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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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

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[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) ("I*nteressenjurisprudenz* 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, *Lochhner'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).