the FCC's balancing approach, was "*zu relativistisch*". On Smend's work, see *infra*, s. 5.2.2.4).

understood to have 'objective' worth.[698] Another reason may have been the fact that absence of a tradition of judicial protection of freedom of constitutional rights meant that it was difficult to cast FCC's approach – its methods and its results in the early cases – as insufficiently protective.[699] In addition, the argument of relativization was particularly hard to make given the textual foundations of the protection of free speech in the Basic Law. It may be recalled that Art. 5 of the Basic Law, on its face, appeared to permit any kind of limitation to this freedom. It was this apparent textual mandate for repression that prompted the FCC, in its *Lüth* decision, to warn against an all too easy "*Relativierung durch einfaches Gesetz*" – a relativization of the right of free speech by way of an overly permissive attitude towards any limiting 'general law'.[700] This warning, of course, turns the standard charge of the relativization of rights through balancing on its head. The circle was complete when critics of the Court's balancing approach claimed, in turn, that the FCC had used balancing to 'relativize' the 'general laws' limitation clause of Art. 5![701]

(3) The 'substantive' in law can also be discussed in terms of the kinds of factors seen as permissible input for legal reasoning. The ideals of particularity and context-sensitivity have already been discussed as part of the 'dialectical' approaches to legal reasoning, above. That discussion has already highlighted the fact that dialectical approaches aimed to introduce these elements into judicial decision making in a disciplined and 'rational' way. Chapter 5 will add a further dimension to this discussion in the form of an analysis of the 'perfect fit' constitution – one of the central elements of balancing's German 'local meaning' to be developed there. It will be shown that particularity and context-sensitivity are important guiding principles for a constitutional order that strives for an as-close-as-possible 'fit' between the abstract meaning of constitutional clauses and their application in individual cases. It will also be argued in Chapter 5 and notably in Chapter 8 that there were strong disciplining, and therefore *formalizing*, dimensions to this context-sensitive ideal of 'perfect fit' and the mechanisms used for its implementation.[702]

(4) Also in terms of the input for decision making: the FCC's balancing approach has been shown to rely heavily on – and to be the main vector for the incorporation in Constitutional law of - the notion of 'values'. Chapter 5 contains an extensive discussion of the role of values under the heading of what will there be called 'material' constitutionalism: an understanding of the constitutional order as a 'value order'. Although an analysis of the nature of 'material' constitutionalism will have to wait until

[698] See *supra*, s. 4.2. This was one of the grounds on which Häberle himself argued that a fear of the relativization of rights was unfounded. *Ibid.*

[699] See also KOMMERS (1997), 442. Showcasing *both* the general attraction of the 'balancing = relativization' critique, *and* its inapplicability to early FCC case law, Kommers argues that many of the FCC's cases feature "delicate balancing (…). *And yet*, when viewed comparatively, the German court's record in defense of freedom of speech … easily rivals that of most of the world's advanced constitutional democracies" (emphasis added). In Kommers' view, the FCC was particularly protective of speech in its earliest decisions, such as *Lüth*, and in later decisions, with an interlude of a more deferential, less protective approach in the late 1960s – early 1970s. The relevant cases are discussed *supra*, s. 4.2.

[700] BVerfGE 7, 198; 208.

[701] *E.g.* Klein, *Öffentliche und Private Freiheit* (1971), 152.

[702] See *infra*, s. 8.2.3 and 5.3.3.

that Chapter, it can easily be seen that there is likely to be considerable overlap with the idea of legal reasoning informed by the "ethical imperatives, utilitarian and other expediential rules, and political maxims" that figure in Weber's substantive rationality.[703] It is important, however, to enter the *caveat* that while Weber saw these values as 'extra-legal',[704] this qualification would be imprecise for the values of 'material constitutionalism', in ways to be discussed in Chapter 5.

4.4 INTERIM CONCLUSION

The first decades after the Second World War saw the theme of judicial balancing become a dominant element of German constitutional legal discourse. Balancing – of values, *Güter*, interests, *etc.* – became the focal point for debate and disagreement on a wide range of issues. Whether dissenting judges or academic critics wished to support or attack the Federal Constitutional Court's interpretation of certain provisions of the Basic Law, debate the Court's broader position in the constitutional architecture or the role of judges in society or a host of other themes; they increasingly came to do so *in the language of balancing*. A first central observation to make, therefore, cannot concern the particular content of contemporary German ideas on the role of balancing, but has to be the mere fact that more and more disagreements on constitutional issues came to be discussed *within* the discourse of balancing. Towards the end of the period covered by this Chapter, by the mid-1970s, balancing truly had become "the key to the method and dogmatics of constitutional law".[705]

The relevant debates reveal a very broad range of views on what should be the appropriate criteria for the evaluation of constitutional legal reasoning, and on how balancing specifically should be rated on those standards. Predictably, no single standard – or set of standards - seems to have commanded universal acceptance and the position of balancing itself was, as has been seen, subject of intense debate. Although exclusive adherence to the standards of formal legal rationality in the classical sense was advocated only by a few commentators, these standards were broadly accepted to have some continued validity for constitutional interpretation. The advent of balancing coincided with the rise of a new understanding of what good legal reasoning should look like, and there were numerous - though conflicting - assessments of the FCC's new approach on these new standards. Finally, in terms of substantive (ir)rationality, some typical elements (pragmatism, instrumentalism) were largely absent from the relevant discussions, while

[703] See *supra*, s. 2.3.4.5.

[704] *Cf.* ANTHONY KRONMAN, MAX WEBER 77 (1983).

[705] SCHLINK (1976), 13. For an example in English, see KOMMERS (1997), 377 (a description of two decades of German free speech law, conducted entirely in terms of balancing). See also Fritz Ossenbühl, *Abwägung im Verfassungsrecht* (1995), 906 (1995) (noting a 1977 assessment that had found "106 decisions with 113 '*Güterabwägungen*' out of the 366 FCC decisions then published", and proclaiming that "one can be certain that in the two decades since then several hundred balancing decisions can be added to that number").

others ('material' constitutionalism, 'perfect-fit' constitutionalism) will be seen to have been prominent. These elements will be analysed in more detail in the next Chapter.

CHAPTER 5

TOWARDS A LOCAL MEANING OF BALANCING DISCOURSE IN GERMAN CONSTITUTIONAL JURISPRUDENCE OF THE LATE 1950s - EARLY 1960s:

THE MATERIAL AND COMPREHENSIVE CONSTITUTIONAL ORDER

5.1 INTRODUCTION: CONFLUENCE AND SYNTHESIS

5.1.1 Project and argument

Balancing in German constitutional law, it was claimed at the outset of Chapter 4, sits at the confluence of a number of important strands of thought and practice. This Chapter aims to come to terms with this richness of meaning by discussing two dominant such strands; those of the 'material' constitution and of what might be called the 'comprehensive' constitutional order.

The twin ideas that the constitution should be the expression of a constellation of 'material' or 'substantive' values and ideals, and that this constellation should somehow encompass as much of the reality of public and private life as possible, are dominant features of post-War German constitutionalism. Both represent particularly successful efforts at overcoming traditional dichotomies in constitutional thinking, especially those between legal formality and substance, law and politics, and the state and the individual. Judicial balancing, it will be suggested below, figures at the centre of each, reflecting and sustaining both.

The idea of the 'material constitution' will be discussed first (in Section 5.2). This – massive – theme is approached selectively, by way of a narrative arc that connects the *Lüth* balancing decision to the writings on freedom of expression, and on constitutional law more generally, by Rudolf Smend, one of the Weimar era's most prominent jurists and the acknowledged 'father' of not only material constitutionalism but of post-Basic Law constitutional law.[706] While the main thrust of this story was familiar to German constitutional lawyers of the early 1960s, and, probably, to a somewhat lesser extent, to those of today,[707] it will be argued that the subtleties of the relationship between material constitutionalism – from Smend to *Lüth* – and balancing have not always been fully understood.

Section 5.3 elaborates the idea of the 'comprehensive constitutional order', or of 'complete constitutional justice'.[708] This Section discusses two related themes: the idea that the constitutional order should be as complete as possible in its scope of coverage, and the idea that this constitutional order should aim for a 'perfect fit' with social life. It will be argued that these two ideas are central to early Post-War German constitutionalism and that the discourse of balancing, in turn, is among their prime manifestations and modes of operationalization.

[706] See below, Section 5.2.2.1.
[707] *Cf.* Ernst Böckenförde, *Grundrechtstheorie und Grundrechtsinterpretation*, 27 NJW 1974, 1530, 1533 (1974) (arguing that the intellectual origins of material constitutionalism in Rudolf Smend's work are 'today' – that is: in 1974 – no longer appreciated by all).
[708] *Cf.* Mattias Kumm, *Who's Afraid of the Total Constitution?*, 7 GERMAN L.J. 341, 345 (2006).

5.1.2 Balancing, the formal and the substantive

Of course, the Sections below cannot claim to give a comprehensive picture of all that was significant in and about early post-War German constitutionalism, or even all that was significant about the discourse of balancing during that period. Part of the argument offered is merely that the ideas of material and comprehensive constitutionalism were important in their own right, that they are important to the meaning of balancing in the German constitutional landscape, and that balancing, in turn, is central to them.

There is, however, a further dimension to the significance of precisely these two themes of material and comprehensive constitutionalism. This is their connection to ideas of legal formality and its opposites. Most of the work involved in substantiating this connection will be undertaken in Chapter 8, but the basic relationships may be expressed as follows.

(1) 'Material constitutionalism', it will be argued, is a dominant German expression of *'the substantive' in law*. To the extent that the language of balancing was invoked as part of this specific constitutional vision, the meaning of balancing itself must understood as associated to this particular brand of substantive ideas. The German version of the substantive however, it will also be claimed in Chapter 8, is in many ways much more heavily 'formalized' than its more pragmatic and instrumentalist U.S counterparts. This difference in the meaning of 'substantive' has important implications for the meaning of balancing.

(2) 'Comprehensive constitutionalism', in turn, will be identified later on as a dominant German expression of *legal formality*. This translation in particular, is not self-evident and will therefore be discussed in detail in Chapter 8. The basic idea, however, is simply that comprehensive constitutionalism, by way of its pressures towards 'completeness' and 'perfection', is seen to exercise a kind of constraining force that is surprisingly similar to the power thought to inhere in more familiar expressions of legal formality, such as rules or hard-edged conceptual definitions.

5.2 BALANCING AND THE 'MATERIAL' CONSTITUTION

5.2.1 Introduction

A view of the Constitution as a system of *substantive values* "commands the general support of German constitutional theorists, notwithstanding the intense controversy, on and off the bench, over the application of the theory to specific situations".[709] Again and again, the FCC has confirmed the value-based nature of the Basic Law,[710] while academic commentators have incessantly stressed the dependency of the German constitutional framework on "*inhaltliche legitimation*" – "substantive legitimization".[711] The relationship between this material – or substantive – constitutionalism and balancing is of a dual nature. On the one hand, as will be argued below, a material understanding of the Constitution informs much of the FCC's balancing discourse. This means that the Court's use of balancing can only really be understood against the background of this 'material' Constitution.[712] At the same time, the discourse of balancing itself is one of the primary manifestations and instruments of this particular constitutional vision. That means, in turn, that an account of one of the dominant strands in German constitutional thought would be incomplete without an extended examination of balancing.

While material constitutionalism permeates all areas of German constitutional law, its influence in freedom of expression law has been particularly noteworthy. It was in this area that Weimar-era theorists first debated the merits of a value-oriented approach to constitutional adjudication. The story of the 'material' strand in German constitutional thought, to a large extent, therefore begins with the guarantee of freedom of expression. Going back to these Weimar-era debates makes it possible therefore to track the birth of a constitutional understanding that has been crucial to the development of constitutional balancing – and of which balancing itself has become a singularly powerful expression.

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[709] DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 47 (2nd ed., 1997). See also: Gerd Roellecke, *Prinzipien der Verfassungsinterpretation*, in: BUNDESVERFASSUNGSGERICHT UND GRUNDGESETZ: FESTGABE AUS ANLAß DES 25JÄHRIGEN BESTEHENS DES BUNDESVERFASSUNGSGERICHTS II 36 (Christian Starck, ed., 1976) (the FCC's material understanding of the Constitution is "forcefully supported by the dominant strands of constitutional theory"); Böckenförde, *Grundrechtstheorie und Grundrechtsinterpretation* (1974), 1534; Klaus Stern, *General Assessment of the Basic Law – A German View*, in: GERMANY AND ITS BASIC LAW 23 (Paul Kirchhof & Donald P. Kommers, eds., 1993) ("Constitutionalism means not only a formal constitution in which law governs, but also a material constitution which incorporates substantive values and insures their protection in law. All of this is undisputed in theory and substantiated by a wealth of literature and jurisprudence").

[710] *E.g.* BVerfGE 2, 1; 12 ('*SRP-Verbot*') [1952]; BVerfGE 5, 85; 134 ('*KPD Verbot*') [1956]; BVerfGE 7, 98; 205 (*Lüth*) [1958]; BVerfGE 10, 59; 81 ('*Elterliche Gewalt*') [1959]; BVerfGE 12, 113; 124 ('*Schmid-Spiegel*') [1961].

[711] *E.g.* BERNHARD SCHLINK, ABWÄGUNG IM VERFASSUNGSRECHT 24 (1976). See also Horst Ehmke, *Prinzipien der Verfassungsinterpretation*, 20 VVDStRL 53, 72 (1963); Peter Badura, *Verfassung, Staat und Gesellschaft in der Sicht des Bundesverfassungsgerichts* ('*Verfassung, Staat und Gesellschaft*'), in: BUNDESVERFASSUNGSGERICHT UND GRUNDGESETZ: FESTGABE AUS ANLAß DES 25JÄHRIGEN BESTEHENS DES BUNDESVERFASSUNGSGERICHTS II 9 (1976).

[712] *E.g.* Roellecke, *Prinzipien der Verfassungsinterpretation* (1976), 36.

5.2.2 The Weimar foundations of 'material' constitutionalism: The Smend-Häntzschel debate

5.2.2.1 Limiting the freedom of expression: The 'allgemeine Gesetze'-clause in the Weimar and Bonn Constitutions

Paragraph II of Article 5 of the German Basic Law establishes that the right to freedom of expression may be limited by '*allgemeine Gesetze*' – 'general laws'. It was in interpreting this limitation clause that the FCC first resorted to the language of balancing in the *Lüth* decision.[713] The Court's seminal declaration in *Lüth* that a balancing of values and of interests would be necessary to solve conflicts between the freedom of expression and "protection-worthy interests of others", occurred in the context of a paragraph concerned specifically with the interpretation of "the concept of general laws".[714]

The wording of this provision, acknowledged early on as among the most complicated and controversial of the Basic Law,[715] was taken from the corresponding article on freedom of expression in the Constitution of the Weimar Republic.[716] That earlier provision, Article 118 of the *Weimarer Reichsverfassung* (WRV), had itself already occasioned "*manche literarische Kontroversen*" during the life of the Republic, with its legislative history obscure and its meaning heavily contested.[717] As the FCC put it in *Lüth*, "the concept of the 'general' law was disputed from the beginning".[718]

The first sentence of Article 118 WRV proclaimed: "Every German has the right, within the limitations of the general laws – '*innerhalb der Schranken der allgemeinen Gesetze*' -, to express his opinion in speech, writing, press, image or in any other way".[719] The qualification 'within the limits of the general laws' formed, as was widely accepted, the key to the scope of protection for expression. The fact that this limitation appears, on its face, to be itself *unqualified*, makes comparison with the similarly 'absolutely' worded First Amendment to the US Constitution especially interesting.[720]

Apart from a short-lived effort in case law and literature, to cast the exception of the 'general laws' as a "drafting error" and therefore as meaningless,[721] two main approaches to the meaning of the '*allgemeine Gesetze*'-clause could be distinguished in contemporary literature. A debate towards the end of the Weimar period, between Kurt

[713] See *supra*, s. 4.1.
[714] BVerfGE 7, 198; 209 (*Lüth*).
[715] Herzog, in MAUNZ-DÜRIG-HERZOG-SCHOLZ (1968), nr. 234.
[716] *E.g.* VON MANGOLDT-KLEIN (1957), 235.
[717] Ridder, in NEUMANN-NIPPERDEY-SCHEUNER (1954), 281 ("manifold literary controversies"). See, for a contemporary commentary: CARL SCHMITT, VERFASSUNGSLEHRE 167 (1928) (noting the "acknowledged unclear and failed wording" of Art. 118 WRV).
[718] BVerfGE 7, 198; 209.
[719] *Weimarer Reichsverfassung* (1919), Part II (*Grundrechte und Grundpflichte der Deutschen*), Chapter 1 (*Der Einzelperson*), Article 118 (*Das Recht der freie Meinungsäußerung*).
[720] See also *supra*, s. 4.1.
[721] See SCHMITT (1928), 167 ("*ein Redaktionsversehen*").

Häntzschel (1889-1941), a civil servant in the Internal Affairs Ministry, and Rudolf Smend (1882-1975), then professor in Berlin, epitomizes these two main points of view. Häntzschel's 1932 contribution on Art. 118 WRV to the authoritative Anschütz-Thoma '*Handbuch des Deutschen Staatsrechts*', can be seen as representative of the '*herrschende Lehre*' at the time.[722] Smend's view, laid down in his 1927 address to the German association of Constitutional Lawyers, was decidedly unorthodox at the time,[723] but has proven highly influential in post-War adjudication.[724]

The Smend-Häntzschel debate is crucial to an understanding of both the 'material' strand in German constitutional thought generally, and of modern German freedom of expression law more specifically. Post-War authors saw Rudolf Smend as the nestor of German constitutional thought, and his work as exemplary of material constitutionalism.[725] It was in the area of freedom of expression that Smend's theory received its first major practical application and, through the work of Häntzschel, an early major critical rebuttal.[726] The ensuing debate was a predominant source for the FCC's interpretation of the '*allgemeine Gesetze*' clause in the *Lüth* decision – a decision in which both Smend and Häntzschel were discussed at length.[727] Many of the early commentaries on Art. 5 Basic Law, too, dealt with these two authors.[728] As one commentator put it after the War: their writings had represented the development of thinking on freedom of expression right up to "the moment when darkness came over German thought".[729] For all these reasons, the Smend-Häntzschel debate, in effect much

[722] Häntzschel, in ANSCHÜTZ-THOMA II nr. 105 (1932) ('*Das Recht der freien Meinungsäußerung*').
[723] Rudolf Smend, *Das Recht der freien Meinungsäußerung*, 4 VVDStRL (1928), reprinted in RUDOLF SMEND, STAATSRECHTLICHE ABHANDLUNGEN 89 (1955). References are to the 1955 edition. See, *e.g.*, Karl August Bettermann, Die allgemeinen Gesetze, 1964 JZ 601, 601 (1964) (writing that Smend's "famous lecture" was neither uncontroversial nor represented a dominant perspective).
[724] See below on Smend's influence on the *Lüth* decision. See also Stefan Korioth, *Rudolf Smend*, WEIMAR: A JURISPRUDENCE OF CRISIS 207, 212 (Bernhard Schlink & Arthur J. Jacobson, eds., 2000) ("[A]mong German constitutional law scholars there is a current that follows Smend and that is a decisive element in contemporary debates"). Among Smend's students are influential scholars of the time, such as Ulrich Scheuner (cited below on freedom of expression), Konrad Hesse (a former judge on the FCC) and Peter Häberle (the author of a seminal early work on the Basic Law). The Smend-Häntzschel debate is discussed also in PETER LERCHE, ÜBERMAß UND VERFASSUNGSRECHT 10ff (1961). For an early discussion in English, see Herbert Bernstein, *Free Press and National Security: Reflections on the Spiegel Case*, 15 AM. J. COMP. L. 547 (1967).
[725] *Cf.* Adolf Arndt, *Gesetzesrecht und Richterrecht*, NJW 1963, 1273, 1273 (1963) (referring to Smend, on the occasion of the latter's address to celebrate the 10th anniversary of the FCC, as "the nestor of German constitutional theory, who developed the theory of material constitutionalism" – '*die materiale Verfassungstheorie*'). See also Böckenförde, *Grundrechtstheorie und Grundrechtsinterpretation* (1974), 1534 (arguing that Smend's work on freedom of expression is still "*exemplarisch*" for material constitutionalism)
[726] The other major critic of Smend at the time was Carl Schmitt.
[727] Note: It is important to emphasize once again that the development of balancing in *Lüth* occurred, not under a heading of any abstract general principle or as part of a 'proportionality' approach, but out of these Weimar-era theories of freedom of expression.
[728] See, *e.g.*, VON MANGOLDT-KLEIN (1954), 250; Ridder, in NEUMANN-NIPPERDEY-SCHEUNER (1954), 281; Roman Schnur, *Pressefreiheit*, 22 VVDStRL 101, 124-125 (1965); Herzog, in MAUNZ-DÜRIG-HERZOG-SCHOLZ (1968), nr. 241ff. Early commentaries on the *Lüth*-line of decisions, too, focused on the debate. See, *e.g.*, Hans Carl Nipperdey, *Boykott und freie Meinungsäußerung*, DVBL 445, 448 (1958); Bettermann, *Die allgemeinen Gesetze* (1964), 601. For a somewhat later rehearsal of the debate, see Hans H. Klein, *Öffentliche und private Freiheit*, DER STAAT 1971, 145, 150ff (1971).
[729] Ridder, in NEUMANN-NIPPERDEY-SCHEUNER (1954), 282.

like the *Lüth* decision itself three decades later, occupies a central place in the twentieth-century development of German constitutional thought.

5.2.2.2 The 'herrschende Lehre': Definitional, categorical, formal

The dominant approach to the interpretation of the '*allgemeine Gesetze*'-clause during the Weimar-era can be described as *definitional, categorical*, and, in a sense, *absolute.* Commentators attempted to develop a precise definition of '*allgemein*' that would allow a straightforward determination of the boundaries of a category of permissible limiting laws. The main criterion for most writers was whether or not limiting laws had *as their objective* the limiting of the freedom of expression. So, for example, Gerhard Anschütz, in his Commentary on the WRV, argued that '*allgemeine Gesetze*' were those that did not "forbid an opinion as such, that are not directed against the expression of an opinion *as such*".[730] In another influential formulation, Karl Rothenbücher, at the same annual meeting as at which Smend was to present his views, suggested that permissible laws were those in defence of a '*Rechtsgut*' – a value protected in law - that was to be protected "without regard for a particular opinion".[731] Carl Schmitt, finally, was of the view that permissible 'general laws' were those that "without consideration for a particular opinion, protect a '*Rechtsgut*' that deserves protection by itself".[732]

While these approaches differed in important respects, notably in whether they merely forbade legislative targeting of specific opinions – 'content-based' distinctions, in U.S. constitutional law vocabulary - or of the expression of opinions generally,[733] they did show an overall coherence in that they did not require, or allow for, any kind of trade-off between freedom of expression and other values or interests. As long as the *purpose* of legislative action was not the prevention of the expression of (certain kinds of) opinions, Art. 118 WRV imposed no limitations on the nature and intensity of the effect these laws could have on freedom of expression.[734] There was, in particular, no room for an assessment of the kinds of goals legislatures would be allowed to promote, or of the importance of these goals, either independently or relative to the value of freedom of expression. As Roman Herzog put it later, this meant that "in all cases of conflict, the fundamental right of freedom of expression had to give way to any other kind of '*Rechtsgut*', no matter how insignificant".[735]

[730] Anschütz, cited in VON MANGOLDT-KLEIN (1954), at 250 ("*Gesetze, die nicht eine Meinung als solche verbieten, die sich nicht gegen die Äußerung der Meinung als solche richten*") (emphasis added in translation).
[731] Karl Rothenbücher, *Das Recht der freien Meinungsäußerung* 4 VVDStRL 1, 20ff (1928) ("*Gesetze, die dem Schütze eines schlechthin, ohne Rücksicht auf eine bestimmte Meinung zu schützenden Rechtsgutes dienen*").
[732] SCHMITT (1928), 167 ("*die ohne Rücksicht gerade auf eine bestimmte Meinung ein Rechtsgut schützen, das an sich Schutz verdient*").
[733] *Cf.* Herzog, in MAUNZ-DÜRIG-HERZOG-SCHOLZ (1968), nr. 242.
[734] See also the decision of the Reichsgericht (4th Penal Senate, 24 May 1930, JW 1930, 268-269 (1930), cited in Häntzschel, in ANSCHÜTZ-THOMA (1932), II-660 ('general laws' are laws "*die sich nicht gegen eine bestimmte Meinung als solche richten, die nicht eine Meinung als solche verbieten*").
[735] Herzog, in MAUNZ-DÜRIG-HERZOG-SCHOLZ (1968), nr. 243.

5.2.2.3 Häntzschel on the 'essence' of expression: Speech vs. conduct, general vs. special

Starting from a subtly different angle, Kurt Häntzschel came to a very similar result with regard to the scope of protection of Art. 118 WRV. Häntzschel began, not with a definition of the limitations – the '*allgemeine Gesetze*' -, as other mainstream writers had done, but of the right itself; '*das Recht der freie Meinungsäußerung*'. For Häntzschel, the general laws limited the right to freedom of expression to that which was "*begriffsnotwendig*" – "conceptually indispensable" – for an expression of opinion even to exist.[736] The essence of this freedom, according to Häntzschel, was to "work spiritually", by convincing others of the rightness of one's views.[737] The core of Art. 118 WRV, then, had to be to make sure that "the spiritual should not be repressed because of its mere spiritual effects".[738]

From this definition of the 'essence' of freedom of expression, two categories of limiting laws followed for Häntzschel. On the one hand, laws "that forbid or limit an otherwise permitted action, merely because of its spiritual direction ('*Zielrichtung*'), or its harmful spiritual effect ('*schädlichen geistigen Wirkung*')" are disqualified, as "*Sonderrecht*" – "special laws", instead of the permitted 'general laws' - against the freedom of expression.[739] On the other hand, whenever the expression of an opinion *goes beyond* what is "*begriffswesentlich*" – "conceptually essential" - for the freedom of expression to exist and, through its form or due to other circumstances, assumes the character of an act – a '*Handlung*', rather than a mere "*Äußerung*" -, laws that address the "direct negative material consequences" of such an act *without regard to the underlying opinion*, are allowed. Not only that, but they would be permitted without constraints.[740] Incorporating elements from what later, in American constitutional law, would be known as the 'speech'/'conduct' distinction and the 'content-based'/'content-neutral' dichotomy, Häntzschel's proposal was a sophisticated version of the dominant Weimar-era approach to the '*allgemeine Gesetze*' clause in Art. 118 WRV. It was, notably, an approach that was absolutist and formal in the sense that it did not allow for any kind of comparison between the relative worth of the freedom of expression and other societal goods.

5.2.2.4 Smend's 'materiale Allgemeinheit'

The most influential critique of this dominant perspective during the Weimar period is contained in a 1927 address by Rudolf Smend. Smend challenged conventional conceptions of constitutional law on multiple levels; challenges that ultimately coalesced

[736] Häntzschel, in ANSCHÜTZ-THOMA (1932), II-659.
[737] *Ibid.* ("*Die Freiheit erschöpft sich also in der Möglichkeit geistig zu wirken*").
[738] *Ibid.*
[739] *Ibid.*, II-659-660 (arguing that speech should be allowed as long as its dangers are merely of a 'spiritual' nature).
[740] *Ibid.*, II-660-661

in a complex, 'material', and 'relative' understanding of the '*allgemeine Gesetze*'-clause of Art. 118 WRV. Smend's theses have proven so significant to post-War German constitutional thinking, in particular with regard to judicial balancing, that it is necessary to discuss his address in some detail. This discussion requires brief background overviews of, first, Smend's broader perspective on constitutional law – his 'integration theory' of the Constitution – and, second, of what Smend saw as the shortcomings of the dominant tradition in public law.

(a) Smend's 'integration theory' of the Constitution

On the most general level, Smend's approach emanates from his 'integration' theory of the Constitution; a theory most extensively described in his 1928 work '*Verfassung und Verfassungsrecht*'.[741] This 'integration' theory holds that the 'essence' of the State is the constant integration of individuals in a community.[742] The very existence of the State has to be found in the permanent, repeated 'actualization' of the values of such a community – in what Smend calls an "actualization of meaning".[743] Smend is very clear that there can be no form of 'integration' in this sense "without a substantive community of values".[744] The idea of the State thus becomes inseparably linked to substantive values. This view has a number of consequences for the role of constitutional law and for constitutional interpretation.

(1) First, as constitutional law has as its object "the totality of the State and the totality of its process of integration",[745] all its particulars "are to be understood not as isolated, by themselves, but only as elements in a universe of meaning".[746] The task for constitutional interpretation, on this view, is what Smend calls, in a significant phrase taken up after the war by critics of the FCC's methods, the "*geisteswissenschaftliche Entwicklung dieses Systems als eines geschichtlich begründeten und bedingten geistigen Ganzen*"; "the humanistic – that is not 'legalistic-technical' - development of the 'culture system' as an historically contingent spiritual whole".[747]

[741] RUDOLF SMEND, VERFASSUNG UND VERFASSUNGSRECHT (1928), Reprinted in RUDOLF SMEND, STAATSRECHTLICHE ABHANDLUNGEN 119 (1955). References are to the 1955 edition, and (where so stated) to translations in Korioth, *Rudolf Smend* (2000), 207.
[742] Korioth, *Rudolf Smend* (2000), 218. See also MICHAEL STOLLEIS, A HISTORY OF PUBLIC LAW IN GERMANY 1914-1945 165 (Thomas Dunlap, trans., 2004) (Describing Smend's theory as "the interpretation of state and constitution as the meaningful interdependence of intellectual processes, as the living creation of humans and human groups"). For an earlier formulation of very similar ideas, see ERICH KAUFMANN, ÜBER DEN BEGRIFF DES ORGANISMUS IN DER STAATSLEHRE DES 19. JAHRHUNDERTS (1908), cited in PETER HÄBERLE, DIE WESENSGEHALTGARANTIE DES ART. 19 ABS. 2 GRUNDGESETZ 161 (1962). For a recent discussion of Smend's theories, see Marco Dani, *Economic and Social Conflicts, Integration and Constitutionalism in Contemporary Europe*, LEQS DISCUSSION PAPER SERIES (2009), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1518629 (last accessed 20 June 2012).
[743] Korioth, *Rudolf Smend* (2000), 229.
[744] *Ibid.*, at 228-229.
[745] *Ibid.*, at 241.
[746] *Ibid.*, at 246.
[747] Smend, *Das Recht der freien Meinungsäußerung* (1928, 1955), 92. For Ernst Forsthoff's critique, see *supra*, s. 4.3.1.2.

(2) Secondly, constitutional rights should be understood as primarily *constitutive* of the State and of a particular "*Kultursystem*", rather than as *limitations* on State authority.[748] Constitutional rights, in Smend's vision, embody the "cultural and moral value judgments of an era".[749] Rather than treating them, as the liberal tradition would, as boundary-markers of individual freedom against State action, these rights should be interpreted in a way that reflects the role the underlying value judgments must play in integrating individuals and community in the State.

(b) Smend's critique of formalism and individualism

The main object of Smend's critique, the negative picture in reaction to which he formulates his own approach in '*Das Recht der freien Meinungsaußerung*', is a political and legal outlook he describes as positivistic, 'individualistic' and 'formalistic'.[750] The dominant approach is individualistic in the sense that it attempts to compartmentalize social relations into distinct, absolute "*Willenssphären*" – "spheres of will" - along familiar lines such as individual *vs.* State, or debtor *vs.* creditor.[751] It is formalistic and positivistic, in Smend's view, in that it attempts to decipher the meaning of the crucial words, such as '*allgemeine Gesetze*', in a formal-logical way.[752] Smend argues that if it is accurate to understand, as he does, the constitutional order as a '*Kultursystem*', a historically contingent constellation of values, then terms like '*allgemein*' and its opposite '*besonder*', should not be interpreted in a 'formalistic-technical' way, as "reciprocally empty negations", but rather, by following methods common in the humanities, as interrelated elements reflective of the underlying value-system.[753] The word '*allgemein*', on this view, becomes mere shorthand for a set of historically developed substantive values. The 'generality' of the 'general laws', then, is in Smend's view "*selbstverständlich*" – "obviously":

> "*the material generality of the Enlightenment*: the values of society, public order and security, the competing rights and freedoms of others (...). 'General' laws in the sense of art. 118 are those laws that have precedence over art. 118 because the societal good they protect *is more important than the freedom of expression*".[754]

[748] *Ibid.*, 91ff.
[749] *Ibid.*, 98 ("*sittliche und kulturelle Werturteil der Zeit*").
[750] *Ibid.*, 93-97.
[751] *Ibid.*, 93-94. See also Korioth, *Rudolf Smend* (2000), 246. For the dominance of this view in American and Continental European legal thinking of the early 20th century, see *supra*, s.3.2.
[752] See also STOLLEIS (2004), 164 (discussing Smend's criticism of positivistic 'constructionism', which he regarded as mechanic).
[753] Smend, *Das Recht der freien Meinungsäußerung* (1928, 1955), 96-97 ("*Wenn es richtig ist, daß die Grundrechte zu bestimmten sachliche Kulturgütern in einer bestimmten geschichtlich bedingten Wertkonstellation von Verfassungs wegen Stellung nehmen, so sind sie dementsprechend geisteswissenschaftlich, insbesondere geistesgeschichtlich zu verstehen und auszulegen*").
[754] *Ibid.*, 97-98 ("*die materiale Allgemeinheit der Aufklärung: die Werte der Gesellschaft, die öffentliche Ordnung und Sicherheit, die konkurierende Rechte und Freiheiten der Anderen (...). 'Allgemeine' Gesetze im Sinne des Art. 119 sind also Gesetze, die deshalb den Vorrang vor Art. 118 haben, weil das von ihnen geschützte gesellschaftliche Gut wichtiger ist als die Meinungsfreiheit*").

What counts for Smend, is the "*materiale Überwertigkeit*" – the "greater substantive value" - of a particular '*Rechtsgut*' in relation to the freedom of expression.[755] To give one example that Smend himself uses; the "*Unkritisiertheit der Regierung*" – allowing the government to forbid criticism – is, in the early 20th Century, simply not a value that deserves precedence over the freedom of expression.[756] Smend acknowledges that this way of looking at the limitations of freedom of expression may seem unorthodox from the perspective of the prevalent "*formalistische Denkgewöhnung*" – the "habitual formalistic mode of thought",[757] and he even acknowledges there is an element of circularity to his approach; '*Rechtsgüter*' receive precedence over the freedom of expression because they "*deserve*" this precedence.[758] For Smend, however, this explicit, conscious "taking position" with regard to the 'value constellations' of public life, is precisely what fundamental rights are all about.[759]

5.2.3 '*Güterabwägung*' and '*Interessenabwägung*': Dissecting the Weimar background to *Lüth*'s 'balancing approach'

As was mentioned earlier, Smend's article '*Das Recht der freien Meinungsäußerung*' was one of the most important sources for the Constitutional Court's 'balancing' approach to freedom of expression in *Lüth*.[760] The FCC is discussing Weimar-era interpretations of the '*allgemeine Gesetze*'-clause when, immediately after copying Smend's formula of a "*Rechtsgut ... dessen Schutz gegenüber der Meinungsfreiheit den Vorrang verdient*" – "a value the protection of which deserves precedence over the freedom of expression" -, it draws its seminal conclusion:

> "*Es wird deshalb eine 'Güterabwägung' erforderlich: Das Recht zur Meinungsäußerung muß zurücktreten, wenn schutzwürdige Interessen eines anderen von höherem Rang durch die Betätigung der Meinungsfreiheit verletzt würden. Ob solche überwiegende Interessen anderer vorliegen, ist auf Grund aller Umstände des Falles zu ermitteln*".[761]

The Court's manifest reliance in *Lüth* on Smend's interpretation invites a more detailed examination of the position Smend's theses occupy in the genealogy of balancing in German fundamental rights adjudication. To what extent did Smend himself invoke ideas and images of 'weighing', and the language of balancing more broadly? In what

[755] *Ibid.*, 97-98.
[756] *Ibid.*, 98.
[757] *Ibid.*
[758] *Ibid.*
[759] *Ibid.*
[760] Smend, unlike Häntzschel, is not mentioned by name in the *Lüth* decision, but his article is referenced (at BVerfGE 7, 198; 209-210). For an early discussion of the influence of Smend's article on the *Lüth* decision, see Nipperdey, *Boykott und freie Meinungsäußerung* (1958), 445.
[761] BVerfGE 7, 198, 210-211 ("A balancing of values therefore becomes necessary. The right to freedom of expression must give way whenever protection-worthy interests of another person of a higher constitutional rank are infringed by the expression. Whether such prevailing rights of another individual are present is to be determined on the basis of all the circumstances of the case"). See also *supra*, s. 4.2.1.1.

ways were Smend's views on the '*allgemeine Gesetze*'-clause understood by his contemporary interlocutors as embodying a 'balancing' approach? And, more specifically; how does Smend's approach relate to the FCC's references to both the balancing of *values* – '*Güterabwägung*' – and the balancing of *interests* in individual cases – "*Interessenabwägung auf Grund aller Umstände des Falles*" in the *Lüth* case. These are the questions that will be addressed in this Section.

5.2.3.1 Balancing language and ideas in Smend's 'Das Recht der freien Meinungsäußerung'

Assessing the position of any particular jurisprudential contribution within the genealogy of a jurisprudential complex of ideas and modes of discourse is necessarily difficult. Analyzing the place of Smend's work in the genealogy of balancing in fundamental rights adjudication, at the very least, will require looking at the use and meaning of balancing discourse in Smend's writings themselves, and at ideas and concepts in these writings that, in retrospect, have provided foundations for later manifestations of balancing in fundamental rights adjudication and theory.

From this dual perspective, it is important to note, first of all, that there is no direct mention of either '*Güterabwägung*' or of '*Interessenabwägung*' in '*Das Recht der freien Meinungsäußerung*', or in Smend's other main work of the same period, '*Verfassung und Verfassungsrecht*'. At the same time, however, Smend's approach clearly differs from the methodologies of his contemporaries in his insistence on the necessity of - and possibility of - carrying out *value trade-offs* between fundamental rights and other societal goods, and it is this aspect of his work that the FCC was later to draw upon. Smend's interpretation of the limitations to freedom of expression hinges on the idea that some values are "*wichtiger*" – more important – than this freedom, and that they will therefore deserve precedence.[762] Although Smend relies more on the imagery of 'importance' and 'precedence' and than on that of 'weight', it is undeniable that his approach involves the search for some sort of accommodation or equilibrium between competing goods – "*gegenüberstehende Werte*" -[763] of the kind that characterizes most approaches covered by balancing discourse. And Smend does, in fact, resort to this type of discourse at least once, where he uses the term "*Abwägungsverhältnisse*" – "relations of relative weight" - to describe the relevant relationships between values.[764]

There is very little discussion in Smend's work on how these trade-offs are to be effectuated, or by whom. Several important themes do, however, emerge. These are

[762] Early critics seized on this. As Michael Stolleis writes, "to many, ..., [*Verfassung und Verfassungsrecht*] seemed like an alarm bell on the dangerous path towards a jurisprudence of evaluation and weighing that was dissolving the secure foundations of scholarly work". STOLLEIS (2004), 166.
[763] Smend, *Das Recht der freien Meinungsäußerung* (1928, 1955), 106.
[764] *Ibid.*, 98.

concerned with the appropriate domain for the question of weighing, with the parameters to be weighed, and with the way this weighing should be carried out.

(1) Smend suggests that the required trade-offs are to be considered part of the realm of 'legal' questions. In '*Das Recht der freien Meinungsäußerung*' Smend repeatedly uses legal terms of art, such as '*juristische Begriffsbestimmung*' and '*Grundrechtsauslegung*', to describe the required judgments.[765] More broadly, in '*Verfassung und Verfassungsrecht*', Smend writes that the question of 'ranking' elements of constitutional law, for which he gives the example of determining the weight of the parliamentary principle, is a "legal question".[766] This means that jurisprudence, or legal science, must be expected to be able to make an important contribution.[767]

At the same time, while the determination of the '*Abwägungsverhältnisse*' may have been a legal question for Smend, it was not to be approached through 'standard' legal methodology. The method Smend proposed was closely modelled on the practice of exegesis in the humanities – a "*geisteswissenschaftliche*", or "idealistic", reading of texts, rather than any kind of formal-logical interpretation. This shift in emphasis with regard to the ideal for constitutional interpretation set Smend up for a clash with authors like Carl Schmitt and Häntzschel who thought his approach was insufficiently respectful of the standards of legal method.[768] Critics of the FCC's approach after the War, as was seen in Chapter 4, continued on precisely this line of attack.[769]

(2) Second, the parameters to be evaluated and compared are consistently described as being of a 'public', or 'social', rather than of a private nature. Smend uses terms such as '*Gemeinschaftswerte*' – communal values -, '*Allgemeininteresse*' – the general interest - and '*gesellschaftliches Gut*' – a societal good, to describe the parameters for trade-offs with the freedom of expression.[770] Even where the rights and freedoms of other individuals are referred to, it is clear that these are to be understood as reflections of underlying *public* goods.[771] On the 'expression' side of the equation, too, Smend emphasizes the 'social character' of this freedom, and its importance as a social institution, alongside its status as an individual right in the liberal tradition.[772] All of this means that, in Smend's conception, the scope the freedom of expression depends on a trade-off between competing *public goods*, rather than between (public and) private interests.

(3) Third, there are important indications that the required trade-offs are to be made, not from case to case, but rather in the form of more durable relationships – '*Verhältnisse*' - of precedence – '*Vorzug*'. Smend's key concept of the '*Kultursystem*' is made up out of '*Wertkonstellationen*' – constellations of values that, while historically contingent,

[765] *Ibid.*
[766] Smend, *Verfassung und Verfassungsrecht* (1928, 1955), 241 ("*eine Rechtsfrage*"). This against a background understanding of the 'political' nature of constitutional law: *Ibid.*, 238.
[767] *Cf.* also Rudolf Smend, *Festfortrag zur Feier des zehnjährigen Bestehens des Bundesverfassungsgerichts*, in DAS BUNDESVERFASSUNGSGERICHT 23, 34 (1963).
[768] For further references, see STOLLEIS (2004), 166.
[769] See *supra*, s. 4.3.
[770] Smend, *Das Recht der freien Meinungsäußerung* (1928, 1955), 96-98.
[771] *Ibid.*, 97.
[772] *Ibid.*, 95 ("*soziale Character des Grundrechts*").

consist of more or less stable complexes of value relations – '*Wertrelationen*'.[773] Everything in Smend's writing suggests that the trade-offs between freedom of expression and competing social goods are to be determined, in principle, only once for each relationship between two values, and are supposed to be of a lasting nature, at least for as long as no major shifts in the political or cultural situation occur.

5.2.3.2 'Balancing' in Weimar-era critiques of Smend: Häntzschel and Schmitt

The FCC, as mentioned earlier, relied on Smend in developing an approach to freedom of expression adjudication involving '*Güterabwägung*' in *Lüth*. In the FCC's conception, this '*Güterabwägung*' in turn, required an '*Interessenabwägung*' in the individual case, between the right to freedom of expression and the 'protection-worthy interests of another'. It has also been shown above that, while Smend's theses do provide ample support for the idea of an abstract balancing of competing values, there is little or nothing in his approach that involves the balancing of (private) interests in particular cases. To get a better understanding of the FCC's association of a Smendian '*Güterabwägung*' with an '*Interessenabwägung*' in specific cases of a kind not found in Smend's own work, it is necessary to turn to his Weimar-era critics.

From the perspective of the genealogy of balancing in German legal thought, the writings of critics of Smend's 'material' interpretation of the limits to freedom of expression are especially interesting in two respects: they use the discourse of balancing as a central element of their critique of Smend, and they identify Smend's approach with the terminology of the *Interessenjurisprudenz* School, putting a very specific gloss on Smend's proposals. The writings of Kurt Häntzschel and Carl Schmitt are particularly relevant illustrations of these points.

(a) Häntzschel and Schmitt's readings of Smend: Particularistic balancing

According to Häntzschel, the key to Smend's approach was the idea that the drafters of the Weimar Constitution had neglected their duty to "equilibrate the various competing legally protected interests".[774] They had left it, in Häntzschels' depiction of Smend's views, to the legislative and judicial authorities to determine "in specific cases, which of several legally protected interests" they would regard as more important.[775] "Undeniably", however, Häntzschel countered, such decisions would depend entirely on the "internal disposition and worldview" of the deciders, which would risk inconsistent

[773] *Ibid.*, 98, 106.
[774] Häntzschel, in ANSCHÜTZ-THOMA (1932), II-659 ("*den Ausgleich zwischen mehreren widerstreitenden rechtlich geschützten Interessen*").
[775] *Ibid.*

outcomes.[776] Instead, what had to be recognized, was that although the problem was indeed one of finding the "the correct relationship between values", this decision was not left to the "free discretion" of judges and lawmakers, but had already been made by the constitution's drafters.[777]

Carl Schmitt's critique of Smend used many of the same arguments. For Schmitt, Smend had mistakenly "introduced a balancing of interests" into the question of the limitations to the freedom of expression; an innovation "that could easily relativize the absolute worth of the value of freedom of expression".[778] Such a 'relativization' did not, however, accord with the fundamental principle of the '*Rechtstaat*', that the freedom of the individual should be rule, and limitation by the State exception.[779] "A fundamental liberty", like the freedom of expression, Schmitt wrote, "is not a right or a value that can be weighed, in a balancing of interests, with other societal goods".[780] Instead of searching for values 'more weighty' than the freedom of expression (a conceptual impossibility, in Schmitt's view), the focus should be on 'merely' finding a limiting standard - a '*Maßstab*' – to limit state interventions in this right, rendering these interventions "measurable and thus controllable".[781]

(b) The problematic nature of the Häntzschel and Schmitt accounts

That Schmitt and Häntzschel would describe and criticize Smend's approach in terms of a balancing of interests in individual cases is understandable, but also problematic.

(1) It is understandable, first of all, in that Smend's rejection of legal formalism and conceptualism – what he calls the "*begriffliche Formaljurisprudenz*" of the dominant approach –, closely tracks similar and contemporaneous attacks by the *Interessenjurisprudenz* scholars.[782] It should not be forgotten that Smend's call for an explicit judicial evaluation of competing legal goods, and his terminology of '*Abwägungsverhältnisse*' and '*Wertrelationen*', were both to a large extent novel at the time, in particular in the area of public law.[783] It was only in 1927 – the year of Smend's address - that the *Reichsgericht* first used the term '*Güterabwägung*' to describe an explicit trade-off between values, in the context of a specific doctrine within criminal law.[784] It is understandable, therefore, that his critics would identify Smend's call for an explicit evaluation of competing legal goods

[776] *Ibid.* ("*von der inneren Einstellung und der Weltanschauung*").
[777] *Ibid.*
[778] SCHMITT (1928), 167.
[779] *Ibid.*
[780] *Ibid.* ("*Ein Freiheitsrecht ist kein Recht oder Gut, das mit andern Gütern in eine Interessenabwägung eintreten könnte*").
[781] *Ibid.*
[782] Smend, *Das Recht der freien Meinungsäußerung* (1928, 1955), 98.
[783] References to 'value judgments' had surfaced earlier in private law. See, *e.g.*, MAX VON RÜMELIN, WERTURTEILE UND WILENSENTSCHEIDUNGEN IM CIVILRECHT (1891), cited in REINHOLD ZIPPELIUS, WERTUNGSPROBLEME IM SYSTEM DER GRUNDRECHTE 3 (1962).
[784] Reichsgericht 11 March 1927, RGSt. 61, 254 ('*Pflichten und Güterabwägung*', abortion decision). Cited in ZIPPELIUS (1962), 15, and in BVerfG 39, 1; 26-27 ('*Schwangerschaftsabbruch*') [1975].

with the closest matching model of the time. And, from their perspective, the proposals of the *Interessenjurisprudenz* scholars may well have seemed a close parallel.

(2) Schmitt and Häntzschel's alignment of Smend's thesis with the balancing of interests of the *Interessenjurisprudenz*, however, also significantly misstated the nature of his approach. Whereas the balancing of interests of Heck and others was a *positivistic*, *legalistic-technical*, *value-neutral*, *private-law oriented* method, focused on *private interests* and designed primarily to effectuate *the will of the legislature*,[785] Smend's interpretation of the limits to freedom of expression was a *humanities-inspired*, *anti-positivist* approach to *limiting legislative discretion* that depended on an explicit taking position in relation to *value choices* concerning *public goods*.

Differences between the two approaches – Smend's material constitutionalism and the *Interessenjurisprudenz* – are visible on many levels. Smend turned to '*Güter*' and '*Werte*' as part of an anti-positivist effort of 'opening-up' constitutional law to a broader range of material than simply posited norms.[786] The *Interessenjurisprudenz*-scholars, on the other hand, relied on '*Interessen*' in order to be able to look *behind* – not *beyond* – posited norms. The *Interessenjurisprudenz* saw itself as value neutral, whereas Smend is very vocal in his affirmation of the essentially value-laden nature of constitutional law and constitutional interpretation. The *Interessenjurisprudenz* aimed for interstital, particularistic judgments, whereas Smend was interested in durable '*Wertkonstellationen*'.

In short: while Smend's work can clearly be invoked in support of the FCC's '*Güterabwägung*', it is much more difficult to see any relations between Smend and the balancing of *interests*. It will be argued below, in Section 5.3, that '*Interessenabwägung*' in FCC case law is in fact better understood as part of, not the idea of the 'material' constitution, but of the 'comprehensive constitutional order'.

[785] See Chapter 4.
[786] Contemporary scholars also involved in this project were Erich Kaufmann, Heinrich Triepel and Hermann Heller. See, *e.g.*, Ehmke, *Prinzipien der Verfassungsinterpretation* (1963), 62. Interestingly, Ehmke reads these scholars' work as confirming his idea that "*Verfassungsrechtliches Denken ist Problemdenken*" (*Ibid.*). Ehmke, therefore, appears to read Smend *et al* through the lens of debates of *his* time – on the '*topische Jurisprudenz*', see Chapter 4 -, in the same way that Schmitt and Häntzschel read Smend through the lens of the key debate of *their* time – on '*Interessenjurisprudenz*'.

5.2.4 'Material' constitutionalism and balancing

> "*Das Grundgesetz, wie es das Bundesverfassungsgericht bei Aufnahme seiner Rechtsprechungstätigkeit vorfand, entsprach in seinem Phänotypus weitgehend dem Idealbild des liberalen Rechtsstaates. (…) Erst durch die Judikatur des Bundesverfassungsgerichts hat sich das Grundgesetz von einer liberalen Rahmenordnung zu einer materiellen Wertordnung gewandelt. Der Schlüssel zu diesem Transformationsprozeß findet sich im Lüth-Urteil*".[787]

Though sometimes less visible than his contemporary Carl Schmitt, Rudolf Smend is omnipresent in German post-War constitutional jurisprudence. His influence can be felt all the way from *Lüth* decision of 1958 to, say, the *Lisbon* decision of 2009.[788] In *Lüth* itself, a direct line was drawn to Smend's Weimar-era work on the freedom of expression. This connection, had it concerned the work of any other theorist, and had it been in any other decision, might have remained merely a footnote. Instead, the combination of Smend's stature, the nature of his work, and the *Lüth*-Court's ambition meant that Smend's powerful, comprehensive, constitutional vision, within which his theory on this one particular constitutional right had been embedded, became emblematic for the whole of the FCC's constitutional rights jurisprudence. And '*Güterabwägung*', in turn, became emblematic for this – now officially sanctioned – constitutional understanding: that of material constitutionalism.

Balancing and material constitutionalism are intimately related in numerous ways. Material constitutionalism is both dependent on and enables an explicitly normative, value oriented approach to constitutional questions. From this perspective, and in a most basic sense, 'balancing' is simply shorthand for the process of the mutual accommodation of values within this substantive framework. Once constitutional ordering is conceived in terms of substantive values, the question of how demanding each value can be becomes a relative question, to be decided on a continuum, or in terms of optimization. In addition, the explicitly substantive nature of material constitutionalism means that legitimacy becomes more dependent on *input* – identifying the appropriate values – and *output* – achieving their appropriate mutual accommodation -, rather than *process* and questions of institutional competence and boundary maintenance. Again, the prominence in German constitutional discourse of the *necessity* to weigh and accommodate, and the comparative neglect of the question of *who* should do this weighing, fits well with these material-constitutionalist ideas.

[787] THILO RENSMANN, WERTORDNUNG UND VERFASSUNG 1 (2007) ("The Basic Law, as the FCC found it when it first took up its interpretation, followed, largely, an ideal-typical liberal 'rule of law' model. (…) Only through the case law of the FCC did the Basic Law change shape from a basic liberal order to a material value order. The key to this transformation lies in the *Lüth* decision"). On the centrality of the Lüth decision in the development of the value order idea, and on the relevance of Smend's work, see also JOSEF FRANZ LINDNER, THEORIE DER GRUNDRECHTSDOGMATIK 13 (2005).

[788] See, *e.g.*, Ingolf Pernice, *Carl Schmitt, Rudolf Smend und die europäische Integration*, 120 AÖR 100 (1995); DIE INTEGRATION DES MODERNEN STAATES. ZUR AKTUALITÄT DER INTEGRATIONSLEHRE VON RUDOLF SMEND (Roland Lhotta, ed., 2005); Dani, *Economic and Social Conflicts, Integration and Constitutionalism in Contemporary Europe* (2009).

The foregoing analysis of the Weimar-era, 'material', background to the FCC's balancing approach in *Lüth* leaves an intriguing question unanswered. If '*Interessenabwägung*' formed no part of material constitutionalism, at least not as espoused by its main early propagator, why did the FCC, without so much as acknowledging any potential issues of compatibility or conflict, resort to *both* '*Güterabwägung*' *and* '*Interessenabwägung auf grund aller Umstände des Falles*' in its early free speech decisions? This question is especially interesting because it is clear that doing so exposed it to criticism from virtually all quarters.

On one side, commentators intent on enhancing the formal qualities of constitutional jurisprudence accused the Court of going beyond what even Smend had suggested. Where Smend had at least argued for an "objective comparison of values", the Court practiced "casuistry".[789] "Instead of objective legal values, [the FCC] weighs subjective interests against each other, thus replacing the '*Smendian*' weighing of values – '*Smendsche Güterabwägung*' - with a balancing of interests on the model of private law", Bettermann wrote in reaction to the *Lüth* decision.[790] Even more moderate commentators, such as the later president of the FCC, Roman Herzog, were critical of the way the Court had "developed" – in quotation marks - Smend's '*Güterabwägung*' into "an individualized balancing" of the interests of different individuals.[791]

On the other hand, the Court's continued references to '*Güterabwägung*' exposed it to more general critiques of its understanding of the Constitution as an 'objective system of values', in ways that an approach based on a mere Heck-style 'balancing of interests' might not have. The invocation of values and of 'value balancing' rendered the Court's case law vulnerable not only to charges that a proper foundation for these values could not be found,[792] but also to the criticism that its approach of deducing concrete outcomes from abstract postulations resembled to closely the formalism of the '*Inversionsmethode*' that Heck and others had railed against.[793] As Roellecke put it, this was a "lethal objection".[794]

Academic commentators often framed the FCC case law in ways that fit their own theoretical and doctrinal preferences. Those supportive of the Court's efforts at constructing an objective value order deplored the language of particularized balancing and suggested that '*Güterabwägung*' should really be seen as the core of the FCC's

[789] Bettermann, *Die allgemeinen Gesetze* (1964), 601-602.

[790] *Ibid.* See also LERCHE (1961), 150. See, for a similar criticism: Nipperdey, *Boykott und freie Meinungsäußerung* (1958), 448.

[791] Herzog, in MAUNZ-DÜRIG-HERZOG-SCHOLZ (1968), nr. 251.

[792] See, *e.g.*, HELMUT GOERLICH, WERTORDNUNG UND GRUNDGESETZ (1973); Böckenförde, *Grundrechtstheorie und Grundrechtsinterpretation* (1974), 1534; RENSMANN (2007), 96 (citing an early qualification of the idea of the value order as a '*Nebelbegriff*'). See also, critically, SCHLINK (1976). Rensmann notes that current German constitutional legal debates largely accept the 'irreversibility' of the *Lüth* Court's innovations (citing a number of former FCC Justices in support), but that it is still felt that the idea of a value order "still rests on a highly insecure doctrinal foundation". See Rensmann (2007), 1-2. For a discussion in English, see ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 96ff (Julian Rivers, trans., 2002).

[793] *E.g.* Roellecke, *Prinzipien der Verfassungsinterpretation* (1976), 27, 38.

[794] *Ibid.*, 39.

approach.[795] Those in favour of particularized balancing rejected the language of '*Güterabwägung*' as superfluous and distracting from what they saw as, at heart, a healthy juristic incrementalism.[796] The FCC itself "solved the problem of the relationship between the order of values and the circumstances of cases", by *simply not mentioning* the difficulties, "without, however, being able to overcome [them]".[797] While commentators were busy promoting their preferred half of the value balancing / interest balancing pair, the FCC itself continued to invoke both abstract value balancing and particularized interest balancing conjointly in its decisions. This thesis argues that the most plausible reading of this continued combined deployment is the idea that 'material constitutionalism' by itself does not capture all of balancing's meaning. It is in order to make this point that the following Sections will proceed to address the theme of the 'comprehensive constitutional order'.

[795] Roman Herzog and Peter Häberle were prominent early supporters for (much of) the Court's 'value balancing' approach. It is generally noted that even today, the "great preponderance" of the literature supports, at least to some degree and in some form, the FCC's invocations of the value order. See, *e.g.*, LINDNER (2005), 13.
[796] Critical of the idea of value balancing and (more) supportive of some form of particularized weighing were Gerd Roellecke, Bernhard Schlink and Konrad Hesse (with important differences between them), among others.
[797] Roellecke, *Prinzipien der Verfassungsinterpretation* (1976), 27.

5.3 BALANCING AND THE COMPREHENSIVE CONSTITUTIONAL ORDER

5.3.1 Introduction

One of the distinguishing characteristics of German post-War constitutionalism has been its conception of the constitutional order as a substantive constellation of values. It is this 'material' or substantive quality, it was argued above, that forms a first crucial strand within the story of balancing in German constitutional thought. This Section adds a second, related, vital dimension to balancing's German genealogy; that of *the comprehensive constitutional order*.

The idea that the Constitution is, or should be, an "*absolut vollständige Oberrechtsordnung*" – "a fully comprehensive overarching legal order" -,[798] was a dominant perspective in German constitutional thought of the late 1950s and the 1960s. As the FCC put it in a 1965 decision, the Basic Law was understood to stand for "*eine einheitliche Ordnung des politischen und gesellschaftlichen Lebens der staatlichen Gemeinschaft*" – "a unified ordering of the political and social life of State and society".[799] Within this broad idea of the comprehensive constitutional order, two main themes will be distinguished. These are (a) the complete constitution, and (b) the 'perfect-fit' constitution.

This Section will argue, on the model of the previous Section, that each of these themes stands in a dual relationship with constitutional judicial balancing. On the one hand, they are important components of an explanation of the role of balancing in German constitutional law. On the other, balancing itself is *the*, or at least one of the, prime instrument, or instruments, of these two facets of the particular understanding of the constitutional order as 'comprehensive'. The 'complete' constitution relies on balancing in order to encompass all domains of social life within a gapless system and in order to overcome fundamental antinomies within this system. In the 'perfect-fit' constitution, on the other hand, individualized balancing of opposing interests, and especially also of aims and effects, is essential to ensure that constitutional reality matches constitutional demands as closely as possible in each individual case.

5.3.2 The 'complete' Constitution

5.3.2.1 Introduction

An important strand in German constitutional thought represents the constitutional order as being, or as aspiring to be – this anthropomorphism itself being a

[798] Roellecke, *Prinzipien der Verfassungsinterpretation* (1976), 33.
[799] BVerfGE 19, 206; 220 ('*Kirchenbausteuer*') [1965].

typical feature of the German debates –[800], a comprehensive arrangement without gaps or openings and without internal contradictions.[801] According to this line of thinking, there are no 'value-less' domains, or constitutional black holes. The constitutional order provides coverage of political and legal life that is exhaustive, complete and unified. Constitutional rights and values are never entirely absent from any given case, they will merely be more or less demanding depending on the circumstances. Constitutional rights bind all organs of the State in all their activities,[802] and their sphere of influence extends right into the domain of private relations.[803] Indeed, German scholars of the 1960s spoke of the "*Allgegenwart des Verfassungsrechts*" – "the omnipresence of constitutional law".[804]

Complete constitutionalism has relied principally on two particular conceptions of the identity of the Constitution, both stemming directly from material constitutionalism – discussed in the previous Section. They are those (a) of the Constitution as a value system, or '*Wertsystem*', for all domains of social life,[805] and (b) the Constitution as a structure aimed at unifying and harmonizing conflicting values and interests within society. Both will be discussed in what follows.

5.3.2.2 The Constitution as a comprehensive value system

Notwithstanding widespread, and sometimes fierce, criticism,[806] the general notion of the Constitution as a value system was "*ständige façon de parler*" – the habitual way of framing matters - in FCC case law of the 1960s,[807] and as such, tremendously influential within German constitutional discourse at precisely the time when constitutional balancing came to the fore.[808] While the traditional liberal vision of constitutional rights as protective of 'spheres of freedom' for individuals remained important, the main innovation of German post-War constitutionalism was to acknowledge that the Basic Law embodied an objective value system that "should count as a foundational constitutional resolution for all domains of law".[809]

800 *E.g.* Badura, *Verfassung, Staat und Gesellschaft* (1976), 6; Roellecke, *Prinzipien der Verfassungsinterpretation* (1976), 39; Peter Schneider, *Prinzipien der Verfassungsinterpretation*, 20 VVDStRL 1, 14(1963) ("*Die Verfassung will* ..."). See also BVerfGE 7, 198; 209 (*Lüth*) [1958].
801 *E.g.* Dürig, in MAUNZ-DÜRIG-HERZOG-SCHOLZ (1958), nr. 12.
802 *Cf.* BVErfGE 7, 198; 209 (*Lüth*) [1958].
803 *Ibid.*
804 Walter Leisner, cited in Ehmke, *Prinzipien der Verfassungsinterpretation* (1963), 70-71. Leisner repeats this qualification in his DER ABWÄGUNGSSTAAT 101 1997).
805 *E.g.* HÄBERLE (1962), 6.
806 Notably from Ernst Forsthoff, see e.g. *Die Umbildung des Verfassungsgesetzes* (1959), in RECHTSTAAT IM WANDEL 130, 152 (2nd ed., 1976). See also Ehmke, *Prinzipien der Verfassungsinterpretation* (1963), 82 (arguing that the historical contingency of constitutional rights precludes interpreting them as constituting a system); Christian von Pestalozza, *Kritische Bemerkungen* zu Methoden und Prinzipien der Grundrechtsauslegung in der Bundesrepublik Deutschland, 2 DER STAAT 425, 436 (1963) (*idem*); KONRAD HESSE, GRUNDZÜGE DES VERFASSUNGSRECHTS 4 (8th ed., 1975) (arguing that the idea of the constitution as value system raises more questions than it can possibly answer).
807 Böckenförde, *Grundrechtstheorie und Grundrechtsinterpretation* (1974), 1534, with references.
808 *Cf.* Ernst W. Böckenförde, *Zur Kritik der Wertbegründung des Rechts*, in RECHT, STAAT, FREIHEIT 67 (1987).
809 *Cf.* BverfGE 7, 198; 205 (*Lüth*) [1958].

(a) The value pyramid of the Basic Law

One of the most distinctive ways in which this notion of the Constitution as value system promoted the idea of the complete constitutional order was through the elevation of certain values to a primordial status from which they could 'radiate' throughout this order, filling-in any potential gaps that might exist between specific provisions. This strategy was pursued principally through the conceptions of '*Menschenwürde*' - human dignity – and '*das Recht auf freie Entfaltung seiner Persönlichkeit*' – a broad 'personality' right -, as overarching constitutional principles. Articles 1 and 2 of the Basic Law, proclaiming human dignity to be inviolable and entrenching every individual's general right to the free development of his personality, have occasioned an overwhelming body of doctrinal commentary. In broad contours, one particularly powerful image to emerge from doctrine and case law is that of 'human dignity' as a "*Grundsatznorm für die gesamte Rechtsordnung*" – a foundational norm for the whole legal order.[810]

The leading commentator to promote this type of view was Günter Dürig, whose remarks on Article 1 and 2 in the '*Maunz-Dürig-Herzog-Scholz*' Commentary on the Basic Law,[811] must rank among the most influential, if controversial, academic interpretations of this part of the Basic Law.[812] Dürig's commentary emphatically embraced the idea that these two provisions could form the foundation for a comprehensive system of rights protection. The '*Menschenwürde*' of Article 1, for Dürig, had the character of "*eines obersten Konstitutionsprinzip allen objektiven Rechts*" –[813] a fundamental principle for all areas of law.[814] As such, it could ground a system of values and claims that was '*lückenlos*'– gapless - within the rights catalogue of the Basic Law. Because the '*Menschenwürde*'s' 'value of freedom' could only ever be partially secured by a catalogue of specific rights provisions, Article 2 of the Basic Law offered a general guarantee of personal freedom – a '*Hauptfreiheitsrecht*' - to cover any omissions that might surface.[815]

Dürig's particular constitutional vision has always been controversial and was never taken on in its entirety by the FCC.[816] Nevertheless, in the Court's case law, one

810 *E.g.* VON MANGOLDT-KLEIN, 146 (Commentary on Art. 1). Von Mangoldt had been one of the representatives involved in the drafting of the Basic Law. For a recent variation on this idea, see LINDNER (2005), 212ff. Lindner invokes a very similar 'gaplessness' idea as did earlier writers.
811 This is a loose-leaf publication. Dürig's Commentary on Articles 1 and 2 was published in 1958. See also Günter Dürig, *Der Grundsatz von der Menschenwürde*, 81 AÖR 117 (1956).
812 See, *e.g.*, Ehmke, *Prinzipien der Verfassungsinterpretation* (1963), 82 (referring to Dürig as 'representative'). More recently, Dürig's contribution has been labelled 'legendary', see Hans Michael Heinig, *Menschenwürde und Sozialstaat*, in MENSCHENWÜRDE IN DER SÄKULAREN VERFASSUNGSORDNUNG 264 (Petra Bahr & Hans Michael Heinig, eds., 2006).
813 Dürig, *Der Grundsatz von der Menschenwürde* (1956), 119, 122; Dürig, in MAUNZ-DÜRIG-HERZOG-SCHOLZ (1958), Art. 1, nr. 5.
814 For references in FCC case law to Dürig's terminology, see, *e.g.*, BVerfGE 33,23; 29 ('*Eidesverweigerung aus Glaubensgründen*') [1972]; BVerfGE 115, 118; 152 ('*Luftsicherheitsgesetz*') [2005] ("*Das menschliche Leben ist die vitale Basis der Menschenwürde als tragendem Konstitutionsprinzip und oberstem Verfassungswert*").
815 Dürig, in *Maunz-Dürig-Herzog-Scholz* (1958), Art. 2, nr. 3-6.
816 See, e.g., ZIPPELIUS (1962), 21.

can find numerous attempts at using 'human dignity' or the personality right of Article 2 as '*oberste Werte*' – supreme values – in order to construct a comprehensive order of basic rights. Sometimes, these rights are presented as standing at *the apex* of the rights order, as in the seminal *Mephisto* case of 1971, where the Court spoke of the value of human dignity as "a supreme value, which controls the entirety of the value system of constitutional rights".[817] At other times, these values are presented as constituting *the core* – the '*Mittelpunkt*' – of the constitutional order. In the *Lüth* case, for example, the Court described a value order that found "its core in the free development of the personality of the individual within the social community".[818] In another important freedom of expression case too, the Court referred to the '*Menschenwürde*' as the "*Mittelpunt des Wertsystems der Verfassung*".[819] These 'supreme value' or 'core value' approaches were an important component of a vision of the constitution as embodying a rights order in which every constitutional right would always be interpreted in light of an overarching general principle, lending the whole a measure of structural integrity that would otherwise be unavailable.[820]

Conceiving basic rights in terms of values, and viewing the constitution as an ordered collection of such values, allowed interpreters and commentators to go beyond the confines of a historically contingent catalogue of rights and of liberalism's one-dimensional, limitational – formal - insistence on rights as boundaries for governmental power. The written Constitution, on the 'system of values' view, might be incomplete and the catalogue of rights haphazard, but the "*hinter der Verfassung stehende Wertordnung*" – the value order behind the written text,[821] could still be comprehensive.

(b) Values and a value system

A second way, in which the notion of the constitutional order as a value system was used to promote comprehensiveness, was through an emphasis on *the systematic character* of the value order.[822] This idea too, went back to Smend's material constitutionalism, and in particular to his vision of the Constitution as a stable, durable constellation of values.[823] Conceiving of the constitutional value order as a system, rather than as a mere collection of assorted rights and principles, again helped imbue this order

[817] BVerfGE 30, 173; 192 ('*Mephisto*') [1971]. See also EDWARD J. EBERLE, DIGNITY AND LIBERTY 258 (2002) ("Since human dignity is the apex of [the Basic Law's] value structure, it naturally radiates throughout the legal system").
[818] BVerfGE 7, 198; 205 (*Lüth*) [1958].
[819] BVerfGE 35, 202; 225 (*Lebach*) [1973] ("the heart of the value system of the constitution").
[820] The idea that general principles could help in the construction of 'legal systems' was a popular perspective in German legal thought of the 1950s and 1960s. See in particular JOSEF ESSER, GRUNDSATZ UND NORM 47, 224ff, 227, 321ff (1956).
[821] The image of a value order behind the constitutional provisions is pervasive in the relevant literature. *Cf.* von Pestalozza, *Kritische Bemerkungen* (1963), 436.
[822] *Ibid.* (commenting on a pervasive '*Bestreben nach Systematisierung*').
[823] See *supra*, s. 5.2.2.4. On Smends' status as the originator of the idea of the value system, see Forsthoff, *Die Umbildung des Verfassungsgesetzes* (1959, 1976), 133.

with a degree of integrity and coherence – "*innere Zusammenhang*".[824] Alexander Hollerbach eloquently described the way this might work in constitutional jurisprudence:

> "*Die Rede vom 'Wertsystem' [hat] zunächst einmal die Bedeutung: Überwindung der punktualistischen Vereinzelung, Intendieren und Sehen des Zusammenhangs und der Bezogenheiten, die zwischen den vielen Einzelnormen der Verfassung und Rechtsordnung obwalten. Jedes Einzelne verweist schon aus sich immer auf das Allgemeine, ist überhaupt Einzelnes nur als Einzelnes eines Allgemeineren*".[825]

The systematic quality of the '*Wertsystem*' was itself to a large extent dependent on the FCC's interpretation of human dignity as an overarching constitutional principle. By investing each individual constitutional right with a degree of '*Menschenwürdegehalt*', by relating the content of each specific right to the ultimate right of human dignity, this perspective assisted in viewing the constitutional order as a unity in which a presumption of gapless-ness could reign.[826]

5.3.2.3 The unitary, harmonizing Constitution

From its earliest decisions onwards, the FCC has emphasised the unitary character of the Constitution. In 1951 already, in its decision in the *Southwest* case, the Court held that individual constitutional provisions could not be interpreted in isolation, but only in light of other constitutional commands and on the basis of a general principle of the '*Einheit der Verfassung*'.[827] The main use of this principle can again be said to be to present the Constitution as "*eine absolut vollständige Oberrechtsordnung*" – a fully comprehensive higher legal order.[828]

Often, the effort to promote the image of the constitutional order as a unity took the form of an emphasis on interpreting individual norms in the light of certain overarching foundational norms and resolutions to which the other specific constitutional provisions were subordinated.[829] Constitutional law, in the view of the FCC's case law of the time, did not consist merely of individual provisions, but also of

[824] See the various definitions of 'system-thinking' in legal thought in CLAUS-WILHELM CANARIS, SYSTEMDENKEN UND SYSTEMBEGRIFF IN DER JURISPRUDENZ 11-13 (1969), 11-13.
[825] Alexander Hollerbach, *Auflösung der rechtsstaatlichen Verfassung?*, 85 AÖR 241, 255 (1960) ("The discourse of the value system, first and foremost, has the following meaning: to overcome individualization, to strengthen and make visible connections and relationships that exist between the manifold individual provisions of the Constitution and the legal order as a whole. Every individual element always refers to the overarching whole; is only an individual element by reference to the whole").
[826] *Cf.* WALTER LEISNER, GRUNDRECHTE UND PRIVATRECHT 146 (1960).
[827] BVerfGE 1, 14; 32 ('*Südweststaat*') [1951] ("the unity of the Constitution").
[828] *Cf.* Roellecke, *Prinzipien der Verfassungsinterpretation* (1976), 33. Even commentators critical of a conception of the value order as a system agreed that the Constitution contained a "*sinnvoll zusammengehörige, materiell aufeinander beziehbare ordnung*". See FRIEDRICH MÜLLER, NORMSTRUKTUR UND NORMATIVITÄT 217 (1966). In Chapter 8, a contrast will be drawn between this mainstream German approach, and the largely 'clause-bound' nature of constitutional interpretation in the U.S. See infra, s. 8.2.2.2.
[829] Beginning with the 1951 '*Südweststaat*' decision: BVerfGE 1, 14; 32 [1951] ("*Verfassungsrechtliche Grundsätze und Grundentscheidungen denen die einzelnen Verfassungsbestimmungen untergeordnet sind*").

"certain unifying principles and guiding ideas" that tied all provisions together.[830] Constitutional doctrine, in a virtually untranslatable phrase, insisted on "*Auslegung der Einzelnorm aus der Totalnorm*" – interpretation of every individual norm by reference to the Constitution's normative whole.[831]

An example of this kind of interpretation within the context of freedom of expression occurred in the *Mephisto* case, discussed in Chapter 4. Here, the Court emphasized that any conflict between the protection of the personality right of Article 2 and the right to freedom of artistic expression had to be solved by way of constitutional interpretation "following the standard of the constitutional value order and while upholding the unity of this foundational value system".[832]

But the significance of ideas of unity and harmony in German constitutional doctrine of the 1950s and 1960s went beyond an understanding of the Constitution as an organized whole. The Court and commentators continuously sought to emphasize the *harmonizing* qualities of the constitutional order set-up by the Basic Law. The Constitution, on this view, actively aimed to *create and foster* unity by overcoming fundamental antinomies in law, politics and society. In language again strongly reminiscent of Smend's integration perspective, the value order of the Basic Law was said to have a "*zusammenordnende und Einheitsbildende Wirkung*" – a function of harmonizing and bringing together.[833] The idea of the Constitution as a vehicle for harmonization and unification found expression on all levels of constitutional law; from the overarching idea of the Basic Law as a grand compromise between philosophical tenets of liberalism, socialism and Christian-Democracy, to detailed technical injunctions to lower courts on how to deal with conflicting values and rights.[834]

One way of promoting constitutional harmony, often encountered in case law and commentary, was through a particular conception of *the relationships* between conflicting values, rights and interests. A popular figure of speech in this area was that of 'dialectical' relations between opposing constitutional values.[835] Law and freedom, or individuals and society, commentators would argue, were indissolubly linked, in the form of communicating vessels.[836] The FCC gave expression to this idea early on, in its 1954 '*Investitionshilfe*' decision:

[830] BVerfGE 2, 380; 403 ('*Haftentschädigung*') [1953].
[831] Von Pestalozza, *Kritische Bemerkungen* (1963), 438, with references.
[832] BVerfGE 30, 173; 192 [1971].
[833] *Cf.* HÄBERLE (1962), 6 (citing Smend). See also HESSE 18th ed. 1975), 5 (relying heavily on Smend's integration theory), and Ehmke, *Prinzipien der Verfassungsinterpretation* (1963), 77.
[834] For a critical perspective, see, *e.g.*, ZIPPELIUS (1962), 157 (with references). See also Dürig, in MAUNZ-DÜRIG-HERZOG-SCHOLZ (1958), Art. 1, nr. 47 (Basic Law occupies middle ground between individualism and collectivism).
[835] *Cf.* Scheuner and Raiser, quoted in Schneider, *Prinzipien der Verfassungsinterpretation* (1963), 33-34. It is noteworthy that the same language of 'dialectics' that was so popular in literature on legal interpretation of the time (see *supra*, s. 4.3.2.2) was used also in this area.
[836] *E.g.* HÄBERLE (1962), 161 (referring to an "*Ineinanderstehen[...] von Recht und Freiheit*"). See also *ibid.*, at 21. For connections to Hegelian philosophy, see, e.g., *Ibid.*, at 164fn.

> *"Das Menschenbild des Grundgesetzes ist nicht das eines isolierten souveränen Individuums; das Grundgesetz hat vielmehr die Spannung Individuum - Gemeinschaft im Sinne der Gemeinschaftsbezogenheit und Gemeinschaftsgebundenheit der Person entschieden, ohne dabei deren Eigenwert anzutasten."*[837]

"Competing constitutional values", Peter Häberle argued in the early 1960s, using very similar vocabulary, "are not related in terms of superiority and inferiority, in the sense that they might be 'played out' against each other. They are, rather, matched so that each influences the other".[838]

5.3.2.4 The task of judges

With this kind of conception of the ties between opposing values and interests and of the nature of the constitutional order of the Basic Law came a particular idea of the task of judges in approaching conflicts. Two approaches were particularly prominent: the idea that courts should 'optimize' all competing values involved, and the understanding that many apparent conflicts between apparently opposing values and interests could be reframed so as to lessen their impact, or even so as to overcome them entirely.

(a) Optimization

If constitutional interpretation should take account of the harmonizing and integrating character of the Constitution,[839] the ideal solution for any conflict between values would be a "*nach beide Seiten hin schonendsten Ausgleich*" – an accommodation that would do justice to both values in play.[840] "The principle of the unity of the Constitution", Konrad Hesse wrote, places before constitutional interpretation "a task of *optimization*: both values must be limited in such a way that both may be optimally effective".[841]

The FCC's case law on freedom of expression reveals numerous manifestations of these ideas of principled compromise, 'adjustment' and optimization. Recall, for example, that in the *Lüth* case, the Court spoke of a '*Wechselwirkung*', and of a "*verfassungsrechtlich gewollten Ausgleich*" – an adjustment demanded by the Constitution -

[837] BVerfGE 4, 7; 15 ('*Investitionshilfe*') [1954] ("The image of man to which the Basic Law adheres, is not that of an isolated sovereign individual. Instead, with regard to the tension between individual and society, the Basic Law has come out on the side of the community-embedded and community-bound nature of the individual, without however diminishing the value of that individual."). The FCC has often referred to this formula in the area of freedom of expression. *E.g.* BVerfGE 30, 173; 193 ('*Mephisto*') [1971].
[838] HÄBERLE (1962), 38.
[839] *Cf.* Ulrich Scheuner, *Pressefreiheit*, 22 VVDStL 1, 52 (1965).
[840] MÜLLER (1966), 213.
[841] HESSE (8th ed., 1975), 28. Hesse's famous label for this process was 'the principle of practical concordance'.

between the "mutually contradictory expanding and limiting tendencies of the right to freedom of expression and the competing constitutional goods protected by the general laws".[842] The *Lüth* Court also referred in more general terms to the necessity of compromise and the adjustment of rights wherever large numbers of people had to live together in harmony.[843] Similarly, in the *Lebach* case, where the Court was again confronted with a conflict between Articles 5 and 2 of the Basic Law – the rights of expression and personality -, it was held that "in case of conflict, both these constitutional values must, to the extent possible, be adjusted to each other".[844]

(b) Reframing conflicts; overcoming antinomies

Besides this focus on the relationships between opposing rights and values, there was a second way in which the Court and commentators tried to promote the harmonizing qualities of the Basic Law: by denying the existence of specific antinomies altogether. The FCC's case law and the academic literature of the time show persistent efforts at reframing conflicts presented to the Court, in such a way that either the apparent conflict would 'go away' entirely, or, at the very least, that the relevant values and interests would be redistributed in such a way as to make the solution to the problem presented seem uncontroversial. The following paragraphs describe the historical and theoretical background to this perspective and its concrete use in reframing individual/State relations and competing rights claims between individuals.

(1) This perspective had a distinguished pedigree in German legal thought. Within constitutional law, one important forerunner was - again - Smend's integration theory of the constitution and, more specifically in the context of constitutional rights, his insistence that the right to freedom of expression not only protected individuals, but had a clear 'social function'.[845] Smend's contemporary and fellow 'material' constitutionalist Erich Kaufmann had similarly argued that "the essence of legal norms consists precisely of the fact that they simultaneously promote public and private interests".[846] More broadly, within legal theory, an important source of inspiration was Otto von Gierke's late nineteenth-century work on the social dimension of private rights.[847]

Among the most prominent academic propagators of this variety of the idea of constitutional harmonization in the 1960s, were Eike von Hippel and Peter Häberle. Von Hippel, relying on Smend and Kaufmann, argued that a constitutional-rights-norm could

[842] BVerfGE 7, 198; 209 [1958].
[843] *Ibid.*, at 220.
[844] BVerfGE 35, 202; 225 [1973]. See also Scheuner, *Pressefreiheit* (1965), 58 (referring to an '*Ausgleich*' between the - beneficial - social influence of the press and the protection of the personal privacy of individuals).
[845] See *supra*, s. 5.2.
[846] *Cf.* HÄBERLE (1962), 23 (citing Kaufmann).
[847] OTTO VON GIERKE, PERSONENRECHT 319 (1895), cited in HÄBERLE (1962), 9, 180 (calling this, following von Gierke, a "*deutschrechtliche[s] Verständniss*" – an understanding specific to German law").

be "valid only to the extent that the interests it protects are not opposed by higher ranking legal goods".[848] Individual, isolated, absolute rights were a conceptual impossibility; something that, von Hippel argued, Smend's adversary Carl Schmitt had failed to understand.[849] Adjustment to countervailing values, instead, formed part of the very essence of constitutional rights. Perhaps paradoxically, by framing the essence of constitutional rights in terms of their relationships to other rights, commentators like Von Hippel simultaneously made the idea of conflict omnipresent and deprived it of any meaning as a separate concept.[850] For his part, Peter Häberle claimed that constitutional rights were "equally constitutive" for both individuals and society.[851] Individual and collective interests would always be intertwined in the exercise *and* the limitation of constitutional rights. This meant that not only would society as a whole always be affected by an infringement of a fundamental right of any individual,[852] but also that limitations of individual rights were in fact also in the interest of the individuals concerned themselves, as much as they served the public interest.[853]

(2) In the contemporary case law of the FCC, numerous examples could be found where this type of perspective was invoked in order to overcome antinomies between individuals and society, or individuals and the State. On a most general level, this view was reflected in the Court's vision of society as a "community of free individuals", in which "the opportunity for *individual development*" would itself be "a *community-building value*".[854] In the specific context of freedom of expression, an instance of this type of view can be found in the *Spiegel* case. Recall that this case concerned the publication in the magazine *Der Spiegel* of secret material and critical commentary on the state of West Germany's defence forces, in particular in view of a possible attack from the Soviet Union.[855] After reciting *Lüth*'s demand for a balancing of opposing values in case of conflict, the Court went on to *deny* the existence of such a conflict altogether. The security of the State and freedom of the press were not, in fact, contradictory propositions. The two values, instead, had to be seen as connected to each other, and united in their common - higher - goal of preserving the Federal Republic and its basic

[848] EIKE VON HIPPEL, GRENZEN UND WESENSGEHALT DER GRUNDRECHTE 25-26 (1965).
[849] *Ibid.*, 27.
[850] See, *e.g.*, in the context of freedom of the press: Schnur, *Pressefreiheit* (1965), 103-105 (claiming that constitutional rights themselves could not properly be said to clash; only *the interests supporting rights* could point in different directions. Arguing also that the scope and content of the freedom of the press only flowed - negatively - from the boundaries to that right, not from any positive value).
[851] HÄBERLE (1962), 8, 21.
[852] *Ibid.*, 21-22.
[853] *Ibid.*, 28. See also at 12 (referring to a '*Wechselwirkung*' between individuals and society). Häberle's argument rested on a proposition that an overly wide conception of constitutional rights would diminish social acceptance of rights protection.
[854] BVerfGE 12, 45; 54 ('*Kriegsdienstverweigerung*') [1960]. Cited in Badura, *Verfassung, Staat und Gesellschaft* (1976), 6 (emphasis, added). See also Schneider, *Prinzipien der Verfassungsinterpretation* (1963), 31-33 (referring to the "*gemeinschaftsbezogenheit des Menschen*", but taking an ambivalent view of this reframing project). See also Schnur, *Pressefreiheit* (1965), 104 (referring to the "*gleiche Legimitation*", within the Constitutional order, of individual freedom and the interests of society).
[855] For a discussion of this case, see *supra*, s. 4.2.1.1. For a recent discussion of this line of thinking, see BENJAMIN RUSTEBERG, DER GRUNDRECHTLICHE GEWÄHRLEISTUNGSGEHALT 44 (2009).

order of freedom and democracy.[856] Without freedom of the press no Republic worth saving; without a Republic no freedom of the press, the Court found in essence.

(3) It was, finally, also not uncommon for a similar perspective to play an important role in the adjustment of the rights of private individuals. In those cases, what happened was that the full force of the general, public, interest was brought to bear on one side of the conflict. This added weight of the general interest would then reveal that what had earlier seemed an evenly balanced conflict was in fact a problem with an easy solution. An example of this device can be found in the *Plakaten* case, decided on the same day as *Lüth*. It may be recalled that this case involved a conflict between a landlord and one of his tenants, over the latter's right to exhibit political advertisements from his apartment.[857] The Court held in favour of the landlord, primarily because he did not use his claim to "vaunt his formal rights as property owner", but in fact acted on behalf of the other tenants in order to preserve peace and quiet in the house.[858] By focusing on the 'use' made by the landlord of his right, the Court transformed - or at least attempted to transform - what initially looked like a 'pure', direct conflict between two basic rights - property and speech - into an arrangement of interests that, again perhaps paradoxically, was, at the same time, much more complex in its layout and much easier to solve.[859]

5.3.2.5 The complete Constitution and balancing

This Section has presented an overview of a range of manifestations of the idea of 'completeness' in German constitutional thought and practice of the late 1950s and 1960s. A conception of the Constitution as a value system was used to bring all domains of public life - including, crucially, that regulated by private law - within the sphere of influence of fundamental rights. The idea of this value-based Constitution as a framework for harmonization and unification – '*integration*', in Smend's terminology - was relied upon to overcome basic antinomies within the Basic Law's "*freiheitliche demokratische Grundordnung*".[860]

This conception of the complete constitutional order informed the local meaning of the discourse of balancing, which, in turn, was one of the prime manifestations and operationalizations of 'complete' constitutionalism itself. Contemporary constitutional rights jurisprudence furnishes abundant evidence for the connection between these two themes, both in supportive and in critical writing. Peter Häberle, who was broadly supportive of the FCC's approach, wrote with reference to *Lüth*: "*Durch die Güterabwägung wird ein Ausgleich zwischen den kollidierenden Rechtsgüter herbeigeführt, wodurch diese in das Ganze der Verfassung eingeordnet werden*".[861] "Seen this way", he concludes, "balancing is both equilibration and ordering within an overarching whole".[862] Lerche, who was much more critical, noted in very similar language: "*Ganz allgemein preist man bisweilen eine 'Güterabwägung' als Patentlösung für das Zusammenstoßen des sozialstaatlichen Prinzips mit der Grundrechtssphäre an*".[863]

Important questions remain as to *why* the judges of the FCC and many of their observers felt that it was important to promote this particular understanding of the constitutional order of the Basic Law. There are also significant issues with regard to the extent to which prevailing social and political conditions in post-War German society allowed them to be successful in this project. Questions of both these categories lie largely outside the scope of this study. But some suggestions as to their answers may be offered. As to the latter theme, there are indications that the German constitutional scene of the late 1950s and early 1960s was much less polarized or politicized than was the case in, for example, the U.S. - the main comparative reference in this project.[864] Ernst Forsthoff, for example, the prominent critic of the Court's general 'material' approach to interpreting the Basic Law, wrote in 1961 of the "far reaching de-politicization of the era in which we live".[865]

Forsthoff is also helpful on the first type of question; the 'why' of comprehensive constitutionalism. All discussions on the 'correct' way of interpreting the Basic Law, he wrote, had to be viewed in light of Germany's recent past. "The demise of the Weimar Constitution and the rise to power of National-Socialism have sharpened the sense of responsibility of constitutional jurists".[866] In the eyes of many, if constitutional law was to erect a meaningful roadblock to totalitarianism, the Basic Law had to be similarly 'total',

[856] BVerfGE 20, 162, 178 [1966]. For an English translation of this part of the decision, see KOMMERS (1997), 400 ("[S]tate security and the freedom of the press are not mutually exclusive principles. Rather, they are complementary, in that both are meant to preserve the Federal Republic").
[857] See *supra*, s. 4.2.2.1.
[858] BVerfGE 7, 230; 237 [1958].
[859] A somewhat similar approach was used in the *Lüth* case itself, where the Court asserted that the right to freedom of expression would be valued more highly whenever a speaker attempted to contribute to a debate of general public interest rather than to a private discussion.
[860] *Cf.* BVerfGE 20, 162, 178 [1966] (*Der Spiegel*).
[861] HÄBERLE (1962), 38 ("The balancing of values accomplishes an equilibrium between clashing legal values, through which both are embedded within the overarching constitutional order as a whole"). Häberle notes: "The Constitution wants '*Sozialstaat*' and fundamental rights … individual rights and penal law … property and expropriation").
[862] *Ibid.*, 39.
[863] LERCHE (1961), 129fn.105, with references ("In very broad terms, a balancing of values is now promoted as a comprehensive solution for the clash between the principle of the '*Sozialstaat*' and the sphere of constitutional rights").
[864] See, *e.g.*, in the context of freedom of expression: Schnur, *Pressefreiheit* (1965), 131fn72 (noting a more 'politicized' debate on freedom of expression in the US, as well as in Switzerland and in the United Kingdom).
[865] Forsthoff, *Zur Problematik der Verfassungsauslegung* (1961) in: ERNST FORSTHOFF, RECHTSTAAT IM WANDEL 153, 164 (2nd ed., 1976). See also, *e.g.*, Jan-Werner Müller, *Introduction: Putting German Political Thought in Context*, in: GERMAN IDEOLOGIES SINCE 1945 1ff (Jan-Werner Müller, ed., 2003) (notably at 7ff, noting the disappearance of both the "nationalist Right and the Weimar left", and arguing that "the disappearance of these extremes … did much to advance the liberalization of German thought"). Notably, the most prominent fault-line in German political and constitutional thought of the time – between the ideas of the '*Rechtsstaat*' and the '*Sozialstaat*' (see *Ibid.*, at 8) – was actively addressed through 'complete' constitutionalism and balancing specifically, as is evident from the Häberle and Lerche passages just quoted. For a slightly later analysis of the link between 'abwägung' and the 'Sozialstaat', see Karl-Heinz Ladeur, *'Abwägung' – ein neues Rechtsparadigma?*, 69 ARSP 463 (1983).
[866] Forsthoff, *Zur Problematik der Verfassungsauslegung* (1961, 1976), 163.

or comprehensive, in its aspirations.[867] All areas of social, political and - to a large extent - even private life, should be protected, against any possible kind of encroachment.[868]

It is impossible, within the context of this study, to go much beyond such general statements. And there are further, related complications. As in all forms of political and intellectual history, it is extremely difficult to attribute causality to ideas, or, more generally, to separate causes and effects, modalities and goals. The idea of the Constitution as a value order, for example, may have served contemporary anxieties well in the early post-War years, but it also found a ready model in theories elaborated in a very different age, at a time when the Weimar Republic was in its final years. It is of course literally impossible to tell what post-War constitutional jurisprudence would have looked like without Smend's '*Das Recht der freien Meinungsäußerung*', or any of the other sources of inspiration for material constitutionalism. The same goes for assigning priority to one of a series of related ideas. It is difficult to tell, for example, whether in the thinking behind the *Lüth* decision, the idea of the value order was introduced to help achieve the extension of the influence of constitutional rights to the private sphere, or whether this extension was rather a corollary of the idea of a value order introduced for other reasons.[869]

5.3.3 The 'perfect fit' Constitution

5.3.3.1 Introduction

A second dimension of the comprehensive constitutional order was the ideal of a 'perfect fit' between constitutional normativity and social reality. As Peter Häberle claimed in his influential 1962 book, under reference to the Weimar-era theorist Hermann Heller: "Every constitutional right wants to be 'rule'. Law is rule-conform reality. The Constitution intends, through its guarantees of constitutional rights, *to make sure that normativity and normality run 'parallel'*".[870] This Section looks in more detail at this ideal of 'perfect fit' and at its relationship to constitutional balancing. In summary form: While the previous Section was focused on the internal structure and content of the constitutional order itself, this Section discusses the relationships between this constitutional order and broader social and institutional life.

The reasons underlying the appeal of 'perfect fit' constitutionalism must again remain largely outside the scope of this thesis. The basic theme, however, again is the

[867] For an example of this argument, see LEISNER (1960), 128-129.
[868] This last element will be covered under the heading of the 'perfect fit' Constitution, below.
[869] See, *e.g.*, Fritz Ossenbühl, *Abwägung im Verfassungsrecht*, 1995 DVBL. 904, 905 (1995) (arguing that the need for balancing was the "consequence" of the acceptance of horizontal effect of constitutional rights. On possibly broader motivations for the *Lüth* decision, see, *e.g.*, RENSMANN (2007), 84 (arguing that the FCC's First Senate, in *Lüth*, wanted to contribute to the "rehabilitation of the moral stature of Germany in the world").
[870] HÄBERLE (1962), 44 (emphasis added; quotation marks in original). For a recent invocation of a similar idea, see, *e.g.*, RUSTEBERG (2009), 65 (arguing that "in the balancing model, more and more questions of ordinary law are pulled upwards and become questions of constitutional law").

"rabbit-like fear of a descent back into barbarity" – a "*kaninchenhaften Angst vor dem Rückfall in die Barbarei*" - underlined earlier.[871] It was widely thought that only a demanding, perfectionist – 'aspirational' and 'maximally effective', to use two terms discussed below - constitutional order could provide secure guarantees against a recurrence of the horrors of the very recent past. The case law of the FCC, Ernst Forsthoff argued, showed how deeply the Court's members were "conscious of its *comprehensive responsibility for the constitution-conformity of legal life*".[872]

In Forsthoff's view, this overriding sense of responsibility led to a deplorable level of casuistry in - and hence 'deformalization' of - FCC case law; a casuistry for which balancing of interests was the prime instrument.[873] One argument of this thesis as to the meaning of balancing, begun here and developed further in Chapter 8, is that while Forsthoff was correct in his assessment of the connection between comprehensive constitutionalism and balancing, his subsequent equation of balancing and deformalization cannot be accepted in any strong form.

5.3.3.2 The modalities of 'perfect fit'

Even though the discourse of 'perfect fit' constitutionalism pervades constitutional legal literature and case law of the late 1950s and early 1960s, it is possible to single out a number of its more concrete manifestations. This Section discusses three such operationalizations of 'perfect fit' constitutionalism: the ideal of legal interpretation as 'actualization'; the ideal of the 'maximum effectiveness' of constitutional rights; and the ideals of the Basic Law as an 'aspirational' constitution.

(a) Interpretation as actualization

The interpretive ideal of the 'concretization' or 'actualization' of norms has already been mentioned, in Chapter 4, as an element of dialectical approaches to legal reasoning that gained prominence during the relevant period.[874] This striving for the "*Ziel der Aktualität*" – "the goal of actuality" – in the interpretation of norms is particularly closely related to the ideal of the 'perfect fit' Constitution. In contradistinction to classical models of interpretation, from an actualization perspective "there is no separation between a norm's meaning and its application".[875] Writers like Christian von

[871] Roellecke, *Prinzipien der Verfassungsinterpretation* (1976), 49.
[872] Forsthoff, *Die Umbildung des Verfassungsgesetzes* (1959, 1976), 151 ("*das starke Bewußtsein einer umfassenden Verantwortung für die Verfassungsmäßigkeit des Rechtslebens*", emphasis added in translation). For an analysis in English, see, *e.g.*, Klaus Stern, *General Assessment of the Basic Law – A German View* (1993), 21.
[873] *Ibid.*
[874] See Chapter 4, Section 4.3.2.5.
[875] Von Pestalozza, *Kritische Bemerkungen* (1963), 427. But contra: VON MANGOLDT-KLEIN, 7ff. For an application in the context of freedom of expression, see BVerfGE 42, 143; 147 ('*Deutschland Magazin*') [1976] ("*Die auf diesem Wege einwandfrei getroffene Feststellung eines Verstoßes gegen die Bestimmungen zum Schutz der Ehre aktualisiert die verfassungsrechtliche Grenze der Meinungsfreiheit im Einzelfall*").

Pestalozza suggested in fact that the choice of method of interpretation should be determined by the nature of the situation of the intended application of the constitutional norm involved:

> *'Es ist deshalb diejenige Methode zu benützen, die im Einzelfall den aktualen Sinn der Grundrechtsnorm am besten verwirklicht".*[876]

Taking an outsider's perspective for a moment: The objection that this way of proceeding is troublingly circular seems difficult to refute. It is hard to see how a norm could have a meaning proper *before* it has been interpreted, which is what this methodological suggestion seems to require.[877] But the quotation is still very revealing. It clearly shows the prominence and attraction of an approach to constitutional rights law that adhered to the idea of a 'meaning before interpretation' and that imposed a specific obligation on interpreters to seek out that precise meaning. In that sense, it shows the deep importance of the ideal of assuring a perfect fit between constitutional meaning and application in every individual case.

This approach, as will be discussed in more detail in Chapter 8, is dramatically different from dominant American methods. Those scholars and judges promoting actualization as an interpretive method were not interested in uncovering the 'original' meaning of constitutional provisions - often an overriding concern for important strands in American constitutional thought - but in the elaboration of a concrete, situated 'meaning-in-application'. German writers were keenly aware of the possibly anti-democratic nature of this approach; specifically, the charge that more respect should be shown for the meaning that was intended at the time of the framing of the Basic Law. But instead of deference to a constitutional founders' moment along American lines, they would point out that any 'original meaning' approach would tie the meaning of the Basic Law to the "highly contingent situation" of its birth in a way that would not be legitimate.[878] Instead, both drafting and application had to be seen as equally constitutive moments for the meaning of constitutional norms, and interpretation should consist of a "continuous dialectic" between general statements and concrete situations.[879] What this mode of interpretation sought to achieve, then, was an elimination of any potential clash between – or, put differently: assuring a perfect fit between – the potentially conflicting ideas of the meaning of norms at the time of their drafting, their abstract meaning at the time of their operation, and their concrete meaning in any given case.

[876] Von Pestalozza, *Kritische Bemerkungen* (1963), 433 ("That method of interpretation should be chosen, therefore, that most accurately captures the meaning of a constitutional norm in the concrete case"). Discussed and criticized by Roellecke, *Prinzipien der Verfassungsinterpretation* (1976), 36ff.
[877] *Ibid.*, with references. This is, however, the position taken by 'objectivist' accounts of constitutional rights law.
[878] Von Pestalozza, *Kritische Bemerkungen* (1963), 428-429.
[879] *Ibid.*, 427.

(b) The principle of 'maximal effectiveness'

A second, closely related, set of interpretive principles shared the ideal of actualization as enabling an 'as-close-as-possible' fit between the constitutional order and social reality. A useful label for these principles is the idea of the 'maximal effectiveness' of constitutional norms. The 'maximal effectiveness'-idea was often traced to the work of the Weimar-era constitutional law theorist Richard Thoma, who in 1929 in a highly influential commentary on the Weimar Constitution had written that where traditional methods yielded multiple acceptable interpretations of a constitutional norm, "preference should be given to the meaning that gives maximal legal effectiveness – '*juristische Wirkungskraft*' - to the relevant norm".[880] Although Thoma offered his maxim for a very specific question under the Weimar Constitution, it was later read as a broader principle favouring maximal protection for the rights of individuals under the Basic Law.[881] This principle, variously known by terms such as '*in dubio pro libertate*', the '*Freiheitsvermutung*', or the principle of '*Grundrechtseffektivität*',[882] was hotly contested, and never became a stable part of the FCC's appraoch.[883] But again; the fact that it was so vigorously debated shows the appeal of the desire to interpret constitutional rights provisions as broadly as possible, in order to make sure that they covered as broad a spectrum of social life as possible, in a way that would be as intensive as possible.

(c) The aspirational constitution

The interpretive tools discussed under the previous two headings – actualization and the principle of maximal effectiveness – can be seen as part of a broader image: that of the Basic Law as an aspirational Constitution.[884] On a practical level, the FCC has always made it clear that the constitutional order of the Basic Law should not merely negatively guarantee individual liberty, but that it should actively aim to realize the

[880] Richard Thoma, *Die juristische Bedeutung der Grundrechte*, in: GRUNDRECHTE UND GRUNDPFLICHTEN DER REICHSVERFASSUNG I 1, 9 (Hans Carl Nipperdey, ed., 1929). On the connection between Thoma's maxim and the work of Rudolf Smend, see STOLLEIS (2004), 74.
[881] *Cf.* Peter Schneider, *In dubio pro libertate*, in: FESTSCHRIFT DEUTSCHER JURISTENTAG II 263ff (1960); von Pestalozza, *Kritische Bemerkungen* 443 (1963); Roellecke, *Prinzipien der Verfassungsinterpretation* (1976), 43ff; Ehmke, *Prinzipien der Verfassungsinterpretation* (1963), 87ff. For a more recent analysis, see PETER UNRUH, DAS VERFASSUNGSBEGRIFF DES GRUNDGESETZES: EINE VERFASSUNGSTHEORETISCHE REKONSTRUKTION 310 (2002).
[882] Schneider, Roellecke, and Ehmke, respectively.
[883] *Ibid.* For a recent supportive assessment of a "*Prinzip der Ausgangsvermutung zu gunsten der Freiheit*" – a principled assumption in favour of fundamental freedoms -, not as a depiction of 'reality', but as a "*Denk – und Rechtfertigungsmodell*" – a model for thinking about constitutional rights questions and for justifying decisions -, see LINDNER (2005), 213-215.
[884] *Cf.* Kim Lane Scheppele, *Aspirational and aversive constitutionalism: The case for studying cross constitutional influence through negative models*, 1 I-CON 296, 299 (2003) (defining aspirational constitutionalism as a process of constitution building "in which constitutional decision makers understand what they are doing in terms of goals that they want to achieve and aspirations that they want to live up to. It is a fundamentally forward-looking viewpoint"). The use of the term here shares Scheppele's 'forward-looking' idea, but is more focused on constitutional interpretation and application than on drafting.

conditions for the meaningful enjoyment of rights.[885] Constitutional rights were understood to have a double character: as '*Verbot*' – prohibition – on certain types of public action, but also as a '*Gebot*' – an imposed obligation, or injunction – on the legislature to realize rights.[886] In broader terms, in the constitutional legal literature of the period there are numerous references to the idea that the constitutional order set out by the Basic Law demands action by the State, and to the Basic Law's ambition to actively create – desirable - forms of social ordering.[887] One striking aspect of this discourse, to which Chapter 8 will return, is its mandatory tone; its references to obligations imposed, and the achievement of goals demanded by a Basic Law that, literally, is said to "want" certain things done. The label 'aspirational constitutionalism', while broadly accurate, should be read against this background.

5.3.3.3 Balancing and the 'perfect fit' Constitution

Chapter 4 aimed to show how, despite academic criticism, the FCC developed its balancing approach in the *Lüth* line of cases as consisting of both a balancing of values *and* a balancing of interests. Simplifying somewhat, this balancing of values corresponds to the idea of the material constitution, while the balancing of interests is particularly closely related to that of the 'perfect fit' constitution. It was through a heavily particularized balancing of interests in each individual case that the FCC – and the courts it mandated to follow this approach – aimed to make sure that social reality would match the constitutional order as closely as possible. The FCC's doctrine, then, demanded not merely the durable constellations of values along Smendian lines, but the precise and individualized adjustment of constitutional rights and obligations. As the dissenting opinion of Judge Stein in the *Mephisto* case put it, the FCC should not only be "the guardian of constitutional rights in all legal domains" – expressing the ideal of the *complete* constitution -, but should also make sure that each and every "concrete balancing of interests … should conform to the value judgments contained in the constitution".[888]

The previous Paragraphs have illustrated how this idea of 'perfect fit' was also reflected in, and supported by, a number of other elements in German constitutional rights discourse of the late 1950s and early 1960s. Those other elements – actualization, maximal effectiveness, and aspirational constitutionalism – should, in turn, cast new light on the meaning of balancing. Each of these other elements appears to have had a significant compulsory or *mandatory* dimension: the ideals of 'actualization' could, in theory, be satisfied by *only one* specific legal outcome in every constitutional rights case; the principle of maximal effectiveness meant, again at least in theory, *maximal*

[885] See, *e.g.*, BVerfGE 33, 303; 330ff ('*Numerus Clausus*') [1972] (claiming that a constitutional guarantee would be "worthless" if the practical conditions for its enjoyment would not exist).
[886] HÄBERLE (1962), 182ff.
[887] *Cf.* Roellecke, *Prinzipien der Verfassungsinterpretation* (1976), 40ff; Badura, *Verfassung, Staat und Gesellschaft* (1976), 7; von Pestalozza, *Kritische Bemerkungen* (1963), 440. See also EBERLE (2002), 233.
[888] BVerfGE 30, 173; 202 [1971] (diss. Stein).

effectiveness and nothing less; and aspirational constitutionalism meant that the Basic Law made specific positive *demands* of public institutions that went beyond prohibitions on interference with rights. This dimension of compulsion will figure again in Chapter 8, where it will be invoked in the elaboration of German paradigmatic understandings of balancing and of legal formality. In short, it will be argued there that the meaning of balancing in its German setting is similarly imbued with a sense of compulsion or obligation, which renders even the most highly particularized, seemingly open-ended, form of balancing 'formal' in a way that is not always appreciated.

One of the clearest and strongest connections between the themes of balancing and of 'perfect fit' constitutionalism in fact lies beyond the scope of this thesis. It is the development of the principle of proportionality in the case law of the FCC. A vast literature on the genealogy of this principle shows how from roots in Prussian administrative law it has come to dominate much of German public – first administrative and then constitutional – law.[889] Balancing and proportionality always have been, and still are, understood to be closely related, although the precise nature of the connection is often contested.[890] Notwithstanding this close relationship, and notwithstanding proportionality's significance in German public law, this thesis focuses on balancing in the form of the '*Güterabwägung*' and '*Interessenabwägung*' as found in the *Lüth* decision and its progeny.[891] The most important reason for this choice of focus is that the constitutional discourse of the late 1950s and early 1960s – the relevant period for comparison with developments in the U.S. – was clearly dominated by balancing *per se*, rather than by the principle of proportionality. This was mainly because at this time, still, the status, provenance and nature of the principle of proportionality in the case law of the FCC were simply profoundly unclear.[892] Proportionality in constitutional law – as opposed to merely administrative law - became a major focus for legal research from the late 1960s onwards, and since then connections to the idea of balancing have always been

[889] See, for an early account, LERCHE (1961), 24ff.
[890] For a recent comparative account of proportionality reasoning in German and Canadian constitutional law, incidentaly showing that a 'balancing-stage' is more prominent in the German understanding than in the Canadian version of proportionality, see Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L.J. 383 (2007).
[891] The role of the principle of proportionality in FCC case law is generally traced back not to the *Lüth* decision, but to the '*Apotheken-Urteil*' of 11 June in the same year. See BVerfGE 7, 377 [1958].
[892] By far the most influential early account of the role of proportionality in constitutional (as opposed to administrative) law was Peter Lerche's '*Übermaß und Verfassungsrecht*' (1961). Another leading early account of the role of proportionality in constitutional law under the Basic Law was RUPRECHT VON KRAUSS, DER GRUNDSATZ DER VERHÄLTNISMÄßIGKEIT (1955). Lerche wrote, at 26 that "contemporary constitutional theory has not yet provided a major assessment of the binding of the legislator to the principles of necessity and proportionality"). On the relationship between the two ideas: Häberle's influential 1962 book contained a section on 'The Principle of Proportionality' where he wrote (at 67): "The question of proportionality only becomes relevant when a balancing of values has already taken place. In other words: a balancing of values – '*Güterabwägung*' – is a prerequisite for the principle of proportionality". For summaries of the historical developments in English, see, *e.g.*, Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence* (2007), 384ff; Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72 (2008). It may be noted that *Lüth* itself does contain references to the idea of a 'fit' between means and goals. See BVerfGE 7, 198; 229.

stressed.[893] What is important about the principle of proportionality for the purpose of this study is merely the way in which it too can be seen as a manifestation of 'perfect fit' constitutionalism – a desire to seamlessly transpose the abstract meaning of constitutional rights guarantees into particularized, individualized instances of rights protection, and the ideal of a State that goes *no further than strictly necessary* in limiting rights and that goes *as far as necessary* in order to realize effective rights protection for all. In this sense, balancing and proportionality, at least in this context, share the same basic meaning.

5.4 CONCLUSION: BALANCING'S 'GERMAN' LOCAL MEANING

What is, given the discussions in this and the previous Chapter, and using von Gierke's wonderful - and wonderfully untranslatable - term, the '*deutschrechtliche*' meaning of the discourse of balancing during the period described here?

(1) A first observation to make is that the discourse of balancing in late 1950s and early 1960s German constitutional rights jurisprudence has been shown to be much broader than merely the occurrence of terms like '*Güterabwägung*' and '*Interessenabwägung*'. These terms, it has been argued, should be seen as lying at the heart of a broad family of related conceptual vocabulary that ran from '*Wertkonstellationen*' and '*Kultursystem*' in Weimar-era constitutional legal thought; '*Wechselwirkung*' and a "'*verfassungsrechtlich gewollten Ausgleich*" in FCC case law; '*aktualisierung*' and "*maximaler Wirkungskraft*" in contemporary academic writing; and the '*Grundsatz der Verhältnismäßigkeit*' in (later) constitutional rights case law. In many ways, balancing lies at the heart of this collection of terms and concepts, providing a bridge between different historical eras – Weimar and the Bonn Republic -, different understandings of the nature of constitutional interpretation – from '*Geisteswissenschaftlich*' to strictly '*juristisch*' -, different understandings of the role of courts, and of the FCC in particular – from highly particularized interest balancing to a more abstract weighing of values -, and even different areas of law – from private law-style interest balancing to the typically constitutional accommodation of values.

(2) This leads to a second observation on the role and meaning of the discourse balancing, conceived in this broad sense. It seems that, in many of its guises, one of the central functions of this discourse was to overcome deep-seated antinomies in German legal and social thought. In the discourse of balancing, basic rights are "equally constitutive" for both individuals and society. Rights encompass their own limitations. Rights are both programmatic statements and legal principles.[894] The abstract meaning of constitutional clauses is identical to their 'actualized' meaning in concrete cases. Value balancing goes hand in hand with interest balancing. The autonomy of private law co-exists with a constitutional order that claims to be total. Ideas of judicial deference co-exist with the desire for intensive scrutiny; etc. And even though these are all quite different projects, the language of '*Abwägung*', of '*Wechselwirkung*', of 'dialectical understanding', or of '*Ausgleich*' and similar terms, in each case, is central to these efforts at synthesis or accommodation.

(3) It is this notion of synthesis, finally, that leads to a third observation. While the ideas of overcoming antinomies, synthesis, or accommodation capture much of what is significant in the German discourse of balancing, it would be less accurate to understand German balancing in terms of pragmatic compromise. For one, German judicial decisions and academic commentary regard this synthesizing project as very much a *juristic* project, to be undertaken according to strict standards of juristic discipline. The shadow of classical legal doctrine and orthodox rules of interpretation is always present. Secondly, what is striking too, from an outsider's perspective, is the extent to which achieving accommodation between ostensibly conflicting values and perspectives often appears in German legal thought as something that can and must be willed. The FCC *wills* there to be no conflict between individualized interest balancing and abstract weighing of values, or between deferential review and intense conformity with constitutional norms. The Basic Law itself, in the anthromorphism that so clearly characterizes German constitutional law case law and literature of this period, *wills* there to be no conflict between more social and more individual dimensions of social life, or between the State and the individual.

A theme to which Chapter 8 returns is the fact that this 'willing' often seems to require some suspension of disbelief by outside observers – and perhaps by German participants themselves. Or, put conversely; the fact that some degree of pervasive 'faith' in legal doctrine, and in legal thought more broadly, seems to be at work. Without that understanding it becomes very difficult to account for the phenomenal success of the Basic Law and its interpretation by the FCC, including notably the success of its balancing discourse. Peter Lerche, in his influential 1961 book on proportionality, spoke of the "*unbewiesene Vorstellung*" – the unproven conception - of the constitutional value system, as a force sustaining the operation of "*konkurrenzlösende Normen*" – competition-overcoming norms – in German constitutional law.[895] That image fits the discourse of balancing wonderfully. The discourse of balancing is arguably the most prominent manifestation of a tradition of synthesis in German legal thought – whether in tying together potentially conflicting rights, bridging potentially conflicting understandings of the constitutional order as a whole, or overcoming potential clashes between that order and social life. And this discourse is able to fulfil this synthesizing function because of some form of faith in its '*unbewiesene*' – unproven, but willed – capacity to fulfil that function.

The remainder of this thesis builds on these observations. Chapters 6 and 7 aim to show that the meaning of the discourse of balancing in mid-Century U.S. constitutional legal thought was diametrically different from what has been seen for

[893] See, *e.g.*, Manfred Gentz, *Zur Verhältnismäßigkeit von Grundrechtseingriffen*, NJW 1968, 1600 (1968); Eberhard Grabitz, *Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Bundesverfassunggerichts*, 98 AÖR 568 (1973).

[894] *Cf.* RENSMANN (2007), 55 (qualifying this as the overcoming of a traditional dichotomy).

[895] LERCHE (1961), 125-126.

Germany. Chapter 8, finally, aims to relate these different meanings – including the German elements of synthesis and faith in doctrine that have just been invoked – to understandings of legal formality and its opposites, using the conceptual vocabulary of legal formality to frame two opposing paradigms of balancing.

CHAPTER 6
BALANCING IN U.S. FREEDOM OF EXPRESSION JURISPRUDENCE OF THE LATE 1950S– EARLY 1960S

6.1 INTRODUCTION

"So much has been written on the subject that the writers, …, have no doubt told us more about balancing than we wanted to know. Yet there remains some uncertainty about what the very term means".[896] This quotation from 1965 captures a sense of the debates on methods of constitutional rights adjudication in late 1950s - early 1960s America. 'Balancing' has already come to be a dominant theme in the relatively young area of civil rights adjudication and its accompanying academic discourse; its centrality is not wholly welcome; and yet, no one is entirely certain what the label refers to. To a large extent, this observation mirrors contemporary developments in Germany, discussed above. In the U.S. too, this period saw an astonishingly rapid *rise of the discourse of balancing.* Even if the exact scope and nature - or even the actual importance - of 'balancing' in constitutional rights adjudication were far from certain, debates in the field were increasingly conducted in the language of balancing. As in Germany, balancing quickly became a focal point for some of the most heated disagreements in all of constitutional rights law.

This Chapter and the next take up the story of balancing discourse in 1950s and 1960s American constitutional rights law, in particular in the area of freedom of expression.[897] As in the previous two Chapters, the aim is to elaborate a 'local meaning' for balancing language in judicial and academic discourse. This project will be carried out through a detailed examination of the major instances of balancing rhetoric in Supreme Court First Amendment case law and of the main lines of critique of this rhetoric in academic and judicial opinion.

The setting for this investigation is radically different from, but also essentially connected to, the one discussed in the first instalment of the Genealogies. Sociological Jurisprudence had to be situated very much in the context of a pre-1937 - *i.e. Lochner* era - America. The material for this Chapter, by contrast, is not only significantly post-*Lochner*, but also very much 'Cold War', and, largely, 'post-*Brown v. Board*', the famous segregation case of 1954. Virtually all the decisions discussed below relate to either efforts to suppress domestic manifestations of Communism or to the struggle over civil rights in the southern States. And they were handed down and debated in a context of acutely heightened sensitivity over the proper boundaries of judicial power in the post-*Lochner* era.

This Chapter proceeds as follows. The context of, and method for, analysis of balancing discourse in mid-Century American free speech law are discussed in Section 6.2. Section 6.3 gives an overview of the main 'balancing opinions' in the Supreme Court. These opinions form the primary material for much of the debates on balancing and freedom of expression adjudication, as they were conducted throughout the 1950s and

[896] Kenneth L. Karst, *The First Amendment and Harry Kalven: An Appreciative Comment on the Advantages of Thinking Small*, 13 UCLA L. REV. 1, 22fn92 (1965).
[897] The reasons behind the choice for freedom of expression as a case study are explained *supra*, s. 4.1.2.3.

1960s. In Section 6.4 an overview is given of the most important lines in contemporary critiques of balancing.

6.2 THE FREE SPEECH AND BALANCING 'LANDSCAPES' OF THE LATE 1950s – EARLY 1960s

6.2.1 Free Speech and balancing

The task of investigating the local meaning of balancing discourse in the setting of Post-War – 1950s and 1960s - freedom of expression case law and doctrine was relatively easy in the case of Germany. There, a single FCC judgment – *Lüth* – was the obvious starting point from *both* the free speech and the balancing perspectives. Pre-war developments in academic literature were certainly important in terms of understanding the *Lüth* decision and its aftermath, but could be dealt with in the form of 'flashbacks', as was done in Chapter 5. Any earlier case law could largely be left aside.

Matters are not so straightforward in the American context, both with regard to free speech law and with regard to balancing. "The problem in running one's mind over the American tradition of freedom of speech", Harry Kalven Jr. wrote in the early 1970s, "is *to find some point from which to begin the journey*".[898] Although, as mentioned at the outset of Chapter 4, Supreme Court pronouncements on the First Amendment began only in earnest in 1919,[899] a number of important decisions had already been handed down by the end of the Second World War. These decisions would have significant repercussions for post-War free speech law. Not only is a starting point difficult to identify, it is also impossible to capture the American fee speech tradition in a single judgment, or even a series of judgments, in a way that comes close to the sense in which the *Lüth* case and its aftermath are representative for German free speech law.[900] Where the FCC in *Lüth* set out to develop an overarching, comprehensive approach to free speech adjudication – and even to constitutional rights adjudication as a whole -, the picture in the U.S. is largely of a patchwork of doctrines and subdivisions. As another commentator, Thomas Emerson, wrote in 1970, "[t]he outstanding fact about the First Amendment today is that the Supreme Court has never developed any comprehensive theory of what that constitutional guarantee means and how it should be applied in concrete cases".[901] A more recent observation also helps to illustrate the landscape of American free speech law:

> "First amendment law now is, if nothing else, a complex set of compromises. (...) The Court periodically formulates exquisitely precise rules; it settles at other times for the most generally phrased standards; often it opts for hazy formulations and relies on the lower courts to fill in the details; sometimes the Court stays its hand and says nothing. The result is a body of law complicated enough to inspire comparisons with the Internal Revenue Code".[902]

Not only, then, is the setting for the investigation into the discourse of balancing in American free speech law significantly more complex than that encountered in the previous Chapters on Germany, the object of that investigation – the role of balancing language – is arguably more elusive as well. In Germany, the FCC in *Lüth* and many subsequent cases set out 'balancing' as an overarching principle of constitutional interpretation and application. In the U.S., by contrast, there is no comparable seminal foundatonal 'balancing' decision. In addition, the significance of balancing, to the extent that it did figure in Supreme Court cases, in the American context has always been much more severely contested. While it is generally understood that balancing as "an overarching principle of constitutional construction has never been Supreme Court doctrine",[903] little common ground has ever existed as to what precisely balancing discourse in constitutional rights adjudication did - and does - mean. Some contemporary commentators saw a wide role for balancing in Supreme Court case law. Emerson, for example, whose comments on the lack of coherence in the Court's approach were cited above, also wrote that "[i]nsofar as the Supreme Court *has* developed any general theory of the first amendment it is the *ad hoc* balancing formula".[904] And in his '*Democracy and Distrust*', John Hart Ely argued that in the 1950s and into the 1960s "the Court followed [an] approach of ... essentially balancing in *all* First Amendment cases".[905] For other contemporary commentators, however, it remained 'obscure' whether a Supreme Court majority regarded "'balancing' as applicable to all first amendment cases, and if not, to what class of cases it applies".[906]

This contested and potentially fragmented setting has several consequences for the investigation undertaken here. For one, it serves once more to underline the importance of a focus on *discourse* – the focus here will be precisely on *the debates* over balancing's status and role. The striking element of contemporaneousness between Germany and the U.S. *is not*, therefore, the fact that during the same period, the late 1950s - early 1960s, balancing came to be '*used*' as a method of adjudicating free speech claims, but the fact that during this period balancing became the focal point for the most significant and most vehement *debates* over constitutional adjudication in the area of

898 HARRY KALVEN, JR., A WORTHY TRADITION 3 (1988), 3 (emphasis added). Note: Kalven's book was written much earlier, in the early 1970s, but was only published posthumously. Kalven, therefore, was very much a contemporary contributor to the debates set out in this Chapter.
899 See *supra*, s. 4.1.2.3.
900 *Cf.* Kent Greenawalt, *Free Speech in the United States and Canada*, 55 LAW & CONTEMP. PROBS. 5, 9 (1992) ("Attempting to summarize American doctrines for reviewing speech regulation is difficult because the law is complex and shifts subtly as new cases are decided".).
901 THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 15 (1970). See also Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).
902 STEVEN SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY AND ROMANCE 2-3 (1990).
903 Louis Henkin, *Infallibility under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022, 1024 (1978).
904 EMERSON (1970), 717.
905 JOHN H. ELY, DEMOCRACY AND DISTRUST 114 (1980) (emphasis in original).
906 Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1424 (1962). See also Laurent B. Frantz, *Is the First Amendment Law? A Reply to Professor Mendelson*, 51 CAL. L. REV. 729, 730 (1963) ("The Court has thus far not committed itself to the theory that balancing applies to all free speech cases."); Harry Kalven, Jr., *Upon Rereading Mr. Justice Black on the First Amendment*, 14 UCLA L. REV. 428, 444 (1967) ("The balancing issue [was] operative within the Court only in a limited number of cases").

freedom of expression. Secondly, given the emphasis within this thesis's comparative method on alternative and competing forms of argument – see Chapter 2 -, this Chapter and the next will have to pay particular attention to how the various relevant actors saw the relationship between balancing and its argumentative surroundings of alternative doctrines, methods and theories.

6.2.2 Engaging with a 'balancing war'

Approaching the twin themes of balancing discourse and 1950s - 1960s American free speech jurisprudence, one is faced with a debate that has assumed canonical status within American constitutional thought. In the eyes of many contemporary observers, explicit disagreement between the Justices over the meaning and merits of 'balancing' became one of *the* key features of Supreme Court first amendment opinions of the 1950s and early 1960s and one of the central battlegrounds of constitutional adjudication more generally. Within a fragmented free speech landscape, "[t]he one thing which appears to emerge with reasonable clarity", Laurent Frantz wrote in 1962, "is that *'balancing' has become the central first amendment issue*".[907] Between on the hand Justices Frankfurter and Harlan – first and foremost -, and on the other Justices Black and Douglas, raged a veritable 'balancing war',[908] that was fought out in a series of majority, concurring and dissenting opinions of the 1950s and early 1960s.

The position of this controversy between so-called 'balancers' and their opponents, the so-called 'absolutists', within the genealogy of balancing discourse in American constitutional law has two important features. First, a number of contemporary participants voiced concerns that this 'balancing/absolutism debate', notwithstanding its high profile, failed to capture the essential problematics of constitutional rights jurisprudence. The debate, for many, was a "verbal shell" that should "collapse for want of inner substance"; an "unfortunate' dispute ... shrouded in semantic confusion".[909] There was, therefore, *a debate on the debate* over balancing. Secondly, later commentators have often viewed the debate as a discrete historical incident; a dispute that had, by the time of their writing, already passed.[910] For many of these writers, this was a positive development. In the late 1970s already, scholars were loath "to reopen the controversy that agitated the Supreme Court a generation ago",[911] and in the 1980s some writers were glad that the 'naive' disputes over the merits of 'balancing' and 'absolutism' of the 1950s and 1960s were over.[912] Others, on the other hand, wondered why the disputes that were 'fashionable' in this earlier period had gone away, and actively promoted "a re-opening of the balancing debate".[913] For commentators of both schools, however, the 'balancing/absolutes' debate has to be located in a very specific historical context.

The following investigation will have to take both these features of the canonical 'balancing/absolutes' debate into account. On the one hand, elaborating balancing's local meaning in 1950s and 1960s American constitutional jurisprudence, will require engaging with the 'balancing/absolutism' debate as it played out, its semantic and conceptual confusion included. This means adopting a focus on the leading 'balancing opinions' as they were identified at the time and on the debates surrounding these opinions. The mutual misunderstandings and polemics referred to simply formed part of what balancing meant to participants at that time. This study is not primarily interested in the abstract analytical question of whether the lens of a 'balancing *vs.* absolutism' debate - or any other specific debate - is a useful way of looking at constitutional rights law. It is, however, interested in finding out what it was in the discourse of balancing and its antinomies that made it the focal point of vehement disagreement between highly respected Justices and commentators. At the same time, however, in trying to uncover the ways in which this era's balancing discourse, in a broader sense, may still be relevant today, it may become necessary to step beyond the boundaries of what contemporary participants would themselves have understood to be *the* 'balancing' debate.[914]

6.2.3 Legacies of pre-1950s First Amendment doctrines

One of the main arguments of this Chapter will be that the rise of balancing discourse in mid-Century American constitutional law has to be understood primarily in the context of a pragmatic search for solutions to new problems through the adoption of existing, older, doctrinal structures. Originally introduced as part of the re-interpretation and adaptation of old 'tests' and doctrines, the language of balancing quickly took on a life of its own.

An examination of these developments requires a short introduction to the main lines in pre-World War Two American free speech case law. In very broad terms, two

[907] Frantz, *The First Amendment in the Balance* (1962), 1432 (emphasis added). See also Kalven, *Upon Rereading Mr. Justice Black* (1967), 441 ("There has in the past decade been much discussion of whether a balancing test is the appropriate measure of first amendment protections").
[908] *Cf. Ibid.*, 444. For a broader account of disagreements between these justices (although with little attention to the issue of balancing in first amendment cases), see WALLACE MENDELSON, JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT (1961).
[909] *Cf.* Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 81 (1960); Kalven, *Upon Rereading Mr. Justice Black* (1967), 441-442.
[910] See, *e.g.*, Mark V. Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502, 1503 (1985) (describing "the central debate that occupied constitutional theory a generation ago, the debate over whether constitutional decisions should rest on a process of balancing or should instead express certain absolute judgments" and writing that "the debate ended").
[911] Henkin, *Infallibility under Law* (1978), 1023. See also at 1043 ("the well known but commonly misconceived controversy about balancing under the first amendment").
[912] Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 266fn5 (1981).
[913] T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 944 (1987) ("Disputes over the wisdom and utility of constitutional balancing were fashionable in the 1950s and 1960s. (...) I hope to raise enough questions about the form and implications of balancing to force a re-opening of the balancing debate").
[914] See on this dimension further Chapter 7, where the 1950s-1960s oppositions over balancing are placed in broader historical context.

exists with a constitutional order that claims to be total. Ideas of judicial deference co-exist with the desire for intensive scrutiny; etc. And even though these are all quite different projects, the language of '*Abwägung*', of '*Wechselwirkung*', of 'dialectical understanding', or of '*Ausgleich*' and similar terms, in each case, is central to these efforts at synthesis or accommodation.

(3) It is this notion of synthesis, finally, that leads to a third observation. While the ideas of overcoming antinomies, synthesis, or accommodation capture much of what is significant in the German discourse of balancing, it would be less accurate to understand German balancing in terms of pragmatic compromise. For one, German judicial decisions and academic commentary regard this synthesizing project as very much a *juristic* project, to be undertaken according to strict standards of juristic discipline. The shadow of classical legal doctrine and orthodox rules of interpretation is always present. Secondly, what is striking too, from an outsider's perspective, is the extent to which achieving accommodation between ostensibly conflicting values and perspectives often appears in German legal thought as something that can and must be willed. The FCC *wills* there to be no conflict between individualized interest balancing and abstract weighing of values, or between deferential review and intense conformity with constitutional norms. The Basic Law itself, in the anthromorphism that so clearly characterizes German constitutional law case law and literature of this period, *wills* there to be no conflict between more social and more individual dimensions of social life, or between the State and the individual.

A theme to which Chapter 8 returns is the fact that this 'willing' often seems to require some suspension of disbelief by outside observers – and perhaps by German participants themselves. Or, put conversely; the fact that some degree of pervasive 'faith' in legal doctrine, and in legal thought more broadly, seems to be at work. Without that understanding it becomes very difficult to account for the phenomenal success of the Basic Law and its interpretation by the FCC, including notably the success of its balancing discourse. Peter Lerche, in his influential 1961 book on proportionality, spoke of the "*unbewiesene Vorstellung*" – the unproven conception - of the constitutional value system, as a force sustaining the operation of "*konkurrenzlösende Normen*" – competition-overcoming norms – in German constitutional law.[895] That image fits the discourse of balancing wonderfully. The discourse of balancing is arguably the most prominent manifestation of a tradition of synthesis in German legal thought – whether in tying together potentially conflicting rights, bridging potentially conflicting understandings of the constitutional order as a whole, or overcoming potential clashes between that order and social life. And this discourse is able to fulfil this synthesizing function because of some form of faith in its '*unbewiesene*' – unproven, but willed – capacity to fulfil that function.

The remainder of this thesis builds on these observations. Chapters 6 and 7 aim to show that the meaning of the discourse of balancing in mid-Century U.S. constitutional legal thought was diametrically different from what has been seen for

[895] LERCHE (1961), 125-126.

formula, by its terms, asks courts to make a prediction; their task is empirical rather than value-based. Finally, it is important to note Holmes' emphasis on the idea that constitutional protection for expression should be a question of degree, to be answered for individual cases on the basis of their specific circumstances. This is in keeping with Holmes' broader philosophical view that "the whole law depends on *questions of degree* as soon as it is civilized".[920] Holmes' Opinion has come to occupy a privileged position in the American free speech tradition. Although in *Schenck* itself the test was used to uphold the convictions of anti-War demonstrators, the clear-and-present-danger formula quickly became very popular with libertarians as a doctrine thought to be highly protective of free speech, especially after Justice Holmes in his dissent in *Abrams v. United States* argued that only a "present danger of an immediate evil" could warrant a limitation upon the freedom of expression.[921]

6.2.3.2 'Time, place and manner' restrictions – Balancing?

When the direct aftermath of World War One had passed, the focus of the freedom of expression cases to come before the Supreme Court shifted, from issues of 'subversive' speech - criticism of the U.S.' involvement in the War in *Schenck*, *Abrams* and *Debs* – to other types of free speech claims. In the late 1930s and early 1940s, the Supreme Court decided a number of cases in which claimants asserted that general, non-speech related municipal or State laws limited their rights of free expression or association. Such laws typically prohibited the distribution of flyers,[922] the use of sound-systems in public spaces,[923] or the staging of demonstrations or marches,[924] and were most often challenged by religious groups - mainly Jehova's witnesses - and labour organizations.[925] In all these cases, local or State governments claimed that any limitations on first amendment rights that occurred were only *indirect* results from general, non-discriminatory measures aimed at safeguarding non-speech related public interests.

The Supreme Court never developed a unified, fully coherent approach to this new type of First Amendment claims[926], many of which were labelled as concerning indirect 'time, place and manner' restrictions on speech.[927] The main problem the Court was faced with was that on the one hand the 'danger' test clearly did not fit well with the factual situations presented, but that on the other hand a need was felt to provide more stringent control over these speech impeding measures than was possible under the

[920] Oliver W. Holmes in 1914, cited in Louis Henkin, *Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 63 (1968) (emphasis added).
[921] USSC *Abrams v. United States*, 250 U.S. 616, 628 (1919).
[922] USSC *Schneider v. State*, 308 U.S. 147 (1939); USSC *Jones v. Opelika*, 316 U.S. 584 (1942).
[923] USSC *Cantwell v. Connecticut*, 310 U.S. 296 (1940); USSC *Kovacs v. Cooper*, 336 U.S. 77 (1949).
[924] USSC *Cox v. New Hampshire*, 312 U.S. 569 (1941).
[925] The leading case was USSC *Thornhill v. Alabama*, 310 U.S. 88 (1940).
[926] Note: the problems themselves were not entirely new, but older cases had not been presented on - or decided on - free speech grounds.
[927] For this phrase, see *Jones v. Opelika*, 316 U.S. 584, 605; *Cantwell v. Connecticut*, 310 U.S. 296, 304 (States can "by general and non-discriminatory legislation, regulate the times, the places, and the manner of soliciting upon its streets and holding meetings thereon").

general 'rational basis' test with its 'presumption of constitutionality', that it had come to use for all kinds of governmental interferences with individual freedom of action post-*Lochner*.[928]

While in many of these cases the language of 'clear and present danger' was still referred to,[929] the Court in fact often adopted some version of a 'means/ends relation' test or 'least restrictive alternative' test to assess the constitutionality of these general regulatory statutes. Interestingly from the perspective of this thesis, in the elaboration of these tests, the Justices sometimes resorted to balancing language. So, for example: In the leading 'handbill' decision of *Schneider v. State* (1939), Justice Roberts in his Opinion for the Court characterized the case as pitting a 'duty' of municipal authorities to keep their streets open – which meant they could "lawfully regulate the conduct of those using the streets" - against a 'personal fundamental right' of freedom of expression.[930] In every case of this kind, where a legislative abridgment of the right of freedom of speech was asserted, Roberts wrote:

> "the courts should be astute to examine the effects of the challenged legislation. ... [T]he delicate and difficult task falls upon the courts *to weigh the circumstances* and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights".[931]

Justice Roberts' description of the Court's task as one of 'weighing the circumstances' and of comparing effects of and reasons for legislative encroachments on the freedom of expression was cited in a number of subsequent handbill[932] and picketing cases. [933] This approach, in the eyes of contemporary commentators, embodied a principled distinction between deferential 'rational basis' review and more stringent, last-resort 'danger' review.[934] As will be seen below, the use of the imagery of 'weighing' in some of these Opinions allowed later judges and commentators to view cases like Schneider as the 'earliest balancing cases'.[935]

[928] See, *e.g.*, *Schneider v. State*, 308 U.S. 147, 161 ("Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but [will] be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions". See for discussion *Notes and Comments*, 1940 WIS. L. REV. 265, 280-281 (1940). Note: This period, following the rejection of the *Lochner* line of cases, in the late 1930s, was marked by efforts to construe a 'bifurcated' system of constitutional review whereby cases involving economic liberties would only be reviewed deferentially while civil liberties would remain robustly protected. See, *e.g.*, G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth Century America*, 95 MICH. L. REV. 299, 301, 331 (1996).

[929] See, *e.g.*, USSC *Thornhill v. Alabama*, 310 U.S. 88, 105 (1940), ("no clear and present danger of destruction of life or property ... can be thought to be inherent in the activities of [peaceful picketers]"); *Jones v. Opelika*, 316 U.S. 584, 613 ("no suggestion ... that the literature distributed ... created any 'clear and present danger' to organized society").

[930] USSC *Schneider v. State*, 308 U.S. 147, 160-161.

[931] *Ibid.*, at 161 (emphasis added).

[932] In *Jones v. Opelika*, a 'handbill' case decided in 1942, the Supreme Court first spoke of a necessary "adjustment of interests" in a free speech case (316 U.S. 584, 595).

[933] In *Thornhill v. Alabama* (1940), one reason for the Court to strike down a restrictive anti-picketing law was that this legislation did not evince sufficient care "in balancing [the interests of business] against the interest of the community and that of the individual in freedom of discussion on matters of public concern" (310 U.S. 88, 96).

[934] *E.g.* Louis Nizer, *Right of Privacy - A Half Century's Developments*, 39 MICH. L. REV. 526, 588 (1941).

6.2.3.3 Doctrinal legacies: Summary

At the beginning of the 1950s, this was, sketched in very broad terms, what American freedom of expression doctrine looked like. The *rhetoric* of 'clear and present danger', stemming from the World War One cases, was dominant in all areas of freedom of expression law, but the precise meaning and scope of application of 'clear and present danger' *as a test* were unclear. In cases involving 'time, place and manner' restrictions, such as *Schneider* and *Cantwell*, the Court had struck down local and State regulations on the basis that they were too intrusive upon the freedom of speech. These cases seemed to strike a middle note between a stringent requirement that State regulation of speech be only ever a measure of last resort to ward off a clear danger, and a minimal 'rational basis' test applicable to governmental interferences with private rights more generally.[936]

[935] *Cf.* Laurent B. Frantz, *The First Amendment in the Balance* (1962), 1425 (1962); White, *The First Amendment Comes of Age* (1996), 333; Iddo Porat, *The Dual Model of Balancing: A Model for the Proper Scope of Balancing in Constitutional Law*, 27 CARDOZO L. REV. 1393, 1431ff (2006).

[936] These doctrinal legacies will be revisited in Chapter 7, as part of an exposition of the 'definitional tradition' in American constitutional legal thought. See *infra*, s. 7.3.

6.3 THE 'BALANCING OPINIONS' AT THE SUPREME COURT

6.3.1 Introduction

It was in this doctrinal setting that, from the beginning of the 1950s onwards, the Supreme Court was asked to decide a rapidly growing number of cases arising out of a new political setting: that of the Cold War. Governmental efforts to repress communism in the United States took an astonishingly wide range of forms: from blunt, direct repression of propaganda through the criminal law, to 'loyalty oaths', special requirements for 'professional qualifications' and, of course, the infamous Congressional investigations of the Un-American Activities Committee. It was mainly in the course of decisions in these cases, that clashes over the discourse of balancing in constitutional adjudication came to a head.

This Paragraph sets out the main 'balancing opinions' in these cases; those that have come to occupy central roles in subsequent judicial and academic discussions of balancing. The starting point for this overview has to be the case of *American Communications Association v. Douds* of 1950.[937] *Douds* was the first major post-War First Amendment case concerning Communism.[938] It was also a case in which Chief Justice Vinson wrote an Opinion for the Court containing balancing language, taken from the *Schneider* line of cases, that was seized upon in many of the later cases.[939] Justice Black dissented in *Douds*, as he would in many later Communism cases, but his dissent did not yet touch upon the appropriateness of balancing as a method of constitutional adjudication. In *Dennis v. United States*, decided a year after *Douds*, balancing language surfaced again; again in an Opinion of the Court by Chief Justice Vinson; this time in the form of a restatement, reinterpretation or modification of the 'clear and present danger' test. *Dennis* is also significant for a concurrence by Justice Frankfurter that discusses the relationship between balancing and constitutional rights adjudication in very broad terms, and dissents by Justice Black and Douglas that begin to frame their disagreement with the majority in terms of balancing. The two cases in which the conflict over balancing received its fullest exposition were *Barenblatt* and *Konigsberg* - two 'compulsory disclosure' cases of 1959 and 1961, in which the appropriateness of balancing became the central issue for disagreement between majority and dissenters. Taken together, *Dennis*, *Douds*, *Barenblatt* and *Konigsberg* not only frame most of the balancing debate in first amendment law, but also conveniently cover the paradigmatic factual instances of the repression of communist expression and association in 1950s America: prosecution based on thoughts expressed (*Dennis*), and the three main forms of 'refusal to answer' problems.[940] This Section discusses the relevant Opinions in turn, with particular focus on the roles played by balancing language.

[937] USSC *American Communications Association v. Douds*, 339 U.S. 382 (1950).
[938] *E.g.* Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 718 (1963) (describing *Douds* as "the first major case arising out of the postwar fear of communism"). For a judicial confirmation, see Black J., dissenting opinion in USSC *Braden v. United States*, 365 U.S. 431 (1961), cited in Reich at 718 ("For at least 11 years, since the decision of this Court in [*Douds*], the forces of destruction have been hard at work"). See also, *e.g.*, Raymond L. Wise, *The Right to Dissent: A Judicial Commentary*, 4 SUFFOLK U. L. REV. 70, 76 (1969).
[939] *Cf.* Emerson, *Toward a General Theory* (1963), 912 ("The [balancing] test, first clearly enunciated by Chief Justice Vinson's opinion in the *Douds* case, has been employed by a majority of the Supreme Court in a number of subsequent decisions").

6.3.2 The early 'balancing opinions': *Douds* & *Dennis*

6.3.2.1 Douds (1950)

The case of *American Communications Association v. Douds* concerned a 'loyalty oath' requirement in the labour law context. Section 9(h) of the National Labor Relations Act (Amended) 1947 provided that the National Labor Relations Board (NLRB), a governmental organization, would not hear any petitions or complaints from workers' unions, if these unions had not filed with the NLRB affidavits stating that none of their board members was or had been a member of a communist political organization and that none of them advocated - or even believed in -the overthrow of the US government by force. The constitutionality of Section 9(h) was challenged in federal court by a number of workers' organizations.

Chief Justice Vinson's Opinion for the Court rested on the view that the loyalty oath requirement was primarily a regulation of *conduct* - so called 'political strikes' -, that Congress had determined, as a matter of fact, was carried out by labour leaders with Communist affiliations, in order to protect interstate commerce. The central question raised by the case, for the Chief Justice, was to what extent any *indirect* limitations on first amendment rights resulting from this regulation of conduct, which was otherwise reasonable and rational, could render Section 9(h) unconstitutional. This way of framing the free speech issue in the case formed the backdrop to an intricate argument rejecting the Unions' contention that their claims were supported by the 'clear and present danger' test.[941] Seizing upon a disagreement between two of the claimant Unions as to what exactly should be counted as the relevant 'danger' for the purposes of the doctrine, Chief Justice Vinson first took aim at the nature of the test itself, warning against attempts to "apply the term 'clear and present danger' as a mechanical test in every case touching First Amendment freedoms", or as a "mathematical formula".[942] "[I]t was never the intention of this Court to lay down an absolutist test measured in terms of danger to the Nation", he wrote.[943] This 'clear and present danger' 'test' of diminished stature could not, in Vinson's view, claim any direct force of application. Not only was the limitation on speech rights merely an indirect result of a general governmental regulation aimed at conduct, as discussed above, also, the Chief Justice wrote, applying "a rigid test requiring

[940] *Cf.* for this typology KALVEN (1988), 549.
[941] 339 U.S. 382, 393.
[942] *Ibid.*, 394.
[943] *Ibid.*, 397.

a showing of imminent danger to the security to the Nation (…) when the effect of a statute … upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial" would be "an absurdity".[944] On these two grounds - the 'indirect' and 'minimal' nature of the limitation on free speech rights -, the case had to be seen as in fact more closely related to the *Schneider* line of cases, on flyers and sound-trucks.[945] And for such cases, Vinson distilled the following general approach from the case law:

> "When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the court is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented".[946]

"In essence", the court's approach had to be one of "weighing the probable effects of the statute upon the free exercise of the right of speech … against the congressional determination that political strikes are evils of conduct which cause substantial harm".[947] The justices, therefore, had to "undertake the delicate and difficult task … to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights".[948] This weighing in the *Douds* case led to a rejection of the claim of the unions.[949]

6.3.2.2 Dennis (1951)

Petitioners in *Dennis* were convicted under the Smith Act, a 1940 'sedition' statute, for conspiring to organize advocacy of the overthrow of the U.S. government by force.[950] Chief Justice Vinson wrote an Opinion for a plurality of four, Justices Frankfurter and Jackson filed concurring opinions, Justices Black and Douglas dissented. For Vinson the criminal convictions of Eugene Dennis and his fellow defendants, as *direct* restrictions upon speech, fell "squarely" within the ambit of the 'clear and present

[944] *Ibid.*, 397.
[945] The Opinion cites cases involving sound-trucks (*Kovacs v. Cooper*), parades (*Cox v. New Hampshire*) and flyers, or 'handbills' (*Schneider v. State*), among others.
[946] 339 U.S. 382, 399-400.
[947] *Ibid.*, 400.
[948] *Ibid.* (quoting from *Schneider*).
[949] There were two dissents. Justice Jackson, concurring and dissenting in part, used balancing language to frame the Court's position in very general terms ("The task of this Court to maintain a balance between liberty and authority is never done, because new conditions today upset the equilibriums of yesterday", 339 U.S. 382, 444-445), but rested his decision on a categorical exception for the Communist Party, which he thought was different from all other political movements (*Ibid.*). Justice Black rested his dissent on the argument that the majority decision in fact permitted punishment of beliefs, and not simply conduct. Justice Black's writing foreshadows his later anti-balancing dissents in its commitment to an 'absolute' freedom ("Freedom to think is absolute of its own nature"), its categorical distinction between speech and conduct, and a weariness of judicial flexibility (criticizing "the assumption that individual mental freedom can be constitutionally abridged whenever a majority of this Court finds a satisfactory legislative reason", *ibid.*, 445, 450).
[950] USSC *Dennis v. United States*, 341 U.S. 494 (1951).

danger test', which meant that the Court had to revisit "what that phrase imports".[951] In Vinson's reading, the 'Holmes-Brandeis' rationale behind the test was that while "mere 'reasonableness'" would not be sufficient to sustain direct limitations on speech rights, free speech was not, on the other hand, itself "an absolute". "[N]either Justice Holmes nor Justice Brandeis ever envisioned that a shorthand phrase should be crystallized into a rigid rule to be applied inflexibly without regard to the circumstances of each case. (…)".[952] "To those who would paralyze our Government in the face of impending threat by encasing it in a semantic straitjacket", Vinson wrote, "we must reply that all concepts are relative". "Nothing is more certain in modern society than the principle that *there are no absolutes*, that a name, a phrase, a standard has meaning only when associated with considerations which gave birth to the nomenclature.[953]

With this Realist gloss in place, Vinson went on to revisit, through a 'balancing' lens, two key elements of the court's 'clear and present danger' tradition. First, he noted that many of the cases in which convictions had been reversed using 'clear and present danger' "or similar tests", had been instances where "the interest which the State was attempting to protect was itself too insubstantial to warrant restriction of speech".[954] Such an approach, however, could not be taken in *Dennis*, as the governmental interest at issue - national security - had to be considered sufficiently weighty, at least in the abstract. Vinson therefore proceeded to engage with the heart of the 'clear and present danger' formula; the required likelihood and level of immediacy of the relevant 'danger'. "The situation with which Justices Holmes and Brandeis were concerned", he wrote, had been one of relatively isolated speakers who did not pose any substantial threat to the community. They had never been confronted with an organization like the Communist Party; "an apparatus … dedicated to the overthrow of the Government, in the context of world crisis after crisis".[955] This new context required a recalibration of the 'clear and present danger test:

> "Chief Judge Learned Hand, writing for the majority [in the court] below, interpreted the phrase as follows: 'In each case, [courts] must ask whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger'. We adopt this statement of the rule. As articulated by Chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those factors which we deem relevant, and relates their significances. More we cannot expect from words".[956]

[951] *Ibid.*, 508.
[952] *Ibid.*, 508.
[953] *Ibid.*, 508 (emphasis added).
[954] Chief Justice Vinson's Opinion is ambiguous as to whether these cases had actually been decided on the basis of 'clear and present danger' ("We … note that many of the cases in which the Court has reversed convictions *by use of this or similar tests* …", emphasis added). Note that Vinson's formulation here reinterprets the Court's older case law on indirect limitations in balancing terms, as discussed *infra*, s. 7.2.1.
[955] 341 U.S. 494, 510.
[956] *Ibid.*, 510.

Vinson held that on this standard, the court below had been entitled to convict the petitioners.

Noting that few questions of similar importance had come before the Court in recent years, Justice Frankfurter wrote a lengthy concurring opinion, in which he sought to recast the Courts' role in all of first amendment law along two main axes: *balancing* and *deference* to congressional authority. Frankfurter framed the issue in the case in terms of "a conflict of interests" between the appellants' right to advocate their political theory so long as their advocacy did not immediately threaten the organization of a free society, and the Government's right to safeguard the security of the Nation by measures such as the Smith Act. Frankfurter maintained that this conflict could not be resolved "by a dogmatic preference for one or the other, nor by a sonorous formula" - 'clear and present danger' - "which is, in fact, only a euphemistic disguise for an unresolved conflict".[957] He framed his own preferred approach in the following terms:

> "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. But how are the competing interests to be assessed? Since they are not subject to quantitative assessment, the issue necessarily resolves itself into asking, who is to make the adjustment? - who is to balance the relevant factors and interests and ascertain which interest is in the circumstances to prevail? Full responsibility for the choice cannot be given to the courts. Courts are not representative bodies. (…) Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress".[958]

Frankfurter formulated his general approach on the basis of an overview of the different 'types' of cases in which the Court had been faced with 'conflicts between speech and competing interests'. This overview led to two basic propositions. First: free speech cases were not an exception to the principle that the Justices are *not legislators*, and second: *results* reached in earlier decisions were "on the whole those that would ensue from careful weighing of conflicting interests".[959] Given these two propositions, Frankfurter defined the Court's role in first amendment cases as one of deferentially reviewing the way in which the legislature had struck a balance between 'the interest in security' and 'the interest in free speech'. On such a deferential review, he upheld the convictions, even while expressing doubt about the practical wisdom of jailing communists for speech offences.[960]

Justice Black wrote a dissenting Opinion that, as his Opinion in *Douds*, foreshadowed many of the themes he would elaborate during the height of the balancing

[957] *Ibid.*, 519.
[958] *Ibid.*, 524-525 (Frankfurter J., concurring) (emphasis added).
[959] *Ibid.*, 539, 542 (Frankfurter J., concurring).
[960] *Ibid.*, 544ff. But see at 550: "It is not for us to decide how we would adjust the clash of interests which this case presents".

debates with Justices Harlan and Frankfurter. Having noted that petitioners in this case had been convicted, not for attempting to overthrow the government, nor for advocating any such attempt, but merely for agreeing to assemble and to "talk and publish certain ideas at a later date", Black concluded that the authorities had applied a "virulent form of prior censorship of speech and press", clearly forbidden by the First Amendment.[961] As a second line of argument, Black held that the 'clear and present danger' test was the appropriate inquiry for dealing with cases of advocacy. The Majority, in Black's view, had repudiated this classic test in a way that, illegitimately, permitted "laws suppressing freedom of speech and press on the basis of Congress' or our own notions of mere 'reasonableness'". "Such a doctrine", Black concluded, "waters down the First Amendment so that it amounts to *little more than an admonition* to Congress".[962]

6.3.3 The later 'balancing opinions': *Barenblatt* & *Konigsberg*

In the Opinions cited in the previous Section, the seeds were sown for the full eruption of the 'balancing war' between Justice Black and Justice Harlan in the cases of *Barenblatt* and *Konigsberg*. This Section deals with these decisions in turn.

6.3.3.1 Barenblatt (1959)

In the course of the 1950s, the investigations into communist associations and activities by the House Un-American Activities Committee of Senator McCarthy were frequently subjected to challenge in the courts. After having dealt with a number of cases on primarily procedural grounds, in 1959, in the case of *Barenblatt v. United States*, the Supreme Court for the first time based its decision on the constitutionality of these investigations squarely on First Amendment grounds.[963] The case gave rise to both an authoritative treatment of the speech rights issues involved in legislative investigations, and a "key engagement" in the balancing debate.[964]

The case concerned a young university lecturer, Lloyd Barenblatt, who had refused to answer questions from the House Committee on whether he was or had ever been a member of the Communist Party, in particular whilst teaching at the University of Michigan a number of years earlier. Justice Harlan wrote a concise opinion of the Court for a majority of five. He began by noting that unlike the absolute protection against self-incrimination under the Fifth Amendment, the First Amendment did not afford a witness the right to resist inquiry 'in all circumstances'. His proposed method followed directly from this comparison: "[w]here first Amendment rights are asserted to bar governmental interrogation, resolution of the issue *always involves a balancing by the courts of*

[961] *Ibid.*, 579-580.
[962] *Ibid.*, 580 (emphasis added).
[963] USSC 360 U.S. 109 (1959).
[964] KALVEN (1988), 498, 500, 504.

the competing private and public interests at stake in the particular circumstances shown".[965] "The critical element", in Harlan's model of inquiry, was "the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness".[966] As the constitutional legislative power of Congress in this situation was 'beyond question' and there were no other factors "which might sometimes lead to the conclusion that the individual interests at stake were not subordinate to those of the state", the majority concluded "that the balance between the individual and the governmental interests here at stake must be struck in favor of the latter", and that, therefore, the provisions of the First Amendment had not been offended.[967]

For Justice Black, the majority opinion accepted "a balancing test to decide if First Amendment rights shall be protected". He voiced strong objections against both balancing in First Amendment cases generally, and, in case balancing had to be accepted, against the way the majority had carried out its balancing in the instant case. First, a balancing approach to the First Amendment, in Black's view, offended the clear language of the Amendment, violated the spirit of a *written* Constitution and went against the notion that "the Bill of Rights *means what it says* and that [the] Court must enforce that meaning".[968] Justice Black framed his position on balancing in unequivocal terms: "I do not agree that laws directly abridging First Amendment freedoms can be justified by a congressional or judicial balancing process".[969] There had been "cases suggesting that a law which primarily regulates conduct but which might also indirectly affect speech can be upheld if the effect on speech is minor in relation to the need for control of the conduct". With the decisions in these 'time, place and manner' cases, like *Schneider* and *Cantwell,* Justice Black agreed. But, he wrote, the Court had not, in *Schneider* or in *Cantwell*, suggested "even remotely … that a law directly aimed at curtailing speech and political persuasion could be saved through a balancing process".[970] Secondly, even assuming what he could not assume, that "some balancing" was proper in the case, Black felt that the Court had ignored its own test. At most, the majority had balanced "the right of the Government to preserve itself" against "Barenblatt's right to refrain from revealing Communist affiliations". In framing its enquiry in this way, the majority had completely ignored the more abstract "interests of society" in the protection of the freedom to remain silent in front of the congressional committee.[971] This form of inquiry, in Black's view, reduced balancing to "a mere play on words" and was completely inconsistent with the rule the Court had previously - in *Schneider* - given for applying a 'balancing test'; that "the courts should be *astute* to examine the effects of the challenged legislation".[972]

[965] 360 U.S. 109, 126 (citing *Douds*) (emphasis added).
[966] *Ibid.*, 126-127.
[967] *Ibid.*, 134.
[968] *Ibid.*, 138-144 (Black J., dissenting) (emphasis added).
[969] *Ibid.*, 141 (Black J., dissenting).
[970] *Ibid.*, 142 (Black J., dissenting).
[971] *Ibid.*, 144 (Black J., dissenting).
[972] *Ibid.*, 145 (Black J., dissenting, citing *Schneider*). Black's emphasis on the word 'astute' does not appear in the original *Schneider* opinion.

6.3.3.2 Konigsberg (1961)

The case of *Konigsberg*,[973] another 'refusal to answer' case, constituted the second act of the balancing debate between Justices Harlan and Black.[974] Konigsberg had been denied admission to the California Bar because he had refused on constitutional grounds to answer the question of whether he was or had ever been a member of the Communist Party. As there was no constitutional authority to deny admission to the bar to members of the Communist party *per se*, this question was ostensibly asked merely to verify indirectly the accuracy of Konigsberg's explicit claims that he did not advocate violent overthrow of government.[975] Such advocacy, on the other hand, *would* constitute a constitutionally valid reason for exclusion.

"At the outset" Justice Harlan began the analysis section of his majority opinion, "we reject the view that freedom of speech and association, as protected by the [First Amendment], are 'absolutes', not only in the undoubted sense that, where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment".[976] The Court had always recognized ways in which the constitutional right to freedom of speech was "narrower than an unlimited license to talk". In particular, "general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise" had been upheld whenever they were "justified by subordinating valid governmental interests". This condition of constitutionality always "*necessarily* involved a weighing of the governmental interest involved".[977] As in this case the limitations on Konigsberg's speech rights had only been the *incidental* results of the exercise of a public power in order to verify the accuracy of his statements that he did not advocate the violent overthrow of government, his First Amendment claim fell within this category of 'general regulatory laws not intended to control the content of speech', which meant that a balancing enquiry would be both necessary and appropriate. The majority regarded "the State's interest in having lawyers who are devoted to the law in its broadest sense (…) as clearly sufficient to outweigh the minimal effect upon free association occasioned by compulsory disclosure" in the circumstances of the case.[978]

Justice Black, in his dissent, focused heavily on the majority's reliance on a 'balancing test':

> "The recognition that California has subjected 'speech and association to the deterrence of subsequent disclosure' is, under the First Amendment, sufficient in itself to render the

[973] USSC *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961).
[974] *Cf.* Frank R. Strong, *Fifty Years of Clear and Present Danger: From Schenck to Brandenburg - and Beyond*, 1969 SUP. CT. REV. 41, 54 (1969) (referring to *Konigsberg* as the site of a 'classic' confrontation between Justices Harlan and Black over balancing).
[975] *Cf.* 366 U.S. 36, fn1 ("[Konigsberg] affirmatively asserted, …, his disbelief in violent overthrow of government), and at 60 (Black J., dissenting) ("[the Bar Committee] could not constitutionally reject him if he did answer those questions and his answers happened to be affirmative").
[976] *Ibid.*, 49.
[977] *Ibid.*, 49-50 (citing *Schneider* and *Douds*) (emphasis added).
[978] *Ibid.*, 52.

> action of the State unconstitutional unless one subscribes to the doctrine that permits constitutionally protected rights to be *'balanced' away* whenever a majority of the Court thinks that a State might have interest sufficient to justify abridgment of those freedoms. As I have indicated many times before, I do not subscribe to that doctrine for I believe that the First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that *the men who drafted our Bill of Rights did all the 'balancing' that was to be done* in this field".[979]

Justice Black reiterated his view, also expressed in *Barenblatt*, that there were essential differences between the kind of 'balancing' that the court had undertaken in cases like *Schneider* "as a method for insuring the complete protection of First Amendment freedoms even against purely incidental or inadvertent consequences", and the balancing test now proposed for a governmental regulation "that is aimed at speech and depends for its application upon the content of speech".[980] Balancing in this latter type of case, for Black, turned the principle of 'Government of the people, by the people and for the people' into a 'government over the people'.[981] As in *Barenblatt*, Justice Black went on to argue that even if he would be able to accept the idea that 'balancing' would be proper in the case, he would not be able to support the decision. Under the majority's 'penurious balancing test', the interest of the government had been 'inflated out of all proportion', while the *societal* interest in free speech had again not been given its due weight.[982]

6.3.4 The balancing debate at the Supreme Court: Interim conclusion

With *Barenblatt* and *Konigsberg*, the judicial interchange on balancing in free speech cases had received its fullest exposure.[983] The Justices did return to the theme on a few more occasions. In a later major communism case, *Communist Party v. Subversive Activities Control Board* (1961),[984] Justice Black rehearsed his by now familiar objections, but in a noticeably more defeatist tone. Summing up his critique of a majority opinion by Justice Frankfurter that accorded a role to balancing,[985] he wrote "I see no possible way to

[979] *Ibid.*, 61. It may be interesting to point to the parallel with Weimar-era discussions of freedom of expression in Germany, where it was felt by some that the drafters of the Weimar Constitution had *omitted* to balance the relevant interests. See *supra*, s. 5.2.2 and 5.2.3. Both formulations are testament to the hold the language of balancing tends to exercise, even over its critics.
[980] *Ibid.*, 68-69 (Black J., dissenting).
[981] *Ibid.*, 68.
[982] *Ibid.*, 71-75.
[983] Other First Amendment cases from this period in which Supreme Court Justices explicitly balanced conflicting interests include: USSC *Wieman v. Updegraff*, 344 U.S. 183, 188 (1952); USSC *Sweezy v. New Hampshire*, 354 U.S. 234, 266-267 (1957) (Frankfurter J., concurring); USSC *Shelton v. Tucker*, 364 U.S. 479, 496 (1960) (Frankfurter J., dissenting). For a more extensive list, see Note, *Civil Disabilities and the First Amendment*, 78 YALE. L.J. 842, 842fn4 (1969). See also the list in Emerson, *Toward a General Theory* (1963), 912fn37.
[984] 367 U.S. 1 (1961).
[985] *Ibid.*, 91 ("To state that individual liberties may be affected is to establish the condition for, not to arrive at the conclusion of, constitutional decision. Against the impediments which particular governmental regulation causes to entire freedom of individual action, there must be weighed the value to the public of

escape the fateful consequences of a return to an era in which all governmental critics had to face the probability of being sent to jail except for this Court to abandon what I consider to be *the dangerous constitutional doctrine of 'balancing'* to which the Court is at present adhering".[986] Balancing language was also used in a number of cases involving not Communism, but civil rights activists who had been persecuted in the South - through very similar techniques, such as the compulsory disclosure of membership.[987] Finally, Chief Justice Warren, towards the end of his tenure, provided a coda to the balancing debate in his 1967 decision in *United States v. Robel*.[988] Holding unconstitutional on the ground of First Amendment 'overbreadth' a compulsory registration requirement for members of Communist organizations, the Chief Justice, in the final footnote of his opinion for the Court, seemed to offer a comprehensive rejection of balancing as a method under the First Amendment:

> "It has been suggested that this case should be decided by 'balancing' the governmental interest (…) against the First Amendment rights asserted by the appellee. This we decline to do. We recognize that both interests are substantial, but we deem it inappropriate for this Court to label one as being more important or more substantial than the other. Our inquiry is more circumscribed. (…) [W]e have confined our analysis to whether Congress has adopted a constitutional means in achieving its concededly legitimate legislative goal. In making this determination, we have found it necessary to measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the First Amendment. *But we have in no way 'balanced' those respective interests*".[989]

Justice Black did not dissent from this statement for a unanimous Court.

The end of this 'balancing war' between the Justices did not, however, mean an end to the discourse of balancing in constitutional rights cases. The Court itself over the following years frequently revisited and developed first amendment doctrine using the language of balancing. In 1968, for example, in the case of *United States v. O'Brien*, the Court constructed an explicit balancing test to deal with instances of so called 'symbolic conduct' - in O'Brien's case: the burning of his military draft card on the steps of the South Boston Court House in violation of a federal law prohibiting the destruction of such cards.[990] And in 1980, the Court developed an explicit 'four-part balancing test' to

the ends which the regulation may achieve", citing *Schenck* - one of the original 'clear and present danger' cases -, *Dennis* and *Douds*).
[986] *Ibid.*, 164 (Black J., dissenting) (emphasis added).
[987] *E.g.* USSC *NAACP v. Button*, 371 U.S. 415, 453 (1963) (Harlan J., concurring) (Where 'general regulatory statutes' are concerned, the 'problem' in each case is "to weigh the legitimate interest of the State against the effect of the regulation on individual rights").
[988] USSC 389 U.S. 258 (1967).
[989] *Ibid.*, fn20 (emphasis added).
[990] USSC 391 U.S. 367 (1968). In his Opinion for the Court, Chief Justice Warren wrote: "This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. (…) [W]e think it clear that a governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important

deal with First Amendment cases in which the relevant speech was of a 'commercial' nature.[991]

The conclusion of the Frankfurter/Harlan *v.* Black/Douglas debate also marked the start of a rise of academic interest in the topic of judicial balancing in the constitutional rights context that has continued to this day. From the early-mid 1960s onwards, a growing number of law review articles appeared that focussed principally, or even solely, on the theme of judicial balancing, in the free speech context,[992] or with regard to constitutional rights adjudication generally.[993] 'Balancing' became a popular framework for understanding free speech issues, and other problems of constitutional rights adjudication. For example: commentators wrote about free speech law as best understood through the prism of the interplay between 'balancing' and 'categorization',[994] or from the perspective of historical shifts along a continuum between ad hoc balancing and 'per se rules'.[995] Others developed comprehensive critiques of First Amendment law based on criticism of the '*ad hoc* balancing model'[996]

The following Section analyses this academic and judicial discourse with the aim of elaborating a local meaning of balancing in its American context. This project is continued through Chapter 7.

or substantial governmental interest; if the governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest".

[991] USSC *Central Hudson Gas & Electric v. Public Service Commission of New York*, 447 U.S. 557 (1980). *Cf.* at 564-566: "In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest". For discussion of *Central Hudson* as imposing a 'balancing test' see, *e.g.*, Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 82ff (1996). For a comparative assessment see Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L.J. 383, 384 (2007) (noting that *Central Hudson* "was not a trend-setting decision that gained much influence outside commercial speech problems", and that its development of a proportionality test was rather rudimentary).

[992] Laurent B. Frantz, *The First Amendment in the Balance* (1962); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245 (1961); Wallace Mendelson, *The First Amendment and the Judicial Process: A Reply to Mr. Frantz*, 17 VAND. L. REV. 479 (1964).

[993] Charles Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755 (1963); Martin Shapiro, *The Supreme Court and Constitutional Adjudication: Of Politics and Neutral Principles*, 31 GEO. WASH. L. REV. 587 (1963); Henkin, *Infallibility under Law* (1978).

[994] John H. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Schauer, *Categories and the First Amendment* (1981).

[995] Note, *Civil Disabilities and the First Amendment* (1969), 843-844, citing Fried, *Two Concepts of Interest* (1963).

[996] Emerson, *Toward a General Theory of the First Amendment* (1963); EMERSON (1970).

6.4 CONTEMPORARY CRITIQUES OF BALANCING IN U.S. FREE SPEECH JURISPRUDENCE OF THE 1950s AND 1960s

6.4.1 Introduction

This Section gives an overview of some of the main lines in contemporary critiques of balancing in American constitutional rights jurisprudence, in particular with regard to freedom of speech. The relevant debates are approached from three angles. A first Section looks at the 'nature and scope' of balancing. These terms refer to two questions. First, what did participants think balancing was, in terms of the various familiar categories of legal thought (doctrine, theory, method, *etc.*). This is the question of the appropriate 'level' for the analysis of balancing. Second, within each of these categories, what did participants think was the extent of the range of problems and issues to which balancing was relevant, or perhaps even determinative. A second Section discusses the implications balancing was thought to have for the interpretation of constitutional rights clauses, with particular reference to the First Amendment. This Section looks at the effects the 'use' of balancing was thought to have for the meaning of the First Amendment and for the intensity of protection it could offer. A third Section, finally, looks at the relationship between balancing and questions regarding the institutional position of the judiciary. All these questions, of course, can be read in terms of balancing's 'legitimizing force'. It matters a great deal for balancing's relative contribution to the project of legitimization whether it is, say, seen as an unconvincing *theory* underlying *all of the Supreme Court's rights case law*, or as a well-defined technical *doctrine* applicable to *one small subset of First Amendment problems*. It is these different dimensions that this Chapter aims to bring out.

The presentation of the various critiques of balancing can be structured in many different ways. What is noticeable in contemporary discussions is an almost total lack of effort to systematize these criticisms. The structure chosen here is designed primarily to bring out salient similarities and differences with debates in Germany of the same period, to be discussed below, in Chapter 8.[997]

[997] By way of illustration of how contemporary commentators *themselves* framed the key issues for their own debates on balancing, here are two organizing schemes taken from early 1960s literature, in quotations complete with their original numbering:

> Laurent Frantz, *The First Amendment in the Balance* (1962)
>
> (1) "There is a fundamental logical and legal objection to 'weighing' a governmental objective, …, against a constitutional statement that the government may not employ a certain means for the attainment of any of its objectives"
> (2) Balancing conflates assessment of the 'wisdom' of governmental action with assessment of the 'power' of the government to act
> (3) "It is difficult to see how the impartiality of … judgments can be assured - much less be made apparent - unless the Justices abandon ad hoc balancing and undertake to state a rule …"
> (4) "As treated by the balancing test, 'the freedom of speech' protected by the first amendment is not affirmatively definable. It is defined only by the weight of the interests arrayed against it"

6.4.2 The nature and scope of balancing

As in Chapter 4, which dealt with German balancing discourse, a first way to distinguish among contemporary interpretations and critiques of the Supreme Court balancing decisions is according to the position commentators took on the question of what balancing, in Supreme Court case law, *was*. This Section takes up this dimension of 'nature and scope' to investigate whether contemporary local actors saw balancing primarily as doctrine, as 'legal method', legal philosophy or any of the other myriad sub-forms of legal thought, and what these actors thought was the reach of balancing so conceived.

By way of *caveat*, and to offer a preliminary sketch of a significant distinction with the analysis of Germany in Chapter 4, it is important to emphasize once again the heavily fragmented nature of American constitutional rights adjudication and theory in the relevant period. Most Supreme Court decisions in the civil liberties field relied on doctrines and approaches developed for relatively small problem areas, such as those set out in the Section on doctrinal legacies, above.[998] And most academic writing focused on the development and critique of these 'localized' doctrinal tools. This means that the specific dimension of 'scope' – the perceived range of applicability of balancing, or the range of issues with respect to which balancing is thought to be relevant – will be much more important than it was in the case of Germany.[999]

This Section discusses four prominent kinds of manifestations of balancing discourse: (1) balancing as doctrine; (2) balancing as judicial technique; (3) balancing and theories of constitutional rights; (4) balancing and the nature of law and adjudication.

(5) "A balancing construction of the first amendment fails to give effective encouragement even to the amount of free speech which it theoretically recognizes"
(6) "The balancing test assures us little, if any, more freedom of speech than we should have had if the first amendment had never been adopted"
(7) "If a balancing test is applied to the first amendment, it is hard to see why it should not be applied to the entire Constitution"

Thomas Emerson, *Toward a General Theory of the First Amendment* (1963)

(1) "The ad hoc balancing test contains no hard core of doctrine to guide a court in reaching its decision"
(2) "If a court takes the test seriously, the factual determinations involved are enormously difficult and time-consuming, and quite unsuitable for the judicial process"
(3) "As applied to date, the test gives almost conclusive weight to the legislative judgment"
(4) "The test gives no real meaning to the first amendment"
(5) "the test is unworkable from the viewpoint of judicial administration"

[998] See *supra*, s. 6.2.3.
[999] The dimensions of 'scope' and 'nature' can be combined in multiple complex ways. So, for example, balancing could be discussed in terms of a philosophy (nature) of all of constitutional law (scope), or as a doctrine (nature) of a particular area of First Amendment law (scope).

6.4.2.1 Balancing as doctrine

The balancing debates between the Justices in opinions such as *Dennis*, *Konigsberg* and *Barenblatt* were mostly confined to discussions of balancing as a form of doctrine in the field of free speech. So, for example, Justice Harlan's endorsement of balancing in *Barenblatt*, as cited above, read "*where First Amendment rights are asserted* …, resolution of the issue always involves a balancing by the court of the competing private and public interests at stake …".[1000]

The scope of application of balancing as a doctrine within First Amendment law was subject to some uncertainty. Observers could note quite easily that balancing had "come to the fore largely *in a single type of case*": that in which compelled disclosure of connections to communist organizations was threatening the exercise of First Amendment freedoms.[1001] But this narrowly circumscribed type of factual situation clearly did not exhaust the range of balancing language used by the Justices; in particular the *Dennis* case did not fit this description. Defining in broader terms the kind of problems to which balancing as a doctrine would be applicable, therefore, was not easy. The Justices themselves made a number of attempts at the development of abstract demarcating criteria for the use of balancing. In *Douds*, Chief Justice Vinson explicitly limited his discussion of balancing to cases in which "particular conduct is regulated in the interest of public order".[1002] And in *Konigsberg*, Justice Harlan spoke of "general regulatory statutes, not intended to control the content of speech".[1003] Both these criteria were clearly inspired by an effort to link the 'loyalty oath' and 'compulsory disclosure' situations to the 'time, place, and manner' cases from before the War (the *Schneider* line of cases, in which early balancing language had appeared).[1004]

Further indices as to the scope of application of balancing as a doctrine came from its opponents. In *Barenblatt*, Justice Black wrote that he did not agree that "laws directly abridging First Amendment freedoms" could be justified by a balancing process.[1005] And in *Konigsberg*, he argued against applying a balancing test "to governmental action that is *aimed at speech* and depends for its application upon the *content of speech*".[1006]

[1000] 360 US. 109, 126-127 (1959).
[1001] Frantz, *The First Amendment in the Balance* (1962), 1429. This holds at least for *Barenblatt*, *Konigsberg* and the *Communist Party* cases. See also Harry Kalven, Jr., *The New York Times Case: A Note on the Central Meaning of the First Amendment*, 1964 SUP. CT. REV. 191, 216 (1964) ("Whatever the Court may have said, it has never used the balancing formula except in a limited type of speech case").
[1002] 339 U.S. 382, 399 (1950).
[1003] 366 U.S. 36, 50 (1961).
[1004] *Cf.* Frantz, *The First Amendment in the Balance* (1962), 1429 (suggesting that *Douds* 'reformulated' the *Schneider* principle). On the connection between the two types of cases, see also Henkin, *Infallibility under Law* (1978), 1045 ("Balancing as an aspect of constitutional doctrine entered first amendment doctrine only in subsidiary areas - as regards regulation of time, place, or manner, (…), and as regulations which had an indirect impact on freedom of speech").
[1005] 360 U.S. 109, 141.
[1006] 366 U.S. 36, 70 (1961).

Taken together, these statements from majority opinions and dissents suggest that balancing as doctrine should be limited to cases in which the governmental measure at issue was both (a) primarily directed at and (or?) had a primary effect on *conduct* rather than on speech, and (b) in which this measure was *neutral as to the content* of expression, in its aims and (or?) in its effects.[1007] As the ambiguity in this summary shows, however, these judicial statements clearly do not answer all questions as to the scope of balancing as doctrine. And even if the relevant criteria of 'indirectness' and 'content neutrality' were broadly agreed upon in the abstract, it seems that a major source of the clashes between Harlan and Black in *Barenblatt* and *Konigsberg* was the fact that Harlan and the majority saw the legislation at issue in these cases as imposing no more than 'indirect' burdens on free speech, and thus suitable for balancing, whereas Black viewed them in terms of 'direct', 'content based' restrictions of expression.[1008] In terms of *application*, therefore, the scope of balancing as doctrine was far from clear.

The statements discussed above, while partially conflicting, at least all reflect the view that balancing as a doctrine was (and should be) limited to particular kinds of First Amendment cases.[1009] There were also, however, suggestions within the balancing debates that, notwithstanding these stated limitations, the application of balancing as doctrine was in fact much broader, potentially even without limits. Thomas Emerson, for example, wrote in 1963: "[i]t is not entirely clear whether the test is meant to be one of general application to all first amendment issues, but it is fair to say that its supporters consider it the dominant theory".[1010] Claims for the broader applicability of balancing as doctrine attached particular weight to the *Dennis* and *Communist Party cases*. In the first, Chief Justice Vinson was seen to have modified the 'clear and present danger' test into an explicit balancing inquiry - the 'Hand/Vinson formula'. In the second, Justice Frankfurter's broad observation that in all civil liberties cases "against the impediments which particular governmental regulation causes to entire freedom of individual action, there must be weighed the value to the public of the ends which the regulation may achieve",[1011] was supported by a majority of five Justices.[1012] Some commentators

[1007] See, *e.g.*, Kalven, *Central Meaning of the First Amendment* (1964), 216 (drawing a distinction between "cases in which legal sanctions are imposed for the specific purpose of restricting speech" and cases "in which the control of speech is a by-product of government action that is otherwise permissible"). This broad test was often summarized as a distinction between 'direct' and 'indirect' regulation of speech. See, *e.g.*, Note, *Civil Disabilities and the First Amendment* (1969), 846. These demarcations contain elements of both a conduct/speech dichotomy and a content neutral/content based dichotomy.
[1008] Note, *Civil Disabilities and the First Amendment* (1969), 846fn16.
[1009] *Cf.* Kalven, *Central Meaning of the First Amendment* (1964), 216.
[1010] Emerson, *Toward a General Theory of the First Amendment* (1963), 912. See also Frantz, *The First Amendment in the Balance* (1962), 1430 ("the Court has not in fact, or at least not always, used 'balancing' as narrowly as Mr. Justice Harlan suggests"). Emerson himself, it should be noted, was highly critical of a 'balancing' approach to free speech. See also Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis* (1975), 1490 ("There was, of course, a time when balancing was sufficient to satisfy a majority of the Court as a general approach to the first amendment"); ELY (1980), 144 (writing that from the 1950s to 'well into the 1960s', the Court followed an approach of "considering context and essentially balancing in all first amendment cases"). John Hart Ely, too, was critical of balancing.
[1011] USSC *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 91 (1967).
[1012] This in contrast to his earlier pronouncements on balancing in concurring opinions.

interpreted this support as suggestive of acceptance of Frankfurter's view, expressed earlier in his *Dennis* concurrence, that the 'weighing of competing interests' should be the approach in all free speech cases.[1013]

Finally, especially from a comparative German-U.S. perspective, it is significant to note that Laurent Frantz's critique,[1014] that "[i]f a balancing test is applied to the first amendment, it is hard to see why it should not be applied to the entire Constitution",[1015] does not seem to have been a dominant theme, either for those advocating balancing, nor for those criticizing its use. Balancing, especially in the early days of the balancing debates, was very much a First Amendment theme.[1016]

6.4.2.2 Balancing as judicial technique or method

These suggestions as to the broader applicability of balancing as doctrine shaded into a second level of balancing discourse; that of balancing as a form of judicial technique or judicial method. On this view, balancing language denoted one particular form of adjudicating, a process of judging, that judges could choose to use or not to use in different areas of law. Balancing as First Amendment doctrine, from this perspective, was merely one of the most famous instances of the use of balancing as a judicial technique in constitutional adjudication.

Within the Balancing debates at the Supreme Court, Justice's Black's position in particular could be read at least partially in this way. A telling example can be found in his criticism, in *Barenblatt*, of the majority's decision to accept "… a balancing test to decide if First Amendment rights shall be protected …".[1017] In its reference to '*a*' balancing test, this statement clearly sees balancing as something broader than mere First Amendment doctrine, but rather as a generic technique, a tool, available for use whenever judges chose. More broadly, it could be said that all discussions of balancing as a 'test' fit particularly well with this perspective of judicial technique or method.[1018]

A key theme within discussions of balancing on the level of judicial technique or method was its comparison with alternative judicial techniques. So, for example, Arthur Miller, in a 1965 article wrote of 'two principal approaches' within 'judicial methodology in constitutional cases': (a) "the 'interest-balancing' technique which may be seen in such

[1013] Frantz, *The First Amendment in the Balance* (1962), 1431.
[1014] Cited as number 7 in his critical scheme.
[1015] *Ibid.* On this point, German and U.S. approaches differ radically. For more discussion, see *infra*, s. 8.2.
[1016] *E.g.* Fried, *Two Concepts of Interests* (1963), 757 (claiming that "it is particularly in respect of claims involving constitutional protections of freedom of speech, press, association, and religion that the controversy about the appropriateness of proceeding by a 'balancing of the interests' has been most heated and most in need of analysis", and discussing "the 'balancing test'" exclusively in this context).
[1017] 360 U.S. 109, 139. See also, *e.g.*, Charles E. Rice, *Justice Black, the Demonstrators, and a Constitutional Rule of Law*, 14 UCLA L. REV. 454, 455 (1967) (referring to balancing as a 'technique' in discussing Justice Black's positions).
[1018] This was a very common depiction of balancing. See, *e.g.*, USSC *Konigsberg v. State Bar of California*, 366 U.S. 36, 68 (1961) (Black J., dissenting). References to balancing as a 'technique' were also common. See, *e.g.*, Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 939 (1968) (referring to 'balancing' as potentially "the most sensible technique in some constitutional areas" - though not in the free speech setting).

diverse matters as state power … to regulate interstate commerce … and First Amendment freedoms" and (b) the "application of more-or-less rigid rules or standards to factual situations".[1019]

The most influential juxtaposition in terms of judicial method in the context of First Amendment law, was between 'balancing' and 'classification' - often also called 'categorization'.[1020] This opposition was often traced back to an early (1942) Supreme Court opinion holding that there were "certain well defined and narrowly limited classes of speech" that fell categorically outside the scope of First Amendment protection.[1021] Justice Harlan, in his *Konigsberg* opinion for the Court, referred to these categorical exclusions as constituting one of the two principal ways in which free speech protection could be limited - the other one being balancing.[1022] In a highly influential analysis, Yale Law professor Thomas Emerson developed this technique of 'classification' into the methodological cornerstone of a general approach to freedom of speech in his '*General Theory of the First Amendment*'.[1023]

The opposition between balancing and categorization or classification will be discussed in more detail in Chapter 7, as part of a dominant strand in the history of American constitutional legal thought and as an important component of balancing's local meaning.

6.4.2.3 Balancing as theory of constitutional rights, in particular of freedom of expression

The balancing / classification opposition in terms of judicial technique, in turn, shaded into a further level of balancing discourse: that of theories of free speech protection and theories of constitutional rights. On this perspective, balancing language has to be seen as a manifestation of a particular underlying normative theory of individual rights protection. The most influential discussions of balancing in these terms can be found in the work of Justice Black and of Thomas Emerson.

[1019] Arthur Selwyn Miller, *On the Choice of Major Premises in Supreme Court Opinions*, 14 J. PUB. L. 251, 254 (1965). The two approaches, in Miller's view, were two among a broader range of techniques used by Supreme Court Justices for "deciding and explaining cases". Miller writes that Justice Black had castigated the balancing approach "in particular with respect to First Amendment cases", *Ibid.*) Note: Miller also writes that the alternative method of 'rule application', "in its most extreme form", would fall within the category of Roscoe Pound's 'Mechanical Jurisprudence'). For a similar juxtaposition between balancing and 'rule-making and rule-application', see Note, *Civil Disabilities and the First Amendment* (1969), at 852. This Student Note was written by Duncan Kennedy, who later elaborated the rules/standards opposition into major critical analyses of law and adjudication.

[1020] *Cf.* Ely, *Flag Desecration* (1975), 1500 ("The debate on the first amendment has traditionally proceeded on the assumption that categorization and balancing … are mutually exclusive approaches to the various problems that arise under the first amendment".).

[1021] USSC *Chaplinsky v. New Hampshire*, 316 U.S. 568, 571-572 (1942).

[1022] 366 U.S. 36, 50-51 (citing *Chaplinsky*).

[1023] See, *e.g.*, Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 21-22 (1964) (discussing the nature of a 'classificatory approach' to the First Amendment).

(a) Black's absolutes

In February 1960, at the height of the balancing debates at the Supreme Court, Justice Black was invited to give the James Madison lecture at New York University. In his lecture, entitled '*The Bill of Rights*', Justice Black sketched what he saw as the two fundamental points of view with regard to the question to what extent the provisions of the Bill of Rights should be held to limit the lawmaking power of Congress.[1024] On one view, "individual rights must, if outweighed by the public interest, be subordinated to the Government's competing interest".[1025] This point of view, Black argues, rests "on the premise that there are no 'absolute' prohibitions in the Constitution, and that all constitutional problems are questions of reasonableness, proximity, and degree".[1026] Both the 'clear and present danger' test and the explicit 'balancing' test, for Black, are 'verbal expressions' of this underlying theory.[1027]

It is in opposition to this first point of view, that Black sets out his own theory:

> "[O]ne of the primary purposes of the Constitution with its amendments was to withdraw from the Government all power to act in certain areas - whatever the scope of those areas may be. If I am right in this then there is, at least in those areas, no justification whatever for 'balancing' a particular right against some expressly granted power of Congress".[1028]

Justice Black here sketches an absolutist, categorical, '*ultra-vires*' theory of constitutional rights as the foundation for his opposition to the judicial technique or doctrine of balancing in civil liberties cases. The image of weighing is simply not suitable to depict the actual task of judges under a written constitution designed to draw clear boundaries between permissible and prohibited governmental action, between spheres of public power and private liberty.[1029]

[1024] Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 866 (1961).

[1025] *Ibid.*

[1026] In another formulation, Justice Black describes this viewpoint as giving a negative answer to the question "whether liberties admittedly *covered* by the Bill of Rights can nevertheless *be abridged* on the ground that a superior public interest justifies the abridgment" (at. 867, emphasis added).

[1027] *Ibid.*, 866. Black does not cite any representations of this viewpoint. Two influential examples of earlier theories of rights protection based on conceptions of 'weighing', 'conflicts of interests' and 'clashes between values' are Louis Nizer, *The Right of Privacy: A Half-Century's Development* (1941); Elliot L. Richardson, *Freedom of Expression and the Function of Courts*, 65 HARV. L. REV. 1 (1951). For a depiction of such theories - again without citation of examples - see also *e.g.* Frantz, *The First Amendment in the Balance* (1962), 1440 (discussing "the theory that the first amendment has no hard core, that it protects not rights but 'interests', that those 'interests' are to be weighed against 'competing interests' on a case-by-case basis").

[1028] Black, *The Bill of Rights* (1961), 874-875.

[1029] Note: This categorical 'demarcation' or 'boundaries' theory of constitutional rights has often been thought to show strong affinities with the '*Lochner*' model of constitutional judicial review, discussed *supra*, s. 3.2.5.2. See, *e.g.*, Patrick Gudridge, *The Persistence of Classical Style*, 131 U. PA. L. REV. 663, 711 (1983) (discussing the view of Justice Peckham [the author of the *Lochner*-opinion] that "[t]he Constitution sets up a taxonomy. It establishes order, separating and fixing spheres of power, through a process of … categorizing"); Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L.

(b) Emerson's system of free expression

A second influential discussion of balancing at the level of constitutional rights theory came from Professor Thomas Emerson. But while Justice Black had written about constitutional liberties generally, Emerson was only concerned "with the specific function of the judiciary in supporting *a system of freedom of expression*".[1030] Any theory of freedom of expression, Emerson argued, had to take into account competing values, such as public order and justice. The task for the judiciary, in maintaining a system of freedom of expression and integrating it "into the broader structure of modern society", was to develop "principles of *reconciliation* … expressed in the form of legal doctrine".[1031] Emerson saw a range of difficulties with the Court's balancing test which meant that, in his view, "the ad hoc balancing test is, as a legal theory of reconciliation, illusory".[1032] Instead of this *ad hoc* balancing test, or its main alternatives - 'clear and present danger' and 'absolutism', in Emerson's view -, he proposed a set of 'general principles of First Amendment interpretation'.[1033] The adoption and continued acceptance of the First Amendment signified

> "that some fundamental decisions with respect to reconciliation have been made, that *a certain major balancing of interests has already been performed.* (…) The function of the courts is not to reopen this prior balancing but to construct the specific legal doctrines which, …, will govern the concrete issues presented in fitting an effective system of freedom of expression into the broader structure of modern society. This problem may appropriately be formalized, …, in terms of *defining* the key elements in the first amendment".[1034]

Emerson adopts a categorical opposition between 'expression' and 'action' as the foundation of his system of freedom of expression. Given the central importance of this distinction to his underlying theory, "starting point for any legal doctrine" within this system, therefore "must be to fix this line of demarcation".[1035]

REV. 1, 46 (1991) (discussing *Lochner* era "constitutional conceptualism" in terms of "specifically defined spheres of power").

[1030] Emerson, *Toward a General Theory of the First Amendment* (1963), 896.

[1031] *Ibid.*, 898.

[1032] *Ibid.*, 914. It is significant to note that Emerson did not see a natural connection between the theme of 'reconciliation', which he favoured, and judicial balancing, which he did not. On this connection in the German context, see *supra*, s. 5.3.2.3.

[1033] *Ibid.*, 916.

[1034] *Ibid.*

[1035] *Ibid.*, 917. See also Emerson, *Freedom of Association and Freedom of Expression* (1964), 21-22 (discussing the connection between a theory of First Amendment protection based on the expression/action dichotomy and the form of its 'translation' into legal doctrine).

6.4.2.4 Balancing and the nature of law and judging

A final, very different, level on which balancing was discussed, was that of the nature of adjudication and of law generally. For quite a few commentators, the language of balancing signalled an acknowledgement, on the part of judges, of the unavoidable, inherent qualities of what they were doing. All adjudication, on this view, could be described as balancing;[1036] using this language merely meant being open about something that was often being concealed. Such views often relied on one or more of Justice Holmes' famous aphorisms, or on (Judge) Benjamin Cardozo's admission that he and his judicial colleagues were "balancing and compromising and adjusting every moment we judge".[1037] For others, adjudication in at least all difficult cases could suitably be described as involving balancing. Lawyers and political scientists interested in the nascent school of 'political jurisprudence',[1038] in particular, liked to emphasize "the more recent thought about the nature of the judicial process", according to which in many cases before the Supreme Court, there would be "no law to be discovered", leaving the Court to "make its own law by balancing the interests of competing parties".[1039] On these views, balancing *as a process* would be inevitable in all or most cases; the appropriateness of using balancing *language* in turn would depend on the costs and benefits of being open about the nature of judging.[1040]

Quite obviously, if this view of the meaning of balancing language is held, much of the content of the specific balancing debates between Justices Black, Frankfurter and Harlan changes dramatically in significance.[1041] Referring to Black's categorical approach, for example, one observer could note that on a view of 'adjudication as balancing', there was "really no difference" between what Black proposed "and the general use of the 'balancing' technique". "Actually", this commentator wrote, "'balancing' is the very essence of judging, because in every case there must be a determination of which of two

[1036] *E.g.* Vince Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1481, 1489fn37 (1970) ("All legal reasoning is 'balancing' in the sense that value conflicts can be intelligently resolved only by adding up the pros and cons of the competing positions"); Karst, *Legislative Facts* (1960), 79 ("All judges balance competing interests in deciding constitutional questions - even those who most vigorously deny their willingness to do so").

[1037] BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 75 (1928).

[1038] *Cf.* Shapiro, *Neutral Principles* (1963), 587; Martin Shapiro, *Political Jurisprudence*, 52 KY. L. REV. 294 (1963).

[1039] Shapiro, *Neutral Principles* (1963), 595, referring to Arthur S. Miller & Ronald F. Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 686 (1960). For a similar view outside the direct context of 'political jurisprudence', see Louis Henkin, *Shelley v. Kramer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 504-505 (1962) (discussing the need for 'balancing' in constitutional adjudication under an 'increasingly particularistic Constitution').

[1041] See, *e.g.*, Robert B. McKay, *Congressional Investigations and the Supreme Court*, 51 CAL. L. REV. 267, 280 (1963) (describing the controversy between Justices Black and Frankfurter as "at least in part misleading", and arguing "[a]ny judgment involves an element of comparing or weighing opposing values, and at least in this sense all members of the Court indulge in some balancing of competing social interests").

or more conflicting interests will prevail. (…) It seems much more realistic to recognize this to be the case than to rely on formulae which merely conceal the true situation".[1042]

6.4.2.5 Interim observations

A neat separation between analytical categories such as doctrine and technique, even if well defined in the abstract, is of course impossible within the realities of legal discourse. Very often, one single judicial or academic contribution will contain elements of multiple levels and perspectives. Nevertheless, it is important to be as precise as possible about the character of the various manifestations of balancing discourse when trying to unearth balancing's contemporary local meaning. With this in mind, the foregoing descriptions give rise to the following interim observations on the nature and scope of balancing.

(1) First, the parallel existence of multiple levels at which balancing was discussed – from 'local' First Amendment doctrine, to general theory of adjudication -, however closely these perspectives were intertwined in practice, is significant in and of itself. The explanation for why a relatively small number of explicit judicial references to balancing in a relatively small number of free speech cases could become the basis for one of the most dominant and heated controversies in constitutional law of the 1960s, largely lies in the fact that many actors involved drew automatic connections between use of the language of balancing as doctrine and other phenomena in constitutional adjudication.[1043] At the same time, these debates persisted, and were - as participants themselves acknowledged! - often less fruitful than they could have been precisely because of continued ambiguities over the nature and scope of balancing.[1044]

[1042] Charles B. Nutting, *Is the First Amendment Obsolete?*, 30 GEO. WASH. L. REV. 167, 174 (1961). See also Michael R. Klein, *Hugo L. Black: A Judicial View of American Constitutional Democracy*, 22 U. MIAMI L. REV. 753, 785 (1968) (referring to Justice Black's 'absolutism' as a "problem solving technique" for conflicts of interests and arguing that Justice Black "necessarily" engages in balancing "albeit under differently labeled devices"). Contemporary views on the benefits and dangers revealing or attempting to conceal the true nature of adjudication are discussed *infra*, s. 7.2.

[1043] See, *e.g.*, Fried, *Two Concepts of Interests* (1963), 755-757 (taking up the Court's "so-called 'balancing test'" under the First Amendment as the manifestation "most in need of analysis" of a much broader theory of adjudication focusing on "the analysis of rights into interests").

[1044] Note: Studying the contributions of individual authors reveals the entirely different meanings of the language of balancing on these different levels of discourse and the range of possible connections between these meanings. The work of Thomas Emerson offers a significant example. The general object of Emerson's theory of freedom of expression - to find 'principles of reconciliation' to arbitrate between the value of free speech and competing values and interests - is expressed in typical 'balancing' vocabulary. The centrepiece of his theory, however, is a categorical, theoretical distinction, between 'expression' and 'action'. At the level of legal doctrine, Emerson is interested in doctrinal constructions that can put this theoretical binary distinction to effect. Finally, Emerson acknowledges that this definitional or categorical approach does "of course involve a weighing of considerations". But, he argues finally, this specific task of weighing is "narrower, taking place within better defined limits, than ad hoc balancing" (Emerson, *Toward a General Theory of the First Amendment* (1963), 916-917). See also at 915 ("It is true that the process of 'defining' requires a weighing of various considerations, but this is not the same as open-ended 'balancing'"). See also Frantz, *The First Amendment in the Balance* (1962), 1434 ("though the mental process by which a judge determines what rule to adopt can be described as 'balancing', this does not make it the same as 'balancing', independent of any rule, to determine what is the best disposition to make of a particular case")

(2) A second observation relates to the dominance of the rhetoric of balancing. Many theories and approaches in the area of freedom of expression were formulated as either in favour of balancing or against balancing, but still heavily reliant on its vocabulary. Commentators who favoured categorical distinctions, like Thomas Emerson, would still argue that their categorical principle flowed from "a prior balance" struck by the Framers.[1045] And many of those most vehemently opposed to balancing as constitutional doctrine or theory, felt compelled to admit that, realistically speaking, 'of course' all adjudication involved some kind of 'weighing' or 'balancing'. This dominance of the idiom of balancing gives a very defensive feel to many of the critiques of balancing. This theme of opposition between the realist impetus to describe and understand adjudication in terms of balancing, and persistent doubts as to balancing's capacity to legitimize or justify decisions, will be discussed in more detail in Chapter 7.

(3) It is noticeable that among the positive discussions of balancing – that is: discussions in favour of reliance on balancing in constitutional rights cases -, there is a heavy emphasis on lower levels of generality - the narrower, more localized perspectives of balancing as doctrine, method or judicial technique -, rather than on the higher 'levels' or broader perspectives of balancing as a theory of free speech adjudication, or constitutional rights adjudication more broadly. Generally speaking, whenever Justice Black, Charles Reich, Laurent Frantz, or any of the other opponents of balancing refer to some 'general theory' which conceives of civil liberties adjudication as a balancing of competing interests, they omit any references to actual scholarly or judicial contributions advocating such a view, which raises suspicions that a straw man may be in play.[1046] Charles Reich, for example, claimed that "during Justices Black's years on the Court its majority has been dominated by *a philosophy of constitutional adjudication based upon the weighing of conflicting values*"; a philosophy which held that "most Constitutional issues which reach the Court essentially present conflicts in policies in values" and that "[t]he task of judges is to resolve these conflicts by the exercise of judgment" on a case-by-case basis.[1047] Reich does not, however, explain the content or background of this 'philosophy' allegedly held by the Court's majority, nor does he offer any references to substantiate his claim. Another early critic of balancing, Laurent Frantz, wrote that "[i]f a balancing test is applied to the first amendment, it is hard to see why it should not be applied to the entire Constitution". But, having suggested such a general theory of balancing himself, he failed to cite any real proponents of this view.[1048] Most importantly, the Justices who

[1045] Emerson, *Toward a General Theory of the First Amendment* (1963), 929. See also Black, *The Bill of Rights* (1960), 879 (arguing that the Framers carried out all the necessary 'balancing' when they wrote the Constitution and the Bill of Rights).

[1046] See, notably, Black, *The Bill of Rights* (1960); USSC *Communist Party v. Subversive Activities Control Board*, 369 U.S. 1, 164 (1961) (Black J. dissenting) (referring to "the dangerous constitutional doctrine to which the Court is at present adhering").

[1047] Reich, *Mr. Justice Black and the Living Constitution* (1963), 737 (emphasis added).

[1048] Frantz, *The First Amendment in the Balance* (1962), 1444-1445. Frantz cites Judge Learned Hand as an advocate of this position ("if I understand him correctly …", at 1445). Analysis of Learned Hand's writing, however, shows that he in no way advocated a general balancing approach to the Bill of Rights in the sense imputed to him by Frantz. See, *e.g.*, Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment*

introduced the language of balancing into Supreme Court case law, as seen above, framed their arguments in much narrower terms.

One important corollary of this prevalence of lower levels of generality is that it went hand in hand with an emphasis on a dimension of *choice* in the resort to balancing. Balancing as 'technique', 'tool', or 'test', had to be evaluated in comparison with other 'techniques', 'tools' or 'tests' that were equally available. This meant that, in a very direct sense, the value of balancing itself could be subjected to a 'balancing' process - a pun not lost on contemporary commentators.[1049]

(4) This last point did itself come with a significant corollary, in the sense that 'balancing as choice' implied an approach that continuously compared balancing to alternative techniques, doctrines, conceptual tools, *etc.* Balancing was, in the debates on and surrounding the Supreme Court, in a very literal sense, given meaning through its perennial opposition to 'absolutes' or 'categorization'. This dimension of contrast and opposition as central to balancing's local meaning will also be discussed in more detail in Chapter 7.

6.4.3 Balancing and constitutional interpretation

A range of contemporary discussions of balancing focussed on the broad theme of what reliance on balancing meant for the institution of *constitutional rights interpretation* by the Supreme Court. These discussions can be divided into two main parts: (1) debates over balancing and the *meaning* of constitutional rights guarantees, and in particular of the First Amendment,[1050] and (2) over the *intensity of protection* offered by constitutional rights, again in particular by the First Amendment.

Doctrine: Some Fragments of History, 27 STAN. L. REV. 719, 720ff (1975) (discussing Hand's aversion to the balancing nature of 'clear and present danger').

[1049] See, *e.g.*, Frantz, *The First Amendment in the Balance* (1962), 1433 (proposing to "'weigh' balancing – to inquire into the propriety and consequences of any such test").

[1050] Note: The overwhelming focus in contemporary debates was on balancing's implications for the freedom of speech. Following the nature of these debates, this will also be the focus of what follows. For a wonderfully pithy example of an analysis of balancing in very similar terms but in the context of the freedom of religion – also contained in the First Amendment -, see Joseph M. Dodge II, *The Free Exercise of Religion: A Sociological Approach*, 67 MICH. L. REV. 679, 687 (1969) (Summarizing experiences with the 'balancing test' in freedom of religion cases as follows: "(1) the state always wins; (2) courts scarcely notice the religious interest, much less attempt to analyze it; (3) courts do not really analyze the state's interest either; (4) neither courts nor attorneys accurately delineate the real issues; and, (5) judicial opinions proceed in terms of policy rather than more justiciable standards". Dodge concludes: "Although accepting the necessity of some kind of 'weighing' test, I categorically reject the 'ad hoc balancing' approach as being arbitrary, useless, and too insensitive to the special competencies of legislatures and the judiciary. The appropriate role for the courts is not to balance policies – that, presumably has already been done by the drafters of the Constitution, by basic social values, and by the legislatures – but rather to *define* interests of both religion and government in terms from which it is possible to generalize about future disputes", emphasis in original).

6.4.3.1 Balancing and the meaning of the First Amendment

Pervasive contemporary critiques condemned balancing for eroding the meaning of the First Amendment. These critiques were formulated in slightly different forms at the different 'levels' of balancing discourse distinguished above, in Section 6.3.

(1) In part, these critiques operated at the levels of doctrine or judicial technique and argued that balancing was an unsuitable approach for adjudication based on - and tied to - written rules of law. While this type of critique could be applied to any written rules, or at least to any written rules of constitutional law, the First Amendment context was where it received its strongest application. Justice Black's argument that balancing violated "the genius of our written Constitution" found support in academic writing.[1051] The balancing test was criticized for giving 'no real meaning' to the First Amendment.[1052] "The balancer's thinking processes eliminate the constitutional text so completely that he soon forgets there ever was one".[1053] "The whole idea of a government of limited powers, and of a written constitution" was said to be at risk.[1054]

(2) A second strand to this 'loss of meaning' critique operated rather on the level of theory of freedom of expression - or theory of fundamental rights. From this perspective the constitutional guarantees of civil liberties, or the constitutional guarantee of freedom of expression in particular, had *a specific meaning* that balancing was incapable of bringing out. Viewing such guarantees as turning on a balance between competing public and private interest, it was argued, risked missing what was their most distinctive quality. These perspectives took many different forms. For some, like Justice Black or professor Alexander Meiklejohn, the First Amendment was among a small group of civil liberties that simply could not be 'abridged' whenever they were held to be applicable (although the scope of their application could be defined more or less broadly). In Meiklejohn's view, for example, the First Amendment, "the most significant political statement which we Americans have made", was simply incompatible with any theoretical framework that accorded "equal status" to the freedom of expression as to competing interests, such as public security or even self-preservation (as in Justice Frankfurter's *Dennis* concurrence).[1055] Others, while not adhering to Black and

[1051] 360 U.S. 109, 143-144.

[1052] Emerson, *Toward a General Theory of the First Amendment* (1963), 913.

[1053] Frantz, *The First Amendment in the Balance* (1962), 1433. See also, *e.g.*, Harold W. Chase, *The Warren Court and Congress*, 44 MINN. L. REV. 595, 602 (1960) ("from what part of the unequivocal language of [the first amendment does] the Court find a basis for exercising discretion to balance competing private and public interests?").

[1054] Frantz, *The First Amendment in the Balance* (1962), 1445. See also, *e.g.*, Alexander Meiklejohn, *What does the First Amendment Mean?*, 20 U. CHI. L. REV. 461, 479 (1953) (arguing that Justice Frankfurter's balancing approach in *Dennis* risked "overruling the authority of the Constitution"); Reich, *Mr. Justice Black and the Living Constitution* (1963), 721: ("In the weighing of competing social values Black saw a denial of the unique features of American government - a written constitution, a legislature subordinate to it, and an independent judiciary capable of reviewing the acts of the other branches").

[1055] Meiklejohn, *What does the First Amendment Mean?* (1953), 461, 479. *Cf.* also Frantz, *The First Amendment in the Balance* (1962), 1438.

Meiklejohn's 'absolutism', still found balancing difficult to square with the substance of their preferred theory of freedom of expression. Emerson's theory, which as seen above, revolved around a categorical distinction between 'conduct' and 'expression', or the theory of Harry Kalven, according to whom the 'central meaning' of the First Amendment was a categorical prohibition of prosecution for criticizing governmental policy, are two prominent examples.[1056] More generally, as one commentator noted in the early 1970s, the balancing test, being "unrelated to any conception of the purposes of the first amendment, gives no indication of *why* speech should be protected and hence offers no guidance as to *when* it should be protected".[1057]

A common thread running through many of these critiques of balancing as erosive of the First Amendment's meaning was the concern to safeguard the special position of free speech protection within the American constitutional framework. Harry Kalven, for example, applauded Justice Black specifically for not treating the First Amendment as if it were "just another rule or principle of law".[1058] The language of balancing, with its connotations of 'social engineering' and utilitarian calculus, was thought by these commentators to be insufficiently respectful of the First Amendment's exalted status.[1059]

6.4.3.2 Balancing and the level of rights protection, in particular with regard to the freedom of speech

Probably the strongest critique of balancing in Supreme Court opinions of the 1950s and 1960s was that this approach failed to offer sufficient protection to freedom of speech; the idea that balancing, in Justice Black's words, was a "dangerous doctrine".[1060] Especially during the critical decade of 1950 to 1960, it was argued, when the 'red scare' was at its height, the Supreme Court majority's balancing approach to the Bill of Rights had failed to safeguard fundamental liberties.[1061] This paragraph gives a short overview of the many forms in which this critique appeared in constitutional rights discourse.

(1) A first version of the 'insufficient protection' critique was a variation on the 'loss of meaning' argument discussed above. Because the balancing test abandoned the constitutional text so completely, this argument ran, it assured "little, if any, more freedom of speech than [would have been the case] if the First Amendment had never been adopted".[1062] The balancing text 'watered down' the 'unequivocal command' of the Bill of Rights, [1063] "into a quavering 'Abridge if you must, but try to keep it reasonable'".[1064]

(2) In a second variety - again closely related to the 'loss of meaning' critiques - commentators argued that the balancing test gave simply the 'wrong meaning' to the guarantee of freedom of expression or induced judges to ask the 'wrong questions' when assessing governmental action - a 'wrong meaning' that was injurious to free speech protection. Interpreting the First Amendment "negatively",[1065] exclusively through the strength of countervailing interests, and conceiving of the judicial task in First Amendment cases as one of solving a mere conflicts of interests,[1066] were examples of criticisms made of the balancing test as insufficiently attentive to strength of the *positive* guarantee of freedom of expression. So, too, were complaints that the balancing test ignored some fundamental substantive principle allegedly at the heart of free speech law - such as Emerson's 'conduct' / 'expression' distinction -,[1067] or that the test made it difficult for judges to make the inquiries crucial to the safeguarding of freedom of expression - such as, for example, the question as to "the sincerity of the state's avowed interest" in suppressing speech.[1068]

(3) A third criticism contemporary commentators often made of balancing language was that it did not offer any 'firm boundaries' and that it posed the risk of 'slippery slopes'. An example of these views is Charles Reich's defence of Justice Black's position. "The Court's ad hoc balances are on a 'slippery slope'", Reich wrote. "Each is likely to reflect present-day needs and views. (…) The urgencies of the day, like gravity, pull the Court along; there is no counterweight in its formula to maintain a constant level". [1069] And even if the Supreme Court itself might be able to withstand public pressure against freedom of speech, the Court's balancing language gave insufficient

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1056 On Emerson, see *infra*, s. 7.3.3.2. See also Kalven, *Central Meaning of the First Amendment* (1964).
1057 Benjamin S. DuVal, *Free Communication of Ideas and the Quest for Truth: Toward a Teleological Approach to First Amendment Adjudication*, 41 GEO. WASH. L. REV. 161, 175 (1972).
1058 Kalven, *Upon Rereading Mr. Justice Black* (1967), 429. Meiklejohn's view on the unique status of the First Amendment has been cited above. For later confirmations of the special position of freedom of expression in the American constitutional tradition, see, *e.g.*, Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 455-456 (1985) ("Few other provisions have so central a role to play in constituting the American polity"); White, *The First Amendment Comes of Age* (1996), 300-301 (describing the First Amendment and freedom of expression as "constitutional and cultural lodestars" in 20th Century America).
1059 For a later analysis in similar terms, see SHIFFRIN (1990).
1060 USSC *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 164.
1061 *Cf.* Reich, *Mr. Justice Black and the Living Constitution* (1963), 718. See also Black, *The Bill of Rights* (1960), 878 ("The great danger of the judiciary balancing process is that in times of emergency and stress it gives Government the power to do what it thinks necessary to protect itself, regardless of the rights of individuals. If the need is great, the right of Government can always be said to outweigh the rights of the individual"). See also Nimmer, *The Right to Speak from Times to Time* (1968), 940 (arguing that is was "no coincidence … that in the overwhelming majority of the major free speech cases in which the ad hoc balancing approach has been applied, the weighing of interests has come out on the side which opposes freedom of speech").
1062 Frantz, *The First Amendment in the Balance* (1962), 1449.
1063 *Cf.* USSC *Dennis v. United States*, 341 U.S. 494, 558, 580 (Black J. dissenting).
1064 Frantz, *The First Amendment in the Balance* (1962), 1449. See also Emerson, *Toward a General Theory of Freedom of the First Amendment* (1963), 913 (arguing that the balancing test "amounts to no more than a statement that the legislature may restrict expression whenever it finds it reasonable to do so").
1065 *Ibid.*, 1442.
1066 Frantz, *Is the First Amendment Law?* (1963), 754.
1067 See *infra*, s. 7.3.3.2. Another example is Alexander Meiklejohn's public/private distinction, also discussed *infra*, s. 7.3.3.2.
1068 *Cf.* Karst, *The Advantages of Thinking Small* (1965), 22 (citing Harry Kalven).
1069 Reich, *Mr. Justice Black and the Living Constitution* (1963), 743. See for a later discussion, Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 111 (1998) (arguing that 'slippery slope rhetoric' is especially pervasive in the First Amendment context).

guidance and support to frontline public officials and lower courts for dealing with speech controversies.[1070]

(4) Finally, the Supreme Court's balancing test was criticized for promoting or inducing an excessive degree of deference towards the legislative branch and its determination of the appropriate scope for freedom of expression. "As applied to date", Thomas Emerson concluded in 1963, "the test gives almost conclusive weight to the legislative judgment".[1071] While it was true, in his view, that the balancing test itself did not "necessarily compel this excessive deference", "the operation of the test tends strongly towards that result".[1072] Of course, in the heady days of the 'red scare', deference to congressional determinations, all too often meant limited protection for freedom of expression. It was no surprise, critics argued, that the Supreme Court's key 'balancing opinions' in the communist cases - *Douds*, *Dennis*, *Barenblatt*, *Konigsberg* - all upheld governmental limitations on free speech.

6.4.3.3 Interim observations

A central theme running through many contemporary discussions of balancing was the almost automatic connection often made between 'balancing' and '*balancing away*'; between 'weighing' civil liberties and allowing them to be '*outweighed*'. Justice Black's evocative imagery - of civil liberties being 'weighed out of the Constitution' -[1073] formed the foundation for a tradition of associating balancing with diminished protection for constitutional rights. "'[B]alancing', or even worse 'ad hoc balancing,' still carries a bad odor" in the First Amendment context, Frederick Schauer wrote at the end of the 1990s.[1074] This connotation, Schauer argues, is at least partially "a legacy of the debates of the 1950s and 1960s, in which 'balancing,' especially as championed by Justice Frankfurter, was associated with a tendency to take the substance of governmental justification for restricting speech quite seriously and with a tendency to defer to the government's own determinations of the weight of those justifications".[1075] However hard proponents of balancing might argue that 'balancing away' was not unavoidable and that rights could just as easily be 'defined away', the "alignment between balancing with scantier free speech protection" has remained strong.[1076]

[1070] *Cf.* Emerson, *Toward a General Theory of the First Amendment* (1963), 913.
[1071] *Ibid.*
[1072] *Ibid.* Towards the end of his career, Emerson reiterated his belief that a "predilection for ad hoc balancing" had made the system of freedom of expression "less effective at serving its underlying values". Thomas I. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CAL. L. REV. 422, 423 (1980).
[1073] *Cf.* USSC *Cohen v. Hurley*, 366 U.S. 117, 134 (1961) (Black J., dissenting). This was a due process case, but Justice Black refers to the First Amendment. See also his dissent in USSC *Konigsberg v. State Bar of California*, 366 U.S. 36, 61-62 (1961).
[1074] Schauer, *Principles, Institutions, and the First Amendment* (1998), 110.
[1075] *Ibid.*, 110-111.
[1076] *Cf.* Karst, *The Advantages of Thinking Small* (1965), 13.

6.4.4 Balancing and the institutional position of the judiciary

The relationship between balancing and the issue of the institutional position of the judiciary was one recognized early on in contemporary discussions.[1077] These institutional concerns, in the American setting, went to the heart of balancing's legitimizing force in constitutional rights adjudication. The various concerns clearly showed an overlap, but the following main themes can be distinguished. First, there was the critique that reliance on balancing limited possibilities to carve out a *distinct role* for the judiciary - and the Supreme Court in particular - in the overall American constitutional institutional scheme. Put differently, this critique entailed the argument that balancing was not compatible with a defensible conception of the *nature of constitutional judicial review*, or that balancing – either inherently or in practice – was not compatible with an appropriate degree of *intensity of review*. Secondly, balancing was discussed in terms of the *institutional capacity* of courts - were courts in fact able to carry out the extensive review of facts and circumstances necessary for a 'thorough balancing'? Finally, observers wondered whether balancing language in Supreme Court opinions gave *sufficient guidance* to lower courts and to frontline officials - police offers, municipal authorities, *etc.* - confronted with free speech claims. This paragraph discusses these objections in turn.

6.4.4.1 The position of the judiciary in the constitutional institutional scheme: The nature and intensity of constitutional judicial review

A central concern in debates on constitutional judicial review in the 1950s and 1960s was how to keep the judicial function distinct from 'politics'; to maintain the status of 'adjudication' as an activity separate from 'policy-making'.[1078] Both the 'balancers' and their opponents were in agreement as to the importance of this goal.[1079] Justice Harlan, for example, one of the quintessential balancing Justices, argued that judges should remain "aloof from the political arena".[1080] Justice Frankfurter repeatedly pledged adherence to the principle that we are not legislators, that direct policymaking is not our province".[1081] As for Justice Black, who unlike Frankfurter and Harlan was often

[1077] See, *e.g.*, Note, *Civil Disabilities and the First Amendment* (1967), 852fn40: "A second branch of the debate over balancing has been concerned with what the different tests imply about the institutional position of the [Supreme] Court").
[1078] For a general discussion from just before the 'balancing war', see Edward McWhinney, *The Supreme Court and the Dilemma of Judicial Policy-Making*, 39 MINN. L. REV. 837 (1955).
[1079] See, *e.g.*, Chase, *The Warren Court and Congress* (1960), 598-599 ("It is generally agreed that … the Court should not arrogate unto itself the legislative function of Congress".
[1080] John M. Harlan, *Thoughts at a Dedication: Keeping the Judicial Function in Balance*, 49 A.B.A. J. 933, 944 (1963), cited in Douglas A. Poe, The *Legal Philosophy of John Marshall Harlan: Freedom of Expression, Due Process, and Judicial Self Restraint*, 21 VAND. L. REV. 659, 662fn17 (1968).
[1081] 341 U.S. 494, 539.

portrayed as an 'activist' rather than a 'passive' judge, commentators still pointed out that "no Justice has … stressed more consistently the need for judicial restraint".[1082] All sides, therefore, agreed on the fact that only a clearly distinct, well-defined judicial role could offer sufficient legitimacy to the Court's exercises of power.

The crux of the disagreement between the 'balancers' and their opponents related to the question of how this distinct judicial role could best be achieved. As the long-time observer of the Supreme Court, Professor Paul Freund, explained later in the 1960s: both approaches had to be seen as answers to the constitutional crisis of the *Lochner*-period.

> "Different minds, repelled alike by the excesses of the Court, nevertheless responded in different ways. Some were profoundly confirmed in the view that in a democratic society the judges must defer to the more representative organs of government … . Justice Black … drew a different moral from the experience through which we had passed. For him the lesson was that the judges lose the way when they put glosses on the Constitution, that they are safe, and the people secure, only when they follow the mandates of the Framers in their full and natural meaning …".[1083]

For Justice Frankfurter, safeguarding a distinct domain for the judiciary meant *recognizing* the inherently political nature of adjudication and *limiting* the judicial function to a highly deferential form of review of the decisions taken by other branches. "[C]onstitutional law … is not at all a science, but applied politics", Frankfurter wrote while still a law professor.[1084] Because judicial decision making, on this perspective, was *essentially identical* to political decision making, the Supreme Court, in Frankfurter's view, should limit its review of Congressional actions to a bare minimum of reasonableness.[1085]

This perspective lay at the heart of Justice Frankfurter's conception of balancing. Political reasoning, it was generally recognized, was ultimately concerned with reconciling competing values and interests. Judicial reasoning, on any frank assessment, *could not be* anything else.[1086] And because the question of "how best to reconcile competing interests" was the business of the legislatures, the balance they struck had to be respected by the Courts, unless it lay "outside the pale of fair judgment".[1087]

A radically different conception of the nature of constitutional adjudication, in turn, lay at the core of Justice Black's and others' opposition to balancing. "Justice Black's theory of judicial review … precludes unfettered judicial subjectivity by pinning down constitutional adjudication to the *interpretation* of specific written language".[1088] In Black's view, keeping the judicial function distinct from politics, meant recognizing that the text of the Constitution and the Bill of Rights "means what it says and that [the Supreme Court] must enforce that meaning".[1089] Because what the Supreme Court did - or rather, 'ought to be doing' -, on this perspective, was inherently and qualitatively different from what Congress did, there could be no question of the judiciary intruding upon the domain of the legislature.[1090] However, when judges would begin to engage in the ad hoc weighing of values and interests, this fragile line of demarcation would be breached, with potentially serious consequences for the institutional position of the judiciary.[1091]

Both these positions were subject to extensive debate during the late 1950s and 1960s - a debate that goes beyond what can be recaptured here. What is important to note from the perspective of the analysis of balancing's meaning is the extent to which the controversy over the Court's use of balancing language came to be used as the primary lens through which to view broader conflicts over the Supreme Court's institutional position.

Many of these debates were complicated by the fact that participants tended to conflate logic and practice, rhetoric and substance. Those claiming that balancing came down to 'legislating from the bench' or amounted to 'judicial policy-making', often ignored that the balancing judges adhered to a severely circumscribed view of what judicial balancing entailed. The theme of deference, which was fundamental to Justices Frankfurter and Harlan's understanding of balancing, restricted in many ways the scope of what might, intuitively, be expected to count as 'balancing'. So, for example, the evaluation of alternative ways in which Congress could have achieved its objectives, which on its face could be seen as part of a serious balancing test, was always proclaimed by Justice Frankfurter to lie largely outside the realm of judicial control.[1092] On the other hand, those in favour of balancing, who claimed that Justice Black's reliance on 'absolutes' and 'literalness' was an unrealistic depiction of the judicial process, often neglected the more symbolic, rhetorical and strategic dimensions of Black's position. To a large extent, however, "the extremity of Justice Black's absolutist professions" had to

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[1082] Archibald Cox, Foreword: *Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 95 (1966) (citing Black's dissent in the 1965 privacy case of *Griswold v. Connecticut*).
[1083] Paul A. Freund, *Mr. Justice Black and the Judicial Function*, 14 UCLA L. REV. 467, 467 (1967).
[1084] Collected Papers, Cited in Alpheus Thomas Mason, *Myth and Reality in Supreme Court Decisions*, 48 VA. L. REV. 1385, 1400 (1962).
[1085] *Cf.* McWhinney, *The Supreme Court and the Dilemma of Judicial Policy-Making* (1955), 843 ("The principal intellectual opposition to judicial activism on the present Court is afforded by Mr. Justice Frankfurter").
[1086] *Cf.* Note, *Civil Disabilities and the First Amendment* (1969), 852 (describing Justice Frankfurter's view of the Supreme Court as a "frankly political but deferential participant in the process of government"). See also Wallace Mendelson, *Mr. Justice Frankfurter and the Process of Judicial Review*, 103 U. PA. L. REV. 295, 311 (1954) (describing Frankfurter's view that deference was a "price to be paid").
[1087] 341 U.S. 494, 540.
[1088] Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication*, 66 YALE L.J. 319, 337 (1957) (emphasis added).
[1089] 360 U.S. 109, 143-144.
[1090] *Cf.* Martin Shapiro, *Judicial Modesty, Political Reality and Preferred Position*, 47 CORNELL L. Q. 175, 177 (1962) (writing in reference to Professor Charles Black, one of Justice Black's supporters: "Professor Black's reply to [the plea for judicial self-restraint] is primarily based on a simple line of logic. The Constitution is law. Courts apply and interpret law. Therefore, courts apply and interpret the Constitution").
[1091] Cf. Reich, *Mr. Justice Black and the Living Constitution* (1963), 749.
[1092] USSC *Shelton v. Tucker* 364 U.S. 479, 493-494 (Frankfurter J., dissenting) ("consideration of feasible alternative modes [does] not imply that the Court might substitute its own choice among alternatives … or that the States [are] restricted to the 'narrowest' workable means of accomplishing an end … Consideration of alternatives … does not alter or displace … the standard of reasonableness"), cited and discussed in Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 916-917fn284 (1970) (the author observes: "Somewhat ironically, it is the interest balancing method …, advocated by the champions of judicial restraint, that by its logic requires a court to inquire into alternative statutory schemes".)

be qualified as "an opposition program" that was "mainly tactical".[1093] In the words of Alexander Bickel's influential *Harvard Law Review* Foreword: "Justice Black knows as well as anyone else that free speech cannot be an absolute … and that the first amendment does not literally say any such certain thing".[1094] Instead, the notion of absolutes had to be seen, in the eyes of Justice Black's supporters, as a more general "plea for constitutional adjudication with definite standards", as "a search for the rule of law", asking for adjudication "on a far higher plane of generality than the balancing formula demands".[1095]

Beyond these mutual mischaracterizations within the 'narrow' balancing debate between Frankfurter, Harlan and Black, however, important differences in outlook persisted, related to the impact of 'balancing' on the judiciary's distinct role in constitutional adjudication. In a particularly influential article, Charles Fried argued that "the theory of legal right as the outcome of a process of weighing competing interests" and a mode of adjudication stimulating courts "to consider the full ramifications of a particular legal dispute", while potentially a liberating technique, also threatened to undermine the institutional legitimacy of the judiciary. "[A] court … cannot hope to and must not try to do ultimate and complete justice in every matter that comes within its ken". Because "although in principle judges too are capable of [this] Olympian view, this is one view of which we are all in principle capable, and thus some other basis for the authority of the Court must be found than that its decisions will be 'correct' in this Olympian sense".[1096] A Court which conceived of its own function as that of purely pragmatic, case-by-case interest balancing, Fried argued, would be unable to find a distinct basis on which to exercise its authority and overrule choices made by other organs of government.

A perspective similar to that of Fried's, finally, was that while case-by-case interest balancing might be appropriate for - or even characteristic of - *common law* adjudication, adjudicating constitutional matters demanded a different approach. "Opponents of the ad hoc approach", Charles Reich wrote, "have seen it as particularly undesirable in constitutional adjudication, where the Court has the function of maintaining a particular historical scheme, as opposed to common law adjudication, where the judicial function is constantly to adjust 'law' to 'reality'.[1097]

[1093] Alexander M. Bickel, *Foreword: The Passive Virtues - The Supreme Court 1960 Term*, 75 HARV. L. REV. 40, 41 (1961). See also Reich, *Mr. Justice Black and the Living Constitution* (1963), 744 ("The notion of 'absolutes' can best be seen … , as an answer to a process of judging which Black believes to be out of keeping with the Constitution. It developed as a dissenting position").
[1094] Bickel, *The Passive Virtues* (1961), 41.
[1095] *Cf.* Reich, *Mr. Justice Black and the Living Constitution* (1963), 743.
[1096] Fried, *Two Concepts of Interests* (1963), 755-761.
[1097] Reich, *Mr. Justice Black and the Living Constitution* (1963), 737-738. See also Note, *Civil Disabilities and the First Amendment* (1969), 851fn. 39.

6.4.4.2 Balancing and the judicial process: Institutional capacity and guidance

Among the critiques of balancing in relation to the institutional position of the judiciary, in particular the Supreme Court, two final sub-themes relating specifically to the judicial process deserve mention.

(1) First, some commentators were keen to point out that balancing placed impossible demands on the judicial process. The judiciary, it was argued, was not institutionally capable of carrying out the sort of detailed factual analysis necessary for any 'serious' balancing exercise. "The complexity of the inquiry which constitutional balancing requires", Charles Reich argued, raised a serious question: "Is this a task which judges are qualified to undertake?".[1098] Following Justice Black, Reich felt that they clearly were not.[1099] Thomas Emerson, too, argued that the judicial process was ill-suited to balancing: "If a court takes the test seriously, the factual determinations involved are enormously difficult and time-consuming, and quite unsuitable for the judicial process".[1100]
The impact of this line of critique seems to have been relatively limited, for two main reasons. First, as the quotation from Thomas Emerson shows ("*if* a court takes the test seriously …") the concern of these writers was not so much with the deferential balancing as actually propagated by Justices Frankfurter and Harlan, but with judicial approaches that would take the logic of balancing further and that would truly attempt to subject governmental action to searching scrutiny.[1101] There was therefore to some degree a mismatch between the theoretical conception of balancing envisaged by these critics and the form of balancing actually seen to operate in Supreme Court decisions. Secondly, emphasizing the limits of judicial capabilities in this area went directly against a trend in jurisprudence, increasingly dominant since the 1930s, of demanding from judges *more* attention to the societal impact of their decisions.[1102]

(2) The Supreme Court's balancing was also criticized from an institutional perspective on the ground that application of a 'balancing test' gave *insufficient guidance* to claimants on the one hand, and to local police-officers, lower courts and all others on the 'frontline' of the First Amendment. One important objection to the 'vagueness' of balancing was that it reduced the protection of civil liberties to guesswork. An individual wishing to assert his First Amendment rights before a congressional investigation into his alleged communist party membership "must determine the value judgments which nine

[1098] Reich, *Mr. Justice Black and the Living Constitution* (1963), 740.
[1099] Ibid., 739ff.
[1100] Emerson, *Toward a General Theory of the First Amendment* (1963), 913. *Cf.* also Frantz, *The First Amendment in the Balance* (1962), 1443.
[1101] Justice Frankfurter had in fact pointed explicitly to 'the limits of the judicial process' in his *Dennis* concurrence (at 341 U.S. 494, 526, 552).
[1102] See *infra*, Chapter 3. See for a contemporary discussion Miller & Howel, *The Myth of Neutrality in Constitutional Adjudication* (1960), 661; Arthur S. Miller, *On the Need for Impact Analysis of Supreme Court Decisions*, 53 GEO. L.J. 365 (1965), with references to balancing, in particular at 371-372.

Justices will make when his case comes before them".[1103] The danger of such unpredictability, which would undermine the effective protection offered by the Bill of Rights, was the animating force behind Justice Black's insistence on "firm and easily apprehended constitutional standards", that would "minimize the vagrant propensities and biases of the thousands of judges, …, who … are called on to administer our constitutional order".[1104] The vagueness of the balancing test would finally, it was argued, also come back to haunt the Supreme Court itself. In Charles Reich's view: "A case-to-case method of interpreting the Constitution really means that the Supreme Court has to settle everything itself".[1105]

[1103] Note, *HUAC and the Chilling Effect*, 21 RUTGERS L. REV. 679, 705 (1967). See also Justice Black's dissenting opinion in *Barenblatt*, discussed *infra*, s. 6.3.3.1.
[1104] Freund, *Mr. Justice Black and the Judicial Function* (1967), 472.
[1105] Reich, *Mr. Justice Black and the Living Constitution* (1963), 749.

6.4 INTERIM CONCLUSION

The first decades after the Second World War saw the theme of judicial balancing become a dominant element of American constitutional legal discourse. The Supreme Court's balancing test, as exemplified in its First Amendment case law, became the focal point for debate and disagreement on a wide range of issues, ranging from topics specific to the free speech context, to broad questions on the position of the Supreme Court in the constitutional architecture. As in the case of Germany, therefore, a first central observation to make cannot concern the particular content of contemporary American ideas on the role of balancing, but has to be the mere fact that more and more disagreements on constitutional issues came to be discussed within the discourse of balancing. By the time of the last cases discussed in detail above, around 1962, balancing truly had become "*the central first amendment issue*".[1106] The Amendment's prominence in the American constitutional scheme, and the stature of the main participants in the free speech debates – Justices Frankfurter, Harlan and Black, and academics like Harry Kalven, Thomas Emerson, Alexander Meiklejohn, Charles Fried and Louis Henkin - conspired to make this 'central First Amendment issue' central to constitutional adjudication more generally.

The relevant debates reveal a very broad range of views on what balancing, in Supreme Court case law, *was*, and on what its invocation meant for constitutional rights protection and for the position of the Court. From among these many subthemes, outlined above, two stand out. The first is the way in which balancing was constantly given meaning through opposition with alternatives; notably Justice Black's absolutes and the categorical conceptual distinctions that were central to a number of First Amendment theories propagated at the time. The second is the ambivalence towards the discourse of balancing stemming from the tension between the realist push towards *understanding* adjudication in its terms, and persistent doubts over its capacity to adequately *justify* judicial decision making. These two themes will be discussed in more detail in the next Chapter, as building blocks of balancing's local, American, meaning.

[1106] Frantz, *The First Amendment in the Balance* (1962), 1432 (emphasis added).

CHAPTER 7

TOWARDS A LOCAL MEANING OF BALANCING DISCOURSE IN AMERICAN CONSTITUTIONAL JURISPRUDENCE OF THE LATE 1950s – EARLY 1960s:

PRAGMATIC INSTRUMENTALISM, STANDARDS OF REASONING, AND THE DEFINITIONAL TRADITION

7.1 INTRODUCTION: OPPOSITION AND CONTRAST

7.1.1 Setting and project

One of the points that the preceding Chapter has aimed to demonstrate was that balancing *did not* become the doctrinal model or underlying theory for all constitutional rights adjudication in the U.S. during the late 1950s, early 1960s. Balancing did not even assume the status of uncontested model - neither descriptively or normatively - for all freedom of expression adjudication during this period.[1107] In this sense, the American experience was decisively different from developments in Germany, where balancing quickly did assume such a role. This interim conclusion again serves to underline the specific nature of the comparative project undertaken here. The dimension of similarity underlying the comparison of balancing in Germany and the U.S. is found on the level of discourse: what makes the German and the U.S. experiences comparable during this period is simply that *the language of balancing* became the focal point for debate about constitutional rights adjudication. The language of balancing, in both settings, became the lens through which problems of rights adjudication came to be viewed and discussed, initially, but in both cases ultimately certainly not exclusively, in relation to freedom of expression. This basic similarity on the level of discourse, will again, as in the case of Germany, form the starting point for a reconstruction of the local contemporary meaning of that discourse. As explained in Section 1.9.2, although the primary focus for both the German and U.S. Chapters is on materials related to the right to freedom of expression, in both settings the analysis moves beyond the confines of this area of law in cases where, and to the extent that, contemporary local debates saw balancing's relevance in a broader light.

7.1.2 Argument

The central theme for this reconstruction in the American setting will be that of opposition and contrast. Although a detailed comparison with the German experience will only follow later, in Chapter 8, the argument may be summarized at this point as the idea that while balancing in Germany fulfilled essential functions of *synthesis and harmonization*, its local American meaning emerges primarily out of *juxtapositions and contrasts* with other currents of discourse.[1108] Two major such oppositions and contrasts will be discussed in this Chapter.

[1107] In fact, it was argued above that pervasive uncertainty as to balancing's 'scope of application' is an essential part of its American local meaning. See *supra*, s. 6.4.

[1108] For this comparison, see Chapter 8. See also Chapter 5. It may be recalled that in the German case, balancing's local meaning was said to flow in part from its unifying or synthesizing role in promoting the concepts and imagery of the complete Constitution and the perfect-fit Constitution.

(1) First, balancing assumed meaning in the clash between, on the one hand, an increasing emphasis on a 'realistic' understanding and depiction of the processes of adjudication and, on the other, increased – or renewed - demands for judicial reasoning to satisfy specific standards of justification. Judicial reasoning increasingly had to be convincing as a depiction of what judges actually did, but this increasingly 'realistic' picture also had to conform to a newly affirmed acceptable ideal image of what judges should be doing. Put differently, using vocabulary from the relevant debates themselves, this was a clash between the currents of 'pragmatic instrumentalism' and of 'reasoned justification'.

During the 1930s and 1940s ever-greater emphasis had been placed on the instrumental and pragmatic qualities of judicial decision making. The language of balancing was an integral part of these projects of arriving at a 'truer', 'more realistic' understanding of adjudication.[1109] This process will be illustrated for the freedom of expression context through an analysis of the way in which the classic 'clear and present danger' test of the early 1920s came to be increasingly reformulated in - and ultimately replaced by - balancing ideas and language. But, as will also be shown, the influence of pragmatic and instrumentalist ideas went much further than just the reformulation of this specific doctrine. The late 1950s, however, also saw a renewed acute interest in the necessities of an adequate justification of constitutional decisions by the Supreme Court. In the terminology of Chapter 2, there was a renewed focus on the necessity of securing the legitimizing force of judicial reasoning, accompanied by a series of proposals for new understandings of what this legitimizing force should entail and how it might be accomplished. Many of these newly formulated - though often in fact rather traditional - ideals for the legitimizing force of judicial reasoning suggested during this period appeared in direct conflict with the ideas associated with judicial balancing. These ideals, and their relation to balancing, will be analysed in this Chapter primarily through the work of Herbert Wechlser, one of the most prominent writers associated with the 'reasoned justification' project. As set out in Chapter 2, the assumption will be that part of balancing's meaning may be understood by looking at what Wechsler and other prominent writers saw as the criteria for 'good' legal reasoning, and by finding out to what extent and for what reasons they saw balancing as conforming to, or deviating from, these standards. The fact that many commentators arguing in this vein explicitly opposed their ideals to the Supreme Court's practice of balancing only serves to support this approach.

(2) The second clash to be detailed here is between balancing and what will be called the '*definitional tradition*' in American legal thought. It will be shown that at each of the various stages of the development of the discourse of balancing in the freedom of expression context, a prominent 'definitional' or 'categorical' alternative was being promoted. And again, following the approach set out in Chapter 2, balancing's meaning may be understood by way of its opposition to this tradition. Whether the definitional alternative was an "absolute and objective test", a system of 'categorization' of free

[1109] This type of description itself being the answer to a normative demand.

speech cases, or a principled definition of the 'core' of the First Amendment, exponents of this tradition explicitly portrayed themselves as being engaged in a project diametrically opposed to what they thought 'balancers' were doing. Their reasons for preferring these approaches to balancing, and the reasons given by their opponents for rejecting 'definitional' alternatives and favouring balancing again are all essential parts of this discourse's local American meaning.

7.1.3 Balancing, the formal and the substantive

As in the case of Germany in Chapters 4 and 5, this American local meaning of balancing will ultimately be expressed in terms of the formal/substantive opposition. Most of the work involved in this translation will be undertaken in Chapter 8, but the basic relationships may be expressed as follows.

(1) In the clash between 'pragmatic instrumentalism' on the one hand, and the ideals of 'reasoned justification' on the other, pragmatic and instrumentalist ideas are clear expressions of the substantive in law. To the extent that the language of balancing was invoked to further such pragmatic and instrumentalist depictions of adjudication, the meaning of balancing itself must therefore be understood as associated to these particular brands of substantive ideas. The debate over the appropriate standards of 'reasoned justification', in turn, was to a very large extent a debate over the virtues of legal formality. Wechsler's main proposal, for judges to decide cases on the basis of 'neutral principles', for example, came to be understood by many as requiring decisions on the basis of a "rule of general application, logically and consistently applied"[1110] - a formula that shows a very clear overlap with Weber's definition of formal legal rationality. It will be seen below that there was an important current in the literature that saw elements of what Wechsler and others proposed as showing strong similarities to the formalism of the *Lochner*-period (discussed in Chapter 3), while others thought Wechsler's appeals for 'generality' and reasoning according to rule were the only way to avoid a kind of illegitimate *ipse dixit* decision making that could itself be qualified as mechanistic and therefore formalistic. If, as is argued here, the conflicts between these proponents and opponents of the 'reasoned justification standards', and the conflicts between 'reasoned justification' and 'pragmatic instrumentalism' can be understood as proxies for the formal/substantive opposition, then it should be possible to express the meaning of balancing, to the extent that it is related to these conflicts, in these very same terms.

(2) As for the second clash outlined above, it will be argued in Chapter 8 that the 'definitional tradition' in the First Amendment context, as analysed in this Chapter, is one of the dominant local American expressions of formal ideals in law, with

[1110] Louis Henkin, *Some Reflections on Current Constitutional Controversy*, 109 U. PA. L. REV. 637, 653 (1961). See also Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 48 (1961) ("[A] neutral principle … is one that the Court must be prepared to apply across the board, without compromise").

reverberations far beyond the confines of free speech law. Many of the leading exponents of this tradition in the free speech context, such as Justice Black and his ideal of an 'absolute' First Amendment, for example, have become rallying figures for judges and scholars arguing for greater emphasis on the formal qualities of law and adjudication generally. Again: insofar as the meaning of balancing emerges from its continuous opposition to this tradition, as this Chapter argues that it does, this meaning will clearly be imbued with a particular sense of *anti*-formality.

7.2 PRAGMATIC INSTRUMENTALISM AND REASONED JUSTIFICATION: BALANCING BETWEEN *DESCRIPTION* AND *JUSTIFICATION* IN RIGHTS ADJUDICATION

7.2.1 The rise of instrumentalism, or means-ends thinking, in free speech law

In the Chapters on balancing discourse in German constitutional law in the late 1950s and early 1960s, it became necessary to look back to developments in thinking on freedom of expression from before the Second World War and to investigate their influence on post-War jurisprudence. In that context, the debate on freedom of expression between Smend, Häntzschel and others was seen to have been at the origins of the intellectual current of 'material constitutionalism'. Material constitutionalism was described in Chapter 5 as a strand of thought wholly separate to the rise of the '*Interessenjurisprudenz*'. The *Bundesverfassungsgericht*'s balancing opinions of the late 1950s and early 1960s, finally, were interpreted as a coalescence of the two currents.

This short recapitulation serves to introduce an important contrast with developments in the US. In a striking difference to the genealogy of balancing in German constitutional law, the American School of 'Sociological Jurisprudence' and contemporary developments in thinking about freedom of expression from he late 1920s onwards were intimately *connected*. To analyse this connection, it will be necessary to return to the classic doctrine of 'clear and present danger' as it emerged from the *Schenck* and *Abrams* decisions.

7.2.1.1 'Clear and present danger' and balancing: Zechariah Chafee and Sociological Jurisprudence

The 'clear and present danger' test is commonly attributed to the Opinions of Justices Holmes and Brandeis in the landmark cases of *Schenck* and *Abrams* (both 1919).[1111] The fact that Holmes' and Brandeis' test has come to be seen as the cornerstone of an expansive American approach to freedom of expression, however, owes much to Zechariah Chafee (1885-1957), a practicing lawyer and professor at Harvard Law School, who was the test's main propagator during the 1920s and 1930s. It was Chafee who first praised 'clear and present danger' as an integral element of the American constitutional tradition and as a strong barrier against government suppression of dissent.[1112] What makes Chafee's contributions particularly relevant from the perspective of this study, is that his plea for 'clear and present danger' rested ultimately

[1111] See supra, s. 6.2.3.

[1112] On Chafee's influence, see, *e.g.*, Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1979); David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205 (1983).

on a conceptualization of the doctrine in terms of balancing. In his 1920 book '*Freedom of Speech*', Chafee wrote:

> "The true boundary line of the First Amendment can be fixed only when Congress and the courts realize that the principle on which speech is classified as lawful or unlawful involves the *balancing against each other of two very important social interests*, in public safety and in the search for truth. Every reasonable attempt should be made to maintain both interests unimpaired, and the great interest in free speech should be sacrificed only when the interest in public safety is really imperilled (...).[1113]

The language in which Chafee described and promoted the clear-and-present-danger test was that of his contemporaries: the 'Sociological Jurisprudes'. Chafee's freedom of speech balancing, in other words, was the balancing of interests of Roscoe Pound and others, discussed above in Chapter 3.[1114] This connection becomes clear if one looks in more detail at the reasons why Chafee conceived of the need to balance interests in First Amendment cases.

(1) First, Chafee was interested, in the same way as Pound was, in the ways in which a jurisprudence of *interests* could be more true to life, more realistic, than a jurisprudence of *rights*. "To find the boundary line of any right, we must get behind rules of law to human facts", he wrote, in language very similar to Pound's.[1115] In the context of freedom of speech, this meant looking at the "desires and needs of the individual human being who wants to speak and those of the great group of human beings among whom he speaks".[1116] "Talk about *rights*" in the context of civil liberties, Chafee thought, could only lead to "deadlock";[1117] to find the "true meaning of freedom of speech", an analysis in terms of rights had to be abandoned in favour of an approach focused on *interests*. This distinction between rights and interests, which Chafee explicitly traces back to both Rudolph von Ihering and Roscoe Pound, in his view was helpful not just to freedom of speech, but could clarify "almost any constitutional controversy".[1118]

(2) Secondly, this refocusing of the inquiry onto interests in Chafee's project functioned as a stepping stone for his main substantive argument for the protection of the freedom of expression: freedom of expression is not merely an individual, but a *social* interest. The First Amendment, in Chafee's view, served, besides the interest of

[1113] ZECHARIAH CHAFEE, FREEDOM OF SPEECH 38 (1920) (emphasis added).
[1114] See on the 'sociological jurisprudence' background to the 1919 decisions and their aftermath, G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth Century America*, 95 MICH. L. REV. 299, 314 (1996).
[1115] CHAFEE (1920), 35. Pound himself discussed freedom of expression in explicit balancing terms, in his two-part article on '*Interests of Personality*'. See for a description of "Pound's Balancing Test" as it emerges from this article, David M. Rabban, *The First Amendment in its Forgotten Years*, 90 YALE L.J. 514, 575ff (1981). Pound did, however, come to a different (less speech protective) result. See *ibid.*, at 589.
[1116] CHAFEE (1920), 35.
[1117] *Ibid.*, 34 (emphasis added). Chafee's illustration of the point is memorable: *not* to regard interests, he says, would be to claim, vacuously, that "your right to swing your arms ends just where the other man's nose begins".
[1118] *Ibid.*, 35fn73.

individuals in being able to express their opinions, a "social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way".[1119] "The great trouble with most judicial construction of the [World War One 'Sedition Act', the principal federal legislation limiting speech]", Chafee wrote, "is that this social interest has been ignored and free speech has been regarded as merely an individual interest which must readily give way".[1120] As Edward White has observed, in promoting this "'social interest' in enhanced public participation in a democracy" to the position of one of the main foundations for the constitutional guarantee of freedom of expression, Chafee restated the philosophical underpinnings of this area of constitutional law in a way that benefited greatly from "his close contact with Progressives like Roscoe Pound".[1121]

As in Roscoe Pound's work, Chafee's interest analysis was integral to a project of recalibration of forces between individuals and society in constitutional rights cases. Chafee frames the requisite analysis in terms of interests specifically to achieve *a re-evaluation of the opposing claims* in constitutional rights cases, in a way very similar to, though also subtly different from, Pound's arguments against the Supreme Court's *Lochner* jurisprudence.[1122] Recall that Pound's project was to promote the view of the constitutional rights of property and contract as (*mere individual*) interests that could be balanced against other (*important social*) interests, in order to overcome the paramount status these rights had been given by the Supreme Court. Using the exact same argumentative device, Chafee defended the view that protecting the freedom of expression was not merely in the interest of individual speakers, but of society at large. This time, however, the 'rights-into-interests' mode of arguing was, of course, designed to result in greater, not less, protection for the constitutional right concerned.

Chafee relied on two related further elements of the Sociological Jurisprudes' argumentative arsenal.

(3) His reliance on balancing was inspired by a proto-Realist scepticism of deduction and 'literalness', and, more generally, of methods of legal reasoning that obscured difficult underlying policy choices. "The rights and powers of the Constitution …, are largely means of protecting important individual and social interests, and because of the necessity of balancing such interests the clauses cannot be construed with absolute literalness".[1123] Balancing, in this view, was a pragmatic solution for where legal dogmatics left off, or failed. In Chafee's terms, it was not possible to 'define' the right to free speech with any precision, but it was feasible to "establish a workable principle of classification in this method of balancing and this broad test of certain danger".[1124] Again,

[1119] *Ibid.*, 36. For an application in Supreme Court case law, see USSC *Thornhill v. Alabama*, 310 U.S. 88, 105 (1940) (referring to "the interest of the community and that of the individual in freedom of discussion on matters of public concern").
[1120] *Ibid.*, 37.
[1121] White, *The First Amendment Comes of Age* (1996), 317fn48.
[1122] See *supra*, s. 3.2.5.2 and 3.3.4.
[1123] CHAFEE (1920), 35.
[1124] *Ibid.*, 38 (emphasis added). See for a similar contemporary perspective, *e.g.*: Myron Gollub, *The First Amendment and the N.L.R.A.*, 27 WASH. U. L. Q. 242, 261 (1942) ("[Law] limits absolute freedom of speech.

this scepticism of definition and the preference for a 'workable', pragmatic approach, are very similar to those evinced by Pound in his critique of 'mechanical jurisprudence'.[1125]

(4) Finally, Chafee's approach to free speech was akin to the Sociological Jurisprudes' balancing in its emphasis on empirical evaluations and attention to factual circumstances. His reference to a "method of balancing *and this broad test of certain danger*", cited earlier, is suggestive of the fact that Chafee's balancing method is primarily based on a prediction of consequences.[1126] The balancing of competing social interests, in his approach, finds its practical application in an attempt at forecasting the imminence and magnitude of costs to other interests if the relevant expression is allowed to stand unpunished. The idea that this inquiry contains a strong factual element is underlined by contemporary suggestions that the question of 'danger' was a matter of fact for juries to decide, and that 'clear and present' was merely a description of the requisite standard of proof for this determination.[1127]

All of these elements combined – Chafee's reliance on interests to overcome the conceptual and normative limits of 'rights' analysis, his scepticism of legal dogmatics and his empiricism – serve to highlight the pragmatic, instrumentalist nature of Chafee's conception of the role of balancing in First Amendment theory and adjudication and to underline the close proximity of his work to that of the Sociological Jurisprudes. In short: free speech balancing, at this early stage of the development of First Amendment jurisprudence in essence *was* interest balancing of the kind promoted by Pound and discussed in Chapter 3.

7.2.1.2 Beyond 'clear and present danger': Balancing and policy

The phrase 'clear and present danger' had a chequered history after its initial invocation in *Schenck* and *Abrams*. Its status as a doctrinal test for deciding cases was far from settled. 'Clear and present danger' was arguably never consistently endorsed as a First Amendment 'test' by a clear majority of the Supreme Court.[1128] Some Justices and observers were not even convinced it was a 'test' at all. "'Clear and present danger' was never used by Mr. Justice Holmes to express a technical legal doctrine or to convey a

Thus it seen that *two interests must be weighed in the balance*: the interest of freedom of speech and the interest of the public welfare. Obviously *there is no logical mathematical solution*. The solution must be *a subjective, intuitive one*", emphasis added).

[1125] See *supra*, s. 3.2.5.2.

[1126] *Cf.* White, *The First Amendment Comes of Age* (1996), 317 (noting that Chafee's formula "looks to empirical analysis").

[1127] *Cf.* Brandeis J., dissenting in USSC *Schaefer v. United States* 251 U.S. 446, 483 (1920), discussed in Elliot L. Richardson, *Freedom of Expression and the Function of Courts*, 65 HARV. L. REV. 1, 25-28 (1951). In *Dennis*, the Supreme Court held that 'clear and present danger' was "a judicial rule to be applied as a matter of law by the courts" based on "a judicial determination of the scope of the First Amendment applied to the circumstances of the case". (341 U.S. 494, 513). See also Wallace Mendelson, *Clear and Present Danger - From Schenck to Dennis*, 52 COLUM. L. REV. 313, 315 (1952) ("In origin 'clear and present danger' was a rule of evidence …").

[1128] Rabban, *The Emergence of Modern First Amendment Doctrine* (1983), 1348; Mendelson, *Clear and Present Danger: From Schenck to Dennis* (1952), 313 ("as a judicial instrument, the danger test has never had more than four enthusiasts on the Supreme Court at any one time").

formula for adjudicating cases", Justice Frankfurter wrote in a 1946 concurring opinion. "It was a literary phrase not to be distorted by being taken from its context".[1129]
This uncertainty over the phrase's doctrinal status, however, has to be contrasted with the unequivocal dominance of *the rhetoric* of 'clear and present danger' in American free speech law of the 1930s and 1940s. Not only was the language of 'clear and present danger' pervasive in discussions on freedom of expression; 'clear and present danger' became the lens through which many of the problems of First Amendment adjudication were viewed.

Throughout these discussions, the connection between the ideas and practices behind 'clear and present danger' and those related to the balancing of interests and values, first expounded by Chafee, assumed ever-greater importance. Paul Freund, for example, in words later cited by Justice Frankfurter,[1130] wrote in 1949 that the 'clear-and-present-danger test' was "an oversimplified judgment", and "no substitute for the weighing of values".[1131] 'Clear and present danger', other commentators argued at the time, was merely a "shorthand description of the balancing process undertaken by the Court".[1132] Whereas the idea of balancing had originally been invoked by Chafee in order to give practical substance to a distinct ideology of freedom of speech represented by the Holmesian-Brandeisian idea of 'clear and present danger', balancing now came to eclipse the original test virtually entirely. By the late 1940s – early 1950s, an increasingly dominant understanding had become that balancing was all there *was* to 'clear and present danger'. Balancing, in the words of one commentator, made up "the extent of the utility of the concept".[1133]

[1129] USSC *Pennekamp v. Florida*, 328 U.S. 331, 353 (1946) (Frankfurter J., concurring). See also Frankfurter's dissent in USSC *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 663 (1943) (criticizing his colleagues for taking "a felicitous phrase out of the context of the particular situation where it arose"). See also Wallace Mendelson, *The Clear And Present Danger Test – A Reply to Mr. Meiklejohn*, 5 VAND. L. REV. 792, 793 (1952) (arguing that Holmes' insights had been transformed into "sterile dogma").

[1130] See 341 U.S. 494, 542 (Frankfurter J., concurring).

[1131] PAUL FREUND, ON UNDERSTANDING THE SUPREME COURT 27 (1949) ("The truth is that the clear-and-present-danger test is an oversimplified judgment unless it takes account also of a number of other factors: the relative seriousness of the danger in comparison with the value of the occasion for speech …; the availability of more moderate controls than those which the state has imposed …. No matter how rapidly we utter the phrase 'clear and present danger,' or how closely we hyphenate the words, they are not a substitute for the weighing of values").

[1132] Richard C. Donnelly, *Government and Freedom of the Press*, 45 ILL. L. REV. 31, 53 (1950); Richardson, *Freedom of Expression and the Function of Courts* (1951), 17 (viewing 'clear and present danger' as "merely a shorthand means of signifying a complicated process of balancing interests").

[1133] *Cf.* Chester James Antieau, *Clear and Present Danger - Its Meaning and Significance*, 25 NOTRE DAME L. REV. 603, 639 (1950) (also describing 'clear and present danger' as "essentially a working principle for the weighing of social utilities"). See also, *e.g.*, Thomas I. Emerson & David M. Helfeld, *Loyalty among Government Employees*, 58 YALE L.J. 1, 86 (1948) (arguing that 'clear and present danger' ultimately "resolved" into issues of balancing competing values); Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 93, 942fn21 (1968) ("as became clear in [*Dennis*], the [clear and present danger] test represents only a particular form of ad hoc balancing").

Two dimensions to this broad transformation are particularly noteworthy.

(1) First, the increased emphasis on balancing meant that the relevance of 'clear and present danger' itself as an independent idea came to be questioned. Commentators still saw 'clear and present danger' as useful in pointing to the 'relevant factors to be balanced', or as expressive of a more general protective 'attitude' towards free speech.[1134] But beyond that, the distinctive qualities of 'clear and present danger', in terms of an approach to deciding cases, were seen as severely limited. "Qualified commentators have repeatedly noted", William Lockhart and Robert McClure summarized the relevant scholarship, "that *whatever formula is used*, the Court's function in freedom of expression cases is to balance competing interests".[1135]

(2) Secondly, in a new development, the balancing seen to be required in free speech cases, whether 'clear and present danger' was mentioned or not, was increasingly described as being 'legislative' in nature. Judging First Amendment claims, on these views, became explicitly a matter of policy.[1136] 'Clear and present danger' or not: what courts were actually doing in First Amendment cases, it was felt, was carrying out "judicial review in the fullest legislative sense of the competing values which the particular situation presents".[1137]

The resulting assimilation of 'free speech adjudication', 'balancing' and 'policy', had assumed considerable importance by the time the Supreme Court decided the *Dennis* case in 1951. It is clearly reflected in the majority's approaches.[1138] In the eyes of the majority, the rise of the balancing perspective meant that the classic 'clear and present danger' formula no longer captured what was important in First Amendment adjudication.[1139] For Chief Justice Vinson, the solution was a reformulation of 'clear and present danger' in balancing terms, which he undertook following the model set out by Judge Learned Hand in the court below.[1140] Justice Frankfurter, for his part, wanted to go further and replace the "sonorous formula" of 'clear and present danger' with a "candid and informed weighing" that no longer obscured the underlying "unresolved conflict".[1141]

7.2.1.3 Broader scene: The rise of pragmatism and instrumentalism

These developments with regard to the 'clear and present danger' test have to be situated within a broader jurisprudential trend of the rise of pragmatism and instrumentalism as elements of the dominant theory of law and adjudication in the U.S. By the mid-1930s, pragmatism and instrumentalism were already described as "the dominant philosophical influence in American law today", with an influence far beyond the confines of the School of Legal Realism.[1142] More recently, Robert Summers has identified 'pragmatic instrumentalism' as "the most influential legal theory during the middle decades of the [20th] century", dwarfing analytical positivism and natural law theories.[1143]

Both instrumentalism and pragmatism are, and were at the time, complex, contested, multi-facetted, and sometimes internally contradictory terms, with historically evolved and evolving meanings.[1144] The two concepts have already been mentioned in Chapter 2 and will be discussed in more detail in Chapter 8. Three specific elements from these theories, however, are of particular relevance to the present discussion. First, instrumentalism and pragmatism promoted an emphasis on the role of interest balancing as a technique of public decision making. Instrumentalism, by viewing law as a means to an end - an end described in very general terms as the 'maximization' of wants and interests. And pragmatism through its abhorrence of fixed rules for broad categories of cases and its insistence on experimentalism and incrementalism.[1145] Secondly, because of its adherence to such a broadly applicable value theory of 'maximization', and a corresponding skepticism of "more particular notions of value for the resolution of specific issues",[1146] 'pragmatic instrumentalism', to use Summers' overarching term, in fact made it very difficult to conceive of adjudication in specific areas, like freedom of expression, in anything else than the terms of 'maximization'. In this way, any degree of *separate* normative content of doctrinal tests like 'clear and present danger', or a categorical prohibition on prior restraints, for example, was severely undermined. Put

1134 *Cf.* William B. Lockhart & Robert C. McClure, *Literature, The Law of Obscenity and the Constitution*, 38 MINN. L. REV. 295, 368 (1954); Antieau, *Clear and Present Danger* (1950), 641.
1135 *Ibid.*, 368fn444 (emphasis added).
1136 *Ibid.*, 367.
1137 Herbert Wechsler & Harry Shulman, *Symposium on Civil Liberties*, 9 AM. L. SCH. REV. 881, 887 (1941). Wechsler qualified 'clear and present danger', seen in balancing terms, as a "thin disguise for the essentially legislative nature of constitutional adjudication" (at 889). On Wechsler, see further *infra*, s. 7.2.2.2.
1138 Not everyone agreed, of course. See, *e.g.*, Wallace Mendelson, *A Reply to Mr. Meiklejohn* (1952), 794 ("The danger test that Justices Holmes and Brandeis fashioned was not a scale for 'balancing' political freedom against other public interests"). Interestingly, some contemporary *German* observers thought that 'clear and present danger' and 'balancing' were distinct. See *supra*, s. 4.1.2.4.
1139 For a critical assessment of the connection between 'clear and present danger' and balancing in cases like *Dennis v. United States*, see Alexander Meiklejohn, *The Balancing of Self-Preservation against Political Freedom*, 49 CAL. L. REV. 4, 13 (1961) ("[The 'balancing theory'] is a fiction which serves to cover the fact that ... the Court has reinstated as 'controlling' the 'clear and present danger' test of 1919, but with the words 'clear' and 'present' left out", citation omitted).
1140 See *supra*, s. 6.3.2.2.
1141 341 U.S. 494, 519 (Frankfurter J., concurring).
1142 Rufus C. Harris, *What Next in American Law?*, 8 AM. L. SCH. REV. 461, 464 (1936).
1143 Robert S. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought - A Synthesis and Critique of our Dominant General Theory about Law and its Use*, 66 CORNELL L. REV. 861, 873(1981).
1144 See *supra*, s. 2.5.5.2.
1145 'Ad hoc balancing', in American discussions, is typically associated with pragmatism. See, *e.g.*, Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1449 (1987); Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 740 (2002) (preferring the label "pragmatist" approach to that of a "balancing approach", and/but identifying pragmatism with cost-benefit analysis); Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST L. Rev. 473, 480 (2003) (describing the "rights-based jurisprudence of the [second half of the 20th century]" as both pragmatist and involving balancing). For a very early reference on the connection between "the pragmatic search for a rule which works" and "the balancing of interests and the weighing of values", see Walter B. Kennedy, *Pragmatism as a Philosophy of Law*, 9 MARQ. L. REV. 63, 66 (1925).
1146 *Cf.* Summers, *Pragmatic Instrumentalism* (1981), 915. See also at 876.

simply: in the pragmatic instrumentalist view, the philosophical foundations of free speech adjudication would be no more than the localized instantiation of the philosophical foundations of rights adjudication generally, which in turn would be only a subset of the foundations underlying all adjudication. Having qualitatively different 'tests' in operation for different areas of free speech law or for different constitutional rights, in the pragmatic instrumentalist view, was a sign of misplaced doctrinal traditionalism rather than the potentially appropriate manifestation of different underlying conceptions. Finally, 'pragmatic instrumentalists' shared with the Realists a distrust of '*formulae*' and doctrinal language. Commentators and judges taking this line were particularly concerned that constitutional metaphors or literary phrases, such as 'clear and present danger' could be transformed into 'sterile dogma', in precisely the way Justice Holmes had warned against. Here again, the perceived formalism of the *Lochner*-period served as a familiar image of what was to be avoided.

7.2.1.4 Interim conclusion: How balancing 'took over' free speech adjudication

Taken together, these micro-level doctrinal developments and broader intellectual currents exemplify the pressures on the Court to 'liberate' itself from the confines of doctrinal *formulae* such as 'clear and present danger' and to move towards candidly framing its opinions in the language of a decisional process that was seen as both inevitable and normatively desirable. That process, of course, was a balancing of interests. The *Dennis* opinion, read in this way, signified "a declaration of independence by the Court from the tyranny of a phrase".[1147] There had been "too many opinions that hide the inevitable weighing process by pretending that decisions spring full-blown from the Constitution" or from constitutional formulae.[1148] "What seems to have brought balancing out of the closet and into the hard light of day", in the eyes of one later observer, "was the judicial desire for candor, the simple drive to tell the truth about judging regardless of costs".[1149] The pragmatic instrumentalist perspective meant, furthermore, that once 'candid balancing' surfaced in one area, there would be significant pressure to similarly 'liberate' other areas of law from obscurantist traditional formulae and to frame decisions there too in terms of balancing.

This pressure towards using the language of balancing to align the Court's written opinions with what was understood to be its underlying decision making process,[1150]

[1147] Edward S. Corwin, *Bowing Out Clear and Present Danger*, 27 NOTRE DAME L. REV. 325, 358 (1952). Corwin agreed with many of the basic ideas of the Realists: see Neil Duxbury, *Some Radicalism about Realism: Thurman Arnold and the Politics of Modern Jurisprudence*, 10 OXFORD J. LEGAL STUD. 11, 12 (1990). His work on constitutional law has been described as "corrosive" by one commentator: see Gary L. McDowell, *The Corrosive Constitutionalism of Edward S. Corwin*, 14 LAW & SOC. INQUIRY 603 (1989).
[1148] Wallace Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CAL. L. REV. 821, 825 (1962).
[1149] Patrick M. McFadden, *The Balancing Test*, 29 B.C. L. REV. 585, 620-621 (1988).
[1150] *Ibid.*

important though it was, only makes up part of the local meaning of balancing in the relevant period. Because during that period, in part in reaction to the very trends that brought out the candour of explicit balancing, major developments took place in the standards of legal reasoning that the Court was expected to adhere to. These developments are set out in the next Section. It is in the clash between these two currents that balancing's contemporary local meaning emerges.

7.2.2 Competing perspective: standards of legal reasoning

The late 1950s and early 1960s were a pivotal time in the history of constitutional adjudication in the U.S. In a climate marked by the rise of civil rights litigation and the political exigencies of the Cold War, a majority of the Warren Court conceded "as perhaps no other Supreme Court before it would have, that courts *make* law".[1151] Such avowals, combined with the monumental impact of decisions like *Brown v. Board of Education* (1954), quickly led to attacks from politicians. During 1957 and 1958, in particular, members of Congress proposed bills to strip the Court of part of its jurisdiction and to abolish life tenure for Justices.[1152] While none of these proposals ultimately were enacted, these were attacks on the Court on a scale not seen since Roosevelt's court-packing plan in the 1930s.[1153] Among legal scholars, the unease about the Supreme Court's work manifested itself in two main related categories of criticisms.[1154] On a more general level, commentators complained about the lack of an adequate theory of constitutional adjudication to justify the practice of constitutional judicial review. With respect to judicial performance in specific cases, critiques focused on the absence of adequate justification for the Court's rulings. One of the most influential examples of the first kind of critique can be found in Judge Learned Hand's 1958 'Holmes Lecture' on '*The Bill of Rights*', in which Learned Hand called for great(er) self-restraint on the part of the judiciary in the face of the democratically accountable branches of government.[1155] An important instance of the second type of critique was

[1151] Harold W. Chase, *The Warren Court and Congress*, 44 MINN. L. REV. 595, 629 (1960).
[1152] WALTER F. MURPHY, CONGRESS AND THE COURT: A CASE STUDY IN THE AMERICAN POLITICAL PROCESS 116 (1962). Cited in Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CAL. L. REV. 397, 427 (2005).
[1153] Alpheus Thomas Mason, *Myth and Reality in the Supreme Court*, 48 VA. L. REV. 1385, 1403 (1962). All this, it should be noted, happened before what came to be seen as the 'activist' period of the Warren Court had even begun.
[1154] *Cf.* Erwin N. Griswold, *Foreword: Of Time and Attitudes - Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81, 82 (1960) ("In the past six or seven years, there has been strong and frequent public criticism of the court. The reasons for this are obvious when one considers the history of the period"); Note, *Civil Disabilities and the First Amendment*, 78 YALE. L.J. 842, 852fn40 (1969) (arguing that the Court faced "an equally serious political crisis at the beginning of the Cold War" as it had faced in the 'Court packing' episode at the end of the *Lochner* period). The two lines of critique were clearly linked. See, *e.g.*,Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 999 (1978) (pointing towards the connection, as seen by contemporary commentators, between the need for "reasoned justification" of specific decisions and the appropriate role for the judiciary in constitutional adjudication).
[1155] LEARNED HAND, THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES, 1958 (1958). See also, *e.g.*, Jan G. Deutsch, *Neutrality, Legitimacy and the Supreme Court: Some Intersections between Law and Political Science*, 20 STAN. L. REV. 169, 170 (1968) (referring to Hand's lectures as the "starting point" for many

Professor Henry Hart's 1959 *Harvard Law Review* '*Foreword*', in which he warned that deficiencies in the Court's reasoning were threatening to undermine "the professional respect of first-rate lawyers for the incumbent Justices of the court".[1156]

As these calls for more attention to "the importance of judicial rationalization" grew stronger in the course of the late 1950s, legal scholars became engaged in projects of formulating "a new set of ideals and standards for judicial decision-making" in order to better secure the legitimacy of the institution of constitutional judicial review and its exercise in specific cases.[1157] What these critiques amounted to was a high profile attempt to restore "order to the legal world in the aftermath of realism",[1158] a call for a "return to reason in law",[1159] at precisely the time when balancing came to play a significant role in Supreme Court decisions. The resulting clash of ideas has had lasting influence on the meaning of balancing in U.S. legal discourse. The following Paragraphs introduce some of the most influential of these projects and their relationship to the discourse of balancing.

7.2.2.1 Process Jurisprudence and 'reasoned elaboration'

The jurisprudential developments presented in this Section are more difficult to pin down than those discussed earlier, in Chapter 3, under the heading of 'Sociological Jurisprudence'. Because rather than consisting of a 'School' or a 'Movement', as was to a large extent the case with Sociological Jurisprudence - or even Legal Realism -, the ideas discussed here are more accurately described as part of a much less clearly circumscribed 'attitude' towards law and adjudication, or as part of a 'tradition' in legal thinking.[1160] This means that the argument in this Section should not be understood as referring to a 'School' of legal thought that was 'founded' in the era under consideration in reaction to the 'School' of Legal Realism.[1161] Instead, what this Section looks at is a strand in American legal thought, elements of which were present alongside earlier movements, as early as the 1930s. It was during the final years of the 1950s, however, as Neil Duxbury and others have argued, that some of the core ideas related to this tradition of thinking

recent debates on constitutional judicial review). For a slightly later, and arguably even more influential, account, see ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

1156 Henry M. Hart, Jr., *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 100-101 (1959) (citing Bickel and Wellington).

1157 G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 286 (1973).

1158 See Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601, 669 (1993) (citing Jan Vetter, *Postwar Legal Scholarship on Judicial Decision Making*, 33 J. LEGAL EDUC. 412, 416 (1983).

1159 M. P. Golding, *Principled Decision Making and the Supreme Court*, 63 COLUM. L. REV. 35, 35 (1963). See also Richard H. Fallon, Jr., *The Rule of Law as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 19 (1997) (writing that the work of the Legal Process scholars sought to explain, "in the wake of Legal Realism ... how the American legal system could satisfy could satisfy at least the minimum requisites of the Rule of Law despite conspicuous departures from the formalist conception").

1160 See, *e.g.*, Duxbury, *Faith in Reason* (1993), 605.

1161 *Ibid.*

received their most influential expressions and came to dominate debates in constitutional law.

Observers have used various labels to refer to this tradition of legal thought, the most commonly used being those of 'Process Jurisprudence' and 'Reasoned Elaboration'.[1162] The tradition's core tenets can be described as a faith in reason and, especially, in reasoned justification of constitutional decisions.[1163] 'Process jurists' or 'Reasoned elaborationists', defended an image of adjudication as "a device which gives formal and institutional expression to the influence of reasoned argument in human affairs". As such, adjudication had to discharge a particularly heavy "burden of rationality".[1164] The precise nature of the concept of 'reason' remained unclear, and the standards of legal argument designed for its fulfillment contentious. A common theme in many contributions, however, was the insistence on reason as a 'suprapersonal construct'; a form of argument that transcended individual predilections.[1165] How to give substance to this idea remained a central challenge for contemporary scholars.

7.2.2.2 Herbert Wechsler and the call for 'neutral principles of constitutional law'

By far the most influential attempt to develop new ideals and standards for constitutional legal reasoning came from Professor Herbert Wechsler of Columbia Law School, and was contained in a lecture delivered in 1959, entitled '*Toward Neutral Principles of Constitutional Law*'.[1166] "If any debate characterizes the Warren Court era most prominently", Barry Friedman has written, it has to be the "debate over the possibility of

1162 *Cf. Ibid.*; White, *The Evolution of Reasoned Elaboration* (1973). These ideas formed part of, or were intimately related to, what has also been called the 'Hart-Wechsler Paradigm', after two of its most influential expositors: Henry M. Hart and Herbert Wechsler. See, *e.g.*, Richard H. Fallon, Jr., *Reflections on the Hart-Wechsler Paradigm*, 47 VAND. L. REV. 953 (1994). The phrase "reasoned elaboration" originates in the famous unpublished 1958 manuscript of course text and materials '*The Legal Process*', by Henry Hart and Albert Sacks.

1163 *Cf.* Greenawalt, *The Enduring Significance of Neutral Principles* (1978), 983; Fallon, *Reflections on the Hart-Wechsler Paradigm* (1994), 966; Duxbury, *Faith in Reason* (1993), 605 (referring to "the belief that those who respect and exercise the faculty of reason will be rewarded with the discovery of a priori criteria that give sense and legitimacy to their legal activities").

1164 *Cf.* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 366-367 (1978). Fuller's article was published in 1978, but Neil Duxbury has noted that Fuller circulated a draft of the paper as early as 1957, which makes it contemporaneous with the debates canvassed here. See Duxbury, *Faith in Reason* (1993), 631.

1165 White, *The Evolution of Reasoned Elaboration* (1973), 287. Commentators often pointed to Hart & Sacks' reference to "the maturing of collective thought" as a description of what was desired.

1166 Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). For a discussion of the influence of Wechsler's lecture, see, *e.g.*, Greenawalt, *The Enduring Significance of Neutral Principles* (1978); Isidore Silver, *The Warren Court Critics: Where Are They Now That We Need Them?*, 3 HASTINGS CONST. L.Q. 373, 375 (1976) (the lecture "colored the course of the great legal debate of the 1960s"). Martin Schapiro, *The Supreme Court and Neutral Principles*, 31 GEO. WASH. L. REV. 587, 588 (1963) (referring to Wechsler's "catalytic Holmes Lectures"). As of August 2011 Wechsler's lecture was cited 2247 times in journal articles in the Hein Online Law Journal Library. In a 1996 study, the article was named as the second most cited American law review article of all time (see Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751 (1996). See on the reception of Wechsler's article also: Barry Friedman, *Neutral Principles: A Retrospective*, 50 VAND. L. REV. 503 (1997).

'neutral principles' of constitutional law".[1167] It is in this debate that many of the themes of process jurisprudence, 'reasoned elaboration' and a more general unease with judicial reasoning at the Supreme Court coalesced.

The central issue in Wechsler's lecture is what he calls "the problem of criteria" - standards for the justification of Supreme Court decisions, to be adhered to by the Justices themselves as well as by their critics.[1168] Such standards are necessary if the Court is to function not as a "naked power organ" but as a "court of law".[1169] The greatest obstacle to the satisfaction of this ideal – "the deepest problem" of constitutionalism, even - in Wechsler's view, is *ad hoc* evaluation; judgments turning on the 'immediate result' in a case.[1170] Wechsler's opposition to the *ad hoc* in adjudication is summed up in an oft-cited paragraph:

> "[W]hether you are tolerant, perhaps more tolerant than I, of the *ad hoc* in politics, with principle reduced to a manipulative tool, are you not also ready to agree that something else is called for from the courts? I put it to you that the main constituent of the judicial process is precisely that it must be *genuinely principled*, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved".[1171]

In Wechsler's depiction of the appropriate standards for judicial reasoning, ideas of 'justification', 'reason', 'principle', and 'law' come together. A 'court of law' should take decisions that are 'entirely principled'; a 'principled decision' is one that rests on 'reasons' with respect to all the issues in the case; and adequate 'reasons' are those that "in their generality and their neutrality transcend any immediate result that is involved".[1172]

Wechsler's article, and in particular his 'tantalizing' concept of 'neutral principles', have received many interpretations over the years.[1173] What matters within the context of this study is a general idea of the position of Wechsler's suggestions within the broader intellectual currents of 'reasoned elaboration' and 'process jurisprudence' described above, and an outline of the reception of these ideas, as a prelude to a discussion of the relationship between principled decision-making and balancing, which is to follow below.

From this perspective, Wechsler's position and its reception can be summarized in two simple general statements: Judicial decisions must be *reasoned*, and the reasons

[1167] Barry Friedman, *The Birth of An Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 241 (2002).
[1168] Wechsler, *Toward Neutral Principles of Constitutional Law* (1959), 11.
[1169] *Ibid.*, 12.
[1170] *Ibid.*, 12, 19.
[1171] *Ibid.*, 15 (emphasis added).
[1172] *Ibid.*, 19.
[1173] *Cf.* Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 590 (1986) ("Despite [Herbert Wechsler's] essay's impact on first amendment theory, the notion of neutral principles has never been altogether clear"). For an early overview of the debate on Wechsler's work, see Golding, *Principled Decision-Making and the Supreme Court* (1963), 35. See also Greenawalt, *The Enduring Significance of Neutral Principles* (1978), 982-983.

supporting these decisions must be *of a special kind*. "The call for neutral principles in its mildest form is a plea for reasoned elaboration rather than *ipse dixits* in Supreme Court opinions", Wechsler's critic Martin Shapiro wrote approvingly.[1174] The difficulty, of course, would be to determine what kinds of reasoning might justify judicial decisions. It was as an answer to this question that Wechsler proposed his concept of neutral, general principles. Condensing a large body of literature replying to his proposal, it could be said that while the specific idea of 'neutrality' in Supreme Court decision making was from the outset greeted with intense skepticism and criticism, Wechsler's broader call for '*general* principles' in judicial reasoning found widespread resonance. "I fail to grasp Professor Wechsler's position if it consists in the statement that one ought to, or even can, supply 'neutral principles' for 'choosing' between competing values", one early critic wrote. However, "we may still require that the tribunal formulate a standard or criterion that shall function as *a principle of decision in this and other cases of its type*. This principle is general in the sense that it covers but also transcends the instant case".[1175] A 'neutral principle', therefore, came to be largely equated with a 'principle' as such, which in turn seemed to mean a "rule of general application, logically and consistently applied".[1176]

7.2.2.3 'Reasoned elaboration', 'principled reasoning' and balancing

This short depiction of Wechsler's contribution to the 'reasoned elaboration' debate should suffice as background to an analysis of the following question: How did Wechsler and his contemporaries view the relationship between 'principled reasoning' and judicial balancing?

Wechsler's article was published just before the 'balancing debate' erupted on the Supreme Court and his paper does not address the theme of 'balancing' in any direct way.[1177] A later commentator, Kent Greenawalt, has observed that Wechsler's original paper left "some doubt" as to whether the Supreme Court's "open-ended standards that indicate some kind of weighing of factors or balancing but that do not unambiguously yield results in many of the cases to which they apply" - that is, among other approaches: its balancing tests - could qualify as 'neutral principles'.[1178] Greenawalt also notes that in a later paper, Wechsler openly wondered whether constitutional-law questions of the

[1174] Shapiro, *The Supreme Court and Constitutional Adjudication* (1963), 591.
[1175] Golding, *Principled Decision-Making and the Supreme Court* (1963), 48 (emphasis added). See also Greenawalt, *The Enduring Significance of Neutral Principles* (1978), 991 ("Wechsler … explicitly recognizes that judges must often make difficult choices among values and he does not suggest that the judge can somehow remain neutral among those values") (citations omitted).
[1176] Henkin, *Reflections on Current Constitutional Controversy* (1961), 653. See also Bickel, *The Passive Virtues* (1961), 48 ("[A] neutral principle … is one that the Court must be prepared to apply across the board, without compromise").
[1177] One important reason for this is that Wechsler was primarily interested in the Supreme Court's 'segregation decisions' and these decisions were not generally seen as raising issues of 'balancing'.
[1178] Greenawalt, *The Enduring Significance of Neutral Principles* (1978), 988.

format "How much is too much?" might be "beyond the possibility of principled decision".[1179]

Reading Wechsler's original article in light of later interpretations, it is possible, however, to piece together a likely contemporary understanding of the balancing/'principled reasoning' relationship.

(a) Candour vs. 'mechanistic reasoning'

Using a freedom of speech example, Wechsler argued that as "some ordering" of values would be essential to maintaining a functioning Bill of Rights, judges should be very careful not to take "*a mechanistic approach* to determining priorities of values".[1180] This *caveat* makes clear that Wechsler was taking aim at *unacknowledged judicial choices* as much as at choices that were acknowledged but unprincipled. From the perspective of 'reasoned elaboration', candour about the tradeoffs required in constitutional adjudication was essential to the proper justification of judicial decisions. The 'mechanistic' label, an obvious throwback to Pound's early 20th century attack on the Supreme Court's *Lochner*-line of decisions,[1181] was invoked to convey the exact opposite of what was demanded of courts.[1182]

Wechsler himself did not raise the question of whether the Supreme Court's 'balancing opinions' should be seen as examples of such 'mechanistic reasoning', or rather as manifestations of the desired judicial candour. Other commentators, however, took up this issue, and came to diametrically opposing conclusions. On the one hand, writers argued that the open articulation of competing interests was precisely one of the main strengths of balancing-based adjudication;[1183] that narrow, "virtually *ad hoc*", but "articulated and undisguised" decisions, were all that could realistically be expected from the Supreme Court in difficult areas of constitutional rights adjudication;[1184] or that *not* to

[1179] Herbert Wechsler, *The Nature of Judicial Reasoning*, in LAW AND PHILOSOPHY 290, 299 (S. Hook, ed., 1964). Cited in Greenawalt, *The Enduring Significance of Neutral Principles* (1978), 989fn25. It may be noted that in this piece, Greenawalt offers a very rare American example of the 'particularism as principle' argument familiar to German constitutional culture; an argument that he, however, rejects. In a tantalizing suggestion, he writes (at 988-989): "Perhaps we should consider the broad standard to be a general principle, but one that demands ad hoc evaluations to resolve particular cases". He continues, though: "However they are labelled, such constitutional standards fail to distinguish with much precision the protected from the unprotected among the situations they cover".

[1180] Wechsler, *Toward Neutral Principles* (1959), 25 (emphasis added).

[1181] See *supra*, s. 3.2.5.2.

[1182] Wechsler's thesis has itself been viewed as intimately connected to formalism of the kind discussed *supra*, s. 3.2. See, *e.g.*, Sunstein, *Pornography and the First Amendment* (1986), 624 (describing the "*Lochner*-like quality" of the 'neutral principles' perspective); Friedman, *Neutral Principles: A Retrospective* (1997), 519-520 ("Wechsler's approach, to those critical of it, bore too much similarity to the now bad old days of arid legal formalism"). See also *infra*, s. 7.2.3.

[1183] Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 81 (1960).

[1184] ALEXANDER BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 77 (1970). Cited in J. Skelly Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 779 (1971). Wright also writes "Bickel is by no means alone in his conclusion that candid case-by-case balancing of particular elements of particular fact situations is the best that can be done". *Cf.* also Gerald Gunther, *Reflections on Robel: It's Not What the Court Did But the Way That it Did it*, 20 STAN. L. REV. 1140, 1148 (1968) (claiming

balance explicitly would be to take an unreasoned, 'mechanistic' approach to constitutional adjudication.[1185] On this view, it was precisely the vehement anti-balancing rhetoric of Justice Black and others which most risked to "deprecate and damage" the process and image of judicial decision making, which had to be "as deliberate and conscious as men can make it".[1186] For others, on the other hand, the Supreme Court's balancing decisions consisted of no more than "a declaration of result accompanied by the simple announcement that the Court has balanced the competing interests".[1187] Such opinions clearly did not qualify as 'reasoned decisions' in Wechslerian terms.[1188]

In the end, then, both sides to the balancing debate invoked the horror of 'mechanistic reasoning', the old shorthand for the vices of formalism, and claimed the virtue of 'candour'. That they did so, in the words of one contemporary overview, "perhaps equally unconvincingly",[1189] only serves to underline the basic ambivalence that, it is claimed here, lies at the heart of the local meaning of balancing in the U.S.

(b) Ad hoc-, result-oriented reasoning

In whatever precise way Wechsler's notions of 'generality' and 'neutrality' are understood, a key underlying unifying theme clearly was the opposition to *ad hoc* decision-making focused on results in individual cases.[1190] On a most basic level, Wechsler called for decisions based on "analysis and reasons ... transcending the immediate result" of the case at hand.[1191] The desirability of this criterion was hotly contested. Many commentators felt that attention to the real-world impact of individual judicial decisions was precisely one of the great contributions of 'realist' perspectives on law. "Professor Wechsler's lecture ... represents a repudiation of all we have learned about law since Holmes published his Common Law in 1881, and Roscoe Pound followed ... with his pathbreaking pleas for a result-oriented, sociological jurisprudence, rather than a mechanical one", Dean Eugene Rostow of the Yale Law School wrote in

that there might be value in the "relatively unobscured acknowledgment" that Courts "balance values", or "assess alternatives", when deciding constitutional cases).

[1185] See, *e.g.*, Wallace Mendelson, *The First Amendment and the Judicial Process: A Reply to Mr. Frantz*, 17 VAND. L. REV. 479, 481 (1964); Arthur S. Miller & Ronald F. Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 671 (1960) ("Any reference to neutral … principles is, …, little more than a call for a return to a mechanistic jurisprudence and to a jurisprudence of nondisclosure").

[1186] BICKEL (1962), 96. Cited in L.A. Powe, Jr., *Justice Douglas After Fifty Years: McCarthyism and Rights*, 6 CONST. COMMENT. 267, 281(1989).

[1187] See, *e.g.*, Robert B. Kent, *Compulsory Disclosure and the First Amendment – The Scope of the Judicial Review*, 41 B.U. L. REV. 443, 484 (1961).

[1188] See also Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 877 (1963) (arguing that balancing test had reduced the First Amendment to a "limp and lifeless formality").

[1189] Note, *Civil Disabilities and the First Amendment* (1969), 851. The student author (Duncan Kennedy) refers to the role of candour in the 'balancing *vs.* absolutes' debate, which, as has been seen, is intimately related to the debate on neutral principles.

[1190] *Cf.* Deutsch, *Neutrality, Legitimacy, and the Supreme Court* (1968), 178; Wechsler, *Toward Neutral Principles of Constitutional Law* (1959), 12.

[1191] *Ibid.*, 15. *Cf.* also Shapiro, *The Supreme Court and Constitutional Adjudication* (1963), 592 (describing the plea for neutral principles as "shading into a broad attack on result-oriented jurisprudence").

1962.[1192] Another writer summarized the debate on 'result-oriented jurisprudence' a year later as follows: "To some, the label connotes subjectivism pure and simple ... To others, a 'result-oriented' court signifies a welcome innovation", a "belated recognition" of the limitations of logic and tradition.[1193] In addition, the idea of 'narrow' decisions, tailored to the individual case, not only fit well with traditional common law conceptions of the judicial role, but also seemed especially appropriate in an era in which courts were called upon to solve difficult new civil rights claims.[1194] As Kenneth Karst observed, "the phrase '*ad hoc*' should not disturb anyone who recognizes that we are concerned with *cases*, decided by courts".[1195]

The Supreme Court's 'balancing opinions' of the late 1950s and early 1960s were widely perceived within academic circles as espousing a kind of '*ad hoc*' decision making – or, in more favourable terminology; a 'case-by-case' approach. Justice Harlan, for example, unambiguously described his preferred solution for First Amendment cases, in his *Barenblatt* opinion for the Court, as a process of "balancing ... the competing private and public interests at stake *in the particular circumstances shown*".[1196] And in *Konigsberg*, Justice Black's dissenting opinion specifically chided Harlan for taking an overly narrow, particularistic view of the interests concerned.[1197] Justice Frankfurter's position, on the other hand, was much more ambiguous. In his *Dennis* concurrence, Frankfurter warned explicitly against the dangers of "*ad hoc* judgment".[1198] And the presentation of his deferential balancing approach proceeds in distinctly general, even 'legislative', terms: a generalized 'interest in security' – threatened by the activities of the Communist party generally -[1199] was to be weighed against a similarly generalized, social 'interest in free speech'.[1200] At the same time, however, Frankfurter's comments on the legacy of the 'clear and present danger' test, in particular his reference to its requirement of 'immediate peril' and his appreciation for Paul Freund's multiple-variable understanding of the test,[1201] reveal a sensitivity for the need for a more situated judgment.[1202]
Notwithstanding these ambiguities, balancing at the Supreme Court predominantly came to be associated with a kind of '*ad hoc*' decision making. In academic commentary,

[1192] Cited in Friedman, *Neutral Principles: A Retrospective* (1997), 519-520.
[1193] Patrick J. Rohan, *The Common Law Tradition: Situation Sense, Subjectivism, or Just-Result Jurisprudence*, 32 FORDHAM L. REV. 51, 53 (1963).
[1194] See, *e.g.*, Friedman, *Neutral Principles: A Retrospective* (1997), 525 ("One may wholly agree with the academic critics that the judicial process must be one of reason and principle and yet recognize that a court may reach a proper result without at once being able to agree on a fully satisfying rationalization").
[1195] Kenneth L. Karst, *The First Amendment and Harry Kalven: An Appreciative Comment on the Advantages of Thinking Small*, 13 UCLA L. REV. 1, 22 (1965).
[1196] USSC *Barenblatt v. United States*, 360 U.S. 109, 126 (1959) (emphasis added).
[1197] USSC *Konigsberg v. State Bar of California*, 366 U.S. 36, 74-75 (1961).
[1198] USSC *Dennis v. United States*, 341 U.S. 494, 529 (1951).
[1199] Frankfurter writes of the need to go beyond the findings of the jury, and to approach the case "in the light of whatever is relevant to a *legislative* judgment" (emphasis added), at 547.
[1200] *Ibid.*, 546-552.
[1201] *Ibid.*, 527, 542.
[1202] This sensitivity also emerges from other statements in Frankfurter's *Dennis* opinion: See, *e.g.*, *Ibid.*, 519 (arguing against a "dogmatic preference" for either speech or its limitation, and for a "candid examination of the conflicting claims").

'balancing' was routinely referred to as "*ad hoc* balancing",[1203] and the Court's 'balancing test' was perceived to lie "very close to the *ad hoc* end of the continuum" of possible judicial decisional techniques.[1204] The great balancing debate between the Justices, in short, was understood to be about not just balancing *per se*, but about *ad hoc* balancing.[1205] In the terminology of Chapter 2, therefore, this debate was at least in part about the virtues and risks of a kind of (extreme) substantivity in law.

As Martin Redish has observed in a later retrospective study, 1960s attitudes towards the *ad hoc* in constitutional judicial decision-making, within the balancing context and beyond, revealed a distinct "schizophrenic" quality.[1206] Much of the Supreme Court's reasoning on this issue seemed trapped between on the one hand "perceptions about the dangers to constitutional rights of anything approaching a detailed case-by-case balancing process", and on the other hand apprehension about "the Court's institutional incompetence to perform [the] 'legislative' function" of assessing potentially offending legislation in any way that would transcend the boundaries of the immediate case at hand.[1207]

(c) Balancing, legislative policy-making, and 'courts of law'

Difficult though Wechsler's opposition to 'mechanistic' reasoning, *ad hoc* decision-making and result-oriented reasoning may be to interpret in any precise fashion, probably the most enigmatic element of the 'Reasoned Elaboriationist's' proposals was their broad call for courts to behave like '*courts of law*'.[1208] In a way, this call for judges to behave 'judicially', in both its negative and positive aspects, formed the core of the new proposals for the standards for judicial reasoning.[1209] Negatively speaking, judges were exhorted *not* to behave like legislators or policy makers. Wechsler and others, notably those scholars whose work has been qualified as exemplifying 'process jurisprudence', were profoundly attached to a principle of 'institutional settlement'.[1210] The question of "who should decide what",[1211] was of fundamental importance to these writers because of their conviction that the Supreme Court's prestige could only be preserved if it could be ensured that the Court "did not overstep the limits of its function".[1212] Viewed from a

[1203] See, *e.g.*, Emerson, *Toward a General Theory of the First Amendment* (1963), 940.
[1204] Note, *Civil Disabilities and the First Amendment* (1969), 844.
[1205] See, *e.g.*, Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 742, 743, 749 (1963); Martin H. Redish, *The Warren Court, the Burger Court and the First Amendment Overbreadth Doctrine*, 78 NW. U. L. REV. 1031, 1046 (1983).
[1206] *Ibid.*
[1207] *Ibid.*, 1045-1046.
[1208] *Cf.* Wechsler, *Toward Neutral Principles of Constitutional Law* (1959), 19 (emphasis added).
[1209] *Ibid.*, 15-16 (arguing that "reasoned explanation" is "intrinsic to judicial action" and "the province of the courts").
[1210] See, *e.g.*, Fallon, *Reflections on the Hart-Wechsler Paradigm* (1994), 964.
[1211] On the 'discovery', in the late 1950s, of this issue as a "fundamental question of modern jurisprudence" by writers such as Lon Fuller, Albert Sacks and Henry Hart, see Duxbury, *Faith in Reason* (1993), 633.
[1212] White, *The Evolution of Reasoned Elaboration* (1973), 290. In Chapter 8, this dimension of American jurisprudence will be related to the idea of the 'second-best' Constitution, and contrasted to the German image of constitutional perfection. See *infra*, s. 8.2.

positive angle, these same commentators were interested in promoting the importance of "traditional standards of judicial performance";[1213] of the relevance of 'doctrine', 'legal method' and 'craftsmanship' to the exercise of the judicial function, as distinct from other forms of decision making.[1214] Taking both these negative and positive dimensions together, the aspiration was for courts to "respect the prerogatives of other institutions" and to "explain their decisions in a way that makes the notion of the 'rule of law' meaningful".[1215]

Throughout the relevant literature and case law of the period, one finds these aspirations for judicial reasoning coupled with, or translated into, critiques of judicial balancing. Balancing, it was argued, was '*not law*'; carrying out balancing exercises was not appropriate 'judicial behaviour'; and balancing opinions forced or incited judges to intrude upon the sphere of competence of the legislative branch. Louis Henkin, in his seminal 1978 article on '*Constitutional Balancing*', gave the following summary of the critique:

> "[...] Wechsler's most famous demand of the Court, that it decide cases on the basis of 'neutral principles, is at bottom a demand *that the Court act according to law*, not caprice. Some have seen a tendency towards judicial 'lawlessness', or at least a straining at the restraints of legal process, method and doctrine, and an exaltation of judicial reinlessness and improvisation, in *the growing resort by the courts to 'balancing'* in constitutional adjudication".[1216]

Henkin here describes a diametrical opposition between balancing and "legal method and doctrine",[1217] that, he writes, 'some' commentators and judges had drawn earlier.[1218] One of the most prominent of these earlier participants was Thomas Emerson, who had formulated many of his central objections to balancing in the First Amendment context in precisely these terms. "The principal difficulty with the ad hoc balancing test", he wrote, for example, "is that it frames the issues in such a broad and undefined way, ..., that *it can hardly be described as a rule of law at all*".[1219] Commenting on the Supreme Court's use of a balancing test for cases of indirect regulation (the *Douds*-type of conflict),[1220] he wondered whether it might be possible "to frame a more satisfactory interpretation of the first amendment in this area", one that would be less 'open-ended', and that would "permit the courts *to function more like judicial institutions?*".[1221]

In criticizing balancing's 'open-ended' nature, Emerson was primarily focused on safeguarding the 'law-like' character of Supreme Court First Amendment doctrine - the 'positive' dimension of the argument outlined above. Other judges and commentators gave predominance to the 'negative' side of the argument, claiming that balancing, as practiced by the courts, was a primarily *legislative*, rather than judicial, activity.[1222] Justice Frankfurter's position on the inevitably legislative nature of balancing has been discussed earlier.[1223] Many commentators voiced very similar concerns. Judicial balancing was felt to be "too insensitive to the special competencies of legislatures and the judiciary".[1224] Interest balancing tended to lead courts "into regions better known to legislatures", hampering "strictly principled decisionmaking".[1225] The perceived similarity between balancing by courts and 'legislative judgment' was problematic, as it might suggest that courts "were in a better position than legislatures to make decisions about social questions".[1226]

While the 'balancing ≠ judicial behaviour' critique was widespread, there were also commentators who took a diametrically opposed viewpoint, arguing that it was not balancing but the idea of 'neutral principles' itself which was 'too legislative'.[1227] These opposing perspectives again exemplify Martin Redish's argument about the 'schizophrenic' attitude towards the particular and the general, the *ad hoc* and the rule-based, formality and substantivity, in constitutional adjudication at the time, mentioned above.[1228]

1213 *Cf.* Greenawalt, *The Enduring Significance of Neutral Principles* (1978), 1005.
1214 See, *e.g.*, White, *The Evolution of Reasoned Elaboration* (1973), 290 (referring to the perceived need for "professional expertise" in opinion writing); Duxbury, *Faith in Reason* (1993), 641 (citing Henry Hart's concern with "good lawyership").
1215 Fallon, *Reflections on the Hart-Wechsler Paradigm* (1994), 966. In the eyes of the 'reasoned elaboration' scholars the two dimensions were linked. As Neil Duxbury has written, the idea was that if judges abided by principles of "institutional competence" and "reasoned elaboration", the problem of how to limit judicial power would "disappear" as courts would "limit themselves". See Duxbury, *Faith in Reason* (1993), 669.
1216 Louis Henkin, *Infallibility under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022, 1022 (1978) (emphasis added). Henkin's analysis, like that of many other writers on the subject, took the Supreme Court's free speech cases as its starting point, but went on to view the practice and problems of balancing in a much broader light. See, *e.g.*, at 1022 ("[The Court's] famous invocations [of balancing] in the application of the first amendment have spread to other individual rights").
1217 In earlier work, Henkin had already made explicit the inverse connection - between 'principle' and 'doctrine'. See Henkin, *Reflections on Current Constitutional Controversy* (1961), 653.
1218 Henkin does not himself substantively endorse this understanding. He also does not indicate who the 'some' commentators and judges were who objected against balancing's 'lawlessness', but his text makes clear that he refers at least in part to the Black/Harlan-Frankfurter debate on balancing in the First Amendment context.
1219 Emerson, *Toward a General Theory of the First Amendment* (1963), 912 (emphasis added). Emerson's work is not discussed in Henkin's article.
1220 See for a discussion *supra*, s. 6.3.2.1.
1221 Emerson, *Toward a General Theory of the First Amendment* (1963), 940 (emphasis added).
1222 For a retrospective view of the relevant case law, see Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 329 (1978) ("[B]ecause many of the Court's first amendment decisions rest on highly particularized analyses of ... many variables, they tend to be more suggestive of the legislative mode of compromise and interest-balancing than the judicial mode of delineation of principle and precedent").
1223 See *supra*, s. 6.3.3.
1224 Joseph M. Dodge II, *The Free Exercise of Religion: A Sociological Approach*, 67 MICH. L. REV. 679, 687 (1969). Dodge added that balancing opinions tended to proceed "in terms of policy rather than more justiciable standards".
1225 Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 913 (1970).
1226 White, *The First Amendment Comes of Age* (1996), 322. As White notes, ironically, "this was the very suggestion that Progressives had deplored in decisions such as *Lochner*".
1227 See Karst, *Legislative Facts in Constitutional Adjudication* (1960), 110.
1228 Redish, *The First Amendment Overbreadth Doctrine* (1983), 1046.

7.2.3 Interim conclusion

The notion of a discourse with 'schizophrenic' characteristics, if use of this term may be forgiven, is possibly the best way to sum-up the intersection of discussions on balancing and on standards for constitutional legal reasoning. The relationship between these two lines of debate has been described over the course of the preceding Paragraphs. The extent to which these two debates were intertwined deserves special emphasis. On the one hand, the debate over balancing was centered to a great extent on "large issues about ... the proper role of judicial review" – *i.e.* the question of standards.[1229] At the same time, discussions on these 'large questions', on the proper role for the judiciary and on the standards for carrying out that role, very often took the problem of balancing as their central concern. Looking at early 1960s constitutional discourse in the U.S. either from the angle of 'balancing', or from the angle of 'standards of reasoning', then, a very similar set of questions and problems emerges. And to a large extent, these problems center precisely on the question of the virtues of legal formality and of its opposites. One suitable way of framing these debates, therefore appears in the form of a triangle of 'balancing', 'standards of reasoning' and 'formal *vs.* substantive'.

The debates that arose at the intersection of these three perspectives were marked by ironies, contradictions blatant and subtle, and aspirations and exhortations to judges and writers that were avowedly unrealistic but which were passionately adhered to nonetheless. What is most important from the perspective of this study, is that it was precisely these ambiguities, ironies and contradictions that made up a significant dimension of the meaning of both the standards and balancing debates, and of the meaning of the terminology of formal and substantive in which both debates were, to a large extent, conducted. It was recognized that commentators and the public at large made "complex and often conflicting demands" upon the federal courts – "demands for adherence to logic, to neutrality, and to experience".[1230] At work was a "nostalgic yearning" for an avowedly impossible "pre-political jurisprudence" or a "return to doctrine". What is significant is that this yearning *itself* was seen as "an existential reality – a fact of American political life".[1231]

Contradictions, impossibilities and tensions abounded on all levels of the 'standards', 'balancing', and 'legal formality' debates, and their interrelations. Within the discussions on standards, there was a foundational tension in that the call for adjudication based on 'neutral principles' contained elements of – and was intended as – both a defense of the institution of judicial review and a limitation on its exercise.[1232] In terms of legal formality, there was the irony that Wechsler's and others' attempts to

[1229] Harry Kalven, Jr., *The New York Times Case: A Note on the Central Meaning of the First Amendment*, 1964 SUP. CT. REV. 191, 215 (1964).
[1230] Deutsch, *Neutrality, Legitimacy, and the Supreme Court* (1968), 243. Deutsch also speaks of a difficult reconciliation on the part of the Court between "craft pressures and the needs of its symbolic role".
[1231] *Cf.* Shapiro, *The Supreme Court and Constitutional Adjudication* (1963), 605.
[1232] *Ibid.*, 598 ("The notion of neutral principles was designed to provide some basis for judicial activism ...").

provide an ideal for the reasoned justification of decisions were often seen as steps on a road leading straight back to the archetype of faulty judicial decisions; the 'mechanistic', formalistic, reasoning of the *Lochner*-era.[1233] Others observed that even Wechsler's own followers "when forced to adjust [his] rules to the realities of constitutional adjudication" wound up "abandoning those rules".[1234] Out of this resignation to reality arose an important idea: "the conclusion that candid case-by-case balancing of particular elements of particular fact situations" might be "*the best that can be done*".[1235]

Such contradictions and tensions continue when the lens of balancing is adopted to look at some of the same issues. On the one hand, it was recognized that if 'neutral principles' were to mean anything more than 'minimal rationality', then their position would have to be "at *the opposite extreme* from a resolutely *ad hoc* weighing of a welter of conflicting interests to produce a one-time-only result".[1236] At the same time, however, there was the irony that some high profile "enthusiastic balancers" were seen also to be "strong advocates of principled decision making".[1237] There were balancers who did not give up their search for principle,[1238] and those who recognized that "devotion to principle" did not preclude a "balancing approach".[1239]

To sum up: both sides in the debates over both standards and balancing proclaimed the virtues of candour and the vices of mechanistic reasoning; both were caught between the dangers of the *ad hoc* and the attractions of situated, 'realistic judgment'; and both seemed trapped between the attractions of the rule of law and the haunting spectre of excessive formalism. Unease over the standards for legal reasoning and apprehension over balancing were, it is argued, not merely *aspects* of mid-century American legal life; they were *emblematic* for it.

[1233] See, *e.g.*, Dean Eugene Rostow's remark on Wechsler, Holmes and Pound, cited above, and *e.g.* Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication* (1961), 671.
[1234] Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court* (1971), 779.
[1235] *Ibid.* (emphasis added).
[1236] Note, *Civil Disabilities and the First Amendment* (1969), 852fn39 (emphasis added).
[1237] *Ibid.* (referring to Gerald Gunther and Dean Erwin Griswold).
[1238] Alexander Meiklejohn so classified Zechariah Chafee. See Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 252-253fn26.
[1239] Karst, *The First Amendment and Harry Kalven* (1965), 17. The reference was to Alexander Bickel.

7.3 BALANCING AND THE DEFINITIONAL TRADITION IN AMERICAN CONSTITUTIONAL LEGAL THOUGHT

7.3.1 Balancing and its alternatives

From its very beginnings, the debate over balancing in American constitutional jurisprudence has been understood by participants as a dispute between balancing *and alternatives*. This Section analyses these alternatives as a component of balancing's local meaning.

No single uniformly agreed upon label covers all of balancing's main perceived alternatives during the period under consideration. But among the various terms used most often – 'categorization', 'classification' and 'absolutism' principally among them – an important degree of continuity can be observed, despite significant differences in emphasis and focus. This continuity will be referred to here as the 'definitional tradition' in American constitutional legal thought.[1240] This definitional tradition, in particular as it played out in the First Amendment context, will, in turn, be presented as one of the predominant American expositions of the ideals of legal formality.

For every 'episode' in the genealogy of free speech balancing discussed earlier – from 'clear and present danger' through the Communism cases of the 1950s and 1960s, this Section shows how a corresponding alternative from within this definitional tradition was available. Balancing's local meaning, it will be argued, has to be seen at least partly as a function of its perennial contest with these alternatives.

7.3.2 Learned Hand's 'absolute and objective test': *Masses Publishing Co. v. Patten* (1917)

Earlier in this Chapter, the genesis of the 'clear and present danger' test in the Supreme Court's early post-World War One case law was reviewed as an important precursor to the Court's later balancing cases. In that same earlier period, an alternative test to 'clear and present danger' was discussed among judges and scholars. This alternative was Judge Learned Hand's test in the case of *Masses Publishing Co. v. Patten*.[1241] The *Masses* case was one of the first judicial decisions to examine the Espionage Act of 1917 - the Act at issue also in *Schenck* (1919) and *Abrams* (1919). At the time, as Gerald Gunther has written, according to prevalent thinking on the First Amendment, "the punishability [*sic*] of speech turned on an evaluation of its likelihood to cause forbidden consequences".[1242] Holmes' and Brandeis' 'clear and present danger test' was, as its name indicates, at heart an application of this line of reasoning, as it turned on an assessment of the probable immediate consequences of expression. Learned Hand, an eminent Federal District Court judge, by contrast, thought this evaluative characteristic of the prevalent formulas "too slippery, too dangerous to free expression".[1243] Instead, he advocated, in his *Masses* Opinion and in later writings, "the adoption of a strict, 'hard', 'objective' test focusing on the speaker's words".[1244] Only when speech had the character of direct incitement to unlawful action, in Learned Hand's view, could it be constitutionally proscribed.[1245] Gerald Gunther's summary of Learned Hand's correspondence with Zechariah Chafee, the main advocate for 'clear and present danger', makes clear the vital differences between his approach and the prevalent wisdom:

> "Instead of asking in the circumstances of each case whether the words had a tendency or even a probability of producing unlawful conduct, he sought a more 'absolute and objective test' focusing on 'language' – 'a qualitative formula, hard, conventional, difficult to evade' as he said in his letters. What he urged was essentially an incitement test, 'a test based upon the nature of the utterance itself': [only] if the words constituted solely a counsel to law violation, they could be forbidden".[1246]

The vocabulary chosen by Learned Hand to describe his test – *qualitative*, *absolute*, *objective* – is clearly the vocabulary of legal formality. It is invoked in direct opposition to the vocabulary of balancing: *quantitative*, *relative*, and, at least in the eyes of its critics, *subjective* and personal. Learned Hand's preferred solution is a "largely definitional"[1247] model, an interpretation and classification of the "nature of the utterance" concerned, which eschews analysis of "case circumstances" and of the "probability of consequences". A brilliant passage from one of Learned Hand's letters to Zechariah Chafee, in which he discussed Justice Holmes' 'clear and present danger' test, presents the intended contrast in stark form:

[1240] The term 'definitional tradition' is not commonplace in U.S. scholarly literature. The term 'tradition' is chosen deliberately. No reference is intended to any distinct 'school' or 'movement'. See for a similar use of the term, Duxbury, *Faith in Reason* (1993). A good way of describing some of the core ideas that may be thought of as prominent within a 'definitional tradition', is through Pierre Schlag's description of the "grid aesthetic" in American law (see Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1051 (2002):
"In the grid aesthetic, law is pictured as a two-dimensional area divided into contiguous, well-bounded legal spaces. These spaces are divided into doctrines, rules, and the like. (...) The subjects, doctrines, elements, and the like are cast as 'object-forms'. They exhibit the characteristic features of objects: boundedness, fixity, and substantiality. (...) The resulting structure – the grid – feels solid, sound, determinate. Law is etched in stone. The grid aesthetic is the aesthetic of *bright-line rules, absolutist approaches, and categorical definitions*" (emphasis added).
An 'aesthetic' in Schlag's view, very much like an intellectual tradition, is formed of – and around – a cluster of elements such as "images and schemas, rhetorical forms, metaphors and other tropes" (at 1052).

[1241] 244 F. 535 (S.D.N.Y.). Billings Learned Hand (1872-1961) was without doubt the most prominent 20th Century American judge never to have sat on the Supreme Court.
[1242] Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine* (1975), 720.
[1243] *Ibid.*, 721.
[1244] *Ibid.*
[1245] See, *e.g.*, Learned Hand's letter to Chafee cited in Gunther, *Ibid.*, at 749: "[N]othing short of counsel to violate law should be itself illegal".
[1246] *Ibid.*, 725.
[1247] *Cf.* Karst, *The First Amendment and Harry Kalven* (1965), 10, discussing Learned Hand's approach together with those of Alexander Meiklejohn and Thomas Emerson; the leading proponents of definitional approaches to freedom of expression in the 1950s and 1960s. See further *infra*, s. 7.3.2.2.

> "I am not wholly in love with Holmesy's test [*sic*] and the reason is this. Once you admit that the matter is one of degree ... you so obviously make it a matter of administration, i.e. you give to Tomdickandharry, D.J. [a fictional lower court judge, JAB], so much latitude that the jig is at once up. Besides even their Ineffabilities, the Nine Elder Statesmen [the Supreme Court Justices, JAB], have not shown themselves wholly immune from the 'herd instinct' and what seems 'immediate and direct' today may seem very remote next year ....".[1248]

All of this, it should be recalled, was written before 'balancing' itself became a significant First Amendment theme, or even before the 'clear and present danger test' had become seen as a 'balancing test'.[1249] And yet all the characterizations and oppositions familiar from the later balancing debates are already in evidence. 'Clear and present danger' is too much a matter of 'degree', giving too much discretion – 'latitude' - to judges and juries. Not surprisingly, the spectre of formalism and 'mechanical jurisprudence', familiar from Pound's writing and from the later balancing debates, is also present. Learned Hand's references to the 'character' and the 'nature' of utterances are reminiscent of the perceived essentialism of the *Lochner*-era.[1250] The Judge himself was concerned to make clear that his distinction between direct incitement to illegal action and 'legitimate agitation' was "not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom".[1251] To the extent, however, that Learned Hand's approach was an "all or nothing proposition" that failed to "adjust the ... meaning of words to the context of their utterance",[1252] a charge of formalism and mechanical reasoning could easily be made.

As it was, Learned Hand's contribution in the *Masses* case was "obliterated" by the ascendancy of the 'clear and present danger' test set out in *Schenck* and *Abrams* and as interpreted by Chafee and others.[1253] But the difference between the Holmes/Brandeis/Chafee approach, focused on context, consequences and questions of degree, and Learned Hand's proposal of a hard, qualitative distinction based on the 'nature' of the speech at issue, provides an early glimpse of the definitional tradition in American free speech law. It is important to note the potential scope of the differences between this definitional approach and the alternative of 'clear and present danger', reinterpreted later in balancing terms. Learned Hand, in fact much like his German contemporaries Häntzschel and Schmitt, searched for a limiting principle to define the

[1248] Learned Hand letter to Zechariah Chafee, cited in Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine* (1975), 749-750.
[1249] The story of that development is recounted *supra*, s. 7.2.1.
[1250] Note: Learned Hand's approach shows clear affinities with the definitional approaches advocated in Germany by Häntzschel and Schmitt (see Chapter 5). They too proposed looking at the 'nature' or the 'essence' of the speech involved to determine its constitutional status.
[1251] Learned Hand in *Masses*, 244 F. 535, 540 (S.D.N.Y.). Cited in Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine* (1975), 725.
[1252] BeVier, *The First Amendment and Political Speech* (1978), 337. See for the connection between Hand's opposition to Holmes' test and 'mechanical jurisprudence' also Bernard Schwartz, *Holmes versus Hand: Clear and Present Danger or Advocacy of Unlawful Action*, 1994 SUP. CT. REV. 209, 243 (1994).
[1253] *Cf.* KALVEN, THE NEGRO AND THE FIRST AMENDMENT 16 (1965) (referring to Learned Hand's judgment in *Masses* as a "great opinion").

appropriate scope of the freedom of expression. Such a limiting principle – in Hand's case the principle of 'seditious libel', or the idea that the advocacy of unlawful conduct should be prohibited but that all other forms of speech should be unrestricted – would provide the foundations for free speech law, but not for adjudication on other constitutional rights. The courts were meant to proceed on the basis of such principle and of an understanding its core application, and then to decide cases further removed from this core instance by way of analogy, allowing the principle to 'radiate outwards'. By contrast, the process of restating the 'clear and present danger' approach in balancing terms, outlined above, was seen to replace such 'localized', *i.e.* speech-specific, considerations of principle with a generalist, pragmatic, balancing assessment of interests and potential consequences that could be invoked in all areas of constitutional adjudication.[1254] This opposition between 'principle' and 'balancing' was to become a staple of debates on balancing, and an important element of its American local meaning.[1255]

7.3.3 Categories and the First Amendment

The early 1940s saw the first appearances of what would become the most prominent manifestation of the definitional tradition in American free speech law: the rhetoric and practice of categories and categorization. It is in the debates on the attractions and vices of 'categorization', even more clearly than in the discussions on Learned Hand's test, that the opposition between balancing and the definitional tradition and, by association, between balancing and the attractions and vices of legal formality, becomes starkly visible.

7.3.3.1 Early Supreme Court categories: Chaplinsky v. New Hampshire (1942) and onwards

In a series of cases that began with *Chaplinsky v. New Hampshire* (1942), and continuing through *Beauharnais v. Illinois* (1952), and *Roth v. United States* (1957), the Supreme Court held that particular kinds of utterances were *categorically* unworthy of First Amendment protection. Although many of the specific assessments made in these cases have since been reversed or modified,[1256] the basic analytical structure and rhetorical

[1254] See, *e.g.*, Karst, *The First Amendment and Harry Kalven* (1965), 9.
[1255] See, *e.g.*, C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 44-47 (1976) (critical of balancing and in favour of 'principled' approach).

[1256] See the discussion below. *Valentine v. Chrestensen* was overturned in USSC *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 758ff. (1976), but binary, categorical choices remain pertinent in the commercial speech context, notably within the '*Central Hudson* four-part test': see USSC *Central Hudson Gas & Electric v. Public Service Commission*, 447 U.S. 557, 566 (1980). *Beauharnais* was distinguished, and largely abandoned, in USSC *New York Times v. Sullivan*, 376 U.S. 254, 268ff (1964), which itself retains a categorical, definitional, element (the key criterion of 'public official'). *Chaplinsky* was revised

form inaugurated in *Chaplinsky* retain an important place in the landscape of American constitutional thinking, even to this day.[1257]

Walter Chaplinsky was a Jehova's Witness who was convicted of shouting "you are a God damned racketeer" and "a damned Fascist" at a local police officer during a manifestation in Rochester, New Hampshire. In a unanimous decision for the Supreme Court upholding his conviction, Mr. Justice Murphy wrote:

> "[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are *certain well-defined and narrowly limited classes of speech*, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous [*sic*], and the insulting or 'fighting' words-those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality".[1258]

Because *Chaplinsky*'s 'fighting words' lay outside the scope of coverage of the First Amendment, it was unnecessary for the State of New Hampshire to show that his arrest and conviction served any societal interest that could override any right to freedom of expression in this specific case.[1259] A few weeks after *Chaplinsky* was decided, the Court adopted a very similar approach in the case of *Valentine v. Chrestensen*, when it held that the First Amendment did not protect "purely commercial advertising".[1260]

The quoted passage from *Chaplinsky* came to be cited as authority for the proposition that particular kinds of speech – libel, obscenity, 'fighting words', *etc.* – lay outside the coverage of the First Amendment. *Chaplinsky*, in this sense, introduced what Harry Kalven later called a "two-level theory" of freedom of expression, according to

and significantly narrowed down in USSC *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383ff (1992), *per* Scalia J. ("Our decisions since the 1960s have narrowed the scope of the traditional categorical exceptions for defamation (…) and for obscenity (…), but a limited categorical approach has remained an important part of our First Amendment jurisprudence"). See for discussion, Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1774-1777 (2004).

1257 See, *e.g.*, USSC *Virginia v. Black*, 538 U.S. 343, 358 (2003) (reference to *Chaplinsky*'s categories).

1258 315 U.S. 568, 571-572 (1942) (emphasis added).

1259 As commentators have noted, the original statement in *Chaplinsky*, with its reference to the benefits of speech being "outweighed" by competing social interests, was ambiguous as to the Court's precise approach. Nevertheless, *Chaplinsky* came to stand for an approach to the First Amendment that explicitly *does not* consider possible countervailing interests. See, *e.g.*, Schauer, *The Boundaries of the First Amendment* (2004), 1777fn52 (acknowledging these ambiguities, but concluding: "To the Court, the fighting words Chaplinsky uttered were regulable not because the state interest in controlling them was so powerful as to trump the First Amendment, but because the words *lay entirely outside the scope* of the First Amendment", emphasis added).

1260 316 U.S. 52, 54 (1942). The Court did not cite *Chaplinsky* in *Valentine*, but commentators have generally treated the 'commercial speech' line of cases as espousing the same logic. See, *e.g.*, Martin Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 431 (1971) ("The Court seems to apply its 'two-tier' theory, first adopted in *Chaplinsky v. New Hampshire* ...")_

which some forms of speech are entirely "beneath First Amendment concerns".[1261] The most famous applications of this 'two-level' model have concerned (group)-libel and obscenity. In *Beauharnais v. Illinois* (1952), the Court quoted *Chaplinsky* to support its conclusion that "libelous utterances" were not "within the area of constitutionally protected speech", which meant that it was not necessary to consider whether they represented any "clear and present danger".[1262] And in *Roth v. United States* (1957), it was stated, again under reference to *Chaplinsky*, that the Court had always assumed that 'obscenity' was outside "the area of protected speech and press".[1263]

In the wake of *Chaplinsky* and *Valentine*, a 'categorization' approach came to signify a determination of First Amendment cases based "solely on the basis of the First Amendment value of the utterance itself, without regard to possible justifications for restriction".[1264] In such a categorization model, questions as to the likely consequences of speech or as to the relative importance of possible countervailing social interests were simply irrelevant. "What distinguishes a categorization approach from 'clear and present danger' and similar tests", John Hart Ely wrote, "is that *context* is considered only to determine *the message* the defendant was transmitting". A categorization approach "asks only 'What was he saying?' (…). "A clear and present danger or *ad hoc* balancing approach, in contrast, would regard that question as nondispositive: a given message will sometimes be protected and sometimes not".[1265]

7.3.3.2 Categories and definitions: The First Amendment Theories of Thomas Emerson and Alexander Meiklejohn

In the course of the late 1950s and early 1960s, the theme of categories and categorization within First Amendment law assumed a new, expanded meaning. No longer confined to *Chaplinsky*'s traditional set of "well defined and narrowly limited classes of speech", categorization – or classification, as it was now also sometimes called – came to refer to any doctrinal method that approached freedom of speech in a binary, 'in-or-out' way. The two most prominent propagators of such methods were Thomas I. Emerson (1907-1991) and Alexander Meiklejohn (1872-1964).

(1) The core of Emerson's theory of freedom of expression was a dichotomy between 'expression' and 'action'.[1266] 'Expression' would be entitled to "complete

1261 Kalven, *The New York Times Case* (1964), 217. See also Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 10 (1960).

1262 343 U.S. 250, 266 (1952).

1263 354 U.S. 476, 481 (1957).

1264 Frederick Schauer, *Codifying the First Amendment: New York v. Ferber*, 1982 SUP. CT. REV. 285, 303 (1982).

1265 John H. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Cases*, 88 HARV. L. REV. 1482, 1493fn44 (1975) (emphasis added). See also, critically, on categorization and context, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 426 (Stevens J., concurring) ("the categorical approach does not take seriously the importance of *context*") (emphasis in original).

1266 Ely, *Flag Desecration* (1975), 1495.

protection against government infringement", while 'action' would be subject to "reasonable and non-discriminatory regulation designed to achieve a legitimate social objective". [1267] Emerson summarized his proposed 'doctrinal structure' for First Amendment analysis as follows:

> "[M]aintenance of a system of freedom of expression requires recognition of the distinction between those forms of conduct which should be classified as 'expression' and those which should be classified as 'action' (...). Translated into legal doctrine based upon the first amendment, this theory requires the court to determine in every case whether the conduct involved is 'expression' and whether it has been infringed by an exercise of governmental authority. (...) The test is not one of clear and present danger, or ... balancing interests. The balance of interests was made when the first amendment was put into the Constitution. The function of a court in applying the first amendment is to define the key terms of that provision – 'freedom of speech', 'abridge,' and 'law'".[1268]

Emerson's approach relies heavily on imagery and a conceptual apparatus that is developed as a direct opposite to 'balancing of interests', or a flexible judicial assessment of proximate consequences in the circumstances of each case. His interest is in the construction of a hard, coherent *system* of freedom of expression, in which the courts' task is to *classify* and to *define*; not to weigh. Emerson, in short, is a 'classifier', or a 'definer', *and therefore*, in contemporary understandings, *not a 'balancer'*.[1269]

(2) The same emphasis on definition and categorical boundaries can be found in the theory of Alexander Meiklejohn. For Meiklejohn, speech was to be protected because of its relation to self-government.[1270] The First Amendment, in his view, did not forbid the abridging of speech *per se*, but it did categorically forbid the abridging of the "freedom of public discussion".[1271] Meiklejohn's theory, therefore, depended upon a clear definition of this narrower freedom; a definition that was to proceed through a binary distinction between expression relevant to the project of self-government, and expression not so relevant. At various points in his work, Meiklejohn made clear the centrality of this definitional enterprise to his theory. "There is a desperate need", he wrote for example in the early 1950s, that the Supreme Court "*should define* much more accurately, and with more careful consideration, what is that 'Freedom' which the First Amendment intends to secure".[1272] By the time 'balancing' became an important part of the Supreme Court's case law, Meiklejohn was quick to point out the differences between

[1267] Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 21 (1964).
[1268] *Ibid.*, 21.
[1269] See, *e.g.*, Note, *Civil Disabilities and the First Amendment* (1969), 844 (referring to Emerson as one of "the classifiers", together with Justice Black); Note, *The First Amendment Overbreadth Doctrine* (1970), 883fn140 ("The 'classificatory' or 'definitional-functional' approach to first amendment adjudication is strenuously advocated by Professor Emerson").
[1270] See, e.g., ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26 (1948) ("The principle of the freedom of speech springs from the necessities of the program of self-government").
[1271] *Ibid.*, 54.
[1272] Alexander Meiklejohn, *What Does the First Amendment Mean?*, 20 U. CHI. L. REV. 461, 462 (1953) (calling on the Supreme Court to "clarify ... the most significant principle of our American plan of government").

the Court's approach and his own theory. "The theory that asserts that constitutional values may be 'balanced' by the appellate courts", he wrote in response to the *Barenblatt* decision, "is radically hostile, not only to the first amendment, but also to the intent and provisions of the Constitution as a whole".[1273]

While their underlying substantive principles were very different, in terms of analytical structure the Emersonian and Meiklejohnian perspectives on freedom of expression adjudication were highly similar. Both approached the question of protection for speech as a matter of defining the coverage of the first amendment, rather than as a matter of assessing the relative strengths of competing values or interests. [1274] That assessment, they argued, had been carried out by the framers when they decided to give absolute protection to the freedom of speech properly defined – *i.e.* insofar as distinguished from action (Emerson), or insofar as related to the project of self-government (Meiklejohn).

Viewed together, these theories give rise to four brief observations. First, both Meiklejohn and Emerson elaborated their theories in direct and explicit opposition to balancing. Weighing interests or consequences and approaching cases as turning on questions of degree was exactly opposite to the 'careful definition' of the scope of the First Amendment they proposed. Second, their definitional alternatives, by contrast, were very clear expressions of an underlying belief in the virtues of legal formality – of the attractions of hard and clear definitions and of not leaving matters to the discretion of 'Tomdickandharry, J.'. Third, by implication, these prominent theories contributed to a jurisprudential climate in which balancing and legal formality were seen as direct opposites. And fourthly, by way of a prelude to the comparative assessment in Chapter 8: while German jurisprudence, too, had had its share of proposals for 'definitional' approaches to the freedom of expression – the Weimar-era theories of Häntzschel and Schmitt and others - none of these proposals had any serious traction by the time the FCC came to decide its first major free speech cases in the late 1950s. By then, Smend's 'material constitutionalism' had obliterated all definitional opposition. By contrast, in the U.S., although 'clear and present' danger' and balancing had been enormously successful, they had clearly not conquered all. The presence of prominent, widely influential alternatives to balancing, such as Meiklejohn's and Emerson's theories, at precisely the time when the Supreme Court began to invoke this discourse more and more often in its decisions, marks a significant difference between the early U.S. and German balancing experiences.

[1273] Meiklejohn, *The Balancing of Self-Preservation against Political Freedom*, 49 CAL. L. REV. 4, 7 (1961).
[1274] See, *e.g.*, with reference to Meiklejohn: Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 270fn24 (1981) ("Taking the 'freedom of speech' as the appropriate unit of coverage has traditionally been the opening move of the 'definers'").

7.3.4 Definitions and 'absolutism': The First Amendment of Justices Black and Douglas

The Opinions of Justices Black and Douglas have already been mentioned as major sources of critiques of balancing, and as sources of inspiration for such critiques by academics. What needs to be discussed briefly at this point is what might be called the positive content of their views on First Amendment adjudication, and the relationship between these views and the definitional tradition in American constitutional legal thought. This is because it was precisely in the Opinions of these two Justices that the definitional tradition received its most high profile exposition in the mid-twentieth century, not just within the area of free speech law, but arguably within all of constitutional rights law.

For Justices Black and Douglas, just as for Professors Meiklejohn and Emerson, issues of substantive principle and doctrinal approach were closely intertwined. Like Thomas Emerson, Black and Douglas espoused a principled 'speech'/'conduct' dichotomy. "A 'bright line' distinction between speech and conduct", Morton Horwitz has summarized the position, was "a staple of Justice Black's effort to develop an absolutist conception of the First Amendment that would nevertheless contain a clear limiting principle".[1275] Justice Black's Dissent in *Barenblatt* and Justice Douglas's Dissent in *Dennis*, to mention two of the cases discussed in Chapter 6, both contain prominent references to the speech/conduct distinction.[1276] In a later Dissent, Justice Black explained his famous "I take 'no law abridging' to mean '*no law abridging*'" interpretation of the First Amendment[1277] in terms of specifically this distinction, when he wrote "I think the Founders of our Nation in adopting the First Amendment meant precisely that the Federal Government should pass 'no law' regulating *speech and press* but should confine its legislation to the regulation of *conduct*".[1278]

Justices Black and Douglas' position on freedom of expression came to be seen as the apex of First Amendment 'absolutism'. 'Absolutism' in the First Amendment context has been, as Dean Ely once remarked, "a term that has been used inconsistently by both friend and foe".[1279] What is clear, however, is that the core of the meaning of absolutism simultaneously places it squarely within the definitional tradition and in diametrical opposition to balancing. Dean Ely himself, for example, drew a contrast

[1275] Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentality without Fundamentalism*, 107 HARV. L. REV. 30, 111 (1993).
[1276] USSC *Dennis v. United States*, 341 U.S. 494, 584 (Douglas J., dissenting); USSC *Barenblatt v. United States*, 360 U.S. 109, 141 (Black J. dissenting).
[1277] See Justice Black's Lecture 'The Bill of Rights', published in 35 N.Y.U.L. Rev. 865, 874, 879, 882 (1960).
[1278] USSC *Mishkin v. New York*, 383 U.S. 502, 518 (1966) (Black J., dissenting), cited in Horwitz, *The Constitution of Change* (1993), 112fn397 (emphasis added).
[1279] Ely, *Flag Desecration* (1975), 1500fn74. Not unlike its perceived opposite – balancing -, of course. See also Meiklejohn, *The First Amendment is an Absolute* (1961), 246fn4 (referring to different varieties of 'absolutism', including Justice Black's and his own).

between balancers on the one hand and "categorizers, or 'absolutists'" on the other.[1280] Edward White's description similarly makes clear the basic dichotomy. "Absolutism in First Amendment jurisprudence", White has written, "refers to a jurisprudential perspective that ostensibly rejects balancing in free speech cases for an analysis that treats some, or even all, forms of expression as presumptively protected".[1281] It should be noted, however, that just as with other manifestations of the definitional tradition – and, of course, as with balancing itself! - absolutism's meaning cannot fully be captured as merely an analytical device. There was clearly an important rhetorical dimension to the Justices' position. Absolutism, for them, was at least in part "a rhetorical device to express an attitude about how first amendment adjudication should be approached".[1282] In this way, absolutism symbolized their condemnation of "how the balance worked out after a decade of deciding cases growing out of the [Anti-Communist, JB] hysteria".[1283] Dean Ely, in '*Democracy and Distrust*' recognized that "a case can be made ... that even though a justice must know deep down that no one can really mean there can be no restrictions on free speech, there is value in his putting it that way nonetheless".[1284]

Justices Black and Douglas' First Amendment absolutism was by no means the last manifestation of the definitional tradition in American free speech law. Indeed, the tradition continues to play a crucial role up until the present day, through such doctrines as the prohibition on 'content-based' restrictions,[1285] and through the differing standards of review attracted by various classes of expression, such as commercial speech,[1286] 'hate speech',[1287] or expressive conduct.[1288] Within the period with which this study is concerned, however, the First Amendment Opinions of these two Justices represent the most prominent exposition of the definitional tradition to date, possibly in all of American constitutional rights practice and theory.

7.3.5 Interim conclusion

By the early 1960s these various strands of the definitional tradition in American constitutional legal thought in this area – Judge Hand's incitement test, the *Chaplinsky* and *Chrestensen* categories, the theories of Emerson and Meiklejohn, and the First

[1280] *Ibid.*, 1500. In Ely's view, all categorization approaches, insofar as they absolutely sheltered some categories of speech or absolutely proscribed certain kinds of restrictions, could properly be labelled 'absolutist'. See also JOHN HART ELY, DEMOCRACY AND DISTRUST 108-110 (1980) (contrasting balancing and different forms of 'absolutism').
[1281] White, *The First Amendment Comes of Age* (1996), 351fn167.
[1282] Powe, *Justice Douglas after Fifty Years: The First Amendment, McCarthyism and Rights* (1989), 281.
[1283] *Ibid.*, 280.
[1284] ELY (1980), 109, referring to Charles Black's famous interview with Justice Black in *Harper's Bazaar*.
[1285] For historical overviews of the development of this doctrine, see Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203 (1982); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).
[1286] USSC *Central Hudson Gas & Electric v. Public Service Commission*, 447 U.S. 557 (1980).
[1287] USSC *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
[1288] USSC *United States v. O'Brien*, 391 U.S. 367 (1968).

Amendment perspective of Justices Black and Douglas - coalesced into a powerful set of ideas, the primary focus of which became to challenge the theory, practice and rhetoric of balancing. The definitional tradition, in a sense, at this time became a *definitional school*.[1289] Its main tenet was opposition to judging the constitutionality of laws by way of 'an interest-balancing technique', and its principal flag bearers were the two Justices.[1290] Categorization now became more than just a particular analytical device to be used with regard to particular forms of (commercial, obscene, *etc.*) speech, or a specific conceptual tool for theories of freedom of expression. It now was the centrepiece of a '*style*' in constitutional legal reasoning – a style that competed for dominance with the style of balancing.[1291]

Both the *content* and the *mere existence* – and persistence - of a set of ideas presented as diametrically opposite to balancing are deeply significant for the local meaning of balancing in US constitutional legal discourse.

(1) First, as to content: It is in the opposition between balancing and its definitional alternatives that some of the perceived core attributes of balancing are most clearly expressed. The main theme to come out of this opposition is that of *attention to context and consequences*, which balancing was thought to offer and definitional approaches were seen to avoid. This particular aspect of balancing's meaning can be traced all the way along the definitional tradition, and has in fact surfaced at various stages above. Thus, for example, it may be recalled that one of the main reasons behind Judge Learned Hand's categorical incitement test was his perception that the 'clear and present danger' test required an assessment of the likely consequences of speech, that he thought was "too slippery".[1292] Similarly, the 'two level theory' of *Chaplinsky* and later cases was interpreted specifically as "an attempt to avoid the clear-and-present danger test"[1293] with its difficult assessment of the "gravity, probability, and proximity" of forbidden consequences.[1294] Dean Ely's observation that the main difference between a categorization approach and balancing tests lay in the role played by 'context' and the prediction of consequences has also been cited above.[1295]

(2) But beyond their specific content, the mere existence - and persistence – of a high profile set of ideas alternative to balancing, has important implications for balancing's local meaning. The existence of a prominent tradition of alternatives to balancing meant that balancing came to be understood, to a large extent, *through* this opposition. Balancing, in other words really was, to an important degree, '*not* categorization', or '*not* definition' – just as categorization and definition were understood to be '*not* balancing'. In the terminology of Chapter 2 and Chapter 8, balancing in the Supreme Court's prominent free speech cases, through this opposition, came to be seen as perhaps the prime example of the '*not* formal' in constitutional law; of legal *anti*-formality.[1296]

These two mutually exclusive styles – definitional and balancing, formal and anti-formal - came to dominate debate on freedom of expression to such an extent that they were thought by many to cover much of what First Amendment adjudication was all about. Dean Ely, in the mid-1970s remarked how debate in this area had "traditionally proceeded on the assumption that categorization and balancing ... are mutually exclusive approaches to the various problems that arise under the first amendment".[1297] Many contemporary contributions similarly framed key issues in free speech law – or even in constitutional rights law generally - in terms of the opposition between balancing and its definitional alternatives.[1298] The most famous of these must be Ronald Dworkin's 1970 essay '*Taking Rights Seriously*', which is centrally concerned with the dichotomy between a model of "striking a balance between the rights of the individual and the demands of society at large" and a principled search for "grounds that can consistently be used to limit the definition of a particular right".[1299]

[1289] Note, *The First Amendment Overbreadth Doctrine* (1970), 883fn146 (referring to Emerson, Meiklejohn and Laurent Frantz as members of a "definitional school of commentary" united in opposition to balancing).
[1290] *Ibid.* (noting that the commentators of the 'definitional school' were "largely in accord with Mr. Justice Black's 'absolutist' views").
[1291] See Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing* (1992), 293. See also the reference to an 'aesthetic' in Schlag, *The Aesthetics of American Law* (2002), 1051ff.
[1292] See Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine* (1979), 720-721.
[1293] Kalven, *The New York Times Case* (1964), 218.
[1294] Karst, *The First Amendment and Harry Kalven* (1965), 5.
[1295] See also Note, *The First Amendment Overbreadth Doctrine* (1970), 887 (observing that the Supreme Court's categorical approach in defamation cases after *Chaplinsky* did not look at "the amount of tangible harm wrought by defamatory statements, but at the culpability of the speaker *in abstraction from consequences*") (emphasis added).
[1296] Cf. Mark V. Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502 (1985).
[1297] Ely, *Flag Desecration* (1975), 1500.
[1298] For an overview, see Note, *Civil Disabilities and the First Amendment* (1969).
[1299] Reprinted in RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 197-200 (1977). See also ELY (1980), 108ff (contrasting balancing and absolutism).

7.4 BALANCING'S U.S. LOCAL MEANING

What is, based on the discussions in this and the previous Chapter, and using Duncan Kennedy's less elegant but useful term, *the 'unitedstatesean' meaning* of the discourse of balancing during the period described here? A number of related distinctive features of this meaning emerge particularly clearly when compared to the German meaning of balancing discussed in Chapters 4 and 5.

(1) One important conclusion with regard to the German discourse of balancing was how much broader this discourse was than the mere invocation of weighing rights and interests, including, as it did, important other elements of the 'material' and 'comprehensive' constitutional visions. The discourse of balancing in the U.S., by contrast, seems to have been much narrower - much more closely linked to the invocation of the language of weighing itself – and much more local – tied to the subject area of freedom of expression. While the idea of weighing was, of course, often also discussed in relation to conceptions of the meaning of rights generally, or of the role of courts generally, there were few if any discussions on the broad level of 'constitutional vision' that was pervasive in the German context. One important reason for this difference must have been that while in Germany the discourse of balancing began with the proverbial 'bang' of the seminal *Lüth* decision, in the U.S. there was a much more gradual development. This process consisted in part of the incremental modification, and sometimes ultimately the replacement, of familiar older doctrines.

(2) Related to these first elements (of a narrower discourse that developed incrementally): it was much less clear in the U.S. context than it was in German law what the language of balancing was supposed to stand for and what its impact was meant to be. Assessments of balancing ranged from 'mere rhetoric', through a narrow doctrine for certain well-defined categories of First Amendment cases, to a description of the judicial function more generally. In addition, many of these different meanings came loaded with – contradictory – assumptions as to how 'balancing courts' were likely to behave, and to what results 'balancing decisions' were likely to lead. One result of these uncertainties of meaning was that many of the participants in the relevant debates often seemed to be talking 'to' each other – and to easily debunked straw men – rather than 'with' each other. Many of the primary contemporary law review articles on balancing, as a result, are both wonderfully insightful even for readers today, and frustratingly opaque.

(3) Amidst all this uncertainty, one aspect of balancing's meaning emerges very clearly. This is the fact that balancing in the U.S. context was, to a very large extent, defined by way of its opposition to another discourse; that of the definitional tradition, mainly in its contemporary guises of 'absolutes' and 'categorization'.

In Chapter 8, in which an American 'paradigm' of the meaning of balancing discourse is constructed, two principal aspects of this last point – the relevance of the definitional tradition - will be developed further.

First, that Chapter aims to show how the pervasive opposition between balancing and the definitional tradition has retained a vital importance within American constitutional legal thought – and how the contrast with the definitional tradition remains central to balancing's contemporary American local meaning. Many of the debates to be canvassed there, such as the late 1980s – early 1990s concern with 'rules *vs.* standards', self-consciously trace their roots back to this basic opposition in 1960s freedom of expression law, as will be illustrated. This discussion will serve as a prima facie argument for concluding that the basic American meaning of balancing itself may also have stayed relatively strongly connected to its 1950s – 1960s intellectual roots.

And secondly, Chapter 8 will elaborate on the relationship between the two dichotomies of 'definitional *vs.* balancing' and 'formal *vs.* substantive'. It will use the basic equivalence of these two dichotomies, as it has emerged from this Chapter, in two directions. On the one hand: to come to a closer understanding of balancing in terms of the formal *vs.* substantive opposition. But also: to develop a more nuanced understanding of the formal *vs.* substantive opposition itself, by way of an analysis of its contingent historical foundations in the great historical debates over balancing and its alternatives.

PART IV

PARADIGMS

CHAPTER 8

TWO PARADIGMS OF BALANCING

8.1 PROJECT AND METHOD: LOCAL MEANINGS AND PARADIGMS

8.1.1 Introduction

Throughout this thesis, it has been argued that balancing is capable of having, and does in fact have, multiple meanings. Balancing in German constitutional law, it was seen in Chapters 4 and 5, both reflects and implements underlying ideas of material constitutionalism and of the comprehensive constitutional order; a perfectionist ideal of constitutional law that is complete in its coverage and aims to achieve a 'perfect-fit' with social reality. In these various senses, balancing is truly elemental to the foundations of Post-War German constitutionalism. In U.S. constitutional law, by contrast, as was discussed in Chapters 6 and 7, judicial balancing is seen rather as a pragmatic, incremental solution for when doctrinal frameworks no longer 'work' – because they are no longer capable of generating commitment among legal actors, or because new fact patterns arise for which they are thought not to offer acceptable outcomes. This pragmatic, experimental form of balancing is generally viewed with suspicion rather than aspiration, and functions in a constant dialectic of opposition with elements of alternative modes of thinking – that of 'reasoned justification' and of the 'definitional tradition' in American law.

This final Chapter aggregates the various meanings encountered so far into two 'paradigms' of balancing. These paradigms are condensed, abstracted depictions of characteristic elements of the 'German' and 'U.S.' meanings of balancing. They will be elaborated using the common grid of formal and substantive, set out in Chapters 1 and 2, and by way of a comparative approach of 'cross-questioning', to be introduced below, in Section 8.1.3. Because of the more abstract and condensed nature of paradigms as defined here, many of the questions raised in this final Chapter are, inevitably, addressed in a more tentative way. The aim is to suggest afinities and contrasts, using the discussions in Chapters 3 to 7 as basic material. This tentative approach is unavoidable given the scope and difficulty of the questions raised. The idea sustaining the work in this Chapter is that having asked readers' indulgence during the extended presentation of detailed historical materials in earlier Chapters, these concluding pages are as good an occasion as any to use the discourse of balancing and the lens of legal formality and its opposites to attempt a contribution to the long tradition of reflections on basic differences between American and European ways of law.

This Chapter is structured as follows. Paragraphs 8.1.2 and 8.1.3, in this first Section, set out the methodological framework. Sections 8.2, 8.3 and 8.4 compare central features of German and U.S. American balancing discourse through the lenses of 'formal', 'substantive' and their interrelationship. Section 8.5 thickens the concept of legal formality by including questions on the nature of the belief in legal form held by local participants. This thickened concept is then used to distinguish German and U.S. American ways of balancing in terms of 'faith' and 'skepticism'. This final dimension allows for the elaboration of the two paradigms of balancing: 'skeptical pragmatic' (U.S.) and 'aspirational formalist' (Germany). Section 8.6, finally, concludes with suggestions to broaden the relevance of the findings of Chapters 3 to 8 and with some tentative predictions for future developments.

8.1.2 Paradigms

A central argument of this thesis is that American and European lawyers do not only think differently about when or how to 'balance' in fundamental rights cases, but that they even think differently about what balancing is.[1300] It is in order to get to the heart of these differences in *thinking about* balancing that this final Chapter invokes the concept of 'paradigms' of balancing discourse. Legal scholars have turned to Kuhn's paradigm concept to describe 'legal paradigms' as "a hard core of shared understandings, of basic theories and concepts, a common language, a common methodology" held by legal actors within a given system.[1301] A legal paradigm is the "thought pattern", the "epistemic background for analysis" that underlies "the way participants discuss", and select for discussion, relevant issues in law and adjudication.[1302]

Legal paradigms, in the definition adhered to here, have four distinctive interrelated features. First, their propositions generally remain *implicit*, which means that they must normally be gleaned indirectly, from the discursive practice of participants in the relevant system.[1303] Second, they are *ideal typical* in the sense that they are abstractions typifying locally held ideas. Paradigms are implicit analytical constructs of which it is

[1300] *Cf.* Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICH. J. INT'L L. 1003, 1011 (2006).
[1301] See, *e.g.*, Mark van Hoecke & Mark Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law*, 47 ICLQ 495, 513-514 (1998).
[1302] Michaels, *Two Paradigms of Jurisdiction* (2006), 1022. Two alternative terms close to what is intended here are "visions of law" (Atiyah & Summers) and "modes of thought" (Kennedy). Atiyah & Summers define a 'vision of law' as "the inarticulate and perhaps unconscious beliefs held to some degree by the public at large, and more especially by judges and lawyers, as to the nature and functions of law, and as to how and by whom it should be made, interpreted, applied and enforced" (P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 4-5 (1987)). Duncan Kennedy defines a 'mode of thought' as consisting of "a conceptual vocabulary, organizational schemes, modes of reasoning, and characteristic arguments" (Duncan Kennedy, *Two Globalizations of Law and Legal Thought*, 36 SUFFOLK U. L. REV. 631, 634 (2003). The notion of paradigm as used here differs from Atiyah & Summers' definition in its focus on elite judges and lawyers rather than on the legally interested public at large. It differs from both the Atiyah & Summers and the Kennedy concepts in its focus on balancing as a specific legal institution rather than on 'law' or 'legal thought' in a more comprehensive sense.
[1303] *Ibid. Cf.* also Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 59fn8 (1984).

expected that, if they were to be made explicit, most local judges and commentators would accept most elements most of the time.[1304] Paradigms could still be valid even when individual judges or commentators object to some or all of their elements in any specific instance.[1305] A third distinguishing feature of paradigms is the way they are seen to exercise *a real hold on the thought and practice of participants*. Paradigms are not theories or principles that can simply be adhered to or not; they constitute a framework within which even opposing theories are formulated.[1306] Paradigms, because of this feature, are seen in colloquial terms as 'ideas with real-world' effects. In the context of adjudication, "paradigmatic understandings of law influence judges collectively", by stabilizing interpretive practices over time and across different areas of law.[1307] Finally, paradigms are, within their area of operation, *comprehensive* in their coverage. Paradigms "contain not just the meaning of a particular institution … but rather the whole set of instruments, argumentative modes, and theories connected with this institution, as well as other, related institutions".[1308] It is important to note that legal paradigms, in the definition adhered to here, need not be comprehensive in the sense that they would have to cover all dimensions of law making and application in a given legal system.[1309] Paradigms of balancing, as defined here, are comprehensive in their coverage of the use of the language of balancing and its related institutions, ideas and practices – that is: of the discourse of balancing in the broad sense as defined in Chapter 2. No further scope of application is claimed for them.

The paradigmatic model has important implications for the nature of the project undertaken in this Chapter. Paradigms, by their nature, are difficult to discern for those within their field of operation. This difficulty suggests that comparison between systems is likely to be especially helpful in revealing the contingency of ideas that local participants may take to be essential.[1310] On the assumption that it is in fact possible for outsiders to gain a sufficient familiarity with foreign legal ideas and "thought patterns" – an assumption that underlies most constructive comparative work -, this is an important

[1304] *Ibid.*, 59.
[1305] *Cf.* Richard H. Fallon, *The Rule of Law as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 10-11 (1997) (describing "ideal types in the Weberian sense" as "clarifying abstractions, introduced for heuristic purposes, that may be approached more or less closely". These ideal types are "not intended to mirror the views of any particular person", but should "help to illuminate an important strain in their thinking").
[1306] *Cf.* Michaels, *Two Paradigms of Jurisdiction* (2006), 1023-1024. In this specific sense, paradigms are akin to ideologies. See, *e.g.*, Katherine van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1515 (1981).
[1307] David Dyzenhaus, *The Legitimacy of Legality*, 46 U. TORONTO L.J. 129, 159 (1996). On the idea of influence through 'stabilization' of practice, see also John Bell, *The Acceptability of Legal Arguments*, in THE LEGAL MIND 62 (Neil MacCormick & Peter Birks, eds., 1986) (referring to Karl Llewellyn's notion of a "period style" in adjudication' as a "stabilizing factor").
[1308] Michaels, *Two Paradigms of Jurisdiction* (2006), 1023.
[1309] This comprehensiveness is a feature of 'paradigms of law' as used in the work of Jürgen Habermas. See, *e.g.*, Jürgen Habermas, *Paradigms of Law*, 17 CARDOZO L. REV. 771 (1996). In order to distinguish between Habermas' comprehensive vision and the model adhered to here, the term 'legal paradigm' will be used as distinct from 'paradigm of law'. Like the 'legal paradigms' referred to here, Habermas' 'paradigms of law' also have practical implications in the sense that they "guide the contemporary practices of making and applying law" (at 771).
[1310] Michaels, *Two Paradigms of Jurisdiction* (2006), 1026.

justification for undertaking a project of the kind pursued here, as someone looking from the outside into both systems compared.[1311]

This Chapter makes one primary and one subsidiary claim with regard to the spheres of operation of the two paradigms of balancing. The primary claim is that these paradigms reflect ideal typical versions of complexes of ideas in operation in German and American legal thought during the late 1950s and early 1960s in the area of constitutional rights adjudication.[1312] The subsidiary claim is that these paradigms have relevance also for later periods, up to the present day. While not all aspects of the paradigms may still be in operation, the thought patterns that formed the epistemic background to the foundational period for the discourse of balancing in constitutional rights adjudication still have implications for current day practice and thinking. A comprehensive argument to support this subsidiary claim would require detailed studies of the contemporary discourses of balancing in German and U.S. constitutional rights adjudication, along the lines of those carried out in Chapters 4 to 7. Such studies would go far beyond what is feasible in the context of this thesis. This Chapter can, therefore, merely offer suggestive evidence in support of the continued validity of (parts of) the two paradigms of balancing, and will do so in its final Sections.[1313]

8.1.3 'Common grid' and 'cross-questioning'

Chapters 1 and 2 adopted a limited definition of the 'legitimization problematic' of judicial reasoning in constitutional rights adjudication as the cornerstone of this thesis's comparative project. According to this definition, the legitimizing force of judicial reasoning was understood as turning on the way such reasoning manages the relationship between formal and substantive dimensions of law and adjudication. This relationship, it was shown, can be characterized in different systems by varying emphases or proportions of formal and substantive elements (the Summers/Atiyah project), or through different forms of combination, integration or juxtaposition of these formal and substantive dimensions (the Lasser project), as outlined in Section 1.6.2. Importantly, it was hypothesized earlier that detailed comparative analysis of local answers to the legitimization problematic may also reveal discursive management through different understandings of what formal and substantive and their combination, integration or juxtaposition mean. Such comparison may also provoke new understandings of familiar concepts, theories or practices as formal or substantive, even if these elements are not traditionally thought of as such in their local setting.

The discourse of balancing, it has been seen throughout this study, has become central to local resolutions of the legitimization problematic. In both the German and the U.S. context the discourse of balancing is one of the most prominent sites where the formal and the substantive intertwine and clash. The nature of these 'meetings', however, has been shown to differ significantly as between these settings. The task for the paradigms of balancing to be developed in this Chapter is to give ideal-typical accounts of the distinctive qualities of these 'meetings' of the formal and the substantive for German and U.S. legal thought and practice.

Up to this point, then, the comparative approach to balancing's meaning in this study has been based on a common conceptual grid consisting of the 'legitimization problematic' and the formal *vs.* substantive opposition. The aim of this 'minimally functionalist – maximally internal' framework has continuously been to approach legal systems, as much as possible, both in their own terms (internally) *and* with the help of a common conceptual grid (externally). To these two perspectives, this Chapter will at times add a dimension of 'cross-questioning', in which each system is approached, not on its own terms, not in common terms, but *in terms of the other*. Cross-questioning, as the term is used here, means nothing more than directing questions that were shown to be relevant for one of the systems studied to the other system. This, regardless of whether this particular question or issue is commonly discussed in that other setting. Where the internal perspective is especially useful for gaining and understanding of legal systems as they are 'lived' by local participants, and the external perspective is essential for creating and maintaining comparability, cross-questioning may, in appropriate contexts, be particularly suited to bringing out contrasts between systems. These contrasts – the *distinctiveness* of particular meanings of balancing - are an important component of ideal-typical paradigmatic understandings of the kind this Chapter seeks to construct.

[1311] An additional implication of the paradigmatic approach is the fact that recognition and acceptance of a paradigm's explicated propositions by local actors, while relevant for the likelihood of that paradigm being accurate, cannot, by definition, be either a sufficient or necessary condition for its validity.

[1312] *Cf.* Klaus Eder's critique that it is unclear whether Habermas' paradigms of law reflect "historical periods, or more theoretical constructs?". See Klaus Eder, *Critique of Habermas's Contribution to the Sociology of Law*, 22 LAW & SOC'Y REV. 931, 940 (1988). The position taken here is that they are ideal typical versions of ideas in their historical context.

[1313] The case for this subsidiary claim is also made indirectly throughout this Chapter, by way of references to literature postdating the period studied in Chapters 4 to 7.

8.2 THE FORMAL: PERFECTION AND LIMITATION

European rights balancing is persistently depicted by American observers as a radically open-ended and informal practice, at odds with the formalist heritage of European legal culture, often acknowledged by those same observers. This Section brings together ideas of legal formality (Chapter 2) and of constitutional perfectionism (Chapter 5), in order to present a case for the hidden formal dimensions of German, and by extension European, judicial balancing.

8.2.1 Germany: Constitutional perfection

The discourse of balancing in German constitutional rights adjudication theory and practice is heavily reliant on, and an important expression of, powerful ideas of constitutional legal perfectionism.[1314] [1315] Chapter 5 presented the concepts of the complete constitutional order and the 'perfect-fit' constitution as the two dimensions in which German constitutional legal thought and practice seek to achieve 'comprehensiveness', or overall perfection, for their constitutional order. The *complete* constitutional order turns on the idea that the value system enacted in the Basic Law "should lay claim to an absolute validity *extending to all spheres of social life*".[1316] The most visible manifestation of this idea is the extension of the constitution's sphere of operation to the field of private law initiated in *Lüth*. This expansive constitutionalism relies on balancing as an important instrument for avoiding inconsistencies in the operation of constitutional rights protection. The 'perfect-fit' constitution demands a close congruence between the abstract meaning of constitutional rights provisions and their effectuation in concrete cases. Classic expressions of 'perfect-fit' constitutionalism are the conception of constitutional interpretation as the 'actualization' of constitutional provisions and the principle of the 'optimization' of constitutional rights and values.[1317]

The idea that rights adjudication requires 'optimization' is most prominently expressed in the work of Robert Alexy, notably in his book '*Theorie der Grundrechte*', of 1986. Fundamental rights norms, understood as 'principles', in Alexy's view are '*Optimierungsgebote*' – optimization requirements -;[1318] "norms which require that something be realized to the greatest extent possible given the legal and factual possibilities".[1319] Balancing and optimization are intimately related in Alexy's theory of fundamental rights, functioning simultaneously as part of its empirical foundations and as part of its operationalization. On the one hand, the FCC's balancing is "the clearest sign that the Federal Constitutional Court understands constitutional rights norms … as principles"; on the other, "competitions between principles are played out in the dimension of weight", through the operation of the proportionality principle and its inherent "law of balancing".[1320] This idea of optimization is present also in other notable contributions to German constitutional legal theory, for example in Konrad Hesse's famous notion of '*praktische Konkordanz*'.[1321]

The prominence of these ideas of perfection and totality in German constitutional rights theory and practice raises the question of the role, if any, such

[1314] *Cf.* Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L.J. 837, 848 (1991) ("Every provision of the Constitution is a legally binding norm requiring full and unambiguous implementation. The preservation of the constitutional state in *all* of its particulars is … the function of the Federal Constitutional Court") (emphasis in original). See also at 851fn44 (1991) (referring to the "tendency of the German legal mind to envision the Constitution as an almost perfect – and gapless – unity").

[1315] A note on the term 'perfectionism' is in order: 'Perfection' and 'perfectionism' are not commonly used terms of art in this field. They are used here primarily as shorthand for 'comprehensive' – complete and 'perfect fit' – constitutionalism. Any broader attempt at definition must remain outside scope of this thesis. Some clarifying comments may, however, be helpful to convey what is intended: (1) The terms are useful for comparative study, as there exists a specific debate in U.S. constitutional legal theory on '*constitutional perfectionism*', which explicitly frames U.S. constitutional law, in its dominant conception, as decidedly *not* 'perfectionist'. The relevant literature highlights the many different – and potentially contradictory – understandings of 'perfection' and 'perfectionism' in the debates, but the general tone of the – critical – observations made of U.S. law are helpful for outside observers; (2) Despite these contradictory and incomplete definitions, as the discussion below will aim to make clear, the non-perfectionist elements of U.S constitutional law targeted in the relevant literature make for a striking, diametrical contrast with the elements in German thinking outlined earlier and summarized here under the 'perfection' label. This contrast again supports the usefulness of this term to highlight (some of) the relevant differences; (3) Further on the issue of incomplete and contradictory definitions: There is no a priori reason to expect the dominant ideal images of law and adjudication in a particular setting to be internally coherent. In fact, it seems likely that many of our most cherished ideals for law and adjudication are somewhat or even deeply paradoxical and internally conflicting. So, for example, while there may be a fundamental incompatibility between the ideals of 'perfection' in the sense of a coherent value order, and 'perfection' in the sense of perfect particularized justice – that is: perfection in the sense famously derided as "overrated" by Justice Scalia of the U.S. Supreme Court -, this basic incompatibility in conceptual terms does not mean that both ideals could not be simultaneously widely held; (4) Finally, on this same point: As s. 8.5, *infra*, aims to explain, it may be that what is most pertinent for a comparison of German and U.S. constitutional legal thinking on an axis of 'perfectionism' to 'anti-perfectionism', is not so much the respective 'end-states' of perfection and its opposites, but a general tendency to strive for the one, or be resigned to the other side of the spectrum. If that claim is valid, then again an imprecisions of definition will be less serious. For an overview of the 'perfectionism' debate in the U.S., see the contributions by James Fleming, Cass Sunstein and Abner Greene to the special May 2007 issue of the *Fordham Law Review* devoted to this topic: James E. Fleming, *The Incredible Shrinking Constitutional Theory: From the Partial Constitution to the Minimal Constitution*, 75 FORDHAM L. REV. 2885 (2007); Abner S. Greene, *The Fit Dimension*, 75 FORDHAM L. REV. 2921 (2007); Cass R. Sunstein, *Second-Order Perfectionism*, 75 FORDHAM L. REV. 2867 (2007). See also JAMES E. FLEMING, SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY (2006).

[1316] Ernst Böckenförde, cited in DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 37 (1997) (emphasis added). See also, *e.g.*, Mattias Kumm, *Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice*, 2 INT'L J. CONST. L. 574, 587 (2004) ("the jurisprudence of the FCC interpreting the Basic Law adopts a remarkably expansive model of constitutional rights").

[1317] Discussed in more detail *supra*, s. 4.3.2.2. See also, *e.g.*, KONRAD HESSE, GRUNDZÜGE DES VERFASSUNGSRECHTS 28ff (8th ed., 1975). In Donald Kommers' translation: "[t]he principle of the Constitution's unity requires the optimization of [values in conflict]. (…) Both legal values need to be limited so that each can attain its optimal effect". See Kommers, *German Constitutionalism: A Prolegomenon* (1991), 851fn43.

[1318] ROBERT ALEXY, THEORIE DER GRUNDRECHTE 75 (1986). At 47 in the English translation by Julian Rivers ('*A Theory of Constitutional Rights*'), cited here as ALEXY (2002).

[1319] ALEXY (2002), 47.

[1320] *Ibid.*, 50. Note that Rivers translates '*Güterabwägung*' in the German original (at 79) as "balancing of interests". On the confusion between these terms, and on the FCC's simultaneous reliance on both as part of its mediating legitimizing strategy, see Chapter 5.

[1321] See *supra*, s. 4.3.2.2.

concepts play in the American setting. The following Paragraphs argue that this type of cross-questioning reveals that on virtually all accounts, American constitutional rights thinking and practice relies on ideas that are *the exact opposite* to perfection and comprehensiveness. In subsequent Paragraphs, these opposing ideas of perfectionism and 'anti-perfectionism' will be viewed through the lens of legal formality and its opposites. It will be argued that German constitutional perfectionism is formal in a sense similar to the way American *anti*-perfectionism is formal. By implication, this argument suggests that *balancing*, which is central to German constitutional perfectionism, *could also be formal* in surprising ways.

8.2.2 U.S.: Constitutional 'anti-perfectionism' and legal formality

8.2.2.1 Introduction

In many different senses, American constitutional adjudication theory and practice are decisively non- or even anti-perfectionist. From the emphasis on self-restraint in adjudication, to views on the limitations in the nature and scope of constitutional rights protection, dominant perspectives in the American tradition are concerned more with negative, limiting constitutionalism than with the construction of a comprehensive, complete and 'perfect-fit', constitutional order.[1322] The claim advanced in this Paragraph *is not* that this 'anti-perfectionism' in American constitutional theory and practice is related to balancing in any similar way as is constitutional perfectionism in the German setting. In fact, the relationship between the different elements of anti-perfectionism and balancing varies widely, ranging from the supportive through the antagonistic to the indifferent, as will be illustrated. The purpose of this discussion is rather to investigate the extent to which constitutional perfectionism is in any way distinctive for German theory and practice, by way of a contrast with experiences and theories in the U.S.,[1323] and to relate the distinct German idea of constitutional perfectionism and the meaning of balancing as one of its main expressions to differences in understandings of legal formality.

8.2.2.2 Facets of American constitutional 'anti-perfectionism'

This Paragraph presents examples of four main strands of anti-perfectionist ideas in American constitutional law, building on, and expanding on, discussions in Chapters 6 and 7. These strands refer to constitutional adjudication theory and practice; constitutional rights generally; the First Amendment specifically; and with regard to the role of constitutional doctrine as elaborated by the Supreme Court.

(1) First, American constitutional theory and practice are generally dominated by un-ambitious, or even pessimistic, views of what constitutional law and adjudication could and should aim to accomplish.[1324] This perspective may be illustrated through the views of major figures in the genealogy of constitutional rights balancing. Zechariah Chafee – the first writer to advocate a balancing of interests in the free speech context - for example, was said to be "acutely aware of the limitations of law and the legal process", and to feel strongly that law "must be tolerant of many evils that morality condemns".[1325] Judge Learned Hand, who advocated a definitional alternative to 'clear and present danger', and Justice Black, who stridently opposed balancing on the Supreme Court, espoused similarly limited conceptions of what judges could, and legitimately should, do.[1326] So too did Justices Frankfurter and Harlan, who advocated balancing on the Supreme Court.[1327]

(2) Second, views emphasizing the limited nature and function of constitutional rights generally are pervasive in American constitutional rights adjudication. The rights contained in the Bill of rights are often seen as essentially negative limitations on governmental authority, much more than as positive contributions to the realization of some overarching value, such as individual autonomy or human dignity.[1328] One implication of this limited – and limiting - perspective is that the rights contained in the Bill of Rights are generally treated individually, and not as part of a unified structure.[1329] This, of course, is strikingly different from the German emphasis on the need to interpret the Basic Law as a unified whole.[1330] Another implication is the widespread

[1322] See, for a summary and a critique of such views, Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990) (writing, at 2273: "Traditionally, the protections of the Constitution have been viewed largely as prohibitory constraints on the power of government"). For a recent comparative German-U.S. assessment, see THILO RENSMANN, WERTORDNUNG UND VERFASSUNG 245ff (2007).

[1323] That claim would not be undermined by a finding that there is no relationship *at all* between balancing and 'anti-perfectionism' in the American context. That, though, is not the argument advanced here.

[1324] See, *e.g.*, Richard H. Pildes, *Conflicts between American and European Views of Law: The Dark Side of Legalism*, 44 VA. J. INT'L L. 145 (2003); Kagan, *European and American Ways of Law* (2007). This dimension figures explicitly in the 'perfectionism' debate in the U.S. mentioned above. See, *e.g.*, Greene, *The Fit Dimension* (2007), 2921-2922 (referring to 'aspirationalist perfectionism'), and FLEMING (2006), 226-227 (calling for fidelity to the Constitution to be understood as "honoring our aspirational principles"). This call is clearly understood as *not* representative of dominant views on constitutional law.

[1325] Ernest Angell, *Zechariah Chafee, Jr.: Individual Freedoms*, 70 HARV. L. REV. 1341, 1343 (1957).

[1326] For Justice Black, see, *e.g.*, Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. Rev. 865 (1960). For Learned Hand, see, *e.g.*, his 1942 paper '*The Contribution of an Independent Judiciary to Civilization, in The Supreme Court of Massachusetts 1692-1942*', cited in Elliot L. Richardson, *Freedom of Expression and the Function of Courts*, 65 HARV. L. REV. 1, 52-53 (1951). Richardson also writes (at 54) of the danger of allowing courts to have "the last word not merely as to what *minimum protection* of free speech and a free press the Constitution compels but as to where it is wise to draw the line", emphasis added).

[1327] See Chapters 6 and 7.

[1328] For one reference – among very many - on the different perspective prevalent in Germany, and on the significance of the *Lüth* decision on this point, see Konrad Hesse, *Entwicklingsstufen der deutschen Verfassungsgerichtsbarkeit*, 46 JAHRBUCH DES ÖFFENTLICHEN RECHTS (Neue Folge) 1, 9 (1998) ("It is difficult to over-emphasize the significance [in contemporary German constitutional law] of the old idea that basic rights are not merely individual rights of humans and citizens, *not just negative protections against State action* – '*nicht nur Abwehrrechte gegen den Staat*' –, but also objective principles for the ordering of the political community. This idea has found expression in [the *Lüth* decision]", emphasis added).

[1329] See AKHIL REED AMAR, THE BILL OF RIGHTS 291 (1998) (arguing that "modern [American] academic discourse about the Bill of Rights is unreflectively clausebound. Yet this discourse ignores the ways in which the Bill is, well, a *bill* – a set of interconnected provisions").

[1330] See Chapters 4 and 5.

hesitation to accord 'horizontal effect' to constitutional rights, again in marked contrast to the situation in German law.[1331]

(3) Third, in the freedom of expression context specifically, anti-perfectionist ideas come in from various directions, associated with two different prominent traditions in judicial and scholarly approaches to the First Amendment: a 'common law' perspective and a 'principled foundations' perspective.[1332]

In the first of these two, the First Amendment is viewed through a classic common law lens. This perspective, exemplified in the scholarly work of Harry Kalven and Kenneth Karst in the period discussed in the preceding Chapters, is limited or modest in its ambitions in the same sense that common law adjudication itself purports to be modest – through its incremental and pragmatic nature and its focus on incidental problem-solving rather than comprehensive system-building. Balancing, as was seen earlier, *can* figure positively in these approaches, if it is seen as an expression of particularist and incrementalist tendencies.

The second tradition relies on the elaboration of general theories of the values that the First Amendment is supposed to protect, or the kinds of harm it is supposed to guard against. This form of theorizing originated during the period discussed in earlier Chapters, in the work of Thomas Emerson – in his '*Toward a General Theory of the First Amendment*' – and Alexander Meiklejohn, both analysed earlier as part of the 'definitional tradition' in American free speech law.[1333] It became increasingly prominent throughout the 1970s and 1980s.[1334] These more abstract approaches may be anti-perfectionist in several ways. For one, if they focus on a single fundamental underlying value for the freedom of speech, as many of these theories do, they obviously limit possibilities for the consideration of alternative values and interests.[1335] Speaking more broadly, however, all approaches seeking to *define* the freedom of speech in any abstract sense treat the question of the coverage of First Amendment protection to some extent in a rule-like, categorical fashion. On these views, cases are either within or outside the area covered by the Amendment, depending on their relationship to its underlying value(s).[1336] This element of categorization is commonly discussed in terms of its contribution to the process of judicial and non-judicial decision making in free speech cases; that is, in terms

[1331] See for comparative studies, *e.g.*, Stephen A. Gardbaum, *The 'Horizontal Effect' of Constitutional Rights*, 102 MICH. L. REV. 388 (2003); Stephen A. Gardbaum, *Where the (State) Action is*, 4 INT'L J. CONST. L. 760 (2006); Jacco Bomhoff, *The Reach of Rights: The Foreign and the Private in Conflict of Laws, State Action, and Fundamental Rights Cases with Foreign Elements*, 71 LAW & CONTEMP. PROBS. 39 (2008); Helen Hershkoff, *Horizontality and the Spooky Doctrines of American Law*, 59 BUFF. L. REV. 455 (2011).

[1332] On these two traditions, see Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. REV. 1405, 1406-1407 (1987).

[1333] See *supra*, s. 7.3.

[1334] See, *e.g.*, Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL & PUB. AFF. 204 (1972); Edwin C. Baker, *The Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978); MARTIN REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS (1984). For a critique, see Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212 (1984).

[1335] *Cf.* Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 126 (1989); Cass, *The Perils of Positive Thinking* (1987), 1413.

[1336] Or, in more nuanced models, cases within this general field of coverage are inside or outside of areas of special protection.

of its institutional dimensions. The 'rule-like' or categorical nature of the First Amendment, and of its sub-categories in Supreme Court jurisprudence, is seen by many as an integral element of the protection offered to individuals expressing unpopular opinions.[1337] "The rule-like nature of the first amendment", Frederick Schauer has written, in fact shows that the amendment "*is not* the reflection of a society's highest aspirations, but rather of its fears, being simultaneously the pessimistic and necessary manifestation of the fact that, in practice, neither a population nor its authoritative decisionmakers can even approach their society's most ideal theoretical aspirations".[1338] The result, in Schauer's view, is a First Amendment that is, beneficially, "*second-best*".[1339]

(4) Finally, anti-perfectionist ideas are prevalent in conceptions of the role of Supreme Court doctrine. In contrast to the German ideal of constitutional interpretation as the 'actualization' of the meaning of the Basic Law (an ideal discussed in Chapters 4 and 5), important strands in American constitutional thinking make a clear distinction between the 'meaning' of constitutional provisions and their judicial 'implementation'. In service of this project of implementation, it is understood that the Supreme Court "must often craft doctrine that is *driven by* the Constitution, but *does not reflect the Constitution's meaning precisely*".[1340] American constitutional jurisprudence is rife with judicially created 'tests', with concern for the elaboration of "judicially manageable standards".[1341] References to original meaning, as opposed to contemporary, actualized application, fit this same pattern, as does the acknowledgment of the fact that some constitutional norms are, appropriately, 'underenforced' by the federal judiciary, leaving space for alternative forms of constitutionalism – popular, state judicial, executive or legislative, cultural, *etc.*[1342] Finally, the Supreme Court is sometimes understood to be crafting deliberately 'prophylactic' rules to protect basic rights.[1343] In all of these instances,

[1337] See, *e.g.*, John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1501 (1975) ("The categorizers were right: where messages are proscribed because they are dangerous, balancing tests inevitably become intertwined with the ideological predispositions of those doing the balancing"). But see the critique in Pierre Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 761 (1983).

[1338] Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1, 2 (1989) (emphasis added).

[1339] *Ibid.* Related limiting perspectives on free speech law include Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985) (First Amendment should strive for doctrine that offers best protection at crisis times, not on average) and Cass, *The Perils of Positive Thinking* (1987).

[1340] Richard H. Fallon, Jr., *Implementing the Constitution*, 111 HARV. L. REV. 54, 57 (1997) (emphasis added). See also Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978) ("It is part of the intellectual fabric of constitutional law … that there is an important distinction between a statement which describes an ideal which is embodied in the Constitution and a statement which attempts to translate such an idea into a workable standard for decision of concrete issues").

[1341] Richard H. Fallon, *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275 (2006).

[1342] See, *e.g.*, Sager, *The Legal Status of Underenforced Constitutional Norms* (1978); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999). There are, of course, powerful countercurrents, not least the 'enforcement' model of constitutional judicial review going back to, at least, *Marbury v. Madison*. But at least from a comparative perspective, it is the persistence of limiting, 'Thayerian' ideas that is distinctive for U.S. constitutional legal thought.

[1343] See, *e.g.*, David A Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988). For criticism, see Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 867 (1999).

constitutional adjudication is seen as something else – sometimes something more, sometimes less – than an exact judicial effort to discover the meaning of constitutional provisions.[1344]

The relationship of all these different constitution-limiting ideas and practices to balancing is varied and complex. Balancing is sometimes seen as the embodiment of a pragmatic, context sensitive approach that avoids taking dogmatic positions that cannot be flexibly tailored to the courts' institutional position. In that sense, balancing is clearly congruent with an 'anti-perfectionist' perspective, which aims to avoid having to formulate and rely on grand statements of constitutional visions. On the other hand, as was also seen in Chapter 7, balancing is related to the 'definitional tradition' in American constitutional law in a dynamic of opposition. And commentators working in this latter tradition often refer specifically to balancing when they want to point to the dangers of allowing the intrusion of personal biases and excessive particularism into the judicial process.[1345] From their perspective, balancing *opens up* judicial reasoning to factors that could be illegitimate for judges to consider. As was mentioned above, however, the purpose of this Section is not to draw out connections between anti-perfectionism and balancing in the American context *per se*, but to come to a better understanding of the relationship between constitutional perfectionism and balancing in the German setting through cross-questioning comparison. That project requires a closer look at the relationship between American anti-perfectionism and ideas of legal formality.

8.2.2.3 U.S.: Anti-perfectionism and formality

The 'anti-perfectionist' perspective in American constitutional adjudication has a variety of sources. A major theme underlying and unifying these different strands, however, is the idea of legal formality. In a very basic sense, American legal thought equates anti-perfectionism = formality = constraint. Legal formality, in its meaning of decisionmaking according to rule, is anti-perfectionist in the sense that it screens off from a decisionmaker "factors that a sensitive decisionmaker would otherwise take into account". [1346] Supreme Court Justice Antonin Scalia, a prominent self-confessed contemporary formalist, has emphasized this very point. "The value of perfection in judicial decisions", Scalia has written, "should not be overrated. "To achieve what is, from the standpoint of the substantive policies involved, the 'perfect' answer is nice – but it is just one of a number of competing values".[1347] Legal formality in the sense of

[1344] For an extended critique of the way in which the Supreme Court's '*formulae*' diverge from constitutional text, see ROBERT F. NAGEL, CONSTITUTIONAL CULTURES (1989).
[1345] Schauer, *The Second-Best First Amendment* (1989), 14 ("Were we searching for the ideal, we would apply background justifications directly, or make particularistic 'all things considered' judgments about individual cases").
[1346] Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988).
[1347] Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989). See also Michelle Everson, *Adjudicating the market*, 8 Eur. L.J. 152, 154 (2002) (referring, in the EU law context, to formalism's "particularism repelling" role).

emphasizing the autonomy of law as a discipline is also inherently anti-perfectionist in the way it blocks consideration of factors thought to lie outside the law.[1348] This dimension, too, is apparent from the many different ways in which important strands in American constitutional law shield-off areas of social life from constitutional law, and *vice-versa*. Formality, in all these senses, is thought to *constrain* decisionmakers.[1349]

Legal formality and constraint, then, in the American context, are seen as essentially connected. Formality means limitation and constraint. Constraint in turn requires legal formality for its operationalization. The intimate relationship between *legal formality* and limiting, *anti-perfectionist*, ideas in the American context raises the intriguing comparative question of the relationship between *legal formality* and *perfectionism* in *German* constitutional legal thought and practice. If American anti-perfectionism is, in many ways, supported by and reflective of formalizing tendencies, is German constitutional perfectionism *anti*-formalizing in any comparable way? Or could it be, rather, that German constitutional perfectionism is instead *formal* in the same basic way as that American anti-perfectionism is formal? And in the latter case, could it be that German constitutional rights balancing, which is such a crucial component of constitutional perfectionism, is itself formal in ways that would be difficult to imagine from an American perspective?

8.2.3 Germany: Perfection, balancing and formality?

At first sight, at least from an American viewpoint, the idea that perfectionism and balancing might be related to formalism is counter-intuitive. After all, important elements of perfectionist constitutionalism and of rights balancing specifically, such as 'maximal particularity' and reliance on open-ended constitutional norms capable of 'constitutionalizing' large areas of social life, seem in direct contradiction to core dimensions of legal formality.[1350] Recent American characterizations of Continental European rights practice, as discussed in Chapter 1, confirm this understanding. Balancing in European freedom of expression adjudication is seen by American scholars as "Qadi-like"; dramatically "open-ended" and "case- and context-specific".[1351] The image of the 'Qadi', or 'Khadi', it will be recalled from Chapter 2, has been the emblem of informality in law since at least the work of Max Weber.

[1348] On formality and autonomy, see, *e.g.*, Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC'Y REV. 239, 247ff (1983).
[1349] Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on Proportionality, Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 621 (1999): "the salient characteristic of formalist analysis is the constraining force of the rule against the felt necessities of particular cases".
[1350] On the opposition between 'ruleness' and 'maximal particularity', see, *e.g.*, Schauer, *The Second Best First Amendment* (1989), 22.
[1351] *Cf.* Frederick Schauer, *Freedom of Expression Adjudication in Europe and America: A Case study in Comparative Constitutional Architecture*, *in* EUROPEAN AND US CONSTITUTIONALISM 49, 59 (Georg Nolte, ed.).

And yet, the comparative project conducted in this Section and in the preceding Chapters, it is argued, strongly supports the view that German constitutional perfectionism and balancing are in fact highly formal, in ways very similar to the formality of American anti-perfectionism. This Paragraph offers examples of three dimensions of the formality of German constitutional perfectionism and balancing.

8.2.3.1 Formalizing and formalized judicial technique

The German approach to constitutional rights adjudication as outlined through the lens of balancing in Chapters 4 and 5, is formalizing, first of all, in the way it combines maximal particularity with case-transcending, stabilizing elements. Among the most important of these stabilizing elements are various conceptions of a 'value system' within the Basic Law and the view of the Basic Law as a "logical-teleological whole".[1352] Another important case-transcending element in the FCC's approach is its simultaneous invocation of *both* interest-balancing *and* value-balancing – what German commentators call "value balancing in the individual case".[1353] All these specific elements are, moreover, embedded within a scholarly culture that continuously makes explicit and implicit efforts to formalize judicial technique.[1354] All these elements have been subjected to scholarly criticism, often from opposing sides, but they are all important components of the Court's balancing approach to adjudication under the Basic Law. And they contribute to a characterization of that approach as something significantly different from mere 'Qadi-like', *ad hoc*, maximal particularism.

8.2.3.2 Optimization as formal

A central dimension of legal formality is the idea of constraint or compulsion, stemming from the (semi)-autonomous character of legal institutions. Formalism in U.S. legal theory focuses on constraining judicial decision makers through various strategies, for example by portraying them as bound to textual sources, through a limitation of the range of considerations they may take into account, or through a denial of the existence of discretion.[1355] Optimization as a guiding principle for constitutional interpretation in the German context can be seen as highly formal in an analogous sense, through a similarly constraining *compulsion* to maximize. This idea of compulsion inherent in optimization can be brought out in two related senses.

(1) First, in a very basic sense, optimization as a principle in German constitutional thought has distinctive 'rule-like' qualities. Alexy's 'law of balancing' and the framing of rights as '*Optimierungsgebote*' – literally: *injunctions* to optimize – are clearly formal by way of their rule-like, mandatory character. So too, to a large extent, are more pragmatic sounding concepts like '*praktische Konkordanz*', or the - now largely discarded but earlier widely discussed - presumption in favour of the individual in rights adjudication.[1356] In all these cases, constitutional rights jurisprudence, despite its superficially apparent openness, incorporates mandatory elements.

(2) Second, optimization is formal in a more complex 'substantive' sense, analogous to one understanding of the formality of the *Lochner*-line of decisions in American constitutional law.[1357] Chapter 3 discussed these decisions and their canonical association with formality and formalism in American constitutional legal thought. An important dimension of *Lochner*'s formality, as it has come to be understood in one major line of thinking, lies in the *Lochner* Court's adherence to a particular conception of neutrality.[1358] As Cass Sunstein has written, in *Lochner* the prevailing socio-economic status quo, "the existing distribution of wealth and entitlements", was taken as a neutral 'baseline', from which the constitutionality of governmental action would be judged.[1359] The Supreme Court understood "market ordering under the common law" to be "a part of nature rather than a legal construct".[1360] The content of contractual agreements between employees - such as the bakers in *Lochner* -, and their employers, no matter how unequal in practice, was seen as 'neutral' and 'natural' by the Supreme Court. All forms of governmental action to support the position of employees, had to be qualified as an interference with this natural state of affairs. Any such deviation from this 'baseline', in the Court's formalist perspective, was in need of special justification in ways that maintenance of the status quo itself was not. Not the choice of such a baseline *per se*, but its rigid observance and in particular the refusal to acknowledge its controversial nature, are hallmarks of formalist judging in the *Lochner*-sense as it has come to be understood in American constitutional legal thought.[1361]

This comparison with *Lochner*-style formality – the archetype of legal formality in American law – brings out clear parallels with the formal character of optimization in German constitutional law. *Lochner*'s 'baseline' has its counterpart in the German vision of *the fully realized optimum of constitutional rights protection*. Where in *Lochner*-formalism, any deviation from the status quo is subject to a high burden of justification, so too in the

1352 See *supra*, s. 5.3.2.2.
1353 See Chapters 4 and 5. See especially KARL LARENZ, METHODENLEHRE DER RECHTSWISSENSCHAFT 405 (6th ed., 1991) (referring to "*Güterabwägung im Einzelfall*").
1354 *Cf.* Lyndel .V. Prott, *Updating the Judicial Hunch: Esser's Concept of Judicial Predisposition*, 26 Am. J. Comp. L. 461, 467 (1978).
1355 See, *e.g.*, William N. Eskridge, *The New Textualism*, 37 UCLA L. REV. 621, 646 (1990) (formalism as constraint by text); Schauer, *Formalism* (1988), at 530 (formalism as constraint of input factors for decision); Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 101 (1989) (formalism as denial of discretion).
1356 See *supra*, s. 5.3.3.2.
1357 See Chapter 3.
1358 Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987). On the continued influence of this idea, see Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy*, 92 COLUM. L. REV. 1, 1 (1992).
1359 Sunstein, *Lochner's Legacy* (1987), 874.
1360 *Ibid.*
1361 On the formalism of baselines in legal thought outside the specific context of *Lochner*, see, *e.g.*, Joseph William Singer & Jack M. Beerman, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 GA. L. REV. 911, 914-915 (1989).

German context is any detraction from fundamental rights' 'full effectiveness', both in terms of scope and intensity.[1362] Under *Lochner* the existing common law arrangements are 'natural', in the German context, the full effectuation of the value order of the Basic Law is considered a similarly natural, uncontroversial, state of affairs.[1363] Wherever the fulfillment of these ideals of constitutional perfection is thought to be brought about by way of FCC balancing, as it often is, this balancing discourse itself can be expected to be imbued with a similar sense of neutrality and compulsion.

8.2.3.3 De-politicization as formal

The formalism of *Lochner*-type neutrality can be broadened into an overarching formalist agenda of de-politicization.[1364] In the American context, formalism is seen as part of a de-politicization strategy in that legal formality is meant to keep judges' ideological preferences out of the adjudication process. This attempted de-politicization through legal form is generally treated with suspicion and is often seen as incorporating an individualist bias.[1365] Interestingly, however, a very similar – though very differently implemented and received – depoliticization process can be observed in post-War German constitutional law. Here, the aim of the FCC, supported by many in the scholarly community, is not so much to keep ideology *out* of constitutional adjudication, but to enforce a *uniform*, all-encompassing semi-official ideology, that integrates democracy, social welfare and individual rights. As was seen in Chapter 5, balancing fulfills a central role in the judicial effectuation and safeguarding of this overarching constitutional vision that aims to find a perfect synthesis between main currents of Post-War German political thought.[1366]

[1362] There is an evocative reference in a recent analysis of the nature of German constitutional rights theory to the idea of a '*status naturalis libertatis fictivus*' which is presented as demanding justification of all actions and omissions that detract from the optimal realization of individual fundamental rights under the Basic Law. The parallel with the idea of a 'base line', especially if both are conceived as figures of argumentation, is striking. See JOSEF FRANZ LINDNER, THEORIE DER GRUNDRECHTSDOGMATIK 212ff (2005).

[1363] Although outside the scope of this thesis, it may be noted that a similar compulsive effect can be observed in the European Court of Justice's invocations of the '*effet utile*' principle in European Union law and the Court's reluctance to allow for any qualification to the 'optimal' effectiveness of EU law. See notably Christophe U. Schmid, *From Effet Utile to Effet Neolibéral: A Critique of the New Methodological Expansionism of the European Court of Justice*, in CONFLICT OF LAWS AND LAWS OF CONFLICT IN EUROPE AND BEYOND: PATTERNS OF SUPRANATIONAL AND TRANSNATIONAL JURIDIFICATION (Rainer Nickel, ed., 2010). It is highly intriguing that Michele Everson and Julia Eisner have recently described the concept of '*effet utile*' in terms of an "alternative formalism". See Michele Everson & Julia Eisner, THE MAKING OF A EUROPEAN CONSTITUTION: JUDGES AND LAW BEYOND CONSTITUTIVE POWER 53 (2007).

[1364] For a discussion of *purposive* de-politicization as a formalist project, see Mitchel de S.-O.-l'E. Lasser, *Do Judges Deploy Policy?*, 22 CARDOZO L. REV. 863, 863 (2001).

[1365] For discussion, see Peer Zumbansen, *The Law of Society: Governance through Contract*, 14 IND. J. GLOB. L. STUD. 191, 207 (2007). Max Weber already noted the likely pro-capitalist, individualist bias in formal legal rationality because of its tendency to reinforce or maintain the status quo.

[1366] On the 'synthesis tradition' in German (constitutional) legal thought, see further *infra*, s. 8.4.4.2.

8.2.4 Interim conclusion: Balancing, perfectionism and legal formality

An enlarged conception of legal formality, elaborated by way of comparative study, allows for an understanding of judicial balancing in German constitutional law as embedded in a web of formalizing supports, ranging from scholarly '*Verwissenschaftlichung*' to optimization and de-politicization. The relationship to American understandings of legal formality is ambivalent. On the one hand, taking American experiences such as the *Lochner*-episode into account enabled a reframing of legal formality that could illuminate otherwise less easily seen elements of German constitutional law. On the other hand, however, observers relying on the archetypical American understanding of legal formality simply may find it hard to see German judicial balancing as formal. For them, formality has to be constraining, in the sense of limiting. The idea that legal formality could also be maximizing and 'perfection-compelling' – and thus in a similar, but simultaneously very different sense: constraining – is difficult to fit-in with common American understandings.

What the enlarged notion of formality used here reveals, ultimately, is the fact that, despite all its apparent open-endedness and informality, a highly formal conception of constitutional judicial balancing in German legal thought is not only possible but is in fact adhered to in large parts of German constitutional legal discourse. Far from standing in direct opposition to formal elements, like rules and conceptualism, as in the American setting, where balancing is continuously seen in opposition to a formal 'definitional tradition', German constitutional balancing is a central element of a legal culture that remains, in profound ways, attached to legal formality.

8.3 THE SUBSTANTIVE: MATERIALITY AND POLICY

One of the central themes in the passages on law in Max Weber's '*Economy and Society*' is what Weber identified as the "anti-formalistic tendencies of modern legal development",[1367] or the materialization of law. In Weber's view, contemporary demands for "social" law and for "judicial creativity" promoted a new understanding of adjudication as turning on "concrete evaluations", rather than on the formally rational "logical analysis of meaning".[1368] The hallmark of this new mode of lawfinding, as Weber described it, is *balancing* – "the expediential balancing of concrete interests" and "the free balancing of values in each individual case".[1369] As mentioned in Chapter 2, Weber qualifies this type of lawfinding as "not only *nonformal* but *irrational*".[1370]

The process of the materialization of law is widely understood as having intensified with the spread of the welfare state and the emergence of the 'age of rights' after the Second World War.[1371] The enunciation of "broad social goals" in legislation, and the implementation of judicial review of broadly formulated constitutional rights are thought to have promoted "judicial methods that are informal, compared … to the traditional civil-law conceptual approach".[1372] The spread of these 'informal' methods is thought to have engendered a crisis of formal legal rationality,[1373] necessitating a quest for new types of legal rationality; initially for that of the 'substantive' variety in Weber's scheme,[1374] but later possibly even for other kinds not envisaged by Weber.[1375]

The materialization thesis has been broadly accepted for the legal systems of Western democracies generally, including those of Europe and the United States.[1376] And in accounts for both settings, judicial balancing is often seen as the prime manifestation of a new materialized, or deformalized, mode of legal thought and practice of

[1367] MAX WEBER, MAX WEBER ON LAW IN ECONOMY AND SOCIETY 303ff (Max Rheinstein, ed., 1954), cited here as WEBER (1954).
[1368] *Ibid.*, 311, 63.
[1369] *Ibid.*, 312-313.
[1370] *Ibid.*, 311 (emphasis added).
[1371] *Cf.* Teubner, *Substantive and Reflexive Elements in Modern Law* (1983) 240; JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 190, 240ff, 392ff (William Rehg, trans., 1996). See also John P. McCormick, *Max Weber and Jürgen Habermas: The Sociology and Philosophy of Law during Crises of the State*, 9 YALE J. L. & HUMANITIES 297, 327 (1997); Rudolf Wiethölter, *Materialization and Proceduralization in Modern Law*, in DILEMMAS OF LAW IN THE WELFARE STATE 221 (Gunther Teubner, ed., 1986).
[1372] *Cf.* David Dyzenhaus, *The Legitimacy of Legality* (1996), 144; Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST L. REV. 473, 481 (2003).
[1373] Teubner, *Substantive and Reflexive Elements in Modern Law* (1983), 242.
[1374] Lawrence M. Friedman, *On Legalistic Reasoning: A Footnote to Weber*, 1966 WIS. L. REV. 148, 164 (1966) ("What judicial reasoning is tending toward is, in Weber's terms, substantive rationality … The move toward this type of rationality has been moderately controversial"); Teubner, *Substantive and Reflexive Elements in Modern Law* (1983), 267-268 (arguing that the in process of (re)materialization, law is thought to develop "a substantive rationality characterized by particularism, result-orientation, an instrumentalist social policy approach, and … increasing legalization").
[1375] Such as 'procedural' or 'communicative' rationality.
[1376] For European law see, *e.g.*, MIGUEL POIARES MADURO, WE THE COURT 17 (1998). For a discussion focused on U.S. law see, *e.g.*, 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 (2004).

adjudication. This Section investigates whether behind this façade of similarity there might be different understandings of what the materialization of law entails. If such differences could be shown to exist, then the role of balancing itself may also have to be understood differently for these different settings.

8.3.1 U.S.: Balancing, pragmatism, instrumentalism, and policy

In post-War American constitutional legal thought, 'the material' – or 'the substantive' – in law is primarily associated with pragmatism, instrumentalism and 'policy' reasoning. In each of these dimensions, the reception the substantive in American legal thinking is subtly different from that encountered in Germany although, as will be seen, capturing these differences in any precise way is difficult.

Pragmatism and instrumentalism are closely associated with the materialization of law, and, in some guises, even directly with Weberian substantive (ir)rationality.[1377] The two terms, as discussed in Chapter 2, refer to multifaceted and interrelated concepts, for which agreed-upon definitions are hard to come by.[1378] In part to overcome these definitional problems, this Section follows Robert Summers' influential depiction of 'pragmatic instrumentalism' as a synthesis of core pragmatist and instrumentalist ideas on law and adjudication.[1379] Judicial balancing in American constitutional adjudication is widely seen as a prime manifestation of such pragmatist and instrumentalist ideas.[1380]

Local observers commonly claim that these ideas are pervasive in American legal thought and practice. Summers himself describes 'pragmatic instrumentalism', a combination of "philosophical pragmatism, sociological jurisprudence, and certain tenets of legal realism", as "America's only indigenous theory of law".[1381] "During the middle decades of [the twentieth] century", Summers writes, "this body of ideas … was our most influential theory of law in jurisprudential circles, in the faculties of major law schools, and in important realms of the bench and bar".[1382] As evidenced by scholars[1383] and judges,[1384] these ideas have continued to influence legal thinking and practice

[1377] See, *e.g.*, Grey, *Judicial Review and Legal Pragmatism* (2003), 478fn20 ("Weber's 'substantively rational' mode of legal thought matches up with pragmatism as I describe it").
[1378] See, *e.g.*, Adrian Vermeule, *Instrumentalisms (Book Review)*, 120 HARV. L. REV. 2113 (2007) (arguing against use of 'instrumentalism', in favour of separate uses of 'consequentialism' and 'pragmatism'). Thomas C. Grey, *Freestanding Legal Pragmatism*, 18 CARDOZO L. REV. 21, 22 (1996) (pragmatism as 'contextualist' and 'instrumentalist'). For further discussion, see Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 302ff (1997).
[1379] Robert S. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought – A Synthesis and Critique of Our Dominant General Theory About Law and its Use*, 66 CORNELL L. REV. 861 (1981).
[1380] Among many others, see, *e.g.*, BRIAN Z. TAMANAHA, LAW AS MEANS TO AN END: THREAT TO THE RULE OF LAW 96 (2006) (balancing as manifestation of instrumentalism); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 949 (1987) (balancing related to pragmatism and instrumentalism).
[1381] Summers, *Pragmatic Instrumentalism* (1981), 862.
[1382] ROBERT S. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 35 (1982).
[1383] See, *e.g.*, Thomas C. Grey, *Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 S. CAL. L. REV. 1569, 1590 (1990) ("pragmatism is the implicit working theory of most good lawyers").
[1384] See, *e.g.*, Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1563, 1566 ((1990) ("most American judges have been practicing pragmatists").

throughout the later decades of the twentieth century.[1385] As will be discussed below, the pervasiveness of pragmatism and instrumentalism is seen by many observers as in some way distinctive for American law.

A similar story can be told for 'policy', 'policy argument' or 'policy analysis'. These, too, are terms with contested meanings, ranging from a more limited conception of a specific form of 'utilitarian argument' to 'everything that is not deduction'.[1386] Policy argument is associated to, or even identified with, the "ethical imperatives, utilitarian and other expediential rules, and political maxims" that Weber saw as central elements of substantive rationality in law.[1387] Policy reasoning, like pragmatism and instrumentalism, is also understood to be pervasive in post-War American legal reasoning.[1388] And as with pragmatism and instrumentalism, policy reasoning too is often regarded as closely related to judicial balancing. Duncan Kennedy, for example, who contrasts 'deduction' (formal) and 'policy analysis' (not formal) as the two basic modes of legal reasoning, has referred to the contemporary "nearly universal elite legal academic view" that all situations of conflicts between norms can ultimately be resolved by a process of balancing "conflicting considerations".[1389]

8.3.2 The substantive in law: U.S. *vs.* German legal thought

It is very difficult to pinpoint the differences between the American and German – or even European – versions of the materialization of law over the second half of the Twentieth Century, in part because demonstrating the absence of some 'typically American' ideas in the German context requires proving a negative. That said, there are numerous indications that subtle but significant differences do exist.

(1) First, the claim that pragmatism, instrumentalism and policy reasoning are in some way distinctive for American legal thought and practice has a distinguished pedigree in comparative legal studies. While instrumental views of law have also spread in other systems, it is often claimed that the U.S. has somehow "moved furthest in this direction".[1390] Robert Kagan, a prominent observer of American and European legal

[1385] *Cf.* Summers (1982), 35. See also, *e.g.*, Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1454 (1987): "Many Americans appear to have rejected the notion tha law can be more than a flexible device for solving human problems".
[1386] *Cf.* RONALD M. DWORKIN, TAKING RIGHTS SERIOUSLY 222 (1978) (a "kind of standard that sets out a goal to be achieved"); DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION – FIN DE SIÈCLE 109 (1997).
[1387] WEBER (1954), 63-64. For the relationship between policy and substantive rationality, see, *e.g.*, Friedman, *On Legalistic Reasoning* (1966), 151fn14 ("In Weber's terms, decisions [built on considerations of "political or social policy"] would be substantively (as opposed to formally) rational").
[1388] See, *e.g.*, in the 1960s GLENDON SCHUBERT, THE POLITICAL ROLE OF THE COURTS: JUDICIAL POLICY-MAKING (1965); and in the 1970s: Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).
[1389] Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's Consideration and Form*, 100 COLUM. L. REV. 94, 95-96 (2000).
[1390] TAMANAHA (2006), 1.

culture, supports this point. "Although European judges may becoming more policy-oriented", Kagan wrote in the late 1990s, "they still are profoundly uncomfortable with the unbridled instrumentalism of many American judges".[1391] Duncan Kennedy has perhaps gone furthest in voicing this comparative claim, arguing that U.S. American legal discourse is "very different" from Continental European practice in the sense that, unlike in Europe, "policy is a standard category in everyday American lawyer-talk" and that the use of policy reasoning by American judges is "universally recognized and accepted".[1392]

Mitchel Lasser has convincingly argued that much of Kennedy's broad claim of difference becomes vulnerable when different definitions of policy are taken into account.[1393] On the one hand, the purported U.S./European difference collapses when policy is understood as 'all non-deductive argument' (Kennedy's own definition), since it is undeniable that European judges, too, invoke such reasoning in their judgments. On the other hand, Lasser argues, if policy is understood in a narrower sense, requiring explicit references to 'policy' or 'policy argument' in judicial reasoning, the distinction is again liable to collapse, since such explicit invocations of policy are by no means "universally accepted" in American adjudication.[1394]

That said, however, Kennedy's analysis of the roles of policy argument does point to some important differences between U.S. and Western European legal thinking. It remains possible that American lawyers debate 'policy' as a separate category in ways not generally recognized in German and European legal systems. Lasser himself, for example, highlights the potential significance of the fact that one legal culture, like the American "uses a single term such as 'policy' to express several different meanings whereas another legal culture, which apparently has no such overarching term, divides the concept into multiple subparts, such as 'equity' or 'legal adaptation'."[1395] That distinction, formulated originally by reference to U.S./French differences, seems particularly apt also for capturing U.S./German contrasts.

(2) Such terminological differences offer an important set of clues. The categories used in the two settings to describe processes of materialization do indeed seem to differ markedly. Most notably, the term 'policy' as used in American legal writing has no direct equivalent either in German or in French.[1396] Also, the term 'pragmatic' and its derivatives are not commonly encountered in German academic legal writing. The German term '*Pragmatismus*' is in fact generally reserved for discussions of Anglo-American legal thought.[1397] Differences also go the other way. While more specific terms,

[1391] Robert A. Kagan, *Should Europe Worry about Adversarial Legalism?*, 17 OXFORD J. LEGAL STUD. 165, 180 (1997).
[1392] KENNEDY (1997), 109.
[1393] *Cf.* Lasser, *Do Judges Deploy Policy?* (2001).
[1394] *Ibid.*
[1395] *Ibid.*, 899.
[1396] For this point in relation to the French language, see KENNEDY (1997), 109.
[1397] See, *e.g.*, JOACHIM LEGE, PRAGMATISMUS UND JURISPRUDENZ (1998) (analysis of the work of the American pragmatist philosopher Charles Sanders Peirce); WOLFGANG FIKENTSCHER, METHODEN DES RECHTS, IN VERGLEICHENDER DARSTELLUNG (VOL. 2: ANLGO-AMERIKANISCHER RECHTSKREIS) 275ff (1975) (disussion of American pragmatism in the context of legal Realism); JOSEF ESSER, GRUNDSATZ UND NORM IN DER RICHTERLICHEN FORTBILDUNG DES PRIVATRECHTS 183ff (1956) (discussing pragmatism and precedent in Anglo-American case law). An important exception is the generally accepted

like pragmatism, are rarely used in the German context, the overarching concept of 'the substantive' or 'the material' is, by contrast, rarely referred to in the American setting. The general idea of the 'materialization' of law, for example, is, at least on this high level of abstraction, not nearly as important a theme in American legal writing as it is in Europe.[1398] Similarly, the idea of a 'substantive' constitution, or a 'substantive' ideal for the rule of law, though by no means nonexistent, are still "relatively rare" in American constitutional law. [1399] If anything, American constitutional discourse is rather characterized by what has been called a "*flight from substance*".[1400]

(3) A final set of differences is related to these terminological points. It seems that, very often, when substantive elements surface in German legal writing, they are 'hemmed in' by other ideas, doctrines or frameworks, or pulled up towards higher level of abstraction. This means that they often lack much of the unequivocally instrumentalist, pragmatist or even ideological dimensions of American policy reasoning. In part, these background frameworks are themselves substantive in nature. Conflicts over social and economic concerns in the first decades after the Second World War, for example, played out in Germany against an ideological background of Ordoliberalism which, while certainly not universally accepted, seems to have been more broadly agreed upon than any set of socio-economic ideas prevalent in the U.S.[1401] Other pervasive background understandings during this period were less substantive and rather more methodological in their focus. Time and again, German legal scholars called for the '*Verwissenschaftlichung*' of substantive evaluations by judges.[1402] *Verwissenschaftlichung* was sought in the form of a '*Wertungsjurisprudenz*' – a jurisprudence of values –,[1403] the 'material Constitutionalism' of Rudolf Smend, '*Systemdenken*' or systematization,[1404] and in the idea of a '*topische Jurisprudenz*' – a jurisprudence of topics, or a dialectical

qualification of Jhering's later work as "*pragmatische Jurisprudenz*". Jhering's work is of such basic, foundational importance for *all* of mainstream modern European legal thinking, however, that it could be said that his pragmatism is, in a sense, no longer pragmatic in any *distinctive* sense. '*Pragmatisch*' is also sometimes used in the context of discussions on '*Topik*' and '*topische Jurisprudenz*' (for discussion, see *supra*, s. 2.5.6.3 and s. 4.3.2.2). See, *e.g.*, ESSER (1956), 44.

1398 *Cf.* Teubner, *Substantive and Reflexive Elements* (1983), 240 (referring to 'materialization' as an idea held by European scholars). In part, this difference is related to variations in the scope and depth of the welfare state as between the U.S. and Europe.

1399 *Cf.* Fallon, *The Rule of Law as a Concept in Constitutional Discourse* (1997), 32. Fallon's concept of the 'substantive ideal type' of the rule of law is clearly not identical to Smend's material constitutionalism, but it does show some affinities.

1400 James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211, 214 (1993) (referring to turns to 'process' and 'original understanding' as constraining influences on judicial reasoning). It is not surprising that the American debate on 'perfectionism' in constitutional law, notably following the publication of James Fleming's book '*Securing Deliberative Democracy*', and this discussion on 'flights from substance', are so closely related, and not merely in terms of personalities.

1401 For a discussion in English, see notably David J. Gerber, *Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the New Europe*, 42 AM. J. COMP. L. 25 (1994).

1402 '*Verwissenschaftlichen*' means to render scientifically acceptable. For a prominent discussion of such efforts, see MARTIN KRIELE, THEORIE DER RECHTSGEWINNUNG 97ff (1967). These tendencies are discussed *infra*, s. 4.3.2.2.

1403 For a discussion of the term '*Wertungsjurisprudenz*' see, *e.g.*, LARENZ (6th ed. 1991), 54-55, 119ff; REINHOLD ZIPPELIUS, WERTUNGSPROBLEME IM SYSTEM DER GRUNDRECHTE (1962) (emphasizing the link with 'value ethics', to which Smend's work was also indebted, and the perceived objectivity of the "*herrschende Rechtsmoral*").

1404 See, *e.g.*, CANARIS (1969).

of the *Bundesverfassungsgericht*'s approach to the Basic Law in the 'Communist Party' (*KPD*) case in an American law review:

> "The court's opinion in the KPD case demonstrates that the constitution is not to be regarded as establishing philosophic absolutes, but standards capable of varying application in varying societal conditions, thus opening the way to a pragmatic, balancing-of-interests approach that is quite novel to German public law jurisprudence and clearly owes much to the influence of American legal ideas and techniques during the Allied occupation period".[1410]

Everything in this observation betrays an Anglo-American perspective. The binary distinction between 'philosophic absolutes' (in the First Amendment sense, as discussed in Chapter 7),[1411] and pragmatism (in the James/Dewey/Peirce sense), simply does not match up with what the *Bundesverfassungsgericht* set out to do, as would become abundantly clear in later decisions. The idea of weighing was not novel, not even in public law, given Smend's influential work on the Weimar Constitution.[1412] And for the – highly unlikely – large-scale influence of "American legal ideas and techniques" on the FCC's approach, no evidence is on offer, neither here nor, it seems, anywhere else.[1413] Again: comparing the materialization of law in Germany and the United States is a very difficult task. Any differences identified in the discourses canvassed here should be seen as suggestive rather than as firmly demonstrated. But taken together, the elements outlined above do hint at different perceptions of the materialization of law in German and American legal writing.

The ideas of 'the substantive', 'policy reasoning' and 'balancing' are intimately related in American legal thought. Explicit weighing is seen as the surest sign that courts are engaged in (illegitimate) policy-making, rather than (legitimate) lawfinding. Yet, if these same courts *neglect* policy argumentation, they stand accused of 'irrealistic' and

1410 Edward McWhinney, *The German Federal Constitutional Court and the Communist Party Decision*, 32 IND. L.J. 295, 308-309 (1957).

1411 *Ibid.*, 302 (referring to early Cold War First Amendment litigation in the U.S.: the cases discussed in Chapters 6 and 7).

1412 McWhinney does refer to the I*nteressenjurispudenz* as a precursor in private law (at 309). Note that the FCC in the *KPD* decision does not purport to be 'balancing' itself; it only mentions '*Abwägung*' when referring to the nature of the 'political freedom of evaluation for the government in deciding whether to ban the *KPD*. The Court's role is merely to police the outer boundaries of that 'freedom of evaluation'. See BVerfGE 5, 85, 231 (1956).

1413 On the contrary. It has been suggested by contemporary observers that in the early years after the War there was "a general tendency towards paying more regard to foreign views than has been the case in the past". See E.J. Cohn, *German Legal Science Today*, 2 ICLQ 169, 181 (1953). Cohn wrote that Allied occupation brought "an opportunity of attaining that degree of comprehension [of foreign law] which can be attained by living experience, but never by mere learning". But, while German *practitioners* were said to be "deeply impressed in particular by English and American criminal procedure", Cohn found it "a matter of regret" that among *legal academics* this "living experience" of foreign law "*remained unused*, in particular because it would have been able to stimulate self-criticism, a habit which unfortunately has always been sadly underdeveloped in the German legal and non-legal tradition" (at 189-190, emphasis added).

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Adopting a comparative perspective on the materialization of law, however, enables a framing of the intrusion, or rather inclusion, of substantive elements in legal reasoning in entirely different terms. While it may be impossible within the paradigmatic American perspective to see the substantive as anything other than policy, politics or unprincipled pragmatism, *an entirely different category of 'substantive'* prevails in German and European constitutional adjudication. Substance, it turns out, can be 'material constitutionalism' with its durable yet evolving 'constellations of values'. Substantive can mean principled.[1415] And the admission of explicitly substantive considerations to constitutional legal reasoning can mean synthesis and integration rather than conflict with legal formality. This last dimension is taken up in the following Section.

[1410] Edward McWhinney, *The German Federal Constitutional Court and the Communist Party Decision*, 32 IND. L.J. 295, 308-309 (1957).
[1411] *Ibid.*, 302 (referring to early Cold War First Amendment litigation in the U.S.: the cases discussed in Chapters 6 and 7).
[1412] McWhinney does refer to the I*nteressenjurispudenz* as a precursor in private law (at 309). Note that the FCC in the *KPD* decision does not purport to be 'balancing' itself; it only mentions '*Abwägung*' when referring to the nature of the 'political freedom of evaluation for the government in deciding whether to ban the *KPD*. The Court's role is merely to police the outer boundaries of that 'freedom of evaluation'. See BVerfGE 5, 85, 231 (1956).
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[1414] MITCHEL DE S.-O. L'E. LASSER, JUDICIAL DELIBERATIONS 15 (2004). For balancing, see notably the contrasts with the 'reasoned justification' and the 'definitional' streams in American legal thought, as discussed in Chapter 6.
[1415] For a recent discussion of this possibility outside the direct context of either U.S. or European law, see Aharon Barak, *Proportionality and Principled Balancing*, 4 LAW & ETHICS OF HUMAN RIGHTS 2 (2010).

8.4 THE FORMAL AND THE SUBSTANTIVE: CONFLICT AND SYNTHESIS

8.4.1 Introduction

This Section forms the final leg of the comparative project along a formal/substantive/mediation-integration grid undertaken in this Chapter. It takes up a third, possibly most revealing, set of contrasts between the roles of balancing in German and U.S. constitutional rights adjudication discourse. Some of the material discussed in this Section has already been covered from slightly different angles in the Sections above. This time the central question is as follows. If, as has been argued throughout this thesis, the discourse of balancing is one of the prime sites where form and substance 'meet', how are these 'meetings' given shape in different settings? How, in other words, do the formal and the substantive interact in paradigmatic versions of German and U.S. constitutional rights adjudication discourse, as exemplified in the discourse of balancing?

8.4.2 Formal and substantive: 'Contingent variations on the same basic combination'?

In Chapter 1 two basic approaches to the roles of legal formality and materiality in comparative analyses of legal reasoning were presented. In one of these approaches, legal reasoning in some systems is seen as more formal or less formal than in other systems. The other approach, while not necessarily denying that some systems might indeed 'on aggregate' be more formal than others, focuses rather on the way in which formal and other elements *are combined* throughout the local varieties of legal discourse. As Mitchel Lasser, who has developed this second approach in his comparative studies of French and American judicial reasoning, writes, in a phrase quoted before: "[w]hat really matters is not so much that both systems deploy both types of discourse (can one even really imagine a contemporary, Western democratic legal system that would not?), but *how* they do so".[1416] From this perspective, in Lasser's own studies, contemporary French and American judicial discourse reveal themselves to be "historically and culturally contingent variations on the same basic combination" of formalist and non-formalist types of reasoning.[1417]

In this work on French and American judicial reasoning, Lasser goes on to characterize the ways in which these discourses combine formal and non-formal elements in terms of 'bifurcation' and 'integration'.[1418] French judicial discourse is *bifurcated* between a self-consciously open-ended but hidden dialogue among magistrates and a public discourse that is formal in the extreme. American judicial discourse, on the other hand, *integrates* its formalist and policy-oriented discourses in one space – the individually signed, published opinion. The "pragmatic, open-ended and purpose/policy oriented" elements of judicial reasoning,[1419] in these American opinions, are hemmed in by the formal structures and categorical frameworks of so-called 'multi-part tests', including multi-part balancing tests, schemes of 'tiered scrutiny' and other structuring devices.[1420] What this means, in Lasser's view, is that, ultimately, "the composite character of American judicial discourse produces and/or is constituted by a certain formalization of purpose/effect/policy discourse". This "*formalization of the pragmatic*", Lasser argues, "may well be *the defining trait of American judicial discourse as a whole*".[1421] This perception, it seems, is widely shared among American observers.[1422] This Section aims to reappraise and supplement this observation based on the analyses of the German and U.S. discourses of balancing in previous Chapters.

8.4.3 The formal and the substantive in U.S. constitutional legal discourse

Detailed analysis of the discourse of balancing in U.S. constitutional law, as undertaken in Chapters 3, 6 and 7, offers the following picture of the integration or combination of formal and substantive elements; a picture that will be filled-in throughout the following Paragraphs. Formality and the substantive, while often combined in one place, *remain distinct entities* in U.S. constitutional legal thought and practice, as exemplified by the side-by-side existence of categorical and more open-ended 'steps' in the typical American 'multi-part' doctrinal test. In the American context, formality is always optional; a matter of strategic choice by participants. This strategic dimension of legal formality is informed by, and does itself sustain, the idea that legal formality has inherent substantive implications. Given this dimension of the materialization of legal formality, a comprehensive characterization of the formal/substantive relationship in American legal discourse should include not only the idea of the formalization of the pragmatic (or the substantive), but also the idea of the formal *as* substantive. The following Paragraphs explain these characteristics in turn.

[1416] LASSER (2004), 155 (emphasis in original).
[1417] *Ibid.*, 154. See also Lasser, *Do Judges Deploy Policy?* (2001), 885. Lasser also uses the term 'grammatical reading' for formalism, and 'hermeneutic reading' or 'policy-oriented reasoning' for its opposite. See also Mitchel de S.-O. l'E. Lasser, *Lit. Theory Put to the Test: A Comparative Literary Analsysis of American Judicial Tests and French Judicial Discourse*, 111 HARV. L. REV. 689 (1998).
[1418] LASSER (2004), 27ff, 62ff.
[1419] *Ibid.*, 245.
[1420] *Ibid.*, 64. On tiered scrutiny and other formalizing *formulae* see, *e.g.*, Calvin R. Massey, *The New Formalism: Requiem for Tiered Scrutiny*, 6 U. PA. J. CONST. L. 945, 980-981 (2004); NAGEL (1989).
[1421] LASSER (2004), 251.
[1422] Ranging from those on the left to those on the right of the political spectrum. See, *e.g.*, Kennedy, *The Disenchantment of Logically Formal Legal Rationality* (2004), 1073 (on the 'ritualization' of policy argument); NAGEL (1989).

8.4.3.1 Formal and substantive: Combined, but separate

In American constitutional legal discourse, formal and substantive elements appear side by side.[1423] Open-ended analysis of circumstances and interests, generally framed in terms of balancing, is combined with highly formal analytical and rhetorical structures of 'steps', 'stages', 'tiers' and other elements of the 'definitional tradition' in American law, as outlined in Chapter 7. The typical multi-part American judicial 'balancing test' or scheme of tiered analysis is an intricate, deliberate effort by judges "to create impersonal, formal rules that can constrain the Court itself".[1424] The resulting 'tests' and 'frameworks' have justly been characterized as efforts to 'fuse' formalist and policy-oriented discourses,[1425] and as "an attempted synthesis of formalism and realism".[1426] This attempted fusion, in turn, is often seen as a hallmark of the modern style of American judicial reasoning.[1427]

This focus on the peculiarities of the interaction between formal and substantive dimensions of legal reasoning, however, should not detract from the basic observation that despite the intricately interwoven character of these tests and *formulae*, the formal and the substantive remain two separate categories in American legal discourse. They co-exist and are integrated within overarching jurisprudential constructs, but they have not lost their respective distinctive natures. Theirs is a true side-by-side existence. And because the formal and the substantive remain distinct modes of reasoning, legal formality always remains available as *a matter of choice* for participants – a point to be discussed in more detail below.

Examples abound of the 'intertwined but separate' relationship between form and substance in American legal discourse. In the 1960s already, Lawrence Friedman wrote that "[t]he Anglo-American legal system, … is characterized by the not always peaceful coexistence of both types of reasoning – legalistic and policy".[1428] Two particularly illustrative and famous examples from the period and material studied in Chapters 6 and 7, both taken from the area of freedom of expression law, can be found in the work of John Hart Ely and Melville B. Nimmer. Both these authors wrote in reaction to the apparently all-or-nothing balancing/absolutism controversy of the late 1950s and early 1960s. In Ely's view, "what the decisions of the late Warren era [that is:

1423 *Cf.* LASSER (2004), 21-22.
1424 Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 181 (1985).
1425 LASSER (2004), 15.
1426 Nagel, *The Formulaic Constitution* (1985), 182.
1427 It is true that 'formality', as it is used in German and European law, also consists of a number of 'steps', so that, superficially, the American and German approaches may look similar. There are, however, important differences. A sample: (1) Proportionality is primarily a '*principle*', not just a 'test'; (2) Proportionality is *comprehensive* (is often thought to cover all domains of (constitutional) law, and *compulsory* (it cannot be rejected in favour of an alternative 'test'); (3) Proportionality *reflects the meaning of constitutional rights* directly; it is not a mechanism to 'implement' these rights (see on this difference also *supra*, s. 8.2); (4) Balancing outside the proportionality context plays a much broader role in Germany than does balancing outside the confines of multi-part tests in the U.S.
1428 Friedman, *On Legalistic Reasoning* (1966), 151.

of the years up to 1969] began to recognize is that categorization and balancing need not be regarded as competing general theories of the first amendment, but are *more helpfully employed in tandem*, each with its own legitimate and indispensable role in protecting expression".[1429] Nimmer, for his part, attempted to construct a "third approach" to free speech adjudication, situated in between what he saw as the "equally unacceptable" alternatives of literal interpretation and *ad hoc* interest balancing in first amendment cases.[1430] "*Definitional balancing*", as Nimmer labeled this third approach, aimed to combine the virtues of balancing and of more formal approaches, without falling into the excesses of either.[1431]

Both these projects have generated large literatures.[1432] But while very different in orientation, they both reveal underlying conceptions of legal formality and informality as coexisting but separate components of legal reasoning. Formal and informal analysis, in both projects, are techniques, or tools, that can be used in different ways - in combination (Nimmer), or alongside each other (Ely).

8.4.3.2 Formality as substantive: The instrumentalization of legal formality

This conception of formality and informality as separate but combinable tools is widespread in American constitutional legal thought. This makes for interpretations of form, substance and their interrelationships that are very different from those commonly encountered in Continental European literature. Formalism in American legal thought is in essence "*an interpretive strategy*".[1433] Even a pragmatic judge, as Adrian Vermeule has recently summed up this position, "might think the pragmatic thing to do would be a formalist course of action".[1434] Formalism is simply one 'weapon' among others in the lawyer's arsenal.[1435]

Because legal formality and its opposites are seen as a matter of choice and strategy, the question of *the reasons for* this choice is naturally thrust into the foreground. This question has given rise to a type of jurisprudential enquiry that is far more pervasive in American legal thought than, it seems, anywhere else. This 'jurisprudence of form', in Duncan Kennedy's depiction, is premised on the notion that the choice between the tools of legal formality (*e.g.* rules) and of informality (*e.g.* standards) "can be analyzed in

1429 Ely, *Flag Desecration* (1975), 1501 (emphasis added). See also at 1483fn8 (referring to "distinct and quite sensible roles" for balancing and categorization). For a similar view, see Mark V. Tushnet, *Anti-formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502, 1531 (1985).
1430 Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 941-942 (1968).
1431 *Ibid.*, 944ff (emphasis added).
1432 On Ely see, *e.g.*, Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 266 (1981). For an extensive overview of Nimmer-inspired literature, see Norman T. Deutsch, *Professor Nimmer Meets Professor Schauer (and Others): An Analysis of Definitional Balancing as a Methodology for Determining the Visible Boundaries of the First Amendment*, 39 AKRON L. REV. 483, 485-486 (2006).
1433 Cass R. Sunstein, *Must Formalism be Defended Empirically?*, 66 U. CHI. L. REV. 636, 638 (1999) (emphasis in original). See also RICHARD A. POSNER, LAW, PRAGMATISM AND DEMOCRACY 59 (2003) (referring to legal formality as potentially part of a "pragmatic strategy").
1434 Vermeule, *Instrumentalisms* (2007), 2116.
1435 *Cf.* Friedman, *On Legalistic Reasoning* (1966), 169 ("legalism remains a weapon in the Court's armory").

isolation from the substantive issues" that these tools respond to.[1436] Once legal formality is a matter of choice, however, and once the reasons for this choice are seen to be the ordinary reasons of policy, politics and ideology, this position, of course, translates into nothing less than *the instrumentalization of legal formality*.

This instrumentalization of legal formality has a long history in American legal thought. At the beginning of the Twentieth Century, as described in Chapter 3, adherence to formal methods of interpretation was blamed for the Supreme Court's rejection of socially progressive legislation. Roscoe Pound and others blamed the Court's method of "logical deduction" for judgments that were "wholly inadequate" for industrialized society.[1437] The invention of this 'Demon of Formalism' was most likely a "creative act" on the part of Pound, Holmes and others.[1438] But if the relationship between legal formality and substantive inadequacies was an invention, it was a singularly successful one.[1439] Just as Roscoe Pound decried the false "belief" of formalist judges in the necessity and neutrality of their methods, he and his fellow critics managed to instill an entirely similar 'belief' – this time in the negative substantive implications of legal formality – among wider legal academic and judicial circles.[1440]

A comparable invention of connections between legal form and substantive outcomes could be observed in the period discussed in Chapters 6 and 7. This time, the target of criticisms was the *informality* of Supreme Court balancing in free speech cases. Writers have noted how balancing "got a bad name with liberals from the speech and association cases of the McCarthy era".[1441] For these liberals, balancing was thought to be inherently government-friendly. But balancing was not the only methodological aspect of constitutional adjudication that was politicized. 'Reasoned elaboration', for example - the standards for good judicial reasoning developed by 'legal process' scholars and others, discussed in Chapter 7 - "was at first largely methodological" in its critique.[1442] But, Edward White has written, these methodological critiques "*inevitably* took on substantive

[1436] Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687 (1976). Intriguingly, even Kennedy's own 'jurisprudence of form' has its origins in the 'balancing debates' of the late 1950s and early 1960s canvased in Chapters 6 and 7. In what seems to be his first published work, a *Harvard Law Review* Student Note not acknowledged on his biographical page, Kennedy makes extensive references to the balancing debate in a series of footnotes that are, in this author's view, among the most insightful early comments on the heated 'balancing' related questions of that earlier period. See Note, *Civil Disabilities and the First Amendment*, 78 YALE L.J. 842 (1969), *e.g.* at 845fn13 "this Note … focuses on the attitude towards per se rules as the principal issue between balancers and classifiers"). For an influential examination of Supreme Court case law through the lens of 'form', see Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (analyzing an entire term of Supreme Court decisions through this particular lens), and Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293 (1992) (emphasizing the connection to balancing).

[1437] Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 616 (1908).

[1438] *Cf.* Grey, *Judicial Review and Legal Pragmatism* (2003), 477. See *supra*, s. 3.2.5.2. The debate over the formalism of the *Lochner*-era continues. See most recently BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE (2010).

[1439] On the dominance of the 'received wisdom' with regard to *Lochner* and on its questionable empirical foundations, see, *e.g.*, MICHAEL J. PHILLIPS, THE LOCHNER COURT, MYTH AND REALITY (2001).

[1440] *Cf.* Pound, *Mechanical Jurisprudence* (1908), 608 (describing a misguided belief that deductive jurisprudence would be 'scientific').

[1441] *Cf.* Sullivan, *Post-Liberal Judging* (1992), 294.

[1442] G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 279-280 (1973).

content with the explosive loss of social consensus on first principles in the 1960s".[1443] Again: The precise nature of any such 'inevitable' connection between method – form – and substance is highly uncertain.[1444] What is evident, however, is the widespread intuition, or suspicion, that the formal and the substantive are connected – that methodological choices for different kinds of 'tests' have political or ideological implications.

It is this instrumentality of legal formality that sets up a crucial distinction with German, and European, legal thought, as the next Paragraph will argue. In U.S. law, in the very setting where formalism is commonly thought to have been most decisively rejected by the Realists, and all who came after them, legal formality remains available as a powerful jurisprudential weapon. The use of this weapon is, however, subject to two important paradoxes. First, legal formality *as choice* sits uneasily with the core notion of legal formality *as constraint* or compulsion. The constraining power of 'realist' versions of legal formality has to rely heavily on 'active' notions of judicial *self*-restraint. Second, however, the power of the weapon of legal formality is thought to reside at least partly in an actual, external, constraining force of *formulae*, tests and categories. The formality of multi-part tests, *per se* rules and categorization devices depends on the perception that these jurisprudential tools are *in fact* able to constrain judicial power. John Hart Ely's work contains a revealing manifestation of this idea in an article looking back on the balancing debates of the late 1950s and early 1960s:

> "The categorizers were right: (...) balancing tests *inevitably* become intertwined with the ideological predispositions of those doing the balancing – or if not that, at least with the relative confidence or paranoia of the age in which they are doing it – and we must build barriers as secure as words are able to make them. *That means rigorous definition* of the limited categories of expression that are unprotected by the first amendment".[1445]

Ely did add the eloquent and cautious reference to barriers that are merely "as secure as words are able to make them", showing some skepticism as to the constraining power of form. But the basic idea does remain that the forms of constitutional doctrine do exert at least some constraining influence.[1446]

Of course, neither of these paradoxes is insoluble. Judicial self-restraint is a widely described empirical phenomenon and a commonly advocated normative

[1443] *Ibid.* (emphasis added).

[1444] Kathleen Sullivan writes: that "[n]either the categorization/conservative nor the balancing/liberal connection is borne out". See Sullivan, *Post-Liberal Judging* (1992), 294. See also Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 66fn18 (arguing that it is a coincidence that formalism has been politically conservative and *vice versa* in the U.S, and that one can also imagine a radical formalism – the French Revolution's program to remake society in accordance with abstract legal rights, for example -, or a conservative Realism, such as German historicism).

[1445] Ely, *Flag Desecration* (1975), 1501 (emphasis added).

[1446] For a recent juxtaposition of balancing and 'textualism', see Frederick Schauer, *Balancing, Subsumption, and the Constraining Role of Legal Text*, 4 LAW & ETHICS OF HUMAN RIGHTS 34, 41ff (2010) (describing "the pervasive formality of law" as "the handmaiden of its textuality").

position.[1447] And the power of tests and categories could lie merely in their appeal to judicial self-limitation, even if that appeal is mainly or even purely rhetorical. But the impression given by vast swaths of the American legal literature on legal formality and its opposites does not give the impression that this is how formality and formalism are actually understood. Legal form *does* constrain; hard and fast rules *do* bind; "rigorous definition" *is* able to prevent the ideological bias of balancing.[1448] *And balancing*, quite simply, *is "nothing like rule-application"*.[1449]

8.4.4 The Formal and the Substantive in German constitutional legal discourse

In German legal thought – and in Continental European legal thought, more broadly, although that is not directly part of the claims defended here – legal formality *is not* a matter of choice or strategy. Formality, rather, is *always present*, even in the most open-ended, seemingly informal legal analyses such as constitutional rights balancing. In contrast to the American setting, where form is substance, in European legal thought, the substantive has always remained formal.

Earlier Paragraphs have introduced American observations on the alleged extreme informality of European constitutional rights balancing – recall the references to the '*Qadi*-like' jurisprudence of the *Bundesverfassungsgericht*. Clearly, the type of balancing engaged in by the FCC is not formal in the paradigmatic American understanding. But the argument developed here is that this type of judicial reasoning is not only *formal by other means*, but also integrates formal and substantive elements in ways quite unlike those seen in U.S. law. To this end, this Paragraph presents the following argumentative steps, all designed to highlight differences with paradigmatic U.S. understandings. First, in the German setting, formality is achieved primarily through conceptualization and systematization ('conceptual formalism'), rather than by way of constraint through doctrinal rules ('rule formalism'). This different form of formality is thought to allow for the infusion of substantive values without any – critical – loss of formality. Second, within German constitutional legal thought there are continuous efforts to synthesize formal and material elements – a tradition that goes back at least to the Weimar era, and that was continued through law under Fascism and under the Basic Law. Again, it is important to note that these amalgamations are easier to achieve with a concept/system understanding of legal formality, than with the understanding focused on rules, prevalent in the U.S. Third, in U.S. legal thought and practice, connections between form and substance are generally drawn from the perspective of attempts to "blame method", that is; the negative search for undesirable substantive consequences of formal choices. This particular way of connecting form and substance is far less prevalent in the German setting, despite the obvious, 'elephant in the room', example of law under Fascism.

[1447] For a recent discussion, see Aileen Kavanagh, *Judicial Restraint in the Pursuit of Justice*, 60 U. Toronto L. J. 23 (2009).
[1448] See Ely, *Flag Desecration* (1975).
[1449] TAMANAHA (2006), 96.

8.4.4.1 Legal formality: Concepts, system and deduction

Whereas in modern Anglo-American legal thought legal formality is vested primarily in *rules*, *categories* and *definitions*, the formality in the German tradition is focused rather more heavily on ideas of *concepts*, *system* and *deduction*. All these elements go back to Nineteenth Century understandings of the nature of law and 'legal science'.[1450] "The idea of a science of German private law", Wieacker has noted, was founded on a "juristic formalism" that transferred "the systematics and concept-building of Pandecticism to substantive German private law".[1451] Its formalism, therefore, was first and foremost a "*conceptual* formalism",[1452] based on an "assumption of the perfection and inherent completeness of the system",[1453] and a powerful faith in deductive logic.[1454]

Despite the radical critique offered of conceptual formalism during the Nineteenth Century itself – Von Kirchmann,[1455] Von Ihering – and in the early twentieth century – the *Freirecht* scholars and others - all these ideas retain their relevance for modern German legal thought, both in private and in public law. In private law, a revealing example can be found in Gunther Teubner's analysis of the role of 'general clauses' in German law and of their possible reception in English law.[1456] Teubner's study of the 'good faith' general clause brings out very clearly some important differences between the German and Anglo-American styles of legal reasoning:

> "[T]he specific way in which continental lawyers deal with such a 'general clause' is abstract, open-ended, principle-oriented, but at the same time strongly systematised and dogmatised. This is clearly at odds with the more rule-oriented, technical, concrete, but loosely systematised British style of legal reasoning".[1457]

"Conceptual systematisation", Teubner writes, is still "close to the heart of German law".[1458] But this conceptual formality, with its roots in the nineteenth century ideas just mentioned, is now combined with open-endedness and orientation to principles in a synthesis of form and substance that is largely unthinkable in Anglo-American, common law legal thought. Intriguingly, however, Teubner's study also shows

[1450] These ideas were important in Nineteenth Century American legal thought as well, see Chapter 3. The legacy of these ideas has been very different, however. See *supra*, s. 3.2.6 and 3.4.1, and below.
[1451] FRANZ WIEACKER, A HISTORY OF PRIVATE LAW IN EUROPE 320-321 (Tony Weir, transl. 1995).
[1452] *Ibid.*, 292 (emphasis added).
[1453] Mathias Reimann, *Nineteenth Century German Legal Science*, 31 B.C. L. REV. 837, 882 (1990).
[1454] *Ibid.*, 894. For public law, see, *e.g.*, C.F. V. GERBER, GRUNDZÜGE EINES SYSTEMS DES DEUTSCHEN STAATSRECHTS viii (2nd ed., 1869) (referring to the primordial value of '*sichere juristische Deduktion*' – secure juristic deduction).
[1455] J.H. VON KIRCHMANN, DIE WERTLOSIGKEIT DER JURISPRUDENZ ALS WISSENSCHAFT (1848, new ed. 2000).
[1456] The interpretation of general clauses is often seen as requiring a similar kind of 'balancing process' as prevalent in constitutional rights law.
[1457] Gunther Teubner, *Legal Irritants: Good Faith in British Law, or How Unifying Law Ends up in New Divergences*, 61 MOD. L. REV. 11, 19 (1998).
[1458] *Ibid.,* 21. See also, *e.g.*, CLAUS-WILHELM CANARIS, SYSTEMDENKEN UND SYSTEMBEGRIFF IN DER JURISPRUDENZ (1969).

that Anglo-American reasoning, in foregoing systematisation, dogmatism and conceptualism, is not necessarily less formal than its German counterpart. In its reliance on rule-orientation and technicality, Anglo-American legal reasoning is simply formal *by other means*.

In public law, the continuing legacy of nineteenth century classical legal thought can be illustrated through the work of Robert Alexy. Professor Alexy is widely recognized as one of the leading theorists of constitutional rights law active in Germany today, and as one of the most prominent expositors and defenders of balancing and proportionality in constitutional rights adjudication in the world.[1459] It would most likely come as a surprise to many Anglo-American lawyers to hear that such a leading defender of balancing would himself locate his own work within "the great analytical tradition of conceptual jurisprudence" in German legal thought.[1460] Alexy's theory is heavily invested in conceptual dogmatics,[1461] and his main work, '*A Theory of Constitutional Rights*', cites such leading nineteenth-century public law jurists as Laband and Gerber in support of its conceptual approach.[1462] And an important part of Alexy's work on balancing is in fact an attempt to show how balancing is not simply 'rational' in any generic sense, but *formally* rational in the way deductive reasoning is.[1463] This project itself is revealing not only in the way it assumes the continued primordial legitimizing power of formally rational legal reasoning, but also because it seeks connections between balancing and formal rationality that are simply not 'on the radar' within the dominant American perspective.

Naturally, none of these differences are absolute. Aspects of the interaction between legal formality and substance in German law are indeed similar to American experiences. The way proportionality assessment has been structured in a number of heavily dogmatized 'steps', for example, does look somewhat like the American judicial 'tests'. In this respect, German legal formality relies upon 'rules', in addition to 'systematization' and 'conceptualization'. Even here, however, differences remain. As discussed *supra*, s. 8.2.2.2, American judicial 'tests' are primarily seen as methods to '*implement*' Constitutional commands, not (as in Germany) as methods to uncover the exact *meaning* of the Constitution. In addition: this 'step-wise', or 'rule based' formality in German law co-exists with all the formal elements outlined earlier. To say, therefore, that German constitutional legal practice formalizes its balancing predominantly through the steps of proportionality analysis in the same way as do American balancing tests, is to read German material through American eyes. Balancing's German formality goes much further.

[1459] For discussions in English, see Schauer, Balancing, Subsumption and the Constraining Force of Legal Text (2010); William Ewald, *The Conceptual Jurisprudence of the German Constitution*, 21 CONST. COMMENT. 591 (2004) (Book Review); the contributions to ARGUING FUNDAMENTAL RIGHTS (Agustín José Menéndez & Erik Oddvar Eriksen, eds., 2006).

[1460] ALEXY (2004), 18. The German original uses the classic term *Begriffsjurisprudenz* (at 38).

[1461] See, *e.g.*, Ewald, *The Conceptual Jurisprudence of the German Constitution* (2004).

[1462] ALEXY (2004), 16-17, 14. See also Ewald, *The Conceptual Jurisprudence of the German Constitution* (2004), 595 ("in advocating a turn towards rigorous conceptual analysis, Alexy is very much taking sides in the long-standing debate between 'formalists' and 'anti-formalists in German legal theory"

[1463] Although Alexy does not, it seems, use the term 'formal rationality' or refers to Weber's scheme, it is clear from his work that this is the kind of rationality envisaged. See, *e.g.*, Robert Alexy, *Constitutional Rights, Balancing, and Rationality*, 16 RATIO JURIS 131 (2003).

8.4.4.2 The Formal and the substantive: The 'synthesis' tradition in German legal thought

Formality, in German legal thought, is always present, as a permanent background notion, not as an option or an available strategy. Legal reasoning is always (somewhat) formal alongside any material elements it may contain. Formality in German law, to put it colloquially, unlike in U.S. law, cannot be 'turned off' at will.

But the relationship between legal formality and materiality in German legal thought is given shape through more complex mechanisms than this mere background presence. There is a long tradition within German legal scholarship of deliberate efforts *to overcome contradictions and tensions*, including principally the tensions between legal formality and its opposites. In the nineteenth century, the most prominent exponent of this tradition – and in some ways its founder – was Friedrich Carl von Savigny. Von Savigny's work famously attempted to bridge the divide between historical and systematic conceptions of law. The notion of *Rechtswissenschaft* that Von Savigny's work helped to establish was, as has rightly been noted, "a concept full of tensions".[1464] But, as Mathias Reimann has written, "its fusion of the real and the ideal, the historical and the logical, the organic and the systematic, promised to resolve conflicts hitherto believed unsolvable".[1465] In the early twentieth century, Philip Heck and Rudolf Smend both, in very different ways, belonged to this same tradition of synthesis. Heck in his simultaneous defense of conceptual refinement and interest analysis, and Smend in his elaboration of durable value constellations, intended to mediate between social change and stability.

This tradition of synthesis has continued throughout the twentieth century.[1466] In the Fascist era, Karl Larenz, the dogmatic legal scholar whose post-War work is still a prominent part of the legal curriculum in Germany, emphasized the "complete reciprocal penetration and concrete unity of the individual and the whole",[1467] and expounded the Orwellian sounding notion of "*konkret-allgemeine Begriffe*" – concrete-general concepts.[1468] Early discussions of the Basic Law, too, often took this form, relying on very similar imagery, a feature that once again emphasizes the basic continuity in German legal thought throughout this period -[1469] not in substance, but very clearly in style. Peter

[1464] Reimann, *Nineteenth Century German Legal Science* (1990), 894. Reimann labels his account of the nature of *Rechtswissenschaft* as the "synthesis of history and system".

[1465] *Ibid.*

[1466] For a general statement on this point with regard to legal scholarship as such, see Mattias kumm, *On the Past and Future of European Constitutional Scholarship*, 7 I-CON 401, 408 (2009) ("The idea of European legal scholarship, then, can be [defined in positive terms] as an attempt to *integrate* the formal/conceptual with the empirical and moral in some way so as to define a distinctly legal perspective. It is precisely the nonreductive nature of jurisprudence that defines it".) (emphasis in original).

[1467] *See* Christian Joerges, *History as Non-History: Points of Divergence and Time Lags Between Friedrich Kessler and German Jurisprudence*, 42 AM. J. COMP. L. 163, 179 (1994).

[1468] KARL LARENZ, ÜBER GEGENSTAND UND METHODE DES VÖLKISCHEN RECHTSDENKENS 43 (1938). For discussion see BERND RÜTHERS, DIE UNBEGRENZTE AUSLEGUNG 277 (1968).

[1469] Also undermining any suggestions that post-War developments, such as balancing, were the result of Allied foreign influence. See the discussion of Edward McWhinney's early assessment, *supra*, s. 8.3.3.

Schneider, for example, writing on '*Principles of Constitutional Interpretation*' in 1963, saw the constitution of the Basic Law as embodying a '*logisch-teleologisches Sinngebilde*' – a logical-teleological meaningful unity/construction.[1470] For Martin Kriele, writing in 1967, there was, despite all apparent tensions, no *real* contradiction between formal and substantive conceptions of the rule of law: "*Der materiale Rechtsstaat schließt den formalen ein und begrenzt ihn*".[1471] Unsurprisingly, this attempted synthesis can, finally, also be found in Alexy's work on balancing. "Balancing on the facts of a case and universalizability", Alexy writes, are "*not irreconcilable*".[1472]

This Paragraph does not argue the correctness or incorrectness of any of these positions in jurisprudential terms. What matters, rather is simply to note the persistent and prominent efforts to overcome contradictions that turn on legal formality: between the '*Gerechtigkeitspostulat*' and the '*Rechtssicherkeitpostulat*'; between the material and formal '*Rechtsstaat*'; between the individual and the social.[1473] It should be noted here too that this effort at synthesis is arguably much easier given the German conception of legal formality in terms of system and concepts, as opposed to the American paradigmatic understanding of formality as rule-bound or categorical decision making.

8.4.4.3 Method and substance in German legal thought

One important aspect of local understandings of legal formality in U.S. American legal thought, it was seen above, lies in the way legal actors make persistent efforts to link legal method to – ideological or political - substance. Legal formality, it was claimed, is pervasively tied to (received images of) *Lochner*-era economic conservatism, while open-ended informal balancing is often seen as linked to McCarthy-style persecution of free speech. This Paragraph, therefore, looks at associations between method and substance in German legal thought, following the 'cross-questioning' model set out earlier.

The obvious candidate for the development of associations between legal method and substantive evils in the German context has to be the cataclysm of law under Fascism. In the early post-War years, some commentators, Gustav Radbruch most prominently among them, did indeed blame legal positivism and formalism as having rendered German jurists "defenseless and powerless against … unlawfulness in the form of a statute".[1474] This episode of 'blaming formalism', however, remains clearly distinct

[1470] Peter Schneider, *Prinzipien der Verfassungsinterpretation*, 20 VVDStRL 1, 13 (1963) (defending a systematic conception of the Basic Law that aims "to interpret the specific in light of the general, and *vice-versa*"). See also at 33 (calling for a 'dialectical' understanding of individual freedom and its limitations). Schneider's paper for the Association of German Constitutional Law Scholars is discussed in more detail *supra*, s. 4.3.2.2.

[1471] MARTIN KRIELE, THEORIE DER RECHTSGEWINNUNG 225-226 (1967) ("the material Rechtsstaat incorporates the formal Rechtsstaat, and delimits it").

[1472] ALEXY (2004), 107.

[1473] For the connection of these last two categories to formality and materiality in legal thinking, see John. P. McCormick, *Habermas' Reconstruction of West German Post-War Law and the Sozialstaat*, in GERMAN IDEOLOGIES SINCE 1945 65 (J-W Müller, ed., 2003).

[1474] Gustav Radbruch, '*Die Erneuerung des Rechts*' (1947), cited and translated in Peter Caldwell, *Legal Positivism and Weimar Democracy*, 39 AM. J. JURIS. 273, 273 (1994). For discussion, with regard to both

from experiences in the U.S., for at least three reasons. First, in the German context, most accusations have in fact been leveled against positivism rather than against formalism. The two concepts clearly overlap, but many of the specific charges against fascist-era judicial methodology seem to have concerned typically 'positivist' themes, such as the acceptance of the validity of legislation without regard to its moral worth and the rejection of any form of higher law as capable of overriding posited legislative commands.[1475] Second, after initial identification of positivism/formalism as the primary culprit for Nazi era injustices, legal historians have shifted towards targeting excessive judicial freedom – legal informality – as primarily responsible. According to Vivian Grossswald Curran, "the myth of judicial positivism in Germany slowly unraveled" and "by 1970 numerous German scholars had debunked positivism as a viable culprit theory". 'Free law', positivism's perceived antithesis soon took over positivism's place to bear the brunt of the blame.[1476] This widespread "post-war about-face", in Grosswald Curran's words, absolved positivism/formalism to a great extent. Third and last, some European writers on the relationship between legal method and fascist injustice have actually identified a *positive* role for legal formalism. Guido Calabresi, for example, has argued that in Italy, "for the scholars opposing Fascism, the nineteenth-century self-contained formalistic system became a great weapon" in that it helped conserve liberal values in the face of the new 'functionalist' fascist ideals.[1477]

As these, admittedly radically incomplete, indications illustrate, formalism has never been as thoroughly associated with substantive injustice or with the dominance of a particular brand of politics in Europe as it has been in the U.S. There simply never has been a method-substance connection in Germany of the nature and intensity commonly found in the U.S. The German courts' stance under Fascism has nowhere near the same central status as a contemporary jurisprudential problem in Germany, as the American courts' position on '*laissez-faire*' constitutionalism at the beginning of the twentieth century does in the U.S. It is important to note the significance – and the surprising nature - of this difference. Put colloquially: it is very likely that more American law school classes and introductory texts today deal with the problems of the '*Lochner*'-line of decisions, than there are German law school classes and textbook discussions on law under Fascism. This absence of any pervasive similar method-substance connection with regard to legal formality in European legal thought is one further element of formalism's local European meaning.

Germany and France, *see* Vivian Grosswald Curran, *Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology's Impact on Substantive Law*, 35 CORNELL INT'L L. J. 101 (2001).

[1475] See Grosswald Curran, *Fear of Formalism* (2001), 126-127, 147. Despite its title, Grosswald Curran's article in fact refers to 'positivism' much more frequently than to 'formalism'. One illustration of the confusion of the two concepts: Grosswald Curran misquotes Walter Ott and Franziska Buob's article '*Did Legal Positivism render German Jurists Defenceless during the Third Reich?*', 2 SOCIAL AND LEGAL STUDIES (1993), 91 as 'Did *Legal Formalism* …?'. The title of Ott & Buob's paper, of course, invokes Radbruch's lament cited above. See also the focus on *positivism* in the section of the Hart-Fuller debate on Radbruch's position, in Lon L. Fuller, *Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

[1476] Grosswald Curran, *Fear of Formalism* (2001), 151-152, 158, 165.

[1477] Guido Calabresi, *Two Functions of Formalism*, 67 U. CHI. L. REV. 479, 482 (2000).

8.4.4.4 Counter-currents: 'Materialization' and 'deformalization' in German law?

The claim of a continued background role for legal formality in German legal thought needs to confront one obvious and powerful counter-argument: the observation voiced by numerous leading German theorists that their legal order has radically materialized over the past half century. In Bernard Schlink's summary: "[i]t has often been observed that German law and legal doctrine have, throughout this century, displayed a tendency to turn from formal to material concepts, and from specific to general terms".[1478] The work of one of the leading expositors of this trend, Ernst Forsthoff, was discussed in Chapter 4. For Forsthoff, the "deformalization – '*Entformalisierung*' - of constitutional law" equaled "the unfolding of the judiciary-State" and the "dissolution of the constitution".[1479] It may also be recalled that for Forsthoff, as for many other observers of 'materialization', judicial balancing is often identified as a prime manifestation of this tendency. There are, however, two main reasons for thinking that this widely observed materialization in German law and doctrine does not undermine the comparative conclusions drawn here.

(1) The first of these is the fact that, *pace* Forsthoff, Habermas and others, materialization has not necessarily brought *deformalization* on the scale perhaps expected. Materialization and continued legal formality, it seems, are not unavoidable contradictions in German legal thought. In part, this assertion has to rest on the many indications of the continued formality of German law outlined above – from 'system thinking' to deduction and conceptual rigour. Additional clues can, however, be found in analyses of the process of materialization itself. In the work of Jürgen Habermas, one of the leading scholars of the materialization of post-War German law, for example, legal formality remains a possibility even in the materialized legal conditions of the welfare state.[1480] A similar acknowledgement of the coexistence of formal and material modes of thought can be found in the work of Forsthoff himself.[1481] Of course, Habermas' and Forsthoff's analyses of the coexistence of legal formality and materiality in German law has not – rather famously - led them to accept the *Bundesverfassungsgericht*'s use of constitutional balancing, which both see as a threat to the legitimacy of judicial decision

[1478] Bernard Schlink, *Open Justice in a Closed System*, 13 CARDOZO L. REV. 1713, 1713-1714 (1992), with further references.
[1479] Ernst Forsthoff, *Die Umbildung des Verfassunggesetzes* (1959), in RECHTSTAAT IM WANDEL 130, 145, 151 (2nd ed., 1976).
[1480] See for discussion MacCormick, *Habermas' Reconstruction of West German Post-War Law* (2003), 65 ("formal and substantive modes of law can coexist in the *Sozialstaat* rule of law"). For a similar argument based on a different reading of Habermas, see David Dyzenhaus, *The Legitimacy of Legality* (1996), 154fn54 (arguing that Habermas ignores the possibility "that the materialization of law does not necessarily involve[s] its deformalization").
[1481] Forsthoff, *Die Umbildung des Verfassungsgesetzes* (1959), 145 ("The current situation of public law is characterized by the fact that both these fundamentally different [formal and material] methods of legal interpretation and application coexist, without any logical relationship being present between them; a logical relationship which would be impossible in any event.").

making.[1482] But their rejection of the specifics of the FCC's balancing model does not undermine their broader acknowledgement of the continued role for legal formality in principle within German law and doctrine.

(2) The second reason for emphasizing the continued formality of German law in a comparative U.S./German study is that any deformalization that *has* occurred over the past half-century, has had an impact in German legal thought that is markedly different from experiences in the U.S. Deformalization itself, in short, does not have the same meaning in German and U.S. American law. As with the previous point, much of the support for this position has to be derived from the extended treatment of legal formality and its opposites in these two settings over the course of the previous Paragraphs and the case studies in Chapters 3 to 7. But some additional suggestive evidence derived from a direct German/U.S. academic dialogue may be adduced here.

8.4.4.5 A 'paradoxical faith in law'? U.S. and German 'materialization' critiques in dialogue

A Response by Duncan Kennedy to a study of '*Materialization and Proceduralization in Modern Law*' by Rudolf Wiethölter is revealing for the extent to which how German and American debates on this topic are simultaneously similar and different.[1483] As Kennedy notes, much of Wiethölter's analysis develops very similar themes to those found in American Critical Legal Studies, in particular "the failure, death or exhaustion of legal reason",[1484] and the loss of formal rationality in law. At the same time, however, Wiethölter's initially apparent "pure pragmatism, in the mold of William James" is combined with a - from an American perspective – "paradoxical faith in and hope for law".[1485] In short, Kennedy writes, there appears to be "a general absence in Western Europe of the particular kind of radicalized critique of law represented by legal realism and then critical legal studies in the U.S.".[1486] As mentioned earlier, the critiques offered by *Freirecht* scholars in Germany were at least as 'radical' as anything suggested in the U.S. in the early twentieth century.[1487] The puzzle of German/U.S. comparison therefore is rather: why did such radical critiques not have *the same impact* in Germany as they had in the U.S., or *vice-versa*? Part of the answer to this puzzle has also been suggested above; the fact that American judges, adjudicating constitutional issues, were asked to solve immensely political questions on the limitation of public power at a time when no such issues arose for judicial decision in Western Europe. As a result, strains were placed on legal method in the U.S. that were not as acute elsewhere. As Chapter 3 indicated, the

[1482] Habermas (1996). See for discussion Steven Greer, *'Balancing' and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate*, 63(2) C.L.J. 412 (2004).
[1483] For an important recent invocation of Wiethölter's ideas in the context of European (Union) law, see EVERSON & EISNER (2007).
[1484] Duncan Kennedy, *Comment on Rudolf Wiethölter's 'Materialization and Proceduralization in Modern Law', and 'Proceduralization of the Category of Law'*, 12 GERMAN L.J. 474, 512 (2011 reprint, originally published 1985).
[1485] *Ibid.*, 516.
[1486] *Ibid.*, 518.
[1487] See *supra*, Chapter 3.

American judges that Roscoe Pound and others ridiculed in the U.S. had their counterpart not in any German constitutional judiciary, but in fairly anonymous professors and scholars with not nearly the same kind of impact on legal development. Kennedy's paper also suggests an a supplementary or alternative explanation: the possibility that European experiences of fascism and communism have produced an attitude among European lawyers that makes American-style radical anti-rationalism, and anti-formalism, simply "too painful even to listen to".[1488] This last point may have some degree of truth to it – though it must be noted that the *Freirecht*-critique seems to have been largely a spent force, unlike legal realism in the U.S., already *before* the Nazi atrocities of World War Two.

A detailed answer to the puzzle of German/U.S. difference – including discussion of the very real possibility that it is rather *American* legal thought that is a-typical and needs explaining – has to fall outside the scope of this investigation. The point this Paragraph has sought to make is simply that the oft-voiced observation that German law - like all Western European law - has 'materialized' over the past half century does not fundamentally undermine the thesis that German law – again like all Western European law – continues to rely on a high degree of background legal formality that informs and sustains even the more seemingly open-ended balancing exercises of the *Bundesverfassungsgericht* and its European sister courts.

[1488] *Ibid.*, 522.

Appendix Diagram

This diagram summarizes key components of the two paradigms of balancing, covered in Sections 8.2 to 8.5.

	United States	**Germany**
Formal	Categories & definition	System
	'Base lines' & 'second-best'	Optimization & perfectionism
	Popular	Scholarly
	Conservative	a-political
Substantive	Policy, Pragmatism	Material constitutionalism
Formal & Substantive	Conflict	Synthesis
	Formality as substance	The substantive formalized
	Pragmatic, incremental solutions	Totalization
Balancing	Compromise	Synthesis
	Breakdown of analogy	
	Skepticism	Aspiration
	Policy	Principle

8.5 THE NIGHTMARE AND THE NOBLE DREAM

8.5.1 Introduction: The legitimacy problematic, legal formality and faith in law

All systems of constitutional adjudication face their own version of an overarching 'legtimacy problematic'. At least part of this problematic – the part that this thesis has focused on – is concerned with the classic dilemmas of logic *vs.* experience (Holmes), 'symmetry' *vs.* fairness (Cardozo), 'legal certainty' *vs.* 'correctness' (Habermas),[1489] or 'historical-institutional' embededness *vs.* 'rational-correct' outcomes (Alexy).[1490] In many different ways, as has been emphasized before, these are dilemmas of the formal *vs.* the substantive.

This thesis has presented judicial balancing as a privileged site for meetings of form and substance. Balancing and proportionality, it has been argued, have become linchpins through which legal systems operationalize their contingent combinations of formal and substantive elements. Throughout the investigation above and in earlier Chapters, however, it has become clear that all elements of these combinations – formality, the substantive, and the modes of their interaction or juxtaposition – have different meanings in different settings. These differences can be aggregated into two contrasting paradigms of balancing. Core elements of these two paradigms are listed in the Appendix Diagram.

The ideas of the *'substantivization' of formality* (U.S.) and of *the formalization of the substantive* (Germany) are central components of the local meaning of balancing in these settings. These ideas are helpful in 'solving' the puzzle set out at the beginning of Chapter 1: The mystery of how a 'turn to balancing' in countries outside the U.S. can go hand in hand with an apparent 'turn to legalism' in these very same systems. The heavily 'substantivized' nature of legal formality in the U.S. suggests severe pressure on the idea of law as a social field sufficiently autonomous to generate its own forms of legitimacy. Conversely, where substantive elements in law are formalized, as they are in the German legal system, there is correspondingly greater scope for faith in an appropriate degree of autonomy for the juridical sphere.

The relationship between the theme of legal formality and its opposites and that of 'faith in law', or 'legalism', has been mentioned at the very outset of this thesis. This Section returns to this theme of 'faith in law' in order to capture a final crucial distinction between the German and U.S. meanings of balancing.

[1489] HABERMAS (1996),9 (referring to this dilemma as the "immanent tension in law").
[1490] Robert Alexy, *Jürgen Habermas's Theory of Legal Discourse*, 17 CARDOZO L. REV. 1027, 1028 (1996).

8.5.1.1 Formality as belief

In this context, it may be helpful to return once more to the writings of Max Weber. Weber's work was invoked in Chapter 2 as a common reference framework for ideas of legal formality and its opposites, in the context of discussions on the legitimacy of legal reasoning. A central element in Weber's writing, it may be recalled, is his sociological conception of legitimacy as a belief shared by participants in a given order. Legitimacy, for Weber, is "the belief in the existence of a legitimate order".[1491] This qualification of legitimacy as belief is important in the broader context of Weber's work, which has as one of its dominant themes the rationalization and '*Entzauberung*' – disenchantment – of the world.[1492] Formal rationality, for Weber, was the form legitimacy took in advanced capitalist democracies when religious or charismatic authority no longer had a capacity to 'enchant'.

As later commentators have noted, however, these ideas of belief and (dis-)enchantment can also be used in ways not foreseen by Weber.[1493] In particular, as Duncan Kennedy has argued, they can be applied to the notion of formal legal rationality itself.[1494] If formalism is "a commitment to, and therefore also a belief in the possibility of" a particular method of legal justification, then, it would seem, that belief might change, evolve or be lost just like other ideas and convictions.[1495] Such an approach, in turn, could have important implications for the study of judicial balancing. If the meaning of balancing is seen through the lens of legal formality and its opposites, as this thesis has done, and if legal formality itself is viewed as a belief, then the nature of that belief will itself form an important component of balancing's local meaning.

The question of the nature of formalism as a belief is complex. This is because although many classic discussions of legal formality do rely on some dimension of *attitude* or *commitment* in addition to a list of properties of legal institutions for their definitions,[1496] they generally remain vague about the precise nature of that attitude or commitment.

[1491] Translation by Henderson and Parsons, see MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 124 (A.M. Henderson & T. Parsons, trans. 1947), cited in Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, WISCONSIN L. REV. 1983, 379. 382. The German original uses '*Vorstellung*', which the Rheinstein edition translates as 'idea', instead of 'belief'. See WEBER (1954), 3.
[1492] "The Fate of our times is characterized by rationalization and … above all by the 'disenchantment of the world'" (Max Weber, *Science as a Vocation* (1919), reprinted in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 155 (H.H. Gerth *et al*, eds. 1946).
[1493] Most notably by Habermas. For an overview, see Brian Z. Tamanaha, *The View of Habermas from below: Doubts about the Centrality of Law and the Legitimation Enterprise*, 76 DENVER U. L. REV. 989, 990-991 (1999).
[1494] Kennedy, *The Disenchantment of Logically Formal Legal Rationality* (2004).
[1495] For this definition, see ROBERTO M. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 1 (1986). Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 517 (1988) ("[b]elieving that we can analyze premises at a high level of abstraction to generate answers to questions of social justice is what we mean by formalism"). See also Barnett Lidsky, *Defensor Fidei: The Travails of a Post-Realist Formalist*, 47 FLA. L. REV. 815 (1995). ("Formalism is a matter of faith"). See also, e.g., Louis M. Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006, 1050 (1987) ("Nineteenth century formalism was marked by a belief that law is a carefully worked-out series of deductions from noncontroversial general principles").
[1496] As in Roberto Unger's definition, cited above.

H.L.A. Hart's famous discussion in '*The Concept of Law*', for example, contrasts formalism with 'rule-skepticism'. In such an opposition, formalism literally cannot *only* be about specific inherent qualities of legal norms; it also has to refer to an attitude that is somehow different from 'skepticism'.[1497] And, as is clear even on a purely intuitive level, there are many ways of being *not* skeptical.

And it is precisely such a more nuanced understanding of formalism as a belief that is necessary in order to capture a final important dimension of the difference between the American and German paradigmatic meanings of balancing. This is because of the pervasive association in comparative literature of balancing – and proportionality – with anti-formal open-endedness, mentioned in Chapter 1. But if balancing is seen as inherently anti- or non-formal, and legal formality is no more than an outdated belief no longer held by serious lawyers, then very little space remains for any kind of non-skeptical conception of balancing as faith. This position is strikingly clear from the observation by Paul Kahn, of which part has already been quoted in Chapter 1:

> "*Proportionality is the form that reason will take when there is no longer a faith in formalism* … and there is no longer a belief in a single coherent order among what are otherwise conflicting interests. (…) As long as belief in a formal science of law is strong, the reasoned judgments of a court look different from the 'all things considered' judgments of the political branches. When reasonableness replaces science, however, the work of a court looks like little more than prudence".[1498]

The simple equation of proportionality and balancing with a rejection of legal formality has been criticized throughout this thesis, and in particular earlier in this Conclusion. This final Section extends that critique to the equation of balancing and the loss of faith in law.

8.5.2 Balancing and aspirational legalism

The difficult and multi-facetted relationship between balancing and legal formality in German literature has been discussed in Chapters 4 and 5. Contemporary views on this relationship ranged from skepticism of both formal legal rationality and balancing (*e.g.* von Pestalozza), via a critique of the FCC's balancing approach as itself overly formalist (*e.g.* Roellecke), to faith in formality coupled with a rejection of balancing (*e.g.* Forsthoff). But even through the more skeptical contributions runs a deep commitment to – and therefore belief in – the possibility of rationality, neutrality and objectivity in constitutional adjudication. As in Rudolf Wiethölter's work cited above, there is a widespread and pervasive "faith in and hope for law".[1499]

This faith seems to have a number of intellectual and social sources. One is surely the *idealism*, or intellectualism, found in nineteenth-century German legal thought and its heritage. This idealism, as Franz Wieacker has noted, should not be understood as "restricted to the formal ordering of legal science", but also in a broader sense as urging an "ideologizing of the quest for justice".[1500] It is characteristic for European legal thought, Wieacker writes, "that the issue of justice has been transmuted from a matter of correct public conduct to one of intellectually cognizable judgments about truth", in a way that ensures that an "ideology of general justice" remains compatible with, and available as a counterpoint to, more formal legal ideals.[1501] Another strand may be the powerful revival of *natural law ideas* in the aftermath of World War Two.[1502] Finally, the prestige of the Federal Constitutional Court is intimately tied up with the development and maintenance of a widespread faith in law.[1503] Such is the level of trust in the FCC that some notable observers have warned of a risk that is diametrically opposite to the tenor of American discussions on the counter-majoritarian dilemma, writing "[t]he German faith in constitutional jurisdiction must not be allowed to turn into a lack of faith in democracy".[1504]

It is important to caution against an equation of this faith in law and legal reasoning with a naïve, blind acceptance of all that the FCC does and all that constitutional legal reasoning stands for. What seems most distinctive about the German paradigmatic attitude towards legal formality is rather its *aspirational* quality – the pervasive sustaining idea that, for all its imperfections, constitutional legal reasoning is a worthwhile endeavour. As was seen in Chapters 4 and 5, the basic tenor of German writings on methodology is built on a fundamental commitment to – and again: therefore a belief in – what the FCC is trying to do. German authors *do* ask critical questions such as "[i]s there really no longer any juristic objectivity in constitutional law? Is it no longer

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[1497] H.L.A. HART, THE CONCEPT OF LAW 129 (1961). Hart does describe formalism (and 'conceptualism') as "an attitude to verbally formulated rules which both seeks to disguise and minimize the need for … choice"). He does not, however, give any more details as to what the nature of this 'attitude' is thought to be.

[1498] Paul W. Kahn, *Comparative Constitutionalism in a New Key*, 101 MICH. L. REV. 2677, 2698-2699.

[1499] Duncan Kennedy, *Comment on Rudolf Wiethölter's 'Materialization and Proceduralization in Modern Law', and 'Proceduralization of the Category of Law'* (1985), 516. More specifically: faith in law as an autonomous discipline. *Cf.* Reinhard Zimmermann, *Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science*, 112 LQR 576, 583 (1996) (contrasting American skepticism with European – Continental and English – faith).

[1500] Franz Wieacker, *Foundations of European Legal Culture*, 38 AM. J. COMP. L. 1, 25-26 (1995).

[1501] *Ibid.*, 26-27.

[1502] For an overview in English, see F.A. von der Heydte, *Natural Law Tendencies in Contemporary German Jurisprudence*, 1 NATURAL L. F. 115 (1956). See also GUSTAV RADBRUCH, DER MENSCH IM RECHT (1957).

[1503] On the differences in the relationship between 'trust', or 'confidence', and legal formality in English and American law, see ATIYAH & SUMMERS (1987), 36-38 (noting that a widespread use of 'formal reasons' in judicial reasoning presupposes that the "relevant substantive reasons will be, or have been, or least could have been, more appropriately and more satisfactorily dealt with at some other time … before some other body". Such refusals, by judges to consider substantive reasons "requires a degree of confidence … that the rest of the system is working properly". Discussed in Christopher Forsyth, *Showing the Fly the way out of the Flybottle: The Value of Formalism and Conceptual Reasoning in Administrative Law*, 66 CAMBRIDGE L.J. 325, 332 (2007).

[1504] PETER HÄBERLE, VERFASSUNGSGERICHTSBARKEIT ZWISCHEN POLITIK UND RECHTSWISSENSCHAFT (1980), 59, 79, cited by former FCC president Jutta Limbach, in *The Effects of Judgments of the German Federal Constitutional Court*, 2 EUR. J. L. REF. 1, 9 (2000). Peter Häberle was one of the main participants in the debates canvassed *supra*, in Chapters 4 and 5.

possible to distinguish legitimate and illegitimate forms of legal argument?"[1505] But these are questions raised – and done away with – *at the outset* of books and articles, not at their conclusion. "Insofar as one has not given up all hope entirely", German writers are likely to respond to their own question, realistically but constructively, "various possible solutions present themselves for discussion …".[1506] And that is where they begin their efforts at (re-)construction.[1507] It is this aspirational, constructive attitude that makes for a decisive difference with American legal thought. Striving for coherence and autonomy from politics in legal reasoning, while fully cognizant of its imperfections, is importantly different from giving up on any such ideals and trying rather to minimize the influence of countervailing elements – a contrast that is perhaps best captured in H.L.A. Hart's famous depiction of the differences between a nightmare and a noble dream.[1508]

Constitutional judicial balancing is an integral element, if not the foundation, of this 'aspirationally legalist', or 'aspirationally formalist', German legal culture. Balancing is seen to help preserve the unity and integrity of the constitutional legal order. It sustains this order's comprehensive reach and its attempts to achieve a perfect-fit with social reality. It allows for the inclusion – not, as American writers would have it: the *intrusion* – of substantive considerations. It integrates case-by-case analysis with principle; harmonizes values and interests; *ad hoc* decisions with formal legal doctrine. Constitutional balancing in *Lüth a*nd its progeny ultimately is the embodiment of a powerful *will to believe* that a formal, legal conception of the judicial weighing of interests and values is possible.

8.5.3 Balancing and skeptical pragmatism

American law too, in one of its important self-understandings, found itself once in an 'Age of Faith'.[1509] But, so the self-description goes, that Age is long past. What remains is a 'pervasive skepticism' with which legal scholars view the work of the judiciary.[1510] With belief in formal legal rationality gone, all that is left is an exposed "type of esoteric legalism" under which some legal theorists are "willing to promote *a false belief* in the truth of anti-instrumentalism in order to secure the benefits of that belief", in the face of the overwhelming rejection of these beliefs by their peers and by the population more broadly.[1511]

There is, however, a great paradox at the heart of this often described loss of faith in American law. Because while mainstream American legal thought is highly skeptical of the autonomy or objectivity of law and legal reasoning, faith remains in the ability of legal language to constrain judicial action. As Annelise Riles, the legal anthropologist, has noted with regard to the so-called 'New Formalism' movement of the 1990s, a continued "*faith in rules*" as constraining doctrinal tools, goes hand-in-hand with "*a realist loss of faith* in the conceptual system that sustained the earlier formalism" of Langdell and *Lochner*.[1512] This paradoxical stance has been discussed above as lying at the heart of the instrumentalization of legal formality in American legal thought.

Judicial balancing is one of the main sites at which this paradox plays out in American constitutional law. American constitutional rights adjudication, as was noted in Chapter 7, oscillates between the desire for truthful, 'realistic', descriptions of 'what judges actually do', driven by a loss of faith in legal formality, and the construction of elaborate doctrinal frameworks of steps and tests to guide judicial discretion, sustained by the remnants of a belief in the continued effectiveness of precisely that same legal formality.[1513] Given these surroundings, balancing is only ever allowed to play a pragmatic role. Balancing is what judges turn to when legal doctrine runs out. The suspension of doctrinal, categorical, reasoning in favour of a balancing approach, Kathleen Sullivan has written, "typically comes about from a crisis in analogical reasoning".[1514] That observation covers at least part of the development described in

[1505] KRIELE (1967), 14.
[1506] *Ibid.* 14.
[1507] *Cf.* also Armin von Bogdandy, *The Past and Promise of Doctrinal Constructivism: A Strategy for Responding to the Challenges facing Constitutional Scholarship in Europe*, 7 I-CON 364, 377ff (2009) (describing a 'positivism' prevalent in Continental European constitutional legal scholarship that "systematizes constitutional jurisprudence and, thereby, upholds the original doctrinal agenda in times of balancing-happy constitutional courts". Von Bogdandy notes the dominance of this line of thinking but also expresses some reservations about its long-term viability).
[1508] *Cf.* H.L.A. Hart, *American Jurisprudence through English Eyes*, 11 GA. L. REV. 969 (1967). It should be noted that Hart thought both these elements present in American legal thought, as seen from a European perspective.
[1509] *Cf.* GRANT GILMORE, THE AGES OF AMERICAN LAW 41 (1977).
[1510] TAMANAHA (2006), 96.
[1511] Vermeule, *Instrumentalisms* (2007), 2114 (emphasis added). It is important to note that there are two forms of skepticism at work here that could, in principle, also appear separately: (1) a skeptical attitude towards law and adjudication generally, and (2) a skeptical attitude towards the institution and practice of constitutional judicial review more specifically. In the American case, it would appear that the two go together, just as in the European case, faith in law and faith in constitutional judicial review appear to go together. See, *e.g.*, Duncan Kennedy, *Why Europe Rejected American Judicial Review – And Why It May Not Matter*, 101 MICH. L. REV. 2744, 2778 (2003) ("In sharp contrast with the European situation, Americans – or at least the legal academy – remain deeply divided over the question of if and how to defend constitutional review"); WOJCIECH SADURSKI, RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE xiii (2005) ("In contrast to the United States and Canada, European constitutional adjudication has not developed a tradition of self-doubt, agonising over legitimacy …").
[1512] Annelise Riles, *The Transnational Appeal of Formalism: The case of Japan's Netting Law*, STANFORD/YALE JUNIOR FACULTY FORUM RESEARCH PAPER 2000, Nr. 3, 5, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=162588 (last accessed: 20 June 2012), 60 and 11 (emphasis added).
[1513] For an extended discussion in the context of the displacement of the 'clear and present danger' test by balancing rhetoric – and the reactions to this displacement -, see *supra*, s. 7.2.1. For a flavour of these debates, see, *e.g.*, Charles Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 743-744 (1963) (critique of balancing as a 'slippery slope', conjoined with faith in constraining force of alternative approaches); L.A. Powe, Jr., *Justice Douglas after Fifty Years: The First Amendment, McCarthyism and Rights*, CONST. COMMENT. 1989, 270 ("Douglas drank at the well of legal realism too long and too thoroughly. With the other founders of the movement he stripped away the silly doctrinal shrouds … he concluded that doctrine was irrelevant, the explanatory cloak for decisions reached on more significant grounds. … Perhaps he was right …, but as Edward White notes, this may have been *an insight too fundamental and vastly too unsettling for others to accept*. Douglas, the legal realist, turns out not to have been much of a judicial realist. He had to know that *almost everyone else believed doctrine to have a part in the legal system*", emphasis added).
[1514] Sullivan, *Post-Liberal Judging* (1992), 297.

Chapter 7. Balancing is what happens when "[a] set of cases comes along that just can't be steered readily onto [one particular doctrinal track]";[1515] when familiar frameworks, such as 'clear and present danger',[1516] the speech/conduct distinction *etc.*, are confronted with new circumstances for which they are no longer seen to provide an acceptable answer. In those circumstances, balancing emerges as a place-holder, a solution that can be accepted on a temporary basis, until the area is '*rulefied*' and new doctrinal structures are developed, but which will always be regarded with suspicion and skepticism.

8.5.4 Interim conclusion

This Section has argued that in order to capture balancing's local meaning in terms of the formal *vs.* substantive opposition it is not sufficient to merely look at the (perceived) attributes of legal formality and its opposites. The *attitudes* local lawyers exhibit towards these attributes also constitute an important component of the local meaning of both the formal vs. substantive opposition generally, and of balancing specifically. If formalism is, as in H.L.A. Hart's definition, the opposite of 'rule skepticism', then the nature of this skepticism and of its opposites will have to be taken into account. The opposite of skepticism, it has been argued, is 'faith in, and hope for law'. The skeptical *vs.* aspirational opposition can be combined with the different understandings of legal formality, of the substantive in law and of their interrelationship - all discussed earlier in this Chapter – to elaborate crucial differences between German and U.S. legal thought.

The theme of balancing is intimately related to the skepticism *vs.* faith dichotomy. Put simply: Balancing can be one of the prime manifestations of *both* skepticism and faith, but for very different reasons. In a setting dominated by 'material' and 'comprehensive' constitutionalism, balancing is a prime expression of faith and aspiration – faith in and hope for a constitutional order built on a universally accepted, objective value order, and able to guarantee perfect constitutional justice in every case. This, it is submitted, is the case for the paradigmatic understanding of balancing in German constitutional legal thought and practice. But where balancing comes to the fore when more structured legal doctrines are no longer seen to suffice; where the judicial statement "I have been weighing" is taken as a confession to be applauded for its candour but to be rejected as a reflection of any legitimate mode of judicial decision making; where balancing is pervasively seen as *anti*-rules and *anti*-concepts, it will be very difficult to associate balancing with anything else than a deep skepticism of law and adjudication.

[1515] *Ibid.*

[1516] See, *e.g.*, Lillian R. Bevier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 300fn4 (balancing debate on Supreme Court arose "as the contexts of first amendment cases before the Court began to multiply and *it became increasingly evident that the clear and present danger formulation was an inadequate response to the cases' contextual variety*", emphasis added).

That, it is submitted, to a large extent characterizes balancing's paradigmatic local meaning in the U.S.

8.6 CONCLUSION: BALANCING, POLICY AND PRINCIPLE, CONFLICT AND SYNTHESIS

One of the observations quoted at the outset of this thesis was the following:

> "It is quite intriguing – and enormously significant - … that the attachment to legalism and judicial institutions outside the United States is reaching [a] peak in the same period in which within the United Sates there has been general and increasing skepticism about judicial institutions".[1517]

Richard Pildes's comment ties together the starting point of this study, its conclusions and, as this Section will argue, some suggestions for future research. Pildes' remark formed one of the bases for the puzzles set out in Chapter 1: How can one account for the dramatic spread in balancing language in jurisdictions around the world, in conjunction with the persistent hostility to – despite frequent invocation of – that same language in the U.S? And also: How should one understand the paradox of an *apparent* radical loss of legal formality in German and European constitutional rights adjudication, based on an all-encompassing embrace of balancing and proportionality reasoning, against a background of a traditionally heavily formalist – legalist, in Pildes' terminology – legal culture?

The idea of 'attachment to legalism' brings these two puzzles together, and opens the way to solving them. First, Europe's embrace of balancing is possible thanks to, not in spite of, a continued faith in legal formality, simply because balancing is seen as law, not politics or policy. And second, not only is balancing acceptable within European legal systems; the figure of balancing in fact plays *a central role* in sustaining this distinctly legalist European brand of constitutionalism through the way it garners commitment and belief in the constitutional legal order.

Typical American discussions, not only because of the background skepticism of law and adjudication that often pervades them, but in particular because of their association of the 'rise of balancing' with a paradigm shift from 'formalism' to 'realism' and beyond, often have trouble seeing this European way of balancing. In the paradigmatic American view, the substantive *has to be* policy; formality *can only realistically exist* in the form of doctrinal rules and categories; and any synthesis between the two *can only ever be* pragmatic and instable. Outside the American legal tradition, however, the substantive, the formal and their interaction are all capable of having vastly different meanings.[1518]

[1517] Richard Pildes, *Conflicts between American and European Views of Law: The Dark Side of Legalism*, 44 VA. J. INT'L L. 145, 147 (2003).

[1518] Misunderstandings, of course, also work the other way around. The German paradigmatic account has trouble understanding the side-by-side existence of legal formality and substantive reasoning and the durability of pragmatic mediation between the two.

Pildes' remark also opens the way to broadening the relevance of the investigations conducted in this study. The discussion above has focused on historical balancing debates in specific periods (1920s - 1930s and 1950s – 1960s), in specific jurisdictions (Germany and the U.S.) and with regard to specific topics (constitutional rights adjudication generally, and freedom of expression law more particularly). Pildes, by contrast, speaks about *today*, juxtaposes U.S. American legal thought and practice with '*the rest of the world*' more generally, and does not limit himself to any particular area of law. As a factual observation, the contrast between American skepticism and 'attachment to legalism' elsewhere has to be broadly accurate. The difficult question is how much, if anything, of this present-day global division can be explained through differences in balancing debates of several decades ago. This thesis suggests that the answer to that last question should be: 'quite a lot', and this for several reasons covering the *jurisdictional*, *topical* and *historical* limitations of the investigation.

(1) On the first point, the limitation as to jurisdictions, it is certainly arguable that wider European constitutional adjudication practices have been thoroughly influenced by early Post-War German constitutional rights adjudication under the Basic Law. Much of the jurisprudence of the European Court of Justice and the European Court of Human Rights, for example, has a distinctly 'German' imprint, in particular in the use of balancing and proportionality. Of course, the commitment to in-depth study of individual systems that underlies the approach taken in Chapters 4 to 7 also means that no hard conclusions on the broader validity of the 'German' balancing paradigm can be offered. That said, to the extent that it seems possible to speak of a 'European legal culture', or a 'European way of law', this must be a legal culture in which German experiences, and in particular the use of balancing and proportionality, form a central pillar. And to that extent, it should not be surprising if future research found that many aspects of balancing's local *German* meaning are of relevance to its local *European* meaning.

(2) In terms of subject matter too, it seems that constitutional rights adjudication, and freedom of expression adjudication more specifically, are broadly representative for approaches to law and adjudication more generally. For reasons discussed at the outset of Chapter 4, the right to freedom of expression, despite its important differences in meaning across systems, is one of the more easily 'comparable' rights. In addition, constitutional rights adjudication generally has become such a central part of Post-War legal orders, both in America and elsewhere, that its conceptual tools and modes of thinking are likely to have a radiating effect throughout the rest of the legal order. Finally, Post-War rights adjudication of the kind studied in earlier Chapters, was itself, as a relatively new phenomenon, from the outset deeply embedded in long established legal traditions. It seems reasonable to suppose – and Chapters 4 to 7 have demonstrated - that courts in these early rights cases were quick to adopt habitual terminology and

modes of reasoning.[1519] Again, therefore, there is no reason to assume that constitutional rights adjudication is an area of legal activity so different from other parts of the legal systems that conclusions drawn from its observation might not have a broader relevance. This suggests that balancing's local German and American *constitutional* meanings may also be its local German and American *general* meanings.

(3) This last point shades in to the third limitation mentioned above; that in terms of history. On the whole, the material covered in Chapters 3 to 7, it is submitted, shows clear lines of continuity. German balancing debates of the early 1960s, are very much like German balancing debates in the early 1920s, and the same goes for balancing debates in the U.S. Notably, as could only be shown by using a comparative perspective; German balancing debates of these two periods resemble each other much more closely than they do any of the American debates, and *vice-versa*. Again: Comprehensively demonstrating the validity of the balancing paradigms for today's constitutional adjudication would require research of a scope beyond the reach of this project. But it is important to note that wherever later materials have been cited throughout this thesis - from debates on balancing in the U.S. in the late 1980s and early 1990s to German discussions on balancing since the 1970s - the overwhelming impression, it is submitted, is one of continuity. The work of Robert Alexy, for example, shows remarkable congruity with that of Phillip Heck and other *Interessenjurisprudenz* scholars in the 1920s and 1930s. And the critical discussion of the American 'age of balancing' in Alexander Aleinikoff's famous article owes a lot to earlier such criticisms, voiced in the immediate aftermath of the Supreme Court's first balancing decisions on the First Amendment. On the whole, therefore, the paradigmatic features of discussions of balancing in Germany and the U.S. seem to have been remarkably stable throughout the twentieth century. It should not be a surprise, therefore, to find that balancing's local German and American *mid-Century* meanings are closely related to its local German and American *contemporary* meanings.[1520]

The analyses of historical balancing debates throughout this thesis raise a number of other important questions for the future. It has already been argued that predictions of either the spread of 'European-style' *balancing* and proportionality to the U.S. or, conversely, of 'American-style' 'rulefication' of European balancing, are unlikely to come true. American pragmatic skepticism prevents adoption of the 'open-ended-but-still-law' mode of balancing familiar to Europeans, while European balancing is already formal in ways not captured by the American focus on rules and categories.

[1519] In fact, as Wojciech Sadurski has argued, claiming the mantle of 'law' and 'judicial activity' has very much been part of the legitimizing strategies of newer constitutional courts, even where these courts are institutionally quite separate and different from the ordinary court system. Constitutional courts in Western and Eastern Europe have generally presented themselves very much as *judicial* institutions, embedded within established local *legal* traditions. See SADURSKI (2005), 27ff. This reinforces the argument that constitutional rights adjudication discourse is not likely to be very different from the discourse of other forms of adjudication.

[1520] On balancing's continued importance see, *e.g.*, BENJAMIN RUSTEBERG, DER GRUNDRECHTLICHE GEWÄHRLEISTUNGSGEHALT 50 (2009). For the European context, see 74ff.

But if these trends are not likely, what sorts of developments might be expected instead? Predictions of this kind are, of course, notoriously hard to make. From the examinations above, it seems however that one important difference between the U.S. and German/European cultures of adjudication lies in the *relevant audiences* for the courts' legitimization projects. It has been argued, in Chapter 2 and throughout this thesis, that the work of constitutional courts in different jurisdictions is comparable precisely through the angle of their legitimization problematic – the fact that they must publicly justify their exercises of authority, and that they must do so through the use of a range of argument forms that are considered acceptable by the relevant local legal audience. But little has been said about the precise nature of this audience, apart from the observation that it should at least include participants in 'the higher reaches of the law' – academic commentators and fellow judges. This, however, may not be enough, given the extent to which judicial reasoning in America is the object of public debate more generally and the way in which American judicial argumentation is at least in part addressed to the population at large more often than in Europe. The reasons for this public dimension have been debated at least since Tocqueville and are not especially relevant here. What matters is that if legitimization is a distinctly public affair, and if, as has been argued before, legitimization turns upon the interaction of the formal and substantive elements of judicial reasoning, then the judicial expressions of these formal and substantive elements will have to take on a 'popular' appearance.

Formality, in such a mode, is very likely to be expressed in the highly visible, easily understandable terms of 'bright-line rules' and 'hard and fast tests' and 'black and white categories'. Formality in the much more academic, conceptual and systematic German sense, is less likely to be convincing as such, if the audience is not composed of professors and judges, but of journalists and their readers. Similarly, the substantive is likely to have to be expressed as 'policy', rather than as Smendian 'value constellations'. And balancing itself, finally, in such a setting *simply has to look legal*. To the extent that the broader public is not - and cannot be - convinced of the 'legality' of balancing, such apparently open-ended, flexible modes of reasoning are unlikely to take-off in the American context.[1521] If these popular expectations were to change, however, the outlook for balancing and proportionality could be different.

This same perspective points to perhaps more worrying predictions for the 'German' paradigmatic model of balancing. If, as has been claimed above, the legitimacy of this mode of argumentation is deeply bound-up with a vast network of background understandings peculiar to the German context, this raises the worrying question of the stability and continued legitimacy of the balancing approach outside this very specific setting. The European Court of Human Rights and the European Court of Justice, for example, may not be able to draw on these background understandings in the same way

[1521] *Cf.* also Vicki Jackson's question "Is U.S. legal culture likely to view a less formal, more open-ended approach examining the 'proportionality' of legislative means to legitimate legislative goals as an opportunity for invidious biases to affect decision-making?", in *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on Proportionality, Rights and Federalism*, 1 U. Pa. J. Const. L. 583, 589 (1999).

as the *Bundesverfassungsgericht* has been able to do over the past half century. Whether these and other courts are, or have been, able to develop their own version of balancing as an answer to their own legitimacy problematics, is a question outside the scope of this investigation.[1522] But the original, German, conception of constitutional rights balancing, cannot easily be replicated. The fact that the language of balancing is nevertheless one of the most widely invoked features of modern constitutionalism has to be testament to the uncanny capacity of this language to mean all things to all people.

[1522] For a study along these lines of the European Court of Human Rights, see Janneke Gerards, *Judicial Deliberations in the European Court of Human Rights*, in THE LEGITIMACY OF HIGHEST COURTS' RULINGS 407 (Nick Huls, Maurice Adams & Jacco Bomhoff, eds., 2009).

NEDERLANDSE SAMENVATTING

Het Discours van de Rechterlijke Afweging

Over de oorsprong en de betekenissen van 'afweging' in Amerikaanse en Duitse grondrechtenjurisprudentie van de jaren 1950' en 1960'

Inleiding

In Europa en in de Verenigde Staten overheerst één specifieke vorm van taalgebruik het moderne landschap van de rechtspraak over grondrechten: het discours van de rechterlijke afweging. In veel zaken omtrent de meest in het oog springende grondrechtelijke vraagstukken – over de rechten van terreurverdachten, bijvoorbeeld, of over de reikwijdte van de vrijheid van meningsuiting of de godsdienstvrijheid – geven rechters aan dat hun uiteindelijke beslissing voortvloeit uit een afweging van rechten, waarden of belangen. Dit afwegingsdiscours figureerde in de grondrechtelijke context voor het eerst in een reeks vrijwel gelijktijdige beslissingen van het Amerikaanse Hooggerechtshof (verder: *Supreme Court*) en het Duitse Federale Grondwettelijke Gerechtshof (verder: *Bundesverfassungsgericht*) aan het einde van de jaren '50 en begin van de jaren '60, en in de literatuur die rondom deze beslissingen verscheen. Deze beslissingen bouwden op hun beurt in veel opzichten bewust voort op rechtstheoretische debatten over afweging, en uitgedrukt in termen van afweging, in de eerste decennia van de twintigste eeuw.

Dit proefschrift is het verslag van een rechtsvergelijkend onderzoek naar deze historische wortels van het afwegingsdiscours in Europa en in de Verenigde Staten. Het bestudeert de twee episodes in de ontwikkeling van afweging – de vroege rechtstheoretische debatten, en het eerste rechterlijk gebruik in grondrechtenzaken na de Tweede Wereldoorlog – en analyseert wat deze verschillende achtergronden inhouden voor de betekenis van afweging.Deze samenvatting geeft eerst een kort overzicht van de vragen die de aanleiding vormden voor het onderzoek, en van de gekozen aanpak voor de beantwoording van die vragen. Daarna komen achtereenvolgens de vroege afwegingsdebatten en het grondrechtelijk rechterlijk gebruik aan de orde. Afgesloten wordt met een overzicht van de voornaamste rechtsvergelijkende bevindingen in de vorm van twee afwegingsparadigma's.

Achtergrond

De vraagstelling voor dit onderzoek komt voort uit een botsing tussen twee onverenigbare aannames die beide wijdverbreid zijn in de relevante literatuur.

De eerste aanname heeft betrekking op de betekenis van verwijzingen naar 'afweging' in rechtspraak en rechtswetenschappelijke literatuur. Dit type verwijzing komt inmiddels zo vaak voor dat zij emblematisch is geworden voor hele rechtsgebieden en rechtsordes, en zelfs model is komen te staan voor een omvattend denkkader voor een tijdperk: het zogenoemde 'naoorlogse paradigma' in de wereldwijde grondrechtenjurisprudentie. Sinds het eerste gebruik van afwegingsterminologie in rechtswetenschappelijke debatten van het begin van de twintigste eeuw, is algemeen aangenomen dat verwijzingen naar begrippen als 'afweging' of naar het 'gewicht' van rechten, waarden en belangen, dezelfde betekenis zullen hebben, ongeacht waar zij zich voordoen. Deze aanname blijkt vooral uit de manier waarop rechtsvergelijkend onderzoek het al dan niet voorkomen van afwegingsterminologie in verschillende rechtsordes al heel lang aangrijpt om te concluderen dat die rechtsordes in belangrijke zin vergelijkbaar of juist fundamenteel anders zijn. Dergelijke conclusies hebben uiteraard enkel zin wanneer het idee van 'afwegende rechters' steeds min of meer dezelfde inhoud heeft en dezelfde associaties oproept.

De tweede aanname staat centraal in een traditie van rechtsvergelijkend onderzoek naar juridische redeneerwijzen in de Verenigde Staten en in Europa. Vooraanstaande studies op dit gebied betogen al heel lang dat juridisch redeneren in Europa in belangrijke zin 'formeler', of 'formalistischer', is dan in de Verenigde Staten. In deze voorstelling waren in de negentiende eeuw zowel het Amerikaanse als het Europese rechtsdenken in de greep van het juridisch formalisme. Maar waar Amerika sindsdien een 'Realistische' revolutie heeft ondergaan, bevinden rechtspraak en rechtsgeleerdheid in Frankrijk en Duitsland – de twee meest onderzochte voorbeelden – zich nog altijd in een voor-Realistisch stadium. Dat laatste ofwel omdat een dergelijke 'virulente' kritiek zich lokaal niet heeft voorgedaan, ofwel omdat die kritiek, hoewel bekend, bij lange na niet dezelfde duurzame invloed heeft gehad als in de Verenigde Staten.

De opkomst van afweging in de grondrechtenjurisprudentie roept grote vragen op bij dit klassieke beeld van een formele Europese rechtscultuur tegenover een informele Amerikaanse. Want waar de Amerikaanse rechtspraak en doctrine de rechterlijke afweging vooral met een zekere dosis fatalisme en met terughoudendheid en kritiek hebben ontvangen, hebben Europese rechters – het *Bundesverfassungsgericht* voorop – haar van vroeg af aan met open armen verwelkomd. En die reactie is opmerkelijk omdat zij zo moeilijk verenigbaar is met het Amerikaanse beeld van afweging als, in essentie, puur juridisch pragmatisme. Een voorstelling van afweging als eenvoudige 'redelijkheid', of als "de vorm die de rede aanneemt wanneer er niet langer een geloof is in juridisch formalisme" (Paul Kahn), is moeilijk verenigbaar met het beeld van een Europese rechtscultuur waarin juist dat geloof in het formele karakter van recht traditioneel zo centraal staat. Tenzij, natuurlijk, zich ook in Europa toch een geloofscrisis naar Amerikaans model heeft voorgedaan. Rechtsvergelijkend onderzoek wijst echter uit dat dit, zeker voor de Duitse rechtsorde, niet het geval is. Dit suggereert dat een nieuw perspectief op afweging nodig is. Een perspectief dat verder kijkt dan een simpele associatie van afweging met pragmatisme en juridische informaliteit.

De centrale stellingen van dit proefschrift zijn rechtstreeks gericht tegen deze twee aannames. Rechtsvergelijkende studie laat zien dat afweging niet altijd en overal dezelfde betekenis heeft, en dat de relatie tussen afweging en het formele karakter van juridisch redeneren veel complexer is dan het standaard (Amerikaanse) model toelaat. Deze stellingen berusten op een onderzoek dat naar afweging kijkt door de lens van de tegenstelling tussen de formele en materiële dimensies van recht en dat, tegelijkertijd, diezelfde tegenstelling herijkt op basis van de studie van het discours van de rechterlijke afweging.

Deel I: Methode van onderzoek

Traditioneel wordt afweging gezien als een specifieke juridische methode van beslissen die wordt gesignaleerd door een vorm van taalgebruik. Dit proefschrift gaat daarentegen uit van een analyse van afweging als een *discours*, opgebouwd rondom een vorm van taalgebruik (verwijzingen naar het rechterlijk wegen van rechten, waarden, of belangen). Dat taalgebruik kan, in deze benadering, staan voor een concrete onderliggende beslismethode, maar dat is niet noodzakelijk. Afweging kan namelijk ook verwijzen naar een bredere visie op een bepaald rechtsgebied, of naar een filosofie van de grondrechten, of een ideaalbeeld voor de rechterlijke taak, of nog allerlei andere voorstellingen, al naar gelang de context. De keuze voor deze alternatieve benadering is vooral ingegeven door de gedachte dat een aanname dat het taalgebruik van afweging altijd en overal op dezelfde methode zal doelen, er ongewild toe kan leiden dat de rechtsvergelijker zijn of haar vertrouwde ideeën projecteert op onbekende praktijken. Om dat gevaar zo veel mogelijk te voorkomen, kiest dit onderzoek ervoor om, voor zover dat kan, vragen over wat afweging*is* vooraf open te laten, ter beantwoording binnen de bestudeerde rechtsordes.

Wat overblijft, in die benadering, is enkel de aanname dat afweging in elk geval een vorm van juridisch taalgebruik is, ingeroepen door lokale actoren om dienst te doen bij de legitimatie van, of kritiek op, rechterlijk handelen. De betekenis van dit taalgebruik is dan opgebouwd uit de manieren waarop, en de mate waarin, afweging aan deze legitimatie of kritiek kan bijdragen, in de ogen van die lokale actoren, en gemeten aan lokale maatstaven. Met een wat esoterische term kan dit de 'legitimerende kracht' van de afweging worden genoemd. Een groot deel van het onderzoek volgt deze '*interne*' benadering van de afweging. Het doel hier is te ontdekken wat lokaal, in Duitsland en de Verenigde Staten, ten tijde van de eerste 'afwegingsuitspraken', telde als criterium voor 'goed juridisch redeneren', en hoe afweging gedacht werd te scoren op deze criteria.

Een laatste onderdeel van de gebruikte methode is er op gericht de vergelijkbaarheid van de gevonden betekenissen van afweging te vergroten. De onderliggende gedachte hierbij is dat een zuiver interne benadering, waarbij geprobeerd wordt om juridische fenomenen volledig te duiden in hun eigen termen, weinig ruimte overlaat voor de *vergelijkende* studie van die fenomenen tussen verschillende systemen. Voor dat laatste is immers een begrippenkader nodig dat de te vergelijken instanties overstijgt. Dat begrippenkader wordt voor dit onderzoek gevonden in de tegenstelling tussen de formele en informele, of materiele, dimensies van recht. Deze tegenstelling werd al eerder succesvol gebruikt voor vergelijkende analyses van juridisch redeneren in de Verenigde Staten en Europa, in het bijzonder in het werk van Summers & Atiyah en van Mitchel Lasser. Deze auteurs laten zien dat onderzoek naar de verschillende manieren waarop de formele en materiële dimensies van recht zich tot elkaar verhouden een mooie lens kan bieden voor de identificatie van karakteristieke eigenschappen van juridisch redeneren in verschillende systemen. Dit proefschrift bouwt voort op deze eerdere onderzoeken, en op de hypothese dat actoren in alle Westerse rechtssystemen zich geconfronteerd zien met varianten van hetzelfde fundamentele onderliggende dilemma ten aanzien van de relatieve autonomie – een andere benaming voor de relatieve formaliteit – van hun rechtsorde. De grote verscheidenheid aan gronden waarop lokale actoren hun oordeel over de legitimerende kracht van argumenten als afweging baseren, zo wordt betoogd, kunnen worden ingedeeld in drie grote groepen legitimerende strategieën. Deze zijn ofwel 'formaliserend' (argumenten die de autonomie van het recht ondersteunen), 'substantiverend' (argumenten die juist de banden tussen recht en andere velden benadrukken), en 'integrerend-mediërend' (argumenten specifiek gericht op de instandhouding van wat ter plaatse wordt gezien als een 'juiste' verhouding tussen formele en materiële dimensies). Deze driedeling wordt verdedigd en uiteengezet in Hoofdstuk 2, en gebruikt in Hoofdstuk 8 om de vergelijkende analyse van de 'Duitse' en 'Amerikaanse' betekenissen van afweging vorm te geven.

Deel II: De vroege afwegingsdebatten

Tussen ruwweg 1900 en 1930 begonnen rechtsgeleerden en rechters in zowel de Verenigde Staten als in Europa recht en rechtspraak te beschrijven in termen van afweging van belangen. Dit nieuwe taalgebruik kwam in beide gevallen voort uit een kritiek van ogenschijnlijk heel vergelijkbare orthodoxie: het formalisme en conceptualisme van het 'klassieke rechtsdenken'. In de Verenigde Staten bestond dit klassieke model uit een combinatie van de rechtswetenschappelijke opvattingen van Christopher Columbus Langdell, de invloedrijke eerste Decaan van de*Harvard Law School*, en de *laissez-faire* constitutionele toetsing van progressieve wetgeving culminerend in de beruchte '*Lochner*-periode'. In Europa bestond de orthodoxie veeleer uit de pandektenwetenschap van Puchta en Windscheid en uit de negentiende eeuwse conceptuele jurisprudentie meer in het algemeen. Het op afweging gebaseerde alternatief werd in Frankrijk ontwikkeld door François Gény, in Duitsland door Philipp Heck en zijn medestanders in de beweging van de '*Interessenjurisprudenz*', of de 'belangenleer', en in de Verenigde Staten door Roscoe Pound en andere sociologisch georiënteerde denkers.

In zowel hun kritiek op de klassieke orthodoxie als in de ontwikkeling van alternatieven - daaronder inbegrepen het alternatief van de afweging – maakten Amerikanen als Pound veelvuldig gebruik van Europese ideeën. Die verbanden liggen ten grondslag aan de wijdverbreide opvatting dat Europese en Amerikaanse orthodoxie, Europese en Amerikaanse kritiek, en uiteindelijk ook Europese en Amerikaanse afweging, min of meer dezelfde betekenis toekomt.

Tegen deze achtergrond begint in Deel II van dit proefschrift (Hoofdstuk 3) de zoektocht naar de originele betekenissen van afweging. De centrale stelling van dit Deel is dat de relevante Amerikaanse en Europese debatten veel verder uit elkaar liggen dan veelal wordt gedacht. Amerikaanse rechtsgeleerden (en enkele rechters) namen de hen welgevallige elementen van Franse en Duitse privaatrechtelijke rechtswetenschappelijke kritiek over en transformeerden die in een fundamentele aanval op de Amerikaanse grondwettelijke rechtspraak. Toen Roscoe Pound schreef dat de Europese rechtsgeleerden die Jhering belachelijk had gemaakt hun evenbeeld hadden Amerikaanse rechters, ging de aandacht begrijpelijkerwijs uit naar de bedoelde overeenkomsten tussen Europa en de Verenigde Staten. Maar terugkijkend moet geconstateerd worden dat zijn observatie eerder significant is voor *het verschil* dat zij uitdrukt, tussen ongevaarlijke Europese rechtsgeleerden in hun ivoren torens, en machtige Amerikaanse rechters die met hun formeel-conceptuele redeneerwijzen de opbouw van een rudimentaire welvaartsstaat blokkeerden. Bij een eerlijke, open afweging van de betrokken individuele en maatschappelijke belangen, zo dacht Pound, zouden dit soort conservatieve uitspraken onbestaanbaar zijn.

Deze creatieve associatie is van buitengewoon belang gebleken. Pound en verwante schrijvers en rechters waren de eersten die zo expliciet het verband legden tussen juridische *methode* (de formeel-conceptuele orthodoxie) en *uitkomst* (conservatieve ondermijning van progressieve wetgeving). Een dergelijk verband tussen methode en uitkomst, maar dan uiteraard in tegengestelde richting, werd toen vrijwel geruisloos aangenomen voor de juridische aanpak die juist werd voorgesteld ter vervanging van de orthodoxie: de rechterlijke belangenafweging. Dit type associatie was daarentegen grotendeels afwezig bij de Europese schrijvers bij wie Pound inspiratie putte, met name de voorzichtige en gematigde François Gény, en bij de Duitse schrijvers van de 'belangenleer' school. Philipp Heck, bijvoorbeeld, was heel stellig in zijn verdediging van zijn belangenleer als een 'juridisch-neutrale' methode, die aan geen enkele vorm van politiek – conservatief nog progressief – het overwicht zou geven. De belangenleerjuristen, zo schreef Heck, droomden er niet van om de maatschappij te vertellen welke belangen wel of niet bescherming verdienden.

Hiermee lag, al in een heel vroeg stadium in de ontwikkeling van de afweging, het fundament voor radicaal verschillende associaties in de Verenigde Staten en in Europa. In Amerika was afweging een politiek gekleurde strategie, ingeroepen om een

onwelgevallige rechterlijke politiek te ontkrachten en om te buigen. Afweging in Frankrijk en Duitsland daarentegen was een rechtsgeleerde, technische, neutrale innovatie, door verdedigers geprezen om haar grotere dogmatische overtuigingskracht en praktische toepasbaarheid, maar niet gezien als onderdeel van een rechtspolitieke strategie in welke richting dan ook.

Deel III: Afweging en de grondrechtenrechtspraak van de jaren 1950' en 1960'

Tegen het einde van de jaren 1950' begonnen het Duitse *Bundesverfassungsgericht*, het Amerikaanse *Supreme Court* en rechtsgeleerde commentatoren in deze beide systemen het taalgebruik van de afweging in te roepen in rechtspraak over, en analyse van, grondrechtenzaken. In beide systemen figureerde dit taalgebruik voor het eerst op het gebied van de vrijheid van meningsuiting. In Duitsland was haar opkomst abrupt, in de vorm van de unanieme beslissing in de bekende *Lüth*-zaak van 1958. In de Verenigde Staten was veeleer sprake van een geleidelijke ontwikkeling, culminerend in opinies voor een meerderheid van vijf rechters in een reeks van zaken tussen 1959 en 1961. In beide systemen breidde het afwegingsdiscours zich vervolgens snel uit tot andere grondrechtelijke rechtsgebieden.

Opmerkelijk aan deze parallelle ontwikkelingen is allereerst vooral de mate waarin afweging, in een bijzonder korte periode, in beide systemen het brandpunt werd van een grote verzameling aan fundamentele grondrechtelijke vraagstukken. "Er is zoveel over het onderwerp geschreven", aldus Kenneth Karst al in 1965, "dat de geleerde schrijvers ons zonder twijfel meer verteld hebben over afweging dan we wilden weten". Opmerkelijk is ook, ten tweede, dat beide systemen heel weinig tekstuele grondslag boden voor expliciete rechterlijke afweging. Zowel de Amerikaanse *Bill of Rights* als de relevante bepaling in de Duitse Federale Grondwet nemen namelijk, allicht op het eerste gezicht, een *absolute* positie in ten aanzien van de vrijheid van meningsuiting: het Eerste Amendement garandeert deze vrijheid ogenschijnlijk zonder voorbehoud, terwijl Artikel 5 van de Grondwet elke inperking op grond van 'algemene wetten' lijkt toe te staan.

Dergelijke overeenkomsten maken de opkomst van het afwegingsdiscours in deze vroege vrijheid van meningsuitingszaken tot een geschikte case studie voor de analyse van mogelijke verschillen in de betekenis van afweging. Dit onderzoek staat centraal in Deel III van dit proefschrift (de Hoofdstukken 4 tot en met 7). In telkens twee Hoofdstukken wordt, eerst voor Duitsland en dan voor de Verenigde Staten, bezien op welke manier afweging een rol begon te spelen in de grondrechtenjurisprudentie, en welke associaties dit nieuwe taalgebruik opriep bij rechters en commentatoren. De belangrijkste bevinding van dit Deel is dat waar het Amerikaanse afwegingsdiscours gekenmerkt werd door voortdurende diepe tegenstellingen, dit discours in Duitsland de belichaming is van een van de meest vooraanstaande, succesvolle pogingen in het moderne rechtsdenken om juist dit type tegenstellingen te overbruggen. Amerikaanse rechters en schrijvers gingen steeds uit van een achtergrond van onoverkomelijke antithesen; tussen pragmatische en delibererende besluitvorming, tussen beleid en

principe, en tussen de materiële en formele dimensies van recht. Afweging werd in deze optiek steeds ferm ingedeeld bij slechts één kant van deze dichotomieën. Het Duitse rechtsdenken, daarentegen, is er in grote mate in geslaagd om uit al deze elementen een synthese op te bouwen. Afweging fungeert hier juist als het hart van pogingen om het pragmatische als het beredeneerde te zien, rechterlijk beleid als principieel, en het juridisch materiële als formeel.

Afweging in de Duitse grondrechtenrechtspraak

Toen het Duitse *Bundesverfassungsgericht* zich voor het eerst op afweging beriep, gebeurde dit onder verwijzing naar het werk van Rudolf Smend, de grote staatsrechtsgeleerde uit de Weimar-periode. Smend staat bekend als de grondlegger van het 'materieel constitutionalisme'. Dit is een visie waarin het staatsrecht niet enkel een formele afbakening inhoudt van bevoegdheidssferen, maar opgebouwd is uit constellaties van waarden en beginselen. Hoewel Smend zelf in zijn vooroorlogse werk maar heel weinig indicaties had gegeven over hoe rechters met deze waardenconstellaties zouden moeten omgaan, werd de constructie van de 'afweging van waarden en belangen' door het *Bundesverfassungsgericht* verheven tot middelpunt van de tot materieel staatsrecht bekeerde naoorlogse grondrechtelijke rechtspraak.

Door een afweging van abstracte waarden te combineren met die van veel concretere belangen, zoals het Hof deed in de *Lüth*-zaak, werd daarnaast bijna terloops een verband gelegd tussen het materieel constitutionalisme van Smend en de - veeleer privaatrechtelijke – belangenleer van Philipp Heck en anderen. Dit is opmerkelijk omdat de uitgangspunten van deze twee stromingen moeilijk met elkaar verenigbaar zijn. De gecombineerde abstracte- en concrete afweging maakte het daarentegen wel mogelijk voor het Hof om haar in te zetten in een tweede belangrijke rol: als draaipunt voor een 'omvattend constitutionalisme'. Dit omvattende constitutionalisme bestond zelf opnieuw uit twee hoofdcomponenten: de doelstelling van een zo groot mogelijk bereik van de grondrechtsorde, en die van een zo eng mogelijke band tussen de abstracte betekenis van de grondrechten en hun onderliggende idealen en hun toepassing in concrete zaken. Afweging werd gezien als cruciaal zowel op het punt van de reikwijdte van de grondrechten (met name door middel van de doctrine van de horizontale werking), als ten aanzien van een zo nauwkeurig mogelijke verwezenlijking (met name gebaseerd op het idee van een individualiserende afweging van alle omstandigheden van elk specifiek geval).

Afweging in de Amerikaanse grondrechtenrechtspraak

Waar afweging in de Duitse context doelbewust werd ingezet voor spilfuncties in de twee hoofdstromingen in de naoorlogse grondrechtenjurisprudentie – die van het materiële- en het omvattende constitutionalisme -, was haar opkomst in de Verenigde

Staten het resultaat van een veel incrementeler en pragmatischer proces. Afweging, in het Amerikaanse rechtsdenken, was niet een spil voor synthese, maar een plaats voor botsingen en conflict.

In de vrijheid van meningsuitingscontext was de opkomst van het taalgebruik van de afweging vooral het resultaat van de steeds sterker wordende drang naar een 'realistisch' beeld van het rechterlijk werk. Klassieke doctrines, zoals de bekende '*clear and present danger*' test, werden steeds vaker gezien als oppervlakkige vermommingen voor wat rechters eigenlijk - terecht en onvermijdelijkerwijs - deden: het afwegen van belangen. Deze hang naar rechterlijke eerlijkheid en openheid, kwam echter al gauw in conflict met een nieuwe stroming die juist het vaktechnische, delibererende, en intuïtie-overstijgende karakter van juridisch redeneren voorop stelde. De botsing tussen de groeiende roep om realisme en dit hernieuwde idealisme – met name na het verschijnen van Herbert Wechsler's artikel over 'Neutrale Beginselen van Constitutioneel Recht' in 1959 – vormt een eerste belangrijke component van de betekenis van afweging in de Amerikaanse context.

De tweede dimensie van deze betekenis kwam op dramatische wijze tot uiting in het *Supreme Court* zelf, waar zij leidde tot een heuse 'afwegingsoorlog' tussen de rechters. Hier botste afweging met de overtuigingen van een lange traditie in het Amerikaanse rechtsdenken waarin het belang van harde, categorische onderscheiden en van precieze definities centraal staan. Dat deze 'definitionele traditie' buitengewoon invloedrijk was in de vrijheid van meningsuitingscontext, was te danken aan het gezag van eerdere juristen die het Eerste Amendement op deze manier hadden uitgelegd, en vooral ook aan de tekst van het Amendement zelf, dat immers onomwonden verklaarde dat 'geen enkele wet' inbreuk zou mogen maken op de gegarandeerde vrijheid. Het voortdurende belang van deze traditie betekende dat, anders dan in Duitsland, in Amerika een prominent *alternatief* voor afweging voorhanden bleef. De betekenis van afweging kreeg grotendeels vorm door deze steeds herhaalde tegenstellingen.

Deel IV: Twee afwegingsparadigma's

Het laatste deel (Hoofdstuk 8) van dit proefschrift herleidt de gevonden betekenissen van het afwegingsdiscours tot twee paradigma's van afweging die de Amerikaanse en de Duitse grondrechtenjurisprudentie beheersten en, zo wordt betoogd, nog altijd hun invloed doen gelden. Voor de constructie van deze paradigma's wordt teruggegrepen op de tegenstelling tussen de formele en materiële dimensies van recht, ontwikkeld in Deel I. In Hoofdstuk 8 worden verbanden gelegd tussen dit abstracte conceptuele kader en lokale jurisprudentiële verschijningsvormen.

Het materieel constitutionalisme van Rudolf Smend, overgenomen door het *Bundesverfassungsgericht*, is de dominante 'Duitse' manifestatie van de materiële dimensie van het grondrechtenrecht. De formele dimensie, daarentegen, komt tot uiting in de grondslagen van het omvattend constitutionalisme. Betoogd wordt dat deze laatste stroming precies de sturende en dwingende kracht uitoefent die typisch geassocieerd wordt met juridische formaliteit. Maar waar formalisme traditioneel gezien wordt als inperkend en behoudend, is het omvattend constitutionalisme juist formeel in de manier waarop het de relevante actoren *dwingt* tot uitbreiding van, en ambitie voor, het domein van het recht. In de Amerikaanse context komt de materiële dimensie van het recht vooral tot uiting in het – onvertaalbare – '*policy reasoning*', dat veel meer *ad hoc*, pragmatisch en instrumentalistisch is dan het Duitse materieel constitutionalisme. De lokale verschijningsvorm van de formele dimensie is hier de 'definitionele traditie' in het grondrechtenrecht. Hoofdstuk 8 komt, tot slot, terug op het onderwerp van de verhouding tussen de materiele en formele dimensies van het grondrechtenrecht, en de rol die afweging speelt bij de beheersing van deze relatie. In beknopte zin is deze verhouding er in de Duitse context een van synthese en van het overbruggen, soms zelfs regelrecht ontkennen, van tegenstellingen. In de Verenigde Staten is daarentegen veeleer sprake van een instabiel compromis dat steeds aan herijking bloot staat.

De rol van de afweging bij de beheersing van deze relatie is belangrijk omdat zij in direct verband staat tot de legitimiteit van juridische argumentatie. Afweging, in de Duitse - en meer in het algemeen: in de Europese – context, staat symbool voor een geloof in de gedachte dat een juridisch verantwoorde, legitieme, rechterlijke afweging van belangen, rechten en waarden mogelijk is. Het idee dat afweging, mits zorgvuldig uitgevoerd, uiteindelijk niet zo heel anders is dan wat rechters onder meer traditionele interpretatiemethoden altijd al hebben gedaan. Dat geloof lijkt grotendeels afwezig in de Amerikaanse context. De opkomst van afweging wordt daar juist geassocieerd met die van een groeiende scepsis ten aanzien van rechterlijke activiteit. Er is, paradoxaal genoeg, zo leert studie van de 'definitionele traditie' en haar meest recente incarnatie – het 'nieuwe formalisme' – nog altijd een residueel geloof in de formele kwaliteiten van recht. Maar ongeacht hoe precies dit formele recht er uit ziet, één ding is zeker: rechterlijke afweging is daaraan noodzakelijkerwijs diametraal tegenovergesteld. Afweging kan, in deze omgeving, nooit meer zijn dan een pragmatische tussenoplossing, enkel geschikt voor wanneer het recht, zoals dat eruit zou moeten zien, tijdelijk tekort schiet. In woorden geleend van H.L.A. Hart: waar afweging in het Duitse recht een nobele droom is, of dat tenminste kan zijn, is zij in Amerika een nachtmerrie. Het feit dat deze droom, zoals dit proefschrift betoogd, zo sterk geworteld is in de bijzondere context van het vroege naoorlogse Duitse staatsrecht, roept echter wel vragen op ten aanzien van de toekomst van de rechterlijke afweging - in Europa en elders.

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Curriculum Vitae

Jacco (Jacobus Adriaan) Bomhoff werd op 18 Januari 1978 geboren te Gouda. In juni 1996 behaalde hij zijn eindexamen aan het Coornhert Gymnasium in die stad. Van 1996 tot 2002 studeerde hij Nederlands recht aan de Universiteit Leiden, waar hij *cum laude* afstudeerde in zowel het Civiel recht als het Staats- en bestuursrecht. In 2003 behaalde hij de graad van *Magister Juris* in European and Comparative Law aan de Universiteit van Oxford. Van 2003 tot 2008 was hij als junior docent en promovendus verbonden aan de Afdeling Internationaal Privaatrecht en Privaatrechtelijke Rechtsvergelijking van de Faculteit der Rechtsgeleerdheid in Leiden. In 2004 ontving hij een 'Allen & Overy Onderzoeksbeurs' voor een studie naar het Europees bevoegdheidsrecht, en in het najaar van 2006 gaf hij als Visiting Assistant Professor les aan het Hastings College of the Law (University of California) te San Francisco. Sinds 2008 doceert hij aan de London School of Economics and Political Science, in het Verenigd Koninkrijk. Jacco woont in Brussel met zijn echtgenote, Andrea, en hun twee kinderen, Emma en Matthias.

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