Withdrawal and Expulsion in Germany: A Comparative Perspective on the "Close Corporation Problem"

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WITHDRAWAL AND EXPULSION IN GERMANY: A COMPARATIVE PERSPECTIVE ON THE "CLOSE CORPORATION PROBLEM"

Hugh T. Scogin, Jr.*

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I owe a special debt to the splendidly efficient librarians and staff of the Institute for Advanced Study in Berlin for helping me obtain often obscure materials during my all too brief stay as their guest and to the ever helpful and patient staff of the Law Library of the Free University of Berlin.
INTRODUCTION

The record depicts a course of family controversy and dissen- sion, beginning before the death of the father and continuing to the present, characterized by ill will, accusations, recriminations, extensive and expensive litigation, and physical violence. . . .

Were the suit between David and Arthur personally, much of the testimony would merit discussion. . . . Perhaps, however, it needs to be emphasized that the controversy is between majority and minority stockholders as to dissolution of the corporation, and unapproved personal sins of contentious members are not to be visited upon their innocent associates nor used to destroy their property rights. . . .

In our opinion, the case presents no right to the remedy of dissolution.¹

The image presented by this excerpt evokes the intensely personal aspects² of disputes within closely held corporations. It also illustrates U.S. law’s history of not addressing such aspects or the human relationships that give rise to them. This article will discuss the very different approaches to resolving close corporation disputes taken by the U.S. and German legal systems. In Germany, though starting from a position very similar to the older U.S. approach, the law has come to focus on personal elements between stockholders in a closely held corporation.

Closely held corporations present a special concern for any legal system in that they are usually owned by a small number of shareholders, are often characterized by personal and flexible management, and do not have shares that are easily traded on an open market. As a result,

². By choosing to coordinate their activities in a corporate form, parties establish a legal entity that embodies their understanding of how such coordination is to be effected. Many contemporary observers describe the nature of such an entity as a “nexus of contracts.” A good introduction to this approach is the symposium volume Contractual Freedom in Corporate Law, 89 COLUM. L. REV. 1395 (1989). Although this metaphor is recent, the concept it expresses has long been an element of U.S. and other legal systems. The content of the phrase depends upon the nature and significance of the contracts that constitute the corporate nexus. Concerning shareholders, the contracts generally emphasized in the United States involve rights and expectations regarding a specific range of largely economic concerns such as a share of the profits, an interest in the assets, and a voice in the company. These concerns do not, however, fully capture the ways in which a close corporation impinges on the lives of the parties to it. The parties not only have a theoretical legal relationship, but also a concrete, ongoing human relationship. That human relationship has an impact upon matters such as the psychic gratification of the parties, their sense of fairness, their emotional responses to each other, and the impact of their business activity on other aspects of their lives. These factors are examples of “personal aspects.”
the actual functioning of such companies does not always fit neatly into the categories provided by the formal structure of business law.\(^3\)

A shareholder confronts the "close corporation problem" when, faced with a change in circumstances, he or she desires to sever relations with fellow shareholders but is unable to do so. The difficulty arises in part from the general lack of a ready market for close corporation shares. Aggrieved shareholders can thus be trapped in intolerable situations. Their plight may be exacerbated by the sometimes imperfect fit between the formal relationships among the parties established by law and the factual relationships among them established by life.

All legal systems that provide for a closely held corporate structure encounter this problem. In developing solutions, all of them must balance the inevitable tradeoffs. The more narrowly drawn the remedy and its possible bases, the more the system promotes stability and predictability. At the same time, however, the narrower the solution, the wider the range of shareholder grievances that remain unsolved, and the more acute the "close corporation problem." Conversely, the more broadly defined and discretionary the remedy and the greater the range of grievances that can be addressed, the less able the system is to promote stability and predictability.

Traditionally, U.S. remedies were limited, and the bases for obtaining them were narrowly defined. The resulting hardship to parties has prompted experiments with more open-ended solutions and greater reliance on judicial discretion.\(^4\) These recent developments in U.S. law have suggested practical mechanisms as well as new normative approaches. Although they usually developed without reference to German law, these new U.S. approaches move in the direction of those with which the Germans have had seven decades of experience and which they have carried through to their conclusion. By surveying the German experience, this article will provide a comparative and historical perspective for recent U.S. developments. On a more fundamental level, the fact that German law takes for granted legal assumptions that seem unthinkable in the context of traditional U.S. doctrine gives us a more concrete basis for evaluating the implications of such assumptions for the U.S. legal system.

U.S. law's traditional remedy for the "close corporation problem" was court-ordered dissolution of the corporation. The basis for obtaining

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3. See infra note 20 for a fuller discussion of the German legal system's response to the need to treat the closely held company as a special business entity.
4. See infra part II.A.
this remedy was the economic inviability of the company. The law did not grant dissolution to resolve the broader range of problems caused by personal conflicts. As a result, many shareholders saw their problems compounded by the loss of personal autonomy entailed by their difficulty in extricating themselves from their companies. Even when relief was granted, dissolution was a drastic remedy that meant extinction of the company and a resulting loss of some of its value as a going concern and all of the psychic value derived from it by its shareholders.

More recent approaches in the United States have broadened the availability of relief and have recognized a greater variety of remedies. In order to address some of the personal concerns of close corporation shareholders, courts have looked beyond the economic viability of the company to questions of fiduciary obligations between shareholders and oppression of minority shareholders. Fiduciary concepts such as fair dealing and good faith expand the bases for relief, but they remain circumscribed by doctrinal limits when applied to shareholders. Once the right to relief has been recognized, U.S. courts and legislators have created remedies such as shareholder buyouts, third-party arbitration, and the appointment of provisional directors. All of these remedies enable the corporation to continue its existence. The limits of fiduciary doctrines and the respective strengths and weaknesses of the newer remedies, however, have sometimes led to a greater desire for open-ended judicial discretion in fashioning appropriate relief.

Although they started with a statutory approach very similar to the traditional U.S. approach, German courts have created a body of case law that differs sharply from U.S. law in its mechanisms for relief and its underlying concepts. Germany thus presents a model of a highly developed and influential alternative legal system in which concerns very similar to those facing U.S. shareholders, and statutory provisions very similar to those provided by earlier U.S. law, interact with fundamentally different assumptions about close corporations. The German analogue of the close corporation is the GmbH (Limited Liability Company), in which a small number of shareholders own shares without a ready market in a company often characterized by a flexible manage-

5. See infra notes 159–62 and accompanying text.
6. See infra note 163 and accompanying text.
7. See infra notes 164–76 and accompanying text.
8. Id.
9. As applied to shareholders, fiduciary duties have often been discussed in the context of potential oppression of minority shareholders. See infra note 179.
10. See infra notes 166–71 and accompanying text.
11. See infra notes 20–21 and accompanying text.
Withdrawal and Expulsion in Germany

The GmbH is by far the most common type of corporate entity in what is an increasingly important economy. Its significance is not confined to Germany itself; German law has been a model for legal development in many parts of the world, including East Asia. Although specific provisions of company law (such as rules for dispute resolution) differ widely among countries, knowledge of the German system is important to an understanding of its non-European progeny. As the harmonization process with respect to the business law of European Community Member States continues, the legal practices of a reunified Germany will have added significance in Europe.

The significance of convergences and differences between U.S. and German legal approaches, however, cannot be understood on the level of instrumental concerns and statutory provisions alone. Such seemingly narrow and technical doctrines of corporate law do not exist in isolation; they are inevitably linked to deeper assumptions of their legal cultures. Evaluation of legal approaches must take these links into account. The law should be illuminated by looking at the manner in which doctrines have been put to use over time and in the context of their legal cultures. In the case of Germany, proper evaluation should consider German company law doctrines not only from the perspective of the powerful and democratic Germany of today, but also from the perspective of the Nazi Germany of the all too recent past.

The remainder of this article will examine the German legal system's experience with fashioning remedies for the "close corporation problem" and the underlying concepts that have shaped these remedies. Part I will trace the growth of the doctrines of withdrawal and expulsion in the context of Germany's troubled history. Part II will compare German and U.S. approaches on both practical and conceptual levels. On one level, the focus of the article is narrow. It deals with specific,

12. See infra note 20. The reader should note, however, that the cumbersome requirements of the German public company form lead many companies with quite large capitalization, scale of operations, and workforces to organize as GmbH. This factor is what leads some German commentators to discuss "capitalist" and "personal" companies. Case law has not found this distinction to affect the availability of the remedies discussed in this article. See infra note 118.

13. In 1990, there were 2,682 AGs valued at 149,109,000,000 DM and 433,731 GmbHs valued at 195,815,000,000 DM. See STATISTISCHES JAHRBUCH FÜR DAS VEREINTE DEUTSCHLAND (1991).

14. In China, Japan, and Korea, civil codes were adopted in the twentieth century based heavily on the German code. Legal vocabulary and the institutional structures of the legal systems in these countries were also strongly influenced by German concepts. In the field of company law, Japan adopted a Limited Liability Corporation Law in 1938 (Yūgen Kaisha Hō) that was closely based on the German GmbH Law. Its statutory provisions for dispute resolution are very similar to those of its German model.
technical solutions to only the most extreme examples of the close corporation problem. Such cases are not frequently litigated. Their doctrines do, however, constitute default rules that can affect the behavior of parties. Because they ultimately balance shareholders' obligations of good faith against their property interest in maintaining control, such doctrines provide a useful test case.

The broader implications of withdrawal, expulsion, and the "substantial basis" behind them make these doctrines a useful prism through which to view underlying assumptions of corporate law. To the extent that approaches recently suggested in the U.S. close corporation context resemble those that have been put into effect in Germany, a study of German law can help us better evaluate the strengths and weaknesses of such approaches. With respect to other practices that are alien to U.S. approaches, examining concepts and practices taken for granted in one system, but unthinkable in the other, helps us better understand the relation between corporate doctrines and their legal cultures.

In Germany, the tragic history of the twentieth century provides another revealing dimension. The slow and consistent development of the law of GmbH dispute resolution contrasts with the social and political cataclysms that Germany has faced in this century. This pattern of steady development has been used by some to support the notion that GmbH remedies are independent of their ideological context. The role of legal scholars in some of the more painful episodes of modern German history has been a matter of controversy. Unlike their colleagues in criminal and constitutional law, corporate experts have generally been considered far removed from the political aspects of German ideology. The two German remedies of withdrawal and expulsion in a close corporation context provide a concrete vantage point from which to consider the ideological underpinnings of GmbH law.

The deeper level of German experience can best be understood by placing it in this historical context. The German doctrines of withdrawal and expulsion have been expressed in consistent terms, but they have existed in three very different eras of modern German history. The doctrines were initially suggested during the Weimar period, when courts generally restricted themselves to statutory dissolution as provid-

15. See, e.g., FRANZ SCHOLZ, AUSSCHLIESSUNG UND AUSTRITT EINES GESELLSCHAFTERS AUS DER GMBH (1950).
17. See infra part I.
18. The German Weimar period is recognized as the years 1919-1933.
ed in the GmbH Law and viewed these new remedies of withdrawal and expulsion as narrowly drawn exceptions to the traditional dissolution remedy. The universal availability of withdrawal and expulsion remedies for all GmbH shareholders existed during that time only as a theoretical proposal, urged on normative grounds. As we shall see, acceptance by the German legal system of these two new principles occurred during the Third Reich. In the postwar period, these principles have continued to govern the German approach, though courts have administered them in new ways. Comparing the way in which a single set of normative assumptions operated in three very different historical contexts illuminates both the assumptions underlying the German approach and the potential dangers of that approach.

I. THE GERMAN EXPERIENCE WITH EXPULSION AND WITHDRAWAL IN THE GMBH

Before tracing the historical development of the withdrawal and expulsion doctrines, it is helpful to summarize briefly what those terms presently mean in German law. A fuller discussion of contemporary practice can be found in Part I.B.

A widely-noted aspect of German corporate law is its treatment of what U.S. law calls a closely held corporation as a separate category of legal entity with its own governing statute. The closely held GmbH is

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19. The Nazi Era is recognized as the years 1933–1945.

20. The starting point for any analysis of German company law is the sharp distinction drawn in Germany between the publicly held corporation, the Aktiengesellschaft (AG), and the more closely held limited liability company, the Gesellschaft mit beschrankter Haftung (GmbH). For a century, the German legal system has recognized the fundamental differences between such entities by establishing separate legal regimes for them. The GmbH Law of 1892 provides for many of the attributes that later characterized U.S. close corporation statutes. This aspect of German company law was widely noted in U.S. legal literature at the time those statutes were formulated. See, e.g., Henry P. DeVries & Friedrich K. Juenger, Limited Liability Contract: The GmbH, 64 COLUM. L. REV. 866 (1964); Wyatt R. Haskell, The American Close Corporation and Its West German Counterpart: A Comparative Study 21 A.L.A. L. REV. 287 (1968); Dieter Schneider, The American Close Corporation and Its German Equivalent, 14 BUS. LAW. 228 (1958); Joseph L. Weiner, Legislative Recognition of the Close Corporation, 27 MICH. L. REV. 273 (1929); Norman Winer, Proposing a New York "Close Corporation Law," 28 CORNELL L.Q. 313 (1943).

Given the sui generis nature of the GmbH, one may question whether the close corporation is an appropriate entity with which to compare it. The newly emerging entity of the Limited Liability Company is sometimes said to resemble the GmbH. A comprehensive introduction to this new form is Robert R. Keatinge et al., The Limited Liability Company: A Study of the Emerging Entity, 47 BUS. LAW. 375 (1992). The U.S. Limited Liability Company, however, is much closer in its structure and operation to a limited partnership than is a GmbH. The German courts have stressed the distinction between the limited partnership and the GmbH in discussing dispute resolution issues. The statutory provisions of the GmbH for dispute resolution resemble U.S. corporate provisions. The GmbH management structure, while flexible, resembles the U.S. closely held corporation more than it does the limited
governed by the *Gesetz betreffend die Gesellschaften mit beschränkter Haftung*, of April 20, 1892 (GmbH Law). The GmbH Law's solution to the close corporation deadlock problem is court-ordered dissolution of the enterprise. Section 61 of the GmbH Law provides that:

(1) The company may be dissolved by a court decision in case it becomes impossible to accomplish the purpose of the company or when there are other substantial causes (*wichtige Grund*) for the dissolution resulting from the conditions of the company.\(^{21}\)

This solution resembles the older U.S. approach,\(^{22}\) the dissolution remedy and the reliance on courts are common to both. The German statute's expression of the basis for relief, however, is somewhat broader. Inability to accomplish the company's purpose is a concept familiar to U.S. law. The other concept, a *wichtige Grund* [substantial basis] arising from the company's circumstances is unfamiliar to U.S. law, but the focus on the circumstances of the company rather than on the individual shareholders is consistent with older U.S. doctrines. The dissolution remedy itself has been criticized in Germany as it has been in the United States. The leading post-war German decision on the subject stresses the fact that dissolution leads to a loss of business and a loss of jobs.\(^{23}\)

Because the GmbH Law provides no other solutions, German courts have sought over a seventy year period to fashion their own remedies. The result has been the creation of a "common law" of dispute resolution having only a tenuous relationship to the applicable GmbH statute.

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\(^{22}\) See infra notes 159-62 and accompanying text.

Although such an approach was originally rejected, German courts have come to focus on the factual relationships between the parties and the personal aspects of those relationships as their primary concern. The basis for relief is the wichtige Grund [substantial basis]. The content of this concept will be discussed at length below. Wichtige Grund addresses a wide range of personal factors and may arise from circumstances that involve the company or the shareholders personally. It does not require an element of fault, and thus, it is much broader than the U.S. concept of fiduciary duty, which comprises factors such as disloyalty, self-dealing, oppression, and bad faith. The extremely vague and open-ended language of the applicable German concepts has given judges wide discretion in resolving GmbH disputes.

When a wichtige Grund has been established, modern German courts have recognized two remedies for the resolution of intractable disputes in the GmbH in addition to dissolution: Austritt [withdrawal] and Ausschliefung [expulsion]. Neither is mentioned in the governing statute. Both, however, are held by case law to be mandatory rights of shareholders that cannot be overridden by a company's articles. They function as necessary complements to each other. Withdrawal ensures that aggrieved shareholders can disengage from a company in spite of the illiquidity of their shareholder interest. To some extent, the withdrawal remedy resembles buyout provisions that have been used in the United States. The withdrawal remedy, however, means that aggrieved shareholders may have to forego their relationship with the company and leave it in the hands of those who were the source of their dissatisfaction. When a continuing relationship with the company is of personal importance to the shareholder, the result of withdrawal is a psychic loss to him or her and a corresponding benefit to the shareholders whose behavior caused the problem.

24. See infra part I.B.
26. See infra notes 168–70 and accompanying text.
27. Judgment of Apr. 1, 1953, 9 BGHZ at 159–60 points out that if complaining shareholders must choose between giving up their own livelihood and putting up with an unbearable shareholder, they have no effective remedy. Hence, there is also a need for expulsion.
This potential shortcoming of the withdrawal remedy is ameliorated by the expulsion remedy. Expulsion leaves the aggrieved party in control while removing the source of the company's problems. It provides the sharpest point of comparison with U.S. law. German courts have found the right of expulsion so fundamental to fairness among shareholders that they have held explicitly that a minority shareholder can expel a majority shareholder if wichtige Grund can be established. The relational obligations of shareholders to each other thus take priority over the property right of majority shareholders to proportional voting power in the company. U.S. law also places some constraints on the exercise of voting power by majority shareholders. The ability of a minority to expel a majority from a German company, however, is a much more drastic remedy. Expulsion most clearly exposes the tension between the legal structure of the corporation and the underlying personal relations of the shareholders. The creation of such a remedy by the German legal system illustrates the degree of importance it attaches to those relations.

A. Historical Development

1. The Weimar Era

In the GmbH context, the issue of expulsion first arose in the famous December 7, 1920 case regarding the Albatroswerke GmbH. The Albatros case involved a GmbH that was initially organized as a two-shareholder company with the shares split equally between the plaintiff and the defendant. The defendant was convicted in 1915 of treason and sentenced to eighteen months imprisonment and a 3,000 DM fine. The plaintiff sued for court-ordered dissolution pursuant to the GmbH Law because the defendant had refused to vote his share for voluntary dissolution. The dissolution was ordered in 1917, whereupon the defendant and a third party organized a new company to buy the assets of Albatros. In the current suit, the plaintiff sought damages for losses resulting from the delay in acquiring Albatros occasioned by the defendant's allegedly wrongful refusal to vote for voluntary dissolution.

The intermediate appeals court accepted the plaintiff's arguments. It found the parties to have determined that the internal structure of the
GmbH would resemble a partnership. The court opinion stressed the mutual obligations of the parties and the closeness of their personal relationship. Despite the technical requirements of the GmbH form, the intermediate court held that, because of the essentially partnership-like reality of the company in question, provisions of the Commercial Code dealing with the treatment of expelled partners should apply by analogy. These provisions required expelled partners to disgorge profits accruing after the filing of a suit for expulsion. The standard was that of the wichtige Grund [substantial basis].

The Supreme Court firmly rejected this approach. It emphasized the fundamental differences between the GmbH and a partnership. It held that treating one business entity by using concepts drawn from two distinct forms, partnership and GmbH, was "unthinkable." Because the relevant provisions of partnership law were ancillary to the expulsion remedy, they could not be applied. To do otherwise would be to introduce a completely alien concept into the law of the GmbH. The Supreme Court concluded that:

Such an expulsion of a shareholder is unknown in the GmbH. It knows only dissolution as the means for ending a legally constitut-ed GmbH.

The Court based its analysis on the distinction between the "internal" and "external" aspects of a company's existence. With respect to the former, the flexible GmbH form allowed shareholders to arrange their relationships inter se to resemble other business forms. These arrangements, however, could have no impact on the latter, which involved the company's relations with the outside world. The key element of the external aspect was the separate legal personality of the GmbH. Expulsion was incompatible with the independent personality of the GmbH. The implications for mechanisms of company decisionmaking and for title in company property made statutory dissolution the exclusive

30. Id. at 55-56.
31. Id.
32. Id.
33. The concept of wichtige Grund dealt with matters that had a profound impact on the parties involved in ongoing relationships such as partnership, employment contracts, and the like. For a discussion of the role of wichtige Grund in the GmbH, see infra notes 108-11 and accompanying text.
34. Judgment of Dec. 7, 1920, RGH, 101 RGZ 55-56 (Ger.).
35. Id. at 58.
36. Id. at 60.
37. Id. at 61-62.
vehicle for involuntary termination of a GmbH shareholding. Provisions of the Commercial Code ancillary to expulsion derived from other business forms could not, therefore, be applied to the GmbH. Likewise, despite the close relationship between shareholders, the general concept of *wichtige Grund* could not be transferred from the fields of partnership and personal performance to the GmbH.³⁸

The Supreme Court's formalistic rejection of the expulsion remedy established the basic approach of Weimar courts. Only in two narrow areas did the courts carve out an exception and accept the principle of *wichtige Grund*. The first area involved companies associated with cartels.³⁹ If shareholders became unable to fulfill obligations owed to the cartel, withdrawal or expulsion might be available if holding shares required the fulfillment of the obligations.⁴⁰ Later, a February 7, 1930 decision expanded this exception to include all *Nebenleistungs-gesellschaft* [companies in which the maintenance of shareholder status required performance of services in addition to payment of money for shares].⁴¹ These exceptions did not conflict with the principles laid down in the *Albatros* case; the GmbH Law recognized the possibility of removing shareholders who had not paid consideration for their shares.⁴² Both of the new judge-made exceptions of withdrawal and expulsion extended this principle. In each case it would have been anomalous for shareholders to remain in companies when they were unable to fulfill obligations to the company that were the basis of their shareholding. It was precisely the independent personality of the GmbH and the legal effect of the company's property rights that established a narrow *wichtige Grund* for the limited availability of withdrawal or expulsion.

Despite the narrow holdings of the Weimar courts, an October 30, 1930 decision contained general language that would be adopted by later courts.⁴³ In considering withdrawal from an association, the decision stated that "a legal relationship that impinged strongly on the *Lebenstätigkeit* [life experience] of a party can be terminated before the

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³⁸. *Id.* at 62.

³⁹. German industrial organization during this period was characterized by the widespread establishment of cartels, which were organized groups of companies in which the member companies would coordinate their business and marketing activities.

⁴⁰. Judgment of July 2, 1926, RGH, 114 RGZ 213 (Ger.). The *Hefeverband* facts involve shareholders whose cartel obligations were terminated pursuant to another statute. Continued performance of required obligations to the GmbH was therefore impossible.

⁴¹. Judgment of Feb. 7, 1930, RGH, 128 RGZ 1 (Ger.).

⁴². *See infra* notes 137-40 and accompanying text.

end of its term if a substantial basis led to it.” This principle would be expanded in subsequent decades in cases dealing with the GmbH.

For the time being, however, this broad language was not exploited by the courts. They cautiously extended the nonstatutory remedies of expulsion and withdrawal only in cases where it served to effectuate rights that were provided by statute but impeded by circumstances. These extensions remained exceptions to the general rule that nonstatutory rights were unavailable. General clauses such as wichtige Grund were carefully circumscribed when applied to the governance of companies.

The courts' hesitation to derive new rights of withdrawal and expulsion from the broad language of general clauses stood in sharp contrast to the legal movement then transforming German civil law. In fields such as contracts, finance, and labor regulation, general clauses provided activist courts with a basis upon which to introduce greater flexibility in applying the formalistic Civil Code. In doing so, the courts sought to maintain the legitimacy of the German legal system in the face of harrowing social crises. The greatest of these was the hyperinflation that ruined many.

In 1923 at the height of hyperinflation, old German marks were valued in new marks at the rate of one trillion to one. The astonishing rate of inflation was matched by the suddenness and unpredictability of disruptions in contractual expectations. Famous anecdotes of people transporting wheelbarrows full of currency only to discover that prices had risen again while they were en route to a store evoke the harsh reality. That reality made the enforcement of contract terms agreed to in earlier times a windfall for some and ruin for others. The field of contracts was therefore one of the first fields in which the new flexible approach took hold.

The most widely used of the general clauses was Civil Code section 242 Treu und Glaube [good faith], which will be discussed in Part II. This section of the Code expresses an underlying norm of fairness that courts have read into other sections of the Code. During the first two decades of the Code's operation, however, section 242 was largely ignored, and it certainly did not have the broad applicability it later

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44. Id.
47. See infra notes 155-57 and accompanying text.
acquired. The expansion of section 242 began with a Supreme Court
case dealing with the provision of steam heat under a long-term lease
when the cost of steam heat had risen exponentially. Although it
remained highly controversial at the time and was constrained by many
limiting doctrines, the Court's reasoning provided a point of departure
during the following decade when economic conditions deteriorated markedly:

The first and highest duty of the judge in his decisions is to re-
spond to the imperative needs of life and to let himself be guided
by the experience of life . . . . [Prior decisions] have been overrid-
den by the experiences this court has had during the further course
of the war and particularly through its unexpected outcome and the
resulting upsetting of all economic conditions. These conditions
clearly require the intervention of the judge in existing contract
relations when a situation would result that would contradict every
command of justice and fairness and would be simply intolerable.

This invitation to judicial intervention met with considerable opposition.
In fact, judicial intervention was antithetical to the systematic structure
of the Civil Code. Flexible application of vaguely worded norms on a
case-by-case basis undermined clarity, consistency, and predictability,
which were important goals of the Civil Code. When the course of
events impelled courts to intervene, ironically they turned to ideas
unsuccessfully advanced during the previous century by Bernhard
Windscheid for legitimation.

The systematic nature of the Civil Code was itself partly a testament
to Windscheid's formalism. The initial drafting of the Civil Code was
carried out under his influence. Nevertheless, Windscheid's theory of the
stillschweigende Voraussetzung [tacit presupposition] served as the basis
for judicial intervention by courts in the 1920s. Windscheid argued that
all volitional acts involved the interaction of volition with presupposi-
tions. In fact, presuppositions helped define the purpose of a volitional

48. Dawson, supra note 45, at 465–66. See also Arthur von Mehren & James
Gordley, The Civil Law System 1066–99 (1977) (giving detailed treatment of this
development and including some case translations).
49. Judgment of Sept. 21, 1920, RGH, 100 RGZ 129 (Ger.); Dawson, supra note 45, at
465–66. See also supra note 48 and accompanying text.
50. Dawson, supra note 45, at 466. See also von Mehren & Gordley, supra note 48,
at 1076.
51. Dawson, supra note 45, at 467–68. See also infra notes 53–55 and accompanying
text.
52. See 1 Bernhard Windscheid, Lehrbuch des Pandektenrechts 507–19 (1906).
See also Dawson, supra note 45, at 467; von Mehren & Gordley, supra note 48, at 1045.
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act. They could be expressly declared, or they could be implicit in the will manifested by other aspects of the act. In an act with legal consequences, when the presuppositions ceased to obtain, the legal consequences of the act no longer reflected the will of the parties. If the will of the parties was a relevant consideration, the legal consequences needed reformation.

Windscheid's theory was rejected by his contemporaries and by the other drafters of the Civil Code. The drafters' interest in maintaining the logical completeness of the Code system revealed the degree to which they were influenced by the formalism that characterized Windscheid's own general approach. A strong objection to Windscheid's tacit presumption theory was that the theory undermined certainty in the law and in transactions. In an article written during the year of his death, Windscheid acknowledged the threat to certainty that would be posed by his theory in the hands of unreflective judges. He felt, however, that such cases would be anomalous and that rules of construction would limit the danger. He labeled the drafters' objection a "phantom" and urged that it should not lead the legal system to rob judges of a useful tool for effectuating their sense of justice. In a famous statement, Windscheid predicted that his theory would inevitably work its way into German legal practice:

It is my firm conviction that the tacit presupposition, no matter what may be objected against it, will again be reinstated.

Thrown out the door, it will come back in through the window.

Despite the abstract deductive reasoning supporting his theory, Windscheid's defense of his position was ultimately premised on his hopeful estimation of the good faith and reasoning ability of German judges.

In the hyperinflation and economic dislocation of the 1920s, tacit presuppositions often failed to obtain. In the realm of economic relations, the most common vehicles for achieving fairness became the Civil Code's general clauses regarding *Treu und Glaube* [good faith] and *wichtige Grund* [substantial basis]. The former concept was applied

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53. See Windscheid, supra note 52, at 507–19. See also Dawson, supra note 45, at 467; Von Mehren & Gördley, supra note 48, at 1045.

54. Bernhard Windscheid, Die Voraussetzung, 78 Archiv für die civilistische Praxis 161, 197 (1892).

55. *Id.*

56. Dawson, supra note 45, at 467 (citing Windscheid, supra note 54).

57. Windscheid, supra note 54, at 197.
widely in the field of contracts, and the latter applied to matters involving ongoing relationships or personal obligations. The two concepts often involved overlapping subject matter. As will be discussed in Part I.B, both concepts have come to play an important role in the law of the GmbH, which is created by contract and involves an ongoing personal relationship. This apparently obvious linkage emerges in hindsight and in view of later legal developments. During the 1920s, these connections did not appear obvious to German courts.

The general application of section 242 to the field of contracts opened the floodgates of a new type of litigation. Parties asked courts to reform the terms of agreements in order to achieve fairness. Judges thus spent more and more time dealing with questions of valuation in a range of complex situations with little more to guide them than the vague language of section 242 and their own consciences. The concept of wichtige Grund led to similar intervention in matters involving personal services. The tacit presuppositions in such cases dealt with the parties and with the relationships between them that underlay the legal forms in question. Issues of personality were no more amenable to general rules than were transactional issues. As in the case of section 242, the clauses dealing with wichtige Grund provided little more than rhetorical guidance to judges taking a case-by-case approach. Such fact-based legal reasoning, with its heavy reliance on judicial discretion, was a sharp break from the formalistic tradition of the Civil Code.

Despite the increasingly common judicial resort to section 242 and to the doctrine of wichtige Grund, there was remarkable reluctance to apply either clause to the questions of expulsion and withdrawal from the GmbH. As we have seen, the general clauses were only used in this context to effectuate rights and obligations specifically created by provisions of the GmbH Law. The use of general clauses to create fundamental rights of withdrawal and expulsion as inherent elements of GmbH shareholding was not embraced by the German legal system for another decade — under a considerably different political and intellectual climate.

The reticence of courts with respect to GmbH law did not extend to the fields of commercial and employment law. By 1933, the widespread resort to general clauses had begun to raise alarm about the predictability of law and the discretionary power of judges. In his famous work, The Flight into the General Clauses, Hedeman warned against the

58. Dawson, supra note 45, at 468–76.
59. See infra notes 113–15 and accompanying text.
60. See Dawson, supra note 45, at 472–73.
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dangers of this new trend. Other authors complained of the "monstrous cult of precedents" that had developed. Hedeman's critique was more fundamental; he stressed the threat posed by unconstrained judicial discretion. In his view, the obliteration of clear legal rules in the name of general clauses removed the constraints on discretion. He adduced as an example the supplanting of Roman law by Byzantine despotism in which "[t]he absolute emperor proclaims in the name of equity the authority of the imperial will, unrestrained by law." Just as Hedeman's work was being released by the publisher, Adolf Hitler took power as chancellor of Germany. Ironically, Hedeman would become an honored member of the Nazi legal establishment.

2. The Third Reich

The broad application of general clauses, such as wichtige Grund and Treu und Glaube, to enable withdrawal and expulsion in the GmbH context was not adopted by the German courts until 1942. Prior to that time, courts used the general clauses to carve out narrowly drawn exceptions to the rule that dissolution was the only remedy available for disputes within closely held corporations. The famous case of August 13, 1942 established the approach discussed in Part I.B and remains a leading case today.

The 1942 case involved a real estate holding company originally organized as a GmbH with three shareholders having equal shares. Although the company had been reorganized by shareholder agreement

61. Id. at 475–76; J. W. HEDEMAN, DIE FLUCHT IN DIE GENERALKLAUSELN (1933).
62. DAWSON, supra note 45, at 476.
63. Id.
64. In 1942, the Nazi party increased its effort to influence the outcome of judicial cases. Judges whose formalistic reliance on earlier legal principles led to results unfavorable to Nazi policies came under greater pressure from this time on.
65. Judgment of Aug. 13, 1942, RGH, 169 RGZ 330 (Ger.). Such private law developments during the Third Reich change our perspective on the debate over the nature and role of Nazi law. In their famous articles, H.L.A. Hart and Lon Fuller address the issue of whether Nazi law could be considered "law" in any meaningful sense. The challenge of the Nazi experience forced them to test their conceptions of the definition of law. H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 HARV. L. REV. 593 (1958); Lon L. Fuller, Positivism and Fidelity to Law: A Reply to Professor Hart, 71 HARV. L. REV. 630 (1958). Hart and Fuller emphasized Nazi legislation and criminal procedure. In these areas, Nazi policies dominated the language of the law themselves. These laws, however, should not be equated with the "law as a whole" of the Nazi period. Such legislation existed in the context of a larger body of law that continued seemingly unchanged from the pre-Nazi era. The interaction of this body of traditional law with Nazi policies must be taken into account in order to have a balanced view of the legal system's function during the Third Reich. GmbH law is one example among many of Nazi policies' impact on the pre-existing body of civil law.
into another form, that agreement provided that all relations among the shareholders and between the shareholders and the company would continue to be governed by the provisions relating to a GmbH. The issue of expulsion was therefore analyzed in terms of a GmbH. Two shareholders in the 1942 case made a request for expulsion premised on the general clause wichtige Grund. The complaining shareholders claimed that the continued presence of the third shareholder in the company had become unbearable. As a result, good faith obliged the third shareholder to leave, and if he refused to do so he should be expelled.

The substantial basis in question was that the shareholder, M, was a Jew. In 1938, the other shareholders invited M to a meeting whose agenda was to deal with claims against the shareholders and "miscellaneous" matters. M did not attend, and he was expelled at the meeting on the grounds that his Jewishness made his presence in the company unbearable. Because of new laws restricting Jewish business activities, M's presence would subject the company to such restrictions. M filed suit claiming that he was still a shareholder, that there was no substantial basis for his expulsion, and that he had been denied a hearing. The district court found for M on all counts, despite the recently promulgated anti-Jewish laws. It held that Jewishness per se did not constitute a wichtige Grund, and that since the other shareholders had knowingly associated themselves with M, they had no grounds for further complaint about his being Jewish. In addition, it found that M had been denied a rightful hearing. On appeal, the appellate court upheld the decision of the district court. This decision was in turn appealed. By the time the matter reached the Supreme Court, circumstances had worsened for M. His property had been forfeited to the State under Nazi law, and he had become, in the words of the court, an "émigré" Jew.

In overturning the appellate court, the Supreme Court asserted both the conclusion that Jewishness constituted a substantial basis for expulsion and the broader premise that expulsion was an inherent right in the GmbH — even when a company's articles were silent on the issue. The Court based its opinion largely on the theories advanced in 1942 by Franz Scholz in Expulsion and Withdrawal of a Shareholder from the GmbH. The Court's reliance on the specifics of Scholz's theory ul-

67. Id. at 335-38 (discussing the appellate court's affirmation of the district court's holding).
68. Id. at 338-39.
69. FRANZ SCHOLZ, AUSSCHLIESSUNG UND AUSTRITT EINES GESELLSCHAFTERS AUS DER GMBH 18-23 (1942). Note that the original edition of Scholz's book differs considerably from
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ultimately arose from two deeper assumptions common in Nazi discourse on corporations and jurisprudence. The assumptions dealt with the nature of the corporation and the way in which a general clause, such as wichtige Grund, should be applied.

The German tradition of corporate law had long been characterized by a debate between the adherents of the realist or "Germanic" view of the corporation and those of the legal fiction or "Roman" view. For the former, the corporation's fundamental nature lay in its existence as a set of social relationships. Group interaction standing alone gave rise to rights and obligations of group members. The function of the law was to accord with these underlying realities. For the Roman school, the constitutive elements of society were individuals rather than groups; the corporation had a real existence but only as a legal fiction. The group represented by the corporation was created by the law and therefore did not have an independent source of legal norms.

In its 1942 decision, the Supreme Court used the "Germanic" view of the corporation, a central tenet of Nazi legal thinking, to break with the earlier line of expulsion cases. As we have seen, earlier cases expanded the right of expulsion only as an exception and only when it furthered rights or obligations arising from statutes. In addressing the limited statutory basis for expulsion, the Court held that the provisions of the GmbH Law dealt only with matters not already covered by "den ungeschriebenen, weil zwingenen und selbstverständlichen Gesellschaftswillen" [the unwritten because binding and self-evident will of the corporation]. The Court seemed to imply that, because the unwritten will of the corporation did not arise from a legal source, it arose from the social fact of corporate relationships as well as from the unstated presuppositions of the company charter. The Court went on to describe the corporate will as characterized by obligations of good faith. These obligations could be affected by the existence of a wichtige Grund. The general clauses thus operate directly in the social context of the corporation without the need for statutory authorization.

The Court's view of corporate existence was linked to a new ap-

70. See, e.g., OTTO VON GIERKE, DAS DEUTSCHE GENOSSENSCHAFTSRECHT (1913). Gierke was the leading proponent of this school and his ideas had a profound effect on supporters of this more communitarian view of the corporation. For partial translations, see OTTO VON GIERKE, NATURAL LAW AND THE THEORY OF SOCIETY 1500 TO 1800 (Ernest Barker trans., 2d ed. 1960); OTTO VON GIERKE, ASSOCIATIONS AND LAW (George Heiman trans., 1977); OTTO VON GIERKE, POLITICAL THEORIES OF THE MIDDLE AGES (Frederic W. Maitland trans., 2d ed. 1913).

proach to applying general clauses. This approach was an outgrowth of Nazi reliance on certain Hegelian concepts, which will be discussed in Part II. As we have seen, courts of the Weimar era concentrated on the concrete realities of the situation facing shareholders or contract parties inter se. Devastating hyperinflation may have been a general social phenomenon, but the Weimar courts’ analyses centered on the manner in which the parties obligations to each other were affected. In the case of M, the district court continued this approach. In holding that M’s Jewishness did not constitute a wichtige Grund, it pointed to the fact that the other shareholders had knowingly associated with him. Although the external political climate had changed drastically, the fundamental relationship between the shareholders had not.

The Supreme Court found the district court’s approach to general clauses to be in error. In determining whether a wichtige Grund existed, it was necessary for a court to view the parties’ relationship within its social and political context. Changes in that context mandated a reassessment of the parties’ obligations. The Court noted the promulgation of the anti-Jewish decrees and held that the new “attitude of the German people” toward the Jews was the perspective from which to analyze the question of wichtige Grund. Its result was to link the unwritten communal norms of the corporate entity with the “attitudes” of the German people. This somewhat mystical continuum was the basis for determining the deeper realities of the law of associations. Because of the wide-ranging applicability of the concept of wichtige Grund, the Court’s opinion could provide a legal basis for expelling Jews and other undesirables while permitting business organizations to continue their activities without disruption.

Soon after the decision, its reasoning and results were warmly greeted by Scholz in a brief article in Deutsches Recht. In his 1942 book, on which the Court relied, Scholz sought to place the law of business associations, especially the GmbH, in the context of a few basic premises. Following the general approach of Nazi jurisprudence, he stressed the relationship between law, justice, and morality. The proper goal of the legal system should be justice. Justice, Scholz felt, could only arise when law was in harmony with morality. An important achievement of the legal system would be to “close the gap between law and morality so that that which contradicts the healthy views of the

72. Id. at 337.
74. Scholz, supra note 69, at 18–23.
people cannot be law." In the law of associations, positive law had to be placed in the context of unwritten, but generally accepted, community values. The reality of human relationships gave birth to certain fundamental moral principles such as good faith. All specific legal provisions must therefore be read in the light of these permeating concepts (which Scholz refers to as the "unwritten law"). They were the "general legal concepts of the public's moral order, which are called 'general clauses', and which are to be recognized as tacitly inherent in all legal relationships." He later concluded that "each legal relationship is governed by the force of the unwritten but binding law of the principle of good faith." In achieving justice, the legal system should uphold the principles of honor and Persönlichkeit [personhood]. Individuals in a group achieved their own personhood through membership in the group. Scholz saw the fulfillment of personhood as a principle that was promoted through the process of expelling certain shareholders from the GmbH. Personhood was a particularly important concern in the GmbH context because of the close nature of the personal relationships between GmbH shareholders. Such concrete realities were linked to the professed concern of Scholz and other Nazi legal thinkers for achieving justice in the individual case through flexible application of the law.

Scholz was sophisticated enough to recognize the threat to legal certainty posed by an "elastic" approach to the general clauses. As we have seen, maintaining legal certainty was a concern of the approach's opponents for decades. Rather than minimize the importance of this concern, Scholz embraced it and stressed the centrality of legal certainty. He sought to achieve it in two ways. First, it was important to select judges who would act in good faith. He admitted that elastic law in the hands of irresponsible judges could lead to an undermining of the law. Second, the concept of legal certitude had to be understood on a deeper level. Traditional views emphasized consistency in terms of what Scholz called the Paragraphensicherheit [certitude on the paragraph level of the law]. Scholz's problem was that "artful" theoretical arguments could produce unexpected results in the name of superficial...
consistency. It was therefore necessary to base the search for consistency on the deeper ground from which the law springs. Scholz characterized this shift as moving from *Paragraphendenken* [paragraph thinking] to *Rechtsdenken* [justice thinking].° He cited Hans Frank and Hermann Göring to the effect that this "deeper" concept of legal certainty was "a basic requirement of communal life and of justice." He cited Hans Frank and Hermann Göring to the effect that this "deeper" concept of legal certainty was "a basic requirement of communal life and of justice." From this perspective, true legal certainty was only possible when the law's results accorded with the people's intuition of justice arising from community norms.

Scholz's specific work on the issues of expulsion and withdrawal were consistent with the general Nazi approach to corporate law reform. A proper treatment of that complex topic is far beyond the scope of this article. Nevertheless, it is important to note briefly some of its key points in order to gain a better understanding of the Nazi embrace of the expulsion and withdrawal doctrines.

Nazi corporate reform proceeded under the auspices of two organizations: the Academy for German Law and the Ministry of Justice. The Academy included many leading law professors and jurists. They were divided into working groups to study the reform of all branches of the law under the leadership of Hans Frank, Hitler's lawyer and the future governor-general of occupied Poland. The Justice Ministry, whose personnel included career bureaucrats from the pre-Nazi era along with Nazi activists, was charged with drafting and effectuating specific statutes—often in the light of the Academy's proposals.

Corporate reform initially focused on the publicly held corporation. The AG legal provisions, such as multiple votes and bearer shares, led to the perception that power in large corporations was concentrated in the hands of large financial interests. Nazi rhetoric had long embraced populist, anti-capitalist attacks on the corporate order. The economic situation that faced the government during the 1930s, however, was more complex than such rhetoric. There was a need to harness capital for the task of economic growth and for the fulfillment of the four year plan. Calls for a fundamental change in the nature of the corporation were rejected. The new AG Law promulgated in 1937 included many

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82. *Id.*
83. *Id.*
technical changes, but it maintained traditional provisions such as the controversial bearer shares. Despite occasional resort to Nazi rhetoric, the Nazis left the AG form intact and, though amended, the AG Law remained in force until 1965.

One policy furthered by corporate reform was the encouragement of greater reliance on forms of business organization such as the GmbH and the partnership, which the Nazis accomplished by increasing the minimum capitalization of AGs. The more personal nature of these entities made them analogous to human social experience and made their members more accountable. Because the reform of the AG took into account the availability of the GmbH, many in the legal academic community felt that the GmbH Law of 1892 should also be revised to reflect newer approaches to the law. Their proposals included guaranteeing the general right to withdrawal and expulsion that the courts had rejected earlier. The ensuing discussion shows that the Supreme Court's 1942 decision was not an aberration; instead it was consistent with scholarly opinion both as to normative assumptions and political programs.

Following a series of discussions held by the Academy for German Law, in 1939 the Justice Ministry drafted its proposal for a revision of the GmbH Law. In the Academy, the question of the availability of an expulsion remedy was placed in the context of the personal aspects of GmbH shareholding. An Academy report stressed the importance of focusing on the underlying question of the GmbH's essential nature:

Whether one wishes to permit this suit for expulsion in the legal sphere of the GmbH or not depends conclusively upon the question of principle as to whether in the newly constituted GmbH the personal company elements will be considered so strongly dominant, particularly the view of the bonds between the shareholders as so striking, that, in contrast to the prior statutory rules, henceforth there must be created the possibility of a forced expulsion of a particular person from the personal union. The attitude toward this fundamental question is determinative for answering the expulsion question.85

The treatment of the GmbH as a judicial entity apart from its shareholders, as well as the anonymity it afforded shareholders, were seen as obstacles to the State's effort to make companies reflect the norms of

85. 2 AKADEMIE FÜR DEUTSCHES RECHT, 1933–1945, PROTOKOLLE DER AUSSCHÜSSE 541 (Werner Schubert et al. eds., 1986).
the new legal thinking and the "Führer principle." Long-standing commonplace Nazi rhetoric claimed that it was necessary to eliminate the sharp distinction between the company and its shareholders in the GmbH context. The proposed statute that emerged from the Academy and Ministry’s efforts was never enacted, but it illustrates the Nazi approach to specific issues of GmbH law reform.

Articles 136 and 137 of the proposed law provided for the remedies of court-ordered expulsion and withdrawal respectively. The ground for expulsion was the existence of a substantial basis caused by a shareholder personally that made it unacceptable to continue the company with that shareholder. The grounds for withdrawal were somewhat narrower; they resembled the U.S. concept of oppression. Shareholders could seek court-ordered withdrawal when "the majority of the business partners misuse their position of power in a way that greatly damages the interests of the other partners that are worthy of protection." The official commentary linked these remedies to the need for strengthening the personal elements in the GmbH form:

The proposal begins from this development and seeks to work out more strongly the features of the personal company in the provisions that govern the internal relationships of the company. Of significance in this connection are the elaboration of personal law and the possibility, newly created by this proposal, of the expulsion and withdrawal of a shareholder, whose effectuation, to be sure, is bound by strong preconditions.

For years, Nazi business law theorists had used the concepts of faithfulness and the relational nature of business activities as the foundation for the GmbH. In doing so, they generally focused on shareholder obligations to each other. As noted by Scholz and the Supreme Court, however, the new view of good faith incorporated the obligations of the parties to the broader community. This perspective often remained implicit in academic treatments of the GmbH. The need to strengthen

86. This principle linked individuals to the will of the leader, who was a crystallization of the will of the group he represented. See the general discussion in ENTWURF DES REICHSJUSTIZMINISTERIUMS ZU EINEM GESETZ ÜBER GESELLSCHAFTEN MIT BESCHRÄNKTER HAFTUNG VON 1939, at 35–69 (Werner Schubert ed., 58th ed. 1985) [hereinafter ENTWURF DES REICHSJUSTIZMINISTERIUMS].
87. Id. at 42.
88. Id. at 133.
89. See infra note 179 and accompanying text.
90. ENTWURF DES REICHSJUSTIZMINISTERIUMS, supra note 86, at 133 (translated by author).
91. Id. at 149 (translated by author).
the fiduciary community created by the shareholders of a GmbH was expressed most clearly in the Nazi legal handbook edited under the auspices of Hans Frank:

According to the outmoded legal view, the shareholders do not stand in a contractual relationship as to each other and to the company. There is only the so-called principle of equal treatment of the shareholders. From this, the shareholders and the company were only protected by section 138 of the Civil Code from harm done to the shareholders or the company by an action of a fellow shareholder who finds himself in possession of a majority of the shares, and then were only entitled to a claim for damages if there had been a violation of sections 226 or 826 of the Civil Code.

This legal view stands in sharpest contradiction to the fundamental views of National Socialism. One of its major principles is the principle of faithfulness. The emanation of this fundamental view of the new legal development should therefore be furthered so that company law can be governed by the principle of mutual faithfulness. Between the shareholders of a GmbH and to their company there is, according to the new legal view a relationship of faithfulness.

The duty of the reform of GmbH law under the governing principles of National Socialism must therefore be to give legal effect to this principle of a relationship of faithfulness established by the principles of National Socialism.92

Resort to the vocabulary of faithfulness, in theory, linked the GmbH revisions to the wider movement toward a good faith standard in commercial dealings that had characterized Weimar jurisprudence. The corresponding shift by legal theorists in the 1930s from focusing on the parties inter se toward viewing good faith in a broader social context had a direct effect on the application of Treu und Glaube.

In the postwar years, many have argued that their concepts were articulated on a purely theoretical level and were not connected to political programs. As we have seen, the nature of the expulsion remedy and the need to articulate a basis for it exposes this connection clearly. Three years before the Supreme Court’s opinion, in evaluating some of the difficulties in applying the proposed expulsion remedy, the Justice Ministry’s theorists took into account the practical realities of the context in which it was to be applied. Despite the consistently high moral

tone of the normative rationales for the expulsion remedy, the Justice Ministry’s official commentary reveals, as an afterthought, the underlying political ends for which the new GmbH remedy was intended:

Expulsion is bound by no further preconditions, so that a majority shareholder can also be expelled by a minority. In such a case, only the payment to the one expelled would raise serious difficulties. That this would not always be impossible to overcome is demonstrated by the measures that have been carried out for the elimination of Jews from the German economy.

3. Postwar Germany

After World War II, the Nazi development of the rule on expulsion of GmbH shareholders became controversial. In 1949, for example, Masur condemned the 1942 decision that sanctioned the expulsion rule, taking care to place the blame on Nazi legislators rather than the justices of the Supreme Court:

The moral answerability for this legislation falls not on the judge, but rather on the legislator. That, however, does not change the fact that the opinion was a consequence and the practical carrying out of a criminally false doctrine. Such opinions should be forgotten as quickly as possible, and be caused to be forgotten, and one should not erect an again healthy law upon them.

While rejecting the Nazis’ view of the basis for expulsion, Masur did accept the need for the remedy. He sought to limit the use of expulsion by imposing a fault requirement and applying it in cases where the unbearable shareholder, in contravention of the obligations imposed by a good faith reading of the company charter, made it impossible for the company to carry out its purposes.

Within a year after the publication of Masur’s article, Scholz pub-

93. ENTWURF DES REICHJUSTIZMINISTERIUMS, supra note 86, at 192 (translated by author).
94. Schilling and Buchwald took the position that the expulsion remedy was tainted by its Nazi origins and therefore could not be the basis of a just doctrine. Wolfgang Schilling, in HACHENBURG, supra note 25, app. 1 to § 3 (1953 edition); Buchwald, Die Ausschließung eines GmbH-Gesellschafters aus der Gesellschaft, 16 DER BETRIEBS-BERATER 457 (1953). Bergenroth rejected the Nazi approach and called for more objective standards. Schilling Bergenroth, Ausschluß eines Gesellschafters aus der GmbH, in MONATSSCHRIFT FÜR DEUTSCHES RECHT 721, 721-23 (Kurt Mittelstein ed., 1951).
96. Id. at 408-409.
lished a revised version of his book. Gone, along with the citations to Frank and Göring, were references to the unwritten law of the community. Scholz continued to base his argument for a general right of expulsion on the general clauses and to see those clauses as the basis for sections of the GmbH Law such as section 34. He sought, however, to add a new perspective to his theory. The relationships between shareholders were still his primary concern, but they were evaluated in light of the corporate agreement as manifested by the company charter. Scholz went back to the revaluation cases of the Weimar era for examples of the effect of changed circumstances on prior agreements. In doing so, he stressed the fact that the expulsion remedy came from a line of judicial reasoning that antedated the Nazi period. Although he had warmly greeted the 1942 case holding that personal characteristics such as Jewishness constitute a substantial basis, Scholz rejected such a treatment of personal characteristics in 1950. His book was published during a period marked by the "denazification" process. Scholz asserted that the characteristic of having been an active Nazi should not constitute a substantial basis for purposes of expulsion from the GmbH.

The debate over whether to continue recognizing an inherent general right to expulsion from the GmbH was settled by the Supreme Court in its April 1, 1953 decision, which remains the leading postwar case on the subject. That case involved a GmbH in the process of liquidation. At a shareholders' meeting, the holders of 30,000 RM worth of shares expelled the majority shareholder, whose holding was 60,000 RM. The expelled shareholder complained to the district court, which held in his favor. In overruling the lower court and reaffirming the general right of expulsion, the Court considered several possible bases for such a right. It rejected the idea of expanding the implicit assumptions of section 34 of the GmbH Law. It also rejected the application by analogy of sections 737 of the Civil Code and section 140 of the Commercial Code. The Court pointed out that those sections dealt with business organizations other than the GmbH and therefore were not applicable to the GmbH.

97. SCHOLZ, supra note 15.
98. Id. at 10–22.
99. Id. at 19–20.
100. Id. at 20.
102. Id. at 161.
103. Id.
The Court grounded the expulsion right on a deeper level of justice common to all commercial relationships, as well as to the general clauses of wichtige Grund and good faith. These specific provisions, like the code sections mentioned above, were expressions of the fundamental assumption of German law that one should not be trapped in an unbearable commercial relationship:

The legal grounding for the ability to expel a shareholder from the GmbH because of a substantial basis is supplied by the principle, which governs the civil as well as the commercial code, that a legal relationship heavily impinging on the life activities of a party can be terminated early if a substantial basis is present.104

The Court, however, set two conditions that must be met before the expulsion remedy could be available in the absence of relevant charter provisions. First, the action must be confirmed by a court order; it could not be accomplished by shareholder vote alone. Second, in ordering an expulsion, the court must also provide a valuation of the expelled shareholder's equity share. While circumscribing court discretion in this manner, the Court also provided a vigorous manifesto for judicial activism:

The law must serve life and must provide the appropriate forms for its ordering. A judge who is aware of his responsibility cannot evade the duty, in case of need, to develop the law further.105

Cases since 1953 have focused on technical questions such as availability of the remedy in the case of a two-shareholder company and the specific procedures for effectuating the expulsion remedy in GmbHs.106 Many have dealt with the issue of valuation of the departed shareholder's holding. Such developments have resulted in the rules and approaches discussed in the next part of this article.

B. Withdrawal and Expulsion in Contemporary German Practice

1. Withdrawal

The right to withdraw is now generally available to all shareholders in a GmbH.107 The basis for obtaining such relief is the existence of a

104. Id. (translated by author).
105. Id. at 164 (translated by author).
106. See infra part I.B.2.
107. See BAUMBACH & HUECK, supra note 25, at 368-72. See also FISCHER et al., supra note 25, at 578; Peter Ulmer, in HACENBURG, supra note 25, § 1, ¶ 31; ROTH, supra note
wichtige Grund [substantial basis]. The wichtige Grund can arise from three sources. The first source involves the departing shareholder personally. In this case, there must be a situation that makes remaining in the company infeasible for the departing shareholder. Such situations can include extreme financial need, lengthy and expensive illness, relocation abroad, and inability to perform duties required by the terms of the shareholding. A second possible source for a wichtige Grund is the behavior of other shareholders. Arbitrary exercise of majority power or a permanent dispute with other shareholders can give rise to withdrawal. A third source is the situation of the company. Long-term lack of return on shareholdings or a change in the purposes of the company that entails additional risks can suffice.

The broad scope of wichtige Grund shows that neither fault nor exclusion from decisionmaking is necessary in order to establish a right of withdrawal. In the absence of relevant provisions in the GmbH Law, this right has been grounded on the general principle of good faith and on the "consideration with respect to long-term relationships that an individual must be able to terminate them when the circumstances on the basis of which they were entered have permanently and negatively changed." These notions permeate the commercial law of which corporation law is a part.

The procedure for withdrawal, at the outset, is a matter of internal company policy. This procedure can be regulated by the company's articles of association. The articles, however, can only amplify the right of withdrawal; they cannot restrict or eliminate it. Such a right is a

25, at 582-83; Rowedder et al., supra note 25, at 507-508; Winter, supra note 25, § 15; Schulze zur Wiesche, supra note 25, at 56-60; Soufleros, supra note 25, at 12.

108. See Baumbach & Hueck, supra note 25, at 369. See also Rowedder et al., supra note 25, at 508; Winter, supra note 25, § 15, ¶ 119.

109. See Rowedder et al., supra note 25, at 508.

110. Id. Note, however, that the substantial basis for expulsion differs from that on which dissolution is predicated. For expulsion, the substantial basis must lie in the person of the expelled shareholder. See Judgment of Feb. 23, 1981, BGH, 80 BGHZ 346 (F.R.G.). For dissolution, the substantial basis must lie in the company rather than a shareholder. If it lies in a shareholder, then expulsion is available and dissolution will not be granted. Id.

111. See Rowedder et al., supra note 25, at 503 (translated by author). See also Soufleros, supra note 25, at 37-38 (discussing the relationship between good faith and substantial basis in the parallel expulsion context); Judgment of Apr. 1 1953, BGH, 9 Entscheidungen des Bundessgerichtshofs in Zivilsachen [BGHZ] 157, 157 (F.R.G.) (dealing with issue prefigured in Judgment of Feb. 7, 1930, RGH 128 RGZ, 1 (Ger.)).

112. Baumbach & Hueck, supra note 25, at 370-71. See also Fischer et al., supra note 25, at 293; Ulmer in Hachenburg, supra note 25, § 9a, ¶ 17; Rowedder et al., supra note 25, at 509-12; Winter, supra note 25, § 15, ¶ 121-29.

113. Baumbach & Hueck, supra note 25, at 371. See also Fischer et al., supra note 25, at 292.
legally guaranteed aspect of shareholding in the GmbH. Whether or not the articles have applicable provisions, the departing shareholder first gives notice to the company of a desire to leave.\(^\text{114}\) The other shareholders then meet to give their consent. The departing shareholder must be paid the value of his or her share, and payment can be accomplished in one of several ways.\(^\text{115}\) Unless the articles specify a procedure, the company can retire the share, assign it to a third party, assign it pro rata to the remaining shareholders, or acquire it in the name of the company. If none among the company, the remaining shareholders, or third parties is able to pay the value of the withdrawn share, then the departing shareholder’s recourse would be liquidation of the company.\(^\text{116}\)

2. Expulsion

The withdrawal remedy is ideally suited to the needs of shareholders who, for personal reasons, find continued participation in the company onerous. Such personal concerns can be far removed from the company-based issues addressed by analogous remedies in U.S. law. When shareholder dissatisfaction arises from such company-based issues, however, withdrawal is seen as an incomplete solution in German law. In cases of deadlock or arbitrary action by majority shareholders, withdrawal gives dissatisfied shareholders the monetary value of their share, but forces them to sever their relationship with the company and leave it in the hands of the remaining shareholders. To fill this gap and address the problem of dissatisfied shareholders who wish to remain in the company, German courts recognize another remedy for dispute resolution in the GmbH — expulsion (Ausschlüß or Ausschließung).

Unlike withdrawal, expulsion is not an attempt to effectuate the will of the departing shareholder. Instead, expulsion represents the extinction of the expelled shareholder’s right to a voice in company affairs, which is usually considered a fundamental element of shareholding. As we have seen, expulsion of shareholders against their will has been controversial; the basis that ultimately led to such a remedy was initially rejected by German courts.\(^\text{117}\) During the past half century, however, expulsion has come to be accepted as a general right of GmbH share-

114. Rowedder et al., supra note 25, at 511–12. See also Winter, supra note 25, § 15, ¶ 122.

115. Rowedder et al., supra note 25, at 514–18; Winter, supra note 25, § 15, ¶ 126


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As in withdrawal, it can be authorized by a company’s articles. The articles may not, however, restrict or eliminate the right of expulsion. Regardless of the presence or absence of relevant provisions in the company’s articles, German courts have found the following elements and approaches required as a matter of law.

As in withdrawal, the procedure for expulsion begins within the company, though the mechanism for effectuating it is ultimately a court of law. Since the eventual suit is in the name of the company, the company must decide to expel the shareholder in question by a shareholders’ vote. The general trend among German courts is to require a supermajority of votes for such a motion to carry. Some commentators have argued that the remedy should be available on the basis of a simple majority vote. The most striking aspect of this procedure from the non-German perspective results from the fact that the subject of the vote may not vote his or her shares. It is therefore entirely possible for a minority to expel a majority shareholder. Although expulsion is a decision made in the company’s name, the right to determine company policy inherent in owning a majority share is not upheld in this context. The leading postwar case on the subject crystallized the German view:

It can therefore happen that a majority shareholder can be expelled by the court upon the decision of a minority if a substantial basis is present. The view of the complaint that it would be

118. Some commentators have suggested that the expulsion right should only be available in GmbH’s with "personal" rather than "capitalist" structures. The argument has been widely rejected. See, e.g., BAUMBACH & HUECK, supra note 25, at 362; SOUFFLEROS, supra note 25, at 42-44 (rejecting the limitation of the expulsion remedy to personal companies); Winter, supra note 25, § 15, ¶ 131 (pointing out that personal structure, while not a necessity, can be one factor among many in evaluating the presence of a substantial basis); Judgment of Sept. 25, 1985, OLG-Celle, 30 Rechtsprechung der oberlandesgerichte in Zivilsachen [OLGZ] 462 (F.R.G.) (dealing with fairness of par value compensation but accepting expulsion of bankrupt AG from GmbH, as provided for in its articles).

119. See BAUMBACH & HUECK, supra note 25, at 362; ROTH, supra note 25, at 583; ROWNEDDER et al., supra note 25, at 504.

120. See BAUMBACH & HUECK, supra note 25, at 364–65; Winter, supra note 25, § 15, ¶ 138–46; SOUFFLEROS, supra note 25, at 48–75 (rejecting the idea that shareholders can expel without a court decision). See also Judgment of Apr. 1, 1953, BGH, 9 Entscheidungen des Bundesgerichtshofs in Zivilsachen [BGHZ] 157, 157 (F.R.G.) (rejecting the notion that shareholders do not need a court order to expel). Scholz had originally argued for the proposition that a shareholder could be expelled by a shareholders’ meeting without a court order.

121. See BAUMBACH & HUECK, supra note 25, at 364–65; Winter, supra note 25, § 15, ¶ 140; SOUFFLEROS, supra note 25, at 58–62.


grotesque for the minority to be able to expel a shareholder who holds a majority overlooks the fact that a majority position in the company is no carte blanche for conduct in violation of company norms (gesellschaftswidriges Verhalten).\textsuperscript{124}

The procedure mandated by German law raises serious difficulties in the common case of the two-shareholder GmbH. Because shareholders cannot vote on the issue of their own expulsion and because minorities can expel majorities, stalemates can arise even in the absence of an equal division of shareholding. In Germany this problem arises in any two-person company. For many years this issue was avoided because the validity of a one-person GmbH was not recognized under German law. Expelling one of two shareholders would have created, even if temporarily, a one-person GmbH. As long as the validity of such a company remained an open question, the applicability of the expulsion remedy to the two-person GmbH was accordingly unclear.

In recent decades, however, German court decisions have recognized both the validity of the one-person GmbH and the possibility of expelling one of two shareholders in a company.\textsuperscript{125} In the presence of an intra-company dispute, the result can be a race to the courthouse with parallel actions by each shareholder seeking to expel the other. The theoretical question of whether such shareholders are acting in the name of the company remains open. The practical reality is that the court must disentangle the procedural and substantive issues.

Once the court has decided on the merits, expelled shareholders must be paid the value of their holding.\textsuperscript{126} The means by which payment

\textsuperscript{124} Id.

\textsuperscript{125} Georg Hohner, \textit{in Hachenburg, supra} note 25, § Einl, ¶ 31 (Carl H. Barz et al. eds., 7th ed. 1975); Roth, \textit{supra} note 25, at 587; Rowedder et al., \textit{supra} note 25, at 512–13; Soufleros, \textit{supra} note 25, at 73–74. The shareholder seeking expulsion must not, however, present a wichtige Grund himself or herself. See, e.g., Judgment of Jan. 25, 1960, BGH, 32 BGHZ 17 (F.R.G.) (holding that a two-person company expulsion of one is not fair if both present wichtige Grund; in the underlying complaint, breach of trust, the general right of expulsion was upheld); Judgment of Feb. 23, 1981, BGH, 80 BGHZ 346 (F.R.G.) (holding that expulsion of a shareholder in a two-person GmbH is valid only if remaining shareholder does not present a wichtige Grund).

\textsuperscript{126} See Baumbach & Hueck, \textit{supra} note 25, at 365–67; Fischer et al., \textit{supra} note 25, at 292; Hohner, \textit{in Hachenburg, supra} note 25, § 33, ¶ 2; Roth, \textit{supra} note 25, at 588–90; Rowedder et al., \textit{supra} note 25, at 514–18; Soufleros, \textit{supra} note 25, at 38–40. The dependence of the expulsion remedy on valuation has been limited in some cases. See, e.g., Judgment of Feb. 17, 1955, BGH, 16 BGHZ 317 (F.R.G.) (holding that if the expelled party does not cooperate in the valuation process, expulsion can proceed independently of compensation); Judgment of June 20, 1983, BGH, 50 Neue Juristische Wochenschrift 2880 (validating a provision in the company’s articles stating that expelled shareholders were to be paid market value, and if parties could not agree, an outside accountant would determine it; if the expelled party was not satisfied with the compensation, an action for damages would be appropriate, but it would not invalidate expulsion).
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is accomplished resemble those available in withdrawal situations. The share can be redeemed, acquired by the company, acquired by one or more remaining shareholders, or acquired by a third party. If there is no way to effectuate this process and pay the expelled shareholder, the alternative is dissolution.\(^{127}\)

Regardless of the option chosen, price is the crucial question in balancing the conflicting interests of the expelled and remaining shareholders. The leading modern case on expulsion declared the standard to be the “full worth” of the lost share.\(^{128}\) Unfortunately, “full worth” is a concept so vague as to provide little guidance. The court has responsibility for determining the full value of the expelled shareholder’s share. The most common standard articulated by commentators is *Verkehrswert* [market value].\(^{129}\) This value is defined as what a disinterested third party would pay for the shares. It includes *Firmenwert* [good will] in order to realize full value of the shares. If there are outstanding disinterested offers, the determining of value is straightforward. In the absence of such offers, valuation of shares is as problematic as it is in the United States. First, the company itself must be valued as a whole before proportional shares in it can be assigned values. The standards suggested by German commentators focus on going concern valuation. They usually reject a balance sheet approach and seek to include good will as part of the capitalized value of *Ertragswert* [earnings potential].\(^{130}\) The less tangible aspects of value, such as earnings potential, would involve German courts in a difficult evaluation of company policies and their future potential. There is anecdotal evidence that at least some courts do not engage in such financially sophisticated analysis.\(^{131}\) Rather, legally trained judges unfamiliar with accounting methodologies sometimes value companies conservatively without including such factors as goodwill. These intangible elements of value are some-

\(^{127}\)  Baumbach & Hueck, *supra* note 25, at 365–67. See also Soufleros, *supra* note 25, at 130–212 (containing the most detailed treatment of the mechanisms for paying the expelled shareholder and valuing his or her share).

\(^{128}\)  Judgment of Apr. 1, 1953, 9 BGHZ at 164, 168.


Courts have also considered the rights and obligations of expelled shareholders. See, e.g., Judgment of Oct. 26, 1983, BGH, 88 BGHZ 320 (F.R.G.) (holding that after announcement of withdrawal, but before compensation is paid, a shareholder has the right to vote on financial matters personally affecting the shareholder, but is bound by good faith not to obstruct other matters).

\(^{130}\)  Rowedder et al., *supra* note 25, at 514–16; Soufleros, *supra* note 25, at 194–211.

\(^{131}\)  Private interviews by the author of clerks in German court commercial chambers conducted in March 1991 and September 1993.
times held to be unsubstantiert [unsubstantiated]. The party claiming compensation for them can then be found not to have met the necessary burden of proof.

The basis for obtaining expulsion of a shareholder, like that for withdrawal, is the existence of a wichtige Grund [substantial basis]. Because expulsion is carried out against the will of the affected shareholder, the range of circumstances that can constitute a substantial basis is narrower than it is in the case of withdrawal. In a suit for expulsion, the substantial basis must lie in the person of the shareholder to be expelled. Despite this limitation, the variety of actionable bases is wider than one schooled in the U.S. approach would expect.

Postwar German courts and commentators have resorted to the remedy of expulsion in cases involving factors such as advanced age, extended illness, or mental derangement that make participation in the affairs of the company infeasible.\(^\text{132}\) In addition to characteristics such as these, a shareholder’s behavior or financial circumstances can also constitute a wichtige Grund. Examples of these factors include lack of trustworthiness or creditworthiness, disorganized financial circumstances, the loss of personal qualifications mandated by the articles, dereliction of duty, breach of trust, causing incurable dissension among the shareholders, making improper sexual advances, and the like.\(^\text{133}\)

The broad range of these factors is instructive. Some involve misconduct and fault on the part of the expelled shareholder. These cases are the easiest to justify. Courts and commentators, however, have consistently held that misbehavior or fault, while constituting a substantial basis, is not a necessary element for expulsion.\(^\text{134}\) Many of the actionable bases listed above involve no notion of fault whatsoever. Old age, financial difficulties, and the like simply describe situations in which the continued presence of one shareholder is intolerable for the others. The test, then, focuses on the circumstances of the parties’ relationship in determining the availability of the expulsion remedy.

When they attempt to articulate the standards by which their test is to be applied, German courts and commentators have generally relied on vague formulations. The most common is that the presence of the shareholder in question must be unbearable (unerträglich or untragbar) to the

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132. See Baumbach & Hueck, supra note 25, at 362–63; Fischer et al., supra note 25, at 290; Hachenburg, supra note 25, § Einl, ¶ 4; Roth, supra note 25, at 586–87; Rowedder et al., supra note 25, at 506; Winter, supra note 25, § 15, ¶ 133–35; Soufleros, supra note 25, at 28–33.


134. Id.
In underscoring the fact that expulsion is a remedy of last resort, courts usually require that the substantial basis be so severe that it is impossible for the company to achieve its purposes. Although this aspect of the test resembles the U.S. practice, the examples of wichtige Grund listed above clearly demonstrate that the unbearableness standard embraces a wider range of issues than the concepts of deadlock and oppression found in U.S. law.\footnote{Id. at 363.}

In attempting to flesh out the vague language of the prevailing German standard, many commentators rely on the GmbH law proposed, but not adopted, in the 1970s. The proposed law would have codified the existing judge-made law regarding withdrawal and expulsion. The traditional GmbH law was retained, however, it contained several key amendments. Withdrawal and expulsion were left outside the statute, and they remained matters for judicial development. The language of the proposed law, however, has played a role in that development. Section 207(1) of the proposal defines wichtige Grund as follows:

A substantial basis (wichtige Grund) is presented in particular if the shareholder, either through his person or his behavior, makes reaching the goals of the company impossible or greatly threatened, or if, moreover, the person or behavior of the shareholder makes it evident that his remaining in the company would be unbearable.\footnote{Palandt, BÜRGERLICHES GESETZBUCH § 626 (47th ed. 1988).}

Unfortunately this definition, though widely cited, clarifies the vague concept of wichtige Grund by reference to the equally vague concept of unbearability.

As we have seen, the courts were initially reluctant to rely on wichtige Grund in the GmbH context. Although applied to the GmbH by later judges, it arises from sections of the German Civil Code (Bürgerliches Gesetzbuch or BGB) dealing with contract-based personal relationships or obligations. Section 626 of the Civil Code permits termination of personal service contracts by a party if the facts present a substantial basis such that continuing the performance cannot be expected.\footnote{Hachenburg, supra note 25, at 488.} Section 671 of the Civil Code permits the person owing performance under a contract of mandate to terminate the mandate in the presence of a substantial basis without having to compensate the other party.\footnote{Id. § 671.} Civil Code sections 712 and 723 allow partners to remove those others.\footnote{See infra part II.A.}
engaged in management or to terminate their own partnership because of a substantial basis.\textsuperscript{140} These four Code sections all involve situations in which a party is required to continue performance personally over a period of time. The concept of \textit{wichtige Grund} expressly permits such parties to extricate themselves from these obligations without incurring fault.

With respect to the GmbH, however, there are no such statutory provisions. Courts must therefore have a conceptual basis for linking these doctrines of personal service law to the problems of the GmbH. Judges have introduced the remedies of withdrawal and expulsion and the concept of substantial basis on two theoretical grounds: (1) analogy to other sections of GmbH Law; and (2) derivation from general notions of good faith that underlie German commercial law.\textsuperscript{141}

Several provisions of the GmbH Law allow for removal of shareholders who are in default on obligations required by their shareholder status. These provisions deal with those who default on payment of the required amount of investment in the company,\textsuperscript{142} those who voluntarily return shares to the company on which additional calls for investment have been made,\textsuperscript{143} those who have assigned their shares,\textsuperscript{144} and those whose shares have been redeemed through amortization.\textsuperscript{145} All of these cases involve situations where the economic basis (what Anglo-American lawyers might call consideration) for maintaining shareholder status either does not exist or has been transferred. The GmbH Law itself thus treats continued membership in a company in narrowly financial terms. Early on, German courts expanded very slightly the scope of application of these GmbH Law provisions. They were also held to include non-performance of services required under the terms of shareholding in the company (\textit{Nebenleistungspflichten}).\textsuperscript{146}

In response to the historical development outlined in Part I.A, some postwar German courts and commentators have argued that a more general application of the withdrawal and expulsion remedies is a proper extension of the approach found in the foregoing sections of the GmbH Law.\textsuperscript{147} For them, the personal attributes and behavior toward fellow

\textsuperscript{140}. \textit{Id.} §§ 712, 723.
\textsuperscript{141}. \textsc{Soufleros, supra} note 25, at 19–24.
\textsuperscript{142}. \textsc{Mueller, supra} note 21, at 25–27.
\textsuperscript{143}. \textit{Id.} at 31.
\textsuperscript{144}. \textit{Id.} at 35-39.
\textsuperscript{145}. \textit{Id.} at 43.
\textsuperscript{146}. \textit{See supra} notes 40–41 and accompanying text.
\textsuperscript{147}. \textsc{Soufleros, supra} note 25, at 19–22.
shareholders bounded by the concepts of substantial basis and
unbearableness also represent commitments to the company that should
constitute de minimis requirements for continued maintenance of share-
holder status. The analogy to these GmbH sections, however, is a tenu-
ous basis for the more general remedies of expulsion and withdrawal.
Some sections, such as section 34,\textsuperscript{148} require authorization in the articles
of association. More basically, these carefully circumscribed provisions
of the GmbH Law can by their very existence undercut the notion that a
generally available expulsion remedy exists.

Some authors and courts have gone beyond the confines of the
GmbH Law to find a basis for expulsion and withdrawal in general
commercial law. One such approach emphasizes similarities between the
personal relationships characteristic in the GmbH and those found in
other types of associations such as partnerships. Section 737 of the Civil
Code\textsuperscript{149} and section 140 of the Commercial Code (\textit{Handels-gesetzbuch}
or HGB) provide analogous remedies in such business forms.\textsuperscript{150} Under-
lying similarities between distinct legal forms, however, do not indicate
whether analogy is an appropriate or necessary solution. As the Albatros
case stressed, a GmbH is not a partnership, and the GmbH Law does not
provide for such a partnership remedy.\textsuperscript{151}

A more commonly accepted approach does not focus on particular
analogies with technical provisions of statutes. Rather, it looks at the
underlying principles of German commercial law as a whole.\textsuperscript{152} The
GmbH is a commercial entity, and its formation involves explicit and
implicit commercial agreements. It is effected by relevant sections of the
Civil and Commercial Codes and by the broad norms that courts have
found to underlie such sections. One such norm is the general principle
that in legal relationships involving ongoing obligations (\textit{Dauerschuld-
verhältnisses}), it must be possible for a party to extricate itself when
new circumstances have made continuing the relationship unac-
ceptable.\textsuperscript{153} With respect to the GmbH, the German Federal High Court
has specifically held that long-term personal relationships can be termi-

\textsuperscript{148} GmbH Law, supra note 21, § 34.
\textsuperscript{149} PALANDT, \textit{Bürgerliches Gesetzbuch}, supra note 138, § 737.
\textsuperscript{150} SOUFLEROS, supra note 25, at 22.
\textsuperscript{151} See supra notes 29–35 and accompanying text.
\textsuperscript{152} SOUFLEROS, supra note 25, at 23–25.
\textsuperscript{153} See ROWEDDER et al., supra note 25, at 503. See also SOUFLEROS, supra note 25, at
37–38 (discussing the relationship between good faith and substantial basis in the parallel
expulsion context); Judgment of Apr. 1, 1953, BGH, 9 Entscheidungen des Bundes-
gerichtshofs in Zivilsachen [BGHZ] 157 (F.R.G.) (dealing with the good faith issue prefigured
in Judgment of Feb. 7, 1930, RGH, 128 RGZ 1 (Ger.).
nated because of a substantial basis if there is a strong effect on a shareholder's life activities or if the business relationship involves reciprocal interlocking of interests and necessitates personal cooperation, friendly terms, or undisturbed mutual trust between the parties.\textsuperscript{154} Although the general availability of expulsion was not accepted then, the broader relational principle later articulated by the Federal High Court was noted as early as 1930 by a Supreme Court decision.\textsuperscript{155}

The principle's development and wider application occurred in tandem, with the development of the other commonly accepted basis for the expulsion remedy — the general obligation of Treuepflicht [good faith]. The central role played by the concept of Treu und Glaube [good faith] in German commercial law has been noted frequently by outside observers.\textsuperscript{156} Its classic formulation is section 242 of the Civil Code, which states with pregnant simplicity:

\begin{quote}
242. Performance based on good faith (Treu und Glaube). The obligator has a duty to effect performance as required by good faith and with regard to common practice.\textsuperscript{157}
\end{quote}

As we have seen, the devastating hyperinflation of the 1920s disrupted the German economy and demolished the assumptions on which economic actors had based their expectations. Judges used section 242 to fashion a response to the crisis. The result became an ever-expanding body of jurisprudence dealing with the content and applicability of the good faith concept. The doctrine of good faith spread from specific areas of contract and debtor-creditor law to the entire field of business and commercial law. Good faith came to embrace related duties of protection, cooperation, clarification, and notification. It was also related to the acceptance of the fundamental principle of the Geschäftsgrundlage [basis of the transaction] in German contract and commercial law.

To the extent that the relational and good faith norms governing German commercial law as a whole are viewed as the foundation for the expulsion remedy, they provide further criteria for determining whether the "unbearability"\textsuperscript{158} perceived by a shareholder merits judicial relief. The obligation of good faith, expressed in abstract terms, is no clearer than the notion of unbearability. There is, however, an enormous body

\begin{footnotes}
\begin{enumerate}
\item \textsuperscript{154} See Judgment of Apr. 1, 1953, 9 BGHZ at 157.
\item \textsuperscript{155} Judgment of Feb. 7, 1930, 128 RGZ at 1.
\item \textsuperscript{156} See, e.g., E.J. Cohn, Manual of German Law 96–101 (2d ed. 1968).
\item \textsuperscript{157} Palandt, Bürgerliches Gesetzbuch, supra note 138, § 242.
\item \textsuperscript{158} See supra notes 135–36 and accompanying text.
\end{enumerate}
\end{footnotes}
of case law and practice evaluating standards of good faith. As a practical matter, therefore, the standard does provide some guidance.

II. A COMPARATIVE PERSPECTIVE

Before engaging in a more explicit comparison of German and U.S. approaches to close corporation dispute resolution, this section will summarize briefly the U.S. approaches. In the preceding discussion, occasional references to the U.S. approach highlighted aspects of German practice particularly interesting to U.S. observers. These aspects of German practice involve the remedies available to aggrieved parties, the basis on which such remedies are granted, and the scope of judicial involvement in settling issues between the parties. The following brief summary will discuss U.S. developments with respect to these same issues in order to provide a framework for comparison. For details, readers should consult the notes. After making some general points about German legal culture, Part II will address several specific elements of the withdrawal and expulsion doctrines. The Conclusion will then discuss some broader implications of the historical development of those doctrines.

A. The U.S. Approach

The traditional U.S. remedy for deadlock or dissension in a closely held corporation has been dissolution. Personal dislocation and the loss of going value commonly follow such an event.\(^{159}\) The threshold for


On the remedy, see generally *In re Radom & Neidorff, Inc.*, 119 N.E.2d 563 (N.Y. 1954) (affirming dismissal of petition for involuntary dissolution divided between two hostile shareholders because there was no stalemate regarding corporate policies, and the corporation
obtaining such relief was generally high—economic inviability of the enterprise. This criterion, however, was not necessarily linked to the issues causing dissension between the parties. It is perfectly possible for a company to be profitable even though the shareholders find each others' presence intolerable. As in Germany, the mechanism for effectuating this drastic solution was the court system. Judges were called upon to evaluate the viability of the enterprise in question rather than the merits of the underlying grievances between the shareholders.

The three elements of the traditional approach—remedy, basis, and mechanism—were inextricably linked. They reflected a consistent, somewhat formalistic view. Judges' lack of business expertise and their consequent reticence to address issues of business management reinforced the need for a high threshold of court action. In addition, this threshold was defined in terms of "objective" indicia of economic viability.

Courts thus avoided the difficult task of analyzing the was flourishing). Hetherington and Dooley compiled data regarding dissolution proceedings and found that dissolution has no significant impact upon whether the business will survive or die because in a majority of cases, one party eventually bought the other party out. This led to their suggestion to establish a statutory buyout scheme. Hetherington & Dooley, supra.

160. Courts view dissolution as a drastic remedy of last resort. Hockenberger v. Curry, 215 N.W.2d 627, 628 (Neb. 1974) (quoting Polikoff v. Dole & Clark Bldg. Corp, 184 N.E.2d 792, 795 (Ill. Ct. App. (1962)). See also Stott Realty Co. v. Orlaff, 247 N.W. 698, 699 (Mich. 1933) (allowing dissolution only where, with any other remedy, corporation cannot be made to function for the purpose of its creation); Johnston v. Livingston Nursing Home, Inc., 211 So. 2d 151, 155 ( Ala. 1968) (holding that in a dissolution proceeding, the party must show injury and, in this case, the corporation operated at a substantial profit; therefore dissolution was denied).

For further statutory interpretations reflecting the drastic nature of problems required to effect dissolution, see N.C. GEN. STAT. § 55-14-30(2)(i) (1990) (granting dissolution in a deadlock only when business can no longer be conducted to the advantage of all the shareholders); Paulman v. Kritzer Radiant Coils, Inc., 143 A.2d 272 (Del. 1958) (interpreting DEL. CODE ANN. tit. 8, § 226(a)(1), (2) (1991) and stating that with respect to electing directors, there must be more than a showing of shareholder deadlock); In re Lakeland Development Corp., 152 N.W.2d 758, 764 (Minn. 1967) (interpreting MINN. STAT. ANN. § 301.49(4) (repealed and superseded by MINN. STAT. ANN. § 302A.752 (West Supp. 1993)) and stating that a party must show irreconcilable deadlock and prove that the business cannot be conducted to the advantage of the shareholders); Lush'us Brand Distrib., Inc. v. Fort Dearborn Lithograph Co., 70 N.E.2d 737, 741 (Ill. Ct. App. 1941) (refusing to grant dissolution and requiring "irreparable injury"); MODEL BUS. CORP. ACT ANN. § 14.30(2)(ii) (Am. Bar Ass'n 1993) (with respect to director deadlock, there must be irreparable injury or it must be shown that the business can no longer be conducted to the advantage of shareholders generally). For an example of state statutes that track the Model Business Code and require irreparable injury, see WIS. STAT. ANN. § 180.1430(2)(c) (West 1992). Note, however, that some statutes, much like the Model Business Code, do not require irreparable injury where there is shareholder deadlock regarding the election of directors for a certain period of time. See N.J. STAT. ANN. § 14A:12-7(1)(a) (West Supp. 1993). See also In re Radom & Neidorff, Inc., 119 N.E.2d 563, 569 (N.Y. 1954); Wollam v. Littman, 316 N.Y.S.2d 526, 527 (1970) (holding that irreconcilable differences do not mandate dissolution).

161. See Johnston v. Livingston Nursing Home, Inc., 211 So. 2d at 154-55 (denying petition for dissolution because business was profitable and objective indicia of viability were
subjective attitudes of the shareholders toward each other and the merits of their business disputes. The dissolution remedy addressed the corporation as an independent judicial person. When dissolution was granted, by severing all parties' ties to the company, the court avoided the necessity for apportioning responsibility or allocating remedies among them. Thus, at the threshold and final stages, judicial efforts at dispute resolution avoided dealing with concrete relationships between the parties.162

The traditional approach's advantages to the judicial system were obtained at the cost of possible injustice to aggrieved shareholders. If successful in their suits for dissolution, shareholders nevertheless sustained losses in the psychic and material value of their stake in the defunct corporation.163 In recent decades, U.S. courts and legislators have responded to this problem in a variety of ways. Each of the three elements of the older solution has given rise to new developments.

The dissolution remedy was widely perceived as leading to a loss of what economists call "going concern value."164 As between the parties, the liquidation that often follows dissolution may not yield proceeds that

satisfied); Firebaugh v. McGovern, 88 N.E.2d 473, 476 (Ill. 1949) (regarding economic viability, it was "[i]mpossible for the corporation to carry on its business or preserve its assets"); Hammond v. Hammond, 216 S.W.2d 630, 633 (Tex. 1948) (allowing dissolution only if it appears that "the dissensions are of such a nature as to imperil the business"); Bartlett v. Caines, 363 So. 2d 574, 575 (Fla. Dist. Ct. App. 1978) (pointing to the solvency and viability of the company as evidence of the lack of deadlock and thus refusing to order dissolution). See also In re Radom & Neidorff, Inc., 119 N.E.2d at 564 (denying dissolution partially because corporation was operating profitably).

162. See In re Radom & Neidorff, Inc., 119 N.E.2d at 564 (recognizing that the business was successful and denying dissolution regardless of the fact that the two shareholders despised each other); Johnston v. Livingston Nursing Home, Inc., 211 So. 2d at 154 (denying dissolution because corporation operating at a profit, and the court did not want to get involved with internal dissension); Smith-Schrader Co. v. Smith, 483 N.E.2d 283, 291 (Ill. Ct. App. 1985) (denying dissolution because the inability of two shareholders to get along did not constitute economic inviability of the corporation). But see Martin v. Martin's News Services, Inc., 518 A.2d 951, 956 (Conn. Ct. App. 1986). Martin interpreted a Connecticut statute allowing dissolution for any good and sufficient reason as permitting courts to analyze the management issues involved. In Martin, the court granted relief because there was no input for a 50% shareholder.

163. See Moore v. Carney, 269 N.W.2d 614 (Mich. Ct. App. 1978) (refusing to order dissolution because remedy was seen as too harsh and the court was concerned about the loss of material value in the corporation); In re Radom & Neidorff, Inc., 119 N.E.2d at 568 (denying dissolution because allowing it would not be beneficial to one of the shareholders); Banker v. Commercial Body Builders, Inc., 507 P.2d 387 (Or. 1973) (granting forced buyout in lieu of statutory dissolution, because dissolution was too drastic and harsh of a remedy and would cause loss of material value); Thisted v. Tower Management Corp., 409 P.2d 813 (Mont. 1966) (refusing to grant dissolution because it was not in the best interest of shareholders and using instead a receiver to replace the board of directors.).

164. See Jackson v. Nicolai-Neppach Co., 348 P.2d 9, 22 (Or. 1959); In re Radom & Neidorff, Inc., 119 N.E.2d at 568 (denying petition for dissolution because of the possible injustice for one shareholder — a loss of going concern value in this case). But see Lebold v. Inland Steel Co., 125 F.2d 369 (7th Cir. 1942) (disputing the amount of the going value lost).
reflect the full value of the enterprise. Judicial and legislative responses fall broadly into two categories. The first turns the matter over to neutral third parties for resolution. The second leads to various mechanisms for a buyout by one party of the other’s interest.

The first approach has been reliance on third-party arbitration. Traditionally, courts were quite skeptical about arbitration in an intra-corporate context. There was concern that agreement to turn decisionmaking over to outside arbitrators divested the board of directors of its statutory obligations to manage the affairs of the corporation. More generally, there was also some hesitation by common law courts to turn legal dispute resolution over to other fora.

In recent decades, however, both concerns have receded and arbitration is an increasingly popular solution.

Legislators have taken a somewhat analogous approach. Many state corporation codes provide for court appointment of a provisional director, or a custodian. As in the case of arbitration, provisional directors enable the corporation to survive and provide a means for breaking


In many states, the legislature has specifically provided for appointment of a provisional director to serve as an outside neutral party to resolve the dispute and deadlock situation. This is very much like using arbitration as a dispute resolution technique. These statutes generally provide the provisional director with the rights and powers of other directors. See N.J. STAT. ANN. § 14A:12-7(3) (West Supp. 1993); ILL. REV. STAT. ch. 32, para. 12.55 (1989); CAL. CORP. CODE § 1802 (West 1990) (provisional director appointed by the court and has the rights and powers of a regular director until the deadlock is broken or the provisional director is removed by the court or shareholders). One California case has even held that the sole purpose of the director is to vote with one side and form a majority to resolve the dispute. Latt v. Superior Court, 166 Cal. App. 3d 296, 212 Cal. Rptr. 380 (1985). For examples of provisional director appointment in close corporation statutes, see DEL. CODE ANN. tit. 8, § 353 (1991); WIS. STAT. ANN. § 180.995(19)(b)(7) (West 1992).

167. Provision of a custodian resembles the appointment of a provisional director except that the custodian replaces the entire board of directors and runs the corporation on the grounds that the board is incapable of functioning. See DEL. CODE ANN. tit. 8, § 352 (1991); ILL. REV. STAT. ch. 32, para. 12.60(h) (1989); N.J. STAT. ANN. § 14A:12-7(4) (West Supp. 1993). For an example of close corporation statutes, see WIS. STAT. ANN. § 180.1833 (West 1992).
deadlocks. Unlike arbitration, the statutory solution is not dependent upon agreement between the parties. It thus affords a measure of protection to parties with weak bargaining power.

Despite obvious benefits to the approaches, reliance on arbitration and provisional directors has serious drawbacks. An important concern of any party in a closely held corporation is the opportunity to have a meaningful voice in the operation of the business. Both third-party approaches divest, either temporarily or for a longer term, all parties to the corporation of effective control. While the corporation’s existence is preserved, it is not always clear that the parties’ desires are being fulfilled. Moreover, the efficacy of third-party dispute resolution is circumscribed by the nature of the dispute. A one-issue deadlock in the context of an otherwise satisfactory relationship between the parties is the most amenable to such a solution. More bitter and protracted disputes require ongoing third-party involvement and are less appropriate.

The limitations of the third-party approach have encouraged the spread of the second most common solution — the party buyout. A leading 1977 article demonstrated that, notwithstanding the law’s focus on dissolution, corporate practice often led to private settlement in the form of purchase by a party or parties of the other’s interest in the company. Such a solution avoided the loss of control inherent in third-party approaches and made it more likely that the going concern value would be reflected accurately in the purchase price. The past decade has seen the incorporation of this widespread practice into a formal legal framework. In some cases the buyout remedy is available only in the context of a suit for involuntary dissolution, but its use has spread to a broader range of contexts.


169. In general, the legal framework for buyouts is encompassed in state statutes. In some instances the buyout right exists only where there is a formal petition for dissolution with the court. See, e.g., CAL. CORP. CODE § 2000 (West 1990); N.J. STAT. ANN. § 14A:12-7(8) (West Supp. 1993); WIS. STAT. ANN. § 180.1833(2)(a)(9) (West 1992) (concerning only close corporations); N.Y. BUS. CORP. LAW §§ 1104-a, 1118 (McKinney 1986) (concerning only close corporations).


In addition, some courts have allowed a buyout in the absence of any specific statutory authority, citing their inherent equitable powers to fashion any remedy. See, e.g., Baker v. Commercial Body Builders, Inc., 507 P.2d 387, 395-97 (Or. 1973) (stating alternatives to dissolution and ordering buyout as an appropriate relief); Maddox v. Norman, 669 P.2d 230,
As in the case of third-party resolution, the enterprise is preserved during buyout, and the disruptions associated with dissolution are avoided. The interaction of economic factors relevant to a buyout shifts the focus of dispute resolution to the question of price. To the extent that the determination of purchase price is left to bargaining or bidding by the parties, their respective financial positions remain key factors. Many courts and statutory regimes have sought to introduce a more objective element into the process either by determining the applicable standards or by involving the court in deciding the company’s value.\textsuperscript{171}

The standards generally employed by courts, however, give little guidance. The application of terms such as “going concern value” or “investment value” is controversial among accountants and economists.\textsuperscript{172} Behind such expressions lie a variety of applicable factors. Some courts respond by turning the matter over to outside appraisers, which requires an additional proceeding and attendant costs for the parties.\textsuperscript{173} Other courts take upon themselves the responsibility for determining value but must often rely on expert testimony.\textsuperscript{174}

\begin{footnotesize}
\begin{itemize}
\item 236 (Mont. 1983) (holding that liquidation and dissolution are not justified by the equities and stating that courts can adopt flexible approaches); Stefano v. Coppock, 705 P.2d 443 (Alaska 1985) (citing Alaska Plastics v. Coppock, 621 P.2d 270, 275 (Alaska 1980), which noted the remedial nature of the involuntary dissolution statute, and permitting court to order buyout as an appropriate equitable remedy). \textit{See also} Davis v. Sheerin, 754 S.W.2d 375, 380 (Tex. App. 1988) (holding that a Texas court, under general equity power, may decree “buyout” in an appropriate case where less harsh remedies are inadequate of fully protecting the rights of the parties).
\item 171. \textit{See}, \textit{e.g.}, \textit{Wis. \textsc{Stat. Ann.} § 180.1833(2)(b) (West 1992)} (directing a court to set a fair value based on “going concern value” as determined by evidence, experts, etc.); \textit{Minn. \textsc{Stat. Ann.} § 302A.751(2) (West Supp. 1993)} (stating that the “fair value” of shares is to be measured as of the date of commencement of the action or by another date found equitable by the court and referring to appraisal statute \textit{Minn. \textsc{Stat. Ann.} § 302A.473(5)(a)}; \textit{N.J. \textsc{Stat. Ann.} § 14A:12-7(8)(c) (West Supp. 1993)} (referral to appraisal statute \textit{N.J. \textsc{Stat. Ann. §§ 14A:11-8-11 to 14A:11-11 (West Supp. 1993)}); \textit{Cal. \textsc{Corp. Code} § 2000 (West 1990)} (stating that the fair value in dissolution proceedings is determined by liquidation value but that the court may take into account the sale of business as a going concern allowing for the appointment of 3 disinterested appraisers with the value of the holding determined by a majority vote of appraisers). For cases interpreting the California statute, see Abrams v. Abrams-Rubaloff & Associates, 114 Cal. App. 3d 248, 170 Cal. Rptr. 656 (1980); Brown v. Allied Corrugated Box Co., 91 Cal. App. 3d 477, 154 Cal. Rptr. 170 (1979).
\item 172. \textit{See} \textit{Harry J. Haynsworth, Valuation of Business Interests, 33 \textsc{Mercer L. Rev.} 457 (1982)} (listing various ways to value and specific problems of valuation).
\item 174. \textit{See \textsc{N.Y. Bus. Corp. Law} §§ 1104-a, 1118 (McKinney 1986). For cases discussing this provision, see Mitchell v. A.J. Medical Supply, Inc., 529 N.Y.S.2d 589 (1988) (holding that a private referee is not necessary to determine value in the absence of complex issues); Petition of Levitt, 492 A.D.2d 502, 492 N.Y.S.2d 736, 739–40 (1985) (discussing the determination of fair value).}
\end{itemize}
\end{footnotesize}
In view of the strengths and weaknesses inherent in all approaches to dispute resolution, a recent U.S. trend has been to expand the scope of judicial discretion. Some courts are authorized to fashion whatever remedy they deem appropriate under the circumstances.\(^\text{175}\) The best features of different approaches can thus be combined. This solution extends the general movement toward greater flexibility and addresses the gap between the paucity of remedies and the variety of disputes. The lack of clear standards and the open-ended grant of authority to the court, however, raise other fundamental concerns. U.S. judges have traditionally been reluctant to become involved in disputes over "business" rather than legal issues. Granting a virtual carte blanche to courts shifts concern to the question of whether judges are appropriate mechanisms for resolving these disputes.\(^\text{176}\)

The increasing variety of remedies and of mechanisms for effectuating them has also led to an expansion of the third element of the traditional approach, the basis for obtaining relief. In the past, concern focused on the ability of a corporation to make the decisions necessary to continue functioning. The notion of deadlock was conceived in terms of mechanisms of corporate governance.\(^\text{177}\) The standard for relief was economic unviability of the enterprise.\(^\text{178}\) By its nature, this approach was most appropriate for disputing parties whose shareholding or directorial representation was evenly matched. In these cases decisions could not be made and the corporation could not function effectively. Newer legal developments have extended relief to cases of "oppression" as well as deadlock. Here the majority's voting power enables the corporation to function, but the exercise of that power is detrimental to the interests of the minority shareholder. Since the corporation as a separate entity remains viable and makes decisions, the focus of concern


178. See supra notes 129–31 and accompanying text.
shifts to the relationship between the shareholders and the obligations
that arise from that relationship.

The most common test for oppression used by courts and legisla-
tures has been whether the minority was excluded from having a "mean-
ingful voice" in company affairs.\textsuperscript{179} This approach to oppression has the
advantage of providing courts with somewhat clearer guidelines. It does
not, however, extend to the full range of personal concerns that could
make a shareholder's relationship to his or her fellows intolerable. In
addressing this range of concerns, a legal system must grapple with
intangible aspects of relationships that are often experienced on an
intensely personal level. Such aspects can only be characterized on a
general level by resorting to vague notions such as fairness. The more
flexible approaches taken by U.S. courts in recent years have moved in
the direction of recognizing the personal aspects of shareholding, though
oppression remains the more common formulation of the basis for relief.

B. Contemporary Approaches Compared

German courts have developed an approach to close corporation
dispute resolution that is fundamentally different from the U.S. concept.
In dealing with extreme cases, they have placed a broad range of per-
sonal factors faced by aggrieved shareholders at the center of judicial
concern. Despite the divergence between the approaches of the U.S. and
German systems, specific elements of both systems often perform
similar functions.

1. Similarity of Statutory Approaches

One key element is the similarity of both countries' statutory provi-
sions. The German GmbH Law was promulgated at the end of the

\textsuperscript{179} For illegality, fraud, and oppression cases, see Central Standard Life Insurance Co.
v. Davis, 141 N.E.2d 45 (Ill. 1957) (holding that oppression by majority is an important
consideration, and first case discussing oppression as a basis for liquidation); Compton v. Paul K.
Harding Realty Co., 285 N.E.2d 574, 581 (Ill. Ct. App. 1972) (viewing conduct which is
arbitrary, overbearing, and heavy-handed as depriving those not in control of a meaningful
voice in corporate affairs and, therefore, as oppressive). \textit{See also} Gidwitz v. Lanzit Corrugat-
ed Box Co., 170 N.E.2d 131, 138 (Ill. 1960) (holding that the exclusion of an equal share-
holder from meaningful participation may be oppression); White v. Perkins, 189 S.E.2d 315,
319 (Va. 1972) (holding that oppressive conduct does not require fraud or illegality).

For cases demonstrating a trend in looking at reasonable expectations in order to
determine whether oppression has occurred, see \textit{In re} Kemp & Beatley, Inc., 473 N.E.2d
1173, 1179 (focusing on "[c]onduct that substantially defeats the 'reasonable expectation' held
by minority shareholders in committing their capital to the particular enterprise.") \textit{In re}
Topper, 433 N.Y.S.2d 359 (N.Y. Sup. Ct. 1980) (defining oppressive conduct in terms of
reasonable expectations of the minority shareholder); \textit{see also} MINN. STAT. ANN. § 302A.751(3)(a) (West Supp. 1993) (codifying the reasonable expectation language).
nineteenth century. U.S. states were enacting or revising their modern general corporation statutes at the same time. Both legal regimes paid deference to the independent legal personality of corporations and to the processes of shareholder decisionmaking within them. Additionally, both regimes set a high threshold for judicial intervention and provided dissolution as the only remedy. These statutory provisions, however, differed in the degree of their congruence with other key elements of the respective legal cultures in which they operated.

In the United States, such an approach was consistent with judicial reluctance to intervene in company management and mirrored U.S. law's treatment of related fields such as contracts. Traditional U.S. law emphasizes the importance of participation in corporate decisionmaking as an inherent element of the property right shareholders hold in their companies. If a company's "will" could not be expressed because of a breakdown in decisionmaking, courts did not attempt to substitute other principles for it; their alternative was to order dissolution. Although use of the "nexus of contracts" metaphor for describing the nature of the corporation is recent, this traditional reliance on dissolution was consistent from the beginning with the perspective of U.S. contract law. In the field of contracts, certain events can make continued performance difficult for one or more parties. To the extent that such difficulty constitutes impossibility, frustration, or impracticability, U.S. courts will release parties from their contract. The high threshold of judicial intervention and the remedy of dissolving the parties' relationship are similar in both fields. As remedies become more flexible and the threshold becomes lower, newer approaches to close corporation dispute resolution become less congruent with contract law.

In the context of German commercial law, the dissolution provisions of the GmbH statute are more anomalous. From the beginning, German courts have viewed participation in intra-corporate decisionmaking more broadly than merely in terms of shareholders' property interest in their voice in the company. The matter is most clearly demonstrated with respect to the AG. Although the statutes emphasize the role of shareholder voting, there are mechanisms to include employees, creditors, and

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180. See supra note 20.

181. In the famous case of Stokes v. Continental Trust Co., 78 N.E. 1090 (N.Y. Ct. App. 1906), the court established stockholder preemptive rights (in the absence of statutory provisions) in the inherent property right of original shareholders to proportional voting power.

other community interest groups in the decision-making process. Legal institutions such as AG bearer shares and supervisory boards permit stakeholders and other groups affected by a company's activities to have a voice in its internal decisionmaking. This view of the role of shareholder voting in corporate decisionmaking also influences the GmbH, as evidenced by the application of co-determination laws to some GmbH. German discourse on corporate law has been influenced by a strain of thought that emphasizes the social community created by the ongoing relationships between and activities among those whose lives are encompassed by a corporation. We have seen the influence of such rhetoric in the normative rationales for withdrawal and expulsion. Nonetheless, this social community approach has not occupied the field entirely. Its implications were controversial, and the dissolution procedures of the GmbH Law itself do not reflect it. Furthermore, early court decisions rejected such arguments on grounds reminiscent of older U.S. doctrines. One approach presented a vision of the company as a contractually based legal arrangement between individuals. The other saw the company as a community whose binding norms reflected a reality that was more than just an aggregate of the individuals in the group. The tension between these differing German approaches played an important role in the development of GmbH remedies discussed above.

In the field of contracts, twentieth century German law evolved a much more interventionist approach to the problems of frustration of purpose and changed circumstances than did its U.S. counterpart. Rather than extinguishing such contractual relationships, German courts often reformed the terms of contracts to promote fairness while allowing the economic benefits of contracts to remain. The basis for judicial action was the general concept of good faith. German courts thus engaged on a regular basis in evaluating and balancing the kind of business issues that U.S. courts traditionally avoided. The resulting gap between the original approach reflected in the GmbH statute and these aspects of modern German legal culture gave rise to the judicial lawmaking discussed in this article. As a result of such efforts, the German

185. See supra note 70 and accompanying text.
186. See supra notes 29–33 and accompanying text.
187. See supra notes 45–60 and accompanying text.
approach to GmbH dispute resolution became more similar to the general approach of German contract and commercial law.

2. Judicial Lawmaking

GmbH dispute resolution clearly demonstrates the important role judicial creativity plays in German law. When broad comparisons are made between the civil law and common law systems, one frequent generalization focuses on the alleged non-reliance by civil law systems on caselaw precedents. Such non-reliance is certainly an important element of the theoretical underpinnings of the civil law. It is also part of what Merryman has called the “folklore” of the civil law tradition. Merryman, David, Dawson, and others have demonstrated that this generalization is somewhat misleading with respect to the actual practice and evolution of the civil law. The area of torts in French and Swiss law and product liability in German law are well known examples of elaborate caselaw doctrines founded on slender code provisions. Such legal evolution saw the extension of applicable code provisions to new fact situations. Within limits, the process of judicial gap-filling is part of the civil law “folklore.” A remarkable aspect of German caselaw developments in GmbH dispute resolution is that they have been created out of whole cloth by judges. In fact, no German codes or statutes provide for any of the specific solutions discussed in Part I.B of this article. Thus the ability of German judges to fashion these solutions highlights the integrated nature of the German legal system. The doctrinal bases for decisions of German courts came not from the GmbH Law itself, but rather from broad overarching principles that were seen as immanent in commercial and business law as a whole. The manifestation of these overarching principles was seen at work in the fields of contract and of personal service obligations. Although these developments were controversial in Germany, they have nevertheless become an accepted element of GmbH law.

3. Withdrawal, Expulsion, and Buyout Remedies

The German solution of withdrawal is closest to modern U.S. developments. As we have seen, many technical issues of the withdrawal and

190. Id.; see also David, supra note 188, at 133-37.
191. See, e.g., von Mehren & Gordley, supra note 48, at 590-780.
expulsion remedies are essentially the same, such as the threshold for availability of the remedy, the procedure for carrying out the remedy, and the requirement for share valuation. To this extent, much of the following discussion of withdrawal also holds true for expulsion.

When considering the operation of these legal doctrines of withdrawal and expulsion, one must remember that they are not commonly litigated; shareholders often settle their differences prior to litigation. Reported cases tend to represent extreme situations. By their own terms, these remedies are a last resort. Nevertheless, these doctrines remain important to the dispute resolution process; they constitute default rules that the parties will face if they cannot settle. The doctrines thus skew the relative incentives of the parties and determine the downside risk incurred by certain patterns of shareholder behavior. The following discussion should be read in the light of this practical reality.

The U.S. remedy most analogous to the right of withdrawal is the buyout, which has become increasingly popular in recent years. Both the U.S. buyout and the German withdrawal remedies address the illiquidity of minority interests in closely held companies. Each of them seeks to allow the aggrieved shareholder to withdraw without facing a loss while at the same time permitting the company to continue its existence. Therefore, on this level of generality, the diagnosis of the problem, the cure, and the critique of the disruptions caused by resort to dissolution are the same in both countries. On a more detailed level of analysis, however, significant differences emerge.

One important issue in the analysis is the nature of the problem that the remedy addresses. Often, the right to a buyout is triggered only within the context of a pre-existing suit for dissolution. The problem then becomes avoiding the default rule of dissolution. Frequently, once the buyout process is initiated, each party must account for the possibility of having to buy the other party's share if its own offer to sell is rejected. Both the context and the mechanism can thus skew the practical situation facing an aggrieved party.

The default rule of dissolution may also affect the parties differentially. Their financial resources, their degree of personal attachment to the company, and their range of options for alternative livelihood may differ considerably. In a situation where one party feels continued membership in the corporation to be, in the words of German law, "unbearable," the feeling of compulsion may lead him or her to accept a price for his or her share below a fair market value (assuming a market among third parties).

Of course, the notion of market value depends entirely upon the market one has in mind. The buyout remedy can, in effect, create a
market restricted to existing shareholders, and the price at which the shares are sold by definition is a market price from that perspective. The elegance of this solution is that it enables the parties to translate many intangible aspects of their relationship into a price. From the perspective of the legal system, it may be efficient to place the responsibility to value their respective feelings of aggrievement on the parties. Such a price also reflects, however, the external circumstances mentioned above, which are not related to the merits of the parties' dispute. External economic circumstances also influence the decisions as to which party remains in the company and which party leaves. If one is concerned with achieving justice between the parties in terms of the merits of their dispute, the result remains unsatisfying. Since the merits of such business disputes are precisely the kind of issue that U.S. courts generally avoid as a matter of policy, this concern is less problematic in the U.S. context.

4. Bases for Relief

From the German perspective, once an aggrieved party makes the choice either to seek withdrawal and leave the company or to seek expulsion and remain in the company, the merits of the dispute between the parties are the focus of the court's concern. Unlike the U.S. approach which emphasizes the economic viability of the corporation and the parties' right to a voice in its affairs, the German approach concentrates on the underlying relationship between the parties. The success or breakdown of this relationship is what gives rise to the overarching norms of the general clauses. As we have seen, the doctrines from which the remedy is derived are wichtige Grund [substantial basis] and good faith.\(^2\) The result in Germany is generally that the question of which party remains in the company is separated from the external economic factors that otherwise influence price in the U.S. buyout context. Once the proceeding begins, the focus of analysis is on whether a substantial basis for the remedy exists. As described, the range of potential substantial bases includes the notions of economic inviability and shareholder oppression familiar to U.S. observers. We have also seen, however, that the substantial basis can extend to a wide range of personal and even emotional factors that affect the quality of a shareholder's experience in the company.

The breadth of the German wichtige Grund concept contrasts with the somewhat narrower ground for U.S. remedies that are analogous to

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\(^2\) See supra part I.A.
withdrawal and expulsion. In the United States, a common basis for the newer forms of relief is "oppression." Oppression, in turn, usually means the exclusion from a meaningful voice in company affairs. Once again, the implicit assumption of the law is that the legal entity's internal decision-making process is a sine qua non of the rights inherent in shareholding itself. The deprivation of a shareholder's property right in having a voice in company affairs is a primary concern of U.S. courts.

In Germany, oppression can constitute a wichtige Grund, but it is only one of many possible grounds. The duty of good faith that concerns German courts arises from the underlying relationship of the parties and is superior to the decision-making structure established by the company's charter. German courts therefore have much greater flexibility in trying to achieve fairness between parties. The disadvantage, however, is that the courts are forced to evaluate precisely the difficult factual issues of business affairs and relationships that U.S. courts historically were loath to address.

Another threshold issue is the universality of access to the U.S. buyout and German withdrawal remedies. This issue is treated differently in different U.S. jurisdictions. Due to the lack of a consistent doctrinal basis for the buyout remedy, in some jurisdictions the law defers to agreement between the parties. In others, the buyout option is provided by law. In some cases, a buyout remedy requires a pre-existing suit for dissolution. In Germany, the law holds clearly that all shareholders in a GmbH have access to the withdrawal and expulsion remedies as an inherent and inalienable right of shareholding. This doctrine governing access to the remedies of withdrawal and expulsion is a logical consequence of the remedies' grounding in the nature of the relationship between all GmbH shareholders. Furthermore, this general right cannot be limited by company charters. The universal availability of the German remedies yields certain potential advantages. For example, a common drawback of holding a minority interest in a closely held corporation is the difficulty one faces in selling such an interest. If parties know in advance that, regardless of shifting control in the company or amendments to the company's charter, they will always be guaranteed the right to extricate themselves with their assets intact if there is a substantial basis, the downside risk of shareholding is lessened to some extent. The ongoing availability of the withdrawal remedy during the life of a

193. See supra text accompanying note 179.
194. See supra note 179.
195. See supra text accompanying note 124.
company could also restrain unacceptable behavior by members of the company, regardless of whether they are majority or minority shareholders.

U.S. law constrains majority shareholders through the fiduciary obligation not to oppress the minority. As we have seen, this U.S. concept of oppression is often defined narrowly in terms of exclusion from a meaningful voice in the company. The broader and more vaguely worded duty of good faith imposed on both majority and minority GmbH shareholders presents them with a much broader risk in that if they put the other party in an impossible position, that party may leave or even that the shareholder himself or herself may be expelled. To the extent that courts value companies conservatively, without fully compensating expelled shareholders for intangible assets, this risk can provide a real incentive to moderating shareholder behavior.

5. Importance of Valuation Mechanisms

The legal systems of both Germany and the United States seek to safeguard the value of a departing shareholder’s interest. In both systems, therefore, dispute resolution often revolves around the problem of valuation. In theory, the approaches of both systems are quite similar. Each of these systems emphasizes the importance of a market value that incorporates going concern value. The valuation approaches differ primarily in the mechanisms on which they rely to yield a result. Notions of market value are notoriously fluid, and both systems, in theory, confront this difficulty in attempting to achieve fairness.

In the United States, many approaches to the problem of valuation have been suggested and implemented. As previously seen, reliance on a bidding process pursuant to a buyout creates a market between the parties which handles the valuation problem. Another common approach is to rely on third-party experts who determine share value in a more “objective” manner. These third parties are sometimes arbitrators to whom the parties turn and sometimes accountants or other experts appointed by the court. In other cases, judges attempt to deal with the issue of valuation themselves. In such situations, however, courts rely on expert testimony.

196. Id.
197. Id.
198. Id.
199. See supra notes 172–74 and accompanying text.
All of these approaches inevitably have strengths and weaknesses. We have already discussed the process of buyouts and bidding. Reliance on third-party experts has the advantage of a more objective analysis that is not skewed by the personal situations of the parties. The problem, however, is that the concepts and categories underlying the experts’ valuation are capable of varying interpretation. Thus, to the extent the experts’ decisions are not appealable, parties may have cause for grievance. Courts have the advantage that their decisionmaking is subject to a higher degree of procedural constraint. Unfortunately, a court’s expertise does not extend to corporate finance, and a court is not equipped to be an ideal decisionmaker on the subject of valuation.

In relying on expert witnesses, the end result is similar to reliance on outside parties, except that the ability to rebut expert testimony may give parties greater input into the valuation process.

The German pattern with respect to valuation as expressed in legal doctrine and in the work of commentators is clearer. German courts are charged with responsibility for valuation as an integral part of their decisionmaking. One must remember, however, that comparing German courts with their U.S. counterparts can be misleading. In theory, German parties to commercial law cases have the possibility of facing a judicial panel some of whose members are lay judges drawn from a panel of business experts. Under the system envisioned in the statute, the expertise needed for valuation analysis is brought into the judicial process itself. There would, therefore, be less need for arbitrators or outside expert opinion. In practice, however, the potential advantages of this approach are not always realized. The option of waiving the participation of lay judges, which is presented by the presiding law judge at the outset of trials, is often accepted by the parties. As a result valuation decisions are often made by single judges trained in civil law, with little experience of financial accounting.

In addition to the composition of courts, there are important differences in the appeals process. German court decisions of first instance have a much broader scope of reviewability on appeal than their U.S.

200. See supra part II.A.
201. See supra notes 172–74 and accompanying text.
202. Sections 105 and 109 of the Court Organization Law (Gerichtsverfassungsgesetz or GVG), establish the principle that commercial tribunals include lay judges who must have business experience. Zivilprozessordnung mit Gerichtsverfassungsgesetz 2261, 2263 (Adolf Baumbach et al. eds., 1988). The Civil Procedure Law (Zivilprozessordnung or ZPO), however, provides in § 349(iii) that parties may agree to have their case heard by a single judge. Id. at 1046.
203. See supra note 131.
Withdrawal and Expulsion in Germany

6. Underlying Assumptions of Company Law

Apart from these technical details of laws' application, a comparison between U.S. and German approaches can also illuminate basic assumptions of company law. Procedures considered essential for achieving justice in one system can be unthinkable in another. The fact that one system finds a procedure unthinkable whereas another system takes it for granted forces an observer to reflect on assumptions that shape the way in which legal problems and their remedies are conceived. The German doctrine of expulsion provides an excellent example of this process.

From the time over six decades ago when German commentators began addressing the shortcomings of statutory dissolution as a remedy for intra-company disputes, the doctrine of expulsion was paired with that of withdrawal. They were seen as necessary complements in order to cover the range of possible plaintiff grievances. Although expulsion is available in U.S. (and German) partnerships, it has not been considered appropriate in the U.S. corporate context.

The German doctrine, therefore, is somewhat shocking to the U.S. observer. It concretely represents the most extreme expression of the relational vision of corporate reality. U.S. commentators have often pointed to the course of dealing or relationship between shareholders. In the U.S. context, however, such analysis usually revolves around the notion of fiduciary obligation. U.S. shareholders are not normally charged with such general obligations towards each other. As we have seen, U.S. doctrine usually focuses on “oppression.” The implications of focusing on the underlying relationship between the parties as the essence of a company have not been systematically explored by the U.S. legal system. As we have seen, in Germany they have been explored on a theoretical level and also put into practice.

The relational and communitarian rhetoric of corporate law has been central to the German legal system’s attempts to grapple with the prob-

204. Later appeals from the intermediate court to the Supreme Court involve the procedure of Revision which, in theory, is restricted to review of legal issues only. See von Mehren & Gordley, supra note 48, at 130–33.
lem of GmbH dispute resolution. The expulsion remedy represents that rhetoric carried through to its logical conclusion. In its landmark April 1, 1953 decision, the German Supreme Court addressed this aspect of the problem directly:

[T]hus the shareholders in a GmbH have a genuine duty of good faith, not one simply following from the principle of good faith (242 BGB), because the relationships between a shareholder in the GmbH and his fellows are not purely capitalist, but also personal. . . . If a shareholder destroys the company bond (gesellschaftliche Verbundenheit) then there is no further room for him in the GmbH.205

In extending this remedy to situations in which minorities can expel majority shareholders, German courts have broken completely from the concept of the sanctity of property interest held by shareholders in their proportional voice in company management. In doing so, German courts have held that the good faith obligations of shareholders’ relationships to each other are superior to their voting rights in their company. In U.S. law, there are also good faith obligations, but they are construed more narrowly. Most importantly, violation of obligations by a U.S. majority shareholder only gives a minority shareholder the rights to an independent cause of action for damages or injunctive relief. In Germany, a violation can cause the majority shareholder to lose his or her position in the company entirely and thus extinguish all of his or her participatory rights.

The issue of expulsion thus presents in sharpest relief the potential conflict between shareholder control and relational obligations. In confronting this conflict, one must seek to understand why expulsion was considered a necessary complement to withdrawal. What was the aspect of a shareholder’s interest in the company that could not be adequately protected without an expulsion remedy? The nature of the relational rhetoric behind this German development, particularly the extreme vagueness with which the controlling principles were formulated, raises difficulties in any legal system. Clear distinctions and deference to corporate structures, which characterize both the traditional U.S. approach and the original German statutory provisions, enhance predictability and stability in the system. Such predictability, however, is bought at the expense of placing some aggrieved shareholders in intolerable positions. In evaluating alternative approaches, such as that of

Germany, one must ask whether the amelioration of this problem is worth the danger of abuse inherent in relying on vague concepts coupled with considerable judicial discretion. An evaluation of alternative approaches must also take into account the ways in which the German system itself has sought to minimize these dangers.

CONCLUSION

The German experience with withdrawal and expulsion provide a range of practical solutions to close corporation problems that can be helpful for the kind of comparison undertaken in Part II.B. Such a comparison, however, remains limited to narrow instrumental concerns. Given the link between the German approaches and deeper assumptions of German legal culture, these comparisons have broader implications.

The withdrawal and expulsion remedies place the personal aspects of shareholder relationships at the center of the law’s attention. In doing so, the normative basis for court action has been shifted from the economic and contractual concerns of the GmbH statute and from the clear rules the statute articulates. When German courts and commentators have expressed the concerns that this shift addresses, they have generally emphasized two factors. First, they have argued that the law recognizes no legal relationships from which one cannot extricate oneself. Second, they have focused on the elements of relationships that impinge strongly on the shareholders’ life experiences. In both cases the underlying principle is what Scholz and others characterize as “personhood” (Persönlichkeit). This longstanding philosophical use of the term Persönlichkeit goes beyond its common business usage, which often refers to the corporate personality of a company. In the jurisprudence of the 1930s and of the postwar period, it has been used by some to express a view of personal autonomy in which the realization of the self is closely linked to membership in groups. The value of “personhood” conflicts with the notion that the application of the law’s formal categories may force shareholders to remain in an intolerable situation against their will. It would seem, however, that this concern could be fully addressed by the withdrawal remedy. Withdrawal guarantees all aggrieved shareholders the right to leave such a situation.

The constant insistence by proponents of the withdrawal and expulsion remedies that an expulsion right is necessary indicates that something more is involved. Expulsion guarantees some aggrieved shareholders the right to maintain their relationship rather than sever it. German courts stress that the impact of a relationship on shareholders’ lives provides an independent basis for judicial action. For those supporting this position, the factual relationship between shareholders is
more than the sum of specific contractual arrangements between individuals. As a social reality, the relationship creates normative obligations between the parties even in the absence of specific statutory authorization. Because the relationship comes before the legal form that effectuates it, its norms can overturn the contractual expectations of parties as to their voice in the company. To the extent that membership in this relationship is important to the realization of a shareholder’s “personhood,” German courts have sought to protect this interest. German courts and commentators rely on the concepts of good faith and wichtige Grund to provide a link between the harm experienced by shareholders and the remedies offered by courts. Given the great variety of circumstances that affect the relationship between shareholders, the concepts are necessarily vague and open-ended.

As we have seen, the dangers of abuse created by such an approach are all too real. They had long been admitted as a theoretical possibility, but dismissed as unlikely in the German context. During the Third Reich, however, such abuses flourished and, ironically, their practical results were applauded by Scholz himself. Nevertheless, postwar German courts embrace the approach with apparently benign results. The struggle within German law to limit the dangers can be seen in the different approaches to expulsion and withdrawal taken by the system over the course of this century.

The normative rationales for the German withdrawal and expulsion remedies have been remarkably consistent throughout the seven decades in which they have been proposed. This consistency has been adduced by some postwar observers as supporting the idea that the rationales behind the remedies are independent of the political abuses they furthered during the Third Reich. From this perspective, the Nazi approach to withdrawal and expulsion is an aberration in a long jurisprudential tradition. Unfortunately, such a view is inconsistent with the historical developments discussed above. Although the normative vocabulary has been consistent, its relationship to its context and the courts’ treatment of it has differed sharply. It was precisely during the Third Reich that such ideas were accepted into German law. Therefore, rather than being an aberration, the Nazi period was the formative stage of such ideas.

The fact that these developments were rooted in an earlier tradition might lead the observer to draw a conclusion opposite to that of those who see the jurisprudence of the 1930s as an aberration. Some might

206. See supra part I.A.2.
see the abuses of that period as a natural and inevitable result of the normative language and of the legal culture it mirrored. In fact, the dangers of the approach were obvious to its proponents from the beginning. From Windscheid to Scholz, in the field of contracts and later in that of the GmbH, its proponents recognized its hypothetical dangers, but remained convinced that the decency of the advanced German legal system and bureaucracy and the rectitude of German judges made such concern unnecessary. As we have seen, Scholz continued to make such arguments at the height of Nazi power. The events of German history demonstrate that such faith was naive at best.

The argument for the inevitability of abuse, however, does not accord with the experience of postwar Germany. The basic approach embraced by postwar courts has been the one enunciated in 1942, not the earlier Weimar rejection of it. The easy response is to point to the very different political context. The Third Reich was a totalitarian state and the Federal Republic is a liberal democracy. To rely in this fashion on external political factors, however, replicates the older confident assurances that abuses could never be a problem in Germany. Doing so also abdicates responsibility for considering the role played by the legal doctrine itself. One should remember that the careers of many distinguished legal experts spanned the three periods discussed above, during which they articulated similar normative positions. What then should be the status of ideas in periods of freedom that are capable of abuse when political circumstances change? This was the problem confronted in theory during the Weimar era and in hindsight after World War II.

During the Weimar era, courts accepted withdrawal and expulsion remedies only in limited cases as exceptions to the general rule of dissolution, and they refused to base the remedies directly on the general clauses. As the work of Hedeman illustrates, critics were aware of the danger of abuse inherent in combining judicial discretion with the direct applicability of general clauses. It is ironic that the Weimar courts’ hesitation to apply general clauses to the GmbH occurred during the heyday of their application in the field of contracts. As we have seen, the courts stressed the need for maintaining the formal distinctions between the GmbH and other forms of business organization. They also refused to treat the general clauses or the relationship between the parties as independent bases for judicial intervention in company governance. Weimar courts insisted in grounding their treatment of the GmbH in the applicable statutes and the company charter.

207. See supra notes 52–57 and accompanying text.
208. See supra text accompanying note 62.
The areas into which the availability of withdrawal and expulsion were extended were those in which rights were already afforded by statute or by the company charter. Such an approach has relevance to the present inquiry on two levels. First, the inherent dangers of the vague general clauses were limited by subordinating them to clear rules articulated in the statute. In this context, the general clauses operated at the margins to provide flexibility and fill gaps. Second, the German courts' perspective emphasized the contractual expectations of the parties inter se in terms of the express statutory and corporate provisions on the basis of which they established their company. The continuing influence of this approach can be seen in the remarkable decisions of the lower and intermediate courts in the case of M's Jewishness. According to those courts, since the parties had entered into business with M knowing that he was a Jew, they could not complain of his Jewishness and could not argue that it violated their relationships with each other. These contractual aspects of the case were considered by the lower courts to outweigh the argument that Jewishness could be a substantial basis for expulsion.

Formalistic approaches to the law were an inconvenience to the Nazi regime. The implementation of the Nuremberg laws was not blocked, but it was rendered more disruptive to the German economy. Shareholders in companies that were suddenly deemed Jewish corporations faced great uncertainty. The expulsion remedy urged by legal scholars provided a vehicle for lessening the disruption caused by the removal of Jews from the economy (Entjudung). General application of the expulsion remedy, however, required a new approach to the application of general clauses.

As we have seen, Nazi theorists saw the general clauses and factual relationships as independent sources of legal norms more fundamental than the positive legal rules that effectuated them. Even so, viewing the general clauses from the internal perspective of the relationship between parties would result in an approach similar to that of the lower courts to the case of M. As in many other areas of the law, the neo-Hegelianism prominent among many Nazi legal theorists provided a solution.

209. See supra notes 48-50 and accompanying text.
210. See supra note 50 and accompanying text.
211. Among the leading proponents of neo-Hegelian legal theory during the Third Reich were Karl Larenz and Carl Schmitt. Larenz remained firmly rooted in traditional Hegelian approaches. Schmitt stressed the need to move beyond the traditional Hegelian bureaucratic state and create a new legal theory. See, e.g., CARL SCHMITT, STAAT, BEWEGUNG, VOLK — DIE DREIGLIEDERUNG DER POLITISCHEN EINHEIT (1933); KARL LARENZ, DIE BEDEUTUNG DER VÖLKISCHE SITTE IN HEGELS STAATSOPHILosophIE, ZgS 98, 109 (1938); KARL LARENZ,
Much of the civil and commercial legislation of earlier eras remained unchanged during the Third Reich. It fell to jurisprudential theorists to create new concepts that could enable these received legal provisions to acquire new meanings and perform new functions. Nazi legal theorists saw legal concepts as "concrete general concepts" (Konkret-allgemeine Begriff) that expressed the reality of life experience. Such concepts derived their content from Tätigkeit [factual reality]. Tätigkeit was expressed in the same terms as the legal locus of concern for the impact of the relationships involved in GmbH shareholding, Lebenstätigkeit. This concentration on factual circumstances made legal concepts more variable. The concrete general concept did not, however, mean simply empiricism and flexibility. The factual reality that its concrete aspect was meant to reflect was itself shaped by the broader values that linked it to society as a whole. Its general aspect meant that, once defined, it could be broadly applied as a legal term. This approach was particularly suited to the general clauses of civil and commercial law. The necessary link to the programs of the Third Reich was provided by other concepts common to the rhetoric of the period, those of the world view (Weltanschauung) and the spirit of the age (Zeitgeist). For Nazi theorists, legal concepts were not only factual in nature, but also dynamic — the product of the changing spirit of the age interacting with concrete circumstances. From this perspective, the concrete position of parties, such as those involved in shareholder disputes, must be understood in terms of the way in which changes in the governing world view affected their position. When the Supreme Court revised the lower court's rulings in the case of M, it applied this approach.

In the postwar period, though many normative rationales for the withdrawal and expulsion remedies dating from the Third Reich remain, their application has been different. Postwar courts rejected the earlier approach of the Weimar courts, which limited the dangers of general clauses in the corporate context by subordinating them to statutory
provisions. The cases discussed above show that courts now base the two remedies directly on the application of general clauses without resorting to the statute and continue to emphasize the factual relationship between the parties. In evaluating these relationships, however, courts do not do so in terms of a general world view. The approaches discussed in Part I.B and the cases that established them focused on the position of the parties inter se. The general clause is now viewed in a more genuinely empirical manner than it was during the Third Reich. The relationship between the parties, though itself still a source of norms, is evaluated in its own terms.

When we consider the line of cases that followed the decision of 1953, a clear pattern emerges that establishes procedural requirements for effectuating the withdrawal and expulsion remedies. The provisions summarized in Part I.B set out detailed rules for intracompany procedures that must be followed before a suit can be brought. Once in court, they establish further procedures that limit the scope of the general clauses' operation. The provisions deal with shareholder voting requirements, rules of court procedure, burdens of proof, standards for valuation, and mechanisms for compensating departed shareholders.

The three historical periods in which the withdrawal and expulsion remedies have been proposed exhibit different responses by the German legal system to the dangers inherent in reliance on such a vague basis for judicial intervention. This experience demonstrates the manner in which instrumental concerns and statutory provisions common to U.S. and German law developed in fundamentally different directions in response to historical events. The German and U.S. experiences provide a basis for evaluating the inevitable tradeoffs between promoting legal certitude and addressing shareholder grievances. They also show the link between the narrow technicalities of corporate law and deeper issues of legal culture. The Weimar courts subordinated general norms to the clearly articulated rules of the statute, whereas the Third Reich embraced those norms as independent sources of legal obligation and saw their flexibility as necessary to achieving justice in the context of dynamically changing factual circumstances. Despite the experience of the Nazi era, postwar Germany continues to accept with apparently good results the normative basis for the withdrawal and expulsion remedies first adopted by the courts in 1942. While accepting the general clauses and the relationship between the parties as independent sources of norms, postwar German courts constrain these norms by imposing elaborate procedural requirements. Their approach reflects long experience with the practical implications of carrying through to its conclusion the abstract proposition that "a majority position in the company is no carte blanche ..."