BALANCING CONSTITUTIONAL RIGHTS

The language of balancing is pervasive in constitutional rights jurisprudence around the world. In this book, Jacco Bomhoff offers a comparative and historical account of the origins and meanings of this talismanic form of language, and of the legal discourse to which it is central. Contemporary discussion has tended to see the increasing use of balancing as the manifestation of a globalization of constitutional law. This book is the first to argue that ‘balancing’ has always meant radically different things in different settings. Bomhoff makes use of detailed case studies of early postwar US and German constitutional jurisprudence to show that the same unique language expresses both biting scepticism and profound faith in law and adjudication, and both deep pessimism and high aspirations for constitutional rights. An understanding of these radically different meanings is essential for any evaluation of the work of constitutional courts today.

JACCO BOMHOFF is Associate Professor of Law at the London School of Economics and Political Science.
The aim of this series is to produce leading monographs in constitutional law. All areas of constitutional law and public law fall within the ambit of the series, including human rights and civil liberties law, administrative law, as well as constitutional theory and the history of constitutional law. A wide variety of scholarly approaches is encouraged, with the governing criterion being simply that the work is of interest to an international audience. Thus, works concerned with only one jurisdiction will be included in the series as appropriate, while, at the same time, the series will include works which are explicitly comparative or theoretical – or both. The series editors likewise welcome proposals that work at the intersection of constitutional and international law, or that seek to bridge the gaps between civil law systems, the US, and the common law jurisdictions of the Commonwealth.

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BALANCING CONSTITUTIONAL RIGHTS

The Origins and Meanings of Postwar Legal Discourse

JACCO BOMHOFF
Die Rechtsprechung zu den Grundrechten und deren Dogmatik sind in den letzten Jahren so sehr von der Theorie der Abwägung dominiert worden, dass weder deren vielfach unausgesprochen gebliebenen Voraussetzungen noch dogmatische Alternativen überhaupt Konturen gewinnen konnten.


Over the past few decades, with little justification or scrutiny, balancing has come of age. […] Without a pause, our minds begin analysis of [constitutional law] questions by thinking in terms of the competing interests. Before we have time to wonder whether we ought to balance, we are already asserting the relative weights of the interests. Constitutional law has entered the age of balancing.


[European] Continental legal theory is uncannily 'other' for an American, perhaps because just about everything in our legal culture is present in theirs, often translated word for word, but nothing seems to have the same meaning.

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Jacco Bomhoff
Frontmatter
More information
CONTENTS

Acknowledgements page viii

Introduction 1

1 Questioning a global age of balancing 10

2 Balancing’s beginnings: concepts and interests 31

3 A perfect constitutional order: balancing in German constitutional jurisprudence of the 1950s and 1960s 72

4 A dangerous doctrine: balancing in US constitutional jurisprudence of the 1950s and 1960s 122

5 Two paradigms of balancing 190

Conclusion 235

Bibliography 244

Index 273
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