Unconstitutional and Outlawed Political Parties: A German-American Comparison

Paul Franz
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by Paul Franz**

I. INTRODUCTION

The West German Constitution includes a provision¹ that allows that country's highest constitutional court² to declare political parties unconstitutional and to order them dissolved.³ To an American, such a provision may seem harsh if not drastic. A comparison of the decisions of the German Federal Constitutional Court under this provision with contemporaneous decisions of the United States Supreme Court dealing with political parties belies that first impression. The conclusion reached from this comparison is that, whatever one might think of the wisdom of this constitutional provision, the German court has been more honest, as well as more activist, in its treatment of political parties than has the American Court.

This article will outline how two democratic constitutional systems have tried to remain open to historical change while preserving an existing order that ideally is the product of popular choice.⁴ Since this is a constitutional dilemma, this article will focus on the decisions of the authoritative interpreters of the two

* (Editor's note: unless otherwise noted, all quotations from German-language sources are the author's).
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1. For a discussion of the legal effect of the document entitled the "Basic Law of the Federal Republic of Germany" (Grundgesetz), see note 10 and accompanying text infra.
2. Grundgesetz [GG] art. 21 (W. Ger.). For the text of this article, see text accompanying notes 19-20 infra. For a brief description of the Constitutional Court, see notes 11-18 and accompanying text infra.
3. GG art. 21(2).
4. Commentators in both systems have noted this constitutional dilemma. See, e.g., 3 Kommentar zum Bonner Grundgesetz 32 (1976). "The contradictory principles of openness of the political order to historical change and preservation of this same order can be reconciled only through practical political reason, through careful progress and through piecemeal change, which preserves the continuous existence of the whole." Id. See also Tribe, Toward a Metatheory of Free Speech, 10 Sw. U. L. Rev. 237 (1978) [hereinafter cited as Tribe, Metatheory].

It should be clear that no satisfactory theory of free speech can presuppose or guarantee the permanent existence of any particular social system. For example, a free speech theory must permit evolution from a society built on the ideals of liberal individualism to a society aspiring to more communitarian visions — just as it must permit evolution from communitarianism to individualism.

Id. at 239.
countries' constitutions, their highest constitutional courts.\(^5\) After setting out the role of the Constitutional Court within the West German system, the author will turn to the position political parties hold in the Federal Republic of Germany. The essay will then explore two landmark cases in which the German Constitutional Court has declared political parties unconstitutional. In order to present a more complete picture, the author next will examine a privilege the Constitutional Court has created for political parties. He will then conclude his exposition of the German system by delineating the relationship political parties have with the German government.

The focus then shifts to the United States, as the author examines the American Court's decisions as to the legality of certain political parties. Because indirect governmental action can be as harmful to parties as can a criminal prosecution, such governmental regulation of political parties will also be highlighted, the discussion underscoring the problem of giving fair treatment to minor parties. The final section makes a comparative analysis of the advantages and disadvantages of both the American and German approaches to the problem of the proper method for dealing with radical political parties. In order to present this comparison clearly, the author will provide considerable background information to his analysis, and he begs the indulgence of those who are already familiar with many of the American decisions he treats.

II. THE FEDERAL REPUBLIC: "UNCONSTITUTIONAL" POLITICAL PARTIES

A. The Basic Law and the Federal Constitutional Court

The Basic Law (Grundgesetz) of the Federal Republic of Germany was adopted by a Parliamentary Council in Bonn on May 8, 1949,\(^6\) and was later ratified by the German states.\(^7\) The document's title reflects a hope for the reunification of the German nation;\(^8\) the Basic Law is not called the "constitution" of the nation, but the fundamental "statute" (Gesetz)\(^9\) of a political subdivision of the nation.

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5. It should be noted, however, that in West Germany the opinions of the Federal Constitutional Court are not given the same deference as are opinions of the Supreme Court in the United States. See D. KOMMERS, JUDICIAL POLITICS IN WEST GERMANY: A STUDY OF THE FEDERAL CONSTITUTIONAL COURT 200 (1976) [hereinafter cited as KOMMERS].


7. Id.

8. See notes 10 & 54 infra.

9. The choice of title is significant. Although the entire document "Grundgesetz" is called a Basic Law (Gesetz) roughly translating to "statute"), individual provisions are Recht. See, e.g., Decision of Aug. 17, 1956, 5 Bundesverfassungsgericht [BVerfG] 85. Recht is a word of wide compass and is difficult to translate. It can mean "law" in the sense of law with a capital L, that "brooding omnipresence in the sky," to borrow a phrase from S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting); it can also mean "right" in either a substantive or adjectival sense. The highest West German constitutional
The Basic Law has, nevertheless, become a constitution in everything but name.

The authoritative interpreter of the Basic Law is the Federal Constitutional Court. The Basic Law breaks from the German tradition of a “supreme” legislative branch by granting broad powers of judicial review to this court. The court has original jurisdiction not only over all “cases and controversies” requiring interpretation of the Basic Law, but also over cases in which a declaratory judgment of the constitutionality of state or federal action is requested. The court has flatly stated that the law (Recht) of which the Basic Law is an expression as a whole is more than the sum of the document’s provisions. See Decision of Feb. 14, 1973, 34 BVerfG 269, 287.

10. “Constitution” is of course a Protean concept. For example, two German commentators offer no less than seven possible meanings of the German equivalent. SCHMIDT-BLEIBTREU & KLEIN, supra note 6, at 120-22. The meanings given range from “a set of rules for the workings of government” to “the sum of the highest legal norms in the nation, from which all other norms are derived.” Id.

The drafters of the Basic Law were faced with the dilemma of creating a national unit, rather than a mere administrative entity, without appearing to ratify the partition of Germany into sovereign eastern and western states. See J. GOÉRY, THE FOUNDING OF THE FEDERAL REPUBLIC OF GERMANY 14 (1958). The product of this dilemma is a Basic Law that is admittedly provisional, see GG art. 146, but is nevertheless a true guarantee of basic rights and “not a mere organizational statute.” SCHMIDT-BLEIBTREU & KLEIN, supra note 6, at 124.

11. GG art. 93. For the text of Article 93, see note 14 infra. 12. GG art. 93. Regarding judicial review, Article 102 of the Weimar Constitution of 1919 declared only that “judges are independent and subject only to the law.” G. DüRR & W. RUDOLF, TEXTE ZUR DEUTSCHEN VERFASSUNGSGESCHICHTE 148 (1967). Following the adoption of the Weimar Constitution, heated controversy arose among scholars over the power of the highest German Courts to examine the constitutionality of national laws which had been properly enacted and promulgated. See J. MATTERN, PRINCIPLES OF THE CONSTITUTIONAL JURISPRUDENCE OF THE GERMAN NATIONAL REPUBLIC 590 (1928). Another commentator notes that: “The role of ‘guardian of the constitution,’ a subject of political and scholarly controversy in the late Weimar period, has obviously been granted to the Federal Constitutional Court by the Basic Law.” T. MAUNZ, DEUTSCHES STAATSRCHT 292 n.3 (15th ed. 1967).

One East German critic of the Basic Law sees such a role of the Constitutional Court as “undemocratic,” making the Court an “instrument with which the ruling classes can engage in class struggle free of the vicissitudes of elections and of legislative and executive realities.” SCHUSTER, DIE RolLE DES BUNDESVERFASSUNGSGERICHTS BEIM ABBAU DER BÜRGERLICHEN DEMOKRATIE IN DER BRD, 28 STAAT u. REcht 35, 35 (1979).

13. GG art. 100.

14. The original jurisdiction of the Court is set forth in Article 93:

(1) The Federal Constitutional Court shall render decisions:

(1) regarding the interpretation of this Basic Law in the event of a dispute over the scope of the rights and duties of the highest federal organs, or of any other party which is granted proper rights either by this Basic Law or by the regulations of a federal organ;

(2) in cases of controversy or doubt over the formal or substantive compatibility with this Basic Law of a federal or state law (Recht), or of the compatibility of federal and state laws. A decision may be rendered at the request of the federal government [herein used in the narrower British and German sense of incumbent executive branch], a state government, or one-third of the members of the Bundestag;

(3) in cases of controversy over the rights and duties of the Federation and the states, especially controversy regarding the exercise of federal supervision of the states;

(4) in other public-law (öffentlich-rechtlichen) disputes between the Federation and the
court has received praise for its rejection of the passive, positivist jurisprudence of the Nazi era. Nazi legal thought had often held that whatever was useful to the state was lawful: "Recht ist, was dem Staate nutzt."15 Recently, however, the court has drawn adverse criticism for its activism and "interference" in areas such as international treaty-making, which have traditionally been regarded as purely within the political realm.16

Unlike their American counterparts, the judges of the Constitutional Court are not life-tenured members of an independent judicial caste. The sixteen judges serve staggered twelve-year terms and are each limited to one term.17 Members of the court are selected by the two houses of the German federal legislature.18 Thus, the judges of the Constitutional Court may themselves be only recently and temporarily removed from the political arena. Yet, it is to these judges that the Basic Law entrusts the power to dissolve political parties.
B. The Constitutional Status of German Political Parties

The political parties of the Federal Republic have a qualified constitutional status under Article 21 of the Basic Law, which provides that:

1. Parties participate in the formation of the popular political will. They may be freely formed. Their internal organization must be based on democratic principles. They must give a public accounting of their funds.

2. Parties which by their goals or through the acts of their adherents seek to impair or to do away with the liberal democratic order, or to endanger the existence of the Federal Republic of Germany, are unconstitutional. The Federal Constitutional Court shall determine the unconstitutionality of a party.

3. This article shall be implemented by federal statutes.

An American reader might initially conclude that this judicial power to declare a party unconstitutional represents an abrogation of democracy, excused only by the German experience with the Nazi Party. However, even the “weak” Weimar Republic possessed similar constitutional and statutory powers to act against parties that were hostile to the Weimar government and to the values it rep-
resented. Article 21, therefore, may not be explained as mere recoil from the Nazi period. Rather, Article 21 is part of a normative jurisprudential system. The Constitutional Court has argued that the legitimacy of its powers under Article 21 is based not in history and pragmatism, but in the values which imbue the Basic Law. Further, the court has used its exclusive jurisdiction over party-prohibitions to bar unwarranted governmental interference with unproscribed parties. The Constitutional Court has declared only two political parties unconstitutional under Article 21(2): The Sozialistische Reichspartei (SRP, or Socialist Imperial Party) and the Kommunistische Partei Deutschlands (KPD, or Communist Party of Germany).

C. The SRP Decision

The SRP was the first party to be declared unconstitutional by the Constitutional Court. The party was founded in 1949 as an outgrowth of the rightist Deutsche Reichspartei (German Imperial Party). In May 1951 the German federal executive branch found that the SRP "sought to impair the liberal democratic order," and it initiated a party-prohibition before the Constitutional Court.

The Constitutional Court received abundant evidence that the SRP was an unabashed Nazi-front organization. With such evidence, the court could have issued a simple opinion making little law. However, one of the defenses raised by the SRP required the court to define the term "liberal democratic order" of Article 21(2). The party argued that as a matter of constitutional principle,

21. WEIMAR CONST. art. 48(2). See also Law for Protection of the Republic of July 21, 1922, I Reichsgesetzblatt [RGB] 585, amended by Act of June 2, 1927, I RGBI 125; Law for Protection of the Republic of Mar. 25, 1930, I RGBI 91. As one commentator on Article 21 has noted, "in Prussia alone, roughly thirty parties and other political groups were dissolved and prohibited between 1922 and 1929." Maurer, Das Verbot politischer Parteien: Zur Problematik des Art. 21 Abs. 2 GG, 96 ARCHIV DES ÖFFENTLICHEN RECHTS 203, 206 (1971) [hereinafter cited as Maurer].

22. See ¶ II.E infra.


24. Id. at 3-5.


26. The evidence summarized in the court's opinion is often astounding. It included correspondence between SRP members who referred to each other as "old warriers" who were "still loyal to the cause." Decision of Oct. 23, 1952, 2 BVerfG at 30. Party literature showed a fundamental tenet of anti-semitism. Id. at 65. Perhaps most shocking of all this evidence is its reference to the war criminals sentenced to die at Nuremberg: In Landsberg seven Germans must climb the gallows. They will be killed on German soil by so-called Americans, even though the Basic Law — which the Allies approve — no longer recognizes the death penalty. We are very far from thinking the American people responsible for this new bloodshed. Rather, we know very well the circle at whose command these seven men in Landsberg will be murdered. Id. at 53. The "circle," of course, comprised the German government in Bonn, the "traitors" but for whom Germany "might have won in 1945." Id. at 54.
the form of government proposed by the SRP was as good as any potential government.27 This argument was powerful. If the "liberal democratic order" of the Basic Law was merely the blueprint of a structure for national government, there could be no constitutional basis for rejecting the SRP’s alternative order, as long as the party could win enough popular support to establish itself and realize its goals democratically.

The court responded to the party’s argument by noting that the liberal democratic order of Article 21(2) was a “normative order.”28 This order was “fundamental” and transcended the “constitutional order,”29 a term used by the court to designate the political apparatus of the state. The court held the fundamental characteristics of this normative basic order to be:

At the very least, respect for the rights of man as set forth in the Basic Law, above all respect for the rights of one individual to life and free development, the sovereignty of the people, separation of powers, the accountability of the government, administration according to law, the independency of the judiciary, the multiparty principle, with equal opportunity for all political parties, including the right to constitutionally acceptable development, and opposition.30

At least passive assent to these principles was a prerequisite to a party’s "participation in the formation of the popular political will."31 The evidence against the SRP showed it to be actively hostile to most of these principles. Therefore, the court reasoned that it could declare the party unconstitutional under Article 21(2) because the Article’s application no longer conflicted with the democracy which is part of a liberal democratic order. The court dissolved the party and confiscated its assets.32 The court also forbade any re-creation of the party in “ersatz” organizations.33 The court did not overstep its authority in

27. Id. at 12.
28. The phrase "eine wertgebundene Ordnung" literally means a “value-bound order.” Id.
29. Id. at 13. “Verfassungsmässige Ordnung” is a phrase taken from Article 9(2) of the Basic Law, which provides: “Organizations which have goals or activities running counter to the criminal laws, or which direct themselves against the constitutional order, or against internationally acknowledged principles [Gedanken der Völkerverständigung] are prohibited.” GG art. 9(2).

Under Article 9, summary government action is possible. For example, on January 30, 1980, the Federal Minister of the Interior found that the “Military Sporting Group Hofmann,” an exotic neo-Nazi group, was an “organization with goals inimical to the constitution.” See 34 DER SPIEGEL 57 (Feb. 4, 1980). A police raid on the group’s headquarters followed. Id.

Almost as a make-weight for the lawfulness of Article 21(2), the court reasoned that the article was a lex specialis for political parties, exempting them from Article 9(2). SRP decision at 2 BVerfG 13. This party-privilege has been recognized and expanded in later cases under Article 21. See § II.E infra.

30. Decision of Oct. 23, 1952, 2 BVerfG at 13. These characteristics were announced by the court “with no rationale,” according to one commentator. See H. Goerlich, Wertordnung und Grundgesetz 33 (1973).
32. Id. at 2, 71, 78-79.
33. Id. at 78.
requiring these changes because a federal statute had already set forth the consequences of a judgment of unconstitutionality.\footnote{34}

The finding of unconstitutionality did not settle the matter entirely. There were two SRP delegates in the federal legislature at Bonn\footnote{35} and other SRP members in various state legislatures.\footnote{36} The issue of whether these delegates could retain their seats after their party had been banned remained to be resolved. The court, however, without reservation, held that the SRP’s delegates must lose their seats, declaring:

[W]hen by a judgment of the Constitutional Court a political party’s ideas are found to fall short of the prerequisites for participation in the formation of the popular political will, the mere dissolution of the party’s organizational apparatus, which was meant to further these goals, cannot truly implement the court’s judgment. Rather, it is the intent of the Court’s sentence to exclude the ideas themselves from the process of the formation of the political will.\footnote{37}

In so stating the court did not hold that it could lawfully suppress political doctrines; rather, the court found that it could deny the advancement of doctrines through “constitutional institutions” such as political parties, and could exclude them from the “process of the formation of the political will” in which parties participate.\footnote{38} Even popular approval of such doctrines, through the election of candidates espousing them, could not mitigate their intrinsic vices.

Thus, in the SRP decision, the Constitutional Court demonstrated that it would interpret Article 21(2) broadly and would exercise the power inherent in such a broad interpretation. The court declared the fundamental order of the Basic Law to be “normative”\footnote{39} and, with only slight reliance on the document itself, announced the relevant norms.

Following the SRP decision, the Constitutional Court was paramount in assessing the proper place of competing values within this normative order. Considering the unattractiveness of a neo-Nazi party in post-war Germany, the SRP decision may seem unnecessarily sweeping. The breadth of the opinion, however, might have been the result of a contemporaneous proceeding before the court, i.e., a party-prohibition directed at, not a fascist, but a Communist party.\footnote{40}

\footnote{34. Federal Constitutional Court Act of March 12, 1951, [1951] BGBl I 243, § 43.}

\footnote{35. Two of the over four hundred members of the lower house of the federal legislature (Bundestag) were members of the SRP. Office of the U.S. High Commission for Germany, Elections and Political Parties in Germany 1945-52 37 (1952).}

\footnote{36. Id. at 11.}

\footnote{37. Decision of Oct. 23, 1952, 2 BVerfG at 73.}

\footnote{38. See Maurer, supra note 21, at 228. The Court later elaborated on the free speech implications of a party prohibition in the only other case in which a party was dissolved. See § II.D infra.}

\footnote{39. See note 28 and accompanying text supra.}

\footnote{40. See § II.D infra.}
Therefore, the court had to formulate principles in the SRP decision which would be tested in a more controversial case.

D. The KPD Decision

The Constitutional Court, in a more recent decision, banned the KPD.\textsuperscript{41} The federal government challenged the party's constitutionality in 1951, and prosecuted the case at length even though election results indicated that the KPD was dying a natural death: the party received only 2.2% of the vote in the West German national elections of 1953.\textsuperscript{42} Although the accusations against the KPD and the SRP had been brought at the same time, the Constitutional Court decided the KPD case four years after it handed down the SRP decision. The KPD's lengthy defense, in part, caused the delay.\textsuperscript{43} Among the arguments raised by the defense were that: (1) Article 21(2) was itself an "unconstitutional constitutional norm," because it both hindered the reunification of Germany mandated by the Basic Law, and violated rights of free speech and free association recognized in other parts of the Basic Law;\textsuperscript{44} and that (2) the Marxist-Leninist ideology espoused by the Party was a "science" not properly subject to any court's review.\textsuperscript{45}

To a positivist,\textsuperscript{46} the first argument, that a constitutional provision was itself unconstitutional, would be meaningless. Article 21(2) clearly grants the court the authority to declare a political party unconstitutional. If the power to declare a party unconstitutional conflicts with rights provided elsewhere in the constitution, the conflict simply is an example of an exercise of the drafters' power to carve out exceptions to the rights they had enumerated. The Constitutional Court had already rejected the KPD's reasoning, since the court had in its earliest

\textsuperscript{41} Decision of Aug. 17, 1956, 5 BVerfG 85. For an English translation of this opinion, see OUTLINING THE COMMUNIST PARTY: A CASE HISTORY (W. von Schmetzing trans. 1957). The complete case record is collected in KPD-PROZESS: DOKUMENTARWERK ZU DEM VERFAHREN UBER DEN ANTRAG DER BUNDESREGIERUNG AUF FESTSTELLUNG DER VERFASSUNGSWIDRIGKEIT DER KOMMUNISTISCHEN PARTEI DEUTSCHLAND VOR DEM ERSTEN SENAT DES BUNDESVERFASSUNGSGERICHTS (G. Pfeiffer & H. Strickert eds. 1955).

\textsuperscript{42} 10 BROCKHAUS ENZYKLOPAEDIA 389 (17th ed. 1970).

\textsuperscript{43} Even at the time the decision was finally announced, the KPD was seeking to continue oral argument. McWhinney, The German Federal Constitutional Court and the Communist Party Decision, 32 Ind. L.J. 295, 300 (1957) [hereinafter cited as McWhinney]. McWhinney also attributes the delay to the justices' reluctance to render a controversial judgment. Id. In his opinion, the decision was finally announced in 1956 because several of the justices of the court were reaching the ends of their terms, and did not want the case decided by judges who had not heard the oral arguments. Id.

\textsuperscript{44} Decision of Aug. 17, 1956, 5 BVerfG at 137.

\textsuperscript{45} Id. at 105.

\textsuperscript{46} The term "positivism" has admittedly been used by many people to mean many things in legal writing. See, e.g., Hart, Legal Positivism, in 4 THE ENCYCLOPEDIA OF PHILOSOPHY 418-20 (1967). As used here, "positivist" indicates one who holds the view that legal norms may have any kind of content. See id. at 419.
opinions recognized “supra-positive” law which was binding even on the drafters of constitutions. The framers could not arrange everything in the constitution to suit themselves. An “unconstitutional constitutional norm” was, therefore, no oxymoron. The Constitutional Court could, in American terms, exercise judicial review of the constitution itself.

According to the court, a provision of the constitution would be unconstitutional only if it contradicted one of the “basic values” of the constitution, i.e., if it were “contradictory to a fundamental constitutional principle by which the individual positive provisions of the constitution can and must be measured.” The principle to which the court referred was the “dignity of man.” The court held that when, in the contest for political power, a party no longer recognized a “sphere of individual freedom vis-a-vis the state, then neutrality towards that party is no longer possible on the part of a liberal democracy which must protect the dignity of man.”

The principle of the dignity of man did not, however, provide a standard for determining when the court would exercise its power to dissolve a party. For that determination, the court turned to the hallmarks of the “liberal democratic order” noted in the SRP decision. These political principles, although not enunciated in the Basic Law, were of constitutional stature because: “[c]ertain fundamental principles grow out of the variety of goals and value systems that is embodied by political parties. These principles, once sanctioned in a democratic fashion, shall be recognized as absolute values, and therefore protected against every attack.”

The court further held that the Basic Law’s principle of the dignity of man overrides popular approval, and any theory which derogates that principle would be repugnant to the Basic Law even if it had universal popular support. Therefore, the court did not overturn the SRP rule that it may constitutionally deny the political advancement of an idea, even when exponents of the idea have been democratically elected.

47. Decision of Oct. 23, 1951, 1 BVerfG at 18 Leitsatz 27. These supra-constitutional norms have been identified with natural-law concepts. See Dietze, *Unconstitutional Constitutional Norms? Constitutional Development in Postwar Germany*, 42 VA. L. REV. 1 (1956); von Hippel, *The Role of Natural Law in the Legal Decisions of the German Federal Republic*, 4 NAT. L. F. 106, 112 (1954). Both writers predicted a retreat from this natural law jurisprudence, a philosophy which Dietze sees as foreign to the German legal tradition. *But see* Decision of Feb. 25, 1975, 39 BVerfG 1, 67 ("Each man has an independent value in the order of creation."); Decision of Feb. 14, 1973, 34 BVerfG 269, 287 ("Law (Recht) is not identical with the sum of written provisions (Gesetze)"); Hahn, *supra* note 17, at 637.


50. *Id.* Article 1(1) of the Basic Law says that this dignity is “inviolable.” GG art. 1(1).

51. *See* Decision of Aug. 17, 1956, 5 BVerfG at 140. *See also* accompanying note 30 *supra*.

52. Decision of Aug. 17, 1956, 5 BVerfG at 139.

53. *See id.*
The court, however, did not see all values embodied in the Basic Law as overriding. For example, the party had argued that as a Communist party, it could serve as a liaison with the Communist Eastern Zone.\footnote{54} Therefore, the proceeding against it was unconstitutional because such an application of Article 21(2) hindered the reunification of Germany — a goal central to the Basic Law.\footnote{55} The court rejected this argument, stating, in effect, that it would imply a standard of reasonableness in the Basic Law’s reunification goal. The court found no “tension” between the application of Article 21(2) in this case and the reunification sought by the Basic Law. The court reasoned that the agencies created by the constitution could choose among many possible alternatives to achieve unity.\footnote{56} Therefore, dissolution of the Communist party would not hinder this reunification. For example, the party’s existence would be unnecessary to reunification through “pan-German” elections.\footnote{57} Although reunification of Germany might be required by the Basic Law, the court felt that this requirement was not constitutionally more significant than the protection of the liberal democratic basic order required by Article 21(2).\footnote{58}

The court reconciled these seemingly competing aims of the Basic Law by applying a traditional interpretation of German codes. The court read the Basic Law as an “organic structure of innerly related norms,”\footnote{59} norms which could be ranked according to their place within that structure. The court used similar

\footnote{54. The KPD, as a Communist party, supported immediate reunification with the Eastern Zone, and had opposed the unification of the three Western occupation zones under the Basic Law. Decision of Aug. 17, 1956, 5 BVerfG at 110.  
55. “The entire German people still face the challenge of perfecting the unity and freedom of Germany through free self-determination.” GG preamble. Article 146 limits the validity of the Basic Law until the time of “the free adoption of a constitution framed by the German people.” Id. art. 146. See also note 10 supra.  
56. Id. at 129.  
57. Id. at 132.  
58. Id. at 125-32.  
59. See generally I KOMMISSION ZUR AUSARBEITUNG DES ENTWURFS EINES DEUTSCHEN BÜRGERLICHEN GESETZBUCHES, MOTIVE ZU DEM ENTWURFE EINES BÜRGERLICHEN GESETZBUCHES FÜR DAS DEUTSCHE REICH 14-17 (1888). This technique of interpretation was known as Rechtsanalogie, in contrast to Gesetzesanalogie, the interpretation of a statutory provision by analogy to similar positive legal provisions. Id.  

German codes are generally of much older origin, and could more colorably be styled “organic structures of interrelated norms,” than their American counterparts. “[German] [c]riminal law was codified in 1871; criminal and civil procedure in 1877; general private law in 1896; commercial law in 1897.” KOMMERS, supra note 5, at 43. These codes are, mutatis mutandis, still in use. With such extensive codification, there was less need for judge-made law. Novel situations were handled by holistic interpretation of codes rather than ad hoc interpretation of discrete statutes. Prior judicial decisions were not binding “precedents.” Professor Kommers suggests that, within such a tradition, the Basic Law should be viewed as a “constitutional code” which is itself a more important “source of law” than the decisions of the Constitutional Court interpreting it. The opinions (Rechtsprechung) of the court are, however, becoming more important as legal texts. Id. at 42-48. This may well be the working of a natural-law jurisprudence, which rejects the idea of an authoritative text. See note 47 supra.
reasoning to reconcile its power under Article 21(2) with the fundamental right of "freedom of political opinion" guaranteed by Article 5(1) of the Basic Law. 60

The conflict between suppression of a party and the right to free expression did not make the application of Article 21(2) inappropriate because that provision, like Article 5(1), is part of the Basic Law, and "there can be no thought of a formally higher rank for either." 61

Article 21, then, was of an equal rank with both the "unification" and "free speech" provisions of the Basic Law. The court's conclusion that Article 21 may be applied in derogation of both of those provisions is, therefore, a non sequitur. Despite its language to the contrary, the court ranked protection of the liberal democratic order above both reunification and expression of political opinion within a party.

The free speech implications of this interpretation of Article 21 were clearly limited to political parties. The court went beyond the Basic Law itself to answer the charge that the Marxist-Leninist doctrine espoused by the KPD was "scientific" and, therefore, not subject to judicial review. The court cited the SRP decision for the proposition that Article 21(1) raised parties from the "realm of the socio-political to that of constitutional institutions," 62 and outlined the duties of such institutions:

[At the very least, those who are called upon to participate in the formation of this [political] will must be unanimous in their affirmation of the basic values of the constitution. It is conceivable that a political party that renounced and opposed these basic values could exist and be active as a sociopolitical group, but it is unthinkable that its lawful, responsible participation in the formation of the political will could be constitutionally guaranteed. 63

Thus, forfeiture of constitutional status, rather than the abstract merits of a party's ideology, is at issue in a party-prohibition case. Because legal standards drawn from the Basic Law determine the revocation of this status, forfeiture of the status is a justiciable question.

E. The "Party Privilege"

In its two party-prohibition decisions, the Constitutional Court created and refined the concept that a political party is a constitutional entity with a duty to support a normative liberal democratic order.

60. Article 5(1) provides: "Each person has the right to express and publicize opinions in speech, writing, and images. Each person has the right to seek information without hindrance from every generally [publicly] available source. Freedom of the press and freedom of radio and film reporting are guaranteed. There shall be no censorship." GG art. 5(1).
62. Id.
63. Id. at 134.
The court has the enormous power to prohibit a party in order to protect this order. Yet, a corresponding privilege exists for political parties. Article 21(2) of the Basic Law provides that "the Federal Constitutional Court shall decide the question of a party's unconstitutionality."64 The court could narrowly construe this clause as one which simply grants it original jurisdiction in party-prohibition cases. Instead, almost as a counterweight to its enormous party-prohibition power, the court has found that this clause provides a "privilege" to a party, under which both the party and its officials, when lawfully acting on behalf of the party, are to be free from government discrimination and governmental intervention as long as the Constitutional Court has not found the party to be unconstitutional. Through this interpretation, Article 21(2) retains a continuing vitality, despite the fact that the Constitutional Court last prohibited a party over twenty years ago.65

The court based this "party-privilege" on the theory that a judgment of a party's unconstitutionality is "operative," not "declarative."66 The court's judgment of a party's unconstitutionality is, in other words, a "performative utterance"67 that changes something in the world. A party becomes unconstitutional only when the court adjudges it so. The court does not "discover" unconstitutional parties and merely label them as such.68 Because only the Constitutional

64. GG art. 21(2).
65. With the rise of neo-fascism in the Federal Republic, the possibility of prohibiting parties is gaining acceptance in current German political thought. See Maurer, supra note 21, at 204. For a description of recent neo-Nazi activity in the Federal Republic, see, e.g., 33 DER SPIEGEL 71-3 (Sept. 24. 1979).
67. "Performative utterance" is a term coined by philosopher J. L. Austin to describe sentences which are not descriptions of states of affairs, but actually cause some change in a state of affairs. See J. AUSTIN, How To Do Things WITH WORDS 4-7 (1962).
68. The idea of the operative effect of the court's judgment of a party's unconstitutionality has fascinated German commentators. See, e.g., H. MANGOLDT & F. KLEIN, Das Bonner Grundgesetz 632 (1966). Like many other legal fictions, this one has raised as many questions as it has answered. For example, how could the ban be lifted from a prohibited party that had reformed its goals? Could the party only "become" constitutional through another judgment of the Constitutional Court, and if so, what is the procedure for obtaining such a judgment? See Schuster, Über die Grenzen der "Abwehrbereiten Demokratie," [1968] JURISTENZEITUNG 152.

The operative effect of the Constitutional Court's judgment extends to "ersatz organizations" for the proscribed party, even though at the time of the Constitutional Court's judgment the organizations were nonexistent or beyond the court's jurisdiction. See Decision of Mar. 21, 1957, 6 BVerfG 309, holding that the Saarland Communist Party came under the ban of the KPD, even though at the time of that ban the Saarland was not part of the Federal Republic. This is an example of the "statutory force" (Gesetzeskraft) of the decisions of the Constitutional Court. Its decisions are binding not only on the parties before it, but on citizens and governmental organs generally. See Lange, supra note 14, at 6.

Despite the Saarland Party decision, in 1968 a "new" German Communist Party, the DKP, was founded, without any governmental attempt to enforce the KPD prohibition against the new organization. 10 BROCKHAUS ENZYKLOPAEDIE 389 (10th ed. 1970).
Court can “make” an unconstitutional party, all parties enjoy a legal immunity from impairment of their constitutional status by any government agency.

When this immunity is threatened, a party may seek redress directly from the Constitutional Court by following the simple procedure of the “constitutional complaint.”69 As a result of such complaints, the court had delineated the “party-privilege.”70 The privilege extends to the lawful acts of a party’s agents and adherents done in furtherance of the party’s goals;71 thus, an ex-Communist could not be denied federal compensation otherwise due him, solely because he had worked to advance the Communist Party from 1949 until its court-ordered dissolution in 1956.72 Public radio stations are precluded from discriminating against parties that the station’s management considers insignificant or even harmful.73 The principle of equal political opportunities for all constitutional parties requires that all parties qualified to participate in an election be allocated some air time for their campaign spots.74 Election laws may not be rigged so that parties thought to pose a “political threat to democracy” are effectively excluded from political life.75

However, the fact that the Constitutional Court has not pronounced a party unconstitutional does not mean that the party and its agents are immune from governmental action. The Constitutional Court has held that a report published by the Federal Minister of the Interior, which characterized a right-wing party as a “danger to the liberal democratic order” and “hostile to the constitution” was not an actionable attack on the party in violation of Article 21.76

69. This complaint procedure is free and the complainant need not be represented by an attorney. The complainant is, however, very unlikely to obtain the relief sought. Of the 36,000 constitutional complaints filed from 1952 to the end of 1977, only 400, or 1.11 per cent, were successful. 32 DER SPIEGEL 44, 57 (Oct. 30, 1978). The availability of this procedure is nonetheless a significant aid to parties, which would otherwise, as constitutional organs, be required to institute the more formal Organstreit proceedings under Article 93(1) of the Grundgesetz. See Decision of May 30, 1962, 14 BVerfG 121; Decision of Sept. 3, 1957, 7 BVerfG 99.

Professor Kommers, apparently relying on very early cases, states: “[p]arties do not, like ordinary citizens, corporations, or other private groups, have the right to file constitutional complaints with the Federal Constitutional Court.” Kommers, Politics and Jurisprudence in West Germany: State Financing of Political Parties, 16 AM. J. JURISPRUDENCE 215, 221 n.14 (1971) [hereinafter cited as Kommers, Politics]. This assertion is simply untrue. Parties may file constitutional complaints to vindicate their basic legal equality with other parties. Decision of Sept. 3, 1957, 7 BVerfG at 103; Decision of Feb. 21, 1957, 6 BVerfG 273, 277. It is true, however, that parties may redress injury to their “constitutional status” only through Organstreit proceedings. Decision of Sept. 3, 1957, 7 BVerfG at 103.


72. Id.


74. Id. The allocation may be proportional to the importance of the party. Id. at 108.


The court ruled that the opinions expressed by the Minister had absolutely no "legal" (rechtlich) effect, and that whatever "practical" (faktisch) disadvantage to the party resulted, the Minister's action did not violate the party-privilege. 77

Similarly, membership in a radical but unproscribed party may be considered as "one element of the behavior" of an applicant for a civil service job. The Basic Law requires that civil servants (Beamten) support the constitutional order, even though private citizens are guaranteed the right to oppose that order lawfully through membership in a constitutional party. 78 Therefore, a state law requiring civil service job applicants to guarantee their support of the "liberal democratic order" was constitutional even when invoked against members of extremist parties. 79

Membership in a constitutional party cannot shield otherwise unlawful acts, even if the acts are performed to further the party's goals. 80 A party official, for example, may be tried for treason even if his party has not been declared unconstitutional. 81 Yet, lawful acts may not be punished which support a political organization even if a lower court has found the goals and activities of the party to be directed against the constitutional order. The Constitutional Court struck down a statute criminalizing such acts, 82 even though the law stated that if an affected organization was a political party, the "criminal" acts could be punished only after a prohibition of the party by the Constitutional Court. 83

77. Id. Dicta in an earlier decision sheds some light on this "practical"/"legal" dichotomy. A "practical" disadvantage would be an adverse effect on party membership or popularity. See Decision of May 22, 1975, 39 BVerfG at 360. Such harm, which does not affect a party's legal status, is not forbidden by Article 21. Id. "Legal disadvantage" means, in effect, legal sanctions of otherwise lawful activities of party members. Id. at 357.

78. Decision of May 22, 1975, 39 BVerfG at 359. It is the verfassungsmiessige Ordnung ("constitutional order") that civil servants must support, not only the "liberal democratic order" protected by Article 21. For more on this distinction between the "constitutional" and "liberal democratic" orders, see note 29 and accompanying text supra.

79. Decision of May 22, 1975, 39 BVerfG at 359. The court's ambiguous language left unanswered the question whether party membership alone could disqualify a candidate. 32 DER SPIEGEL 86 (Nov. 6, 1978). Libertarians saw the suggestion of mere party membership as a bar to civil service as a violation of Article 21's procedural safeguards. See, e.g., Kriele, Feststellung der Verfassungsfeindlichkeit von Parteien ohne Verbot, 8 Zeitschrift fuer Rechtspolitik 201 (1975).

In a recent decision, the Third Chamber of the Federal Disciplinary Court reportedly decided that members of the DKP, a German Communist party founded long after the KPD, see note 68 supra, may continue to hold civil service jobs as long as the members are not active on the Party's behalf. See 34 DER SPIEGEL 27-28 (Mar. 31, 1980).


83. Id. § 90(a)(3).
according to the court, ignored the "operative effect" of the court's judgment of prohibition, and would have made such a judgment have the effect of an *ex post facto* criminal law.\textsuperscript{84}

Once the Constitutional Court has declared a party unconstitutional, it may impose severe criminal sanctions on persons who attempt to perpetuate the party, including persons whose speech promotes the survival of the party organization.\textsuperscript{85} The mere peacable promotion of an ideology which is identical to that of an unconstitutional party, on the other hand, is not culpable.\textsuperscript{86} As in the *KPD* decision, the rationale of the party-privilege cases is that the court may abolish a constitutional entity, but it may not proscribe political doctrines. A party-prohibition, therefore, bans only the organization and does not forfeit the fundamental rights of the party's former adherents.\textsuperscript{87} It is the organization that is placed outside the law, not its members.\textsuperscript{88}

F. Government and Parties

In cases involving government participation in party activities, as in party-privilege cases, the Constitutional Court has protected the legal equality of parties. In the first *Party Financing Case*\textsuperscript{89} the court struck down legislation which wholly subsidized any party represented in the Bundestag. The Court rejected the argument that the legislation promoted anti-plutocratic goals, holding that "Article 21 guarantees parties freedom from the state, not protection from the influence of rich individuals, businesses or organizations."\textsuperscript{90} Article 21's re-

\begin{thebibliography}{99}
\bibitem{84} Decision of Mar. 21, 1961, 12 BVerfG 296.
\bibitem{85} Decision of Jan. 14, 1969, 25 BVerfG 44. The Court nevertheless upheld a six-month sentence for running for office as a "Communist" using the slogans of the proscribed *KPD*. The Court viewed this sentence as lawful enforcement of its proscription of the party. Id. at 47. The Constitutional Court has also upheld a two-year prison sentence and a five-year exclusion from the profession of journalism for a defendant who had founded a Communist voters' league and had run for office as its candidate. See Decision of Jan. 15, 1969, 25 BVerfG 88. It is ironic that at the time of this judgment, a "constitutional" Communist party existed in the Federal Republic; however, this party had not been founded at the time of the defendant's culpable acts.\textsuperscript{86}
\bibitem{87} Id. at 51-52.
\bibitem{88} Once a party has been thus outlawed, "ersatz organizations" for the proscribed party have no claim to the party-privilege. See Decision of Apr. 2, 1963, 16 BVerfG 4. Any German court, it appears, may find that a "new" party or group is in fact a substitute or camouflage party, and may entertain criminal actions against the group's agents. Id.
\bibitem{89} It is unclear why the determination that a "new" group is attempting to perpetuate a forbidden party is not for the Constitutional Court alone. The Court has simply asserted that article 21(2) guarantees each party only one proceeding before the Constitutional Court, and that this guarantee of a proceeding is satisfied by the party-prohibition itself. See Decision of Aug. 17, 1956, 5 BVerfG 392.
\bibitem{90} Decision of July 19, 1966, 20 BVerfG 56. One interesting aspect of this decision is that the court's original 4-4 deadlock was broken by the disqualification, at the behest of a rightist party, of Justice Leibholz, whose scholarly works had often dealt with the role of political parties in the Federal Republic. See McWhinney, *Federal Supreme Courts and Constitutional Review*, 45 CAN. B. REV. 578, 593-96 (1967).
\end{thebibliography}
quirement that parties account for the sources of their funds was designed to prevent the anonymous wielding of political power, not the accumulation of power through wealth. Therefore, the "public accounting" provision of Article 21 did not support the egalitarian argument. Further, the government could not award subsidies only to successful parties as a "bonus" for winning elections, because this violated parties' constitutional equality and served only to perpetuate the political status quo.

Although government subsidy of all of a political party's expenses was an impermissible interference with the formation of the "popular will and opinion," the court suggested that reimbursement of parties' campaign expenses would be constitutional, since such subsidies would be limited in amount and duration. According to the court, reimbursement could be contingent on a party's winning a minimum of popular support, since it is within the legislature's constitutional powers to inhibit the fragmentation of the political system into a multitude of splinter parties. However, the court warned that this minimum must be considerably less than five percent of the vote. Finally, the court indicated that some parties were more important than others and, therefore, the legislature need not treat all parties equally. However, the legislature could not use campaign financing to lawfully "sharpen the existing practical differences in the parties' election chances."

The legislature tried to follow the court's blueprint by enacting the Political Parties Act in 1967. In the second Party Financing Case, the court upheld, with the exception of one provision, the system of reimbursement of parties' election expenses established by the Act. According to the Act, the cut-off figure for reimbursement eligibility was 2.5% of the relevant vote. The court noted that in a national election, this percentage would require a party to receive roughly 835,000 votes, many more than the court felt were needed to "demon-
strate the good faith of a party's campaign effort." The court suggested that .5% would be more appropriate as a cutoff. The legislature again took heed.

The court, in the second Financing Case, also struck down, in part, the requirement of public disclosure of private contributions to political parties. The legislature, in enacting the Political Parties Act, had inexplicably established different standards for requiring disclosure of contributions by individuals and corporations. Specifically, the legislation required individuals to disclose the amount of any contribution of 20,000 DM or more, whereas corporate donors had only to report contributions equal to or exceeding 200,000 DM.

The court invalidated the higher corporate threshold, explaining that it saw no reason for the large disparity between the two groups. The court upheld, however, the 20,000 DM threshold for individual contributions because it felt that the legislature could reasonably conclude that "considerable political influence is rarely coupled with lower contributions."

These party financing cases demonstrate the reluctance of the Constitutional Court to allow parties in power to perpetuate themselves through invidious financing schemes. Consistent with this reluctance, the court later held that a party in power was prohibited from promoting itself through electioneering under the pretense of performing its governmental duty to inform the public. In this case the federal government, during the 1976 West German national elections, advertised its accomplishments in national newspapers and magazines. The ads typically ended with the following slogan: "We're bringing security to your future."

The government also had distributed "informational" literature to political parties through federal ministries. Most of the literature was distributed to

102. Id. at 342.
103. See Amendment of Political Parties Act of July 22, 1969, [1969] BGBl I 925, § 18(2) which incorporates the court's .5% figure.
106. (1 DM = approx. $.42 as of March 1, 1982).
107. Id. § 25.
108. Id.
110. Id. at 356. The court in the second Financing Case also upheld the deductibility from taxable income of contributions to parties of up to 600 DM (1,200 DM for married couples). Id. at 357-61. These limits were recently challenged before the Constitutional Court as being too low. See Decision of July 24, 1979, 52 BVerfG 63. The court rejected this claim, saying that such questions called for "political decisions," unless the tax regulations favored certain parties or heightened the existing practical inequalities between parties. Id. at 94.
111. The court has nonetheless been criticized for permitting the legislature to link the amount of a party's campaign-cost recovery to the party's success at the polls. See, e.g., 2 I. VON MÜNCH, supra note 20, at 15.
112. Decision of March 2, 1977, 44 BVerfG 125.
113. Id. at 128.
The court recognized that "there will often be a correspondence between propaganda (Öffentlichkeitsarbeit) of the federal government and the ideology of the party or coalition forming that government." However, the court found that "the limit of the government's task of informing the public is reached when electioneering begins" and that in the present case, the government had exceeded that limit.

Article 21's specificity has resulted in a consistent interpretation by the Constitutional Court of its scope and application in party-prohibition cases. A court's power to dissolve parties in a democratic system, such as Germany, is legitimate because the Basic Law's "normative" order may be lawfully protected. By placing the exercise of this power exclusively in the Constitutional Court, the framers of the Basic Law have diminished the potential for arbitrary or abusive exercise of the dissolution power. Until a party has been declared unconstitutional by this court, the party enjoys equal constitutional status and political opportunities, at least to the extent that the Constitutional Court can ensure such equality of opportunity. A constitutional party's unpopularity or unorthodoxy justifies only the slightest deviations from this principle. Further, the antidemocratic proscription of parties is countered by minimal legal requirements to parties wishing to enter the political marketplace. In the United States, however, treatment of political parties under more general constitutional provisions has been quite different.

III. THE UNITED STATES: "OUTLAWED" AND "MINOR" POLITICAL PARTIES

The United States Supreme Court, like its German counterpart, has frequently reviewed the legal status of extremist parties, to assess the relationship between government and political parties, regardless of their popularity. The result has been the judicial delineation of, not a "normative," but a neutral constitutional order under which fair treatment of competing parties is sometimes difficult to discern.

A. Outlawry: Direct and Indirect

One American party, the Communist Party of the United States, has been outlawed by name in specific legislation, i.e., the Communist Control Act of 1954. The Act is openly prohibitory; its announced purpose is to bar the

114. The parties in power received the bulk of this literature. Id. at 128-29.
115. Id. at 153.
116. Id. at 150.
117. Id. at 138.
Party’s name from appearing on any national, state or local ballots. It sought to achieve this end by providing that the Communist Party of the United States was illegal. In this respect, the Act is analogous to a party-prohibition under Article 21(2) of the German Basic Law. The Communist Control Act, however, is based on legislative, rather than judicial “findings and declarations of fact.” Among these “facts” is the assertion that the Party’s role as “the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the United States,” and that “the Communist Party should be outlawed.”

Ironically, as interpreted by the Supreme Court, the Communist Control Act proved to be both too specific and too vague to effect its intended purpose. The Court found that by specifying the “Communist Party of the United States of America,” the Act excluded the Communist Party of Indiana from its scope. Thus, the legislative proscription of a named party raised problems of party identity, problems avoided by the German practice of outlawing party programs and of forbidding the fostering of these programs by “ersatz” and “camouflage” organizations. The Communist Control Act was also too vague to achieve its intended effect. The Court refused to read the Act as denying the national Communist Party the right to participate as an employer in a state’s unemployment compensation program. The Court found the Act’s legislative history to be too sparse to specify the meaning of the clause purporting to strip the Party of its “rights, privileges, and immunities.”

119. This is clear from the Congressional debates. See 100 Cong. Rec. 14,644 (1954) (remarks of Rep. Celler); id. at 14,713 (remarks of Sen. Kefauver and Sen. Butler). See also Auerbach, The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech, 23 U. Chi. L. Rev. 173, 175 (1956) [hereinafter cited as Auerbach]. The legislative history of the Act is quite interesting. The bill was a counterproposal to one offered by Senator Humphrey, which would have made Party membership a crime. Chase, The Libertarian Case for Making It a Crime to be a Communist, 29 Temp. L.Q. 121, 124 (1956). Humphrey, it seems, was “tired of reading headlines about being 'soft' toward communism.” Id. at 125. Republicans opposed the Humphrey bill, fearing it would hinder FBI work under anti-subversion statutes by broadening the privilege against self-incrimination available to Party members. Id. at 125-26.

120. Like the judicial act of a party-prohibition, the Communist Control Act changed the legal status of one named party, rather than that of a class or group. See notes 87-88 and accompanying text supra. It was this feature of the Act that invited challenge under the bill of attainder clause. See Communist Party U.S.A. v. Catherwood, 367 U.S. 389, 391 n.2 (1961). However, this issue was not reached by the Court. See id. at 392-93.

121. Congress’ findings and declarations of fact are incorporated into the Act. See 50 U.S.C. § 841. 122. Id.

123. Id.


125. See note 88 and accompanying text supra.


127. The Court noted that “[t]he statute contains no definitions, and neither committee reports nor authoritative spokesmen attempt to give any definition of the clause . . . .” Id. at 392-93.

A further problem not noted by the Court was that the Party was never incorporated, and was
The Smith Act of 1940, a more general anti-subversion statute, was more successful in hampering the Communist Party's activities. Although originally directed against both Communist and fascist-oriented groups, this Act was most commonly and successfully invoked in the 1950s and early 1960s against members and functionaries of the Communist Party. The legislation reaches the acts of individuals, without affecting the legal status of any group. Specifically, the Act punishes "organizing" and "membership" by imposing criminal sanctions against any individual who:

- knowingly or wilfully advocates, abets, advises or teaches the duty, necessity, desirability or propriety of overthrowing the government of the United States...
- organizes or helps to organize any group... any such society, group, or assembly of persons, knowing the purposes thereof.

1. **Dennis v. United States**

In *Dennis v. United States*, eleven leaders of the Communist Party had been convicted under the Smith Act of conspiring to organize the Communist Party of...
the United States, a group advocating the overthrow of the nation by force and violence. The petitioners had also been convicted of so conspiring "knowingly and willfully." The convictions were affirmed by the Supreme Court. Chief Justice Vinson, writing for only a four member plurality, focused on the constitutionality of prohibiting the advocacy of government overthrow when that advocacy was not accompanied by action. According to the Chief Justice, the goals of the Party were not legally relevant because the means advocated by the Party to achieve these goals lacked constitutional protection:

Whatever theoretical merit there may be to the argument that there is a "right" to rebellion against dictatorial governments is without force where the existing structure of the government provides for peaceful and orderly change. We reject any principle of governmental helplessness in the face of preparation for revolution, which principle, carried to its logical conclusion, must lead to anarchy.

There was no "right" to rebellion, but there was at least a qualified right to talk about it. Since the "advocacy" clause of the Act involved speech, the proper test of the Act's constitutionality was whether the statute, as applied, reached only a "clear and present danger" that Congress had a right to prevent. The Chief Justice was not troubled by the statute's failure to state this restriction directly. The defendants could not complain that the Act did not contain "clear and present danger" in haec verbis, since they themselves accepted the standard as the proper one for testing restrictions on political speech. The Act was not unconstitutionally vague, since:

[It] well serves to indicate to those who would advocate constitutionally prohibited conduct that there is a line beyond which they may not go — a line which they, in full knowledge of what they intend and the circumstances in which their activity takes place, will well appreciate and understand.

133. See United States v. Dennis, 183 F.2d 201, 205 (2d Cir. 1950), aff'd, 341 U.S. 494 (1951).
134. 341 U.S. at 511.
135. Id. at 501.
136. Justice Holmes formulated this familiar test in a World War I espionage case. "The question in every case is whether the words used are used in such . . . a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." Schenck v. United States, 249 U.S. 47, 52 (1919). Justice Holmes later disavowed the test as it was being applied. See Whitney v. California, 274 U.S. 357, 359 (1927) (Brandeis, J. and Holmes, J., concurring) (the precedent established in Whitney was overruled in Brandenburg v. Ohio, 395 U.S. 444, 449 (1969)); Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J. and Brandeis, J., dissenting). The Court in both Whitney and Gitlow had deferred to state criminal syndicalism statutes as legislative determinations of the clear and present danger inherent in the defendants' activities. See 274 U.S. at 371; 268 U.S. at 668.
137. 341 U.S. at 515.
138. Id. at 516.
Despite this sanguine view, the plurality's own application of the clear and present danger standard offered little hope that the classic phrase could be used as a predictable test. The plurality adopted the formula used in the Court of Appeals by Judge Learned Hand: "[T]he gravity of the evil, discounted by its improbability, justifies the invasion of free speech as is necessary to avoid the danger." Because the threatened evil, namely, the overthrow of government, was so grave, only a slight probability of its realization was necessary to justify the invasion of speech rights. The plurality saw government as providing "structure," the ultimate value of any society without which "no subordinate value can be protected." In the dramatic language of the plurality:

The Government need not wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a cause whereby they will strike when the leaders feel the circumstances permit, action by the Government is required.\(^{141}\)

Even advocacy of future action could thus create a "present" danger justifying invasions of freedom of speech, a "subordinate" value.\(^{142}\)

2. *Yates v. United States*

Following *Dennis*, a number of lower-echelon Communist Party leaders were prosecuted under the Smith Act. However, the Supreme Court had provided

\(^{139}\) United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950), aff'd, 341 U.S. 494 (1951).

\(^{140}\) 341 U.S. at 509.

\(^{141}\) Id.

\(^{142}\) Id.

little guidance for the lower courts. Interpretations of Dennis in the courts of appeals varied widely but the convictions were upheld.\textsuperscript{144} Six years after Dennis, the Supreme Court clarified its position in Yates v. United States.\textsuperscript{145} In this case, the Court reversed the convictions of fourteen Communist Party members found guilty of a conspiracy to advocate the overthrow of the United States, and of organizing the Party to accomplish that overthrow. Yates neutralized the "organizing" clause of the Smith Act when applied to Communists, since the Party had been organized in 1945, and the Court held that the applicable three-year statute of limitations had run by the time the indictments of the defendants had been handed down.

Yates clarified the "clear and present danger" test used by Dennis as the standard by which to determine whether the advocacy of future action was constitutionally protected. The Court held that the Smith Act could not be construed to prohibit "advocacy and teaching of forcible overthrow as an abstract principle, divorced from any effort to instigate action to that end, so long as such advocacy or teaching is engaged in without evil intent."\textsuperscript{146} Statutory construction, not constitutional limitation, was the basis of the decision. Yet this construction imputed to Congress an awareness of the constitutional limits on Congressional power. Since the distinction between advocacy of abstract doctrine and advocacy of unlawful acts had been "consistently recognized" in the opinions of the Supreme Court, the Court assumed that the legislature had not disregarded "a constitutional danger zone so clearly marked."\textsuperscript{147} Congress could not have used "teach" and "advocate" in their everyday senses, "when they had already been construed as terms of art carrying a special and limited connotation."\textsuperscript{148} In addition, according to the Yates Court, Dennis did not stand for the proposition that the Smith Act could reach a conspiracy to advocate in the future; it reached a conspiracy to advocate action in the future. Nor did Dennis obliterate the dividing line between advocacy of political doctrine and advocacy of action: advocacy was beyond the first amendment's protection only if it urged those to whom it was addressed "to do something, now or in the future, rather than merely to believe in something."\textsuperscript{149}

In a sense, the United States Supreme Court in the Smith Act cases and the German Constitutional Court in the party-prohibitions reached a common destination by different routes. In both systems a line was drawn dividing "doc-
trine" from "action." The similarity between the two courts' approaches ends there. The Constitutional Court's delineation of the duties of a constitutional party described far more than the renunciation of force and violence as political tools. Applying Justice Holmes's formula to analyze these decisions, it can be said that the German court looked to the "substantive evils" the Basic Law allowed it to prevent while the U.S. Court fastened on "clear and present dangers," ignoring (or assuming away) the normative question of whether the threatened events might justly be prevented.\textsuperscript{150} It is a distinction with a difference.

B. Regulation or Outlawry?

Both the Communist Control Act and the Smith Act were openly prohibitory in that they both sought to outlaw certain associations and activities.\textsuperscript{151} As the German Constitutional Court recognized in formulating the party-privilege, "administrative interference" could be used to suppress political groups as effectively as could outright prohibition.\textsuperscript{152}

1. The Subversive Activities Control Act

The Subversive Activities Control Act of 1950\textsuperscript{153} embodied another legislative determination — that "Communist action" and "Communist front" organizations, as participants in a worldwide movement controlled by "the Communist dictatorship of a foreign country,"\textsuperscript{154} presented a "clear and present danger to the security of the United States and to the existence of free American institutions."\textsuperscript{155} The Subversive Activities Control Act required such organizations to register with the Subversive Activities Control Board. The Board was empowered to order the registration of any organization it found to be a Communist front or Communist action group.\textsuperscript{156} A registration order carried grave conse-

\textsuperscript{150} See notes 235-42 and accompanying text infra.
\textsuperscript{151} The Smith Act also outlawed membership, with knowledge of its unlawful goals, in an organization seeking the overthrow of government by violence. If this mere knowing membership could lawfully be made a crime, then the right of political association could be denied to subversive parties as easily under the Smith Act as under the Grundgesetz article 21(2).

The difficulties raised by ascribing party goals to party members was addressed in the companion cases of Noto v. United States, 367 U.S. 290 (1961), and Scales v. United States, 367 U.S. 203 (1961). Justice Harlan, writing for the Court in both cases, read the Act's membership clause as requiring members' specific intent to further party goals. See Scales, 367 U.S. at 221-22. "Merc" membership with knowledge of a group's goal was not criminal under the Act; therefore the Act's membership clause did not allow guilt by association. See id. at 224. But "purposeful" membership in a group engaged in "forbidden advocacy" was not protected by the first amendment. Id. at 228-29.

\textsuperscript{152} See § II.F. supra.
\textsuperscript{154} Id. § 781(4).
\textsuperscript{155} Id. § 781(15).
\textsuperscript{156} 50 U.S.C. § 786(a)-(c) (1964) (repealed 1968).
quences: the members of the registrant organization could not apply for or use passports,\textsuperscript{157} nor hold jobs in a "defense facility;"\textsuperscript{158} the organization itself was restricted in its use of public communications media,\textsuperscript{159} and was denied certain tax exemptions.\textsuperscript{160}

In \textit{Communist Party of the United States v. Subversive Activities Control Board},\textsuperscript{161} the Party challenged such an order. The American Court again deferred to the exercise of a governmental "right" of self-preservation, a right the legislature could invoke:

[Where the problems of accommodating the exigencies of self-preservation and the values of liberty are as complex and intricate as they are in the situation described in the findings of . . . the Subversive Activities Control Act . . . the legislative judgment as to how that threat may best be met consistently with the safeguarding of personal freedom is not to be set aside merely because the judgment of judges would, in the first instance, have chosen other methods.\textsuperscript{162}]

The Court reaffirmed this primacy of governmental self-preservation and the power it gave to the legislative branch in \textit{Barenblatt v. United States}.\textsuperscript{163} In this case, the Court upheld a sentence for contempt of Congress resulting from Mr. Barenblatt's refusal to answer a House subcommittee's questions regarding his Communist affiliations. The Court purported to use a sort of ad hoc balancing of the competing private and public interests at issue in the case.\textsuperscript{164} In reality, the Court balanced Barenblatt's right to remain silent against the Congressional authority rooted in "the right of self-preservation, the ultimate value of any society."\textsuperscript{165} The judicial balance between the competing interests was easily struck, with Barenblatt's private interest being subordinate to the public interest.

\begin{itemize}
\item \textsuperscript{157} 50 U.S.C. § 785.
\item \textsuperscript{158} Id. § 784(a)(1).
\item \textsuperscript{159} Id. § 789.
\item \textsuperscript{160} Id. § 790. Other consequences of a Board order are summarized in \textit{Communist Party of the United States v. Subversive Activities Control Bd.}, 367 U.S. 1, 72-73 (1961).
\item \textsuperscript{161} 367 U.S. 1 (1961).
\item \textsuperscript{162} 367 U.S. at 96-97. Ten years earlier a similar registration order, albeit pursuant to an executive order, was struck down in \textit{Joint Anti-Fascist Refugee Comm. v. McGrath}, 341 U.S. 123 (1951). \textit{McGrath} is clearly distinguishable from the \textit{Control Board} case in that the Refugee Committee was afforded no hearing. \textit{Id.} at 123. It is, nonetheless, ironic that in his concurring opinion in \textit{McGrath}, Justice Frankfurter wrote that the Committee had standing to challenge the registration order simply because injury flowed from the \textit{status} of being labelled a subversive organization. \textit{See} 341 U.S. at 157-60.
\item \textsuperscript{163} 360 U.S. 109 (1959).
\item \textsuperscript{164} \textit{Id.} at 126. Cf. \textit{Emspak v. United States}, 349 U.S. 190 (1955); \textit{Quinn v. United States}, 349 U.S. 155 (1955) (Court held that the fifth amendment privilege embraces refusal to answer Congressional subcommittee's questions regarding Communist affiliations). \textit{But see} \textit{Uphaus v. Wyman}, 360 U.S. 72 (1959), (upheld a contempt conviction for failure to comply with a subpoena issued by a state legislative committee investigating subversive groups).
\item \textsuperscript{165} \textit{Barenblatt v. United States}, 360 U.S. 109, 128 (1959). Professor Meiklejohn, in a commentary
Later cases arising under the Subversive Activities Control Act invalidated several provisions discriminating against Party members. The Court, in these cases, did not balance first amendment and public rights, but held that fifth amendment due process rights had been violated by "overbroad" denials of other legal rights or privileges.166 However, legislative neglect rather than judicial review diminished the vitality of the Act. The Control Board was discontinued as unfunded in 1973.167 The history of the Subversive Control Act reinforces the impression left by the Dennis decision, that political extremes are tolerable as long as they are not popularly, and, thus, judicially seen as a threat.

2. Artful Balances

The Supreme Court in deciding other federal and state statutes directly affecting the Communist Party or its members has not established a consistent standard for determining the permissible extent of government regulation of "subversive" groups. The only common principle in these cases is that the Court's treatment of the Party reflects the composition of the Court and the era of the decision. For example, state criminal anti-sedition statutes are "as­Slimed" precluded by federal law;168 yet, state civil actions against supposed "subversives" are not assumed to be precluded, and a county may fire an employee for refusing to answer a Congressional committee's questions about

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subversive activities. Wikipedia:Subversion

innocuously worded loyalty oaths for state employees have, on the other hand, been struck down as overbroad. Similarly, Communist Party membership may not be used as prima facie evidence of disqualification from the teaching profession.

Continuity was especially lacking in those decisions in which vocational fitness was the state interest involved. In 1950, the Court thought "Congress could rationally find that the Communist Party is not like other political parties in its utilization of positions of union leadership," and therefore upheld, after ad hoc balancing a provision of the Taft-Hartley Act which withdrew federal benefits from unions whose officers refused to sign affidavits disavowing Communist affiliations. In 1965, the Court held that a statute prohibiting present or former Communist Party members from becoming officers in a labor organization was a bill of attainder. Depending upon which decisions control, a state may, or may not, deny admission to the bar solely because of a refusal to

170. Elfbrandt v. Russell, 384 U.S. 11, 16-19 (1966). Under a "legislative gloss" put on the oath, membership in a Communist Party violated the loyalty oath and could be grounds for dismissal and perjury prosecution. Id. at 13. Justice Douglas saw such state action as resting on a doctrine of "guilt by association," since party members could be fired without a showing of their specific intent to further a party's illegal aims. Id. at 19. Cf. Shelton v. Tucker, 364 U.S. 479, 488 (1960) (the Court held that there must be "less drastic means" of monitoring schoolteachers' fitness than requiring annual affidavits listing all of teachers' organizational affiliations).

The Court in Elfbrandt grounded its decision on "the cherished freedom of association." 384 U.S. at 18. Justice White, who wrote in dissent in Elfbrandt that the state is constitutionally authorized to inquire into the affiliations of its employees with subversive groups, and may discharge those who refuse to deny such affiliations, id. at 19, had two years earlier written a majority opinion holding two state loyalty oaths unconstitutionally vague. Baggett v. Bullitt, 377 U.S. 360, 366-70 (1964). In Baggett, one of the challenged oaths required all teachers in a state university to swear that they were not "subversive persons" or "members of the Communist party" or any other "subversive organization." 377 U.S. at 365 n.4.

A similar oath was struck down as vague in Cramp v. Board of Public Instruction, 368 U.S. 278 (1961), which the Court cited in Baggett for the proposition that "the vice of unconstitutional vagueness is further aggravated where . . . the statute in question operates to inhibit the exercise of [constitutionally protected] individual freedoms." 377 U.S. at 372. The use of the word "unconstitutional" is inappropriate, since the Court in Cramp clearly meant that stricter standards of vagueness would be applied to statutes having inhibiting effects on speech. See 368 U.S. at 278.

171. Keyishian v. Board of Regents, 385 U.S. 589, 605-10 (1967). Such a disqualification was seen as overbroad.

173. Id. at 406-12. The legislative provision, § 9(h) of the Taft-Hartley Act, was later repealed by the Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 525.
176. In re Stolar, 401 U.S. 23 (1971); Baird v. State Bar of Ariz., 401 U.S. 1, 5-6 (1971). Konigsberg and Anastaplo were not distinguished in Justice Black's plurality opinion in Baird, but were merely men-
answer questions about membership in Communist or other revolutionary organizations.

This analysis demonstrates a practical advantage of the Basic Law's specific treatment of political parties. The legal principles governing parties in West Germany are narrowed and codified in the Basic Law itself. The Constitutional Court created the "party-privilege" through an admittedly imaginative interpretation of those principles. Yet, both the party-privilege and Article 21 are narrow in application. In the American system, on the other hand, the rights of free speech and assembly, and of due process, are sweepingly guaranteed; yet, these rights and their subordinate doctrines which provide the "tests" for limiting their scope,177 must be variously applied with differing results.

C. Fairness and Minority Parties

Since the Dennis plurality stressed that there was no "right of revolution" whenever peaceful means for effecting social change were available, equal political opportunities for those seeking political change would seem to be a constitutional requirement.178 Yet, in numerous areas the Court, while using the language of strict scrutiny, has upheld legislation invidious to minor parties and candidates.

The Court has counseled states to perfection in ballot-access cases, setting out an unattainable standard. States have an interest in avoiding long ballots and resultant voter confusion, as well as in preserving the "integrity" of the electoral process; such interest in turn justifies "reasonable" restrictions on the appearance of independent and "minor" candidates on state ballots.179 States may, then,
also require a "preliminary showing of a modicum of support" for a candidate before putting the candidate on state ballots, but state requirements may not be a "mere device to . . . exclude parties with significant support from the ballot." Courts have had difficulty in applying this standard.

In *Buckley v. Valeo*, the Court did not employ the purported "exactong scrutiny" of the ballot-access cases in reviewing a comprehensive scheme regulating federal election campaigns. The Federal Election Campaign Act of 1971 limited campaign expenditures by and for candidates and required that the names of those who contributed more than $100 to a candidate in a calendar year be disclosed in public records. Related provisions of the Internal Revenue Code established a system of public financing for general and primary presidential elections. The Court upheld the financing scheme while striking down campaign expenditure limits. The unequal financing of legislatively defined "major," "minor," and "new" parties did not receive the same exacting scrutiny as ballot-access because the withholding of public funding was "less restrictive" of voters' and candidates' rights than ballot regulation. The Con-

181. *Id.* The Court upheld the requirement of a petition signed by voters numbering more than 5% of those registered in a previous election.
183. *See notes 179 and 181 supra.*
185. See *id.* at 94.
188. 2 U.S.C. § 434.
191. *Id.* at 99-99.
192. *Id.* at 94.
gressional interest in not funding hopeless candidacies justified withholding assistance from candidates "without significant public support." 193

The Court did purport to scrutinize closely the Campaign Act's contribution disclosure provisions. These provisions had been attacked as overbroad as applied to minor-party and independent candidates. 194 The Court held that a "blanket exemption" for such contributions was unnecessary, but that specific exemptions from the Act's disclosure provisions were constitutionally required where a "reasonable probability" of "chill and harassment" of contributors could be shown. 195 This is, once again, a standard that has proven flexible in lower courts. 196 The Court did not consider whether delay in obtaining such exemptions could negate their remedial effects. 197

The Court's decision left in place a system which favored large, financially secure parties. Expenditure limitations were, in effect, voluntary, being imposed only upon a party or candidate that accepted public funding. 198 No candidate winning less than 5% of the vote in a presidential election would be entitled to any public assistance. 199 Relatively small contributions to candidates would become matters of public record, unless it could be shown that such disclosures were likely to have adverse effects on "unpopular" candidates or parties. The unorthodox or hopeless candidate would bear the burdens of campaign regulation without enjoying the benefits of public financial assistance. 200

Federal regulation of candidates' access to the media even further reduces the strength and potential of a minor-party candidacy. 201 The "fairness doctrine" allows broadcast licensees to cover candidates in "bona fide" newscasts, news interviews, news documentaries, and in "on-the-spot coverage of bona-fide news events" without being required to provide equal time to the candidate's adversaries. 202 Major party candidates are inherently "news"; their "natural" advan-

193. Id. at 96.
194. Interestingly, however, the Court did not consider the possibility of less restrictive alternatives. See Tribe, supra note 183, at 808.
195. 424 U.S. at 74.
197. Delay in obtaining an exemption could result in an unremedied chilling of important early contributions to a candidate. See id. at 507.
198. See 424 U.S. at 99.
199. See id. at 206.
200. It is easy to agree with Professor Shiffrin that "[t]he most disturbing aspect of Buckley is not so much its result . . . but its failure to recognize that the equality concerns of the first amendment were implicated, that deference to Congress was inappropriate . . . ." Shiffrin, Government Speech, 27 U.C.L.A. L. Rev. 565, 632 (1980).
201. In Germany public radio and television give free time, albeit in differing amounts, to candidates and parties. See note 74 and accompanying text supra.
antages over their less newsworthy opponents are made yet greater by statute. Few will doubt that this practical advantage should not be disturbed by the government; but it should also be recognized that the line between bona fide news reporting and coverage of manufactured news is closely approached when the media broadcast "debates" and joint appearances by major candidates. 203

The statute expressing the fairness doctrine only requires licensees to afford "equal opportunities" to candidates. 204 However, the statute does not prohibit a candidate who can afford much more on paid advertising than his opponent from buying this access. A licensee is not required to provide free time to any candidate, 205 a fact compounding the effect that the five-percent-of-the-vote threshold for public campaign financing that the Court approved in Buckley has on minor parties.

IV. Comparative Analysis

A. Procedural and Background Fairness

In Buckley, the Court not only severed each part of a legislative plan for campaign financing for separate review, it also saw little connection between regulation of elections and its earlier opinions on regulation of political parties. Forgotten, apparently, were the rationales from those earlier cases: The Dennis plurality's view that the possibility of peaceful change of "the existing structure of the government" precluded lawful encouragement of revolutionary activity; 206 that the most radical political activists might be limited to teaching revolution only as an "abstract doctrine"; 207 that the mere invocation of a governmental right of self-preservation would mean considerable deference to legislatures; 208 and that the vagaries of judicial review could combine procedural barriers 209 and great uncertainty of outcome 210 for parties and party members challenging discriminatory regulation.

203. See, e.g., Note, Keeping Third Parties Minor: Political Party Access to Broadcasting, 12 IND. L. REV. 715, 733 (1979), noting that in a joint televised appearance during the 1976 campaign, candidates Carter and Ford remained silent before a live studio audience for over twenty minutes when audio broadcasting equipment malfunctioned. The debate was not being "covered" by broadcast media, but was rather staged for broadcast. Id.

204. 47 U.S.C. at § 315(a).


206. See note 135 and accompanying text supra.

207. See notes 146-49 and accompanying text supra.

208. See text accompanying notes 162-65 supra.

209. See notes 225-26 and accompanying text infra.

210. See text accompanying notes 168-76 supra.
Despite Dennis's counsel to parties to use existing procedures for working changes in government, and despite the difficulties facing extremist parties in their challenges of government regulation, the Court in Buckley permitted additional impediments to the activities of "new" and "minor" parties to stand. The Court's treatment of parties has had no doctrinal underpinnings, except perhaps the notion that change of the existing order will be a matter of "pure procedural justice." Little has been done, however, to ensure that the procedures used are fair, or that they exist against a "fair background."

The Court has, using traditional first amendment analyses, concentrated on "procedural fairness" for parties, and, most notably in Buckley, has ignored "background fairness." The distinction between the two sorts of fairness is most easily shown by example:

Procedural fairness rules out one boxer having a piece of lead inside his gloves, but background fairness would also rule out any undue disparity in the weight of the boxers; similarly background fairness would rule out sailing boats or cars of different sizes being raced against one another unless suitably handicapped.

The worrisome problem in avoidance of "undue disparities" between political parties is the difficulty of finding a "stopping place" in determining when an inequality is "undue." It is a problem that the Constitutional Court has not been reticent in addressing. The Constitutional Court, by insisting on legal equality for all parties' political opportunities, has attempted to achieve background fairness. Whether deviations from this principle of equality could be justified by any governmental interests was answered by the Basic Law itself: constitutional parties enjoy a legal immunity from discrimination by government. The constitutionality of a party may be challenged only in a party-prohibition action. Here, the relevant issues are clear and need not be placed

211. See notes 190-205 and accompanying text supra.
212. One philosopher notes that "pure procedural justice obtains when there is no independent criterion for [a] right result; instead there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed." J. Rawls, A THEORY OF JUSTICE 86 (1971) [hereinafter cited as Rawls].
213. Background fairness is easier to describe than to define. John Rawls says that "only against the background of a just basic structure, including a just political constitution and a just arrangement of economic and social institutions, can one say that the . . . just procedure [requisite for pure procedural justice] exists." Rawls, supra note 212, at 87.
215. For a description of the Supreme Court's treatment of the equality principle in media-access, voting and ballot-access cases, see Karst, supra note 178, at 43-65.
216. See § II.F supra.
217. See GG art. 21. See also notes 64-69 and accompanying text supra.
218. See note 64 and accompanying text supra.
under the general rubrics of "freedom of speech" or "freedom of association." Only the party's support of the principles of the liberal democratic order is material.

Protection of this order is not entrusted to the democratic process, or to any neutral means of allowing societal change. The Basic Law's "normative" order can be protected by the court. Since parties, in the words of the Basic Law, are to "take part in the formation of the popular will" and not merely to reflect it, the Constitutional Court can lawfully make parties' constitutional status depend on the goals they seek.

It is paradoxical that there is a greater concern over background fairness in the "normative" German approach to parties than in the "neutral" American system. This paradox extends even to the judicial administration of party-cases in the two systems. In Germany, for example, because of the operative effect of a party-prohibition, members of an unproscribed party need not fear that their advocacy of that party could be a political crime. No otherwise lawful act could be prosecuted as "subversion" until the actor's party has been proscribed. By comparison, Chief Justice Vinson's assertion that the Smith Act was definite enough to give notice of the criminality of some political activity is less than satisfactory, particularly in the context of a decision in which the Court applying the Act could not produce a majority opinion.

Similarly, American "judicial restraint" can have disastrous effects for a party challenging government regulation. In the Control Board Case, the Communist Party argued that the cumulative effects of registration under the Act would result in the outlawing of the organization. Justice Frankfurter, writing for the Court, refused to consider the effects on the Party of the Act as a whole. He deemed it "wholly speculative" to imagine that the Party or its members would, following registration, actually seek to do all that the Act would prohibit. "Merely potential impairment of constitutional rights under a statute" does not "create a justiciable controversy in which the nature and extent of those rights may be litigated." A German party challenging such regulation would not have been subject to similar ripeness or standing requirements. Such regulation would not only be a possible violation of the rights of the party and its members, but also an actual encroachment upon the Constitutional Court's exclusive powers under Article 21(2) of the Basic Law.

219. See notes 29-30 and 63 and accompanying text supra.
220. See note 38 and accompanying text supra.
221. GG art. 21(1).
222. See note 37 and accompanying text supra.
223. See note 138 and accompanying text supra.
225. Id. at 71.
226. See § II.E supra. See also Decision of Aug. 17, 1956, 5 BVerfG at 140. "The monopoly on the power to determine the unconstitutionality of a party which is granted to the Constitutional Court by
B. Constitutional Ends and Means

In the United States, a party’s goals should have no legal significance if the party members seek these goals by lawful means, or, at least, do not strive to achieve their goals by inciting illegal acts.\textsuperscript{227} Article 21 of the Basic Law says bluntly that certain goals may render a party unconstitutional. American constitutional neutrality is almost a logical necessity: there is no “right” to revolution because there are no substantive limits on procedurally lawful change under the American Constitution.\textsuperscript{228} If realization of certain political goals is precluded by the Constitution, revolution would become, if not a right, then a practical necessity for proponents of those goals. The \textit{Dennis} plurality would be surprised that the German Basic Law specifically forbids some political goals. The German Basic Law permits no constitutional amendments that would disturb the principles of the dignity of man or the separation of governmental powers, or would do away with the division of the German federation into semi-autonomous Länder.\textsuperscript{229} The Basic Law expressly recognizes the right of every German to resist the overthrow of the constitutional order.\textsuperscript{230} The \textit{KPD} and \textit{SRP} decisions clearly distinguish this “constitutional order” from the government of the moment. Thus, a German could assert a legal right to abolish a government that subverted the Basic Law’s immutable principles. The Basic Law, in effect, recognizes a legal right to rebellion justiciable before the Constitutional Court.\textsuperscript{231} Means that might otherwise be unlawful may, thus, be used to protect immutable constitutional ends.

This legal framework drastically differs from the assertion of the \textit{Dennis} plurality that the value of the “very structure of society” is a value to which all else is subordinate. The philosophical difference in the outlook and background of the two courts has had a practical significance. For example, it is impossible to imagine a principled justification of the \textit{SRP} decision based on the “clear and present danger” test as applied in \textit{Dennis}. The \textit{SRP} was intensely nationalistic.\textsuperscript{232}

the Basic Law precludes administrative attacks on the existence of a party, regardless of the party’s enmity toward the liberal democratic order.” \textit{Id.}

\textsuperscript{227.} See notes 135-46 and accompanying text \textit{supra}.

\textsuperscript{228.} See note 135 and accompanying text \textit{supra}.

\textsuperscript{229.} GG arts. 79(3), 1(1), 20(2)-(3).

\textsuperscript{230.} \textit{Id.} art. 20(4). This provision was added to the Basic Law by the Act of June 24, 1968, [1968] BGBl I 709. Some commentators argue that Article 20(4) is made irrevocable by Article 79. \textit{See generally, Schmidt-Bleibtreu & Klein, supra} note 6, at 341. Even before the addition of this express right of resistance, the Constitutional Court had recognized that “the right to resist an obviously unlawful regime is no longer foreign to the new concept of law.” Decision of Aug. 17, 1956, 2 BVerfG at 376. Such resistance could only lawfully be offered as a last resort. \textit{Id.} at 377.


\textsuperscript{232.} See note 26 and accompanying text \textit{supra}. \textit{See also} Decision of Aug. 17, 1956, 2 BVerfG at 15-16: “The \textit{SRP} is concededly a right-wing party . . . .” The court characterizes a right-wing party as one which “accords the State primacy over the individual . . . .” \textit{Id.} at 16.
The Court could not have seen the Party as the domestic ally of a hostile foreign power. Although the SRP was clearly hostile to the Basic Law’s principle of the dignity of all men and to the contemporary German regime, the party was expansively “pro-German.” Thus, although the party might have posed a danger to the Federal Republic as constituted, this danger would have been wholly irrelevant if the Constitutional Court had seen the Basic Law as completely mutable, as the plurality in Dennis saw the U.S. Constitution.

The Constitutional Court could not have relied on a government’s right of self-preservation in either party-prohibition, since the Basic Law explicitly rejects any such right by creating a right to resist subverted use of government power. Under the Basic Law “the very structure of society” is not, as Chief Justice Vinson saw it in Dennis, superior to every other value. Rather, the government that provides that structure draws its worth from superior values that the order must embody. Since unconstitutional parties were suppressed in Germany not to protect a morally neutral constitutional structure, some party goals could fairly be said to be political “obscenity” beneath the protection of the Basic Law.

Article 21 is, therefore, a constitutional rejection of the American “free...
market" theory of freedom of expression.

In American constitutional law, the principle that government may not prescribe what is orthodox, whether in politics or any other realm, has risen to the level of a shibboleth. However, a difference exists between declaring what is orthodox and declaring what is unacceptable. The German court has done the latter. Although the Constitutional Court's delineation of a liberal democratic order that is linked to supra-positive values may be arbitrary in the choice of those values, the German court's practice is fundamentally more honest than invoking a clear and present danger test under which the threatened evil is the overthrow of government. The U.S. Supreme Court in its own "party-prohibition" decisions has too often sought refuge in a governmental right of self-preservation that is not only apparently unbounded, but is of unknown origin.

The right of a government to preserve itself is analogous to the personal right of self-defense. Some American courts have even viewed this personal right as a natural rather than a legal one. Personification of government has, after all,

Id. at 60-61 (emphasis in original).

While Article 21, like obscenity regulation, is inherently normative, its prophylactic effect was not overlooked by the Constitutional Court. See Decision of Aug. 17, 1956, 5 BVerfG at 142. The presence of a danger to the state is, however, clearly irrelevant to the applicability of Article 21(2). Id. at 143. One German scholar even suggests that the proper time for the prohibition of an unconstitutional political party is when the party is defenseless and politically impotent, since a party which had become powerful and presently dangerous might not be excluded from political life merely by a judicial decree. Maurer, supra note 21, at 231.

237. The market metaphor is traceable to Justice Holmes, who wrote that "the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Accord Red Lion Broadcasting Co. v. F.C.C., 391 U.S. at 390. "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . ." On the marketplace metaphor generally, see Tribe, Metatheory, supra note 4, at 240.

Suppression of intolerant groups could be easily justified under a marketplace theory of the first amendment — just as, in antitrust law, certain forms of competition can be prohibited for the sake of competition. Political groups could similarly be held to the "rules of the game" of political association in a democracy. See McWhinney, supra note 43, at 308, in which the author describes Article 21 as writing this "rules of the game" thesis into the Bonn Constitution.

238. See West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ." Id. at 642. See also Branti v. Finkel, 445 U.S. 507-14 (1980); Elrod v. Burns, 427 U.S. 347, 356 (1976) (plurality opinion).


Professor Fletcher provides three more sophisticated analyses of the individual's "right" of self-defense. First, self-defense could be seen as a subdivision of the defense of necessity, i.e., the claim being that the defender had no choice; government, obviously, could never justify its own defense against subversion on such grounds. G. Fletcher, Rethinking Criminal Law, 856-64 (1978). Second, necessary defense could be seen as a choice of lesser evils — an aggressor's safety is valued less than a defender's because of the aggressor's culpability; it would be circular to argue that a "subversive" rights of speech and association were devalued because of his culpability. Id. at 857. Third, necessary defense may be seen as vindication of the victim's autonomy. Id. at 858-64. German legal theory permits
been common at least since the time of Hobbes. Yet "government," if taken to mean a set of institutions, has no "self" to preserve. The American Court has invoked the right of government to preserve a "self" that the justices themselves see as mutable without limit.

The U.S. Supreme Court, in Communist Party cases, defers almost automatically to legislative exercise of this right of self-preservation, as if recognition of the right determined the propriety of its exercise. The Basic Law and the opinions of the Constitutional Court show that the governmental exercise of the right of self-preservation may not always be legitimate. The SRP, in its defense, made the same point: even if government may be entitled to preserve itself, the existing order may not be entitled to govern. The Constitutional Court, by finding the alternative governmental orders proposed by the SRP and KPD to be illegitimate under the Basic Law, and by citing the grounds for that illegitimacy, went as far as it could to avoid asserting a governmental interest in self-perpetuation that was rooted only in government's de facto power, or in the questionable theory that any government is preferable to anarchy.

V. Conclusion

Article 21 of the German Basic Law and American "anti-subversion" measures raise the constitutional problem of "toleration of the intolerant." The German Constitutional Court and the American Supreme Court have developed fundamentally different solutions to this problem. In the German court's view, the politically intolerant need not be tolerated at all, at least not as a political party.
because parties could turn the "popular will" away from inviolable constitutional values. In contrast, in the American view, the first amendment is a shield against repression of the intolerant, until the intolerant become so dangerous that the state's "right of self-preservation" can be asserted. The Supreme Court, stressing the degree rather than the substance of threats of harm, has been much less active in protecting social values, and more positivistic in its jurisprudence, than the Constitutional Court. In the Dennis, Barenblatt, and Buckley opinions the U.S. Supreme Court viewed the weighing of competing social interests as ongoing and political, and properly the function of Congress, not the Court. The Court's first duty was to ensure procedural fairness in the balance Congress had struck. Yet this notion of procedural fairness was compatible with actual discrimination against parties that were "minor" in Congress' eyes. Analogous discrimination was abhorrent to the Constitutional Court, jealous of its role as sole arbiter of the constitutional status of political parties. The American attempt at "pure procedural" justice failed when the Supreme Court refused to guarantee background fairness for parties.