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

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

PART III

GENEALOGIES 2: PRINCIPLE AND POLICY

CHAPTER 4

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

4.1 INTRODUCTION TO PART III

4.1.1 Aims and set-up of this Part

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

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

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

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

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

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

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

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

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

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

model set out in Chapter 2. Chapter 5 then presents two strands of thought that make-up much of balancing's local meaning in German constitutional discourse: those of the 'material' constitution (Section 5.2) and of the 'comprehensive' constitutional order (Section 5.3).

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

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

4.1.2.1 The advent of balancing in free speech jurisprudence

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.1.2.3 Freedom of expression adjudication as a case study

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

(a) The centrality of freedom of expression

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

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

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

(b) The 'comparability' of freedom of expression

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

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

(c) The 'novelty' of freedom of expression

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

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

(d) Freedom of expression and balancing

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

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

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

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

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

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

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

These claims are relevant to both the feasibility and the relevance of the project undertaken here. The durable conviction that similarities in balancing language stood for similarities in underlying practices and ideas provides a supportive precedent for the idea that the discourse of balancing is sufficiently cohesive to serve as an object of comparative inquiry. That would make the project undertaken here feasible. That same persistent focus on similarities, coupled with the differences between German and U.S.

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

ideas and practices observed in the previous Chapter, however, also indicates that it might be worthwhile to see whether the *Bundesverfassungsgericht* and U.S. Supreme Court and their respective commentators did in fact mean the same thing when they spoke of balancing. That, in turn, would be a first step in making this project relevant.

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

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

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

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

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

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

In 1950, Erich Lüth, at the time Chairman of the Publications Office of the City of Hamburg, gave a lecture before members of Germany's motion picture industry. In his lecture, Lüth called for a boycott of a new film by Veit Harlan, a film director who, during the fascist-era, had produced a strongly anti-semitic film (*Jud Süss*). Lüth was afraid that Harlan's re-emergence as a director would stain Germany's image abroad and

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

would complicate efforts to rebuild relations between Christians and Jews; a cause he himself was particularly closely involved in. The producer and distributor of Harlan's new film brought an action against Lüth on the basis of art. 826 of the Civil Code, claiming that his call for a boycott was a tortious act – an "*unerlaubte Handlung*". The civil law courts found against Lüth and ordered him to refrain from promoting any further boycott of Harlan's film. Lüth then filed a "*Verfassungsbeschwerde*" – an individual constitutional complaint – with the FCC.

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

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

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

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

[547] Translated in EBERLE (2002), 209.
[548] BVerfGE 7, 198, 210-211 [1958].

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) Strains and questions

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

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

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

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

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

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

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

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

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

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

4.3 CONTEMPORARY CRITIQUES OF THE *LÜTH* LINE ON BALANCING

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

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

4.3.1 The nature and scope of balancing

A first way to distinguish among contemporary interpretations of the FCC's *Lüth*-line of decisions is according to the position commentators took on the question of what balancing, in FCC case law, *was*. This Section discusses three important perspectives. First, the idea that the FCC's balancing's language did not in fact reflect the Court's actual approach in the relevant cases. Second, the idea that balancing had to be seen, at least in part, as an element of - and therefore had to be analysed and criticized at the level of - overarching theories of constitutional law. And third, views of balancing as simply a method of legal interpretation or of legal reasoning, to be analysed and criticized primarily as one of a range of available such methods. In short, these are the perspectives of balancing as just language, balancing as constitutional theory, and balancing as legal reasoning. As will be seen below, these perspectives showed considerable overlap. For one: the 'levels' of constitutional rights theory – nr. (2) - and of legal (constitutional)

[589] See also *infra*, s. 4.3.1.

interpretation and argumentation – nr. (3) – were and are closely intertwined. Also; those arguing that the FCC's balancing language did not reflect underlying methods generally had an idea of 'real' balancing in mind, which they might defend or critique on grounds of constitutional theory – nr. (2) – or standards for legal reasoning – nr. (3). There were, however, differences in emphasis, which this Section aims to elucidate. A subsequent Section will discuss the third level – the legitimizing force of balancing as interpretation or legal reasoning – in more detail.[590]

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

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

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

[590] Note: One 'level' of analysis largely absent from German legal thought is that of balancing 'as Art. 5 Basic Law doctrine', in the American sense of balancing 'as First Amendment doctrine', which was pervasive in the U.S. at the time studied. See further *infra*, s. 6.4.2.1.
[591] "Without any real balancing"
[592] Arndt, *Zur Güterabwägung bei Grundrechte* (1966), 869 ("On Balancing and Fundamental Rights").
[593] Ibid., 871.
[594] Ibid. See also Schnur, *Pressefreiheit* (1965), 122-123 ("*Allgemeine Formeln können nicht zur Antwort verhelfen*", which could be translated by way of the Holmesian aphorism that general propositions do not decide concrete cases) and 127 (speaking of the '*Leerformel*' – the empty formula - of interest balancing).
[595] SCHLINK (1976), 20-21. See also 24-25 and 27-28 for a similarly ambivalent analysis of *Schmid-Spiegel* and *Blinkfüer*. See also KOMMERS (1997), 401 (arguing that while the *Spiegel* decision "reaffirmed the validity of the balancing test set forth in *Lüth*", the Court in the *Spiegel* case curiously "*did not employ* a balancing analysis", emphasis added).

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

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

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

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

4.3.1.2 Balancing and theories of constitutional (rights) law

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

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

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

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

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

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

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

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

4.3.1.3 Balancing as legal reasoning or interpretation

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

What these and other similar contributions have in common is their view of balancing as an *empty* idea and/or as an *irrational* form of argument. On this view, courts may purport, aim and believe to be employing balancing as a standard for constitutional adjudication, but, since this formula is in fact devoid of any guiding power – "*kriterienlos*" -,[623] what these 'balancing judges' actually do, is follow their own convictions or some other standard inappropriate to constitutional rights adjudication.

There seem to have been two main varieties of this form of criticism. On one view, balancing's lack of content meant an unwarranted departure from conventional *legal method*; on the other, the emphasis was on balancing as lying outside the realm of *rational*

616 Klein, *Öffentliche und Private Freiheit* (1971), 154-155.
617 *Ibid.*
618 *Ibid.*
619 MÜLLER (1966), 208.
620 *Ibid.*, 211.
621 *Ibid.*, 209 ("*kaum anders als affirmativ*").
622 *Ibid.*, 209.
623 *Cf.* Böckenförde, *Zur Kritik der Wertbegründung des Rechts* (1987), 81.

argument. In both cases, what was objected against was the fact that balancing did not exercise any independent constraining force – in terms of the rules of legal doctrine or through the rules of rational argumentation – on the personal preferences of the individual deciding judge. Where, as in many contemporary German perspectives, legal method and the standards of rationality are held to overlap, the charge is substantively identical.[624] On either view, balancing is illegitimate as a mode of arguing in constitutional rights adjudication.

Two examples of the view that balancing is 'empty' or irrational, are Von Pestalozza's seminal article '*Kritische Bemerkungen zu Methoden und Prinzipien der Grundrechtsauslegung*' ('*Critical Remarks on the Methods and Principles of the Interpretation of Constitutional Rights*', 1963) and Schnur's lecture on freedom of the press, mentioned above (1963, published in 1965).[625] For Von Pestalozza, balancing is "a circular argument", a "tautology" and an "empty formula" – a "*Leerformel*".[626] "The principle of balancing", in Von Pestalozza's view, "is merely a shell, to be filled with substantive criteria".[627] Schnur argues along very similar lines that "general formula's cannot bring answers", and that "to balance, one needs units of measurement"; substantive criteria that the formula of balancing itself cannot provide.[628]

4.3.2 Critiques of the legitimizing force of balancing as interpretation

For Schnur and Von Pestalozza and the other writers just cited, balancing's emptiness and irrationality as a method distinguishes it from what courts *should* be doing with regard to the Constitution. And that, in the most general terms would be to *interpret* it - with 'interpretation' equalling both 'legal method' and (legal) rationality. This charge is also visible in the work of commentators like Forsthoff and Böckenförde who, as has been seen, combined their attacks on balancing as an irrational form of argument with their critique of balancing as the implementation of a misguided theory of the constitution.

Within this broad range of critiques, commentators adhered to different understandings of what good legal interpretation or argumentation should look like. A second step in uncovering the significance of 1960s critiques of balancing, therefore, is to analyse these various understandings of the legitimizing force of legal argument. The content of these definitions, the kinds of *'rational' alternatives* suggested for balancing, and the answer to the questions of whether legal reasoning *can ever be rational at all*, are important indicators of balancing's local meaning.

In Chapter 2, several elements of the 'legitimizing force' of legal arguments were related to ideas on rationality in law. Max Weber's formal legal rationality was presented

[624] The extent to which these domains are thought to overlap is contingent.
[625] Von Pestalozza, *Kritische Bemerkungen* (1963); Schnur, *Pressefreiheit* (1965).
[626] *Ibid.*, 448. Von Pestalozza is especially critical of the fact that balancing reasoning does not itself provide an '*Abwägungsmaßstab*' (at 447).
[627] *Ibid.*, 449.
[628] Schnur, *Pressefreiheit* (1965), 122-123.

as an archetypical instance of 'formal-universalizing' legitimizing strategies. Weber's substantive rationality and irrationality were discussed as 'substantive-contextualizing' strategies. And 'dialectical' or 'topical' models of legal reasoning were identified as instances of 'mediating-integrative' legitimizing strategies. This Section places these understandings alongside early 1960s German debates on the rationality of balancing in constitutional adjudication.

4.3.2.1 Legitimizing force and legal formality

Forsthoff's views, discussed above, offer the archetypical mid-century example of a balancing critique turning on classical, Weberian formal rationality. For Forsthoff, the constitution has an "unideologically-rational" structure that allows for answers to concrete problems to be "deduced" from its overarching complex, in a way that is "*logisch nachvollziehbar*" – "logically replicable".[629] With this statement, Forsthoff aligned himself with a distinguished tradition within German constitutional law where, in the second half of the Nineteenth Century, towering scholars like Von Gerber and Laband had argued that the object of constitutional law scholarship had to be the development of a conceptual system that could function as the basis for "secure juridical deduction" – "*sichere juristische deduction*".[630] As was mentioned in Chapter 3, it was an idealized form of this understanding in private law scholarship that Weber took as the starting point for his conception of formal legal rationality.

Forsthoff's analysis is a rare example of an explicit assessment of the FCC's balancing approach on the orthodox standards of formal legal rationality – the ideal of "correct subsumption in the sense of a syllogistic argument".[631] And, as mentioned above, Forsthoff clearly found the FCC's approach wanting, arguing that it was in urgent need of an "equivalent for the disciplining effect" of that found in the traditional rules of interpretation.[632] Although Forsthoff's comprehensive critique of the FCC's methods in terms of the "deformalization of the constitution" was rare, numerous authors shared his concerns about allegedly excessive particularity in FCC balancing case law. For these commentators, the FCC had erred primarily in combining an abstract weighing of values with a particularistic balancing of interests in the individual case.[633] Perhaps the most prominent author taking this line was Roman Herzog. Herzog conceded that balancing between competing goods on some abstract level was generally "*unumgänglich*" – "unavoidable" -,[634] but attacked the individualized nature, or the particularism, of the

[629] Forsthoff, *Der introvertierte Rechtsstaat und seine Verortung* (1963), 178-182. See Forsthoff, *Die Umbildung des Verfassungsgesetzes* (1959), 151 for a discussion of Weber. On Forsthoff's call for a return to 'classical hermeneutics', see also Peter Schneider, *Prinzipien der Verfassungsinterpretation*, 20 VVDSTRL 1, 3 (1963).
[630] See, *e.g.*, VON GERBER, GRUNDZÜGE EINES SYSTEMS DES DEUTSCHEN STAATSRECHT viii (2nd ed., 1869), viii, cited in Schneider, *Prinzipien der Verfassungsinterpretation* (1963), 37.
[631] Forsthoff, *Die Umbildung des Verfassungsgesetzes* (1959), 135.
[632] *Ibid.*, 138.
[633] See, *e.g.*, Herzog, in MAUNZ-DÜRIG-HERZOG-SCHOLZ (1968), nr. 252ff; Bettermann, *Die allgemeinen Gesetze* (1964), 602ff.
[634] Herzog, in MAUNZ-DÜRIG-HERZOG-SCHOLZ (1968), nr. 252.

Court's balancing.[635] Herzog's commentary on Art. 5 GG describes his objection to the fact that balancing in the *Lüth* case "does not play out in the form of an abstract balancing of abstract legal values, but has been 'developed' by the Court into a balancing in the individual case, (...) [There is no longer] a balancing of legal values – '*Güterabwägung*' -, but rather a balancing of the opposing interests of two individuals – '*Interessenabwägung*'".[636] Arguments against this form of '*Güterabwägung im Einzelfall*' were, in particular, the threat posed to legal certainty and the predictability of constitutional law, and the arrogation of power implicit in the judicial *ad hoc* evaluation of State action.[637] Instead of the Court's particularized balancing in light of all the circumstances of the case, Herzog pleaded for a more structured approach that would proceed in two steps. In a first stage, the Court should only look at the value of the competing '*Rechtsgüter*' in the abstract. A second step should then take into account what Herzog called the "*Gefahrenintensität*" – the degree to which the abstract value was threatened in the circumstances of a particular case.[638] As Herzog wrote, such a phased review of '*Schutzgut*' and '*Gefährdungsgrad*' – the value to be protected and the severity of the threat -, would mean drawing upon the "principle of necessity"– "*Erforderlichkeitsprinzip*" –, familiar from other areas of constitutional jurisprudence, in the process of free speech balancing.[639]

Roman Herzog's work, then, in part entails an effort to discipline judicial balancing through a framework of 'steps' or 'stages'. In this sense, it can be seen as a precursor to the writings of later authors who increasingly came to see balancing as part of a broader three-step proportionality model.[640] To the extent that these 'steps' or 'stages' are intended to regulate judicial evaluations, they are operationalizations of ideals of legal formality. That is true also for Herzog's emphasis on the need for weighing on a higher plane of abstraction, in the earlier part of his proposals.

[635] *Cf.* Scheuner, *Pressefreiheit* (1965), 82 ('*individualisierende Güterabwägung*').
[636] Herzog, in MAUNZ-DÜRIG-HERZOG-SCHOLZ (1968), nr. 252. See, in addition to the sources cited by Herzog, LERCHE (1961), 150 (citing Forsthoff); Klein, *Öffentliche und private Freiheit* (1971), 151; Bettermann, *Die allgemeinen Gesetze* (1964), 601-602. When the Court in *Lüth* required an evaluation "on the basis of all the circumstances of the case", Bettermann wrote, it put "casuistry and *ad hocery* in the place of constitutional interpretation".
[637] *Ibid.* See also LERCHE (1961), 150 (arguing that the '*Gesetzesvorbehalt*' of Art. 5 GG has become an '*Urteilsvorbehalt*').
[638] Herzog, in MAUNZ-DÜRIG-HERZOG-SCHOLZ (1968), nr. 267. For an earlier effort in this direction (in the field of private law), see Heinrich Hubmann, *Grundsätze der Interessenabwägung*, 155 ACP 85, 110ff (1956) (under the headings of '*Interessennähe*' and '*Interessenintensität*').
[639] Herzog, in MAUNZ-DÜRIG-HERZOG-SCHOLZ (1968), nr. 267. This last element, though not the abstract balancing of Herzog's first stage, is shared by SCHLINK (1976), 198ff.
[640] *Cf.* Fritz Ossenbühl, *Abwägung im Verfassungsrecht*, 1995 DVBL. 904, 905 (1995). On this transformation further Schlink (1976), 59ff, 143ff. On the relationship between balancing and proportionality, see also ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (Julian Rivers, trans., 2002).

4.3.2.2 Legitimizing force, discipline and 'dialectical rationality'

Roman Herzog's two-step approach can be seen as an attempt to bring 'discipline' to balancing-based reasoning. As such, his work fits among the views of a broad group of commentators who similarly criticized the FCC for leaving its balancing approach unstructured, inconsistent and unclear in its actual operation. The background to these critiques was an acknowledgment – or even an enthusiastic embrace – of the idea that explicit balancing was going to remain a fixture of the Court's practice, and a recognition that the task of constitutional scholarship should therefore be to help improve the Court's methods.

These critiques are interesting primarily for two points: for what they say about how constitutional scholars viewed their own relationship to the Court, and for the content of the actual proposals.

(1) With regard to the first issue; a pervasive, double sided theme within the relevant debates of the 1960s was that (a) a form of malaise in the *scholarship* of constitutional interpretation was, at least partly, to blame for defects in the Court's approach, and (b) improvement in scholarly work on constitutional interpretation could make a real contribution towards better decisions. The weaknesses in the Court's balancing approach were understandable, wrote Friedrich Müller in 1966. After all, "*Die Theorie hat der Praxis bisher kaum verwertbare Hinweise (…) gegeben*" – theoretical scholarship had not offered sufficient assistance to the courts.[641] What was needed was "*hermeneutische Präzisierung*" - hermeneutical clarification and sharpening -, to be offered, naturally, by academics.[642] These two convictions help explain why many authors asked for their contributions to be understood "not as criticism of the Court, but as a call to persevere in efforts to create a consistent, convincing constitutional dogmatics – '*Verfassungsdogmatik*'".[643] The quest, to be led by scholars, is to develop methods of interpretation that are "theoretically-scientifically secure".[644] This conception puts a gloss on the contributions of scholars intended to discipline or structure the FCC's balancing approach in that it implicitly accepted the standards of "*juristischer Wissenschaftlichkeit*" – the scientific standards of the scholarly community - as relevant to the evaluation of the Court's work.

(2) With regard to the second point – the content of these critical-supportive scholarly proposals –, an important and widely shared trend in legal scholarship of the late 1950s and early 1960s was a turn towards the standards of 'dialectical reasoning' as ideals for legal argumentation. Rather than relying on the analytical structure of 'steps' or

[641] MÜLLER (1966), 211.
[642] *Ibid.*, 212. See also KRIELE (1967), 17 ("*Alles, was dazu nötig ist, ist eine Methodenlehre...*").
[643] Roellecke, *Prinzipien der Verfassungsinterpretation* (1976), 24. See also at 49 ("*Das Gericht spiegelt nur die Ergebnisse der wissenschaftlichen Methodendiskussion wider*"). See also Ehmke, *Prinzipien der Verfassungsinterpretation* (1963), 59 (blaming not the Court's approach to concrete cases, but "*die Methodenauffassung unserer herkömmlichen Auslegungslehre*").
[644] Schneider, *Prinzipien der Verfassungsinterpretation* (1963), 15.

'stages' of the kind proposed by Herzog, these approaches sought to discipline legal reasoning by way of an invocation of certain 'rules' for rational deliberation and interpersonal agreement.[645] It is this project, and its implications for the meaning of balancing, that will be discussed in the remainder of this Paragraph.

(a) The project and standards of dialectical reasoning in law

By the early 1960s, the ideal of formal rationality in law as espoused by Ernst Forsthoff, had come under increasing pressure.[646] In the course of the 1950s, a number of writers, in particular the private law scholar Theodor Viehweg in Germany and the philosopher Chaïm Perelman in Belgium, had been concerned with the rehabilitation of Aristotle's model of 'dialectical argumentation', described in *The Topics*, as a normative basis for legal reasoning.[647] Virtually simultaneously, another professor of private law, Josef Esser, undertook a large-scale comparative study of common law adjudication to argue, in very similar Aristotelian terms, for an understanding of private law jurisprudence as a 'practical' discipline.[648] The philosopher Hans Georg Gadamer, finally, also using classical sources, redirected attention to 'practical reason' and to the importance of "*Vorurteile*" – literally "prejudgments", convictions already held – for deciding normative questions.[649] What these efforts had in common was a rejection of the formal-logical quality of (legal) reasoning;[650] an opening-up of legal argumentation to new sources of input beyond norms, including, primarily, 'principles' and common understandings and conventions – 'ενδοξα' -[651], a new emphasis on legal argumentation as a practical,[652] dialectical discipline aimed at *convincing* rather than at *proving*.[653]

[645] This rule-based character also implies a formal dimension. See for the relevant definitions *supra*, s. 2.4 and 2.5.4.
[646] For such an assessment in the constitutional law context, see, *e.g.*, the opening lines of Kriele's '*Theorie der Rechtsgewinnung*': "The classic conception in German constitutional legal thinking of the nature of 'juristic method' in general and of the nature of constitutional interpretation more specifically that is still prevalent, is so alien to the new realities of constitutional adjudication that it is in real danger of making impossible demands". KRIELE (1967), 5.
[647] *Cf.* Chaim Perelman & Lucie Olbrechts-Tyteca, *The New Rhetoric* (1958), in THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT (1963); THEODOR VIEHWEG, TOPIK UND JURISPRUDENZ (1953).
[648] JOSEF ESSER, GRUNDSATZ UND NORM NORM IN DER RICHTERLICHEN FORTBILDUNG DES PRIVATRECHTS (1956). Esser's source of inspiration was primarily common law adjudication (see, *e.g.*, Ehmke, *Prinzipien der Verfassungsinterpretation* (1963), 55). But Esser also made frequent reference to Aristotelian ideas and terms, notably at 48 (qualifying '*Interessenjurisprudenz*' as 'topical' jurisprudence) and 53 (referring to the Aristotelian term ενδοξα, to designate generally accepted opinions).
[649] HANS-GEORG GADAMER, WAHRHEIT UND METHODE (1960).
[650] *E.g.* LARENZ (1st ed., 1960), 136; LARENZ (3rd ed., 1975), 139 (on Viehweg). On Gadamer's critique of Cartesian logic, see, *e.g.*, DONATELLA DI CESARE, GADAMER: EIN PHILOSOPHISCHES PORTRÄT 112 (2009).
[651] ESSER (1956), 53; KRIELE (1967), 106. '*Endoxa*' are 'generally accepted opinions'; '*Topoi*' are 'common places'.
[652] See VIEHWEG (1953), 85 (on the link between jurisprudence and problem solving).
[653] Note that the term 'dialectical' appears in at least three different meanings in the relevant works: (1) a dialectical relationship between 'pre-positive' content and 'posited' form, *e.g.* in LARENZ (1st ed. 1960), 131; (2) a dialectical relationship between major and minor premise in syllogistic reasoning, *e.g.* in von Pestalozza, *Kritische Bemerkungen* (1963), 426; (3) the dialectical nature of legal argumentation in the sense used by Viehweg, Esser and others. In yet a fourth sense, the term 'dialectical' was used to characterize the

In the early 1960s, just a few years after the FCC's *Lüth* decision, a number of public law scholars began to tap the work of these private law thinkers and philosophers to develop a new conception for the rationality of constitutional legal reasoning. Thus, in 1961, when the German Association of Constitutional Law Scholars met in Freiburg for their annual assembly to discuss '*Priniciples of Constitutional Interpretation*' – the first time this prominent body discussed constitutional interpretation *in plenum* since the *Lüth* decision - dialectical rationality and topics stood at the centre of attention. Both main lectures on this theme, in effect, were largely concerned with this specific project.[654]

Obviously, the different constitutional scholars differed in their emphases and interests, but a number of important main themes can be distinguished. These themes concern the *object* or *purpose* of legal interpretation, its *input* and *process*, and its *evaluation*.

(1) The purpose of legal reasoning, in the new views, was the "*Aktualisierung*" – "actualization" – and "*Konkretisierung*" – "concretization" – of legal norms.[655] *Concretization* meant determining the content and "the reality" of norms anew in each case, "bound by particular rules of art, certainly, but always with the aim of *actuality*";[656] an aim of bridging the gap between past and present, between legislative ideal and social reality.

(2) With regard to the 'input' of legal reasoning, the new theories brought a revaluation of the importance of the position and views of those individuals that decide legal questions. Referring to Gadamer, Viehweg and Esser, Christian von Pestalozza argued, for example, that in constitutional law too, interpretation was influenced "by the particularities of the interpreter".[657] Rather than neglecting or minimizing the importance of the predispositions of judges, constitutional scholars should acknowledge that the "*Vorurteil*" was "*essential* to interpretation".[658] Also on the input side, scholars began to argue that constitutional law, like private law, had a "*topische Grundstruktur*"; an "open" structure in which multiple "*interpretationsgesichtspunkte*" – "perspectives of interpretation" - such as values, legal goods and principles all had a role to play.[659]

(3) This re-appreciation of the outlook and position of the interpreter and the widening of the range of permissible 'input' materials to include values and "*Rechtsgüter*" went hand in hand with changes in the understanding of the *process* and *evaluation* dimensions of legal reasoning. As it was put in the 1961 Freiburg lectures, legal interpretation "as a process of thought", while clearly not entirely irrational, could no

relationship between constitutional rights and their exceptions, *e.g.* in KOMMERS (1997), 415-416 (quoting Helmut Steinberger, 1983).
[654] The papers on '*Prinzipien der Verfassungsinterpretation*' by Schneider and Ehmke (published in 1963). See also von Pestalozza, *Kritische Bemerkungen* (1963), 427ff (referring to Gadamer, Esser and Viehweg); Scheuner, *Pressefreiheit* (1965), 38fn111.
[655] *E.g.* von Pestalozza, *Kritische Bemerkungen* (1963), 427-428. The idea of '*Aktualisierung*' was introduced most prominently by Gadamer (see GADAMER (1960), 307). See also LERCHE (1961), 229-230; MÜLLER (1966), Chapter XIV. ('*Zur Konkretisierung und zur Verfassungstheorie der Grundrechte*'); KARL ENGISCH, DIE IDEE DER KONKRETISIERUNG IN RECHT UND RECHTSWISSENSCHAFT UNSERER ZEIT (1953).
[656] Von Pestalozza, *Kritische Bemerkungen* (1963), 427-428 (emphasis in original – '*Aktualität*').
[657] *Ibid.*, 429-430.
[658] *Ibid.*, 432.
[659] Ehmke, *Prinzipien der Verfassungsinterpretation* (1963), 62, 61-71.

longer be seen as "entirely within the domain of the 'rational'" either.[660] "Logically compelling conclusions" in the traditional sense were only available "to a very limited extent in jurisprudence generally and in constitutional law specifically".[661] Not the traditional exigencies of logical demonstration, therefore, but the "*Überzeugungskraft*" – "convincing power" – of a particular form of argumentation should determine its value;[662] to be assessed, not by the *Bundesverfassungsgericht* itself, but by a "consensus of all rational and reasonable individuals".[663] "The demands from the perspective of rationality", then, could be summarized "under the maxim of "optimally susceptible to discussion" – "*maximaler Diskutierbarkeit*".[664] The classical views of "*Subsumtions-positivismus*" had forced legal decision making to face an unrealistic and unattractive alternative: legal reasoning was *either* fully rational and conclusive, *or* it was "left hopelessly in the hands of arbitrariness and convenience".[665] In place of these outdated views, the topical theories of law put a criterion of "justifiable on methodologically acceptable grounds that are susceptible to rational deliberation".[666]

(b) General acceptance of the standards of dialectical reasoning in constitutional jurisprudence

With the advent of this dialectical turn in German constitutional scholarship came the potential for a considerable broadening of the range of criteria for the evaluation of the rationality of constitutional legal reasoning. A number of gradations now were available, ranging from Forsthoff's extremely demanding "*logisch nachvollziehbar*", via "*kontrollierbar*" – verifiable -,[667] to "*diskutierbar*" –debatable in a fair and orderly manner among independent individuals. Both the reception of these 'new' dialectical standards of legal rationality generally and the evaluation of constitutional balancing on the new standards are important indicators of balancing's contemporary local meaning. Knowing to what extent the dialectical theories came to be accepted – and for what reasons – gives an indication of the sort of criteria for legal reasoning local audiences applied to the evaluation of the FCC's balancing approach. And finding out how contemporary authors did in fact evaluate balancing on these criteria offers insight into their understanding of balancing's overall legitimizing force.

On the whole, it seems that the main tenets of the topical/dialectical theories found fairly widespread acceptance among constitutional lawyers. It has been remarked that the original 1961 Freiburg lectures met mostly with "*abwartende Zurückhaltung*", or

[660] Schneider, *Prinzipien der Verfassungsinterpretation* (1963), 34 ("*sich als Denkvorgang nicht ganz ins Rationale auflösen lasse*").
[661] Ehmke, *Prinzipien der Verfassungsinterpretation* (1963), 71.
[662] *Ibid.*, 71. See also Schneider, *Prinzipien der Verfassungsinterpretation* (1963), 35.
[663] *Ibid.*, 71 ("*der Konsens aller 'Vernünftig- und Gerecht-Denkenden'*").
[664] Schneider, *Prinzipien der Verfassungsinterpretation* (1963), 35.
[665] KRIELE (1967), 54.
[666] *Ibid.*, 54 ("*daß sich die Meinung durch methodologisch akzeptable Gründe rechtfertigen läßt. Methodisch akzeptabel sind aber nur Gründe die rational diskutierbar sind*").
[667] *Cf.* MÜLLER (1966), 209.

reticence,[668] and certainly commentators differed in the extent to which – and the reasons for which – they embraced the new ideas. But many influential authors did take up at least part of the dialectical theorists' suggestions. "*Verfassungsinterpretation ist Konkretisierung*" wrote Konrad Hesse, a onetime judge of the FCC in his widely used textbook on constitutional law.[669] In the absence of a logical-axiomatic closed system, constitutional reasoning could only be "topical" and directed at providing "convincing justifications" for decisions.[670] Similarly, in a contribution on '*Principles of Constitutional Interpretation*', published in the *Festschrift* for the FCC's 25th anniversary, professor Gerd Roellecke took as his starting point the observation that the relevant question in assessing the Court's decisions was whether its reasoning was "*plausible*". The object of constitutional interpretation, on the whole, was to obtain "*Zustimmung*" – assent, and what mattered, therefore, was whether the Court's argumentation was "*überzeugend*", or convincing.[671]

Roellecke's article is particularly revealing because of the way it identifies balancing itself as a '*topos*' – the "*Güterabwägungstopos*".[672] His contribution thus provides a link to the issue of the evaluation of balancing on topical/dialectical standards. And on this issue too, Roellecke's views are largely representative. Since, while many commentators found some place for the standards of dialectical rationality in constitutional legal reasoning, most of them went on to *condemn* the FCC's balancing precisely as failing to live up to these new standards. Put most succinctly; the Court's balancing decisions, such as *Lüth*, simply "did not convince".[673]

Among those commentators who broadly accepted the relevance and appeal of 'dialectical' or 'topical' standards of legal reasoning, three principal types of assessment of balancing can be distinguished. Some largely *accepted* the FCC's balancing's approach on these standards; some used these standards to *object* to the FCC's balancing; and some *reframed* the FCC's balancing approach in the terms of dialectical reasoning.

(c) Balancing and dialectical reasoning (I): Acceptance of the FCC's balancing approach

A rare *positive* evaluation of balancing in terms of dialectical reasoning can be found in Ulrich Scheuner's 1963 lecture on freedom of the press. "The insight that the application of legal norms does not depend solely on logical deduction, but that the concretization of general norms constantly requires supplementary valuations", Scheuner argued, "points to the importance of balancing the relevant ethical principles as well as

[668] *Cf.* KRIELE (1967), 115.
[669] KONRAD HESSE, GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND (1st ed., 1960, 19th ed., 1993) (references are to the 1993 edition), nr. 60.
[670] *Ibid.*, nr. 67. See also nr. 61ff on the importance of the '*Vorverständnis*' (citing Gadamer and Viehweg).
[671] Roellecke, *Prinzipien der Verfassungsinterpretation in der Rechtssprechung des Bundesverfassungsgerichtes* (1976), 23, 29.
[672] *Ibid.*, 29.
[673] *Ibid.*

the social interests concerned in the interpretation of fundamental rights".[674] If the Court were to hide behind "the old logical-systematic method, in those cases in which its boundaries are overstepped", this would merely "amount to self-deception".[675] Scheuner was, therefore, glad to observe "a clear commitment to the modern methods of interpretation" in the case law of the FCC, and in particular in the Court's balancing approach.[676] It is clear from Scheuner's lecture that the 'modern methods of interpretation' he refers to, are the dialectical/topical theories just discussed.

(d) Balancing and dialectical reasoning (II): Rejection of the FCC's balancing approach

Most commentators, however, found the Court's balancing wanting on the new standards. Scheuner's co-referent at the 1963 Saarbrücken Meeting, Roman Schnur, for example, argued that the Court's balancing in case like *Lüth* led to decisions that were "no longer rational", in the sense of "controllably linked to the Constitution".[677] Schnur, like many others, drew a strong distinction between reasoned "*Auslegung*" – interpretation – on the one hand, and the use of "*Leerformeln*" – empty formula – like balancing on the other. In the latter case, instead of following a rational process of deliberation, decision making was reduced to a "*Wettlauf*", a competition or a shouting match, between parties, with the court cutting off the formulation of their claims at an arbitrary moment, by way of an "abrupt" decision.[678] Such a brusque ending was contrary to the rules for inter-subjective deliberation that were central to the new theories of rationality in law.

In another article on freedom of expression of a few years later, Hans Klein similarly attacked Scheuner's plea for "*individualisierende Güterabwägung*", using the dialectical criteria of rationality.[679] If one compared the Court's reasoning in *Lüth* and *Blinkfüer* - the two boycott cases -, Klein argued, "it was not demonstrable, on the basis of criteria equally susceptible to all that are rational and therefore binding" why freedom of expression was, or was not, given precedence over competing values and interests.[680] In Klein's work again, an acceptance of the dialectical theories' new criteria for the rationality of legal reasoning was combined with a *rejection of balancing* on precisely the criteria suggested by these theories.[681]

[674] Scheuner, *Pressefreiheit* (1965), 55 ("*Aus der Einsicht daß Anwendung rechtlicher Normen in Ausführung und Rechtsprechung nicht allein auf logischer Ableitung beruht, ..., ergibt sich die Bedeutung, die der Abwägung der beteiligten ethischen Prinzipien wie auch der Beurteilung der mitsprechenden sozialen Interessen in der Grundrechtsinterpretation*", citing Esser, at 60-61).
[675] *Ibid.*, 61-62.
[676] *Ibid.*, 61 ("*Ein klares Bekenntnis zu den modernen Auslegungsmethoden ...*"). See also at 38 (arguing that constitutional law especially is in need of 'topical' interpretation).
[677] Schnur, *Pressefreiheit* (1965), 127-128 ("*eine rational, d.h. an der Verfassung … überprüfbare Entscheidung*").
[678] *Ibid.*, 128 ("*unvermittelt*").
[679] Klein, *Öffentliche und Private Freiheit* (1971), 154.
[680] *Ibid.*, 155 ("*an Hand jedermann gleichermaßen einsichtiger, rationaler und darum verbindlicher Kriterien*").
[681] The term 'new' can be used with some justification, as the dominant understanding at the time was that the theories of Viehweg and Esser did indeed represent a 'new' phase in the understanding of legal reasoning.

Outside the immediate context of freedom of expression one can find similar assessments. A prominent example is Friedrich Müller's wide-ranging 1966 study on the structure of constitutional norms. For Müller, the central question with regard to constitutional balancing was "how the goods to be balanced may be rationally described and valuated in a verifiable and truly inter-subjectively debatable way".[682] Müller's criterion of "*potential for inter-subjective deliberation*" was clearly inspired by the scholarship on new forms of rationality. And it was on this criterion that Müller found the Court's balancing deficient. The FCC's balancing was "*kaum kontrollierbar*" – "virtually unverifiable". The Court's decisions were proclaimed in a way that was "*kaum anders als affirmativ*" – "scarcely different from merely propositional". Balancing decisions, in short, did not rest on rational deliberation, but merely posited "*ein Wort ... gegen ein anderes Wort*".[683]

(e) Balancing and dialectical reasoning (III): Recasting the FCC's decisions in 'practical' terms

Many commentators, then, *rejected* the Court's balancing on the new criteria. The FCC's balancing was *not* seen as conducive to rational dialectical discussion, or as increasing the 'potential for inter-subjective deliberation'. It did nothing or very little, in these writers' views, to augment the '*Überzeugungskraft*' – the convincing power - of the Court's decisions.

This summary conclusion is particularly interesting given how easy it is to think *in the abstract*, as an outside observer, of ways in which the standards of dialectical rationality and balancing-based discourse might be intimately related. Ideas of balancing and understandings of dialectical or topical reasoning could, at least in theory, refer to very similar things. Balancing might be taken to open up judicial argumentation to the broader range of input – principles, shared convictions, *etc.* - that the dialectical scholars were keen on promoting. And an understanding of legal reasoning as aimed at *convincing* rather than at proving could, again in theory, point specifically to balancing-based reasoning as an alternative to syllogistic demonstration and as a way to openly and dispassionately consider conflicting viewpoints.

These intuitive connections may explain a second important line in the literature: contributions that, while critical of the FCC's *Güter-* and *Wertabwägung* as too formal, sought to *recast* the Court's balancing reasoning in terms closely aligned with the standards of dialectical reasoning. Authors writing in this vein made an effort to read into the Court's decisions an idealized form of balancing that would match the dialectical rationality criteria they espoused. Gerd Roellecke, for example, was one of the authors who criticized the FCC's *Güterabwägung* as a throwback to the nineteenth-century

[682] MÜLLER (1966), 211.
[683] *Ibid.*, 209.

formalism that the *Interessenjurisprudenz* had fought so vehemently against.[684] But he also argued that, on a different reading, the "*Güterabwägungstopos*" could function as a "*legitime Argumentationsfigur*".[685] What was problematic, was the "apocryphal use of what are, as such, appropriate forms of argument" in the FCC's decisions, not the invocation of balancing *per se*.[686] The most influential attempt to reframe the Court's balancing in a way that would fit the standards of dialectical reasoning came from Konrad Hesse, later himself a long-time member of the Federal Constitutional Court (1975-1987).[687] In his textbook on the Basic Law, Hesse adopted the basic tenets of "topical reasoning" as the foundations for his approach to constitutional interpretation – an approach he labelled as "*Konkretisierung*".[688] One of the relevant '*topoi*', or "*Konkretisierungselemente*", for the Court to consider when "solving problems", according to Hesse, was "*das Prinzip praktischer Konkordanz*" – the principle of "practical concordance" or "mutual accommodation".[689] Hesse's descriptions of 'practical concordance' as requiring the "establishment of a proportional correlation between individual rights and community interests" and as aimed at the "optimization" of competing values, are in fact very close to descriptions often used for balancing.[690] Hesse is at pains, however, to distinguish his proposal from the balancing of legal goods and values found in the case law of the FCC. What he describes as "overly hasty *Güterabwägung*" and "abstract *Wertabwägung*", in his view risk promoting one value at the expense of others in ways that would undermine the fundamental unity of the constitutional order.[691] Interestingly, Hesse does not, in the relevant sections of his *Grundzüge des Verfassungsrechts*, offer any examples of how the Court's 'overly formal' approach to balancing has actually produced such one-sided results.[692] He also does not deal in any explicit way with the fact that most of the Court's *Güterabwägung* decisions in fact, as was seen above, incorporated elements of a highly particularistic *Interessenabwägung*.[693]

[684] *E.g.* Roellecke, *Prinzipien der Verfassungsinterpretation* (1976), 38. See on the *Interessenjurisprudenz* further *supra*, Chapter 3.
[685] *Ibid.*, 29-30 ("a legitimate argument form").
[686] *Ibid.*, 30.
[687] HESSE (1st ed., 1967).
[688] *E.g.* HESSE (8th ed., 1975), pp. 22-26.
[689] HESSE (19th ed., 1993), nr. 67 and 72. For a discussion in English of Konrad Hesse's contributions, see T. Marauhn and N. Ruppel, *Balancing Conflicting Human Rights: Konrad Hesse's Notion of 'Praktische Konkordanz' and the German Federal Constitutional Court*, in CONFLICTS BETWEEN FUNDAMENTAL RIGHTS 273 (Eva Brems, ed., 2008).
[690] HESSE (19th ed., 1993), nr. 318 (translated in Marauhn and Ruppel, *Balancing Conflicting Human Rights* (2008), 280ff).
[691] HESSE (19th ed., 1993), nr. 72.
[692] The themes of reconciliation and accommodation are central in FCC case law, as Chapter 5 will argue in more detail. The relevant question at this stage is whether such accommodation is only possible within Hesse's model (as he assumes) or whether the Court might be able to couple its formal understanding of value balancing with the practical dimension of accommodation. For more discussion, see *infra*, s. 5.3 and s. 8.4.
[693] See *supra,* s. 4.2.

4.3.2.3 Legitimizing force and 'the substantive' in law

Using the idea of the 'substantive' in law to analyse contemporary evaluations of balancing's legitimizing force is complex. This is in part because, as was shown in Chapter 2, the idea of the 'substantive' covers so many different elements, and in part because of the overlap with elements discussed under the previous headings. Some additional observations may, nevertheless, be useful. They aim to highlight, first of all, two dimensions of the substantive that were relatively marginal in contemporary German constitutional legal thought. These were: pragmatist and instrumentalist ideals for decision making (in a sense: the substantive and 'process') and the critique of the threat of relativization of rights through balancing (the substantive and 'outcomes'). By contrast, two dimensions of the substantive in law that were of profound relevance to balancing's local meaning both concerned 'input': the nature and range of factors considered appropriate as material for judicial decision making. These were: particularity and context-sensitivity and the role of 'values' within the theory of 'material constitutionalism'. Both will only be mentioned here, and will be discussed in greater detail in Chapter 5.

(1) Out of the range of 'substantive-contextualizing' dimensions of legitimizing force distinguished in Chapter 2, ideas of 'pragmatism' and 'instrumentalism' were marginal in German constitutional legal thought and practice of the time. This point will be discussed in more detail in Chapters 5 and 8. It will be argued there that balancing, in its German setting, was not commonly seen in terms of 'pragmatic compromise' or of 'instrumentalist' reasoning – at least not in the typically U.S. American sense of 'pragmatic' and 'pragmatic instrumentalism.[694] There is little or no talk of balancing 'costs and benefits', and no - or hardly any - discussion of balancing in terms of 'policy' jurisprudence.[695] Instead, balancing is generally pursued as a method of constitutional interpretation that aspires to juristic standards of reasoning, and that is meant to lead to a single 'correct' answer. Balancing, in an expression discussed later, is something that "*the Constitution demands*";[696] not something that can be resorted to at will.

(2) One critique of balancing with substantive overtones that did have *some* traction in contemporary debates, was the fear of the *relativization* of constitutional rights through explicit judicial weighing. "Ever since the principle of balancing has been introduced to determine the boundaries of constitutional rights", Peter Häberle observed in 1962, for example, "it has been confronted with the charge of relativization".[697] This fear, however, was hardly a dominant theme at the time. One reason was the fact that the FCC placed its balancing approach firmly within the confines of a 'value order' that was

[694] See *supra*, s. 2.5.5.2 and *infra*, s. 7.2.1.3.
[695] See *infra*, s. 8.3 and 8.4. A notable exception is SCHLINK (1976).
[696] BVerfGE 7, 198; 209. See *supra*, s. 4.2.
[697] HÄBERLE (1962), 39. See also Ridder, *Meinungsfreiheit*, in Neumann-NIPPERDEY-SCHEUNER, GRUNDRECHTE (1954), 282 (arguing that the position of Rudolf Smend, one of the main Weimar-era sources for the FCC's balancing approach, was "*zu relativistisch*". On Smend's work, see *infra*, s. 5.2.2.4).

understood to have 'objective' worth.[698] Another reason may have been the fact that absence of a tradition of judicial protection of freedom of constitutional rights meant that it was difficult to cast FCC's approach – its methods and its results in the early cases – as insufficiently protective.[699] In addition, the argument of relativization was particularly hard to make given the textual foundations of the protection of free speech in the Basic Law. It may be recalled that Art. 5 of the Basic Law, on its face, appeared to permit any kind of limitation to this freedom. It was this apparent textual mandate for repression that prompted the FCC, in its *Lüth* decision, to warn against an all too easy "*Relativierung durch einfaches Gesetz*" – a relativization of the right of free speech by way of an overly permissive attitude towards any limiting 'general law'.[700] This warning, of course, turns the standard charge of the relativization of rights through balancing on its head. The circle was complete when critics of the Court's balancing approach claimed, in turn, that the FCC had used balancing to 'relativize' the 'general laws' limitation clause of Art. 5![701]

(3) The 'substantive' in law can also be discussed in terms of the kinds of factors seen as permissible input for legal reasoning. The ideals of particularity and context-sensitivity have already been discussed as part of the 'dialectical' approaches to legal reasoning, above. That discussion has already highlighted the fact that dialectical approaches aimed to introduce these elements into judicial decision making in a disciplined and 'rational' way. Chapter 5 will add a further dimension to this discussion in the form of an analysis of the 'perfect fit' constitution – one of the central elements of balancing's German 'local meaning' to be developed there. It will be shown that particularity and context-sensitivity are important guiding principles for a constitutional order that strives for an as-close-as-possible 'fit' between the abstract meaning of constitutional clauses and their application in individual cases. It will also be argued in Chapter 5 and notably in Chapter 8 that there were strong disciplining, and therefore *formalizing*, dimensions to this context-sensitive ideal of 'perfect fit' and the mechanisms used for its implementation.[702]

(4) Also in terms of the input for decision making: the FCC's balancing approach has been shown to rely heavily on – and to be the main vector for the incorporation in Constitutional law of - the notion of 'values'. Chapter 5 contains an extensive discussion of the role of values under the heading of what will there be called 'material' constitutionalism: an understanding of the constitutional order as a 'value order'. Although an analysis of the nature of 'material' constitutionalism will have to wait until

[698] See *supra*, s. 4.2. This was one of the grounds on which Häberle himself argued that a fear of the relativization of rights was unfounded. *Ibid.*
[699] See also KOMMERS (1997), 442. Showcasing *both* the general attraction of the 'balancing = relativization' critique, *and* its inapplicability to early FCC case law, Kommers argues that many of the FCC's cases feature "delicate balancing (…). *And yet*, when viewed comparatively, the German court's record in defense of freedom of speech … easily rivals that of most of the world's advanced constitutional democracies" (emphasis added). In Kommers' view, the FCC was particularly protective of speech in its earliest decisions, such as *Lüth*, and in later decisions, with an interlude of a more deferential, less protective approach in the late 1960s – early 1970s. The relevant cases are discussed *supra*, s. 4.2.
[700] BVerfGE 7, 198; 208.
[701] *E.g.* Klein, *Öffentliche und Private Freiheit* (1971), 152.
[702] See *infra*, s. 8.2.3 and 5.3.3.

that Chapter, it can easily be seen that there is likely to be considerable overlap with the idea of legal reasoning informed by the "ethical imperatives, utilitarian and other expediential rules, and political maxims" that figure in Weber's substantive rationality.[703] It is important, however, to enter the *caveat* that while Weber saw these values as 'extra-legal',[704] this qualification would be imprecise for the values of 'material constitutionalism', in ways to be discussed in Chapter 5.

4.4 INTERIM CONCLUSION

The first decades after the Second World War saw the theme of judicial balancing become a dominant element of German constitutional legal discourse. Balancing – of values, *Güter*, interests, *etc.* – became the focal point for debate and disagreement on a wide range of issues. Whether dissenting judges or academic critics wished to support or attack the Federal Constitutional Court's interpretation of certain provisions of the Basic Law, debate the Court's broader position in the constitutional architecture or the role of judges in society or a host of other themes; they increasingly came to do so *in the language of balancing*. A first central observation to make, therefore, cannot concern the particular content of contemporary German ideas on the role of balancing, but has to be the mere fact that more and more disagreements on constitutional issues came to be discussed *within* the discourse of balancing. Towards the end of the period covered by this Chapter, by the mid-1970s, balancing truly had become "the key to the method and dogmatics of constitutional law".[705]

The relevant debates reveal a very broad range of views on what should be the appropriate criteria for the evaluation of constitutional legal reasoning, and on how balancing specifically should be rated on those standards. Predictably, no single standard – or set of standards - seems to have commanded universal acceptance and the position of balancing itself was, as has been seen, subject of intense debate. Although exclusive adherence to the standards of formal legal rationality in the classical sense was advocated only by a few commentators, these standards were broadly accepted to have some continued validity for constitutional interpretation. The advent of balancing coincided with the rise of a new understanding of what good legal reasoning should look like, and there were numerous - though conflicting - assessments of the FCC's new approach on these new standards. Finally, in terms of substantive (ir)rationality, some typical elements (pragmatism, instrumentalism) were largely absent from the relevant discussions, while

[703] See *supra*, s. 2.3.4.5.
[704] *Cf.* ANTHONY KRONMAN, MAX WEBER 77 (1983).
[705] SCHLINK (1976), 13. For an example in English, see KOMMERS (1997), 377 (a description of two decades of German free speech law, conducted entirely in terms of balancing). See also Fritz Ossenbühl, *Abwägung im Verfassungsrecht* (1995), 906 (1995) (noting a 1977 assessment that had found "106 decisions with 113 '*Güterabwägungen*' out of the 366 FCC decisions then published", and proclaiming that "one can be certain that in the two decades since then several hundred balancing decisions can be added to that number").

others ('material' constitutionalism, 'perfect-fit' constitutionalism) will be seen to have been prominent. These elements will be analysed in more detail in the next Chapter.