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Article 3

Property as a Fundamental Constitutional Right - The German Example

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PROPERTY AS A FUNDAMENTAL CONSTITUTIONAL RIGHT? THE GERMAN EXAMPLE

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INTRODUCTION

Property rights finally seem to be getting some respect. From the renaissance of the Takings Clause[1] to state legislation requiring that

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1 *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994) (holding that a city could not condition the approval of a building permit on the dedication of a portion of an appli-

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" 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 once again raise 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 rights under the Equal Protection Clause, including the rights to vote and procreate?[5] There is no dearth of contemporary commentators who believe that it should be. Scholars like 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," Epstein contends, "all rights are, as it

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cant's property for flood control and traffic improvements); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (creating new category of per se taking for regulations that entirely destroy all economic value of affected land).

2 Several states have enacted legislation requiring that government agencies determine whether their actions may constitute a taking of property. *See, e.g.*, TENN. CODE ANN. §§ 12-1-201 to -206 (1999); TEX. GOV'T CODE ANN. §§ 2007.001–2007.045 (Vernon 2000); UTAH CODE ANN. §§ 63-90-1 to -90a-4 (1997 & Supp. 2002). 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(2) (West Supp. 2002). For critical discussions of such legislation, see John Martinez, *Statutes Enacting Takings Law: Flying in the Face of Uncertainty*, 26 URB. LAW. 327 (1994); Frank I. 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).

3 For background on the current property rights movement, see A WOLF IN THE GARDEN: THE LAND RIGHTS MOVEMENT AND THE NEW ENVIRONMENTAL DEBATE (Philip D. Brick & R. McGreggor Cawley eds., 1996) and LAND RIGHTS: THE 1990s' PROPERTY RIGHTS REBELLION (Bruce Yandle ed., 1995).

4 On the recent property rights movement in general, see LET THE PEOPLE JUDGE: WISE USE AND THE PRIVATE PROPERTY RIGHTS MOVEMENT (John D. Echeverria & Raymond Booth Eby eds., 1995) and JAMES V. DELONG, PROPERTY MATTERS (1997).

5 Shortly after this Article was completed, a student Comment 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 LAW. 363 (2001). Despite this surface similarity, there is little overlap between the two articles. In particular, the student Comment 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 plays in this country compared with Germany, a social-welfare state?

6 RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

7 JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (2d ed. 1998).

were, fundamental."[8] Similarly, one may understand recent Supreme Court decisions like *Nollan v. California Coastal Commission*,[9] *Dolan v. City of Tigard*,[10] and, more recently, *Eastern Enterprises v. Apfel*,[11] as attempts by the Court to pave the way for a gradual shift of property rights into the ranks of established fundamental rights like the freedoms 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 Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances."[13]

Although property rights have gained greater protection under the Takings Clause, they nevertheless remain a "poor relation" to liberty interests for substantive due process purposes.[14] Courts treat liberty interests as "fundamental," vigorously protecting them against all governmental encroachments save those undertaken for "compelling" reasons.[15] 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 property right as fundamental for substantive due process purposes.[16]

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8 EPSTEIN, *supra* note 6, at 143.

9 483 U.S. 825 (1987).

10 512 U.S. 374 (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. COMMENT. 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).

13 512 U.S. at 392.

14 *See* 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.").

15 *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 721 (1997) ("[T]he Fourteenth Amendment 'forbids the government to infringe . . . "fundamental" liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.'" (alteration in original) (quoting Reno v. Flores, 507 U.S. 292, 302 (1993))).

16 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, 1408–09 (9th Cir. 1989) (holding that substantive due process protects property rights), *cert. denied*, 494 U.S. 1016 (1990), *overruled by* Armendariz v. Penman, 75 F.3d 1311, 1324–26 (9tb Cir. 1996) (en banc), *and* Moore v. Warwick Pub. Sch. Dist. No. 29, 794 F.2d 322, 328–30 (8th Cir. 1986) (same), *with* Local 342, Long Island Pub. Serv. Employees v. Town Bd. of Huntington, 31 F.3d 1191, 1196 (2d Cir. 1994) (holding that substantive due process does not protect property interests in premium payments to a trust), *and* Charles v. Baesler, 910 F.2d 1349, 1352–56 (6th Cir. 1990) (holding that substantive due process does not protect property interest in contractual right to promotion). For a discussion of this split in the federal circuits, see Robert Ashbrook, Comment, *Land*

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.[17] 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 attack against the activist state. The story of *Lochner*'s rise and demise is too familiar even to summarize here.[18] Suffice it to say that after *Lochner*'s downfall in 1937, property was pushed to the constitutional back burner, much to the 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 *Carolene Products*.[19]

It is understandable why conservatives are perplexed over the apparently inferior position of property rights in modern American constitutional law. That the world's leading 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 private property's institutional legitimacy and grants it constitutional protection in positive terms. Thus, rather than stating that property shall not be taken or owners shall not be governmentally deprived of their property except under certain

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Development, The Graham *Doctrine, and the Extinction of Economic Substantive Due Process*, 150 U. PA. L. REV. 1255, 1265–76 (2002).

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 nonfundamental property interests. *See* Krotoszynski, *supra* note 14, at 559. 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* discussion *infra* Parts II and III.

17 *See, e.g.*, Truax v. Corrigan, 257 U.S. 312 (1921).

18 For a recent telling, see HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE (1993).

19 United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

circumstances, Article 14 states: "Property and inheritance are guaranteed."[20] The German Constitutional Court (*Bundesverfassungsgericht*) has interpreted this provision as guaranteeing the existence of private property as a legal institution.[21] Further, the Court has expressly characterized the right to private ownership of property as "an elementary basic right."[22]

Astute American scholars of German constitutional law have pointed out the important position that property occupies in the list of German individual rights. 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."[23] 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 U.S. Supreme Court has refused to do in recent history and what conservative scholars like Epstein have urged it to do—that is, has 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 different positions of property under the American and German Constitutions would indeed be paradoxical and would 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 is a fundamental right *tout court* under either the German or the American Constitutions, the inquiry should focus on two

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20 GRUNDGESETZ [GG] art. 14(1) (F.R.G.).

21 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. *See* DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY (1994); DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY (2d ed. 1997).

22 BVerfGE 50, 290 (339) (Codetermination Case, 1979).

23 CURRIE, *supra* note 21, at 290. Some commentators have taken the view that the U.S. 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 using the Takings or Due Process Clauses. *See* John B. Attanasio, *Personal Freedoms and Economic Liberties: American Judicial Policy*, *in* GERMANY AND ITS BASIC LAW 221, 237–40 (Paul Kirchhof & Donald P. Kommers eds., 1993).

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 implicated by the particular interest immediately involved? In other words, is their approach contextual? The answers to both questions reveal the core differences between the German and American approaches on the status of property as a constitutional right. The German Constitutional Court has adopted an approach that is both purposive and contextual, while the U.S. 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 or purposes 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.[24] 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 noneconomic interest relating to the owner's status as a moral or political agent.[25] Only the latter are protected as fundamental constitutional interests.[26] 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. In German constitutional law, property is a fundamental right that is accorded the highest degree of protection only in cases in which 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 the neo-classical vision of the minimalist "night-watchman" state.[27] 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."[28]

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 *why* 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 takings cases,

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24 *See infra* Part III.

25 *See infra* Part II.A.

26 *See infra* note 68 and accompanying text.

27 The best expression of that vision remains ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 26–28 (1974).

28 *See* GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970, at 1–2 (1997).

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, recent takings jurisprudence has begun in some respects to resemble the highly property-protective stance of the *Lochner*-era Court.[29] The constitutional tools have changed, from substantive due process to takings, but the net results are often similar.[30] The Court 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.[31] 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.

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, the difference 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 constitutional law.[32] Land held for the sole purpose of market speculation is as apt under the U.S. Constitution, perhaps more apt, to receive strong protection as is a tenant's interest in remaining in her home.[33]

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29 *See, e.g.*, Molly S. McUsic, *The Ghost of* Lochner*: Modern Takings Doctrine and Its Impact on Economic Legislation*, 76 B.U. L. REV. 605 (1996). Brownstein insists that

> in 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.

Brownstein, *supra* note 12, at 53.

30 *See* McUsic, *supra* note 29, 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.").

31 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 Commission*, 483 U.S. 825 (1987).

32 *See* discussion *infra* Part III.B.

33 *See* William W. Fisher III, *The Trouble with* Lucas, 45 STAN. L. REV. 1393, 1398 (1993).

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 considers the differences between German and American approaches to the problem of determining when government actions constitute impermissible takings of property. Part IV discusses some normative implications of the comparative study. Perhaps the most important of these is that politically progressive legal scholars should not categorically oppose extending strong constitutional protection to property. As the German example illustrates, property as a fundamental right need not have antiredistributive consequences and may in fact advance a progressive vision. 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 with respect to particular economic systems. "Even a socialized economy," one noted scholar wrote, "would not violate the Constitution, since [A]rticle 15 . . . allows it under specific conditions."[34] Whether the Constitution can properly be read to permit a "full-blown socialist society" is debatable, but the Constitution clearly does not block socialist legislation.[35] The 1949 German Constitution created not only a *Rechtstaat* (state governed by the rule of law), but, equally important, a *Sozialstaat* (social welfare state).[36] 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 state characterized by the rule of law [*sozialer Rechtstaat*]."[37] This does not mean that the Basic Law serves as a complete

34 Ernst Karl Pakuscher, *Judicial Review of Executive Acts in Economic Affairs in Germany*, 20 J. PUB. L. 273, 274 (1971).

35 *See* KOMMERS, *supra* note 21, at 242–43.

36 *See id.* at 241–42.

37 GRUNDGESETZ [GG] arts. 20(1), 28(1) (F.R.G.).

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.[38] Although the Basic Law embraces a modern version of this idea, its roots extend much further back in German history. It can be 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 for the welfare of his people.[39] 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 1794.[40] Although it would be anachronistic to say that the Prussian Code created anything like the modern welfare state, the Code certainly reflected a continuing commitment to the idea of the state's responsibility to secure the people's basic needs.[41] A more modern version of the *Sozialstaat* dates to the social welfarist reforms adopted in Prussia between 1830 and 1840. The significance of these legislative measures is the fact that in an age of liberalism, the state intervened in the public sector for the first time, thereby creating a precedent for future intervention. The social legislation of the Bismarck era and, later, the Weimar Republic greatly deepened and extended the reach of the state's intervention.[42] 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.[43] The notion that the public's welfare depends upon assuring that no one lives in poverty and upon avoiding gross inequalities in the social distribution of wealth, while heretical in most American circles, is relatively uncontroversial in Germany today.[44] As one German legal scholar put it, it is "well-established knowledge[ ] that the social situation of the people improves, if and as far as everybody shares the results of what has been produced by society."[45]

Although some uncertainty exists as to whether the commitment to the social welfare state imposes affirmative duties on the state to

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38 KOMMERS, *supra* note 21, at 35.

39 *See id.* at 41.

40 On the Prussian Code, see FRANZ WIEACKER, A HISTORY OF PRIVATE LAW IN EUROPE 260–66 (Tony Weir trans., Clarendon Press 1995).

41 *See* Gerhard Casper, *Changing Concepts of Constitutionalism: 18th to 20th Century*, 1989 SUP. CT. REV. 311, 321.

42 *See* KOMMERS, *supra* note 21, at 35.

43 Ulrich Karpen, *The Constitution in the Face of Economic and Social Progress*, *in* NEW CHALLENGES TO THE GERMAN BASIC LAW 87, 91–92 (Christian Starck ed., 1991).

44 *See* ULRICH KARPEN, SOZIALE MARKTWIRTSCHAFT UND GRUNDGESETZ 14 (1990).

45 Karpen, *supra* note 43, at 90.

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.[46] At the 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.[47]

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 "[t]he dignity of man is inviolable. It is to be respected and safeguarded with the full authority of the State."[48] The German Basic Law views basic rights hierarchically, and the right 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."[49] Therefore, one could conclude that the German courts regard the right to human dignity as pre-political, objective, and, 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.[50] The conception of human dignity that 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. One professor observes that "social conditions . . . determine the ex-

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46 *See* Kurt Sontheimer, *Principles of Human Dignity in the Federal Republic, in* GERMANY AND ITS BASIC LAW, *supra* note 23, at 213, 216.

47 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! Dismantling, No!").

48 GRUNDGESETZ [GG] art. 1(1) (F.R.G.).

49 BVerfGE 27, 1(6) (Microcensus Case, 1969).

50 Indeed, Article 79(3) of the Basic Law provides that these two provisions are immune from any constitutional amendment.

tent to which the individual is truly able to safeguard his own human dignity."[51]

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 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.[52]

Ernst Benda, the distinguished and influential former president (chief justice) of the Constitutional Court's First Senate,[53] has noted that the Basic Law rejects the "individualistic conception of man derived from classical liberalism as well as the collectivist view."[54] 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[55] with a strongly communitarian ontology.[56] 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 independence necessary for proper self-development and responsible citizenship.[57]

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51 Sontheimer, *supra* note 46, at 215.

52 BVerfGE 4, 7 (15–16) (Investment Aid Case, 1954).

53 The Constitutional Court is divided into two eight-member panels, called senates, which have mutually exclusive jurisdiction and membership. *See* KOMMERS, *supra* note 21, at 16–17. In cases of jurisdictional conflict, the two senates meet together as a single Plenum. *Id.* 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. *See id.* at 17. The two-senate structure represents a compromise from an old debate over the character of the Constitutional Court as a legal or a political institution. *See id.* at 17.

54 ERNST BENDA ET AL., HANDBUCH DES VERFASSUNGSRECHTS 9 (1984).

55 For a rich discussion of the Kantian roots of the German constitutional "image of man," see G.P. Fletcher, *Human Dignity as a Constitutional Value*, 22 U. W. ONTARIO L. REV. 171, 178–82 (1984).

56 *See* KOMMERS, *supra* note 21, at 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. *See* LIBERALISM AND ITS CRITICS (Michael J. Sandel ed., 1984); Michael J. Sandel, *Political Liberalism*, 107 HARV. L. REV. 1765, 1766 (1994); Charles Taylor, *Cross-Purposes: The Liberal-Communitarian Debate*, *in* LIBERALISM & THE MORAL LIFE 159 (Nancy L. Rosenblum ed., 1989).

57 *See* J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT 463 (1975); Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273, 286–87 (1991).

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,[58] 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 to develop fully both as 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."[59] The case involved a challenge to a 1964 statute enacted by the city-state of Hamburg converting into public property all grassland that the state classified as "dikeland."[60] The statute terminated private ownership of such lands, but it did require that owners be compensated.[61] Several owners of dikeland claimed that the statute violated their fundamental right to property under Article 14.[62]

The basis of this claim illustrates one major difference between the American and German approaches to constitutionally protected property. Under the American Constitution, if the amount of compensation were 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 Hamburg government's measure was to build an effective system of dikes in the wake of the devastating floods that hit Hamburg in 1962[63]—certainly a sufficiently public purpose to satisfy the weak American "public use" requirement.[64] Under the American Takings Clause, once the publicness of the governmental encroachment and the sufficiency of monetary compensation have

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58 For a modern classical expression of the economic theory, see Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

59 BVerfGE 24, 367 (1968).

60 *See id.* at 368–70.

61 *See id.* at 373–74.

62 *See id.* at 374.

63 *See id.* at 403.

64 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) (upholding in an 8-0 decision the state's scheme to transfer title to land, with compensation, from private parties to other private parties, because the Act served the public purpose of reducing concentration of land ownership).

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 the monetary value of property, but extant ownership itself. The Constitutional Court expressly recognized this in its opinion, when it stated the following: "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—but rather *to secure existing property in the hands of its owner.*"[65] This is the central meaning of the statement in Article 14(1) that "[p]roperty [is] guaranteed."[66] Given 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 is personal and moral. The Court 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.*[67]

The last phrase signals the animating idea behind the constitutional role of property under the German Basic Law: self-governance. Property is a 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

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65 BVerfGE 24 at 389 (emphasis added). 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. Under the Weimar Constitution, compensation was always an adequate substitute for the thing itself. *See* Hans-Jürgen Papier, *Die Eigentumsgarantie des Art. 14 I 1, in* 2 GRUNDGESETZ KOMMENTAR 18–23 (Theodor Maunz et al. eds., rev. 2001). 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, *supra* note 43, at 141, 150–52.

66 GRUNDGESETZ [GG] art.14(1) (F.R.G.).

67 BVerfGE 24 at 389 (emphasis added).

personality. The Court made the connection between property and personhood explicit in its opinion when it stated that "the property guarantee under Article 14(1)(2) must be seen in relationship to the personhood of the owner—that is, to the realm of freedom within which persons engage in self-defining, responsible activity."[68]

The Court here is invoking an understanding of the function of property that in some respects echoes discussions of "personhood" by some recent American scholars, most notably Margaret Jane Radin, drawing on Hegel, and C. Edwin Baker.[69] 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."[70] 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. This theory is most closely associated with Hegel,[71] 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 of the proper development of the self. Rousseau, for example, developed a comparable theory of property that stressed the importance of property to proper and full development of the personality.[72] For Rousseau, private ownership was morally justifiable only to the extent that it fulfilled that function.[73]

As the Constitutional Court's opinion makes clear, the German idea of the constitutional 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,[74] one can say that German constitutional law, like the Hegelian theory of property and the self, understands liberty in its positive as well as negative sense—that is, freedom *to* rather than freedom *from*.[75] It may be more accurate to

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68 *Id.* In the immediate case, the court decided that the compensated expropriation of dikelands did not violate the owners' basic rights because it satisfied the requirement of Article 14(3), that expropriations be made only for "the public weal" (*Wohle der Allgemeinheit*). *See id.* at 403. More specifically, it was not a redistribution of land made for general reasons but an appropriate response to a particular problem affecting the public good. *See id.* at 410–13.

69 *See* Baker, *supra* note 12, at 746–47; Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

70 Radin, *supra* note 69, at 957.

71 On Hegel's view of property and its relation to work and politics, see ALAN RYAN, PROPERTY AND POLITICAL THEORY 118–41 (1984).

72 *See id.* at 49–72 (discussing Jean-Jacques Rousseau's views on work and property).

73 *See id.*

74 *See* ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY *passim* (1958).

75 It is important to be very careful here, however. It is not clear to what extent public assistance, what we would call welfare aid, is protected as "ownership" under Article 14. Social security interests are protected in Germany today, but these accrue by virtue of em-

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 it is a precondition for him to act in a way that is necessary for 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 through a politics of enabling self-governance. The point of protecting individual ownership is not to 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, who are not isolated agents but members of society. Welfare is less a matter of guaranteeing that the distribution of wealth throughout society is morally optimal than it is of 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

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ployment. *See* PETER KRAUSE, EIGENTUM AN SUBJEKTIVEN ÖFFENTLICHEN RECHTEN 65–66 (1982); 1 FRITZ OSSENBÜHL, FESTSCHRIFT FÜR W. ZEIDLER 625 (1987). 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 througb the legislature. *See* BVerfGE 27, 253 (283) (1969); BVerfGE 41, 126 (153–54) (1976); BVerfGE 82, 60 (80) (1990).

> 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.[76]

The relevance of functional changes of property to constitutional protection is illustrated by the "Small Garden Plot Case" (*Kleingartenentscheidung*).[77] In that case, the Court struck down a federal statute that severely limited the right of landowners to terminate garden leases.[78] The historical background of the statute as well as 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.[79] These garden plots were an important method of feeding the German public.[80] As the dominant means of agricultural production shifted to large-scale commercial production, 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.[81] They applied for a permit to terminate the garden leases on their land, but the regulatory agency refused to grant the permit because the federal statute did not recognize this sort of change of circumstance as a permissible basis for terminating leases.[82] 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.[83] Although these garden allotments originally functioned to provide a source of food in times of social emergency, the purpose had by modern times become no more than a source of recreation, a social function that the Court regarded as decidedly less weighty than its original purpose.[84] Comparing the weakness of the new function with the se-

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76 KONRAD HESSE, GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 192 (20th ed. 1995).

77 BVerfGE 52, 1 (1979).

78 *See id.* at 1–2.

79 *See id.* at 2.

80 *See id.* at 3.

81 *See id.* at 12.

82 *See id.*

83 *See id.* at 29. 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, *supra* note 21, at 307–10.

84 *See* BVerfGE 52 at 34–35.

verity of the restriction on the owners' use, the Court had little difficulty in concluding that the statute was unconstitutional.[85]

The "Small Garden Plot Case" also illustrates the other characteristic of German constitutional property jurisprudence: its perception of private ownership as being "socially tied," as the Constitutional Court put it.[86] A provision in the Basic Law's property clause, which finds no real analogy in the American Constitution, forms the basis for this conception of private property as socially obligated.[87] Article 14(2) provides the following: "Property entails obligations. Its use shall also serve the common good."[88] Although 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 laedas* (so use your own as not to injure another's property). The social obligation of ownership is intended to express the idea that private property rights are always subordinate to the public interest.[89] This idea was more fully expressed in the original draft of Article 14(2), which reads as follows: "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."[90] That the social obligation recognized in Article 14(2) 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[91] and anti-eviction regulations.[92]

From an American perspective, perhaps the most striking sign of the broad reach of the social obligation is the important

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85 *See id.* at 36–40.

86 *See id.* at 29.

87 For a recent and stimulating argument that the American Constitution should also treat private property as socially obligated, see Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 767–92 (1999).

88 GRUNDGESETZ [GG] art. 14(2) (F.R.G.).

89 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. RESOURCES 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] 189–203 (1998). The seminal article on the public trust doctrine is, of course, Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

90 *See* RUDOLF DOLZER, INT'L UNION FOR CONSERVATION OF NATURE & NATURAL RES., PROPERTY AND ENVIRONMENT: THE SOCIAL OBLIGATION INHERENT IN OWNERSHIP 17 (1976) (internal quotation marks omitted).

91 *See* BVerfGE 37, 132 (139–43) (Tenancy and Rent Control Case, 1974).

92 *See* BVerfGE 68, 361 (367–71) (1985).

"Codetermination Case" (*Mitbestimmungsentscheidung*).[93] 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.[94] The Act mandates worker representation on the boards of directors of large firms, defined as firms with two thousand or more employees.[95] It further requires that the firm's legal representatives and its primary labor director be selected by the supervisory board according to specified procedures, and it requires that the board's chair and vice-chair be elected by a two-thirds majority.[96]

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.[97] Anyone who has read James Buchanan and Gordon Tullock's famous book, *The Calculus of Consent*,[98] however, 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 by 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 that the Codetermination Act

> does not merely serve a pure group interest. Rather, the co-operation and integration aimed at by institutional co-participation . . . have general importance in social policy; co-participation has especially been regarded as calculated to secure the market economy politically. . . . [I]t is intended to serve the welfare of the public. It cannot be regarded as unsuitable or not necessary to achieve this purpose . . . .[99]

The plaintiffs, which included a large number of business firms and employers' associations, attacked the Act as a gross interference with their property rights.[100] They argued that the Act violated the constitutional property rights of shareholders and of the firms themselves under Article I4 of the Basic Law as well as under other constitutional guarantees.[101] Rejecting this claim, the Constitutional Court

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93 BVerfGE 50, 290 (Codetermination Case, 1979).

94 *See id.* at 294.

95 *See id.* at 299–302.

96 *See id.*

97 *See id.* at 294.

98 JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962).

99 2 CEC (CCH) 324, 366 (1979) (translating BVerfGE 50, 290).

100 *See id.* at 332–38.

101 *See id.* Other grounds for the challenge included interference with the rights of occupation (Article 12) and association (Article 9). *See id.* at 337–38. There is a substantial degree of interrelationship between Articles 12 and 14. For a lucid discussion, see Fritz

concluded that the Act was merely an exercise of the legislature's power under Article 14(1) to define the "contents and limits" of property.[102] By implication, the Court concluded that the Act did not violate the injunction of Article 19(2) that "the essence of a basic right [not] be encroached upon."[103] The Court stated that although the Act admittedly reduced the powers of shareholders as members of the supervising board, the restriction "keeps within the bounds of a constitutionally permissible social binding."[104] Article 14(2) makes clear, the Court pointed out, that "use and disposal do not remain merely within the sphere of the [individual] owner, but affect interests of other persons entitled to rights who are dependent on the use of the [particular] property object."[105] The magnitude of an owner's social commitment under Article 14 varies with the social importance of the asset and its contemporary purpose.[106] As the Constitutional Court stated,

> It accords with these principles if property [obligations] (*Eigentumsbindungen*) must always be proportionate. A statutory property binding must be dictated on the basis of the area of activity regulated and must not go any further than the protective aim which the regulation serves. In this respect, limits are set all the more tightly on the legislator, the more the use and disposal of property remain within the sphere of the owner, since, in that case, a purpose extraneous to the latter which could justify a "proportionate" property [obligation] will be harder to find. Altogether the legislator's area of discretion in the case of social relation and in the case of social function of the property is thus relatively wide in view of its social [obligation]; it becomes narrower if these conditions are not present or are present only to a limited extent.[107]

Applying this sliding-scale approach, the Court reasoned that

> the important social function of share property is obvious for all to see. Its social relation shows itself in the mere fact that, as a general rule, it consists in the mutual participation with others in a company which is the owner of the means of production. Above all, in order to use the share property, the collaboration of the workers is always needed[.][108]

Ossenbühl, *Economic and Occupational Rights*, *in* GERMANY AND ITS BASIC LAW, *supra* note 23, at 251.

102 *See* 2 CEC (CCH) at 358–65.

103 *See* GRUNDGESETZ [GG] art. 19(2) (F.R.G.).

104 2 CEC (CCH) at 361.

105 *Id.* at 359 (footnotes omitted).

106 *See* Peter Badura, *Eigentum*, *in* HANDBUCH DES VERFASSUNGSRECHTS, *supra* note 54, at 653.

107 2 CEC (CCH) at 359–60 (footnotes omitted).

108 *Id.* at 364–65.

Although the text of Article 14 speaks only of "property" and seemingly does not distinguish among various sorts of property, the Constitutional Court has in fact drawn such qualitative distinctions. The "Codetermination Case" and "Small Garden Plot 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. As discussed in subpart A, one line of cases 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 thus not subject to exclusive individual control. The other line of cases, discussed in subpart B, arises out of the question whether and to what extent government-provided welfare assistance benefits are protected as property under Article 14.

These two lines of cases indicate two important differences between the American and German approaches to constitutional property. The first of these differences concerns the source of constitutional property. The German Court has unambiguously rejected a positivist approach to the question of what is or are the sources of property interests protected under Article 14.[109] In determining whether or not an asserted interest is property for constitutional purposes, the Court looks not only to nonconstitutional, private-law sources, but also to the values of the Basic Law as a whole.[110] As a result, property in its constitutional sense is not limited to those interests that private law defines as property.

The second vital difference between the American and German 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

109 *See* discussion *infra* Part III.A.

110 *See infra* notes 114–15 and accompanying text.

aggregate wealth maximization, individual-preference satisfaction, or individual liberty (in its classical, or negative, sense) as the primary purpose of constitutionally protected property interests.[111] The primary reason for protecting property as a fundamental right under the German Constitution, rather, is to secure the material conditions necessary for each person's self-development.[112]

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

Unlike the U.S. Supreme Court, the German Constitutional Court has been clear about the legal source used in defining what interests are protected as constitutional property.[113] 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 nonconstitutional law (that is, the German Civil Code.)[114] 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.[115]

Although 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, although textually rooted, differs in important ways from the "originalist" and "traditionalist" approaches favored by conservative American judges and constitutional scholars. The German approach avoids temporally freezing the meaning of constitutional property in any particular historical moment, permitting Article 14's protection over time to embrace new and unprecedented sorts of interests.

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111 *See* discussion *infra* Part III.B.

112 *See infra* Part III.B.

113 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 doctrines (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 American Constitution does not necessitate a multiplicity of meanings.

114 The Civil Code restricts the meaning of property to tangible, corporeal assets. *See* § 903 BGB.

115 *See, e.g.*, BVerfGE 51, 193 (216–18) (*Warenzeichensentscheidung*, 1979) (Trademark Case); BVerfGE 58, 300 (334–36) (*Naßauskiesungsentscheidung*, 1981) (Groundwater Cases).

Behind this approach to defining the constitutional limits of governmental 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 that the Court has characterized as basic to human existence.

An important example of this development is the notorious series of "Groundwater Cases" (*Naßausskiesungsentscheidungen*), litigated before the federal Supreme 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 reflecting on to consider what they indicate about current German legal attitudes toward property, the market, and the public weal.[116]

The litigation concerned the constitutional validity of the 1976 amendments to the Federal Water Resources Act (*Wasserhaushaltgesetz*), first enacted in 1957.[117] The most important of these amendments was a provision requiring anyone wishing to make virtually any use of surface or groundwater to obtain a permit.[118] That amendment represented an extension of the Act's basic premise, which declared 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.[119]

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."[120]

The plaintiff, who owned and operated a gravel pit, applied for a permit to use the water beneath his land.[121] He had previously taken groundwater for decades for the purpose of extracting gravel, but the city denied him permission to continue doing so because his quarry

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116 For a sampling of views about the case, see Martin Burgi, *Die Enteignung durch "teilweisen" Rechtsentzug als Prüfstein für die Eigentumsdogmatik*, 6 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 527 (1994); Ingo Kraft, *System der Klassifizierung eigentumsrelevanter Regelungen*, BAYERISCHE VERWALTUNGSBLÄTTER, Feb. 15, 1994, at 97; Joachim Lege, *Der Rechtsweg bei Entschädigung für "enteignende" Wirkungen*, 42 NEUE JURISTISCHE WOCHENSCHRIFT [New Law Journal] 2745 (1995).

117 *See* BVerfGE 58 at 301–02.

118 *See id.* at 305–06.

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

120 *See* BVerfGE 58 at 304.

121 *See id.* at 309.

operation threatened the city's water wells.[122] He sued for damages, claiming that the permit denial was an uncompensated expropriation of his property that is unconstitutional under Article 14 of the Basic Law.[123]

The federal Supreme Civil Court, 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(1).[124] Under German law, however, only the Constitutional Court has the authority to declare statutes unconstitutional,[125] so the Supreme Civil Court was required to submit the case to the Constitutional Court. The latter Court held that the Water Resources Act was constitutional and that the permit denial was not an expropriation of the plaintiff's constitutionally protected property.[126] 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."[127] The Court acknowledged that the constitutional guarantee of property in Article 14(1) prohibits the legislature from undermining the basic existence of the right embedded in the private law of property in a way that removes or substantially impairs the guaranteed zone of freedom under Article 14.[128] The guarantee of the legal institution of property, the Court continued, is not encroached on, however, when the security and defense of resources that are vital to the common welfare of the public are placed under the authority of the public, rather than the private, legal order.[129]

Water is such a resource. The Court stated that, whatever the meaning of ownership for private law purposes, the constitutional meaning of land ownership has never entailed ownership of water below the surface.[130] 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 (*Bürgerliches Gesetzbuch*, or *BGB*), because property rights in groundwater are inherently and historically

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122 *See id.*

123 *See id.*

124 *See* 45 NEUE JURISTISCHE WOCHENSCHRIFT [New Law Journal] 2290 (1978).

125 *See* GRUNDGESETZ [GG] art.100(2) (F.R.G.).

126 *See* BVerfGE 58 at 338–48.

127 *Id.* at 345.

128 *See id.* at 339.

129 *See id.*

130 *See id.* at 345.

public, not private, in character.[131] Private rights in land end when they reach the water level.[132] Consequently, the 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, to answer the nagging question of *why* water is special. Why, exactly, do private property rights not extend to groundwater in the same way that they do to land? A coherent, substantive answer to this question is absolutely necessary if one is to assuage the Supreme Civil 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(3) would remain. The doctrine of regulatory takings (*enteignungsgleicher Eingriff*) would be emptied of all content. In Justice Holmes's terms, it would be impossible to say that a regulation "goes too far."[133]

Unfortunately, it was just at this most crucial stage that 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.[134] This separation was constitutionally authorized at least since the time of the German constitution of 1871, the Court noted.[135] Fine, but that does not answer the question; it only changes the character of the question.

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131 *See id.* The Supreme Civil Court had reasoned that ownership of land confers ownership of water below the land, *see id.* at 332, relying on a provision of the Civil Code that 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," § 905 BGB. American property lawyers will recognize this norm as the counterpart to the common-law maxim *usque ad coelum et ad infernos* (up to the sky and down to the depths). The Constitutional Court never questioned that this is correct as a matter of private law, but it concluded that the constitutional meaning of property is not determined solely by the private-law meaning, but is determined by the constitution itself. BVerfGE 58 at 335.

132 *Id.* at 329 ("*So wie seine Befugnisse an den Grundstücksgrenzen enden, endet seine Rechtsstellung in der Tiefe prinzipiell dort, wo er mit dem Grundwasser in Berührung kommt.*" ["Just as one's authority over one's land ends at its borders, one's legal rights below one's land end where the subsurface comes into contact with groundwater."]).

133 *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

134 *See* BVerfGE 58 at 333.

135 *See* BVerfGE 58 at 332.

Why has it historically been constitutional to assign property rights in land to the private realm and rights in 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,[136] the Court emphasized that social changes occurring in this century have necessitated certain adjustments in the legal regulation of water.[137] Water has always been a vital resource to society, the Court pointed out, but it has become even more so in modern German society.[138] As the Court observed, the processes of growing industrialization, urbanization, and construction have increased the scarcity and social importance of water. The Court declared that

> 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.[139]

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

There are, however, important differences between water and land. The most obvious respect in which subterranean water differs from land, of course, is water's "fugitive," or ambient character.

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136 This statement requires an important caveat: Under Article 14(1), the legislature has sole competence to define the "contents and limits" of ownership, *see* GRUNDGESETZ [GG] art. 14(1) (F.R.G.), but Article 19(2) requires that the Constitutional Court define the essence of the constitutionally protected property right, GRUNDGESETZ [GG] art. 19(2) (F.R.G.) ("In no case may the essential content of a basic right be encroached upon.").

137 *See* BVerfGE 58 at 340.

138 For a penetrating analysis of the modern regulation of water in German and Austrian law, see FRANZ MERLI, ÖFFENTLICHE NUTZUNGSRECHTE UND GEMEINGEBRAUCH 140–75 (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, 45–49 (2000).

139 BVerfGE 58 at 341 (citing BverfGE 10, 89 (113) (1959)).

Whereas land is necessarily immobile, underground water is not. The Constitutional Court alluded to this factor when discussing the functional significance of water. The Court emphasized that, as a human resource, water is now vital both for purposes of drinking and industry, and the increase in these social uses has brought the two more and more in conflict with each other.[140] This is especially true in the case of groundwater, the Court noted.[141] 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.[142] The constitutional status of water must be determined by taking into account the need to reconcile these conflicting social interests.[143] The Court concluded that 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 land parcels.[144] Why? Why not rely on the market, predicated on private property rights, to achieve an efficient allocation of groundwater?

Although the Court's answer here was a bit murky, its reasoning echoes points that some American property scholars have made concerning the limits of the market as a means of allocating rights in groundwater. These scholars have pointed out that, left as a commons, groundwater involves major problems with externalities, or spillover effects.[145] Self-interest is not a reliable means of protecting a resource whose use, especially given the resource's fugitive character, has substantial external effects. As Eric 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."[146] Flowing water, Freyfogle points out, is "communally embedded," both in a social and an ecological sense.[147] The ecological community includes "soils, plants, animals, microorganisms, nutrient flows, and hydrological cycles."[148] These two communities are themselves so interdependent that a threat to one is a threat

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140 *See supra* text accompanying note 139.

141 *See* BVerfGE 58 at 340.

142 *See id.* at 343.

143 *See id.* at 341.

144 *See id.* at 340.

145 See the excellent discussion in Barton H. Thompson, Jr., *Tragically Difficult: The Obstacles to Governing the Commons*, 30 ENVTL. L. 241, 249–53 (2000). For similar discussions, see generally Michael C. Blumm, *The Fallacies of Free Market Environmentalism*, 15 HARV. J.L. & PUB. POL'Y 371 (1992) (discussing market failure in the environmental area); NAT'L RESEARCH COUNCIL, WATER TRANSFERS IN THE WEST: EFFICIENCY, EQUITY, AND THE ENVIRONMENT (1992) (examining harm to third parties when water rights are transferred).

146 Eric T. Freyfogle, *Water Rights and the Common Wealth*, 26 ENVTL. L. 27, 31 (1996).

147 *See id.* at 32.

148 *Id.*

to the other.[149] Under these circumstances, any individual use of water profoundly affects the entire community and directly implicates the common weal.

As the Constitutional Court stated, the major legal question is whether shifting water regulation from the private to the public realm can be constitutionally justified.[150] The argument was made that individual rights in groundwater are constitutionally inseparable from ownership of the surface.[151] Rejecting this argument, the Court stated that federal regulation of groundwater use would not effectively empty landownership of all its content (*Substanzentleerung des Grundeigentums*).[152] Landownership would not become completely subordinated to the social obligation.[153] Merely subjecting the owner's right to use groundwater to regulatory approval does not remove the entire use-interest from the bundle of rights.[154] Even if it did, the Court reasoned, 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.[155] The Court stated that ownership of land is valuable primarily with respect to use of the surface, not subterranean water.[156] 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."[157]

The Court's second basis for the constitutional validity of the Federal Water Law did not involve the constitutional property right itself, but instead drew from 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.[158] The plaintiff had argued that the Federal Water Law arbitrarily burdened him, thus violating his Article 3 equality right, because his quarry was located close to groundwater while other quarry owners were not affected.[159] The Court had little difficulty dismissing that objection, pointing out that

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149 *See generally* Lynda L. Butler, *The Pathology of Property Norms: Living Within Nature's Boundaries*, 73 S. CAL. L. REV. 927 (2000) (discussing ecological interdependence and its implications on property law).

150 *See* BVerfGE 58, 300 (301) (1981).

151 *See id.* at 345.

152 *See id.* at 345.

153 *See id.*

154 *See id.*

155 *See id.*

156 *See id.*

157 *Id.* ("*Aus der verfassungsrechtlichen Garantie des Grundeigentums läßt sich nicht ein Anspruch auf Einräumung gerade derjenigen Nutzungsmöglichkeit herleiten, die dem Eigentümer den größtmöglichen wirtschaftlichen Vorteil verspricht.*").

158 *See* CURRIE, *supra* note 21, at 322–37.

159 *See id.* at 346.

the regulation affected all similarly situated quarry owners equally.[160] Similarly, the regulation did not violate the constitutional principle of proportionality (*Verhältnismäßigkeit*), because no particular owner was singled out to bear a disproportionate share of the burden necessary to achieve the benefits sought by the statute.[161]

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 previously exercised; he 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.[162] The Court directly confronted the familiar dilemma: stability versus 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.[163]

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 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.[164]

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."[165] 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.[166] Because the Act did not take effect until thirty-one months after its enactment, the claim-

160 *See id.*
161 *See id.*
162 *See id.* at 348.
163 *See id.* at 349–50.
164 *Id.* at 350–51.
165 *Id.* at 351.
166 *See id.* at 352.

ant effectively had almost eight years of continued use.[167] Moreover, owners could get an extension if they had filed for a permit.[168] The consequence of these 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.[169] Under these circumstances, the statute's transition provisions reasonably accommodated the plaintiff's economic interest.[170]

German constitutional scholars have debated whether the "Groundwater Cases" made obsolete the concept of a regulatory taking (*enteignungsgleicher Eingriff*, or equivalent expropriation). In American terms, the question is whether there remains an inverse condemnation action available to property owners. It is understandable why some scholars believe 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 compensate? How could there be any circumstance in which the legislature has "gone too far"?

One distinguished German scholar has argued that the case, properly read, does not abolish the idea of compensation for regulatory takings.[171] He points out that the Constitutional Court never mentioned the doctrine of regulatory takings anywhere in its opinion.[172] 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 Supreme Court awarded the plaintiff compensation.[173] It did so on the theory that, although the basic principle of property protection emerges from constitutional principles, the particulars of protection must be determined based on nonconstitutional law (*einfaches Recht*).[174] The relevant nonconstitutional basis for state liability in the case, said the Court, is the principle of individual sacrifice (*Aufopferungsgedanke*).[175] If governmental action sacrifices an individual for the benefit of the general public, the state

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167 *See id.*

168 *See id.*

169 *See id.*

170 *See id.* at 351.

171 FRITZ OSSENBÜHL, STAATSHAFTUNGSRECHT 182–84 (4th ed. 1991).

172 *See id.* at 183.

173 *See* 20 NEUE JURISTISCHE WOCHENSCHRIFT [New Law Journal] 1169 (1984).

174 *See id.* at 1169–72.

175 *See id.* at 1171.

is liable to compensate the individual in an action that is similar to, but not technically, an "expropriation," as used in Article 14(3).[176]

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 Supreme Civil Court's decision does seem to leave open the possibility of monetary compensation for regulatory takings. More interestingly, it creates the possibility of compensation *without* a taking in cases in which justice seems to demand it even though the Constitution does not.[177]

Three final comparative points about the "Groundwater Cases" need to be made. First, the case makes clear that the German Constitutional Court, like its American counterpart,[178] has rejected what in American takings literature has become known as "conceptual severance." Conceptual severance, a term first coined by Margaret Jane Radin, means that every incident of ownership, every twig in the bundle of rights, is itself ownership.[179] The implication of conceptual severance, of course, would be to strengthen vastly the bite of the Takings Clause, because virtually every regulation affecting private ownership of any resource would become a taking of ownership itself. The U.S. Supreme Court's reaction to conceptual severance has been somewhat ambiguous,[180] but the German Court clearly rejected it, at least with respect to the relationship between land and subsurface resources.[181] 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.

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176 What really seems to be going on here is a tug-of-war game between the Constitutional Court and the Supreme Civil Court, with the latter taking a more expansive view of 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. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978). Ossenbühl has expressed the interesting idea that the alternative, nonconstitutional 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, *supra* note 171, at 185–87.

177 The possibility of this approach in American takings law is insightfully discussed in Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 1009–13 (1999).

178 *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987); *Penn Central*, 438 U.S. at 130–31.

179 *See* Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667 (1988).

180 Although the Court in cases like *Penn Central*, 438 U.S. at 130–31, and, most recently, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), has expressly rejected conceptual severance, the analysis in other cases, like *Hodel v. Irving*, 481 U.S. 704 (1987), appears to rely on conceptual severance.

181 *See supra* text accompanying notes 151–57.

The second point concerns the Court's statement in the "Groundwater Cases" that the constitutional right to property does not guarantee the right to exploit the resource for its highest economic value.[182] 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 determining how a wide variety of contemporary American takings disputes would be resolved under German law. Wetlands regulation is an obvious example. Landowners (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 German courts might find another basis for striking down wetlands regulations, they clearly would reject the basic premise of the attack on American wetlands regulations.

The third respect in which American property lawyers can learn from the "Groundwater Cases" concerns the approach that the German Court took to determine that the property interest in question was what Carol Rose has called "inherently public property."[183] The Court focused on both the social necessity of the resource and the degree of social interdependence associated with the resource and the conditions of contemporary society.[184] 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 into account all of these external effects. Indeed, precisely because of the intensity of the social and ecological interdependence that characterizes flowing water, no owner can possibly take into account all or even most of the external effects of a given use when choosing among possible uses.[185] 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

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182 *See supra* note 127 and accompanying text.

183 *See* Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 720 (1986).

184 *See supra* text accompanying notes 136–56.

185 *See* Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 351 (1996); Barton H. Thompson, Jr., *Water Law as a Pragmatic Exercise: Professor Joseph Sax's Water Scholarship*, 25 ECOLOGY L.Q. 363, 379–83 (1998).

and dangerously misleading.[186] 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 Law at issue in the "Groundwater Cases" 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 state's property, but property that is "inherently public."[187]

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 the Basic Law as neutral with respect to the core purpose of property in the overall constitutional scheme. The Court has repeatedly stressed an interpretation that views property as important only 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 the constitutional protection of property than cases dealing with the status of welfare benefits as constitutional property.

In a 1985 case, the Court considered whether an amendment to the federal statute providing health insurance benefits for the elderly violated Article 14.[188] The Court held that it did not.[189] For present purposes, the case is more important for what the Court said than for what it held. The Court emphasized at the outset the legislature's duty to protect the liberty of its citizens.[190] 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.[191] The initial ques-

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186 *See generally* Butler, *supra* note 149 (discussing the "pathological effects" of property norms on natural resources).

187 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 ENVTL. L. 473 (1989).

188 *See* BVerfGE 69, 272 (Personal Contribution, 1985).

189 *See id.*

190 *See id.* at 284.

191 *See id.* at 280–83.

tion was whether such welfare benefits (*Eigenleistungen*) counted as property under Article 14.[192]

In general, German constitutional law, unlike American constitutional law, does recognize as property what Charles Reich called "the New Property."[193] 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 "nontrivial" contributions.[194] This prerequisite is the so-called "*Eigenleistung*" requirement. The 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.[195] There is no absolute level or amount of personal contributions required. The Court stated, "For premiums[, like those in the instant case] that 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."[196]

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. Examples include housing subsidies[197] and family allowances.[198] However, unemployment insurance[199] and pension plans[200] satisfy the requirement.

As these examples illustrate, although 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* article was full constitutional protection for all forms of what he termed government "largesse."[201] This concept included everything from welfare benefits to federal Social Security to taxicab medallions.[202] Reich drew no distinction between those forms of government-provided wealth to which the recipient had personally contributed and 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 Aid to Families with Dependent Children.[203] German constitutional law, like its American counterpart,

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192 *See id.* at 302.
193 *See* Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).
194 *See* BVerfGE 69 at 300.
195 *See id.* at 302.
196 *Id.*
197 *See* BVerfGE 78, 232 (243–44) (1988).
198 *See* BVerfGE 39, 169 (170) (1975).
199 *See* BVerfGE 72, 9 (9) (1986).
200 *See* BVerfGE 53, 257 (257) (1980).
201 *See* Reich, *supra* note 193, at 785–86.
202 *See id.* at 734–37.
203 *See id.* at 778–79.

clearly excludes the latter from substantive protection.[204] The personal-contribution requirement is not satisfied simply because the claimant has paid taxes, which indirectly fund the program in question.[205] The contributions must have been made directly to the program itself.[206] 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 interests under German and American constitutional property law. Although both largely agree on the meaning of "property" in this context, the cases discussed above demonstrate that 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.[207] No American case has come remotely close to suggesting that the Fifth Amendment's Takings Clause applies to such interests. German constitutional protection, although limited with respect to the scope of publicly derived interests that are covered, is, by contrast, substantive. If no compensation is paid for the termination of a protected 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 the protection provided by American constitutional law in the ways just described, one can understand why some commentators have concluded that property is a more highly valued interest under the German Constitution than under its American counterpart.[208] That conclusion is premature, however, because under German law, 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

204 *See supra* note 194 and accompanying text.
205 *See* BVerfGE 69, 272 (301) (1985).
206 *See id.* at 301–03.
207 *See* Flemming v. Nestor, 363 U.S. 603 (1960).
208 *See, e.g., supra* note 23 and accompanying text.

subsistence-level security of the person entitled."[209] 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."[210] The Court noted that many entitlement claims in social insurance law clearly do not involve any consequences for the claimant's personal subsistence.[211] Claims of that sort do not merit the constitutional guarantee of property ownership.[212] At the same time, though, it is not necessary that the claimant be destitute or poor.[213] Protected pensioners include white-collar employees (*Angestellten*) as much as they do blue-collar workers (*Arbeiter*).[214] 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.[215]

Although this line of thinking obviously does reflect the strong influence of Germany's status as a social welfare state (explicitly recognized in its Basic Law), it is *not* some version of communist nonsense. Although 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 and public benefits that 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 must 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[216] or Robert Nozick's night-watchman state.[217] Nor is German constitutional prop-

209 BVerfGE 69 at 303.
210 *Id.* at 304 (citations omitted).
211 *See id.*
212 *See id.*
213 *See id.* at 303.
214 *See id.* at 303–04.
215 *Id.* at 303.
216 *See* RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD (1995).
217 *See* NOZICK, *supra* note 27, at 26–28.

erty 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. Within the German scheme of constitutional property, autonomy, in its full sense, means the capacity for self-realization.[218] 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 the view 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*,[219] tend to protect property because of its wealth-creating role.[220] That is, the takings cases reflect an understanding that the core, though not the only, purpose of property as a constitutional value is individual-preference satisfaction, a role that I have elsewhere labeled "property as commodity."[221]

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 citizens 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.[222] It is only when 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.

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218 *See supra* note 67 and accompanying text.

219 Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

220 *Andrus v. Allard* might seem to contradict this statement. 444 U.S. 51 (1979). It held that a federal statute prohibiting the sale of eagle parts and artifacts made from such parts was not a taking. *See id.* at 67–68. I do not think so, however. First, the case concerns only personal property. Second, and more fundamentally, the Court went out of its way to point out that the statute left intact other wealth-creating uses for artifacts made from eagle parts. *See id.* at 66. If anything, then, I think that case supports, rather than undermines, the statement in the text.

221 *See* ALEXANDER, *supra* note 28, at 1.

222 *See supra* notes 197–200 and accompanying text.

IV
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 constitutional protection of property that have engendered considerable debate in recent years. The first question, discussed in subpart A, is aimed at lawyers and policymakers involved in constitution-making and constitution revision around the world, as well as at American lawyers: Are constitutional property clauses inherently anti-redistributive? The second question, examined in subpart B, concerns American constitutional lawyers more directly: Should property be treated in our system as a fundamental right for constitutional purposes, protected as fully as are the rights to vote, free speech, and similar civil rights?

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.[223] The basis for this argument is the premise that constitutional property clauses are inherently anti-redistributive.[224] As such, property clauses inhibit constitutional democracies from realizing what these scholars consider 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 then bear the burden of justification.[225]

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223 The clearest exponent of this view is Jennifer Nedelsky, *Should Property Be Constitutionalized? A Relational and Comparative Approach*, *in* PROPERTY LAW ON THE THRESHOLD OF THE 21ST CENTURY 417, 422–32 (G.E. van Maanen & A.J. van der Walt eds., 1996). For a similar view, see Frank I. Michelman, *Socio-Political Functions of Constitutional Protection for Private Property Holdings (in Liberal Thought)*, *in* PROPERTY LAW ON THE THRESHOLD OF THE 21ST CENTURY, *supra*, at 433, 441–45. For a rebuttal of this view, see A.J. VAN DER WALT, THE CONSTITUTIONAL PROPERTY CLAUSE 1–29 (1997).

224 *See* Michelman, *supra* note 223, at 448–49; Nedelsky, *supra* note 223, at 422–23.

225 Nedelsky, *supra* note 223, at 422.

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.[226] American property-rights advocates doubtless would respond that this is nonsense, because 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 a nation with a constitution that includes a property clause provides a more neutral perspective from which to evaluate the claim that such 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 a social-welfare state,[227] 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, an area on which Article 14's "social obligation" component weighs heavily. As the "Groundwater Cases" make abundantly clear, environmental well-being is an area in which the individual land owner's social obligation is especially important.[228] Rolling back environmental regulations that restrict an owner's use of his land or decrease its value 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.[229]

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226 *See, e.g., id.* at 431 ("It is not appropriate to take the centrally contested questions of distributive justice, of the allocation of power, of the inevitable trade-offs entailed in policy areas such as environmental protection and insulate them from democratic debate.").

227 *See supra* text accompanying notes 36–47.

228 *See* discussion *supra* Part III.A.

229 By the same token, the normative theory underlying the German constitutional property clause is that the clause should not be used affirmatively as a tool to promote redistributions of wealth. Rather, 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." *See* McUsic, *supra* note 29, at 665.

This approach is somewhat at odds with the recent theory of Hanoch Dagan. *See* Dagan, *supra* note 87, at 778–92 (arguing that progressive distributive considerations can and should influence takings doctrine).

As we have already seen, German courts do not take such an indiscriminate approach to protecting property under Article 14.[230] They do not consider all property interests to be fungible or equally important. The weight that German courts attach to any given interest depends upon a variety of factors,[231] the most important of which is how immediately and substantially the interest in question protects the affected owner's human dignity interest.[232] 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.[233] "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.[234] The kind of freedom that property promotes is what Alan Ryan calls "practical freedom,"[235]—that is, the opportunity of "human beings [to] show their creative and intelligent capacities."[236] 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. Although both are property, the former is fundamental, while the latter is not.[237] In theory, all property interests are fundamental rights in a formal sense under the German Basic Law, but 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 freeze the extant distribution of wealth. The distinguished South African legal scholar Andre van der Walt has argued that a constitutional property clause that has

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At the same time, the German constitutional property clause's social obligation provision closely tracks Dagan's views regarding the social responsibility considerations in takings law, at least as applied to land. *Id.* at 767–78. Dagan argues that because "land ownership is a source of special responsibility toward the landowner's community," *id.* at 772, takings doctrine should develop in ways that "promot[e] the virtue of social responsibility," *id.* at 744.

230 *See* discussion *supra* Parts II and III.

231 *See* discussion *supra* Part III.

232 *See supra* note 49 and accompanying text.

233 *See supra* note 68 and accompanying text.

234 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).

235 RYAN, *supra* note 71, at 118.

236 *Id.* at 120.

237 *Compare* BVerfGE 89, 1 (Renter's Rights Case, 1993), *with* BVerfGE 52, 1 (Small Garden Plot Case, 1979).

a dual normative commitment to individual liberty and social welfare is "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 have-nots, between the powerful and powerless."[238]

Of course, this is not to say that property clauses have no effect whatsoever on 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.

In reality, in some respects property already *is* given highly deferential treatment in our constitutional scheme. Although it remains true that for due process purposes courts apply a 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,[239] 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.[240] In the takings setting, property rights have 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 given property far more robust constitutional value than it

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238 VAN DER WALT, *supra* note 223, at 13.

239 Government acts that encroach upon fundamental rights must serve a compelling state interest if they are to pass constitutional review. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997). Government acts that encroach upon property interests, on the other hand, merely must substantially advance a legitimate state interest. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834 (1987).

240 *See supra* notes 14–16 and accompanying text.

had just twenty years ago. For example, the *Nollan-Dolan* nexus test[241] and the *First Evangelical Church* temporary-takings doctrine[242] have greatly expanded the extent to which constitutional law protects privately owned resources. Moreover, the scope of resources within the protective reach of the Takings Clause has also expanded. Although most of the modern takings cases have involved land,[243] courts have protected a variety of other forms of property as well.[244]

Still, it would be disingenuous to say that the so-called "takings revolution" has achieved everything that property-rights advocates seek. Their long-term agenda, presumably, is to finish the "Reagan Revolution" by dismantling the regulatory state and ending most forms of state redistribution of wealth. Had state and federal courts implemented the plan detailed in Richard Epstein's notorious book, *Takings*,[245] that is exactly what the takings renaissance would have accomplished. 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.[246] No one believes that a takings attack on these programs would have the slightest chance of success in the foreseeable future. Even interests in land have occasionally been left unprotected against government regulations whose redistributive effects are difficult to gainsay.[247] In short, for all of the ballyhooed advances of a pro-property interpretation of the Takings Clause, the degree of protection accorded to property interests 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 encourage American constitutional lawyers to rethink the extant Ameri-

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241 *See* Dolan v. City of Tigard, 512 U.S. 374, 386–88 (1994); *Nollan*, 483 U.S. at 837.

242 *See* First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 317–19 (1987).

243 *See, e.g., Dolan*, 512 U.S. at 377; Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); *First Evangelical Church*, 482 U.S. at 306.

244 *See, e.g.*, E. Enters. v. Apfel, 524 U.S. 498, 529–37 (1998) (finding an unconstitutional taking in the application of a federal statute to a former coal mining company, where the statute required the company to make substantial contributions to a health benefits fund for retired mine workers); Phillips v. Wash. Legal Found., 524 U.S. 156, 160 (1998) (holding that interest earned on client funds deposited in Interest on Lawyers Trust Accounts is clients' property for the purpose of analysis under the Takings Clause).

245 EPSTEIN, *supra* note 6.

246 The notable exception to this statement is the Supreme Court's decision in *Eastern Enterprises v. Apfel. See supra* note 244.

247 *See, e.g.*, Yee v. City of Escondido, 503 U.S. 519, 532 (1992) (holding that a rent control ordinance did not constitute a physical taking of property).

can regime? After all, one might argue that Germany, a constitutional democracy with a market-based economy much like ours, has succeeded in protecting property as a fundamental constitutional value without eliminating all legislatively mandated redistributions of wealth. Should not the United States, the most property-oriented society in the world, follow suit and use the German Basic Law as a model for changing our due process and takings doctrines? The short answer, once again, is "no." Although 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.[248] Although 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.[249] The Court's remedy in such cases is limited to striking down the offending legislation.[250]

Similarly, there is no real analogue to the substantive due process doctrine in the German scheme. Although German courts certainly do provide substantive protection for property interests, they do so only within the context of 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.[251] Applying that test to property interests would go a long way toward fulfilling the property-rights advocates' dream of shutting down, or at least substantially inhibiting, redistributive legislation, for much of it would fail this stringent test. But, as we have seen, that is emphatically not the situation under the German constitutional system.

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248 *See* discussion *supra* Part III.

249 *See* DOLZER, *supra* note 90, at 16–18.

250 *See id.*

251 *See supra* note 15.

The long and short of the situation is that the United States 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 the United States has 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.[252] Property interests are treated as fundamental interests to the extent that they promote the core constitutional values of human dignity and self-realization.[253] American 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 to face openly the question of *why* some property interests are more protected than others. Is property's primary constitutional purpose to promote wealth creation, to serve some noneconomic goal, such as personal privacy,[254] or is it to promote fairness through the leveling of the playing field on which government regulators and individual owners deal with each other?[255] 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 to learn from the Germans.

CONCLUSION

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, the U.S. Supreme Court should clearly articulate the core reasons behind the Constitution's property clause. Second, American courts should analyze the property interest immediately involved to determine whether and to what extent the interest

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252 *See* discussion *supra* Part III.

253 *See* discussion *supra* Part III.B.

254 This is one way of understanding the per se rule adopted in *Loretto*. *See* Loretto v. Teleprompter Manhatten CATV Corp., 458 U.S. 419 (1982).

255 This is one interpretation of the *Nollan-Dolan* doctrine. *See supra* note 241 and accompanying text.

implicates the core purpose of constitutional protection of property. The more that a core constitutional purpose is involved, the more a 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 changing those practices in other cases. If the affected interest strongly implicates the constitutional property clauses' core purposes, a more robust substantive due process doctrine may be needed; in other cases the doctrine should remain moribund. Similarly, the renaissance of the Takings Clause may continue, even advance 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 would depend on how the courts define the core reasons for constitutionalizing property rights in the first place. The process of identifying those reasons would, of course, be enormously controversial. Although the question of what those reasons are would remain subject to controversy, the German experience provides grounds for believing that a consensual understanding would 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[256] ignore this point. They naively assume that constitutions are liquid and easily morphed and can readily migrate from one state to another. Such critics would have us use the German constitution as the model for changing our constitutional practices regarding property by designating property as a "fundamental" right, *à la* the Germans.[257] 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 do occur, of course. For example, 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 may give different meanings to those provisions than the meanings their German ancestors carry.[258] South Africa is not Germany, however. Its Constitution, no matter how textually similar or identical to Germany's, cannot recreate the German Basic Law. Constitutional

256 *See, e.g.*, CURRIE, *supra* note 21, at 290–99.

257 *See, e.g., id.*

258 *See* van der Walt, *A Critical Analysis of the Civil-Law Tradition in South African Property Law*, 11 S.A.J. ON HUMAN RTS. 169 (1995).

morphing *will* occur in the course of attempts to borrow, but the morphing will not be intentional. It will instead result from indigenous legal conditions.

This inability of constitution makers and interpreters to morph constitutions at will does not mean that the enterprise of comparative constitutional law is pointless. As this Article has already emphasized,[259] American constitutionalists have much to learn from the German experience with constitutional protection of property. Although we cannot replicate the German experience, we can learn from Germany's interpretive practices, most notably from its purposive approach to 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.

259 *See* discussion *supra* Part IV.