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

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CHAPTER 5

TOWARDS A LOCAL MEANING OF BALANCING DISCOURSE IN GERMAN CONSTITUTIONAL JURISPRUDENCE OF THE LATE 1950s - EARLY 1960s:

THE MATERIAL AND COMPREHENSIVE CONSTITUTIONAL ORDER

5.1 INTRODUCTION: CONFLUENCE AND SYNTHESIS

5.1.1 Project and argument

Balancing in German constitutional law, it was claimed at the outset of Chapter 4, sits at the confluence of a number of important strands of thought and practice. This Chapter aims to come to terms with this richness of meaning by discussing two dominant such strands; those of the 'material' constitution and of what might be called the 'comprehensive' constitutional order.

The twin ideas that the constitution should be the expression of a constellation of 'material' or 'substantive' values and ideals, and that this constellation should somehow encompass as much of the reality of public and private life as possible, are dominant features of post-War German constitutionalism. Both represent particularly successful efforts at overcoming traditional dichotomies in constitutional thinking, especially those between legal formality and substance, law and politics, and the state and the individual. Judicial balancing, it will be suggested below, figures at the centre of each, reflecting and sustaining both.

The idea of the 'material constitution' will be discussed first (in Section 5.2). This – massive – theme is approached selectively, by way of a narrative arc that connects the *Lüth* balancing decision to the writings on freedom of expression, and on constitutional law more generally, by Rudolf Smend, one of the Weimar era's most prominent jurists and the acknowledged 'father' of not only material constitutionalism but of post-Basic Law constitutional law.[706] While the main thrust of this story was familiar to German constitutional lawyers of the early 1960s, and, probably, to a somewhat lesser extent, to those of today,[707] it will be argued that the subtleties of the relationship between material constitutionalism – from Smend to *Lüth* – and balancing have not always been fully understood.

Section 5.3 elaborates the idea of the 'comprehensive constitutional order', or of 'complete constitutional justice'.[708] This Section discusses two related themes: the idea that the constitutional order should be as complete as possible in its scope of coverage, and the idea that this constitutional order should aim for a 'perfect fit' with social life. It will be argued that these two ideas are central to early Post-War German constitutionalism and that the discourse of balancing, in turn, is among their prime manifestations and modes of operationalization.

[706] See below, Section 5.2.2.1.
[707] *Cf.* Ernst Böckenförde, *Grundrechtstheorie und Grundrechtsinterpretation*, 27 NJW 1974, 1530, 1533 (1974) (arguing that the intellectual origins of material constitutionalism in Rudolf Smend's work are 'today' – that is: in 1974 – no longer appreciated by all).
[708] *Cf.* Mattias Kumm, *Who's Afraid of the Total Constitution?*, 7 GERMAN L.J. 341, 345 (2006).

5.1.2 Balancing, the formal and the substantive

Of course, the Sections below cannot claim to give a comprehensive picture of all that was significant in and about early post-War German constitutionalism, or even all that was significant about the discourse of balancing during that period. Part of the argument offered is merely that the ideas of material and comprehensive constitutionalism were important in their own right, that they are important to the meaning of balancing in the German constitutional landscape, and that balancing, in turn, is central to them.

There is, however, a further dimension to the significance of precisely these two themes of material and comprehensive constitutionalism. This is their connection to ideas of legal formality and its opposites. Most of the work involved in substantiating this connection will be undertaken in Chapter 8, but the basic relationships may be expressed as follows.

(1) 'Material constitutionalism', it will be argued, is a dominant German expression of *'the substantive' in law*. To the extent that the language of balancing was invoked as part of this specific constitutional vision, the meaning of balancing itself must understood as associated to this particular brand of substantive ideas. The German version of the substantive however, it will also be claimed in Chapter 8, is in many ways much more heavily 'formalized' than its more pragmatic and instrumentalist U.S counterparts. This difference in the meaning of 'substantive' has important implications for the meaning of balancing.

(2) 'Comprehensive constitutionalism', in turn, will be identified later on as a dominant German expression of *legal formality*. This translation in particular, is not self-evident and will therefore be discussed in detail in Chapter 8. The basic idea, however, is simply that comprehensive constitutionalism, by way of its pressures towards 'completeness' and 'perfection', is seen to exercise a kind of constraining force that is surprisingly similar to the power thought to inhere in more familiar expressions of legal formality, such as rules or hard-edged conceptual definitions.

5.2 BALANCING AND THE 'MATERIAL' CONSTITUTION

5.2.1 Introduction

A view of the Constitution as a system of *substantive values* "commands the general support of German constitutional theorists, notwithstanding the intense controversy, on and off the bench, over the application of the theory to specific situations".[709] Again and again, the FCC has confirmed the value-based nature of the Basic Law,[710] while academic commentators have incessantly stressed the dependency of the German constitutional framework on "*inhaltliche legitimation*" – "substantive legitimization".[711] The relationship between this material – or substantive – constitutionalism and balancing is of a dual nature. On the one hand, as will be argued below, a material understanding of the Constitution informs much of the FCC's balancing discourse. This means that the Court's use of balancing can only really be understood against the background of this 'material' Constitution.[712] At the same time, the discourse of balancing itself is one of the primary manifestations and instruments of this particular constitutional vision. That means, in turn, that an account of one of the dominant strands in German constitutional thought would be incomplete without an extended examination of balancing.

While material constitutionalism permeates all areas of German constitutional law, its influence in freedom of expression law has been particularly noteworthy. It was in this area that Weimar-era theorists first debated the merits of a value-oriented approach to constitutional adjudication. The story of the 'material' strand in German constitutional thought, to a large extent, therefore begins with the guarantee of freedom of expression. Going back to these Weimar-era debates makes it possible therefore to track the birth of a constitutional understanding that has been crucial to the development of constitutional balancing – and of which balancing itself has become a singularly powerful expression.

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[709] DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 47 (2nd ed., 1997). See also: Gerd Roellecke, *Prinzipien der Verfassungsinterpretation*, in: BUNDESVERFASSUNGSGERICHT UND GRUNDGESETZ: FESTGABE AUS ANLAß DES 25JÄHRIGEN BESTEHENS DES BUNDESVERFASSUNGSGERICHTS II 36 (Christian Starck, ed., 1976) (the FCC's material understanding of the Constitution is "forcefully supported by the dominant strands of constitutional theory"); Böckenförde, *Grundrechtstheorie und Grundrechtsinterpretation* (1974), 1534; Klaus Stern, *General Assessment of the Basic Law – A German View*, in: GERMANY AND ITS BASIC LAW 23 (Paul Kirchhof & Donald P. Kommers, eds., 1993) ("Constitutionalism means not only a formal constitution in which law governs, but also a material constitution which incorporates substantive values and insures their protection in law. All of this is undisputed in theory and substantiated by a wealth of literature and jurisprudence").

[710] *E.g.* BVerfGE 2, 1; 12 ('*SRP-Verbot*') [1952]; BVerfGE 5, 85; 134 ('*KPD Verbot*') [1956]; BVerfGE 7, 98; 205 (*Lüth*) [1958]; BVerfGE 10, 59; 81 ('*Elterliche Gewalt*') [1959]; BVerfGE 12, 113; 124 ('*Schmid-Spiegel*') [1961].

[711] *E.g.* BERNHARD SCHLINK, ABWÄGUNG IM VERFASSUNGSRECHT 24 (1976). See also Horst Ehmke, *Prinzipien der Verfassungsinterpretation*, 20 VVDStRL 53, 72 (1963); Peter Badura, *Verfassung, Staat und Gesellschaft in der Sicht des Bundesverfassungsgerichts* ('*Verfassung, Staat und Gesellschaft*'), in: BUNDESVERFASSUNGSGERICHT UND GRUNDGESETZ: FESTGABE AUS ANLAß DES 25JÄHRIGEN BESTEHENS DES BUNDESVERFASSUNGSGERICHTS II 9 (1976).

[712] *E.g.* Roellecke, *Prinzipien der Verfassungsinterpretation* (1976), 36.

5.2.2 The Weimar foundations of 'material' constitutionalism: The Smend-Häntzschel debate

5.2.2.1 Limiting the freedom of expression: The 'allgemeine Gesetze'-clause in the Weimar and Bonn Constitutions

Paragraph II of Article 5 of the German Basic Law establishes that the right to freedom of expression may be limited by '*allgemeine Gesetze*' – 'general laws'. It was in interpreting this limitation clause that the FCC first resorted to the language of balancing in the *Lüth* decision.[713] The Court's seminal declaration in *Lüth* that a balancing of values and of interests would be necessary to solve conflicts between the freedom of expression and "protection-worthy interests of others", occurred in the context of a paragraph concerned specifically with the interpretation of "the concept of general laws".[714]

The wording of this provision, acknowledged early on as among the most complicated and controversial of the Basic Law,[715] was taken from the corresponding article on freedom of expression in the Constitution of the Weimar Republic.[716] That earlier provision, Article 118 of the *Weimarer Reichsverfassung* (WRV), had itself already occasioned "*manche literarische Kontroversen*" during the life of the Republic, with its legislative history obscure and its meaning heavily contested.[717] As the FCC put it in *Lüth*, "the concept of the 'general' law was disputed from the beginning".[718]

The first sentence of Article 118 WRV proclaimed: "Every German has the right, within the limitations of the general laws – '*innerhalb der Schranken der allgemeinen Gesetze*' -, to express his opinion in speech, writing, press, image or in any other way".[719] The qualification 'within the limits of the general laws' formed, as was widely accepted, the key to the scope of protection for expression. The fact that this limitation appears, on its face, to be itself *unqualified*, makes comparison with the similarly 'absolutely' worded First Amendment to the US Constitution especially interesting.[720]

Apart from a short-lived effort in case law and literature, to cast the exception of the 'general laws' as a "drafting error" and therefore as meaningless,[721] two main approaches to the meaning of the '*allgemeine Gesetze*'-clause could be distinguished in contemporary literature. A debate towards the end of the Weimar period, between Kurt Häntzschel (1889-1941), a civil servant in the Internal Affairs Ministry, and Rudolf Smend (1882-1975), then professor in Berlin, epitomizes these two main points of view. Häntzschel's 1932 contribution on Art. 118 WRV to the authoritative Anschütz-Thoma '*Handbuch des Deutschen Staatsrechts*', can be seen as representative of the '*herrschende Lehre*' at the time.[722] Smend's view, laid down in his 1927 address to the German association of Constitutional Lawyers, was decidedly unorthodox at the time,[723] but has proven highly influential in post-War adjudication.[724]

The Smend-Häntzschel debate is crucial to an understanding of both the 'material' strand in German constitutional thought generally, and of modern German freedom of expression law more specifically. Post-War authors saw Rudolf Smend as the nestor of German constitutional thought, and his work as exemplary of material constitutionalism.[725] It was in the area of freedom of expression that Smend's theory received its first major practical application and, through the work of Häntzschel, an early major critical rebuttal.[726] The ensuing debate was a predominant source for the FCC's interpretation of the '*allgemeine Gesetze*' clause in the *Lüth* decision – a decision in which both Smend and Häntzschel were discussed at length.[727] Many of the early commentaries on Art. 5 Basic Law, too, dealt with these two authors.[728] As one commentator put it after the War: their writings had represented the development of thinking on freedom of expression right up to "the moment when darkness came over German thought".[729] For all these reasons, the Smend-Häntzschel debate, in effect much

713 See *supra*, s. 4.1.
714 BVerfGE 7, 198; 209 (*Lüth*).
715 Herzog, in MAUNZ-DÜRIG-HERZOG-SCHOLZ (1968), nr. 234.
716 *E.g.* VON MANGOLDT-KLEIN (1957), 235.
717 Ridder, in NEUMANN-NIPPERDEY-SCHEUNER (1954), 281 ("manifold literary controversies"). See, for a contemporary commentary: CARL SCHMITT, VERFASSUNGSLEHRE 167 (1928) (noting the "acknowledged unclear and failed wording" of Art. 118 WRV).
718 BVerfGE 7, 198; 209.
719 *Weimarer Reichsverfassung* (1919), Part II (*Grundrechte und Grundpflichte der Deutschen*), Chapter 1 (*Der Einzelperson*), Article 118 (*Das Recht der freie Meinungsäußerung*).
720 See also *supra*, s. 4.1.
721 See SCHMITT (1928), 167 ("*ein Redaktionsversehen*").
722 Häntzschel, in ANSCHÜTZ-THOMA II nr. 105 (1932) ('*Das Recht der freien Meinungsäußerung*').
723 Rudolf Smend, *Das Recht der freien Meinungsäußerung*, 4 VVDStRL (1928), reprinted in RUDOLF SMEND, STAATSRECHTLICHE ABHANDLUNGEN 89 (1955). References are to the 1955 edition. See, *e.g.*, Karl August Bettermann, Die allgemeinen Gesetze, 1964 JZ 601, 601 (1964) (writing that Smend's "famous lecture" was neither uncontroversial nor represented a dominant perspective).
724 See below on Smend's influence on the *Lüth* decision. See also Stefan Korioth, *Rudolf Smend*, WEIMAR: A JURISPRUDENCE OF CRISIS 207, 212 (Bernhard Schlink & Arthur J. Jacobson, eds., 2000) ("[A]mong German constitutional law scholars there is a current that follows Smend and that is a decisive element in contemporary debates"). Among Smend's students are influential scholars of the time, such as Ulrich Scheuner (cited below on freedom of expression), Konrad Hesse (a former judge on the FCC) and Peter Häberle (the author of a seminal early work on the Basic Law). The Smend-Häntzschel debate is discussed also in PETER LERCHE, ÜBERMAß UND VERFASSUNGSRECHT 10ff (1961). For an early discussion in English, see Herbert Bernstein, *Free Press and National Security: Reflections on the Spiegel Case*, 15 AM. J. COMP. L. 547 (1967).
725 *Cf.* Adolf Arndt, *Gesetzesrecht und Richterrecht*, NJW 1963, 1273, 1273 (1963) (referring to Smend, on the occasion of the latter's address to celebrate the 10th anniversary of the FCC, as "the nestor of German constitutional theory, who developed the theory of material constitutionalism" – '*die materiale Verfassungstheorie*'). See also Böckenförde, *Grundrechtstheorie und Grundrechtsinterpretation* (1974), 1534 (arguing that Smend's work on freedom of expression is still "*exemplarisch*" for material constitutionalism)
726 The other major critic of Smend at the time was Carl Schmitt.
727 Note: It is important to emphasize once again that the development of balancing in *Lüth* occurred, not under a heading of any abstract general principle or as part of a 'proportionality' approach, but out of these Weimar-era theories of freedom of expression.
728 See, *e.g.*, VON MANGOLDT-KLEIN (1954), 250; Ridder, in NEUMANN-NIPPERDEY-SCHEUNER (1954), 281; Roman Schnur, *Pressefreiheit*, 22 VVDStRL 101, 124-125 (1965); Herzog, in MAUNZ-DÜRIG-HERZOG-SCHOLZ (1968), nr. 241ff. Early commentaries on the *Lüth*-line of decisions, too, focused on the debate. See, *e.g.*, Hans Carl Nipperdey, *Boykott und freie Meinungsäußerung*, DVBL 445, 448 (1958); Bettermann, *Die allgemeinen Gesetze* (1964), 601. For a somewhat later rehearsal of the debate, see Hans H. Klein, *Öffentliche und private Freiheit*, DER STAAT 1971, 145, 150ff (1971).
729 Ridder, in NEUMANN-NIPPERDEY-SCHEUNER (1954), 282.

like the *Lüth* decision itself three decades later, occupies a central place in the twentieth-century development of German constitutional thought.

5.2.2.2 The 'herrschende Lehre': Definitional, categorical, formal

The dominant approach to the interpretation of the '*allgemeine Gesetze*'-clause during the Weimar-era can be described as *definitional, categorical*, and, in a sense, *absolute.* Commentators attempted to develop a precise definition of '*allgemein*' that would allow a straightforward determination of the boundaries of a category of permissible limiting laws. The main criterion for most writers was whether or not limiting laws had *as their objective* the limiting of the freedom of expression. So, for example, Gerhard Anschütz, in his Commentary on the WRV, argued that '*allgemeine Gesetze*' were those that did not "forbid an opinion as such, that are not directed against the expression of an opinion *as such*".[730] In another influential formulation, Karl Rothenbücher, at the same annual meeting as at which Smend was to present his views, suggested that permissible laws were those in defence of a '*Rechtsgut*' – a value protected in law - that was to be protected "without regard for a particular opinion".[731] Carl Schmitt, finally, was of the view that permissible 'general laws' were those that "without consideration for a particular opinion, protect a '*Rechtsgut*' that deserves protection by itself".[732]

While these approaches differed in important respects, notably in whether they merely forbade legislative targeting of specific opinions – 'content-based' distinctions, in U.S. constitutional law vocabulary - or of the expression of opinions generally,[733] they did show an overall coherence in that they did not require, or allow for, any kind of trade-off between freedom of expression and other values or interests. As long as the *purpose* of legislative action was not the prevention of the expression of (certain kinds of) opinions, Art. 118 WRV imposed no limitations on the nature and intensity of the effect these laws could have on freedom of expression.[734] There was, in particular, no room for an assessment of the kinds of goals legislatures would be allowed to promote, or of the importance of these goals, either independently or relative to the value of freedom of expression. As Roman Herzog put it later, this meant that "in all cases of conflict, the fundamental right of freedom of expression had to give way to any other kind of '*Rechtsgut*', no matter how insignificant".[735]

[730] Anschütz, cited in VON MANGOLDT-KLEIN (1954), at 250 ("*Gesetze, die nicht eine Meinung als solche verbieten, die sich nicht gegen die Äußerung der Meinung als solche richten*") (emphasis added in translation).
[731] Karl Rothenbücher, *Das Recht der freien Meinungsäußerung* 4 VVDStRL 1, 20ff (1928) ("*Gesetze, die dem Schütze eines schlechthin, ohne Rücksicht auf eine bestimmte Meinung zu schützenden Rechtsgutes dienen*").
[732] SCHMITT (1928), 167 ("*die ohne Rücksicht gerade auf eine bestimmte Meinung ein Rechtsgut schützen, das an sich Schutz verdient*").
[733] *Cf.* Herzog, in MAUNZ-DÜRIG-HERZOG-SCHOLZ (1968), nr. 242.
[734] See also the decision of the Reichsgericht (4th Penal Senate, 24 May 1930, JW 1930, 268-269 (1930), cited in Häntzschel, in ANSCHÜTZ-THOMA (1932), II-660 ('general laws' are laws "*die sich nicht gegen eine bestimmte Meinung als solche richten, die nicht eine Meinung als solche verbieten*").
[735] Herzog, in MAUNZ-DÜRIG-HERZOG-SCHOLZ (1968), nr. 243.

5.2.2.3 Häntzschel on the 'essence' of expression: Speech vs. conduct, general vs. special

Starting from a subtly different angle, Kurt Häntzschel came to a very similar result with regard to the scope of protection of Art. 118 WRV. Häntzschel began, not with a definition of the limitations – the '*allgemeine Gesetze*' -, as other mainstream writers had done, but of the right itself; '*das Recht der freie Meinungsäußerung*'. For Häntzschel, the general laws limited the right to freedom of expression to that which was "*begriffsnotwendig*" – "conceptually indispensable" – for an expression of opinion even to exist.[736] The essence of this freedom, according to Häntzschel, was to "work spiritually", by convincing others of the rightness of one's views.[737] The core of Art. 118 WRV, then, had to be to make sure that "the spiritual should not be repressed because of its mere spiritual effects".[738]

From this definition of the 'essence' of freedom of expression, two categories of limiting laws followed for Häntzschel. On the one hand, laws "that forbid or limit an otherwise permitted action, merely because of its spiritual direction ('*Zielrichtung*'), or its harmful spiritual effect ('*schädlichen geistigen Wirkung*')" are disqualified, as "*Sonderrecht*" – "special laws", instead of the permitted 'general laws' - against the freedom of expression.[739] On the other hand, whenever the expression of an opinion *goes beyond* what is "*begriffswesentlich*" – "conceptually essential" - for the freedom of expression to exist and, through its form or due to other circumstances, assumes the character of an act – a '*Handlung*', rather than a mere "*Äußerung*" -, laws that address the "direct negative material consequences" of such an act *without regard to the underlying opinion*, are allowed. Not only that, but they would be permitted without constraints.[740] Incorporating elements from what later, in American constitutional law, would be known as the 'speech'/'conduct' distinction and the 'content-based'/'content-neutral' dichotomy, Häntzschel's proposal was a sophisticated version of the dominant Weimar-era approach to the '*allgemeine Gesetze*' clause in Art. 118 WRV. It was, notably, an approach that was absolutist and formal in the sense that it did not allow for any kind of comparison between the relative worth of the freedom of expression and other societal goods.

5.2.2.4 Smend's 'materiale Allgemeinheit'

The most influential critique of this dominant perspective during the Weimar period is contained in a 1927 address by Rudolf Smend. Smend challenged conventional conceptions of constitutional law on multiple levels; challenges that ultimately coalesced

[736] Häntzschel, in ANSCHÜTZ-THOMA (1932), II-659.
[737] *Ibid.* ("*Die Freiheit erschöpft sich also in der Möglichkeit geistig zu wirken*").
[738] *Ibid.*
[739] *Ibid.*, II-659-660 (arguing that speech should be allowed as long as its dangers are merely of a 'spiritual' nature).
[740] *Ibid.*, II-660-661

in a complex, 'material', and 'relative' understanding of the '*allgemeine Gesetze*'-clause of Art. 118 WRV. Smend's theses have proven so significant to post-War German constitutional thinking, in particular with regard to judicial balancing, that it is necessary to discuss his address in some detail. This discussion requires brief background overviews of, first, Smend's broader perspective on constitutional law – his 'integration theory' of the Constitution – and, second, of what Smend saw as the shortcomings of the dominant tradition in public law.

(a) Smend's 'integration theory' of the Constitution

On the most general level, Smend's approach emanates from his 'integration' theory of the Constitution; a theory most extensively described in his 1928 work '*Verfassung und Verfassungsrecht*'.[741] This 'integration' theory holds that the 'essence' of the State is the constant integration of individuals in a community.[742] The very existence of the State has to be found in the permanent, repeated 'actualization' of the values of such a community – in what Smend calls an "actualization of meaning".[743] Smend is very clear that there can be no form of 'integration' in this sense "without a substantive community of values".[744] The idea of the State thus becomes inseparably linked to substantive values. This view has a number of consequences for the role of constitutional law and for constitutional interpretation.

(1) First, as constitutional law has as its object "the totality of the State and the totality of its process of integration",[745] all its particulars "are to be understood not as isolated, by themselves, but only as elements in a universe of meaning".[746] The task for constitutional interpretation, on this view, is what Smend calls, in a significant phrase taken up after the war by critics of the FCC's methods, the "*geisteswissenschaftliche Entwicklung dieses Systems als eines geschichtlich begründeten und bedingten geistigen Ganzen*"; "the humanistic – that is not 'legalistic-technical' - development of the 'culture system' as an historically contingent spiritual whole".[747]

[741] RUDOLF SMEND, VERFASSUNG UND VERFASSUNGSRECHT (1928), Reprinted in RUDOLF SMEND, STAATSRECHTLICHE ABHANDLUNGEN 119 (1955). References are to the 1955 edition, and (where so stated) to translations in Korioth, *Rudolf Smend* (2000), 207.
[742] Korioth, *Rudolf Smend* (2000), 218. See also MICHAEL STOLLEIS, A HISTORY OF PUBLIC LAW IN GERMANY 1914-1945 165 (Thomas Dunlap, trans., 2004) (Describing Smend's theory as "the interpretation of state and constitution as the meaningful interdependence of intellectual processes, as the living creation of humans and human groups"). For an earlier formulation of very similar ideas, see ERICH KAUFMANN, ÜBER DEN BEGRIFF DES ORGANISMUS IN DER STAATSLEHRE DES 19. JAHRHUNDERTS (1908), cited in PETER HÄBERLE, DIE WESENSGEHALTGARANTIE DES ART. 19 ABS. 2 GRUNDGESETZ 161 (1962). For a recent discussion of Smend's theories, see Marco Dani, *Economic and Social Conflicts, Integration and Constitutionalism in Contemporary Europe*, LEQS DISCUSSION PAPER SERIES (2009), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1518629 (last accessed 20 June 2012).
[743] Korioth, *Rudolf Smend* (2000), 229.
[744] *Ibid.*, at 228-229.
[745] *Ibid.*, at 241.
[746] *Ibid.*, at 246.
[747] Smend, *Das Recht der freien Meinungsäußerung* (1928, 1955), 92. For Ernst Forsthoff's critique, see *supra*, s. 4.3.1.2.

(2) Secondly, constitutional rights should be understood as primarily *constitutive* of the State and of a particular "*Kultursystem*", rather than as *limitations* on State authority.[748] Constitutional rights, in Smend's vision, embody the "cultural and moral value judgments of an era".[749] Rather than treating them, as the liberal tradition would, as boundary-markers of individual freedom against State action, these rights should be interpreted in a way that reflects the role the underlying value judgments must play in integrating individuals and community in the State.

(b) Smend's critique of formalism and individualism

The main object of Smend's critique, the negative picture in reaction to which he formulates his own approach in '*Das Recht der freien Meinungsaußerung*', is a political and legal outlook he describes as positivistic, 'individualistic' and 'formalistic'.[750] The dominant approach is individualistic in the sense that it attempts to compartmentalize social relations into distinct, absolute "*Willenssphären*" – "spheres of will" - along familiar lines such as individual *vs.* State, or debtor *vs.* creditor.[751] It is formalistic and positivistic, in Smend's view, in that it attempts to decipher the meaning of the crucial words, such as '*allgemeine Gesetze*', in a formal-logical way.[752] Smend argues that if it is accurate to understand, as he does, the constitutional order as a '*Kultursystem*', a historically contingent constellation of values, then terms like '*allgemein*' and its opposite '*besonder*', should not be interpreted in a 'formalistic-technical' way, as "reciprocally empty negations", but rather, by following methods common in the humanities, as interrelated elements reflective of the underlying value-system.[753] The word '*allgemein*', on this view, becomes mere shorthand for a set of historically developed substantive values. The 'generality' of the 'general laws', then, is in Smend's view "*selbstverständlich*" – "obviously":

> "*the material generality of the Enlightenment*: the values of society, public order and security, the competing rights and freedoms of others (...). 'General' laws in the sense of art. 118 are those laws that have precedence over art. 118 because the societal good they protect *is more important than the freedom of expression*".[754]

[748] *Ibid.*, 91ff.
[749] *Ibid.*, 98 ("*sittliche und kulturelle Werturteil der Zeit*").
[750] *Ibid.*, 93-97.
[751] *Ibid.*, 93-94. See also Korioth, *Rudolf Smend* (2000), 246. For the dominance of this view in American and Continental European legal thinking of the early 20th century, see *supra*, s.3.2.
[752] See also STOLLEIS (2004), 164 (discussing Smend's criticism of positivistic 'constructionism', which he regarded as mechanic).
[753] Smend, *Das Recht der freien Meinungsäußerung* (1928, 1955), 96-97 ("*Wenn es richtig ist, daß die Grundrechte zu bestimmten sachliche Kulturgütern in einer bestimmten geschichtlich bedingten Wertkonstellation von Verfassungs wegen Stellung nehmen, so sind sie dementsprechend geisteswissenschaftlich, insbesondere geistesgeschichtlich zu verstehen und auszulegen*").
[754] *Ibid.*, 97-98 ("*die materiale Allgemeinheit der Aufklärung: die Werte der Gesellschaft, die öffentliche Ordnung und Sicherheit, die konkurierende Rechte und Freiheiten der Anderen (...). 'Allgemeine' Gesetze im Sinne des Art. 119 sind also Gesetze, die deshalb den Vorrang vor Art. 118 haben, weil das von ihnen geschützte gesellschaftliche Gut wichtiger ist als die Meinungsfreiheit*").

What counts for Smend, is the "*materiale Überwertigkeit*" – the "greater substantive value" - of a particular '*Rechtsgut*' in relation to the freedom of expression.[755] To give one example that Smend himself uses; the "*Unkritisiertheit der Regierung*" – allowing the government to forbid criticism – is, in the early 20th Century, simply not a value that deserves precedence over the freedom of expression.[756] Smend acknowledges that this way of looking at the limitations of freedom of expression may seem unorthodox from the perspective of the prevalent "*formalistische Denkgewöhnung*" – the "habitual formalistic mode of thought",[757] and he even acknowledges there is an element of circularity to his approach; '*Rechtsgüter*' receive precedence over the freedom of expression because they "*deserve*" this precedence.[758] For Smend, however, this explicit, conscious "taking position" with regard to the 'value constellations' of public life, is precisely what fundamental rights are all about.[759]

5.2.3 '*Güterabwägung*' and '*Interessenabwägung*': Dissecting the Weimar background to *Lüth*'s 'balancing approach'

As was mentioned earlier, Smend's article '*Das Recht der freien Meinungsäußerung*' was one of the most important sources for the Constitutional Court's 'balancing' approach to freedom of expression in *Lüth*.[760] The FCC is discussing Weimar-era interpretations of the '*allgemeine Gesetze*'-clause when, immediately after copying Smend's formula of a "*Rechtsgut ... dessen Schutz gegenüber der Meinungsfreiheit den Vorrang verdient*" – "a value the protection of which deserves precedence over the freedom of expression" -, it draws its seminal conclusion:

> "*Es wird deshalb eine 'Güterabwägung' erforderlich: Das Recht zur Meinungsäußerung muß zurücktreten, wenn schutzwürdige Interessen eines anderen von höherem Rang durch die Betätigung der Meinungsfreiheit verletzt würden. Ob solche überwiegende Interessen anderer vorliegen, ist auf Grund aller Umstände des Falles zu ermitteln*".[761]

The Court's manifest reliance in *Lüth* on Smend's interpretation invites a more detailed examination of the position Smend's theses occupy in the genealogy of balancing in German fundamental rights adjudication. To what extent did Smend himself invoke ideas and images of 'weighing', and the language of balancing more broadly? In what

[755] *Ibid.*, 97-98.
[756] *Ibid.*, 98.
[757] *Ibid.*
[758] *Ibid.*
[759] *Ibid.*
[760] Smend, unlike Häntzschel, is not mentioned by name in the *Lüth* decision, but his article is referenced (at BVerfGE 7, 198; 209-210). For an early discussion of the influence of Smend's article on the *Lüth* decision, see Nipperdey, *Boykott und freie Meinungsäußerung* (1958), 445.
[761] BVerfGE 7, 198, 210-211 ("A balancing of values therefore becomes necessary. The right to freedom of expression must give way whenever protection-worthy interests of another person of a higher constitutional rank are infringed by the expression. Whether such prevailing rights of another individual are present is to be determined on the basis of all the circumstances of the case"). See also *supra*, s. 4.2.1.1.

ways were Smend's views on the '*allgemeine Gesetze*'-clause understood by his contemporary interlocutors as embodying a 'balancing' approach? And, more specifically; how does Smend's approach relate to the FCC's references to both the balancing of *values* – '*Güterabwägung*' – and the balancing of *interests* in individual cases – "*Interessenabwägung auf Grund aller Umstände des Falles*" in the *Lüth* case. These are the questions that will be addressed in this Section.

5.2.3.1 Balancing language and ideas in Smend's 'Das Recht der freien Meinungsäußerung'

Assessing the position of any particular jurisprudential contribution within the genealogy of a jurisprudential complex of ideas and modes of discourse is necessarily difficult. Analyzing the place of Smend's work in the genealogy of balancing in fundamental rights adjudication, at the very least, will require looking at the use and meaning of balancing discourse in Smend's writings themselves, and at ideas and concepts in these writings that, in retrospect, have provided foundations for later manifestations of balancing in fundamental rights adjudication and theory.

From this dual perspective, it is important to note, first of all, that there is no direct mention of either '*Güterabwägung*' or of '*Interessenabwägung*' in '*Das Recht der freien Meinungsäußerung*', or in Smend's other main work of the same period, '*Verfassung und Verfassungsrecht*'. At the same time, however, Smend's approach clearly differs from the methodologies of his contemporaries in his insistence on the necessity of - and possibility of - carrying out *value trade-offs* between fundamental rights and other societal goods, and it is this aspect of his work that the FCC was later to draw upon. Smend's interpretation of the limitations to freedom of expression hinges on the idea that some values are "*wichtiger*" – more important – than this freedom, and that they will therefore deserve precedence.[762] Although Smend relies more on the imagery of 'importance' and 'precedence' and than on that of 'weight', it is undeniable that his approach involves the search for some sort of accommodation or equilibrium between competing goods – "*gegenüberstehende Werte*" -[763] of the kind that characterizes most approaches covered by balancing discourse. And Smend does, in fact, resort to this type of discourse at least once, where he uses the term "*Abwägungsverhältnisse*" – "relations of relative weight" - to describe the relevant relationships between values.[764]

There is very little discussion in Smend's work on how these trade-offs are to be effectuated, or by whom. Several important themes do, however, emerge. These are

[762] Early critics seized on this. As Michael Stolleis writes, "to many, ..., [*Verfassung und Verfassungsrecht*] seemed like an alarm bell on the dangerous path towards a jurisprudence of evaluation and weighing that was dissolving the secure foundations of scholarly work". STOLLEIS (2004), 166.
[763] Smend, *Das Recht der freien Meinungsäußerung* (1928, 1955), 106.
[764] *Ibid.*, 98.

concerned with the appropriate domain for the question of weighing, with the parameters to be weighed, and with the way this weighing should be carried out.

(1) Smend suggests that the required trade-offs are to be considered part of the realm of 'legal' questions. In '*Das Recht der freien Meinungsäußerung*' Smend repeatedly uses legal terms of art, such as '*juristische Begriffsbestimmung*' and '*Grundrechtsauslegung*', to describe the required judgments.[765] More broadly, in '*Verfassung und Verfassungsrecht*', Smend writes that the question of 'ranking' elements of constitutional law, for which he gives the example of determining the weight of the parliamentary principle, is a "legal question".[766] This means that jurisprudence, or legal science, must be expected to be able to make an important contribution.[767]

At the same time, while the determination of the '*Abwägungsverhältnisse*' may have been a legal question for Smend, it was not to be approached through 'standard' legal methodology. The method Smend proposed was closely modelled on the practice of exegesis in the humanities – a "*geisteswissenschaftliche*", or "idealistic", reading of texts, rather than any kind of formal-logical interpretation. This shift in emphasis with regard to the ideal for constitutional interpretation set Smend up for a clash with authors like Carl Schmitt and Häntzschel who thought his approach was insufficiently respectful of the standards of legal method.[768] Critics of the FCC's approach after the War, as was seen in Chapter 4, continued on precisely this line of attack.[769]

(2) Second, the parameters to be evaluated and compared are consistently described as being of a 'public', or 'social', rather than of a private nature. Smend uses terms such as '*Gemeinschaftswerte*' – communal values -, '*Allgemeininteresse*' – the general interest - and '*gesellschaftliches Gut*' – a societal good, to describe the parameters for trade-offs with the freedom of expression.[770] Even where the rights and freedoms of other individuals are referred to, it is clear that these are to be understood as reflections of underlying *public* goods.[771] On the 'expression' side of the equation, too, Smend emphasizes the 'social character' of this freedom, and its importance as a social institution, alongside its status as an individual right in the liberal tradition.[772] All of this means that, in Smend's conception, the scope the freedom of expression depends on a trade-off between competing *public goods*, rather than between (public and) private interests.

(3) Third, there are important indications that the required trade-offs are to be made, not from case to case, but rather in the form of more durable relationships – '*Verhältnisse*' - of precedence – '*Vorzug*'. Smend's key concept of the '*Kultursystem*' is made up out of '*Wertkonstellationen*' – constellations of values that, while historically contingent,

[765] *Ibid.*
[766] Smend, *Verfassung und Verfassungsrecht* (1928, 1955), 241 ("*eine Rechtsfrage*"). This against a background understanding of the 'political' nature of constitutional law: *Ibid.*, 238.
[767] *Cf.* also Rudolf Smend, *Festfortrag zur Feier des zehnjährigen Bestehens des Bundesverfassungsgerichts*, in DAS BUNDESVERFASSUNGSGERICHT 23, 34 (1963).
[768] For further references, see STOLLEIS (2004), 166.
[769] See *supra*, s. 4.3.
[770] Smend, *Das Recht der freien Meinungsäußerung* (1928, 1955), 96-98.
[771] *Ibid.*, 97.
[772] *Ibid.*, 95 ("*soziale Character des Grundrechts*").

consist of more or less stable complexes of value relations – '*Wertrelationen*'.[773] Everything in Smend's writing suggests that the trade-offs between freedom of expression and competing social goods are to be determined, in principle, only once for each relationship between two values, and are supposed to be of a lasting nature, at least for as long as no major shifts in the political or cultural situation occur.

5.2.3.2 'Balancing' in Weimar-era critiques of Smend: Häntzschel and Schmitt

The FCC, as mentioned earlier, relied on Smend in developing an approach to freedom of expression adjudication involving '*Güterabwägung*' in *Lüth*. In the FCC's conception, this '*Güterabwägung*' in turn, required an '*Interessenabwägung*' in the individual case, between the right to freedom of expression and the 'protection-worthy interests of another'. It has also been shown above that, while Smend's theses do provide ample support for the idea of an abstract balancing of competing values, there is little or nothing in his approach that involves the balancing of (private) interests in particular cases. To get a better understanding of the FCC's association of a Smendian '*Güterabwägung*' with an '*Interessenabwägung*' in specific cases of a kind not found in Smend's own work, it is necessary to turn to his Weimar-era critics.

From the perspective of the genealogy of balancing in German legal thought, the writings of critics of Smend's 'material' interpretation of the limits to freedom of expression are especially interesting in two respects: they use the discourse of balancing as a central element of their critique of Smend, and they identify Smend's approach with the terminology of the *Interessenjurisprudenz* School, putting a very specific gloss on Smend's proposals. The writings of Kurt Häntzschel and Carl Schmitt are particularly relevant illustrations of these points.

(a) Häntzschel and Schmitt's readings of Smend: Particularistic balancing

According to Häntzschel, the key to Smend's approach was the idea that the drafters of the Weimar Constitution had neglected their duty to "equilibrate the various competing legally protected interests".[774] They had left it, in Häntzschels' depiction of Smend's views, to the legislative and judicial authorities to determine "in specific cases, which of several legally protected interests" they would regard as more important.[775] "Undeniably", however, Häntzschel countered, such decisions would depend entirely on the "internal disposition and worldview" of the deciders, which would risk inconsistent

[773] *Ibid.*, 98, 106.
[774] Häntzschel, in ANSCHÜTZ-THOMA (1932), II-659 ("*den Ausgleich zwischen mehreren widerstreitenden rechtlich geschützten Interessen*").
[775] *Ibid.*

outcomes.[776] Instead, what had to be recognized, was that although the problem was indeed one of finding the "the correct relationship between values", this decision was not left to the "free discretion" of judges and lawmakers, but had already been made by the constitution's drafters.[777]

Carl Schmitt's critique of Smend used many of the same arguments. For Schmitt, Smend had mistakenly "introduced a balancing of interests" into the question of the limitations to the freedom of expression; an innovation "that could easily relativize the absolute worth of the value of freedom of expression".[778] Such a 'relativization' did not, however, accord with the fundamental principle of the '*Rechtstaat*', that the freedom of the individual should be rule, and limitation by the State exception.[779] "A fundamental liberty", like the freedom of expression, Schmitt wrote, "is not a right or a value that can be weighed, in a balancing of interests, with other societal goods".[780] Instead of searching for values 'more weighty' than the freedom of expression (a conceptual impossibility, in Schmitt's view), the focus should be on 'merely' finding a limiting standard - a '*Maßstab*' – to limit state interventions in this right, rendering these interventions "measurable and thus controllable".[781]

(b) The problematic nature of the Häntzschel and Schmitt accounts

That Schmitt and Häntzschel would describe and criticize Smend's approach in terms of a balancing of interests in individual cases is understandable, but also problematic.

(1) It is understandable, first of all, in that Smend's rejection of legal formalism and conceptualism – what he calls the "*begriffliche Formaljurisprudenz*" of the dominant approach –, closely tracks similar and contemporaneous attacks by the *Interessenjurisprudenz* scholars.[782] It should not be forgotten that Smend's call for an explicit judicial evaluation of competing legal goods, and his terminology of '*Abwägungsverhältnisse*' and '*Wertrelationen*', were both to a large extent novel at the time, in particular in the area of public law.[783] It was only in 1927 – the year of Smend's address - that the *Reichsgericht* first used the term '*Güterabwägung*' to describe an explicit trade-off between values, in the context of a specific doctrine within criminal law.[784] It is understandable, therefore, that his critics would identify Smend's call for an explicit evaluation of competing legal goods

[776] *Ibid.* ("*von der inneren Einstellung und der Weltanschauung*").
[777] *Ibid.*
[778] SCHMITT (1928), 167.
[779] *Ibid.*
[780] *Ibid.* ("*Ein Freiheitsrecht ist kein Recht oder Gut, das mit andern Gütern in eine Interessenabwägung eintreten könnte*").
[781] *Ibid.*
[782] Smend, *Das Recht der freien Meinungsäußerung* (1928, 1955), 98.
[783] References to 'value judgments' had surfaced earlier in private law. See, *e.g.*, MAX VON RÜMELIN, WERTURTEILE UND WILENSENTSCHEIDUNGEN IM CIVILRECHT (1891), cited in REINHOLD ZIPPELIUS, WERTUNGSPROBLEME IM SYSTEM DER GRUNDRECHTE 3 (1962).
[784] Reichsgericht 11 March 1927, RGSt. 61, 254 ('*Pflichten und Güterabwägung*', abortion decision). Cited in ZIPPELIUS (1962), 15, and in BVerfG 39, 1; 26-27 ('*Schwangerschaftsabbruch*') [1975].

with the closest matching model of the time. And, from their perspective, the proposals of the *Interessenjurisprudenz* scholars may well have seemed a close parallel.

(2) Schmitt and Häntzschel's alignment of Smend's thesis with the balancing of interests of the *Interessenjurisprudenz*, however, also significantly misstated the nature of his approach. Whereas the balancing of interests of Heck and others was a *positivistic*, *legalistic-technical*, *value-neutral*, *private-law oriented* method, focused on *private interests* and designed primarily to effectuate *the will of the legislature*,[785] Smend's interpretation of the limits to freedom of expression was a *humanities-inspired*, *anti-positivist* approach to *limiting legislative discretion* that depended on an explicit taking position in relation to *value choices* concerning *public goods*.

Differences between the two approaches – Smend's material constitutionalism and the *Interessenjurisprudenz* – are visible on many levels. Smend turned to '*Güter*' and '*Werte*' as part of an anti-positivist effort of 'opening-up' constitutional law to a broader range of material than simply posited norms.[786] The *Interessenjurisprudenz*-scholars, on the other hand, relied on '*Interessen*' in order to be able to look *behind* – not *beyond* – posited norms. The *Interessenjurisprudenz* saw itself as value neutral, whereas Smend is very vocal in his affirmation of the essentially value-laden nature of constitutional law and constitutional interpretation. The *Interessenjurisprudenz* aimed for interstital, particularistic judgments, whereas Smend was interested in durable '*Wertkonstellationen*'.

In short: while Smend's work can clearly be invoked in support of the FCC's '*Güterabwägung*', it is much more difficult to see any relations between Smend and the balancing of *interests*. It will be argued below, in Section 5.3, that '*Interessenabwägung*' in FCC case law is in fact better understood as part of, not the idea of the 'material' constitution, but of the 'comprehensive constitutional order'.

[785] See Chapter 4.
[786] Contemporary scholars also involved in this project were Erich Kaufmann, Heinrich Triepel and Hermann Heller. See, *e.g.*, Ehmke, *Prinzipien der Verfassungsinterpretation* (1963), 62. Interestingly, Ehmke reads these scholars' work as confirming his idea that "*Verfassungsrechtliches Denken ist Problemdenken*" (*Ibid.*). Ehmke, therefore, appears to read Smend *et al* through the lens of debates of *his* time – on the '*topische Jurisprudenz*', see Chapter 4 -, in the same way that Schmitt and Häntzschel read Smend through the lens of the key debate of *their* time – on '*Interessenjurisprudenz*'.

5.2.4 'Material' constitutionalism and balancing

> "*Das Grundgesetz, wie es das Bundesverfassungsgericht bei Aufnahme seiner Rechtsprechungstätigkeit vorfand, entsprach in seinem Phänotypus weitgehend dem Idealbild des liberalen Rechtsstaates. (…) Erst durch die Judikatur des Bundesverfassungsgerichts hat sich das Grundgesetz von einer liberalen Rahmenordnung zu einer materiellen Wertordnung gewandelt. Der Schlüssel zu diesem Transformationsprozeß findet sich im Lüth-Urteil*".[787]

Though sometimes less visible than his contemporary Carl Schmitt, Rudolf Smend is omnipresent in German post-War constitutional jurisprudence. His influence can be felt all the way from *Lüth* decision of 1958 to, say, the *Lisbon* decision of 2009.[788] In *Lüth* itself, a direct line was drawn to Smend's Weimar-era work on the freedom of expression. This connection, had it concerned the work of any other theorist, and had it been in any other decision, might have remained merely a footnote. Instead, the combination of Smend's stature, the nature of his work, and the *Lüth*-Court's ambition meant that Smend's powerful, comprehensive, constitutional vision, within which his theory on this one particular constitutional right had been embedded, became emblematic for the whole of the FCC's constitutional rights jurisprudence. And '*Güterabwägung*', in turn, became emblematic for this – now officially sanctioned – constitutional understanding: that of material constitutionalism.

Balancing and material constitutionalism are intimately related in numerous ways. Material constitutionalism is both dependent on and enables an explicitly normative, value oriented approach to constitutional questions. From this perspective, and in a most basic sense, 'balancing' is simply shorthand for the process of the mutual accommodation of values within this substantive framework. Once constitutional ordering is conceived in terms of substantive values, the question of how demanding each value can be becomes a relative question, to be decided on a continuum, or in terms of optimization. In addition, the explicitly substantive nature of material constitutionalism means that legitimacy becomes more dependent on *input* – identifying the appropriate values – and *output* – achieving their appropriate mutual accommodation -, rather than *process* and questions of institutional competence and boundary maintenance. Again, the prominence in German constitutional discourse of the *necessity* to weigh and accommodate, and the comparative neglect of the question of *who* should do this weighing, fits well with these material-constitutionalist ideas.

[787] THILO RENSMANN, WERTORDNUNG UND VERFASSUNG 1 (2007) ("The Basic Law, as the FCC found it when it first took up its interpretation, followed, largely, an ideal-typical liberal 'rule of law' model. (…) Only through the case law of the FCC did the Basic Law change shape from a basic liberal order to a material value order. The key to this transformation lies in the *Lüth* decision"). On the centrality of the Lüth decision in the development of the value order idea, and on the relevance of Smend's work, see also JOSEF FRANZ LINDNER, THEORIE DER GRUNDRECHTSDOGMATIK 13 (2005).

[788] See, *e.g.*, Ingolf Pernice, *Carl Schmitt, Rudolf Smend und die europäische Integration*, 120 AÖR 100 (1995); DIE INTEGRATION DES MODERNEN STAATES. ZUR AKTUALITÄT DER INTEGRATIONSLEHRE VON RUDOLF SMEND (Roland Lhotta, ed., 2005); Dani, *Economic and Social Conflicts, Integration and Constitutionalism in Contemporary Europe* (2009).

The foregoing analysis of the Weimar-era, 'material', background to the FCC's balancing approach in *Lüth* leaves an intriguing question unanswered. If '*Interessenabwägung*' formed no part of material constitutionalism, at least not as espoused by its main early propagator, why did the FCC, without so much as acknowledging any potential issues of compatibility or conflict, resort to *both* '*Güterabwägung*' *and* '*Interessenabwägung auf grund aller Umstände des Falles*' in its early free speech decisions? This question is especially interesting because it is clear that doing so exposed it to criticism from virtually all quarters.

On one side, commentators intent on enhancing the formal qualities of constitutional jurisprudence accused the Court of going beyond what even Smend had suggested. Where Smend had at least argued for an "objective comparison of values", the Court practiced "casuistry".[789] "Instead of objective legal values, [the FCC] weighs subjective interests against each other, thus replacing the '*Smendian*' weighing of values – '*Smendsche Güterabwägung*' - with a balancing of interests on the model of private law", Bettermann wrote in reaction to the *Lüth* decision.[790] Even more moderate commentators, such as the later president of the FCC, Roman Herzog, were critical of the way the Court had "developed" – in quotation marks - Smend's '*Güterabwägung*' into "an individualized balancing" of the interests of different individuals.[791]

On the other hand, the Court's continued references to '*Güterabwägung*' exposed it to more general critiques of its understanding of the Constitution as an 'objective system of values', in ways that an approach based on a mere Heck-style 'balancing of interests' might not have. The invocation of values and of 'value balancing' rendered the Court's case law vulnerable not only to charges that a proper foundation for these values could not be found,[792] but also to the criticism that its approach of deducing concrete outcomes from abstract postulations resembled to closely the formalism of the '*Inversionsmethode*' that Heck and others had railed against.[793] As Roellecke put it, this was a "lethal objection".[794]

Academic commentators often framed the FCC case law in ways that fit their own theoretical and doctrinal preferences. Those supportive of the Court's efforts at constructing an objective value order deplored the language of particularized balancing and suggested that '*Güterabwägung*' should really be seen as the core of the FCC's

[789] Bettermann, *Die allgemeinen Gesetze* (1964), 601-602.

[790] *Ibid.* See also LERCHE (1961), 150. See, for a similar criticism: Nipperdey, *Boykott und freie Meinungsäußerung* (1958), 448.

[791] Herzog, in MAUNZ-DÜRIG-HERZOG-SCHOLZ (1968), nr. 251.

[792] See, *e.g.*, HELMUT GOERLICH, WERTORDNUNG UND GRUNDGESETZ (1973); Böckenförde, *Grundrechtstheorie und Grundrechtsinterpretation* (1974), 1534; RENSMANN (2007), 96 (citing an early qualification of the idea of the value order as a '*Nebelbegriff*'). See also, critically, SCHLINK (1976). Rensmann notes that current German constitutional legal debates largely accept the 'irreversibility' of the *Lüth* Court's innovations (citing a number of former FCC Justices in support), but that it is still felt that the idea of a value order "still rests on a highly insecure doctrinal foundation". See Rensmann (2007), 1-2. For a discussion in English, see ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 96ff (Julian Rivers, trans., 2002).

[793] *E.g.* Roellecke, *Prinzipien der Verfassungsinterpretation* (1976), 27, 38.

[794] *Ibid.*, 39.

approach.[795] Those in favour of particularized balancing rejected the language of '*Güterabwägung*' as superfluous and distracting from what they saw as, at heart, a healthy juristic incrementalism.[796] The FCC itself "solved the problem of the relationship between the order of values and the circumstances of cases", by *simply not mentioning* the difficulties, "without, however, being able to overcome [them]".[797] While commentators were busy promoting their preferred half of the value balancing / interest balancing pair, the FCC itself continued to invoke both abstract value balancing and particularized interest balancing conjointly in its decisions. This thesis argues that the most plausible reading of this continued combined deployment is the idea that 'material constitutionalism' by itself does not capture all of balancing's meaning. It is in order to make this point that the following Sections will proceed to address the theme of the 'comprehensive constitutional order'.

[795] Roman Herzog and Peter Häberle were prominent early supporters for (much of) the Court's 'value balancing' approach. It is generally noted that even today, the "great preponderance" of the literature supports, at least to some degree and in some form, the FCC's invocations of the value order. See, *e.g.*, LINDNER (2005), 13.
[796] Critical of the idea of value balancing and (more) supportive of some form of particularized weighing were Gerd Roellecke, Bernhard Schlink and Konrad Hesse (with important differences between them), among others.
[797] Roellecke, *Prinzipien der Verfassungsinterpretation* (1976), 27.

5.3 BALANCING AND THE COMPREHENSIVE CONSTITUTIONAL ORDER

5.3.1 Introduction

One of the distinguishing characteristics of German post-War constitutionalism has been its conception of the constitutional order as a substantive constellation of values. It is this 'material' or substantive quality, it was argued above, that forms a first crucial strand within the story of balancing in German constitutional thought. This Section adds a second, related, vital dimension to balancing's German genealogy; that of *the comprehensive constitutional order*.

The idea that the Constitution is, or should be, an "*absolut vollständige Oberrechtsordnung*" – "a fully comprehensive overarching legal order" -,[798] was a dominant perspective in German constitutional thought of the late 1950s and the 1960s. As the FCC put it in a 1965 decision, the Basic Law was understood to stand for "*eine einheitliche Ordnung des politischen und gesellschaftlichen Lebens der staatlichen Gemeinschaft*" – "a unified ordering of the political and social life of State and society".[799] Within this broad idea of the comprehensive constitutional order, two main themes will be distinguished. These are (a) the complete constitution, and (b) the 'perfect-fit' constitution.

This Section will argue, on the model of the previous Section, that each of these themes stands in a dual relationship with constitutional judicial balancing. On the one hand, they are important components of an explanation of the role of balancing in German constitutional law. On the other, balancing itself is *the*, or at least one of the, prime instrument, or instruments, of these two facets of the particular understanding of the constitutional order as 'comprehensive'. The 'complete' constitution relies on balancing in order to encompass all domains of social life within a gapless system and in order to overcome fundamental antinomies within this system. In the 'perfect-fit' constitution, on the other hand, individualized balancing of opposing interests, and especially also of aims and effects, is essential to ensure that constitutional reality matches constitutional demands as closely as possible in each individual case.

5.3.2 The 'complete' Constitution

5.3.2.1 Introduction

An important strand in German constitutional thought represents the constitutional order as being, or as aspiring to be – this anthropomorphism itself being a

[798] Roellecke, *Prinzipien der Verfassungsinterpretation* (1976), 33.
[799] BVerfGE 19, 206; 220 ('*Kirchenbausteuer*') [1965].

typical feature of the German debates –[800], a comprehensive arrangement without gaps or openings and without internal contradictions.[801] According to this line of thinking, there are no 'value-less' domains, or constitutional black holes. The constitutional order provides coverage of political and legal life that is exhaustive, complete and unified. Constitutional rights and values are never entirely absent from any given case, they will merely be more or less demanding depending on the circumstances. Constitutional rights bind all organs of the State in all their activities,[802] and their sphere of influence extends right into the domain of private relations.[803] Indeed, German scholars of the 1960s spoke of the "*Allgegenwart des Verfassungsrechts*" – "the omnipresence of constitutional law".[804]

Complete constitutionalism has relied principally on two particular conceptions of the identity of the Constitution, both stemming directly from material constitutionalism – discussed in the previous Section. They are those (a) of the Constitution as a value system, or '*Wertsystem*', for all domains of social life,[805] and (b) the Constitution as a structure aimed at unifying and harmonizing conflicting values and interests within society. Both will be discussed in what follows.

5.3.2.2 The Constitution as a comprehensive value system

Notwithstanding widespread, and sometimes fierce, criticism,[806] the general notion of the Constitution as a value system was "*ständige façon de parler*" – the habitual way of framing matters - in FCC case law of the 1960s,[807] and as such, tremendously influential within German constitutional discourse at precisely the time when constitutional balancing came to the fore.[808] While the traditional liberal vision of constitutional rights as protective of 'spheres of freedom' for individuals remained important, the main innovation of German post-War constitutionalism was to acknowledge that the Basic Law embodied an objective value system that "should count as a foundational constitutional resolution for all domains of law".[809]

800 *E.g.* Badura, *Verfassung, Staat und Gesellschaft* (1976), 6; Roellecke, *Prinzipien der Verfassungsinterpretation* (1976), 39; Peter Schneider, *Prinzipien der Verfassungsinterpretation*, 20 VVDStRL 1, 14(1963) ("*Die Verfassung will* ..."). See also BVerfGE 7, 198; 209 (*Lüth*) [1958].
801 *E.g.* Dürig, in MAUNZ-DÜRIG-HERZOG-SCHOLZ (1958), nr. 12.
802 *Cf.* BVErfGE 7, 198; 209 (*Lüth*) [1958].
803 *Ibid.*
804 Walter Leisner, cited in Ehmke, *Prinzipien der Verfassungsinterpretation* (1963), 70-71. Leisner repeats this qualification in his DER ABWÄGUNGSSTAAT 101 1997).
805 *E.g.* HÄBERLE (1962), 6.
806 Notably from Ernst Forsthoff, see e.g. *Die Umbildung des Verfassungsgesetzes* (1959), in RECHTSTAAT IM WANDEL 130, 152 (2nd ed., 1976). See also Ehmke, *Prinzipien der Verfassungsinterpretation* (1963), 82 (arguing that the historical contingency of constitutional rights precludes interpreting them as constituting a system); Christian von Pestalozza, *Kritische Bemerkungen* zu Methoden und Prinzipien der Grundrechtsauslegung in der Bundesrepublik Deutschland, 2 DER STAAT 425, 436 (1963) (*idem*); KONRAD HESSE, GRUNDZÜGE DES VERFASSUNGSRECHTS 4 (8th ed., 1975) (arguing that the idea of the constitution as value system raises more questions than it can possibly answer).
807 Böckenförde, *Grundrechtstheorie und Grundrechtsinterpretation* (1974), 1534, with references.
808 *Cf.* Ernst W. Böckenförde, *Zur Kritik der Wertbegründung des Rechts*, in RECHT, STAAT, FREIHEIT 67 (1987).
809 *Cf.* BverfGE 7, 198; 205 (*Lüth*) [1958].

(a) The value pyramid of the Basic Law

One of the most distinctive ways in which this notion of the Constitution as value system promoted the idea of the complete constitutional order was through the elevation of certain values to a primordial status from which they could 'radiate' throughout this order, filling-in any potential gaps that might exist between specific provisions. This strategy was pursued principally through the conceptions of '*Menschenwürde*' - human dignity – and '*das Recht auf freie Entfaltung seiner Persönlichkeit*' – a broad 'personality' right -, as overarching constitutional principles. Articles 1 and 2 of the Basic Law, proclaiming human dignity to be inviolable and entrenching every individual's general right to the free development of his personality, have occasioned an overwhelming body of doctrinal commentary. In broad contours, one particularly powerful image to emerge from doctrine and case law is that of 'human dignity' as a "*Grundsatznorm für die gesamte Rechtsordnung*" – a foundational norm for the whole legal order.[810]

The leading commentator to promote this type of view was Günter Dürig, whose remarks on Article 1 and 2 in the '*Maunz-Dürig-Herzog-Scholz*' Commentary on the Basic Law,[811] must rank among the most influential, if controversial, academic interpretations of this part of the Basic Law.[812] Dürig's commentary emphatically embraced the idea that these two provisions could form the foundation for a comprehensive system of rights protection. The '*Menschenwürde*' of Article 1, for Dürig, had the character of "*eines obersten Konstitutionsprinzip allen objektiven Rechts*" –[813] a fundamental principle for all areas of law.[814] As such, it could ground a system of values and claims that was '*lückenlos*'– gapless - within the rights catalogue of the Basic Law. Because the '*Menschenwürde*'s' 'value of freedom' could only ever be partially secured by a catalogue of specific rights provisions, Article 2 of the Basic Law offered a general guarantee of personal freedom – a '*Hauptfreiheitsrecht*' - to cover any omissions that might surface.[815]

Dürig's particular constitutional vision has always been controversial and was never taken on in its entirety by the FCC.[816] Nevertheless, in the Court's case law, one

810 *E.g.* VON MANGOLDT-KLEIN, 146 (Commentary on Art. 1). Von Mangoldt had been one of the representatives involved in the drafting of the Basic Law. For a recent variation on this idea, see LINDNER (2005), 212ff. Lindner invokes a very similar 'gaplessness' idea as did earlier writers.
811 This is a loose-leaf publication. Dürig's Commentary on Articles 1 and 2 was published in 1958. See also Günter Dürig, *Der Grundsatz von der Menschenwürde*, 81 AÖR 117 (1956).
812 See, *e.g.*, Ehmke, *Prinzipien der Verfassungsinterpretation* (1963), 82 (referring to Dürig as 'representative'). More recently, Dürig's contribution has been labelled 'legendary', see Hans Michael Heinig, *Menschenwürde und Sozialstaat*, in MENSCHENWÜRDE IN DER SÄKULAREN VERFASSUNGSORDNUNG 264 (Petra Bahr & Hans Michael Heinig, eds., 2006).
813 Dürig, *Der Grundsatz von der Menschenwürde* (1956), 119, 122; Dürig, in MAUNZ-DÜRIG-HERZOG-SCHOLZ (1958), Art. 1, nr. 5.
814 For references in FCC case law to Dürig's terminology, see, *e.g.*, BVerfGE 33,23; 29 ('*Eidesverweigerung aus Glaubensgründen*') [1972]; BVerfGE 115, 118; 152 ('*Luftsicherheitsgesetz*') [2005] ("*Das menschliche Leben ist die vitale Basis der Menschenwürde als tragendem Konstitutionsprinzip und oberstem Verfassungswert*").
815 Dürig, in *Maunz-Dürig-Herzog-Scholz* (1958), Art. 2, nr. 3-6.
816 See, e.g., ZIPPELIUS (1962), 21.

can find numerous attempts at using 'human dignity' or the personality right of Article 2 as '*oberste Werte*' – supreme values – in order to construct a comprehensive order of basic rights. Sometimes, these rights are presented as standing at *the apex* of the rights order, as in the seminal *Mephisto* case of 1971, where the Court spoke of the value of human dignity as "a supreme value, which controls the entirety of the value system of constitutional rights".[817] At other times, these values are presented as constituting *the core* – the '*Mittelpunkt*' – of the constitutional order. In the *Lüth* case, for example, the Court described a value order that found "its core in the free development of the personality of the individual within the social community".[818] In another important freedom of expression case too, the Court referred to the '*Menschenwürde*' as the "*Mittelpunt des Wertsystems der Verfassung*".[819] These 'supreme value' or 'core value' approaches were an important component of a vision of the constitution as embodying a rights order in which every constitutional right would always be interpreted in light of an overarching general principle, lending the whole a measure of structural integrity that would otherwise be unavailable.[820]

Conceiving basic rights in terms of values, and viewing the constitution as an ordered collection of such values, allowed interpreters and commentators to go beyond the confines of a historically contingent catalogue of rights and of liberalism's one-dimensional, limitational – formal - insistence on rights as boundaries for governmental power. The written Constitution, on the 'system of values' view, might be incomplete and the catalogue of rights haphazard, but the "*hinter der Verfassung stehende Wertordnung*" – the value order behind the written text,[821] could still be comprehensive.

(b) Values and a value system

A second way, in which the notion of the constitutional order as a value system was used to promote comprehensiveness, was through an emphasis on *the systematic character* of the value order.[822] This idea too, went back to Smend's material constitutionalism, and in particular to his vision of the Constitution as a stable, durable constellation of values.[823] Conceiving of the constitutional value order as a system, rather than as a mere collection of assorted rights and principles, again helped imbue this order

[817] BVerfGE 30, 173; 192 ('*Mephisto*') [1971]. See also EDWARD J. EBERLE, DIGNITY AND LIBERTY 258 (2002) ("Since human dignity is the apex of [the Basic Law's] value structure, it naturally radiates throughout the legal system").
[818] BVerfGE 7, 198; 205 (*Lüth*) [1958].
[819] BVerfGE 35, 202; 225 (*Lebach*) [1973] ("the heart of the value system of the constitution").
[820] The idea that general principles could help in the construction of 'legal systems' was a popular perspective in German legal thought of the 1950s and 1960s. See in particular JOSEF ESSER, GRUNDSATZ UND NORM 47, 224ff, 227, 321ff (1956).
[821] The image of a value order behind the constitutional provisions is pervasive in the relevant literature. *Cf.* von Pestalozza, *Kritische Bemerkungen* (1963), 436.
[822] *Ibid.* (commenting on a pervasive '*Bestreben nach Systematisierung*').
[823] See *supra*, s. 5.2.2.4. On Smends' status as the originator of the idea of the value system, see Forsthoff, *Die Umbildung des Verfassungsgesetzes* (1959, 1976), 133.

with a degree of integrity and coherence – "*innere Zusammenhang*".[824] Alexander Hollerbach eloquently described the way this might work in constitutional jurisprudence:

> "*Die Rede vom 'Wertsystem' [hat] zunächst einmal die Bedeutung: Überwindung der punktualistischen Vereinzelung, Intendieren und Sehen des Zusammenhangs und der Bezogenheiten, die zwischen den vielen Einzelnormen der Verfassung und Rechtsordnung obwalten. Jedes Einzelne verweist schon aus sich immer auf das Allgemeine, ist überhaupt Einzelnes nur als Einzelnes eines Allgemeineren*".[825]

The systematic quality of the '*Wertsystem*' was itself to a large extent dependent on the FCC's interpretation of human dignity as an overarching constitutional principle. By investing each individual constitutional right with a degree of '*Menschenwürdegehalt*', by relating the content of each specific right to the ultimate right of human dignity, this perspective assisted in viewing the constitutional order as a unity in which a presumption of gapless-ness could reign.[826]

5.3.2.3 The unitary, harmonizing Constitution

From its earliest decisions onwards, the FCC has emphasised the unitary character of the Constitution. In 1951 already, in its decision in the *Southwest* case, the Court held that individual constitutional provisions could not be interpreted in isolation, but only in light of other constitutional commands and on the basis of a general principle of the '*Einheit der Verfassung*'.[827] The main use of this principle can again be said to be to present the Constitution as "*eine absolut vollständige Oberrechtsordnung*" – a fully comprehensive higher legal order.[828]

Often, the effort to promote the image of the constitutional order as a unity took the form of an emphasis on interpreting individual norms in the light of certain overarching foundational norms and resolutions to which the other specific constitutional provisions were subordinated.[829] Constitutional law, in the view of the FCC's case law of the time, did not consist merely of individual provisions, but also of

[824] See the various definitions of 'system-thinking' in legal thought in CLAUS-WILHELM CANARIS, SYSTEMDENKEN UND SYSTEMBEGRIFF IN DER JURISPRUDENZ 11-13 (1969), 11-13.
[825] Alexander Hollerbach, *Auflösung der rechtsstaatlichen Verfassung?*, 85 AÖR 241, 255 (1960) ("The discourse of the value system, first and foremost, has the following meaning: to overcome individualization, to strengthen and make visible connections and relationships that exist between the manifold individual provisions of the Constitution and the legal order as a whole. Every individual element always refers to the overarching whole; is only an individual element by reference to the whole").
[826] *Cf.* WALTER LEISNER, GRUNDRECHTE UND PRIVATRECHT 146 (1960).
[827] BVerfGE 1, 14; 32 ('*Südweststaat*') [1951] ("the unity of the Constitution").
[828] *Cf.* Roellecke, *Prinzipien der Verfassungsinterpretation* (1976), 33. Even commentators critical of a conception of the value order as a system agreed that the Constitution contained a "*sinnvoll zusammengehörige, materiell aufeinander beziehbare ordnung*". See FRIEDRICH MÜLLER, NORMSTRUKTUR UND NORMATIVITÄT 217 (1966). In Chapter 8, a contrast will be drawn between this mainstream German approach, and the largely 'clause-bound' nature of constitutional interpretation in the U.S. See infra, s. 8.2.2.2.
[829] Beginning with the 1951 '*Südweststaat*' decision: BVerfGE 1, 14; 32 [1951] ("*Verfassungsrechtliche Grundsätze und Grundentscheidungen denen die einzelnen Verfassungsbestimmungen untergeordnet sind*").

"certain unifying principles and guiding ideas" that tied all provisions together.[830] Constitutional doctrine, in a virtually untranslatable phrase, insisted on "*Auslegung der Einzelnorm aus der Totalnorm*" – interpretation of every individual norm by reference to the Constitution's normative whole.[831]

An example of this kind of interpretation within the context of freedom of expression occurred in the *Mephisto* case, discussed in Chapter 4. Here, the Court emphasized that any conflict between the protection of the personality right of Article 2 and the right to freedom of artistic expression had to be solved by way of constitutional interpretation "following the standard of the constitutional value order and while upholding the unity of this foundational value system".[832]

But the significance of ideas of unity and harmony in German constitutional doctrine of the 1950s and 1960s went beyond an understanding of the Constitution as an organized whole. The Court and commentators continuously sought to emphasize the *harmonizing* qualities of the constitutional order set-up by the Basic Law. The Constitution, on this view, actively aimed to *create and foster* unity by overcoming fundamental antinomies in law, politics and society. In language again strongly reminiscent of Smend's integration perspective, the value order of the Basic Law was said to have a "*zusammenordnende und Einheitsbildende Wirkung*" – a function of harmonizing and bringing together.[833] The idea of the Constitution as a vehicle for harmonization and unification found expression on all levels of constitutional law; from the overarching idea of the Basic Law as a grand compromise between philosophical tenets of liberalism, socialism and Christian-Democracy, to detailed technical injunctions to lower courts on how to deal with conflicting values and rights.[834]

One way of promoting constitutional harmony, often encountered in case law and commentary, was through a particular conception of *the relationships* between conflicting values, rights and interests. A popular figure of speech in this area was that of 'dialectical' relations between opposing constitutional values.[835] Law and freedom, or individuals and society, commentators would argue, were indissolubly linked, in the form of communicating vessels.[836] The FCC gave expression to this idea early on, in its 1954 '*Investitionshilfe*' decision:

[830] BVerfGE 2, 380; 403 ('*Haftentschädigung*') [1953].
[831] Von Pestalozza, *Kritische Bemerkungen* (1963), 438, with references.
[832] BVerfGE 30, 173; 192 [1971].
[833] *Cf.* HÄBERLE (1962), 6 (citing Smend). See also HESSE 18th ed. 1975), 5 (relying heavily on Smend's integration theory), and Ehmke, *Prinzipien der Verfassungsinterpretation* (1963), 77.
[834] For a critical perspective, see, *e.g.*, ZIPPELIUS (1962), 157 (with references). See also Dürig, in MAUNZ-DÜRIG-HERZOG-SCHOLZ (1958), Art. 1, nr. 47 (Basic Law occupies middle ground between individualism and collectivism).
[835] *Cf.* Scheuner and Raiser, quoted in Schneider, *Prinzipien der Verfassungsinterpretation* (1963), 33-34. It is noteworthy that the same language of 'dialectics' that was so popular in literature on legal interpretation of the time (see *supra*, s. 4.3.2.2) was used also in this area.
[836] *E.g.* HÄBERLE (1962), 161 (referring to an "*Ineinanderstehen[...] von Recht und Freiheit*"). See also *ibid.*, at 21. For connections to Hegelian philosophy, see, e.g., *Ibid.*, at 164fn.

> *"Das Menschenbild des Grundgesetzes ist nicht das eines isolierten souveränen Individuums; das Grundgesetz hat vielmehr die Spannung Individuum - Gemeinschaft im Sinne der Gemeinschaftsbezogenheit und Gemeinschaftsgebundenheit der Person entschieden, ohne dabei deren Eigenwert anzutasten."*[837]

"Competing constitutional values", Peter Häberle argued in the early 1960s, using very similar vocabulary, "are not related in terms of superiority and inferiority, in the sense that they might be 'played out' against each other. They are, rather, matched so that each influences the other".[838]

5.3.2.4 The task of judges

With this kind of conception of the ties between opposing values and interests and of the nature of the constitutional order of the Basic Law came a particular idea of the task of judges in approaching conflicts. Two approaches were particularly prominent: the idea that courts should 'optimize' all competing values involved, and the understanding that many apparent conflicts between apparently opposing values and interests could be reframed so as to lessen their impact, or even so as to overcome them entirely.

(a) Optimization

If constitutional interpretation should take account of the harmonizing and integrating character of the Constitution,[839] the ideal solution for any conflict between values would be a "*nach beide Seiten hin schonendsten Ausgleich*" – an accommodation that would do justice to both values in play.[840] "The principle of the unity of the Constitution", Konrad Hesse wrote, places before constitutional interpretation "a task of *optimization*: both values must be limited in such a way that both may be optimally effective".[841]

The FCC's case law on freedom of expression reveals numerous manifestations of these ideas of principled compromise, 'adjustment' and optimization. Recall, for example, that in the *Lüth* case, the Court spoke of a '*Wechselwirkung*', and of a "*verfassungsrechtlich gewollten Ausgleich*" – an adjustment demanded by the Constitution -

[837] BVerfGE 4, 7; 15 ('*Investitionshilfe*') [1954] ("The image of man to which the Basic Law adheres, is not that of an isolated sovereign individual. Instead, with regard to the tension between individual and society, the Basic Law has come out on the side of the community-embedded and community-bound nature of the individual, without however diminishing the value of that individual."). The FCC has often referred to this formula in the area of freedom of expression. *E.g.* BVerfGE 30, 173; 193 ('*Mephisto*') [1971].
[838] HÄBERLE (1962), 38.
[839] *Cf.* Ulrich Scheuner, *Pressefreiheit*, 22 VVDStL 1, 52 (1965).
[840] MÜLLER (1966), 213.
[841] HESSE (8th ed., 1975), 28. Hesse's famous label for this process was 'the principle of practical concordance'.

between the "mutually contradictory expanding and limiting tendencies of the right to freedom of expression and the competing constitutional goods protected by the general laws".[842] The *Lüth* Court also referred in more general terms to the necessity of compromise and the adjustment of rights wherever large numbers of people had to live together in harmony.[843] Similarly, in the *Lebach* case, where the Court was again confronted with a conflict between Articles 5 and 2 of the Basic Law – the rights of expression and personality -, it was held that "in case of conflict, both these constitutional values must, to the extent possible, be adjusted to each other".[844]

(b) Reframing conflicts; overcoming antinomies

Besides this focus on the relationships between opposing rights and values, there was a second way in which the Court and commentators tried to promote the harmonizing qualities of the Basic Law: by denying the existence of specific antinomies altogether. The FCC's case law and the academic literature of the time show persistent efforts at reframing conflicts presented to the Court, in such a way that either the apparent conflict would 'go away' entirely, or, at the very least, that the relevant values and interests would be redistributed in such a way as to make the solution to the problem presented seem uncontroversial. The following paragraphs describe the historical and theoretical background to this perspective and its concrete use in reframing individual/State relations and competing rights claims between individuals.

(1) This perspective had a distinguished pedigree in German legal thought. Within constitutional law, one important forerunner was - again - Smend's integration theory of the constitution and, more specifically in the context of constitutional rights, his insistence that the right to freedom of expression not only protected individuals, but had a clear 'social function'.[845] Smend's contemporary and fellow 'material' constitutionalist Erich Kaufmann had similarly argued that "the essence of legal norms consists precisely of the fact that they simultaneously promote public and private interests".[846] More broadly, within legal theory, an important source of inspiration was Otto von Gierke's late nineteenth-century work on the social dimension of private rights.[847]

Among the most prominent academic propagators of this variety of the idea of constitutional harmonization in the 1960s, were Eike von Hippel and Peter Häberle. Von Hippel, relying on Smend and Kaufmann, argued that a constitutional-rights-norm could

[842] BVerfGE 7, 198; 209 [1958].
[843] *Ibid.*, at 220.
[844] BVerfGE 35, 202; 225 [1973]. See also Scheuner, *Pressefreiheit* (1965), 58 (referring to an '*Ausgleich*' between the - beneficial - social influence of the press and the protection of the personal privacy of individuals).
[845] See *supra*, s. 5.2.
[846] *Cf.* HÄBERLE (1962), 23 (citing Kaufmann).
[847] OTTO VON GIERKE, PERSONENRECHT 319 (1895), cited in HÄBERLE (1962), 9, 180 (calling this, following von Gierke, a "*deutschrechtliche[s] Verständniss*" – an understanding specific to German law").

be "valid only to the extent that the interests it protects are not opposed by higher ranking legal goods".[848] Individual, isolated, absolute rights were a conceptual impossibility; something that, von Hippel argued, Smend's adversary Carl Schmitt had failed to understand.[849] Adjustment to countervailing values, instead, formed part of the very essence of constitutional rights. Perhaps paradoxically, by framing the essence of constitutional rights in terms of their relationships to other rights, commentators like Von Hippel simultaneously made the idea of conflict omnipresent and deprived it of any meaning as a separate concept.[850] For his part, Peter Häberle claimed that constitutional rights were "equally constitutive" for both individuals and society.[851] Individual and collective interests would always be intertwined in the exercise *and* the limitation of constitutional rights. This meant that not only would society as a whole always be affected by an infringement of a fundamental right of any individual,[852] but also that limitations of individual rights were in fact also in the interest of the individuals concerned themselves, as much as they served the public interest.[853]

(2) In the contemporary case law of the FCC, numerous examples could be found where this type of perspective was invoked in order to overcome antinomies between individuals and society, or individuals and the State. On a most general level, this view was reflected in the Court's vision of society as a "community of free individuals", in which "the opportunity for *individual development*" would itself be "a *community-building value*".[854] In the specific context of freedom of expression, an instance of this type of view can be found in the *Spiegel* case. Recall that this case concerned the publication in the magazine *Der Spiegel* of secret material and critical commentary on the state of West Germany's defence forces, in particular in view of a possible attack from the Soviet Union.[855] After reciting *Lüth*'s demand for a balancing of opposing values in case of conflict, the Court went on to *deny* the existence of such a conflict altogether. The security of the State and freedom of the press were not, in fact, contradictory propositions. The two values, instead, had to be seen as connected to each other, and united in their common - higher - goal of preserving the Federal Republic and its basic

[848] EIKE VON HIPPEL, GRENZEN UND WESENSGEHALT DER GRUNDRECHTE 25-26 (1965).
[849] *Ibid.*, 27.
[850] See, *e.g.*, in the context of freedom of the press: Schnur, *Pressefreiheit* (1965), 103-105 (claiming that constitutional rights themselves could not properly be said to clash; only *the interests supporting rights* could point in different directions. Arguing also that the scope and content of the freedom of the press only flowed - negatively - from the boundaries to that right, not from any positive value).
[851] HÄBERLE (1962), 8, 21.
[852] *Ibid.*, 21-22.
[853] *Ibid.*, 28. See also at 12 (referring to a '*Wechselwirkung*' between individuals and society). Häberle's argument rested on a proposition that an overly wide conception of constitutional rights would diminish social acceptance of rights protection.
[854] BVerfGE 12, 45; 54 ('*Kriegsdienstverweigerung*') [1960]. Cited in Badura, *Verfassung, Staat und Gesellschaft* (1976), 6 (emphasis, added). See also Schneider, *Prinzipien der Verfassungsinterpretation* (1963), 31-33 (referring to the "*gemeinschaftsbezogenheit des Menschen*", but taking an ambivalent view of this reframing project). See also Schnur, *Pressefreiheit* (1965), 104 (referring to the "*gleiche Legimitation*", within the Constitutional order, of individual freedom and the interests of society).
[855] For a discussion of this case, see *supra*, s. 4.2.1.1. For a recent discussion of this line of thinking, see BENJAMIN RUSTEBERG, DER GRUNDRECHTLICHE GEWÄHRLEISTUNGSGEHALT 44 (2009).

order of freedom and democracy.[856] Without freedom of the press no Republic worth saving; without a Republic no freedom of the press, the Court found in essence.

(3) It was, finally, also not uncommon for a similar perspective to play an important role in the adjustment of the rights of private individuals. In those cases, what happened was that the full force of the general, public, interest was brought to bear on one side of the conflict. This added weight of the general interest would then reveal that what had earlier seemed an evenly balanced conflict was in fact a problem with an easy solution. An example of this device can be found in the *Plakaten* case, decided on the same day as *Lüth*. It may be recalled that this case involved a conflict between a landlord and one of his tenants, over the latter's right to exhibit political advertisements from his apartment.[857] The Court held in favour of the landlord, primarily because he did not use his claim to "vaunt his formal rights as property owner", but in fact acted on behalf of the other tenants in order to preserve peace and quiet in the house.[858] By focusing on the 'use' made by the landlord of his right, the Court transformed - or at least attempted to transform - what initially looked like a 'pure', direct conflict between two basic rights - property and speech - into an arrangement of interests that, again perhaps paradoxically, was, at the same time, much more complex in its layout and much easier to solve.[859]

5.3.2.5 The complete Constitution and balancing

This Section has presented an overview of a range of manifestations of the idea of 'completeness' in German constitutional thought and practice of the late 1950s and 1960s. A conception of the Constitution as a value system was used to bring all domains of public life - including, crucially, that regulated by private law - within the sphere of influence of fundamental rights. The idea of this value-based Constitution as a framework for harmonization and unification – '*integration*', in Smend's terminology - was relied upon to overcome basic antinomies within the Basic Law's "*freiheitliche demokratische Grundordnung*".[860]

This conception of the complete constitutional order informed the local meaning of the discourse of balancing, which, in turn, was one of the prime manifestations and operationalizations of 'complete' constitutionalism itself. Contemporary constitutional rights jurisprudence furnishes abundant evidence for the connection between these two themes, both in supportive and in critical writing. Peter Häberle, who was broadly supportive of the FCC's approach, wrote with reference to *Lüth*: "*Durch die Güterabwägung wird ein Ausgleich zwischen den kollidierenden Rechtsgüter herbeigeführt, wodurch diese in das Ganze der Verfassung eingeordnet werden*".[861] "Seen this way", he concludes, "balancing is both equilibration and ordering within an overarching whole".[862] Lerche, who was much more critical, noted in very similar language: "*Ganz allgemein preist man bisweilen eine 'Güterabwägung' als Patentlösung für das Zusammenstoßen des sozialstaatlichen Prinzips mit der Grundrechtssphäre an*".[863]

Important questions remain as to *why* the judges of the FCC and many of their observers felt that it was important to promote this particular understanding of the constitutional order of the Basic Law. There are also significant issues with regard to the extent to which prevailing social and political conditions in post-War German society allowed them to be successful in this project. Questions of both these categories lie largely outside the scope of this study. But some suggestions as to their answers may be offered. As to the latter theme, there are indications that the German constitutional scene of the late 1950s and early 1960s was much less polarized or politicized than was the case in, for example, the U.S. - the main comparative reference in this project.[864] Ernst Forsthoff, for example, the prominent critic of the Court's general 'material' approach to interpreting the Basic Law, wrote in 1961 of the "far reaching de-politicization of the era in which we live".[865]

Forsthoff is also helpful on the first type of question; the 'why' of comprehensive constitutionalism. All discussions on the 'correct' way of interpreting the Basic Law, he wrote, had to be viewed in light of Germany's recent past. "The demise of the Weimar Constitution and the rise to power of National-Socialism have sharpened the sense of responsibility of constitutional jurists".[866] In the eyes of many, if constitutional law was to erect a meaningful roadblock to totalitarianism, the Basic Law had to be similarly 'total',

[856] BVerfGE 20, 162, 178 [1966]. For an English translation of this part of the decision, see KOMMERS (1997), 400 ("[S]tate security and the freedom of the press are not mutually exclusive principles. Rather, they are complementary, in that both are meant to preserve the Federal Republic").
[857] See *supra*, s. 4.2.2.1.
[858] BVerfGE 7, 230; 237 [1958].
[859] A somewhat similar approach was used in the *Lüth* case itself, where the Court asserted that the right to freedom of expression would be valued more highly whenever a speaker attempted to contribute to a debate of general public interest rather than to a private discussion.
[860] *Cf.* BVerfGE 20, 162, 178 [1966] (*Der Spiegel*).
[861] HÄBERLE (1962), 38 ("The balancing of values accomplishes an equilibrium between clashing legal values, through which both are embedded within the overarching constitutional order as a whole"). Häberle notes: "The Constitution wants '*Sozialstaat*' and fundamental rights … individual rights and penal law … property and expropriation").
[862] *Ibid.*, 39.
[863] LERCHE (1961), 129fn.105, with references ("In very broad terms, a balancing of values is now promoted as a comprehensive solution for the clash between the principle of the '*Sozialstaat*' and the sphere of constitutional rights").
[864] See, *e.g.*, in the context of freedom of expression: Schnur, *Pressefreiheit* (1965), 131fn72 (noting a more 'politicized' debate on freedom of expression in the US, as well as in Switzerland and in the United Kingdom).
[865] Forsthoff, *Zur Problematik der Verfassungsauslegung* (1961) in: ERNST FORSTHOFF, RECHTSTAAT IM WANDEL 153, 164 (2nd ed., 1976). See also, *e.g.*, Jan-Werner Müller, *Introduction: Putting German Political Thought in Context*, in: GERMAN IDEOLOGIES SINCE 1945 1ff (Jan-Werner Müller, ed., 2003) (notably at 7ff, noting the disappearance of both the "nationalist Right and the Weimar left", and arguing that "the disappearance of these extremes … did much to advance the liberalization of German thought"). Notably, the most prominent fault-line in German political and constitutional thought of the time – between the ideas of the '*Rechtsstaat*' and the '*Sozialstaat*' (see *Ibid.*, at 8) – was actively addressed through 'complete' constitutionalism and balancing specifically, as is evident from the Häberle and Lerche passages just quoted. For a slightly later analysis of the link between 'abwägung' and the 'Sozialstaat', see Karl-Heinz Ladeur, *'Abwägung' – ein neues Rechtsparadigma?*, 69 ARSP 463 (1983).
[866] Forsthoff, *Zur Problematik der Verfassungsauslegung* (1961, 1976), 163.

or comprehensive, in its aspirations.[867] All areas of social, political and - to a large extent - even private life, should be protected, against any possible kind of encroachment.[868]

It is impossible, within the context of this study, to go much beyond such general statements. And there are further, related complications. As in all forms of political and intellectual history, it is extremely difficult to attribute causality to ideas, or, more generally, to separate causes and effects, modalities and goals. The idea of the Constitution as a value order, for example, may have served contemporary anxieties well in the early post-War years, but it also found a ready model in theories elaborated in a very different age, at a time when the Weimar Republic was in its final years. It is of course literally impossible to tell what post-War constitutional jurisprudence would have looked like without Smend's '*Das Recht der freien Meinungsäußerung*', or any of the other sources of inspiration for material constitutionalism. The same goes for assigning priority to one of a series of related ideas. It is difficult to tell, for example, whether in the thinking behind the *Lüth* decision, the idea of the value order was introduced to help achieve the extension of the influence of constitutional rights to the private sphere, or whether this extension was rather a corollary of the idea of a value order introduced for other reasons.[869]

5.3.3 The 'perfect fit' Constitution

5.3.3.1 Introduction

A second dimension of the comprehensive constitutional order was the ideal of a 'perfect fit' between constitutional normativity and social reality. As Peter Häberle claimed in his influential 1962 book, under reference to the Weimar-era theorist Hermann Heller: "Every constitutional right wants to be 'rule'. Law is rule-conform reality. The Constitution intends, through its guarantees of constitutional rights, *to make sure that normativity and normality run 'parallel'*".[870] This Section looks in more detail at this ideal of 'perfect fit' and at its relationship to constitutional balancing. In summary form: While the previous Section was focused on the internal structure and content of the constitutional order itself, this Section discusses the relationships between this constitutional order and broader social and institutional life.

The reasons underlying the appeal of 'perfect fit' constitutionalism must again remain largely outside the scope of this thesis. The basic theme, however, again is the

[867] For an example of this argument, see LEISNER (1960), 128-129.
[868] This last element will be covered under the heading of the 'perfect fit' Constitution, below.
[869] See, *e.g.*, Fritz Ossenbühl, *Abwägung im Verfassungsrecht*, 1995 DVBL. 904, 905 (1995) (arguing that the need for balancing was the "consequence" of the acceptance of horizontal effect of constitutional rights. On possibly broader motivations for the *Lüth* decision, see, *e.g.*, RENSMANN (2007), 84 (arguing that the FCC's First Senate, in *Lüth*, wanted to contribute to the "rehabilitation of the moral stature of Germany in the world").
[870] HÄBERLE (1962), 44 (emphasis added; quotation marks in original). For a recent invocation of a similar idea, see, *e.g.*, RUSTEBERG (2009), 65 (arguing that "in the balancing model, more and more questions of ordinary law are pulled upwards and become questions of constitutional law").

"rabbit-like fear of a descent back into barbarity" – a "*kaninchenhaften Angst vor dem Rückfall in die Barbarei*" - underlined earlier.[871] It was widely thought that only a demanding, perfectionist – 'aspirational' and 'maximally effective', to use two terms discussed below - constitutional order could provide secure guarantees against a recurrence of the horrors of the very recent past. The case law of the FCC, Ernst Forsthoff argued, showed how deeply the Court's members were "conscious of its *comprehensive responsibility for the constitution-conformity of legal life*".[872]

In Forsthoff's view, this overriding sense of responsibility led to a deplorable level of casuistry in - and hence 'deformalization' of - FCC case law; a casuistry for which balancing of interests was the prime instrument.[873] One argument of this thesis as to the meaning of balancing, begun here and developed further in Chapter 8, is that while Forsthoff was correct in his assessment of the connection between comprehensive constitutionalism and balancing, his subsequent equation of balancing and deformalization cannot be accepted in any strong form.

5.3.3.2 The modalities of 'perfect fit'

Even though the discourse of 'perfect fit' constitutionalism pervades constitutional legal literature and case law of the late 1950s and early 1960s, it is possible to single out a number of its more concrete manifestations. This Section discusses three such operationalizations of 'perfect fit' constitutionalism: the ideal of legal interpretation as 'actualization'; the ideal of the 'maximum effectiveness' of constitutional rights; and the ideals of the Basic Law as an 'aspirational' constitution.

(a) Interpretation as actualization

The interpretive ideal of the 'concretization' or 'actualization' of norms has already been mentioned, in Chapter 4, as an element of dialectical approaches to legal reasoning that gained prominence during the relevant period.[874] This striving for the "*Ziel der Aktualität*" – "the goal of actuality" – in the interpretation of norms is particularly closely related to the ideal of the 'perfect fit' Constitution. In contradistinction to classical models of interpretation, from an actualization perspective "there is no separation between a norm's meaning and its application".[875] Writers like Christian von

[871] Roellecke, *Prinzipien der Verfassungsinterpretation* (1976), 49.
[872] Forsthoff, *Die Umbildung des Verfassungsgesetzes* (1959, 1976), 151 ("*das starke Bewußtsein einer umfassenden Verantwortung für die Verfassungsmäßigkeit des Rechtslebens*", emphasis added in translation). For an analysis in English, see, *e.g.*, Klaus Stern, *General Assessment of the Basic Law – A German View* (1993), 21.
[873] *Ibid.*
[874] See Chapter 4, Section 4.3.2.5.
[875] Von Pestalozza, *Kritische Bemerkungen* (1963), 427. But contra: VON MANGOLDT-KLEIN, 7ff. For an application in the context of freedom of expression, see BVerfGE 42, 143; 147 ('*Deutschland Magazin*') [1976] ("*Die auf diesem Wege einwandfrei getroffene Feststellung eines Verstoßes gegen die Bestimmungen zum Schutz der Ehre aktualisiert die verfassungsrechtliche Grenze der Meinungsfreiheit im Einzelfall*").

Pestalozza suggested in fact that the choice of method of interpretation should be determined by the nature of the situation of the intended application of the constitutional norm involved:

> *'Es ist deshalb diejenige Methode zu benützen, die im Einzelfall den aktualen Sinn der Grundrechtsnorm am besten verwirklicht".*[876]

Taking an outsider's perspective for a moment: The objection that this way of proceeding is troublingly circular seems difficult to refute. It is hard to see how a norm could have a meaning proper *before* it has been interpreted, which is what this methodological suggestion seems to require.[877] But the quotation is still very revealing. It clearly shows the prominence and attraction of an approach to constitutional rights law that adhered to the idea of a 'meaning before interpretation' and that imposed a specific obligation on interpreters to seek out that precise meaning. In that sense, it shows the deep importance of the ideal of assuring a perfect fit between constitutional meaning and application in every individual case.

This approach, as will be discussed in more detail in Chapter 8, is dramatically different from dominant American methods. Those scholars and judges promoting actualization as an interpretive method were not interested in uncovering the 'original' meaning of constitutional provisions - often an overriding concern for important strands in American constitutional thought - but in the elaboration of a concrete, situated 'meaning-in-application'. German writers were keenly aware of the possibly anti-democratic nature of this approach; specifically, the charge that more respect should be shown for the meaning that was intended at the time of the framing of the Basic Law. But instead of deference to a constitutional founders' moment along American lines, they would point out that any 'original meaning' approach would tie the meaning of the Basic Law to the "highly contingent situation" of its birth in a way that would not be legitimate.[878] Instead, both drafting and application had to be seen as equally constitutive moments for the meaning of constitutional norms, and interpretation should consist of a "continuous dialectic" between general statements and concrete situations.[879] What this mode of interpretation sought to achieve, then, was an elimination of any potential clash between – or, put differently: assuring a perfect fit between – the potentially conflicting ideas of the meaning of norms at the time of their drafting, their abstract meaning at the time of their operation, and their concrete meaning in any given case.

[876] Von Pestalozza, *Kritische Bemerkungen* (1963), 433 ("That method of interpretation should be chosen, therefore, that most accurately captures the meaning of a constitutional norm in the concrete case"). Discussed and criticized by Roellecke, *Prinzipien der Verfassungsinterpretation* (1976), 36ff.
[877] *Ibid.*, with references. This is, however, the position taken by 'objectivist' accounts of constitutional rights law.
[878] Von Pestalozza, *Kritische Bemerkungen* (1963), 428-429.
[879] *Ibid.*, 427.

(b) The principle of 'maximal effectiveness'

A second, closely related, set of interpretive principles shared the ideal of actualization as enabling an 'as-close-as-possible' fit between the constitutional order and social reality. A useful label for these principles is the idea of the 'maximal effectiveness' of constitutional norms. The 'maximal effectiveness'-idea was often traced to the work of the Weimar-era constitutional law theorist Richard Thoma, who in 1929 in a highly influential commentary on the Weimar Constitution had written that where traditional methods yielded multiple acceptable interpretations of a constitutional norm, "preference should be given to the meaning that gives maximal legal effectiveness – '*juristische Wirkungskraft*' - to the relevant norm".[880] Although Thoma offered his maxim for a very specific question under the Weimar Constitution, it was later read as a broader principle favouring maximal protection for the rights of individuals under the Basic Law.[881] This principle, variously known by terms such as '*in dubio pro libertate*', the '*Freiheitsvermutung*', or the principle of '*Grundrechtseffektivität*',[882] was hotly contested, and never became a stable part of the FCC's appraoch.[883] But again; the fact that it was so vigorously debated shows the appeal of the desire to interpret constitutional rights provisions as broadly as possible, in order to make sure that they covered as broad a spectrum of social life as possible, in a way that would be as intensive as possible.

(c) The aspirational constitution

The interpretive tools discussed under the previous two headings – actualization and the principle of maximal effectiveness – can be seen as part of a broader image: that of the Basic Law as an aspirational Constitution.[884] On a practical level, the FCC has always made it clear that the constitutional order of the Basic Law should not merely negatively guarantee individual liberty, but that it should actively aim to realize the

[880] Richard Thoma, *Die juristische Bedeutung der Grundrechte*, in: GRUNDRECHTE UND GRUNDPFLICHTEN DER REICHSVERFASSUNG I 1, 9 (Hans Carl Nipperdey, ed., 1929). On the connection between Thoma's maxim and the work of Rudolf Smend, see STOLLEIS (2004), 74.
[881] *Cf.* Peter Schneider, *In dubio pro libertate*, in: FESTSCHRIFT DEUTSCHER JURISTENTAG II 263ff (1960); von Pestalozza, *Kritische Bemerkungen* 443 (1963); Roellecke, *Prinzipien der Verfassungsinterpretation* (1976), 43ff; Ehmke, *Prinzipien der Verfassungsinterpretation* (1963), 87ff. For a more recent analysis, see PETER UNRUH, DAS VERFASSUNGSBEGRIFF DES GRUNDGESETZES: EINE VERFASSUNGSTHEORETISCHE REKONSTRUKTION 310 (2002).
[882] Schneider, Roellecke, and Ehmke, respectively.
[883] *Ibid.* For a recent supportive assessment of a "*Prinzip der Ausgangsvermutung zu gunsten der Freiheit*" – a principled assumption in favour of fundamental freedoms -, not as a depiction of 'reality', but as a "*Denk – und Rechtfertigungsmodell*" – a model for thinking about constitutional rights questions and for justifying decisions -, see LINDNER (2005), 213-215.
[884] *Cf.* Kim Lane Scheppele, *Aspirational and aversive constitutionalism: The case for studying cross constitutional influence through negative models*, 1 I-CON 296, 299 (2003) (defining aspirational constitutionalism as a process of constitution building "in which constitutional decision makers understand what they are doing in terms of goals that they want to achieve and aspirations that they want to live up to. It is a fundamentally forward-looking viewpoint"). The use of the term here shares Scheppele's 'forward-looking' idea, but is more focused on constitutional interpretation and application than on drafting.

conditions for the meaningful enjoyment of rights.[885] Constitutional rights were understood to have a double character: as '*Verbot*' – prohibition – on certain types of public action, but also as a '*Gebot*' – an imposed obligation, or injunction – on the legislature to realize rights.[886] In broader terms, in the constitutional legal literature of the period there are numerous references to the idea that the constitutional order set out by the Basic Law demands action by the State, and to the Basic Law's ambition to actively create – desirable - forms of social ordering.[887] One striking aspect of this discourse, to which Chapter 8 will return, is its mandatory tone; its references to obligations imposed, and the achievement of goals demanded by a Basic Law that, literally, is said to "want" certain things done. The label 'aspirational constitutionalism', while broadly accurate, should be read against this background.

5.3.3.3 Balancing and the 'perfect fit' Constitution

Chapter 4 aimed to show how, despite academic criticism, the FCC developed its balancing approach in the *Lüth* line of cases as consisting of both a balancing of values *and* a balancing of interests. Simplifying somewhat, this balancing of values corresponds to the idea of the material constitution, while the balancing of interests is particularly closely related to that of the 'perfect fit' constitution. It was through a heavily particularized balancing of interests in each individual case that the FCC – and the courts it mandated to follow this approach – aimed to make sure that social reality would match the constitutional order as closely as possible. The FCC's doctrine, then, demanded not merely the durable constellations of values along Smendian lines, but the precise and individualized adjustment of constitutional rights and obligations. As the dissenting opinion of Judge Stein in the *Mephisto* case put it, the FCC should not only be "the guardian of constitutional rights in all legal domains" – expressing the ideal of the *complete* constitution -, but should also make sure that each and every "concrete balancing of interests … should conform to the value judgments contained in the constitution".[888]

The previous Paragraphs have illustrated how this idea of 'perfect fit' was also reflected in, and supported by, a number of other elements in German constitutional rights discourse of the late 1950s and early 1960s. Those other elements – actualization, maximal effectiveness, and aspirational constitutionalism – should, in turn, cast new light on the meaning of balancing. Each of these other elements appears to have had a significant compulsory or *mandatory* dimension: the ideals of 'actualization' could, in theory, be satisfied by *only one* specific legal outcome in every constitutional rights case; the principle of maximal effectiveness meant, again at least in theory, *maximal*

[885] See, *e.g.*, BVerfGE 33, 303; 330ff ('*Numerus Clausus*') [1972] (claiming that a constitutional guarantee would be "worthless" if the practical conditions for its enjoyment would not exist).
[886] HÄBERLE (1962), 182ff.
[887] *Cf.* Roellecke, *Prinzipien der Verfassungsinterpretation* (1976), 40ff; Badura, *Verfassung, Staat und Gesellschaft* (1976), 7; von Pestalozza, *Kritische Bemerkungen* (1963), 440. See also EBERLE (2002), 233.
[888] BVerfGE 30, 173; 202 [1971] (diss. Stein).

effectiveness and nothing less; and aspirational constitutionalism meant that the Basic Law made specific positive *demands* of public institutions that went beyond prohibitions on interference with rights. This dimension of compulsion will figure again in Chapter 8, where it will be invoked in the elaboration of German paradigmatic understandings of balancing and of legal formality. In short, it will be argued there that the meaning of balancing in its German setting is similarly imbued with a sense of compulsion or obligation, which renders even the most highly particularized, seemingly open-ended, form of balancing 'formal' in a way that is not always appreciated.

One of the clearest and strongest connections between the themes of balancing and of 'perfect fit' constitutionalism in fact lies beyond the scope of this thesis. It is the development of the principle of proportionality in the case law of the FCC. A vast literature on the genealogy of this principle shows how from roots in Prussian administrative law it has come to dominate much of German public – first administrative and then constitutional – law.[889] Balancing and proportionality always have been, and still are, understood to be closely related, although the precise nature of the connection is often contested.[890] Notwithstanding this close relationship, and notwithstanding proportionality's significance in German public law, this thesis focuses on balancing in the form of the '*Güterabwägung*' and '*Interessenabwägung*' as found in the *Lüth* decision and its progeny.[891] The most important reason for this choice of focus is that the constitutional discourse of the late 1950s and early 1960s – the relevant period for comparison with developments in the U.S. – was clearly dominated by balancing *per se*, rather than by the principle of proportionality. This was mainly because at this time, still, the status, provenance and nature of the principle of proportionality in the case law of the FCC were simply profoundly unclear.[892] Proportionality in constitutional law – as opposed to merely administrative law - became a major focus for legal research from the late 1960s onwards, and since then connections to the idea of balancing have always been

[889] See, for an early account, LERCHE (1961), 24ff.
[890] For a recent comparative account of proportionality reasoning in German and Canadian constitutional law, incidentaly showing that a 'balancing-stage' is more prominent in the German understanding than in the Canadian version of proportionality, see Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L.J. 383 (2007).
[891] The role of the principle of proportionality in FCC case law is generally traced back not to the *Lüth* decision, but to the '*Apotheken-Urteil*' of 11 June in the same year. See BVerfGE 7, 377 [1958].
[892] By far the most influential early account of the role of proportionality in constitutional (as opposed to administrative) law was Peter Lerche's '*Übermaß und Verfassungsrecht*' (1961). Another leading early account of the role of proportionality in constitutional law under the Basic Law was RUPRECHT VON KRAUSS, DER GRUNDSATZ DER VERHÄLTNISMÄßIGKEIT (1955). Lerche wrote, at 26 that "contemporary constitutional theory has not yet provided a major assessment of the binding of the legislator to the principles of necessity and proportionality"). On the relationship between the two ideas: Häberle's influential 1962 book contained a section on 'The Principle of Proportionality' where he wrote (at 67): "The question of proportionality only becomes relevant when a balancing of values has already taken place. In other words: a balancing of values – '*Güterabwägung*' – is a prerequisite for the principle of proportionality". For summaries of the historical developments in English, see, *e.g.*, Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence* (2007), 384ff; Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72 (2008). It may be noted that *Lüth* itself does contain references to the idea of a 'fit' between means and goals. See BVerfGE 7, 198; 229.

stressed.[893] What is important about the principle of proportionality for the purpose of this study is merely the way in which it too can be seen as a manifestation of 'perfect fit' constitutionalism – a desire to seamlessly transpose the abstract meaning of constitutional rights guarantees into particularized, individualized instances of rights protection, and the ideal of a State that goes *no further than strictly necessary* in limiting rights and that goes *as far as necessary* in order to realize effective rights protection for all. In this sense, balancing and proportionality, at least in this context, share the same basic meaning.

5.4 CONCLUSION: BALANCING'S 'GERMAN' LOCAL MEANING

What is, given the discussions in this and the previous Chapter, and using von Gierke's wonderful - and wonderfully untranslatable - term, the '*deutschrechtliche*' meaning of the discourse of balancing during the period described here?

(1) A first observation to make is that the discourse of balancing in late 1950s and early 1960s German constitutional rights jurisprudence has been shown to be much broader than merely the occurrence of terms like '*Güterabwägung*' and '*Interessenabwägung*'. These terms, it has been argued, should be seen as lying at the heart of a broad family of related conceptual vocabulary that ran from '*Wertkonstellationen*' and '*Kultursystem*' in Weimar-era constitutional legal thought; '*Wechselwirkung*' and a "'*verfassungsrechtlich gewollten Ausgleich*" in FCC case law; '*aktualisierung*' and "*maximaler Wirkungskraft*" in contemporary academic writing; and the '*Grundsatz der Verhältnismäßigkeit*' in (later) constitutional rights case law. In many ways, balancing lies at the heart of this collection of terms and concepts, providing a bridge between different historical eras – Weimar and the Bonn Republic -, different understandings of the nature of constitutional interpretation – from '*Geisteswissenschaftlich*' to strictly '*juristisch*' -, different understandings of the role of courts, and of the FCC in particular – from highly particularized interest balancing to a more abstract weighing of values -, and even different areas of law – from private law-style interest balancing to the typically constitutional accommodation of values.

(2) This leads to a second observation on the role and meaning of the discourse balancing, conceived in this broad sense. It seems that, in many of its guises, one of the central functions of this discourse was to overcome deep-seated antinomies in German legal and social thought. In the discourse of balancing, basic rights are "equally constitutive" for both individuals and society. Rights encompass their own limitations. Rights are both programmatic statements and legal principles.[894] The abstract meaning of constitutional clauses is identical to their 'actualized' meaning in concrete cases. Value balancing goes hand in hand with interest balancing. The autonomy of private law co-exists with a constitutional order that claims to be total. Ideas of judicial deference co-exist with the desire for intensive scrutiny; etc. And even though these are all quite different projects, the language of '*Abwägung*', of '*Wechselwirkung*', of 'dialectical understanding', or of '*Ausgleich*' and similar terms, in each case, is central to these efforts at synthesis or accommodation.

(3) It is this notion of synthesis, finally, that leads to a third observation. While the ideas of overcoming antinomies, synthesis, or accommodation capture much of what is significant in the German discourse of balancing, it would be less accurate to understand German balancing in terms of pragmatic compromise. For one, German judicial decisions and academic commentary regard this synthesizing project as very much a *juristic* project, to be undertaken according to strict standards of juristic discipline. The shadow of classical legal doctrine and orthodox rules of interpretation is always present. Secondly, what is striking too, from an outsider's perspective, is the extent to which achieving accommodation between ostensibly conflicting values and perspectives often appears in German legal thought as something that can and must be willed. The FCC *wills* there to be no conflict between individualized interest balancing and abstract weighing of values, or between deferential review and intense conformity with constitutional norms. The Basic Law itself, in the anthromorphism that so clearly characterizes German constitutional law case law and literature of this period, *wills* there to be no conflict between more social and more individual dimensions of social life, or between the State and the individual.

A theme to which Chapter 8 returns is the fact that this 'willing' often seems to require some suspension of disbelief by outside observers – and perhaps by German participants themselves. Or, put conversely; the fact that some degree of pervasive 'faith' in legal doctrine, and in legal thought more broadly, seems to be at work. Without that understanding it becomes very difficult to account for the phenomenal success of the Basic Law and its interpretation by the FCC, including notably the success of its balancing discourse. Peter Lerche, in his influential 1961 book on proportionality, spoke of the "*unbewiesene Vorstellung*" – the unproven conception - of the constitutional value system, as a force sustaining the operation of "*konkurrenzlösende Normen*" – competition-overcoming norms – in German constitutional law.[895] That image fits the discourse of balancing wonderfully. The discourse of balancing is arguably the most prominent manifestation of a tradition of synthesis in German legal thought – whether in tying together potentially conflicting rights, bridging potentially conflicting understandings of the constitutional order as a whole, or overcoming potential clashes between that order and social life. And this discourse is able to fulfil this synthesizing function because of some form of faith in its '*unbewiesene*' – unproven, but willed – capacity to fulfil that function.

The remainder of this thesis builds on these observations. Chapters 6 and 7 aim to show that the meaning of the discourse of balancing in mid-Century U.S. constitutional legal thought was diametrically different from what has been seen for

[893] See, *e.g.*, Manfred Gentz, *Zur Verhältnismäßigkeit von Grundrechtseingriffen*, NJW 1968, 1600 (1968); Eberhard Grabitz, *Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Bundesverfassunggerichts*, 98 AÖR 568 (1973).

[894] *Cf.* RENSMANN (2007), 55 (qualifying this as the overcoming of a traditional dichotomy).

[895] LERCHE (1961), 125-126.

Germany. Chapter 8, finally, aims to relate these different meanings – including the German elements of synthesis and faith in doctrine that have just been invoked – to understandings of legal formality and its opposites, using the conceptual vocabulary of legal formality to frame two opposing paradigms of balancing.