Publicising the Global Town-square

Social Media Platforms as Addressees of Public Obligations in the United States and Germany

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Abstract

This dissertation analyses the legal protection the users of social media platforms, the town-squares of our times, in Germany and the United States (US) enjoy before state courts. It particularly focusses on the obligations of social networks to observe the fundamental rights of their users. The stark differences between both countries in today's jurisprudence and regulation are traced back to the general interpretation of the functions of fundamental rights by the US Supreme Court and the German *Bundesverfassungsgericht.*

The dissertation introduces in its Chapter 2 the constitutional jurisprudence on the effects of fundamental rights on private relationships in both countries. While the US Supreme Court has underlined its understanding of the state as exclusive addressee of constitutional obligations by its development of the state action-doctrine, the German *Bundesverfassungsgericht* has emphasised the role of fundamental rights as "objective value order" which not only binds the state but also affects private relationships. Chapter 3 outlines the doctrines which are applied to limit private autonomy for the benefit of the weaker contractual party in both countries. Such doctrines are either based on the market power a private entity has, such as the common carrier-doctrine in the US and obligations to contract in Germany, or rooted in the public function an entity serves, namely the public forum-doctrine in the US and the concept of public institutions in Germany. In particular the latter were historically not designed for private relationships but deploy nonetheless effects on individuals and corporations under particular circumstances. Following that, the adoption of the doctrines to the non-physical world, e.g. communication systems, is described. These developments of the legal doctrines culminate into the different approaches courts in both countries have taken for the application of public obligations to social platforms. Chapter 4 discusses legislative proposals and current regulation in the US and Germany, including proposals made on EU level. The dissertation concludes that the varying degrees of regulation reflect the respective stances the courts in both countries have taken on applying public obligations on private entities.

Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

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Erik Tuchtfeld

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1. Introduction

The town-square is the symbol of a space for public debate, of the market of ideas where thoughts and opinions are exchanged. Everyone has access to it, everyone can express themselves and everyone can encounter new and unfamiliar ideas. In this thesis, I investigate the legal protection of individuals using the town-squares of our times, social platforms, in the United States (US) and Germany.

Today's use and importance of social platforms is the culmination of two ongoing developments: the privatization of the public sphere[1] and the digitization of formerly physical spaces. Democratic constitutions protect these public spaces and the rights exercised in them. They enshrine the citizens' right to assembly and to freedom of expression. If these rights are under attack, it is first and foremost the task of the judiciary to act as the defender of fundamental freedoms. Traditionally, it defended the individual's rights against actions taken by the government. In this constellation, the judiciary plays its role as guardian of the constitution against dangers originating from the other branches. By now, it is only a few powerful private companies which define the limits of freedom of expression on the internet and moderate the public debate. Also, and that qualifies them in particular for a comparative approach, they exist simultaneously in most states of the world and therefore are subject to many jurisdictions at the same time.

I argue that the different constitutional cultures in the US and Germany are responsible for the current differences in legal protection users enjoy when expressing their opinions in the digital realm. In Germany, the encompassing understanding of fundamental rights has led to jurisprudence emphasising the (procedural) rights of users which later served as guidance to enact adequate legislation. In the US, on the other hand, the reluctance of courts to interfere with the relationships between private actors might be one factor why lawmakers are failing to unite behind concrete legislative proposals.

1 See for the impact privatization has on the exercise of human rights on public spaces Karima Bennoune, 'Report on the Importance of Public Spaces for the Exercise of Cultural Rights' (UN Special Rapporteur in the field of cultural rights 2019) A/74/255 paras 71–79.

1.1 Comparing the United States and Germany

The choice of judicial systems in this thesis is justified by the influence both countries have on the regulation of global social platforms and their mutual classification as liberal, western democracies. Both share a common set of values, enshrined in the fundamental rights they guarantee in their constitutions. They are strong allies and are culturally intertwined. However, when it comes to the function of fundamental rights, courts in both countries have taken substantially different stances, as I will demonstrate. Germany has a long constitutional culture of a broad, encompassing understanding of fundamental rights which also includes effects on private relationships. Such an understanding has always been promoted and advanced by the *Bundesverfassungsgericht*, the German Constitutional Court. US jurisprudence, on the other hand, has focused on the state as the addressee of the public obligations deriving from the Constitution. These different constitutional cultures are reflected in the judicial decisions concerning the exercise of political rights on social platforms and, eventually, also in the laws the legislative powers—on state, federal and supranational level—have (not) enacted in this field.

Their position when it comes to platform regulation is outstanding: Home to these platforms, the US legislator wields the most immediate regulatory potential. The platform's CEOs have repeatedly had to appear before Congress to explain and justify their companies' actions.[2] Most recently, since the election of Donald Trump as US President in 2016, and the alleged Russian interference via Facebook, Twitter and others,[3] these social media platforms' internal policies on content moderation have been under public scrutiny. Reform proposals for "holding Big Tech accountable" are on the table. With current political

2 See e.g. 'Mark Zuckerberg Testimony: Senators Question Facebook's Commitment to Privacy' *The New York Times* (10 April 2018) <https://www.nytimes.com/2018/04/10/us/politics/mark-zuckerberg-testimony.html> accessed 1 March 2022; Mike Isaac, Cecilia Kang and Nathaniel Popper, 'Zuckerberg to Admit That Facebook Has Trust Issues' *The New York Times* (22 October 2019) <https://www.nytimes.com/2019/10/22/technology/zuckerberg-libra-facebook-cryptocurrency.html> accessed 1 March 2022; Kate Conger, 'Big Tech C.E.O.s Face Lawmakers on Disinformation' *The New York Times* (25 March 2021) <https://www.nytimes.com/live/2021/03/25/business/social-media-disinformation> accessed 1 March 2022.

3 Mike Isaac and Daisuke Wakabayashi, 'Russian Influence Reached 126 Million Through Facebook Alone' *The New York Times* (30 October 2017) <https://www.nytimes.com/2017/10/30/technology/facebook-google-russia.html> accessed 1 March 2022.

events, such as the 2021 Capitol attack[4] or leaks by whistleblowers like Frances Haugen,[5] this debate has become even more controversial. However, there are still no concrete legislative proposals with good prospects of becoming law.

At the same time, it was the debate concerning "hate speech", insulting, illegal comments on social media, which put the regulation of social networks on the German legislator's agenda. The result was the enactment of a globally discussed "law for the improvement of law enforcement in social networks" (*NetzDG*) in 2017.[6] Further, the European Union (EU), with Germany as an important member state, has shown its willingness to lead the regulation of the digital sphere. Its General Data Protection Regulation (GDPR) is understood as a role model for data protection legislation around the world.[7] In December 2020, the EU Commission proposed two fundamental laws for the regulation of digital companies: the Digital Services Act and the Digital Markets Act have been labeled as proposals for a "constitution of the internet"[8]. In particular the first incorporates many approaches from the *NetzDG*, which itself is inspired by earlier jurisprudence of German courts when it comes to the obligations of social media platforms.

4 Sheera Frenkel, 'The Storming of Capitol Hill Was Organized on Social Media.' *The New York Times* (6 January 2021) <https://www.nytimes.com/2021/01/06/us/politics/protesters-storm-capitol-hill-building.html> accessed 1 March 2022.

5 'The Facebook Files' *Wall Street Journal* (1 October 2021) <https://www.wsj.com/articles/the-facebook-files-11631713039> accessed 1 March 2022.

6 The Global Network Initiative came to the conclusion that the law 'poses a threat to open and democratic discourse', see 'Proposed German Legislation Threatens Free Expression' (*Global Network Initiative*, 20 April 2017) <https://globalnetworkinitiative.org/proposed-german-legislation-threatens-free-expression-around-the-world/> accessed 1 March 2022.

7 One of the drafters of the GDPR with a fierce argument for its importance, Jan Philipp Albrecht, 'How the GDPR Will Change the World' (2016) 2 European Data Protection Law Review (EDPL) 287; rather critical and pointing towards European hegemony, Roxana Vatanparast, 'Designed to Serve Mankind? The Politics of the GDPR as a Global Standard and the Limits of Privacy' [2020] Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 819.

8 The EU Parliament seems to have the ambition to 'put the constitution of the internet on a modern basis', Annegret Bendiek, 'The Impact of the Digital Service Act (DSA) and Digital Markets Act (DMA) on European Integration Policy' (swp 2021) 8; see also Eike Kühl, 'Digital Services Act: Das neue Grundgesetz für Onlinedienste' *Die Zeit* (Hamburg, 14 December 2020) <https://www.zeit.de/digital/internet/2020-12/digital-servcies-act-eu-kommission-facebook-google-amazon-gesetz/komplettansicht> accessed 1 March 2022.

1.2 Structure and Methodology

This thesis follows a functional approach[9] for analysing the legal protection users of social media platforms in the US and Germany enjoy. It compares the jurisprudence on the regulation of private entities in both countries to explain recent judgments of courts as well as legislative (in-)actions regarding the obligations of social platforms as digital public spaces of our time.

Hereby, a particular focus lies on constitutional jurisprudence. I understand constitutional jurisprudence in a broad sense, not only including judgments by the US Supreme Court or the German Constitutional Court but all jurisprudence on claims based on fundamental rights violations. The effect of an application of fundamental rights to private relationships is a limitation of the private autonomy of the contracting parties for the benefit of the "weaker" party. Thus, I will not only consider constitutional jurisprudence but also other cases limiting private autonomy based on other reasons, such as market power, as they—at least partly—have led to similar results. For the purpose of this thesis I define the obligations deriving from such a restriction of private autonomy as "public obligations" because they regularly consist of duties the state has to respect when carrying out its tasks.

The special value of constitutional law and its jurisprudence in this field derives mainly from two reasons: first, the importance of social media platforms for the exercise of fundamental rights, such as freedom of speech; and second, from the lack of regulation of these platforms through ordinary law. More than 2.9 billion users access Facebook on a regular basis.[10] Political parties and governments try to influence their (potential) voters or constituents via social media, (fake) news are spreading, and political debates take place with posts and comments being the means to express one's opinion. Social media's importance for modern communication and public debate can hardly be overstated. In this context, the legislation prohibiting particular speech, such as defamation laws, applies to the users located on (private) digital spaces as it does to people shouting on a (public)

9 For more details on this method, see Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, Oxford University Press 2019); Mark van Hoecke and Maurice Adams (eds), *Comparative Methods in Law, Humanities and Social Sciences* (Edward Elgar Publishing Limited 2021) 65–78.

10 'Facebook MAU Worldwide 2021' (*Statista*, February 2022) <https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/> accessed 1 March 2022.

physical town-square. No amendments to the law were necessary.[11] But on the opposite side, on the challenging questions of what content must be allowed, published or carried on the platforms, ordinary law remained silent for a long time (and still remains so in the US). That is why courts have had to assess how far fundamental rights can be a mean to fill this regulatory gap.

To understand today's court decisions on the public obligations of social networks, this thesis goes back to the historical roots of the doctrines applied to these cases. It starts with a general analysis of the dichotomy between the private and the public sphere in the jurisprudence of the US Supreme Court and the German *Bundesverfassungsgericht*. While doing so, a focus lies on the way political liberties, such as the right to freedom of expression or the right to assembly, can influence the relationships between private actors (Chapter 2).

Chapter 3 constitutes the core of this thesis and demonstrates how courts in both countries have established public obligations for private entities under certain circumstances. It starts with the historical origins of the existing doctrines for the "physical world" which are categorized by their "legal trigger" (section 3.1). Such a trigger could be the importance a space has for the exercise of political rights, as it is the case for the public forum-doctrine. In other cases, the public obligations are based on the economic power of an entity (usually in combination with some sort of public element), leading to the development of the common carrier-doctrine in the US or obligations to contract in Germany. Here, it already shows that German courts focus on the effective exercise of political rights, while US courts emphasize the main function of fundamental rights as taming the state and underline the importance of private autonomy. Courts in both countries have generally been open to applying their doctrines to the "non-physical", virtual world (section 3.2). However, there is a notable difference between carrying a person or a good versus an opinion for those obliged. Section 3.3 analyses the different degrees of protection courts in the US and Germany have awarded to private entities in such matters. This eventually leads to the jurisprudence on the obligations of social networks to protect their users' freedom of expression (section 3.4). As courts in both countries further developed their existing,

11 It is, of course, true that social platforms also entail many new questions regarding the removal of so-called "awful but lawful" content, in particular in the fight against disinformation and hate speech. However, with defamation laws as public and community guidelines as private regulation the legal framework is substantively more nuanced and detailed than the legal basis for the obligation to host content.

diverging doctrines, the differences between both legal cultures also deepened. The reluctance of US courts to establish any requirements which social networks must meet when moderating the content published by their users contrasts sharply with the approach by German courts. The latter were only disagreeing on how far the obligations deriving from the fundamental rights of the platforms' users should go. Despite the stark difference in obliging the platforms to respect fundamental rights, courts in both countries agree that at least social media pages managed by government officials on social networks constitute a public enclave in this private-owned space, leading to successful claims based on violations of freedom of expression against the officials behind the pages (section 3.5).

In the last chapter, current approaches regarding the regulation of social media platforms in the US and Germany, including measures on the European level, are analysed. While European legislation largely reflects the developments initiated by courts in the last years, lawmakers in the US—possibly due to missing guidance caused by judicial restraint—are missing a common theme when it comes to the aim and methods of platform regulation.

2. The Private-Public Dichotomy in Constitutional Law

The differentiation between private and public actors is fundamental for most legal systems when formulating rights and obligations. This is particularly true in the field of constitutional law, in which the direct addressee of constitutional obligations is first and foremost the state. However, most constitutions accept by now that constitutional law, especially fundamental rights, does also have effects on purely private relationships.[12] In which manner and to which extent depends on the history and understanding of the constitution in question.

2.1 In the United States

The US Constitution, as signed in 1787 and ratified in 1788, initially did not contain any fundamental rights.[13] However, this changed soon as in 1791 the first ten Amendments

12 See for many national reports (and a comparative analysis as general report) Verica Trstenjak and Petra Weingerl (eds), *The Influence of Human Rights and Basic Rights in Private Law* (Springer 2015).

13 David Brian Robertson, 'The Constitution from 1620 to the Early Republic' in Mark Tushnet, Mark A Graber and Sanford Levinson (eds), *The Oxford Handbook of the U.S. Constitution* (Oxford University Press 2015) 34.

were ratified, the so-called Bill of Rights.[14] This included the First Amendment, guaranteeing that

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble […].

Since the Constitution was the result of the colonies gaining independence from Great Britain and its monarchy, it is motivated by a clear will to transform negative experiences with this form of public power into constitutional safeguards to prevent future tyrants or tyrannical institutions.[15] Beyond that, however, British legal traditions still had a significant impact on the constitutional thinking of the drafters of the Constitution.[16] The designers of the US Constitution had experienced how the English legal system had given fundamental, but not supreme rights to the people.[17] Based on the doctrine of Parliamentary sovereignty,[18] the rights applied towards the executive, they did not limit the possibilities of Parliament. In consequence, they did not constitute an effective protection against the state.[19] To counter this threat of insufficient protection, the founders of the US Constitution referred to natural law as source for fundamental rights.[20] The rights ought to secure pre-existing liberty against an omnipotent government, against Hobbes' *Leviathan*. The purpose of the Bill of Rights was thereby fulfilled with a negative understanding of fundamental (and supreme) rights, guaranteeing freedom *from* the state.

2.1.1 State Action Doctrine

In shaping this concept of fundamental rights, the US Supreme Court developed its "state action doctrine". Following this doctrine, applied since the late nineteenth century, the Constitution only restricts the activities of the state, including all branches and federal and

14 ibid 35.
15 ibid 20.
16 ibid 19–20.
17 Dieter Grimm, 'The Protective Function of the State' in Georg Nolte (ed), *European and US Constitutionalism* (Cambridge University Press 2005) 139–140; more general on the concept of Parliamentary Sovereignty, see Ángel Aday Jiménez Alemán, 'Parliamentary Sovereignty' in Rainer Grote, Frauke Lachenmann and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (2018) para 6.
18 Alemán (n 17) para 9.
19 Grimm (n 17) 139–140.
20 ibid; Ioanna Tourkochoriti, 'Bill of Rights' in Rainer Grote, Frauke Lachenmann and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (2020) para 8.

state level alike, not those of private actors.[21] The Supreme Court assumes "state action" if one of the following two criteria is met: either there is significant involvement of the state or a private actor performs a public function.[22] The state action doctrine originates from the 1870-1880s with its first cases concerning obligations deriving from the Fourteenth Amendment, in particular the Equal Protection Clause mandating that no state shall "deny to any person within its jurisdiction the equal protection of the laws". Focussing on the wording of the provision, the Supreme Court found its *Civil Rights Cases* in 1883[23] that the Congress has no constitutional power to adopt a law forbidding US citizens to discriminate on the basis of race when offering accommodations, facilities or "other places of public amusement".[24] Since the Equal Protection Classical only addresses states, the Congress has only the power to enact legislation enforcing the prohibition of states to discriminate.[25] Individuals cannot be the subject of such legislation.[26] This interpretation of the Fourteenth Amendment continues until today. For example, in 2000 the Supreme Court found that the Congress had no power to enact parts of the Violence Against Women Act of 1994, giving victims of gender-based violence a private civil remedy to sue their alleged perpetrator in federal courts.[27] The US government argued that insufficient investigation of gender-motivated crime by the state authorities is an interference by the state with the right to life and liberty of the victims. Therefore, the possibility of a private remedy for the victims of such crimes constitutes an enforcement of the Equal Protection Clause against state actions. However, the Court found, referring explicitly to precedents set by the *Civil Rights Cases* in 1883,[28] that the Fourteenth Amendment gives the Congress only the constitutional power to enact legislation which gives individuals remedies against the state, not against other individuals.[29] Anti-discrimination law which has been considered constitutional by the Court, such as the Civil Rights Act of 1964, finds it constitutional source in the Commerce

21 Stephan Jaggi, 'State Action Doctrine' in Rainer Grote, Frauke Lachenmann and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (2017) para 1; describing (and criticizing) this 'dividing line' between the public and the private sector, Erwin Chemerinsky, 'Rethinking State Action' (1985) 80 Northwestern University Law Review 503, 504.

22 Terri Peretti, 'Constructing the State Action Doctrine, 1940–1990' (2010) 35 Law & Social Inquiry 273, 276; Jaggi (n 21) paras 5–10.

23 As Peretti points out, this was in fact not the first mention of the 'state action doctrine' since it was already applied in US v. Cruikshank (1875) and Virginia v. Rives (1879). However, the Civil Rights Cases (1883) are generally seen as origin of the doctrine, Peretti (n 22) 275–276.

24 *Civil Rights Cases* (1883) 109 US 3 (US Supreme Court) the law in question can be found on p. 9.

25 ibid 11.

26 ibid.

27 *United States v Morrison* (2000) 529 US 598 (US Supreme Court).

28 ibid 621–622.

29 ibid 625–626.

Clause of the US Constitution, giving the Congress power to "[t]o regulate Commerce [...] among the several States".[30]

In 1948, it seemed like the strict understanding of the state action doctrine might be broadened. In its *Shelley* decision, the Court found that private agreements discriminating on the basis of race do not violate the Fourteenth Amendment in itself,[31] however, an enforcement of such contracts by state courts would constitute "state action" and therefore be contrary to the Equal Protection Clause.[32] Some understood the judgement as a victory of the legal realist movement which gained popularity during the first half of the 20th century and generally rejected the private/public distinction.[33] Its supporters argued that private law as a result of voluntarily, autonomous decisions by individuals is a fiction. For example, by protecting the right to property, the state effectively forces individuals to obey the rules of the owners, as they possess what is needed to survive.[34] Discussing the human need to eat while all food is owned by someone, *Hale* summarized it vividly: "While there is no law against eating in the abstract, there is a law which forbids him to eat any of the food which actually exists in the community—and that is the law of property."[35]

By others, the judgement was met with harsh criticism as some feared it would render the state action doctrine ultimately ineffectual.[36] Every private agreement must be somehow enforceable to effectively govern the relationship between two or more individuals. If the enforcement of a private contract by a state court triggered the state action doctrine and activates thereby the binding to the Constitution, individuals would be bound indirectly to the rights guaranteed in it.[37] It is noteworthy how the Supreme Court itself did not build upon this judgement in the following, but rather seemed to ignore it. While it still affirmed

30 *Heart of Atlanta Motel v United States* (1964) 379 US 241 (US Supreme Court).
31 *Shelley v Kraemer* (1948) 334 US 1 (US Supreme Court) 13.
32 ibid 19–23.
33 Chemerinsky (n 21) 523–525; see also with a critical overview Mark D Rosen, 'Was Shelley v. Kraemer Incorrectly Decided - Some New Answers' (2007) 95 California Law Review 451, 470–474.
34 On the 'sovereign power' conferred to the 'captains of industry and finance' Morris R Cohen, 'Property and Sovereignty' (1927) 13 Cornell Law Review 8.
35 Robert L Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) 38 Political Science Quarterly 470, 472. He later points out that also the customers and laborers can execute some form of 'coercion', p 474.
36 Outlining the critique, Peretti (n 22) 281; Mark Tushnet, 'The Issue of State Action/Horizontal Effect in Comparative Constitutional Law' (2003) 1 International Journal of Constitutional Law 79, 81.
37 Like this also Colm O'Cinneide and Manfred Stelzer, 'Horizontal Effect/State Action' in Mark Tushnet, Thomas Fleiner and Cheryl Saunders (eds), *Routledge Handbook of Constitutional Law* (Taylor & Francis Group 2012) 180.

the finding of state action in many cases until the 70s, it refused to apply the *Shelley* rule.[38] In the following decades, the affirmation of state actions in the jurisprudence of the Court decreased substantially.[39] This might be explained with the conservative turn the Court took after its rather liberal composition in the decades before.[40] Since many cases regarding the application of the state action doctrine involved the constitutional validity of anti-discrimination laws, liberal, civil-rights-friendly Justices tended to prefer a broader interpretation of state actions. This is particularly remarkable since it is not possible to categorize the current positions on the application of First Amendment rights to online platforms along party lines.[41] Nowadays, the rather narrow understanding of the state action doctrine clearly prevails in the jurisprudence of the court.

Many argue that the reason for the mainly[42] negative function of the rights enshrined in the US Constitution lies in its history, in the circumstances of its creation.[43] *Judge Posner* for example argued that the drafters of the Constitution recognized that the main danger for a citizen is the enormous power of the government. Those in power—the majority—strive to expand their influence to control the minority and treat them on a discriminatory basis.[44] The majority has no inherent motivation to not turn itself against those who it assumes to be different, to be a danger to its own way of living. This lack of motivation needs to be compensated by a stable limitation: the constitution. In contrast, this argumentation does not apply for legislation hindering the people to slaughter each other. The idea is that majority and minority have the same—or similar—interests in living in a safe society free from assaults by others. That is why these issues could be delegated to the regular law-making process, without a need for constitutional guidelines.[45] While this assessment ignores any exercise of private, systemic power and led to an understanding of fundamental rights which limited the possibilities of the legislative power to fight discrimina-

38 Peretti (n 22) 287; on how the courts were seen a purely 'neutral arbiters' in subsequent judgments, O'Cinneide and Stelzer (n 37) 180.
39 See for an insightful overview of the leading state action cases from 1940-1990 Peretti (n 22) 282.
40 ibid 283–290; Tushnet understands the focus on the state action doctrine as reaction of the Court to an increasing commitment of the government to social democratic norms, as the Court tried to insulate private decision-making, see Tushnet (n 36) 88.
41 See on this in more detail, section 4.1 of this thesis.
42 The Thirteenth Amendment states that "[n]either slavery nor involuntary servitude […] shall exist within the United States", which is generally understood as not only addressing the state but also individuals. See on this already *Civil Rights Cases* (n 24) 20; Jaggi (n 21) para 1.
43 Frank I Michelman, 'The Protective Function of the State in the United States and Europe: The Constitutional Question' in Georg Nolte (ed), *European and US Constitutionalism* (Cambridge University Press 2005) 164–167.
44 *Jackson v City of Joliet* (1983) 715 F2d 1200 (US Court of Appeals, Seventh Circuit) 1203–1204.
45 Like this—with reference to Posner—also Michelman (n 43) 165.

tion, it might be a convincing explanation why those who favour an *originalist* interpretation of the Constitution underline the negative functions of the rights enshrined in it.

Some point out that general, societal reasons lead to the rather strict interpretation of the US Constitution and its non-application to private relationships. However, the ordinary law which is formed constantly by the legislative power, so to say, "by the people" in democracies, does not differ fundamentally when it comes to "classical" norms protecting individuals.[46] Bodily harm and manslaughter are penalized by the criminal systems in the US as they are in European countries (which often know a concept of positive obligations or horizontal application of fundamental rights). It is the state which intervenes hereby in the relationship between two private individuals, not allowing one to kill the other. In constitutional systems accepting the concept of positive obligations, the criminal system constitutes one means of the state to fulfil its positive obligation to protect the right to life and physical integrity of its citizens.[47] The same goes for tort law, regulating civil remedies between individuals after one violated the rights of another.[48] Such obligations are also not strange to the US constitution, as I will show in the following.

2.1.2 Positive Obligations and Effects on Private Relationships

While the application of fundamental rights to private relationships and "positive rights" (or positive obligations) deriving from fundamental rights are similar, they are not the same. The first leads to the (indirect) application of constitutional law to the relationship between two individuals, for example when evaluating the validity of contractual agree-

46 Focussing on this when asking whether the doctrinal difference between Germany and the USA is a 'real' social difference, ibid 177–180.

47 On the prerequisites of an individual right to effective criminal persecution, see the German Constitutional Court in *Kunduz* [2015] *Bundesverfassungsgericht* 2 BvR 987/11, juris [20–24]; also fundamental on the need of a criminal prohibition of abortion *Schwangerschaftsabbruch II* [1993] *Bundesverfassungsgericht* 2 BvF 2/90, 2 BvF 4/92, 2 BvF 5/92, juris [161–177] (inter alia); comparing the German and the US constitutional approach to abortion David P Currie, 'Positive and Negative Constitutional Rights' (1986) 53 University of Chicago Law Review 864, 869–870.

48 On Germany Claus-Wilhelm Canaris, 'Grundrechte Und Privatrecht' (1984) 184 Archiv für die civilistische Praxis 201, 229–231; Josef Isensee, '§ 191 Das Grundrecht Als Abwehrrecht Und Als Staatliche Schutzpflicht' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol IX (3rd edn, CF Müller 2011) para 197; for an international overview see Verica Trstenjak, 'General Report: The Influence of Human Rights and Basic Rights in Private Law' in Verica Trstenjak and Petra Weingerl (eds), *The influence of human rights and basic rights in private law* (Springer 2015).

ments ("horizontal obligation").[49] The latter only addresses the state and obligates it to act to protect the freedom of its citizens against interferences by other individuals (positive obligations, "duty to protect").[50] One example for such an action would be, as mentioned already above, a law forbidding the killing of others.

A famous case showing how the Supreme Court rejects this concept of positive rights of individuals against the state is *DeShaney*.[51] The Court had to decide whether the state violated its positive obligation deriving from the right to bodily integrity when it did not react to a multitude of reports of a child being beaten regularly by his father. Ultimately, the child suffered permanent brain damage and became disabled. The Court concluded that the Fourteenth Amendment does only limit the state's power to act and does not serve "as a guarantee of certain minimal levels of safety and security. [...] Its purpose was to protect the people from the State, not to ensure that the State protected them from each other."[52] In defending its judgement,[53] the Court explicitly refers to the possibility of the "people of Wisconsin" to create in its regular law-making process a tort law system which holds the state liable for such inactions. But to create such a system would not be the task of the Court.[54]

That the Court was not always that reluctant when assessing whether the state has a constitutional obligation to protect the right to life shows it jurisprudence on the matter of abortion. In *Roe v. Wade*, sixteen years before *DeShaney*, the Court famously decided that the right to privacy of a woman is violated when the state generally, without taking into account the stage of the pregnancy, prohibits abortions.[55] From the standpoint of the state action doctrine this conclusion is no surprise: Since there is no constitutional duty to protect life against interferences by other individuals, the intrusion by the state into the

49 Christopher Unseld, 'Horizontal Application' in Rainer Grote, Frauke Lachenmann and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (2017) para 2.

50 On (different types) of positives rights Emily Zackin, 'Positive Rights' in Mark Tushnet, Mark A Graber and Sanford Levinson (eds), *The Oxford Handbook of the U.S. Constitution* (Oxford University Press 2015) 717–719; on the positive and negative side of 'Drittwirkung' (indirect effects of fundamental rights on private relationships) Martin Borowski, 'Drittwirkung' in Rainer Grote, Frauke Lachenmann and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (2018) paras 13–16; on the difference but proximity between horizontal application and positive rights Unseld (n 49) para 22.

51 *DeShaney v Winnebago County Dept of Social Services* (1989) 489 US 189 (US Supreme Court).

52 ibid 195–196.

53 As such the last paragraphs must be read, describing how '[j]udges and lawyers, like other humans, are moved by natural sympathy in a case like this', ibid 202–203.

54 ibid 203.

55 *Roe v Wade* (1973) 410 US 113 (US Supreme Court) 114.

private decision-making of a woman can hardly be constitutionally justified. Of course, the Court also takes into consideration the state's own interest "in protecting the potentiality of human life."[56] But it seems like one decisive factor for the Court was the denial of personhood to the unborn, based on the assessment that it is not on the judiciary to decide when life starts, since not even the experts in the fields of medicine, philosophy and theology arrive at any consensus.[57] Would a fetus be a "person" in the sense of the Constitution, "the appellant's case, of course, [would] collapse [...], for the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment."[58] Why is that? If the fetus' right to life only protects it against actions by the state—what the state action doctrine suggests—why would it ("of course") prevail when assessing a situation in which another individual, the pregnant woman, and not the state acts? It would still be a situation in which the state only interferes with the rights of one individual: the woman carrying the unborn. The reasoning of the Court suggests that it either implicitly assumes a constitutional duty of the state to actively protect the right to life or even of the pregnant woman and her doctor to respect the life of the unborn.[59]

Furthermore, apart from the federal Constitution, US constitutionalism is no stranger to positive obligations. Several state constitutions include individual rights demanding an action by the state.[60] These rights can be clustered into fields of education, workers' rights, environmental protection and welfare rights.[61] Many of them are not lacking any details, as for example the Illinois Constitution of 1870 and the New Mexico Constitution of 1911, both declaring explicitly the obligation of the legislature to pass laws providing ventilation in coal mines.[62] Rights which have been added by amendments in the more recent history (the 1960-70s) focus mainly on the right to a healthy environment. They remain, compared to some of the quite specific provisions protecting labour rights, rather vague and general (e.g. the Illinois Constitution "Each person has the right to a healthful environment"), leaving it to the courts to define their particular scope. But the question of (judicial) enforcement of these provisions has proven to be the weak spot of a more positive understanding of US constitutionalism: Even the states which contain positive obligations lack

56 ibid 162–164.
57 ibid 159–162.
58 ibid 156–157.
59 Michelman (n 43) 174–175.
60 See Emily Zackin, *Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights* (Princeton University Press 2013).
61 For the first three: ibid Chapter 5, 6 and 7; for the latter: Helen Hershkoff, 'Positive Rights and State Constitutions: The Limits of Federal Rationality Review' (1998) 112 Harvard Law Review 1131.
62 Zackin (n 60) 113–114.

jurisprudence effectively enforcing them.[63] There is no coherent doctrine by state constitutional courts on how such positive obligations, such "duties to protect" shall be interpreted. Of course, as *Zackin* rightly points out, the value of constitutional provisions goes beyond their judicial enforcement.[64] They might guide politics and provide a frame for legislation but regarding their immediate judicial effects they remain a mere "paper tiger".

2.1.3 The Negative Constitution

In summary, the understanding of the effects of the fundamental rights enshrined in the US Constitution is largely focused on their negative function, protecting citizens against an omnipotent, tyrannical government. This finding is central to the interpretation by the Supreme Court since its first *Civil Rights Cases* from the 1880s. It is the state which is obligated by the constitution, not private entities. While this perception is still applied today (including referrals to the early cases), the Court has occasionally taken a small bite from the forbidden fruit of constitutional values affecting private relationships.[65] But these cautious steps have never developed into a serious, coherent doctrine. On the contrary, the Court withdrew from this field and clarified the importance of the *state action doctrine* over and over again.

While the explicit provisions in some state constitutions show that positive constitutional obligations do exist in US constitutionalism, these exceptions were rather reluctantly enforced by the courts. Whether this is rooted in the historical background of the drafting process of the constitution, the exact wording of the text, the professional culture, or political philosophy (or maybe a mixture of all of these and other reasons) remains impossible to be ultimately determined.[66] The result, however, is clear: the US Constitution must be understood as a negative constitution, neither obliging the state to act, nor having effects on horizontal relationship between individuals.

63 Lawrence Friedman, 'Rights in Front of Our Eyes: Positive Rights and the American Constitutional Tradition Book Review' (2013) 44 Rutgers Law Journal 609, 615–617; on welfare rights Hershkoff (n 61) 1136.

64 Zackin (n 60) 197–198.

65 With the by far biggest bite being *Shelley* (n 31); see on other cases which might involve affirmative obligations Currie (n 47).

66 Discussing all these reasons Michelman (n 43); for a strong argument on the lack of commitment to social democratic norms in the US political system as reason for denying the existence of positive rights, see Tushnet (n 36) 88–92.

2.2 In Germany

The current German constitution, the *Grundgesetz*, cannot be properly understood without taking a short look at its two most important predecessors, the *Paulskirchenverfassung* and the *Weimarer Reichsverfassung*. They are the foundation German constitutionalism is built on, both containing fundamental rights catalogues and—which is of importance for this thesis—not only classical, negative fundamental rights, but also positive obligations mandating the state to take action (and giving individuals an individual right for such actions).

The Frankfurt Constitution of 1848 (*Paulskirchenverfassung*) was the first democratic Constitution in Germany. Drafted as revolutionary Constitution by the *Nationalversammlung* in the *Paulskirche*, it never came into force.[67] The revolution was lost when King Friedrich Wilhelm IV of Prussia rejected the offer of becoming the emperor of a united German Empire, organized as constitutional monarchy.[68]

The draft of the constitution, however, can be considered genuinely progressive. It contained a comprehensive catalogue of fundamental rights, focussing on classical negative rights, such as freedom of expression and the right to assembly.[69] Unlike the drafters of the US Constitution, the authors of the *Paulskirchenverfassung* did not rely upon natural law as source for fundamental rights but rather upon historical experiences and positive constitutional law.[70] Apart from its negative function, the fundamental rights served the purpose of being an objective order which should constitute the state's foundation and have general effects on the legal order.[71] While the discussed right to work was not included in the final version of the constitution,[72] some social rights, obliging the state to take particular actions, were added to the text.[73] This included for example a right to free

67 On the judicialization of the March revolution in Germany see Walter Pauly, '§ 3 Die Verfassung Der Paulskirche Und Ihre Folgewirkungen' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol I (3rd edn, CF Müller 2003) paras 8–18.

68 ibid 43.

69 ibid 29.

70 ibid 30; Jörg-Detlef Kühne, '§ 3 Von Der Bürgerlichen Revolution Bis Zum Ersten Weltkrieg' in Detlef Merten and Hans-Jürgen Papier (eds), *Handbuch der Grundrechte in Deutschland und Europa*, vol I: Entwicklung und Grundlagen (CF Müller 2004) paras 7–9.

71 Pauly (n 67) para. 29; Kühne (n 70) paras 11–14.

72 Pauly (n 67) paras 29, 34.

73 Finding fundamental rights belonging to all categories of Jellinek's later developed status doctrine Kühne (n 70) para 16.

public schooling.[74] Also, some provisions—mostly concerning relationships of subservience—were directly binding upon individuals and declared them "forever void".[75]

After World War I, the democratic revolution in Germany led to the first democratic constituted nation-state on German grounds, the "Weimar Republic". Its Constitution of 1919 was inspired by the *Paulskirchenverfassung* and did contain a catalogue of fundamental rights which resembled the model from 1848 to some extent. It contained the classical negative, political rights (right to freedom of expression, freedom to assembly, religious freedom) but also positive rights.[76] For example, families with many children enjoyed a particular protection by the state and basic public education was guaranteed to be free of charge.[77] However, unlike the Constitution of 1848, the Constitution of 1919 did not contain any provisions directly binding upon individuals. Its obligations and mandates were only addressed to the state. The fundamental rights catalogue of *Weimar* never gained the power of the *Grundgesetz*. While the rights enshrined in the Constitution were legally binding (and not merely guidelines), particularly for the executive branch,[78] the federal legislator and the President of the Reich with his executive orders could easily limit their effect.[79] The Constitution was never formally suspended, however, it lost any normative function during the time of Nazism.[80] Many fundamental rights were already suspended in February 1933 when the "Decree for the Protection of People and State" by President Paul von Hindenburg came into force, only a month after the seizure of control by Adolf Hitler. In theory only for a limited time, in fact for the next 12 years.[81]

74 Section 157 of the *Paulskirchenverfassung*.
75 Section 166 et seq. of the *Paulskirchenverfassung*, on this Jörg-Detlef Kühne, '§ 3 Von Der Bürgerlichen Revolution Bis Zum Ersten Weltkrieg' in Detlef Merten and Hans-Jürgen Papier (eds), *Handbuch der Grundrechte in Deutschland und Europa*, vol I: Entwicklung und Grundlagen (CF Müller 2004) para 17.
76 See on this from the Weimar time Carl Schmitt, *Verfassungslehre* (11th edn, Duncker & Humblot 2017) 169–170; Hans Schneider, '§ 5 Die Reichsverfassung Vom 11. August 1919' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol I (3rd edn, CF Müller 2003) para 35; Horst Dreier, '§ 4 Die Zwischenkriegszeit' in Detlef Merten and Hans-Jürgen Papier (eds), *Handbuch der Grundrechte in Deutschland und Europa*, vol I: Entwicklung und Grundlagen (CF Müller 2004) para 36.
77 Article 119 and Article 145 of the *Weimarer Verfassung*.
78 Dreier (n 76) paras 20–23.
79 Presenting the classification by Richard Thoma (1928) into fundamental rights restrictable (1) only against constitutional amendments, (2) only federal statutory law and (3) federal and state law ibid 26.
80 ibid 54.
81 ibid.

After the horror of the Nazi regime, a new Constitution had to be created. Four years after the end of World War II, the Parliamentarian Council (*Parlamentarischer Rat)* drafted the *Grundgesetz*, the current German Constitution which entered into force on May 24, 1949.

2.2.1 Fundamental Rights as "Rights of Defence"

The drafters of the *Grundgesetz* put the individual and its dignity at the center of the new constitution. Its fundamental rights catalogue is not "hidden" somewhere at the end of the Constitution but is rather prominently placed at the very beginning. With regard to the binding nature of these rights article 1 para 3 reads:

> The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

By this, the Constitution clarifies first and foremost that its fundamental rights are compulsory and not only—as it was the case with some of the provisions of the *Weimar Constitution*[82]—non-binding guidelines. Being drafted as reaction to the terror of the German Nazi regime, the dimension of fundamental rights as "rights of defence", protecting against an unrestrained monster of state, was (and still is) central.[83] In 1958, the *Bundesverfassungsgericht* stated in its ground-breaking *Lüth*-decision (which will be analysed with regard to other findings in more detail in the following section):

> There is no doubt that the main purpose of basic rights is to protect the individual's sphere of freedom against encroachment by public power: they are the citizen's bulwark against the state. This emerges from both their development as a matter of intellectual history and their adoption into the constitutions of the various states as a matter of political history: it is true also of the basic rights in the Basic Law, which emphasizes the priority of human dignity against the power of the state by placing the section on basic rights at its head and by providing that the constitutional complaint (Verfassungsbeschwerde), the special legal device for vindicating these rights, lies only in respect of acts of the public power.[84]

82 Schneider (n 76) para 34.

83 Michael Sachs, '§ 39 Abwehrrechte' in Detlef Merten and Hans-Jürgen Papier (eds), *Handbuch der Grundrechte in Deutschland und Europa* (CF Müller 2006) para 1.

84 *Lüth* [1958] *Bundesverfassungsgericht* 1 BvR 400/51, juris [25] [Translation by Tony Weir, published by UofTexas at Austin, Foreign Law Translations].

Following this understanding of fundamental rights protecting an individual sphere of liberty, the *Bundesverfassungsgericht* has developed a sophisticated scheme for assessing governmental interference with individual rights, in particular individual liberties (concerning the *status negativus* of the right's owner)[85]. Every state action which interferes with the scope of a right, needs to be justified. Therefore, the interference needs to be based on statutory law (which depending on the particular right might need to fulfil particular requirements)[86] and be suitable, necessary and (most importantly) proportionate.[87]

The binding of the German state to fundamental rights is comprehensive.[88] The *Bundesverfassungsgericht* has underlined that the government cannot seek "refuge in private law" by setting up (private) companies which are controlled by public entities.[89] Whenever a governmental entity has significant influence on a legal body, may it be constituted under public or under private law, the obligation to respect fundamental rights applies. This significant influence is generally affirmed if more than 50% of the shares of a company is held by the public.[90] But also in cases in which the public ownership does not reach this threshold, the government needs to use its (not-decisive) share to increase the compliance with fundamental rights of the private company.[91] It does not matter in this context whether the same public institution holds the majority of shares, e.g. 30% of them could be owned by a regional state and 30% by the federal republic.[92] From a constitutional perspective, it is "the state", the power(s) bound unexceptionally by the fundamental rights enshrined in the *Grundgesetz*, who is acting as (under private law constituted) company.

85 Calling it the 'status libertatis' Georg Jellinek, *System Der Subjektiven Öffentlichen Rechte* (Mohr Siebeck 1892) 89–108.

86 Thorsten Kingreen and Ralf Poscher, *Staatsrecht II: Grundrechte* (37th edn, CF Müller 2021) paras 304–318.

87 ibid 330.

88 For the (unlimited) territorial scope of the obligation to respect the negative dimension of fundamental rights, see *Überwachung ausländischer Kommunikation* [2020] *Bundesverfassungsgericht* 1 BvR 2835/17, juris [88–104]; for the possible scope of positive obligations, see the decision of the *Bundesverfassungsgericht* on climate protection *KlimaschutzG* [2021] *Bundesverfassungsgericht* 1 BvR 2656/18, juris [73–81].

89 *Fraport* [2011] *Bundesverfassungsgericht* 1 BvR 699/06, juris [45–55].

90 ibid 53–54.

91 Christian Hillgruber, 'Art. 1' in Volker Epping and Christian Hillgruber (eds), *BeckOK GG* (47th edn, 2021) para 71.

92 For example, in 'Fraport' the Court only mentioned the combined amount of shares without differentiating between those owned by the federal state, the state Hesse and the City of Frankfurt *Fraport* (n 89) para 2.

2.2.2 Positive Obligations and Effects on Private Relationships

Unlike the rights guaranteed by constitutional amendments in the US, it is generally accepted by German jurisprudence and legal scholarship that the fundamental rights of the *Grundgesetz* also include positive obligations for the state (to offer certain services and to protect the liberty of individuals), have effects on individuals (in a direct way), and on private relationships (in its horizontal application).

Positive obligations—often categorized as "social rights"—[93], intended to offer certain services are mentioned only rarely in an explicit manner in the German constitution. There is the right of the mother "to the protection and care of the community" (article 6 para 4 *Grundgesetz*) but, for example, no (specific) right to free education (or proper ventilation in coal mines, as in some US states)[94] can be found. The *Grundgesetz* has thereby fallen below the standard set by *Paulskirchenverfassung* and the *Weimarer Reichsverfassung*.[95] However, some of the provisions in the fundamental rights catalogue of the *Grundgesetz* are understood as having also, sometimes even mainly, such a "service dimension"[96]. For example, the protection of human dignity by article 1 para 1 *Grundgesetz* also implies a right to a life in dignity and thereby the obligation of the state to provide a system of social welfare.[97]

Only very few provisions of the German Constitution are directly binding for private individuals, as it binds "the legislature, the executive and the judiciary" (article 1 para 3) and (in principle) not private entities. However, there is no rule without exception. For example, article 9 para 3 *Grundgesetz* explicitly states that "[t]he right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession. Agreements that restrict or seek to impair this right shall be null and void; measures directed to this end shall be unlawful." This

93 In International Human Rights Law socio-economic rights are seen as the "second generation" of human rights (after civil and political rights as first generation and before collective rights concerning self-determination and religious and ethnic minorities as third generation). Its most important international human rights treaty is the International Covenant on Economic, Social and Cultural Rights of 1966.
94 See n 62 on this.
95 Dreier (n 76) para 36.
96 The German term "*Leistungsgrundrechte*" roughly translates as "Fundamental Rights of Service".
97 *Hartz IV* [2010] *Bundesverfassungsgericht* 1 BvL 1/09, juris [133–138].

prohibition is not addressed to the state but directly affects private agreements, declaring them "null and void" if they interfere with the individual's right to set up a labour union.[98] However, similar to the prohibition of slavery in the US constitution,[99] such provisions[100] are rather foreign, rare objects in the constitution. In general, a *direct* binding effect of constitutional provisions for individuals does, just like in the US, not exist.

However, protective duties as well as the concept of an "indirect third-party effect" of the Constitution from fundamental rights might be one of the most important differences between German and US constitutionalism. The wording of article 1 para 1 *Grundgesetz*—fundamental norm of the German constitution—already suggests such an understanding:

> Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

It is not only the "duty of all state authority" to *respect* but also to *protect* human dignity. This active duty is a general dimension of all fundamental rights. The German state must not only refrain from (unjustified) interferences with fundamental rights, but must also be a guardian protecting individuals from interferences by third parties, may it be other states[101] or other individuals. In consequence, the fundamental rights of the *Grundgesetz* establish not only a right to freedom *from* the state, but also a right to freedom *by* the state in which the state becomes the enabler for individual freedom.[102] The *Bundesverfassungsgericht* has developed its jurisprudence on this in particular regarding the right to life and physical integrity. For example, the state is obligated to establish a system of criminal law and effective prosecution to fulfil its duty to protect—not only to respect—the life and bodily integrity of individuals.[103] Also, its abortion judgements are particularly shaped by the importance the court attaches to the unborn's right to life and the state's duty to protect this life.[104] Interestingly enough, even the US Supreme Court, which generally rejects the idea

98 Rupert Scholz, 'Art. 9 GG' in Theodor Maunz and Günter Dürig (eds), *Grundgesetz-Kommentar* (supplement 94, 2021) paras 171, 332.
99 See on the direct effect on individuals *Civil Rights Cases* (n 24) 20.
100 A similar direct effect has article 48 para 2 *Grundgesetz*, outlawing dismissals because one runs for public office.
101 *Grenzen der Schutzpflicht der BRD* [2008] *Bundesverfassungsgericht* 2 BVR 1720/03, juris [35].
102 Barbara Remmert, 'Art. 19 Abs. 2 GG' in Theodor Maunz and Günter Dürig (eds), *Grundgesetz-Kommentar* (94 supplement, 2021) para 45; Walter Krebs, '§ 31 Rechtliche Und Reale Freiheit' in Detlef Merten and Hans-Jürgen Papier (eds), *Handbuch der Grundrechte in Deutschland und Europa* (CF Müller; Dike 2006).
103 See on this *Kunduz* (n 47) paras 20–24.
104 *Schwangerschaftsabbruch, Schwangerschaftsabbruch II, Abtreibung* (n 47) paras 161–177 (inter alia).

of protective duties deriving from fundamental rights, seems to implicitly assume such a dimension for the right to life in *Roe v. Wade*.[105]

In addition to this protective duty of the state, the fundamental rights enshrined in the *Grundgesetz* do not leave private relationships untouched but deploy horizontal effects. In its *Lüth*-decision in 1951, the Court had to decide on the call to boycott by *Erich Lüth*, chairman of the press club of Hamburg, concerning a movie by the German screenwriter *Veit Harlan*, who was famous for the propaganda movies he produced during the time of the Nazi regime (such as "Jud Süß").[106] The film company distributing movies by Harlan brought a successful injunctive relief claim before the Regional Court of Hamburg, which ordered *Lüth* to refrain from calling on theatre managers, film distributors and the German public not to go to watch the movie. The decision was later confirmed by the Higher Regional Court of Hamburg.[107] The injunctive relief claim was based on the assumption that *Lüth's* statements aimed towards an "immoral damage" of *Harlan*, since his work as screenwriter for German movies should—with the call to boycott addressing the German public—effectively be prevented. The *Bundesverfassungsgericht* annulled this decision as it violated *Lüth's* freedom of expression as guaranteed by the German constitution. The court pointed out that the *Grundgesetz* constitutes an order of objective values which "radiates" to all fields of law, even private law. No provision of private law can exist in contradiction to this value order, on the contrary, the Constitution takes effect through the medium of private law.[108] Its norms must be interpreted in the light of the Constitution. Not least because of the binding of all three state powers to fundamental rights, also the judge deciding a private law case between two individuals is bound by the *Grundgesetz* and must only issue a verdict compatible with values expressed.[109] The *Bundesverfassungsgericht* has deepened and refined its jurisprudence on horizontal effects of fundamental rights in the last decades in a multitude of judgements.[110] In consequence, ordinary courts have

105 See on this Chapter 2.1.2.
106 *Lüth* (n 84) paras 1–4.
107 ibid 5–16.
108 ibid 26–28.
109 ibid 29.
110 Summarising the judgements declaring private contracts void Bernhard Jakl, '§ 138 BGB', *beck-online.GROSSKOMMENTAR* (2021) paras 64–70; with an overview on more recent jurisprudence (and rather critical) Jörg Neuner, 'Das BVerfG Im Labyrinth Der Drittwirkung' [2020] Neue Juristische Wochenschrift 1851.

declared private contracts void which conflicted with fundamental rights norms,[111] because of their incompatibility with public policy.[112]

2.2.3 A Constitution for Everyone and Everywhere

The protection of fundamental rights under the German Constitution is characterized by its encompassing scope of application. Individuals are not only protected against interferences by the state, but also against inactions of the state to protect them against harmful conduct by other individuals. With regard to its effects on private relationships, the mere wording of the current Constitution is by far not as clear as for example the *Paulskirchenverfassung*. However, from early on the *Bundesverfassungsgericht* established its jurisprudence on fundamental rights as not only being individual rights against the state, but also a general foundation for the German legal order, an "order of objective values". While the constitutional rights take effect quite broadly, the *Bundesverfassungsgericht* limits this development with a gradual approach. Fundamental rights affect private relationships, but only indirect, therefore less intense (if this is truly always the case, will be discussed in the following). While the US Constitution (only) serves as stop sign, taming the *Leviathan*, the *Grundgesetz* has (also) the function of a direction sign, showing the state where to go. Liberties should not only exist against the state, but also be realized through actions by the state. These approaches are also reflected in the doctrines developed in both countries for assessing the public obligations of private entities.

3. Public Obligations For Private Entities: A Two-Fold Approach

Keeping in mind the findings on the functions of fundamental rights in both states, I will analyse in the following the limitations courts have set in both states to the principle of private autonomy. As many of these limitations imitate obligations the state would have to consider when providing goods or services to its citizens, I consider them "public". Such

111 For example, regarding no-competition clauses (and its compatibility with freedom of occupation), see *Wettbewerbsverbot* [1986] Federal Court II ZR 254/85, 1986 NJW 2944; the Constitutional Court on clauses in marriage contracts concerning financial issues: *Inhaltskontrolle von Eheverträgen* [2001] *Bundesverfassungsgericht* 1 BvR 1766/92, juris; with an overview: Christian Armbrüster, '§ 138 BGB', *Münchener Kommentar zum BGB* (9th edn, 2021) paras 32–37.

112 The legal "opener" for such prohibitions in civil law is section 138 of the German Civil Code, stating that "[a] legal transaction which is contrary to public policy is void."

public obligations for private entities are no novelty arising from the ongoing digitalization of our lives, they are long-known to the legal frameworks of both Germany and the US.

I will try to divide the multitude of existing approaches "from the physical world" to justify such public obligations in two general categories: Some obligations derive from the particular market power a company has. These duties follow the general idea that "with great power comes great responsibility". In the context of "transporting" an object (may it be grain in the past or social media posts in the present), these duties are known as must-carry- or common-carrier-obligations in the US. In Germany, similar obligations to contract ("Kontrahierungszwänge") exist.

Other obligations result out of the function a company fulfils. The more public a task is a private company takes over, especially when it comes to the privatization of tasks formerly carried out by the state, the more it might be bound to obligations which have only addressed the public administration in the past. With regard to freedom of speech, this is particularly true when it comes to providing spaces for the general public. Spaces where people walk, buy, eat and drink, in short: spaces where citizens communicate with each other. The doctrine for regulating access to such public places in the US is the public forum-doctrine. In Germany, the concept of "*öffentliche Einrichtungen*" is regulating the access to (and qualification of) public institutions. In addition to that, the *Bundesverfassungsgericht* has adopted its own kind of public forum-doctrine.

Both approaches have in common that they were (first) developed by judges. In the US in the tradition of the common law, in Germany by referring to the values enshrined in the Constitution and the interpretation of equivocal norms in a fundamental-rights friendly manner.[113] While I am trying to disentangle and systematize the different origins of public obligations for private companies, there is no sharp line between obligations of the first kind and those of the latter. It rather must be understood as two ends of a spectrum with an extensive overlapping area in between, in which both approaches develop interdependences and are used to support each other.

The importance of jurisprudence for the development of such long-established doctrines is particularly true when it comes to their application to the non-physical world of commu-

113 See for this in more detail section 2.2.2.

nication, such as telecommunication systems or television (section 3.2). Courts in both states have demonstrated the doctrines' flexibility under such circumstances. However, entering the field of communications brings some new factors into the equation, especially concerning the freedom of expression or—more precisely—not to express a particular opinion (section 3.3).

All these cases define the doctrines applied today to the "global town-square", to social media networks used globally to communicate with each other. I divide the existing jurisprudence on them in two main categories: claims filed against the network operators themselves (section 3.4) and claims brought forward against the (natural or legal) person behind a page or profile (section 3.5). As the latter cases reflect a classical constellation for fundamental rights, the individual on one and the state on the other side, courts in both states handle them similarly. Claims against the networks themselves, on the other hand, bring into light the deep divide between both constitutional cultures regarding the legal protection against private power.

3.1 Doctrines from the Physical World

3.1.1 In the United States

Regarding the US, the common carrier- and the public forum-doctrine are essential to understand the regulation of powerful entities serving public functions as well as the access to places with fundamental importance for public communication. While "common carriage" always addressed private entities with a particular position in the market, the public forum-doctrine was mainly developed for the state. That's why I will summarize the historical origins of the first, before elaborating in more depth on the exceptions leading to the application of the public forum-doctrine to private entities.

3.1.1.1 Common Carriers: Obligations Deriving From Market Power

The history of common carriage obligations is long and dates back to "common callings" in English common law. Due to the limited scope of this thesis, I will focus on those parts which establish a duty to offer ones service non-discriminatory and on reasonable terms.

The idea behind the concept of "common callings" (or "public callings"), developed by judges, was to impose particular obligations on certain professions who offered a stock of basic services, needed by and open to everyone.[114] For example, tradesmen had to serve everyone with reasonable care and had to charge a just price.[115] Those duties generally applied to all businesses and trades, as only few persons worked in this field.[116] A *de facto* monopoly as an important factor for "common calling" obligations was the line of thought which was pursued in the 16th and 17th century. Due to the growing number of tradesmen, this subsequently led to a narrower group of businesses following a "common calling", mostly carriers and the transportation sector.[117] Thus, the "common calling" term was later on replaced by "common carriage".

In the following centuries, judges did not only focus on the monopolistic position of a business but additionally on its "public" nature when it came to the services it offered.[118] This might be traced back to the more active role and the accepted supremacy of the Parliament, which led to the conviction on part of the jurisprudence that it has to interpret its own role more reluctant.[119] In consequence, the scope of application of judge-made "common carriage"-obligations were narrowed down by using the supplementary prerequisite of a "public" service, e.g. such services which had been historically provided by the King (in England) or were supported by some sort of public funding.[120] These two elements were emphasized in the fundamental *Munn v. Illinois* decision of the Supreme Court in 1876,[121] when the court had to decide on the constitutionality of legislation requiring grain elevators to serve all customers. It cited extensively established (English) common law jurisprudence stressing that

> if for a particular purpose the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the

114 James B Speta, 'A Common Carrier Approach to Internet Interconnection' (2001) 54 Federal Communications Law Journal 225, 244; Mark A Jamison and Janice A Hauge, 'Do Common Carriage, Special Infrastructure, and General Purpose Technology Rationales Justify Regulating Communications Networks' (2014) 10 Journal of Competition Law and Economics 475, 484.
115 Speta (n 114) 254; Jamison and Hauge (n 114) 485.
116 With reference to Wyman, Speta (n 114) 255.
117 ibid.
118 ibid 255–256; Jamison and Hauge (n 114) 480–482.
119 Speta (n 114) 256.
120 Charles K Burdick, 'Origin of the Peculiar Duties of Public Service Companies: Part II' (1911) 11 Columbia Law Review 616, 632–633; Speta (n 114) 255.
121 *Munn v Illinois* (1877) 94 US 113 (US Supreme Court).

> benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms.[122]

In consequence, having a monopoly and benefiting from it leads—when there is general access for the public to the services in questions—to a prohibition of arbitrariness when negotiating contracts with others. The "public" element was further elaborated on by stating *inter alia* "that when private property is affected with a public interest it ceases to be *juris privati* only"[123]. As common carriers "exercise a sort of public office, and have duties to perform in which the public is interested [their] business is […] 'affected with public interest'"[124]. While the common carriage-doctrine obligated owners of particular businesses to act reasonable and non-arbitrary, it was not a strict obligation to treat all customers equally. For example, different prices for the same services were considered legal, as long as the prices did not cross the threshold of being unreasonable.[125]

In 1887, the concept of common carriage was also implemented into federal legislation as part of the Interstate Commerce Act (ICA). The legislation was mirroring the development of the doctrine and based upon economic reasons (the monopolistic power of railroad companies) as well as upon the recognition of their public function.[126] In the following, railroad companies were obligated to offer their services for reasonable rates, conditions of service and without price discrimination. This development is one example of the fruitful interplay between courts and legislation, as judge-made concepts based upon general principles of (common) law are taken up by legislative bodies and included into (specific) laws.

3.1.1.2 The Public Forum: A Place for Debate

The US Supreme Court has developed a nuanced doctrine of public fora since it introduced the concept for the first time in 1939.[127] It differentiates between three main categories of fora: Traditional public fora, designated public fora—which are divided in two sub-

122 Citing Lord Ellenborough in Aldnutt v. Inglis, 12 East, 527, decided in 1810, ibid 127–128.
123 Citing Judge Le Blanc in Aldnutt v. Inglis, 12 East, 527, decided in 1810, ibid 129.
124 ibid 130.
125 Speta (n 114) 258.
126 Speta (n 114).
127 In *Hague v CIO* (1939) 307 US 496 (US Supreme Court).

categories—and non-public fora.[128] "Traditional" public fora "have immemorially been […] used for purposes of assembly, communicating thoughts between citizens […]. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."[129] These fora are in particular streets and parks,[130] the Supreme Court is very reluctant with regard to a possible expansion of the definition of "traditional" public fora.[131] Any regulation of expressions for such a forum needs to serve a compelling state interest and be necessary in a strict sense.[132]

Designated public fora are places controlled and/or owned by the government which are not "traditionally" (as in "from ancient times") used for expressive purposes but have been opened by the government for such an exchange of opinions.[133] The designation can be limited to a particular purpose ("limited public forum") or of general nature. If the designation is limited to a specific purpose, like a specific subject, the government can restrict the speech to this subject matter. However, apart from that, the government is bound to the same restrictions on the regulation of the forum as it is for "traditional" public fora, in particular it must not discriminate on the basis of a particular standpoint.[134]

A non-public forum is property which is owned by the government but in general dedicated to one expressive purpose and not open for the public.[135] This does include for example school facilities, which are only open to members of the school community,[136] jails or military bases.[137] The right to freedom of expression does not grant citizens access to all property owned by the state, thus, the state is not obligated to enable free speech in non-public fora.[138]

128 See on this in more detail Dawn Carla Nunziato, 'From Town Square to Twittersphere: The Public Forum Doctrine Goes Digital' (2019) 25 Boston University Journal of Science and Technology Law 1, 25 et seq.; as well as the overview by the SC itself in *Perry Ed Assn v Perry Local Educators' Assn* (1983) 460 US 37 (US Supreme Court) 45–47.
129 *Hague* (n 127) 515.
130 ibid; *Perry* (n 128) 45.
131 *Arkansas Ed Television Comm'n v Forbes* (1998) 523 US 666 (US Supreme Court) 678; Nunziato (n 128) 25.
132 *Carey v Brown* (1980) 447 US 455 (US Supreme Court) 461–462; *Perry* (n 128) 45.
133 *Perry* (n 128) 45; Nunziato (n 128) 26.
134 *Perry* (n 128) 45–46; Nunziato (n 128) 26–27.
135 *Perry* (n 128) 46.
136 ibid 46–47.
137 Nunziato (n 128) 24.
138 *Perry* (n 128) 46.

3.1.1.2.1 A Private Town—*Marsh v. Alabama*

While developing such a sophisticated doctrine for public fora which are in public ownership, the Supreme Court remained—with few exceptions—rather reluctant to apply the same standards to similar places in private ownership. One of those exceptions is *Marsh v. Alabama*. The town Chickasaw in Alabama was a so-called "company town", a town completely in private ownership. The claimant tried to distribute religious leaflets on the side-walk and was—after she refused to refrain from this and leave—charged with illegal trespassing for it.[139] The Supreme Court came to the conclusion that there is no general difference for the citizens of public- and private-owned towns in their constitutional rights.[140] Citizens must be able to inform themselves and to be informed to be "good citizens".[141] Therefore, the right to freedom of press and religion of the citizens prevail the property rights of the private owner and a state cannot allow corporations to restrict their fundamental liberties in such manner.[142] However, one must keep in mind that in this case basically all of the social life of citizens was controlled by a private entity, as the town as whole—not just a shopping mall, not only a park—was in private ownership. The Court emphasized this difference in later decisions between total control of one's private life and control exercised over minor parts, only important for particular activities.

3.1.1.2.2 Leaflets in Shopping Centres I—*Lloyd Corp v. Tanner*

Roughly two and a half decades later, the Supreme Court decided on a narrower case of a private-owned place open to the general public: In *Lloyd Corp v. Tanner* the claimants sought access to a shopping center for distributing handbills on the grounds that the side-walks, streets and parking areas of a shopping center are equally spaces for the exercise of ones freedom to speech as public facilities are. The court rejected this view—which was explicitly based on *Marsh*—with a 5-4 vote as "too far".[143] The court pointed out that in *Marsh* the private owner "stood in the shoes of the State."[144] The sole opening of property for the general public or its big size, on the other hand, would not change its private character.[145] The dissenting opinion, drafted by Justice Marshall and joined by the three other Justices, emphasized on the other hand the integral function of the Lloyd Center for the

139 *Marsh v Alabama* (1946) 326 US 501 (US Supreme Court) 503–504.
140 ibid 507.
141 ibid 508.
142 ibid 509.
143 *Lloyd Corp v Tanner* (1972) 407 US 551 (US Supreme Court) 569.
144 ibid.
145 ibid.

community in Portland.[146] Since a multitude of political events took place in the mall, such as speeches by presidential candidates or ceremonies on Veterans Day, also opinions which might differ from those preferred by the owners of the shopping center must be possible to express.[147] Judge Marshall based his opinion also on an outlook the future developments: As more and more public facilities are privatized, places for citizens to communicate with each other are shrinking.[148] If free speech lacks effective means to be expressed, it would become "a mere shibboleth."[149]

3.1.1.2.3 Government-Controlled Places without Forum Quality—*ISKCON*

This split within the court also came to light in its International Society for Krishna Consciousness (ISKCON) judgement in 1992. The religious group challenged a rule of the Port Authority of New York and New Jersey which prohibited the distribution of papers in the terminals of their airports. The Port Authority managing the airports was a public entity. However, the majority of the court found that the terminals did not constitute public fora. Not in a traditional sense since they are a rather new phenomenon and not known "immemorially"[150] and not as designated public fora because the Port Authority itself rejected such a designation.[151] Justice Kennedy—joined by three others—criticized in his dissenting opinion the development of the doctrine undertaken by the majority. In particular the narrow interpretation of designated public fora being only such which are opened intentionally by the governance to allow and promote the exchange of opinions would leave "the government with almost unlimited authority to restrict speech on its property".[152] Without the approval of the government no new public fora could develop.[153] He suggests an objective approach instead, based on the actual characteristics of the place in question.[154] The majority did not share this view but only requires the measures satisfy a test of "reasonableness" which the regulations of the Port Authority passed since the prohibition of distributing papers in the terminal protects the normal flow of traffic.[155]

146 ibid 576.
147 ibid 579.
148 ibid 586.
149 ibid.
150 *International Society for Krishna Consciousness* (1992) 505 US 672 (US Supreme Court) 680.
151 ibid 680–681.
152 ibid 695.
153 ibid.
154 ibid.
155 ibid 683–685.

3.1.1.2.4 Leaflets in Shopping Centres II—*Pruneyard Shopping Center v. Robins*

These examples show that while the Justices of the Supreme Court did not share one homogenous view on this matter, an affection of a rather narrow interpretation of the public forum doctrine can be observed. The prime example of the opposite, an extensive interpretation of the forum-doctrine, is the *Pruneyard* decision from 1980. The set up was from a legal perspective substantially different from the aforementioned cases. High school students had solicited support for a political petition in the Pruneyard shopping center but were told to leave the center shortly after they started as political activities were prohibited in the shopping center. The students challenged this prohibition before ordinary state courts but lost their case in the first and second instance.[156] However, the California Supreme Court reversed the decision by the ordinary courts and pointed out that the Constitution of California protects the exercise of free speech even in private-owned centers.[157] It emphasized the access to the center for the general public (more than 25,000 persons entered it daily) and, thus, the difference to the private property of an individual homeowner, where privacy and property rights would be of different significance.[158]

The decision by the Californian Supreme Court was appealed and brought before the US Supreme Court. The appellant claimed a violation of its right to property, on the one hand, and its own First Amendment rights, on the other, as they are guaranteed by the US Constitution. Thus, the US Supreme Court did not have to decide on whether the US Constitution gives access to a private shopping center, but if a state constitution granting such access is compatible with the federal Constitution. The alleged violation of the right to property was based on the assessment that the right to exclude others is an integral part of it. The Court assessed this allegation, also comparing it to its own jurisprudence, and found that an unconstitutional interference did not take place. The interference to the right of property by the state's obligation to let the students disseminate leaflets did not amount to a taking of property (which would require just compensation), as the appellant was not able to demonstrate that such an obligation would have a significant economic impact.[159] In particular, the Court found that this case is not comparable with its judgement in *Kaiser Aetna*, in which a private company invested in developing an exclusive marina, open only to fee-paying

156 *Pruneyard Shopping Center v Robins* (1980) 447 US 74 (US Supreme Court) 77–78.
157 ibid 78.
158 ibid.
159 ibid 82–84.

members. Here, the government's attempt to create a public right of access constitutes a "taking" in the sense of the US Constitution, as the business model of the company was based on the exclusiveness of the pond, leading to an excessive economic loss if the access limitations would be lifted.[160] As it shows, the Supreme Court differentiates in its assessment thoroughly between places open to the public, without general limitations regarding the access, and exclusive places.

The violation of the shopping center owner's First Amendment rights aims at their negative dimension, as one cannot be obligated to share and disseminate the opinion of another individual or the government. The Supreme Court pointed out the difference between cases in which the government obligated an individual directly to display a particular message, may it be on its property or in a press publication, to a situation in which only another private person is allowed to disseminate its own opinion while standing on the property of another. In this situation, it is not a specific message which is endorsed by the State. Most importantly, the shopping center owner can distance itself from the message publicly. In consequence, the Court found no violation of the US Constitution's First Amendment by the Californian Supreme Court's decision.

3.1.1.3 Interim Conclusion: A Question of Legislative Leeway

When it comes to public obligations for private entities, judge-made obligations to "carry" have been slowly phased out by legislation stating explicitly when and under which circumstances an entity qualifies as common carrier. As a consequence of this development, also the general development of the concept was taken out of the hands of courts. This judicial reluctance is also demonstrated in more recent cases concerning the non-physical world of communication, when the court decided it would be "unnecessary and unwise" to decide on the issue of common carriage[161] or when it handed the decision to the executive branch instead of replacing the executive's interpretation with its own.[162]

Similarly, *Pruneyard* shows that it remains the legislator's choice to what extent it "publicizes" private-owned, publicly accessible spaces. While the fundamental rights enshrined

160 ibid 84; *Kaiser Aetna v United States* (1979) 444 US 164 (US Supreme Court) 178–180.
161 See section 3.2.1.4 on *Denver Area*.
162 See the debate on *net neutrality* in section 3.2.1.5.

in the US Constitution generally do not affect (indirectly) private relationships, it does also not violate the US Constitution if a state constitution, as in *Pruneyard*, or the legislator decides to address classically public obligation to private entities. Also, under circumstances in which a private corporation stands "in the shoes of the state", like in *Marsh*, corporations can be treated like the state when it comes to the exercise of fundamental freedoms. However, *Marsh* remains a rather exceptional judgement in a field characterized by judicial reluctance. Generally, the Supreme Court seems to point at the legislative leeway, but refrains from replacing such political decisions with its own judgment.

Picking up the analogy of the stop and direction sign I used for the functions fundamental rights have in the jurisprudence in both countries, it shows how the Supreme Court emphasises the broad legislative leeway before the stop sign, but refrains from replacing political decisions with its own judgment. In contrast, the German direction sign leads to courts pointing explicitly towards particular obligations they deem necessary, also without explicit basis in law but based on general considerations, as I will demonstrate in the following.

3.1.2 In Germany

In Germany, obligations similar to must-carry are known as obligations to contract. Just as must-carry, those are clear restrictions on private autonomy. One cannot freely choose anymore with whom he or she wants to contract but has to do it (the "if" of the contract) and often under particular, predefined conditions (the "how" of the contract). Just like for the US, I will focus on judge-made obligations to contract, but also shortly elaborate on those which are stated explicitly in the laws.

The question of access to public places was governed for a long time by the doctrine of public institutions ("öffentliche Einrichtungen"). It has been challenged with the ongoing privatization of public services, in particular with the choosing of private forms of corporations by public entities such as municipalities or the states. However, the doctrine showed that it is sufficiently flexible to react to these developments. It is the access to places which are controlled by a "real" private corporation but serve a public function which is at the centre of current debate.

3.1.2.1 Restricting Private Autonomy: *Kontrahierungszwänge*

3.1.2.1.1 Doctrines created by the *Reichsgericht* and Statutory Law

Just like in the US, obligations to contract are an exception to the general principle of private autonomy, which can refer to a long tradition in Germany. Already in the German Empire, the *Reichsgericht* (the then-Supreme Court of Germany) stated in 1901 in a case concerning the tariffs for the use of cargo ships[163] the conditions under which such an obligation to contract shall be assumed: Corporations possessing a *de facto* or *de iure* monopoly or serving a public function must offer their services to everyone.[164] With this obligation to contract (the if) comes also requirements regarding the condition of such contracts (the how). A must carry-obligation binds the addressee to treat all customers equally and prohibits arbitrariness.[165] The similarities regarding the prerequisites and in the terminology of these duties are no coincidence, the *Reichsgericht* refers explicitly to US-American (*common carriers*) and French jurisprudence (*entrepreneurs publics*) on such corporations.[166] In the following decades, the *Reichsgericht* confirmed such an obligation to contract in a multitude of cases,[167] namely by accepting a claim for damages by the other party.

These fundamental principles set up by the *Reichsgericht* survived the *Kaiserreich*, the first German republic of Weimar, the regime of the Nazis and are still referred to in modern jurisprudence by the German Federal Court. The court accepts an obligation to contract for monopolistic entities, leaving its concrete judicial reasoning open. It refers to a possible general analogy with the provisions prescribing an explicit obligation to contract, antitrust law and the constitutional principle of the welfare state.[168]

163 *Dampfschiffsgesellschaft - Illoyale Handlungen* [1901] Reichsgericht VI 443/00, 48 RGZ 114.
164 ibid 127.
165 ibid.
166 ibid.
167 Listing several cases from the first two decades of the 20th century *Monopolmissbrauch* [1933] Reichsgericht VII 292/33, 143 RGZ 24, 28.
168 *Allgemeinen Vertragsbedingungen für Krankenhausbehandlungsverträge* [1989] Federal Court IX ZR 269/87, juris [25].

The rationale of the courts' argumentation formed the basis of many legislative acts,[169] constituting obligations to contract for particularly those fields which can either be considered a necessary public service or coined by the dominance of one or few companies. For example, when it comes to classic "must-carry" in the transport sector, not only public companies operating public transport must transport all individuals fulfilling their general terms and conditions (section 22 *Personenbeförderungsgesetz*) but also privately operated taxi services (section 47 para 4 *Personenbeförderungsgesetz*). Similar provisions exist also for air travel (section 21 para 2 *Luftverkehrsgesetz*) and in energy market (section 36 para 1 *Energiewirtschaftsgesetz*).[170] In antitrust law, section 19 and 20 of the Act against Restraints of Competition (GWB) are of particular importance, prohibiting any abuse of a dominant position or superior market power of a company, in particular an unjustified discrimination when it comes to the supply of other companies with goods. These provisions in statutory law have clarified the prerequisites for assuming an obligation to contract based on market power. There comprehensive character has rendered those judge-made obligations to contract based on general clauses unnecessary.[171]

3.1.2.1.2 A Fundamental Right to Contract

However, this can only be considered true regarding an evaluation of the obligations of private individuals and companies based on their economic power. Another strand of judicial argumentation brought forward by judges is not so much based on the obligor, but on the claimant. It examines the effects of the decision not to contract on the fundamental rights of an individual, based on the concept of the *Grundgesetz* as an objective order of values, enfolding indirect effect on all private relationships.[172]

Fundamental rights as a source for an obligation to contract with others has been applied by ordinary courts to different situations. Of particular importance was the freedom of press when journalists needed access to the objects or their articles, e.g. theatres or sports clubs. As early as 1931 the *Reichsgericht* accepted such a claim by a theatre critic, who was confronted with a ban on entering the theatre as a reaction to his (rather negative)

169 See for example the explicit referrals to the jurisprudence of the *Reichsgericht* in the preparatory documents for the Act against Restraints of Competition (GWB) issued in 1957: Federal Parliament Journal 02/1158, 27; Federal Parliament Journal 02/3644zu, 5.

170 See for more examples Christian F Majer, 'Das Ende der Privatautonomie? Zum Kontrahierungszwang bei allgemein dem Publikum zugänglichen Leistungen' 2015 Juristische Rundschau 107, 107.

171 Gerhard Wagner, '§ 826 BGB', *Münchener Kommentar zum BGB* (8th edn, 2020) para 216.

172 For more on this see section 2.2.2.

articles on its plays, in principle and uphold the ban only because the theatre did not act arbitrary when issuing the ban, but rather reasonable to prevent disadvantages.[173] While the concrete judgment consequently did not obligate the theatre to contract with the critic, the abstract judicial reasoning laid the foundation for subsequent judgements in the Federal Republic of Germany, in which courts were more open to such legal attempts (also in the results of their findings). In a decision on the ban of a print journalist issued by a football club, the court underlined that with opening its games and press conferences in general to media coverage, the club loses any right to then "punish" unpleasant reporting. Giving the club such a right would restrict the freedom of the press disproportionately, as it would require reporters to only cover the club favourably.[174]

Of particular importance is the constitutional "general right to personality" (*Allgemeines Persönlichkeitsrecht*) and the general principle of equal treatment (article 3 para 1 *Grundgesetz*, *Allgemeiner Gleichbehandlungsgrundsatz*). The first has been construed by out of the protection of human dignity (article 1 para 1) and personal liberty (article 2 para 1) as guaranteed by the *Grundgesetz*.[175] This construction was necessary because the German Constitution does not know an explicit right to privacy, a gap filled by the general right to personality by protecting *inter alia* the public image of an individual and the collection of information about it (*informationelle Selbstbestimmung*).[176] In 1993, the Federal Court stated that those who open their stores for the general public are expressing their desire to sell their services and goods to anybody, irrespective of the concrete characteristics of a person. In doing so, they are giving up their individual right to decide with whom to contract to a great extent and cannot make such contracts dependent on the acceptance of significant interferences with the general right to personality, such as the searching of bags without any reasonable suspicion.[177] Notably, the court did not refer to any kind of monopoly, but only based its reasoning on the opening of the business for the

173 *Städtische Theater - Zwang zum Vertragsschluss* [1931] Reichsgericht V 106/31, 133 RGZ 388, 392.
174 [2000] Higher District Court Cologne 16 W 8/00, 2001 NJW-RR 1051, 1052.
175 See for an overview of its origins in the jurisprudence of the Reichtsgericht, the Federal Court and the *Bundesverfassungsgericht* Udo Di Fabio, 'Art. 2 Abs. 1 GG' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz-Kommentar* (95th edn, 2021) paras 127–131.
176 Explaning on how German personality rights derive from the concept of human dignity Edward J Eberle, 'Observations on the Development of Human Dignity and Personality in German Constitutional Law: An Overview' (2012) 33 Liverpool Law Review 201; see also Corinna Coors, 'Headwind from Europe: The New Position of the German Courts on Personality Rights after the Judgment of the European Court of Human Rights' (2010) 11 German Law Journal 527, 529 et seq.
177 *Taschenkontrolle im Supermarkt und Hausverbot* [1993] Federal Court VIII ZR 106/93, 1994 NJW 188, 188–189; while the case only dealt with the ban on entering the supermarket, Maier shows how this ban to enter can actually only be understood as a ban to contract Majer (n 170) 111–112.

general public. Most recently, the court underlined this jurisprudence once again and pointed out that the actual conclusion of a contract can in these cases be made dependent on such conditions which have been set out beforehand and are recognizable for the other party. This derives not only from the general right to personality but also from the general principle of equal treatment.[178] A general obligation to treat all person equal is—having in mind the principle of private autonomy as starting point—quite far reaching, but not at all surprising considering the quite coherent jurisprudence of German ordinary courts on matters of obligations to contract.

It must be emphasized, however, that none of these obligations to contract (also not those defined in statutory law), may they be based on market power or on the fundamental rights impact for the claimant, are absolute. They prohibit arbitrary actions by the obligated party and require them to only refrain from contracting based on (good) reasons. But if such reasons exist, e.g. when a journalist is known for insulting (which must be differentiated from critical coverage) the object of its reporting, the private entity could reasonably ban the journalist from its property.

3.1.2.1.3 The *Bundesverfassungsgericht*'s Stance on Contract Obligations—The *Stadionverbot* decision

In 2018, the *Bundesverfassungsgericht* had the chance to weigh in its authoritative interpretation of the fundamental rights provisions in question. In the *Stadionverbot* case it had to decide on the fundamental rights obligations of a football club which banned a fan nationwide—possible due to reciprocal authorization the clubs give each other—from stadiums for a duration of two years because of his alleged participation in acts of violence after a game. While the Court rejected the claim of the fan and evaluated the ban as constitutional, it used the chance set out fundamental guiding principles for the obligations of powerful private entities when enforcing sanctions against individuals.

It shortly reiterated the principle of private autonomy which allows everyone to contract in general with whom it wants,[179] but then emphasised—in line with the existing jurisprudence by ordinary courts—that the general principle of equal treatment (article 3 para 1 *Grundgesetz)* also has effects in specific constellations between private entities. Such

178 *NPD Hausverbot* [2019] *Bundesverfassungsgericht* 1 BvR 879/12, juris [22–23].
179 *Stadionverbot* [2018] *Bundesverfassungsgericht* 1 BvR 3080/09, juris [40].

constellations are those in which one contracting party opens its events to the general public and a prohibition to participate in such event would have significant impact on the social life of the individual addressed by the ban.[180] This leads to an indirect binding of the organizer to the principle of equality and forbids on the substantial level arbitrary measures.[181] Additionally, on the procedural level, a minimum standard of what one could call a "fair trial"-procedure must be respected. This includes the right of the person concerned to be heard and an obligation of the organizer to state reasons (upon request) for sanctions it imposes.[182] The court also underlined that the concrete case is only one of many examples in which such obligations could be triggered, as they might also arise from a monopoly or a position of structural advantage.[183] These statements, confirming a line of jurisprudence which can be traced back to decisions by the *Reichsgericht* presented above, are backed up not only with the constitutional argument of the indirect effect of the general principle of equal treatment, but also with the principle that property entails a social responsibility for the public good, explicitly laid down in article 14 para 2 *Grundgesetz*.[184]

As demonstrated, German jurisprudence has a long-established tradition of *Kontrahierungszwänge*. When it comes to obligations which are judge-made, based on general principles or at least general clauses of civil law, the rather market- and company-orientated argumentation of the first years was on the one hand replaced by concrete provisions foreseeing contract obligations for monopolists and corporates offering public services (such as public transportation) and, on the other, driven out by an approach based on evaluating the impact of a denial of a contract on the individual's fundamental and human rights.

3.1.2.2 Public Institutions, Airports, and Flashmobs: Access to (Private) Public Places

3.1.2.2.1 Town Halls and Swimming Pools—The Concept of Public Institutions

In Germany, the notion of "public institutions" ("*öffentliche Einrichtungen*") fulfils to some extent a similar function the notion of "public forum" does in US jurisprudence:

180 ibid 41.
181 ibid 45.
182 ibid 46 et seq.
183 ibid 41.
184 ibid.

Regulating the conditions of access to public spaces by citizens. Such public institutions are a concentration of personnel or equipment as part of the public service, dedicated to a particular use by the citizens.[185] Classical examples for public institutions are kindergartens, public swimming pools or town halls. Since they all serve a particular purpose, the concept probably comes closest to the "designated forum" in US jurisprudence. The consequences are similar: The administration is bound to its dedication and cannot—arbitrarily—change it to prohibit a certain use it does not like. Unlike "public fora", the legal concept of "public institutions" does not aim mainly at the protection of the right to freedom of speech or the right to assembly but rather at generally regulating the way the (often municipal) government is making its services available to the public. Generally, all citizens of a municipality—or whoever the target group of the institutions is—have an equal and non-discriminatory right to access and use it in the limits of its designation.

But it is of course the political cases which lead to controversies. For example, in 2017, the city of Wetzlar did not want to put its town-hall at the disposal of the right-extremist party NPD for their annually party convention. It has, however, in the past given its town-hall to other political parties for their (election) events. The administrative court—later confirmed by the *Bundesverfassungsgericht*—decided that with this practice, the city had bound itself to allow the use of the town-hall for political events.[186] In consequence, any discrimination on the basis of a particular political orientation of a party (even when its directed against the fundamental norms of the state) is unlawful.[187] It is only the *Bundesverfassungsgericht* which can decide in a special procedure upon the constitutionality of a party (article 21 para 2-4 *Grundgesetz*). While these findings were not surprising, the case later became infamous as the city decided to ignore the verdicts, even of the *Bundesverfassungsgericht*, and did not open its doors to the NPD. This provoked a rather harsh response by the Court, criticising the behaviour of the city publicly in a press release and demanding legal actions in a letter to the district president, who's responsible for the legal supervision of the municipalities.[188]

185 Martin Burgi, *Kommunalrecht* (6th edn, CH Beck 2019) ch 16 para 5.

186 [2017] Administrative Court Gießen 8 L 9187/17.GI, juris; confirmed by [2018] Higher Administrative Court Kassel 8 B 23/18, juris; *Stadthalle Wetzlar* [2018] *Bundesverfassungsgericht* 1 BvQ 18/18, juris.

187 Burgi (n 185) ch 16 para 28.

188 'Presse - Schreiben an Die Kommunalaufsichtsbehörde Im Fall Wetzlar' (Bundesverfassungsgericht, 20 April 2018) <https://www.Bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2018/bvg18-026.html> accessed 1 March 2022.

The position of German jurisprudence regarding the comprehensive binding to fundamental rights, in particular exclusion of a possibility to search "refuge in private law", sketched out above,[189] also shows in the legal evaluation of public institutions. It does not matter whether an institution is formally administered by a public or private entity, and whether potential contracts of use are concluded as private or public, as long as the government has factual influence on the decisions made by the institution's administration. With its "two-steps-theory", German legal doctrine developed a system in which the first step, the "if" (someone has access to a public institution) always must be governed by public law, while the "how" (the contract is designed) can be concluded according to private law.[190]

Interestingly enough, despite the existence of the concept of "public institutions" and its "two-steps-theory" for the treatment of private, but government-controlled actors, the *Bundesverfassungsgericht* decided to introduce the US-American public forum-concept into German legal doctrine in its 2011 "Fraport"-decision for dealing with the issue of private actors serving public functions.

3.1.2.2.2 The Introduction of the Public Forum—*Fraport*

In *Fraport*, the claimants demanded access to Frankfurt Airport to protest against deportations by the government. The airport was—and still is—operated by the Fraport-AG, a stock-company according to German corporate law. However, it is predominantly owned by public entities such as the State Hesse and the City of Frankfurt.[191] Its Term of Services prohibited any exercise of the right to assembly in the airport. In reaction to the demonstrations organized by the claimants, they were banned to enter the airport and threatened with legal action because of trespassing if they would violate the ban.[192] The claimants sought legal protection against the ban before ordinary courts but their actions were dismissed on first, second and even third instance. The courts argued that while the Fraport-AG was owned predominantly by public institutions, an immediate binding to fundamental rights could not be presumed since not only the public institutions but also private entities hold

189 See above 2.2.1.
190 Steffen Detterbeck, *Allgemeines Verwaltungsrecht* (19th edn, CH Beck 2021) paras 920, 1326.
191 *Fraport* (n 89) para 2.
192 ibid 4 et seq.

shares of company.[193] Also, even if such a binding would be affirmed, only the use of public space for its designated purpose, in this case travelling, would be protected.[194]

In its decision the *Bundesverfassungsgericht* underlined once again that a "refuge into private law" must not be allowed for public entities. Therefore, with regard to its binding to fundamental rights it is of no importance if a state acts in public or private robe. On the contrary, the obligation to respect human rights for the state is encompassing and knows no exceptions.[195] When companies are owned partly by the state and partly by privates, the human rights obligation takes effect as soon as the state holds the majority of the shares.[196]

It then followed to elaborate on the question under which circumstances the state must permit the use of its property for demonstrations. While the right to assembly does not give a right to access to any desired place, it is guaranteed for places of "general traffic". To determine what such places are, the *Bundesverfassungsgericht* used the model of the "public forum" with an explicit reference to Canadian and US-American jurisprudence.[197] Such fora are characterized by a multitude of different facilities, e.g. commercial shops or areas for relaxation. Visitors are not only coming for one particular purpose but for a variety of reasons including strolling.[198] To confront others with political opinions and societal conflicts in these places is protected by the right to assembly as enshrined in article 8 of the German constitution.[199] Since the Frankfurt airport does not only offer services with a direct connection to the arrival and departure of flights but is also home for several shops, restaurants and other services, it constituted a public forum in the definition of the Court. In consequence, the absolute prohibition of any kind of demonstration on its property violates the right to assembly of the claimants.

The same goes for the freedom of expression. This right does not only protect the content expressed but also the choice of the location and the means to express ones opinion. It does not give one the right to access a particular place, however, different to the right to assembly, the right to freedom of expression takes effect everywhere one has access to and

193 ibid 11.
194 ibid 15 et seq.
195 ibid 45 et seq.
196 ibid 49 et seq.
197 ibid 70, 105; interestingly enough, the court chose to refer to a decision in which the US Supreme Court denied the 'public forum'-quality of an airport: *ISKCON* (n 150).
198 *Fraport* (n 89) para 70.
199 ibid.

is in principle not limited to public fora.[200] While restrictions on particular areas can be justified—the *Bundesverfassungsgericht* refers in this regard once again to US-American and Canadian jurisprudence—a blanket prohibition cannot. In particular, the aim to create a "feel-good atmosphere in a sphere which is strictly reserved for consumer purposes and which remains free from political discussions and social conflicts" to protect the "carefree mood of citizens" from the "misery of the world" is not protected by the Constitution and can therefore not constitute a reason to limit the fundamental rights of others.[201]

While the Fraport-case was only about a private entity which was—because of its public ownership—bound to fundamental rights directly, it remains remarkable how detailed the Court explained the nature of public fora and the consequences of such an assessment. These explanations were not necessary, it could have simply reiterated its well-established jurisprudence on the right to assembly. However, the *Bundesverfassungsgericht* seems to have felt the need to give a hint on its opinion under which circumstances "purely" private corporations who offer public places for the exchange of communication (public fora) are restricted in their usually almost unlimited freedom to set the rules on their property.[202] This (indirect) obligation to respect fundamental rights is particularly strong, and can be equal to the obligations of the state, when private entities fulfil functions which were previously assigned to the state, e.g. in the sector of postal and telecommunication services.[203]

3.1.2.2.3 The Private Place—*Bierdosenflashmob*

A few years later, the court issued a preliminary order in a case concerning the access to a private but central town square for a "beer can flashmob" ("*Bierdosenflashmob*"), a political demonstration against the ongoing privatization of security forces. The *Bundesverfassungsgericht*, referring largely to *Fraport*, emphasizes that the right to assembly takes effect on all those places which are open to general traffic.[204] It takes into consideration the change of the public space with an increasing role of private-owned places, such as shop-

200 ibid 98.
201 German wording: 'Deshalb kann das Verbot des Verteilens von Flugblättern insbesondere auch nicht auf den Wunsch gestützt werden, eine „Wohlfühlatmosphäre" in einer reinen Welt des Konsums zu schaffen, die von politischen Diskussionen und gesellschaftlichen Auseinandersetzungen frei bleibt. Ein vom Elend der Welt unbeschwertes Gemüt des Bürgers ist kein Belang, zu dessen Schutz der Staat Grundrechtspositionen einschränken darf', see ibid 103.
202 This interpretation of the judgement is also shared by the one dissenting opinion by judge Schluckebier, see ibid 123 et seq.
203 ibid 59.
204 *Bierdosen-Flashmob* [2015] *Bundesverfassungsgericht* 1 BvQ 25/15, juris [5].

ping centers and open squares which match the requirements for public fora.[205] It reiterates its *obiter dictum* from *Fraport*—now not an *obiter* anymore—that the indirect obligation of private stakeholders to respect fundamental rights can reach a similar or even equal level compared to the state's obligations, in particular considering that private entities take over tasks which were public before.[206] Thereby, the court follows the path of *Fraport*, assessing the "public forum"-character of a place from a functional perspective with general access and communicative exchange being the decisive factors, not the state ownership.

However, one must keep in mind that the *Bundesverfassungsgericht*, when issuing preliminary orders, carries out only an impact analysis and does not give a final ruling on an issue.[207] The court might come to different results in the main proceedings. In *Bierdosenflashmob* the case never reached this stage since the claimant reached his designated aim, the realization of the demonstration on private grounds, already with the preliminary ruling of the *Bundesverfassungsgericht*.

3.1.2.3 Interim Conclusion: How *Fraport* and *Stadionverbot* differ

Courts do not hesitate to apply public obligations to private entities if certain conditions are fulfilled: monopolists can be obligated to contract with others due to their market power. Also, an entity offering services in general to everyone with differentiating on an individual level must not act arbitrary when declining a particular person its services. While some draw a straight line from the *Bundesverfassungsgericht's* decisions in *Lüth* (defining the *Grundgesetz* as an objective order of values)[208] via *Fraport* to *Stadionverbot*,[209] I would like to point out the key differences: *Stadionverbot* was a decision based on the interpretation of fundamental rights, but it was about restraining (economic) power and protecting individuals from abuse and arbitrariness by private entities in their day-to-day-life. *Fraport* addressed another issue: It aims at political communication and suggests that those who a providing places for such communication, in particular when those places have been provided by the state in earlier times, must respect freedom of expression and freedom to

205 ibid.
206 ibid 6.
207 The court itself emphasizes this in its decision, see ibid 7.
208 See 2.1.2
209 Simon Jobst, 'Konsequenzen Einer Unmittelbaren Grundrechtsbindung Privater' [2020] Neue Juristische Wochenschrift 11, 11–12; Matthias Ruffert, 'Privatrechtswirkung Der Grundrechte: Von Lüth Zum Stadionverbot – Und Darüber Hinaus?' [2020] Juristische Schulung 1.

assembly just like the state. This would go substantially beyond an obligation to non-arbitrariness.

The different concerns of both decisions seem to be recognised by the *Bundesverfassungsgericht*. It did only refer once in *Stadionverbot* to the *Fraport*-decision. The concept of a public forum was not mentioned at all. The difference to public fora seems to be the purpose of the place to which access is requested. While public fora and football stadiums are both open to the general public, the sole purpose of visiting a stadium is participating in cultural life by watching a game. It is not a place where (political) opinions are exchanged and communication (on social disputes) takes place. Therefore, its value for the functioning of a democratic society might be less fundamental.

3.2 Application to the Non-Physical World of Communication

Neither the concepts of “common carriage” and “Kontrahierungszwänge” nor the public forum-doctrine had to stay in the “analogue”, “physical” world. Instead, the underlying doctrines were adapted to fit new needs and (technological) developments. While keeping their main characteristics, obliging dominant market players who serve a somehow public function, judges applied them beyond the questions of what should be transported by grain elevators or who is allowed to distribute leaflets.

In the following, I will first try to give a general overview of judgements regulating the carrying of communication in non-physical systems, as they are often invoked by the parties of current social media-related proceedings. This includes *inter alia* the regulation of newspapers, of mailing systems and TV cable systems. It is also necessary to differentiate between judgements in claims based on general principles or clauses of law, basically asking for judge-made obligations for the providers of these communication systems, and such cases in which the constitutionality (or its compatibility with federal law) of legislative regulation was challenged.

3.2.1 In the United States

The discussions regarding the application of the common carriage-doctrine to telecommunication systems did not start with the internet or other digital phenomenon. From the beginning on, telecommunication systems were seen as (potential) addresses of the general obligations developed for quasi-monopolistic companies. This development started in courtrooms but was quickly implemented into federal legislation. In more recent time, in particular since the 1990s, the regulation of the TV cable market became a role model for those claiming that social media should be qualified as common carriers with respective duties.

While the US-American debate focuses on the question of common carriage, also public forum arguments are invoked from time to time. US jurisprudence has been open to apply the public forum-doctrine also to communication systems operated by public institutions. But just like with physical places, it remained very reluctant to use the doctrine on privately owned systems.

3.2.1.1 Organizational Systems as Public Fora—*Perry Education Association (PEA) v. Perry Local Educators' Association (PLEA)*

In *Perry Education Association (PEA) v. Perry Local Educators' Association (PLEA)* in 1983—quite some time before the internet or even social networks were invented—the Supreme Court applied the public forum-doctrine for the first time to the virtual, "metaphysical" sphere.[210] PLEA sought access to the mailing system of the school district based on the public forum-doctrine, claiming that it constitutes a (limited) public forum. The Supreme Court denied PLEA such right but clarified that the mailing system could, in principle, constitute a public forum when it is open to the general public.[211] Since access to the mailing system by external organizations was only granted under particular circumstances, e.g. for PEA, the exclusive bargaining organization of the teachers, just these or similar organizations had the right to access it. Since PLEA was not in the position to negotiate as

210 See on this in more detail Nunziato (n 128) 29 et seq; the Supreme Court used the term 'metaphysical' in its own jurisprudence as well, see *Rosenberger v Rector and Visitors of Univ of Va* (1995) 515 US 819 (US Supreme Court) 830.

211 *Perry* (n 128) 47.

representative of the teachers while PEA was, it was not "similar" in the sense that it would not be affected by the limitation set up by the school district.[212]

While the claim of PLEA was therefore, in last instance, not successful, the Supreme Court did apply the public forum-doctrine to a communication system, thus not a physical place in the strict sense. It shows how the Court applies "physical" doctrines beyond their original scope.

3.2.1.2 Telecommunication Systems as Common Carriers—Historical Origins

The same is true for the common carrier-doctrine, for which the first applications beyond the physical world dates back to the end of the 19th century. While the first claims brought before the courts against telegraph and telephone companies based on violation of common carrier duties were met with some reluctance,[213] courts started to qualify telecommunication companies as at least "quasi-common carriers" at the end of the 19th century.[214] Following the established jurisprudence on common carriers, this was based on the public function of the companies, proven by the public support the companies received, e.g. through the power of eminent domain and franchises, and on the quasi-monopolies the companies held.[215]

In 1910, the jurisprudential development was incorporated into legislation by the *Mann-Elkins Act*, an amendment to the ICA[216], and manifested, just like the ICA did in 1887 for railroad companies, the common carriage-duties telecommunication companies had to observe, e.g. non-discrimination requirements and a prohibition of arbitrary rates. These clauses were moved in 1934 to the new *Communications Act* (which was largely overhauled in 1996 by the *Telecommunications Act*) but remain into force with their basic provisions for telecommunication companies until today. With the rise of the internet and broadband services, a controversial and still ongoing (legal and political) debate surrounding the classification of internet service providers (ISPs) as either information

212 ibid 48.
213 *Grinnell v Western Union Telegraph Co* (1873) 113 Mass 299 (Massachusetts Supreme Judicial Court) 302; Speta (n 114) 261, see in particular fn 184 with further jurisprudence.
214 Speta (n 114) 261.
215 With detailed reference to the jurisprudence: ibid 261–262, fn 185, 186.
216 The Interstate Commerce Act, see section 3.1.1.1.

services—a newly introduced category of services in 1996—or common carriers under the Telecommunications Act started. This discussion concerns the question of "net neutrality". From a legal point of view, it is mainly circling around the definitions in the *Telecommunications Act* and the power of federal agencies to interpret them, and does not so much concern the general, abstract qualification and duties of common carriers. That is why I will first analyse the more general jurisprudence regarding TV cable operators as common carriers from the 1990s before coming to "net neutrality" in section 3.2.1.5.

3.2.1.3 TV cable providers as common carriers I—Turner I & II

When it comes to must-carry-obligations, the courts had to decide mainly on two constellations: Either there was no written obligation for an entity to carry specific content and someone claimed that the entity nevertheless has to do so, as it qualifies as common carrier according to the principles established in common law. Or the legislator explicitly defined a group of services as common carriers and members of such group challenged the regulation in court, mainly invoking fundamental rights to claim that such regulation would be unconstitutional. While these two constellations are different, they are interdependent: When the legislator explicitly decides that A is a common carrier, and B is very similar to A, but does not fall exactly under the definition of the legislator, a court might be more willing to assume the common carrier qualification of B based on the traditional common carrier-doctrine as known to common law. The relevance of this showed in the *Turner* cases. Here, the Supreme Court had to assess the constitutionality of provisions creating must-carry-obligations for TV cable operators. Later, in *Denver Area* it was on the Court to decide whether a cable provider with no written obligation to carry particular content (or more precise: an explicit allowance to not carry pornographic content) qualifies as common carrier nonetheless.

In Turner Broadcasting System, Inc. et al. v. FCC in 1994 (*Turner I*)[217] and in 1997 (*Turner II*)[218], the Court had to decide whether an obligation for cable operators to transmit local commercial and public broadcast stations via their infrastructure (one must keep in mind that the cable technology was a closed system, with physical cables owned by the

217 *Turner Broadcasting System, Inc v FCC* (1994) 512 US 622 (US Supreme Court).
218 *Turner Broadcasting System, Inc v FCC* (1997) 520 US 180 (US Supreme Court).

respective cable operators)[219] was constitutional. The Court pointed out—for the first time[220] that cable operator's activities are protected under the speech and press provisions of the First Amendment, as they exercise editorial discretion.[221] However, strict legal scrutiny for such interferences with the operator's First Amendment rights would only be triggered if the regulation would not be content-neutral.[222] Since the must carry-obligations imposed by Congress upon the cable operators do not differentiate based on content a cable operator transmits (and—in consequence—are not based on the editorial decisions which have been made), the regulation qualifies as content-neutral.[223] While it is true that cable operators have to carry content not of their choosing, there is no risk of confusion for the viewer that the TV channel transmitted via cable is endorsed by the cable operator. Instead, the viewer is used to understand the operator as a mere conduit for the messages of others, in particular since TV stations identify themselves in their programmes.[224] That is why the Court, after giving the case back to the district court for more factual findings in 1994, decided eventually in 1997 that such a content-neutral obligation to carry content does not violate the cable operator's First Amendment rights.[225]

In its argumentation in *Turner I*, focussing rather on the legal than on the factual issues, the Court underlined the essential gatekeeper function the cable operators have by controlling the television programming channelled into the subscriber's (the viewer's) home rather firmly:

> The potential for abuse of this private power over a central avenue of communication cannot be overlooked. [...] The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas.[226]

This general statement can be understood as a hint to the potential and constitutional margin US Congress has to regulate powerful private actors. The First Amendment rights

219 On the difference between 'cable operators' and 'cable programmers' see *Turner I* (n 217) 628.
220 David Tobenkin, 'The Supreme Court's Denver Nondecision and the Need for a New Media Speaker Paradigm Note' (1998) 7 Southern California Interdisciplinary Law Journal 205, 213.
221 *Turner I* (n 217) 636; *Turner II* (n 218) 214.
222 *Turner I* (n 217) 642–643 with more references to its own jurisprudence.
223 ibid 644–645, 647, 652.
224 ibid 655.
225 *Turner II* (n 218) 224–225.
226 *Turner I* (n 217) 657.

of powerful private entities do not impede legislation to interfere with such rights for the purpose of protecting less powerful persons against the more powerful.

3.2.1.4 TV cable providers as common carriers II—Denver Area Educ. Telecomm. Consortium, Inc.

In 1996, after its first *Turner* decision, the Court had to decide on the constitutionality of *content-based* regulation of cable operators. While the *Turner* cases circled around the question if a cable operator can be "made" a common carrier by becoming the explicit addressee of must carry-obligations (the duty to carry local TV stations), the issue in *Denver* was whether a statutory provision permitting cable television operators to allow or prohibit the broadcasting of materials which "depicts sexual […] activities" (§ 10(a),(c) of the Act) was constitutional. This led to discussions between the Justices in how far cable operators qualify generally—not only when it comes to local TV stations—as common carriers or public fora.

The majority of the Court decided to leave this question open (and handled it quite shortly), as a decision on this would be "unnecessary and unwise",[227] since the arguments in favour of the constitutionality of the limitations to freedom of speech by the provisions in question would also be applicable to limitations on the use of a common carrier.[228] This reluctance was not shared by all Justices. In their partly concurring and partly dissenting opinions Justice Thomas, joined by Justice Scalia, on the one side, and Justice Kennedy, joined by Justice Ginsburg, on the other, exchanged their differing views of the effects of the qualification of cable operators as common carriers or public fora extensively. In the opinion of the first, it would not have any real consequences. Also, the qualification as common carrier would not obligate the television operators to carry "indecent" speech.[229] Common carriers who are responsible for carrying content are not stripped of their constitutional rights, *inter alia* freedom of speech which protects such editorial discretion. According to Justice Thomas the Constitution only prohibits the banning of indecent speech by Congress, it does not disallow public institutions to refuse carrying such speech.[230]

227 *Denver Area Ed Telecommunications Consortium, Inc v FCC* (1996) 518 US 727 (US Supreme Court) 742–743, 749.
228 ibid 750.
229 ibid 825.
230 ibid.

On the opposite side of the spectrum of judicial opinions, Justice Kennedy deepened his public forum-argumentation from ISKCON[231] and pointed out that laws governing the protection of free speech should be all reviewed under the same standard.[232] Any law requiring someone to carry the content of another in a first-come, non-discriminatory basis, in this concrete case to provide leased TV channel, makes such person a common carrier.[233] Justice Kennedy sees no legal difference in laws prohibiting the transmission of a particular kind of content and laws withdrawing legal protection from such content. In consequence, a legal prohibition to carry particular content has to meet the same standard like a rule giving a private entity, which could generally be qualified as common carrier, the right to refuse carrying a specific kind of content.[234] Justice Kennedy equates common carrier-obligations and the creation of public fora insofar, as they serve the same function: ensuring non-discriminatory access to means of communication.[235] Once regulation demands non-discriminatory access to such means, the state created a public forum which then has to fully comply with the constitutional requirements set out in the public forum-doctrine, allowing content-based restrictions only when they survive strict scrutiny and, in particular, serve compelling state interests.[236] With this interpretation, Justice Kennedy proposed to significantly extend the reach of the public forum-doctrine, as it would enfold immediate effects on private-owned property and means, as soon as access to these places is substantially regulated by the state. Quite forward-thinking from today's perspective, Justice Kennedy justified his application of the public forum-doctrine to the digital, private sector by pointing out that "[t]o an increasing degree, the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media."[237]

The case—and its dissenting opinions—shows streams of argumentation which are followed until today. The judges are circling around two questions: (1) What constitutes a common carrier (or public forum) when it comes to the "carrying" content in a non-physical manner and (2) how far goes the obligation of non-discrimination for the common carrier, in particular with respect to its own right to freedom of expression.

231 See section 3.1.1.2.3.
232 *Denver Area Ed. Telecommunications Consortium* (n 227) 797–798.
233 ibid 796–797.
234 ibid 797.
235 ibid 798.
236 ibid 798–803.
237 ibid 803.

3.2.1.5 Internet Service Providers as Common Carriers—The Net Neutrality-Debate

With the Telecommunications Act in 1996, a new category of "information services" was explicitly[238] introduced to which the duties of common carriers do not apply. According to the Act, information services offer the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilising, or making available information via telecommunications, and includes electronic publishing"[239]. The classification was of particular importance for the obligations of ISPs when it comes to non-discrimination of the data they transport, coined under the term "net neutrality".

The Federal Communications Commission (FCC) decided to classify ISPs as information services, not falling under the significant stronger regulation for common carriers.[240] This led to the Supreme Court's *Brand X*[241] judgement in 2005 which was all about the definition of how to differentiate between "information services" and common-carrier telecommunication services. However, while it seems at first like this case would be a perfect fit for contributing to the question when a digital service must be classified as common carrier, it is not. The case did not so much concern the "classic" common carrier-doctrine —there was not one reference to relevant precedents—but the interpretation of the definitions written explicitly into the Telecommunications Act. The key question was the competence of the FCC as federal agency to act as decisive interpreter for the ambiguous terms used in the Act. The Supreme Court accepted the FCC's margin of discretion when classifying ISPs as "information services" and defined its role as "to fill the […] statutory gap"[242]. The case shows how the Supreme Court is generally reluctant to allow courts to put their interpretation in place for an agencies interpretation of a provision, if the latter is still within the scope of possible understandings of a provision. The Court explicitly states that even prior judicial interpretations only supersede later interpretations by agencies if

238 While the term 'information service' was coined by the 1996 Telecommunication Act, it was a codification of the concept of 'basic' and 'enhanced' services of the FCC, published in 1976, see Robert Cannon, 'The Legacy of the Federal Communications Commission's Computer Inquiries' (2003) 55 Federal Communications Law Journal 167, 183–192.

239 Title I, Section 3(20) of the 1934 Act, as Amended by the Telecommunications Act of 1996.

240 Inquiry concerning high-speed access to the internet over cable and other facilities; internet over cable declaratory ruling 2002 (FCC-02-77).

241 *National Cable & Telecommunications Assn v Brand X Internet Services* (2005) 545 US 967 (US Supreme Court).

242 ibid 997.

there is no room for discretion on side for the agency.[243] Consequently, the political nature of the issue of net neutrality led in the following years to different assessments on how to qualify ISPs depending on the administration in charge,[244] without advancing a coherent understanding of the legal prerequisites to qualify as common carrier.

3.2.2 In Germany

In Germany, the doctrines of public institutions and obligations to contract were also applied to the non-physical space (the latter, just like in the US, as must-carry-obligation for TV cable operators). It is noteworthy that this application never sparked any relevant discussions or was problematized by courts, scholarship or legislation.

3.2.2.1 Choirs and Public Events as Public Institutions

Similar to the application of the public forum-doctrine to communication systems in the US,[245] also the doctrine of public institutions in Germany was applied by courts to spaces of communication. Here, it was mainly the right to participate in social events which was brought before the courts.

In 1991, the higher administrative court of Munich had to decide on a case on the participation rights of married women to selection committees for the Passion Plays of the city Oberammergau.[246] It qualified the Plays as "public institution",[247] giving all citizens of the municipality—including females—the right to participate in its organization. The exclusion of women from participating constituted an unlawful discrimination based on their gender and their marital status.[248] While the concrete legal assessment of an unlawful discrimination is hardly surprising, the application of the public institution-doctrine by the court—without any further comment—shows how the doctrine does not need a physical space as its object of regulation, but merely a set-up by a (local, regional or national) government.

243 *Brand X* (n 241) 982.
244 See for President Obama's administration: Open Internet Report and Order on Remand, Declaratory Ruling, and Order 2015 (FCC-15-24); for President Trump: Restoring Internet Freedom Declaratory Ruling, Order, Report and Order 2018 (FCC-17-166); and for the current President Biden: Promoting Competition in the American Economy 2021 (EO 14036).
245 See section 3.2.1.1.
246 [1990] Higher Administrative Court Munich 4 B 883280, 1991 NJW 1498.
247 ibid 1499.
248 ibid.

This approach was also shared by the higher administrative court of Münster, when it had to decide whether the exclusion of a claimant from a choir by the city was lawful.[249] In its decision, the court applied the general principles established for protecting public institutions against disturbances to the decision of exclusion. It pointed out that the choir was part of the public institution "music school", which was set up by the city. That the choir was, unlike the music school itself, or other public institutions like town-halls or public swimming pools, not a physical place but "only" an organizational unit, an association of people, was not considered a problem.

3.2.2.2 Must-Carry Obligations for Media Platforms

When it comes to must carry-obligations for TV cable providers, German legislation knows such obligations just like the US regarding the transmission of local or public TV stations. For example, section 81 of the Media State Treaty (*Medienstaatsvertrag, MStV*), a treaty of the 16 German states regulating the media in Germany, requires all so-called "media platforms" to provide capacities for public broadcasting channels and even regional private broadcasting channels. The compatibility of this provision (and its predecessors) with freedom of speech notably has never been raised in court. Quite the opposite, must-carry obligations are explicitly seen as a mean to promote free speech.[250] In the words of the European Court of Justice, the cultural pluralism must-carry obligations for local TV stations "seek […] to safeguard is connected with freedom of expression", in particular "the freedom of expression of the different social, cultural, religious, philosophical or linguistic components which exist in that region."[251]

Instead, the legal debate concerning must carry-obligations in Germany focuses on the interference with the right to property and corporate freedom.[252] In this context, only the need for financial compensation has been brought before the courts[253] and was discussed as

249 [1994] Higher Administrative Court Münster 22 A 2478/93, 1995 NVwZ 814.

250 Karl-E Hain, Christine Steffen and Thomas Wierny, 'Das Deutsche Must-Carry-Regime Auf Dem Prüfstand: Vereinbarkeit Entgeltlos Zu Erfüllender Must- Carry-Pflichten Mit Unionsrecht Und Deutschem Verfassungsrecht' [2014] Multimedia und Recht 24; Christoph Grabenwarter, 'Art. 5 Abs. 1, Abs. 2 GG' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), Grundgesetz-Kommentar (95th edn, 2021) para 795.

251 *United Pan-Europe Communications Belgium SA and Others v Belgian State* [2007] ECJ C-250/06 [41–42]; see also *European Commission v Kingdom of Belgium* [2011] ECJ C-134/10 [52–53].

252 Hain, Steffen and Wierny (n 250) 28.

253 *netCologne* [2016] Federal Court KZR 30/14, juris; [2018] Higher District Court Hamburg 3 U 132/14, juris.

an issue in legal literature.[254] The right to freedom of speech of the "carriers", the media platforms, is not considered (potentially) infringed.

3.3 The Fundamental Rights of the Addressees

Neither courts in the US or in Germany nor legislation hesitate to apply doctrines which are hundreds of years old and were created for problems in a different time to their equivalents in modern times. By doing so, the doctrines were also transferred to non-physical spaces. However, to understand the current debate on their application to social platforms, it is also important to take into consideration the specific jurisprudence on freedom of expression also in cases not involving the must carry-, the public forum-doctrine or their German equivalents. I have sketched out the general differences between Germany and the US regarding the application of fundamental rights to individuals or private corporations in the first chapter and will now outline the particularities of the weighing of (or the assessment of an interference with) one's right to freedom of expression when "hosting" (in the broadest sense) the content of others. As these cases mostly concern the rights of corporations, I will also elaborate shortly on their standing when it comes to freedom of expression.

3.3.1 In the United States

While the general entitlement of corporations to freedom of expression is indisputable by now, its concrete extent has been controversial and was subject of many Supreme Court decisions, with the 2010 *Citizens United*[255] judgement as its last landmark decision.

In its 1978 *Bellotti* case, the Court struck down a Minnesotan criminal statute prohibiting business corporations to make any contribution influencing voters (in referendums) regarding any questions which does not directly affect the property or business of the corporation.[256] While it left open "the abstract question whether corporations have the full measure of rights that individuals enjoy under the First Amendment"[257], it underlined its

254 Karl-E Hain, Christine Steffen and Thomas Wierny, 'Must-Carry! Must-Offer! Must-Pay? Deutsche Must-Carry-Regelungen Zu Gunsten Öffentlich-Rechtlicher Angebote Und Die Frage Der Einspeiseentgelte' [2013] Multimedia und Recht 769.

255 *Citizens United v Federal Election Comm'n* (2010) 558 US 310 (US Supreme Court).

256 For the merits see *First National Bank of Boston v Bellotti* (1978) 435 US 765 (US Supreme Court) 767–769.

257 ibid 777.

former jurisprudence on (one of) the First Amendment's major purpose being to protect the discussion of government affairs.[258] With regard to this purpose, the degree of protection by freedom of expression does not differ between an individual's and a corporation's speech.[259] A limitation of the protection to such topics which directly affects the business is explicitly rejected by the Court.[260] The general assessment that "speech does not lose its protection because of the corporate identity of the speaker"[261] has been affirmed repeatedly.[262] As an outstanding exception, the Court narrowed in *Austin* (1990)[263] the scope of corporation's protection by the First Amendment as it declared a rule prohibiting organizations to use general treasury funds for expenditures for state elections constitutional. The court found the goal of fighting corruption legitimate[264] and the rule sufficiently narrowly tailored, since it allows the funding of political actions through segregated funds solely for political purposes.[265] Two decades later, the Supreme Court overturned *Austin* by a tight 5:4 majority in *Citizens United*,[266] a case handling once again the prohibition of the use of general treasury funds of corporations to make independent expenditures in the context of elections. It declared *Austin* "not well reasoned"[267] as it "abandoned First Amendment principles"[268]. Instead, it underlined its finding from *Bellotti:* Congress must not discriminate categorically in its regulation of speech based on the corporate identity of the speaker.[269]

So, also (profit like not-for-profit) organizations can invoke the First Amendment to protect their speech from governmental interferences. This has further developed, independent of the must carry- and public forum-doctrine, into a jurisprudence generally assessing under which circumstances one must tolerate the speech of another on its (non-physical) grounds. While in particular the public forum-jurisprudence, e.g.,in *Pruneyard*,[270] addresses the scope of the right to property, these judgements focus on the First Amendment rights of the

258 ibid 776–777.
259 ibid 777.
260 ibid 784–785.
261 *Pacific Gas & Elec Co v Public Util Comm'n* (1986) 475 US 1 (US Supreme Court) 16.
262 *Consolidated Edison Co v Public Serv Comm'n* (1980) 447 US 530 (US Supreme Court) 533; with an extensive overview of existing jurisprudence *Citizens United* (n 255) 342.
263 *Austin, Michigan Secretary of State, et al v Michigan State Chamber of Commerce* (1990) 494 US 652 (US Supreme Court).
264 ibid 658–660.
265 ibid 660–661.
266 *Citizens United* (n 255) 363–365.
267 ibid 363.
268 ibid.
269 ibid 364.
270 See section 3.1.1.2.4 on this.

"hosts", their right to freedom of speech. The decisive factor for the Supreme Court's assessment of such situations is: Is it possible, or even probable, that the (unwanted) speech of another person is attributed to the host and, in consequence, thereby alters the speech of the speaker?[271]

In *Miami Herald v. Tornillo* (1974)[272], the Supreme Court had to decide whether a right-of-reply for political candidates, who are on the opinion that a newspaper reported falsely on them,[273] is constitutional. In *Riley* (1988)[274] it was the inclusion of specific information in pitches on fundraising events, in *Hurley* (1995)[275] the inclusion of specific groups as part of a parade. In all of these cases, the Court decided that the obligations in question were unconstitutional, as they effectively altered the speech of the affected speaker.[276] The Court underlined the negative dimension of the freedom of speech in these cases, as it does not only protect the speaker from a prohibition to say anything it wants to express, but also from a compulsion to say something it does not want to.[277] With regard to newspapers, the Court emphasised the importance of editorial decisions for compiling the product, since a "newspaper is more than a passive receptacle or conduit for news, comment, and advertising."[278] Also, a right-of-reply can only enfold effect as reaction to something a speaker said (or a newspaper published). This interferes also with the positive dimension of freedom of speech, as it is a content-based obligation for a host of speech to act in specific way and can be understood as "punishment" of what has been said before.[279] Just like a newspaper is "more than a […] conduit"[280], also a "parade's overall message is distilled from the individual presentations along the way"[281]. Enforcing the participation of a particular unit at a parade would alter the character of it, changing the message the organizer likes to express, as the compilation of the parade itself qualifies as message.[282] And even a mandatory transparency obligation in a fundraiser's pitch regarding the actual transfer of

271 The Court differentiates between mere conduit of the speech of others (with reference to Turner I) and expressing ones own speech, see *Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc* (1995) 515 US 557 (US Supreme Court) 575–577; with an overview of the jurisprudence Eugene Volokh, 'Treating Social Media Platforms Like Common Carriers?' (2021) 1 Journal of Free Speech Law 377, 423–428.
272 *Miami Herald Publishing Co v Tornillo* (1974) 418 US 241 (US Supreme Court).
273 For the facts, see ibid 244.
274 *Riley v National Federation of the Blind* (1988) 487 US 781 (US Supreme Court).
275 *Hurley* (n 271).
276 *Riley* (n 274) 795; see on this analysis also Volokh (n 271) 423–425.
277 *Tornillo* (n 272) 258; *Hurley* (n 271) 573; *Riley* (n 274) 796–797.
278 *Tornillo* (n 272) 258.
279 ibid 256–257.
280 ibid 258.
281 *Hurley* (n 271) 577.
282 ibid 574.

the donations to charity, which only addresses the publication of facts,[283] alters the speech of the speaker and is, therefore, unconstitutional.[284]

However, the Court also clarified that in those cases in which there is no danger of an attribution of the mandatorily hosted speech to the host, a compulsion to carry/host/publish another one's speech can be constitutional. Referring to *Pruneyard*, in which the Court found no violation of constitutional rights in the mandatory access to a shopping center for leaflet distributors, it pointed out in a later decision that "any concern that access to this area might affect the shopping center owner's exercise of his own right to speak"[285] was absent. In *Rumsfeld*[286] the Court had to decide on the constitutionality of statutory provisions requiring educational institutions to provide access to their institutions equally for military recruiters as they do for others, otherwise they would lose certain federal funds.[287] It used the case to elaborate on the difference it sees between a public parade, as in *Hurley* and the grounds of a law school. The court did not recognize any speech by the law school when hosting interviews or recruiting receptions, as such recruiting services "lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper"[288]. The mere presence of military recruiters would not suggest that the law school endorse the military or their policies, and the law school would still be free to express their criticism publicly in any way they want.[289]

This jurisprudence of the Supreme Court paves the way for such compulsions of hosting speech of others in which hosting does not go beyond the carrying or displaying of another one's speech, not affecting either the (editorial) composition of one coherent product (such as a newspaper) or making it likely to attribute the speech of the other person to the host. Also, such obligations must not be content-based, as this would increase the probability of refraining from expressing particular statements to avoid the consequence of then having to transport someone else's message.

283 Expressively on this *Riley* (n 274) 797–798.
284 ibid 795.
285 *Pacific Gas & Electric* (n 261) 12.
286 *Rumsfeld v Forum for Academic and Institutional Rights, Inc* (2006) 547 US 46 (US Supreme Court).
287 For the facts see ibid 52–53.
288 ibid 64.
289 ibid 65–66.

3.3.2 In Germany

In Germany, the standing of an organization ("legal person") is defined by article 19 para 3 of the *Grundgesetz*. According to this provision, fundamental rights shall apply to (domestic)[290] legal persons "to the extent that the nature of such rights permits". The concrete meaning of what nature of such right permits" is subject to (rather academic)[291] controversy, however, a "characteristic situation of danger to fundamental rights" (in particular for the individuals behind the organization) suffices to apply fundamental rights to organizations.[292] It is generally accepted that freedom of expression also protects organizations, independent of their profit or not-for-profit orientation.[293] Restrictions exist, similar to the US,[294] insofar as the speech (not the speaker) does not constitute an "opinion", but is merely commercial.[295] It lies in the nature of such commercial speech that it is primarily expressed by a particular kind of speakers (corporations), the legal link, however, remains the content of the speech. When corporations do not only try to convince a consumer to buy their products but also try to convince them of a particular opinion, characterized by the weighing of arguments, also "commercial speech" falls under the protection of freedom of opinion as guaranteed in the *Grundgesetz*.[296]

Jurisprudence on the financing of political campaigns as an expression of constitutionally protected opinions by corporations did, unlike in the US,[297] not focus on freedom of speech,[298] but rather on the equal treatment of individuals and corporations.[299] In doing so,

290 The specific questions arising with regard to foreign legal persons shall not be discussed here. For the purpose of social networks (which do all have a European subsidiary) it suffices that the protection of German and EU corporations is the same, see Grabenwarter (n 250) para 36; see for the limited protection of foreigners by the First Amendment in the United States *Citizens United* (n 255) 362, 424.

291 Helge Sodan and Jan Ziekow, *Grundkurs Öffentliches Recht: Staats- und Verwaltungsrecht* (9th edn, CH Beck 2020) ch 25 para 13.

292 ibid.

293 Grabenwarter (n 250) para 34.

294 Ronald J Colombo, *The First Amendment and the Business Corporation* (Oxford University Press 2014) 126.

295 *Südkurier* [1967] *Bundesverfassungsgericht* 1 BvR 414/64, juris [31].

296 *Frischzellentherapie* [1985] *Bundesverfassungsgericht* 1 BvR 934/82, juris [41]; with an exhaustive, critical overview of the *Bundesverfassungsgericht*'s jurisprudence Timo Arnold, *Wirtschaftswerbung und die Meinungsfreiheit des Grundgesetzes: Plädoyer für einen vollumfänglichen Grundrechtsschutz kommerzieller Werbeinhalte* (Springer 2019) 41–51.

297 See section 3.3.1.

298 Also academic contributions on this topic are rare and date back to the 1950/60s, on this (and assessing donations as expression of opinions) Jakob Hahn, 'Die Parteispende Der Aktiengesellschaft' [2018] Die Aktiengesellschaft 472.

299 *Wahlkampfkostenpauschale* [1968] *Bundesverfassungsgericht* 2 BvE 1/67, 2 BvE 3/67, 2 BvE 5/67, juris [228–229]; *Parteispendenurteil III* [1986] *Bundesverfassungsgericht* 2 BvE 2/84, 2 BvR 442/84, juris [104, 126–127].

the *Bundesverfassungsgericht* found no violation of the *Grundgesetz* in legislation treating individuals and corporations equally when it comes to (non-)taxation of donations to political parties.[300] More fundamental, very critical questions of the constitutional protection of political opinions of and participation of corporations in the political process raised by the partly dissenting vote by judge *Böckenförde*[301] were not picked up by the majority. This might hint towards an understanding of freedom of opinion of the majority which does generally not differentiate between individuals and corporations.

Regarding the "hosting" of the speech of others, differences to the US Supreme Court's jurisprudence are recognizable. Just like in the US, also the German Constitution protects the right not to express an opinion one does not share (or to be attributed to such an opinion). Such right not to have or express an opinion is labelled as "negative freedom of opinion".[302] When an attribution of a statement to the "hoster" is implausible, a "hosting obligation" does not constitute an interference with one's right to freedom of opinion.[303] That is why an obligation to print warnings on tobacco products does not violate (not even interfere with) the freedom of opinion of tobacco companies.[304] However, unlike in the US,[305] a (limited) right of reply (*Gegendarstellungsanspruch*) is qualified as interference with freedom of press and broadcasting, but justified by the personality rights of the individuals affected by news coverage.[306] Such replies must only concern facts (not opinions) and cannot go beyond the extent of the original reporting.[307]

The latter constellation is a key difference to the US jurisprudence on freedom of opinion. Both courts emphasize the editorial discretion of a newspaper (or broadcaster) to decide on what it includes in its media product.[308] But while the US Supreme Court declared any right-of-reply unconstitutional in *Tornillo*,[309] the *Bundesverfassungsgericht* brings in the state's duty to protect the personality rights of the persons affected by the reporting.[310] Arguments the Supreme Court understands as intensifying the danger for a free expression

300 *Parteispendenurteil III* (n 299) paras 126–127.
301 ibid 189–197.
302 Grabenwarter (n 250) paras 95–97.
303 *Warnhinweise für Tabakerzeugnisse* [1997] *Bundesverfassungsgericht* 2 BvR 1915/91, juris [46].
304 ibid 46–49.
305 *Tornillo* (n 272).
306 *Gegendarstellung* [1983] *Bundesverfassungsgericht* 1 BvL 20/81, juris [28–33]; *Caroline von Monaco I* [1998] *Bundesverfassungsgericht* 1 BvR 1861/93, 1 BvR 1864/96, 1 BvR 2073/97, juris [109, 115].
307 *Caroline von Monaco I* (n 306) para 117.
308 *Tornillo* (n 272) 258; *Caroline von Monaco I* (n 306) paras 107–109.
309 See on this section 3.3.1.
310 *Caroline von Monaco I* (n 306) para 115.

of opinions, such as the right-to-reply being triggered by former reporting (and therefore, by a particular speech),[311] the *Bundesverfassungsgericht* emphasizes to justify the very same interference, as no one has a stand-alone right to publish its statement in a newspaper, but can only react to former reporting on its personal life.[312] This jurisprudence once again underlines the more comprehensive approach of German constitutional jurisprudence when it comes to taking into account fundamental rights in private relationships. For the *Bundesverfassungsgericht*, the right-of-reply is not only an interference with the freedom of opinion, it is at the same time the result of the state's protective duty deriving from the personality rights of the person affected by media coverage. The Supreme Court, on the other hand, sees only the limitation of the press' liberty by the state, it does not take into account the interferences of private origin with the rights of others in its weighing of interests.

3.4 Social Media Platforms as Public Fora or Common Carriers

The increasing influence of social media platforms on the public discourse led to attempts of applying established doctrines created for public, government-controlled institutions (the public forum-doctrine in the USA, the doctrine of public institutions in Germany) or from the more heavily regulated private sector (such as the common carrier-doctrine in the USA or the concept of obligations to contract in Germany) to these private actors. Some of these efforts are taken by individuals in court, others are taken by state, federal or European legislation. The success rate differs substantially between claims in both states. While German courts emphasized the indirect effect of freedom of opinion when it comes to claims of individuals against the platforms, rather protecting the first, US-American courts focused on the direct protection by the First Amendment when it comes to state regulation of editorial decisions made by platforms. Also, differences in statutory law regarding the liability of hosting providers led to diverging judgements.

311 *Tornillo* (n 272) 256–257.
312 *Caroline von Monaco I* (n 306) para 117.

3.4.1 In the United States

Claims before US courts against social platforms are mainly founded on two streams of legal argumentation.[313] They are either based on contractual or general civil law, or on alleged fundamental rights violations by social networks. As both arguments by claimants were unsuccessful in court until now, lawmakers sympathising with the critique towards social networks have tried to change their obligations through state law. This attempt, however, was quickly declared void by federal courts due to its incompatibility with the liability regime set up by federal law and with the First Amendment rights of the social platforms.

3.4.1.1 Civil Claims and Section 230

Civil claims on reinstating content or gaining access to a social network, often after a (former) user has been removed from the network, are mainly deflected by the defendant's referral to Section 230 Title 47 of the US Code (part of the Communications Decency Act), the most prominent provision for the immunity of hosting providers. Set up in 1996 as part of the reform of the Telecommunications Act, it excepts hosting providers extensively from legal liability deriving from the content hosted on their platforms and for their actions to take down content. Stating rather simple that no platform "shall be treated as the publisher or speaker of any information provided by another"[314], the provision's effect on today's shaping of the internet can hardly be underestimated. Only by removing the web hosting service's responsibility for the content published on it, platforms disseminating user-generated content could grow to size they have nowadays.[315]

313 For an overview of the legal bases of such claims, see also Daphne Keller, 'Who Do You Sue?' [2019] Aegis Series Paper.

314 47 U.S. Code § 230 (c) reads in its entirety as follows: "(1) No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider. (2) No provider or user of an interactive computer service shall be held liable on account of—(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1)."

315 Mike Godwin, 'On Publishers, Carriers, and Bookstores: A Monolog for Our Political Season about the Political and Legislative Background of Section 230' (*Verfassungsblog*, 31 October 2020) <https://verfassungsblog.de/on-publishers-carriers-and-bookstores/> accessed 1 March 2022; for a detailed analysis, see Jeff Kosseff, *The Twenty-Six Words That Created the Internet* (Cornell University Press 2019).

Section 230 has been understood consistently as immunising a social network in all cases of speech removal, may it be political or non-political, as long as they are based on civil law.[316] Claims that Section 230 would only apply to obscene speech were rejected, as the courts underlined explicitly the comprehensive approach of Section 230, stating that a hosting provider shall not be treated as the publisher of *any information*.[317] However, the immunization does only protect against civil claims, not against claims based on alleged violations of constitutional rights, such as the First Amendment.[318] Those must be treated differently and worked as a gateway for (unsuccessful) attempts to apply the public forum-doctrine.

3.4.1.2 Constitutional Claims

The main decision recent claims of fundamental rights violations are based on is the Supreme Court's judgment in *Packingham v. North Carolina*. The Court had to decide on the constitutionality of a North Carolinian law forbidding registered sex offenders to access social networking site. The Supreme Court pointed out the importance the access to public places has for the Right to Free Speech and mentioned that "a street or a park is a quintessential forum for the exercise of First Amendment rights."[319] But today, cyberspace is the "most important place […] for the exchange of views"[320]. Therefore, North Carolina blocked with its law in an unconstitutional manner the "perhaps […] most powerful mechanisms available to a private citizen to make his or her voice heard"[321]. While the Court refrained from explicitly applying the public forum doctrine on social media, it labelled social media as the "modern public square"[322].

Courts have pushed back these claims and underlined that *Packingham* only concerned the validity of state law. While accepting the equivalence of social media to public fora set up by *Packingham*,[323] it did not address the question of how to treat a private company

316 *Langdon v Google, Inc* (2007) 474 FSupp2d 622 (US ND Del) 630–631; *Sikhs for Justice, Inc v Facebook, Inc* (2017) 144 FSupp3d 1088 (US ND Cal) 1094–1095; *Federal Agency of News LLC, et al, v Facebook, Inc* (2019) 395 FSupp3d 1295 (US ND Cal) 1304–1308; *Ebeid v Facebook, Inc* 2019 WL 2059662 (US ND Cal) 3–5.
317 *Langdon v. Google, Inc.* (n 316) 631; *FAN v. Facebook* (n 316) 1307.
318 *FAN v. Facebook* (n 316) 1304,1308.
319 *Packingham v State of North Carolina* (2017) 137 SCt 1730 (US Supreme Court) 1735.
320 ibid.
321 ibid 1737.
322 ibid.
323 *Nyabwa v Facebook* 2018 WL 585467 (US SD Tex) 1.

offering such a place for public exchange.[324] The same goes for other jurisprudence, such as *Denver Area*,[325] in which the Supreme Court also decided on the validity of state law, not on the actions undertaken by a private entity.[326] When assessing if social networks fulfil a public function, the court went through all the precedents, denying that a social networks are like private town owners (*Marsh v. Alabama*)[327], control a formerly public park or side walk, hold public elections or act as an international peacekeeping force.[328] While there is no doubt when it comes to the latter two, it remains remarkable how courts focused on a narrow interpretation of what constitutes "functions that were traditionally 'exclusively reserved to the State'"[329] when evaluating (regularly rather shortly) the first two. Instead of applying a functional approach (like the Supreme Court did when assessing the importance of social media for modern debate in *Packingham*), ordinary courts seem to focus on an historical approach and ask, when testing the state actor-quality of a social network, if the *exact* task has been carried out by the state before. Consequently, also claims against search engines invoking the public forum-doctrine have been rejected with the same arguments, emphasising *Google's* characteristics as private corporation.[330] This differs from German jurisprudence which is more open—due to its long-established tradition of applying fundamental rights to private entities—to qualify social networks as modern public fora.[331]

The position of US courts on the qualification of platforms dates back to times long before modern social platforms. Already in 1996 the US District Court for Eastern Pennsylvania compared *AOL* to *Marsh* and decided that it did not "stand in the shoes of the State" as it did not perform "any municipal power or essential public service".[332] While the case was about the access to the internet and to e-mail-systems, *AOL's* function at that time can hardly be compared to today's closed, proprietary social platforms—especially in its importance for the exchange of ideas. However, US courts still refer to cases such as this one from the early days of the internet when assessing the public function of modern social

324 ibid; *Prager University v Google LLC* 2018 WL 1471939 (US ND Cal) 8; *Freedom Watch, Inc v Google, Inc* (2019) 368 FSupp3d 30 (US DDC) 40.
325 See section 3.2.1.4.
326 *Prager University v. Google LLC* (n 324) 8; *Ebeid v. Facebook, Inc.* (n 316) 6.
327 See section 3.1.1.2.1.
328 *Prager University v. Google LLC* (n 324) 8.
329 ibid.
330 *Langdon v. Google, Inc.* (n 316) 631–632.
331 See section 3.4.2.1.
332 *Cyber Promotions, Inc v American Online, Inc* (1996) 948 FSupp 436 (US ED Pa) 442.

platforms.[333] Hereby, they fail to recognise the development the internet underwent in the last 20 years. Facing the governance of few private companies over the digital global town-square, US courts decided to focus on their characteristic as private, not on their power nor they importance for the public discourse.

3.4.1.3 An Attempt of Regulation—*NetChoice*

Since the courts rejected all claims against social networks for reinstating content or user accounts based on existing statutory law, some (state) lawmakers tried to change just this. While there seems to be consensus in the political sphere that the regulation of platform needs to be changed, that the power of the private corporations needs to be constrained, the concrete measures to do so are highly controversial.[334]

One attempt to reform platform regulation was Florida's "social media law" (Senate Bill 7072). The law *inter alia* prohibited large social media companies to bar any candidate for public office from their platforms, to append their own statements to the posts of users, to algorithmically advantage or disadvantage the content of any candidate and to "censor" (in the meaning of deleting or adding information) any content from "journalistic enterprises". Also, social media companies were obligated to apply their community standards in a "consistent manner".[335]

The understanding of the non-removal obligations regarding content and specific users as "must carry"-obligations was explicitly brought forward by the State of Florida, as it stated in section 1 para 6 of its bill "Social media platforms hold a unique place in preserving First Amendment protections for all Floridians and should be treated similarly to common carriers". This has also been recognized as the core issue by the District Court, pointing out that the "truth" between treating social platforms like any other speaker and treat them as common carriers "is in the middle".[336]

The District Court's decision (a preliminary injunction) was not about qualifying social media companies as common carriers based on established common law-doctrines, but

333 See, e.g. *Prager University v. Google LLC* (n 324); *FAN v. Facebook* (n 316) 1310; *Rutenburg v Twitter, Inc* 2021 WL 1338958 (US ND Cal) 2.
334 Current proposals will be discussed in chapter 4.
335 See on the content of the bill *NetChoice v Moody* (2021) 546 FSupp3d 1082 (US ND Fla) 1086–1089.
336 ibid 1091.

about the compatibility of declaring social media companies explicitly as common carriers by state law with federal statutory (Section 230) and constitutional (the First Amendment) law. In its analysis of the plaintiff's and defendant's arguments, the court rejected any argument by the State of Florida pointing at the monopolistic position of social media platforms, as such a concentration of market power would not strip any of the First Amendment rights the platforms can invoke.[337] It closely links its findings to Supreme Court judgements regulating newspapers, forcing them to publish particular statements as part of an individual's right-to-reply (*Tornillo)*[338].[339] As social platforms curate content, they exercise editorial discretion and fall, like newspapers, under the protection of the First Amendment.[340] The bill "comes nowhere close"[341] not survive the test of strict scrutiny[342] of the court, since it only aims to promote one kind of speech (the one of conservative candidates), which cannot be qualified as legitimate state interest.[343]

However, when analysing the case at hand in light of *Pruneyard*[344] and *FAIR*[345],[346] the court might have given some hints on how regulation of social platforms could be designed in a constitutional manner. It underlined that Florida's social media law altered the speech of the platform, as it dictates how the algorithms of the platforms could order content, and it prohibited some speech by forbidding the display of warning signs (for example against misinformation) underneath a user's post.[347] While such an alteration or restriction of speech is incompatible with the First Amendment, a mere carry-obligation—when there is no danger the carried speech is wrongly attributed to the carrier—seems only to be in conflict with Section 230 as federal law, not with constitutional provisions.[348] This perception might instruct current regulatory proposals on federal law.[349]

337 ibid.
338 *Tornillo* (n 272).
339 *NetChoice* (n 335) 1091.
340 ibid 1092.
341 ibid 1094.
342 The strict scrutiny test is applicable since the regulations in the bill are content-based, see ibid 1093.
343 ibid 1095.
344 *U.S. Reports* (n 156).
345 *Rumsfeld v. FAIR* (n 286).
346 See section 3.1.1.2.4 for *Pruneyard* and section 3.3.1 for *FAIR*.
347 *NetChoice* (n 335) 1093.
348 ibid 1090,1093.
349 See section 4.1 for a discussion of current proposals.

3.4.2 In Germany

The constitutional jurisprudence developed by the *Bundesverfassungsgericht* on the indirect effect of fundamental rights in general, but also particularly in situations when a private corporation offers a public forum to the general public has been incorporated and applied by ordinary courts in a multitude of cases concerning the digital sphere, mainly cases regarding the removal of posts or comments or even bans on social media platforms. While the courts often do not mention the public forum doctrine explicitly, they refer to similar criteria in their assessment of (indirect) fundamental rights obligations of Facebook and others.

3.4.2.1 Decisions by Ordinary Courts

Two general streams of argumentation can be found in the jurisprudence of the (higher) district courts.[350] On the one hand, some courts follow the hints made by the *Bundesverfassungsgericht* in *Fraport*[351] and *Bierdosenflashmob*[352] and apply an (indirect) obligation to respect fundamental rights—in particular the right to freedom of speech—which is equivalent to the level of protection the state has to guarantee. On the other hand, several courts are rather fond of the *Stadionverbot*-decision and apply the guidelines developed there. They do accept the blocking of posts which a still compatible with freedom of speech—as it must be guaranteed by the state—but violate the guidelines set by the platform itself, as long as such blocking is not arbitrary.

The courts following the first stream focus on the social power of the platforms—namely Facebook—and its *de facto* monopoly, constituting an imbalance between the user on the one side and the network on the other.[353] They come to the conclusion that Facebook is, because of its high number of users, of significant importance for the public life and constitutes a public forum.[354] In consequence, the "virtual domiciliary right" of the platform cannot give the platform the right to remove statements which are protected by right to

350 For an overview of German jurisprudence see also Matthias C Kettemann and Anna Sophia Tiedeke, 'Back up: Can Users Sue Platforms to Reinstate Deleted Content?' (2020) 9 Internet Policy Review 8–11.

351 See section 3.1.2.2.2 on this.

352 See section 3.1.2.2.3 on this.

353 [2018] District Court Bamberg 2 O 248/18, juris [77, 81].

354 Using the term 'öffentlicher Marktplatz' in German, [2018] Higher District Court Munich 18 W 1294/18, juris [28]; [2020] Higher District Court Munich 18 U 1491/19 Pre, juris [105]; (n 353) paras 78, 82.

freedom of speech as it obligates the state.[355] This is particularly true as long as the network is not designated as a platform for one particular topic but is open for general discussions.[356] Users must be able to use the platform without the fear of being blocked for lawful comments.[357]

The courts following the latter stream underline the fundamental rights the platforms can claim, such as the right to property and the right to freedom of occupation.[358] Some are referring to a "requirement of dispassion and restraint" issued by the platform with their community guidelines.[359] They have a legitimate interest in keeping "hate" away from their platforms, for commercial interests—as many users should feel as comfortable as possible—as well as for reducing liability risks.[360] While not giving the platforms total freedom in their decisions of content moderation, this stream adheres stronger to the requirement of non-arbitrariness and procedural requirements, such as a possibility for the user to object a decision by a network and to be heard.[361]

3.4.2.2 Der III. Weg by the *Bundesverfassungsgericht*

Not only ordinary courts, also the *Bundesverfassungsgericht* was able to apply its abstract guidelines on a concrete case concerning Facebook. In *Der III. Weg* the claimant, a small right-extremist party sought judicial support to access Facebook again after it had been banned temporarily due to hate speech—in the terminology of the Facebook community guidelines—it has published.[362] Since the elections for the European Parliament were only days ahead, the courts had to decide on preliminary injunctions. While the ordinary courts did not see any reason to obligate Facebook to lift its ban for the party,[363] the *Bundesverfassungsgericht* ordered it to do so. It underlined its preliminary assessment, focussing on the potential negative impact its decision has for the parties involved. As Facebook just had to give on more user access to platform, but the political party would have been deprived on an important mean to communicate with its potential voters shortly before an election, the

355 *Munich* (n 354) para 30; (n 353) para 86.
356 *Munich* (n 354) para 117.
357 [2018] District Court Frankfurt 2-03 O 182/18, 2/03 O 182/18, 2-3 O 182/18 2/3 O 182/18, juris [13]; [2018] Higher District Court Brandenburg 1 W 41/18, juris [4–5].
358 [2020] Higher District Court Nuremberg 3 U 3641/19, juris [97]; [2020] Higher District Court Hamm I-29 U 6/20, 29 U 6/20, juris [164].
359 *Nuremberg* (n 358) para 106.
360 ibid 96, 101; *Hamm* (n 358) para 165; [2018] Higher District Court Stuttgart 4 W 63/18, juris [74].
361 *Nuremberg* (n 358) para 129.
362 *III Weg* [2019] *Bundesverfassungsgericht* 1 BvQ 42/19, juris [1 et seq].
363 ibid 5 et seq.

weighing went in favour of the claimant.[364] The *Bundesverfassungsgericht* emphasized that the question of the platform's duty to respect fundamental right remain open and unresolved.[365] However, the claim of a quite strict (indirect) fundamental rights obligation of social networks can at least not be seen as manifestly ill-founded.[366]

3.4.2.3 Proceduralising Power: The Federal Court's Decision on Facebook T&Cs

The Federal Court of Germany, however, joined the group of courts demanding "justice by procedure". It established a set of procedural requirements as method of fundamental rights protection when it had to decide on the validity of Facebook's Terms and Conditions regarding the removal of content and the blocking of users. In the opinion of the court, Facebook is not bound to fundamental rights like a state, as it does not fulfil basic functions formerly offered by the state, such as postal or telecommunication services.[367] Even the market power of Facebook is not comparable to the monopolistic position these companies had held as the platform might of importance for discussions on the internet, but does not regulate the access to the internet as such.[368]

Instead, Facebook can invoke fundamental rights itself. Mainly its freedom to conduct business, but also its freedom of opinion it exercises when taking decisions on moderating content.[369] Algorithmic rankings or warning signs, both mechanisms discussed in the US-American *NetChoice* decision, were not dealt with in the Federal Court's judgement.

To establish an equilibrium between the rights of users and Facebook's rights, the court established several procedural obligations mandatory for platforms to observe. The platform must have an objective reason for its measure,[370] it must try to explore the facts and the context of the discussed content,[371] must hear the affected individual and review its

364 ibid 18–20.
365 ibid 17.
366 ibid 14.
367 *Facebook AGB* [2021] Federal Court III ZR 179/20, juris [59].
368 ibid.
369 ibid 72–74.
370 ibid 81–82.
371 ibid 83.

decision taking into consideration the individual's statement.[372] Since Facebook's Terms and Conditions did not satisfy these requirements, they were declared invalid.[373]

Such procedural obligations are long-established in German administrative law.[374] The application of these public duties to private entities, a path the *Bundesverfassungsgericht* has paved with its *Stadionverbot* decision,[375] shows how the impact of private decisions on the fundamental rights of individuals are taken seriously, while at the same time refraining from applying strict fundamental rights standards in substance. A way similar to what current European legislation proposes,[376] characterized by the attempt to hinder the dissemination of "harmful but legal" content by allowing social platforms to apply stricter standards to the public debate than a state could do.[377]

Whether this jurisprudence is in line with the standards set forth by the *Bundesverfassungsgericht* can be questioned. Comparing *Fraport*[378] and *Stadionverbot*, it seems like the first was rather worried about the market power, focussing on the influence a decision of a private corporation has on the cultural life of an individual, while the latter, with an indication on state-like standards for private entities, explicitly aimed at the exercise of political rights.[379] Taking into consideration the *Bundesverfassungsgericht's* statement in *Fraport* that the Constitution does not protect the aim of creating a "feel-good atmosphere in a sphere which is strictly reserved for consumer purposes and which remains free from political discussions and social conflicts"[380], the Federal Court's focus on Facebook's business interest as advertising platform in "creating an attractive communication and advertising environment for both its users and its advertising customers"[381] might run counter to this.

372 ibid 85–89.
373 ibid 90–96.
374 For the procedural rights guaranteed by German administrative law see Detterbeck (n 190) paras 947–960.
375 On *Stadionverbot* see section 3.1.2.1.3.
376 See section 4.2 for this.
377 *Facebook AGB* (n 367) para 73.
378 On *Fraport* see section 3.1.2.2.2.
379 See for a comparison of both decisions already section 3.1.2.3.
380 *Fraport* (n 89) 103.
381 *Facebook AGB* (n 367) para 73.

3.5 The Public in the Private: Government-Controlled Fora on Social Media Platforms

While the approaches by US and German courts towards the obligations of the social platforms differ substantially, courts in both states are united in underlining that the pages run by public officials or the government on these platforms qualify as public spaces. Here, the courts apply their established doctrines—the public forum-doctrine in the US, the doctrine of public institutions in Germany—to these digital spaces and continue thereby to show the flexibility of such doctrines for new technical developments.[382]

3.5.1 In the United States: Social Media Pages as Designated Public Fora

The problem with social media pages of government officials is the blurred line between private accounts of the individuals in office and public accounts of the offices they are holding.[383] The major case for this constellation is *Knight First Amendment Institute at Columbia University v. Trump*, in which then-President Trump was sued for blocking the access of users to its personal Twitter page.[384] Mr. Trump's account was created in 2009 as personal account, and he would have retained personal control over the account after the end of his presidency[385] if he had not been blocked from all social networks due to the January 6 attack on the Capitol.[386] The court stressed that the private ownership of the virtual space does not rule out the possibility of being a public forum, as the decisive question is that of governmental control.[387] While not every social media page of a government official constitutes a public forum, a page dealing with official business does.[388] As state

382 See on this already section 3.2.

383 For an analysis of government official's social media pages as public fora see also Nunziato (n 128) 42–59.

384 *Knight First Amendment Institute v Trump* (2019) 928 F3d 226 (US CA2-NY); see for the decision in first instance (with the same result) *Knight First Amendment Institute at Columbia University v Trump* (2018) 302 FSupp3d 541 (US SDNY); later, the decision was vacated by the Supreme Court as moot due to the change of the presidential administration, see *Biden v Knight First Amendment Institute at Columbia Univ* (2021) 141 SCt 1220 (US Supreme Court).

385 *Knight First Amendment Institute v. Trump* (n 384) 235.

386 Kari Paul, 'Twitter and Facebook Lock Donald Trump's Accounts after Video Address' *The Guardian* (7 January 2021) <https://www.theguardian.com/us-news/2021/jan/06/facebook-twitter-youtube-trump-video-supporters-capitol> accessed 1 March 2022; the decision of of the Oversight Board on Facebook's ban of Mr. Trump can be found here: 'Case decision 2021-001-FB-FBR - Donald Trump' (*Oversight Board*, 5 May 2021) <https://www.oversightboard.com/decision/FB-691QAMHJ> accessed 1 March 2022.

387 *Knight First Amendment Institute v. Trump* (n 384) 235.

388 ibid 236.

agencies explicitly referred to the (not-so-) "private" Twitter page of President Trump for information and the President himself used it on a regular basis to announce policy decisions and interact with foreign leaders,[389] the page became a public forum when the person behind it became "public" by being elected for office. Also, it is not merely "government-speech" published for other users as passive audience,[390] but each publication is accompanied by possibilities of interaction, such as comments, likes, retweets etc. In consequence, comments on such a page are not just addressed towards the "owner" of the page—here then-President Trump—but to all the other users commenting and liking in reaction to a post.[391] The first instance judgement was even more precise when it comes to the public forum analysis: While a social media page does not constitute a "traditional public forum", a government official creates a "designated public forum" when setting up a social media page as a space for interaction with constituents.[392]

These judgements have been taken into account and agreed with in a variety of judgements by other courts regarding the public forum quality of social media pages of public institutions,[393] state representatives,[394] and other government officials.[395] When it comes to personal pages, the use of official titles and contact details, the announcements of public information and the use of a social media page for interaction with constituents transform these pages into public fora in the sense of the public forum-doctrine,[396] forbidding any kind of viewpoint-based discrimination.[397]

3.5.2 In Germany: Social Media Pages as "öffentliche Einrichtungen"

In Germany, cases regarding the qualification of social media pages of state-related institutions or government officials as public institutions focus less on the pages of individuals,

389 ibid 235–236.
390 See for the principles applying to government speech *Pleasant Grove City, Utah v Summum* (2009) 555 US 460 (US Supreme Court) 467–469; also referred to in *Knight First Amendment Institute v. Trump* (n 384) 239–240, pointing out that the initial tweets of then-President Trump constitute government speech, however, this does not apply to the possibilities of interaction created by each tweet.
391 *Knight First Amendment Institute v. Trump* (n 384) 238–239.
392 *Knight First Amendment Institute at Columbia University v. Trump* (n 384) 574–575.
393 *Price v City of New York* WL 2018 3117507 (US SD NY) 15–16; *Scarborough v Frederick County School Board* (2021) 517 FSupp3d 569 (US WD Va) 577–579.
394 *Campbell v Reisch* (2019) 367 FSupp3d 987 (US WDMo) 991–992.
395 *Davison v Randall* (2019) 912 F3d 666 (US 4th Cir) 685–687.
396 ibid 683; *Campbell v. Reisch* (n 394) 994–995.
397 *Price v. City of New York* (n 393) 16; *Davison* (n 395) 687; *Campbell v. Reisch* (n 394) 993.

such as state representatives, and more on cases against social media pages set up by public broadcasting channels. This might be related to the specific task of public broadcasting in Germany to set up a tele-media services providing "possibilities for interactive communication"[398]. By fulfilling this task, broadcasting channels also became more active on social networks and explicitly asked their online subscribers to engage in discussions in the comment sections of their posts regarding the content published there.[399] However, some cases also dealt with the question of the attribution of statements published on social media pages of government officials to the public office they hold. While these cases did not directly concern the question of access to such a page (and, in consequence, the admissibility of content moderation), they also contribute to these issues by defining when these digital spaces located on private property can be qualified as "public".

In 2016, the Constitutional Court of the state Thuringia had to decide on some statements made by the state premier in an interview against the right-extremist party NPD.[400] The court underlined that it is decisive if such statement had been given his function as state premier or as party politician. If it is attributed to the latter, also controversial statements against other political parties are protected as part of the political debate, while statements as the first, as government official, must remain neutral. Although the general framing of the interview hinted to his position as party politician,[401] the later publication of a link to the interview on the Twitter page of the state chancellery leads to an immediate attribution to his position as government officials.[402] Twitter and Facebook page of the state chancellery qualify as official publication mediums of the state, despite their non-traditional character,[403] thus making the critical statements of the state premier as government official on a political party unlawful.[404]

Similarly, the Constitutional Court of the city-state Berlin issued a decision on a Twitter post published on the official Twitter page of the mayor of Berlin praising a demonstration

398 See section 30 para 3 of the Media State Treaty.
399 For example, the ZDF (Second German Broadcaster) wants to 'communicate and interact' with its users and asks them to 'praise, criticize and comment' on their content; when discussing content, users should remain friendly and respectful, as everyone is entitled to its own opinion, see 'ZDF-Netiquette' <https://www.zdf.de/uri/b71033f1-9875-435f-969c-d11252e48eb2> accessed 1 March 2022.
400 [2016] Constitutional Court of Thuringia 25/15, juris.
401 ibid 88.
402 ibid 90.
403 ibid.
404 ibid 96–108.

against racism and for democracy and freedom.[405] As the occasion for the demonstration was the party convention of the right-wing party AfD, the party claimed that the mayor violation his neutrality obligations.[406] The court decided that by indicating its official status with its user-name, its description and by being referred to on other websites of the city of Berlin, the page owner showed unequivocally that he uses his specific capacity as mayor to distribute such message.[407] However, as the concrete wording of the post did not mention the party, the statement was still considered "party-neutral" by the court.[408]

In their decisions on the social media pages of public broadcasting channels, the courts support their finding with the designation of the social media pages as spaces for interaction and communication by the broadcasters.[409] Users should not only consume the content given by the page owner but should start to enter a discussion amongst each other by commenting on such content. To be precise, the actual public institution is not the social media page as such, but its space for comments. The "public" character of these pages derives from the broadcasting channel's legal task to provide modern media services to support the participation of all population groups in the information society and create possibilities of interactive communication, while promoting media literacy of all generations and of minorities.[410] However, users' right to comment is limited by the standards set forth by the broadcasters for their social media channels. In particular, statements must be topic-related, just like in designated public fora in the US. Violations of these standards give the broadcasters the right to block users from accessing their page.[411]

4. The Publicization of the Private

In the US as well as in Germany, the debate concerning hate speech, disinformation, and the influence of private platforms on the public debate, has brought the topic of platform regulation to the centre of attention. Claims against social platforms in the US were deflected, on the one hand, based on a strict understanding of state action—and the need of

405 [2019] Constitutional Court of Berlin 80/18, juris.
406 ibid 25.
407 ibid 44.
408 ibid 45–57.
409 [2020] Administrative Court Leipzig 1 K 1167/19, juris [14, 43]; [2018] Administrative Court Mainz 4 K 762/17.MZ, juris [59–61].
410 [2017] Administrative Court Munich M 26 K 16.5928, juris [14, 17]; [2021] Administrative Court Cologne 6 K 717/18, juris [44]; *Mainz* (n 409) para 58, see section 30 para 3 of the Media State Treaty (Medienstaatsvertrag) as legal basis.
411 *Mainz* (n 409) paras 80–81; *Cologne* (n 410) paras 46–55.

actions attributable to the state for invoking fundamental rights—and, on the other, by the (nearly) all-encompassing immunity against civil claims Section 230 has given to platforms. Consequently, the legislative debate is circling around the reform of Section 230, with a remarkable variety of proposals.

In Germany, a first set of regulations, the "Act to Improve Enforcement of the Law in Social Networks" (*Netzwerkdurchsetzungsgesetz* (*NetzDG)*), focused not so much on potential dangers to the freedom of expression of the users by content moderation of private platforms, but rather on the issue of (illegal) hate speech. However, more recent reforms have adapted and codified the procedural requirements for decisions of content removal or blocking developed by the jurisprudence, showing once again the interplay between jurisprudence and legislation in adapting law to new situations. This development will most probably be joined by European legislation currently drafted, with the issue of substantive standards of content regulation remaining controversial.

4.1 Legislative Proposals in the United States

Section 230 is understood as core provision of internet regulation in the US. But while it is largely and from all political sides criticized, its critics are disagreeing substantially in their analysis of current problems and the aims of their reform proposals.[412] Politicians from both sides of the political landscape, most prominently former President Trump[413] and current President Biden[414], have called for repealing Section 230. Mr. Trump and his Republican colleagues accuse the big social networks of favouring liberal politicians, e.g. with algorithmic rankings or with banners warning for misinformation under the posts of some politicians.[415] Their reform proposals aim at increasing the liability of platforms for

412 The proposals to reform Section 230 have been categorized in more than ten different branches: Ashley Johnson and Daniel Castro, 'Proposals to Reform Section 230' (Information Technology & Innovation Foundation 2021).

413 Tony Romm, 'Trump Threatens to Veto Major Defense Bill Unless Congress Repeals Section 230, a Legal Shield for Tech Giants' *Washington Post* (1 December 2020) <https://www.washingtonpost.com/technology/2020/12/01/trump-repeal-section-230-ndaa/> accessed 1 March 2022.

414 Editorial Board, 'Interview with Joe Biden' *The New York Times* (17 January 2020) <https://www.nytimes.com/interactive/2020/01/17/opinion/joe-biden-nytimes-interview.html> accessed 1 March 2022.

415 However, the myth of an anti-conservative bias has been disproved several times, see Paul M Barrett and J Grant Sims, 'False Accusation: The Unfounded Claim That Social Media Companies Censor Conservatives' (Stern Center for Business and Human Rights, New York University 2021); Mark Scott, 'Despite Cries of Censorship, Conservatives Dominate Social Media' *POLITICO* (26 October 2020) <https://www.politico.com/news/2020/10/26/censorship-conservatives-social-media-432643> accessed

the content moderation decisions, giving users the possibility to sue platforms when their posts have been removed. Liberal lawmakers from the Democratic Party also want to increase the accountability of social platforms, but not to force them to carry more content, but instead to become more active in the fight against misinformation and hate speech.[416]

For reaching their respective targets, also a multitude of more nuanced approaches has been proposed, for example only carving out the protection of platforms of a particular size or against claims on a particular legal basis.[417] However, one must keep in mind the constitutional boundaries in place for any reform proposal. In particular, criticism aiming at the (dis-)advantaging treatment of content is doomed to fail. Florida's attempt to regulate this matter was not only invalidated because of its incompatibility with federal law, namely Section 230, but also because of its unconstitutionality.[418] According to the US-American understanding of freedom of speech of platforms "carrying" the content of others, any kind of editorial decision is protected by the First Amendment and a content-based restrictions to this must survive the strict-scrutiny test.[419] The algorithmic placement of a post in a "timeline" provided by a platform constitutes protected speech of the platform, the same goes for warning messages attached to posts by users. Considering the level of protection the Supreme Court and other courts have granted also to opinions expressed by companies, regulation in this field will always be at the borderline of constitutionality.[420] However, US jurisprudence has also outlined that obligations to carry the content of others can be constitutional, if it is (in particular) ensured that the speech is not falsely attributed to the carrier nor is its own speech altered.[421] Consequently, a mere obligation to host someone else's legal content, without any obligation to advantage nor a prohibition to disadvantage it or not to comment on it publicly, could be compatible with the right to freedom of expression as enshrined in the First Amendment of the US Constitution.[422]

1 March 2022.

416 For a critical assessment of several of such proposals, see Johnson and Castro (n 412) 7–9.

417 ibid 6–7.

418 See section 3.4.1.3 on this.

419 See section 3.3.1 on this.

420 Like this Volokh (n 271) 433, 451–452.

421 See section 3.3.1 for more details.

422 See for a detailed and compelling argument on this Volokh (n 271).

4.2 Legislative Developments in Germany and Europe

In Germany, the introduction of the *NetzDG* in 2017 was a first big step in the reform of platform regulation. Despite grave concerns regarding its constitutionality and its compatibility with European law,[423] it became a role model for platform regulation in other countries.[424] Its focus on the fight against hate speech later shifted also towards the protection against "over-blocking", the blocking and removal of content which is neither illegal nor a violation of the platform services terms and conditions. Therefore, the reform of the *NetzDG* in 2021 introduced mandatory complaint mechanisms for social networks which ensures that the perspective of the users affected by the blocking or removal is heard and taken into consideration.[425] The complaint mechanism shows clear parallels to administrative review mechanisms by government administrations and address the demands expressed by courts for establishing justice by procedure. Apart from the realization of the right to be heard, the review must be undertaken by a person who did not deal with the issue initially (probably to diminish any possible bias) and its decision must be reasoned.[426] Additionally, the possibility for users to appeal to out-of-court dispute settlements was introduced.[427] While it remains silent with regard to the substantive standard for content moderation—apart from illegal/criminal content—it sets procedural rules which should protect the (fundamental) rights of the users.

This strand of legislation is also followed by the current proposal of a *Digital Services Act (DSA)* by the European Commission.[428] The new "Constitution of the Internet", as it is hailed by some,[429] aims to achieve justice by procedure. Online platforms must provide complaint-handling systems after decisions to remove or disable the access to user

423 See Elisa Hoven and Hubertus Gersdorf, 'NetzDG § 1' in Hubertus Gersdorf and Boris P Paal (eds), *BeckOK Informations- und Medienrecht* (34th edn, 2021) paras 5–11; most recently, some provisions of the NetzDG have been declared incompatible with European Union law by [2022] Administrative Court Cologne 6 L 1277/21, juris.

424 See the critical reports by the Danish think tank 'Justitia': Jacob Mchangama and Joelle Fiss, 'The Digital Berlin Wall: How Germany (Accidentally) Created a Prototype for Global Online Censorship' (Justitia 2019); Jacob Mchangama and Joelle Fiss, 'The Digital Berlin Wall: How Germany (Accidentally) Created a Prototype for Global Online Censorship - Act Two' (Justitia 2020).

425 See section 3b *NetzDG*.

426 See section 3b para 2 *NetzDG*.

427 See section 3c *NetzDG*.

428 Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC 2020 [COM/2020/825 final].

429 See for example from German media Kühl (n 8).

accounts or content.[430] Also, similar to the existing *NetzDG* regulation in Germany, users should be able to challenge the decisions by platforms in out-of-court-dispute-settlements. These dispute settlement mechanisms shall be "impartial and independent of online platforms" and settle disputes in "a swift, efficient and cost-effective manner".[431] The *DSA* only becomes concrete on these procedural rules, its regulation of what content must be allowed/carried by the platform remains rather vague. It obligates them to enforce their terms and conditions "in a diligent, objective and proportionate manner […] with due regard to the rights and legitimate interests of all parties involved, including the applicable fundamental rights" of the users.[432] When comparing the provisions on procedural rules and these statements on substantive questions of the terms and conditions, it shows that the latter cannot be understood as establishing a comprehensive binding to fundamental rights for online platforms. If this had been the aim of the Commission when drafting the proposal, it would have tailored the rules more narrowly only for "Very Large Online-Platforms (VLOPs)"[433] and would have been more explicit than a mere "with due regard to the [fundamental] rights".[434] Just like in the last years in Germany, it will be task of the European courts to define the concrete extent of fundamental rights obligations for powerful private platforms with their jurisprudence.[435]

5. Concluding Remarks

Social media platform are the global town-squares individuals in Germany and the US share. They use this space for similar purposes, for expressing their opinion and participating in the public debate, their legal protection, however, differs fundamentally. While courts and politicians in both countries have emphasized the power private platforms have in modern democracies, only German legislation and judiciary has taken action. I have argued that these different approaches can be traced back on the general value of fundamental rights for private relationships, reflected in each country's jurisprudence.

430 See article 17 Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC (n 428).
431 Article 18 para 2 ibid.
432 Article 12 para 2 ibid.
433 When it comes to risk assessments, mitigating risks, and transparency rules the Commission did precisely that, see sec 4 (art 25-33) ibid; the 'undifferentiated rule' is also criticized by Alexander Peukert, 'Five Reasons to be Skeptical About the DSA' (*Verfassungsblog*, 31 August 2021) <https://verfassungsblog.de/power-dsa-dma-04/> accessed 1 March 2022.
434 Like this also Naomi Appelman, João Pedro Quintais and Ronan Fahy, 'Using Terms and Conditions to apply Fundamental Rights to Content Moderation' (*Verfassungsblog*, 1 September 2021) <https://verfassungsblog.de/power-dsa-dma-06/> accessed 1 March 2022.
435 See also ibid.

In the US, the dominant understanding of the function of fundamental rights in the jurisprudence of the Supreme Court is to tame the state as *Leviathan*. Fundamental rights are rights against the state, defending the individual's sphere of freedom. Consequently, courts in the US do not qualify disputes between social networks and their users as fundamental rights matters but refrained from applying public obligations to social platforms. More recent judgments acknowledge the power of these platforms but only hint at what kind of regulation might be possible. Despite some examples of legal doctrines developed by courts and later taken up by lawmakers,[436] and even decisions with a significantly broader understanding of the fundamental rights,[437] current jurisprudence does not show the will for judicial activism on this matter. The lack of court decisions which could serve as a starting point for lawmakers might be one reason for the current lack of orientation on how to regulate social platforms in US politics.

In Germany, on the other hand, fundamental rights are understood as obligating the state to act in a particular manner (not only to refrain from actions) and to protect the rights of its citizens against violations by other private entities. In doing so, the fundamental rights apply not only to the relationship between individual and state, but also (indirectly) to relationships between individuals. This interpretation of fundamental rights has led to a productive exchange between courts and legislation when it comes to the regulation of private power. Courts have paved a way, based on the assessment how fundamental rights are best brought into force against powerful entities, and lawmakers are willing to follow their guidance. While the concrete extent of the platforms' obligations remain unclear when it comes to substantive issues, their procedural obligations equal those of public administrative bodies. This development originating from court benches has been taken over by current legislation (Germany's *NetzDG)* and legislative proposals (the EU's Digital Services Act).

436 E.g. the development of the common carrier-doctrine, see section 3.1.1.1.
437 Such as *Shelley* (section 2.1.1) and *Marsh* (section 3.1.1.2.1).

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