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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Two Discourses of Balancing

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

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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

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.

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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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