Articles

FREE SPEECH AND PRIVATE LAW IN GERMAN CONSTITUTIONAL THEORY

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I. INTRODUCTION

The promulgation in 1949 of the Bonn Constitution—or Basic Law—marked the re-emergence of German political life. The framers of the Basic Law rejected the authoritarian style of previous political traditions and sought to erect, on a more durable foundation, a political order reflecting the republican and libertarian principles of the Weimar Constitution.1 The framers also undertook an experiment that was almost completely new in German constitutional history—and, indeed rare anywhere in the world—a comprehensive system of judicial review of legislative and executive action for conformity with constitutional principles.

Although the propriety of constitutional review had been widely debated under the Weimar Constitution, and there were some instances of judicial review by the ordinary courts, the institution was by no means firmly established during that period.2 In contrast, the

1. The political history of Germany in the 19th and 20th centuries can be seen as a struggle for hegemony between liberal and authoritarian movements, with the authoritarian movements most often in the ascendant until the founding of the present Federal Republic. Against the background of the conservative reaction to the French Revolution in the first half of the 19th century, the abortive liberal revolution of 1848 gave rise to the Frankfurt (Paulskirche) Constitution of 1849 which, however, never came into effect. See generally P. STEARNS, 1848: THE REVOLUTIONARY TIDE IN EUROPE ch. 7 (1974). This was followed in 1871 by Bismarck’s Constitution for a united Germany which, although it established a parliamentary assembly, rested on the theory that all political power was derived from the princes whose dominions coalesced to form the empire. G. CRAIG, GERMANY: 1866-1945, at 43-44 (1978). After the defeat of Germany in World War I, the Constitution of the new Weimar Republic broke with this tradition by proclaiming that all political power was derived from the people. WEIMAR CONSTITUTION [WRV] art. 1. The Weimar Constitution established representative institutions, sought to protect individual liberty against the state, and provided certain guarantees of social welfare. The Weimar Republic was destroyed by the Nazi dictatorship which proclaimed the so-called “Führer-principle” in which all “law” was derived from the will of one man. After World War II—and in reaction to the Nazi period—the Basic Law of 1949 was founded essentially on the liberal, social and democratic notions of the Weimar and Frankfurt (Paulskirche) Constitutions and traces its lineage to those documents.

Basic Law established the Federal Constitutional Court, a tribunal whose principal function was the adjudication of constitutional questions. In creating a special court for constitutional matters, the framers took account of the continental tradition that viewed the regular judiciary as a special kind of bureaucracy, whose pretentions and abilities would not ordinarily extend to the invocation of constitutional norms against statutory law.\(^3\) In light of this tradition a special court for the decision of constitutional questions was required.\(^4\)

The Bonn Constitution was a product of the western liberal tradition which addresses certain central issues of popular sovereignty and individual rights. Many of the concerns reflected in the Basic Law are similar to those addressed in the American Constitution and it was to be expected that many of the constitutional issues that over the years were subject to adjudication in the United States would ultimately come before the West German Constitutional Court. Of those common concerns, the protection of freedom of expression holds a central position. The struggle over the law of seditious libel formed the background of an important aspect of American constitutional history; the totalitarian information policy


\(^4\) In contrast to the ordinary judiciary—which resembles the career civil service in appointment, tenure and promotion—the judges of the Federal Constitutional Court are chosen equally by the two houses of the German parliament. GG art. 94, § 1. This political process of choice is intended to encourage the selection of individuals whose views and experience are broader than those of the ordinary judiciary. Nonetheless, any prospective judge must have completed a legal education, and a significant minority of the judges of the Constitutional Court must be drawn from the ordinary courts. *See Bundesverfassungsgerichtsgesetz* [BVerfGG] § 2-3 (Constitutional Court Act).

The concept of a special Constitutional Court, distinct from the ordinary judiciary, is derived from a similar institution created in Austria in the 1920s under the intellectual influence of Hans Kelsen. *See* M. Cappelletti, *supra* note 3, at 46-47. Like a number of other German courts, the Constitutional Court almost never sits as a single body. Rather, it is divided into two separate panels or "senates" which have distinct areas of jurisdiction and are, for almost all purposes, two separate courts. Moreover, an increasingly important segment of the Court's work is performed by "chambers" of three judges, which have the power to sustain or reject certain constitutional complaints in clear cases. *See* BVerfGG §§ 15a, 93b, 95c; Zuck, *Die Fünfte Novelle zum Bundesverfassungsgerichtsgesetz*, 1986 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 968. *See also* infra n.254. *See generally* Vitzthum, *Das Verfassungsrechtsverfahren für Verfassungsbeschwerden*, in *Festschrift für Otto Bachof zum 70. Geburtstag* 293-320 (G. Pütter ed. 1984).
of Josef Goebbels had an immediate cautionary effect on the drafters of the Basic Law. Following the pattern of the Weimar Constitution, the Basic Law contains a number of distinct provisions that establish rights of expression and political organization. Article 5, for example, provides for certain rights of free expression and prohibits censorship. Article 8 guarantees the right of assembly, while article 9 secures rights of political association. Article 17 provides for the right of petition and article 21 guarantees rights of political parties. With characteristic brevity, the American Constitution contains all rights of expression in the first amendment and these rights, with their various implications and extensions, are consequently viewed and analyzed as aspects of the same basic right of expression and thought. In contrast, the dispersal of these provisions in separate sections of the Basic Law encourages an approach that considers these rights as the distinct subjects of differing analytical approaches.

With a history extending back to Marbury v. Madison in 1803—and in some respects even earlier—judicial enforcement of American constitutional law has produced well-developed bodies of doctrine that are naturally older than any doctrine elaborated under the Basic Law. Judicial enforcement of the first amendment, however, is a relatively recent development. Aside from the famous Holmes and Brandeis opinions in the decade following World War I, and a handful of important opinions in the 1930s, first amendment adjudication in the Supreme Court really begins with the World War II and post-war period. Accordingly, much first amendment doc-

6. The text of the Basic Law explicitly provides varying levels of protection for different forms of political rights. The right to form political parties, for example, is accorded a high degree of protection, which can be removed only by a prior judgment of the Federal Constitutional Court. See GG art. 21. In contrast, the right to form other kinds of political organizations may be limited by executive action in certain cases, and any possible judicial review must be pursued in the administrative courts after the executive action has taken place. See GG art. 9. Similarly, the right of free expression of political opinion may be limited by "general laws" while, according to the text of the Basic Law, the right of artistic freedom is not so limited. See GG art. 5; see also infra text accompanying notes 154-157.
7. 5 U.S. (1 Cranch) 137 (1803).
10. For early precursors in the state courts and in the scholarly literature, see Rabban, The First Amendment in Its Forgotten Years, 90 Yale L.J. 514 (1981).
trine is not substantially older than similar doctrine derived from
the Basic Law of 1949.

Although contemporaneous in its growth, the development of
German constitutional doctrine on freedom of speech reflects a sub-
stantially different political and philosophical tradition and has
reached different results through different methods of adjudication.
It is perhaps inevitable that a nation with a monarchical and aristoc-
ратric tradition that lasted into the twentieth century—along with
the catastrophic history of the Nazi period—would develop views of
the role of political speech and other forms of expression that to
some extent reflected the impact of that experience. Conversely,
the Lockean roots of the American Republic have left traces in first
amendment jurisprudence.

Differing legal traditions are also reflected in the underlying
systems of "ordinary law," the background against which constitu-
tional rights are inevitably defined. Constitutional law, a fairly ex-
otic growth in any system, naturally draws much of its substance
from the ordinary system of law that governs most legal relations,
and the systems of ordinary law in the United States and Germany
are derived from quite different origins. The framers of the Ameri-
can Constitution thought in the concepts and categories of the com-
mon law; the authors of the Basic Law were schooled in the German
Civil Code of 1900 which has displayed a remarkable tenacity and
resilience through the upheavals of the twentieth century. Before
expression becomes protected by constitutional guarantees, it may
be governed by doctrines of the ordinary law. Thus when the judici-
ary turns its attention to the development of constitutional rights,
themes in the ordinary law may sometimes reappear, perhaps in
somewhat altered form, as aspects of constitutional doctrine. In the
United States, for example, the first amendment "clear and present
danger" test reflects aspects of the common law of criminal at-
ttempts, and the New York Times test for defamation of public offi-

11. Fears of totalitarianism clearly animated sections of the Basic Law limiting rad-
cal political parties and other forms of "extreme" speech, see GG arts. 18, 21; remnants
of an aristocratic tradition may conceivably be seen in the high value given to personal
honor in the German law of defamation. See infra text accompanying notes 167-168.
to criticize governors because the people are sovereign).
13. Rabban, The Emergence of Modern First Amendment Doctrine, 50 U. CHI. L. REV. 1205,
1271-83 (1983). Moreover, Judge Learned Hand's well-known test for determining neg-
ligence in common-law tort, see United States v. Carroll Towing Co., 159 F.2d 169, 173
(2d Cir. 1947), makes an unmistakable reappearance in his revised version of the first
amendment "clear and present danger" test. See United States v. Dennis, 183 F.2d 201,
212 (2d Cir. 1950), aff'd, 341 U.S. 494 (1951).
cials\textsuperscript{14} was foreshadowed by a nineteenth century doctrine of privilege developed—as a minority view—under common law and state constitutions.\textsuperscript{15} In the development of constitutional rights under the German Basic Law, doctrines of the ordinary law—and also nineteenth century debates about what should be protected under the ordinary law—have also played a role.

Varying theories of the ordinary law may have a significant constitutional impact in another respect. One of the most important questions in any constitutional system concerns the extent to which the constitution binds not only the state but also private individuals or groups. Of course the text and history of the constitution can have an important—and perhaps dispositive—influence on the resolution of this question. Yet, the nature of the system of private law—which regulates general legal relations among individuals—will also have a bearing on the extent to which that system will be viewed as being subject to replacement by constitutional rules. Thus not only the constitutional tradition but also the tradition of the ordinary law may be important in determining the extent to which the constitution will control the actions of individuals or groups.

These two strands of doctrine combine in determining the extent to which constitutional rights of speech will be applicable against private persons in various settings. An examination of this complex problem will tell us something both about the differences between various theories of speech under the American and German constitutional systems and also the quite different ways in which questions of the binding effect of the constitution on individuals are approached and resolved.

II. The Lüth Case

A. Historical and Doctrinal Background

The first major free speech case decided under the Basic Law of 1949 was a dispute between Erich Lüth, a minor official in Hamburg, and Veit Harlan, a former director of racist films under the Nazis. The factual roots of the dispute lay deep in the history of the Nazi period.

During World War II Veit Harlan had written and directed the notorious anti-Semitic film \textit{The Few Suess}, produced under the gen-

\textsuperscript{14} New York Times, 376 U.S. at 279-80.
\textsuperscript{15} See N. Rosenberg, Protecting the Best Men 153-77, 244 (1986).
eral direction of Nazi propaganda minister Josef Goebbels. In 1950, after a period of retirement, Harlan directed his first post-war movie, *Immortal Beloved*. Incensed by the re-emergence of this director of the Nazi period, Lüth called for a boycott of Harlan's new film. Lüth believed that a boycott would demonstrate to the world that the new German cinema was not to be identified with this anti-Semitic director.

Suing in a state court, the producer and distributor of *Immortal Beloved* sought an injunction against Lüth, prohibiting him from issuing further calls for a boycott of the film. The plaintiffs sued under section 826 of the German Civil Code (BGB)—one of the famous "general clauses" of the Code—which provides a remedy against a person who "intentionally causes injury to another person in a manner contrary to good morals." Finding that Lüth's state-

16. See 7 BVerfGE 198, 223 (1958) (Lüth). After the war, a criminal court found that Harlan had committed a crime against humanity by making a film that contributed to the atmosphere of persecution in the Third Reich; he was nonetheless acquitted on a finding that if he had not made the movie he most likely would have been sent to a concentration camp or suffered some other grievous fate. Harlan also was classified as "exonerated" in de-Nazification proceedings. See id. at 219, 222-26; cf. 19 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt] 63 (1963) (holding that commercial distribution of *The Jew Suess* in the Federal Republic would be a criminal offense).

17. 7 BVerfGE at 199-200.

18. The "general clauses" of the German Civil Code constitute an important exception to what has been viewed as the general presupposition of some European codes—the view that laws should be set down with a clarity and specificity that will allow judges to find a clear answer in specific cases without the exercise of any significant creative power. In sharp contrast with that view, the broad language of the general clauses allows the creation of new causes of action, and provides exceptions to what would otherwise be binding obligations, in a manner that encourages the development of large judge-made bodies of law. See generally J. Dawson, *The Oracles of the Law* ch. 6 (1968).

BGB § 826—the "general clause" at issue in *Lüth*—has been used, for example, to provide tort remedies against individuals who betrayed others to the Gestapo during the Nazi period. R. Schlesinger, *Comparative Law* 680-84 (4th ed. 1980); Nipperdey, *Die Haftung für politische Denazifizierung in der Nazizeit*, in 1 Festschrift für Heinrich Lehmann 285-307 (2d ed. 1965). It has also been employed to provide a tort remedy for improper business practices. See H. Kötz, *Deliktsrecht* 95-96 (3d ed. 1983).

Another important general clause, BGB § 138, renders invalid any "jural act" (Rechtsgeschäft) which violates good morals; a third requires that all obligations, including contract obligations, be carried out in a manner consistent with good morals "in light of prevailing usage." BGB § 242. A large number of contracts—particularly the kinds of agreements that might be considered "contracts of adhesion" under American law—have been invalidated or reformed under these clauses. See, e.g., Dawson, Unconscionable Coercion: The German Version, 89 Harv. L. Rev. 1041 (1976); see also Dawson, Effects of Inflation on Private Contracts: Germany, 1914-1924, 33 Mich. L. Rev. 171, 177 (1934) (use of general clauses to rewrite contracts during inflation of early Weimar period).

In general the opportunities for social amelioration present in the general clauses
ments injured the plaintiffs' business in violation of section 826, the state court issued an injunction prohibiting Lüth from making further calls for a boycott of Harlan's film. 19

In response, Lüth filed a "constitutional complaint" in the Federal Constitutional Court—a procedural method through which a litigant can challenge a lower court's decision on constitutional grounds. 20 Lüth claimed that the injunction against his further expression violated article 5, section 1 of the Basic Law, which gives every person "the right freely to express and disseminate his opinion, orally, in writing, and in pictures." 21 In a ground-breaking opinion, the Constitutional Court held that Lüth's speech was indeed protected by the guarantees of article 5 and required that the film producers' complaint be dismissed. This result could only be reached, however, after a complicated and difficult doctrinal journey.

Because this was the first case squarely presenting important issues of free expression, the Constitutional Court was required to confront a number of fundamental points. For example, an initial argument that was available to Harlan and the film producers—an argument that may seem strange from an American perspective—was that because the dispute between the film producers and Lüth was a dispute between private individuals, invoking the rules of "pri-

were intended to mitigate what might otherwise have been the strictly individualistic and laissez-faire presuppositions of the BGB. See generally Deák & Rheinstein, supra note 2, at 574.

19. 7 BVerfGE at 201-02. For earlier examples of the invocation of BGB § 826 against economic boycotts, see H. Hubmann, Das Persönlichkeitsrecht 200, 225 (2d ed. 1967); J. Dawson, supra note 18, at 461-64.

20. All civil actions must be commenced in a state court, as there are no lower federal courts in the German system. After a civil action is heard by a lower state court (Landgericht) and by the state supreme court (Oberlandesgericht), questions of law can ordinarily be appealed to the Federal Supreme Court—Bundesgerichtshof (BGH)—which decides cases arising under the Civil and Criminal Codes. The BGH stands at the highest level of the "ordinary" judiciary and its decision is final in most civil and criminal matters; it should not be confused with the Federal Constitutional Court, which is superior to it in constitutional matters only. See supra note 4 and text accompanying notes 3-4.

If a litigant believes that a decision of the ordinary judiciary has disregarded his or her rights under the Basic Law, the litigant may file a constitutional complaint in the Federal Constitutional Court. See GG art. 93, § 4a. Ordinarily, a constitutional complaint may not be filed in a civil action until the case has proceeded through the state court system and has been adjudicated by the BGH. In Lüth, however, the Constitutional Court accepted the complaint, due to the importance of the issue raised, even though the state supreme court had not yet heard the case. See BVerfGG § 90(2); see also 10 BVerfGE 302, 308-09 (1960).

21. For the full text of GG art. 5, see infra Appendix, at p. 348.
private law,” the constitution had no application whatsoever to this case. In the years before Lüth a number of scholars had argued that the Basic Law, as an aspect of “public law,” had no effect on rights of “private law”—the body of rules which seeks to do justice between private individuals and which does not ordinarily concern the state as a party.22 Because the Basic Law has no impact on private law disputes, it could be argued, the constitutional right of free expression did not protect Lüth’s call for a boycott against the private law claims of the film producers.

This argument rested on the sharp analytic and historical distinction, common in European legal cultures, between “public” and “private” law.23 Imbued with the laissez-faire attitudes of nineteenth century liberalism (and influenced, perhaps, by the deontological moral theory of Immanuel Kant),24 the theoreticians of the German Civil Code viewed the civil law primarily as a means of adjusting purely individual and private rights in traditional areas such as contracts, torts, inheritance, and family relationships. The apparatus of the state was excluded from private law, except to the extent necessary for the judiciary to allocate the private rights recognized by the Civil Code, and these rights generally implied a maximum of individual autonomy and a minimum of intervention to redress individual or group inequalities already existing in society.25 In effect,

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22. See infra note 30 and accompanying text.

23. For general discussions of the distinction between public and private law in Germany, see, e.g., M. Bullinger, Öffentliches Recht und Privatrecht (1968); H. Krüger, Allgemeine Staatslehre 319-33 (1964). For the distinction in French law, see, e.g., R. David, French Law 98-107 (M. Kindred trans. 1972); B. Nicholas, French Law of Contract 22-26 (1982) [hereinafter French Law of Contract]. Although the separation of legal doctrine into domains of public and private law had its origin in Roman law, see, e.g., B. Nicholas, An Introduction to Roman Law 2 (1962), it has been argued that the present form of the distinction is a product of the 19th century. M. Bullinger, supra, at 37-74. On the Roman Law influence, see generally A. Watson, The Making of the Civil Law 144-57 (1981) (tracing impact of Justinian’s Corpus Juris on distinction between private and public law in European systems).


25. See, e.g., I K. Zweigert & H. Kötz, Introduction to Comparative Law 154 (trans. T. Weir, 2d ed. 1987) (“The law of contract in the BGB is unequivocally dominated by the bourgeois idea that contracting parties are formally free and equal.”); see also K. Larenz, supra note 24, at 48; G. Radbruch, Einführung in die Rechtswissenschaft 103-05 (K. Zweigert ed. 1980); F. Wieacker, Privatrechtsgeschichte der Neuzeit 479-83 (2d ed. 1967); but see supra note 18 (effect of general clauses). Cf. A. Bebel, Das Bürgerliche Gesetzbuch und die Sozialdemokratie, in Politik als Theorie und Praxis 93-107 (A. Langner ed. 1967) (attacking the BGB as class legislation favoring the bourgeoisie).

For a parallel insistence on the autonomy of private legal relationships in 19th cen-
therefore, the rules of private law were thought to enhance a more
general freedom of individuals not to be interfered with by the
state—particularly in commercial relationships but also in other
areas of everyday life.

In "public law," in contrast, the executive or administrative arm
of the state was ordinarily an active party, and the litigation involved
obligations or regulations of the political organs of the state, often
under relatively new regulatory or distributive programs of the late
nineteenth century. Because much public law was relatively new—and
because it was thought to require a special perspective of its
own—public law was not the subject of adjudication in the ordinary
civil courts. Rather it was largely relegated to a series of special
tribunals, such as the numerous administrative courts that were es-
established in the late nineteenth century. Confided to these ad-
ministrative tribunals—and later to a series of even more specialized
courts—were questions involving social insurance and the social
welfare programs arising from Bismarck's reforms of the 1880s. German legal theoreticians viewed the doctrine that arose from so-
cial insurance and similar programs as a form of law that was infer-
ior to the intellectual achievements of the Civil Code—a view that
may still persist, albeit in attenuated form, in German legal culture
today. In any case, the mystique of the Civil Code as a coherent and
valuable body of doctrine that should generally be maintained in-
tact—and basically separate from public law—has had a persistent
life in German legal culture.

This history explains the background of the initial issue consid-

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26. Disputes adjudicated in these courts were viewed as not being susceptible of res-

olution through ordinary "legal" techniques. See Freund, The Law of the Administration in

America, 9 Pol. Sci. Q. 403, 418 (1894) ("[In Germany special administrative tribunals]

are justified on the ground that civil judges are not well qualified to deal with questions

of public law, and that purely judicial reasoning is not sufficient to determine a conflict

of public and private rights."); see also E. Freund, Administrative Powers Over Per-

sons and Property 230 (1928).

27. On the history and structure of the administrative courts, and other special pub-

lic law courts for taxation and social insurance, see 1 E. Cohn, Manual of German Law

26-27, 31 (2d ed. 1968); H. Hattenhauer, supra note 24, at 143-44. Questions of ad-

ministrative law, taxation, and social welfare in Germany are still decided by court sys-

tems that are distinct from the courts that decide matters of civil and criminal law, and
each of these special areas has its own "supreme court" whose purpose is to assure
uniformity in that branch of public law. Id. at 39-40.

28. See H. Hattenhauer, supra note 24, at 259.

29. For a recent illustration, see Zöllner, Die politische Rolle des Privatrechts, 1988 Juris-

tische Schulung (JuS) 329.
erated in the Lüth case. Because all jurists agreed that constitutional law is a form of public law, it was argued that this form of public law—like any other form of public law—has no bearing on the separate, distinct and autonomous system of private law. Indeed some went so far as to suggest that because constitutional rights were historically directed only against the state, the Parliamentary Council that was convened to draft the Basic Law in 1948 was not even authorized to affect the traditional relationships of private law. A related view was that basic rights were needed only against "superior" authority—i.e., the state—and were not necessary to govern legal relations among individuals who possessed equal legal status. According to these arguments, therefore, the film producers' case against Lüth—being a dispute between private parties—would be decided solely according to the private law rules of the Civil Code.

The argument over this basic issue took a conceptual and somewhat philosophical form because the text of the Basic Law does not yield a definite conclusion on whether constitutional rights should generally apply to regulate legal relationships among private individuals. On the one hand, many basic rights are stated in positive, declarative form; they are not phrased as prohibitions against the government. From this grammatical form it could be argued that the application of these basic rights should not be limited to cases of public law. On the other hand, at least one provision of the basic


The argument that basic rights were historically viewed solely as rights against the state has been sharply disputed. For an important exposition of the contrary view, see W. Leisner, GRUNDSCHEN UND PRIVATRECHT 3-29 (1960) (arguing that the original concept of natural or fundamental rights did not distinguish between rights in public and private law). See also A. Bleckmann, STAATSRICHT II: ALLGEMEINE GRUNDSCHRIFTEN 162 (2d ed. 1985) (in French Revolution and German constitutional monarchy, basic rights were thought to apply against individuals as well as against the state).

31. See Schätzle, supra note 30. See also F. Lawson, A COMMON LAWYER LOOKS AT THE CIVIL LAW 89 (1953) (historically, the civil law "was essentially a law between equals . . . . [Therefore,] the constitution of the government and its relations with anyone else . . . were entirely outside Civil Law and were called public law.").


33. See, e.g., GG art. 1, § 1 ("Human dignity is inviolable."); GG art. 2, § 1 ("Everyone has the right to the free development of his personality . . . . ").
rights explicitly applies to private legal relationships;\textsuperscript{34} perhaps it could be inferred from this provision that without explicit language, the basic rights do not apply in private relationships.\textsuperscript{35} Yet a small number of other basic rights explicitly refer to or require governmental action,\textsuperscript{36} and perhaps from these provisions a contrary inference can be drawn.\textsuperscript{37}

In sum, the textual guidance on this point was inconclusive. In \textit{Lüth}, therefore, the Constitutional Court found that it was required to step back from the text of the Basic Law and view the problem from a more general perspective.

\textbf{B. The \textit{Lüth} Opinion, Part I: The "Influence" of the Constitution on Private Law}

In considering the general question of whether constitutional rights are applicable in private law, the Constitutional Court in the \textit{Lüth} case remarked that it was confronted with two “extreme” positions.\textsuperscript{38} The first was the view, noted above, that public and private law are two distinct systems and therefore that public law in general and constitutional law in particular have no bearing on private law.\textsuperscript{39}

The second “extreme” view was a diametrically opposed position. Before \textit{Lüth}, a number of scholars had advanced the view that the most important basic rights are not only directed against the

\begin{itemize}
\item \textsuperscript{34} GG art. 9, § 3 (prohibiting contracts that seek to interfere with the right to form labor unions); for commentary, see W. Geiger, \textit{Die Grundrechte in der Privatrechtsordnung} 13-18 (1960).
\item \textsuperscript{35} 1 Grundgesetz-Kommentar, supra note 32, at 37.
\item \textsuperscript{36} See, e.g., GG art. 3, § 1 (“All persons are equal before the law.”); GG art. 6, § 5 (parliament shall legislate to achieve equality for illegitimate children).
\item \textsuperscript{37} Moreover, GG art. 19, § 4 (guaranteeing a judicial remedy for the violation of individual rights by the government), has been viewed as indicating that the basic rights apply against the government only. Finally, GG art. 1, § 3 (stating that the basic rights directly bind the legislative, executive and judiciary), has given rise both to arguments that the Basic Law does not apply to private relationships and the argument that (by binding the judiciary) it does apply to those relationships.
\item With respect to rights of free expression protected by GG art. 5, one additional piece of textual evidence is furnished by the Weimar Constitution. WRV art. 118 guaranteed the free expression of opinion in language similar to that of GG art. 5, but also indicated that the right was protected against certain acts of private individuals. The absence of analogous language in GG art. 5 might suggest that rights of expression in the Basic Law are not protected against individuals. See 1 Entscheidungen des Bundesarbeitsgerichts [BAGE] 185, 192 (1954). Certain state constitutions drafted before the adoption of the Basic Law also contain guarantees of speech directed against certain forms of private action. See, e.g., Const. of Hesse art. 11 (1946).
\item \textsuperscript{38} 7 BVerfGE 198, 204 (1958).
\item \textsuperscript{39} See supra text accompanying notes 22-31.
\end{itemize}
state, but are also fully and "directly" applicable among individuals in private legal relationships. The implication of this theory was that certain constitutional rights should ordinarily be binding on individuals and private groups in approximately the same manner and to the same extent as they are applicable against the government. Indeed, in an important line of decisions the Federal Labor Court, under the leadership of Chief Judge Hans Carl Nipperdey, had adopted just such a position. In one group of cases, for example, the Labor Court stated that an employee could assert constitutional rights of free speech against an employer. In other decisions the court indicated that the constitutional provision requiring equal rights for women may prohibit wage discrimination by private employers. The Labor Court had also found that certain other basic rights—such as the right of marriage and the right to the free choice of employment—could invalidate provisions in employment contracts that unduly burdened an employee's ability to exercise those rights. Finally, the court held that an employee's

40. For Nipperdey's views, see Nipperdey, Grundrechte und Privatrecht, in Festschrift für Erich Molitor 17-33 (1962); Nipperdey, Gleicher Lohn der Frau für gleiche Leistung, 1950 RDA 121; Nipperdey, Die Würde des Menschen, in Die Grundrechte pt. 2, at 1-50 (F. Neumann, H. Nipperdey & U. Scheuner eds. 1950). For a sharp attack on Nipperdey's position, see H. Ehmk, Wirtschaft und Verfassung 78-83 (1961) (arguing that "direct" application of constitutional rights among individuals would shift too much power to regulate ordinary legal relations from the democratic legislature to the courts).

41. 1 BAGE 185 (1954) (employer's firing of an employee for political speech violates GG art. 5 under some circumstances). This conclusion (and some of the conclusions advanced in the cases discussed infra notes 42 & 45) are contained in dictum, but that does not impair the seriousness with which these statements were taken as the prevailing view of the Federal Labor Court. Later opinions in the Labor Court have continued to assert the applicability of GG art. 5 in private employment relations but the court has been reluctant to hold that the right has been violated in specific cases. See 41 BAGE 150 (1982); 29 BAGE 195 (1977); 24 BAGE 438 (1972); H.-W. Thümmel, Betriebsfrieden und Politplakette (1985). See generally Gamillscheg, Die Grundrechte im Arbeitsrecht, 164 Archiv für die Civilistische Praxis 385, 434 (1964).

42. 4 BAGE 240 (1957); see also 1 BAGE 348 (1955); 1 BAGE 258 (1955) (invalidating industry-wide labor agreements providing lower wages for women than for men). Although the agreements in these cases possessed a number of elements that might have led to a finding of "state action" under American law, the court's language suggests that this principle is also applicable to other forms of employment contracts. See 4 BAGE at 242-45; see also 1973 NJW 77; Nipperdey, 1950 RDA, supra note 40, at 126; 4 BAGE 274, 284-85 (1957). Since 1980, discrimination on the basis of sex in employment relations has been prohibited by amendments to the Civil Code. See BGB §§ 611a, 611b, 612(3); Grundgesetz-Kommentar, supra note 32, at 207-08.

43. GG art. 6, § 1.

44. GG art. 12.

45. See, e.g., 4 BAGE 274 (1957) (invalidating a contractual provision that terminated the employment relationship upon an employee's marriage). Although the employer in this case was a state hospital, and the agreement prohibiting marriage had been ordered
constitutional rights of human dignity and personality are violated if an employer fails to provide the employee with productive work during the employment period.\textsuperscript{46}

In reaching these conclusions the Labor Court emphasized that some constitutional rights are so important that they should be viewed as general rules for the governance of all of society—including the private law relationships of individuals and private groups—and not only as rules for limitation of the government.\textsuperscript{47} The Labor Court also noted the relevance of the "social state" provisions of the Basic Law,\textsuperscript{48} which can be read as approving (or requiring) the active intervention of the state—presumably including the active intervention of the judiciary—to ameliorate various forms of societal, rather than governmental, oppression.\textsuperscript{49} It was these considerations that animated the Labor Court's theory of the "direct" impact of basic rights on the rules of private law, in contrast with the sharply opposing view that the constitution had no effect whatsoever on those rules.

In the \textit{Lüth} case the Court took notice of both of these "extreme" positions and then made clear that it was not prepared to accept either of them fully. Rather, the Court adopted an intermediate theory which permitted a degree—but only a degree—of constitutional control of the relations of private law. The Court began by acknowledging that the basic rights of individuals do indeed ap-

by a government official, the decision apparently rested on the applicability of the constitutional right of marriage to private contracts, without consideration of governmental involvement. \textit{See id.} at 279; \textit{see also} Nipperdey, in \textit{Festschrift für Erich Molitor}, \textit{supra} note 40, at 28.

In 13 BAGE 168 (1962), which was decided after \textit{Lüth}, the Labor Court found that the constitutional right of occupational choice (GG art. 12) limits contract provisions that require a departing employee to repay costs incurred by the employer for the employee's education; under some circumstances such provisions could unreasonably impair the employee's freedom to choose another place of employment. In this case, however, the court found that the specific provision was reasonable.

\textsuperscript{46} 2 BAGE 221 (1955) (public hospital apparently treated as private employer); 28 BAGE 168 (1976) (private employer). In these cases the court relied on GG arts. 1, 2 (see \textit{infra} Appendix at p. 348). In a recent decision the Labor Court has also held that the constitutional right of privacy created by the same provisions of the Basic Law requires an employer to destroy a personal questionnaire submitted by an applicant whose application for employment had been denied. 46 BAGE 98 (1984); \textit{see infra} note 285.

\textsuperscript{47} 1 BAGE 185, 193 (1954) (Under the Basic Law, certain fundamental values "have entered into [the basic legal] framework, and neither the organization of a workplace nor agreements nor acts of legal peers should be allowed to contradict those values . . . . Thus these basic rights affect not only the relationship of the individual citizen to the state, but also the interrelationship of the citizens as legal equals.")

\textsuperscript{48} GG arts. 20, § 1; 28, § 1.

\textsuperscript{49} \textit{See} 1 BAGE at 193; \textit{see also} 4 BAGE 274, 276, 279-80 (1957).
ply most fully against the power of the state exercised as "public law."\textsuperscript{50} This conclusion was implied by the history of the concept of basic rights:\textsuperscript{51} certainly after the gruesome events of the Nazi period it was clear that excessive governmental power represented the basic threat to those rights. Nonetheless, the Court also emphasized that the Basic Law establishes an "objective ordering of values," and indicated that the introduction of this concept in constitutional doctrine represents a fundamental strengthening of the effectiveness of the basic rights and a certain extension of those rights beyond their traditional realm.\textsuperscript{52}

The concept of an "objective" ordering of values—outlined in the \textit{Lüth} case—was central to the Court's decision in that case and has come to be a central concept in German constitutional doctrine. Generally, in German legal theory, an "objective" value is a value that is applicable in general and in the abstract, independently of any specified relationship—in contrast with a "subjective" right, which is the right of a specified individual to some legal result against a specific party. In effect, by stating that the basic rights establish an "objective" ordering of values, the Court was stating that those values are so important that they must exist apart from any specified legal relationship—that is, in this context, apart from any specific relationship between the individual and the state. These values are not only specified rights of individuals but are also part of the general legal order, benefiting not only individuals who may be in a certain relationship with the state but possessing relevance for all legal relationships.\textsuperscript{53}

The Court's view that the basic rights form an "objective" order appears to bear some relationship to the view that the Basic Law itself establishes certain fundamental principles that are permanent ends of the state and cannot be changed, even by constitutional amendment.\textsuperscript{54} The permanence of these fundamental values in the

\textsuperscript{50} 7 BVerfGE at 204.
\textsuperscript{51} \textit{Id.} at 204-05; \textit{but see supra} note 30.
\textsuperscript{52} 7 BVerfGE at 205.
\textsuperscript{54} \textit{See generally} GG art. 79, § 3 (prohibiting amendments of the Basic Law that would affect certain fundamental constitutional principles); \textit{cf.} A. Bleckmann, \textit{supra} note 30, at 218. In accordance with such a view, the Constitutional Court, in decisions handed down before the \textit{Lüth} case, banned two political parties which it found to hold basic
Basic Law was intended to contrast with what was seen as the legal relativism of the Weimar Constitution, in which basic principles could be easily altered by constitutional amendment, and seems to reinforce the view that the basic rights are intended not only to grant individual rights against the state but also to apply more generally in all legal relationships. It seems a small step from the proposition that the core of certain rights cannot be changed under any circumstances because they are so important, to the position that basic rights are so important that they constitute general presuppositions of the legal order whose function is to affect all areas of the law.

Moreover, if basic rights are seen as "objective" values essential for the public good, it is reasonable to suppose that rights may be impaired even under circumstances in which they have not been abridged by the state. If a citizen is guaranteed certain rights of speech, for example, and external pressure is applied that makes it impossible as a practical matter to exercise those rights, it may make little difference as far as the abstract rights are concerned whether that pressure comes from the state or from some other source—for example, from an authoritarian private employer. If the goal of the "objective" value is to encourage the optimal amount of speech for the good of society, that value can be significantly impaired by repression of speech whether the repression comes from the state or from private individuals or groups. Because the basic rights establish "objective" values, then, those rights must apply not only against the state exercising its authority under public law; according to the Constitutional Court, basic rights must also have an effect on the rules of private law which regulate legal relations among individuals.

Yet even though the Court acknowledged that the constitution must play a role in private law, it also made clear that constitutional rights do not ordinarily have the same impact in private law disputes

values fundamentally inconsistent with the values of the Basic Law. See 5 BVerfGE 85 (1956) (Communist Party Case); 2 BVerfGE 1 (1952) (Socialist Reich Party Case). In applying the specific test of GG art. 21, § 2 (authorizing the banning of certain political parties), the Court argued that it is fundamentally inconsistent to allow parties to function in a constitutional system that presupposes basic values rejected by those parties. The court in Lüth cites the two political party cases in introducing its discussion of basic rights as an "objective ordering of values." See 7 BVerfGE at 205.

55. For a contrary position, see The Civil Rights Cases, 109 U.S. 3, 17-18 (1883). In that decision Justice Bradley seems to argue that, as a matter of fundamental definition, only the state can deprive a person of constitutional rights. In Bradley's view, if the state has not acted there is only a private wrong.

56. 7 BVerfGE 198, 205 (1958).
as when those rights are asserted against the state in public law controversies. In reaching this conclusion the Court adopted what has come to be known as the doctrine of the "indirect" effect of constitutional values on private legal relations—as opposed to the "direct" theory endorsed by Judge Nipperdey and the Labor Court.\textsuperscript{57} In a public law action between an individual and the state, a constitutional right can directly override an otherwise applicable rule of public law. In private law disputes between individuals, in contrast, constitutional rights were said to "influence" rules of civil law rather than actually to override them.\textsuperscript{58} A certain intellectual content "flows" or "radiates" from the constitutional law into the civil law and affects the interpretation of existing civil law rules. In such cases the rules of private law are to be interpreted and applied in light of the applicable constitutional norm, but it is nonetheless the civil law rules that are ultimately to be applied. Even in such cases, the court emphasized, the dispute "remains substantively and procedurally a dispute of civil law."\textsuperscript{59}

Under the "indirect" theory of Lüth, therefore, private law values retain considerable potency even when confronted by a value of constitutional law. This position may reflect the strength of the private law tradition and the persistence of the view that there should be an area of private legal relations that remains free from substantial government control. In this manner the Court may assume that the values of private law make their own important contribution to the autonomy of the individual—and to the public good—and therefore should remain in effect, to some extent at least, even when confronted by the countervailing objective and public values of constitutional law.\textsuperscript{60} Consequently, the Court in Lüth called for an accommodation of public and private law values when a constitutional value is threatened in a dispute of private law. The Court's "indirect" theory therefore imposes an obligation on the lower courts to use their powers creatively to alter or adapt a rule of the civil law when a constitutional value is implicated.\textsuperscript{61} A substantial tension

\textsuperscript{57} See supra text accompanying notes 40-49.
\textsuperscript{58} 7 BVerfGE at 205-06.
\textsuperscript{59} Id. at 205.
\textsuperscript{60} One commentator has argued, for example, that the rules of private law themselves preserve an area of constitutional liberty for those individuals whose rights—e.g., the right of contract protected by GG art. 2, § 1—would be limited if the constitution were fully applicable against them. See Dürig, Grundrechte und Zivilrechtsprechung, in Festschrift zum 75. Geburtstag von Hans Nawiasky 158-61 (T. Maunz ed. 1956).
\textsuperscript{61} 7 BVerfGE 198, 205-07 (1958).
remains, however, between the force of the private law values and the influence of constitutional norms.

According to the Court, the influence of constitutional rules on private law should be strongest when the applicable private law rule constitutes "mandatory law"—that is, a rule which cannot be changed by private agreement, as opposed to a "dispositive" rule which can be waived by the parties.\textsuperscript{62} Mandatory rules form a part of the \textit{ordre publique}—the public policy of the community; as such, they bear a certain resemblance to rules of public law rather than just reflecting an individual accommodation between private parties. According to the Court, constitutional values should have an even greater impact when the "mandatory" law is contained in a general clause,\textsuperscript{63} because the general clauses refer to extra-legal values such as "good morals" and thus expressly take into account the broader interests and values of society, including constitutional values.\textsuperscript{64} Perhaps because the general clauses resemble doctrines of public law in their nature, any specific private law values that they retain should have less weight when confronted by the values of the Basic Law. As a result, the dispute in \textit{Lüth}, which invokes "mandatory" law in the form of a "general clause," is highly susceptible of influence by constitutional norms.\textsuperscript{65}

To recapitulate, then, the Court in \textit{Lüth} started with the proposition that the producers' action against \textit{Lüth} was an action of "private" law and, therefore, the constitutional speech rights of \textit{Lüth}—while not irrelevant to the action—were only "indirectly" applicable in the case. In this type of private law action, as in all types of private law actions, constitutional principles "influence" the norms of private law but do not completely supersede them. On the contrary, the doctrines of private law retain a certain force and, at bottom, the action continues to be viewed ultimately as a matter of private law.

\textsuperscript{62} \textit{Id.} at 206. For the continental distinction between "mandatory" and "dispositive" rules, see, \textit{e.g.}, 1 \textsc{Münchener Rechts-Lexikon} 7 (H. Tilch ed. 1987). For the incorporation of a similar distinction in the Uniform Commercial Code, see Herman, \textit{Llewellyn the Civilian}, 56 Tul. L. Rev. 1125, 1144-47 (1982). In Germany (as in the United States) contract law contains a mixture of mandatory and dispositive rules, while tort law is basically composed of mandatory rules.

\textsuperscript{63} For the role of the general clauses in the German Civil Code, see \textit{supra} note 18.

\textsuperscript{64} 7 BVerfGE at 206.

\textsuperscript{65} Although the role of the general clauses—as "portals" for the entry of the constitution into the civil law—is emphasized by the Court in \textit{Lüth}, this aspect of the doctrine seems to have declined in importance thereafter. In more recent decisions the influence of the Basic Law on private law has frequently been reaffirmed without specific mention of the role of the general clauses. \textit{See} H. Bettege, \textsc{Zur Problematik von Grundrechtskollisionen} 405 (1977).
The impact of the constitution on private law is at its strongest where, as in Lüth, the matter concerns “mandatory law” in the form of a “general clause.”

C. The Theory of the Lüth Case and the American “State Action” Doctrine

It was ultimately the influence of the constitution on private law that allowed Lüth’s free speech rights to prevail in this litigation.


In elaborating its “indirect” theory, the Constitutional Court adopted a position first advocated by the eminent commentator, Günter Dürg, as an alternative to the “direct” theory of Judge Nipperdey and the Labor Court. See supra notes 40-49 and accompanying text; Dürg, supra note 60, at 157-90; T. Maunz, G. Dürg, GRUNDEBETZ-KOMMENTAR, art. 1, § 3, No. 127-33; art. 3, § 1, No. 505-19 (hereinafter MAUNZ-DÜRG). It has been argued, however, that in practice the “indirect” theory may reach results that do not differ significantly from those reached under the “direct” theory of Judge Nipperdey. See von Mangoldt, supra note 30, at 132-33. See also Bydlinski, Bemerkungen über Grundrechte und Privatrecht, 12 ÖSTERREICHISCHE ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT (n.f.) 423, 440-41 (1962/63). See generally Lewan, The Significance of Constitutional Rights for Private Law: Theory and Practice in West Germany, 17 INT’L & COMP. L.Q. 571 (1968) (analyzing the views of Dürg and Nipperdey).

In any case, even after Lüth, the Labor Court has continued to employ its “direct” theory in deciding some cases. See, e.g., Canaris, Grundrechte und Privatrecht, 184 ACP 201 (1984); 46 BAGE 98, 102 (1984) (right of personality), 13 BAGE 168, 174-76 (1962) (right of occupational choice); but see 47 BAGE 363 (1984), discussed infra text accompanying notes 90-92. Intransigence of this sort is possible, as a practical matter, because certain cases decided by the Labor Court may not be reviewed in the Constitutional Court. Moreover, continental law has always focused more on the doctrine elaborated by commentators than on the decisions of judges, and traditionally no court has been able to claim that it possesses a monopoly of the power of interpretation. Although this situation is changing in German constitutional law under the authority of the Constitutional Court, the practice of an important tribunal rejecting the Court’s views in an important constitutional matter does not appear as illegitimate (or even threatening) as would an analogous practice in the United States—particularly when constitutional rights seem thereby to be extended rather than contracted.

Some commentators have suggested, moreover, that the use of separate tests by the two courts may in fact be justified: the one-sided relations of social power actually involved in the typical employment cases considered by the Labor Court may justify more direct application of constitutional guarantees to protect employees than would be appropriate in many other relationships of private law. See Zöllner, Die gesetzgeberische Trennung des Datenschutzes für öffentliche und private Datenverarbeitung, 1985 RECHT DER DATENVERARBEITUNG [RDV] 3, 7; infra note 100. See also Gamillscheg, supra note 41; W. Geiger, supra note 34, at 13-18.
The second part of the Lüth opinion, however, turned to other issues. For a more comprehensive understanding of this German doctrine, therefore, it will be useful to compare its scope and impact with the "state action" doctrine, its closest American analogue, before returning to the concluding passages of the Lüth opinion itself.

Although problems arising from the "influence" of constitutional norms on private law bear some resemblance to issues raised by the American state action requirement, the two doctrines differ in significant respects. Both doctrines seek to distinguish a public from a private sphere—and acknowledge that constitutional values are more powerful in the public sphere—but the two doctrines have important differences of theory and approach which yield quite different results in certain areas.

Under the German doctrine, the impact of constitutional rights varies according to the distinction between two bodies of law—private and public law—a distinction that is traditional and deeply ingrained in German doctrine and reflected to a significant extent in the structure of the judiciary. In public law, under German doctrine, the constitution is "directly" and fully applicable. In private law, under the principles of the Lüth case, the constitution is only indirectly applicable, but it has some—albeit reduced—application nonetheless. One important result of this approach is that under the Basic Law the potential application of the constitution cannot be completely ignored in any case. Because the Basic Law is "indisi-

67. See supra text accompanying notes 23-27. Even though the distinction is fundamental in German legal thought, the precise border-line between public and private law is not completely clear. Although the state is ordinarily a party in public law disputes, for example, it does not follow that every dispute in which a state is a party is a dispute of public law. When the state enters the market as an ordinary participant (e.g., as the purchaser of office supplies or as the operator of a brewery), it enters into a relationship of private law and assumes a role that many German commentators consider to be indistinguishable from the role of a private individual or corporation. See e.g., W. Geiger, supra note 34, at 26-27. According to the prevailing view, therefore, the constitutional doctrine applicable to private law applies to the state when it enters into these private law relationships. In such cases the state is subject only to the "indirect" effect of the constitution outlined in the Lüth case, and not to the "direct" effect of the constitution which limits the state when it acts in a "sovereign" public law capacity. See, e.g., Dürrig in Mainz-Dürrig, supra note 66, art. 1, § 3, No. 134-137. See also I Grundgesetz-Kommentar, supra note 32, at 40-42, 831-33; W. Leisner, supra note 30, at 201-10. For an argument that the basic rights should apply fully against the state even when it acts in a private law form as a purchaser or seller of goods, see Ehlers, Rechtsstatistische und prosessuale Probleme des Verwaltungsprivatrechts, 1983 Deutsches Verwaltungsblatt [DVBl] 422, 424-25.

68. See supra text accompanying notes 50-61.
rectly" applicable even in disputes of private law, the constitution is at least indirectly applicable in all cases in which a substantive constitutional value is arguably affected.

In American law, in contrast, the question is not viewed as a question of the area of law that is being applied. Rather, American constitutional doctrine requires a determination of whether the state has "acted" to burden the affected individual. If the state has so acted in any area of law—whether in its regulatory capacity or as a private property owner—there is state action and the Constitution applies, with full force, to limit that action. If, however, the state has not so acted, there is no "state action" and the Constitution does not apply. Thus in many disputes between private individuals the Constitution has no applicability whatsoever—even though a substantive constitutional value may be profoundly affected.

In the typical case of state action under American doctrine, an executive officer of the state has acted or has threatened to act against an individual—perhaps in accordance with express statutory authority or perhaps not—and consequently that officer or the state is a party in litigation concerning that action. It does not follow, however, that the state or an officer must always be a party to the relevant litigation in order for state action to exist: under the American doctrine, the state can be found to have "acted" in certain disputes between seemingly private individuals. The aspects of the state action doctrine that apply in such cases, however, are quite different from—and in a sense considerably narrower than—the general doctrine of the Lüth case which makes the constitution "indirectly" applicable to all disputes between private individuals.

The ways in which the state can be found to have "acted" in disputes between private individuals fall generally into two categories. First, in a number of American cases, certain individuals or groups have been found to be so closely "involved" with the state, or so like the state in the exercise of a "public function," that they

69. Indeed, although there is sometimes said to be a distinction between "private" and "public" law in American doctrine, that distinction is not nearly so clear or well accepted as it is in continental theory. Cf. Watson, Legal Change: Sources of Law and Legal Culture, 131 U. Pa. L. Rev. 1121, 1122 (1983).

70. For treatment of the state in "private law" relationships under German constitutional doctrine, see supra note 67.


72. To that extent, therefore, there is a significant overlap between cases in which state action exists in American doctrine and cases of "public law" in German theory.
are viewed as if they were the state for purposes of the Constitution. In such cases the Constitution may be fully applicable against those individuals or groups—to the same extent as it would have been if they were in fact the state. There is no general analogue of this doctrine—through which a private actor, by virtue of its relation with the state, can be held to the full duties of the state—in German law.

The second way in which the state may "act" in a dispute between private individuals is more apposite to the problems of the Lüth case. There are some instances in American law in which the decision of a court in a dispute between private individuals can be viewed as the exercise of possibly unconstitutional state action. When a court adjudicates a dispute between private individuals, the question of whether the court's decision is an exercise of unconstitutional state action in this sense focuses on the provenance of the rule being applied by the court in the private dispute: the basic question is whether the decision of policy that is being attacked as unconstitutional has been formulated entirely by the state or whether the decision of policy has been formulated in part by a private person or group. In the clearest of these cases, for example, a court may apply a rule of decision that has been completely formulated by a governmental organ—that is, a statutory rule formulated by the legislature or a common-law rule totally formulated by the court, without any significant component of private choice of policy. If, in such a case, a court applies that rule against an individual—for example, through the imposition of a damage remedy or injunction in a tort action—there is state action and the court's application of the legal rule is subject to constitutional limitations, even though the party who seeks to have the rule applied is a private individual and not the state. Even though the dispute is between private individuals, the state has "acted" by formulating the entire choice of policy that is being applied by the court. Thus, for example, the rules of libel law that were found unconstitutional in cases like New

York Times Co. v. Sullivan\textsuperscript{74} and Gertz v. Robert Welch, Inc.\textsuperscript{75} were invoked by individual plaintiffs against individual defendants; yet the defendants in those cases were permitted to assert their first amendment rights precisely as though that rule of libel law had been invoked against them in a criminal libel action by the state.\textsuperscript{76} For the purposes of the state action doctrine, it was not important that the plaintiffs were private individuals and not the state. What was important was that the rule of libel law was formulated entirely by the state and thus that the basic decision of policy being challenged as unconstitutional was formulated by the state. The only choice made by the individual plaintiffs was the choice of filing the action.

Even more apposite than the libel cases—because similar in some ways to Lüth—is a recent decision in which boycotted merchants secured common-law tort damages in a state court action against blacks who had instituted a trade boycott for the purpose of achieving nondiscriminatory treatment in the community.\textsuperscript{77} Reversing the judgment, the Supreme Court found that the state court's judgment violated the organizers' first and fourteenth amendment rights of speech and political association. The Court treated the state court damage award against the boycott participants exactly as it would have treated a fine in a prosecution for criminal conspiracy initiated by the state. The fact that this was an action between individuals did not raise serious doubts as to the full applicability of constitutional principles.\textsuperscript{78} The crucial point was that the decision of policy represented by the common-law or statutory rule had been completely formulated by the state; the only private decision by the plaintiffs was the decision to invoke the rule that the state had made.\textsuperscript{79}

\textsuperscript{74} 376 U.S. 254 (1964).
\textsuperscript{75} 418 U.S. 329 (1974).
\textsuperscript{77} NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).
\textsuperscript{78} "Although this is a civil lawsuit between private parties, the application of state rules of law by the Mississippi state courts in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment." Id. at 916 n.51 (emphasis added). Cf. New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) ("Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which [defendants] claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that the law has been applied in a civil action . . . ." (emphasis added)).
\textsuperscript{79} This category of actions—cases between individuals in which the state has formulated the entire rule of decision—principally includes common-law tort claims and related statutory causes of action. Certain rules of property law that allocate property
When, however, private rights have been enforced under circumstances in which the applicable governmental rule allows the incorporation of a choice of policy by a private individual or group—and it is the judicial enforcement of this choice of policy that is attacked as unconstitutional—American courts have had greater difficulty. These cases typically involve judicial enforcement of such nominally private arrangements as contracts or testamentary dispositions. In the cases that have raised these problems, the rule as judicially applied contains a component of private will that has been exercised in a manner which, if explicitly so formulated by the state, would violate constitutional principles.

In the famous case of *Shelley v. Kraemer*, for example, the Supreme Court found state action in the judicial enforcement of a racially restrictive covenant at the request of one neighborhood resident against another. The state rule said in effect: "We will ordinarily enforce restrictive covenants in land"; it was the choice of the residents or the original sellers and purchasers to make this covenant a racially restrictive covenant (which would have been invalid if imposed by the state) rather than, for example, a restrictive covenant prohibiting taverns (which the state might constitutionally have imposed itself).

In *Shelley* the Court found that the Constitution prohibited the state court’s enforcement of the covenant, but in other cases in which a general common-law (or statutory) rule was filled in by an individual’s discriminatory choice of policy, courts have found no

interests apart from contract should also ordinarily fall into this category, but the Supreme Court has indicated that at least in some instances in which a property rule validates self-help actions of individuals no state action is present. See Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978).

It is important to bear in mind that under the doctrine of Lüth, in contrast with the American position, private law cases in which the state has entirely determined the rule of decision (e.g., German tort actions analogous to *Sullivan*, 376 U.S. 254, and *Claiborne Hardware*, 458 U.S. 886) are treated like all other cases of private law; accordingly, these cases in theory are subject only to the "indirect" influence of the Basic Law. See, e.g., 34 BVerfGE 269, 279-82 (1973) (Soraya); 7 BVerfGE 198 (1958) (Lüth).

A prominent German commentator has recently suggested that all areas of private law in which the rule of decision has been entirely determined by the state should be subject to the direct, undiluted impact of the Basic Law—a position that would resemble the position of the Supreme Court in cases like *Sullivan* and *Claiborne Hardware Co.* See Canaris, *supra* note 66. For criticism of this position, see Zöllner, *supra* note 66, at 6 (suggesting that considerations of private autonomy support "indirect" constitutional impact even when the state seeks to mediate between private individuals by setting forth complete rules of decision). See also Dürrig, in *Maunz-Dürrig*, *supra* note 66, art. 3, § 1, No. 513.

80. 334 U.S. 1 (1948).
unconstitutional state action in judicial enforcement of the private arrangement. Thus, notwithstanding Shelley v. Kraemer, courts have found no constitutional violation in the judicial enforcement of wills that discriminate on the ground of religion,81 or in the recognition or enforcement of certain contracts that discriminate on the basis of ethnic origin.82 A number of explanations have been proposed for these varying results which remain the subject of doctrinal dispute.83 Cases of this kind pose difficulties under the state action doctrine because in one sense the choice of policy appears private but in another sense the choice of policy appears to have been made by the state. Although the choice of policy itself has been made by private individuals—without the private choice there would be no policy—the court has lent its weight to the explicit private policy by choosing to enforce it.84

Because the Court in Shelley held that the Constitution prohibits the enforcement of certain nominally private contractual arrangements among individuals, the decision in that case perhaps comes the closest of any of the Supreme Court’s decisions to introducing into American law something like the German concept of the com-


83. For example, Shelley, 344 U.S. 1, has been distinguished from cases like Rice, 245 Iowa 147, 60 N.W.2d 110, on the ground that in Shelley the seller and purchaser of the property were “willing” and the discriminatory clause was invoked by a third person who was not a direct participant in the transaction. See Pollak, Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler, 108 U. Pa. L. Rev. 1, 9-16 (1959). See also Henkin, Shelley v. Kraemer: Notes for a Revisited Opinion, 110 U. Pa. L. Rev. 473 (1962) (proposing distinctions based on countervailing constitutional interests). Cf. Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959) (suggesting that no tenable distinctions are possible).

84. See, e.g., L. Tribe, American Constitutional Law 1713-14 (2d ed. 1988) (doubting that cases enforcing contracts can be distinguished from cases enforcing tort rules, like New York Times).

According to the Supreme Court, if a state has a statute or regulation requiring that certain private arrangements, once entered into, must be carried out, such a rule is unconstitutional to the extent that it requires the carrying out of discriminatory arrangements. See Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 177-79 (1972) (a state regulation requiring that private clubs conform to their own by-laws is unconstitutional to the extent that it requires the club to enforce a by-law provision discriminating on the basis of race). But see Blum v. Yaretsyk, 457 U.S. 991 (1982) (nursing home’s decision to transfer Medicaid patient is not state action, even though state encourages such decisions through continuing review and financial sanctions in context of extensive regulatory program).
prehensive "influence" of constitutional rights on private legal relationships.\textsuperscript{85} The Court's reluctance to extend \textit{Shelley v. Kraemer} beyond the context of racially restrictive covenants—thus suggesting that \textit{Shelley} is actually based on the more traditional view that a system of restrictive covenants resembles the public function of zoning—may reflect the fear of uncabin ed expansion that a more general acknowledgment of the applicability of constitutional rights in individual legal relationships might entail.\textsuperscript{86}

One other class of American cases implicating certain problems raised by \textit{Shelley v. Kraemer} should be mentioned. In these cases the applicable rule of law is not unconstitutional and there is no reference to a formally acknowledged private source of policy such as contract, covenant, or will. Rather, the invocation of an otherwise innocuous legal rule by a private individual follows an intentional pattern which, were it followed as an intentional pattern of enforcement by state officers, would render the enforcement unconstitutional. For example—to take one widely discussed problem of the recent past—a property owner might systematically invoke the state trespass laws for the purpose of excluding black people but not white people from the property. The property owner might be a single householder or the owner of a place of public accommodation such as a restaurant or lunch counter. In these cases the courts have often found or assumed that judicial enforcement of the rule is not unconstitutional, presumably because the discriminatory decision of policy is primarily private. Theoretically at least, the court may not even be required to acknowledge the discriminatory motivation of the exclusion, unlike the situation in contract or wills cases in which the court is called upon to enforce a private discrimination that appears on the face of the document being enforced. In these trespass cases state action has been found only where the property owner is so closely related to the state (by involvement or function) that its decision of policy to invoke the statute according to the discriminatory pattern—or in some other unconstitutional manner—can be attributed to the state.\textsuperscript{87}

\textsuperscript{85} See also Barrows v. Jackson, 346 U.S. 249 (1953) (state court's imposition of damages for violation of racially restrictive covenant held unconstitutional); but see infra note 88.

\textsuperscript{86} On this point, see H. Ehmke, supra note 40, at 82.

\textsuperscript{87} Compare Marsh v. Alabama, 326 U.S. 501 (1946) (exclusion of speaker from private property is subject to constitutional limitations because property owner was operating a company town and thus exercising public function), with Hudgens v. NLRB, 424 U.S. 507 (1976) (exclusion of picketers from shopping center is not subject to constitutional limitations because shopping center is not exercising public function). For an
An examination of this overall pattern indicates that the force of the American Constitution in disputes between individuals is in some instances weaker and in some instances stronger than the effect of the German Basic Law under the doctrine of the Lüth case. In those actions between individuals in which state action is found to exist, the United States Constitution generally applies against private individuals as fully as it applies against the state; once state action is found, the whole panoply of constitutional doctrines is called into play and the Constitution supersedes the "private" law. In contrast, in German cases involving disputes between individuals, the Basic Law only "influences" the rules of private law. The values of private law remain present in the balance and must be accommodated. Moreover, as discussed below, the fact that the action remains a private law action may have a significant limiting effect on the scope of the Constitutional Court's review. In these respects, therefore, the impact of the Basic Law on disputes between individuals appears weaker than the impact of the American Constitution in those disputes in which state action would be found under American doctrine.

In contrast, in those private disputes in which state action does not...
not exist under American doctrine, the impact of the German Basic Law becomes stronger than that of the United States Constitution. When there is no state action in American law, the United States Constitution ordinarily has no effect at all. Under American doctrine, therefore, if there is state action constitutional rights theoretically apply with full vigor; if there is no state action, there are no constitutional rights. 89 Under the German Basic Law, however, the fact that a certain dispute of private law lies beyond where the state action line would be drawn under the United States Constitution has no particular meaning. The rules of private law are still “influenced” by the basic rights of the constitution. Thus the German constitution continues to have an impact in cases in which no state action would be found under American law.

This difference between German and American doctrine is perhaps most notable in the area of contractual relations—particularly private employment contracts—in which the United States Constitution generally has no impact. In these cases the German Basic Law can have some force. In a recent German case, 90 for example, a press operator in a private printing shop refused on grounds of conscience to print an advertisement for books that he believed glorified war. The press operator was fired, and he sued in the labor courts to have the discharge set aside. Holding for the employee, the Federal Labor Court found that article 4 of the Basic Law—guaranteeing freedom of conscience—exerts a substantial influence on the applicable private law. Because of the constitution’s “influence” on private law, the court found that the “reasonableness” of the employer’s orders to the employee must be evaluated in light of the employee’s constitutionally guaranteed freedom of conscience. 91 The practical result was that the employee’s constitutional interests must be balanced against the interests of the employer in running its business and, under the circumstances of

89. For a particularly clear expression of this point in a recent decision, see Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982) (“The core issue presented in this case is not whether petitioners were discharged because of their speech or without adequate procedural protections, but whether the school’s action in discharging them can fairly be seen as state action. If the action of the respondent school is not state action, our inquiry ends” (footnote omitted)).


91. According to BGB § 315, a party to a contract can make certain demands for performance if those demands lie within the party’s “reasonable discretion.” Under § 315, therefore, the employer’s demand on the employee had to be “reasonable,” and it was this requirement that was “influenced”—under the Lüh doctrine—by the employee’s constitutional right of freedom of conscience. See GG art. 4.
this case, the court struck the balance in favor of the employee.92 In this case, therefore, the court indicated that the Basic Law operated to protect an employee against discharge by his employer under circumstances in which state action would not have been found under American law.

The application of constitutional rights in private legal relations under German doctrine is not exhausted, however, by its "influence" on those contractual relationships in which the United States Constitution does not ordinarily apply. Indeed, the "influence" of the German Constitution on the norms of private law may even lead, in some circumstances, to something that looks very much like the judicial creation of a constitutional tort action by one private person against another private person to redress a constitutional violation—another use of constitutional rights that is generally unknown in American doctrine.93 With respect to the right of free speech, this result was first suggested by the Blinkfüer case,94 a decision that resembles Lüth in certain important respects. If under some circum-

92. 47 BAGE at 375-79; see infra text accompanying notes 118-121. In undertaking the required balancing, the court found that the employee was acting on sincere grounds of conscience, that the brochure did in fact glorify war, and that the employer easily could have given the task to another employee. 47 BAGE at 375-79. This case is a recent example of the Labor Court's application of an "indirect" theory of the impact of constitutional rights on private law, rather than its own "direct" theory. See supra note 66. For an interesting case in which the "indirect" impact of the Basic Law resulted in a nullification of a contract to pay interest on a loan, see 1987 NJW 959 (State Court Lübeck, 1986) ("indirect" impact of GG art. 1 (guarantee of human dignity) and GG arts. 20 and 28 ("social state" provisions) invalidates borrowers' agreement to pay interest at a rate which, while not usurious, would severely limit their ability to purchase necessities—a fact apparently known to the lender).

93. Of course American courts have created constitutional causes of action on behalf of private individuals against certain governmental actors to redress violations of constitutional rights. See, e.g., Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). Since the Bivens-type actions are intended to redress governmental deprivations of certain constitutional rights, the defendants in those cases must be exercising governmental action. The Bivens line of cases therefore does not represent a parallel to the German cases, discussed below in the text, in which the Basic Law has been interpreted to require the creation of what appears to be a constitutional cause of action by one private person against another private person. See infra text accompanying notes 94-113.


stances the "influence" of the Basic Law calls for the judicial creation of a constitutional cause of action by one private individual against another, such a result goes beyond even cases like Shelley v. Kraemer—in which constitutional principles are employed to nullify a judicially imposed burden on individuals—and emphasizes the power of the German doctrine that acknowledges the influence of the Basic Law on individual legal relations.

When the Berlin Wall was built in 1961, Axel Springer Company, an important newspaper publisher, circulated a letter to news dealers threatening to withdraw its business from any dealer who carried publications listing East German television programs. Springer's letter was apparently directed against Blinkfüer, a small left-wing magazine that listed East German programs. Alleging that the threatened boycott had illegally injured its business, Blinkfüer sued Springer under section 823(1) of the Civil Code, a basic tort provision which provides compensation for the intentional or negligent infliction of injuries to property and certain other specified interests, "in a manner contrary to law."95

In response to Blinkfüer's suit, Springer argued that it possessed a constitutionally protected right to call for the boycott, but the Constitutional Court upheld Blinkfüer's damage claim. In the first part of its opinion, the Court held that the "influence" of article 5 of the Basic Law did not protect Springer from being found in violation of section 823(1). Although the speech rights of article 5 do indeed influence this rule of private law, Springer's call for a boycott was not protected because Springer was simply applying its economic power against the news dealers rather than making a general contribution to the formation of public opinion.96

Moreover, in the second—and more important—part of its opinion in Blinkfüer, the Court went on to find that Springer's call

95. For commentary on BGB § 823(1), see H. Kötz, supra note 18, at 38-83. For the full text of § 823, see infra Appendix at pp. 348-49.

96. 25 BVerfGE at 263-67. Because Springer possessed substantial economic control over the news dealers, they were not free to rest their decision of whether to join the boycott solely on the intellectual persuasiveness of Springer's views. See generally Biedenkopf, Zum politischen Boykott, 1965 Juristenzitung [JZ] 553, 555. Springer's call for a boycott would have been more favorably viewed if, instead of addressing a threatening letter to the news dealers, it had called upon the general public to boycott publications that listed East German programs. 25 BVerfGE at 266. For a careful analysis of this section of the Blinkfüer opinion, see Lerche, Zur verfassungsgerichtlichen Deutung der Meinungsfreiheit (Insbesondere im Bereiche des Boykotts), in Festschrift für Gebhard Müller 197-215 (1970). For a recent decision that follows this aspect of the Blinkfüer case, see 62 BVerfGE 230 (1982) (article in trade paper, seeking to mobilize the economic force of retailers against certain manufacturers, is not protected by GG art. 5).
for a boycott actually violated Blinkfüer's right to publish information about East German television programs. The Court held that Springer's attempt to apply economic pressure violated Blinkfüer's constitutional freedom of the press, expressly protected by article 5, section 1. Thus the Court not only found that a private law damage award against Springer would not violate its constitutional rights of speech but, moreover, held that in calling for the boycott, Springer, a private concern, had violated the constitutional speech rights of Blinkfüer.  

Because Springer's call for a boycott violated the constitutional rights of Blinkfüer, the Court also indicated by its ruling that the failure of the lower courts to issue a judgment for the plaintiff Blinkfüer perpetuated that constitutional violation. The result in this case may suggest that, if necessary, Blinkfüer could proceed directly against Springer for violation of Blinkfüer's basic right of free reporting; at least, under the Court's "indirect" theory, Blinkfüer was constitutionally entitled to an interpretation of the general clauses of the private law that would afford it a remedy against another private individual for a constitutional violation under these circumstances. Thus, under the Court's "indirect" theory, the constitutional impact on private law serves not only to protect a defendant against certain judicially imposed burdens that interfere with constitutional rights, as in Lüth. In addition, the impact of the constitutional on relationships between individuals may require the judiciary to create what is in effect a constitutional cause of action that will allow private individuals to enforce their constitutional interests against other private individuals.

97. 25 BVerfGE at 267-69; see K. Hesse, supra note 66, at 143. For procedural reasons the second section of the Blinkfüer opinion was essential to sustain the result in the Constitutional Court. The Federal Supreme Court (BGH)—the court directly below—had found that the influence of GG art. 5, § 1, protected Springer's call for a boycott, see 1964 NJW 29, and it was against this judgment that Blinkfüer filed a constitutional complaint in the Constitutional Court. The second section of the opinion was essential because Blinkfüer, as a constitutional complainant, could succeed in the Constitutional Court only if its own basic rights had in some way been violated by the lower court's finding that Springer was not liable. A simple finding that Springer's speech rights were not protected would not have been sufficient—in itself—for the requisite showing that Blinkfüer's constitutional rights had been violated.

98. See 25 BVerfGE at 256; supra note 97. For the view that the action of the BGH in dismissing Blinkfüer's claim constitutes reviewable judicial approval of Springer's boycott, see J. Schwabe, DIE SOGENANnte DRITT WIRKUNG DER GRUNDRECHTE 66 & n. 174 (1971); Schwabe, supra note 66, at 459-62. Compare Canaris, supra note 66, at 229-31.

99. See 25 BVerfGE at 263; see generally K. Hesse, supra note 66, at 142-43.

100. In a central passage of the Blinkfüer opinion the Constitutional Court stated:

In order to protect the institution of a free press, the independence of organs
Indeed, shortly after the decision in Blinkfüer, the Constitutional Court in the well-known Soraya case\textsuperscript{101} expressly approved the creation of what is in effect a constitutional cause of action in damages by one private individual against another. This cause of action was not created to protect rights of speech, however, but rather to protect a general constitutional right of "personality," derived from articles 1 and 2 of the Basic Law, against the actions of private individuals.\textsuperscript{102}

The approval of a constitutional cause of action in Soraya was the culmination of a line of doctrine that the Federal Supreme Court (BGH)\textsuperscript{103} had originally developed in two basic steps. In the first step, the BGH found that articles 1 and 2 include a "general right of

\begin{quote}
of the press must be assured against the incursions of powerful economic groups using inappropriate means . . . . The goal of freedom of the press—to encourage and protect the formation of free public opinion—thus requires protection of the press against attempts to suppress the competition of ideas by means of economic pressure. The boycott of the weekly paper "Blinkfüer" contravenes this constitutionally protected freedom . . . . The action of the defendant (Springer) is directed toward the suppression of news through primarily economic means, in violation of the [constitutional] freedom of reporting.
\end{quote}

25 BVerfGE at 268-69 (emphasis added).

Among other things, this language suggests that in a system in which the constitution may impose some limitations on private persons, the question of whether the constitution limits a private person in any specific case may sometimes depend upon the social or economic power wielded by that person. The danger to objective constitutional rights presented by a person or group with strong social or economic power is naturally greater than the danger presented by other private individuals. See generally I Grundgesetz-Kommentar, supra note 32, at 39; Dürrig in Maunz-Dürrig, supra note 66, art. 3, § 1, No. 511; Läufke, supra note 32, at 182.

A constitutional principle requiring the government to protect weaker individuals and groups from the economic or social power of stronger social units may conceivably also be derived from the "social state" clauses of GG arts. 20, 28. The primary purpose of these clauses is probably to require the government to furnish means of social welfare to economically deprived persons, but they also may oblige the government to adjust private law relations among individuals and groups in order to furnish similar protections. See generally Läufke, supra note 32, at 185-86. For an analysis of some of these issues in the context of employment law, focusing on the need to protect the weaker against the stronger economic forces, see Gamillscheg, supra note 41, at 407 ("The concept of social power, social strength is the key to the problem.").

In the American literature, certain commentators have also argued that constitutional limitations should apply against substantial aggregations of "private" corporate power. See, e.g., Berle, Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion through Economic Power, 100 U. Pa. L. Rev. 933 (1952). The Supreme Court, however, has never accepted this view. See e.g., Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (electric power company enjoying "at least a partial monopoly" status in its area is not limited by due process clause of fourteenth amendment when it terminates customer's service).

\textsuperscript{101} 94 BVerfGE 269 (1973).

\textsuperscript{102} For GG arts. 1 & 2, see infra Appendix at p. 348.

\textsuperscript{103} For the Federal Supreme Court, see supra note 20.
personality” and that this constitutional right is enforceable by injunction not only against infringements by the state but also against infringements by individuals.\(^{104}\) As discussed more fully below, this “general right of personality” includes, among other things, certain aspects of what is referred to as “privacy” in American law; the prevailing view is that these rights—and a number of others—are emanations of a central core of human personality.\(^{105}\) Early cases in the BGH found, for example, that the general right of personality protects an individual’s control over the distribution of his own writings, and over the secrecy of his medical records, against infringements by other individuals.\(^{106}\)

In the second step in this development, the BGH invoked the implications of articles 1 and 2 of the Basic Law to create a damage remedy, on behalf of one individual against another, for the viola-


\(^{105}\) For recent remarks on the development of the right of personality, see Kastner, Freiheit der Literatur und Persönlichkeitsrecht, 1982 NJW 601, 603-04; for an exhaustive survey of the doctrine, see H. HUBMANN, supra note 19. See also P. SCHWERDTNER, DAS PERSÖNLICHKEITSRECHT IN DER DEUTSCHEN ZIVILRECHTSSORDNUNG (1977). For an important American discussion of rights of “personality,” see Pound, Interests of Personality, 28 Harv. L. Rev. 343, 445 (1915).

\(^{106}\) 13 BGHZ 334 (1954) (Schacht-Letter) (newspaper’s publication of lawyer’s letter with misleading editorial excisions violated lawyer’s right of personality); 24 BGHZ 72 (1957) (release of insured’s medical data by insurance company employee can violate insured’s right of personality) (dictum).

In connection with the recognition of this new right, the coverage of BGB § 823(1), see supra text accompanying note 95 and infra Appendix at p. 348, was expanded by interpretation to provide a statutory remedy for an individual whose constitutional right of personality had been violated. See 24 BGHZ at 77. For a defense of what some viewed as a questionable statutory construction, see H. HUBMANN, supra note 19, at 107-55; for criticism, see Larenz, Das "allgemeine Persönlichkeitsrecht" im Recht der unerlaubten Handlungen, 1955 NJW 521. See also Brandner, Das allgemeine Persönlichkeitsrecht in der Entwicklung durch die Rechtsprechung, 1983 JZ 689 at 689, 696.

To a certain extent this line of cases embodies the result that would have occurred in American law if the arguments of Warren and Brandeis for the creation of a general right of privacy had been adopted by American courts not as a matter of common-law development, but rather as a matter of constitutional compulsion. See Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890); cf. id. at 205-07 (right to privacy rests on the principle of "an inviolate personality"). Such a development would have been difficult in American law, however, because constitutional rights are ordinarily not directed against individuals and the failure of courts to create a cause of action is ordinarily not the kind of state action that is necessary for a constitutional violation. See infra text accompanying note 215. But see Melvin v. Reid, 112 Cal. App. 285, 291, 297 P. 91, 93-94 (1931) (deriving tort action for invasion of privacy from provision of state constitution); Pavesich v. New England Life Ins. Co., 122 Ga. 190, 197, 50 S.E. 68, 71 (1905) (right of privacy derived from natural law and federal and state constitutions).
tion of the general right of personality.\textsuperscript{107} Although damage remedies are common in American law, this step was quite dramatic under German doctrine because the Civil Code relies in the first instance on specific performance\textsuperscript{108} and limits the areas in which awards for damages may issue. Indeed, the Civil Code expressly excludes damage liability for most instances of injury to "non-property" interests.\textsuperscript{109} Because many assertions of the general right of personality involve "non-property" interests, the text of the Civil Code expressly excluded a damage remedy for invasions of broad areas of this newly acknowledged right; moreover, recent legislative attempts to create a damage remedy in these cases had failed.\textsuperscript{110}

Nonetheless, in the \textit{Soraya} case the BGH found that the influence of articles 1 and 2 of the Basic Law overrode the clear statutory command and established a damage remedy by one private individual against another for the invasion of the constitutional right of personality.\textsuperscript{111} The BGH found that the impact of the constitution on private law required this result because otherwise the values of articles 1 and 2 would not be adequately protected against the actions of individuals. Thus the constitution required the acknowledgement of a private cause of action that the Civil Code had expressly excluded. Although the BGH took the lead in this doctrinal innovation, the Constitutional Court approved this line of development in its opinion in \textit{Soraya}.\textsuperscript{112} Blinkfüer indicates that, in the same manner,

\begin{itemize}
\item \textsuperscript{107} See 26 BGHZ 349 (1958) (Herrenreiter). For commentary on this decision, see Larenz, \textit{Anmerkung}, 1958 NJW 827; for an English translation, see B. Markessinis, supra note 104, at 195-201.
\item \textsuperscript{108} See 1 E. Cohn, supra note 27, at 105; Watson, supra note 69, at 1155; 34 BVerfGE 269, 286 (1973) (Soraya).
\item \textsuperscript{109} See BGB §§ 253, 847; for the historical background of these provisions, see D. Leuze, \textit{Die Entwicklung des Persönlichkeitsrechts im 19. Jahrhundert} 65-80 (1962).
\item \textsuperscript{110} See 34 BVerfGE at 272-73.
\item \textsuperscript{111} In \textit{Soraya} the BGH approved a damage award against a tabloid newspaper that had published a fabricated interview with the former wife of the Shah of Iran. See 1965 NJW 685. (The tabloid was part of the huge Axel Springer publishing empire, also the defendant in Blinkfüer; see supra text accompanying notes 94-100.) For other early cases in the BGH imposing damages for violation of a general right of personality, see, e.g., 39 BGHZ 124 (1963) (insulting statements about TV personality's appearance and sexual preferences); 35 BGHZ 363 (1961) (unauthorized use of professor's name in advertisement). For a criticism of this line of doctrine, noting the dangers posed to speech interests, see Löffler, \textit{Die Grenzen richterlicher Rechtsfindung beim immateriellen Schadensersatz}, 1962 NJW 225; for a defense, see H. Hubmann, supra note 19, at 349-56.
\item \textsuperscript{112} See 34 BVerfGE 269 (1973). For commentary on the \textit{Soraya} decision in the Constitutional Court, see, e.g., R. Wellbrock, \textit{Persönlichkeitsschutz und Kommunikationsfreiheit} 55-56 (1982); Larenz, \textit{Richterliche Konkretisierung verfassungsmässig gesicherter Rechtsprinzipien und einfaches Gesetz}, 1973 Archiv für Presserecht [AFP] 450; Knieper,
the principles of the Lüth case can be employed to create a constitutional cause of action—by one individual against another—for violations of article 5 rights as well. Indeed we will see below that recently, in a somewhat unexpected fashion, something of the sort has once again come to pass.\textsuperscript{113}

This line of cases illustrates another way in which the German doctrine results in broader constitutional impact than is possible under the American state action doctrine. Even under the broadest interpretation of Shelley v. Kraemer\textsuperscript{114} it is the action of a court that creates state action in American law. The failure of a court to act is ordinarily not state action; if it were, all private actions would be converted into state action by a court's failure to grant redress. Thus, as a general matter, there is no significant argument in American law that there is a constitutional requirement that a new cause of action be created to protect one private individual against the actions of another. Yet Blinkfüer and Soraya, and other cases acknowledging constitutional causes of action by one private individual against another, indicate that such a result is a natural implication of the "influence" of constitutional rights on private law in German constitutional doctrine first elaborated in the Lüth case.

\textbf{D. A Return to the Lüth Opinion, Part II: Free Speech and "General Laws"}

The Court's discussion of the relationship between free speech and private law in Lüth could not conclude simply with a finding that constitutional rights "influence" private law. Language contained in article 5, section 2 of the Basic Law—which qualifies the rights of free expression of opinion contained in section 1—raised a more specific argument that rights of free expression do not as a practical matter apply in disputes of private law. Article 5, section 2 states that the speech rights of section 1—the rights relied on in Lüth—"find their limits in the rules of the general laws . . . ." The purpose of this provision clearly was to permit the legislature to place some limits on the expression of opinion, and the basic question was whether section 826 of the Civil Code—and, more generally, all of the rules of private law—are "general laws" which limit the basic rights of article 5, section 1. If the rules of private law were found to

\textsuperscript{113} See infra text accompanying notes 274-282.
\textsuperscript{114} 334 U.S. 1 (1948).
be "general laws" in this sense, it might follow that the basic right of free expression of opinion would never be applicable to disputes of private law because the "general law" embodied in the rule of private law—for example, the private law doctrine prohibiting certain boycotts—would always limit the basic right of speech from the outset.

Perhaps foreseeing this possibility, Lüth argued that in cases involving speech that contributes to public political life, the "general laws" of article 5, section 2, should include rules of public law only.\textsuperscript{115} This argument apparently assumed that the contribution of speech to public life is so great that speech can only be limited by a rule of public law—which serves general community values—rather than by a private law rule, which may be directed primarily toward serving the economic or other private interests of individuals. According to this view, constitutional law has a significant impact on private law, and in cases of public speech the private rules are not "general laws" that can limit speech. Lüth's underlying view, therefore, was that constitutional values of speech had a distinctly superior position in comparison with the values of private law.

In the second part of the Lüth opinion, the Constitutional Court rejected this argument without retreating to the position that under article 5, section 2, private law values always prevail over rights of free speech. The Court's first task was to determine which laws are "general laws," which would be permitted to limit free expression. Drawing on the interpretation of the same phrase in the Weimar Constitution, the Court asserted that "general laws" are any laws that do not prohibit an opinion as such [and] that are not directed against the expression of opinion as such; [rather, they are laws that] serve to protect a legal value that can be protected without consideration of a particular opinion, [that is, they serve] to protect a community value that has priority over the free expression of opinion.\textsuperscript{116}

Under a definition of such breadth, rules of private law certainly could be "general laws," and private law rules protecting important personal interests therefore might limit speech under article 5, sec-

\textsuperscript{115} 7 BVerfGE 198, 202 (1958).

\textsuperscript{116} Id. at 209-10. For criticism of the imprecision of this formulation, see Klein, \textit{Öffentliche und private Freiheit: Zur Auslegung des Grundrechts der Meinungsfreiheit}, 1971 \textit{DER STAAT} 145, 150; for discussion of the meaning of the phrase "general laws" under the Weimar Constitution and in the legislative history of the Basic Law, see \textit{id.} at 150-59; see also Herzog, in \textit{Maunz-Dürig, supra} note 66, art. 5, §§ 1, 2, No. 250-51.
The Court thus found that the basic speech rights of article 5, section 1, can be limited by rules of private law under section 2. This conclusion did not mean, however, that the general rules of private law would always prevail over expressions of opinion. As discussed above, all aspects of the legal order—even the rules of "private law"—are to be influenced by "objective" constitutional values. Moreover, according to the Court, this influence is particularly important in the case of the rights of free speech because speech is "absolutely fundamental" (schlechthin konstituierend) in a liberal constitutional order. As a result, even general laws that may have the effect of limiting speech—whether they are rules of private law or of public law—must also be influenced by basic constitutional values, including the basic value of free speech itself. Thus, in determining the extent of the limitation of speech effected by the general laws, those laws must themselves be interpreted in light of the basic right of free speech, so that the special values of expression are preserved. In other words, the basic right of free expression can be limited by legislation under article 5, section 2, but because the legislature and the judges are themselves bound by the basic right, any general laws that are enacted and interpreted must in turn be limited by that basic right. As the Court put it, the basic right and the general laws qualify each other through the exercise of a "reciprocal effect" (Wechselwirkung). In light of this "reciprocal effect," the only way in which a result can be reached in any specific case is by deciding whether the values embodied in the general laws or the values embodied in the basic right are more weighty under the circumstances and therefore have the more powerful qualifying effect in the particular case. Thus the Court concluded that an individual balancing of the values of the basic right against the values of the general law must be undertaken in each

117. 7 BVerfGE at 211.
118. See id. at 208. By using this language, the Court emphasized that freedom of expression is an institution that is necessary to "constitute," or make up, a democratic government; in this context, the Court quoted Justice Cardozo's remark that free speech is "the matrix, the indispensable condition, of nearly every other form of freedom." Id.; see Palko v. Connecticut, 302 U.S. 319, 327 (1937). (Although "constitutive" is a literal translation of the Court's word, "konstituierend," I have used "fundamental" which seems more idiomatic and readily intelligible in the context). For a recent reaffirmation of the Court's view in a related context, see 69 BVerfGE 315, 342-47 (1985) (Brokdorf) (the right of assembly is "fundamental").
119. 7 BVerfGE 198, 208-09 (1958).
120. Id.
case under article 5, sections 1 and 2.\textsuperscript{121}

In sum, then, the constitutional protection of Lüth's call for a boycott could be determined only by balancing Lüth's speech interests against the private law interests of Harlan and the film companies, in the specific circumstances of the case. In the final pages of the opinion, the Court undertook the required balancing.\textsuperscript{122} Acknowledging that there is a "presumption" in favor of free expression,\textsuperscript{123} the Court remarked that speech should be given heightened protection to the extent that it furthers a discussion of public matters rather than the purely private or economic interests of the individual speaker.\textsuperscript{124} The Court also reiterated the point that its task was to interpret the phrase "contrary to good morals" in section 826 of the BGB\textsuperscript{125} in light of the constitutional influence exerted by article 5, section 1 of the Basic Law—an influence that the Court found to be particularly weighty because of the implicit reference to evolving ethical principles contained in the statutory language. The Court thus sought to determine whether Lüth's call for a boycott was "contrary to good morals" and invoked the speech values of article 5, section 1, in answering that question.\textsuperscript{126}

\textsuperscript{121} Id. at 210-11. For the subsequent development of a similar balancing technique in related areas, see, e.g., 69 BVerfGE 315, 348-49, 353 (1985) (Brokdorf) (right of assembly); 20 BVerfGE 162, 176-78 (1966) (Spiegel) (freedom of the press); see also 67 BVerfGE 157, 173 (1984) (privacy of the mails and telephone).

As we have seen, the Court explains that balancing is necessary because the rights of GG art. 5, § 1, are limited by "general laws" under GG art. 5, § 2, and those general laws are themselves influenced by the basic rights. In private law cases, however, balancing also might be required because basic rights only "influence" (rather than supersede) the workings of private law. See supra text accompanying notes 50-61. Determination of the extent of this "influence" in a specific case could possibly involve a balancing of the constitutional guarantee against private law values, even if the specific language of GG art. 5, § 2, did not exist.

\textsuperscript{122} 7 BVerfGE at 214-30.

\textsuperscript{123} Id. at 212.

\textsuperscript{124} Id. For a recent case relying on this point, see 68 BVerfGE 226, 232-33 (1984) (Sheriff in Black). But see Klein, supra note 116, at 159-68 (arguing that speech furthering private values should be given equal weight).

\textsuperscript{125} See supra text accompanying note 18 and infra Appendix at p. 349.

\textsuperscript{126} 7 BVerfGE at 215. See supra text accompanying notes 50-61. The Court's insistence on its "indirect" theory in Lüth is underscored by the fact that throughout the opinion the Court seeks to interpret the meaning of the phrase "contrary to good morals" in § 826 BGB, using the values of GG art. 5, § 1, to aid that interpretation, rather than by stating that the case must be decided through an interpretation of Lüth's article 5 rights alone. Presumably the latter technique would have been employed if the speech provisions of the Basic Law, set forth in article 5, were "directly" applicable to this dispute. Sometimes it seems, however, that the Court's references to the "interpretation" of § 826 co-exist in uneasy tension with the balancing theory developed under GG art. 5, §§ 1, 2. In any case, the two techniques—both advanced by the Court in Lüth—do not always seem to be precisely the same.
In undertaking the balancing that was required in order to perform this task, the Court considered a somewhat broader range of factors than is ordinarily taken into account in American balancing opinions—focusing with special care on certain aspects of Lüth’s activities and career that made the speech particularly justifiable in his case. To determine whether the speech was “contrary to good morals” in the requisite sense, the Court first considered Lüth’s motives and goals in calling for the boycott. First, the Court noted that Lüth was not motivated by economic goals of his own and was not in economic competition with Harlan or the film producers. Moreover, the goal of the speech—to exclude Harlan as a representative of German films—arose from Lüth’s fear that Harlan’s re-emergence would lead world opinion to believe that Germany had not rejected the national-socialist past. Thus Lüth’s speech reflected his general political views concerning an issue that was of essential importance for the German people—the reputation of German cultural life and the German nation after the gruesome events of the Nazi period. Moreover, it was clear that this justification was not merely a pretext subsequently devised by Lüth, because a number of other individuals had protested against Harlan’s re-emergence for similar reasons. The Court placed particular emphasis on the fact that Lüth was a person with a particularly “legitimate” interest in taking a position on Harlan’s re-emergence as a director, because of Lüth’s involvement in activities furthering understanding between Christians and Jews in Germany and his involvement in matters relating to the cinema in Hamburg. Indeed, in this light, the public probably expected a statement from Lüth on this question and his response accordingly could be seen as an understandable defensive reaction rather than an unprovoked attack.

128. Id. at 216.
129. Id. at 216-17.
130. Id. at 218; see also id. at 228-29 (Lüth’s statement made in public forum as defensive reaction to widespread publicity for Harlan’s film).

In the development of free speech doctrine after Lüth, the view that certain speech may be justified as a defensive reaction has played a prominent role—particularly in cases in which the constitution is found to affect the German law of defamation. Thus important early decisions took this factor into account in the balancing required by Lüth. See, e.g., 24 BVerfGE 278 (1968) (GEMA-Tonjägerverband) (vigorouc criticism of trade group by consumers’ newspaper was in response to group’s advocacy of measures unfavorable to consumers); 12 BVerfGE 113 (1961) (Schmid-Spiegel) (state judge’s sharp criticism of Spiegel, a German magazine, was in response to magazine’s article calling judge’s credentials into question). For more recent cases invoking similar principles, see 66 BVerfGE 116 (1984) (“Bild”-Wallraff) (sharp criticism of newspaper was justified when newspaper itself intentionally furthered polarization of political debate); 61
Against these very powerful interests favoring Lüth's speech, the private economic interests of Harlan and the film producers occupied a distinctly subordinate position.\footnote{7 BVerfGE 198, 218-19 (1958).} Indeed, the Court did not concede that Harlan had any countervailing constitutional interests of substance. For example, the Court rejected the argument that Lüth's remarks injured Harlan in his "human dignity"—a right protected by article 1, section 1 of the Basic Law. The Court doubted that the power of Lüth's attack was sufficient to remove Harlan from his chosen sphere of endeavor—activity in the cinema; some such damage would have been necessary, apparently, to constitute an invasion of human dignity.\footnote{Id. at 220-21. One basic right that the Court did not explicitly consider is GG art. 12, § 1, which grants a measure of protection to an individual's free choice of occupation. Perhaps the Court should have made clear that the case involved a conflict of two basic rights—Lüth's right of speech and Harlan's right of occupational choice. See Dürig, supra note 60, at 197. Indeed Harlan's own article 5 rights of expression as a film producer might also have been more explicitly discussed. See Klein, supra note 116, at 154.} In light of the strength of Lüth's constitutionally protected interests and the minimal nature of Harlan's economic interest protected by the private law, the constitutional interests prevailed over the private law interests and the injunction against Lüth was accordingly dissolved.

Even though the speech interest prevailed in Lüth, however, the opinion contained uncertain omens for the future. If in a subsequent case the constitutional interest in speech were to be balanced against "general laws" protecting countervailing constitutional interests—or in the event that speech interests were to be balanced against interests that were for any reason stronger than Harlan's interests in Lüth—the interest in speech might not prevail. Indeed in a decision that was handed down on the same day as Lüth, the Constitutional Court found that rights of speech were subordinate to cer-

BVerfGE 1 (1982) (Political Pamphlet Case) (both sides in elections employ vigorous invective and thus a political party must accept certain attacks made during a campaign); 54 BVerfGE 129 (1980) (Art Critique Case) (journalists' criticism of sculptor was in response to sculptor's lecture attacking practices of art critics and museums). For a similar doctrine in American libel law, see, e.g., Israel v. Portland News Publishing Co., 152 Ore. 225, 55 P.2d 529 (1936).
tain traditional property interests under the balancing test of Luith. Moreover, the delineation of a balancing technique as a basic technique relating to speech raises heightened problems of uncertainty—a particularly severe problem in speech cases, if one takes seriously the view that expression is both particularly valuable and

133. 7 BVerfGE 230 (1958). In this case the Constitutional Court upheld an injunction obtained by an apartment house owner against a tenant who attached a political placard to the outside wall of the house. Here, the article 5 speech rights of the tenant confronted the constitutional property interests of the owner and, as in Luith, the Court sought to balance the competing interests. In striking the balance, the Court found that the tenant’s interests were not particularly strong because he was the candidate of a large political party and thus had many alternative forms of expression at his disposal. Id. at 237. Moreover, the placard contained nothing that related specifically to the tenant or to the neighborhood. In contrast, the landlord’s interests were substantial: other tenants had complained about the placard and the owner was thus seeking to maintain congenial relations in the apartment house, id.; moreover, attaching a placard to the wall of the building was not an ordinary use of the property. As a result, the landlord’s property interest prevailed over the speech interest of the tenant under the specific facts of the case.

The differences between American and German doctrine in this area are illustrated by a comparison of the German apartment house case with American shopping center decisions following Marsh v. Alabama, 326 U.S. 501 (1946)—cases that also involve a clash between speech and property interests. Typically, shopping centers have sought to exclude individuals who wish to give speeches or distribute leaflets on shopping center property. The question under American “state action” law is whether the shopping center is so related to the state, or is exercising a function that is so much like a function ordinarily exercised by the state, that the shopping center’s action should be considered the action of the state for this purpose. After some vacillation, the Supreme Court has found that a typical shopping center does not exercise state action. The Constitution, therefore, has no limiting effect whatsoever on the decision of the shopping center to exclude speakers. See Hudgens v. NLRB, 424 U.S. 507 (1976), overruling Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968).

In contrast, a German court would not find that the constitution is completely inapplicable in determining whether individuals have rights to speak in shopping centers or on other private property. Rather, as exemplified in the apartment house case, the principles of Luith would require a careful weighing of the opposed speech and property interests under the specific circumstances of the case. Although there are suggestions of such a balancing in a few American cases, see, e.g., Lloyd Corp. v. Tanner, 407 U.S. 551, 567-70 (1972), the Supreme Court has ultimately ignored that technique in favor of the more traditional state action analysis. See Hudgens, 424 U.S. at 519 (quoting Lloyd Corp., 407 U.S. at 567, 568-69).

In contrast some American scholars have suggested that a balancing technique should be introduced in the Supreme Court’s state action law, see Henkin, supra note 83; Williams, The Twilight of State Action, 41 Tex. L. Rev. 347 (1963). See also Glennon & Nowak, A Functional Analysis of the Fourteenth Amendment “State Action” Requirement, 1976 Sup. Ct. Rev. 221 (arguing that Supreme Court actually employs balancing technique in state action cases). Cf. Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), aff’d, 447 U.S. 74 (1980) (state constitution grants individuals certain rights of speech and petition in privately owned shopping centers—an example of constitutional rights asserted by one “private individual” against another, without any explicit consideration of state action, in state constitutional law); Note, Private Abridgment of Speech and the State Constitutions, 90 Yale L.J. 165 (1980).
also particularly fragile.\textsuperscript{134} If a new balance is to be struck on the manifold facts of each case, the result in any future speech decision (and consequently the future extent of protection of speech) will be particularly difficult to ascertain. Moreover, the sort of stabilizing principles that may ultimately emerge in the course of common-law adjudication from a number of decisions employing ad hoc balancing may be somewhat slow to develop in a system in which stare decisis and the hierarchical authority of courts is not so well established as it is under Anglo-American doctrine.\textsuperscript{135} The resulting uncertainty may have the effect of discouraging the expression of opinions that are indeed constitutionally protected.\textsuperscript{136}

It is concerns of this general sort that presumably have led the Supreme Court of the United States to reject the techniques of ad hoc balancing—techniques like those of the \textit{Lüth} case—in many areas of first amendment adjudication.\textsuperscript{137} Instead, the Court has fre-

\textsuperscript{134} Cf. NAACP v. Button, 371 U.S. 415, 433 (1963) (first amendment rights are “delicate and vulnerable, as well as supremely precious in our society.”).

\textsuperscript{135} For an example of an attempt by the Constitutional Court to draw general principles from the balancing exercised under the doctrines of \textit{Lüth}, see 60 BVerfGE 234, 240-41 (1982) (Credit Shark Case). See also Tettinger, \textit{Der Schutz der persönlichen Ehre im freien Meinungskampf}, 1983 JZ 317. Even these subsidiary principles, however, are quite general in form and do not purport to create relatively clear categories of protected or unprotected speech. See infra text accompanying notes 137-138. They remain principles that must be taken into account in the course of a more comprehensive balancing.


The uncertainties of balancing also have raised concern in the German literature, but the proposed solutions have not always been particularly favorable to speech interests. See E. STEINDORFF, \textit{PERSÖNLICHKEITSSCHUTZ IM ZIVILRECHT} 20 (1983) (suggesting that balancing should be replaced, in part, by an absolute protection of “core” personality interests opposed to speech); Tettinger, supra note 135, at 325 (expressing concern that interests of personality may be accorded insufficient weight when balanced against speech interests). See also Brandner, supra note 106; W. GEIGER, supra note 34, at 40-41; Klein, supra note 116, at 154-55; Herzog, in MAUNZ-DÜRING, supra note 66, art. 5, §§ 1, 2, at No. 259-60.

\textsuperscript{137} The Court has generally rejected ad hoc balancing when the question is whether speech of a particular content is protected against governmental regulation. The Court does engage in ad hoc balancing, however, when adjudicating cases that do not involve the government’s regulation of the content of speech but rather regulation of the time, place, or circumstances of speech. See e.g., Brown v. Louisiana, 383 U.S. 131 (1966). The Court has also employed ad hoc balancing in reviewing regulations of the content of speech in certain special areas. See, e.g., Connick v. Myers, 461 U.S. 138 (1983); Pickering v. Board of Educ., 391 U.S. 563 (1968) (speech of public employees); United
quently adopted the technique of "categorization," through which it attempts to define with as much clarity as possible certain relatively narrow areas of unprotected speech and finds that most speech that does not fall into these categories is constitutionally protected.\textsuperscript{138}

This technique is employed in an attempt to achieve a substantial measure of clarity and predictability in first amendment adjudication and consequently to restrain the chilling effect that may arise when the scope of constitutional protection cannot readily be predicted in advance—a problem that is often present when a court employs ad hoc balancing.

To illustrate the difference between the two techniques, the opinion in \textit{Lüth} can be compared with the opinion of the Supreme Court of the United States in \textit{NAACP v. Claiborne Hardware Co.},\textsuperscript{139} a case in which black residents of a Mississippi town organized a boycott against local merchants in order to achieve equal treatment in the community. The boycott in \textit{Claiborne} appeared to have been much more effective than the boycott sought by \textit{Lüth}, but the speech and organizational activity engaged in by the defendants in \textit{Claiborne} were held to be constitutionally protected. In a tort action brought by the merchants, the Court found that the various forms of speech and association engaged in by the organizers of the boycott were covered by the first amendment and did not fall into any unprotected category. Only those forms of speech that involved advocacy of imminent violent action—when such action actually was imminent—fell into a category of unprotected expression and could thus be subject to liability;\textsuperscript{140} political association was also protected, unless the group was directed toward violent action and individual members specifically intended to achieve that end.\textsuperscript{141} The Court found, however, that no such activity had been shown.\textsuperscript{142} The minute weighing of countervailing interests, such as that undertaken in \textit{Lüth}, was not present in the \textit{Claiborne} case.

Reliance on an ad hoc balancing technique to protect speech

\textsuperscript{138} See generally Ely, \textit{Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis}, 88 HARV. L. REV. 1482 (1975). For an important example of this technique, see Cohen v. California, 403 U.S. 15 (1971).

\textsuperscript{139} 458 U.S. 886 (1982); see supra text accompanying notes 77-79.

\textsuperscript{140} 458 U.S. at 927-28 (citing Brandenburg v. Ohio, 395 U.S. 444 (1969)).

\textsuperscript{141} \textit{Id.} at 908-09, 918-20.

\textsuperscript{142} See \textit{id.} at 924-25, 928.
may evoke the added danger that balancing can be felt by the judiciary to be a fundamentally unjudicial form of operation—unjudicial because it does not call for the elaboration and application of something that looks like a rule. Rather it may appear to call upon the judiciary for the sort of judgment, uncabined by principle, that legislatures and executives are often thought better equipped to perform than courts. This view of constitutional balancing may lead to a lack of confidence on the part of the judiciary and a reluctance to assert that a constitutional right elaborated through balancing rather than the working out of a guiding rule should prevail over ordinary law. 143 This reluctance also may be apparent even when constitutional balancing is applied to private law adjudication which may itself sometimes require the balancing of countervailing private rights. To judges brought up in the tradition of the private law, the weighing of countervailing private rights may seem to involve balancing of a more limited and familiar kind than the weighing of more capacious public interests required in constitutional balancing. The elaboration of balancing tests instead of categorical rules in constitutional law therefore may sometimes lead to a reluctance to apply constitutional doctrine vigorously in private law cases. This reluctance may be particularly marked when a relatively new constitutional value confronts a more traditional value long protected by the ordinary law. It is to this sort of problem that we now turn.

III. The Mephisto Case

A. Artistic Endeavor and the Rights of Personality

In retrospect, with its significant discounting of private law values and its manifest willingness to engage in careful appellate review to protect constitutional rights of expression, the Court's opinion in Lüth can be seen as a relatively strong assertion of constitutional values over the traditional values of the ordinary law. By insisting, however, that the matter remained in form and substance a dispute of private law, the Court acknowledged a permanent state of tension which contained the seed of a re-emergence of those traditional values. In light of the historical importance of private law in the German legal tradition perhaps it was to be expected that such a move would not be long in coming; it came in the famous

143. Cf., e.g., Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring) (remitting “[p]rimary responsibility” for the weighing of speech and national security interests to Congress).
Mephisto case decided in 1971. In this case the re-assertion of private law took two forms: first, certain traditional legal values that can limit expression—values long protected in the ordinary law—were accorded very significant weight as an independent constitutional right; and, second, the Constitutional Court sharply limited its scope of review in private law cases.

As was also true of Lüth, the Mephisto case had its roots in the history of the Nazi period. In the 1920s Klaus Mann, son of the great writer Thomas Mann, befriended a young actor by the name of Gustaf Gründgens. Gründgens eventually married Klaus Mann's sister, although the marriage was short-lived. With Hitler's accession to power in 1933, the Mann family was forced to leave Germany. Gründgens remained and continued his rise to fame as an actor in Hamburg and Berlin. Ultimately, he was appointed director of the Prussian State Theatre as protégé of Hermann Göring, commandant of the Luftwaffe and amateur of the arts. Gründgens' most famous role was that of Mephistopheles in Goethe's Faust.

In 1936 Klaus Mann completed a novel entitled Mephisto, Portrait of a Career. Published in Amsterdam by an émigré press, the novel portrayed the rise of an actor, Hendrik Höfgen, whose life history was clearly modeled on that of Gründgens. Writing in later memoirs, Mann explained that although the portrait of Höfgen was based on the external facts of Gründgens' life, it was intended to depict a general type of opportunist intellectual in the Third Reich rather than to portray Gründgens as a specific individual. In 1963 a West German firm announced plans to publish Mephisto in the Federal Republic of Germany. Gründgens died in the same year, but his adopted son and heir filed an action under the Civil Code, seeking an injunction against publication of the book.

146. 30 BVerfGE at 175-76; see K. Mann, Der Wendepunkt: Ein Lebensbericht 383-85 (1981). For Mann's comments on Gründgens as a young actor in the 1920s, see id. at 186-90.
147. Gründgens' heir proceeded under BGB § 823(1), a general tort provision that provides a civil remedy against any person who "intentionally or negligently infringes on the life, body, health, freedom, property or other right of another person, in a manner contrary to law." See supra text accompanying note 95 and infra Appendix at p. 348. Prior to Mephisto, the Federal Supreme Court (BGH) had found that the right of "personality"—allegedly infringed by Mann's novel—was an "other right of another" within the meaning of BGB § 823(1). See 50 BGHZ 133, 143 (1968) (and cases cited therein); supra note 106. For a general analysis of BGB § 823(1), see H. Kötz, supra note 18, at
At the outset of the action a lower court issued a preliminary injunction and, in response, the publisher of _Mephisto_ appended a brief foreword which included Mann's statement—that "all characters in this book represent [general] types, not portraits." 148 In subsequent proceedings, however, a state supreme court and the Federal Supreme Court (BGH) found that the prefatory disclaimer was insufficient and prohibited further publication of the work. 149 The courts found that although the general portrait was clearly that of Gründgens, Mann had inserted certain fictitious events, and the reader's probable imputation of these generally discreditable incidents to Gründgens would injure his continuing reputation. 150 The courts rejected the publisher's argument that the work was protected by article 5, section 3 of the Basic Law, which contains an explicit guarantee of the freedom of artistic endeavor. 151

In a decision upholding the injunction, the Constitutional Court undertook its first major interpretation of the guarantee of artistic freedom set forth in article 5, section 3 of the Basic Law. In the structure of the Basic Law, this guarantee is set apart from article 5, section 1, which protects free expression of "opinion"—an indication that the drafters considered the values of artistic endeavor to be separable from the values inherent in other forms of protected expression. According to the Court, the main function of section 3 is to protect the autonomy of the artistic process against all incursions by the state. The Court also noted that the guarantee of artistic freedom protects not only the process of artistic creation but

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38-83; for a comparison of BGB § 823(1) with BGB § 826, the general clause at issue in _Lüth_, see id. at 90-91.

148. 30 BVerfGE 173, 177 (1971). Because Klaus Mann had committed suicide in 1949, the publisher of _Mephisto_ was the only defendant in the action commenced by Gründgens' heir. The difficulty of finding a publisher for _Mephisto_ in West Germany had clouded the final months of Mann's life. For the problems encountered in attempting to publish the novel, see K. MANN, BRIEFE UND ANTWORTEN 1922-1949, at 614 (M. Gregor-Dellin ed. 1987); 2 E. MANN, BRIEFE UND ANTWORTEN 118-68 (A. Prestel ed. 1985). See generally E. SPANGENBERG, KARRIERE EINES ROMANS (1984).

149. See 50 BGHZ 133 (1968) (opinion of BGH in _Mephisto_). For the hierarchy of courts through which a civil action must ordinarily proceed before it can reach the Constitutional Court, see supra note 20.

150. The lower courts found that if Mann had invented discreditable incidents, it was incumbent upon him to avoid making the general portrait recognizable as Gründgens. The courts focused particularly on a description of Höfgen's "conduct toward a dancer with whom Höfgen carried on a long-standing relationship and whom Höfgen perfidiously caused the Gestapo to imprison and deport when she became dangerous to his career." 30 BVerfGE at 179-81. There was apparently no indication that a similar event had occurred in Gründgens' life.

151. "Art and scholarship, research and teaching are free." GG art. 5, § 3.
also the process of distribution and publication.\textsuperscript{152} Because all parties agreed that Klaus Mann’s novel was a work of art, the work was covered by this guarantee and the publishers of the work also enjoyed its protection.\textsuperscript{153}

Because \textit{Mephisto} was a work of art, the plaintiff faced a major problem because the provisions of article 5, section 3 of the Basic Law seem to guarantee artistic production without qualification. It is true, of course, that article 5 does contain some qualifications of the rights of expression, but these qualifications appear to limit the rights of section 1 only, and not the rights of section 3. As discussed in \textit{Lüth}, article 5, section 2 of the Basic Law subjects the rights of free expression of opinion—article 5, section 1—to the limits found “in the rules of the general laws.” Article 5, section 2, also qualifies these rights of expression by “statutory provisions for the protection of youth” and by “the right of personal honor.”\textsuperscript{154} The latter limitation—which refers to the law of defamation in general—might seem particularly applicable to the problem of \textit{Mephisto}.

In its opinion in \textit{Mephisto}, however, the Constitutional Court confirmed that the language of article 5, section 2, imposes limits on

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\textsuperscript{152} 30 BVerfGE 173, 189 (1971). On the distinction between the process of artistic creation (Werkbereich) and the process of distribution to the public (Wirkbereich), see Müller, \textit{Strafrecht, Jugendschutz und Freiheit der Kunst}, 1970 JZ 87.

\textsuperscript{153} Although all parties in \textit{Mephisto} agreed that Mann’s novel was a work of art, in other contexts the question of whether a writing or other production qualifies as “art” under GG art. 5, § 3, is sharply disputed, and the use of this problematic term in the Basic Law has given rise to elaborate doctrinal discussions. See, e.g., 1 Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] 303 (1954) (Sünderin); Arndt, \textit{Umwelt und Recht: Die Kunst im Recht}, 1966 NJW 26-28.

For a recent analysis of the problems raised by the definition of “art” under the Basic Law, see Henschel, \textit{Zum Kunstbegriff des Grundgesetzes}, in \textit{Festschrift für Rudolf Wassermann} 351 (C. Broda ed. 1985). See also, e.g., Schick, \textit{Der urfassungsrechtliche Begriff des Kunstwerks}, 1970 JZ 645 (arguing that courts should defer to experts in determining what qualifies as “art” under GG art. 5, § 3); Müller, \textit{ supra} note 152, at 89 (work should be considered “art” if it possesses typical “formal” characteristics of a work of art, regardless of its quality); Zöbeley, \textit{Zur Garantie der Kunstfreiheit in der gerichtlichen Praxis}, 1985 NJW 254 (distinguishing three general methods of determining whether material qualities as art).

For recent statements by the Constitutional Court on the protection of artistic freedom, see 67 BVerfGE 213 (1984) (\textit{Anachronistic Parade}) (traveling street-theater production based on Brecht poem is “art” under GG art. 5, § 3); 1984 NJW 1293 (Preliminary Committee decision) (Sprayer of Zurich) (the spraying of designs—which otherwise might be “art”—on the walls of buildings owned by others is not protected by GG art. 5, § 3). \textit{See also 75 BVerfGE 369 (1987); 84 BGHZ 237 (1982) (political satire as art). For a discussion of the fascinating problems raised by the \textit{Sprayer} case—involving a collision of the basic rights of artistic freedom and property—see Hoffmann, \textit{Kunstfreiheit und Sacheigentum}, 1985 NJW 237. \textit{ See also supra} note 133.

\textsuperscript{154} \textit{See infra} Appendix at p. 348.
section 1 alone, and does not limit the artistic freedom guaranteed by section 3. Thus, according to the Court, "art, in its independence and autonomy, is protected in article 5 section 3 without reservation." In this connection, moreover, the integrity of the work of art must be respected; it is impermissible to extract certain portions of the work and call them "expressions of opinion" under section 1, thus subjecting them to the limitations of section 2. The result of the Court's interpretation in Mephisto, therefore, is that artistic endeavor may enjoy greater protection than political speech (and other expressions of opinion) because art is not limited by the "general laws" that can limit expressions of opinion.

The Court's decision that the guarantees of article 5, section 3 of the Basic Law are not limited by section 2 did not, however, require a finding in favor of publication of the novel. Although the

155. 30 BVerfGE at 191. The Court traced this special protection of art to the severe repression of artists during the Nazi period. Id. at 192. The Court's explanation curiously ignores the fact that political speech and other "expressions of opinion" were subjected to restrictions of at least equal stringency under the Nazi dictatorship.

156. Id. at 191.

157. The Weimar Constitution also contained guarantees of art and learning that were not restricted by the "general laws" which could limit expressions of opinion. Compare WRV art. 118(1) (expressions of opinion), with WRV art. 142 (protection of art and scholarship); see generally 1 BVerwGE 303 (1954) (Sünderrin). This apparent preference for art over expression of opinion, including political speech, may reflect a history in which artistic endeavor has generally been prized and political activity often regarded with some disdain. Such a view contrasts with American first amendment doctrine, which clearly places expressions of opinion on political affairs and other "matters of public concern" at the core of protected speech. See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758-59 (1985) (opinion of Powell, J.); Brown v. Hartlage, 456 U.S. 45, 52-53 (1982). Indeed, American commentators have sometimes encountered difficulty in justifying the extension of first amendment protections to works of art at all. Compare, e.g., Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1 (1971), with Meiklejohn, The First Amendment is an Absolute, 1961 Sup. Ct. Rev. 245. The preference for artistic over political endeavor, suggested by the structure of GG art. 5, seems consistent with the elaboration of a strong right of personality under GG arts. 1, 2, which can in many instances outweigh the values of public speech, see supra text accompanying notes 104-106 and infra notes 170-180; in both developments the inner life of the individual is emphasized in a manner that can place the public and the political in a secondary role. On the other hand, the Court's emphasis in Lüth on the "fundamental" or "constitutive" importance of political speech in a democracy, see supra note 118 and accompanying text, may indicate a hierarchy of speech values rather different from that suggested by the text of GG art. 5.

In an interesting reprise of an argument that was apparently put to rest in Lüth, see supra text accompanying notes 22-31, the plaintiff in Mephisto argued that GG art. 5, § 3, applied only against the state, and therefore could not protect an artist in an action of private law filed by another individual. Following the general doctrine of Lüth, however, the BGH found that GG art. 5, § 3, incorporated a basic value of the constitution and consequently was applicable in private law through the general clauses of the BGB. See 50 BGHZ 133, 144-45 (2d ed. 1968).
rights of artistic freedom could not be limited by the "general laws," it did not follow that artistic freedom was completely without limit. The Court stated that the guarantee of artistic freedom must be seen as only one constitutional guarantee in a larger constitutional setting. If there are other constitutional guarantees that conflict with artistic expression, the protection of artistic expression may be limited to some extent by those countervailing constitutional guarantees.\textsuperscript{158}

The Court found such a countervailing constitutional guarantee—in effect, a constitutional right of an individual not to be libeled—in the guarantee of human dignity contained in article 1, section 1 of the Basic Law.\textsuperscript{159} As we have seen, a line of cases in the BGH and other courts had found that certain rights of personality—including rights of reputation—are protected by the guarantee of human dignity in article 1, section 1 (and by the right of free development of the personality in article 2, section 1), and this constitutional protection is not only applicable against the state but also applies in a manner that limits the rights of other individuals in the relationships of private law.\textsuperscript{160} In \textit{Mephisto} the Constitutional Court found that a right of reputation traditionally invoked in the law of defamation falls within this constitutional protection of human dignity. The Court noted that a work of art has an effect in real life and that it may consequently have a deleterious impact on the personality rights of others.\textsuperscript{161} It was this countervailing constitutional guarantee of personality, therefore, that could have the effect of limiting artistic expression.

The Court concluded that if a work of art threatens human dignity by using (or misusing) details of an individual's life history, the Basic Law may require that the protection of personality be given greater weight than the guarantee of artistic expression. The decision of which competing constitutional protection should prevail can be determined only "through a weighing of all the circumstances of the individual case."\textsuperscript{162} Even without applying the limita-

\textsuperscript{158} 30 BVerfGE 173, 193 (1971).
\textsuperscript{159} Id.
\textsuperscript{160} See supra text accompanying notes 101-111.
\textsuperscript{161} 30 BVerfGE at 193-94.
\textsuperscript{162} Id. at 195. In the course of this balancing the court should take into account the extent to which the author has drawn a portrait of a specific individual from real life and, if the court finds that such a portrait has been drawn, it must then consider the extent to which "falsifications" of the recognizable person's life story have injured that person's reputation or memory. Id.

The Court also noted that the constitutional protection of human dignity does not
tions of article 5, section 2 of the Basic Law, therefore, the Court found that the rights of artistic freedom are subject to a form of constitutional balancing similar to that required under section 2 by the opinion in Lüth. The apparent difference between rights arising under article 5, section 1, and those arising under section 3 is that in section 3 the balance may only be struck between artistic freedom and a countervailing constitutional interest—not between artistic freedom and those "general laws" that represent community or individual interests not rising to constitutional status.163

In private law disputes, however, even that distinction may be more apparent than real. In private law disputes the "general laws" that can be asserted as limits on expressions of opinion under article 5, section 1—but apparently not as limits on artistic freedom under section 3—are laws that often can be viewed as protecting important personal interests. Given the very general nature of constitutional provisions such as the guarantee of "human dignity" and the "free development of the personality," such personal interests often can be viewed—if the court so desires and if the underlying legal tradition is hospitable to such a result—as protected aspects of those general constitutional guarantees. As a result, broad constitutional provisions can be employed to elevate personal interests—in some cases interests resembling those traditionally protected by the private law—to the status of constitutional values that may counter the constitutional interest in artistic endeavor.164

In private law matters, therefore, there is always the possibility that a "general law" asserted as a limit on expression can be seen not only as a general law under article 5, section 2 of the Basic Law,
but also as a law that asserts or represents a countervailing constitutional interest—an aspect of human dignity or personality that will limit the rights of section 3 as well. Moreover, if that is the case, a "general law" protecting that interest would certainly be a more powerful counterweight in limiting section 1 than it would be if not found to further constitutional values.\textsuperscript{165}

If the court employs a broad constitutional provision to incorporate a value of the ordinary law, this technique may have the effect of limiting constitutional rights of expression by re-casting countervailing personal interests in constitutional form. As we have seen, an attempt of this sort had been made in \textit{Lüth} and rejected by the Court. In \textit{Lüth}, Harlan argued that the continued exercise of his profession was endangered by Lüth's call for a boycott and that this interest was a constitutionally protected aspect of his human dignity. Because his professional interest was a constitutional interest, Harlan argued, that interest should limit Lüth's constitutional interest in speech. The Court rejected the argument on the ground that Harlan could show no infringement of his human dignity unless he was completely excluded from his profession—a possibility that seemed remote under the circumstances.\textsuperscript{166}

In \textit{Mephisto}, in contrast, the Court followed a line of doctrine developed in the BGH, and found that a personal value similar to the value represented in the ordinary law of defamation is a constitutionally protected aspect of human dignity. "It would be inconsistent with the constitutional guarantee of the inviolability of human dignity, which is the foundation of all Basic Rights, . . . if an individual's general claim to the respect of others could be degraded or abased, even after his death."\textsuperscript{167} Thus, in this manner, a personal interest confronting constitutionally protected speech was incorporated in the capacious protection of human dignity and thereby granted the status of a constitutional right. As such, the protection against defamation was entitled to a powerful limiting effect on the constitutional values of artistic expression.\textsuperscript{168} As discussed further

\textsuperscript{165} See 34 BVerfGE 269, 282 (1973) (Soraya) ("The potential strength of the general law receives a constitutional strengthening" from the impact of GG arts. 1 and 2); see also 35 BVerfGE 202, 225 (1973) (Lebach).

\textsuperscript{166} See supra text accompanying note 132. The Court also ignored the possibility that Harlan's apparent private law interest also might be protected under the more specific provisions of GG art. 5, § 1, or GG art. 12. See supra note 132.

\textsuperscript{167} 30 BVerfGE 173, 194 (1971).

\textsuperscript{168} As noted above, the "right of personal honor"—the right protected by the laws of libel—also receives constitutional acknowledgment in GG art. 5, § 2, in which it is specifically mentioned as a limitation on the free speech rights of GG art. 5, § 1. See supra
below, the Court found that the question of which constitutional interest should prevail could be answered only through a process of balancing in each individual case.\textsuperscript{169}

Following \textit{Mephisto}, the technique of developing and elaborating text accompanying note 154. This portion of GG art. 5, § 2, apparently refers, however, to a "right" that exists only to the extent that it is reflected in statutory law, see 33 BVerfGE 1, 17 (1972), and does not purport to create an independent basic right. In any event, the \textit{Mephisto} case involved rights of artistic expression protected by GG art. 5, § 3, which, as the Court found, is not limited by the "right of personal honor" or any other part of § 2. \textit{See supra} text accompanying note 155.

\textsuperscript{169} \textit{See supra} text accompanying notes 162-163; \textit{infra} text accompanying notes 181-186.

The Court's finding that the right of artistic expression under GG art. 5, § 3, is not subject to the limitations of GG art. 5, § 2, raises questions about the treatment of arguably artistic material that may contravene other legal norms. GG art. 5, § 2, for example, restricts certain sexually explicit material covered by "statutory provisions for the protection of youth," see 30 BVerfGE 336 (1971); under the principles of \textit{Mephisto}, however, that limitation applies to the guarantees of GG art. 5, § 1, only, and not to the protection of art contained in GG art. 5, § 3. Absolute protection for artistic endeavor under GG art. 5, § 3, might therefore prohibit regulation of this material.

Some courts have met this argument by finding that certain publications "dangerous to youth" are not works of art and therefore are not entitled to the protections of GG art. 5, § 3. \textit{See Meyer-Cording, Das literarische Portrait und die Freiheit der Kunst, 1976} JZ 737, 744; \textit{see also} 39 BVerwGE 197 (1971). In a somewhat different argument—an argument that recalls the Court's opinion in \textit{Mephisto}—some commentators have asserted that these publications threaten the "right of personality" of minors and that laws for the "protection of youth" safeguard this constitutionally guaranteed right. Since under \textit{Mephisto} a countervailing constitutional interest can limit the otherwise unrestricted right of artistic expression, this argument would permit regulation of even those works that qualify as works of art, if the threat posed to the personality of minors "outweighs" the protections of GG art. 5, § 3, under the specific circumstances. Thus, what may seem to be general societal values can be recast as constitutionally protected interests, with the result that further limitations are imposed on the "absolute" values of GG art. 5, § 3. Indeed this technique goes one step beyond the technique of \textit{Mephisto} because here the countervailing constitutional interest (supposedly of the minors) is asserted by the state rather than by the individuals to whom the constitutional protection is said to be due. \textit{See generally} Meyer-Cording, \textit{supra}; Scholz, in \textit{Maunz-Dürig, supra} note 66, art. 5, § 3, No. 70 (arguing that GG art. 6—protection of family and children—also can limit artistic freedom).

A similar question is raised by works of art that are thought to be "subversive." Although general laws directed at seditious speech may limit the freedom of expression of opinion under GG art. 5, § 1, the \textit{Mephisto} case makes clear that "general laws" will not limit works of art protected by GG art. 5, § 3. In this area, however, the Constitutional Court has employed a technique similar to that of \textit{Mephisto} in order to suggest that, here also, some limitation of artistic expression may be possible. According to the Court, the existence of the Federal Republic of Germany and its "free democratic basic order" are values of constitutional rank, which can prevail over artistic freedom if the effect of a work of art on an average viewer or reader would create a direct and present danger to the existence of the Federal Republic and its basic order. See 33 BVerfGE 52, 70-71 (1972) (\textit{The Laughing Man}) (dictum). This approach goes beyond the technique of \textit{Mephisto} (and even beyond the suggested technique for limiting material that is "dangerous to youth") because here the individual right of artistic expression is not balanced.
ing constitutionally protected rights of personality has had an important effect in imposing substantial limits on expression in the jurisprudence of the Constitutional Court. In some instances the constitutional right so recognized has been a right that offsets the seemingly absolute guarantee of article 5, section 3, as in Mephisto; in other instances it has strengthened the effect of a "general law" limiting speech, in the balancing undertaken under article 5, sections 1 and 2. In this process the broad provisions of article 1 and article 2, section 1—guaranteeing "human dignity" and the "free development of the personality"—have played a principal role, for this language gives maximum opportunity for casting personal interests of reputation and privacy as constitutional rights of the person affected by the speech or other expression.

Cases further developing this technique were decided by the Constitutional Court shortly after Mephisto. In the important Lebach case, for example, the Court prohibited the showing of a documentary television film describing—with apparent accuracy—the planning of a famous robbery of an army munitions depot which resulted in the deaths of four soldiers. The Court found that the privacy right of a convicted accessory to the offense—who was soon to be released from prison—overrode the article 5, section 1 rights of the television station in depicting this well-known event of recent history. In the documentary film the accessory was referred to by name, and the Court found that his chances of successful reintegration in the community would be threatened if the film were shown in that form—particularly in light of the fact that references to homosexual relationships among the conspirators figured prominently in the script. Important in the Court's decision was its finding that the prisoner's rights of personality under articles 1 and 2 of the Basic Law included a right of "informational self-determination"—a right "exclusively [to] determine whether and to what extent others might be permitted to portray his life story in general, or certain events against an individual right of human dignity or personality, but rather against an asserted community right of governmental "self-preservation."

In light of these developments, it appears that courts and commentators come quite close to imposing on the supposedly unrestricted right of artistic expression many of the limitations actually imposed by the general laws under GG art. 5, § 2—even though § 2 is, in constitutional theory, not applicable for the purposes of restricting artistic expression. See Lerche, supra note 164, at 499.

170. See, e.g., 34 BVerfGE 269 (1973) (Soraya), discussed supra text accompanying notes 101-112; 35 BVerfGE 202 (1973) (Lebach), discussed infra text accompanying notes 171-176.

171. 35 BVerfGE 202 (1973); for an English translation, see B. Markesinis, supra note 104, at 205-13.
from his life."172 It was this constitutional right that was to be balanced against the broadcaster's article 5, section 1 rights of free reporting. After a detailed consideration of the facts, the Court found that the complainant's right of personality outweighed the broadcaster's right of free reporting under the specific circumstances of the case.173

It is worth emphasizing that in Lebach the right of personality was construed to require the prohibition of a television production that was not claimed to contain false statements. Rather, the Court upheld the complainant's constitutional right to be free from certain invasions of personality that might result even from completely accurate speech. In this case, therefore, the courts acknowledged (apparently as a matter of constitutional compulsion) a cause of action

172. 35 BVerfGE at 220. For a recent invocation of the "right of informational self-determination" in a public rather than a private law context, see 65 BVerfGE 1 (1983) (Census Case), discussed infra text accompanying notes 283-286.

173. Since the decision rested in part on a general law that created a qualified right to control one's own picture, Kunsturhebergesetz [KUG] §§ 22, 23; see generally P. Schwerdtner, supra note 105, at 218, the Lebach case is an instance of a constitutional right strengthening the force of a general law. See 35 BVerfGE at 225.

In the balancing process undertaken in Lebach, the Court acknowledged that both of the contending rights—the broadcasters' right of reporting and the prisoner's right of personality—were central to the constitutional system. Id. at 225. According to the Court, however, even an objective television report could seriously invade an individual's private sphere because of the psychological impact of television and its broad geographical range. Id. at 226-27. Moreover, the documentary form is particularly dangerous because the film's point of view is often accepted as a representation of reality. Id. at 228-29. Indeed, viewers in the Federal Republic are generally less critical in their acceptance of television than of other mass media. Id. at 229. On the other hand, while contemporary reports of crimes have great value, id. at 231, after a period of time has elapsed this interest becomes less pressing. Id. at 233-34. Moreover, with the passage of time a prisoner's interest in resocialization after release from prison increases. Id. at 235-36. In sum, the documentary, which was to be broadcast a few years after the offense occurred, would unduly impair the prisoner's chances of resocialization. Id. at 235-44. The television station's position as a quasi-public enterprise also may have played a role in the Court's decision. Id. at 221. For an interesting discussion of some of the factors in the Court's balancing in Lebach, see Wenzel, Anmerkungen zur Lebach-Entscheidung des Bundesverfassungsgerichts, 1973 ArP 432. See also E. Steindorff, supra note 136, at 24-25 (suggesting that the decision in Lebach should have rested on the prisoner's absolute right to be let alone); P. Schwerdtner, supra note 105, at 218-25 (arguing that press interests were given too much weight in Lebach).

For an even more extreme case, in which the right to control one's own picture prevailed over rights of expression and reporting, see 1966 NJW 2353 (BGH) (prohibiting use of plaintiff's picture in connection with a television report of his activities in the Third Reich); for criticism of this decision, see Arndt, Umwelt und Recht: "Vor unserer eigenen Tür", 1967 NJW 1845. These cases lend added weight to a recent argument in the American literature that a "privacy" right to control information about oneself can in reality be a right to self-misrepresentation. Posner, The Right of Privacy, 12 Ga. L. Rev. 393 (1978).
similar to that advocated by Warren and Brandeis as a matter of common-law development—a cause of action that goes well beyond an action for defamatory and untrue statements such as those found to be at issue in Mephisto. 174

It also is worth noting that, in the Lebach case, the Court went beyond any clear parallels in the ordinary law. Whereas the offense of defamation, generally at issue in Mephisto, was traditionally subject to sanction through the criminal and civil law, 175 the drafters of the Civil Code had failed to recognize any general right of personality that would ordinarily cover true statements invading privacy. 176 Moreover, as we have seen in the Soraya case, 177 the German courts have construed articles 1 and 2 of the Basic Law to require the creation of a damage action to protect rights of personality against invasion by individuals—a decision that overrides explicit provisions of the Civil Code. 178

As the various rights of personality have been construed in the Constitutional Court, a wide range of constitutional invasions may result from the use of language in various forms, including press reports. In consequence, the limiting effect of the constitutional right of personality on expression can be substantial. Thus, Mephisto and its successors show that the influence of the constitution on private law can work not only as a protection for speech and press in protecting against certain forms of private actions—as in Lüth. It can also work against rights of expression by creating causes of action against the press and other speakers based on the recognition of new constitutional interests that can be infringed by speech. Moreover, the Lebach case suggests that in the required balancing of the competing constitutional interests, the press sometimes can be

174. See supra note 106. If an American court were confronted with the Lebach case, freedom of expression almost certainly would be given greater weight than it was accorded by the Constitutional Court under German doctrine. See, e.g., Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (first amendment protects broadcast of name of rape victim obtained from public court documents); see also Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979); but see Briscoe v. Reader’s Digest, 4 Cal. 3d 529, 483 P.2d 94, 93 Cal. Rptr. 866 (1971); Restatement (Second) of Torts § 652D comment k. Indeed, first amendment considerations have substantially impeded development of the type of invasion of privacy action proposed by Warren and Brandeis. See Kalven, Privacy in Tort Law—Were Warren and Brandeis Wrong?, 31 Law & Contemp. Prob. 326 (1966); Zimmerman, Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort, 68 Cornell L. Rev. 291 (1983).

175. Strafgesetzbuch [StGB] §§ 185-187; BGB § 823(2). See H. Kötz, supra note 18, at 276.

176. Id. at 53.

177. 54 BVerfGE 269 (1973).

178. See supra text accompanying notes 101-112.
cast as the more socially powerful of the two private parties, with a correlatively reduced weight accorded to its interest.\textsuperscript{179}

In sum, one legacy of the \textit{Mephisto} case was the Court's acknowledgment of the view that there in effect existed a constitutional right not to be libeled—as a component of a broader constitutional right to be free of invasions of personality—and that these constitutional rights could be asserted not only against the state but also (and indeed more commonly) against individuals such as writers and others who were engaged in the expression of opinion or artistic expression. These rights of personality—some of which had existed previously as components of the ordinary law—were now accorded constitutional status.\textsuperscript{180}

\textbf{B. The Scope of Constitutional Review in Mephisto}

The recasting of the interest in reputation as an important constitutional right was not the only indication of the re-emergence of private law values in \textit{Mephisto}. At least as significant was the judges' finding that under the Court's balancing doctrine the weighing of the constitutional value of expression against conflicting values was generally to be remitted to the private law courts.\textsuperscript{181} Although the prevailing opinion in \textit{Mephisto} continued to acknowledge the influ-

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179. See supra note 100.

180. Some commentators have pointed out that the opinion in \textit{Mephisto} omits any express reference to the "indirect" effect of the constitution on private law—the doctrine endorsed in \textit{Lüth}—and have inferred that, for libel cases at least, the Court has abandoned that technique in favor of a "direct," full application of the Basic Law. Schwabe, supra note 144. At least one scholar has seen a "direct" constitutional impact in the creation of the constitutional right of personality by the BGH and its incorporation in the category of an "other right of another" in BGB § 823(1). See Canaris, supra note 66, at 208; see also supra notes 106 & 147. On the other hand, the Constitutional Court in later decisions has reiterated language reflecting the "indirect" effect of the Basic Law in cases like \textit{Mephisto}. See 34 BVerfGE 269, 279-80 (1973) (Soraya). See also infra note 191; Canaris, supra note 66, at 211; Wente, \textit{Informationelles Selbstbestimmungsrecht und absolute Drittwirkung der Grundrechte}, 1984 NJW 1446, 1447.

Professor Schwabe's position, noted above, proceeds from his more general view that the Basic Law should have the same—"direct"—impact in public and in private law cases because both types of cases involve the action (or wilful nonaction) of the judiciary, a public authority. See Schwabe, supra note 144. Schwabe's view of the essential unity of constitutional application in public and private law cases—although widely discussed—remains a minority view in German constitutional doctrine. For comprehensive statements of Schwabe's views, see J. Schwabe, \textit{Die sogenannte Drittwirkung der Grundrechte} (1971). See also J. Schwabe, \textit{Probleme der Grundrechtsdogmatik} (1977).

181. See 30 BVerfGE 173, 195-99 (1971). The Court was equally divided on this portion of the decision. According to the Constitutional Court Act (BVerfGG § 15), no finding of unconstitutionality can be made by an evenly divided panel; therefore the lower court's injunction against the publication of \textit{Mephisto} was upheld. References to
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ence of article 5 of the Basic Law on disputes of private law, the judges' description of the relationship between the Constitutional Court and the private law courts reflected a substantial shift from the position espoused in Lüth. Instead of engaging in the elaborate de novo balancing undertaken in Lüth, the opinion imposed severe limits on the role of the Constitutional Court in reviewing the civil courts' weighing of the countervailing constitutional interests. In so doing, the prevailing opinion appeared to accord new weight to the basic view—outlined in Lüth—that even when constitutional values are at issue, a civil action ultimately remains an action of private law.182

According to the prevailing opinion in Mephisto, it is the task of the civil law judge to undertake an "evaluative weighing of the circumstances of the individual case" and to "render concrete" the limits of one party's constitutional protection against the other.183 The Constitutional Court can only find a constitutional violation if the judge below "has not recognized that a weighing of values of countervailing Basic Rights is necessary or if his decision rests on a fundamentally incorrect view of the Basic Rights—particularly, an incorrect view of the extent of the area protected by the Basic Right."184 If the civil law court has asserted the correct principles, the constitutional right of the losing party is not violated even if the civil judge's balancing "might be questionable because he attributed too much or too little weight to the interests of one or the other side."185 In deciding whether the rights of expression have been violated, the Constitutional Court cannot place itself in the position of the private law judge and undertake its own balancing of the countervailing interests.

Under the doctrine of Mephisto, therefore, the Constitutional Court is substantially constrained in reviewing decisions of the private law courts that have a bearing on constitutional rights. Interestingly, the language of the opinion suggests that this conclusion is not a decision of procedure only. Rather, in the relevant passages of the prevailing opinion, the questions of the scope of review and of the underlying right seem to be treated as equivalent questions. It is not only that the Constitutional Court cannot intervene to im-

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182. See 30 BVerfGE at 197; supra text accompanying note 59.
183. 30 BVerfGE at 197.
184. Id. (emphasis added).
185. Id.
pose its own balancing of the interests; rather, it appears that the basic right is itself not violated if a civil judge, who does not appear to have mistaken the general principles involved, weighs the interests and comes to a different conclusion than the Constitutional Court would have reached had it weighed the interests itself.\textsuperscript{186} In theory this approach could result in different conclusions in identical cases in the Constitutional Court, so long as the civil judges in each case proceed from a correct general understanding of the constitutional principles at issue. The prevailing opinion appears to conclude that one has a constitutional right only to the statement of correct general principles and a plausible application of those principles to the specific case by a private law judge; one does not have a constitutional right to any specific result.

In taking this position, the prevailing opinion rested heavily on two cases that had been handed down after \textit{Lüth}. These cases shed further light on the underlying nature of the Court’s view in \textit{Mephisto}. In the first case the Constitutional Court accorded substantial deference to a Patent Court’s decision that the government’s disclosure of certain technical information submitted with a patent application did not violate the applicant’s property rights guaranteed by article 14 of the Basic Law.\textsuperscript{187} In the second decision the Court held that its scope of review was quite limited in determining whether a state court’s award of support payments in a separation case was so low that it violated the constitution.\textsuperscript{188} Although the court relied on these decisions to justify its limited scope of review in \textit{Mephisto}, neither of these cases involved the freedom of speech or artistic expression and the patent case, particularly, involved the allocation of contending economic interests. Substantial reliance on the doctrine of the patent case in \textit{Mephisto} suggests that the prevailing opinion

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  \item \textsuperscript{186} \textit{Id.} \textit{See also supra} text accompanying note \textsuperscript{185}.
  \item \textsuperscript{187} 18 BVerfGE 85 (1964). In this case, the Constitutional Court was apparently impressed with the difficulty of the underlying patent law and the complexity of the technical assessments that must be undertaken in order to apply that law.
  \item \textsuperscript{188} 22 BVerfGE 93 (1967). The complainant argued that a woman’s right to equality (GG art. 3, § 2) may require that support payments include compensation for the loss of employment and professional development if she remained in the home during marriage; moreover, she argued, the constitutional protection of marriage (GG art. 6) could be impaired by unduly low support payments—presumably on the ground that high awards deter separation and divorce. 22 BVerfGE at 95. In deferring to the private law court on these issues, the Constitutional Court noted that the appropriate level of support payments must depend on such specific circumstances as the length of the marriage, the presence of children, and the state of the labor market. The Court intimated that such a detailed consideration must be left to the private law courts in each case. \textit{See} \textit{id.} at 99.
\end{itemize}
considered the nature of the balance to be struck in cases of artistic freedom—and presumably in all speech cases—not to differ substantially from the balancing of any other constitutional rights (including property rights), and that a reasonable attempt to balance the appropriate rights was all that the constitutional guarantee of artistic freedom afforded. What appears to be ignored in this view is the Lüth court’s insistence that expression is “absolutely fundamental”—a position that might suggest the attribution of greater weight to rights of speech than to many other rights, and would also support more careful review by the Constitutional Court in cases involving rights of expression.\(^{189}\)

Applying the deferential standard of review outlined in Mephisto, the prevailing opinion upheld the lower courts’ order against publication of the novel. According to the opinion, the private law courts had not adopted a fundamentally incorrect view of the basic rights at issue: the ordinary courts had taken into account the impact of the publication on Gründgens’ reputation and had also given weight to countervailing artistic values. Consequently, there was no reason to reject the finding of the lower courts that a significant group of readers would recognize Gründgens in the portrait of Hendrik Höfgen and that libelous details had been inserted into an otherwise recognizable portrait.\(^{190}\) In sum, the Constitutional Court deferred to the balancing of the private law judges below.\(^{191}\)

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189. See supra text accompanying note 118. Although the language in Lüth asserting the “fundamental” or “constitutive” nature of speech refers to the expression of opinion (GG art. 5, § 1) rather than to artistic expression (GG art. 5, § 3), there is no indication in the opinion of the prevailing judges that the deferential review of Mephisto was to be limited to cases involving artistic expression. Indeed, the unqualified protection afforded by GG art. 5, § 3—in contrast with the more limited provisions of GG art. 5, § 1—might even suggest a greater degree of constitutional review in the case of artistic expression than in the case of certain other forms of expression. Cf. supra note 157 and accompanying text.

190. Specifically, the Court cited what it called the “fabricated conduct of Höfgen” with respect to the dancer, Tebab. See supra note 150.

191. In a parallel assertion of private law values, the prevailing opinion in Mephisto also rejected the argument that a complete prohibition of publication—instead of an over-protective order to join publication with a more extensive explanatory foreword—was a disproportionate sanction for the degree of harm caused to Gründgens’ memory. There is a “principle of proportionality” with constitutional rank, but the Court indicated that the principle is applicable in public law cases only, as a protection of the individual against disproportionate exercises of state power. The principle does not apply in private law disputes, which involve competing interests of individuals who are “equally-situated subjects of the law.” 30 BVerfGE 173, 199 (1971). In those disputes, the Constitutional Court can determine only whether the sanction is so unreasonable that it violates the less demanding equality provision of GG art. 3, § 1. Id. at 199-200.

Dissenting in Mephisto, Judge Stein argued that the injunction did indeed violate the
In an important dissenting opinion in *Mephisto*, Judge Rupp-von Brünneck argued that the deferential review endorsed by the prevailing opinion marked a sharp break from the doctrine of Lüth and subsequent cases in which the Court had undertaken its own constitutional balancing. In Rupp-von Brünneck’s view, the prevailing position would result in no constitutional review at all if the lower court merely specified the applicable basic right or rights and repeated an appropriate statement of general principles extracted from opinions of the Constitutional Court. Rupp-von Brünneck noted that even the patent case cited by the prevailing opinion conceded that the boundaries of the scope of constitutional review were not fixed and that a certain latitude must be conceded to the judges of the Constitutional Court. Moreover, she concluded, a proper consideration of *Mephisto’s* function as a work of art would have resulted in a reversal of the courts below: by extracting certain portions of the novel and testing them against reality the lower courts had failed to view the work of art as a whole and, in fact, had limited the absolute guarantee of article 5, section 3 of the Basic Law by the applicable limitations of section 2.

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principle of proportionality. *Id.* at 217-18. See also Schwabe, *supra* note 144, at 690 (arguing that the principle of proportionality should apply in cases like *Mephisto* because it is inappropriate to distinguish between the strength of the constitutional impact in private and public law); *supra* note 180. Indeed, in subsequent private law cases, the principle of proportionality has sometimes been applied as an alternative to, or along with, the general balancing technique of Lüth. See, e.g., 35 BVerfGE 202 (1973) (Lebach); see also 32 BVerfGE 143, 161 (1976) (Deutschland-Magazin) (Rupp-von Brünbeck, J., dissenting).

The principle of proportionality has, if anything, become even more important in the years since *Mephisto*. For general discussions of the doctrine, see Grabitz, *Der Grundstein der Verhältnismässigkeit in der Rechtsprechung des Bundesverfassungsgerichts*, 1973 AöR 568; Wendt, *Der Garantiegehalt der Grundrechte und das Übermassverbot*, 104 AöR 414 (1979).

92. In the last few years, dissenting opinions in the Constitutional Court have played a role similar to that of dissenting opinions in the Supreme Court of the United States. See generally Zierlein, *Erfahrungen mit dem Sondervotum beim Bundesverfassungsgericht*, 1981 DÜ 83. Until recently, however, the dissenting opinion was almost unknown in German jurisprudence and, apparently, in the civil law world generally. Dissents and other separate opinions became possible in the Constitutional Court only after they were expressly permitted by statute in 1970, see BVerfGG § 30(2), and separate opinions are still not found in most other German courts. The number of separate opinions filed in the Constitutional Court remains quite modest by American standards; in the period 1970-79, judges of the Constitutional Court filed 56 separate opinions, in a total of 659 cases. See Zierlein, *supra*, at 88-89.


94 According to Rupp-von Brünneck, this latitude must be exercised in accordance with the importance of the basic right at issue. *Id.* at 220.

95 *Id.* at 221-22. According to Rupp-von Brünneck, the unlimited protection of GG art. 5, 3, rests on the "maturity of the citizen"—the citizen's ability to understand that a novel is something other than an expression of opinion and that it is, instead, a crea-
In sum, although the prevailing opinion in Mephisto continues to recognize the influence of constitutional rights of expression on the private law, that opinion seems to endorse a much stronger role for private law values confronting expression than did the Court in Lüth. First, the prevailing opinion found that the interest in freedom from defamation, long protected by the criminal and civil law, is a constituent of the constitutional right of human dignity protected by article 1 of the Basic Law; accordingly, that interest has substantial weight in the balance against rights of artistic expression. Second, a reassertion of private law values also seems evident in the Court's withdrawal from full constitutional review in private law cases by extending substantial deference to the results of balancing undertaken by the private law courts.

C. Mephisto: Implications and American Contrasts

1. Deferece and the "Preferred Position."—The importance of the Court's decision in Mephisto—and some further implications of its underlying theory—may perhaps be illuminated by exploring some related points of contrast with American constitutional doctrine. These points suggest the longer-term significance of the prevailing opinion in Mephisto if its view of the constitutional status of expression were to be adopted over the long run.

One of the most striking aspects of the Mephisto opinion is its apparent assumption, in sharp contrast with Lüth, that the interest in free expression is not significantly weightier than any other constitutional interest. Certainly, Gründgens' rather remote interest in personality is found capable of outweighing Mann's rights of artistic expression, and the language of the opinion seems to reflect the view that rights of speech do not hold any particularly special position. Indeed, as noted above, the crucial assertion in Lüth of the fundamental or "constitutive" nature of speech is missing in Me-
In general, the balancing process as approved in *Mephisto*, seems to reflect a return to something like the relatively modest value accorded to interests of speech in the ordinary law.

A similar point is suggested in those passages of the prevailing opinion that rely on the patent and alimony cases in deferring to the balancing undertaken by the ordinary courts. Not only is the practical result that the effective balancing is performed by the private law courts and not by the Constitutional Court; the use of the patent and alimony cases suggests that, with respect to the scope of review, the status of rights of expression is not fundamentally different from that of other constitutional rights including property rights. In the patent case, for example, the Constitutional Court deferred to an ordinary court's balancing of interests in determining that the forced revelation of certain information, submitted with a patent application, did not violate the applicant's property rights. In relying on this case the prevailing opinion did not acknowledge that the special values of speech or artistic expression distinguished *Mephisto* in any significant way from a dispute over a manufacturer's protection of commercial information.

Accordingly, these and other passages of the opinion may resemble the view urged by some American scholars and judges in the 1950s that speech should have no "preferred position" over other substantive constitutional rights. Moreover, the prevailing opinion also resembles the views of those American commentators in that it seems to contemplate a very modest role for the Constitutional Court in actually enforcing any constitutional values, including the value of free expression.

Yet there also are important distinctions between the issues.

196. In this context, the Court's emphasis on Gründgens' rights of personality may also be contrasted with passages in Lüth in which the Court appears to show scant concern for Harlan's GG art. I rights in comparison with Lüth's speech rights. See 7 BVerfGE 198, 219-21 (1958); supra text accompanying note 132. It may be possible, however, to view the Court's position in *Mephisto* as assuming that speech rights deserve a special place but countervailing rights of personality also deserve a similar special role.

197. See supra text accompanying notes 187-189.

198. See supra note 187 and accompanying text.

raised in *Mephisto* and American discussions of the general status of first amendment rights. At the core of the "preferred position" debate—and other American debates about the general status of free expression—has ordinarily been a dispute about the relative power of the judiciary and the legislature. "Majoritarian" justices like Frankfurter resisted a "preferred position" for speech because they were reluctant to elevate the power of an unelected judiciary over that of the representative branch in any constitutional area, including speech.\(^{200}\) The prevailing opinion in *Mephisto*, in contrast, assumes that in private law disputes constitutional balancing will necessarily have to be undertaken by courts in any event. The question was *which court or courts* would have primary authority in striking the balance: would the Constitutional Court have primary authority because private law is profoundly influenced by the basic rights, or would the private law courts have primary authority because after the constitutional "influence" is accounted for, the dispute remains a dispute of private law. Under the Basic Law, therefore, the issue does not primarily concern the relationship between the judiciary and the representative legislature, but rather the relationship between the Constitutional Court and the ordinary private law courts.\(^{201}\) The prevailing opinion in *Mephisto* suggested that in balancing constitutional rights relating to speech, the Constitutional Court should not have any greater power over the ordinary courts than it has in balancing other constitutional interests—and, indeed,

200. In the decades before the New Deal crisis, jurists such as Frankfurter vigorously argued that the unelected judiciary should defer to the democratic legislature on questions of economic regulation. See, e.g., Felix Frankfurter on the *Supreme Court: Extrajudicial Essays on the Court and the Constitution* (P. Kurland ed. 1970) [hereinafter P. Kurland]. When the Supreme Court ultimately accepted that position in the late 1930s, some theorists concluded that democratic theory also required deference to the legislature in many cases involving speech and other "personal" rights. See generally Hand, *Chief Justice Stone's Conception of the Judicial Function*, 46 *Columbia L. Rev.* 696 (1946); A. Bickel, *The Supreme Court and the Idea of Progress* 11-42 (1970). The famous *Carolene Products* footnote, United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938), was an attempt to distinguish between disfavored economic rights and certain rights of representation and equality that might enjoy more comprehensive judicial protection.

201. See Ossenbühl, *Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit*, in *Festschrift für H.P. Ipsen* 129 (R. Stötder & W. Thieme eds. 1977); K. Schlaich, *supra* note 2, at 150. Of course, the "private law" that is being interpreted and applied by the ordinary courts is derived from the provisions of a statute, the Civil Code. Yet what is ordinarily at issue in these cases is the interpretation of very general provisions whose precise meaning has been filled in by interpretation of the ordinary courts, rather than by any clear legislative choice. Thus, in most cases of private law, the doctrine that is affected by the "influence" of the Basic Law is doctrine that has been elaborated by the ordinary courts rather than by explicit legislative decision.
that the Constitutional Court should not in any instance have substantial power over the ordinary courts in actually determining the outcome of cases in which constitutional interests must be balanced. Because deference here is basically deference to the judges of the ordinary courts and not to the legislature, the justification for deference in cases like Mephisto cannot easily be traced back to majoritarian concerns of legislative supremacy, such as those that animated the views of Justice Frankfurter.202

Moreover, deference to the ordinary courts cannot rest on concerns of federalism—a consideration that has sometimes been urged in arguments for more deferential Supreme Court review of state court findings in American free speech cases.203 Although the lower courts in Germany are perforce state courts—because there are no lower federal courts—the underlying private law is generally federal rather than state law. The great German codes, the Civil, Criminal and Commercial Codes and the procedural codes, are products of federal law. Consequently, there is no specific policy of the individual states that competes with the overriding policies of federal constitutional law in the ordinary private law case; any competing private law values are also values of federal law.204

2. Primacy of Principle or Primacy of Result.—The failure of these justifications for deferential constitutional review—justifications based on considerations of legislative supremacy or federalism—raises the important question of exactly what it is that justifies the measure of deference to the ordinary courts adopted by the prevailing opinion in Mephisto. One intriguing possibility is that this measure of deference should not be seen as extraordinary or, properly viewed, as deference at all. This brings us to a second point of contrast between German and American doctrine. It is possible that the

202. See supra notes 199-200.

Interestingly, justifications for the American state action doctrine also have rested in part on considerations of federalism. See, e.g., Note, Private Abridgment of Speech and the State Constitutions, 90 YALE L.J. 165, 174 (1980) (state action doctrine, by excluding the federal constitution and federal courts from many relationships between individuals, remits the regulation of those relationships to the states). See also The Civil Rights Cases, 109 U.S. 3 (1883).

204. Moreover, to the extent that the Constitutional Court reviews the work of the Federal Supreme Court in private law matters, see supra note 20, it is reviewing the work of a federal rather than a state court.
striking abnegation that an American reader sees in the prevailing opinion in *Mephisto*—a position that declines to review the result of constitutional balancing by a private law court if that court has correctly stated the applicable constitutional principles—may reflect a distinction between general principle and individual case that is viewed rather differently in civil law and in common-law theory. Indeed, what seems to be an extraordinary lack of concern about the decision in the individual case (from an American point of view) may not seem so remarkable in a civil law system. It may be that the Civil law doctrine, with its emphasis on general rules set forth in codes (and in the works of academic commentators), and its relative lack of interest in the results of specific cases, reflects the view that general principles have an existence that is independent of their “application” in the individual case. The implicit common-law view—in which general principles are extracted from decisions in specific cases—seems to reflect the basic position that there is no intelligible general principle without a series of specific instances that in fact define the principle. 205 In the continental view, in contrast, maintenance of the general principle in the abstract may seem to some to be the most important thing; 206 therefore, as long as the general statement of the principle is maintained, and the result is not too extreme, the result in the individual case may perhaps not be viewed as affecting the existence of the principle. In Anglo-American theory, on the other hand, each new “application” of the principle in a specific case alters—whether substantially or only subtly—the meaning of the principle itself. The position of the prevailing opinion in *Mephisto*—in which the Constitutional Court refrains from reviewing the result below if the private law court states (and appears to apply) the correct constitutional principle—may therefore rest on the unar-

205. See, e.g., K. Llewellyn, *The Bramble Bush* 2 (1960). See also Holmes, *Codes, and the Arrangement of the Law*, 5 Am. L. Rev. 1 (1870) (“It is the merit of the common law that it decides the case first and determines the principle afterwards.”); Dennis v. United States, 341 U.S. 494, 528 (1951) (Frankfurter, J., concurring) (“Since the significance of every expression of thought derives from the circumstances evoking it, results reached rather than language employed give the vital meaning.”).

206. See, e.g., *French Law of Contract*, supra note 23, at 4-5 (“[F]or the Civil lawyer the rules logically precede the solutions... Law is still seen as a system, complete and intellectually coherent, composed of substantive rules.”). See also J. MERRIMAN, supra note 3, at 61-67; Cooper, *The Common and The Civil Law—A Scot’s View*, 63 Harv. L. Rev. 468, 471 (1950); Watson, *supra* note 69 at 1128. Nonetheless it seems clear that these differences between the two systems—which may always have been primarily a matter of emphasis—have narrowed considerably since World War II, at least in Germany. See, e.g., M. KRIELE, *Theorie der Rechtsgewinnung* (1967). Yet significant remnants of an earlier tradition do certainly remain, and that tradition may have been reflected in the views of the prevailing judges.
ticated premise that the principle can be separated from the result of individual cases purporting to apply the principle. The prevailing opinion suggests that a constitutional principle is in an important sense preserved if it is acknowledged in correct terms by private law courts, even though the Constitutional Court—established to decide constitutional cases largely because of the limitations of the ordinary courts—might have reached a conclusion different from that of the ordinary court making the decision.\(^{207}\)

3. Constitutional Balancing and Judicial Deference.—In addition to the effect of the German doctrinal emphasis on principles rather than results in specific cases, the nature of the Constitutional Court’s balancing standard may itself make deference to the private law courts seem particularly tempting. Deference on constitutional questions may seem particularly easy to justify when the underlying constitutional standard is a standard of great generality such as that evident in the balancing test elaborated by the Court. In one sense ad hoc balancing has an enormous appeal for courts. Ultimately, it may seem more equitable to recognize all possible social interests according to their perceived weight and thus to avoid the screening out of significant factors that is inevitable in the creation of categorical rules.\(^{208}\) Because the technique of ad hoc balancing appears to

\(^{207}\) Quite a different position on the scope of appellate review is taken by the United States Supreme Court in free speech cases. Emphasizing the importance of the individual case in a manner that reflects the common-law tradition, the Supreme Court frequently engages in careful factual review to assure that first amendment doctrine has been properly applied. In some instances this review is obviously undertaken to prevent a lower court or jury from intentionally distorting the applicable first amendment doctrine. See New York Times Co. v. Sullivan, 376 U.S. 254 (1964). In other cases, however, the Court’s factual review seems to reflect a more general concern that its statements of principle be correctly understood—a goal that can best be achieved by giving content to the principle through a series of individual decisions. In a recent libel case, for example, the Supreme Court emphatically re-affirmed its power to review specific findings in first amendment cases. See Bose Corp. v. Consumers Union, 466 U.S. 485, 498-511 (1984). The Court in Bose noted that its "role in marking out the limits of the standard through the process of case-by-case adjudication is of special importance," id. at 503, and explicitly rejected the view that its appropriate function is exhausted by a statement of general principles. See id. at 505. See also Connick v. Myers, 461 U.S. 138 (1983) (review of facts by Supreme Court in case involving asserted free speech rights of public employee); Yates v. United States, 354 U.S. 298 (1957) (review of facts by Supreme Court in criminal case involving freedom of speech).

For a recognition of the importance of individual decisions in determining constitutional doctrine, in the German literature, see B.-O. BRYDE, VERFASSUNGSENTWICKLUNG 320-21 (1982). Bryde, however, generally endorses deference by the Constitutional Court to the ordinary courts as reflecting the proper distribution of judicial authority. Id.

\(^{208}\) See, e.g., Aleinikoff, Constitutional Law in the Age of Balancing, 96 YALE L.J. 943, 962
promise that all relevant interests will be taken into account, it may seem to be the most effective tool in dealing with a wide range of constitutional problems. Accordingly, once a court determines that balancing should be undertaken to determine the permissibility of certain forms of speech—as the Constitutional Court did in passing on expressions of opinion under article 5, section 1 of the Basic Law, in Lüth—it may be difficult to confine the technique of balancing to one discrete set of cases.209

Constitutional balancing, however, also has its risks. Regardless of its attractiveness as a technique of arguably greater complexity and sophistication, constitutional balancing may ultimately be perceived by courts as unjudicial in nature because it seems to rely on inarticulate calculations rather than the elaboration of guiding principle. When constitutional courts find themselves employing many of the same techniques as nonconstitutional organs (such as legislatures or ordinary courts), they may lose confidence in the distinctive value of the constitutional enterprise. There is a danger, therefore, that courts that adopt ad hoc balancing tests will be reluctant to use them to find governmental action unconstitutional and will seek to remit the actual decision to those officials who are responsible for promulgating or elaborating the ordinary positive law.210 Doubts of this sort may have had their effect on the prevailing judges in Mephisto. In the views of some American judges who have advocated

(1987). In Mephisto this impulse may have contributed not only to the adoption of a balancing test where none was clearly indicated by the text, but also to the Court's recognition of values of the ordinary law as constitutional values—which was necessary in that case to make the process of balancing doctrinally possible. See supra text accompanying notes 158-163.

209. In this light, the Mephisto opinion illustrates what might be called the "imperialism of balancing." Although the Court stated clearly that GG art. 5, § 3, was not subject to the limitations of GG art. 5, § 2, it nonetheless ultimately found that Klaus Mann's right of artistic expression must be balanced against other possible constitutional interests. The beginnings of a similar "imperialism" in free speech jurisprudence were evident in the United States in the 1950s. Although ad hoc balancing was adopted by the Supreme Court as a technique for use in certain types of speech cases, see, e.g., Schneider v. State, 308 U.S. 147 (1939) (time, place and manner of speech), proponents of the technique sought to expand its use into other areas and implied that it should be used as a general first amendment technique applicable in a broad range of speech cases. See American Communications Ass'n v. Douds, 339 U.S. 382 (1950); Barenblatt v. United States, 360 U.S. 109 (1959); Meaning of First Amendment, supra note 136; Reply to Frantz, supra note 136. Presumably because the Supreme Court found that ad hoc balancing poses dangers to the protection of speech, see infra text accompanying notes 210-211, the spread of balancing was checked to a significant extent by the rise of the technique of "categorization." See supra notes 137-138 and accompanying text.

balancing, analogous uncertainties counseled recourse to the values chosen by the unprincipled struggle of interests in the legislature; at least legislation has the legitimacy of democratic choice. In a jurisdiction with a highly respected Civil Code such as Germany, perhaps a similar tendency reaches back not only toward the legislature, but also toward the perceived legitimacy or solidity of the more "real," underlying ordinary law.

4. Libel, State Interests, and State Action.—One final distinction between the constitutional law of libel in German and American doctrine brings us back to the impact of the constitution on private law and the underlying problems of the Lüth case. This distinction is important because it helps us understand the different constitutional positions occupied by the law of libel in German and in American doctrine. As developed in cases such as Mephisto, the German law of defamation is viewed as involving a conflict of two constitutional rights—the plaintiff's right of personality and the rights of speech, press, or artistic expression asserted by the defendant-speaker. In American constitutional law, in the line of cases following New York Times Co. v. Sullivan, there is also a clash of interests but the conflicting interests are viewed rather differently. Instead of a conflict of two constitutional interests of individuals as in German law, American doctrine views the law of libel as pitting the constitutional (first amendment) interests of the speaker against the interests of the state in regulating the kind of speech in question. Although the state may well be representing the interests of the defamed person—in addition to the state's own interest in preventing the violence that might result from unredressed defamation—it is in the first instance the state's decision whether to assert that interest, and there is no constitutional requirement that it do so. Therefore, the state can presumably narrow its law of defamation quite significantly (or abolish it altogether) without running afoul of federal constitutional problems. But in German law, as we have seen, there is a clash between two constitutional interests and the state probably is required—as a result of the "influence" of the constitu-

211. See, e.g., Dennis v. United States, 341 U.S. 494, 517-61 (1951) (Frankfurter, J., concurring).
212. See, e.g., Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 538 P.2d 450 (1975) (state court narrows liability for defamation beyond requirements of federal Constitution by demanding "actual malice" in case of any statement of "public or general concern"). But see Franklin, The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law, 16 Stan. L. Rev. 789 (1964) (specific language of certain state constitutions has been interpreted to prohibit narrowing of liability for libel).
tional right of personality on private law—to provide a cause of action vindicating the constitutional interest not to be defamed that is contained within that right of personality. It seems unlikely, therefore, that the law of defamation could be significantly weakened or abolished under German constitutional law.

This difference in treatment reflects two important characteristics of American law that contrast significantly with German doctrine. First, unlike the doctrine exemplified by Mephisto, Soraya, and Lebach, development of any substantive constitutional right of personality is quite limited in American law. In the United States Constitution there are no explicit guarantees of “human dignity” or “the free development of the personality”—the guarantees that have been crucial for this purpose in German law—and the possible derivation of such guarantees from general provisions such as the due process clause is subject to the suspicion that has attended any extension of “substantive” due process after the constitutional revolution of the 1930s. On occasion, a groundwork for certain substantive “due process” rights has been painfully extracted from other specific guarantees—or from the constitutional system in general—but the rights so acknowledged have tended to focus on those fundamental aspects of “privacy” that relate to marriage, sexual relations, and family life.213 In consequence, there is little basis for the assertion of a constitutional right not to be defamed in American law. Even if a state officer engages in libelous speech about an individual under circumstances in which state action is unquestionably present, the constitutional right not to be libeled by the state seems extremely narrow if indeed it exists at all.214 Therefore, as a substantive matter, the American doctrine views the interest of an indi-


214. See Paul v. Davis, 424 U.S. 693, 712 (1976) (individual’s interest in reputation is not a constitutionally protected interest; “his interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law”). Limiting Wisconsin v. Constantineau, 400 U.S. 433 (1971). Although Supreme Court opinions have sometimes referred to the right to be free from defamation as an aspect of “the essential dignity and worth of every human being” and as “a basic of our constitutional system,” see Rosenblatt v. Baer, 385 U.S. 75, 92 (1966) (Stewart, J., concurring); Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974), the Court has never translated these dicta into any judicially enforceable obligation of the states to create or enforce a law of libel.

Paul, 424 U.S. at 712-14, also suggests that there is no constitutional right to be free from statements that constitute an invasion of privacy of the Warren and Brandeis type, even when those statements are made by the government. See supra note 106. See also Laird v. Tatum, 408 U.S. 1 (1972).
individual in remaining free from libel as an interest that generally does not rise to independent constitutional status.

Second—and more important for our purposes—even if there were a constitutional right not to be libeled in American doctrine, under the state action doctrine that right probably would remain a right against the state only. It is rather difficult to conceptualize the precise role that such a right would play in a defamed person's libel action against another individual because when a private individual defames another private individual that act of defamation does not in itself constitute state action. As noted above, the only state action that is present in the typical libel case is the action of the state court in enforcing a rule of libel law against the speaker (in a manner that may infringe his or her first amendment rights). A putative right not to be defamed could be infringed only by the private individual's making of the statement itself (but actions of private individuals do not in themselves constitute state action under American doctrine), or by the failure of the court adequately to redress the speaker's infringement of the defamed person's constitutional right. Ordinarily, however, in American law the failure of a court to act to protect an asserted interest under the tort law is not state action. Therefore, the application of any constitutional or other protection of a speaker that resulted in the dismissal of a defamation action against the speaker is difficult to conceptualize as state action infringing the plaintiff's right of personality, because it is just the court's decision to do nothing. This is probably another reason why the interests of the defamed person and the integrity of his or her personality are not viewed as establishing an individual constitutional right in American libel law.

Of course, the state has an interest in protecting the reputation of defamed persons—which it can assert as a discretionary matter in defining its law of defamation—and, as we have seen in cases like New York Times Co. v. Sullivan and Gertz v. Robert Welch, Inc., the state's interest may be strong enough to impose some limits on the speaker's freedom of speech. The decision to assert this interest, however, is basically the state's decision and, accordingly, the interests that confront the speaker's first amendment interest are viewed in American doctrine as the state's interests in limiting speech and not as a countervailing constitutional interest of the defamed person standing on its own.215

215. In contrast to a putative right not to be defamed, rights to property in the United States Constitution probably do require that the state act against private persons who seek to impair the property interests of other private persons. Indeed, the entire institu-
In German doctrine, in contrast, the development of a constitutional right of personality that protects individuals against defamatory (and other forms of injurious) speech is now accepted as a substantive matter.\textsuperscript{216} More important for our purposes, however, is the fact that the doctrine of the influence of constitutional values on relations of private law—first outlined in the Lüth case—does not rest on the finding of any state action in the American sense. As we have seen, an important result of this doctrine is that the Basic Law not only provides certain defenses against judicial decisions in private law; it also seems to go farther and require that—under some circumstances—the courts provide rights of action by one private individual against another private individual for the redress of constitutional violations.\textsuperscript{217} Under those circumstances, it seems quite natural—and indeed necessary—to take into account the constitutional right to freedom from defamation in any consideration of the application of the German law of libel and slander. When the cause of action for defamation is probably required by the Constitution itself, it is certainly natural to weigh the constitutional interests that have led to the creation of the cause of action against any constitutional defenses—e.g., defenses based on the freedom of expression—that might be asserted by the defendant.\textsuperscript{218}
In sum, therefore, the result of the *Mephisto* case emphasizes the power of the constitutional right not to be defamed which, although the court acknowledges it as a constitutional right, was first developed as a more traditional doctrine of the ordinary law. In the *Mephisto* case this traditional right, now protected by the constitution, was asserted in a manner that limited rights of artistic expression. Moreover, the balancing of those countervailing constitutional interests was not undertaken by the Constitutional Court but was effectively remitted to the courts of private law.219

IV. THE *DEUTSCHLAND-MAGAZIN* CASE

If the influence of the Constitution on private law was to continue to play a significant role in the free speech doctrine of the Constitutional Court, it might seem that aspects of the prevailing opinion in *Mephisto* would have to be subject to some qualification. And indeed in a later case—the *Deutschland-Magazin* case decided in 1976220—the Court revealed some second thoughts about the standard of constitutional review employed by the prevailing opinion in *Mephisto*. In the *Deutschland-Magazin* case the Court moved away from the extreme deference of *Mephisto*, and attempted to strike a middle position between that opinion and Lüth by elaborating an adjustable standard of review for the Constitutional Court in private law actions.

In 1969 a labor union press service distributed an article attacking the conservative *Deutschland-Magazin* as “a right-radical hate sheet” (*rechtsradikales Hetzbblatt*). In a libel action filed by the magazine’s publisher, a state court enjoined the union press service from repeating this statement “in the same words or in words that have the same meaning.”221 On review, the state supreme court upheld

supra note 165 and accompanying text; see generally Tettinger, supra note 135, at 317-18, 325.

219. The history of the *Mephisto* case has a recent and perhaps final coda. In 1980, a publisher in Hamburg issued a paperback edition of *Mephisto* as part of the full edition of the works of Klaus Mann and the edition has sold well over 300,000 copies. Whether this publication violates the injunction upheld in *Mephisto* is not clear because the opinion of the BGH noted that Gründgens’ right of personality would diminish in strength as his memory among the population fades. See supra note 162. See also Kastner, supra note 105, at 605. Perhaps enough time has now elapsed to change the result in *Mephisto*; in any event, no judicial action appears to be in the offing. The republication of *Mephisto* has, however, provoked new discussions of the tension between the right of artistic freedom and the right of personality. See generally id.

220. 42 BVerfGE 143 (1976).

221. id. at 144. The magazine’s publishers proceeded under BGB § 823(1), (2). As noted above, BGB § 823(1) has been interpreted to afford civil redress for statements

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the injunction to the extent that it prohibited any repetition of the specific phrase “right-radical hate sheet,” but reversed the prohibition against restating the remarks in words that are different but “have the same meaning.” The court found that the specific phrase used by the press service accused the Deutschland-Magazin of agitating for unconstitutional goals—a particularly severe charge—and that the defendant’s basic criticism could have been made in less inflammatory language, in which case the statement might have been constitutionally justified.222

The Constitutional Court upheld the judgment, but did so in an opinion that departed substantially in its underlying doctrine from the prevailing opinion in Mephisto. The Court began by recapitulating the passages from Lüth which emphasized that, even though constitutional law has an impact on the resolution of a private law dispute, the litigation remains fundamentally a dispute of private law. The Court also cited the Mephisto decision in reiterating that the role of the Constitutional Court is not to review the interpretation and application of private law nor to substitute its own judgment in each individual case, but rather to assure that the private law courts have taken constitutional norms and standards into account.223 Indeed, the Court even seemed to make explicit a point implied by the prevailing opinion in Mephisto by asserting that the constitution does not prescribe a specific result in any given private law case.224

Nonetheless, the Court indicated, some circumstances can just-

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that violate the “general right of personality” arising from GG arts. 1, 2. See supra note 106. BGB § 823(2)—under which the cause of action apparently was chiefly considered—affords civil redress for acts that violate certain criminal statutes. See infra Appendix at pp. 348-49; see generally H. Kötz, supra note 18, at 89-90. In order to fall within the provisions of BGB § 823(2), the publishers claimed that the statement in question violated two sections of the Criminal Code that prohibit various forms of defamatory statements. See StGB §§ 185 (Beleidigung), 186 (übliche Nachrede).

222. 42 BVerfGE at 145-46. The court’s reasoning may rest on the particular historical resonance of the phrase “rechtsradikales Hetzblatt.” The noun “Hetzee” (verb: “hetzen,” originally meaning “to hunt”) is particularly difficult to translate in this context. Although “Hetzblatt” can be translated generally as “scandal,” “hate,” or “slander-sheet,” the word in this context carried rather clear overtones of persecution under the Nazis—particularly when coupled with the epithet “right-radical” (rechtsradikales). Therefore the phrase “rechtsradikales Hetzblatt” suggests that the magazine purveys the kind of virulent hatred that can result in murder and genocide. This connotation may explain the distinction that a court might see between this phrase and other language which, in translation, might seem equally sharp.

223. Id. at 147-48.

224. How the “correct” decision of a civil law dispute should appear in the specific case is not prescribed in the Basic Law. Rather, [the Basic Law] contains . . . fundamental constitutional determinations for all areas of law, which are
tify a heightened standard of review in private law cases. The Constitutional Court must be allowed a certain degree of discretion to adjust the standard of review according to the nature of the individual case. Indeed, in extreme cases

developed in the first instance through the medium of the rules that directly control the area of law in question.


This basic position is interestingly reflected in a commentary on three recent decisions of the Constitutional Court involving free speech and private law. See Roellecke, Münchenkampf und allgemeines Persönlichkeitsrecht, 1980 JZ 701. The commentator begins his discussion of the problems raised by the cases with the following revealing statement: "Whether the three cases were correctly or wrongly decided is not discussed here. That is a problem of the ordinary [private] law." Id. (emphasis added). The author then goes on to discuss the relevant constitutional principles in some detail.

225. 42 BVerfGE at 148. Interestingly, the Court at this point cited language to the same effect from the patent case, 18 BVerfGE 85, 93 (1964); see supra note 187 and accompanying text—language that had been emphasized in Rupp-von Brünneck's dissent in Mephisto but was ignored by the prevailing opinion in that case. See 30 BVerfGE 173, 220 (1971).

226. 42 BVerfGE at 149. Upon first reading, this standard of constitutional review may seem problematic. Because the level of review depends upon the "intrusiveness" of an asserted invasion, the Court's formulation may seem circular—calling for an intrusive degree of review only after the Court has determined on the merits that the constitutional right in question has been violated. Upon examination, however, it appears that the Court's argument is not subject to this infirmity. Under Lüth and Mephisto, whenever the general "sphere" of a basic right is invaded, the final determination of whether the right is actually infringed must rest on a balancing of the right against general laws limiting that right or against other countervailing constitutional interests. Only after this weighing has been undertaken can the court determine that an actual violation has occurred. The Court in Deutschland-Magazin seems to be saying that, in order to determine the appropriate level of constitutional review, the Court will make an initial assessment only of the extent to which the general "sphere" of the basic right appears to be invaded by the lower court's decision—without considering the countervailing justifications. If the "sphere" of the right is not substantially invaded, the Court will not engage in a careful examination of the countervailing interests asserted to justify the invasion of the right—as long as the lower court appears to have applied the correct general principles. The Court's rationale seems to be that, since the invasion of the right is not very great in any event, there would not be a serious invasion of freedom even if the lower
the Court can undertake a very significant degree of constitutional review. "When the intensity of the invasion is at its greatest . . . the Court is fully empowered to replace the evaluation undertaken by the civil court with its own evaluation."

In the Deutschland-Magazin case, however, the invasion of the speaker's interest was not severe. First, according to the Court, the injunction was directed solely against a repetition of the precise phrase "right-radical hate sheet." This phrase was particularly sharp but, according to the Court, it did not represent a unique idea that could not be phrased in other words. In this sense, therefore, the lower court had not really prohibited the expression of a particular opinion but only one "form" of expressing that opinion. Moreover, the Court indicated, the invasion of the speaker's interest was minor because the sanction was minor. The only sanction issued against the press service was a prohibition of the repetition of the remark; there was no "imputation of individual guilt," no fine, no requirement that the phrase be retracted, and no other lasting sanction. Indeed because the press service had already accomplished its general goal of informing its readers about the nature of the Deutschland-Magazin in the article itself, the dispute had become for both sides "little more than a matter of prestige." Thus in both respects—the mildness of the sanction and the narrow nature of the speech covered by the sanction—the "invasion" of the area protected by the basic right of free expression was not severe. In consequence, the case was distinguishable from decisions, such as Lüth, in which the Court had exercised closer appellate review. In this light the lower court's balancing in Deutschland-Magazin—although it may not have been done precisely as the Court would

court were incorrect and the right were actually violated. In contrast, if the general sphere of the basic right is seriously invaded—either by a severe sanction issued against the claimed exercise of the right or even perhaps by a less severe sanction that covers a broad area of activity possibly guaranteed by the right—error by the lower court would involve a more severe infringement of the right, and the Constitutional Court should exercise a high degree of constitutional scrutiny.

227. Id. (citing Lebach, 35 BVerfGE 202 (1973)), discussed supra text accompanying notes 171-176. Lebach can be viewed as a precursor of Deutschland-Magazin because in Lebach the Constitutional Court applied a stringent standard of constitutional review of facts in a private law case. See generally Wenzel, supra note 173. In Lebach, however, the Court applied a stringent standard of review not for the purpose of protecting speech interests, but rather for the purpose of protecting rights of personality that were opposed to speech interests.

228. 42 BVerfGE 143, 151 (1976).

229. See id. at 149-150; see also supra note 222.

230. Id. at 151.

231. Id.
have done it—adequately recognized the contending constitutional interests and, given the modest scope of review in such a case, was not impermissible.

Although the lower court’s injunction was thus upheld in Deutschland-Magazin, a companion case suggests that the decision may indeed reflect a real move from the deferential attitude of Mephisto back toward the more substantial degree of constitutional review exercised in Lüth. In this case, a political party official, Jürgen Echternach, wrote an article attacking the Deutschland Foundation, publisher of the Deutschland-Magazin. Among other things, Echternach stated that in establishing a “Konrad Adenauer Prize,” the Foundation had “misused the name of Konrad Adenauer for [the benefit of] right-wing sectarians.” The article also asserted that the Foundation was “a nationalistic enterprise . . . in democratic clothing.” In a libel action by the Foundation, a state supreme court prohibited a repetition of these remarks, either in the same words or words having an equivalent meaning. The Constitutional Court reversed this decision, employing the heightened standard of review outlined in Deutschland-Magazin. Restating (or rephrasing) the doctrine of that case, the Court remarked: “The more a civil court’s decision infringes the predicates of free existence and action that are protected by a basic right, the more searching must be the Constitutional Court’s investigation to determine whether the infringement is constitutionally justified.” In contrast with the Deutschland-Magazin case, the state court’s order in Echternach prohibited not only a repetition of the defendant’s exact words but also the repetition of defendant’s remarks in “language having an equivalent meaning.” The state court’s order, therefore, “prohibited the expression of a certain thought-content” and thus was “a limitation of the complainant’s freedom of opinion which touches the basic right of article 5 of the Basic Law not only at the margin, but in its central meaning . . . .” Consequently, the Constitu-

233. Id. at 164.
234. Id.
235. Id. Here also, the state court’s decision rested on a finding that the statements violated StGB § 185 or 186, and therefore gave rise to civil liability under BGB § 823(2). See supra note 221. The state supreme court found for the plaintiff on the ground that Echternach’s statements of opinion should have been accompanied by underlying facts that would have allowed the average reader to assess the accuracy of Echternach’s opinions. 42 BVerfGE at 165-66.
236. Id. at 168.
237. Id. at 169.
tional Court was required not only to review the general principles employed by the lower court but also to consider specific mistakes in the application of those principles—a level of review that more closely resembles the review exercised in *Lüth* than that exercised in *Mephisto*.

Employing this higher level of review, the Court found that the state supreme court had not adequately understood the manner in which the rights of article 5, section 1 of the Basic Law themselves influence the "general laws" (or laws protecting "personal honor") which are asserted to limit those rights. Harking back to some of the factors considered in *Lüth*, the Court noted that Echternach's criticisms of the Deutschland Foundation were not inspired by any private goal or solely by a desire to insult the Foundation, but rather were the normal sort of expression that is found in public political disputes. Under these circumstances, the lower court's requirement that Echternach's statements of opinion must be accompanied by a supporting factual discussion was an excessive requirement that violated article 5 of the Basic Law. Something that approaches a careful balancing of the interests by the Constitutional Court itself is evident in this opinion.

The difference between the modest scope of review exercised in the *Deutschland-Magazin* case, and the more searching review exercised in *Echternach*, seems to rest on a distinction between prohibition of a specific form of words in the first case and the prohibition of all "forms" of expressing a certain "thought-content" in the second. Because the Court perceived a greater invasion of the speaker's interest in *Echternach*, the Court undertook a searching review that was much like the review in *Lüth* itself; but because the Court saw the prohibition of only one "form" of words as a less serious infringement, it exercised a narrower review in *Deutschland-Magazin*.

It is interesting that the distinction suggested in *Echternach* between the "thought-content" of a statement and the expression of that content in a specific "form" bears some resemblance to the distinction that appears to underlie the prevailing opinion in *Mephisto*—the distinction between the expression of a general principle and the "application" of that principle in a specific case—and this distinction also may yield insights on modes of thought in the Constitu-

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238. *Id.*
239. See supra text accompanying notes 118-119 & 154.
tional Court. The idea that there is an intelligible, but disembodied, "content" that can remain unimpaired even though its expression in a particular "form" is prohibited, seems related to the idea that there is an intelligible abstract principle which can exist intact even though no particular attention is paid to its "application" in certain specific cases. As noted above, the latter view is implicitly rejected in common-law theory. The underlying common-law view is that there are first individual cases, which are the important elements, and it is from a series of these cases that tentative (and always incomplete) statements of "general principles" can be successively essayed. In the same way, one might say that in speech the important elements are the individual expressions themselves and that an attempt to generalize the "content" of supposedly related expressions may be useful for some purposes but can never actually refer to some detached ideal "content" that exists apart from any specific expression.

Indeed, in the Deutschland-Magazin case the phrase "rechtsradikales Hetzblatt" may have been chosen precisely for its unique historical overtones. Language is inextricably linked to the cultural and social history not only of a particular society in general, but also of smaller social groups. The press service of a German labor organization—a number of whose members may have suffered under Nazi dictatorship—might find it useful, for the purpose of explaining the intensity of its views about a right-wing hate-filled newspaper, to use language which in its overtones seemed to carry connotations of possible dictatorial oppression not unlike that of recent history. Any less pungent expression might indeed lack an equivalent "content."

241. See supra text accompanying note 205.
242. See supra note 222.
244. Interestingly, it is this position (or something very much like it) that has been adopted in the basically common-law perspective of American constitutional law. In Cohen v. California, 403 U.S. 15 (1971), the defendant was convicted of disturbing the peace after he wore a jacket bearing the words "Fuck the Draft," in a courthouse corridor. Writing for the Court, Justice Harlan found that the conviction violated the first and fourteenth amendments. Against the state's argument that the content of the defendant's views could reasonably have been expressed in a different and less offensive form of words, Justice Harlan remarked:

[M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little
In her dissent in Deutschland-Magazin, Judge Rupp-von Brünneck appeared to favor a higher degree of constitutional review in all cases involving freedom of expression, because of the "fundamental" nature of that basic right.\textsuperscript{245} Rupp-von Brünneck emphasized that the Court's function in speech cases is not only to protect the specific speaker from sanctions, but also to prevent incorrect decisions of lower courts from having a "negative effect on the general exercise" of free expression:\textsuperscript{246} if an incorrect lower court decision is allowed to stand by reason of superficial review, the speech of numerous individuals in society may be chilled. Varying the Court's standard of constitutional review according to the impact of the sanction on the specific speaker therefore reflects an unduly narrow conception of the Court's proper role in protecting rights of expression.\textsuperscript{247}

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As an important landmark in this line of decisions, the Deutschland-Magazin case reaches an uneasy—and quite possibly unstable—accommodation between the thorough constitutional review exercised in Lüth and the deference to private law courts evident in the prevailing opinion in Mephisto. Even though the constitution applies to matters of private law, it applies in an "indirect" and muted form as a matter of doctrine. Consequently, the private law courts continue to enjoy a degree of deference in certain cases even though their decision may as a practical matter determine whether or not a

\textsuperscript{245} Id. at 26 (emphasis added). For an indication, however, that certain members of the Supreme Court may be retreating from Justice Harlan’s position in Cohen, see Pacifica Found., 438 U.S. at 743 n.18 (Stevens, Burger, Rehnquist, JJ.); compare id. at 772-74 (Brennan, J., dissenting).

Dissenting in the Deutschland-Magazin case, Judge Rupp-von Brünneck developed an argument similar to that of Justice Harlan: "Even the majority acknowledges that the basic right of free expression of opinion includes the freedom to decide how an expression should be formulated. Is it not, then, a dangerous self-deception to believe that the 'censorship' of a [specific form of speech] leaves the intellectual content unaffected?" 42 BVerfGE 143, 158 (1976). Rupp-von Brünneck went on to speculate on the "forms" of expression that, as a practical matter, are now open to the press service. The lower courts in Deutschland-Magazin gave no examples of what formulas are permissible. Indeed "it is very difficult, if not impossible, to find a substitute formula that has the requisite journalistic impact." \textit{Id}. at 159. The result may be a chilling effect because the speaker, not knowing what precise form of words will satisfy a future court, may not wish to risk another legal action that might result in a more severe sanction.

\textsuperscript{246} Id. at 154.

\textsuperscript{247} Id. at 156 (emphasis added).
constitutional right is to be protected.\footnote{248}

With the added illumination of the Deutschland-Magazin case, we can return to the question of how this measure of deference by the Constitutional Court to the ordinary judiciary in private law cases—particularly those involving freedom of expression—is to be explained. As we have seen above,\footnote{249} various arguments advanced by American jurists in support of a measure of judicial deference—arguments based on considerations of majoritarianism or federalism—are generally inapplicable to the German doctrine involving the influence of constitutional principles on private law. On the other hand, the Deutschland-Magazin case suggests with even greater clarity than Mephisto that deference to the private law courts may reflect certain considerations of efficient judicial administration. The Federal Constitutional Court is the only federal court whose specific mission is to decide constitutional questions. Although the state courts and the Federal Supreme Court (BGH) also must pass on constitutional questions, the constitutional decisions of those courts are not nearly as authoritative as decisions handed down by the Constitutional Court. Moreover, the Constitutional Court is obliged to decide all constitutional issues appropriately presented to it—unless a committee of three justices decides that the result in the case is so clear that the complaint can be summarily rejected or sustained.\footnote{250} In this light a deferential or adjustable scope of review might be seen as an acceptable method of controlling the Court’s caseload\footnote{251}—perhaps through a reliance on the developing consti-

\footnote{248. For a criticism of the formula of the Deutschland-Magazin case and for alternative tests proposed by academic commentators, see K. Schlaich, supra note 2, at 143-47. See also W.-R. Schenke, Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit 44-46 (1987). Many of the commentators argue that the Constitutional Court’s scope of review, as outlined in Deutschland-Magazin, unduly invades the province of the private law courts.}

Although the test for review by the Constitutional Court, elaborated in Deutschland-Magazin, was first developed in the private law context, it has been applied to the Constitutional Court’s review of lower court judgments in public law cases as well. See Hesse, Funktionelle Grenzen der Verfassungsgerichtsbarkeit, in Ausgewählte Schriften 316 (P. Häberle & A. Hollerback eds. 1984). Even though the Constitutional Court employs the Deutschland-Magazin formula in reviewing both private and public law cases, it has been suggested that the actual review exercised by the Court is less stringent in private law cases because the application of the Basic Law is “indirect” rather than “direct” in those cases. See K. Schlaich, supra note 2, at 151-52. See also 73 BVerfGE 261, 268-69 (1986) (expressly relating Constitutional Court’s restricted scope of review to the “indirect” impact of basic rights on private law).

\footnote{249. See supra text accompanying notes 200-204.}

\footnote{250. See infra note 254.}

\footnote{251. See Faller, Zu den Eingriffsmöglichkeiten des Bundesverfassungsgerichts bei Rügen der
tutional expertise of the lower courts. With constitutional cases coming from the BGH and from other courts (and, in some instances, directly to the Constitutional Court without prior judicial consideration), some comprehensive method of screening may be required. The argument that the function of screening in the Constitutional Court is adequately performed by the present system of relegating preliminary decisions to three-judge panels—an argument suggested, for example, by Judge Rupp-von Brünneck in Deutschland-Magazin—may not entirely meet the point. Although a three-judge panel can dispose of a constitutional complaint in clear cases, maintenance of a manageable caseload in the Constitutional Court might require additional screening techniques.

Deference to the private law courts, however, does not seem to be based entirely on a fear of inundation by reason of numbers. It may also have a qualitative side. The Constitutional Court is basically limited to the decision of constitutional questions; it is not a tribunal like the Supreme Court of the United States, which is also authorized to decide a broad range of nonconstitutional matters. Many judges of the Constitutional Court have never been judges of the ordinary courts, and these judges may not be imbued with the doctrine and characteristic modes of thought of the private law.

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Verletzung von Meinungs- und Pressefreiheit, in Festschrift für Martin Löffler 56-57 (1980); Ossenbühl, supra note 201, at 129-30.

252. Constitutional expertise may be particularly well-developed in the BGH—a huge tribunal with over a hundred judges sitting in many panels—which must decide numerous constitutional questions in civil and criminal cases. See supra note 20.

253. See 42 BVerfGE 143, 154 (1976).

254. See BVerfGG § 93b(1), (2); Vitzthum, supra note 4; Zuck, supra note 4. A unanimous three-judge "chamber" can reject a constitutional complaint if the complaint has "no adequate prospect of success" or "if it is to be expected" that the full eight-judge senate will refuse to "accept" the case. BVerfGG § 93b(1). The three-judge chamber can decide the case in favor of the constitutional complainant if it unanimously finds that the complaint is "obviously well-founded . . . because the Constitutional Court has already decided the relevant constitutional question." BVerfGG § 93b(2).

If the three-judge panel does not dispose of the complaint, the full senate of the Constitutional Court must "accept" the case if at least two judges believe that the case will clarify a constitutional issue or that failure to decide may expose the complainant to a serious and unavoidable detriment. BVerfGG § 93c.

255. The basic academic qualification for appointment to the Constitutional Court is successful completion of the first and second state examinations, the prerequisite for becoming a practicing lawyer or a judge of any court. See BVerfGG § 3(2). The framers of the Basic Law apparently intended, however, that most judges of the Constitutional Court would not be appointed from the regular judiciary. Only six of the sixteen judges of the Constitutional Court must be chosen from among the judges of the other highest courts of the Federal Republic. BVerfGG § 2(3); see supra note 4. Because a majority of these six judges will normally be appointed from "highest courts" other than the BGH (e.g., the Federal Administrative Court, Federal Social Security Court, etc.), it is not
With a highly sophisticated and academic Civil Code, it is possible that private law doctrines are considered particularly complex and that a high degree of expertise is thought necessary to thread one's way with confidence through those complexities. Presumably, however, the private law judges develop a special degree of skill in the evaluation and weighing of private law arguments.\textsuperscript{256} In American doctrine—where constitutional law can completely supersede the intricacies of the private law (if state action is present) and where, in any event, private law is probably not as complex—such a point possesses less force. But, if one starts with the proposition that in German doctrine the matter remains a private law matter and is only "influenced" by the principles of constitutional law, then in many cases the Constitutional Court may be reluctant to become involved in the intricacies of private law analysis. Moreover, when a court applies a balancing test, close familiarity with the facts of the case becomes particularly important; the likely combination of doctrinal and factual complexity in a large number of private law cases may seem especially onerous for the Constitutional Court.\textsuperscript{257}

If this view is adopted, the ultimate position of the Deutschland-Magazin case may make some sense. If the Court believes that parsing the intricacies of a private law problem is a strenuous mental operation, it might be sensible to undertake that effort only when the damage to constitutional interests appears severe. In speech cases, this could be done in a manner not suggested by the Court: an assessment could be made of the value of the speech involved, and constitutional intervention undertaken only when particularly valuable speech is suppressed. The Court, however, avoids

\textsuperscript{256} In the Deutschland-Magazin case, for example, Rupp-von Brünneck refers to the "range and specialization" of the ordinary law and notes the "qualitative" burden that excessive review of private law cases would impose on the Court. 42 BVerfGE at 154.

\textsuperscript{257} Cf. Ossenbühl, supra note 201, at 130 (referring to the greater expertise of the highest ordinary courts and their closeness to the problem in question); W.-R. SCHENKE, supra note 248, at 57-58 (emphasizing the experience of ordinary courts, developed in a constant stream of private law cases).

To this view of the doctrinal complexity of the private law should also be added the view—still of some importance in German legal theory—that the private law is a particularly well thought-out and excellent product of legal science and that, in consequence, it should be disrupted as little as possible even by general constitutional norms. \textit{See supra} text accompanying note 29. In the last analysis, therefore, the limited scope of constitutional review in private law cases may be a continuing reflection of the traditional mystique of the private law. \textit{See also supra} note 60.
the assessment of values that such a course would entail and focuses instead on the seriousness of the invasion or sanction.

These arguments may seem plausible from within the German doctrinal system. Yet the use of an adjustable standard of review of this nature also raises its own problems. The use of an adjustable standard of review—in which the factors triggering a greater or lesser degree of scrutiny are themselves vague in nature—adds another layer of uncertainty to an already complex doctrine. Moreover, the technique opens the possibility that a court could employ the standard as a method of reducing the substantive protection of certain constitutional interests without actually acknowledging that those interests are receiving reduced protection. If the ordinary courts tend to disfavor certain constitutional interests, a decision to remit a significant number of cases involving those interests to the private law judges might—on balance—achieve the result of according those interests diminished protection. Relaxing the scope of review of ordinary courts in such cases—while simultaneously requiring a statement of strong constitutional principles adopted by the Court—could, therefore, result in according diminished actual protection to certain values while maintaining the general position that they are being strongly protected. To the extent that adequate protection of the values of the Basic Law requires active intervention by the Constitutional Court, relaxing the scope of review might mask a retreat from certain constitutional values under the guise of a procedural adjustment.258

Notwithstanding these possible difficulties, the principles of Deutschland-Magazin significantly expand the Constitutional Court’s review of decisions limiting freedom of expression—in comparison, at least, with the principles of the prevailing opinion in Mephisto. Therefore the Deutschland-Magazin decision can be viewed—at least

258. Judge Rupp-von Brünneck seems to suggest such a possibility in her dissent in Deutschland-Magazin. See 42 BVerfGE 143, 156 (1976). Rupp-von Brünneck remarks that the Court’s restraint in reviewing decisions of private law courts appears inconsistent with other decisions of approximately the same period which greatly expanded the scope of the Court’s review of acts of the legislature in certain areas. Rupp-von Brünneck cites two cases in which the Court invalidated statutes that seemed to represent a new reformist spirit of the early 1970s. See 39 BVerfGE 1 (1975) (Abortion Case) (invalidating a federal statute that permitted most abortions during the first three months of pregnancy); 35 BVerfGE 79 (1973) (University Case) (striking down a state statute granting students, nontenured faculty members, and workers a share in the governance of universities). In the abortion case, particularly, the Court replaced legislative findings of fact with its own determinations. Rupp-von Brünneck’s laconic paragraph seems to imply skepticism about a doctrine that narrows constitutional review of the ordinary courts while expanding constitutional review of these legislative measures.
at this point in the story—as a decision that clearly favors the protection of speech in contrast with what had gone immediately before. Nonetheless, the vagueness of the variable standard of review—together with the vagueness of the Court’s underlying balancing test for speech cases—may raise concerns about whether expression is adequately protected under formulas of that sort. We have seen, moreover, that the doctrine of Deutschland-Magazin was prefigured by the Lebach case, in which the Court employed a heightened standard of review to protect interests in personality that were opposed to speech.\textsuperscript{259} The Deutschland-Magazin case does not specifically confront the question of how the variable standard of review shall be applied with respect to interests in personality that conflict with constitutional rights of expression; the answer to that question—which was addressed in important cases in the 1980s—will also be important in achieving a full understanding of the relationship between free speech and private law in German doctrine.

\section*{V. Free Speech and Private Law in the 1980s: Böll and Wallraff}

Notwithstanding any difficulties that may remain in its theoretical justification, the general technique of the Deutschland-Magazin case continues to be the Court’s standard of constitutional review in private law cases. Indeed, in recent years the application of the standard has been refined and to some extent extended. In a case decided in 1980, for example, the Court reversed a damage award for defamation issued in favor of a sculptor against two radio broadcasters who had criticized a lecture that the sculptor had delivered.\textsuperscript{260} Applying the concepts of Deutschland-Magazin, the Court emphasized that an award of damages for defamation is a particularly severe penalization of speech in comparison with more typical sanctions under the Civil Code, such as an order prohibiting repetition of the defamatory matter.\textsuperscript{261} Because a damage award would have an "unavoidable deterrent effect" on expression, the Court did not limit itself to a review of the general principles applied by the state court but subjected the lower court’s opinion to a more search-

\textsuperscript{259} See supra note 227.

\textsuperscript{260} 54 BVerfGE 129 (1980) (Art Critique).

\textsuperscript{261} Id. at 135-36. As noted above, injunctive relief is the basic remedy under the Civil Code—in libel cases as well as other civil actions—while damage awards are often viewed as extraordinary. See supra text accompanying notes 108-109. In American doctrine, of course, just the opposite is true. An injunction against continued speech is viewed as a more serious invasion of first amendment interests than damages for defamation.
ing review. As a result, the Constitutional Court reversed the
defamation award largely because the sculptor had himself invited a
response by launching a bitter attack on certain art critics.

If this case and other cases such as Echternach are compared with
the result in Mephisto, the technique of Deutschland-Magazin appears
to be a move towards using a heightened scope of constitutional
review in order to accord enhanced protection to speech. Yet such a
conclusion would reflect only part of the story, for a parallel develop-
ment in other cases shows that in some circumstances the height-
ened judicial review of Deutschland-Magazin can also work to limit the
freedom of expression. As we have seen in cases such as Mephisto,
Soraya and Lebach, free speech interests are sometimes confronted by
countervailing constitutional interests and—because those countervai-
lng rights are often considered fully as important as rights of
speech—the Court has employed heightened constitutional review
to protect those interests as well. Accordingly, certain recent cases
have shown that when the basic principles of Deutschland-Magazin are
used to protect other constitutional rights—e.g., the right of per-
sonality protected by articles 1 and 2 of the Basic Law—the technique
can have the seemingly paradoxical effect of imposing increased
burdens on speech.

This tendency is perhaps most clearly seen in a recent case in-
volving the famous author, Heinrich Böll, in which the Court ap-
plied the principles of Deutschland-Magazin to the judicial
enforcement of the right of personality where that right was op-
posed to the interest in free speech. As a result, the Court exercised
vigorous judicial review in order to protect the constitutional inter-
est in personality in a decision that had the effect of penalizing poli-
tical expression.

The Böll case arose out of a television commentary—broadcast
shortly after a terrorist assassination—in which the commentator
charged that public statements of certain well-known social critics

262. 54 BVerfGE at 136.
263. Id. at 130; see generally supra note 130.

For the application of the principles of Deutschland-Magazin in the Constitutional
Court's review of criminal libel convictions, see 43 BVerfGE 130 (1976) (Political Leaflet)
criminal libel conviction requires closer review by Constitutional Court than civil judg-
ment, because criminal conviction imposes greater burden); 67 BVerfGE 213 (1984)
(Anachronistic Parade) (because the imposition of a criminal libel penalty in a case involv-
ing political street theater would have a particularly severe impact on art, close constitu-
tional review is justified); 75 BVerfGE 369 (1987) (Strauss Caricature) (strict review
should be exercised in criminal case involving political satire). See generally Tettinger,
supra note 135, at 324.
264. 54 BVerfGE 208 (1980).
had laid the groundwork for violence. To illustrate his point, the commentator cited a number of disparaging remarks about the German state which he attributed to Böll.265 In a suit against the commentator, Böll asserted that his right of personality had been violated, and a state supreme court awarded substantial damages on the ground that the purported quotations were inaccurate or taken out of context.266 The Federal Supreme Court (BGH) reversed, however, and dismissed the action.267 The BGH found that, although the commentator may have misquoted Böll’s remarks, the statements that Böll actually made could convey to the ordinary reader a message not unlike the message attributed to him by the commentator.268 Consequently, Böll’s right of personality was not invaded and the broadcaster’s remarks were protected speech under article 5, section 1 of the Basic Law.

In applying the principles of Deutschland-Magazin to this case, the Constitutional Court confronted a novel and interesting problem. The BGH had dismissed Böll’s action and consequently had not imposed a penalty on anyone. The constitutional complainant in the Böll case, therefore, was a plaintiff who argued that his failure to receive redress in the courts below violated his constitutional rights—unlike the constitutional complainants in cases such as Lüth, Mephisto, Deutschland-Magazin and Echternach who were defendants challenging as unconstitutional a lower court’s imposition of a burden on them. Thus the degree of review in the Constitutional Court could not depend—as it had in Deutschland-Magazin and Echternach—on the severity of a judicially imposed penalty that might affect the interests of the constitutional complainant. Rather, in this case, the Court indicated that the degree of constitutional review depended on the effect that the lower court’s rejection of Böll’s claim would have on his right of personality if the lower court’s decision were

265. According to the commentator, “Heinrich Böll characterized the liberal state [Rechtsstaat]—against which the [terrorists’] violence was directed—as a ‘pile of dung’, and said that he saw only ‘the remnants of decaying power, which are defended with rat-like rage.’ He accused the state of pursuing the terrorists ‘in a pitiless hunt.’” ld. at 209.

266. According to the state supreme court, Böll had never said that the liberal state was a “pile of dung.” The statement about “decaying power” had been taken out of context, and Böll had accused the press—not the government—of having pursued the terrorists “in a pitiless hunt.” ld. at 210. Prior cases had established that the right of personality includes the right not to be quoted or cited erroneously. See 13 BGHZ 334 (1954) (Schacht-Letter); supra notes 104 & 106; see also 34 BVerfGE 269 (1973) (Soraya); supra note 111.

267. 1978 NJW 1797; see 54 BVerfGE at 211-13.

268. 54 BVerfGE at 211-13.
incorrect. The Court concluded that because of the nature of the commentator's statements and the broad impact of television, a decision improperly protecting the commentator's remarks would invade the core of Böll's right to personality; accusations of intellectual complicity in terrorism would gravely injure Böll's personal honor. A substantial degree of constitutional review was therefore justified.\textsuperscript{269} In focusing on the impact of the lower court's rejection of Böll's claim, the Constitutional Court in effect allowed the standard of review to depend on the severity of the unredressed injury to constitutionally protected rights of personality inflicted by one private individual upon another—that is, the severity of the claimed injury to Böll's personality inflicted by the television commentator. Lying behind this discussion, therefore, appears to be the Court's continued assumption that an individual's constitutional interest of personality can be damaged by the action of another individual.\textsuperscript{270}

In undertaking the requisite substantial degree of review, the Constitutional Court found that the judgment of the BGH, dismissing the action, invaded Böll's right of personality. The Court emphasized that an individual's right of personality includes the right not to be misquoted because each individual has a right to decide how he or she will be presented or represented to others.\textsuperscript{271} The Court concluded that the BGH had applied an improper standard in deciding the case and that the commentator's statements were not protected by article 5, section 1 of the Basic Law.\textsuperscript{272} Con-

\textsuperscript{269} Id. at 215-17.

\textsuperscript{270} See generally supra text accompanying notes 101-112. Certain alternative methods of viewing this problem are possible, however. It could be argued, for example, that the dismissal of the plaintiff's civil action by the court below in effect placed the court's imprimatur on the statements, thus converting the action of the individual into the action of the court, a branch of the state. This is the position advocated by Professor Schwabe, see supra note 180. An alternative view is that the Basic Law (in GG art. 1 and elsewhere) imposes certain affirmative obligations on the state to protect the constitutional rights of individuals against other individuals. The lower court's dismissal of the action could therefore be viewed as the state's failure to live up to its constitutional obligations of affirmative protection. See generally Canaris, supra note 66.

\textsuperscript{271} 54 BVerfGE at 217-18. See supra text accompanying note 172 and infra text accompanying notes 283-286.

\textsuperscript{272} According to the Court, the BGH applied an improper standard because it replaced Böll's decision about the meaning of his own language with the possible misinterpretations of the "average reader or listener." 54 BVerfGE at 218-19; see supra text accompanying note 268. The commentator's statements were not protected by GG art. 5, § 1, because incorrect citations—like any other false statements—are not protected speech. If there was a question about the meaning of Böll's remarks, the commentator should have made it clear that he was transmitting an interpretation of those remarks rather than a purported quotation. 54 BVerfGE at 219-22.
sequently, the Court indicated that Böll's right of personality had been infringed and remanded the case to the BGH for further determination of the precise extent of that infringement.273

In a more recent case in this series, the Court again employed the principles of Deutschland-Magazin for the purpose of undertaking stringent constitutional review which had the effect of imposing burdens on expression.274 The case was particularly interesting because the countervailing constitutional right that was found to limit speech was itself elaborated from the guarantee of freedom of the press also contained in article 5, section 1 of the Basic Law. Among other things, this case reinforces the suggestion in Blinkfüer that an individual can have article 5, section 1 rights against another individual and that the legal system is constitutionally obligated to provide a remedy for violation of those rights.275 It is ironic, however, that the Court here interprets article 5, section 1, in a way that has the ultimate effect of limiting certain individual rights of expression.

In 1977 the well-known journalist Günther Wallraff employed a fictitious name to secure a job at the "Bild"-Zeitung, a right-wing newspaper of wide circulation in Germany. Using information so

273. On remand, the BGH upheld the judgment in Böll's favor. 1982 NJW 635.

The Böll case evoked wide comment. For a suggestion that the Court's requirement of scrupulous quotation may have undervalued speech interests, see Zippelius, Meinungsfreiheit und Persönlichkeitsrecht, in Beiträge zum Schutz der Persönlichkeit und ihrer schöpferischen Leistungen—Festschrift für H. Hubmann 519-21 (H. Forkel & A. Kraft eds. 1985). For an argument that the Court's result in Böll was correct, but that the decision should have rested on the view that the commentator's remarks linking Böll with terrorism invaded the "core" of Böll's personality, see E. Steindorff, supra note 136, at 20, 25.

An interesting contrast is furnished by a case decided by the Constitutional Court on the same day as Böll. 54 BVerfGE 148 (1980) (Eppler). In this decision Erhard Eppler, a well-known politician, sought an injunction prohibiting opponents from repeating their charge that Eppler, in his proposals for economic and social policy, indicated a desire to "test the endurance of the economy." This statement apparently implied that Eppler was willing to take undue risks with the economy in pursuing his social goals. As in Böll, a lower court dismissed the action; in determining the appropriate scope of review, therefore, the Constitutional Court was again required to apply the principles of Deutschland-Magazin in an instance in which the complainant was a plaintiff contesting a lower court's dismissal of the complaint. In contrast with Böll, however, the Constitutional Court indicated that the challenged remarks did not pose a severe danger to Eppler's constitutional right of personality. The Court was therefore confined to a minimal level of review and could do no more than correct any basic misconceptions of principle revealed by the lower court. Applying this deferential standard, the Court rejected Eppler's constitutional complaint. For an interesting discussion of Böll, Eppler and the art critique case, discussed supra in text accompanying notes 260-263, see Schmidt, Der verfassungsgerichtliche Grundrechtschutz im öffentlichen Meinungskampf, 1980 NJW 2066.


275. See supra text accompanying notes 97-100.
obtained, Wallraff published a book criticizing "Bild's" journalistic methods. "Bild" sued to enjoin publication of portions of the book, including a passage describing an editorial conference at the newspaper. State courts issued a partial injunction, but the BGH dismissed "Bild's" complaint on the ground that, even though Wallraff may have engaged in illegal deception in concealing his identity, his publication was protected by article 5, section 1 of the Basic Law because it revealed various abuses in the editing of a mass circulation newspaper. As in the Böll case, therefore, the Constitutional Court was not reviewing the imposition of a penalty by a lower court, but rather the lower court's failure to impose a penalty at the request of a plaintiff—here "Bild." The Court emphasized, as it had in Böll, that the intensity of its scrutiny must depend on the constitutional interest threatened by the lower court's dismissal of the action. As in Böll, the Court appeared to recognize that Wallraff's actions—the actions of an individual—may have violated the constitutional rights of "Bild," with the result that a court's failure to redress that constitutional violation may itself be a violation of the Basic Law.

In determining the proper standard of review, the Court found that publication of passages describing "Bild's" editorial conference threatened a serious invasion of the paper's constitutional interest in editorial confidentiality. Accordingly, a heightened degree of scrutiny was necessary in reviewing the lower court's failure to enjoin publication of those passages. To that extent, it was insufficient for the Court to review the lower court's understanding of general principles only; rather, the Court had to decide whether specific mistakes in constitutional interpretation had been made.

Undertaking this review, the Court first found that a newspaper's editorial confidentiality is protected by the guarantee of press

276. 80 BGHZ 25 (1981). The decision of the BGH dismissing "Bild's" action encountered vigorous criticism in the scholarly literature. The critics were particularly dismayed that the BGH had not more strongly condemned Wallraff's use of a fictitious name to obtain his job at the "Bild"-Zeitung. See Bettermann, "Publikationsfreiheit für erschliche Informationen?", 1981 NJW 1065; Schmitt-Glaeser, Der Fall Günter Wallraff oder die Dogmatisierung der Kritik, 1981 ArP 314.

277. 66 BVerfGE at 131-32. In contrast, the Court employed the principles of Deutschland-Magazin to set a much less intrusive standard of review in other parts of the same case. The BGH had also refused to enjoin publication of (1) a passage that reproduced one of Wallraff's manuscripts as edited by "Bild's" chief reporter, (2) a description of a conversation between a "Bild" editor and Wallraff, and (3) Wallraff's critical appraisals of "Bild." In each of these instances (in the first instance by an equally divided panel), the Constitutional Court decided that the potential infringement of editorial confidentiality was not great and that a minimal standard of review was justified. Exercising that lower standard of review, the Court affirmed the refusal of the BGH to issue an injunction on these matters. Id. at 143-51.
freedom contained in article 5, section 1 of the Basic Law. This right of editorial confidentiality is protected more fully against the state than against individuals. Nonetheless, "editorial confidentiality is one of the prerequisites of a free press, which can be infringed not only by the state but also by societal forces and individuals. To that extent editorial confidentiality is an aspect of the guarantee of the independence of the press as an objective principle which governs the interpretation and application of the relevant rules of the civil law." The freedom of the press can be limited, however, and when that right is asserted against other individuals it may sometimes have a narrower scope than it has when asserted against the state.

In this case, the newspaper's right of editorial confidentiality apparently possessed substantial weight. The real question centered on the strength of Wallraf's countervailing rights of free expression. In a detailed discussion, the Court concluded that Wallraf's rights of expression were not sufficiently weighty under the circumstances, because the information in his book had been obtained in a deceptive and therefore illegal manner. Consequently, the Court found that the newspaper's right of editorial confidentiality outweighed Wallraf's rights of expression and that an injunction against the publication of the description of the editorial

278. Id. at 134-35; see infra Appendix at p. 348. Citing the famous Spiegel case, 20 BVerfGE 162 (1966), the court emphasized that editorial confidentiality is important for the preservation of sources of information and frank collaboration among the editors.

279. 66 BVerfGE at 135.

280. Id.

281. Id. at 135-43. The Court emphasized that Wallraf's constitutional rights of expression and press freedom were themselves limited under GG art. 5, § 2, by "general laws" such as BGB §§ 823(1), 826. Under these statutory provisions—prohibiting certain actions that are "contrary to good morals" or otherwise wrongful, see infra Appendix at pp. 348-49 and supra notes 18 & 147—Wallraf's deceptive acquisition of the information was found to be illegal. Although publication of illegally acquired information is not necessarily excluded from constitutional protection, the requisite weighing of interests will ordinarily not result in protection unless the information so acquired possesses particular social importance. 66 BVerfGE at 138-39. Indeed, illegally obtained information will ordinarily be excluded from constitutional protection unless the information actually reveals other illegal actions. Id. Although the BGH accepted a similar principle, it applied the principle incorrectly by overvaluing Wallraf's interest in using the information to criticize "Bild" and undervaluing the general interest in furthering observance of the law—an interest that would be neglected if the illegality of Wallraf's action were not taken into account. Id. at 140-43. Because Wallraf's book revealed no actual illegality by "Bild," Wallraf's rights under GG art. 5, § 1, were limited by the general laws and therefore could not overcome "Bild's" rights of editorial confidentiality.
conference should be granted.  

A review of recent cases such as Böll and Wallraff indicates that the recognition of constitutional rights in private legal relationships—even though that recognition may begin with a vigorous protection of free speech—is not necessarily an unmitigated gain for expanded rights of expression. This is even the case if, as in Blinkfüer, there is an indication that one person may have an individual right of action against another for violation of free speech rights. The danger to speech interests arises in part from the difficulty of limiting the impact of the constitution on private law to the protection of rights of expression, and the possibility that countervailing values of privacy and personality—interests that are sometimes related to the traditional values of the private law—will be recognized as powerful constitutional values on their own account. Under those circumstances these countervailing values can be asserted with great force against the speech interests of individuals. Thus, in the Böll case, for example, the constitutional right of personality is asserted in a way that limits the constitutional speech rights of other individuals. Not only does the language of that case reaffirm a constitutional requirement of a cause of action to vindicate the right of personality against certain forms of speech as in Mephisto, Soraya and Lebach; the Böll case also affirms a requirement of vigorous judicial review under some circumstances in order to vindicate the right of personality against the countervailing interests in speech. Moreover, as the Wallraff case indicates, certain putative speech or press interests can themselves be asserted in actions of private law in a way that may limit speech. Thus in Wallraff the Court indicates that

282. The Court did, however, affirm the refusal of the BGH to issue an injunction against three other portions of Wallraff’s book. See supra note 277.

One possible approach to the problems of the Wallraff case—an approach that was emphasized in Blinkfüer—was curiously ignored by the Constitutional Court. The “Bild”-Zeitung is a branch of the Springer publishing empire (the defendant in Blinkfüer), which is a massive economic enterprise, one of the most important in the Federal Republic of Germany. In contrast, Wallraff—although an eminent journalist—is simply one individual. As we have seen, courts and commentators have sometimes focused on the relative social and economic power wielded by the respective parties in considering disputes of private law when constitutional rights are at issue. See supra note 100. Certainly in this context “Bild” and Springer Publishing Company wield much greater economic and political power than any individual journalist. It might have been reasonable, therefore, for the Court to have taken these respective positions into account in determining the “indirect” impact of constitutional rights on this particular relationship of private law. Cf. 45 BGHZ 296, 310 (1966) (Hellfire) (defamation action between two magazines was dismissed in part on the ground that plaintiff magazine “because of its wide circulation and the potential influence on public opinion resulting therefrom, is not defenseless against sharp attacks.”)
a newspaper has a constitutional right against a private speaker who invades the privacy of the newspaper's editorial room—even though the incursion was undertaken in order to further commentary about the newspaper's policies and actions. In Waltraff, therefore, the views of the Blinkfüer Court are re-affirmed, and a constitutional right is elaborated from the guarantees of article 5, section 1, on behalf of private individuals against other private individuals. Paradoxically, however, the constitutional right of the press in Waltraff has the effect of limiting and inhibiting other constitutionally protected rights of expression.

It may be useful to conclude this discussion of the German doctrine by mentioning a recent ground-breaking decision of the Constitutional Court that may presage an even stronger enforcement of individual constitutional rights of privacy and personality, possibly against values of speech asserted in private law. In 1983 the Constitutional Court invalidated portions of a statute authorizing the national census, on the ground that the statutory measures for protecting the privacy of census information were inadequate.283 The decision rested on possible violations of the general right of personality, and the Court emphasized that the right of “informational self-determination” might be infringed if personal census information became public.284 In the census case itself the right of personality was asserted against the state, but scholars have also discussed the possible effect that this decision may have on the relationships of private law through the technique of the “indirect” effect of the constitution on private relationships, outlined in Lüth. According to some commentators, one possible effect of the decision might be to impose constitutional limits on the collection or distribution of information by employers, creditors, banks, and other “private” actors who come into possession of information about others by virtue of a position of social or economic power.285


284. See supra text accompanying note 172.

285. For differing views on this point, see, e.g., Simitis, Die informationelle Selbstbestimmung—Grundbedingung einer verfassungskonformen Informationsordnung, 1984 NJW 398, 400-02; Wente, supra note 180; Zöllner, supra note 66. See also Riedel, supra note 283, at 72-73. For a recent decision finding that the constitutional right of “informational self-determination” does indeed apply in relationships of private law, see 46 BAGE 98
Another effect, however, might be to add even further strength to the right of “informational self-determination” when it confronts the rights of speech.286 The result might be a further extension of the doctrine of cases like Lebach to permit individuals to secure judicial prohibition of true but unfavorable statements about themselves on the ground that the statements would impair their right of informational self-determination. Such a development would indicate further that the doctrine of the impact of constitutional values on private law can have a significant—sometimes severe—limiting effect on rights of expression.

VI. Conclusion

This review of the development of German doctrine has shown that there are important contrasts between German and American theories of the public and the private realm in constitutional law. Indeed, the German and American doctrines appear to reflect fundamentally differing views about the nature of the distinction between the public and the private realms.

The American doctrine posits a clear distinction between the state and society—an “essential dichotomy” between state and private action—and adheres to the position that only the state is bound by the fundamental law.287 Society enjoys a realm of freedom from constitutional restraint and, although individuals and private groups can be regulated to a substantial extent, that regulation must be undertaken by statutes or other measures of positive law which are subject to continuing contemporary adjustment unlike the more rigid rules of constitutional law. Although nongovernmental individuals or groups may sometimes be bound by the American Constitution, such a result occurs mainly when the members of society concerned have entered into some kind of partnership with the state—either through actual involvement with organs of the state or through the performance of traditional state functions. If this form of partnership were to be free of constitutional restrictions, the state might well circumvent constitutional guarantees by entering into ar-

286. See generally Wente, supra note 180; Krause, supra note 283 (discussing speech issues after census case).
rangements of that sort on a large scale. This aspect of the state action doctrine can therefore be viewed as a necessary device to prevent circumvention by the state of constitutional limitations rather than a significant extension of the constitution into the private or social realm. And, indeed, the history of the state action doctrine—which until recently has largely focused on attempts to prevent the state from collaborating with private groups in racial discrimination—seems to reinforce this position. American cases like New York Times Co. v. Sullivan and NAACP v. Claiborne Hardware Co. are not inconsistent with this general view, because in those cases the state has made a decision—either through its legislature or through its courts—to protect a certain private interest and the circumstances under which that interest will be protected are completely defined by the state, leaving nothing to private choice except the decision of the injured person to commence legal action. Thus, the American view rests on the assumption that a relatively clear theoretical line can be drawn between the state and society and that the state alone—and in certain narrow cases, members of society effectively collaborating with the state—should be bound by constitutional limitations.

The German position, in contrast, seems to rest on a different fundamental view. The underlying German theory appears to reject the problematic view that it is possible to separate the public from the private realm. At very least, the German view is skeptical of the position that the fundamental law should apply only to the "public" realm, even assuming that such a realm can be clearly delineated. The German doctrine rests on the position that certain constitutional values are so fundamental—for a decent life for all—that those values should permeate state and society, wherever the line between the two (if any) is to be drawn. This position may seem paradoxical in light of the clear traditional distinction between public and private law in German theory, but the doctrine that constitutional values should "influence" even private law indicates that, when constitutional values are at issue, the distinction between public and private realms cannot be absolute. That is a crucial difference between the American state action doctrine and the doctrine of the German cases first elaborated in Lüth. As a practical matter, this

288. See supra text accompanying notes 74-79.

289. A view of this sort seems to underlie not only the Constitutional Court's adoption of Professor Dürrig's "indirect" theory in Lüth, but also the Labor Court's adoption of its "direct" theory of the impact of constitutional rights on private law. See supra text accompanying notes 47 & 53-56.
difference can be seen most clearly in the impact of the German Constitution on contractual relations (an area in which state action under American doctrine is rarely found) and in the recognition of constitutional causes of action by one private individual against another private individual—also ordinarily without an analogue in American doctrine.

Instead of attempting to exclude the application of constitutional values in the private realm, the German position recognizes that even in private law an accommodation of constitutional and private law values must be achieved. This accommodation is to be accomplished through a wide-ranging consideration of the specific circumstances of each case. In determining the strength of constitutional values in relations between individuals, a range of factors must be taken into consideration—the degree to which the asserted constitutional right has been impaired, the motive with which the constitutional values are asserted, the social and economic power of the person whose actions threaten those constitutional values, and any countervailing constitutional rights or other interests that such a person might have. Thus, under German doctrine, the status of an actor as a private person rather than the state is not dispositive—instead, it is just one factor to be taken into account in a broader determination of whether the constitutional values at issue are sufficiently weighty to require their imposition in a specific case. As discussed above, an assessment of the impact of the constitution on values of private law—that is, on legal relationships among individuals—requires a complex balancing of countervailing factors in each case.290

Indeed the German view, in which all rules of private law are at least “influenced” by constitutional values, is more or less in accord with the perception of the American legal realists that there is no clear distinction between the public and private realms.291

290. For an argument in the literature of American political theory rejecting the sharp distinctions of the state action doctrine and adopting a comprehensive balancing test similar to the German position, see Gutmann, Is Freedom Academic?: The Relative Autonomy of Universities in a Liberal Democracy, in NOMOS XXV: LIBERAL DEMOCRACY 257-86 (J. Pennock & J. Chapman eds. 1985). For similar views in the American legal literature, see, e.g., Glennon & Nowak, supra note 133; Henkin, supra note 83; Williams, supra note 133. See also Horowitz, The Misleading Search for “State Action” Under the Fourteenth Amendment, 30 S. CAL. L. REV. 208 (1957).

ing to the realists, even those realms of private law considered most private—such as tort, contract and property—actually represent the results of significant choices of public policy and applications of public power.\textsuperscript{292} If one accepts this position, there seems little reason to interrupt the impact of constitutional values—in what must seem to be an artificial manner—when the focus moves from the clearly identifiable realm of public power to another realm where public power is applied but in a somewhat less evident way.

In contrast to the German view, however, the American “state action” doctrine turns its back on these arguments of the realists when it posits a clear distinction between the public and private realms. In the American view, only the public realm—that is, governmental power—has sufficient danger to be subjected to constitutional limitations; the actions of private individuals do not possess that special measure of comprehensive danger unless they are closely aligned with the state.

The complexity and incoherence of the Supreme Court’s state action doctrine may well arise from an attempt to maintain this position. The gyrations apparent in some of the cases reflect an attempt to make certain particularly dangerous exercises of “private” power—that is power exercised by parties not nominally the state—appear to be so closely related to the state that those actions can be attributed to the state. As a theoretical matter, however, it is not absolutely clear why a particularly close relationship to the state should be determinative with respect to the application of constitutional limitations. If one treats constitutional values as “objective” values, then it may not make a difference whether the agglomerations of power represented by company towns or controlling political parties are considered a part of the state or not.\textsuperscript{293} To ask whether they should be considered to be exercising the power of the state is perhaps to be asking the wrong question. The German doctrine suggests that the question should be the extent to which an important constitutional value is infringed by the action of the company town or political party—or other individual or group—without adequate countervailing justification in the rights or constitutionally legitimate interests of the acting party. In this view, the inquiry

\textsuperscript{292} This view has been re-asserted by writers in the critical legal studies tradition. See e.g., Kennedy, \textit{The Stages of the Decline of the Public/Private Distinction}, 130 U. Pa. L. REV. 1349 (1982); Peller, \textit{The Politics of Reconstruction}, 98 HARV. L. REV. 863 (1985).

\textsuperscript{293} See generally Berle, supra note 100.
should focus on the seriousness of the infringement and not (in the first instance) on the source from which the infringement comes. 294

Yet even conceding the power of the realists' views, it is important to understand that an extension of the constitution into "private" relations will not necessarily result in an unqualified expansion of any given substantive right. Indeed, an extension of the constitution into relations among individuals—as is evident in the theory of the German cases—may raise new difficulties of its own. It seems inevitable that an extension of the constitution into the "private" realm will ultimately require a balancing of interests of the individual who claims that constitutional rights have been violated against the asserted rights of the individual who is said to have effected the violation. If one were to focus on one set of rights only—for example, rights of expression, which generally occupy a special position in American doctrine—the extension of those rights into private legal relationships might seem to be a welcome extension of constitutional liberty. Thus, one might welcome the recognition of constitutional speech rights of employees against employers—rights that might prohibit, for example, employers from discharging employees on the grounds of protected expression—a form of guarantee that does play a role in German constitutional doctrine. 295 As we have seen, however, the extension of the constitution into private legal relationships may not be limited to one set of "preferred" rights; in the German cases, for example, courts have recognized other constitutional rights which are applicable against individuals and may have the effect of limiting the speech rights of those individuals. Thus, the German courts have developed individual rights of personality which can be asserted against other individuals in a manner that may very sharply curtail rights of expression. Moreover, even apart from separate countervailing rights, the recognition of constitutional rights in private relationships can result, in effect, in one right's being turned against itself—one individual's constitutional right can form the basis of a constitutional cause of

294. Of course the text and history of relevant American constitutional provisions may be viewed as requiring a state action doctrine of the American type—although as an historical matter such a conclusion with respect to the fourteenth amendment has been questioned. See Nerken, A New Deal for the Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Bases of the Civil Rights Cases and State Action Theory, 12 HARV. C.R.-C.L. L. REV. 297 (1977). See also Williams, supra note 133, at 348-49. The discussion in the text is not intended to take a position on this specific point but rather to explore how "private" action may best be treated in a constitutional system.

295. See supra note 41 and accompanying text. See also supra text accompanying notes 90-92 (Freedom of Conscience Case).
action that might curtail the exercise of the same or related right by another individual. Thus, in the Wallraff case the protection of editorial confidentiality—a right very closely related to other rights of expression—was found to justify (and indeed require) curtailment of a journalist’s rights of speech.296 Moreover, although the Constitutional Court did not pursue the point in Luth, the impact of constitutional rights on private legal relationships might also have rendered plausible an argument that Harlan’s article 5 rights of expression might—under some circumstances—have justified (or required) curtailment of Luth’s attack on Harlan’s films.297 In this sense, the extension of the constitution into the private realm may not necessarily be viewed with unreserved enthusiasm from the perspective of any given set of constitutional rights, because the result may be the elaboration of countervailing constitutional causes of action that may have the ultimate effect of restricting those rights. And, as apparently is the case in the German doctrine, these may be permanent constitutional causes of action, which cannot be moderated or withdrawn by the legislature.

This observation suggests one additional point that should be borne in mind when considering the implications of an extension of the Constitution into the private realm. To the extent that an extension of this sort will result in a required balancing of constitutional interests of individuals on both sides of the dispute, the Constitution may be more likely to require a specific result in each case, because under such a technique, where the constitutional rights of one individual end, the countervailing constitutional rights of the other individual may well begin. In American defamation and privacy doctrine, the first amendment rights of the speaker extend up to a certain point, but after that point there are no countervailing constitutional rights but rather the discretionary power of the state. That is to say, within a certain area the speaker is protected by the first amendment, but outside that area the state can decide whether or

296. In American doctrine the assertion of a first amendment right of editorial confidentiality has not prevailed on the facts of a number of recent cases. See, e.g., Herbert v. Lando, 441 U.S. 153 (1979). See also Zurcher v. Stanford Daily, 436 U.S. 547 (1978); Branzburg v. Hayes, 408 U.S. 665 (1972). The Supreme Court, however, has acknowledged a measure of protection for editorial confidentiality in dictum and has indicated that the first amendment would prohibit a “law that subjects the editorial process to private or official examination merely to satisfy curiosity or to serve some general end such as the public interest.” Herbert, 441 U.S. at 174; see also id. at 208-10 (Marshall, J., dissenting). See also Branzburg, 408 U.S. at 709-10 (Powell, J., concurring).
297. See supra note 132.
not to impose penalties on the speech in question. As we have seen, there is no requirement that the state impose liability; consequently, there is room at this point for experimentation and legislative discretion. In a regime in which the Constitution influences individual legal relationships and in which (perhaps as a result) there are countervailing constitutional interests on each side—that is, for example, the speaker’s constitutional right to speak and the defamed person’s constitutional right of personality—there is less room for adjustment and legislative discretion. It may well be that in many instances in which the speaker is not constitutionally protected, the balance has fallen in favor of the constitutional right of the defamed person and, consequently, the state must under such circumstances vindicate the right of personality and provide a cause of action against the speaker. This may or may not be a disadvantage, but it is important to understand that the extension of the constitution into private legal relations may have the effect of withdrawing legislative discretion and remitting all questions of private law in certain areas to judicial constitutional decisions that cannot be legislatively reconsidered.

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In some ways the differences in the German and American treatment of the impact of constitutional values on the private realm reflect the more fundamental fact that American constitutional theory generally excludes constitutional provisions that impose affirmative obligations on the government to act in society, whereas the


299. R. EPSTEIN, C. GREGORY & H. KALVEN, JR., CASES AND MATERIALS ON TORTS 1217-18 (4th ed. 1984) (differing fault standards can be chosen by various states to govern defamation actions by private individuals; see supra note 212).

300. See, e.g., supra text accompanying notes 101-112 (discussion of Soroya). But see Lauke, supra note 32, at 166 (suggesting that even when Court sets down constitutional principle, some legislative discretion may be possible).

301. The German system interestingly mitigates this result—to some extent at least—by dividing judicial competence between the Constitutional Court and the ordinary courts and by according a significant measure of discretion to the ordinary courts. Even in the German system, however, the Constitutional Court will feel obliged to exercise stringent judicial review under some circumstances and, when it does, it may well decide which of two countervailing rights prevails—without the opportunity for discretion either by the legislature or by the ordinary courts. See, e.g., 66 BVerfGE 116 (1984) ("Bild"-Wallraf); 54 BVerfGE 209 (1980) (Böll). For a discussion of an analogous point in the context of Shelley v. Kraemer, see Tushnet, Shelley v. Kraemer and Theories of Equality, 33 N.Y.L. SCH. L. REV. (forthcoming).
German system acknowledges certain affirmative constitutional requirements of social welfare and also certain requirements that the government act affirmatively to impose certain burdens on individuals. In interesting ways, provisions that require the constitution to affect legal relations among individuals in society resemble other constitutional provisions that require the government to confer various sorts of benefits and burdens on individuals—such as provisions that require the government to grant social welfare benefits to individuals. A constitutional doctrine that affects the legal relations of individuals will upon occasion require the government to act affirmatively to realign individual legal relations and, consequently, require the government to grant benefits to some individuals and impose equivalent burdens on others. Indeed, we have seen that the Basic Law imposes this sort of affirmative obligation on the state in cases like Soraya, Lebach, Böll, and Wallraff, in which the Court apparently acknowledges that the state must create a cause of action on behalf of one private individual against another. This result resembles an affirmative requirement that the government grant funds (or other benefits) to plaintiffs in such cases and an equivalent constitutional requirement that the government take funds from some other private person or that some other burden (such as an injunction) be imposed on that person.

If, in contrast, the Constitution is applicable against the state only—as in American doctrine—then there is no constitutional requirement that the government in effect enter society to reallocate burdens and benefits among individuals and accordingly impose burdens on some individuals for the benefit of other individuals (except to the extent that the former are considered to be the state for the purposes of the state action doctrine). The state action doctrine, by excluding requirements that the government act in society in this manner, is therefore consistent with broader presuppositions of American constitutionalism that the government generally has no constitutional obligation to act for or against private individuals in society—unless the government itself has previously deprived those individuals of constitutional rights.

An important underlying theme of American constitutional law is thus the withdrawal of the Constitution from society—both in its restriction of constitutional limitations to actions of the state and its exclusion of other types of constitutional provisions that might require the government to act in society.\(^{303}\) The broader German doctrine requiring that the constitution influence private legal relations is in accordance with the Basic Law’s more general acknowledgment of affirmative constitutional requirements affecting society—both through requirements that the government accord benefits to certain members of society and through requirements that the government impose burdens on certain members of society. This is accomplished not only by constitutional provisions which are interpreted directly to require such governmental action. The “influence” of the constitution on private law also has this effect to the extent that it requires the state, as a constitutional matter that probably cannot be changed by legislation, to grant benefits to certain individuals whose constitutional rights may be violated and to impose burdens on other private individuals—those who have been found to have violated the constitutional rights in question.

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\(^{303}\) For attempts to change this paradigm, see, e.g., Black, *Further Reflections on the Constitutional Justice of Livelihood*, 86 *COLUM. L. REV.* 1103 (1986).
APPENDIX

Selected Provisions of the Basic Law

Art. 1. § 1 Human dignity is inviolable. It is the duty of all state authority to observe and protect human dignity.

§ 2 The German people thus acknowledge that inviolable and inalienable human rights are the basis of every human society and the basis of peace and justice in the world.

§ 3 The following basic rights bind the legislature, the executive and the judiciary as directly effective law.

Art. 2. § 1 Everyone has the right to the free development of his personality, so long as he does not infringe on the rights of others or violate the constitutional order or the law of morals.

§ 2 Everyone has the right to life and bodily integrity. The freedom of the person is inviolable. These rights may be curtailed only pursuant to law.

Art. 5. § 1 Everyone has the right freely to express and disseminate his opinion, orally, in writing, and in pictures, and to educate himself without hindrance from all generally accessible sources. The freedom of the press and the freedom of reporting through radio and film are guaranteed. There is to be no censorship.

§ 2 These rights find their limits in the rules of the general laws, the statutory provisions for the protection of youth and in the right of personal honor.

§ 3 Art and scholarship, research and teaching are free. The freedom of teaching does not release one from loyalty to the constitution.

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Selected Provisions of the German Civil Code

§ 823 (1) Whoever intentionally or negligently infringes on the life, body, health, freedom, property or other right of another person, in a manner contrary to law, is obligated to provide compensation to that other person for the resulting damage.

(2) The same obligation applies to a person who violates a statute whose goal is the protection of another person. If the content of the statute indicates that it can be
violated even without fault, the obligation of compensation arises only if fault is present.

§ 826 (1) Whoever intentionally causes injury to another person in a manner contrary to good morals has the duty of compensating for that injury.