FREE SPEECH MEETS FREE ENTERPRISE IN THE UNITED STATES AND GERMANY*

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INTRODUCTION

Society finds itself in a state of fundamental transformation, of progression to a new epoch. Futurists, as they call themselves nowadays, talk of a new "paradigm" in which the institution of the nation-state is in decline.[1] Society is evolving. New values and new hierarchies are being ushered in. In this process, the influence of government is waning and that of private or "free" enterprise is waxing.

This Article seeks to expose and analyze this process or "paradigm shift." This exposition is peppered with examples, that is, with evidence that is suggestive rather than conclusive. This is so because the process is evolutionary, not revolutionary; the victory of a society and legal order focused on enterprise, over one centered on nation-states, is not yet assured. Nevertheless, if society does indeed continue to progress as imagined in this Article, then certain values of the existing order will be pitted against those of the new. And the confrontation will make itself felt in general in every aspect of public life and in the legal order and regime in particular.[2]

The confrontation between the old and new hierarchies is investigated in this article by the collision between two representative core values. The core value chosen to epitomize the present governmental hierarchy is the constitutional right of free speech, without which democratic government is

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1. *See generally, e.g.*, JOSEPH A. CAMILLERI & JAMES FALK, THE END OF SOVEREIGNTY? (1992); PAUL KENNEDY, PREPARING FOR THE TWENTY-FIRST CENTURY (1993); RAYMOND VERNON, IN THE HURRICANE'S EYE: THE TROUBLED PROSPECTS OF MULTINATIONAL ENTERPRISES (1998); Stephan Hobe, *Global Challenges to Statehood: The Increasingly Important Role of Nongovernmental Organizations*, 5 IND. J. GLOBAL LEGAL STUD. 191 (1997); Christoph Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm for International Law?*, 4 EUR. J. INT'L L. 447 (1993); *An Agenda for Peace: Report of the Secretary-General on the Work of the Organisation*, U.N. GAOR & U.N. SCOR, 47th Sess., Agenda Item 10 of the Preliminary List, U.N. Doc. A/47/277-S/2411 (1992).

2. Care has been taken in this article not to suggest that the developments here depicted and predicted are "for the good" in any philosophical, moral, or other sense.

unimaginable. The value selected to represent private enterprise is competition or, more specifically, competition's corollary, the prohibition against unfair competition. Without (free) competition, private enterprise cannot exist. To employ the terminology of our statist society, the right to free competition is fundamental and necessary to the new paradigm and in this sense is "constitutional."

The choice of the two countries examined here is accidental rather than deliberate. This article began as a comparative study of the law on political boycotts in the United States and Germany on the celebration of the fiftieth anniversary of the German constitution.[3] In the course of this study the author determined that the decisions of the highest courts of the respective countries revealed a remarkable similarity in holdings and often in analysis and justification, although there is virtually no statutory law on the point. While the similarity might be purely coincidental, it seems more likely that other factors and forces are at work. One factor is the familiarity of German judges with U.S. Supreme Court precedent.[4] But these precedents would not be cited, much less followed, unless the legal milieus of the two countries were roughly comparable. This "rough comparability" is therefore both a conclusion of this study and an assumption. If true, then the global forces of commercialization have penetrated German and American legal sensibilities to a roughly equivalent degree, providing two stations at which to sound the rising tide of commercialization.

The terms employed so far—society, hierarchy, and influence—require a short explanation. The term "society" is used instead of more familiar terms such as "citizens," "people," or "population." This is due in part because these more familiar terms have less relevance today than they once did. The recent amendment to the German citizenship law and the embryonic European citizenship are just two examples.[5] According to the new German citizenship law, children born in Germany of foreign nationals may become German citizens, and may retain German citizenship until age twenty-three without relinquishing their foreign citizenship.[6] Both of these developments indicate

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3. This article is based on a speech delivered by the author at the Faculty of Law of the University of Münster in a series of lectures celebrating the fiftieth anniversary of the German Basic law. *See* VERFASSUNGSRECHT UND SOZIALE WIRKLICHKEIT IN WECHSELWIRKUNG 209-29 (Boro Pieroth ed., 2000).

4. See, e.g., the reference to *Palko v. Connecticut*, 302 U.S. 319, 327 (1937), by the German Federal Constitutional Court in the *Lüth* case, quoted at footnote 41, *infra*. On the influence of precedents on the European Continent, see INTERPRETING PRECEDENTS: A COMPARATIVE STUDY (D. Neil MacCormick & Robert S. Summers eds., 1997) and Thomas Lundmark, *Stare Decisis vor dem Bundesverfassungsgericht*, 28 RECHTSTHEORIE 315 (1997).

5. *See* Treaty Establishing the European Community (as amended) Art. 8 (1): "Citizenship in the Union is hereby established." *See generally*, EUROPEAN CITIZENSHIP: AN INSTITUTIONAL CHALLENGE (Massimo La Torre ed., 1998).

6. *See* § 4 (3) Staatsangehörigkeitsgesetz, (BGBL. I 1618), *construed in* Heinrich Bornhofen, *Prüfung und Dokumentation des ius-soli-Erwerbs der deutschen*

an erosion of the traditional association of citizenship and nationality.

The word "society" is relatively neutral, at least to lawyers, and it offers the advantage of allowing one to speak simultaneously of Germany and the United States. The United States and Germany have much in common from a traditional constitutional standpoint in that they belong to one western, essentially European, democratic political and economic society. However, it would stretch the political vocabulary to speak of Germany and the United States as having common citizenship and government, even though corporate ownership and control and much else in economic society do not respect political boundaries.

The term "hierarchy" is employed instead of "paradigm" or even "institution." This is not because "hierarchy" denotes the entirety of society's present or future. "Paradigm" might be better for this purpose. The word "hierarchy" does not, for example, capture the complexity and beauty of a constitutional order dedicated to the pursuit of liberty and equality. Nor does the word "hierarchy" do justice to the richness and simplicity of free enterprise and the unabashed pursuit of wealth and happiness. Rather, speaking in terms of "hierarchy" allows one to see more clearly that societal norms and values can be relegated to different positions relative to each other. Use of the term "hierarchy" thus permits a readier comparison between the relative importance within German and American society of the values of speech and competition.

Finally, this article prefers the term "influence" over other terminology often employed in constitutional scholarship, such as "power," "regulate," and "control," because these concepts imply the threat or use of force. As such, these terms are not subtle enough to explain the extent to which commerce permeates our society and is replacing traditional institutions and values.

The broad brush "influence" is particularly apropos for this article's first and third parts. The first part describes in general terms the transformation of epochs—the "paradigm shift"—while the third part consults historical antecedents to divine perspectives on the future. These two parts are impressionistic in nature, somewhat like a painting by Claude Monet. The second part of this article scrutinizes decisions of the highest courts in the United States and Germany dealing with political boycotts. The comparisons made in this second part describe in a somewhat legalistic fashion the relevant legal norms and their relative positions in the constitutional value systems of the United States and Germany. To remain with the metaphor of painting, the second part would resemble a pen and ink drawing by Albrecht Dürer.

Staatsangehörigkeit durch den Standesbeamten, 52 DAS STANDESAMT 257 (1999). For a recent overview of similar measures throughout Europe, see Fritz Sturm, *Europa auf dem Weg zur mehrfachen Staatsangehörigkeit*, 52 DAS STANDESAMT 225 (1999).

I. CHANGE IN EPOCHS: THE EPOCH OF PRIVATE ENTERPRISE

In order to provide a general context for what follows, the first part of this article chronicles in cursory fashion the commercialization of society, of the law, and of the state. As noted above, this process is gradual. Nevertheless, examples from all three sectors—society in general, law, and the state—demonstrate a relative increase in the influence of commerce and a concomitant decline in that of the state.

A. Commercialization of Society

The commercialization of society surrounds us. Commercial advertisements await us in the mailbox, on the doorknob, on walls, on busses, on television, in newspapers, in E-mail, and sometimes written in the sky itself. We hear commercial advertisements on the radio, on the telephone, from loudspeakers, and from merchants hawking their wares. Perfumed advertising flyers fall from magazines to assault our noses. Over and above the commercial assault on our pocketbooks is the more subtle suggestion to our psyches that anything expensive is good, whether food, clothing, transportation, housing, carpeting, vacation, or education. The free market has become the yardstick for society. The desirability and status of a position are measured by its salary. The prominence and importance of authors, artists, and athletes are measured by what they earn or what their art pieces and manuscripts bring at auction.

Just a few years ago, professional athletes were not allowed to compete in the Olympic Games. Athletes were supposed to represent their nation-states, not themselves or petty commercial interests.[7] Commercialism was considered common and base. It had no place among the high virtues exemplified by the Olympic spirit. Today, such considerations appear outdated, even cynical and hypocritical, considering the commercial exploits of the Olympic committee members.[8]

B. Commercialization of the Law

People do not trust the government to organize their lives and affairs as they once did. For example, prenuptial agreements are replacing statutory and common law marriage laws. Fewer and fewer people rely on the laws of intestate succession. Adoptions are opened as people bypass state strictures.

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7. *See* James A.R. Nafziger, *International Sports Law: A Replay of Characteristics and Trends*, 86 AM. J. INT'L L. 489, 493 (1992).

8. *See Die olympische Reinigung vollzieht sich im Schonwaschgang*, FRANKFURTER ALLGEMEINE ZEITUNG, Jan. 24, 1999, at 19.

A sign of the changing times is the Law and Economics movement,[9] with its preference for private law and private enterprise solutions and with its leveling principle of efficiency. Twenty-five years ago, an early adherent of this movement told law students that in twenty years there would no longer be law faculties, only departments of economics. Legal language is strewn with commercial terms: the court did not "buy" a particular argument,[10] or free speech is important in the "marketplace of ideas."[11]

Even public law is becoming commercialized. The German Constitution, which just celebrated its fiftieth anniversary, explicitly guarantees the right to practice a profession.[12] All of the Four Freedoms—free movement of goods, workers, services, and capital—of the European Community or Union, formerly called the European Economic Community, are commercially motivated. Environmental law, to cite just one example, employs economic instruments.[13] The principle of efficiency has spread to administrative law.[14]

Deregulation is symptomatic of the changing epoch, for behind deregulation stands the conviction that private enterprise will serve the public, if not exactly the public welfare, better without interference from the antiquated state. The catch-word is privatization, which literally entails the relinquishment of particular obligations by the state to private actors, even if these actors are often still subject to state regulation. Privatization of public tasks necessarily means a loss of the state's influence.[15] At the state universities in Germany, people debate whether to charge tuition or perhaps impose fees for bar review courses offered by professors. The discussion regarding tuition revolves around the concept of the fee state, a kind of university post office for students.[16] Almost all German law students attend expensive private bar review courses for a year after completing their

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9. *See* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 109-13 (4th ed. 1992).

10. One of many examples is found in Walter T. Champion, Jr., *Attorneys Qua Sports Agents: An Ethical Conundrum*, 7 MARQ. SPORTS L. J. 349, 355 (1997).

11. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

12. GRUNDGESETZ [GG] [Constitution] art. 12 (F.R.G.).

13. A German-American comparative discussion is found in Thomas Lundmark, *Systemizing Environmental Law on a German Model*, 7 DICK. J. ENV'T. L. & POL'Y 1, 39-43 (1998).

14. *See generally* EFFIZIENZ ALS HERAUSFORDERUNG AN DAS VERWALTUNGSRECHT (Wolfgang Hoffmann-Riem & Eberhard Schmidt-Aßmann eds., 1998); Loren A. Smith, *The Aging of Administrative Law: The Administrative Conference Reaches Early Retirement*, 30 ARIZ. ST. L.J. 175 (1998); Paul R. Verkuil, *Is Efficient Government an Oxymoron?*, 43 DUKE L.J. 1221 (1994).

15. In a direct challenge to Canada's government-run health system, the province of Alberta announced that it will turn to private, for-profit hospitals to provide some services. *See Alberta to Permit Private Hospitals*, INT'L HERALD TRIB., Nov. 19, 1999, at 5.

16. The German postal authority has already been privatized, as has the railway, even though both private companies are closely bound up with the machinery of the state.

university course work. As in the United States, the state does not even regulate who can offer these courses, even though the courses train students to pass the examination which is a state prerequisite to admission to the bar. The state seems unwilling if not unable to respond to the forces of commercialization.

Through its membership in the European Union, the German state is losing exclusive control over admission of lawyers to practice law. A "race to the bottom," which is decried in the environmental arena,[17] is also perceptible in the education of lawyers.[18] Another development, perhaps even more momentous and ominous, is the appearance of foreign legal advisors who counsel their clients on foreign or global law. Large CPA firms in the United States are employing lawyers in large numbers. Many contend that they are not practicing law and as such are not subject to state regulation.

C. *Commercialization of Government*

In the present political climate, government apparently cannot be trusted to run post offices, schools, prisons,[19] or even police forces. Private police officers outnumber public officers in most western countries.[20] In the United States, business executives are transforming large portions of a fragmented, cottage industry of independent, non-profit institutions into consolidated, professionally managed, moneymaking businesses.[21] Even state universities and public elementary schools[22] have become commercial ventures, while the states are reduced to running lotteries to support local schools. Public primary schools were once thought to exist to train good citizens.[23] But recently, the

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17. *See generally* REINER SCHMIDT & HELMUT MÜLLER, EINFÜHRUNG IN DAS UMWELTRECHT XXVII (5th ed. 1999); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the- Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992).

18. *See, e.g.*, Erhard Blankenburg, *Patterns of Legal Culture: The Netherlands Compared to Neighboring Germany*, 46 AM. J. COMP. L. 1, 7 (1998) (noting that competition with other European countries is fueling the debate to shorten the German legal education).

19. *See, e.g.*, RICHARD W. HARDING, PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY (1997); Cheryl L. Wade, *For-Profit Corporations That Perform Public Functions: Politics, Profit, and Poverty*, 51 RUTGERS L. REV. 323 (1999).

20. *See Welcome to the New World of Private Security*, ECONOMIST, Apr. 19, 1997, at 21. *See generally* David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165 (1999).

21. *See* Edward Wyatt, *The Profits of Education; Investors Look To Make Schools Big Business*, INT'L HERALD TRIB., Nov. 5, 1999, at 1. The author also makes the point, relevant to the discussion in Part III below, that institutions of learning grew out of religious institutions.

22. *See infra* notes 23 - 25.

23. *See Scientific American: 50, 100, and 150 Years Ago*, Nov. 1999, *at* http://www.sciam.com/1999/1199issue/119950100.html (last visited April 16, 2001).

> The question of Free Schools is be decided at the coming election. We have conversed with thousands of our mechanics and yeoman upon this subject, and in general they are in favor of it. No man can be a fit citizen of the Republic,

President of the United States, a majority in Congress, and four out of nine judges of the U.S. Supreme Court determined that primary school education was so "inextricably intertwined with the Nation's economy"[24] that Congress could regulate guns on school grounds under its commerce power.[25]

Private home owners' associations make quasi-governmental decisions for their members. Unions do the same thing in Germany, but on a much larger scale. American lawyers spend huge amounts of money to manipulate legislation in their commercial self-interest.[26]

The new hierarchy of private enterprise has long been in the process of founding its own courts, consisting of arbitrators, rent-a-judges, and the like. International courts of arbitration are sometimes staffed by "judges" who never studied law or served as a judge in any particular jurisdiction. In this way the state is losing its traditional influence over the resolution of disputes, and simultaneously over the development of the common law.[27] Companies and conglomerates on the international level increasingly subject themselves to their own *lex mercatoria*,[28] which is not subject to the legislative jurisdiction of any particular state.[29]

The very institution of democracy appears to be threatened by commercialization[30] and thus by free enterprise. Political campaigns have become marketing campaigns in which the most influential positions in the body politic are up for sale to the highest bidder. The results of elections can

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unless he reads the opinions of our Statesmen upon different questions.

Id.

24. United States v. Lopez, 514 U.S. 549, 620. (1995). The Court found the federal legislation unconstitutional. *Id.* For a discussion of this case, see Thomas Lundmark, *Guns and Commerce in Dialectical Perspective*, 11 BYU J. PUB. L. 183 (1997).

25. The dissenters (Justices Breyer, Stevens, Souter, and Ginsburg) even confessed not to have been surprised to learn "that half of the Nation's manufacturers have become involved with setting standards and shaping curricula for local schools." *Lopez*, 514 U.S. at 622.

26. *See Who speaks for Main Street?*, ECONOMIST, June 26, 1999, at 87. According to the table published with this article, lawyers in the United States contributed $40 million to election funds in the period January 1, 1997 through June 30, 1998, which was more than labor's contribution.

27. It should perhaps be stressed that none of the developments sketched in this article is necessarily bad, just as the Church's loss of influence over the equity courts was not necessarily bad. On the loss of influence of the Christian Church over the equity court, see generally Jack Moser, *The Secularization of Equity: Ancient Religious Origins, Feudal Christian Influences, and Medieval Authoritarian Impacts on the Evolution of Legal Equitable Remedies*, 26 CAP. U.L. REV. 483 (1997).

28. *See, e.g.*, Philip J. McConnaughay, *The Risks and Virtues of Lawlessness: A "Second Look" at International Commercial Arbitration*, 93 N.W. U. L. REV. 453 (1999); Georges R. Delaume, *State Contracts and Transnational Arbitration*, 75 AM. J. INT'L L. 784, 814 (1981).

29. In this way it bears some resemblance to the early development of the common law, which was largely beyond parliamentarian control.

30. *See generally* ULRICH BECK, DEMOCRACY WITHOUT ENEMIES (Mark Ritter trans., 1998); Paul H. Brietzke, *How and Why the Marketplace of Ideas Fails*, 31 VAL. U. L. REV. 951 (1997).

be predicted—perhaps made superfluous—by private political polls. Voter turnouts are at historic lows, as was recently witnessed for the elections to the European Parliament.[31] The cause of lower voter turnout is not apathy, but rather the superfluousness of the state,[32] since the influence of the state and its politics on the individual has been diminishing rapidly. As is graphically said, people vote with their feet. Nowadays they vote with their wallets, as often as they like. One euro, or one dollar, one vote.

The principle of equality is giving way to the principle of competition, which only concerns itself with equality of opportunity, not results. The notion that conditions should be the same for everyone in society appears ludicrous when judged by this principle, for competition necessarily implies both winners and losers. The losers in this new hierarchy, such as those on welfare, will favor the traditional state with its welfare system. The winners will see the welfare state at best as a necessary evil, an institution that must be funded, lest civil unrest result.

The hierarchies of the traditional state are relatively stable and quite transparent. Those of the new society are multilateral and mostly inscrutable.[33] Every week, newspapers report mergers between major competitors and the acquisition of one company by another. The state feels understandably threatened by this concentration of power and influence inside and outside of its boundaries. Governments attack with their antitrust laws, for, even if antitrust theory does not ordinarily account for this phenomenon,[34] the states are waging a battle for their continued existence. In this battle, states react unreasonably, even emotionally. They do businesses' bidding by waging a commercial "banana war."[35] People seem almost relieved if a war is waged, as in Kosovo, for other than economic purposes, such as protection of oil reserves. Prosecutors and judges try unsuccessfully to rein in Bill Gates

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31. The European elections of 1999 had by far the lowest voter turnout of any nationwide election in Germany. *See Waehler halten Union fuer wirtschaftspolitisch kompetenter*, FRANKFURTER ALLGEMEINE ZEITUNG, June 15, 1999, Politik, at 4.

32. The United Census Bureau reported that whereas 64% of those listed as immigrants to the United States had obtained citizenship in 1970, in 1997 it was only 35%. The drop is attributed in part to an apparent lack of interest in citizenship by many immigrants. Philip P. Pan, *U.S. Naturalization Rate Drops; 35% of Nation's Foreign-Born are Citizens, the Least This Century*, WASH. POST, Oct. 15, 1999, at A01, *available at* WL 23309220.

33. Thus, Professors Falk and Strauss call for a Global People's Assembly. *See* Richard Falk and Andrew Strauss, *Globalization Needs a Dose of Democracy*, INT'L HERALD TRIB., Oct. 5, 1999, at 8.

34. *See, e.g.*, E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 1 *et seq.* (1992). However, the antitrust theory does sometimes receive brief mention. *See, e.g.*, INGO SCHMIDT, WETTBEWERBSPOLITIK UND KARTELLRECHT 30-31 (5th ed. 1996).

35. Michael M. Weinstein, *The Banana War Between the United States and Europe is More Than a Trivial Spat*, N.Y. TIMES, Dec. 24, 1998, at C2; *see also* Rodrigo Bustamante, *The Need for a GATT Doctrine of Locus Standi: Why the United States Cannot Stand the European Community's Banana Import Regime*, 6 MINN. J. GLOBAL TRADE 533 (1997).

and company,[36] who fight back by lobbying Congress to reduce funding for antitrust enforcement.[37]

The motor driving this development is private enterprise. Lawyers who cling to an old-fashioned notion of the state are being left behind.

II. CONFRONTATION BETWEEN HIERARCHIES: POLITICAL BOYCOTTS

One way to trace the evolution from a constitutional governmental hierarchy to a private enterprise society is to describe the gradual alterations in institutions. One could, for example, examine the confrontation between these two hierarchical systems by comparing the judicial systems of the states to the dispute resolution tribunals of arbitration and mediation. Or, one could compare principles of democracy with those of private enterprise. Antitrust law contains much of the institutional law of the hierarchy of the future in rudimentary form. One could compare the constitutional principle of separation of powers to the prohibition against horizontal monopolization, for example. The principle of federalism and its corollary, subsidiarity, can be glimpsed in antitrust's prohibition against vertical monopolization. For purposes of this article, however, the study will address the area of civil rights, specifically, the right of free speech versus the right of free competition as seen in the judicial decisions of Germany and the Unites States regarding calls for political boycotts. In Germany, constitutional rights for the most part are listed in the catalogue of rights in the German Constitution or "Basic Law." In the U.S. Constitution, most are found in the amendments. Private enterprise does not yet possess a similar catalogue.[38] But many norms analogous to civil rights can be found in the law of unfair competition.

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36. *See* Daniel J. Gifford, *Java and Microsoft: How Does the Antitrust Story Unfold?*, 44 VILL. L. REV. 67 (1999).

37. *See* Dan Morgan & Juliet Eilperin, *Microsoft Prods Congress To Cut Antitrust Funding*, INT'L HERALD TRIB., Oct. 16, 1999, at 1. To much the same effect *see also* Rajiv Chandrasekaran, *Microsoft's Big Lobbying Pays Off in Washington; Supporters in Congress Rally Around Company*, INT'L HERALD TRIB., Nov. 12, 1999, at 15; Joel Brinkley, *Microsoft Curries Favor With Bush; Firm Hires Consultant to Lobby in Opposition to the Antitrust Case*, INT'L HERALD TRIB., Apr. 12, 2000, at 3.

38. Some maintain that the treaties making up the European Union constitute an economic constitution. *See* Pieter VerLoren van Themaat, *Die Aufgabenverteilung zwischen dem Gesetzgeber und dem Europäischen Gerichtshof bei der Gestaltung der Wirtschaftsverfassung der Europäischen Gemeinschaften, in* EINE ORDNUNGSPOLITIK FÜR EUROPA: FESTSCHRIFT FÜR HANS VON DER GROEBEN ZU SEINEM 80. GEBURTSTAG 425 (Ernst Joachim Mestmäcker, Hans Möller, & Hans Peter Schwartz eds., 1987); Pieter VerLoren van Themaat, *Einige Bemerkungen zu dem Verhältnis zwischen den Begriffen Gemeinsamer Markt, Wirtschaftsunion, Währungsunion, Politische Union und Souveränität, in* EUROPARECHT, ENERGIERECHT, WIRTSCHAFTSRECHT: FESTSCHRIFT FÜR BODO BORNER ZUM 70. GEBURTSTAG (Jürgen F. Baur, Peter Christian Müller-Graf, & Manfred Zuleeg eds., 1992); Wolf Sauter, *The Economic Constitution of the European Union*, 4 COL. J. OF EUR. L. 27 (1998).

A. *Political Boycotts in Perspective*

If one were to choose one single constitutional right to typify and define the democratic state, it would be freedom of speech. This freedom is protected in the Fifth Article[39] of the German Constitution and in the First Amendment[40] to the U.S. Constitution. A liberal democratic state would be unimaginable if freedom of speech were not protected. As the German Federal Constitutional Court stated in its *Lüth* case:

[The right of free speech] is absolutely necessary to liberal democracy because it makes possible the constant intellectual exchange, the battle of opinions, which is its life's blood. In a certain sense it is the foundation of every liberty, "the matrix, the indispensable condition of nearly every other form of freedom" (Cardozo).[41]

For purposes of this Article, it is not necessary to delve into the intricacies of various constitutional protections and to make differentiations in Germany between freedom of press, opinion,[42] assembly, and association,[43] or in the United States between freedom of speech, press, association, and petition, as expressed in the First Amendment. This study is concerned with the priority enjoyed by freedom of speech (using the more inclusive American terminology) relative to rights of private enterprise. It attempts to ascertain whether, and to what extent, rights of private enterprise diminish freedom of speech. In other words, which principle[44] is entitled to more respect?

Free competition is the free speech of the free enterprise system. It is the policy that is the most important; the most fundamental to private enterprise is perhaps that of competition. For competition to be free, it must be fair. Underhanded, false, or otherwise unfair competition clouds comparisons and distorts the market.

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39. Paragraph (1) of Article V of the German Constitution, GRUNDGESETZ [GG][Constitution] art. 5. (F.R.G), sometimes translated as "Basic Law," states: "Each person possesses the right freely to express and disseminate her opinion in speech, writing, and illustrations, and to inform herself without hindrance from generally accessible sources. Freedom of the press and freedom to report in broadcasts and film are guaranteed. There shall be no censorship."

40. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

41. 7 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS (BVerfGE) 7, 198, 208 (1958), citing Palko v. Connecticut., 302 U.S. 319, 327 (1937)(citation omitted).

42. Freedom of speech and of the press are protected by paragraph (1) of Article 5 of the German Constitution. GRUNDGESETZ [GG][Constitution] art. 5, ¶ 1 (F.R.G).

43. Freedom of assembly is guaranteed by Article 8 of the German Constitution and freedom of association by Article 9. GRUNDGESETZ [GG][Constitution] arts. 8, 9 (F.R.G).

44. In this article the terms principle, value, and policy are used interchangeably unless the context indicates otherwise.

Prohibitions against unfair trade practices are found in statutory and common law. In Germany, the statutes most relevant to the cases digested below are §826 of the Civil Code,[45] which imposes liability for intentional, immoral activities, and §1 of the Law Against Unfair Trade Practices,[46] which accords a right to compensatory and injunctive relief against one who violates moral standards of business for purposes of trade competition. Comparable causes of action in the United States include the following: (1) §1 of the Sherman Act,[47] prohibiting combinations and conspiracies in restraint of trade; (2) §8(b)(4) of the National Labor Relations Act,[48] prohibiting secondary boycotts; (3) tortious interference with business relationships[49]; (4) trade or "product disparagement" pursuant to §623A[50] of the Restatement (Second) of the Law of Torts[51]; and (5) "food slander laws," discussed below,[52] that are on

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45. Section 826 of the BÜRGERLICHES GESETZBUCH (BGB) (German Civil Code) states: "One who intentionally injures another in a way that offends good morals is liable to make compensation for that injury."

46. Section 1 of the GESETZ GEGEN DEN UNLAUTEREN WETTBEWERB (UWG) states: "Injunctive and compensatory relief are available against one who, for competitive purposes, undertakes activities in business intercourse that offend good morals."

47. 15 U.S.C. § 1 (2001).

48. 29 U.S.C. § 158(b)(4)(4) (2001).

49. *See* RESTATEMENT (SECOND) OF TORTS §§ 767 and 766B (1977), *discussed in* Joel E. Smith, *Liability of Third Party for Interference with Prospective Contractual Relationship Between Two Other Parties*, 6 A.L.R. 4th 195 (1981). These causes of action are generally traceable to a tort cause of action, first recognized in Lumley v. Gye, 118 Eng. Rep. 749 (1853), for inducing a breach of contract. *See generally* MARC A. FRANKLIN & ROBERT L. RABIN, CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES 1140 *et seq.* (1996).

50. The RESTATEMENT (SECOND) OF TORTS § 623A (1977) states:

> One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if (a) he intends for publication of the statement to result in harm to interests of the other having pecuniary value, or either recognizes or should recognize that it is likely to do so, and (b) he knows that the statement is false or acts in reckless disregard of its truth or falsity.

51. This is cited and discussed in, for example, David J. Bederman, Scott M. Christensen, & Scott Dean Quesenberry, *Of Banana Bills and Veggie Hate Crimes: The Constitutionality of Agricultural Disparagement Statutes*, 34 HARV. J. ON LEGIS. 135 (1997); David J. Bederman, *Food Libel: Litigating Scientific Uncertainty in a Constitutional Twilight Zone*, 10 DEPAUL BUS. L.J. 191 (1998); Lisa Dobson Gould, *Mad Cows, Offended Emus, and Old Eggs: Perishable Product Disparagement Laws and Free Speech*, 73 WASH. L. REV. 1019 (1998); J. Brent Hagy, *Let Them Eat Beef: The Constitutionality of the Texas False Disparagement of Perishable Food Products Act*, 29 TEX. TECH L. REV. 851 (1998); Julie K. Harders, *Iowa's Proposed Agricultural Food Products Act and Similar Veggie Libel Laws*, 3 DRAKE J. AGRIC. L. 251 (1998); Kevin A. Isern, *When is Speech No Longer Protected by the First Amendment: A Plaintiff's Perspective of Agricultural Disparagement Laws*, 10 DEPAUL BUS. L.J. 233 (1998); Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999); Megan W. Semple, *Veggie Libel Meets Free Speech: A Constitutional Analysis of Agricultural Disparagement Laws*, 15 VA. ENVTL. L.J. 403 (1995-96); Julie J. Srochi, *Must Peaches Be Preserved at All Costs? Questioning the Validity of Georgia's*

the books in approximately a dozen American states.

The United States Supreme Court follows a uniform approach to cases involving freedom of speech when they involve "matters of public concern."[53] According to this approach, statements of opinion are absolutely protected regardless of how vicious or malicious. Regardless of their effect, statements of fact enjoy equivalent protection only if they are true, or at least not demonstrably false. Even false statements of fact are protected under the U.S. approach if they have been uttered in good faith, that is, they were not published with reckless disregard for their truth or falsity.[54] To put it into the vernacular, according to the Supreme Court, the First Amendment protects the most outrageous statements of opinion on matters of public concern, and also protects fools who are even negligently ignorant of the facts; however, it does not protect outright liars.

By contrast, the German Federal Constitutional Court has never expressly accorded priority to freedom of speech above privacy rights and other values, although it recognizes that expressions uttered on a matter of substantial public moment (*eine die Öffentlichkeit wesentlich berührende Frage*) are entitled to a presumption of protection under the Fifth Article.[55] According to the German Federal Constitutional Court, the rights of the speaker must always be weighed against those of the person being injured by his speech; however, in undertaking this balance, the court accords wider latitude to statements of opinion than it does to false statements of fact.[56] As

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Perishable Product Disparagement Law, 12 GA. ST. U. L. REV. 1223 (1996); Eric M. Stahl, *Can Generic Products Be Disparaged?*, 71 WASH. L. REV. 517 (1996).

52. See *infra* note 84.

53. The statement in the text may be overly optimistic, for the Supreme Court has not yet been confronted with a case arising under a food slander statute. In the single case reaching the Court in which the right of free speech was raised in a product disparagement case, the Supreme Court only implicitly approved a decision of the Court of Appeals which had employed *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), in this context. *See also* Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485 (1984).

54. *See New York Times Co.* 376 U.S. at 279-80.

55. Dieter Grimm, *Die Meinungsfreiheit in der Rechtsprechung des Bundesverfassungsgerichts*, NEUE JURISTISCHE WOCHENZEITSCHRIFT 1697, 1703 (1995). For other comparative views, see Georg Nolte, *Falwell vs. Strauß: Die rechtlichen Grenzen politischer Satire in den USA und der Bundesrepublik*, 88 EUROPÄISCHE GRUNDRECHTE 253 (1988) and Guido C. Zöllner, *Ehrenschutz in den Vereinigten Staaten von Amerika - Vorbild für Deutschland?*, 22 DAJV-NEWSLETTER 111 (1997).

56. Grimm, *supra* note 55, at 1702. *See* Rudolf Wendt, in INGO VON MÜNCH & PHILIP KUNIG, GRUNDGESETZ-KOMMENTAR, art. 5, para. 10 (4th ed. 1992). *But see* Lars Weihe, *Freedom of speech - Freiheit ohne Grenzen, Eine rechtsvergleichende Untersuchung zur Meinungsfreiheit in den USA und Deutschland*, 24 DAJV-NEWSLETTER 46, 51 (1999)(citing examples of balancing in Supreme Court opinions). Compare the following statement from Lüth, "In cases concerning the formation of public opinion on an issue of importance to society, private interests of the individual, particularly those of a commercial nature, must generally give way." BVerfGE 7, 198, 219. *See also* Rüdiger Zuck, *Anmerkung zu BVerfG Beschluß vom 10.10.1995* ['Soldiers are Murderers' Case], JURISTENZEITUNG 364, 365 (1996).

in the United States, lies are also not protected.[57]

In order to narrow the subject of this study,[58] and hopefully to make the comparison more interesting, the discussion below concentrates on political boycotts, that is, boycotts that do not confer a direct commercial advantage on the person calling for the boycott.[59] For purposes of this study, political boycott is defined as any statement addressed to the public by someone who is not in competition with the subject of the boycott and which has as its purpose the impairment of the business of another.[60] By restricting the discussion to boycotts that meet this definition, it is hoped that democratic, political interests on the one hand, and commercial interests on the other, can be brought into closer focus. The definition intentionally excludes critical comments made by competitors in the marketplace, whether or not these comments be factual in nature, or merely opinions, and whether or not the statements be true or false. This is done in order to heighten the conflict between the values of democracy and those of commerce. To repeat, to constitute a call for political boycott under the definition employed in this study, there must be (1) a statement of fact or opinion; (2) directed to the public; (3) by one who is not in competition with the subject of the boycott; and (4) which has as its purpose the impairment of the business of the subject of the boycott, particularly by persuading others not to buy the products or use the services of that person.[61]

Two examples illustrate the application of this definition: Greenpeace and OprahWinfrey.[62] Some years ago, Greenpeace in Great Britain called for

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57. Holocaust Denial Case, BVerfGE 90, 241 (1994), *discussed in* Edward J. Eberle, *Public Discourse in Contemporary Germany*, 47 CASE W. RES. L. REV. 797, 889-90 and 892-94 (1997). *See also* BverfGE 54, 208, (219) (stating "[I]ncorrect information is not worthy of protection.").

58. Limiting the discussion to political boycotts also serves to exclude consideration of the extent of the protection of commercial speech.

59. For an early but perceptive view of the German case law, see Lerche, *Zur verfassungsgerichtlichen Deutung der Meinungsfreiheit (insbesondere im Bereich des Boykotts)*, FESTSCHRIFT FÜR GEBHART MÜLLER 197 (1970).

60. Compare the demarcation undertaken by Wendt, *supra* note 56, art. 5, ¶14, which states,

> Most would agree . . . that boycotts are in general entitled to a high degree of protection under the freedoms of speech and of the press, or perhaps that they even enjoy priority over the rights of the person being boycotted, as long as the boycott 'is not based on commercial self-interest but rather on concern for political, commercial, social, or cultural interests of the public' and as such serves 'to inform public opinion.'

Id.

61. The practice of boycotting was named after Captain Charles Cunningham Boycott, an English land agent in Ireland who was so ruthless in evicting tenants that his employees refused all cooperation with him and his family. See THE NEW COLUMBIA ENCYCLOPEDIA 349 (William H. Harris & Judith S. Levey eds., 1975).

62. A third recent example is the McDonald's case, a libel action brought by the fast food

worldwide boycott of Shell Oil in the Brent Spar affair. The statements made by the environmental group Greenpeace were statements of fact and opinion.[63] They were directed to the public by an organization (Greenpeace) which was not in competition with Shell. The purpose of the action was to impair Shell's business by dissuading people from buying Shell's products, particularly gasoline. Greenpeace was successful, but the matter never reached the courts. The second example is from the United States. That was the case of the American beef industry against television hostess Oprah Winfrey. Discussion of that case is deferred until after a comparison of the basic principles from case law in the United States and Germany relative to political boycotts.

The cases discussed below concern an area of law in which constitutional protections are extended to what appear to be private transactions. In Germany, this extension is known as *Drittwirkung*.[64] In the United States, this topic is ordinarily addressed under the "state action doctrine," although *Drittwirkung* is a broader concept.[65] According to explicit textual provisions in the constitutions of both countries, constitutional rights are designed to protect people only against the state, and not against private actors. However, there are many exceptions to this doctrine, as can be seen from the following comparisons.

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chain McDonald's against two pamphleteers who criticized the employment policies and the food served at McDonald's. Although this case is legally and historically quite interesting, it occurred in England and as such is beyond the scope of this paper. *See generally* JOHN VIDAL, MCLIBEL: BURGER CULTURE ON TRIAL (1997).

63. *See* Peter J. Spiro, *The Decline of the Nation State and its Effect on Constitutional and International Economic Law: New Global Potentates: Nongovernmental Organizations and the 'Unregulated' Marketplace*, 18 CARDOZO L. REV. 957 (1996).

64. *See* BODO PIEROTH & BERNHARD SCHLINK, GRUNDRECHTE STAATSRECHT 11, 49, para. 173 (14th ed. 1998). *Drittwirkung* literally means "third (party) effect." Professor Markesinis also refers to it as "horizontal effect." *See also* Basil Markesinis, *Privacy, Freedom of Expression, and the Horizontal Effect of the Human Rights Bill: Lessons from Germany*, 115 LAW Q. REV. 47 (1999).

65. For an overview of the law in the United States, see William B. Fisch & Richard S. Kay, *The Constitutionalization of Law in the United States*, 46 AM. J. COMP. L. 437 (1998). For German-American comparisons, see Peter Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247 (1989); DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 182-87 (1994); Eberle, *supra* note 57, at 811; Markesinis, *supra* note 64, at 80-84.

Comparisons are difficult not only because the United States recognizes common law, which is directly developed and reviewed by courts, as a source of law, but also because all American judges, not just those of a constitutional court, as in Germany, review the constitutionality of legislation. *See e.g.*, U.S. CONST. art. VI, § 2; Martin v. Hunter's Lessee, 14 U.S. 304 (1816). For an article that tackles some of these subtleties, see William B. Fisch & Richard S. Kay, *The Constitutionalization of Law in the United States*, 46 AM. J. COMP. L. 437 (1998).

B. *The Superiority of Political Speech*

Research of both German laws and the laws of the United States reveals that political speech (i.e., speech on a matter of public concern by a commercially disinterested person), that is not demonstrably false, enjoys superiority over claims of commercial harm. This superiority is seen most clearly in the *Lüth* and *NOW* cases discussed below. The discussion in this section will also address the Oprah Winfrey case, which illustrates the difficulty in distinguishing between opinion on matters of public concern, which is always protected, and statements of fact, which are entitled to less protection if they are not true.

1. *Germany*

The seminal case in Germany on the meaning and extent of the constitutional protection of speech is the so-called *Lüth* case, decided by the Federal Constitutional Court in 1958.[66] In that case, Herr Lüth, president of the Hamburg Press Club,[67] addressed an audience of film distributors and producers at the opening of the "Week of the German Film" in Hamburg. In his speech, he pleaded with film distributors and theater owners to boycott an innocuous romantic film *Unsterbliche Geliebte* ("Immortal Beloved") because the film had been directed by the leading director of National Socialist films, Viet Harlan. In calling for the boycott, Herr Lüth said, among other things:

> [The director and writer of the anti-Semitic film *Jud Süß* ("The Jew 'Sweet'")[68] is] the least capable person of all to restore [the moral reputation of the German film industry]. . . . His not-guilty verdict in Hamburg [where he had stood trial for crimes against humanity] was purely formal in nature. The written judgment of the court is morally damning.[69]

The film's producer, who stood to lose the most by a boycott, demanded a retraction. Herr Lüth responded by sending an open letter to the press:

> The court [in Hamburg] did nothing to disprove that Viet Harlan was the "Nazi film director No. 1" for a long period

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66. BVerfGE 7, 198 *discussed in* Eberle, *supra* note 57, 808.

67. Herr Lüth was also chief of the City of Hamburg's Press Office at the time, but the opinion stresses that he was speaking in his private capacity. *See id.*

68. BGHSt 19, 63. This historical drama, based roughly on the life of Suess ("Sweet") Oppenheimer, was later held by the Supreme Court for Criminal Matters to be anti-constitutional (*verfassungsfeindlich*) and, therefore, confiscatable. *See id.*

69. BVerfGE 7, 198 (198-99).

> of time during the Hitler regime and that his film *Jud Süß* made him one of the most important exponents of the murderous anti-Semitism of the Nazis.[70]

In fact, these statements by Herr Lüth were not quite accurate, for the not-guilty verdict was not "purely formal" in nature. In finding Viet Harlan not guilty, the court in Hamburg concluded that, had he refused to work on the film *Jud Süß*, he probably would have suffered bodily harm or even death. Accordingly, Viet Harlan was found not guilty because he had acted under duress. Nevertheless, despite the inaccuracies in Herr Lüth's report, his statements were found to enjoy the protection of the German Constitution. The court held that:

> [b]y summarizing his impression of the content of the judgment of the court in the words "formal acquittal" and "morally damning," [Herr Lüth] was not, in the opinion of the Federal Constitutional Court, exceeding the allowable boundary for public discussion of a topic of serious substance. It would constitute an unreasonable limitation of freedom of speech in a liberal democracy to demand . . . that [Herr Lüth], who is not a lawyer, should use the care of a "reader schooled in the criminal law," which would have led him to eschew the characterization "formal acquittal," because that term is [technically] only permissible when the court finds a lack of the objective prerequisites to criminal punishment. The descriptions chosen by [Herr Lüth] are not statements of fact whose truth or falsity could be proven; indeed, "formal acquittal" does not describe unambiguous findings of fact. What we are faced with is a conclusory, judgmental characterization of the content of the entire judgment. This must be accepted as proper because it is neither injurious in form nor so contrary to the facts as necessarily to cause misunderstandings of the content of the judgment in his listeners and readers. This might, for example, be the case if one were to speak without further explanation of someone who had been found not guilty as having been "convicted". . . . The statement of [Herr Lüth] can therefore not be likened to cases in which one calls for a boycott by spreading a short description of a factual situation which cannot be properly understood by those to whom it is addressed.[71]

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70. BVerfGE 7, 198 (200).

71. *Id.*

To summarize *Lüth*, the case concerned a call for a political boycott that was entitled to constitutional protection. The call included both statements of opinion and statements of fact. The court had no trouble recognizing an absolute right to utter one's opinions ("Herr Harlan is the least capable person imaginable to help restore the moral reputation of the German film industry.") However, the court was troubled by factual inaccuracies. Still it apparently allowed these because they were either inextricably mixed with elements of opinion[72] ("The judgment was morally damning."), or because they were not seriously misleading ("The verdict of not guilty was purely formal in nature.") The Federal Constitutional Court seems to imply that Herr Lüth's call for a boycott would not have been protected if he had seriously misled his readers and listeners by a misstatement of material fact.

2. *United States*

When researching American case law, clear boundaries must be set to avoid losing one's way in a forest of court decisions. The large number of cases in this field is due in large measure to the large number of legislative bodies, specifically the legislatures of the fifty states, that are actively involved in regulating commerce. The large number of cases is also due in part to the jurisdiction enjoyed by all courts, even state trial courts, to hear constitutional arguments and to strike down laws as unconstitutional.[73] In Germany, by contrast, the power to hold statutes unconstitutional resides solely in the German Federal Constitutional Court.[74]

Rather than attempt to collect every reported decision involving the conflict between free speech and free enterprise in the United States,[75] this article restricts itself primarily to the federal law of antitrust and unfair trade practices, where the federal courts enjoy exclusive jurisdiction.[76] Accordingly, this article limits itself to decisions of the federal courts, primarily to those of the U.S. Supreme Court. The most important decisions of that Court are discussed first.

The American case that compares most closely to the facts of the *Lüth* decision is *Missouri v. National Organization for Women* (NOW).[77] At issue

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72. *See* PIEROTH & SCHLINK, *supra* note 64, at 153, *citing* BVerfGE 61, 1.

73. *See* U.S. CONST. art. VI, § 2; *see also* Martin v. Hunter's Lessee, 14 U.S. 304 (1816).

74. *See* GRUNDGESETZ [GG][Constitution] art. 100 (F.R.G.).

75. For an early case arising out of a labor dispute, see Truax v. Corrigan, 257 U.S. 312 (1921). Congress exempted calls for boycotts by labor groups from the reach of the antitrust laws in § 21 of the Clayton Act. 15 U.S.C. § 52. *See* WERNER Z. HIRSCH, LAW AND ECONOMICS 322 (2d ed. 1988); Daralyn Durie & Mark A. Lemley, *The Antitrust Liability of Labor Unions for Anticompetitive Litigation*, 80 CAL. L. REV. 757 (1992).

76. 28 U.S.C. §1337(a).

77. Missouri v. National Organization for Women (NOW), 467 F. Supp. 289 (W.D. Mo.

was a boycott that was purely political in nature, that is, where the group calling for the boycott was not in competition with the industry at which the boycott was aimed, and where the matter was one of public concern.

In 1977, NOW joined a number of other organizations by lobbying its members and other like-minded organizations not to hold conventions and meetings in states that had not yet ratified the Equal Rights Amendment. The State of Missouri filed an action in federal court under §1 of the Sherman Act alleging an unlawful combination to restrain trade. The district court ruled that the boycott was politically motivated and thus enjoyed the protection of the First Amendment. The Court of Appeals affirmed, and the Supreme Court denied review, letting the decision stand.[78] Comparing U.S. and German case law as sketched to this point, calls for boycotts are protected in both countries where the group or person calling for the boycott is not in competition with the group or person at which the boycott is aimed, and where the grounds for the boycott is a matter of public concern.

Before turning to a discussion of boycotts called for by competitors, what of the disparate treatment of statements of fact and statements of opinion? For example, in the *Lüth* case, the German Federal Constitutional Court said of the statements of Herr Lüth: "The descriptions chosen by [Herr Lüth] are not statements of fact whose truth or falsity could be proven [but rather] a conclusory, judgmental characterization."[79]

This demarcation between statements of fact and of opinion is employed by both the U.S. Supreme Court and the German Federal Constitutional Court.[80] And it is criticized by legal scholars in both countries.[81] The primary criticism is that the differentiation between statements of fact and statements of "mere" opinion is often impossible or nearly impossible to make. Nevertheless, in the United States even false statements of fact are protected

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1979).

78. Missouri v. Nat'l Org. for Women (NOW), 620 F.2d 1301 (8th Cir.), *cert. den'd*, 449 U.S. 842 (1980).

79. BVerfGE 7, 198 (200).

80. BVerfGE 85, 1 (14-15) "[Opinions] enjoy constitutional protection regardless of whether the comment is it valuable or valueless, true or false, well-grounded or not, emotional or rational." *See also* New York Times Co. v. Sullivan, 376 U.S. 254, 271 (1964) (stating that "The constitutional protection . . . 'does not turn upon the truth, popularity, or social utility of the ideas'."). The German Constitution does not explicitly protect speech, but expression of opinion instead. GRUNDGESETZ [GG][Constitution] art. 5 (F.R.G.). On the fact/opinion distinction in Germany, see SABINE MICHALOWSKI & LORNA WOODS, GERMAN CONSTITUTIONAL LAW: THE PROTECTION OF CIVIL LIBERTIES 201-06 (1999).

81. On the difficulty of separating statements of fact from statements of opinion, see Rupert Scholz & Karlheinz Konrad, *Meinungsfreiheit und allgemeines Persönlichkeitsrecht: Zur Rechtsprechung des Bundesverfassungsgerichts*, 60 ARCHIV FÜR ÖFFENTLICHES RECHT 119 (1998) and Robert L. Spellman, *Fact or Opinion: Where to Draw the Line*, 9 COMM. & L. 45 (1987) and authorities cited. At least one judge considers the case decisions confusing. *See, e.g.*, Ollman v. Evans, 740 F.2d 970 (D.C. Cir. 1984)(en banc)(Edwards, J., stating, "When you read the [fact/opinion] cases, they are a mess.").

by the Constitution if they are not intentionally false, or if the speaker has not intentionally failed to investigate their truth or falsity.[82] Thus, even when calling for a boycott that is purely political, if the group calling for the boycott intentionally makes false factual statements that are material to the boycott, that particular speech is not protected by the Constitution. If, however, the facts though false are uttered by someone who is merely negligent in ascertaining the truth, the utterance is protected by the Constitution. As described above, the decision in the *Lüth* case comes to the same conclusion, even though it employs different reasoning. In other words, the holdings of the case decisions of the two courts concerning political boycotts are identical in their result if not their reasoning.

The difficulties encountered in the fact/opinion distinction are illustrated by the famous case against Oprah Winfrey,[83] in which the well-known television star and her network were sued for criticizing the safety of beef.

Before reviewing the facts of the case, some background information may be necessary. Twelve American states, including Texas, have enacted "food slander" legislation that in one form or another forbids the publication of false information on agricultural products.[84] This legislation is traceable to an episode of the *60 Minutes* in 1989 which reported that a substance (daminozide) sprayed on apples in the State of Washington was a potential carcinogen.[85] An organization of Washington apple producers sued CBS, the network that broadcasts *60 Minutes*, alleging that their products had been disparaged. According to the common law product-disparagement cause of action, the organization had to prove that the network knowingly published false information in order to impair the business of the apple growers. The organization of apple growers lost the case, in part because it could not prove that the network knew the report to be false.

In reaction to this decision, the legislatures of a number of American states enacted legislation to allow the recovery of damages in cases of agricultural disparagement even where publication was not knowingly false. Oprah Winfrey was claimed to have violated such a law when she said on camera in Texas that "[This information] has just stopped me cold from eating another hamburger. I'm stopped."[86] She said this after she had been informed

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82. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

83. Texas Beef Group v. Oprah Winfrey, 1998 U.S. Dist. Lexis 3559 at 10 (N.D. Tex. Feb. 26, 1998).

84. *See* Hagy, *supra* note 51, at 858. The states that have enacted legislation are Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Louisiana, Mississippi, Ohio, Oklahoma, South Dakota, and Texas.

85. Auvil v. CBS *60 Minutes*, et al., 836 F. Supp. 740, 743, (E.D. Wash. 1993), *aff'd without opinion*, 67 F.3d 816 (9th Cir. 1995).

86. David J. Bederman, *Food Libel: Litigating Scientific Uncertainty in a Constitutional Twilight Zone*, 10 DEPAUL BUS. L.J. 191, 218 (1998) (quoting Ms. Winfrey).

by a vegetarian and "food advocate" about the risk of Kreuzfeldt-Jakob infection from eating beef.

Even if not familiar with the case, one can imagine the result: the consumption and therefore sale of beef dropped dramatically. But where is the legal problem? According to the American beef industry, the legal problem lay in the fact that there had not been a single case in the United States in which Kreuzfeldt-Jakob disease was found to have been transmitted from beef to human beings. The actual risk of infection was therefore virtually zero.[87]

Should Oprah Winfrey's statement be considered a statement of fact or of opinion? If considered a statement of opinion, then it is entitled to absolute constitutional protection in the United States even if it had been uttered maliciously with intent to harm the beef industry, because the quality of food is a matter of public concern. However, if the statement is considered one of fact (that is, that beef is so dangerous that the consumption of a single hamburger represents an immediate risk of death), then the statement is false, and Oprah would have to defend herself by adducing evidence that she acted without knowledge of its falsity but rather negligently, for she cannot be held liable for negligent misstatements of fact under the case decisions of the U.S. Supreme Court.

The Oprah Winfrey case is not as far afield from the topic of political boycotts as might first appear, for the statement of Oprah Winfrey—whether factual or opinion—fits the definition of a political, that is, non-commercial, call for a boycott. Perhaps the element of intent is missing, but one could imagine a similar situation in which Oprah Winfrey says: "Do yourself and your family a favor, don't eat beef in any way, shape, or form!"

There is no decision of the highest court of either the United States or Germany which could be found to shed light on making the fact/opinion distinction in the area of political boycotts. Oprah prevailed before a jury, but the reasons for the decision are somewhat difficult to discern.[88]

To this point, this analysis has made several general findings: First, the case decisions of both countries are in agreement as long as the politically motivated call for a boycott is restricted to the use of rhetoric that is not provably false. Next, statements of opinion are, by their nature, impossible to prove true or false, and are for that reason protected.[89] Also, false statements

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87. Lawrence K. Altman, *F.D.A. Proposal Would Ban Using Animal Tissue in Feed*, N.Y. TIMES, Jan. 3, 1997, at A14.

88. Oprah probably won because it could not be proven that she intentionally misstated the facts. *See* Kuran & Sunstein, *supra* note 51, at 749. The judge named a number of reasons for her decision and for that of the jury. *See* Texas Beef Group v. Oprah Winfrey, 1998 U.S. Dist. Lexis 3559 at 10 (N.D. Tex. Feb. 26, 1998).

89. *See* BVerfGE, 90. 241(247) (1994) (stating that "[An opinion] cannot be proven right or wrong."); *see also* Gertz v. Welch, 418 U.S. 323, 340 (1974) (stating that "[T]here is no such thing as a false idea.").

of fact are protected in Germany as well as in the United States as long as they are entwined with political opinion. Furthermore, false statements are protected in the United States—perhaps not in Germany—as long as they are merely negligent in nature. Finally, intentionally false statements of fact enjoy constitutional protection in neither country.

C. *Competitors' Speech Distinguished*

The discussion thus far has examined calls for boycotts on matters of public concern by persons or groups who are not in competition with the subject of the boycott and who therefore do not stand to gain directly from the boycott. This Article refers to these boycotts as "political." As described above, they are entitled to protection as long as they are truthful. But what of boycotts called for by competitors? Are their utterances unprotected because of their commercial stake? Or does democratic governance compel protection even of competitors' opinions and truthful statements on matters of public concern?

The German Federal Constitutional Court faced these issues in the so-called "Reminder Notice" case[90] at the end of the 1970s. A trade organization for small retail stores was concerned about competition from large chain stores. The trade organization had been informed that certain manufacturers were selling their products to chain stores at reduced prices even though the manufacturers had promised to deal exclusively with the small retail stores. In reaction, the trade organization called for what amounted to a boycott. It included a "Reminder Notice" in a mailing to its members that asked members to list the names of offending manufacturers. It also suggested that the member stores stop carrying products from these manufacturers.

One supermarket chain challenged this action by the trade organization. The chain promptly obtained an injunction on the basis that the action constituted an unfair trade practice. The appellate court upheld the grant of injunction, whereupon the trade organization petitioned to the Federal Constitutional Court, claiming that its free speech rights had been violated.

The Federal Constitutional Court denied the petition, ruling that the action of the trade organization was not entitled to constitutional protection because the boycott had been for commercial, not political purposes. Truth of the factual assertions was therefore no defense. The court stressed that the trade organization had gone beyond merely informing its members by suggesting the boycott. It found that there was an underlying threat that those specialty stores that did not take part in the boycott would be barred from membership in the trade organization. Further, the court noted that the call for a boycott was not aimed at the public in general, but rather at specialty stores who constituted members of the trade organization. In short, the action

90. BVerfGE 62, 230 (1982).

was merely a commercial combination by one branch of retail stores against another, and as such was subject to prohibition. Those involved in enterprise cannot automatically invoke the protections afforded those involved in democratic government.

The case of *Eastern Railroad Presidents' Conference v. Noerr Motor Freight*[91] similarly concerned less of a political boycott than a battle by one branch of the transportation sector against another to protect or expand market share. It was, therefore, a commercial and not a political struggle. However, the commercial (non-political) speakers were nonetheless entitled to First Amendment protection.

The case concerned a political battle between the railroads and the trucking industry. Fearing bankruptcy, members of the railway industry banded together and hired a public relations firm to conduct a campaign against the trucking industry. The campaign was directed at the public, to encourage the public to ship by rail rather than by truck, and also at legislators, to influence them to change the law. There was no direct use of market power, as in the *Blinkfüer* case, discussed below,[92] nor was there any threat of the use of market power. Further, the railway industry occupied a decidedly subordinate position in the market. Thus, even though the battle was in the last analysis commercial, it was one that confined itself basically to the political arena. In response to the publicity campaign and the lobbying of the railway industry, the trucking industry brought an action under Section 1 of the Sherman Act,[93] claiming that the railroads were employing an unfair trade practice. Specifically, they claimed that the contract they had entered into with the public relations firm was a contract in restraint of trade.

The U.S. Supreme Court ruled against the trucking industry by finding the actions of the railroad companies to be protected by the First Amendment.[94] The Court held that, in order for democracy to work, the public and their representatives must be aware if a commercial branch is in desperate straits, even when being made aware of the financial situation might have adverse commercial consequences for competitors.[95] Later decisions make clear that not every kind of public relations action is protected by the First Amendment, rather, only those that are primarily designed to inform the public—particularly those that have as their primary purpose bringing about a change in the law.[96] While no comparable decision could be found in

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91. Eastern Railroad Presidents' Conference v. Noerr Motor Frieght, 365 U.S. 127 (1961).

92. *See infra* notes 95 - 97.

93. 15 U.S.C. § 1.

94. Eastern Railroad President's Conference, 365 U.S. 127. If an industry which stands to benefit from a boycott or other political action enjoys First Amendment protection, then a disinterested member of the public should *a fortiori* enjoy protection.

95. *Id.*

96. *See generally*, United Mine Workers v. Pennington, 381 U.S. 657 (1965) (finding that

Germany, there is sufficient reason to infer that German industry would be entitled to similar protection. For example, in the *Blinkfüer* case, the trade organization would have been within its rights to have sought protective legislation, and to have conducted a (truthful) public awareness campaign to this end.

To compare the case decisions from Germany with those from the United States digested to this point, it appears that politically motivated calls for boycott on a matter of public concern are protected in the United States as well as in Germany as long as they contain no misstatements of material fact and as long as the group calling for the boycott does not compete in the market with the subject of the boycott. Still open is the question whether use of economic or other means to support a boycott enjoys protection when the economic means are not exercised by one who stands to benefit from the boycott.

D. Coercive Means

This section collects cases in which otherwise protected calls for boycotts lost or potentially lost that constitutional protection. As will be shown, the common thread is the use or threat of use of physical or economic force to coerce others to participate in the boycott.

1. Germany

The last German case considered in this study is the so-called *Blinkfüer* case,[97] decided by the German Federal Constitutional Court in 1969. As in the "Reminder Notice" case, the underlying boycott did not meet the definition of political boycott employed in this article. The decision is nevertheless interesting because it involved political issues.

The controversy arose immediately following the building of the Berlin Wall in 1961. Before the Wall was built, publishers in both East and West Germany published magazines similar to *TV Guide* that listed the television and radio programs from East and West Germany. After the erection of the Wall, radio and television programs from the German Democratic Republic took on an even greater propaganda function. Much of this propaganda was aimed at Germans living in West Germany, including West Berlin. To protest the construction of the Berlin Wall, and the politicization of radio and television, the Axel Springer publishing conglomerate, which published a large number of popular magazines, called on stores and newsstands in

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agreements to persuade public authorities are not proscribed by the Sherman Act) and California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972) (finding that impeding a competitor's access to court does violate the Sherman Act). *See also* Einer Elhauge, *Making Sense of Antitrust Petitioning Immunity*, 80 CAL. L. REV. 1177 (1992).

97. BVerfGE 25, 256 (1969), *discussed in* Eberle, *supra* note 57, at 830.

Western Germany and West Berlin not to sell publications that listed radio and television programs from the German Democratic Republic.

If the case had progressed no further than this, or if the Axel Springer conglomerate had merely called for a boycott by readers,[98] then Springer may or may not have run afoul of unfair trade practice laws. Even though it was calling for a boycott for political purposes, the publisher stood to gain, more or less directly, from a boycott, because its magazines, which did not list East German programs, would presumably have been purchased in place of the magazines of publishers who did list these programs. Indeed, however, the Axel Springer conglomerate went one step further: it threatened not to deliver its magazines to stores and newsstands that carried publications that listed East German programs.

Blinkfüer was such a magazine, a competitor of the Axel Springer conglomerate, whose sales fell off dramatically after Springer's announcement. *Blinkfüer* filed suit and lost because the Federal Supreme Court, the highest civil court, ruled that freedom of speech protected the action of Springer.

The German Federal Constitutional Court reversed. In doing so, it made clear that the right to call for a boycott is only enjoyed by someone who limits himself or herself to the use of arguments, not to the use or threat of the use of economic force against those who refuse to join in. Distinguishing the *Lüth* case, the Federal Constitutional Court stated that there the call for a boycott had confined itself to an appeal to the conscience and to moral considerations of those to whom it was addressed. No force, economic or otherwise, was threatened. The decision on whether or not to take part in the boycott was consequently free of compulsion. By contrast, the threat of the Springer conglomerate to stop delivery of its popular publications constituted, in light of the market strength of the conglomerate, a threat which many dealers could withstand only if they were willing to go out of business. The Court found the following:

> A call for a boycott will not be protected by freedom of speech if it does not confine itself to intellectual arguments, such as the use of the persuasive powers of representations, descriptions, and considerations, but rather employs such means that threaten to deprive those to whom it is addressed of the possibility of reaching a decision in full inner freedom without commercial pressure.[99]

According to the reasoning of this decision, it would follow that one who enjoys dominant market strength may not bolster his or her political

98. Markesinis, *supra* note 64, at 55.
99. BVerfGE 25, 256 (264).

convictions by the threat of the use of commercial compulsion. At most, the Springer conglomerate might have been able to call for such a boycott, but could not have taken part in the boycott itself. However, for purposes of charting the dividing line between freedom of speech and free enterprise this decision is of limited assistance, because it does not present a clear confrontation between the values of political democracy and those of private enterprise. It belongs more properly to the class of cases in which political and economic interests coincide.

2. *United States*

In 1966, the National Association for the Advancement of Colored People (NAACP)[100] called for a nonviolent boycott of stores owned by whites in Claiborne County, Mississippi, until the county had met nineteen demands for justice and equal protection.[101] The boycott was successful, in part because violence and threats of violence had been employed by some in support of the boycott.

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100. In another action, the NAACP has recently urged vacationers and groups seeking convention sites to boycott the state of South Carolina unless the legislature discontinues flying what many believe is a racist symbol, the confederate battle flag, over the state's capitol. *See* Sue Anne Pressley, *Boycott Aims to Bring Flag Down; NAACP Targets South Carolina Tourism to Rid Capitol of 'Symbol of Slavery,'* WASH. POST, Aug. 2, 1999, at A03, *available at* WL 17017188.

101. National Ass'n for the Advancement of Colored People v. Claiborne Hardware, 458 U.S. 886 (1982). From the hundreds of articles addressing this case, the most useful for the preparation of this article, in chronological order, were: Ronald E. Kennedy, *Political Boycotts, the Sherman Act, and the First Amendment: An Accommodation of Competing Interests*, 55 S. CAL. L. REV. 983 (1982); Barbara J. Anderson, *Secondary Boycotts and the First Amendment*, 51 U. CHI. L. REV. 811 (1984); Michael C. Harper, *The Consumer's Emerging Right To Boycott: NAACP v. Claiborne Hardware and Its Implications for American Labor Law*, 93 YALE L.J. 409 (1984); Paul G. Mahoney, *A Market Power Test for Noncommercial Boycotts*, 93 YALE L.J. 523 (1984); Donald L. Beschle, *Doing Well, Doing Good and Doing Noncommercial Boycotts Under the Antitrust Laws*, 30 ST. LOUIS U. L.J. 385 (1986); Gary Minda, *Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the Noerr-Pennington Doctrine*, 41 HASTINGS L.J. 905 (1990); James Gray Pope, *Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution*, 59 TEX. L. REV. 889 (1991); Cynthia L. Estlund, *What Do Workers Want? Employee Interests, Public Interests, and Freedom of Expression under the National Labor Relations Act*, 140 U. PA. L. REV. 921 (1992); Kay P. Kindred, *When First Amendment Values and Competition Policy Collide: Resolving the Dilemma of Mixed-Motive Boycotts*, 34 ARIZ. L. REV. 709 (1992); Victor Brudney, *Association, Advocacy, and the First Amendment*, 4 WM. & MARY BILL OF RTS. J. 1 (1995); Jennifer L. Dauer, *Political Boycotts: Protected by the Political Action Exception to Antitrust Liability or Illegal Per Se?*, 28 U.C. DAVIS L. REV. 1273 (1995); Michael Peter Waxman, *Threats of Foreign Group Boycotts of American Industry Made in Response to U.S. Government Trade Policy: Illegal Anticompetitive Activity or Protected Lobbying Under the Noerr-Pennington Doctrine?*, 29 GEO. WASH. J. INT'L L. & ECON. 659 (1996).

The violence and threats were contrary to the common law of Mississippi, and the NAACP denounced them. The Mississippi courts held that the violence so tainted the action as to render it illegal, but a unanimous U.S. Supreme Court reversed.[102] Nonviolent participation in the boycott, as well as calls for the boycott and continuation of the boycott themselves, were ruled to be protected by the First Amendment. Presumably the action would not have been protected if the NAACP supported or encouraged the coercive means.

The question of whether the threat of applying economic force, as in the *Blinkfüer* case, lies outside the protection of the First Amendment in the United States arose in a 1982 in a decision of the United States Supreme Court, *International Longshoremen's Association v. Allied International*,[103] involving a suit by an importer against a labor union. Reacting to news of the Soviet invasion of Afghanistan, the leadership of the International Longshoremen's Association ordered its members not to unload Russian products from ships in American ports. An American importer of Russian products sued the union, claiming that the action of the longshoremen constituted an illegal secondary boycott pursuant to Section 8(b)(4) of the National Labor Relations Act.[104] The trial court ruled that the union was validly exercising its constitutional rights. However, the Court of Appeals and the U.S. Supreme Court ruled against the union, even though the public actions of the union were of a purely political nature, the matter was of great public importance, and the union would not, directly or indirectly, benefit from the boycott.[105]

The reasoning of the Supreme Court bears a striking resemblance to that of the German Federal Constitutional Court in the *Blinkfüer* case.[106] The Court wrote, "Actions which have as their purpose not the use of communication but the use of compulsion are not protected by the First Amendment."[107] In effect, the importer was asserting the rights of the union membership, which had no choice but to honor the "boycott." Indeed, since the union had a monopoly, no one had a choice not to comply. Presumably, individual calls for a boycott and individual action by longshoremen not acting under union compulsion would both have been constitutionally protected.

To summarize, American and German law are identical on this issue: although a boycott itself envisages the application of economic force, the

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102. NAACP v. Claiborne Hardware, 458 U.S. 886.

103. International Longshoremen's Association v. Allied International, 456 U.S. 212 (1982).

104. 29 U.S.C. § 158(b)(4)(4).

105. International Longshoremen's Association, 456 U.S. at 225-26.

106. See quotation at *supra* note 99.

107. *See* International Longshoremen's Association., 456 U.S. at 226 (1982). The Court also stated "It would seem even clearer that conduct designed not to communicate but to coerce merits still less consideration under the First Amendment." *See id.*

threat or use of economic or other force to coerce others to join a boycott is not constitutionally protected, regardless of whether the group calling for the boycott will benefit from it.

III. PERSPECTIVES ON THE FUTURE

To attempt to look into the future, it is sometimes useful to consider the past. In looking for evolutionary developments in which one hierarchy loses influence to another, in this case the state loses influence to private enterprise, it should be remembered that hierarchies consist merely of people, and that consequently no hierarchy can claim superiority in, much less a monopoly on, wisdom, justice, truth, public welfare, and social conscience.

The U.S. Constitution is a product of the Enlightenment. One substantial goal of the Enlightenment was to free society from the influence of a hierarchy which at the time predominated and allegedly suffocated the people: the Christian Church. By "freeing" people from the influence of the Christian Church, the revolutionaries of the Enlightenment hoped to enable people to decide for themselves.[108] At the time of the Enlightenment, societies had become more mobile, and citizens of different faiths were coming into contact with each other more and more often, especially in the colonies in North America. Churches were seen as inflexible, impractical, and old-fashioned. They divided people who wanted to be joined for non-religious reasons. Political mottoes, such as "Power to the People" and "Let the People Decide" are mottos that had the purpose and effect of freeing people from the influence of the Church. By freeing themselves from one hierarchy, the people established a new hierarchy: the democratic, liberal state. The institution of the Church was demoted in stature.[109]

Rather than set themselves in direct opposition to the churches, as did the Socialist states, the new liberal states of the United States of America and Weimar Germany, the constitutional precursor to the Federal Republic of Germany, created a special place for churches in the new constitutional order. This was a place inferior to that of the state, but a secure place nonetheless. It is thus no accident that the Bill of Rights of the American Constitution guarantees the separation of Church and State and guarantees freedom of religion: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[110]

Article IV of the German Basic Law, in which freedom of speech is found, reads: "(1) Freedom of belief, of conscience, and freedom of religious

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108. In the words of Immanuel Kant: "Enlightenment is the exit of mankind out of his self-imposed inability to transact" (Aufklärung ist der Ausgang des Menschen aus seiner selbstverschuldeten Unmündigkeit). IMMANUEL KANT, KRITIK DER REINEN VERNUNFT (1781).

109. The recent rise of religious politics might be seen as a reaction to the further erosion of ecclesiastic influence in society in favor of the political hierarchy.

110. U.S. CONST. amend. I.

and philosophical creeds are inviolable; (2) The undisturbed practice of religion is protected."[111] As demonstrated in studies,[112] and as known from experience, freedom of religion and belief enjoys very high protection in both the United States and Germany even though this freedom is arguably of little importance to the functioning of a democratic state.

Freedom of belief is to religion what freedom of speech is to democracy: an absolute necessity. For that reason, freedom of speech will be protected in the hierarchy of the future, the hierarchy of free enterprise. This has practical consequences. It means that, if one involved in international arbitration believes that his or her activities are protected by freedom of speech, the arbitrators will do their utmost to avoid a confrontation with the states and accordingly will protect freedom of speech. Freedom of speech will not be diminished in the new hierarchical structure of free enterprise as long as it is not used for competitive purposes. Indeed, when international arbitrators have progressed to the point that they have developed their own caselaw on political boycotts, this will constitute their "Dear John" letter to the states, and the states as we have known them will be in decline. State organizations will doubtless continue to exist, but not with the same influence. They will doubtless continue to secure public order, much as private police services do today; but they will do so haltingly and modestly as one sees churches of today dedicate themselves to spiritual and social matters and for the most part abstain from politics.

On the international stage, the United Nations is "out" and the World Trade Organization is "in." In the future the United Nations, which is the ultimate expression of the nation-states of the earth, will content itself with protecting the rights of airline passengers, guaranteeing basic "human rights" to animals, and similar matters. All the while the World Trade Organization, or perhaps some other commercially centered organization, will be deciding whether and in what manner products and animals may be genetically manipulated, whether education should be provided by the public or private sector,[113] and whether domestic markets must be open to foreign products.[114] In some sense western society is leaving the age of geopolitics behind and entering the age of econopolitics.

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111. GRUNDGESETZ [GG][Constitution] art. 4 (F.R.G).

112. *See e.g.*, P. C. JAIN, LAW AND RELIGION: A COMPARATIVE STUDY OF THE FREEDOM OF RELIGION IN INDIA AND THE UNITED STATES (1974).

113. Recently the French Education Minister accused the United States of trying to brainwash the world by including education among service industries to be liberalized by the World Trade Organization. INT'L HERALD TRIB., Nov. 24, 1999, at 10.

114. *See* Barry James, *Battle to Prove Beef Hormone Risk*, INT'L HERALD TRIB., Oct. 18, 1999, at 13 (indicating that the WTO has ordered the European Union to lift its 10-year ban on U.S. and Canadian beef); *see also* Sam Howe Verhovek, *Seattle's WTO Talks Draw Globalization Foes*, INT'L HERALD TRIB., Oct. 14, 1999, at 13 (indicating that the WTO has already been entangled in spats over Caribbean-grown bananas, gas refined in Venezuela, and Japanese imported liquor).

One hears it said that churches have done more harm than good. Similar statements are already being made about government: "Private enterprise can do it better." That is the bottom line.