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PROPERTY AS A FUNDAMENTAL CONSTITUTIONAL RIGHT? THE GERMAN EXAMPLE

Gregory S. Alexander*

Property rights finally seem to be getting some respect. From the renaissance of the takings clause[1] to state legislation requiring that compensation be paid for a broad range of regulatory restrictions,[2] the property-rights movement has scored impressive gains within the past several years.[3] If its war against bird-lovers, tree huggers, and other like-minded "collectivists"

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[1] See, e.g., Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003 (1992).

[2] Several states have enacted legislation requiring that government agencies determine whether their actions may constitute a taking of property. E.g., Tenn. Code Ann. § 12-1-201 to -206; Utah Code § 63-90-1 to -90a-4; Tex. Gov't Code Ann. § 2007.001-2007.026. Florida's statute authorizes compensation when an owner proves that a governmental action "has inordinately burdened" the use of land. Fla. Stat. Ann § 70.001. For critical discussions of such legislation, see Frank Michelman, A Skeptical View of "Property Rights" Legislation, 6 Fordham Envtl. L.J. 409 (1995); Jerome M. Organ, Understanding State and Federal Property Rights Legislation, 48 Okla. L. Rev. 191 (1995); John Martinez, Statutes Enacting Takings Law: Flying in the Face of Uncertainty, 26 Urban Law. 327 (1994).

[3] For background on the current property-rights movement, see Philip D. Brick and R. McGreggor Cawley, eds., A Wolf in the Garden: The Land Rights Movement and the New Environmental Debate (Lanham, MD, 1996) and Bruce Yandle, ed., Land Rights: The 1990s Property Rights Rebellion (Lanham, MD, 1995).

is not yet entirely won, at least the pendulum seems to have swung in favor of the movement.[4]

These successes of the property-rights movement raise once again the question of the degree of substantive protection that should be accorded to property rights, not only under the takings clause of the Federal Constitution but also for substantive due process purposes under the Fourteenth Amendment. Why has property not been treated as a fundamental right, equal in status to the due process clause's liberty interest or the rights to vote, procreation, and other rights under the equal protection clause?[5] There is no dearth of contemporary commentators who believe that it should be. Scholars like Professors Richard Epstein[6] and James Ely[7] have argued that, properly understood, the Constitution provides no basis for relegating property to an inferior position in a lexical ordering of constitutional rights. "Under the proper analysis," Professor Epstein contends, "all rights are, as it were, fundamental."[8] Similarly, recent Supreme Court

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[4] On the recent property-rights movement in general, see Let the People Judge: Wise Use and the Private Property Rights Movement (John Echeverria & Raymond Booth Eby eds., 1995). See also James V. DeLong, Property Matters (New York, 1997).

[5]Shortly after this Article was completed, a student Note with a similar title to this Article's appeared. Tonya R. Draeger, Comment, Property as a Fundamental Right in the United States and Germany: A Comparison of Takings Jurisprudence, 14 Transnat'l Lawyer 363 2001). Despite this surface similarity, there is little overlap between the two papers. In particular, the student Note does not address the central question of this Article: why is property accorded a higher status under the German constitution than it is under the U.S. Constitution, especially given the greater emphasis that private property as a social institution play in this country compared with Germany, a social-welfare state?

[6] Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain (Cambridge, MA, 1985).

[7] James W. Ely, Jr., The Guardian of Every Other Right: A Constitutional History of Property Rights (New York, 1992)

[8] Epstein, p. 143.

decisions like *Nollan v. California Coastal Commission*[9], *Dolan v. City of Tigard*[10], and, more recently, *Eastern Enterprises v. Apfel*,[11] may be understood as attempts by the Court to pave the way for a gradual shift of property rights into the ranks of established fundamental rights like freedom of speech, association, and procreation.[12] Indeed, in *Dolan*, Chief Justice Rehnquist unambiguously stated, "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances."[13]

While property rights have gained greater protection under the takings clause, they remain a "poor relation" to liberty interests for substantive due process purposes.[14] Courts treat liberty interests as "fundamental," vigorously protected against all governmental encroachments save those undertaken for "compelling" reasons. Property interests, on the other hand, cannot resist any governmental encroachment that passes a weak "rationality" standard. No modern Supreme Court decision has recognized a fundamental property right for substantive due process

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[9] 483 U.S. 825 (1987).

[10] 114 S. Ct. 2309 (1994).

[11] 524 U.S. 498 (1998).

[12] For an attack on the sophistry underlying these calls for equal treatment of property with other personal constitutional rights, see Alan E. Brownstein, "Constitutional Wish Granting and the Property Rights Genie," 13 Const. Com. 7 (1996). An earlier, and brilliant, critique of this argument is C. Edwin Baker, "Property and Its Relation to Constitutionally Protected Liberty," 134 U. Pa. L. Rev. 741 (1986).

[13] 114 S. Ct. at 2320.

[14] *Accord* Ronald J. Krotoszynski, Jr., Fundamental Property Rights, 85 Geo. L.J. 555, 560 (1997) ("[P]laintiffs who wish to assert that the deprivation of a particular property interest violates substantive due process have had difficulty getting the contemporary Supreme Court's attention.").

purposes.[15]

As every constitutionalist knows, things were different once. Property once enjoyed an exalted status in American constitutional law. During the notorious *Lochner* era, the Supreme Court used the due process clause of the Fourteenth Amendment to protect not only liberty of contract but property interests as well.[16] Indeed, the Court barely distinguished then between property and contract for due process purposes, tending to lump together all private economic interests in its aggressive to attack against the activist state. The story is *Lochner*'s rise and demise is too familiar even to summarize here.[17] Suffice it to say that after *Lochner*'s downfall in 1937, property was pushed to the constitutional back burner, much to oft-repeated dismay of political conservatives. They declaim and lament the "double standard" that has existed between the judicial treatment of property rights and political rights ever since the infamous footnote 4 in

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[15] In the lower federal courts, a split has emerged over whether substantive due process protects property interests at all. *Compare* Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398 (9th Cir. 1989) (holding that substantive due process protects all property right, fundamental and non-fundamental alike), *cert. denied*, 494 U.S. 1016 (1990), *overruled by* Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996) (en banc) *and* Moore v. Warwick Pub. School Dist. No. 29, 794 F.2d 322 (8th Cir. 1986) (same) *with* Local 342, Long Island Pub. Serv. Employees v. Town Bd., 31 F.3d 1191 (2d Cir. 1994) (holding substantive due process does not protect non-fundamental property interests) *and* Charles v. Baesler, 910 F.2d 1349 (6th Cir. 1990) (same).

A recent article argues that courts should recognize the existence of some fundamental property interests, protectible as strictly as fundamental liberty interests, and should also grant somewhat more modest protection to non-fundamental property interests as well. *See* Krotoszynski, note 11 *supra*. Professor Krotoszynski's suggested approach, particularly in its emphasis on the type of property interest involved, somewhat resembles the approach taken by the German Constitutional Court for purposes of determining when and whether a governmental act must be struck down as violating the property clause of the German Basic Law. *See* text accompanying notes *infra*.

[16] See Truax v. Corrigan, 257 U.S. 312 (1921).

[17] For a recent telling, *see* Howard Gillman, The Constitution Besieged: The Rise and Demise of *Lochner* Era Police Powers Jurisprudence (Durham, NC, 1993) *passim*.

Carolene Products.[18]

It is understandable why conservatives are perplexed over the apparently inferior position of property rights in modern American constitutional law. That the world's most market-oriented nation relegates property to the ranks of subordinate constitutional rights creates at least an apparent paradox. The paradox grows when the status of property under the American constitution is compared with property's place in the constitutional hierarchy of western nations with strong roots in the tradition of social welfarism.

A pertinent example is the Federal Republic of Germany. Unlike the American constitution, whose due process and takings clauses do not recognize property rights in affirmative terms and do not explicitly recognize private property as a legitimate institution, the German constitution (actually termed the Basic Law, or *Grundgesetz)* both explicitly affirms its institutional legitimacy and grants it constitutional protection in positive terms. Thus, rather than stating that property shall not be taken or owners governmentally deprived of their property except under certain circumstances, Article 14 states, "Property and inheritance are guaranteed." The German Constitutional Court (*Bundesverfassungsgericht*) has interpreted this provision as guaranteeing the existence of private property as a legal institution.[19] Further, it has expressly

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[18] United States v. Carolene Products Co., 304 U.S. 144 n.4 (1937).

[19] BVerfGE 24, 367, 389 (Hamburg Flood Control Case, 1968).

Unlike American practice, the official reports of the Constitutional Court do not give official names to the cases. The names provided here in parentheses are based either on common German reference or on identification provided in the leading English-language works on German constitutional law, Donald P. Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany, 2d ed. (Durham, NC, 1997) and David P. Currie, The Constitution of the Federal Republic of Germany (Chicago, 1994).

characterized the right to private ownership of property as "an elementary basic right."[20]

Astute American students of German constitutional law have pointed out the important position that property occupies in the list of German individual rights. Professor David Currie, for example, has observed that "property rights are by no means relegated to an inferior position in Germany, as they have been in the United States."[21] So, the apparent paradox deepens.

But just what does it mean to say that the right to private property is "an elementary basic right"? It is tempting to answer that the German Constitutional Court has done what the American Supreme Court has refused to do in recent history and what conservative scholars like Professor Epstein have urged it to do, i.e., recognized the status of property as a fundamental personal right, equal in rank and stature to personal liberties of speech, religion, and the rest, and as a primary legal tool in the effort to resist redistributive governmental measures. If that were in fact the case, then the difference positions of property under the American and German constitutions would indeed be paradoxical and provide American constitutional scholars who have defended the existing two-tier system of rights with reason to reconsider whether property ought to continue to hold its less-than-fundamental position.

In this Article, I will argue that there is indeed an asymmetry between the German and American constitutional treatments of property, but not that identified by the commentators. The problem stems from the way the question is framed. Rather than asking whether or not property

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[20] BVerfGE 50, 290, 339 (Codetermination Case, 1979).

[21] Currie, The Constitution of the Federal Republic of Germany, p. 290 (footnote omitted). Some commentators have taken the view that the Supreme Court in fact has been quite protective of property interests, using the First Amendment and other provisions that protect ostensibly political rights rather than the takings or due process clauses. See John B. Attanasio, Personal Freedoms and Economic Liberties: American Judicial Policy, in Germany and Its Basic Law, Paul Kirchhof and Donald P. Kommers eds. (Baden-Baden, 1993), p. 221.

is a fundamental right *tout court* under either the German or the American constitutions, the inquiry should focus on two closely related matters. First, assuming that the interest involved qualifies as "property" within the meaning of their constitutional texts, do German or American courts, in assessing the degree of protection that property rights warrant under their constitutions, explicitly discuss the primary purpose or function that they attribute to property rights as a general matter? Stated more simply, is their analysis of the constitutional status of property purposive? Second, do German or American courts focus on the values and functions that the particular interest immediately involved implicates? In other words, is their approach contextual? The answers to both questions reveal the core differences between the German and American approaches to the status of property as a constitutional right. The German Constitutional Court has adopted an approach that is both purposive and contextual, while the American Supreme Court has not.

The first question recognizes that the institution of property has multiple potential purposes and that the level of constitutional protection accorded to property, indeed, the basic question whether constitutionally to protect property at all, depends on what purpose(s) the legal system involved has historically assigned to property. Property rights are epiphenomenal. They are not ends in themselves but rather an instrument designed to instantiate and serve deeper substantive values, such as wealth-maximization, personal privacy, and individual self-realization. In this sense property rights are never "fundamental." Only the substantive interests they serve can be.

The second question recognizes that in the realm of property, contingency accompanies multiplicity. Just as there are multiple potential purposes that the general institution of property

may serve, so there are different functions associated with different types of particular property interests. One type of property interest may primarily protect economic goals like wealth-maximization while another type may primarily protect personal privacy. Whether, how, and why property interests are constitutionally protected frequently depends on the type of interest involved. Neither constitutional texts nor judicial opinions typically draw such distinctions openly, but often the other way to make sense of some individual judicial decision or group of decisions is to pay attention to the sort of interest that is immediately at stake. More to the point, the level of constitutional protection that courts grant to property both does and, this Article argues, should depend on the interest involved and the core purpose the court associates with that type of property interest.

These two questions illuminate the real difference between German and American constitutional property law. While American courts generally do not recognize (at least not openly) the functional differences just drawn, the German Constitutional Court sharply and explicitly does. The German court distinguishes between those property interests whose function is primarily or even exclusively economic, especially wealth-creating, and those that primarily serve a non-economic interest relating to the owner's status as a moral and/or political agent. Only the latter are protected as fundamental constitutional interests. Stated differently, it is a mistake to say that the German constitution, as interpreted by the Constitutional Court, treats property as a fundamental right across the board. Property is a fundamental right, accorded the highest degree of protection, in German constitutional law only to the extent that the affected interest immediately at stake implicates the owner's ability to act as an autonomous moral and political agent. Stated yet another way, German constitutional law treats property as a derivative,

or instrumental, value in the general constitutional scheme. It strongly protects a particular property interest only to the extent that the interest immediately serves other, primary constitutional values, in particular, human dignity and self-governance.

German constitutionalism does not view the right of property as a matter of protecting subjective preferences. Nor does it recognize property as a basic right for the purpose of blocking legislative or regulatory redistributive measures that frustrate the full satisfaction of individual preferences. It is not, in short, designed to instantiate neo-classical vision of the minimalist "nightwatchman" state.[22] Its purpose instead is more moral and civic than it is economic. The moral dimension of property is that it is basic insofar as it implicates the values of human dignity and self-governance. The civic dimension is that property is the material basis for realizing a preexisting understanding of the proper social order. Stated differently, the German constitutional right of property is not a Lockean right, but a right that fuses the traditions of Kantian liberalism and civic republicanism. It is a conception of property that I have called "proprietarian."[23]

Examining the German approach to constitutional protection of property provides a basis for critiquing and rethinking existing American constitutional property doctrine. To know whether we should characterize a right as fundamental, we need to know just <u>why</u> we value that right. In the case of property rights, as is so often the case with constitutional rights, this is often not clearly expressed. I want to suggest that when we look at the Supreme Court's recent

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[22] The best expression of that vision remains Robert Nozick, <u>Anarchy, State and Utopia</u> (New York, 1974).

[23] See Gregory S. Alexander, <u>Commodity and Propriety: Competing Visions of Property in American Legal Thought, 1776-1970</u> (Chicago, 1997).

takings cases, it becomes clear that the characterization of German constitutional law as highly property-protective and American constitutional law as relegating property rights to the status of a poor cousin is a gross and inaccurate generalization. As other commentators have noted,[24] recent takings jurisprudence has begun in some respects to resemble the highly property-protective stance of the *Lochner*-era Court. The constitutional tools have changed, from substantive due process to takings, but the net results are often similar .[25] It has done this through *Lochner*-like close scrutiny of the relationship between regulatory means and legislative ends and through a heightened burden of proof regarding the causal connection between the affected owner's conduct and the harm to be remedied.[26] This mode of analysis leaves no room for distinguishing among different sorts of property interests on the basis of their functions. The Court has gradually expanded the range of protected interests with no discussion of the function served by the particular interest. In fact, however, the interests that have gained greater protection under the new heightened scrutiny are strictly commercial or entrepreneurial in character.

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[24] See, e.g, Molly McUsic, "The Ghost of *Lochner*: Modern Takings Doctrine and Its Impact on Economic Legislation," 76 B.U. L. Rev. 605 (1996). Cf. Alan E. Brownstein, "Constitutional Wish Granting and the Property Rights Genie," 13 Const. Com. 7, 53 (1996) (" [I]n a variety of circumstances, property receives favorable , or at least roughly equivalent, treatment in comparison to the protection provided personal liberty rights such as freedom of religion, freedom of speech, equal protection rights or procedural due process. . . . Indeed, the direction of the case law seems to clearly favor property as opposed to personal liberty and equality interests.").

[25] Id. at 608-09 ("The similarity between the Court's current [takings] jurisprudence and the *Lochner* jurisprudence lies not in the amount or type of legislation at risk but the*proportion* of redistributive legislation put at risk.").

[26] This dual-focused form of scrutiny is the upshot of the Court's decisions in Dolan v. City of Tigard, 512 U.S. 374 (1994) and Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

Here, then, is the major difference between German and American constitutional property law. The difference is not that in the United States property is a poor relation to such fundamental civil rights as speech, association, and travel. Rather it is that property interests that would receive minimal protection under German constitutional law because they do not immediately implicate the fundamental values of human dignity and self-realization receive increasingly strong protection under American constitution law. Land held for the sole purpose of market speculation is as apt under our constitution, perhaps more apt, to receive strong protection as is a tenant's interest in remaining in her home.[27]

Part I of this Article briefly describes the relationship among three German legal concepts, its constitution, its social state, and its conception of the human self, or personality. Understanding how the German constitution is related to the ideas of the social state and the human personality is essential to grasping the meaning of property as a preferred right in German constitutional law. Part II then examines Article 14 of the *Grundgesetz*, the central property clause of the constitution, and its interpretation by the German Constitutional Court. Part III then considers the differences between German and American approaches to the problem of determining when government actions constitute impermissible takings of property. A brief coda about morphing constitutions and the aims and limits of comparative constitutional analysis completes the Article.

I. THE BASIC LAW, THE *SOZIALSTAAT*, AND THE "IMAGE OF MAN"

It is commonly said that the German Basic Law is neutral regarding particular economic

[27] See William W. Fisher III, The Trouble with *Lucas*, 45 Stan. L. Rev. 1393, 1398

systems. "Even a socialized economy," one noted scholar wrote, "would not violate the Constitution, since Article 15 allows it under specific conditions."[28] Whether the Constitution can properly be read to require socialist policies is debatable, but it certainly clear that it does not block them.[29] The 1949 German Constitution created not only a *Rechtstaat* (state governed by the rule of law) but, equally important, a *Sozialstaat* (social welfare state).[30] Far from perceiving any tension between these two ideals, the Constitution contemplates that the two are mutually reinforcing. Thus, Article 20 defines Germany as a "social federal state," while Article 28(1) requires the creation of a legal regime that is consistent with "the principles of a republican, democratic, and social legal state [*sozialer Rechtstaat*]." This does not mean that the Basic Law serves as a complete economic as well as political constitution, but it does create a general framework for the state's responsibility in the economic realm.

The basic substantive idea underlying the *Sozialstaat* is that the government has a responsibility to provide for the basic needs of all its citizens. While the Basic Law embraces a modern version of this idea, its roots extend much further back in German history. It can traced back to the Lutheran idea that the relationship between the prince and his people is one of mutual obligation. The people owe allegiance to the prince, but the prince in turn is obligated to provide

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(1993).

[28] Ernst Karl Pakuscher, Judicial Review of Executive Acts in Economic Affairs in Germany, 20 J. Pub. L. 274 (1971).

[29] See Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany, 2d ed., at pp. 242-243.

[30] H.W. Koch, A Constitutional History of Germany in the Nineteenth and Twentieth Centuries (London, 1984), p. 26.

for the welfare of his people.[31] This idea is a theme that recurs throughout German constitutional history. It is evident, for example, in the remarkable *Allgemeines Landrecht der Preußischen Staaten*, the comprehensive code for the Prussian States, completed in 1786. [32] While it would be anachronistic to say that the Prussian Code created anything like the modern welfare state, it certainly reflected a continuing commitment to the idea of the state's responsibility to secure the people's basic needs.[33] A more modern version of the *Sozialstaat* dates to the social welfarist reforms adopted in Prussia between 1830 and 1840. As one scholar has put it, the significance of these legislative measures is that fact that "in an age dominated by the Liberalism of the Manchester School, the state intervened for the first time in the public sector and thus created a precedent for the future." The social legislation of the Bismarck era and, later, the Weimar Republic greatly deepened and extended the reach of the state's intervention. Today, the concept of the *Sozialstaat* embraces not only the responsibility to provide a social "safety net," as that term is understood in the United States, but further, to redistribute wealth. The notion that the public's welfare depends upon assuring that no one lives in poverty and avoiding gross inequalities in the social distribution of wealth, while heretical in most American circles, is relatively uncontroversial in Germany today.[34] As one German legal scholar put it, it is "well-established knowledge" that "the social situation of the people improves, if and so far as

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[31] See Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany, p. 41.

[32] On the Prussian Code, see Franz Wieacker, A History of Private Law in Europe, Tony Weir trans. (Oxford, 1995), p. 260-266.

[33] See Gerhard Casper, Changing Concepts of Constitutionalism: 18th to 20th Century, 1989 S. Ct. Rev. 311, 321.

[34] See Ulrich Karpen, Soziale Marktwirtschaft and Grundgesetz. Eine Einführung in die

everybody shares the results of what has been produced by society."[35]

While some have expressed uncertainty whether the commitment to the social welfare state imposes affirmative duties on the state to provide particular benefits to all citizens or merely authorizes the state to do so, the majority legal opinion in Germany today is that the state is under a constitutional obligation to guarantee a minimal subsistence for individual citizens.[36] At that same time, there is growing realization in Germany today that there are limits to what the state can realistically provide, and an increasing number of Germans now believe that Germany may have already reached (or indeed exceeded) those limits. Still, there is no sense that the existence of limits undermines that basic commitment to the social welfare state.[37]

The commitment to the social welfare state has to be understood in connection with the most basic commitment in the entire German constitution--the commitment to the principle of human dignity (*Menschenwürde*). It is no coincidence that the first article of the Basic Law states that "The dignity of man is inviolable. It is to be respected and safeguarded with the full authority of the State."[38] The German Basic Law views basic rights hierarchically, and the right

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rechtlichen Grundlagen der sozialen Marktwirtschaft (Baden-Baden, 1990), p. 14.

[35] Ulrich Karpen, The Constitution in the Face of Economic and Social Progress, in New Challenges to the German Basic Law, Christian Starck ed. (Baden-Baden, 1991), p. 87, 90.

[36] Kurt Sontheimer, Principles of Human Dignity in the Federal Republic, in Germany and Its Basic Law, Paul Kirchhoff and Donald P. Kommers eds. (Baden-Baden, 1993), p. 213, 216.

[37] In the recent elections in the German *Land* of Baden-Württemberg, for example, the SPD, a center-left party that is the main opposition party in the German Parliament, campaigned on a platform whose slogan was "*Sozialstaat: Reformen--Ja! Abbau--Nein!*" ("The Social Welfare State: Reform, Yes! Demolition, No!")

[38] Art. 1 (1) *Grundgesetz* [GG].

to human dignity is the bedrock of all other constitutional rights. "Human dignity," the Constitutional Court has unambiguously stated, "is at the very top of the value order of the Basic Law."[39] It is, moreover, regarded as prepolitical, objective, indeed, transcendental.

From an American perspective, the core challenge would seem to be reconciling the human dignity principle with the commitment to the *Sozialstaat*, reconciling, that is, Article 1 with Article 20. To American ears, "human dignity" strongly resonates of the individualist outlook associated with classical liberalism, making the constitutional right negative rather than positive in character. From that perspective, the interventionist character of the *Sozialstaat* might be thought to contradict the commitment to individual human dignity.

From the German perspective, however, this is a false trade-off.[40] The conception of human dignity the Article 1 embraces is not that of classical individualism. Individual human dignity exists in a social and economic context. It cannot be fully and meaningfully protected without attending to the concrete conditions in which individuals live. "[I]t is social conditions that determine the extent to which the individual is truly able to safeguard his own human dignity."[41]

The social aspect of human dignity is evident in the German concept of the "image of man," that is, the nature of the human personality. This concept, which is central to the German Constitutional Court's dignitarian jurisprudence, defines the human personality as community-centered. Thus, the Constitutional Court early and explicitly stated that "[t]he image of man in

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[39] 27 BVerfGE 1 (Microcensus case, 1969).

[40] Indeed, Article 79 of the Basic Law provides that these two provisions are immune from any constitutional amendment.

[41] Sontheimer, Principles of Human Dignity in the Federal Republic, p. 215.

the Basic Law is not that of an isolated, sovereign individual; rather, the Basic Law has decided in favor of a relationship between individual and community in the sense of a person's dependence on and commitment to the community, without infringing upon a person's individual value."[42] Ernst Benda, the distinguished and influential former president (Chief Justice) of the Constitutional Court's First Senate,[43] has noted that the Basic Law rejects the "individualistic conception of man derived from classical liberalism as well as the collectivist view."[44] Perhaps the most accurate description of this conception of the self is to say that it combines the Kantian injunction against treating people as means rather than ends[45] with a strongly communitarian ontology.[46] There are also strong parallels between the German conception of the relationship between the self and property and the role of property in civic republican thought. Republican theory, like German constitutional theory, valued property as the source of personal

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[42] 4 BVerfGE 7, 15-16 (Investment Aid Case, 1954).

[43] The Constitutional Court is divided into two eight-member panels, called senates. These have mutually exclusive jurisdiction and membership. In cases of jurisdictional conflict, the two senates meet together as a single Plenum. Each senate is headed by the equivalent of a chief justice; traditionally, the president heads the First Senate, while the vice-president heads the Second Senate. The two-senate structure represents a compromise of an old debate over the character of the Constitutional Court as a legal or a political institution. See generally Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany, 2d ed., at pp. 16-18.

[44] Ernst Benda, Werner Maihofer, and Hans-Jochen Vogel, Die Menschenwürdige, Handbuch des Verfassungsrechts, 2 vols. (Berlin, 1984), I, at p. 110, 117.

[45] For a rich discussion of the Kantian roots of the German constitutional "image of man," see George P. Fletcher, Human Dignity as a Constitutional Value, 22 U. Western Ontario L. Rev. 178 (1984).

[46] See Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany, 2d ed. at p. 241. The communitarian theories that seem most compatible with the Basic Law's image of man idea are those of Michael Sandel and Charles Taylor.

independence necessary for proper self-development and responsible citizenship.[47]

II. ARTICLE 14 AND THE ROLE OF PROPERTY

A. Property and Self-Development

The relevance of the constitution's commitment to the *Sozialstaat* for understanding the meaning of property under the German constitution should be apparent by now. The *Sozialstaat* and the principle of human dignity lay the foundation for a particular way of understanding the core purpose of property rights. This theory holds that the core purpose of property is not wealth-maximization or the satisfaction of individual preferences, as the American economic theory of property holds,[48] but self-realization, or self-development, in an objective, distinctly moral and civic sense. That is, property is fundamental insofar as it is necessary for individuals fully to develop both as a moral agents and participating members of the broader community.

The clearest exposition of this self-developmental theory of property was in the famous 1968 *Hamburg Flood Control Case*.[49] The case involved a challenge to a 1964 statute enacted by the city-state of Hamburg converting all grassland that the state classified as "dikeland" into public property. The statute terminated private ownership of such lands, but it did require that owners be compensated. Several owners of dikeland claimed that the statute violated their fundamental right to property under Article 14.

The basis of this claim illustrates one major difference between the American and

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[47] See J.G.A. Pocock, The Machiavellian Moment (Cambridge, 19); Gregory S. Alexander, Time and Property in the American Civic Republican Legal Culture, 66 N.Y.U. L. Rev. .

[48] For a modern classical expression of the economic theory, see Harold Demsetz, Toward a Theory of Property Rights, 57 Am. Econ. Rev. 347 (Papers & Proc. 1967).

[49] 24 BVerfGE 367 (1968).

German approaches to constitutionally protecting property. Under the American constitution, assuming that the amount of compensation was adequate (and there was no allegation in the case that it was not), there simply would be no basis for a constitutional challenge at all. The purpose of the governmental measure was to build an effective system of dikes in the wake of the devastating floods that hit Hamburg in 1962--certainly public enough to satisfy our weak "public use" requirement.[50] Under our takings clause, once the publicness of the governmental encroachment and the sufficiency of monetary compensation have been satisfied, there is no basis for constitutionally challenging the measure. Monetary (or other) compensation is always an adequate substitute for the thing itself.

Not so under the German constitution. Article 14 is understood to guarantee not merely monetary value of property but extant ownership itself. The Constitutional Court expressly recognized this in its opinion. It stated, "The function of Article 14 is not primarily to prevent the taking of property without compensation--although in this respect it offers greater protection than Article 153 of the Weimar Constitution[51]--but rather *to secure existing property in the hands*

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[50] The standard datum cited to evidence the weakness of the public-use requirement under the Fifth Amendment's takings clause is Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984).

[51] Article 153 of the 1919 Weimar Constitution was the basis for some aspects of Article 14 of the post-World War II Basic Law. A number of important differences existed, however, between the treatment of property under the two constitutions, including the fact that, by not allowing compensated expropriations to be judicially challenged, the Weimar Constitution did not protect the institution of property as such. Compensation was always an adequate substitute for the thing itself. See Hans-Jürgen Papier, Die Eigentumsgarantie des Art. 14 I 1 GG, in Theodor Maunz and Günter Dürig, Grundgesetz Kommentar, 4 vols. (München, 1993), vol. 2, Randnummern 18-23.

On the weakness of basic rights under the Weimar Constitution generally, see Volkmar Götz, Legislative and Executive Power under the Constitutional Requirements Entailed in the Principle of the Rule of Law, in New Challenges to the German Basic Law, Christian Starck ed. (Baden-Baden, 1991), p. 141, 150-152.

of its owner."[52] This is the central meaning of the statement in Article 14 I that "[p]roperty [is] guaranteed." Give this view that the Basic Law protects property itself, not just its monetary equivalent, it is easy to understand why commentators have stated that property is a more important value under the German constitution than it is under the American takings or due process clauses. But what needs to be asked is why the German Basic Law protects existing property relationships themselves.

The answer is that German constitutional jurisprudence does not treat property as a market-commodity but as a civil, and one may say, *civic* right. The Court in the *Hamburg Flood Control Case* made it clear that the core purpose of property as a basic constitutional right is not economic but personal and moral. It stated, "To hold that property is an elementary constitutional right must be seen in the close context of protection of personal liberty. Within the general system of constitutional rights, its function is to secure its holder a sphere of liberty in the economic field *and thereby enable him to lead a self-governing life*."[53] The last phrase signals the animating idea behind the constitutional role of property under the German Basic Law--self-governance. Property is necessary condition for autonomous individuals to experience control over their own lives. Without property, they lack the material means necessary for a full and healthy development of their personality. The Court made the connection between property and personhood explicit in its opinion. It stated, "[T]he property guarantee under Article 14 I 2 must be seen in relationship to the personhood of the owner--that is, to the realm of freedom within

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[52] 24 BVerfGE at (Emphasis added).

[53] Id. at 389 (Emphasis added).

which persons engage in self-defining, responsible activity."[54]

The Court is here invoking an understanding of the function of property that in some respects echoes what some recent American scholars, most notably Margaret Jane Radin and C. Edwin Baker, drawing on Hegel, have called the "personhood function."[55] As Radin explains, the premise of this understanding is that "to achieve proper self-development-- to be a person--an individual needs some control over resources in the external environment."[56] The purpose of legal property rights, then, is to secure the requisite degree of control--self-determination--as a necessary means of facilitating self-development. The theory is most closely associated with Hegel, but Hegel and his followers were by no means the first or the only political philosophers to explain and justify property rights on the basis (and to the extent of) the proper development of the self.[57] Rousseau, for example, developed a comparable theory of property that stressed the importance of property to proper and full development of the personality.[58] For Rousseau, private ownership was morally justifiable only to the extent that it fulfilled that function.

As the Constitutional Court's opinion makes clear, the German idea of the constitutional

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[54] 24 BVerfGE at . In the immediate case, the court decided that the compensated expropriation of dikelands did not violate the owners' basic right because it satisfied the requirement of Article 14 III 1, that expropriations be made only for "the public weal" ("*Wohle der Allgemeinheit*"). More specifically, it was not a redistribution of land made for general reasons but an appropriate response to a particular problem of affecting the public good.

[55] See C. Edwin Baker, Property and Its Relation to Constitutionally Protected Liberty, 134 U. Pa. L. Rev. 741, 746-47 (1986); Margaret Jane Radin, Property and Personhood, 34 Stan. L. Rev. 957 (1982).

[56] Radin, Property and Personhood, p. 957.

[57] See generally Alan Ryan, Property and Political Theory [get pages].

[58]See Jean-Jacques Rousseau,

property right shares with the self-developmental tradition a conception of liberty that differs from the classical Anglo-American understanding of that term. Borrowing the distinction made famous by Isaiah Berlin,[59] one can say that German constitutional law, like the Hegelian theory of property and the self, understands liberty in its positive as well as a negative sense, that is, freedom to rather than freedom from.[60] It may be more accurate to describe the German constitutional conception of liberty, in its relation to property, as blending the positive and negative dimensions. The individual owner's freedom from external interference with his property is valued just because that it a precondition for him to act in a way that in necessary to realization of the self. Put differently, property and liberty are connected with each other, not solely through a politics of fear of the state, but a politics of enabling self-governance. The point of protecting individual ownership is not create a zone of security from a powerful and threatening state but to make it possible for individuals to realize their own human potential.

The German constitutional commitments to both human dignity and the *Sozialstaat* clearly influence the way in which the Constitutional Court understands the relationship between property and self-development. The Court views considerations of individual welfare as integrally related to the proper self-development of citizens, not as isolated agents but as members of society. Welfare here is less a matter of guaranteeing that the distribution of wealth

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[59] See generally Isaiah Berlin, Two Concepts of Liberty (1958) *passim*.

[60] It is important to be very careful here, though. It is not clear to what extent public assistance, what we would call welfare benefits, are protected as "ownership" under Article 14. Social security interests are protected in Germany today are so protected, but these accrue by virtue of employment. See generally P. Krause, Eigentum als subjektiven öffentlichen Recht (1982); F. Ossenbühl, Festschrift für W. Zeidler, Bd. 1 (1987), at p. 625. Similarly, the Sozialstaatsprinzip (principle of social justice) of Article 20 does not create subjective rights, but instead establishes a goal for the state to pursue through the legislature. See 27 BVerfGE 253, 283; 41 BVerfGE 126, 153; 82 BVerfGE 60, 80.

throughout society is morally optimal than it is securing the material conditions necessary for the proper development of individuals as responsible and self-governing members of society.

B. Property as Dynamic and Social: The "Social Obligation" of Ownership

This conception of property as the basis for proper self-development has produced two defining characteristics of German constitutional property jurisprudence. The constitution's treatment of property, both textually and as interpreted by the courts, is functionally dynamic and socially based. It is functionally dynamic in the sense that the courts consider social and economic changes that have affected the purposes that particular resources serve over time. An influential treatise on German constitutional law aptly captures this focus on the functional change of

property and its relevance to constitutional protection:

> As a basis for the individual existence and individual conduct of life as well as a principle of social order the individual ownership of property has lost its importance. Modern life is based only to a limited extent on the individual power of disposition as the basis for individual existence, with respect, for example, to the peasant farm or the family enterprise. The basis for individual existence is usually no longer private property as determined by private law, but the produce of one's own work and participation in the benefits of the welfare state.[61]

The relevance of functional changes of property to constitutional protection is illustrated by the *Small Garden Plot Case* (*Kleingartenentscheidung*).[62] In that case the Court struck down a federal statute that severely limited the right of landowners to terminate garden leases. The historical background of the statute and changes in social conditions are crucial to understanding the decision. At one time in German history it was common for large landowners, particularly on the outskirts of cities, to lease to people who owned little or no land small plots for the purpose of small gardens. These garden plots were an important method of feeding the German public. As the dominant means of agricultural production shifted to large-scale commercial productions, these individual garden plots lost their original social purpose and indeed became something of an anachronism. The individual landowners in the case wanted to change the use of their land from agricultural purposes to commercial development because the amount of annual rent from the leasehold had become insubstantial. They applied for a permit to terminate the garden lease on their land, but the regulatory agency refused to grant the permit because the federal statute did

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[61] Konrad Hesse, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, 20th ed. (Heidelberg, 1995), p. 192.

[62] 52 BVerfGE 1 (1979).

not recognize this sort of change of circumstances as a permissible basis for terminating leases. The Court held that the statute was unconstitutional because the magnitude of the restriction on the owner's freedom of use was disproportionate to the public purpose to be served.[63] While the original function of these garden allotments was to provide a source of food in times of social emergency, the purpose had by modern times become no more than to be a source of recreation, a social function that the court regarded as decidedly less weighty than its original purpose. Comparing the weakness of the new function with the severity of the restriction on the owners' use, the court had little difficulty in concluding that the statute was unconstitutional.

The *Garden Plot Case* also illustrates the other characteristic of constitutional property jurisprudence, its perception of private ownership as being "socially tied," as the Constitutional Court put it. The basis for this conception of private property as socially obligated is a provision in the Basic Law's property clause that finds no real analogy in the American constitution.[64] Article 14 II provides, "Property entails obligations. Its use shall also serve the common good." While the Court has yet to define the precise scope of this "social obligation of ownership," it is clear that the clause is understood as something more than the idea expressed in the familiar common-law apothegm, *sic utere tuo ut alienum non laedes* (use your thing in a way that does not interfere with the legal interests of others). It is intended to express the idea that private

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[63] The principle of proportionality (*Verhältnismäßigkeit*), although nowhere expressly mentioned in the constitution, is a fundamental aspect of German constitutional jurisprudence. It is derived from the rule of law ideal (*Rechtsstaatlichkeit*) and has a long history predating the 1949 Basic Law. For a good summary of its origins and role, see Currie, The Constitution of the Federal Republic of Germany, p. 307-310.

[64]For a recent and stimulating argument that it should, see Hanoch Dagan, "Takings and Distributive Justice," 85 Va. L. Rev. 741, 767-792 (1999).

property rights are always subordinate to the public interest.[65] This idea was more fully expressed in the original draft of Article 14 II, which stated, "Ownership entails a social obligation. Its use shall find its limits in the living necessities of all citizens and in the public order essential to society."[66] That the social obligation recognized in Article 14 II is broader than the minimal duty to avoid creating a public nuisance is clear from various decisions of the Constitutional Court. The social obligation (*Sozialverpflichtung*) was the basis for the Court's statements recognizing the constitutional legitimacy of certain forms of rent control[67] and anti-eviction regulations.[68]

From an American perspective, perhaps the most striking sign of the broad reach of the social obligation is the important *Codetermination Case* (*Mitbestimmungsentscheidung*).[69] That case involved a challenge to the constitutional validity of the federal Codetermination Act of 1976, an extremely important piece of legislation regulating the relationship between labor and management in German industries. The act mandates worker representation on the boards of

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[65]Hanno Kube has argued that in the context of natural resources German courts have interpreted Article 14's social obligation clause in a way that tracks the Anglo-American public-trust doctrine. See Hanno Kube, "Private Property in Natural Resources and the Public Weal in German Law–Latent Similarities to the Public Trust Doctrine?," 37 Nat. Res. J. 857 (1997). For a fuller exposition of his theory, see Hanno Kube, Eigentum an Naturgütern: Zuordnung und Unverfügbarkeit [Property in Natural Resources: Coordination and Undisposability] (Berlin, 1998). The seminal article on the public trust doctrine is, of course, Joseph Sax, The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471 (1970).

[66] Rudolf Dolzer, Property and Environment: The Social Obligation Inherent in Ownership (Marges, Switzerland, 1976), p. 17.

[67]37 BVerfGE 132, 139-43 (Tenancy and Rent Control Case 1974).

[68] 68 BVerfGE 361, 367-71 (1985).

[69] 50 BVerfGE 290 (Codetermination Case 1979).

directors of large firms, defined as firms with 2000 or more employees. It further requires that the firm's legal representatives as well as its primary labor director be selected by the supervisory board according to specified procedures and that the board's chair and vice-chair be elected by a two thirds majority.

The ostensible purpose of the act was to extend and strengthen worker participation in the governance of business enterprises, a practice that has a long history in German labor-management relations. But anyone who has read James Buchanan and Gordon Tullock's famous book, *The Calculus of Consent*,[70] may be tempted to react skeptically to that explanation. A public choice analysis of the act would simply see it as a clear instance of rent-seeking legislation, supported but an obviously well-organized and intensely political interest group. That may indeed have been the real basis for the act, but the German Constitutional Court did not think so. Squarely addressing the public-choice reading (although not calling it by that term), the Court stated: "The Codetermination Act does not promote narrow group interests. Rather, the cooperation and integration served by institutional coparticipation . . . has general importance as a social policy; coparticipation is a legitimate political means of safeguarding the market economy. It serves the public welfare and cannot be regarded as an unsuitable means for the achievement of this purpose."[71]

The plaintiffs, which included a large number of business firms and employers' associations, attacked the act as a gross interference with their property rights. They argued that the act violated the constitutional property rights of shareholders and the firms themselves

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[70]Gordon Tullock and James Buchanan, The Calculus of Consent (19).

[71] European Commercial Cases, vol. 2, at

under Article 14 of the Basic Law as well as other constitutional guarantees.[72] Rejecting this claim, the Constitutional Court concluded that the act was merely an exercise of the legislature's power under Article 14 I to define to "contents and limits" of property. It did not violate the injunction of Article 19 II that "the essence of a basic right [not] be encroached upon." The court stated that while the act admittedly reduced the powers of shareholders as members of the supervising board, the restriction "remains within the ambit of the commitments of property owners to society in general."[73] Article 14 II makes clear, the court pointed out, that "use and power of disposal do not remain [solely] in the sphere of the individual owner, but concern also the interests of other individuals who depend upon the use of the [particular] object of property."[74] The magnitude of owners' social commitment under Article 14 varies with the social importance of the asset and its contemporary purpose.[75] As the Constitutional Court stated, the social obligation "increase[s] in scope as the relationship the property in question and its social environment as well as its social function narrows."[76] Applying this sliding scale approach, the court reasoned that shareholding

> ha[s] far-reaching social relevance and serve[s] a significant social function, especially since the use of this property always requires the cooperation of the employees whose

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[72] Other grounds for the challenge included interference with the rights of occupation (Article 12) and association (Article 9). There is a substantial degree of interrelationship between Articles 12 and 14. For a lucid discussion, see Fritz Ossenbühl, Economic and Occupational Rights, in Germany and Its Basic Law, p. 251.

[73] European Commercial Cases, vol. 2, p. 324 (1979).

[74] Id. at

[75] See generally Peter Badura, Eigentum, in Handbuch des Verfassungsrecht, Ernst Benda et al. (Berlin, 1984), p. 653.

[76] Id. at

fundamental rights are affected by such use.[77]

While the text of Article 14 speaks only of "property" and seemingly does not distinguish among various sorts of property, in fact the Constitutional Court has drawn just such qualitative distinctions. The *Codetermination Case* and *Small Garden Case*, read together, allow one to say that the Court distinguishes among different categories of property, creating a kind of hierarchy among types of resources. The sliding scale approach to evaluating the magnitude of the social obligation and the social function of property is the basis for this ordering of property. This is the primary means by which the court has cabined the social obligation, which otherwise would seem to be the proverbial unruly horse. Greater legislative power is recognized over socially important assets like corporate stock than over small garden plots used for leisure.

III. THE SOURCE AND MEANING OF CONSTITUTIONAL PROPERTY

This Part analyzes two lines of cases in which the German Constitutional Court has discussed and identified the source and substantive meaning of property for constitutional purposes . One line of cases arises out the question whether and to what extent government-provided welfare assistance benefits are protected as property under Article 14. The other deals with environmental regulations. Here the question has concerned the constitutional status of natural resources that the Constitutional Court, following legislative signals, deems essential to human life and not subject to exclusive individual control.

These two lines of cases indicate two important differences between the American and German approaches to constitutional property. The first of these concerns the source of

constitutional property. The German Court has unambiguously rejected a positivist approach to the question what is or are the sources of property interests protected under Article 14. In determining whether an asserted interest is or is not property for constitutional purposes, it looks not only to non-constitutional, private-law sources but also to the values of the Basic Law as a whole. As a result, property in its constitutional sense is not limited just to those interests that private law defines as property.

The second vital difference between the two courts' approaches concerns the substantive purpose of constitutional protection of property. The German Court, unlike its American counterpart, rejects an interpretation of the property clause that views aggregate wealth-maximization, individual preference-satisfaction, or individual liberty (in its classical, or negative, sense) as the primary purpose of constitutionally protecting property interests. The primary purpose protecting property as a fundamental right under the German Constitution, rather, is to secure the material conditions necessary for each person's self-development.

A. The Basic Law as the Source of Constitutional Property: Environmental Regulation

Unlike the American Supreme Court,[78] the German Constitutional Court has been clear about the legal source used in defining what interests are protected as constitutional property.[79]

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[77] European Commercial Cases, vol. 2, p.

[78]See Merrill, "The Landscape of Constitutional Property," supra, at .

[79]For a lucid and insightful discussion of the muddled state of American constitutional doctrine on this question, see Thomas W. Merrill, "The Landscape of Constitutional Property," 86 Va. L. Rev. 885 (2000). The difference between the American and German experiences may be due in part to the fact that the German Basic Law has a single property clause and a single property-dependent doctrine, while the American Constitution has two property clauses (the Fifth and Fourteenth Amendments) and three property-dependent doctrine (the takings doctrine of the Fifth Amendment and the procedural due process and substantive due process doctrines of the Fourteenth Amendment). Of course, the mere existence of multiple references to property in the

For Article 14 purposes, the Basic Law itself defines the meaning of the term "ownership" (*Eigentum*). Constitutional property is not limited to those interests defined as property by non-constitutional law, specifically, the German Civil Code.[80] The Constitutional Court has clearly and consistently stated that the term "ownership" (or "property") has a broader meaning under Article 14 than it has for private law purposes under the Civil Code.[81]

While the Court looks to the Basic Law to define the range of protected interests, its approach is not one of direct textual interpretation. Rather it identifies the substantive interests that animate the Basic Law as a whole. These interests serve as criteria used to distinguish those interests that count as constitutional property from those that do not. This strategy, while textually rooted, differs in important ways from the "originalist" and "traditionalist" approaches favored by conservative American judges and constitutional scholars. It avoids temporally freezing the meaning of constitutional property to any particular historical moment, permitting Article 14's protection over time to embrace new and unprecedented sorts of interests.

Behind this approach to defining the constitutional limits of government power over property is a certain level of distrust of the market as a reliable mechanism for serving the public good (*Gemeinwohl*) with respect to particular sorts of resources. This has been especially so with respect to natural resources. The Court has been remarkably solicitous of environmental regulations aimed at protecting natural resources which the Court has characterized as basic to

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American Constitution does not necessitate multiplicity of meanings.

[80]The Civil Code restricts the meaning of property to tangible, corporeal assets. See BGB § 903.

[81]See 51 BVerfGE 193 (*Warenzeichensentscheidung* 1979); 58 BVerfGE 300 (*Naßauskiesungsentscheidung* 1981*).*

human existence.

An important example of this development is the notorious series of "Groundwater"cases (*Naßausskiesungsentscheidungen),* litigated before the federal High Civil Court (*Bundesgerichtshof*) as well as the Constitutional Court. These cases, especially the Constitutional Court's opinion, are among the most widely-discussed constitutional property cases in Germany of the past several decades and are worth pausing on to consider what they indicate about current German legal attitudes toward property, the market, and the public weal.[82]

The litigation concerned the constitutional validity of the 1976 amendments to the Federal Water Resources Act (*Wasserhaushaltgesetz*), first enacted in 1957. The most important of these amendments was a provision requiring that anyone wishing to make virtually any use of surface or groundwater obtain a permit. That amendment represented an extension of the act's basic premise, which was that "the attainment of a sensible and useful distribution of the surface water and groundwater, in quantity and quality, for the whole Federal Republic . . . [can be achieved only] if the free disposition by private owners is restricted and if the interest of the public weal is the starting point for all action."[83] Under the act, the owner of the surface has no entitlement to such a use permit; indeed, the permit must be denied wherever the proposed use threatens the "public weal."

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[82]For a sampling of views about the case, see Joachim Lege, Der Rechtsweg bei Entschädigung für "enteignende Eingriff" Wirkungen, 42 Neue Juristische Wochenschrift 2745 (1995); Ingo Kraft, System der Klassifizierung eigentumsrelevanter Regelungen, Bayerische Verwaltungsblätter, Feb. 15, 1994, at 97; Martin Burgi, Die Enteignung durch 'teilweisen' Rechtsentzug als Prüfstein für die Eigentumsdogmatik, Neue Verwaltunge Zeitschrift, 1994 no.4, at 527.

[83] Schriftlicher Bericht des 2. Sonderausschusses - Wasserhaushaltsgesetz - BtDrs. II/3536 (1953) [Record of the Parliamentary Debates of the Federal Water Resources Law].

The plaintiff, who owned and operated a gravel pit, applied for a permit to use the water beneath his land. He had previously taken groundwater for the purpose of extracting gravel for decades, but the city denied his permission to continue to do so because his quarry operation threatened the city's water wells. He sued for damages, claiming that the permit denial was an uncompensated expropriation of his property, unconstitutional under Article 14 of the Basic Law.

The Federal Supreme Civil Court (*Bundesgerichtshof*), the highest civil court in Germany, held that the permit denial indeed violated the plaintiff's constitutional property right and that the amendment to the Water Resources Act was unconstitutional under Article 14 I.[84] Under German law, only the Constitutional Court has the authority to declare statutes unconstitutional, so the Supreme Court was required to submit the case to the Constitutional Court. The latter court held[85] that the Water Resources Act was constitutional and that the permit denial was not an expropriation of the plaintiff's constitutionally-protected property. In the course of a long and extraordinarily complicated opinion, the Court squarely rejected a conception of property that identifies as its primary function the maximization of individual wealth. The Court stated, "From the constitutional guarantee of property the owner cannot derive a right to be permitted to make use of precisely that which promises the greatest possible economic advantage."[86] The Court acknowledged that the institutional guarantee of property in Article 14 I prohibits the legislature from undermining the basic existence of the right that is embedded in the private law of property in a way that removes or substantially impairs the

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[84] Neue Juristische Wochenschrift [New Law Journal] 1978, p. 2290.

[85] 58 BVerfGE 300 (1981).

[86] Id. at 345.

guaranteed zone of freedom under Article 14.[87] The guarantee of the legal institution of property is not encroached on, however, the Court continued, when the security and defense of resources that are vital to the paramount common welfare of the public are placed under the authority of the public rather than the private legal order.[88] Water is such a resource. Whatever the meaning of ownership for private law purposes, the constitutional meaning of ownership of land, the Court stated, has never entailed ownership of water below the surface. Legal rights concerning ground water are not determined by, or at least not primarily by, the ordinary rules of property law under the civil code (*Burgerliches Gesetzbuch*, or *BGB*) because property rights in groundwater are inherently and historically public, not private, in character.[89] Private rights in land end when they reach the water level.[90] Consequently, Water Resources Act, in subjecting the owner's ability to exploit groundwater to a permit system, did not take from landowners any property right (*Anspruch*) that they ever had under the Constitution.

So, the German Constitutional Court regards water as special, too important to be left completely to the market, or private ordering, to allocate. One is left, though, with the nagging

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[87] Id. at 339.

[88] Ibid.

[89] The Federal High Civil Court (*Bundesgerichtshof*) had reasoned that ownership of land confers ownership of water below the land, relying on a provision of the Civil Code which states that "[t]he right of the owner of a parcel of land extends to the space above the surface and to the resources below the surface." (BGB § 905). American property lawyers will recognize this norm as the counterpart to the common-law maxim *usque ad coelum et as infernos*. The Constitutional Court never questioned that this correct as a matter of private law, but it concluded that the constitutional meaning property is not determined solely by the private-law meaning but it determined by the constitution itself.

[90] Id. at 329 ("*So wie seine Befugnisse an den Grundstücksgrenzen enden, endet seine Rechsstelllung in der Tiefe prinzipiell dort, wo er mit dem Grundwasser in Berührung kommt*.").

question, why water is special. Exactly why do private property rights not extend to groundwater in the same way that they do land? A coherent substantive answer to this question is absolutely necessary if one is to assuage the Supreme Court's entirely understandable fear that regulatory measures like the Federal Water Law have effectively erased the line between the social obligation of ownership, on the one hand, and expropriation, on the other. If regulatory measures limiting or even eliminating private rights to resources can always be rationalized as simply expressions of the *Sozialbindung*, then hardly any protection against uncompensated expropriations under Article 14 III would be left. The doctrine of regulatory takings (*enteignendesgleiches Eingriff*) would be emptied of all content. In Justice Holmes' terms, it would be impossible to say that a regulation "goes too far."

Unfortunately, it was just at this most crucial stage where the Constitutional Court's analysis broke down. The Court relied on two factors, history and social need, to explain why property rights in water are so limited, why groundwater is essentially or inherently public in character. Historically, the Court pointed out, German private law has separated property rights concerning land and water. This separation was constitutionally authorized at least since the time of the German constitution of 1871, the Court noted. Fine, but that does not answer the question; it only changes the character of the question. Why has it historically been constitutional to assign property rights in land to the private realm and water to the public realm?

The Court gave more extended consideration to the functional role of water in society. As part of its reasoning that the water law falls within the "contents and limits" (*Inhalt und Schranken*) of ownership of land, a matter over which the legislature has complete regulatory

authority,[91] the Court emphasized that social changes occurring in this century have made certain adjustments in the legal regulation of water necessary.[92] Water has always been a vital resource to society, the Court pointed out, but it has become even more so in modern German society.[93] The processes of growing industrialization, urbanization, and construction have increased the scarcity and social importance of water. "Water is one of the most important bases of all of human, animal, and plant life. [Today] it is used not only for drinking and personal use, but also as a factor of industrial production. Because of these simultaneous yet diverse demands, it was previously established as a matter of constitutional law that an orderly water management scheme was vital for the population as well as for the overall economy."[94]

At this point, one wants to say, yes, water is essential to life, but so are many other resources. Would the Court be prepared to hold that the Basic Law does not recognize private property rights in all other natural resources that are necessary for life? Indeed, what about land, which clearly is also essential to the existence of animals and plants? Are we to surmise that private ownership of land is somehow being put in jeopardy? That hardly seems likely. The point is that it begs the question simply to declare that because certain resources are essential to

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[91] This statement requires an important caveat: Under Article 14 II, the legislature has sole competence to define the "contents and limits" (*Inhalt und Schranken*) of ownership, but Article 19 II requires that the Constitutional Court define the essence of the constitutionally-protected property right.

[92] Id. at 340.

[93]For a penetrating analysis of the modern regulation of water in German and Austrian law, see Franz Merli, *Öffentliche Nutzungsrechte und Gemeingebrauch* 140-175 (Wien, 1995).

For a recent discussion of the dominant role that materialist rhetoric has played in American discussions about natural resources, see Holly Doremus, The Rhetoric and Reality of Nature Protection: Toward a New Discourse, 57 Wash. & Lee L. Rev. 11, 19-23 (2000).

[94] Id. at 341, citing 10 BVerfGE 113.

human existence, the constitutional status of property rights in those resources must somehow be different from property rights in other resources.

The most obvious respect in which subterranean water differs from land, of course, is water's "fugitive," or ambient character. While land is necessarily immobile, underground water is not. The Constitutional Court alluded to this factor is discussing the functional significance of water. The Court pointed out that, as a human resource, water is now vital both for purposes of drinking and industry, and the increase in these social uses have brought the two more and more in conflict with each other. This is especially true in the case of groundwater, the Court noted. In that context there is an inevitable conflict between commercial uses such as excavation of subsurface resources and the community interest in protecting both the supply and quality of subterranean water. The constitutional status of water must be determined by taking into account the need to reconcile these conflicting social interests. The first priority must be to preserve the quality of drinking water. Industrial uses of groundwater, such as the discharge of chemicals into it, simply cannot be left to the discretion of each owner of parcels of land. Why? Why not rely on the market, predicated on private property rights, achieve an efficient allocation of groundwater?

The Court's answer here was a bit murky, but its reasoning echoes points that some American property scholars have made concerning the limits of the market as means of allocating rights in surface water. These scholars have pointed out that, left as a commons, groundwater involves major problems with externalities, or spillover effects.[95] Self-interest is not a reliable

[95] See the excellent discussion in Barton H. Thompson, Tragically Difficult: Overcoming Obstacles to Governing the Commons, 30 Env'l Law 241, 249-253 (2000). See generally National Research Council, Water Transfers in the West: Efficiency, Equity, and the

means of protecting resources whose uses, especially given the resource's fugitive character, have substantial external effects. As Professor Freyfogle has stated, "In the case of water, . . . many external harms affect ecosystems and future generations, or are otherwise uncertain in scope and infeasible to calculate or trace."[96] Flowing water, Freyfogle points out, is "communally embedded," both in a social and an ecological sense. The ecological community includes "soils, plants, animals, microorganisms, nutrient flows, and hydrological cycles."[97] These two communities are themselves so interdependent that a threat to one is a threat to the other.[98] Under these circumstances, any individual use of water profoundly affects the entire community and directly implicates the common weal.

The major legal question, the Constitutional Court stated, is whether shifting water regulation from the private to the public realm can be constitutionally justified. The argument had been made that individual rights in groundwater are constitutionally inseparable from ownership of the surface. Rejecting this argument, the Court stated that federal regulation of groundwater use would not effectively empty landownership of all its content ("*Substanzentleerung des Grundeigentums*"[99]). Landownership would not become completely subordinated to the social obligation. Merely subjecting the owner's right to use groundwater to

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Environment (1992); Michael C. Blumm, The Fallacies of Free Market Environmental, 15

[96] Eric T. Freyfogle, Water Rights and the Common Wealth, 26 Envt'l. L. 27, 31 (1996).

[97] Id. at 32.

[98] On the topic of ecological interdependence and its implication for property law, see Lynda L. Butler, The Pathology of Property Norms: Living Within Nature's Boundaries, 73 So. Cal. L. Rev. 927 (2000).

[99] 58 BVerfGE at 345.

regulatory approval does not remove the entire use-interest from the bundle of rights. Even if it did, there would be no constitutional violation because the right to use groundwater is not a twig that is essential to private ownership of the land. Ownership of land is valuable primarily with respect to use of the surface, not subterranean water, the Court said. Even with respect to the surface, the Constitution permits regulation of various uses. "The constitutionally-guaranteed right to property does not permit the owner to make use of just that use having the greatest economic value."[100]

The second basis the Court gave for the constitutional validity of the Federal Water Law did not involve the constitutional property right itself but the principle of equality. Article 3 of the Constitution secures a principle of equality (*das Gleichbehandlungsgebot*), which the Court has repeatedly stated informs the meaning of other constitutional values, including property. The plaintiff had argued that the Federal Water Law arbitrarily burdened him in violation of his Article 3 equality right, because his quarry was located close to groundwater while other quarry owners were not affected. The Court had little difficulty dismissing that objecting, pointing out that the regulation affected all similarly situated quarry owners equally. Similarly, the regulation did not violate the constitutional principle of proportionality (*Verhältnismäßigkeit*). There was no singling out of a particular owner to bear a disproportionate share of the burden necessary to achieve the benefits sought by the statute.

The final significant aspect of the case concerns the recurrent problem of legal transitions. The Federal Water Law denied the plaintiff a legal right that he once had and had exercised. He

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[100] Ibid. ("*Aus der verfassungsrechtlichen Garantie des Grundeigentums läßt sich nicht ein Anspruch auf Einräumung gerade der jenigen Nutzungsmöglichkeit herleiten, die dem Eigentümer den größmöglichen wirtschaftlichen Vorteil verspricht.*")

had been quarrying gravel since 1936, and under the law existing at that time, the right of property clearly protected the right to use groundwater. The Court directly confronted the familiar dilemma: stability vs. dynamism. On the side of stability, the Court stated, "It would be incompatible with the content of the Constitution if the government were authorized suddenly and without any transitional period to block the continued exercise of property rights that had required substantial capital investment. Such a law . . . would upset confidence in the stability of the legal order, without which responsible structuring and planning of life would be impossible in the area of property ownership." The Court was equally frank about the need to avoid freezing the distribution of property rights extant at any given time:

> The constitutional guarantee of ownership exercised by the plaintiff does not imply that a property interest, once recognized, would have to be preserved in perpetuity or that it could be taken away only by way of expropriation [i.e., with compensation]. [This Court] has repeatedly has repeatedly ruled that the legislature is not faced with the alternative of either preserving old legal positions or taking them away in exchange for compensation every time an area of law is to be regulated anew.[101]

The Constitution resolves this dilemma, the Court said, by permitting the legislature to "restructure individual legal positions by issuing an appropriate and reasonable transition rule whenever the public interest merits precedence over some justified expectation, based on continuity of practice, in the continuance of a vested right."[102] The statute followed this constitutionally-sanctioned path by providing a grace period of five years, during which owners could continue to use groundwater without a permit. Since the Act did not take effect until 31 months after its enactment, the claimant effectively had almost eight years of continued use. Moreover, owners could get an extension if they had filed for a permit. The upshot of these

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[101] 58 BVerfGE at 350-51.

[102] Id. at

provisions in the instant case, the Court noted, was that the plaintiff had been able to continue his gravel operations for some seventeen years after the statute's enactment. Under these circumstances the statute's transition provisions were reasonable by sufficiently accommodating the plaintiff's economic interest.

German constitutional scholars have debated whether the effect of the *Groundwater Case* is to make the concept of a regulatory taking (*enteignungsgleicher Eingriff*, or "equivalent expropriation") obsolete. In American terms, the question is whether there is any longer an inverse condemnation action available to property owners. It is understandable why some have thought that there is not. The Court did, after all, permit the legislature to wipe away without compensation a discrete property right that had once been expressly recognized. How could there be any circumstance, then, in which the legislative obliteration of a legally-recognized property interest would trigger the obligation to compensation? How could there be any circumstance in which the legislature had "gone too far"?

One distinguished German scholar has argued that the case, properly read, does not abolish the idea of compensation for regulatory takings.[103] He points out that the Constitutional Court never mentioned the doctrine of regulatory takings anywhere in its opinion. More significantly, subsequent developments in the case reveal that the possibility of compensation for a regulatory taking is far from dead. Following the Constitutional Court's decision, the case went back to the Supreme Court. That court awarded the plaintiff compensation.[104] It did so on the theory that, although while the basic principle of protection of property emerges from

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[103] Fritz Ossenbühl, Staatshaftungrecht, 4th ed. (München, 1991), p. 182-184.

[104] BGH. DVBl. 1984, 391, reported in Neue Juristiche Wochenschrift 1984, 1169.

constitutional principles, the particulars of protection have to be determined on non-constitutional law (*einfaches Recht*). The relevant non-constitutional basis for state liability in this case, said the Court, was the principle of individual sacrifice (*Aufopferungsgedanke*). Where the governmental action sacrifices an individual for the benefit of the general public, the state is liable to compensate the individual in an action which is similar to but not explicitly falling under the term "expropriation," as used in Article 14 III.[105]

This debate has continued without any clear resolution, leaving this aspect of German state liability law (*Staatshaftungsrecht*) in considerable confusion. Whatever its legal basis, the High Civil Court's decision does seems to leave open the possibility of monetary compensation for regulatory takings. More interestingly, it creates the possibility of compensation *without* a taking in cases where justice seems to demand it even though the constitution does not.[106]

Three final comparative points about the *Naßauskiessung* case need to be made. First, the case makes clear the German Constitutional Court, like its American counterpart,[107] has rejected what in American takings literature has become known as "conceptual severance."

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[105] What really seems to be going on here is a tug-of-war game between the Constitutional Court and the High Civil Court, with the latter taking a more expansive view about the state's obligation to compensate private owners for governmental encroachment of their property interests. In American terms the conflict is somewhat analogous to the difference between the views of Justice Brennan and Chief Justice Rehnquist in the *Penn Central* case. Professor Ossenbühl has expressed the interesting idea that the alternative, non-constitutional basis for compensation in cases of regulatory takings should be customary law. That is, the concept of *enteigungsgleicher Eingriff* should be separated from Article 14 of the *Grundgesetz* and treated as a matter of customary law. See Ossenbühl, Staatshaftungsrecht, p. 185-187.

[106]The possibility of this approach in American takings law is insightfully discussed in Michael A. Heller and James E. Krier, Deterrence and Distribution in the Law of Takings, 112 Harv. L. Rev.997, 1009-1013 (1999).

[107]See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1980); Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).

Conceptual severance, a term first coined by Professor Margaret Jane Radin,[108] means that every incident of ownership, every twig in the bundle of rights is itself ownership. The implication of conceptual severance, of course, would be vastly to strengthen the bite of the takings clause, because virtually every regulation affecting private ownership of any resource would become a taking of ownership itself. The United States Supreme Court's reaction to conceptual severance has been somewhat ambiguous,[109] but the German Court clearly rejected it, at least with respect to the relationship between land and subsurface resources. In fact, none of the Court's decisions under its constitutional property clause provides any basis at all for supposing that the Court is prepared to entertain such an approach.

The second point concerns the Court's statement in the *Naßauskiessung* case that the constitutional right to property does not guarantee the right to exploit the resource for its highest economic value. This statement indicates that German constitutional protection of property is not rooted either in notions of wealth-maximization or libertarianism. Eliminating those two possible theoretical bases of constitutional protection of property has important implications for how a wide variety of contemporary American takings disputes would be resolved under German law. Wetlands regulations are an obvious example. Land owners (especially farmers) whose parcels include regulated wetlands have been very vocal in recent years about their supposed constitutional right to capture the full potential market value of the affected land. Using the takings clause, they have challenged wetlands regulations precisely on the ground that they deprive the owner of the ability to put the land to its highest economic use. Whether or not

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[108] See Margaret Jane Radin, The Liberal Concept of Ownership, 88 Colum. L. Rev.1667 (1988)

[109] See text accompanying notes *infra*.

German courts might find another basis for striking down wetlands regulations, they clearly would reject the basis premise of the attack on American wetlands regulations.

The third respect in which American property lawyers can learn from the *Naßauskissung* case concerns the approach that the German Court took to determining that the property interest in question was what Carol Rose has called "inherently public property."[110] The Court focused on both the social necessity of the resource and the degree of social interdependence associated with the resource in the conditions of contemporary society. What the Court implicitly said was the following. Any use of flowing water by any single person or group of persons affects both the social and ecological communities in multiple ways, and it is unrealistic to suppose that any given owner will take all of these external effects into account. Indeed, precisely because of the intensity of the social and ecological interdependence that characterizes flowing water, no owner can possibly take all or even most of the external effects of a given use into account when making choices among possible uses.[111] The consequences of any given use by an individual are both wildly unpredictable and profoundly felt by the entire community. Under such circumstances of intense interdependency, the boundary between *meum* and *tuum* is both meaningless and dangerously misleading.[112] A resource whose use so profoundly affects the interdependent social and natural communities is inherently public and can only be regulated by public norms as expressions of the common will. Under this view the German Federal Water

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[110]Carol M. Rose, The Comedy of the Commons: Custom, Commerce, and Inherently Public Property, 53 U. Chi. L. Rev. 711 (1986).

[111]See Barton H. Thompson, Water Law as a Pragmatic Exercise, 25 Ecology L.Q. 363 (1998); Carol M. Rose, Property as the Keystone Right?, 71 Notre Dame L. Rev. 329, 351 (1996).

[112]See generally Butler, The Pathology of Property Norms, *supra* note .

Law at issue in the *Naßauskiessung* case is not redistributive. It does not take an asset from *A* and give it to *B*. Rather, the statute is premised on the understanding that groundwater, for constitutional purposes at least, is now and always has been both *A*'s and *B*'s. It is not the property of the state's but property that is "inherently public."[113]

B. The Substantive Meaning of Property in German Constitutional Law: Welfare Benefits

The Basic Law may be formally neutral regarding a positive duty to create any particular economic system, but the Constitutional Court certainly does not read it as neutral about the core purpose of property in the overall constitutional scheme. The Court has repeatedly stressed an interpretation that views property as important just insofar as the interest involved implicates some other substantive value that the Court regards as foundational in the Basic Law's overall value hierarchy. The substantive values that the Court has consistently linked with constitutionally-protected property interests are what I will call individual self-realization and civic capacity. No line of decisions better illustrates the relationship between these fundamental constitutional values and constitutional protection of property than cases dealing with the status of welfare benefits as constitutional property.

In a 1985 case the question was whether an amendment to the federal statute providing health insurance benefits for the elderly violated Article 14.[114] The Court held that it did not. For present purposes, the case is more important for what the Court said than for what it held.

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[113]For a rich discussion of the legal status of water rights from a similar perspective, see Joseph L. Sax, The Constitution, Property Rights, and the Future of Water Law, 61 U. Colo. L. Rev. 257 (1990); Joseph L. Sax, The Limits of Private Rights in Public Waters, 19 Envt'l Law 473 (1989).

[114]69 BVerfGE 272 (*Eigenleistung* Case, 1985).

The Court emphasized at the outset the legislature's duty to protect the liberty of its citizens.[115] The claimants had asserted that by reducing their health-care benefits the legislature had deprived them of a property interest that was essential to the personal liberty that the social-state principle guaranteed. The initial question was whether such welfare benefits (*Eigenleistungen*) counted as property under Article 14.

In general, German constitutional law, unlike American constitutional law, does recognize what Charles Reich called "the New Property"[116] as property for constitutional purposes. It does so, however, only under certain conditions. A key prerequisite is that the beneficiary must have acquired the right, at least in part, as a result of her own personal and "non-trivial"contributions. This is the so-called "*Eigenleistung*" requirement. This requirement may be met not only by premiums paid directly by the beneficiary herself but also by premiums paid on her behalf by third parties, including her employer.[117] The degree of the personal contributions is not permanently fixed. The court stated, "For premiums that [like those in the instant case] are produced throughout the year at varying levels because of changing legislation, a complete examination will be required for fixing the degree of the personal contribution."[118]

The *Eigenleistung* requirement effectively excludes from constitutional protection those public law entitlements that are based solely on the state's duty to provide welfare maintenance.

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[115]Id. at 284.

[116]Charles A. Reich, The New Property, 73 Yale L.J. 733 (1964).

[117]69 BVerfGE at 302.

[118]Id. at 302.

Examples include housing subsidies[119] and family allowances.[120] Included, however, are unemployment insurance[121] and pension plans.[122]

As these examples illustrate, while German constitutional law does extend substantive protection to some forms of state-originating benefits, it by no means embraces all of Charles Reich's theory of the "new property." What Reich called for in his famous 1964 *Yale Law Journal*[123] article was full constitutional protection for all forms of what he termed government "largesse." This concept included everything from welfare benefits to federal Social Security to taxicab medallions. Reich drew no distinction between those forms of government-provided wealth to which the recipient had personally contributed from those that were purely state payments intended for the recipient's personal subsistence or the subsistence of members of the recipient's family, such as AFDC. German constitutional law, like its American counterpart, clearly excludes the latter from substantive protection. The personal-contribution requirement is not satisfied by the fact that the claimant has paid taxes, which indirectly fund the program in question. The contributions must have been made directly to the program itself. To hold otherwise would effectively eviscerate the requirement, for few claimants will have paid nothing to the state through taxes or other contributions to the public fisc.

Nevertheless, there is a significant difference between the treatment of public benefit

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[119]See 78 BVerfGE 232 (1988).

[120]See 39 BVerf GE 169 (1975).

[121]See 72 BVerfGE 9 (1986).

[122]See 53 BVerfGE 257 (1980).

[123]See note 111 *infra*.

interests under German and American constitutional property law. While both largely agree on the meaning of "property" in this context, German law extends substantive, not merely procedural, protection to those interests that are protected. American constitutional law limits protection of state-derived interests to the procedural requirement of notice and a hearing. No American case has come remotely close to suggesting that the takings clause of the Fifth Amendment applies to such interests. German constitutional protection, while limited with respect to the scope of public-derived interests that are covered, is, by contrast, substantive. With no compensation paid for the termination of the interest, the court will strike down the statute as violating Article 14. In this respect at least, German constitutional law comes closer to embracing Reich's "new property" theory than American law does.

Given that German constitutional law's protection of property is broader and deeper than American constitutional law's in the senses just described, one can understand why commentators have concluded that property is a more highly valued interest under the German constitution than under its American counterpart. That conclusion is premature, however, because there is a second and more fundamental requirement for constitutional protection of public law interests as property. Even if the claimant has paid financial contributions to the benefit program in question, the benefits will not be constitutionally protected against state encroachments or restrictions if the purpose of the benefit program is something other than advancing the personal autonomy of all participants in the program through assuring their economic security. In the *Eigenleistung* case, for example, the court stated, "The feature that constitutes the basis for protecting as property a legal entitlement to social security is that it

should serve the subsistence-level security of the person entitled."[124] The court provided the following rule of thumb for determining whether this second requirement is met: "Legal protection for social insurance interests is possible only in the event that their termination or reduction would vitally affect the freedom-assurance function of the constitutional guarantee of ownership."[125] The court noted that many entitlement claims in social insurance law clearly do not involve any consequences for the claimant's personal subsistence. Claims of that sort do not merit the constitutional guarantee of property ownership. At the same time, though, it is not necessary that the claimant be destitute or poor. Protected pensioners include white-collar employees (*Angestellten*) as much as they do blue-collar workers (*Arbeiter*). The court expressly observed that in German society "the great majority of citizens . . . expect their subsistence-level security to come" more from employment-based programs than they do from their own personal resources.[126]

While this line of thinking obviously does reflect the strong influence of Germany's status (explicitly recognized in its Basic Law) as a social welfare state, it is *not* some version of communist nonsense. While the state and its benefits play a large role in Germany, so too does private property. The German economy is, it bears remembering, predominately a market economy. The court's point in the *Eigenleistung* case is that the core constitutional function of property is providing the material security that is necessary for both human dignity and civic self-governance. In the German scheme that function is served by both individually-owned wealth

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[124]Ibid.

[125]Id. at 304 (citations omitted).

[126]Id. at 302.

and public benefits which are entitlements by virtue of one's own contributions through work. The requirement that public benefits be connected to one's own employment-based contributions in order to qualify as constitutional property removes any basis for characterizing the German system as illiberal or collectivist.

At the same time it has to be said that the German scheme of constitution property clearly does repudiate classical economic liberalism. It is difficult to imagine reconciling the German Basic Law with Richard Epstein's minimalist state or Robert Nozick's night watchman state.[127] Nor is German constitutional property law premised strictly on welfarism. The purpose of the personal-subsistence requirement is not to promote welfare for its own sake but as a means toward securing individual autonomy. Material well-being is viewed as essential to but not identical with personal autonomy. In its full sense, autonomy, within the German scheme of constitutional property, means the capacity for self-realization. No one lacking in basic material needs for subsistence can experience self-realization, but wealth alone is no guarantor of a fully realized self.

Synthesizing these two lines of constitutional property cases from the German constitutional court, what emerges is a purposive conception of property that differs in important respects from that implicit in most of the recent calls for greater constitutional protection of property in the United States. American takings cases, especially recent Supreme Court cases like*Lucas* , tend to protect property because of its wealth-creating role.[128] That is, the takings

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[127] See Robert Nozick, Anarchy, State, and Utopia (New York, 1974).

[128]Andrus v. Allard, 444 U.S. 51 (1979) (upholding a federal statute prohibiting the sale of eagle parts and artifacts made from such parts as not a taking) might seem to contradict this statement. I do not think so, however. First, the case concerns only personal property. Second, and more fundamentally, the Court there went out of its way to point out that the statue left intact

cases reflect an understanding that the core, though not the only, purpose of property as a constitutional value is individual-preference satisfaction, role that I have elsewhere labeled "property as commodity."[129]

The German approach is different. The core role of property in the constellation of German constitutional values is to facilitate individual self-realization, not only for its own sake but also in the interest of enabling them to be fully functioning and contributing members of society. The cases in which the German court has strongly protected property against regulatory encroachment are those in which the involved interest primarily served a personal or social function rather than an economic, wealth-creating function. It is only where the courts perceive that the interest immediately involved in the case primarily serves this function that they in effect protect property as a fundamental right. It is this purposive difference between the conceptions of property as a constitutional value that explains why property is treated as fundamental under the German Basic Law but not under the American constitution.

III. NORMATIVE IMPLICATIONS OF THE GERMAN EXPERIENCE

Having explained why property is given greater weight under the German constitutional scheme than under its American counterpart, the question becomes, what normative lessons should American lawyers draw from the German experience. This Part addresses, albeit briefly, two normative questions about constitution protection of property that have engendered considerable debate in recent years. The first question is aimed at lawyers and policymakers involved in constitution-making and constitution revision around the world as well as at

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other wealth-creating uses for artifacts made from eagle parts. If anything, then, I think that case supports rather than undermine the statement in the text.

[129]Alexander, Commodity & Propriety *supra* note .

American lawyers: Are constitutional property clauses inherently anti-redistributive? The second question concerns American constitutional lawyers more directly: Should property be treated in our system as a fundamental right for constitutional purposes, protected fully as much as the rights to vote, free speech, and similar civil rights are?

A. Are Constitutional Property Clauses Inherently Anti-Redistributive?

Some North American constitutional scholars on the political Left have argued that nations developing new constitutions or revising existing ones should reject provisions expressly protecting private property.[130] The basis for this argument is the premise that constitutional property clauses are inherently anti-redistributive. As such, property clauses inhibit

[130]The clearest exponent of this view is Jennifer Nedelsky. See Jennifer Nedelsky, Should Property Be Constitutionalized? A Relational and Comparative Approach, in G.E. van Maanen and A.J. van der Walt, "Property Law on the Threshold of the 21st Century (Antwerp, 1997), p. 417. See also Frank I. Michelman, Socio-Political Functions of Constitutional Protection for Private Property Holdings (In Liberal Thought), in ibid, p. 433. For a rebuttal of this view, see A.J. van der Walt, The Constitutional Property Clause (Kenwin, South Africa, 1996), pp. 1-29.

constitutional democracies from realizing politically and morally attractive visions of distributive justice through the processes of deliberative politics. Jennifer Nedelsky succinctly captures this view in the following statement:

> To designate property as a constitutional right conveys the idea of property as essentially a private right requiring insulation from public interference and control. In short, constitutionalizing property is an extremely powerful symbol of the public/private divide which designates governmental measures affecting property as public "interferences" with a sacred private realm–which the bear the burden of justification.[131]

Progressives rely on the experience of constitutionalized property in the United States to support this view that the effect of constitutional property clauses is inherently antithetical to government redistributions of wealth. American property-rights advocates doubtless would respond that this is nonsense since property is a weakly protected right in our constitutional scheme, an interest that has had little if any effect on the expanding state and its redistributive ways. The whole thrust of their movement is to change that situation. Looking at the experience of another constitution that includes a property clause provides a more neutral perspective from which to evaluate the claim that constitutional property clauses are inherently anti-distributive.

Does the German experience confirm the fears of American legal progressives? The short answer is "no." Shutting down the activist state is neither the purpose nor the effect of the German constitution's property clause. Given the Basic Law's express commitment to Germany as a social-welfare state, this is hardly surprising. Protecting property interests across the board would seriously undermine that commitment, for all social-welfare legislation encroaches upon private property interests in some fashion.

Similarly, aggressive protection of all landed property interests of every variety and in

every context would substantially interfere with the state's ability to promote community well-being in vital areas like the environment, areas as to which Article 14's "social obligation" component weighs heavily. As the *Naßauskiessung* case makes abundantly clear, environmental well-being is an area in which the individual land owner's social obligation is especially important. Rolling back environmental regulations that restrict an owner's use or decrease the value of his land in the interest of preventing coerced redistribution of wealth is fundamentally at odds with the German constitution's theory of the relationship between private property and social obligations.[132]

As we have already seen,[133] German courts do not take such an indiscriminate approach to protecting property under Article 14. They do not consider all property interests to be fungible or equally important. The weight that they attach to any given interest depends upon a variety of

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[131]Nedelsky, *supra* note 130, at 422.

[132]By the same token, the normative theory underlying the German constitutional property clause is that the clause should not be used as a tool affirmatively to promote redistributions of wealth. The takings regime should be redistributively neutral in both directions. Just as redistributive effects do not themselves trigger a determination that a regulation is unconstitutional, neither is the constitutional property clause used (nor should it be used) affirmatively as "a major engine of [promoting] redistribution." Molly S. McUsic, "The Ghost of *Lochner*: Modern Takings Doctrine and Its Impact on Economic Legislation," 76 B.U. L. Rev. 605, 665 (1996).

This approach is somewhat at odds with the recent theory of Professor Hanoch Dagan. See Hanoch Dagan, "Takings and Distributive Justice," 85 Va. L. Rev. 741 (1999). Dagan argues that progressive distributive considerations can and should influence takings doctrine. Id. at 778-785.

At the same time, the German constitutional property clause's social obligation provision closely tracks Professor Dagan's views regarding the social of social responsibility considerations in takings law, at least as applied to land. *Id.* at 767-791 (1999). Dagan argues that because "land ownership is a source of special responsibility toward the landowner's community," takings doctrine should develop in ways that "promot[e] the virtue of social responsibility." *Id.* at 772, 744.

[133]See pages accompanying notes *supra*.

factors, the most important of which is how immediately and substantially the interest in question protects the affected owner's human dignity interest. In its relationship to property, human dignity does not mean preference-satisfaction. Rather it means the capacity and opportunity of individuals to lead lives that are self-governing and self-realizing. "Liberty" comes close to expressing the value that underlies property's fundamental status in the German constitutional scheme, but it does not fully capture the core ontological idea of living a life of self-realization.[134] The kind of freedom that property promotes is what Alan Ryan calls "practical freedom,"[135] that is, the opportunity of "human beings [to] show their creative and intelligent capacities."[136] Some forms of property are more important than others in maintaining freedom in this sense. An apartment as home weighs much more heavily on this scale than does, say, a small vegetable garden. While both are property, the former is fundamental while the latter is not.[137] While all property interests are fundamental rights in a formal sense under the German Basic Law, in effect the courts distinguish among them according to their relationship to the deeper value of self-realization. This approach is, quite obviously, not what American proponents of treating property as a fundamental constitutional right have in mind.

The clear implication of the German experience for the redistribution question, then, is that the Progressives' fears are unfounded. Constitutional property clauses need not, and in this

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[134]Jeremy Waldron has used a similar conception of individual liberty to argue that homelessness is incompatible with human freedom. See Jeremy Waldron, Homelessness and the Issue of Freedom, 39 UCLA L. Rev. 295 (1991).

[135]Alan Ryan, Property and Political Theory (Oxford, 1984) 118.

[136]Id. at 120.

[137]Compare 89 BVerfGE 1 (1993) (*Besitzrecht des Mieters*, or Renter's Rights, Case) with 52 BVerfGE 1 (1979) (*Kleingarten*, or Small Garden, Case).

case has not, frozen the extant distribution of wealth. The distinguished South African legal scholar, Andre van der Walt, has argued that where a constitutional property clause is understood within the context of a dual normative commitment to individual liberty and social welfare, such a clause "[i]s a 'thick' multi-dimensional instrument of constitutionalism, [one] which has to be read , understood, interpreted and applied with due regard for the tensions between the individual and society, between the privileged and the underprivileged, between the haves and the nave-nots, between the powerful and powerless."[138]

Of course, this is not to say that property clauses have no effect whatsoever of governmental attempts at redistribution. Clearly they do provide outer limits on how far governments can go with legislative programs that, either intentionally or not, have redistributive effects. But any national constitution whose private-law background recognizes the legitimacy of private-property rights will to some extent inhibit governmental redistributions of privately-owned resources. In the context of such legal systems constitutional property clauses operate only on the margin; they do not create the core commitment.

B. Should Property Be Treated as a Fundamental Constitutional Right under the American Constitution?

The second normative question that this comparative project prompts is whether the German experience furnishes grounds for rethinking the status of property as a fundamental right under the American constitution. In answering this question we need first to take stock of the current status of property as a constitutional value in the American scheme.

The reality is that in some respects property already *is* given highly deferential treatment in our constitutional scheme. While it remains true that for due process purposes courts apply a

[138]Van der Walt, The Constitutional Property Clause, *supra*, at 13.

much weaker test in evaluating the validity of public acts that encroach on property interests than they do when looking at regulation of activities like speech, procreation, and travel, due process protection is only part of the story. Virtually every constitutional lawyer and property specialist knows that the constitutional property story has shifted from the due process clause to the takings clause. In the takings setting property has played a much larger role over the past two decades. In its new role, property is hardly the "poor cousin" that many commentators have depicted in the past. The renaissance of the takings clause has made property a far more robust constitutional value than it was just twenty years ago. Doctrines like the *Nollan-Dolan* nexus test to the *First Evangelical Church* temporary takings doctrine have greatly expanded the extent to which constitutional law protects privately-owned resources. Moreover, the scope of resources within the takings clause's protective reach have also expanded. While most of the modern takings cases have involved land,[139] courts have protected a variety of other forms of property as well.[140]

Still, it would be disingenuous to say that the so-called "takings revolution" has achieved everything that property-rights advocates want. Their deep agenda is to finish the "Reagan revolution," dismantling the regulatory state and ending most forms of state redistributions of wealth. Had state and federal courts implemented the plan detailed in Richard Epstein's notorious book *Takings*, that is exactly what the takings renaissance would have accomplished.

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[139]See, e.g., Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

[140]See, e.g., Eastern Enterprises v. Apfel, 524 U.S. 498 (1998)(holding unconstitutional a federal statute requiring companies formerly doing coal mining business to contribute to health benefits fund for retired mine workers); Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998)(holding unconstitutional statutes requiring lawyers to client funds in Interest on Lawyers Trust Accounts with interest on such accounts going to certain charitable foundations).

But thus far at least, no such luck. From the perspective of property-rights advocates, the takings revival's biggest disappointment has been the fact that the takings clause has had minimal, if any, effect on the most transparently redistributive government programs, including federal and state welfare programs and the progressive income tax.[141] No one believes that a takings attack on these programs would have the slightest chance of success. Even interests in land have occasionally been left unprotected against government regulations whose redistributive effects are difficult to gainsay.[142] In short, for all of the ballyhooed advances of a pro-property interpretation of the takings, the degree of protection accorded to property interest is nowhere close to that granted to fundamental rights like procreation, speech, and voting. The takings revolution, in short, has not been *Lochner redivivus*.

Would a comparative perspective change this? Should Germany's experience with property as a fundamental constitutional right lead American constitutional lawyers to rethink the extant American regime? After all, one might argue, Germany, a constitutional democracy with a market-based economy much like ours, has succeeded in protecting property as a fundamental constitutional value without shutting down all legislatively-mandated redistributions of wealth. Shouldn't *we*, the most property-oriented society in the world, follow suit, using the German Basic Law as a model for changing our due process and takings doctrines?[143] The short answer,

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[141]The notable exception to this statement is the Supreme Court's decision in *Eastern Enterprises v. Apfel*, where the court struck down under the takings clause a federal statute providing health care benefits for coal miners and their dependents.

[142]See Yee v. City of Escondido, 503 U.S. 519 (1992).

[143]The notable exception to this statement is the Supreme Court's decision in *Eastern Enterprises v. Apfel*, where the court struck down under the takings clause a federal statute providing health care benefits for coal miners and their dependents.

once again, is "no." While there may be persuasive reasons to treat property as a fundamental right under our Constitution, the German example is not one of them. There are substantial differences between the background constitutional practices of the two systems, making the comparative argument a matter of apples and oranges.

It is grossly misleading to say that property enjoys far greater respect and protection under the German Basic Law than it does under the U.S. Constitution. While German courts and commentators do designate property as a "fundamental" constitutional value, that characterization does not have the same meaning as it does in American constitutional jurisprudence. German constitutional doctrine does not track the American distinction between substantive due process protection of property and protection against uncompensated takings. The German Constitutional Court cannot order compensation for unconstitutional expropriations; only the legislature can do so. The Court's remedy in such cases is limited to striking down the offending legislation.

Similarly, there is no real analogue to the substantive due process doctrine in the German scheme. While German courts certainly do provide substantive protection for property interests, they do so only within the context of the property provision, Article 14 of the Basic Law, either on the ground that the statute or regulation in question is an uncompensated expropriation of property or that the regulation imposes a constitutionally unjustified *limitation* on the affected property interest. The test is not, as it is for fundamental liberty interests under the substantive due process doctrine, whether the regulation substantially advances a compelling state interest. Applying that test to property interest would go a long way to fulfilling the property-rights advocates dream of shutting down, or at least substantially inhibiting, redistributive legislation, for much redistributive legislation would fail the stringent test. But, as we have seen, that is

emphatically not the situation under the German constitutional system.

The long and the short of the situation is that we cannot mimic the German experience. The differences between our background constitutional doctrines are too great to permit transplanting Germany's constitutional property doctrine into our constitutional scheme. Germany's round peg simply won't fit into our square hole.

This is not at all to say, however, that we have nothing to learn from the German approach. We can and should think deeply about the wisdom of their purposive interpretation of constitutional property. As we have already discussed, the German courts vary the amount of protection granted to particular property interests depending upon the main purpose that the affected interest serves. Property interests are treated as fundamental interests to the extent that they promote the core constitutional values of human dignity and self-realization. Our constitutional property jurisprudence lacks an explicit and fact-specific focus on the purposes that property interests serve. The German purposive approach would force American courts openly to face the question of *why* some property interests are more protected than others. Is property's primary constitutional purpose to promote wealth-creation, or it is to serve some non-economic goal such as personal privacy[144] or promoting fairness by leveling the playing field on which government regulators and individual owners deal with each others.[145] American courts, unlike their German counterparts, simply do not openly address questions like these. This lack of transparency regarding the core reasons for granting constitutional protection to property has made American constitutional property doctrine the mess that it is. In this respect we have much

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[144]This is one way of understanding the per se rule adopted in *Loretto*.

[145]This is one interpretation of the *Nollan-Dolan* doctrine.

to learn from the Germans.

CONCLUSION: MORPHING CONSTITUTIONS

Two lessons emerge from this comparative project, the first specific, the second general. The specific lesson is that American courts can and should emulate the German courts' practice of purposive analysis of constitutional property claims. This practice involves a simple two-step process. First, clearly articulate the core reasons behind the Constitution's property clause. Second, analyze the property interest immediately involved to determine whether and the what extent the interest implicates the core purpose of constitutional protection of property. The more the core constitutional purpose is involved, the more the court should protect the interest, either under the takings clause or through the substantive due process doctrine. The likely result of this approach would be to maintain current constitutional practice in some categories of cases while in other cases to change those practices. Where the affected interest strongly implicates the constitutional property clauses' core purposes, a more robust substantive due process doctrine may be needed; in some cases the doctrine should remain moribund. Similarly, the takings clause' renaissance may continue, even strengthen in some types of cases, while in others the takings clause should play a less active role than it currently does. Specifically where doctrinal changes will occur all depends on how the courts define the core reasons for constitutionalizing property in the first place. The process of identifying those reasons will, of course, be enormously controversial. While the question of what those reasons are will remain subject to controversy, the German experience provides grounds for believing that a consensual understanding will develop over time.

The second, more general lesson to be learned from comparing German and American approaches to constitutional protection of property is that constitutions cannot be morphed.

Critics of current American constitutional practice who cite Germany's treatment of property as a "fundamental" constitutional value neglect this point. They naively assume that constitutions are liquid and easily morphed and migrated from one state to another. They would have us use the German constitution as the model for changing our constitutional practices regarding property by designating, á la the Germans, property as a "fundamental" right. But constitutions, while malleable, are not liquid. Background political traditions, institutional arrangements and doctrinal practices limit the extent to which one nation can shape its constitution's interpretation in the image of another nation's comparable provision. Constitutional borrowings occur, of course. Much of the new South African constitution, including its property clause, was borrowed from the German Basic Law, but South Africa's private-law tradition of Roman-Dutch law already has given different meanings to those provisions than their German ancestors carry.[146] South Africa is not Germany. Its constitution, no matter how textually similar or identical to Germany's, cannot recreate the German Basic Law. Constitutional morphing *will* occur in the course of attempts to borrow, but the morphing will not be intention. It will be the result of indigenous legal conditions.

This inability of constitution-makers and interpreters to morph constitutions at will not not mean that the enterprise of comparative constitution law is pointless. As this Article has already emphasized,[147] American constitutionalists have much to learn from the German experience with constitutional protection of property. While we cannot replicate the German experience, we can learn from their interpretive practices, notably the purposive approach to

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[146]See van der Walt,

[147]See text accompanying note *supra*.

weighting particular property interests. The point of the comparative enterprise is not to find models to mimic but to remove our interpretive blinders and enhance our expressive transparency. We cannot morph other constitutions, but we can still learn from them.