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978-1-107-04441-8 - Balancing Constitutional Rights: The Origins and Meanings
of Postwar Legal Discourse
Jacco Bomhoff
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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.

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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.

Karl-Heinz Ladeur, *Kritik der Abwägung in der Grundrechtsdogmatik*, 2004

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.

T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 1987

[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.

Duncan Kennedy, *A Critique of Adjudication (fin de siècle)*, 1997

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CONTENTS

<i>Acknowledgements</i>	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
<i>Bibliography</i>	244
<i>Index</i>	273

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