The Constitutional Protection of Property Rights: Lessons from the United States and Germany

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Constitutional limitations on a government=s power to confiscate property, whether by an outright taking of title or by excessive regulation, are important to economic growth. Over the past 200 years, the Supreme Court of the United States has used different clauses in the constitution as the basis for this protection. When the usefulness of one clause waned, the Supreme Court turned to another clause to continue its protection of property rights. Our paper will trace the path from the use of the contract clause in the nineteenth century to the rise of substantive due process after the Civil War and its demise during the New Deal to the modern use of the takings clause. After analyzing the extent of the protection accorded property rights in the United States today, we will turn to the German constitution for a comparison of constitutional property rights protection. In many ways, the German courts have used Article 14 of the German constitution to provide similar protection to that given in the United States. However, the German courts have used a principle of Aproportionality@ as a basis for greater scrutiny of legislative action. We will show that the German Aproportionality@ principle is similar to the principles that had been used in the United States under substantive due process but no longer apply under the takings clause. We will also show that the decision of the United States Supreme Court and the German Constitutional Court are so similar that they could be viewed as part of one legal doctrine, both in terms of analysis and outcome. Next we will examine why the constitutional law of the two countries are so similar given two constitutional provisions with vastly different language. Finally, we will conclude by considering the lessons we can draw from the similar enforcement of the two different constitutional provisions and the lessons each country can draw from the other=s experience.

A constitution sets out the basic principles of a society. It creates a structure for government and lays out the rights and duties of the highest order. These basic rules of

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social and political cooperation are not only established as superior law, they also set an example for citizens by emphasizing the most important aspects of the society. The constitutional protection of property rights is an important aspect of social governance. The right to own and use property, to work and to better oneself economically, is one of the core essential human rights. Besides this aspect of human dignity, constitutional limitations on a government=s power to confiscate property, whether by an outright taking of title or by excessive regulation, help create a trust in a government -- a belief in the "credible commitment" of a government -- that serves economic growth.[1]

The constitutions of both the United States and Germany protect property rights in various ways. This article will examine constitutional limitations on legislative regulation of economic activity in both countries. In Part I, we will show how the Supreme Court of the United States has remained steadfast in its use of the Constitution to protect property rights. Whenever the usefulness of one clause in the Constitution waned, the Court found another clause to use in its place. The degree of scrutiny of legislative action has diminished over the years, but the Court has always maintained some level of property rights protection. Part II will examine the extent of protection afforded by the takings clause of the fifth and fourteenth amendments, the constitutional provision currently used to limit economic regulation. After examining in Part III the constitutional protection of property rights in Germany, we will conclude by comparing

[1]We are well aware that the words and formalism of a constitution will do little to accomplish these goals if the citizens lack respect for constitutional principles and the country lacks structures to enforce constitutional rights. As Judge Learned Hand wrote, ALiberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it.@ L. Hand, AThe Spirit of Liberty,@ quoted in 206 F.2d at 226, n.29.

the two constitutional doctrines and considering whether we can draw lessons from each country=s practice that would be helpful to that of the other.

I. A Brief History of Constitutional Property Rights

Protection in the United States

At the time of the drafting of the United States Constitution, both Lockean liberalism and republicanism were competing political theories. Although the two theories conflicted on many issues, both gave great importance to property rights. It is not surprising that many different parts of the Constitution protect property rights. The Framers were wealthy men who wanted to spur economic growth, of which they would be part. They wrote the Constitution to correct economic problems that had persisted under the Articles of Confederation, fearing commercial disintegration from state laws that compromised the payment of private debt, by allowing payment in paper currencies or commodities. Shays's Rebellion figured prominently in the Framers' concern, because many were alarmed that it marked the beginning of a fearful trend. The Constitution was, in part, a response to the economic problems of the day.

The Supreme Court has always interpreted the Constitution to provide some protection of property rights from government regulation. In the early days of the country, the Court used the contract clause to check state economic regulation. Chief Justice John Marshall made that clause "a mighty instrument for the protection of the rights of private property."[2] In the best known case of that era, *Dartmouth College v. Woodward*, the Marshall Court determined that a corporate charter was a contract protected by the clause. This meant that a state could not regulate a corporation in any way that would be inconsistent with the provisions of the corporate charter.

Beginning with the Taney Court, the Supreme Court began to loosen constraints on the states, and the states themselves began to draft corporate charters which expressly reserved rights for future state regulation. As the importance of the contract clause began to wane, economic substantive due process began to rise in importance. Beginning in at least the *Dred Scott* case, on the eve of the Civil War, the Supreme Court began to use the notion of due process (contained in the fifth amendment to the Constitution) as a way to deal with economic matters. By 1886, when the Court decided the *Railroad Commission Cases*,[3] it was expressing the view that excessive rate regulation amounted to "a taking of private property for public use without just compensation, or without due process of law." The series of nineteenth century railroad rate regulation decisions by the Supreme Court played an important role in the development of economic substantive due process, although the cases also contained the seeds of the regulatory takings doctrine. The takings clause lay dormant for decades while economic substantive due process grew in importance during the early twentieth century.

The Supreme Court interpreted the due process clause as requiring that legislation be directed at a Alegitimate governmental objective@ and that the legislation be a Arational means@ to accomplish that objective. This Ameans/ends@ test gave the courts considerable discretion in reviewing the constitutionality of economic legislation. By the time of the New Deal, the Supreme Court had overturned a number of important, popular economic reforms, such as a minimum-wage law and a limitation on working hours of bakers (for health purposes). Facing a serious threat to his New Deal reforms, President Roosevelt contemplated enlarging the size of

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[2]B.F. Wright, The Contract Clause of the Constitution 28 (1938).

[3]115 U.S. 307, 331 (1886).

the Supreme Court to be sure that he would have majority support on the Court for his reforms. Averting a constitutional crisis, the Supreme Court began to determine that economic reform legislation satisfied the due process clause. Within a few years (and after changes in the composition of the Court), the Supreme Court abandoned the use of due process to judge the constitutionality of economic regulation. The Court did not alter the means/ends test of due process. Rather it decided to defer to the legislature=s determination that the objectives of a statute were legitimate and the means rational. Although the Court has continued to use due process as a way to judge the constitutionality of statutes that limit personal rights, such as abortion legislation, the Supreme Court and the other federal courts have not found any economic legislation to violate the due process clause since the time of the New Deal. Many commentators have criticized the Court for its abdication of economic review, but the Court=s current position is a consequence of what nearly everyone views as the excessive interference by the Supreme Court with economic reform in the first third of the last century.

Before the Supreme Court recanted from its use of the due process clause, it had already laid the foundation for another constitutional limitation on government regulation. In *Pennsylvania Coal Co. v. Mahon*, decided in 1922, the Court held that excessive economic regulation would be the equivalent of the confiscation of property and consequently violate the Atakings@ clause of the fifth amendment that prohibits the taking of property without the payment of just compensation. Unlike the due process clause, the takings clause cannot be used to prevent regulation. Rather, excessive regulation triggers the compensation requirement. To the extent that a government refuses to open its coffers to pay for the effects of excessive

regulation, the practical effect of the two clauses will be the same because the government will withdraw the challenged regulation.

The Supreme Court has never said that one constitutional clause has replaced another as a check on government regulation. But as one clause fell in prominence another one always came forward. That was true with economic substantive due process following the demise of the contract clause and with the takings clause following the demise of economic due process. We believe that the Supreme Court is sensitive to the need for some constitutional check on economic regulation. When the prevalent clause has become ineffective, the Court has found another clause to serve that purpose. There are significant differences between each of the three clauses, so one clause has never wholly replaced another, but they all serve the same general purpose. The contract clause diminished in importance because regulation comes in many forms besides state corporate charters. Economic substantive due process died because the doctrine was abused in the early part of this century. The cause of the demise of one clause is not important; what is important is that the Court was able to find another part of the Constitution as a vehicle for parties to litigate whether economic regulation is excessive. We also suspect that part of the birth of a new clause stems from litigation strategy. When lawyers sue to protect property rights, they will search for laws that will support their cause. It made no sense to challenge economic regulation after the Supreme Court decided *Nebbia v. New York*[4] in 1934, but *Pennsylvania Coal Co.* was a 1922 case setting out a new strategy. Since the courts do protect property rights, some of the new strategy must have been successful, which then

[4]291 U.S. 502 (1934). Even if there was a basis for an economic substantive due process argument after *Nebbia*, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) made it clear that the doctrine no longer had any chance of supporting a plaintiff's case.

encouraged more litigation under that new constitutional clause. In this manner, we think there is a common thread running through the contract clause, economic substantive due process and the takings clause that demonstrates a continued commitment to use the Constitution to protect property rights by constraining government regulation.

II. The Takings Clause

A. *Creation and Gradual Expansion*

The takings clause of the fifth amendment has its roots in the Magna Carta.[5] Similar clauses existed in the Massachusetts and Vermont constitutions and in the Northwest Ordinance prior to the adoption of the fifth amendment.[6] Scholars are not certain, however, about the reasons for the inclusion of the takings clause in the fifth amendment. The state conventions considering ratification of the constitution proposed every part of the Bill of Rights except the takings clause.[7] James Madison added the takings clause when he drafted the proposed Bill of Rights for Congress. Although Madison left no explanation of his decision, some believe that Madison was concerned that the apparatus of the federal government could be used by a majoritarian government to confiscate the property of landowners.[8] Others believe that the clause was written in response to the practice of impressing supplies for the army during the Revolutionary

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[5]"No free man shall be ... dispossessed ... except by the legal judgment of his peers or by the law of the land." Magna Carta art. 39; see William Treanor, "The Original Understanding of the Takings Clause and the Political Process," 95 Colum. L. Rev. 782, 787 (1995).

[6]William Treanor, *supra*, at 825.

[7]See Edward Dumbauld, The Bill of Rights and What It Means Today 161-63 (1957); William Treanor, *supra*, at 791.

[8]*E.g.*, William Treanor, *supra*, at 847-55.

War.[9] In addition, some colonial governments had used the power of eminent domain to take title to land for roads and other public projects without the payment of any compensation to the owners.[10] This was consistent with republican political theory, since all citizens were expected to support the common good as the need arose. Regardless of the sources of the takings clause, it is undisputed that the clause was only an eminent domain provision dealing with the taking of title to or possession of property. That understanding lasted nearly a century, until the Supreme Court ruled in *Pumpelly v. Green Bay Co.*[11] in 1871 that a "taking" occurred when a farmer's fields were permanently inundated as a result of a new dam on a nearby river.

While the federal courts confined the fifth amendment to eminent domain, state courts were interpreting state constitutions to require compensation for a broader range of government activities. During the antebellum period, nearly all the original states and all the new states adopted takings clauses in their constitutions.[12] Using those state constitutions, as well as principles of natural law, state courts held compensable an increasing variety of governmental actions. These included the destruction of water rights and sources, the destruction of rights of access to roads (frequently resulting from the construction of railroad beds or from raising the grade of streets), and the need to build additional fencing for livestock as a consequence of the

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[9]William Treanor, *supra*, at 791-92 (quoting St. George Tucker, the editor of an 1803 edition of Blackstone's Commentaries); see Respublica v. Sparkhawk, 1 U.S. (1 Dall.) 357, 363 (Pa. 1788) (upholding the impressment of provisions).

[10]William Treanor, *supra*, at 787-88.

[11]80 U.S. (13 Wall.) 166 (1871).

[12]The Carolinas were the only exceptions. See Kris Kobach, The Origins of Regulatory Takings: Setting the Record Straight 23 (unpublished manuscript).

construction of new roads.[13] These state court decisions were expanding the meaning of a government taking, but they all involved tangible, physical property. The great expansion of the taking concept in the nineteenth century came in the Supreme Court when it ruled in the *Railroad Commission Cases* in 1886 that a loss of profits, an intangible property right, could result in an unconstitutional taking.[14] This ruling dramatically changed the conception of the takings clause and laid the foundation for a new interpretation of the takings clause: not only did it govern eminent domain, it also constrained government regulation.

In 1922, Justice Holmes wrote a characteristically pithy opinion in *Pennsylvania Coal Co. v. Mahon*[15] that was to become the foundation of the modern regulatory taking doctrine. As he put it, an otherwise valid exercise of governmental regulation becomes unconstitutional under the takings clause if it "goes too far." Since then, hundreds of cases, and hundreds of scholars, have grappled with the question of when does regulation go too far.[16]

B. *The Modern Regulatory Takings Doctrine*

The Supreme Court has identified a number of different factors that are relevant to the determination of whether a taking has occurred. Two related factors are especially important. The issue at the heart of the takings clause is whether we can fairly ask people to bear a regulatory burden as part of their obligations as citizens of the United States. All citizens benefit in innumerable ways from our government and society. The converse is that society can expect

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[13]See generally *ibid.* *Cf.* William Treanor, *supra*, at 792-94.

[14]See John N. Drobak, From Turnpike to Nuclear Power: The Constitutional Limits on Utility Rate Regulation, 65 Boston U. Law Rev. 65, 71-77 (1985).

[15]260 U.S. 393 (1922).

[16]*E.g.*, Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain 114-15 (1985).

everyone to contribute in various ways to the common good. As the Supreme Court has said, the question is whether the burden imposed by a regulation can be "borne to secure 'the advantage of living and doing business in a civilized community.'"[17] This notion, part of pre-Revolutionary republican political theory, is important because it puts the focus on the underlying question, but it still leaves considerable uncertainty in the application of the takings clause.

A related consideration arises from the belief that the takings clause was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[18] Wide-spread obligations are less apt to qualify as takings because many share the burdens, or, to put it another way, wide-spread obligations are often the things we expect citizens to bear. Nothing could be more of a taking than taxation, but everyone must pay taxes. Tax programs do not "single out" a few to bear public burden: The more narrowly targeted a governmental program, the more likely a few will be singled out, making it more likely that a taking will result. This principle also has a political economy dimension. The smaller the group that bears the burden of a government program, the less likely the group will have much influence in the legislature.

As Justice Jackson wrote about the equal protection clause:

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would

[17]Andrus v. Allard, 444 U.S. 51, 67 (1979), quoting the dissent by Justice Brandeis in *Pennsylvania Coal*, 260 U.S. at 422.

[18]Armstrong v. United States, 364 U.S. 40, 49 (1960).

> impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.[19]

The singling out principle, like the equal protection clause, works against those arbitrary actions.

The Supreme Court has also focused on whether the regulation interferes with "reasonable investment-back expectations."[20] A person's reasonable expectation is relevant to the compensation issue. If someone buys beachfront property knowing that a state legislature is considering a ban on beachfront development, the buyer is taking a risk that the ban may pass.[21] The same can be said for someone who opens a brewery knowing that prohibition may be in the wings.[22] In *Penn Central Transportation Co. v. New York City,* the Supreme Court used this notion to disallow compensation when New York refused to allow the construction of a large office building over Grand Central Station in order to preserve the look of the station. Since the building was built to be a railroad station and the station was still generating a fair return, the Court concluded that the prohibition on construction did not interfere with the owner's primary

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[19] Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112-13 (1948) (Jackson, J., concurring). *See also* Pennell v. City of San Jose, 485 U.S. 1, 22 (1988) (Scalia, J. concurring and dissenting) (rent control is attractive politically because it permits a town to accomplish social goals "off budget" with immunity for ordinary political processes).

[20] Penn Central Transportation Co. v. New York City, 438 U.S. 104, 136 (1978). *See generally* Daniel R. Mandelker, Investment-Backed Expectations in Takings Law, 27 Urban Lawyer 215 (1995).

[21] *Cf.* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

[22] *Cf.* Mugler v. Kansas, 123 U.S. 623 (1887).

expectations and hence no compensation was required. This aspect of the takings doctrine gives greater protection to the status quo than to plans for development or new uses of property..

The Court has also denied compensation when the challenged program provides benefits as well as burdens to the same class of people. Zoning is a good example of this, because property owners are just as apt to be benefitted as well as burdened. The Court has also stated that the extent of financial harm caused by a law is relevant to the takings issue. Although the Supreme Court has identified this variety of factors as relevant to the takings issue, the cases usually end up turning on a balance of the public benefit and the private harm.[23] In the vast majority of the cases, it appears that the Court will not award compensation if the justification for the law is great enough even if all the other factors point to compensation. To someone who cares about Pareto optimality or whose sense of justice requires winners to compensate losers, this makes no sense. The more gain to the public, the more money available to compensate the losers. In another sense, however, the balancing test is appropriate. If we assume that the injured party will not be compensated, we need to be certain that the public gain outweighs the private harm. If it does not, people will be needlessly harmed by the failure to compensate for the losses stemming from a program that brings little benefit to the public. Viewed this way, the balance of public benefit and private harm is like a typical cost-benefit analysis.

[Insert recent cases dealing with denial of Aall economic value,@ apportionment of parcel, and moratoria. *E.g.*, Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, ___ U.S. ___ (2002); Palazzolo v. Rhode Island, 533 U.S. 606 (2001).]

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[23]See, e.g., Frank Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation," 80 Harv. L. Rev. 1165, 1193-96, 1234-35 (1967). Dolan v. City of Tegaid, 114 S. Ct. 2309 (1994); Andrus v. Allard, 444 U.S. at 51.

C. *Miller v. Schoene*

There are a number of subtle and important aspects of the takings doctrine that are hidden by a simple recitation of the factors that make up the doctrine. The classic -- and controversial -- case of *Miller v. Schoene*[24] illustrates these extremely well. Julia Miller was a widow who owned land in the Shenandoah Valley in Virginia that contained a good number of old, ornamental red cedar trees. The most beautiful were the 200 trees that lined the drive from the highway to her house.[25] In 1914, Virginia enacted a law to protect apple orchards from cedar rust fungus that was devastating the apple industry. The fungus originated in spores produced by cedar trees which were carried by the wind to apple trees that were as far away as two miles or more.[26] Although the rust quickly destroys the fruit and within a few years the apple trees, it does no harm to the cedar trees.[27] The disease spreads rapidly through a region because the apple trees infect healthy cedar trees in the region, and the cycle continues.[28] At the time, there was no way to stop the disease other than destroying the infected cedar trees near the orchards. The Cedar Rust Act empowered the state entomologist to do that. The Act limited compensation for the loss of cedar trees to the cut lumber and the cost of cutting, which was ultimately passed on to the orchards in the area.[29] When the state entomologist ordered Miller to cut down her trees

[24]276 U.S. 272 (1928).

[25]Brief for Appellant, Miller v. Schoene, 5; Brief for Respondent, Miller v. Schoene, 6.

[26]276 U.S. at 278-79; Kelleher v. Schoene, 14 F.2d 341, 347 (D.C. W.D. Va. 1926).

[27]Brief for Respondent, Miller v. Schoene, 3-4.

[28]276 U.S. at 278.

[29]The language of the Act left some room for another construction, but the Virginia courts interpreted the statute to limit the amount of compensation to the costs of cutting and removal, in addition to the lumber. See Miller

because they were the source of cedar rust for neighboring orchards, she refused and the entomologist sued for a court order under the Cedar Rust Act.

The Supreme Court recognized that the state had no choice but to choose "between the preservation of one class of property and that of the other whenever both existed in dangerous proximity."[30] If it had not acted, apple trees would have been destroyed; by its action cedar trees were destroyed. The Supreme Court concluded that it was constitutional for the state to preserve the property that was much more valuable to the state and its economy and to destroy the other, even without compensation to Miller.

This case has been criticized on a number of different grounds. Richard Epstein, for example, is concerned that someone who did no wrong must suffer at the hands of the state:

> The real issue turns on the scope of the police power, which in turn depends upon whether there was sufficient justification for cutting down the trees. This last inquiry made it imperative for the court to decide whether the claimant's cedar trees were in fact a nuisance to the apple trees.... Physical invasion seems difficult to establish, given that the fungus moved from the cedars to the apple trees either by their own motion or by the forces of nature and not by any act of the defendant, unless it could be said that the cedars were planted as a lure or a trap for fungus. If forced to decide the particular question -- did the defendant's cedars constitute a nuisance to apple trees in the vicinity? -- I should, with some caution, answer no.... In the absence of any wrong by the owners of the cedar trees, the decision not to compensate is nothing more than authorization to transfer property illicitly from one class of citizens to another, as the owner of the cedar trees is left with neither the thing nor its value, when he has done no wrong.[31]

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v. State Entomologist, 146 Va. 175, 192, 135 S.E. 813, 818 (1926), *aff'd* 276 U.S. 272 (1928); Tenth Report of the State Entomologist and Plant Pathologist of Virginia, 1914-15, at 21-29 (Opinion in *State Entomologist v. Glass*, Va. Cir. Ct.).

[30]276 U.S. at 272.

[31]Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain 114-15 (1985).

Epstein is correct that Miller did no wrong, but that conclusion alone cannot resolve the compensation issue. If it does, a great number of governmental actions long thought to be constitutional will become unconstitutional because they impose financial harm on innocent people. The exercise of eminent domain harms tens, maybe hundreds, of thousands of people each year because the "just compensation" paid is based on the fair market value of the parcel being condemned. That measure undercompensates people because their choosing not to sell voluntarily shows that they value the property at more than fair market value. Subjective valuation would raise problems of proof and encourage opportunistic behavior by property owners who would then try to inflate their subjective valuation. Fair market value is an efficient rule, but it causes financial harm to many people who have done no wrong. Likewise, the brewery owner in *Mugler v. Kansas*[32] who lost all his stock after Kansas passed a prohibition law did no wrong. He was producing a product that was legal when he began operations. Yet the Supreme Court did not require compensation. The same could be said about factories that pollute legally for years and then must install costly antipollution equipment to meet new laws, or about nuclear power plants that must be retrofitted to meet new safety standards. The list of people who do no wrong but must nonetheless suffer financial consequences is nearly endless. These are people we ask to contribute for the good of society, adding an additional price to the cost of their citizenship in our country.

One could also object to the Supreme Court's decision in *Miller v. Schoene* on political economy grounds.[33] Cedar tree owners had little voice in the legislative process that led to the

[32]123 U.S. 623 (1887).

[33]*Cf.* James M. Buchanan, Politics, Property, and the Law: An Alternative Interpretation of Miller et al. v.

passage of the Cedar Rust Act, while the apple growers were organized and had powerful state senators representing them in the legislature.[34] The growers' representatives introduced the bills which passed quickly and virtually unanimously. The votes were 88 to 0 in the Virginia House of Delegates and 23 to 3 in the Senate.[35] If one of the purposes of the takings clause is to check majoritarian decisions that impose on those at a disadvantage in the legislative process, *Miller v. Schoene* may appear to be an appropriate case for that approach. Both apple growers and cedar tree owners were large in number and broadly dispersed throughout parts of the state. This raises collective action problems for both groups, except the growers were already organized and had representatives at work for their interest in the legislature. Apple growing was big business in Virginia, with more than $20 million invested in orchards making Virginia the third largest apple growing state in the country at that time.[36] Notwithstanding the effectiveness of the apple lobby, this case is not one in which the politically disadvantaged need to be protected. First, land owners (any of whom could own cedar trees) generally do not need help in the political process; we do not usually think of them as politically powerless. Second, it is impossible to believe that anything would have turned out differently if the cedar tree owners had had a role in the political process. Although there were tens of thousands of people owning cedar trees in Virginia, very few cared about losing them.[37] Most people considered them to be a weed or scrub tree. With

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Schoene, 15 J. Law & Econ. 439 (1979); Warren J. Samuels, Inter-relations Between Legal and Economic Processes, 14 J. Law & Econ. 435 (1978).

[34]Interview with Don Kludy, retired Virginia Entomologist, June 24, 1993.

[35]Journals of the Virginia House and Senate, for Wednesday, January 14, 1914.

[36]Kelleher v. Schoene, 14 F.2d at 348.

[37]See, e.g., Eleventh Report of the State Entomologist and Plant Pathologist of Virginia, 1916-17, at 8-9;

such small opposition, the law surely would have passed as it did, without specifying compensation for the destroyed trees. The Cedar Rust Law was not effective in any county until it was adopted by the county supervisors. By the time the measure was taken to the counties, some cedar tree owners were well-aware of the scope of the law, so they tried to prevent implementation at the county level. The cedar tree owners were successful in only a couple districts, which are subsections of counties.[38]

One could also say that *Miller v. Schoene* is unfair. First, the growers received a savings in production costs when the state did not require them to internalize the complete cost of eradicating the cedar rust. Rather, the owners of the cedar trees were forced to bear some of those costs. In addition, Miller would never have expected that her trees would be sacrificed for the sake of apple trees. Thus, the Cedar Rust Act interfered with her reasonable expectations about her ownership of the cedars.

Those arguments overlook important counterarguments. First, not all externalities get internalized. Nor should they be because doing so can be costly. Moreover, if one wants to be true to this principle, positive externalities must be internalized as well as negative ones. That complete internalization is impossible. Second, it is not so clear what expectations would be reasonable. Most cedar owners willingly cut down their trees to help the growers. Many felt that good neighbors willingly took that action because there was a near epidemic in the apple industry. Further, the destruction of trees had been a common method to fight plant disease. Until red cedar rust arose, all the trees that had been destroyed had been diseased themselves.

Thirteenth Report, 1920-21, at 21.

[38]See, e.g., Eleventh Report, at 8; Twelfth Report, at 15; Thirteenth Report, at 20-21.

Cedar rust was unusual because it did not harm the cedars. It is hard to know what is the better view of reasonable expectations: since it was common to fight plant disease by tree cutting, should we say that Miller should have recognized the risk that her trees would be destroyed someday, or should we say that Miller should not have anticipated the risk that her healthy trees might have to be destroyed? The expectations issue is hard to decide.

In some ways the singling out aspect of the takings doctrine makes *Miller v. Schoene* an appropriate case for compensation. Very few people had cedar trees that beautified their property. Most considered the tree to have little value. Since only Miller and a few others suffered greatly from the law, it is fair to say they are singled out for a disproportionate share of the cost of a program with public benefits. In that sense, Miller and the few others like her deserve compensation. In another way, however, the Red Cedar Act did not single anyone out. It was a broad-based program with huge impact throughout Virginia. Between 1916 and 1925, more than 200,080 thousand acres were cleared of cedar trees. More than 5,000 farmers and other land owners had their trees cut. Unlike most cedar tree owners, Miller suffered because her trees lined the drive from the highway to her house. That gave them special value. One other cedar owner who sued objected to the cutting because the trees made a nice grove that he used for picnics. In some ways, the greater harm to Miller and the few like her results from their own subjective evaluation of the importance of the cedar trees. As with the eminent domain evaluation problem, one could conclude that subjective evaluation should not be taken into account in making the compensation decision. If that is so, Miller would not have been singled out and she surely does not deserve compensation for her lost trees. Our view, however, is to err

on the side of compensation for those who are situated quite differently than most. We would say that Miller was singled out, although the question is close and debatable.

Awarding compensation to someone like Miller could lead to strategic behavior in similar cases by those who see a chance to make more money at the expense of the state.[39] Sometimes strategic behavior can be handled as an issue of proof. No one doubted that Miller found special value in her cedar trees. The testimony by experts on her behalf was that the trees increased the fair market value of her property by $5,000 to $6,000 dollars, compared to the $100 dollars she was given for the cost of removing the trees. The use of the fair market value standard, rather than an attempt at subjective valuation, also minimizes the effects of strategic behavior. In another case challenging the Cedar Rust Act, the property owner was unable to prove any damages. He valued highly the grove he used for picnics, but the experts who testified for the state concluded that the fair market value of his property increased after the trees were cut, because the area could now be used for farming.[40] The use of the fair market value test may have been unfair to him, just as it is unfair to those who lose their property by eminent domain, but that test does minimize the risk of strategic behavior.

III. The Constitutional Protection of Property Rights in Germany

The AGrundrechte,@ the basic or fundamental rights, are listed in the first part of the AGrundgesetz,@ the German Constitution. The protection of property is part of the Grundrechte, governed by GRUNDGESETZ art. 14. Unlike the United States Constitution, the Grundgesetz

[39]Eleventh Report of the State Entomologist and Plant Pathologist of Virginia, 1916-17, at 9 (Most opponents selfishly seek reimbursement for themselves).

[40]Virginia State Entomologist v. Glass, in Tenth Report of the State Entomoligist and Plant Pathologist of Virigina, 1914-15, at 17.

expressly recognizes the social obligations that come with property ownership. For example, GRUNDGESETZ art. 14 (II) states that AProperty imposes duties. Its use should at the same time serve the public weal." The section on eminent domain, GRUNDGESETZ art. 14 (III), differs from the takings clause in the United States by specifying that the requisite compensation Ais to be fixed under just balancing of the interests of the public and of the participants."

Most of the constitutions of the Bundesländer, the German states, include the protection of property.[41] Some refer to the articles of the Grundgesetz[42] or repeat art. 14;[43] others differ slightly.[44] Some of the constitutions seem to signal less protection than that given in the Grundgesetz. Whereas the Grundgesetz does not differ between political and social and economic rights[45] some of the constitutions of the states do not mention the protection of property in the list of other fundamental rights but as an economic right[46] or as part of the section of the economic and social system.[47] Two state constitutions stress the subordination of the

[41]The only Bundeslander whose constitution does not include a provision protection property are Hamburg, Lower Saxony and Schleswig-Holstein.

[42]Constitution of Baden-Wurttemberg art. 2 (1), Constitution of Mecklenburg-Western Pomerania art. 5 (III), Constitution of North Rhine-Westphalia art. 4 (I).

[43]Constitution of Saxony art. 31, 32, Constitution of Saxony-Anhalt art. 18, Constitution of Thuringia art. 34.

[44]Constitution of Bavaria art. 103, Constitution of Berlin art. 15, Constitution of the Saarland art. 18.

[45]Unlike *e.g.* the two International Covenants on human rights which separate between civil and political rights and economic, social and cultural rights.

[46]Constitution of Brandenburg art. 41, Constitution of Hesse art. 45, Constitution of Thuringia art. 34.

[47]Constitution of Rhineland-Palatinate art. 60.

protection of property under the public weal;[48] one postulates the state's efforts for a broad distribution of property.[49] The constitutions of the Bundesländer are seldom used, however.

The current constitutional protection of property rights has its roots in earlier constitutions. Predecessors of GRUNDGESETZ art. 14 from the 19th century are § 164 I of the Paulskirchenverfassung [Constitution of the Church of Paul] of March 28th, 1849 and art. 9 of the Preussische Verfassung [Prussian Constitution] of January 31st, 1850.[50] Under the Weimarer Verfassung (Constitution of the Weimarer Reich) property was protected in art. 153.[51] Although the express provisions of the Weimarer Verfassung appear to weaken the protection of property rights, the courts of the Weimarer Reich did not introduce a change but continued to protect property from governmental intrusion based on WEIMARER VERFASSUNG art. 153. Under the National Socialists WEIMARER VERFASSUNG art. 153 was repealed and the system of property rights changed based on the national socialistic ideology.

The Federal Constitutional Court (the ABundesverfassungsgericht@) has categorized economic regulation in a manner very similar to the United States Supreme Court. In explaining

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[48]Constitution of Bremen art. 15, Constitution of Hesse art. 45.

[49]Constitution of Brandenburg art. 41 (III).

[50]Hans-Juergen PAPIER, *in*, GRUNDGESETZ KOMMENTAR [German Constitution Commentary] Vol. 2, art. 14 para. 19 (Theodor Maunz, Guenther Duering et al. eds., 36th supplement, October 1999); Joachim Wieland, *in* GRUNDGESETZ KOMMENTAR [German Constitution Commentary] art. 14 para. 2 (Horst Dreier ed., 1996). PAULSKIRCHENVERFASSUNG ' 164 read: AProperty is inviolable. Expropriation can only be made based on the law and with just compensation.A

[51]WEIMARER VERFASSUNG art. 153:

> AProperty is guaranteed by the constitution. Its content and limits result from the law.
>
> Expropriation can only be made for the public weal and on a legal basis. It occurs against reasonable compensation unless a law of the Reich determines otherwise. As for the amount of compensation the course of law to the civil courts has to be held open unless a law of the Reich determines otherwise. [...]
>
> Property imposes duties. Its use shall at the same time be service for the common good.A

the takings law in the United States, it is common to say that the legislature=s valid use of the Apolice power@ to protect health, safety and welfare does not entail compensation, while invalid use qualifies as a taking and requires compensation. (Of course, this type of classification does not explain how one is to distinguish a valid use of the police power from an invalid one.) In Germany, the constitutional limits for government regulation based on GRUNDGESETZ art. 14 depend on whether the regulation is qualified as a determination of the contents and limits of property (akin to the use of the police power) or a case of expropriation (a taking). The former is governed by GRUNDGESETZ art. 14 (I), which guarantees property rights but leaves considerable control to the legislature; the latter by GRUNDGESETZ art. 14 (III), which permits and regulates eminent domain. The Federal Constitutional Court has explained that a law is a determination of content and limits of property if it Adetermines generally and abstractly the rights and duties of the owners."[52] Expropriation is Athe governmental taking of the property of a single person. According to its purpose it is aimed at the entire or partial withdrawal of concrete subjective legal positions."[53] In other words, an act is only considered an expropriation if it is specific, aimed at the individual and a (forced) conveyance of title.[54] Thus, unlike in the United States,

[52]BVerfGE 24, 367 (404f) (1969).

[53]Groundwater Case BVerfGE 58, 300 (330) (1981) (The name of the case is taken from DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY (1997). In Germany, the case is referred to as the wet gravel production case.) In that case the Federal Constitutional Court qualified regulations establishing a permit requirement for the use of water as public law defining the content of property (rights). Another example for public law defining the content of property (rights) is zoning law. BVerfGE 35, 263 (276) (1973). See also BVerfGE 72, 66 (76) (1986); BODO PIEROTH AND BERNHARD SCHLINK, GRUNDRESHTE STAATSRECHT II [Fundamental Rights, State Constitutional Law II] (14th ed. 1998) para. 921.

[54]BVerfGE 52, 1 (27) (1979). Rarely an expropriation can occur without a forced conveyance of title, such as with dispossession.

excessive regulation is not governed by the takings provision in the Grundgesetz.[55] Most of the regulations interfering with property are qualified as determinations of the contents and limits of property and governed by GRUNDGESETZ art. 14(I). Nonetheless, the constitutional limits on economic regulation in Germany turn out to be quite similar to those in the United States as a result of the German Aprinciple of proportionality.@

The Federal Constitutional Court has defined the obligations of a legislator when considering proposed legislation that affects property rights: AFulfilling his constitutional task to determine the content and limits of property, the legislator has to take into account the constitutional acknowledgment of private property by GRUNDGESETZ art. 14(I)[1] and the social duty of GRUNDGESETZ art. 14 (II) and to keep itself in accordance with all the provisions of the Grundgesetz, he is especially bound by the constitutional principle of proportionality and the principle of equality.@[56] Thus, the limits for government regulation that is qualified as the determination of the contents and limits of property are the principle of proportionality and the principle of equality as set forth in GRUNDGESETZ art. 3(I).

The principle of proportionality has become a general principle which sets limits for all government action in the legislative, executive and judicial process, not only in the context of GRUNDGESETZ art.14.[57] In applying the principle of proportionality the Federal Constitutional

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[55]PIEROTH & SCHLINK, *id*, Rn 923.

[56]BVerfGE 31, 229 (240) (1971); BVerfGE 34, 139 (146) (1972); BVerfGE 52, 1 (27) (1979); BVerfGE 70, 191 (299) (1985).

[57]Its constitutional background is not entirely clear. Neither the Federal Constitutional Court nor all the scholars clearly separate the legal sources of the principle of proportionality. One source mentioned by the Federal Constitutional Court is the rule of law principle (ARechtsstaatsprinzipA). (BVerfGE 17, 306 (313f) (1964) (dealing with a law establishing a permit requirement for the transportation of people and its constitutionality in the context of

Court first inquires whether the legislature pursued a legitimate goal with the law. Second, the Court asks whether the means, that is the legal regulation, are proportional in relation to the pursued goal. To meet the standards of the principle of proportionality the means have to be suitable, necessary and reasonable or proportional in a narrow sense[58] As the Federal Constitutional Court puts it, the law is proportional "if the chosen methods are suitable and necessary to reach the pursued goal, and if, according to a balancing test between the heaviness of interference and the weight of justifying reasons, the limits of reasonableness are maintained."[59] The chosen means are suitable if the "aspired consequences can be promoted with its help."[60] They are necessary if the legislator could not have chosen equally effective but less

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GRUNDGESETZ art. 2); 23, 127 (133) (1968) (dealing with the constitutionality of criminal sanctions against men who refuse to do the civil service as the supplement for obligational military service); 38, 348 (368) (1975) (content described below); 48, 102 (116) (dealing with the constitutionality of tax obligations in the context of GRUNDGESETZ art. 2); 57, 250 (270) (1981) (dealing with the constitutionality of criminal law provisions and criminal procedure provisions.) In one frequently cited decision it has added that the principle of proportionality results from the nature of the Grundrechte itself. (BVerfGE 19, 342 (348f) (1965) (dealing with the constitutionality of criminal procedure provisions in the context of GRUNDGESETZ art. 2),FRIEDRICH E. SCHLAPP , *in*, GRUNDGESETZ-KOMMENTAR [German Constitution Commentary] (Ingo von Muench ed., 4th ed., 1992) art. 20 para 27.) The Grundrechte express the general entitlement to freedom of the citizen against the government. This freedom may only be limited if it is absolutely necessary to protect public interests. (BVerfGE 17, 306 (313ff) (1964); EBERHARD GRABITZ, *Der Grundsatz der Verhaeltnismaessigkeit in der Rechtsprechung des Bundesverfassungsgerichts, in* ARCHIV DES OEFFENTLICHEN RECHTS (AoeR) Archives of Public Law] 96 (1973), 585, 586.) More precisely than the nature of the basic laws as a basis for the principle of proportionality is GRUNDGESETZ art. 1 (III), according to which the Grundrechte are binding for the legislature, the executive and the judiciary as valid law. (CHRISTIAN STARCK, *in* DAS BONNER GRUNDGESETZ (Hermann von Mangoldt, Friedrich Klein & Christian Starck eds., 4th ed. 1999) art. 1 para. 249, PIEROTH & SCHLINK, *id.*, Rn 273.) Other sources suggested by scholars but never mentioned by the Federal Constitutional Court are GRUNDGESETZ art. 19 (II), (Guenter Duerig, *Der Grundrechtssatz von der Menschenwuerde* [The Basic Legal Principle of Human Dignity], AOER 81 (1956), 117 (146f) which provides that the essence (AWesensgehaltA) of a Grundrecht may not be infringed on, 63 and the equality principle in GRUNDGESETZ art. 3. (64 Peter Wittig, *id.*, 822.)

[58]CHRISTIAN STARCK, *id.*, art. 1 para. 243. The term Averhaeltnismaessig@ (proportional) is used in two instances. It is used for the general principle and for one of the criterias which are part of the proportionality principle. In that case the latter is referred to as Aproportional in the narrow sense.@

[59]*E.g.*, BVerfGE 95, 173 (183) (1997) (dealing with a federal decree on labeling of cigarette packages and maximum amount of tar in cigarettes challenged on the grounds of GRUNDGESETZ art. 12.

[60]BVerfGE 30, 292 (316) (1971) (dealing with a law on obligational minimum reserves of oil products

infringing means.[61] The last criteria of proportionality in a narrow sense has been criticized by various authors as unprecise, arbitrary and substituting the court's substantial evaluation of the issues for the legislature's.[62] To limit this problem the Court takes a negative approach in applying the test. It does not remake the legislative decision but inquires whether the regulation is not unreasonable and is not excessive.[63] In a way, this application of the proportionality principle is very much like what a balanced use of substantive due process to review economic legislation in the United States would be.

In its application of the proportionality principle to economic regulation governed by GRUNDGESETZ art. 14, the Federal Constitutional Court has focused on a number of factors analogous to the concerns examined in the United States taking cases. The more others depend on someone else's property, the greater justification for regulation of the property. Cases involving rent control and housing regulations are examples of this.

The Court has stated that the social importance of property and the meaning of housing for a person could lead to a constitutional duty to protect tenants and that the legislature has broad flexibility in regulating the housing supply. Thus limitations on the termination of a lease were not considered a violation of the principle of proportionality. Similarly the court rejected a violation of GRUNDGESETZ art. 14 (I) in a case challenging a law that required administrative

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challenged on the grounds of GRUNDGESETZ art. 12).

[61]BVerfGE 30, 292 (316) (1971).

[62]BVerfGE 30, 292 (316) (1971).

[63]*E.g.*, PIEROTH & SCHLINK *id*., para. 293.

approval before a landlord could change the use of housing space into other forms of use.[64] After repeating the dialectic system of GRUNDGESETZ art. 14 (I) and (II) and the social importance of property others depend on, the Federal Constitutional Court stated that the factual prohibition to use housing space for other purposes is reasonable in the sense of GRUNDGESETZ art. 14 (I), especially as the landlord still received rent as profit.[65] According to the court, the use of property for maximum profit is not constitutionally protected, especially in a case of insufficient housing supply. (These results are very similar to the law in the United States concerning rent and price controls.)[66]

This reference to a landlord earning an adequate, but not maximum, return is identical to the approach courts in the United States take in takings challenges to rent control ordinances. Similarly, a regulation is less likely to be unconstitutional in the United States if it does not have great financial impact on the regulated person, under the "diminution of value" aspect of takings jurisprudence.

The Federal Constitutional Court did set limits based on GRUNDGESETZ art. 14 (I) [1] in the field of small garden law.[67] In BVerfGE 52, 1 the Federal Constitutional Court had to look at a

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[64]Art. 6 of the Mietrechtsverbesserungsgesetz [Act on the Improvement of law governing tenancy] of November 4th, 1971 (Bundesgesetzblatt (BGBl.) [Federal Law Gazette] I S. 1745) together with a decree issued by the Hessian government based on the Act. The petitioners who challenged the law owned a house a district of Frankfurt close to the train station. They had been fined after changing an apartment house into a house with rooms rented out by the day without asking for permission.

[65]Which is a relevant factor for the question of reasonableness, see above.

[66]See J. Drobak, AConstitutional Limits on Price and Rent Control: The Lessons of Utility Regulation, 64 Washington U. Quarterly 107 (1986).

[67]The idea to provide small gardens to compensate for urban living conditions came up in the Baugesetzbuch [Zoning Act] ' 9(1) No. 15.

combination of laws and regulations on the lease of small gardens.[68] These laws fixed the rent and greatly limited the right to terminate leases. The Federal Constitutional Court decided that the law governing the lease of small gardens was "not entirely reconcilable with" the constitution.[69] The Court concluded that the restriction on the right to terminate the lease and dispose of the property was not justified by the public weal. In reaching this decision, the court elaborated on the changing role of small gardens. During the depression and after World War II these gardens had been used for food supply, while at the time of the decision and today they are used for recreation. Even though there is a public interest to provide means of recreation, this public purpose was insufficient to justify the limitation of the owner's right of disposition. The court contrasted the situation to regulations designed to secure an adequate housing supply. After the BverfGE 52, 1 the law on small gardens was revised and again challenged by a dissatisfied landowner. The landowner challenged a provision of the new law that limited the rate of the lease to a maximum of twice the local rate for land used to grow fruits and vegetables.[70] In BVerfGE 87, 114 the Federal Constitutional Court decided that this limitation could not be reconciled with GRUNDGESETZ art. 14 (I) [1]. It stated that while the constitution could not prevent the legislature

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[68]Kuendigungsschutzverordnung [Decree on the Protection from [Lease] Termination] of December 15th, 1944 (RGBl. I S. 347) and Kleingartenaenderungsgesetz [Act on Change of [the law on] Small Gardens] of July 28th, 1969 (BGBl. I S. 1013) (both repealed 1983, now governed by the Bundeskleingartengesetz [Federal Small Garden Act] of February 28th, 1983 (BGBl. I S. 210)).

[69]I. a. in the context of GRUNDGESETZ art. 14 the court often does not declare a law unconstitutional and invalid which would be the usual consequence envisioned in Bundesverfassungsgerichtsgesetz [Act on the Federal Constitutional Court] ' 78 [1]. Instead, it only declares that a law is AunvereinbarA, meaning irreconcilable or incompatible, with the constitution. The law is not invalid but the legislator has to change it to Amake it compatibleA with the constitution. The court uses this type of decision if there are various possibilities to Amake the law compatibleA. The court does not want to interfere with the legislature. It therefore does not decide how a law should be corrected and limits its decision to a declaration of incompatibility (AUnvereinbarkeitserklaerungA).

[70]Bundeskleingartengesetz ' 5.

from regulating rents, the expected difference between the regulated rent and the market price was too great. The purpose to protect low-income leaseholders who could not otherwise afford a small garden could not justify a general rate limitation to this extent. This type of balancing the public need for the regulation against the harm to the regulated person is the same balancing approach taken under the taking law in the United States.

Two cases dealing with published works also illustrate this type of balancing analysis. The Hessian Act on Freedom and Law of the Press required publishers to give a copy of each published book to a public library.[71] The publisher was not entitled to compensation. The law was challenged by a publisher who mainly published collections of graphic arts and prints in small editions. The court declared the law unconstitutional in as much as it required every publisher to deposit a copy without compensation regardless of the special circumstances. The court repeated the formula on the dialectic function of property and the constitutional prohibition of excessive infringement on property. It acknowledged the legislative intent to give access to literary works to scientifically and culturally interested people as legitimate. Still, the production costs of the printed object had to be taken into account. According to the court, publishers like the petitioner take great economic risk to give public access to exclusive works and they should not carry the additional financial burden required by the law. Similarly, the Federal Constitutional Court held unconstitutional a law that permitted schools and churches to copy copyrighted publications without the need to pay royalties.[72]

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[71]Hessisches Gesetz über Freiheit und Recht der Presse [Hessian Act on Freedom and Law of the Press] of November 20t^{h}, 1958 (Hessisches Gesetz- und Verordnungsblatt (GVBl.) [Hessian law gazette] p. 183) ' 9.

[72]The Schoolbook Case, BVerFGE 31, 329.

The Groundwater-Case, BverfGE 58, 300, one of the best known regulatory decisions, dealt with the balance between environmental and economic interests. The federal legislature enacted a regulatory scheme for the use of groundwater.[73] The law required a user of groundwater to obtain a permit, even if the user is the owner of the land containing the groundwater. In the case, the petitioner used his land to mine sand and gravel. When he reached the area of groundwater, he applied for a permit, but the permit was denied because the gravel pit was in the protected area of a drinking water production plant. The petitioner unsuccessfully challenged the law. The Federal Constitutional Court explained that the legislature could establish a "public law use system" separate from the ownership of the land in order to secure a public water supply system. It also repeated that there is no constitutional protection of the most profitable type of use of property. The Court concluded that the law did not violate the principle of proportionality even when applied to the owner of the land containing the groundwater.[74]

IV. Similar Results from Different Constitutional Provisions

The similarity in the constitutional protection afforded property rights in the United States and in Germany is remarkable, especially in view of the differences in the terms of the applicable constitutional provisions. The Federal Constitutional Court in Germany has limited the provision dealing with eminent domain to instances of actual taking of title or possession of property, while in the United States, the Supreme Court has expanded the scope of the eminent domain provision to reach excessive regulation that too greatly undermines property values. The Federal

[73]Wasserhaushaltsgesetz [Act on Water System] of October 16th, 1976 '' 2ff.

[74]The court also rejected the claim that the owner of the gravel pit was a case of hardship requiring compensation during the transition of the new regulatory scheme.

Constitutional Court can limit the reach of the eminent domain provision because other provisions in article 14 of the Grundgesetz can be used to review regulation. On the other hand, history has foreclosed the use of the due process clause and the contract clause to review regulation in the United States. Consequently, the Supreme Court has had to use the only provision that could be made to work -- the takings clause. Nonetheless, the courts in the two countries apply the different provisions in similar fashions to get similar results.

[Insert comparison of cases to show similar analysis and outcome from both courts.]

Why is the constitutional protection of property in the United States and in Germany so similar even though the comparable language of the two constitutions is so different? There are a number of explanations. First, both countries share a long history of concern for property rights, both as a matter of individual liberty and as a matter of economic growth. This historical concern appears in both the intellectual thought of the United States and Germany[75] as well as in the legal treatment of property rights.[76] This similar history is not surprising since the political

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[75]The 1848 German Constitution explicitly protected the freedom of property from federal/state legislation although this document was not widely published or accepted despite its enactment into law. Koch, H.W. A Constitutional History of Germany. Longman Press, New York. 1984, p. 65. In addition, the Prussian Constitution of 1850 granted the protection of property. *Id*. p. 82.

[76]As for Germany, the Weimar Constitution written after the end of World War I protected property from appropriation (article 153), but failed to provide the same level of protection for personal rights. AThe constitutional articles themselves were superfluous, for they offered no protections to right beyond those already existing or which could be established by ordinary law. Toward the constitutional provisions on property rights, however, quite a different attitude was adopted.@ Golay, J.F. The Founding of the Federal Republic of Germany. University of Chicago Press, Chicago. 1958. P. 170-173.

After the World War II, Dr. Seebohm, a constitutional delegate, ensured that expropriation would not be allowed and property rights protected in the post-WWII constitution.

> AFollowing the historical development after the so-called full compensation provision embodied in the Prussian Expropriates Law of 1874, the concept of Aadequate@ compensation was introduced in the Weimar constitution. This concept received juridical acceptance and, in particular, was embodied in judgments of the Reich supreme court. It was also used in all the legislation adopted in the interval, and appears in the constitution of Bavaria and Baden. It is of decisive importance for us that the concept of

and legal theory of the United States grew out of the European tradition.[77] Both the United States and Germany can trace aspects of their legal systems back to Roman Law.[78] Second, the Justices on both the United States Supreme Court and the Federal Constitutional Court were respected and experienced lower-court judges, lawyers, law professors, or government officials prior to their election to the high court.[79] They are relatively free of political influence and view their role to include the protection of individual rights and the confinement of legislative action

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> adequate compensation should be retained, for otherwise the danger exists that the place of this intelligible, judicially clarified concept will be taken by a wording which, although a reasonable interpretation would not theoretically preclude an adequate compensation, would in practice give room for any other interpretation, even to expropriation without compensation.@ See Golay 193 *supra*.

As for the United States, *see* Chapter Four of Stevens, Richard. The American Constitution and its Provenance. Rowman and Littlefield Publishers, Inc. New York, 1977, which examines the European philosophical and historical background of the Constitution. *See also* Richard, Carl J., The Founders and the Classics. Harvard University Press Boston 1944; The Federalist Papers #9, 43, 47, and 78 discussing Montesquieu=s Spirit of Laws.

[77]In addition to the shared legal tradition with England and the rest of Europe, the Founding Father were well versed in and frequently referred to the major works of Greco-Roman civilization. *See* Richard, Carl J. The Founders and the Classics. Harvard University Press Boston 1994.

The present German constitution is a fusion of classical-liberal, socialist, and Christian/natural law thought. Kommer, Donald. The Constitutional Jurisprudence of the Federal Republic of Germany. Duke University Press, Durham. 1989. P. 246-250.

Both the United States and Germany have Senates and rely on written laws that secure rights B similar to Rome=s Twelve Tablets and governmental framework. Also, after the fall of the Roman Empire the Germanic tribes that settled much of Europe admired and borrowed from Roman culture and tradition.

[78]This raises the question of whether other constitutional courts, also influenced by Roman law and a history of European liberal tradition, protect property rights in a similar fashion under the constitution, regardless of the precise language of the constitution.

[79]The FCC is made up of two senates or eight members. Originally, there was a subject matter split between the two senates, but this has been more or less dissolved to balance the caseload. The process of selection is politicized as 1/2 of the FCC is selected by the Bundestag and 1/2 by the Bundesrat. In the Bundestag, a 12 person committee whose composition reflects the overall body, selects its eight while a judge is named by the Bundesrat with a 2/3 vote. The nature of selection promotes compromise. The qualifications to be on the FCC are (a) 40 years of age (b) eligible for election to Bundestag (c) must have passed 1st and 2nd level exams. Furthermore, 3 of the 8 senate members must be picked from the federal judge ranks. Once selected for the FCC, a judge has a 12 year term without possibility of re-election and must retire at 68. He can hold no other job than lecturer at a German university while on the court. See Kommers Chapter 1.

within constitutional bounds.[80] This shared attitude and role makes it more likely that they will render similar decisions on similar issues. Since both countries have similar economies and government structures that affect the economies in similar ways,[81] governmental involvement in economic affairs raises the same issues for both courts. The Justices in the United States are just as likely to be mindful of the economic consequences of their decisions as are the German Justices, and vice versa. Perhaps most importantly, both countries have similar societies and cultures that underlay their laws. From F.A. Hayek to Lawrence Friedman, many prominent legal philosophers believe that a country's law grow out of its culture.[82] The law's content reflects and is constrained by the beliefs of a society. With the strong similarities between the United States and Germany, it should be no surprise that the laws are very similar.

The convergence of the constitutional doctrines in both countries reinforce the connection between economic growth and constitutional property rights protections. Both economies have thrived in this type of legal environment. There are, of course, many more dimensions to the Rule of Law that is so necessary for economic growth, but constitutional property rights

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[80]In the German system, the AFCC is the supreme guardian of the constitution.@ Michalowski, Sabine and Woods, Lorna. German Constitutional Law. Ashgate Publishing, London. 1999. P. at 37. *See also* Kommers at 53 (AConstitution is a logical-teleological entity,@ which shows the FCC recognizes a higher law beyond positive law that must be followed by the legislature and constituents); Koch at 342 (The FCC ensures the safety and security of the constitution and to safeguard it from attacks from without as well as from unconstitutional legislation).

[81]Despite the socialist, Christian/natural law, and classical liberal influences in German politics, its governmental framework is similar to the United States. Although Art. 20(2) establishes Germany as a parliamentary democracy B it does have a bicameral legislature and a free market system. While the Bundesrat is composed of members appointed by the heads of the various Lander (states), the Bundestag is directly elected by the people B although each voter also votes for a party. This party vote can act as a Aseparate@ vote since it helps determine the ratio of members in the Bundestag. This is a very complex parliamentary process. *See* Michalowski and Woods at 3-15.

[82]*See, e.g.*, F.A. Hayek, Law, Legislation and Liberty, vol. 1, pp. 72-93 (1973).

protections are a vital component. This, too, helps explain the convergence between the two systems in the United States and Germany.

V. Lessons from the Differences in Legal Doctrines

The principal difference between the two legal doctrines is the use of the proportionality principle by the Federal Constitutional Court and the abandonment of economic substantive due process by the United States Supreme Court. The misuse of economic substantive due process in the early twentieth century in the United States should serve as a caution to the German court. The proportionality principle has the same potential for egregious misuse. The structure and size of the Federal Constitutional Court does work to ameliorate that risk. With many more Justices, who sit for limited terms, it is less likely that the German court will become so distanced from contemporary ideas as the *Lochner* court did in the United States.

The careful use of the proportionality principle by the Federal Constitutional Court is a lesson for the United States Supreme Court. We think that the Supreme Court could use the due process clause to review economic regulation just as the Federal Constitutional Court uses the proportionality principle, and avoid the abuses of the early twentieth century that led to the demise of economic substantive due process in the United States. The reawakening of economic due process in the United States would take pressure off the need to use the takings clause, originally written to deal only with eminent domain, as the only basis for substantive review of economic regulation.

Two unusual cases decided by the Supreme Court in the last 15 years come close to introducing the German proportionality principle into American Law. Both cases involve the use of the takings clause and consequently result in an incorporation of due process principles into

takings jurisprudence. Both cases arise from local governments imposing "conditions" as a part of decisions to allow building expansions. In *Nollan v. California Coastal Commission*, the Commission had approved the expansion of a beachfront house conditioned upon the owners granting the public an easement to pass along the beach above the mean high tide line. The Supreme Court ruled that the condition resulted in an unconstitutional taking because there was no "nexus" (or connection) between the potential harm caused by a larger beachhouse (worsened views of the beach) and the condition of granting greater access to the beach. This decision, which weaved due process concerns into the takings analysis, is very much like an application of the proportionality principle under German law -- *i.e.*, the harm to the landowner caused by the condition is not proportional to the benefit conferred on the landowner. Similarly, *Dolan v. City of Tigard* involved the conditioning of a building permit on the property owner's dedication of part of the land for a "greenway" along a creek for flood control and a bike and walking path. Although the Supreme Court determined that the required nexus existed between the expansion (which would have increased the run-off from storms and increased congestion on nearby streets) and the condition (for flood control and bike and pedestrian traffic), the Court held the law to be unconstitutional because there was no showing that the harm to the landowner was proportional to the benefit. These two unusual decisions provide the basis for a rebirth of due process notions but within the takings clause. They surely are an American version of the German proportionality principle.

In drawing suggestions for the United States, we are mindful of the different structure of constitutional adjudication in both countries. In Germany, constitutional disputes go directly to the Federal Constitutional Court, so only that court decides issues of constitutional law. In the

United States, constitutional decisionmaking is widely diffused since every judge on every court has the authority to apply the United States constitution. That should make the risk of erroneous and harmful constitutional decisions much greater in the United States. But appellate review is the process for controlling lower court judges. We are also mindful that constitutional property rights protections can be viewed as primarily protecting those with property and wealth. Some might argue that Germany is a better country than the United States in which to expand rights for the more wealthy since Germany has a social democratic tradition of protecting the poor and working classes. But the United States also spends a good portion of government expenditures on social programs. To the extent that greater protection for the wealthy should be dependent on concomitant protection for the poor, the United States would qualify as much as Germany. It is also important to remember that constitutional property right protections help everyone owning property, which includes the middle and many in the lower economic class.

VI. Conclusion

The courts in the United States and Germany sparingly use the property rights provisions in their constitutions to limit government regulation. That they do use them, albeit occasionally, is enough to keep government mindful of the limitation. Since the legal structure and economic climate in both countries are conducive to investment, it seems to us that the occasional use of the clause is enough to create the "credible commitment" that is necessary for economic growth. Further, the occasional losses by governments under the constitution creates enough uncertainty that governments often constrain themselves from excessive regulation. Although many people believe that courts should be more vigilant by using the constitutional protections for property rights, we are not sure that would do much more for economic growth in the United States and in

Germany. The infrequent invalidation is just one of many legal measures that checks government in a beneficial way. It takes much more than this to aid economic growth, but without some constitutional check on economic regulation, growth would be much more uncertain.