

relational character' (p. 754) of state practices, whose outcomes are uncertain, unfinished and imperfect. A similar depiction of law surfaces in this book – of law as a regulatory set of tools saturated by their context, used by different forces and apparatuses, to support different agenda, sometimes effective and sometimes yielding unexpected outcomes. From this perspective, law is worth progressive forces engaging with, and attempting to craft, not because it is deific, but because it is part of what is there.

Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse*

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Jacco Bomhoff's book, *Balancing Constitutional Rights*, is a very impressive achievement. It is probably the most authoritative and extensive review of the history of balancing in the US and in Europe to date. Not many scholars can show a mastery of the literature on the subject in three languages (English, French and German) and throughout a period of more than a century. Moreover, Bomhoff has succeeded in an undertaking that comparativists and historians seldom succeed in executing – producing an intimate and nuanced examination of more than one legal system, and over more than one period.

The book canvases the development of the concept of balancing in the US and in Europe – mostly Germany – concentrating on two periods: the late nineteenth and early twentieth centuries, and the 1950s to 1960s. In addition, it provides important meta observations on the nature of balancing and the significance of the comparative differences.

At the centre of the book is the claim that balancing did not have the same meaning in America and in Germany. This general observation is translated into many sophisticated and complex sub-observations regarding the differences between balancing in the US and in Germany, the particular historical and

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intellectual context in which they were set and the way different legal actors have shaped these meanings. Any attempt to distil one central argument out of this complex analysis would be a simplification; however, if one tries to do so anyway, the following statement would epitomise it: balancing for Germany represents the belief in law and in legal formality while in the US it represents the breakdown of the belief in law and in legal formality. In making this argument, the book dispels a common misconception about balancing – namely that it is always about informality in law. The author believes it to be an American misconception, based on the American experience, and argues that it fails to understand the German legal mentality in which the relationship between the formal and the substantive is much more complex than in America. Balancing, argues Bomhoff, represents in Germany both the formal and the substantive aspect of law at the same time.

The book is densely written and it is not always an easy read, but it is definitely worth the effort, and offers some beautiful prose and a truly passionate style that does not leave the reader indifferent. It is a goldmine of quotations and information, especially for the English-speaking reader who is interested in the European experience of the time. Most importantly, in many crucial points, I find the book to be persuasive and to provide a good phenomenological account of the differences between American and German balancing.

However, I will take issue with several important aspects of the book, without detracting from its importance. In particular, I will argue that the book has at times a jurisprudential emphasis approach that leaves unanswered important socio-political aspects of the phenomena it describes. In addition, it tends to

* There was an error in the title that has now been corrected. An erratum notice has been published providing details.

adopt a sympathetic and relatively uncritical view of the German project while being more critical and less sympathetic to the American project – without clearly indicating this preference to the reader. In particular, I would argue that Bomhoff adopts too uncritically the idea that open-ended and value-laden concepts, such as balancing, can be formal and can actually constrain judges, which is the way German lawyers reason and justify the extensive judicial use of balancing in Germany. I will begin by describing the book, according to the two main periods it covers and their synthesis and analysis, and then move to the critique.

I. Description

Balancing is a legal doctrine and a general theoretical concept of practical reasoning, in which values, rights and interests are ‘balanced’ one against the other – that is, assessed in terms of their relative weight or strength in order to resolve a conflict between them. Bomhoff places his argument in the book in contrast to two prevailing types of arguments on balancing: convergence, arguing that all constitutional systems move towards the adoption of balancing; and divergence, stressing the differences between categorisation in the US and balancing in Canada on the one hand and Europe on the other. Both types of arguments assume that balancing is one same thing – a claim the book challenges: balancing means different things to different local actors.

1.1 Early twentieth century: Germany and the US

Chapter 2 begins the historical survey of balancing by describing the striking similarities in the theoretical origins of balancing in Europe and in the US, respectively, during the early twentieth century.

The similarities are manifested first in the formalist past that preceded balancing. Both in the US and in Europe – Germany is the focal point of the European story throughout the book, but France also takes a part in this chapter – balancing was a reaction and

an antithesis to formalism and conceptualism, which was similar in many ways in both continents. In the US, formalism and conceptualism were associated with what is termed Classical Legal Thought or Legal Orthodoxy, or sometimes, after its main protagonist, Langdellianism (pp. 41–42). In Germany, formalism and conceptualism were associated with the legal Pandectists, who worked in the mid-nineteenth century and were influenced by German Idealism and the Hegelian Historical School of German thought (p. 40). Formalism on both sides of the Atlantic had similar traits, and revolved around three main beliefs: that law was an autonomous and closed system, that it was a perfect and complete system, and that it was a logical system in which results in particular cases were reached by deduction from general principles (pp. 37, 41–42).

Roughly at the same period – the beginning of the twentieth century – balancing arose and was used by theoreticians as a response to formalism both in Europe and in the US. In the US, the use of balancing was led by Roscoe Pound and, in Europe, by Francois Geny in France and Philip Heck and his Jurisprudence of Interests (*Interessenjurisprudenz*) in Germany. These reactions were all based on an instrumental or teleological conception of the law, and on the idea that legal doctrine should take into consideration actual societal interests and balance them one against the other rather than follow a normatively stale process of mechanically deducing results from general principles (pp. 38, 43–46, 58). In both systems, also, balancing was a way of dealing with the fact that law was not really complete and gapless. Its gaps had to be filled based on the balancing of values and interests (p. 57).

There were however several crucial differences to which the chapter turns next. First, balancing in America concentrated on countering categorisation in judicial practice, whereas in Europe it countered mainly conceptualism in legal scholarship (pp. 47–50).¹ Second, in the US, but not in Europe, the balancing critique of formalism did not stop at private law, where it began, but was extended to constitutional law as well (p. 53).² Roscoe Pound

1 Geny and Heck were concerned with conceptualism, namely the idea of the law being a gapless system in which all answers can be logically deduced from a small set of concepts. They attacked therefore the idea of logical subsumption and gaplessness. While these same concerns were in the US, too, there the emphasis was on the false categorisations and rigid rules, signalling, according to Bomhoff, the later preoccupation in the US with the choice of rules vs. standards.

2 This, according to Bomhoff, can be attributed to the fact that, unlike in Europe, central issues of rights and of federalism were adjudicated in the US from a very early period so that US law was always more ‘political’ than its European counterpart.

creatively used the methodological arsenal of anti-formalism in private law, and harnessed it to a political progressivist critique against the natural law-based economic laissez-faire conservatism of the Supreme Court in constitutional law. Pound argued that the court disregarded the actual societal interests that lay behind what it called 'rights' – the right to liberty of contract, for example – and that it should have engaged in a full balancing of societal interests instead of formalistically protecting rights over interests (pp. 43–46, 64–69). This was, as Tom Grey has argued, an artificial combination, but it was extremely successful, and continued to influence American legal thought in future decades.³ Thus, the extension of the anti-formalist attack to constitutional law established for the first time the connection between method and politics – in this case between formalism and conservatism. No similar connection between political agenda and method happened in Europe, where balancing and anti-formalism remained a political and limited to private law only.

Bomhoff also gives a nuanced description of the different strands of the balancing critique manifested by Heck, Geny and Pound, and warns against putting them all in one 'basket'.⁴

1.2 1950s to 1960s Germany

The discussion of the next period – the 1950s and 1960s – is divided into two chapters: one for Germany and the other for the US. As with the previous period, the book first describes the striking similarities between the two systems. In both countries, balancing made its first appearance in actual court decisions and not only in theoretical writing at the same time – the 1950s; in both places, balancing made its first appearance in the same area – freedom of expression; and, in both places, this happened despite there being no room for balancing in free speech in the constitutional text: in America because the text makes free speech absolute, and in Germany because it gives governmental interests absolute priority over free speech. But, since none of these options was viable, balancing entered nevertheless through case-law (pp. 73–76).

Chapter 3 reviews German balancing during the 1950s and 1960s. Since this is one of the main

concerns of the book, I will describe it at some length here. Balancing in German case-law starts with a 'big bang' – the *Luth* case of 1958 that dramatically shaped for an entire age both the use of balancing and the contours of the whole constitutional system. In *Luth*, Bomhoff shows us, we find the two main aspects of the constitutional order that still characterise Germany today and are closely connected to balancing – the material Constitution and the comprehensive Constitution – comprising together what is termed the perfect constitutional order or perfectionist constitutionalism.

Materialism means that the Constitution promotes a substantive set of values. It also means that constitutional rights are positive and require their positive promotion by government. The material Constitution promoted in *Luth* owes its foundations to the work of Rudolf Smend that predated World War II. Contrary to the dominant view, which was then individualist, liberal and which, as in America, regarded rights only as limitation on governmental power, Smend's view was that the Constitution reflected the values of the community. The Constitution reflected a '*Kultursystem*' and embodied the 'cultural and moral value judgments of an era' (p. 97, quoting Smend). According to Smend, the function of the state and of the court was to 'actualise' the values of the community in concrete cases. In Smend's words, the task of the court was 'the humanities-inspired, not legalistic-technical, development of the culture system as a historically contingent intellectual whole' (p. 97, quoting Smend). Smend's was therefore a collectivist rather than individualist view of constitutional law, and a perfectionist (i.e. value-laden) rather than neutral view of the role of the state. Balancing was strongly and inseparably connected to this conception of material values, since, as Bomhoff writes, 'balancing can simply be a shorthand for the process of mutual accommodation of values within this substantive framework' (p. 103).

Comprehensiveness means that the Constitution should be 'a fully comprehensive overarching legal order' and 'a unified ordering of the political and social life of State and society' (p. 104, quoting Roellecke (1976) and the *Kirchenbausteure* case

3 Thomas C. Grey (2003) 'Judicial Review and Legal Pragmatism', *Wake Forest Law Review* 38: 473, 477.

4 Geny, who had a great influence on Pound, actually had only a modest project of complementing and correcting the French formalist system so that it could be adapted to the changing societal and economic circumstances. Heck was more ambitious, but remained strongly neutral in terms of normative content, and his critique was strictly methodological. It was only Pound that made the association between method and substance.

(1965)). Comprehensiveness is divided into two elements: ‘the complete Constitution’ – meaning a gapless constitution encompassing all domains of social life, including the private domain, without any ‘value-less’ areas or constitutional ‘black holes’ (p. 105); and the ‘perfect fit’ Constitution – indicating that the decision in particular cases should conform as closely as possible to the value system of the Constitution (pp. 103–104). ‘The complete Constitution’ is backed by the idea of ‘supreme values’ or ‘core values’, primary amongst them the value of ‘human dignity’, that radiate downwards on all other rights, and allow filling in the gaps where particular rights provisions leave matters open. It is also aided by the idea that the Constitution is a ‘value system’ or an ‘objective value order’, namely that the Constitution is not just a collection of rights and principles, but a coherent whole, in which each part is connected to the other parts and is a manifestation of the supreme values. The complete Constitution makes the written Constitution only an approximation of the full Constitution. As Bomhoff writes: ‘The written Constitution, on the system-of-values view, might be incomplete and the catalogue of rights haphazard, but ... “the value order behind the Constitution” could still be comprehensive’ (p. 107).

Bomhoff is well aware of the fact that these constitutional ideas sound utopic, and assign judges with considerable power and discretion. He therefore provides some crucial historical background to explain how these views made sense in the German context after World War II. The first is the surprising degree of coherence and moderation of the German political system in the decades after the war, which allowed the court to draw on a shared set of values, and to consider its rulings as a-political and as reflecting a societal striving at compromise and against extremes (p. 117).⁵ The second is the project to which the entire German society was recruited at

the time, of rebuilding Germany on liberal and democratic grounds and of making sure that Nazism is uprooted and does not return – or, as a beautiful contemporary quote in the book puts it, ‘the “rabbit-like” fear of a descent back into barbarity’ (p. 117, quoting Roellecke (1976)). As Bomhoff writes, ‘if the constitutional law was to erect a meaningful obstruction to totalitarianism, the Basic Law had to be similarly total or comprehensive in its aspirations’ (pp. 117–118). This is also why, with few exceptions, the dramatic moves of the court were not followed by criticism in academia. Academia too was recruited to the project of rebuilding Germany and viewed its role as helping rather than criticising the court.⁶ A crucial point, according to Bomhoff, is that the constitutional project was ‘aspirational’ – that is, it represented an aspiration for an ideal, rather than a reflection of existing reality. (Drawing on the terminology of Lawrence Lessig, I would add that we can view the German Constitution as a ‘transformative constitution’ rather than a ‘preservative constitution.’) Thus, it had to be positive, and not only negative, and the court had to strive at completeness and perfection (p. 118).⁸

1.3 The 1950s to 1960s in the US

In Chapter 4, Bomhoff reviews the turbulent history of balancing in the US during the 1950s and 1960s. Unlike Germany that was characterised in this period by compromise and moderation, the American experience around balancing was one of heated debate and constant conflict between extremes. The debate is famous and well known to students of American constitutional law and, as in Germany, it took place in the area of free speech. On the one side stood Justice Frankfurter, who, holding a pragmatist and instrumentalist approach to law and continuing the legacies of Justice Oliver Wendell Holmes and Roscoe Pound, believed that balancing conflicting societal interests is unavoidable in free-speech cases

5 Ernst Forsthoff, a contemporary, laments the ‘de-politicization of the era’, *ibid.*

6 Objections such as the criticism of Ernst Forsthoff that viewed the Luth Court as espousing a rule-less order (pp. 87–89) echoing earlier critiques by Carl Schmidt against balancing (pp. 100–102) were left generally at the margins.

7 See Lawrence Lessig (1999) *Code and Other Laws of Cyberspace*. New York: Basic Books. Lessig defines a transformative constitution as a constitution that ‘sets out certain aspirations that are emphatically understood as a challenge to longstanding practices and are defined in opposition to those practices’, *ibid.*, at p. 214; see also Cass Sunstein (2001) *Designing Democracy: What Constitutions Do*. New York: Oxford University Press, p. 67.

8 Bomhoff is also careful to note that some of the reasons for the perfectionism of the Constitution lie in the periods that predated World War II, such as Smend’s work in the Weimar republic who ‘laid a bridge over the abyss of Nazi Germany’.

as in any other area of law. On the other side stood Justice Black, who, holding an absolutist and textual approach to constitutional interpretation, viewed free speech as protecting absolutely against governmental intrusions in the content of speech. The debate ended in a temporary defeat of balancing in the 1960s but, starting from the late 1970s and onwards, balancing was back, and so was the balancing debate; however, this period is outside the scope of the book's review.

Bomhoff shows how the debate around balancing within American jurisprudence of the time focused on two crucial conflicts: between the pragmatic tradition, espoused by Zachariah Chaffee in the 1920s and 1930s and the 'clear and present danger' test in the first-amendment law, and the reasoned tradition, espoused by Herbert Wexler; and between the definitional or categorical tradition and the standard-based balancing tradition. Bomhoff shows how each strand of balancing was accompanied with a corollary strand of categorisation or formalism.⁹ Whatever the particular strand, balancing was framed and understood as the opposite of categorisation.

Whereas, in Germany, balancing was clearly defined by the *Luth* case, and its scope and role in constitutional law were relatively easy to discern, Bomhoff tells us that, in the US, the scope and meaning of balancing were far from being clear. Balancing had multiple understandings, and the critics of balancing were not always criticising the same thing.

1.4 Analysis – form and substance

Chapter 5 combines the insights from the previous chapters and summarises them into the main argument of the book. The comparative analysis in this chapter is detailed and masterful. It is here that Bomhoff demonstrates his impressive abilities as an interpreter of constitution culture. It is here that his passionate, almost poetic, style is at its best. The thesis of Chapter 5 is that, in America and in Germany, 'the formal' and 'the substantive' meant very different things, and consequently balancing represented different relationships between the formal and the substantive.

In the US, formality was manifested as 'rulification', categorisation and effective limitations on judicial discretion based on a pessimistic and anti-perfectionist view of the Constitution. A quote from Schauer brought in the book spells this out perfectly: '... the rule-like nature of the first amendment, ... shows that it is not the reflection of a society's highest aspirations, but rather of its fears' (p. 198).

On the other hand, in Germany, according to Bomhoff, formality manifested itself not as limitations through rules, but 'in a more positive way, as a form of compulsion – the compulsion ... to make the constitutional legal order, in different senses, the best it can be' (p. 192). The positive and perfectionist requirement to strive at maximisation and optimisation of rights functioned as a stabilising and disciplining mechanism for judges. 'It would compel legal actors to take all relevant factors into account. For example obliging them to take seriously the maximal in maximal particularity,' says Bomhoff (p. 200). He further explains how the German seemingly non-formal concepts can be formal: '... these may sound like pragmatic and open ended concepts but they come with powerful preconceptions of the kinds of optional solutions to be achieved ... [They require] a finely calibrated balance, perched on the one narrow ridge where all values and interests in play can receive their exact due' (p. 201). Finally, Bomhoff also shows the particular way in which the German system protects the autonomy of law from politics and ideology, another central aspect of formality, '... not so much [by] keeping ideology out of constitutional adjudication, but [by] enforcing a uniform, all-encompassing semi-official ideology – a public ideology that integrated democracy, social welfare and individual rights' (p. 203).¹⁰

The concept of the 'substantive' is similarly very different in the two systems. In America, it is associated with concepts such as pragmatism, instrumentalism and policy, and represents the suspension of law, or the areas in which we are not governed by law or by principled arguments. In Germany, on the other hand, the substantive is legal,

9 Opposite Holmes's 'clear and present danger', there was the Learned Hand's formal and objective approach to speech; facing the early balancing cases of the 1940s and 1950s, there were categories of speech such as 'fighting words' that excluded some utterances as completely outside the scope of free speech. And, for the balancing of the 1950s and 1960s, there were the categorical and absolutist strands of Emerson and Meikeljohn and of Black and Douglas.

10 Bomhoff further clarifies: 'The autonomy of law is not in the sense of a bounded limited domain of law, but in the form of a totalizing pretension – a mode of thinking in which all other societal domains or modes of knowledge are first framed by law, before they can assert any remaining independent identity' (p. 200).

and thus it is also principled and formal. Rather than using terms such as ‘policy’, the relevant term in Germany is ‘material constitutionalism’ – a term that does not represent anything pragmatic or subjective, but rather the totality of the experience of the community and the shared and consensual ‘value constellations’, as in Smend’s framework (p. 208).

As much as the concepts themselves are different, so is the relationship between them. In the US, the relationship is characterised first by distinctness and conflict – the formal and the substantive remain separate, and a constant conflict goes on between them in jurisprudence. Second, the US system is characterised by the ‘institutionalisation of the formal’ – that is, the instrumental and strategic choice of either the formal (rules) or the substantive (standards). Since it is a matter of choice, a vast literature was created to address the advantages and disadvantages of either rules or standards, and a culture of ‘blaming the method’ was adopted. In this culture, substantive results (the *Lochner*-era economic conservatism or the McCarthy-era human rights abuses) were viewed as following from the adoption of a particular method. This reveals two paradoxes of American jurisprudence – first, ‘legal formality as choice sits uneasily, to put it mildly, with the basic idea of legal formality as constraint’ and, second, ‘the formality of [rules] depends on the perception that these jurisprudential tools are in fact able to constrain judicial power’ (p. 216). Taken together, these paradoxes suggest that there exists a tension at the core of legal realism and pragmatism. On the one hand, the legal method is strategically chosen by legal actors but, on the other hand, the legal method does not matter, because rules, just like standards, cannot really constrain legal actors. And, if rules cannot constrain, why bother so much with the choice of either rules or standards?

As opposed to this, in Germany, the relationship is one of synthesis and harmony. Furthermore, in Germany, the formal is not a matter of choice – a method to be used or discarded at will. It is there always, since, in German constitutional jurisprudence, ‘the substantive has always remained formal’ (p. 217). The synthesis between the formal and the substantive is another aspect of the theme of synthesis that is recurrent in German intellectual history from Savigny through the Weimar republic to the postwar period and is also an aspect of the German faith in law. It is the will to believe in law and a rejection of American legal scepticism. As Duncan Kennedy puts it in another nice quote in the book: ‘... the European experience of fascism and

communism have instilled an attitude among European lawyers that makes American-style radical anti-rationalism and anti-formalism, simply “too painful to listen to” (p. 225).

In conclusion, Bomhoff tells us in his book that American and German balancing represents faith in the law as opposed to disenchantment with it – one views it as a ‘noble dream’, the other as ‘a nightmare’. In America, there was once an age of faith but it is gone and what is left is the remnants of belief in the power of rules to bind legal actors, and balancing which is giving up on formality altogether. For Germany, balancing is the essence of its special belief in the formality of law. Balancing is therefore both faith and disenchantment – depending on where it is placed geographically.

II. Critique

As mentioned in the beginning of this review, the book is an impressive achievement. Just going through the condensed description above, one can appreciate the complexity of the argument and the erudition of the author. The following should not therefore be seen as detracting from the importance of the book, and from the suggestion that it is very worthwhile reading it for any constitutional comparativist. Several comments are however in place, as no scholarly perspective is free of flaws or, at the very least, of particular choices and biases that ought to be fleshed out and discussed.

2.1 Too much jurisprudence, too little politics

Methodologically, the book is written as a socio-political and jurisprudential comparative account. My first comment is that the sociological and political aspects are sometimes (especially when describing America) more thin in comparison to the jurisprudential ones. I should note that the book is definitely not an arid doctrinal book, and it is rich with history, culture and context. However, it manifests a European tendency, albeit a slight one, to depoliticise law and intellectual life generally, and give them internal explanations, rather than external ones. This may be a matter of style and perspective, and therefore a valid choice by the author, but, for readers who are accustomed to looking for political or economic explanations, it leaves some central questions unanswered.

Note, for example, the way the book describes American formalism. The jurisprudential characteristics of formalism are very richly depicted

in the book but Bomhoff does not provide the reader with much of a political or economic explanation for why this strand of thought has developed. Such explanation is central, for example, to Morton Horwitz's historical account of formalism where he shows that Langdellian formalism protected a certain class in American society – an old economic elite – that was threatened by the quick rising of the new industrial tycoons.¹¹ Generally speaking, the great shifts in American society and economy at the end of the nineteenth and twentieth centuries resulting in the concentration of power in big corporations – another central aspect in Horwitz's book – are absent from Bomhoff's story of formalism.

Similarly missing are more elaborate descriptions of how the Pragmatist and Progressivist movements in the US corresponded to these changes in American society and how they were integrated into the politics of the time. True, Bomhoff does make the point that Roscoe Pound made the connection between method and politics and between aversion to conservatism and anti-formalism, but why he objected to conservatism is less clear. Jurisprudential connections between Pound in America and Geny in France, for example, are elaborated, but Pound's political inclinations within US politics are not, as is the fascinating chapter in Pound's life in which he identified with the Nazis.

On the German side, it would have been interesting to think of both the Pandectists and of *Interessenjurisprudenz* scholars such as Heck in terms of the political and economic classes that they either protected or opposed. The story line in terms of the history of ideas is masterfully portrayed, and Bomhoff elaborates on the jurisprudential and philosophical ties between the Pandectists and the Historicists and Kant and between Heck and his contemporaries. But the reader is left to wonder what were the societal and political ties of the Pandectists or of Heck and how they fit into the politics of the time or the economic and societal classes of German society.

Important socio-political facts are missing also in the description of the second period of the 1950s and 1960s. Bomhoff does not address some of the great political and ideological shifts that occurred in

America after World War II: for example, the effect World War II had on the awareness to the rights of political minorities such as Jehovah's witnesses and Blacks,¹² the legacy of the New Deal and its effects on the balancing discourse, and the effects of the Cold War on American society.¹³ In this respect, Germany gets a richer political and sociological description, showing us how the character of Adenauer's Germany affected the jurisprudence of the Federal Constitutional Court (FCC). But, in Germany too, something more on the political aspects of the story could have been told. With all of the harmony and synthesis, there must have been power struggles in that society too. With whom did the FCC align itself? What was the court's effect on those power struggles? Whom did it turn into losers and whom into winners? These questions are not resolved in any clear way in the book.

2.2 Adding democracy to the picture

Following along the previous comment, the political dimension in terms of democracy also does not figure out as centrally in the book, as one might expect, especially in the American side of the story. The types of conflicts between Justices Black and Frankfurter, and between Pound and his formalist predecessors, for example, are as much about democracy, self-governance and separation of powers as they are about pragmatism and formalism or about progressivism and conservatism. This is crucial for understating why for Holmes and Frankfurter balancing was unproblematic in private law, but problematic in constitutional law. In private law, balancing represented a 'filling the gap' function that is a necessary part of the judicial function when legislation is not clear or missing. In constitutional law, it represented the subversion of the legislative will by the judicial will, despite the lack of clear language in the Constitution. Therefore, the anti-formalist progressivist critique, once extended to constitutional law, meant actually judicial restraint. The progressivists acknowledged that constitutional law involved balancing, only to argue that this meant that the court should leave it to the legislature to

11 Morton J. Horwitz (1992) *The Transformation of American Law 1870–1960: The Crisis of Legal Orthodoxy*. New York: Oxford University Press, p. 18.

12 See e.g. Michael Klarman (2004) *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*. New York/Oxford: Oxford University Press, p. 115 (discussing the effect World War II had on the civil rights movement as 'cataclysmic').

13 The great debate between Black and Frankfurter, for example, should be seen in the perspective of two New Dealers who argue on the true legacy of the New Deal and of Holmes and Pound.

balance, and not to argue that the court should balance itself.

Democracy is also crucial for the understanding of the exact nature of the Black/Frankfurter debate. Both Justices were 'New Dealers', both nominees of Roosevelt and therefore both suspicious of elitist judicial power and believers in popular democracy. They were debating how popular will and democracy should be effectuated as against judicial tyranny. Black argued that this should be done by interpreting the Constitution textually, thus imposing judicial restraint on judges, and constraining them to the will of the people as reflected in the Constitution. Frankfurter, on the other hand, thought that this should be done by requiring judges to show judicial restraint towards the legislative will, which reflected the will of the people currently.¹⁴ Democracy, however, was essential to both of them and is an essential part of the story, and I think it is not present enough in Bomhoff's depiction of American jurisprudence, which concentrates on the jurisprudential differences between Black as a formalist and Frankfurter as a balancer and pragmatist.

2.3 'Unperfecting' perfectionism

German jurisprudence of the 1950s and 1960s is characterised in the book as based on synthesis, harmony and rationality, and German formalism is characterised as substantive and as constraining judges through optimisation rather than through rules. Bomhoff is, at times, careful to make clear that these are only statements about the self-perception of German jurists – they conceive of themselves as being constrained through optimisation, and as operating in a system that achieves synthesis, harmony and rationally. But, at times, reading the book, it seems that Bomhoff views the German endeavour as successful and as reflecting an actual reality rather than only self-perception.

For example, Bomhoff argues that 'by nudging legal actors towards the pursuit of completeness and "perfection", comprehensive constitutionalism exercises a compelling and constraining force very similar to the power attributed to expressions of legal formality more familiar in American law, such as per-se rules or hard-edged definitions' (p. 174). Somewhere else in the book, Bomhoff tries to explain the unique character of this type of formalism that is based on open-ended directives, such as

proportionality, by stating that it 'is not about implementing but about uncovering the exact meaning of those commands'. Bomhoff further explains why inserting values into the law does not break the law's autonomy, saying that these values do not represent sectorial or political values, but 'public ideology that integrated democracy, social welfare and individual rights' (p. 220). Bomhoff talks about German balancing also in terms that seem to reflect its actual success, rather than only the way it is perceived to be successful: German balancing is 'arguably the most prominent manifestation of a deep tradition of synthesis in German legal thought ... bridging potentially conflicting understandings of the constitutional order as a whole ... [and] is able to fulfil this synthesizing function because of some form of faith in its unproved, but willed capacity to succeed' (p. 119). Bomhoff also talks about 'The phenomenal success of the Basic Law its interpretation ... including notably the success of its balancing discourse'.

But, for the English-speaking reader, this sounds utopian. She would wonder how exactly does the idea that one must strive at maximum realisation of all values within a system of an objective value order actually constrain a judge in her decisions in a particular case? What does 'uncovering the meaning' of a concept mean and how does it differ from applying it in a way that would make an open-ended concept operate like a rule? How is it that a particular ideology integrates democracy, social welfare and individual rights and is also not political? And how can judges actually 'bridge potentially conflicting understanding of the constitutional order' using a vague doctrine such as balancing?

These, Bomhoff may argue, are misdirected questions, since they fail to get into the mind-frame of German legal thought and fully realise its inner logic, which was one of the central purposes of his book. German constitutional law cannot be understood, Bomhoff tells us very convincingly throughout the book, unless one views it as an aspirational project and as an act of faith and of will. However, it seems, as I tried to show in these passages, that there is also a normative undertone to Bomhoff's account that gives credence to this utopian system and maintains that it can actually constrain judges. At least for the American-oriented reader, he

¹⁴ See Iddo Porat (2013) 'Mapping the American Debate over Balancing' in Grant Huscroft, Bradley Miller and Gregoire Webber (eds.) *Proportionality and the Rule of Law: Rights, Justification, Reasoning*. New York: Cambridge University Press.

has not proven this, certainly not with a much more elaborate account of how such vague concepts acquire exact meaning.

An American or British perspective, doubtful of the actual constraining power of open-ended concepts and of the possibility of non-political value judgments, may present another story in which German perfectionism is 'unperfected'. Alec Stone-Sweet, for example, titled his book on European constitutional law *Governing with Judges*.¹⁵ Stone shows that European constitutionalism represents a model of sharing power between judges and elected officials. Not 'separation of powers', as in the American model, whereby each institution has a different function or different territory, but 'sharing power', meaning that judges and politicians are doing similar things in ways that it would be hard to call completely separate. This portrayal does not purport to argue that German judges are constrained despite having no rules, but may give a sense of how they can be unconstrained but have the legitimacy of making value judgments within the specific democratic framework. They do not just review the political system for mistakes, or impose strict limits on it, but rather share with it some of the decision-making power, and the task of framing and implementing the values of society.¹⁶

2.4 Not enough sympathy to the American project

If the portrayal of German jurisprudence in the book tends to be too utopian or sympathetic, I would argue that it is not sympathetic enough to the American project. I say this cautiously because Bomhoff is generally not normative, but descriptive; he is extremely knowledgeable about the American jurisprudence and literature, and what he says about America is actually backed by facts. However, one can detect a clear critical tone towards American jurisprudence that is absent in the discussion of the German side. Following are a few examples.

Describing American balancing in the 1950s and 1960s, Bomhoff concludes that 'balancing in the US was so much narrower than that in Germany' (p. 188); that 'it was much less clear in the US context what the language of balancing was supposed to stand for' (p. 188); and that 'participants

in the debates were often talking *to* each other – and to easily debunked straw men – rather than *with* each other' (p. 188, emphasis in original). Bomhoff further writes about these participants that 'their contributions remain colourful and sometimes wonderfully insightful, but were and are frustratingly opaque' (pp. 188–189). The undertone is clearly critical. Compare this with the conclusion of the corollary part on German balancing, described above, which describes it as a triumph of will and a success story.

In addition, Bomhoff often attributes to American jurisprudence and its actors false conciseness and irrationality. This is most evident with regard to one of the main theses of the book regarding American law, namely that American jurisprudence is based on a paradox – of both undermining the effectiveness of rules and trying to use them strategically. No basic paradox or inconsistency is attributed to the German project. The closest one can get to a paradox regarding the German side is the claim that it requires from its participants a 'suspension of disbelief'. But this disbelief is generally not portrayed as a paradox or a false consciousness, but as a reality-creating and heroic leap of faith.

To take another example, consider Bomhoff's description of the reasons that lay behind the American choice to reject the 'horizontal effect' doctrine according to which constitutional rights apply to private actors as well: 'Instead of pursuing comprehensive constitutional rights coverage of the private domain, American jurisprudence is so anxious and conflicted over the "spooky" idea of "horizontal effect" that its equivalent doctrines are widely seen as a "conceptual disaster area"' (p. 196) – that is, the reason for this rejection is an irrational phobia from a comprehensive concept. One would be hard-pressed to find in the book a corollary harsh critique against the jurisprudence of the German FCC.

The overall picture that one gets from the book is that American jurisprudence is conflictual, cynical and based on paradox and irrationality, whereas German jurisprudence has achieved an unbelievable and heroic feat of synthesis and harmony.

This too, admittedly, can be a valid choice by the author, and it may well be a true picture, but it would have been better had it been spelled out more clearly, since alternative accounts are also possible

¹⁵ Alec Stone-Sweet (2000) *Governing with Judges*. Oxford: Oxford University Press.

¹⁶ Compare Mattias Kumm (2010) 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights Based Proportionality Review', *Law & Ethics of Human Rights* 4: 142, 144.

and Bomhoff should tell us why he does not opt for them. One could have just as well portrayed American jurisprudence as heroically facing the reality of the complexity of law and of life and German jurisprudence as based on a paradoxical and irrational attempt to make reality perfect and coherent. The great debates of American jurisprudence, such as the Black/ Frankfurter debate, rather than being 'opaque' and 'attacking straw men', as Bomhoff describes them, could have been portrayed as promoting understanding and knowledge in the common law way – through opposing majority and dissenting opinions – and as some of the peaks of judicial prose – a clash of titans, not masking true differences by niceties and decorum. Finally, American jurisprudence, according to such an alternative account, is simply more democratic, and democracy means conflict.

It may well be that one cannot really decide between these two alternative accounts from any objective perspective. My point is, however, that the book could have benefited from a more direct engagement with some of its normative presuppositions.

China and Islam: The Prophet, the Party, and Law

By Matthew S. Erie, Cambridge and New York: Cambridge University Press, 2016. xviii + 447 pp. ISBN: 978-1-107-05337-3 \$140.00 (hardback)*

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I. Introduction

How do Muslims live under both state law and religious law, particularly where these might conflict? And in a political space where a strong state imposes its authority through law, how and where can religious law be asserted? In other words, where are the boundaries between religion, law and the state? And to what extent are these boundaries porous, or are these boundaries paradoxically more real in theory than in practice? These questions, relevant to scholars of interdisciplinary legal studies

III. Conclusion

Balancing Constitutional Rights is an important book. It contains a rich collection of facts and insights on one of the central aspects of the difference between American and European constitutional law – balancing. In particular, it offers one of the best, albeit not the easiest, inside portrayals of the German constitutional frame of mind, which is so different from the American one. I believe it will become an important reference book for researchers in the field for years to come. In this review essay, I have attempted to clarify and present some of the main moves in this rich and condensed book, and have come to the conclusion that, while masterfully portraying the two systems, Bomhoff seems to stress jurisprudential developments over socio-political ones, and adopts a more sympathetic view to German 'faith in law' than to American 'legal scepticism' – without clearly indicating that he is making any normative claims. Maybe just positioning himself more clearly in this regard could have made the more sceptical reader more at ease, knowing where the book stands.

and global religious studies, are at the centre of Matthew Erie's journey in *China and Islam*.

Erie, associate professor of modern Chinese studies at Oxford University, bases his answers to these questions on more than a decade of in-depth research and writing. His book unravels Islamic law's 'localization in Chinese society', using the case of Islamic law and ethics among Hui in north-western China (p. xiii). Erie's book draws from multiple sources, all of which are difficult to access, including more than 200 interviews with scholars, imams, clerics, teachers and jurists; Western-language and Chinese-language archival materials; and ethnographic observations at mosques, diverse Islamic teaching schools, and Sufi shrines and tombs across nearly two years of fieldwork in the north-west region of the People's Republic of China (PRC).

Research on Muslim minorities and their relationship with Islamic law has typically come from scholars of the global West who study Muslims and Islam in North America and Europe (see e.g. An-Na'im, 2014; Massoud and Moore, 2015; Moore, 2010; but see Sezgin, 2013). *China and Islam*, instead, offers

* There was an error in the title, which has now been corrected. A corrigendum has been published providing details.