

## THE SOCIAL OBLIGATION OF PROPERTY OWNERSHIP: A COMPARISON OF GERMAN AND U.S. LAW

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### I. INTRODUCTION

“Property entails obligations. Its use should also serve the public interest.”<sup>1</sup> So states Article 14, the property clause of the German Basic Law, also known as the German *Grundgesetz* (the German Constitution). While property rights in the United States emphasize individual freedom, German law defines property rights by explicitly considering the individual’s place in the social order. Indeed, in Germany, where land is scarce and the rate of home ownership half that of the U.S. rate of 66%,<sup>2</sup> land-use regulation subordinates private preferences to a certain model of the normatively desirable community by favoring dense planning of city centers and mandating equivalent living conditions for all.

The German and U.S. Constitutions highlight the stark contrast between the highly individualistic market-oriented conception of property in the United States and the more community-centered German social welfare state.<sup>3</sup> The property clause in the German *Grundgesetz* contains an affirmative social obligation alongside its positive guarantee of ownership rights. This broad social obligation is only limited by ownership interests that implicate the fundamental values of human dignity and self-realization. The U.S. Constitution, on the other hand, does not explicitly recognize an affirmative social obligation of property use. U.S. courts have not considered property a fundamental right and are reluctant to describe ownership relations as “natural rights.”<sup>4</sup> Thus, in locating a limit on the social obligation of ownership, the U.S. Supreme Court emphasizes the economic impact of regulation rather than its effect on a property owner’s dignity or autonomy.

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1. Grundgesetz [GG] [Constitution] art. 14(2) (F.R.G), *translated in* A.J. VAN DER WALT, CONSTITUTIONAL PROPERTY CLAUSES: A COMPARATIVE ANALYSIS 121 (1999).

2. Press Release, U.S. Dep’t of Commerce, Census Bureau Reports on Residential Vacancies and Homeownership (Apr. 27, 2007), <http://www.census.gov/hhes/www/housing/hvs/qtr107/q107press.pdf>.

3. See, e.g., Gregory Alexander, *Property as a Fundamental Constitutional Right? The German Example*, 88 CORNELL L. REV. 733, 739-40 (2003); Thomas J. Schoenbaum, *Planning and Land Development Law in the Federal Republic of Germany*, 54 TUL. L. REV. 624, 655-56 (1980).

4. Robert G. Bone, *Normative Theory and Legal Doctrine in American Nuisance Law: 1850-1920*, 59 S. CAL. L. REV. 1101, 1226 (1986).

While U.S. law may recognize property owners' non-economic interests informally—e.g., consider the differential treatment of residential and commercial tenants or owner-occupancy carve-outs in just-cause eviction ordinances—economic worth is more prominent in U.S. property jurisprudence than in the philosophical value-based approach of the German courts. When German regulations impose social obligations, the regulations cannot abrogate individual rights such as dignity and self-realization. In contrast, U.S. courts interpret the Takings Clause in the Fifth Amendment of the U.S. Constitution to protect economic value and expectations related to realizing value in a property object, and rarely articulate the purpose of protecting property.

Both legal systems recognize the authority to regulate property rights; German courts use the language of significant social obligations, while U.S. courts use the language of expansive regulatory power. This Article compares how the legal systems in the United States and Germany circumscribe regulatory authority by the different values protected by the property clauses in their constitutions. In depicting the German social obligation, I will pay particular attention to the German Constitution's positive guarantee of property rights, to illustrate how this guarantee limits the social obligation, and to show that German courts determine the personal meaning of property for property owners (invoking what are referred to in Anglo-American jurisprudence as personhood interests) and use such determinations to exclude purely economic interests<sup>5</sup> from constitutional protection. In considering these differences between U.S. and German constitutional property regimes, I aim to address the question of what, if anything, the Fifth Amendment of the U.S. Constitution positively guarantees for property owners.

#### **A. Regulatory Taking and Socially Responsible Property Use**

The notion that property ownership has an inherent social obligation is not controversial in American law. Even John Locke recognized that property could not be justified as a social institution if some people were able to monopolize the ownership of goods needed by all.<sup>6</sup> Although property-rights advocates often cite Locke's view to show that property rights are fundamental in the American civic and

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5. "Purely economic interests" is used here to mean the right to make a profit beyond the threshold level necessary to realize dignity and autonomy in the economic and social order.

6. JOHN LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERANCE* 15 (J.W. Gough ed., Blackwell Oxford 1946) (1690).

legal tradition,<sup>7</sup> Locke believed that individuals should be allowed property sufficient for their needs only so long as there is sufficient land left for others.<sup>8</sup>

All modern legal systems rely on institutions to monitor the behavior of landowners, who might otherwise disregard the negative impacts of their property use on their neighbors or on society in general. Usually, public land-use regulation enacted by centralized administrative or political bodies at the federal, state, or local level dictates how private land can be developed.<sup>9</sup> This property-use regulation often aims to strike a balance between the political needs to further the public welfare and to stabilize the legal order.<sup>10</sup> As the judiciary and the legislature interact, they balance these two goals of land-use regulation and define the social function of property.<sup>11</sup>

Most property regimes require governments to compensate property owners when they use eminent domain to physically take property by transferring title to the property.<sup>12</sup> Such compensation is generally uncontroversial when a court awards it. Similarly, the need for regulation is generally recognized in at least some circumstances—e.g., whether to prevent incompatible development, to conserve natural resources, or to protect historic buildings. However, jurisdictions continue to face the questions of whether and when extensive environmental or land-use regulation can constitute a “taking” or infringement of property rights that requires the government to pay compensation.<sup>13</sup> While the need for regulation is generally recognized by a wide public, much more contentious is the question of who should pay for measures enacted in pursuit of any given public policy goal, particularly when a regulation has considerable financial impact on the worth or development potential of property. Assigning responsibility to the regulated owner is often perceived as unfair. Thus, distinguishing non-compensable regulation from compensable expropriation or “taking” of property often focuses on determining the scope of the legislature’s power to define property rights by regulating use, and on justifying such restrictions on any given owner or use.<sup>14</sup>

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7. See, e.g., Steve P. Calandrillo, *Eminent Domain Economics: Should “Just Compensation” Be Abolished, and Would “Takings Insurance” Work Instead?*, 64 OHIO ST. L.J. 451, 489 (2003); Anthony S. Winer, *Foreign and International Law in Gay Rights Litigation: A Speculation on Enlightenment Roots, Foreign Law, and Fundamental Rights*, 32 WM. MITCHELL L. REV. 509, 540 (2006).

8. LOCKE, *supra* note 6, at 15.

9. See generally UGO MATTEI, *BASIC PRINCIPLES OF PROPERTY LAW: A COMPARATIVE LEGAL AND ECONOMIC INTRODUCTION* (2000). There is also a parallel decentralized private law system that exploits owners’ self-interested monitoring activity over neighboring land uses that negatively affect property values. *Id.*

10. *Id.* at 31.

11. *Id.*

12. *Id.* at 195.

13. *Id.*

14. Danaya C. Wright, *A New Time for Denominators: Toward a Dynamic Theory of Property in the Regulatory Takings Relevant Parcel Analysis*, 34 ENVTL L. 175, 188 (2004).

### **B. The Social Obligation in U.S. and German Constitutional Property Law**

In U.S. law, the nuisance doctrine has traditionally been one measure for allocating the burden of socially responsible land use when the property use disturbs or harms other landowners and the source of disturbance can be identified.<sup>15</sup> However, the justification for governmental regulation of land use becomes more contentious when the use regulated cannot be characterized as a nuisance, in part because the U.S. Constitution does not contain any explicit limits on the right to use property.

German courts have interpreted the social obligation (*Sozialpflicht*) in Article 14, the property clause of the German Constitution,<sup>16</sup> to justify more extensive land-use regulation than U.S. takings jurisprudence allows. The second paragraph of Article 14 states, “Property entails obligations. Its use should also serve the public interest.”<sup>17</sup> The social obligation of property is a generally-accepted and non-controversial part of German property law compared with the social obligation as discussed in U.S. Supreme Court takings cases.<sup>18</sup> Although municipalities in the United States have broad discretion to enact measures under the police power for a broad range of purposes—far beyond what may be characterized as a noxious or

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15. *See, e.g.*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1022-23 (1992) (“[M]any of our prior opinions have suggested that ‘harmful or noxious uses’ of property may be proscribed by government regulation without the requirement of compensation. . . . The ‘harmful or noxious uses’ principle was the Court’s early attempt to describe in theoretical terms why government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate—a reality we nowadays acknowledge explicitly with respect to the full scope of the State’s police power.”).

16. Grundgesetz [GG] art. 14(2) (F.R.G.), *translated in* VAN DER WALT, *supra* note 1, at 121.

17. *Id.*

18. Justice Rehnquist’s dissent in *Penn Central Transportation Co. v. New York City* is representative of perhaps the most enduring objection by plaintiffs bringing regulatory takings claims:

Of the over one million buildings and structures in the city of New York, appellees have singled out 400 for designation as official landmarks. . . . [T]he landmark designation imposes upon [the owner] a substantial cost, with little or no offsetting benefit except for the honor of designation. The question in this case is whether the cost associated with the city of New York’s desire to preserve a limited number of “landmarks” within its borders must be borne by all of its taxpayers or whether it can instead be imposed entirely on the owners of the individual properties.

438 U.S. 104, 138 (1978) (Rehnquist, J., dissenting).

harmful use<sup>19</sup>—U.S. courts are unlikely to use language that explicitly refers to the redistributive purpose of land-use regulation. The German State under the Basic Law, on the other hand, is authorized to pursue a “socially just property order” by balancing individual freedom against the interests of the general welfare, and German courts regularly refer to this affirmative duty of the property owner and of the state.<sup>20</sup> The property owner participates in the social order both by using her property and by recognizing the social obligation as an important limit on the exercise of these rights. Property ownership is seen as an expression of freedom and a means to develop personhood.<sup>21</sup> The German State also participates in this social order by creating a property regime with the most favorable conditions for the greatest number of people to acquire property, and by demanding social responsibility from property owners through land-use regulation.<sup>22</sup>

## II. INTRODUCTION TO U.S. CONSTITUTIONAL PROPERTY LAW

### A. U.S. Takings Law

Direct and indirect protections of property are scattered throughout the U.S. Constitution, primarily in the Fifth Amendment’s Takings Clause<sup>23</sup> and Due Process Clause,<sup>24</sup> and in the Fourteenth Amendment,<sup>25</sup> which was added to the Constitution in 1868 and interpreted to extend the Takings Clause to actions of state and local governments. For the most part, the founding fathers considered property a natural right underpinned by liberty.<sup>26</sup> However, the Framers did not see the Takings Clause as a central feature of the Constitution or Bill of Rights.<sup>27</sup> Of the almost two hundred constitutional amendments considered by the state ratifying conventions, none

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19. See, e.g., *Lucas*, 505 U.S. at 1024 (referring to “[t]he transition from our early focus on control of ‘noxious’ uses to our contemporary understanding of the broad realm within which government may regulate without compensation”).

20. Manfred Weiss, *Sozialbindung und soziale Gerechtigkeit*, POLITISCHE STUDIEN (sonderheft 1/2000), Apr. 2000, at 23.

21. *Id.*

22. *Id.*

23. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

24. *Id.* (“No person shall . . . be deprived of life, liberty, or property, without due process of law.”).

25. U.S. CONST. amend. XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law.”).

26. ROBERT MELTZ, DWIGHT H. MERRIAM & RICHARD M. FRANK, *THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION* 13 (1999).

27. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 791 (1995).

proposed a takings clause.<sup>28</sup> In fact, James Madison, author of the Bill of Rights, unilaterally included it among the amendments he proposed in 1789.<sup>29</sup>

Although no congressional debate survives about the meaning of the Takings Clause, the language eventually adopted, like the language of Madison's initial proposal, was the language of physical seizure.<sup>30</sup> Thus, the Takings Clause may well have been intended to be limited in scope to government confiscation of property for public roads and buildings and other physically invasive uses.<sup>31</sup> Few at the time probably imagined it would be invoked in suits by landowners against the government for actions that merely involved restriction of property use. In fact, it was not until the 1922 *Pennsylvania Coal Co. v. Mahon* case that the U.S. Supreme Court recognized for the first time that a mere restriction by the government, in the absence of any physical occupation or appropriation of land, could trigger a Fifth Amendment right to compensation if the regulation were so restrictive as to render an owner's remaining property rights virtually useless.<sup>32</sup> In *Pennsylvania Coal*, Justice Holmes reasoned that:

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. . . . [But] [w]hen it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act.<sup>33</sup>

By equating the substantial infringement of property use by regulation with the appropriation of ownership through an exercise of eminent domain, Justice Holmes determined that there is a threshold beyond which compensation is required. However, this vision of a constitutional check on the police power to regulate property remained a theory for the next forty years. Cases continued to challenge land-use regulations, but on due process, not takings, grounds,<sup>34</sup> and the Court consistently deferred to governmental restrictions unless they involved physical

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28. *Id.* at 784.

29. *Id.*

30. Compare U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”) with James Madison, Amendments to the Constitution (June 8, 1789), in 12 THE PAPERS OF JAMES MADISON 197, 201 (Charles F. Hobson et al. eds., 1979) (“No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation.”), quoted in Treanor, *supra* note 27, at 837.

31. Treanor, *supra* note 27, at 837.

32. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 414-15 (1922).

33. *Id.* at 413.

34. See, e.g., *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

invasion or total destruction of property.<sup>35</sup> This deference continued throughout the Warren and Burger Court eras, as the Court repeatedly declined to define precisely the parameters of when an excessive regulation went too far.<sup>36</sup>

Finally, in 1978, in *Penn Central Transportation Co. v. New York City*, the Court articulated a three-part test to determine when regulation becomes a taking.<sup>37</sup> The Court identified three factors to be applied in essentially ad hoc, factual inquiries: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government action.<sup>38</sup> The next year, the Court articulated a different two-part rule in *Agins v. City of Tiburon*.<sup>39</sup> In *Agins*, the Court held that a regulation goes too far if “the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land.”<sup>40</sup> Some commentators have tried to make sense of these two different regulatory takings tests by arguing that the *Penn Central* test is appropriate for as-applied challenges to regulations while the *Agins* test is appropriate for facial challenges, but this distinction has not always been respected by the Court,<sup>41</sup> which has in some cases applied the *Agins* test to as-applied challenges,<sup>42</sup> and the *Penn Central* test to facial challenges.<sup>43</sup>

Despite the uncertainty about when to apply which rule, the focus of regulatory takings analysis since *Penn Central* has been on the quality of the government’s actions and its impact on the landowner.<sup>44</sup> The Court looks, on the one hand, at how restrictive, important, narrowly tailored, and valuable the state’s interests are—in other words, at how the state justifies the regulation. At the same time, courts look to the regulation’s effects on the landowner’s ability to use, enjoy, develop, and alienate her property. This latter analysis focuses, in particular, on the

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35. See, e.g., *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951); *United States v. Causby*, 328 U.S. 256 (1946); *United States v. Gen. Motors Corp.*, 323 U.S. 373 (1945).

36. See Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 237 (2004).

37. 438 U.S. 104, 124 (1978).

38. *Id.*

39. 447 U.S. 255, 260 (1980).

40. *Id.*

41. See, e.g., Andrea Peterson, *The Takings Clause: In Search of Underlying Principles Part I – A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1299, 1316 (1989) (outlining the four takings tests used by the Court—*Penn Central*, *Agins*, the “no economically viable use” test, and the *Loretto* “per se” test—and concluding that it is unclear which test to apply in a given case).

42. See, e.g., *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987).

43. See, e.g., *Hodel v. Irving*, 481 U.S. 704 (1987); *Keystone Bituminous Coal Co. v. DeBenedictis*, 480 U.S. 470 (1987).

44. See Wright, *supra* note 14, at 186.

economic impact on the landowner and the regulation's interference with the landowner's reasonable, investment-backed expectations.

Forming the conceptual backdrop to this analysis is the "bundle-of-sticks" metaphor, unique to Anglo-American law.<sup>45</sup> Characterizing "property" as a "bundle of sticks" or "the group of rights inhering in the citizen's relation to the physical thing,"<sup>46</sup> the Supreme Court has recognized four essential kinds of property rights—possession, use, exclusion of others, and disposal.<sup>47</sup> Although the destruction of one "strand" in the bundle is generally not considered a taking because the aggregate must be viewed in its entirety,<sup>48</sup> Supreme Court jurisprudence has at times emphasized one "strand" above others.<sup>49</sup>

For instance, the Court's "per se taking" rule for permanent physical invasion of private property by the government or by something authorized by the government (e.g., residential homes destroyed by government-created floods,<sup>50</sup> or apartment building owners forced to provide a place on their property for television and telephone cables<sup>51</sup>) has been justified by the importance of the "right-to-exclude strand."<sup>52</sup> Since the right to exclude others is one of the most revered incidents of ownership in the Court's jurisprudence, there can be no greater assault on private property rights than permanent physical invasion by the government.<sup>53</sup> These cases are not addressed by the Court with a set of factors to be weighed and balanced in "an ad hoc, case-by-case fashion," but rather are decided on the basis of "per se" rules that focus on one particular aspect of the government's action.<sup>54</sup>

Although the Supreme Court rarely cites the Due Process Clause when the issue is governmental restriction of a tract's economic potential, the Court's announcement in 1980 in *Agins v. City of Tiburon* of a new takings criterion based on the degree of fit between the government's means and ends<sup>55</sup> heralded increased

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45. German legal theory conceptualizes property as a unitary right as opposed to a bundle of entitlements. See Murray Raff, *Environmental Obligations and the Western Liberal Property Concept*, 22 MELB. U. L. REV. 657, 660, 675-55 (1998).

46. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (citing *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377-78 (1945)).

47. See *id.*

48. *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979).

49. In *Hodel v. Irving*, 481 U.S. 704 (1987), for example, the Court dwelled on the right to devise.

50. *Hawkins v. City of La Grande*, 843 P.2d 400, 406-08 (Or. 1992) (sewage-laden water, released from city holding ponds onto private property, is a taking); *Hamblin v. City of Clearfield*, 795 P.2d 1133, 1136-37 (Utah 1990) (city-authorized subdivision changing drainage and flooding property may be a taking).

51. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 (1982) (intrusion of cable service onto rental property is a taking).

52. MELTZ ET AL., *supra* note 26, at 117.

53. *Id.*

54. *Id.* at 9.

55. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (holding that a land-use control is a taking if it fails to "substantially advance legitimate state interests").



judicial attention to due process concerns. In fact, the subsequent *Nollan v. California Coastal Commission*<sup>56</sup> and *Dolan v. City of Tigard*<sup>57</sup> cases require greater means-end scrutiny of land-use regulation than does the due process analysis.<sup>58</sup> Nevertheless, this recent due process layer aside, U.S. takings law focuses on the results, rather than the means, of governmental regulation by analyzing the economic impact or the intrusiveness of governmental control.<sup>59</sup> Although courts have repeatedly held that regulation foreclosing the most profitable use of property for an owner or causing a substantial reduction in a property's fair market value<sup>60</sup> does not alone constitute a taking,<sup>61</sup> the Supreme Court did suggest in dicta in the 1992 *Lucas v. South Carolina Coastal Council* decision that regulatory action that causes diminution in property values falling short of total elimination of value might be compensable under the Takings Clause.<sup>62</sup> Lower courts have also held that non-total reductions in market value due to governmental regulation may violate the Takings Clause.<sup>63</sup>

In cases from 1987 to 2000, the Court tended to protect property rights and closely scrutinize governmental regulations.<sup>64</sup> However, in 2002, the Court reaffirmed the *Penn Central* test as the most important takings test.<sup>65</sup> Most importantly, the Court declined to go further than *Lucas*, viewed by many to be an extreme property-protectionist position.<sup>66</sup> Nevertheless, even if a results-oriented look at takings cases suggests that other interests factor into the Court's analysis, the language the Court employed in applying the *Penn Central* test remains focused on the regulation's economic impact on an owner.

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56. 483 U.S. 825 (1987).

57. 512 U.S. 374 (1994).

58. *Nollan*, 483 U.S. at 834 n.3

59. MELTZ ET AL., *supra* note 26, at 132.

60. *See, e.g.*, *Hadacheck v. Sebastian*, 239 U.S. 394, 405, 410 (1915) (zoning measure that causes approximately 90% reduction of property value is not a taking); *Pace Res., Inc. v. Shrewsbury*, 808 F.2d 1023, 1031 (3d Cir. 1987) (89% reduction is not a taking).

61. *See, e.g.*, *Andrus v. Allard*, 444 U.S. 51, 66 (1979).

62. 505 U.S. 1003, 1019 n.8 (1992).

63. *See, e.g.*, *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1183 (Fed. Cir. 1994) (99% reduction in land value plus additional factors is a taking); *Fla. Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1572 (Fed. Cir. 1994) (62% reduction in land value may be a taking); *Yancey v. United States*, 915 F.2d 1534 (Fed. Cir. 1990) (77% reduction of personal property value is a taking).

64. *See, e.g.*, cases cited *supra* note 63.

65. *Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321, 342 (2002).

66. *Wright, supra* note 14, at 187.

### **B. The U.S. Social Obligation**

Although there is much tough talk about absolute property rights in American public discourse, “the property-rights enthusiast on public radio probably does not even have the right to burn dead leaves in his own back yard.”<sup>67</sup> Indeed, many property owners take for granted the many limits on ownership rights recognized in U.S. law—the rights of neighbors, zoning law, environmental protection measures, and other administrative rules and regulations. Zoning first passed constitutional muster in 1926,<sup>68</sup> and since the Supreme Court began to uphold the economic and labor legislation of the Depression and New Deal period, “vigorous and direct constitutional protection of entrepreneurial property rights” has steadily declined.<sup>69</sup> Courts now employ a highly deferential posture toward means as well as ends (in the rational basis test) and demand only the vaguest sense of “public purpose” in reviewing legislation and regulatory measures.<sup>70</sup>

Under the well-accepted nuisance exception, land-use regulation does not violate the Fifth Amendment when “there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy,”<sup>71</sup> or, put another way, “when the government is preventing or punishing wrongdoing by A [the property owner].”<sup>72</sup> Since the owner’s use of the property is seen as the source of the social problem, “it cannot be said that he has been singled out unfairly.”<sup>73</sup> However, courts apply this principle much more broadly than in traditional common-law analysis. As Justice Kennedy wrote in his concurrence in *Lucas*,

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67. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 9 (1991).

68. See *Vill. of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926).

69. See, e.g., GLENDON, *supra* note 67, at 9.

70. Indeed, in *Kelo v. City of New London, Conn.*, the Court held that even the City’s taking of private property to sell for private development qualified as public use because it was being seized as part of an economic development plan. 545 U.S. 469, 484 (2005). As the Court explained, the Fifth Amendment does not require “literal” public use, but rather the “broader and more natural interpretation of public use as ‘public purpose.’” *Id.* at 480.

71. *Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part).

72. Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part II – Takings as Intentional Deprivations of Property Without Moral Justification*, 78 CAL. L. REV. 53, 85 (1990).

73. *Pennell*, 485 U.S. at 20 (Scalia, J., concurring in part and dissenting in part). In his dissent about San Jose’s rent-control ordinance, Justice Scalia used this reasoning to question the validity of restrictions on rents in apartments occupied by poor tenants. *Id.* at 21. He argued that because landlords who rent apartments to poor tenants are no more to blame for their poverty than “the grocers who sell needy renters their food, or the department stores that sell them their clothes, or the employers who pay them their wages,” the city should not force them to subsidize poor tenants’ housing costs. *Id.*

The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source . . . . [N]uisance prevention accords with the most common expectations of property owners who face regulation, but I do not believe this can be the sole source of state authority to impose severe restrictions.<sup>74</sup>

As non-compensable land-use regulation has ballooned over time through increased judicial deference to the legislature, there is still some discomfort in the jurisprudence about the justification for such a broad interpretation of the police power to limit property rights in land. For example, Justice Scalia asserted in the majority opinion in *Lucas* that the harm-benefit rationale does not explain certain exercises of the police power since “the distinction between ‘harm-preventing’ and ‘benefit-conferring’ regulation is often in the eye of the beholder,”<sup>75</sup> and the distinction between regulations that “prevent harmful use” and those that “confer benefit” are nearly impossible to discern on an “objective, value-free basis.”<sup>76</sup> Professor Joseph Sax similarly observes that takings cases based on nuisance law cannot be viewed as depending on judgments of blameworthiness, but rather often represent a conflict between “perfectly innocent and independently desirable uses.”<sup>77</sup>

Noxious-use reasoning may be difficult to apply to regulations seen to impose affirmative obligations on the property owner,<sup>78</sup> such as historic preservation.<sup>79</sup> The most important case in this area is *Penn Central*, in which the landmarked plaintiffs, prevented from adding additional stories in high-rent and built-up Manhattan, claimed that their property had been singled out to benefit others who bore no burdens on its behalf.<sup>80</sup> The plaintiffs claimed that because the neighboring property owners were able to reap the economic benefits of building skyscrapers

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74. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring).

75. *Id.* at 1024 (majority opinion) (“It is quite possible, for example, to describe in *either* fashion the ecological, economic, and esthetic concerns that inspired the South Carolina Legislature in the present case. One could say that imposing a servitude on Lucas’s land is necessary in order to prevent his use of it from ‘harming’ South Carolina’s ecological resources; or, instead, in order to achieve the ‘benefits’ of an ecological preserve.”).

76. *Id.* at 1026.

77. Joseph L. Sax, *Takings and the Police Power*, 74 *YALE L.J.* 36, 49-50 (1964-65).

78. As Professor Andrea Peterson explains, “[T]he government must compensate A if it simply says, ‘We want your property because it would promote the common good.’” Peterson, *supra* note 72, at 85.

79. “Under the historic-landmark preservation scheme adopted by New York, the property owner is under an affirmative duty to *preserve* his property *as a landmark* at his own expense.” *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 140 (1978) (Rehnquist, J., dissenting).

80. *Id.* at 131.

while the plaintiffs, alone, had to shoulder the preservation burden, the constitutional requirement of “average reciprocity of advantage” had not been met.<sup>81</sup> The Court accepted the legislature’s judgment that “the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole,” contending that “legislation designed to promote the general welfare commonly burdens some more than others” and that the New York City law, in any case, also applied to over 400 other landmarks in the city and all the structures in the thirty-one historic districts.<sup>82</sup> A vigorous dissent written by Justice Rehnquist, however, argued that the statute was fundamentally different from most zoning measures, which are generally justified by the fact that all property owners in a designated area are placed under the same restrictions—not just for the benefit of the municipality as a whole, but also for the common benefit of one another.<sup>83</sup> This reciprocity does not exist when “individual buildings . . . are singled out and treated differently than surrounding buildings.”<sup>84</sup> Moreover, the dissenters argued, the honor of designation, the benefits of which would accrue to all the citizens of New York City, does not offset the multi-million dollar cost to the plaintiffs.<sup>85</sup>

In his *Penn Central* dissent, Justice Rehnquist pointed out the irony in the plaintiff being “prevented from further developing its property . . . because *too good* a job was done in designing and building it.”<sup>86</sup> Even Sax, a proponent of a strong social obligation, admits that there is a doctrinal contradiction. “In the ordinary case, obligation arises only because the owner has done something undesirable,” but here the plaintiff was “worse off than its neighbors,” not because anything in the proposed demolition itself or in the increased density was prohibited, but rather because the plaintiff had “designed and built an especially fine building” and “now wished to withdraw the benefit that its presence had conferred.”<sup>87</sup> Further, Sax acknowledges, in agreement with Justice Rehnquist, that *Penn Central* “departs from the conventional view of the rights and responsibilities of owners, and acknowledges a new sort of affirmative obligation.”<sup>88</sup> The affirmative duty of the property owner to

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81. This theory, first applied in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), is based on the “equitable distribution of benefits and burdens of government action, which is characteristic of zoning laws and historic-district legislation.” *Penn. Cent.*, 438 U.S. at 133.

82. *Penn. Cent.*, 438 U.S. at 133-34.

83. *See id.* at 138-53 (Rehnquist, J., dissenting).

84. *Id.* at 140. The *Penn Central* plaintiffs claimed that “average reciprocity of advantage” was a constitutional requirement. *Id.* The mutuality of benefit and burden justifies much zoning under this theory. *See id.* at 139-40. Restrictions imposed on neighbors in a historic district, for example, attracts tourists and brings economic benefits to all in the district. *See id.* In the same way, everyone in a zone must comply with the height or density limitations in an area to get the benefits of greater visibility or congestion. *Cf. id.*

85. *Id.* at 148-49.

86. *Id.* at 146.

87. Sax, *supra* note 77, at 57.

88. *Id.* at 58.

preserve her property at her own expense is fundamentally different from the usual negative duty (to refrain from doing harm) that has been the basis of many zoning and land-use regulation decisions.<sup>89</sup> Sax suggests that as the courts repeatedly sanction this affirmative duty in historic preservation cases, they countenance “the law’s dirty little secret.”<sup>90</sup> In other words, even while the preservation obligation seems to be a generally accepted public purpose, this restriction on property use remains difficult to justify under the Supreme Court’s interpretation of the Takings Clause.

### III. SOME BASICS OF GERMAN CONSTITUTIONAL PROPERTY LAW

#### A. The Social State Principle

In Germany, just as in the United States, property under the Basic Law (the *Grundgesetz*) is above all a right of exclusion against others and the state,<sup>91</sup> as well as, in the tradition of political liberalism,<sup>92</sup> a recognition of individual freedom.<sup>93</sup> However, Article 14 must also be interpreted in the context of the German social state and the social history of the Federal Republic.

The Basic Law states that Germany is a social welfare state.<sup>94</sup> Adopted right after World War II, the German Constitution arose out of a unique set of historical circumstances. The framers’ debates suggest that the political spectrum in Germany directly after the war was considerably further left than it is today:

The capitalist economic system has not served the vital governmental and social interests of the German people well. Following the terrible political, economic and social collapse as a result of a criminal political power, there can only be a new order from the ground up. The content and goal of this social and

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89. *Id.*

90. *Id.* at 58; see also Daniel T. Cavarelo, Comment, *From Penn Central to United Artists’ I & II: The Rise to Immunity of Historic Preservation Designation from Successful Takings Challenges*, 22 B.C. ENVTL. AFF. L. REV. 593 (1995) (arguing that since the *Penn Central* decision, historic preservation designations have become immune from successful constitutional takings challenges).

91. WALTER LEISNER, DENKMALGERECHTE NUTZUNG: EIN BEITRAG ZUM DENKMALBEGRIFF IM RECHT DES DENKMALSCHUTZES 31 (2002).

92. See THOMAS VON DANWITZ, BERICHT ZUR LAGE DES EIGENTUMS 156 (2002).

93. LEISNER, *supra* note 91, at 4-5.

94. Article 20(1) of the Basic Law states: “The Federal Republic of Germany is a democratic and social federal state.” Grundgesetz [GG] art. 20(1) (F.R.G.), translated in DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY app., at 351 (1994).

economic new order can no longer be the capitalist pursuit of profit and power, but rather only the prosperity of our people.<sup>95</sup>

Despite its foundation in neo-classical economics, Article 14's protection may be distinguished from U.S. liberalist tradition by the importance placed in the German Constitution on community obligation. Even the broad positive right to "development of the personality" in Article 2(1) of the *Grundgesetz*<sup>96</sup> is expressly limited by its social context. In the words of Germany's Federal Constitutional Court (FCC, also known as *Bundesverfassungsgericht*, the court that interprets the Basic Law), "While freedom and individual dignity are fundamentally guaranteed, it cannot be overlooked that the image of man in the *Grundgesetz* is not that of an individual in arbitrary isolation but of a person in the community, to which the person is obligated in many ways."<sup>97</sup> As one commentator points out, since an individual is considered to be "inextricably linked to the social order," an individual's "use of space" must necessarily also be seen as "linked to the relationship of the individual to society."<sup>98</sup>

Thus, the Basic Law envisages broad public control over private property rights to reconcile a property owner's individual right to freedom with similar rights of the individuals who compose society.<sup>99</sup> Land-use planning begins at the federal level and constitutes a much more comprehensive body of law<sup>100</sup> than the United States' patchwork of regulations. Under the Regional Planning Act (*Raumordnungsgesetz*)—a federal law framing the broad outlines of land-use policy and identifying the means of implementation—state-level planning is mandatory.<sup>101</sup> In contrast to the United States, where a developer may evade the unfavorable zoning plan of a municipality by relocating her building activities just outside the city

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95. Christian Grimm, *Landwirtschaftliches Eigentum und Schutzgebietausweisungen – BRD 2 n.2* (Institut für Wirtschaft, Politik und Recht, Universität für Bodenkultur Wien, Diskussionspapier Nr. 95-R-02, 2002) (author's translation), available at [http://www.agrar.de/agenda/schutz\\_und\\_eigentum\\_dp-95.pdf](http://www.agrar.de/agenda/schutz_und_eigentum_dp-95.pdf) (F.R.G.) (quoting the 1947 Ahlener Programm of the Christian Democratic Union).

96. "Everyone has the right to the free development of his personality, insofar as he does not violate the rights of others or offend against the constitutional order or the moral law." Grundgesetz [GG] art. 2(1) (F.R.G.), translated in CURRIE, *supra* note 94, app., at 344.

97. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 20, 1954, 4 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 7 (F.R.G.).

98. Clifford Larsen, *What Should Be the Leading Principles of Land Use Planning? German Perspective*, 29 VAND. J. TRANSNAT'L L. 967, 988 (1996).

99. HANRI MOSTERT, THE CONSTITUTIONAL PROTECTION AND REGULATION OF PROPERTY AND ITS INFLUENCE ON THE REFORM OF PRIVATE LAW OWNERSHIP IN SOUTH AFRICA AND GERMANY: A COMPARATIVE ANALYSIS 39 (2002).

100. See Raumordnungsgesetz [ROG] [Federal Regional Planning Act], Aug. 18, 1997, BGBl. I at 2081, 2102, Dec. 15, 1997, BFBI. I at 2902-03 (F.R.G.); Baugesetzbuch [BauGB] [Federal Building Code] Aug. 18, 1997, BGBl. I at 2081 (F.R.G.). See also the various federal and provincial statutes on nature conservation (*Naturschutzgesetze*).

101. See Raumordnungsgesetz [ROG], Aug. 18, 1997, BGBl. I at 2081, 2102, Dec. 15, 1997, BFBI. I at 2902-03 (F.R.G.).

limit,<sup>102</sup> the individual German states (*Länder*) determine the pace and location of virtually all development, since nearly all German land lies within the territory of a municipality.<sup>103</sup>

Such an expansive and hierarchical system reflects not only the fact that Germans have many fewer acres on which to sprawl than Americans do, but also the different cultural values that have developed regarding property ownership in the two nations.<sup>104</sup> In contrast to the American view of land-use regulation as a means of restricting private property rights, German urban planning assumes that such governmental regulation is essential to maintain the social order.<sup>105</sup> German land-use regulations have been used to promote policy objectives such as “stabilization of small cities’ populations by preventing large-scale migration for economic reasons; the prevention of sprawl and the preservation of the appearance of both cities and countryside; and the promotion of commercial agriculture and especially family farmers.”<sup>106</sup>

Unlike German regulations, which “place the individual in the center of a managed landscape and a restrictive community, American land-use regulation seems to reject this idea of a socially situated self.”<sup>107</sup> Late nineteenth-century suburbanization in the United States marked an important change in the relationship of the individual to society with regard to residential patterns: “The new ideal was no longer to be part of a close community, but to have a self-contained unit, a private wonderland walled off from the rest of the world.”<sup>108</sup> Thus, as one writer argues, the normative form of the American community has become the “private, rustic life,” in which the city is not considered a necessary part of the social order and land-use controls have been “organized around a kind of flight: a flight into privacy and independence captured by the detached suburban house.”<sup>109</sup> American cultural norms of property ownership embrace an individualism in which a landowner’s interests and desires exist outside of a communal setting, and aggressive property rights rhetoric is

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102. Michael A. Light, Note, *Different Ideas of the City: Origins of Metropolitan Land-Use Regimes in the United States, Germany and Switzerland*, 24 YALE J. INT’L L. 577, 588 (1999). In some cases, of course, the developer will be subject to county land-use regulations, but these are often not as stringent as those of a municipality.

103. *Id.*

104. The assumption here is that cultural values influence a society’s legal definition of property. Professor Eric Freyfogle argues that “[i]f private property is a human creation, a mere mental abstraction, then it is something that a culture can change if and when it so chooses.” Eric Freyfogle, *The Construction of Ownership*, 1996 U. ILL. L. REV. 173, 177 (1996).

105. Light, *supra* note 102, at 591.

106. *Id.*

107. *Id.* at 611.

108. KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 58 (1985).

109. Light, *supra* note 102, at 608-09. Similarly, urban historian Kenneth Jackson suggests that the “isolated household” has become the American middle-class ideal to such a great extent that it even “represent[s] the individual himself.” JACKSON, *supra* note 108, at 52.

rarely tempered by talk of duties and obligations as responsible community members.<sup>110</sup>

### **B. History of the German Constitution (“Basic Law”)**

The German Constitution is called the “Basic Law” or *Grundgesetz*, not the “Constitution.” This designation expresses the expectation at the time of its promulgation in 1949 that the division of Germany by the Allied forces after the Second World War would be only a temporary measure and that a permanent constitution for the whole country would be written later.<sup>111</sup>

Negative historical experience played a major role in shaping the Basic Law. The framers, determined to prevent anything similar to National Socialism from happening again, sought to create safeguards against the emergence of either an overly fragmented, multiparty democracy, similar to the Weimar Republic (1918-1933), or an authoritarian institution characteristic of the Nazi dictatorship of the Third Reich (1933-1945).<sup>112</sup> Most strikingly, the German *Grundgesetz* grants primary importance to human dignity. The first two sentences of the *Grundgesetz* after the preamble read: “Human dignity is inviolable. To respect and protect it is the duty of all state authority.”<sup>113</sup>

The Bill of Rights (*Grundrechtskatalog*) makes up the first part of the Basic Law. Articles 1 through 19 delineate basic rights that apply to all German citizens, including the rights to equality before the law; freedom of speech, assembly, the news media, and worship; freedom from discrimination based on race, gender, religion, or political beliefs; and conscientious objection to compulsory military service.<sup>114</sup> Article 20(1) provides that “the Federal Republic of Germany is a democratic and social federal state.”<sup>115</sup>

Fundamental disputes about the formulation of the economic order and the property clause, particularly the social obligation, almost held up ratification of the Basic Law.<sup>116</sup> Although most political parties in Germany between 1945 and 1949, including the SPD (Social Democratic Party), the CDU (Christian Democratic Union) and the KPD (Communist Party of Germany), were in favor of a break with the property order of the past and socialization, the Western Allied Powers promoted an economy based on private ownership of the means of production.<sup>117</sup> By the time the

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110. Freyfogle, *supra* note 104, at 183.

111. ALEXANDER VON BRÜNNECK, *DIE EIGENTUMSGARANTIE DES GRUNDGESETZES* 61-71 (1984).

112. CURRIE, *supra* note 94, at 9.

113. Grundgesetz [GG] art. 1(1) (F.R.G.), *translated in* CURRIE, *supra* note 94, app., at 343.

114. *Id.* arts. 1-19.

115. *Id.* art. 20(1), *translated in* CURRIE, *supra* note 94, app., at 351.

116. Grimm, *supra* note 95.

117. MOSTERT, *supra* note 99, at 53



*Grundgesetz* was drafted in 1949, the more conservative CDU under Chancellor Adenauer opted for a liberal market-based economy.<sup>118</sup> The result of the controversy is that the Basic Law, except for Article 14, which is discussed below, is virtually silent on economic matters.

### **C. Property Protection in the Basic Law**

Article 14 of the *Grundgesetz* consists of three clauses:

1. (i) Property and the right of inheritance shall be guaranteed.  
(ii) Their substance and limits shall be determined by law.
2. (i) Property entails obligations.  
(ii) Its use should also serve the public interest.
3. (i) Expropriation shall only be possible in the public interest.  
(ii) It may only be ordered by or pursuant to a law, which determines the nature and extent of compensation.  
(iii) Compensation shall reflect a fair balance between the public interest and the interests of those affected.  
(iv) In case of dispute regarding the amount of compensation recourse may be had to the ordinary courts.<sup>119</sup>

For purposes of the discussion below, Article 14(1)(i) will be referred to as the guarantee clause; Article 14(1)(ii) read with Article 14(2) as the regulation clause; and Article 14(3) as the expropriation clause. Article 14(1)(i) constitutes a positive guarantee of property. This guarantees that both the property itself—including, to some extent, its value—as well as the legal entity of ownership will be protected. Article 14(2) constitutes a direct social obligation of property owners, while Article 14(1)(ii) mandates the legislature to define property rights to include this obligation. The expropriation clause is analogous to the U.S. Takings Clause, imposing a public purpose requirement and duty of compensation on the legislature.<sup>120</sup> An important difference, though, is that it specifies that compensation may only be granted if provided for by a statute.

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118. *Id.*

119. Grundgesetz [GG] art. 14 (F.R.G.) (translation by the Press and Information Office of the Federal Government, Foreign Affairs Division (1994)). The three paragraphs of Article 14 are not officially given subsections (i, ii, iii) in the official version of the *Grundgesetz*, but they have been numbered here so that they may be referred to throughout the text of this paper.

120. Compare Grundgesetz [GG] art. 14(3), with U.S. CONST. amend V.

In contrast to the U.S. Supreme Court, which rarely mentions the purpose of assigning property rights to owners,<sup>121</sup> the German courts set out the fundamental purpose of the property guarantee at the beginning of almost every important decision.<sup>122</sup> In this relatively consistent statement, Article 14 represents a tension between the liberal view of private property (i.e., individual property rights justified by natural law) and the social function of property (i.e., property rights created and restricted by social context).<sup>123</sup> The property guarantee is, as summarized by one comparative law scholar,

(a) a fundamental human right, (b) which is meant to secure, for the holder of property, (c) an area of personal liberty (d) in the patrimonial sphere, (e) to enable her to take responsibility for the free development and organization of her own life, (f) within the larger social and legal context.<sup>124</sup>

While elements (a) through (e) emphasize the importance placed on personhood (*Freie Entfaltung der Persönlichkeit*, or “free development of personhood”), especially in the economic sphere, element (f) indicates that the content of this guarantee must be defined through legislation that takes account of the social obligation.<sup>125</sup>

On the one hand, property in the German Basic Law is associated with guarantees to liberty and personhood. For holders of property rights, Article 14 guarantees freedom in the “patrimonial sphere,” enabling holders of property rights to live independently and to freely take responsibility for their own lives. In this sense, private property is considered both an expression and a prerequisite of the individual freedom protected as a fundamental right in the second article of the Basic Law.<sup>126</sup> As the Federal Supreme Court (*Bundesgerichtshof*, or Federal Court of Justice) has held, the individual, integrated into the community of the state, needs a strictly safeguarded sphere of property in order to be able to live as a person among equals.<sup>127</sup> Thus, the property guarantee’s function in German constitutional theory is

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121. Alexander, *supra* note 3, at 738.

122. VAN DER WALT, *supra* note 1, at 124.

123. PETER BADURA, STAATSRECHT: SYSTEMATISCHE ERLÄUTERUNG DES GRUNDGESETZES FÜR DIE BUNDESREPUBLIK DEUTSCHLAND 330-31 (3d ed. 2003).

124. VAN DER WALT, *supra* note 1, at 124.

125. ROLF SCHMIDT, GRUNDRECHTE SOWIE GRUNDZÜGE DER VERFASSUNGSBESCHWERDE 22 (6th ed. 2004).

126. Article 2(1) of the *Grundgesetz* provides that “[e]veryone has the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.” Grundgesetz [GG] art. 2(1) (F.R.G.), translated in CURRIE, *supra* note 94, app., at 344.

127. Bundesgerichtshof [BGH] [Federal Court of Justice] June 10, 1952, 6 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 270 (276) (F.R.G.).

to permit the holder of a protected property interest to act freely with the property to control her own economic destiny.<sup>128</sup>

As element (f) suggests, however, the property guarantee is not absolute. The social obligation (*Sozialpflicht*) binds both the legislator, in determining the contents and limits of ownership rights, and the owner, in exercising her rights, to consider the interests of non-owners affected by the exercise of those rights. On the one hand, protecting this interest enables the individual to act upon her own initiative and to take responsibility for her actions, while developing and functioning in the broader social and economic community.<sup>129</sup> Thus, securing individual freedom in the Basic Law is thought to secure a broader social system made up of, and dependent on, the individual freedom of society's participants. At the same time, though, the social obligation in the property clause protects the autonomy and personhood of non-property owners from the impacts of owners' exercise of property rights.<sup>130</sup>

Therefore, since the property guarantee's purpose is to secure the property owner's existence by assuring economic and social autonomy, the Basic Law guarantees property rights to the extent, and only to the extent, that they fulfill this "existence-securing"<sup>131</sup> function. Beyond this, property rights may be up for grabs by the legislature as part of a property owner's social obligation. That is, the *Sozialpflicht* will be concretized by the legislature in the form of limitations on ownership.

### 1. Guarantee Clause

In interpreting the *Grundgesetz*, German courts distinguish between fundamental or subjective rights accruing to the individual, and institutional guarantees prescribing the fundamental values of the existing social and legal order.<sup>132</sup> The *Grundrechte* (fundamental rights) have elements of both. Thus, the property guarantee comprises two separate but related guarantees: a substantive material or individual guarantee (*Bestandsgarantie*), and an institutional guarantee (*Institutionsgarantie*).<sup>133</sup>

The individual guarantee (*Bestandsgarantie*), usually associated with the classic-liberal view of property, protects the individual property holder and her concrete property holdings against specific state interferences. This is a negative guarantee in the sense that the state may only regulate or expropriate away individual

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128. MOSTERT, *supra* note 99, at 53.

129. *Id.* at 226.

130. Bundesverfassungsgericht [BVerfG] Mar. 1, 1979, 50 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 290 (F.R.G.) [hereinafter *Mitbestimmung* case].

131. This is language used in many of the German cases and legal theory, though it may sound awkward in translation.

132. KONRAD HESSE, GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 279, 290-99 (1993).

133. *Id.*

property rights, in accordance with legal requirements, and for public purposes that are more important than the individual property guarantee.<sup>134</sup> In addition to general liberty interests, the *Bestandsgarantie* also protects personhood as a realm for the development of personal autonomy and self-reliance.<sup>135</sup>

The institutional guarantee (*Institutionsgarantie*), on the other hand, recognizes private property objectively as a basic component of a specific economic and ideological model of state organization, which the state is obliged to preserve and foster affirmatively.<sup>136</sup> This guarantee prevents the state from reducing the potential sphere of personal liberty guaranteed by Article 14 by eroding or abolishing the existence, availability, and usefulness of property for individuals.<sup>137</sup> In contrast to the individual guarantee, which protects an individual property holder against the expropriation of a specific piece of land, water use right, or mineral right, the institutional guarantee prevents the state from eliminating or removing whole categories of property such as land, water, or minerals, in general.<sup>138</sup>

## 2. Regulation Clause

The same clause that positively guarantees property also serves as a mandate to the legislature to limit those rights: “Property and the right of inheritance shall be guaranteed. Their substance and limits shall be determined by law.”<sup>139</sup> The fact that these two sentences stand together in a clause of Article 14 has been called the “cardinal problem” of German property law.<sup>140</sup> Based on Article 14(1), the Federal Constitutional Court (FCC) has developed an extensive jurisprudence on certain aspects of property that the legislature cannot alter. At the same time, Article 14(1)(ii) represents a legislative mandate to regulate. The FCC has interpreted this first sentence to constrain the second, which then defines the scope of the social obligation.<sup>141</sup>

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134. VAN DER WALT, *supra* note 1, at 128.

135. *Id.* at 127.

136. RIGHTS, INSTITUTIONS AND IMPACT OF INTERNATIONAL LAW ACCORDING TO THE GERMAN BASIC LAW: THE CONTRIBUTIONS OF THE FEDERAL REPUBLIC OF GERMANY TO THE SECOND WORLD CONGRESS OF THE INTERNATIONAL ASSOCIATION OF CONSTITUTIONAL LAW 81 (Christian Starck ed., 1987).

137. MOSTERT, *supra* note 99, at 43.

138. VAN DER WALT, *supra* note 1, at 129.

139. Grundgesetz [GG] art. 14(1) (F.R.G.) (translation by the Press and Information Office of the Federal Government, Foreign Affairs Division (1994)).

140. VON DANWITZ, *supra* note 92, at 31.

141. *See infra* Part III.C.3.

### 3. Constitutional Definition of Property

Two decisions significantly developed this constitutional notion of property—the 1981 *Gravel Mining (Nassauskiesung)* decision,<sup>142</sup> and one decided the day before, the *Obligatory Sample (Pflichtexemplar)* decision.<sup>143</sup> Before these landmark cases, a property-owner plaintiff could petition the administrative courts to invalidate an “unconstitutionally harsh measure,” or she could comply with the measure and request compensation through inverse condemnation (*enteignender Eingriff*), applied directly by the civil courts based on Article 14(3).<sup>144</sup>

In the *Gravel Mining* decision, the FCC sharply distinguished between Article 14(1)-(2) regulation of property, which is not to be compensated, and compensable Article 14(3) expropriation.<sup>145</sup> In this case, a landowner challenged a provision of the Water Supply Law (*Wasserhaushaltsgesetz*), which required anyone wishing to use surface or groundwater to obtain a permit.<sup>146</sup> The law had been passed to address the widespread groundwater contamination that resulted from extensive mining of gravel during the period of post-World War II reconstruction.<sup>147</sup> The plaintiff owned and operated a gravel pit and had used the water for decades.<sup>148</sup> The city denied the plaintiff a permit to use the water beneath his land, citing possible harm to the public water supply.<sup>149</sup> In his complaint, the plaintiff alleged that denying a permit to continue mining gravel below the groundwater level was a taking of his business and his real property.<sup>150</sup>

The Court acknowledged that this regulation interfered with the plaintiff’s *Bestandsgarantie* (since a permit had not been required to use groundwater until the passage of the Water Supply Law) and the *Institutsgarantie* (since governmental permission was required to develop and use his property).<sup>151</sup> But these protections must give way to vital public resources, which occasionally must be entrusted to the public at large instead of private property owners.<sup>152</sup> Thus, if an owner has no right in the groundwater under his property, there is no right that can be taken from him. The Court accordingly held this provision to be a property-content regulation under

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142. BVerfG 1981, 58 BVerfGE 300 (F.R.G.) [hereinafter *Gravel Mining* case].

143. BVerfG 1981, 58 BVerfGE 137 (F.R.G.) [hereinafter *Obligatory Sample* case].

144. Courts could only award compensation, though, if the statute specifically provided for it. THOMAS LUNDMARK, *LANDSCAPE, RECREATION, AND TAKINGS IN GERMAN AND AMERICAN LAW* 214, 216 (1997).

145. *Gravel Mining* case, BVerfGE 58, 300.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*, discussed in LUNDMARK, *supra* note 144, at 216.

150. *Id.*, discussed in LUNDMARK, *supra* note 144, at 216.

151. *Gravel Mining* case, BVerfGE 58, 300, discussed in LUNDMARK, *supra* note 144, at 217-18.

152. *Id.*, discussed in LUNDMARK, *supra* note 144, at 218.

Article 14(1)(ii), not a taking under Article 14(3).<sup>153</sup> Subsequent to this opinion, expropriation refers only to the physical confiscation of property, and compensation is only available on the basis of Article 14(3).<sup>154</sup> In other words, there is no longer an equivalent for the U.S. regulatory taking.

If the law had constituted a taking, the legislation would need to regulate the type and amount of compensation (*Art und Ausmass der Entschädigung*), as required by Article 14(3)(ii), to withstand constitutional challenge.<sup>155</sup> Otherwise, the law, and any administrative action pursuant to it, would be invalid.<sup>156</sup> Under the *Gravel Mining* case, an owner has no constitutional claim for compensation unless a law provides for compensation (because the civil courts do not have jurisdiction to invalidate the overly harsh administrative action, which is the other plausible remedy in this situation), and must petition the administrative courts to invalidate the action.<sup>157</sup>

#### 4. Property Content Regulation Requiring Reimbursement (Ausgleichspflichtige Inhaltsbestimmung)

After the *Gravel Mining* decision, the regulation or definition of property rights by the legislature (*Inhalts- und Schrankenbestimmung*) does not, in principle, require payment of compensation. (In fact, as explained above, the owner may no longer choose between invalidation and compensation.) However, one day before the *Gravel Mining* case, the FCC decided in its *Obligatory Sample (Pflichtexemplar)* decision that some regulations would only be constitutional if they provided for measures to mitigate excessive burdens on the property owner.<sup>158</sup>

The law at issue obliged all publishers to provide, at no cost, one copy of each of their publications to the central state library so that all new publications would be available and preserved in one place.<sup>159</sup> A publisher of high-quality art books printed in small editions objected, claiming that the regulation

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153. *Id.*, discussed in LUNDMARK, *supra* note 144, at 217.

154. *Id.*, discussed in LUNDMARK, *supra* note 144, at 218.

155. *Id.*, discussed in LUNDMARK, *supra* note 144, at 218. The justification for this latter requirement is that it (1) ensures that expropriation only takes place once the compensation question has been cleared by the democratically elected legislature, and (2) protects the public from being burdened with expenses not foreseen by the legislature. LUNDMARK, *supra* note 144, at 218; see also CURRIE, *supra* note 94, at 293.

156. See BVerfG 1968, 24 BVerfGE 367 (418) (F.R.G.) [hereinafter *Deichordnung* case], translated in NORMAN DORSEN, MICHEL ROSENFELD, ANDRÁS SAJÓ & SUSANNE BAER, *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* 1162 (2003).

157. *Gravel Mining* case, BVerfGE 58, 300, cited in LUNDMARK, *supra* note 144, at 218.

158. Cf. DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 568, n.35 to ch. 6 (2d ed. 1997).

159. *Obligatory Sample* case, BVerfG 1981, 58 BVerfGE 137 (F.R.G.), discussed in LUNDMARK, *supra* note 144, at 219.

disproportionately affected him and therefore violated the equality principle (*Gleichheitsatz*).<sup>160</sup> Although the FCC concluded that the law was not an expropriation, but rather a content regulation,<sup>161</sup> the Court declared the regulation unconstitutional as applied to this publisher because, when applied to small issues of expensive volumes, the law overstepped the bounds of a reasonable-content regulation and violated the equal protection element of Article 14(1)(ii).<sup>162</sup>

The court called this new legal institution a “content regulation requiring equalization” (*ausgleichspflichtige Inhaltsbestimmung*).<sup>163</sup> The so-called “claim for an equalization payment” (*Ausgleichanspruch*) is different from the claim for compensation pursuant to Article 14(3) expropriation. First, the “equalization payment” (*Ausgleichzahlung*) is determined not by the economic value of the property use or object, but by a balancing test that weighs private use against the general good.<sup>164</sup> Accordingly, the property owner generally receives significantly less than she would in the case of compensation for an expropriation.<sup>165</sup> In fact, as will be discussed in more detail below, the FCC has held that this mitigation must not necessarily be monetary and that money is actually only a last resort for other equalization measures (such as variances, grandfathering clauses, or phase-in periods).<sup>166</sup> Second, the “content regulation requiring equalization” is derived from Article 14(1)(ii). In other words, after the *Obligatory Sample* case, restriction on the use of property resulting from Article 14(1)(ii) legislation must be suffered without compensation. Compensation is only possible if an otherwise constitutional enactment causes unreasonable hardship.<sup>167</sup> The equalization payment discharges violations of the reasonableness principle and the constitutional guarantee of property that would otherwise result.<sup>168</sup>

Just like compensation for an Article 14(3) expropriation, though, a property owner only has claim to “equalization” (*Ausgleich*) if the payment or softening measure is provided for in legislation.<sup>169</sup> If the regulatory measure does not provide

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160. *Id.*, discussed in LUNDMARK, *supra* note 144, at 219-20.

161. *Id.* at 144, translated in LUNDMARK, *supra* note 144, at 219 (“The provision contains no executive authorization to take administrative action to seize particular property acquired by the state; rather it establishes a general, theoretical obligation of performance in the form of a donation.”).

162. *Id.* at 148-50, translated in LUNDMARK, *supra* note 144, at 220 (“[Conditions placed on the ownership of property] may not lead to an unfair burden, considering its social relationship, the social significance of the particular object, and also considering the regulatory purpose; they may not lead to unfair harshness nor unreasonably (unzumutbar) impair the owner’s proprietary rights. Furthermore, the equal protection clause must be observed.”).

163. *Id.* at 150, cited in LUNDMARK, *supra* note 144, at 221.

164. See CURRIE, *supra* note 94, at 292-93.

165. *Id.*

166. WALTER LEISNER, EIGENTUM: SCHRIFTEN ZU EIGENTUMSGRUNDRECHT UND WIRTSCHAFTSVERFASSUNG 1970-1996, at 295-97 (1996).

167. LUNDMARK, *supra* note 144, at 221.

168. *Id.*

169. ROLF SCHMIDT, GRUNDRECHTE 419-22 (5th ed. 2004).

for “equalization,” the property holder may attack its validity.<sup>170</sup> The court will void the law if it disproportionately burdens property owners without payment or “equalization” described above.<sup>171</sup>

#### **D. German Judicial System**

The judicial system in Germany is a compromise between legal unity and individual state (*Land*) independence in judicial matters.<sup>172</sup> There are state-level civil courts in every *Land* as well as more specialized federal courts scattered throughout the country to ensure that the law is interpreted uniformly.<sup>173</sup> Divided into different fields of jurisdiction, the highest federal courts include: the Federal Supreme Court (FSC, also known as *Bundesgerichtshof*, or the Federal Court of Justice, the highest federal court in civil matters), the Federal Administrative Court (*Bundesverwaltungsgericht*), the Federal Labor Court (*Bundesarbeitsgericht*), the Federal Social Court (*Bundessozialgericht*), and the Federal Tax Court (*Bundesfinanzhof*).<sup>174</sup>

In property law, jurisdiction is divided between administrative courts (where the Federal Administrative Court is the court of final instance) and what are referred to as “ordinary courts” (where the FSC is the final instance).<sup>175</sup> While the administrative courts review administrative decisions and actions pertaining to expropriation, ordinary courts have jurisdiction over claims for expropriation compensation (in other words, when the amount of compensation is contested).<sup>176</sup> Because these issues are interrelated, both courts have interpreted the public welfare provision of Article 14(2)(ii), considering when compensation must be paid.<sup>177</sup> The two courts thus share jurisdiction and set the standards that balance public and private interests in property regulation.<sup>178</sup>

The Federal Constitutional Court (FCC) protects, interprets, and applies the Basic Law.<sup>179</sup> This court does not function as another higher instance of other branches of the judiciary but rather only has jurisdiction on questions about whether legislation, actions of the state or court decisions are in accordance with the Basic Law.<sup>180</sup> The FCC has its own interpretation of the property clause, which sometimes

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170. *Id.* at 420.

171. *Id.* at 421.

172. NIGEL FOSTER, *GERMAN LEGAL SYSTEM AND LAWS* 39-41 (2d ed. 1996).

173. *Id.*

174. Grundgesetz [GG] art. 95 (F.R.G.).

175. *See* KOMMERS, *supra* note 158, at 253 & 568 n.34.

176. *Id.*

177. *Id.* at 253.

178. *Id.*

179. *Id.* at 10-15.

180. *See* CURRIE, *supra* note 94, at 27-29; Grundgesetz [GG] arts. 93-94, 100 (F.R.G.).



conflicts with the interpretations of the FSC or the Federal Administrative Court.<sup>181</sup> Although shared jurisdiction in matters pertaining to the property clause has led to three different interpretations of Article 14, most scholars consider the FCC to be the most persuasive authority<sup>182</sup> and its decisions will be the focus of this paper.

#### IV. PROPERTY GUARANTEES IN THE U.S. CONSTITUTION AND *GRUNDGESETZ*

The U.S. Constitution does not “create” or guarantee property rights. Rather, the Takings Clause and Due Process Clause protect infringement of such rights by other laws and regulations.<sup>183</sup> In contrast to this “negative” property guarantee, which is also found in the constitutions of many other countries,<sup>184</sup> Article 14 of the *Grundgesetz* contains a positive guarantee of private property as an institution (*Institutsgarantie*) and a subjective right of the individual to a certain constitutionally-protected “condition” (*Bestand*) of property.<sup>185</sup> While the Basic Law permits considerable regulation of ownership under its social obligation clause, ownership is a fundamental right in the *Grundgesetz*,<sup>186</sup> with an identity independent of ordinary laws.<sup>187</sup> Since the constitutional property rights developed by the FCC decisions are separate from the individual property rights created by civil law, they are articulated much more broadly than rights of private law ownership.<sup>188</sup> This enables the courts to interpret the meaning of property to give more weight either to social justice or to individual freedom.<sup>189</sup>

German law has developed extensive theory to explain the separate meaning of the positive guarantee.<sup>190</sup> Similar to the U.S. Supreme Court, the German FCC has examined environmental protection regulation, historic preservation measures, building moratoria, redevelopment schemes, and rent control. Yet, instead of asking,

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181. KOMMERS, *supra* note 158, at 253-54.

182. LUNDMARK, *supra* note 144, at 214-15.

183. VAN DER WALT, *supra* note 1, at 124.

184. Negative guarantees are also found in France and South Africa, for example. *Id.*

185. MOSTERT, *supra* note 99, at 82-83.

186. CURRIE, *supra* note 94, at 12, 298; VAN DER WALT, *supra* note 1, at 124. The German Federal Constitutional Court (FCC) also refers to it as a “fundamental right.” *See, e.g., Gravel Mining case*, BVerfG 1981, 58 BVerfGE 300 (F.R.G.) (cited in LUNDMARK, *supra* note 144, at 217-18).

187. The FCC said in the *Gravel Mining* decision that a private law notion of property is not authoritative for constitutional purposes, and that it is necessary to develop a specific constitutional conception of property. *See* LUNDMARK, *supra* note 144, at 217-18 (citing *Gravel Mining case*, BVerfGE 58, 300).

188. MOSTERT, *supra* note 99, at 21.

189. *Id.* at 38.

190. VAN DER WALT, *supra* note 1, at 124. In fact, most jurisdictions with positive formulations have developed very little theory concerning the meaning of this positive protection. *Id.* (referring to Canada, Ireland, and South Africa, among others).

as do U.S. courts, whether a regulation has gone “too far.”<sup>191</sup> German decisions focus on what the legislature cannot regulate away—in other words, which rights of ownership are left over after legislative definition.<sup>192</sup> Thus, the decisions focus on a constitutionally-guaranteed sphere of rights (the *Kernbereich*, or “core field”) that exists independent of positive law.<sup>193</sup> This “core field” also circumscribes the social obligation because property owners may only be called upon to sacrifice property use for the public welfare insofar as this *Kernbereich* is not infringed.<sup>194</sup>

Although property rights are enjoying some ascendancy in the United States,<sup>195</sup> U.S. courts do not scrutinize or distrust property regulation to the same degree as non-economic civil liberties such as freedom of speech, association, or religion.<sup>196</sup> Indeed, in contrast to Germany, where economic independence is understood to be essential to every other freedom, U.S. jurisprudence does not recognize property as a fundamental right.<sup>197</sup> To encroach on fundamental liberty interests and on the right to make autonomous decisions about highly personal matters, such as abortion,<sup>198</sup> childrearing,<sup>199</sup> or life-sustaining medical procedures,<sup>200</sup> the government objective must be “compelling.”<sup>201</sup> However, property rights are subject to any measure that passes a weak “rationality” standard under substantive

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

192. LEISNER, *supra* note 91, at 25.

193. *Id.*

194. *Id.*

195. During the mid-term elections, nine states passed propositions limiting the government’s ability to use eminent domain for redevelopment. Eric Pfeiffer, *Nine States Limit Eminent Domain*, WASHINGTON TIMES, Nov. 10, 2006, available at <http://washingtontimes.com/national/20061109-114636-7063r.htm>.

196. *See, e.g.*, Alexander, *supra* note 3, at 733-34 (“From the renaissance of the Takings Clause to state legislation requiring that compensation be paid for a broad range of regulatory restrictions, the property rights movement has scored impressive gains within the past several years. . . . [T]he pendulum seems to have swung in favor of the movement.”). Consider also the recent referendum approved by Oregon voters to require government compensation for regulatory takings, *see, e.g.*, Felicity Barringer, *Property Rights Law May Alter Oregon Landscape*, N.Y. TIMES, Nov. 26, 2004, available at <http://www.nytimes.com/2004/11/26/national/26property.html?ex=1170306000&en=488fd0b87481d5da&ei=5070>; or the nine states that voted in the November 2006 elections to limit government’s ability to use its eminent domain authority to take private property, Pfeiffer, *supra* note 195.

197. CURRIE, *supra* note 94, at 290-91. The U.S. Supreme Court has also acknowledged this disparity: “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 . . . .” *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

198. *See Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973).

199. *See Troxel v. Granville*, 530 U.S. 57 (2000) (holding that compulsory visitation violated a mother’s due process rights).

200. *See Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261 (1990).

201. Alexander, *supra* note 3, at 735.

due process theories.<sup>202</sup> In fact, “no modern Supreme Court decision has recognized a property right as fundamental for substantive due process purposes.”<sup>203</sup> Although property rights have gained greater protection under the Takings Clause over time,<sup>204</sup> “the decisions hailed by property rights partisans and property owners as paradigm-shifting victories” remain “doctrinally cautious and often limited in application.”<sup>205</sup> Moreover, the Supreme Court rarely finds “regulatory taking based on land-use restrictions in the absence of either a physical invasion or total deprivation of economic use.”<sup>206</sup>

In a country widely regarded as fiercely protective of property rights, why doesn't the Constitution positively guarantee property and why is the right to private property not considered a fundamental right? Classical-legal philosophy and political theory advocated private property rights zealously,<sup>207</sup> and attributed to ownership the same sacrosanct status as rights to life and liberty, so it might be argued that this generally shared belief made it unnecessary for a Constitution based on the possessive individualism of eighteenth-century revolutionary declarations to grant specific protection to property beyond the Takings Clause.<sup>208</sup> Since the government proposed a Constitution of limited and enumerated powers, the general right of property ownership may have not been specifically protected because the Framers preferred to avoid confining freedom to stated rights which could never comprehend the whole of liberties.<sup>209</sup>

Another possible reason, however, that there is no “fundamental right” to property protection in the U.S. Constitution is that many scholars view property under U.S. law as an artificial creation of law and not a human right created by the Constitution itself, as in Germany.<sup>210</sup> As the U.S. Supreme Court has made clear, property rights are “created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law.”<sup>211</sup>

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202. *Id.*

203. *Id.*

204. *Id.*

205. MELTZ ET AL., *supra* note 26, at 9.

206. *Id.*

207. William Blackstone may have introduced the strongest form of this rhetoric. *See* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, vol. I, 139 (reprint 1979) (“So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community.”).

208. DORSEN, *supra* note 156, at 1156.

209. *Cf. id.*

210. In the *Gravel Mining* decision, the German Court wrote that property guaranteed by the constitution cannot be derived from regular law, but rather must be taken “from the constitution itself.” *Gravel Mining* case, BVerfG 1981, 58 BVerfGE 300 (335) (F.R.G.) (author’s translation).

211. *Webb’s Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 161 (1980).

### **A. Article 14 in the *Grundgesetz*: More Than an Economic Guarantee**

Article 14's positive guarantee goes beyond the Fifth Amendment's negative guarantee, which only provides monetary compensation for a "taking" of property rights.<sup>212</sup> Part of a property *Bestand* is inviolable, which reflects the fact that property is not considered fungible as a guarantee of economic value in the German Constitution, but rather is regarded as a human right.<sup>213</sup> The FCC has distinguished the Basic Law's Article 14 from Article 153 of Germany's earlier Weimar Constitution (which guaranteed the economic value of property) to illustrate the fundamental difference between a negative and positive property clause: "The function of Article 14 is not primarily to prevent the taking of property without compensation . . . but rather to secure existing property in the hands of its owners."<sup>214</sup> Although Article 14's positive formulation may include a guarantee of property's value in the sense that compensated expropriation or mitigated regulation may be acceptable in some cases, "this view does not reflect the [full] purpose and spirit of Article 14."<sup>215</sup> In the Weimar Constitution, "the judiciary had to be concerned primarily with protecting property owners through compensation,"<sup>216</sup> and "the basic right [of property] emerged more and more into a demand for adequate compensation."<sup>217</sup> In contrast, Article 14's property guarantee protects property by securing a realm of freedom for persons to engage in self-defining activity and control their own destinies.

Thus, Article 14 is a defensive or negative right or shield from state intervention, in the tradition of political liberalism in which the U.S. Takings Clause is also grounded.<sup>218</sup> Yet the property right under the *Grundgesetz* is primarily a personal guarantee, not a material one.<sup>219</sup> In contrast to the neoclassical theory of

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212. Compare Grundgesetz [GG] art. 14 (F.R.G.), with U.S. CONST. amend. V. Other than asking for compensation, the only recourse a U.S. property owner has to challenge a land-use regulation as a taking is under the public purpose requirement. However, because the Supreme Court broadly interprets this requirement, it is the rare regulation that is invalidated entirely rather than compensated under the Fifth Amendment. See, e.g., *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

213. MOSTERT, *supra* note 99, at 83-85. In the German Bill of Rights, human dignity influences the interpretation and application of all aspects of the property clause. In fact, some scholars maintain that the fundamental rights in the Basic Law are ranked according to their importance, human dignity the most important of all, with the result that the property guarantee is primarily a guarantee for the protection of personal liberty and not for the protection of property as such. See, e.g., LEISNER, *supra* note 91, at 125.

214. *Deichordnung* case, BVerfG 1968, 24 BVerfGE 367 (389) (F.R.G.), translated in DORSEN, *supra* note 156, at 1162.

215. *Id.*

216. *Id.* This is largely because courts did not review the constitutionality of expropriation laws.

217. *Id.*

218. VON DANWITZ, *supra* note 92, at 156.

219. See *Deichordnung* case, BVerfGE 24, 367 (389).

protecting property as an economic entitlement,<sup>220</sup> the German scheme of constitutional property reflects a republican ideal of moral and civic duty that is largely absent from classical economic liberalism.<sup>221</sup>

While regulations are based on social context, they must also uphold the subjective and the institutional property guarantees. Accordingly, the FCC developed its constitutional concept of property by the rights that cannot be defined away. Of these, “private use” (*Privatnutzigkeit*) is most important.<sup>222</sup> Property no longer “deserves” the name “property,” the Court has said, when an owner can no longer derive any valuable use out of it.<sup>223</sup> While the social obligation may restrict private use, the social obligation may only limit the individual’s freedom to use property to the extent that she still has private use for the object of property protection. Thus, private use is the absolute limit on state regulation.

## **B. What Does the Fifth Amendment Guarantee?**

### 1. A Guarantee of Economic Value?

Under what Gregory Alexander terms the “property as commodity” view, prevalent in the United States,<sup>224</sup> a core purpose of property as a constitutional value is satisfying individual preferences. In other words, property materially defines the legal and political sphere where individuals are able to pursue their private agendas, free from governmental coercion; in this sense, the Fifth Amendment property clause serves as a basic right used to block “legislative or regulatory redistributive measures that frustrate the full satisfaction of individual preferences.”<sup>225</sup>

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220. In the spirit of the familiar American civic argument that good citizenship requires individuals to sometimes sacrifice their private interests for the well-being of the community, Gregory Alexander describes a republican conception of property that emphasizes the social obligations attached to land ownership and stresses the role played by property ownership in collective life. The role of property in this view is to satisfy individuals’ needs so that they can contribute to the commonwealth as independent citizens. GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776-1970*, at 375 (1997).

221. See Alexander, *supra* note 3, at 769. There are, of course, a few civic duties under U.S. law—such as jury duty or the military draft—that may reflect the kernel of what Alexander describes as a republican conception of property ownership.

222. BVerfG 1999, 100 BVerfGE 226 (243) (F.R.G.).

223. *Id.*

224. ALEXANDER, *supra* note 220, at 1-2.

225. *Id.* at 375. Frank Michelman describes this similarly as the “possessive conception” of constitutional property rights, in which property is a negative claim that the owner has against others, including the state, not to interfere with her use, possession, and enjoyment of her property, and the right to be free from redistributive actions by the state that take away any portion of one’s interest in property. Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1319 (1987). C.B. Macpherson also

U.S. constitutional property jurisprudence has developed in the context of takings challenges, rather than substantive due process challenges,<sup>226</sup> to protect the worth of property. According to Alexander:

[P]roperty 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. 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.<sup>227</sup>

Indeed, there are few, if any, instances where the Court has explicitly accorded greater protection to a property right implicating personhood interests than one involving a purely speculative investment.<sup>228</sup>

Moreover, the Court has rarely, if at all, expressed skepticism about protecting pure property profit-making or speculation.<sup>229</sup> Justice Scalia's dissent in *Palazzolo v. Rhode Island* even seems to affirm the equal treatment of such interests in takings jurisprudence: "This is not much different from the windfalls that occur every day at stock exchanges or antique auctions, where the knowledgeable (or the venturesome) profit at the expense of the ignorant (or the risk averse)."<sup>230</sup> As one scholar notes, the Supreme Court seems to view "taking a dollar from a homeless person [as] functionally equivalent to taking a dollar from a millionaire," reflecting a general reticence to conduct an individualized analysis of the property owner's dependence on, or relationship to, the object of protection.<sup>231</sup>

Indeed, U.S. law often defines an owner's interest in property and the impact of governmental regulation in terms of economic value, in contrast to the German courts' rhetoric of dignity and autonomy. As first established in *Penn Central*, which remains the U.S. Supreme Court's "polestar,"<sup>232</sup> the Court's test for all regulatory takings has focused on how the economic impact of governmental regulation relates to regulation's purpose,<sup>233</sup> and on whether the deprivation is contrary to reasonable

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labeled the neoclassical conception "possessive individualism." C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* 3 (1962).

226. See Alexander, *supra* note 3, at 740.

227. *Id.*

228. See *id.*

229. *Id.*

230. 533 U.S. 606, 636 (2001).

231. Wright, *supra* note 14, at 192.

232. *Palazzolo*, 533 U.S. at 633.

233. See *Yee v. Escondido*, 503 U.S. 519, 523 (1992) (regulatory takings cases "necessarily entail[] complex factual assessments of the purposes and economic effects of government actions").

investment-backed expectations.<sup>234</sup> “[T]he Takings Clause . . . protects private expectations,” according to Justice Kennedy, “to ensure private investment.”<sup>235</sup>

## 2. A Purely Constitutional Notion of Property in U.S. Law

Though economic worth is a defining characteristic of constitutionally protected property rights, the Supreme Court has never settled on an essential “stick” from the “bundle” or quantum of property rights that the Constitution unconditionally guarantees. Courts and commentators usually agree that the power to regulate is not boundless. It is hard to imagine a state purpose so compelling that “any competing use must yield,” Justice Scalia wrote in his *Lucas* opinion.<sup>236</sup> In *Palazzolo*, Justice Kennedy similarly suggested that there must be some limit to the state’s authority to shape and define property rights and reasonable investment-backed expectations, even when the property owner takes title with notice of the regulation.<sup>237</sup>

Otherwise, there is an “inherent circularity” to how the legislature defines property: “[I]f the owner’s reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what the courts say it is.”<sup>238</sup> Thus, a limit on the police power to redefine these expectations—a positive guarantee backed by constitutional norms—*must* be read into the U.S. property clause if the Fifth Amendment is to have meaning at all.<sup>239</sup>

It is interesting then, that FCC jurisprudence justified expanding the scope of public control over land use by an exclusively constitutional notion of property. In the watershed *Gravel Mining* decision, discussed above, the FCC departed from its own previous view that property must be considered in light of its historical development under the Civil Code and held that the constitutional notion of property was derived from neither ordinary statutes nor private law regulations, but rather

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234. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1034 (1992) (Kennedy, J., concurring).

235. *Id.* at 1033.

236. *Id.* at 1025, 1028 (majority opinion) (arguing that an approach that “would essentially nullify *Mahon*’s affirmation of limits to the noncompensable exercise of the police power” or that suggests “that title is somehow held subject to the ‘implied limitation’ that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture”).

237. *Palazzolo*, 533 U.S. at 629.

238. *Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring).

239. LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 465 (1978) (“[T]he expectations protected by the [takings] clause must have their source outside the positive law of the state. Grounded in custom or necessity, those expectations achieve protected status not because the state has deigned to accord them protection but because constitutional norms entitle them to protection.”); *see also* RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 304-05 (1985); Frank Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1103 (1981).

from the Constitution's private guarantee itself.<sup>240</sup> Most novel about the *Gravel Mining* decision is that the Court explicitly recognized that the constitutional concept of property realizes a particular social model. Although the legislature defines property in terms of particular rights or duties, the Constitutional Court determines the balance between the content of a law and the law's limitations—between the fundamental protection of private property and the social obligation to use that property with regard for the greater welfare.

## V. COMPARING THE U.S. SOCIAL OBLIGATION WITH THE GERMAN *SOZIALPFLICHT*

### A. Germany's *Sozialpflicht*

German courts interpret the regulation clause, Article 14(1)(ii), as a directive to the legislature to carry out the two mandates of Article 14(2): first, to foster a property regime to promote conditions favorable for all to acquire property; and second, to promote property rights that incorporate the externalities they create for non-owners and society at large.<sup>241</sup> The legislature may regulate these ownership rights to the extent the rights serve a social function—that is, by the extent to which they fulfill the self-development and self-realization purposes of constitutional property protection.<sup>242</sup>

Property rights discourse, a backdrop to the debate over property's social obligation, is not nearly as shrill in Germany as it is in the United States. In fact, there is a remarkable “absence of major debate in Germany about the need for . . . an elaborate system of land use planning.”<sup>243</sup> This is not, however, a function of “lack of attention to land use issues,” but rather the fact “that German land use planning experts, particularly those who are geographers or planners, rather than lawyers, seem to presume that a state inherently has the power and obligation to engage in extensive land use planning.”<sup>244</sup>

As will be explored below, the social obligation (*Sozialpflicht*) in German law is broader in scope than any analog in U.S. law. Just as in the United States, the ownership of property in Germany does not include the right to cause a public nuisance.<sup>245</sup> Uncontroversial regulations include, for example, the right to prevent

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240. *Gravel Mining* case, BVerfG 1981, 58 BVerfGE 300 (F.R.G.).

241. See, e.g., SCHMIDT, *supra* note 169, 395-97; MOSTERT, *supra* note 99, 25-26.

242. See, e.g., sources cited *supra* note 241.

243. Larsen, *supra* note 98, at 1017.

244. *Id.* at 1017-18. Other reasons are “the system's success in contributing to a high level of living conditions for a very large part of society—no small feat in a country as densely populated as Germany” and the fact that “the German system succeeds at creating the consensus necessary to implement such a far-reaching land use planning program.” *Id.*

245. FRITZ OSSENBUHL, STAATSHAFTUNGSRECHT 395 (5th ed. 1998); BVerfG 1966, 20 BVerfGE 351 (355-62) (F.R.G.).



mining companies from depleting groundwater supplies<sup>246</sup> or to destroy dogs suspected of having rabies.<sup>247</sup> Although the *Sozialpflicht* naturally encompasses the legislature's duty to prohibit any noxious property use, Article 14(1)(ii) has neither been limited to preventing nuisance as courts interpret it nor tied to preventing harms—an important concept in U.S. law.<sup>248</sup> Courts do not even stretch to characterize most enactments of the *Sozialpflicht* as preventing a nuisance. Indeed, in its perception of ownership as socially tied, the social obligation clause is much “broader than the minimal duty to avoid creating a public nuisance,” and therefore looks different than the Takings Clause in the American Constitution.<sup>249</sup>

In general, the *Sozialbindung* refers to the justification for all sovereign acts that limit property and are not compensated. This includes all constitutional laws, regulations, and measures enacted under Article 14(2) that do not satisfy either of two criteria. Such laws defining property must not: (1) constitute a physical confiscation of property (*Güterbeschaffung*),<sup>250</sup> an essential criterion for the Court's most recent narrow expropriation term (*enger Enteignungsbegriff*); or (2) belong to the “certain aspects of property which cannot be changed by the legislature” (the positively guaranteed *Kernbereich*).<sup>251</sup> In other words, the state may regulate private property rights by exercising the social obligation so long as the act neither constitutes a “taking” nor infringes the constitutionally defined set of core property rights (the *Kernbereich*).<sup>252</sup>

An Article 14 expropriation is narrower than a U.S. Fifth Amendment taking, under which a land-use control in some cases may be characterized as a compensable regulatory taking. German law does not identify a land-use regulation as an expropriation based on its intensity, scope, or unequally distributed burden,<sup>253</sup> but rather distinguishes it formalistically by its form and purpose.<sup>254</sup> Property must be physically removed from its owner (*Güterbeschaffung*) and the measure specifically intended to limit property rights (rather than the inadvertent consequence of an illegal or negligent state act) for it to be an expropriation.<sup>255</sup> When a measure does not fulfill either requirement, it cannot be an expropriation, no matter how intense its impact on an owner.<sup>256</sup> Even if it is not an expropriation, the Court may

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246. BVerfG 1959, 10 BVerfGE 89 (112-14) (F.R.G.).

247. See BVerfGE 20, 351 (355-62).

248. See, e.g., Peterson, *supra* note 41, at 141.

249. Alexander, *supra* note 3, at 750.

250. This is an essential criterion for takings as defined by the Constitutional Court's most recent narrow “takings” term. SCHMIDT, *supra* note 169, at 394-450.

251. *Id.*

252. See EKKEHART STEIN, STAATSRECHT 72-91 (9th ed. 1984).

253. BVerfG 1999, 100 BVerfGE 226 (240) (F.R.G.) (“The categorization of the law [as an expropriation or a determination of contents and limitations] is independent of the intensity of the burden on the rights bearer.” (author's translation)).

254. STEIN, *supra* note 252, at 88.

255. *Id.* at 101.

256. *Id.*

decide a regulation eliminates an owner's right of dominion over her property or her private use of the property—in other words, it infringes the *Kernbereich*. Even if regulations are not expropriations, the plaintiff may be entitled to injunctive relief. In these cases, the state may not engage in such regulation, even if it pays.<sup>257</sup>

Therefore, the regulatory taking does not exist in German law, and any limitation of property rights that does not fall under one of the narrow categories described above<sup>258</sup> may, in principle, be an expression of the social commitment of property.<sup>259</sup> This does not mean, however, that the property owner must withstand any measure without any sort of compensation. And even if a measure is enacted under the contents and limitations clause, individual property owners may win compensation through a facial challenge, arguing that a particular law does not take into account landowners who are disproportionately burdened by its provisions and should provide compensatory measures, *Ausgleichsleistungen* (the equalization payments described above).<sup>260</sup> A landowner can also claim that she was entitled, but not awarded, compensatory measures for which a specific law provides.<sup>261</sup>

### 1. Direct Obligation

German courts interpret the social obligation in the second clause of Article 14 as a direct mandate for property owners and the legislature.<sup>262</sup> This encompasses a duty to refrain from socially unjust uses (*Unterlassen sozialwidriger Eigentumsnutzungen*), and an affirmative duty to engage in socially just uses (*sozialgerechte Nutzungen*).<sup>263</sup> In other words, the Basic Law has self-executing limitations on the property owner's use of his land.<sup>264</sup> As long as the private property owner exercises his property rights “responsibly” (with an eye to the common good), interference by the state in these rights requires justification.<sup>265</sup> In practice, there are no direct legal consequences of Article 14(2).<sup>266</sup> Only regulation legitimized by the

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257. *Id.*

258. It is only since 1979 that the FCC has used the narrow takings expression (*enger Enteignungsbegriff*); earlier, under the wide takings expression (*weiter Enteignungsbegriff*), an approach closer to our own regulatory takings doctrine was possible, where expropriations could be found in the case of limitation of ownership rights. The problem here was that this “softening” of the takings institute was seen as hollowing the contents and limitations clause of meaning, since this provision is characterized by its limitation of property rights. See, e.g., SCHMIDT, *supra* note 169, at 394-450.

259. STEIN, *supra* note 252.

260. See, e.g., *Obligatory Sample* case, BVerfG 1981, 58 BVerfGE 137 (F.R.G.).

261. *Id.*

262. THEODOR MAUNZ & GÜNTER DÜRIG, GRUNDGESETZ KOMMENTAR 169 (2002).

263. *Id.*

264. *Id.*

265. VON DANWITZ, *supra* note 92, at 189.

266. MOSTERT, *supra* note 99, at 144-45.

legislature or an administrative authority empowered by the legislature can impose binding obligations on the landowner.<sup>267</sup>

## 2. Indirect Obligation

The legislature, empowered to shape property rights by Article 14(1)(ii) (“the contents and limits clause”), must balance the public good against the positive guarantee, which represents the owner’s own interests.<sup>268</sup> This requirement to balance the competing public and individual interests at issue is the “the duty to weigh” (*Abwägungsgebot*). The central question in this balance is whether a regulation is proportionate (*verhältnismässig*) or reasonable for the property owner.<sup>269</sup> While the Basic Law does not explicitly recognize the principle of proportionality (*Verhältnismässigkeit*), legal scholarship recognizes it as a fundamental tool of constitutional interpretation.<sup>270</sup> Proportionality requires: (1) a legitimate reason to interfere with fundamental rights, (2) an appropriate and necessary means to interfere, and (3) that the means be proportionate to the ends.<sup>271</sup> In this test, courts balance the property type’s social function, what the property means to the owner, how the property use affects third parties, the suitability of that property use to its site, whether interests are vested, and how much capital investment or effort the owner has put into the property use.<sup>272</sup>

From the results of this factor-balancing test, the courts distinguish between “non-compensable” (*entschädigungslose*)<sup>273</sup> social obligations and *ausgleichspflichtige* regulations (where there is a duty to undertake an *Ausgleichsleistung*, an equalization payment or measure). The cost of a regulation deemed non-compensable is borne by the property owner as part of the social obligation.<sup>274</sup> In the exceptional case—where a measure’s limitation of property

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267. RUDOLF DOLZER, PROPERTY AND ENVIRONMENT: THE SOCIAL OBLIGATION INHERENT IN OWNERSHIP: A STUDY OF THE GERMAN CONSTITUTIONAL SETTING 28 (1976).

268. See BVerfG 1999, 100 BVerfGE 226 (240) (F.R.G.) (“In determining the content and limitations of property in the sense of Art. 14 Para. 1 Sent. 1 of the Basic Law, the legislature must bring the protectable interests of the property owner and the needs of the common good into a just equalization and a well-balanced relationship.” (author’s translation)).

269. SCHMIDT, *supra* note 169, at 394.

270. See, e.g., VAN DER WALT, *supra* note 1, at 135.

271. CURRIE, *supra* note 94, at 307. This predates the 1949 writing of the new constitution. An account of its origins can be found in *id.* at 307-10.

272. *Id.*

273. Translated literally as an “equalization payment.” The FCC has expressly recognized that although the legislature can eliminate “existing legal positions” (*bestehende Rechtspositionen*), the legislature should provide for transitional measures or some sort of compensation because the limitations can affect the owner just like an expropriation. BVerfG 1995, 93 BVerfGE 121 (F.R.G.); BVerfG 1995, 93 BVerfGE 165 (F.R.G.).

274. *Obligatory Sample* case, BVerfG 1981, 58 BVerfGE 137 (150) (F.R.G.).

rights disproportionately burdens an individual or group of individuals—compensation must be paid or other non-monetary mitigating measures, such as variances and amortization periods, granted.<sup>275</sup> When payment is required, it is usually less than the full market value of the property. Meant to soften the impact of a particular regulatory measure for a particular individual or group of individuals, the equalization payment resembles private law compensation for tort damages more than constitutional compensation for expropriation.<sup>276</sup> The FCC first developed the doctrine of *Ausgleichsleistung* in the 1981 *Obligatory Sample* decision described above.<sup>277</sup> This “hardship plaintiff” is the classic instance of applying the doctrine.

Despite the narrow paths available for compensation or mitigation, many land-use regulations are non-compensable social obligations. For instance, one zoning tool, *Baulandumlegung*, allows legislatures to approve relocation of developed and undeveloped plots within the area of a binding land-use plan for the purpose of opening up new areas for development.<sup>278</sup> The FCC reasoned that because the Federal Building Code provision’s primary purpose was to reconcile the private interests of property owners, *Baulandumlegung* was non-compensable; the public interest purpose (in orderly development) was only secondary.<sup>279</sup> Furthermore, the FCC reasoned, relocating plots does not deny core rights to plaintiffs, but rather facilitates, above all, owners’ developing their own property, and therefore fulfills the constitutional purpose of protecting property instead of denying core rights to the plaintiffs.<sup>280</sup>

Landowners must also tolerate, without compensation, extensive regulation of the landlord-tenant relationship as a part of the social obligation, including rent freezes and very limited eviction rights for landlords.<sup>281</sup> Other regulations include

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275. SCHMIDT, *supra* note 169, at 418-21. Recall that expropriation, as provided for by Article 14(3), must be undertaken pursuant to legislation providing for the type and extent of compensation. Grundgesetz [GG] art. 14(3) (F.R.G.).

276. SCHMIDT, *supra* note 169, at 418-21.

277. BVerfGE 58, 137.

278. BVerfG 2001, 104 BVerfGE 1 (F.R.G.) [hereinafter *Baulandumlegung* case]. Under the *Sollanspruch* in the Federal Building Code, where the reallocation procedure is codified, calculating the share of redistribution mass due to each property owner is based on either the relative size or the relative value of the former plots prior to allocation. BauGB [Federal Building Code] 1997, § 56, ¶ 1, sentence 1 (F.R.G.). Property owners are, insofar as possible, to be allocated plots from within the redistribution mass with a comparable or equivalent location to the plots which have been contributed. *Id.* § 59, ¶ 1.

279. The Court also pointed out that property owners will benefit from the public services, such as roads, that will be provided to the reallocated plots. *Baulandumlegung* case, BVerfGE 104, 1 (7).

280. See *supra* text discussing Federal Building Code accompanying note 278.

281. In the *Eviction Protection Law (Wohnraumkündigungsschutzgesetz)* case, the FCC reviewed the constitutionality of a federal law that was introduced for a limited period to provide protection for lessees of residential property in view of the housing shortage. This law excluded the right of the lessor to raise the rent and to cancel the lease. BVerfG 1974, 37 BVerfGE 132 (F.R.G.) [hereinafter *Eviction Protection Law* case]. The *Vergleichsmiete* case

requirements to use, maintain, or rehabilitate historic buildings;<sup>282</sup> development freezes of up to four years when municipalities are changing a land-use plan;<sup>283</sup> a general right of first refusal for local governments (*Allgemeines Vorkaufsrecht of the Gemeinden*) to purchase land put up for sale by an owner;<sup>284</sup> and the right of the legislature to redefine land ownership to exclude groundwater<sup>285</sup> and mineral resources.<sup>286</sup>

### 3. Social Function or Relevance of Property

In defining and redefining property rights, the legislature must consider whether the proposed regulation interferes with constitutionally protected property

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prohibited the raising of rents more than 30%. BVerfG 1985, 71 BVerfGE 230 (247) (F.R.G.) [hereinafter *Vergleichsmiete* case]. Although this case represented a unique historical circumstance, German law generally protects tenants more than U.S. law does. For example, section 574 of the German Civil Code provides that a landlord may only cancel a lease for a “legitimate interest,” which does not include raising the rent. Bürgerliches Gesetzbuch [BGB] [Civil Code] Aug. 18, 1896, Reichsgesetzblatt [RGBI] 195, as amended, § 574. Section 573, paragraph 2, limits a “legitimate interest” to cases where the tenant is in substantial breach of the contract; the lessor needs the apartment for himself, his family, or members of his household; or the lessor would be prevented from realizing a reasonable economic return on his property and therefore suffer considerable disadvantage, though this excludes rental at a higher price. *Id.* § 573, ¶ 2. Several cases confirmed that it is a constitutional exercise of the legislature’s contents and limitations power to cancel a lease only with a legitimate interest. *See, e.g.*, BVerfG 1989, 81 BVerfGE 29 (32) (F.R.G.); BVerfG 1989, 79 BVerfGE 292 (302) (F.R.G.); BVerfG 1985, 68 BVerfGE 361 (367) (F.R.G.).

282. Sometimes this can be an obligation to use monuments in specific ways or restore features to a condition that they were not in at the time they were declared monuments. RUDOLF KLEEBERG, *KULTURGÜTER IN PRIVATBESITZ: HANDBUCH FÜR DAS DENKMAL- UND STEUERRECHT*, margin note nos. 100, 110 (2d ed. 2001).

283. *See* BauGB [Federal Building Code] Aug. 18, 1997, § 14 (F.R.G.). During this period no considerable improvements may be made and demolitions are prohibited. *Id.* § 14, ¶ 1. Such a moratorium regularly lasts two years, though it is often extended for a third year and in exceptional circumstances may be extended to a fourth year. *Id.* § 17. After four years, some sort of monetary compensation is normally required (*Ausgleichspflicht*). *Id.* § 18.

284. *Id.* § 24.

285. *See Gravel Mining* case, BVerfG 1981, 58 BVerfGE 300 (322f) (F.R.G.). The *Gravel Mining* opinion held that the Water Supply Law (*Wasserhaushaltsgesetz*), which changed the law to require property owners who had been using ground water to obtain permits for its use, was not a “taking,” but an expression of the contents and limits clause. *Id.* With this case, the FCC returned to a narrow definition of “expropriation” (*Enteignung*), which required the partial or total removal of property from the hands of the owner, rather than just the limitation of its use. *Id.*

286. Bundesverwaltungsgericht [BVerwG] [Highest Administrative Court] July 12, 2000, 94 Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] 23 (27) (F.R.G.).

functions.<sup>287</sup> If the personhood or personal autonomy of its owner is closely tied to a type of property, the greater the protection courts recognize and the less discretion the courts leave to the legislature to limit those ownership rights.<sup>288</sup> Courts distinguish different types of property by considering the property type's importance to the general public or to affected third parties.<sup>289</sup> A landowner's social obligation, for example, is greater because land is scarce.<sup>290</sup> Thus, the court may consider the interests of non-owners and the general public more in cases involving land than in cases of property of no special relevance. In another example, the legislature restricts the property rights of public housing owners more than owners of private housing because subsidized housing has a special relevance for a socially just system of land ownership.<sup>291</sup> The high social importance of publicly subsidized housing and the vulnerability of its occupants within the economic sphere and in shaping their own lives justify expansive regulation by the legislature.<sup>292</sup>

Courts have also recognized a hierarchy among various public interests in land-use regulation. For example, protecting natural resources by requiring property owners to remove water or ground pollution is generally considered more important to society—and, therefore, to demand a greater social obligation from individual owners—than promoting cultural life through historic preservation.<sup>293</sup> And despite the high priority placed on protection of natural resources,<sup>294</sup> certain justifications for protection have more weight than others. For example, courts give less weight to purely aesthetic reasons for conservation than ecological considerations.<sup>295</sup> Yet, owners of historically or culturally significant buildings have a higher social obligation than owners of buildings not protected by historic preservation legislation,

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287. BVerfG 1980, 53 BVerfGE 257 (292) (F.R.G.).

288. Van der Walt explains this as the distance between the type of property and the sphere of individual liberty of the owner. VAN DER WALT, *supra* note 1, at 135.

289. MOSTERT, *supra* note 99, at 225. Differentiating among various kinds of property, according to the kind of protection each deserves, as measured against the stated purpose of constitutional property protection, is referred to in the German legal literature as the *Abstufung der eigentumsrechtlichen Grenzen*. *Id.*

290. BVerfG 1966, 21 BVerfGE 73 (82) (F.R.G.) (“Property in land is neither in its political economical nor in its social meaning to be put on an equal footing with other resources.” (author’s translation)).

291. BVerfG 1996, 95 BVerfGE 64 (84) (F.R.G.). Public housing (housing available to low-income individuals for below-market rents) may be owned by private owners in Germany. *See id.*

292. *Id.*

293. Evelyn Haas, *Die Baulandumlegung Inhalts- und Schrankenbestimmung des Eigentums*, NVwZ 272 (2002).

294. Article 20a of the Basic Law provides: “The state, also in its responsibility for future generations, protects the natural foundations of life and the animals in the framework of the constitutional order, by legislation and, according to law and justice, by executive and judiciary.” Grundgesetz [GG] art. 20a (F.R.G.) (author’s translation).

295. MAUNZ & DÜRIG, *supra* note 262, at 227 margin note no. 427.

which are deemed less significant.<sup>296</sup> And even among owners of protected buildings, courts have held that the social obligation to maintain and preserve outweighs the private owner's interest in some buildings more than in others, depending on the buildings' historical or cultural significance.<sup>297</sup>

#### 4. Change of Conditions

The FCC repeatedly emphasizes that the definition of property is dynamic: "The contents and functions of property are capable and in need of adaptation to social and economic conditions. It is the task of the legislature to undertake such adaptation while taking into account the fundamental constitutional values."<sup>298</sup> In other words, the legislature may constantly redefine property within the sphere of constitutional protection to correspond to developments in German society, so long as the other principles of constitutional interpretation, such as proportionality, equality and, most important, the positive guarantee, are observed.

The *Small Garden Plot (Kleingarten)* decision illustrates the willingness of German courts to respond to developments in German society by adjusting the definition of protected property.<sup>299</sup> In this case, the FCC invalidated a federal statute that had made it virtually impossible for private lessors of small garden plots to cancel their leases.<sup>300</sup> Although it had been common at one time for large landowners to lease land for growing vegetables to city dwellers, large-scale commercial agricultural production had supplanted this use and the plots were now held mainly for recreational uses.<sup>301</sup> The Court reasoned that the social obligation no longer required such a limitation of property rights and therefore was no longer justified by Article 14(2). According to the Court, the burden on property owners (the lessors) was unconstitutional, and excessive in relation to the purpose served by the legislation.<sup>302</sup>

In the *Eviction Protection Law (Wohnraumkündigungsschutzgesetz)* case, the FCC relied on the doctrine of changed conditions in upholding the validity of a 1971 federal law that provided additional protection for lessees of residential property in the face of a housing shortage.<sup>303</sup> This law prohibited all evictions and only allowed lessors to raise the rent, with the lessee's permission, to the normal level for

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296. *Id.*

297. *Id.*

298. *Deichordnung* case, BVerfG 1968, 24 BVerfGE 367 (389) (F.R.G.), translated in MOSTERT, *supra* note 99, at 225.

299. BVerfG 1979, 52 BVerfGE 1 (F.R.G.) [hereinafter *Small Garden Plot* case].

300. *Id.*

301. *Id.*

302. *Id.*

303. BVerfG 1974, 37 BVerfGE 132 (F.R.G.).

similarly-situated properties.<sup>304</sup> Finding the provision to be a proportionate exercise of the legislature's Article 14(1)(ii) powers and a fair burden for the lessor, the Court emphasized the dire housing shortage of the time.<sup>305</sup>

In a more recent case, the FSC held a special statute<sup>306</sup> that prohibited landlords from canceling residential leases, even in the case of a "justifiable interest" (*berechtigtes Interesse*) to be unconstitutional.<sup>307</sup> Under the German Civil Code, a "justifiable interest" was sufficient to release owners from lease obligations.<sup>308</sup> Passed right after German re-unification, the legislation aimed to achieve stability in the real estate market by preventing too much property from changing hands during this period.<sup>309</sup> The plaintiff property owner had received a grant from the city redevelopment agency to demolish his building in light of the 38% drop in population and associated apartment surplus in the East German city where the case was filed.<sup>310</sup> However, one holdout tenant refused to leave, citing this statute. In striking down the law, the court held that recent demographic trends and related developments in the housing market no longer justified the policy rationale behind the legislation, and therefore this grant of demolition from the city to the plaintiff was a reasonable social obligation.<sup>311</sup>

### 5. Meaning for the Property Owner and Third Parties

The meaning of the relevant property for the particular owner is another key element in the balancing test used by courts to assess the proportionality of government regulation. Not surprisingly, German courts use this subjective analysis in cases involving a home or residence, closely scrutinizing laws regulating rental property. The FCC has not only protected the personhood interests of legal owners, but also recognized tenants' ownership rights, observing that occupants, like owners, of residential property depend on and develop personhood interests in their homes, even if they are rented.<sup>312</sup> Since this attachment resembles the type of relationship

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304. *Id.*; see also BGB [Civil Code] 1896, RGBI 195, as amended, § 573. If lessees refused to give permission, the lessor could appeal to the court. *Id.*

305. BVerfGE 37, 132.

306. Einführungsgesetz zum Bürgerlichen Gesetzbuche [EGBGB] [German Code on Private International Law] Mar. 31, 2004, art. 232, § 2 (F.R.G.).

307. BGH 2004, 188 BGHZ 3 (F.R.G.).

308. BGB [Civil Code] 1896, RGBI 195, as amended, § 573, ¶ 2, sentence 3.

309. *Id.* § 573.

310. BGHZ 188, 3 (7).

311. *Id.* at 8.

312. See BVerfG 1989, 79 BVerfGE 292 (304) (F.R.G.); BVerfG 1990, 82 BVerfGE 6 (16) (F.R.G.); BVerfG 1999, 91 BVerfGE 294 (310) (F.R.G.). The reasoning here is that insofar as the family home can be described as the core of human existence, providing its owner with a secured sphere of freedom where she can take responsibility for the development



accorded most protection under Article 14, the Court has concluded that lessees may be considered to have separate property interests in the occupied space.<sup>313</sup>

Even before the FCC explicitly recognized ownership rights for tenants, the Court often considered the impacts of legislatively-determined property rights on non-owners.<sup>314</sup> For instance, a 1985 case<sup>315</sup> upheld a section of the Civil Code making a landlord's right to cancel a lease contingent on a justifiable interest.<sup>316</sup> Because "[l]arge parts of the population cannot, for financial reasons, acquire or set up their own homes and are, therefore, in an existential way dependent on the use of foreign property," facing considerable personal, family, economic and social costs if the right to use that property is lost, the Court reasoned that it was proportionate to make a landlord's right to cancel a tenant's lease dependent on a justifiable interest.<sup>317</sup>

In the same case, the FCC affirmed a lower court judgment that denied relief to a woman who wanted to move to a seven-room apartment that she owned.<sup>318</sup> The Court held that she did not have a justifiable interest based on *Eigenbedarf* (necessity) because her interest in moving from a three-room apartment to a larger living space was not important enough to justify displacing the tenant already there.<sup>319</sup> Agreeing with the lower court that "the need portrayed [was], from an objective perspective, excessive or exaggerated,"<sup>320</sup> the FCC concluded that this was an exercise of property rights that, in light of the social meaning of the home, is not

and control of her own life, the lessee's lease rights fulfill the function that tangible property rights serve others. BVerfGE 79, 292 (302-04).

313. BVerfG 1993, 89 BVerfGE 1 (F.R.G.).

314. BVerfG 1992, 84 BVerfGE 382 (385) (F.R.G.) ("Use and disposition do not ever remain solely within the sphere of the property owner, but rather affect the interests of other rights holders, to whom the use of property objects is assigned. Under this premise, the constitutional mandate to pursue a common welfare-oriented use includes a mandate to consider non-owners, who need the use of the property object to secure their own freedom and shape their own self-governing lives." (author's translation)); see also BVerfG 1985, 68 BVerfGE 361 (368) (F.R.G.); *Vergleichsmiete* case, BVerfG 1985, 71 BVerfGE 230 (247) (F.R.G.).

315. BVerfGE 68, 361 (367).

316. Section 573, paragraph 2, of the German Civil Code provides that such an interest may be shown when (1) the tenant violates his contractual obligations, (2) the landlord needs the apartment for himself or his family (*Eigenbedarf*), or (3) the landlord is prevented from a reasonable economic use of his property and suffers considerable disadvantage as a result. BGB [Civil Code] 1896, RGBI 195, as amended, § 573, ¶ 2.

317. BVerfGE 68, 361 (370) ("In light of the personal, familial, economic and social consequences to the tenant that usually go along with moving, restricting the cancellation right of the landlord to cases where he has a justifiable interest in ending the rental relationship seems justified." (author's translation)).

318. *Id.*

319. *Id.* at 374.

320. *Id.*

constitutionally protected.<sup>321</sup> On the other hand, in the case described above where the FCC struck down the law prohibiting lessors from canceling leases, the Court took special note of the fact that the only remaining tenants in the building that was to be demolished had another apartment in a nearby town and were, therefore, not dependent “in an existential way” on this home.<sup>322</sup>

The FCC emphasizes that the legislature must always consider the living needs or requirements (*Wohnbedarf*) of the property owner.<sup>323</sup> Recognizing the home is “the center of [the landlord’s] existence,” the Court has concluded that *Eigenbedarf* must be subjectively interpreted.<sup>324</sup> For example, the same Court that held that the interest of the plaintiff above in moving to a larger apartment that she owned did not constitute *Eigenbedarf* also held in another decision that the lower court had failed to recognize the justifiable interests that a different plaintiff (an 89-year-old woman) had in reclaiming a ground-floor apartment that she owned from the existing tenants.<sup>325</sup> The plaintiff argued that it was difficult to climb the steps to her present apartment and wanted to be closer to her daughter, who lived in the same building as the ground-floor apartment she wanted to use. Although the plaintiff was living at the time in an apartment that was, from the perspective of the Court, suitable in all other ways, the FCC was nevertheless concerned that by not allowing the plaintiff to move to the more accessible apartment near her daughter, she had been “considerably restricted in her freedom to lead her life . . . in the way she considers right.”<sup>326</sup> In other words, the Court found the plaintiff’s reasons to be legitimate because they touched upon the core purpose of property protection. In contrast, FCC did not accord the ownership rights of the other owner such a great degree of protection by the court because her specific relationship to the property did not implicate the autonomy-securing purpose of property protection to the same extent.

Similarly, the Civil Code does not require a “justified interest” to cancel a lease when the landlord lives in such close proximity to a tenant that her own residential and living space is directly affected by the tenant’s use of that property. In other words, when the landlord’s own sphere of autonomy is directly implicated, her interest in canceling the contract is considered as important as the tenant’s interest in remaining.<sup>327</sup>

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321. *Id.* at 371.

322. BGH 2004, 188 BGHZ 3 (F.R.G.).

323. BVerfG 1989, 79 BVerfGE 292 (305) (F.R.G.); BVerfG 1989, 81 BVerfGE 29 (31ff) (F.R.G.).

324. BVerfGE 68, 361 (371).

325. *Id.* at 375.

326. *Id.*

327. This exception, codified in Section 573a of the German Civil Code, exempts the landlord who lives in one of two flats in a building from the justifiable interest requirement. BGB [Civil Code] 1896, RGBI 195, as amended, § 573a.

### 6. Situationally Based Factors (*Situationsgebundenheit*)

The regulatory burden on an owner also corresponds to the property's physical setting and characteristics. Distinct from the *Sozialbindung*, which refers to the way in which property interests are determined by the general social function of a type of property, the principle of *Situationsgebundenheit* governs the legislature's determination of the contents and limits of property rights based on physical context and situation. Since the Basic Law conceptualizes its citizens as persons living within and dependent upon society, the FSC has reasoned that an owner's rights and duties change over time, as the environmental context of her property changes.<sup>328</sup> As the Federal Administrative Court later formulated the principle, the Article 14(2) direct social obligation on the property owner limits the positive constitutional guarantee to those property uses the owner can reasonably expect to continue, unless the owner should have foreseen that a use would be unreasonable because of the natural characteristics or probable development of the surrounding area.<sup>329</sup>

In the *Green Space (Grünflächen)* decision, the FSC reasoned that an owner is presumed to know, based on the location of her property, that she cannot use that property in certain ways.<sup>330</sup> The FSC upheld rezoning of land long used for agriculture to open space in a densely developed industrial area even though the designation prevented any further development.<sup>331</sup> The city justified the building prohibition as necessary in light of the high population density that had developed since the plot was zoned for agriculture.<sup>332</sup> This development made the interest of the regional public in health and outdoor recreation especially compelling. In the *Chapel (Kapellenurteil)* decision, an owner of a plot near a historic chapel was denied a building permit to construct a shed on his property, even though it was zoned for such a structure, because of its proximity to the landmark.<sup>333</sup> In another case, a farm owner who had planted beech and oak trees on his land (in order to sell them as timber) long before they were designated as protected natural resources,<sup>334</sup> was

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328. BODO PIEROTH, GRUNDRECHTE, STAATSRRECHT II margin note no. 931 (2000); BGH 1978, 23 BGHZ 30 (35) (F.R.G.); BGH 1995, 80 BGHZ 111 (116) (F.R.G.); BGH 1996, 90 BGHZ 4 (15) (F.R.G.).

329. BVerwG 1971, 38 BVerwGE 209 (219) (F.R.G.).

330. BGH 1956, 23 BGHZ 30 (F.R.G.) [hereinafter *Green Space* case].

331. *Id.*

332. *Id.* at 36.

333. Bundesbaublatt [BBauBL] 1958, § 1385 [hereinafter *Chapel* case].

334. The property was designated as a "protected natural resource" (*Naturdenkmal*). This designation is among the instruments used by the Federal Nature Protection Act (*Bundesnaturschutzgesetz*) and the Nature Protection Acts of the *Länder* to preserve natural resources. Proclaiming certain areas as nature or landscape preservation areas limits the purposes for which they may be used. See GERHARD ROBBERS, AN INTRODUCTION TO GERMAN LAW 136 (Nomos Verlagsgesellschaft ed., Baden-Baden 2003).

prohibited from felling those trees.<sup>335</sup> As the FSC has held, property is bound by its situation (*seiner Natur nach*)—its geography, surroundings, and natural features—with a certain commitment (*Pflichtigkeit*) that can always, upon the legislature’s exercise of its 14(1)(ii) competence, intensify to a “duty” (*Pflicht*).<sup>336</sup> As the FSC reasoned in the *Gravel Mining* case,

[A] rational and reasonable owner, who had not lost sight of the common good, would abstain from gravel extraction. . . . He would not close his mind to the knowledge that the completely paramount interest of landscape protection requires retention of the remaining forest and compels him to refrain from the otherwise economically rational exploitation of the gravel deposit which lies in his private interests.<sup>337</sup>

Although the direct social obligation derived from Article 14(2) of the *Grundgesetz* may apply in some cases where a once reasonable use no longer corresponds to the current situation, there is a presumption in favor of an already-exercised use that alters the physical state of the property. Such labor or capital investment by the owner demonstrates a certain *Situationsberechtigung* (situationally-bound entitlement).<sup>338</sup> That is, an already-made use enjoying *Bestandschutz* might suggest that this use is appropriate to the property’s location or situational characteristics and changes the “situation” of the property.<sup>339</sup> Thus, the Federal Administrative Court in the *Bavarian Nature Protection Law (Bayerisches Naturschutzgesetz)* case, upholding as a noncompensable content regulation an administrative action that declared the plaintiff’s shoreline property a nature preserve and prohibited recreational uses, including camping, swimming, rowing, and sailing (and only allowed the owner to make agricultural use of his property as a hay meadow that could be harvested once annually), justified its decision partly by the

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335. Die Öffentliche Verwaltung [DÖV] 1957, § 669 [hereinafter *Cathedral of Beech Trees (Buchendom)* case].

336. *Green Space* case, BGHZ 23, 30 (33).

337. Raff, *supra* note 45, at 679 (citing *Gravel Mining* case, BVerfG 1981, 58 BVerfGE 300 (349) (F.R.G.)) (indicating that the property owner was refused permission to extract gravel because, among other reasons, the area to be developed was a small forest that served as a habitat for various animals and that was seen as vital for future regeneration of the area).

338. Article 14 protects the property owner, who has increased the value of his property in reliance upon his property rights, from the sudden devaluation of his property by a change to the legal order. Grundgesetz [GG] art. 14 (F.R.G.). The requirements for this protection, the Court has said, is that the property has “set something in motion” (*etwas ins Werk gesetzt hat*), which means that the property owner has contributed labor or capital to value-creating changes. *Gravel Mining* case, BVerfGE 58, 300 (349).

339. BGH 1988, 105 BGHZ 15 (20) (F.R.G.).

fact that recreational uses had never been made, which it found hardly surprising given the unsuitability of recreational uses to the plot.<sup>340</sup>

## **B. Comparison to the United States**

### 1. Social Relevance

There is general consensus among courts and legal scholars that the American nuisance-influenced takings doctrine reflects an unstated social obligation that takes into account the social function and relevance of different types of property.<sup>341</sup> However, it remains unsettled how much further this obligation extends than the duty not to do harm—that is, how broadly “harm” is to be interpreted and whether the duty can be construed as an affirmative obligation of property owners, to preserve or protect natural or cultural resources for the general public, for example, or whether courts consider the subjective effects of a property use on a larger class of non-property owners.<sup>342</sup>

The California Supreme Court decision of *Ehrlich v. City of Culver City*<sup>343</sup> presents a typical borderline case in defining the scope of an owner’s social obligation. In *Ehrlich*, the owner of the site of a former private health and recreation center challenged a \$280,000 municipal “mitigation fee” and an exaction under the city’s “art in public places” program as conditions for approval of his request that the property be rezoned to permit construction of a condominium project.<sup>344</sup> The trial court concluded that the exaction was “simply an effort to shift the cost of providing a public benefit to one no more responsible for the need than any other taxpayer.”<sup>345</sup> The Court of Appeals reversed, holding that the “mitigation fee was imposed to compensate the city for the benefit conferred on the developer by the city’s approval of the town home project and for the burden to the community resulting from the loss of recreational facilities.”<sup>346</sup> After the U.S. Supreme Court vacated the appellate court’s judgment for reconsideration in light of *Dolan*,<sup>347</sup> the California Supreme Court found the connection between the negative effects that the city could mitigate using its police power and the required dedication insufficient—the record did not

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340. BVerwG 1993, 94 BVerwGE 1 (F.R.G.) [hereinafter *Bavarian Nature Protection Law* case] (discussing *Bayerisches Naturschutzgesetz* [BayNatSchG] [Bavarian Nature Protection Law] Aug. 19, 1998, as amended, art. 36, § 2 (F.R.G.)).

341. John Nivala, *Droit Patrimoine: The Barnes Collection, the Public Interest and Protecting Our Cultural Inheritance*, 55 RUTGERS L. REV. 477, 531 (2003).

342. *See id.* at 491.

343. *See Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996).

344. *Id.* The owner demolished the private health club in the course of his legal battle. *Id.*

345. *Ehrlich v. City of Culver City*, 19 Cal. Rptr. 2d 468, 472 (Ct. App. 1993).

346. *Id.* at 476.

347. *Ehrlich v. City of Culver City*, 512 U.S. 1231, 1231-32 (1994).

support the required “fit” between the monetary exaction and the loss of the parcel zoned for commercial recreational use.<sup>348</sup> Although the court acknowledged that the withdrawal of this private land use had adverse public impacts,<sup>349</sup> the court carefully distinguished between the value of a recreational use on that parcel and the value of plaintiff’s health club: “[T]he loss which the city seeks to mitigate by levying the contested recreational fee is not the loss of any particular recreational facility, but the loss of property reserved for private recreational use.”<sup>350</sup> That is, the city could only impose the costs involved in rezoning or the value of the right not to use the parcel for the use for which it was zoned, not the loss of the actual facility that was being provided to the community.

Although U.S. courts no longer seem to link many forms of social obligation to a harm or noxious-use principle,<sup>351</sup> courts still struggle with the question of which property uses or public purposes must yield to competing land uses. *Ehrlich* is doctrinally about exactions (and therefore triggers the Supreme Court’s means-end analysis from *Nollan* and *Dolan*), but there is still a question lurking in this case about whether the plaintiff caused a “harm” by refraining from a beneficial use that he had previous engaged in, or why his desired future use must be tied to providing a public benefit for the community.

Indeed, there is no shortage of articles describing the Supreme Court’s takings jurisprudence as a “muddle” and puzzling over the source and scope of this

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348. *Ehrlich*, 12 Cal. 4th at 883.

349. *Id.*

The opportunity of Culver City residents to use such private recreational facilities created a *public* benefit by enlarging the availability of such facilities. Without such a facility, residents would have to travel farther, wait longer, and put up with other inconveniences and restricted choices in their recreational pursuits. Thus, the fact that a recreational facility is privately rather than publicly owned does not erase its value to the public.

*Id.* at 879. Note that the court’s analysis here stands in direct contrast to the trial court on this issue. The trial court, in its memorandum opinion granting judgment for the plaintiff, reasoned:

[The plaintiff’s] club . . . was at all times *private* property; the city never owned any interest in it nor was any part of it ever dedicated to *public* use. . . . [Plaintiff’s] actions cannot be said to deprive the *City* of tennis courts, because neither did [plaintiff] have an affirmative duty to provide tennis courts to the City or its residents nor would tennis courts necessarily be available to the City but for [plaintiff’s] project.

*Id.* at 878.

350. *Id.* at 883.

351. *See* *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1026 (1992).

obligation.<sup>352</sup> Andrea Peterson proposes one model for understanding the outcomes of Supreme Court regulatory takings cases that in some ways resembles the German doctrines for circumscribing the *Sozialpflicht*. Peterson suggests that by asking “whether the lawmakers reasonably believed that the people of their jurisdiction would consider A’s conduct to be wrongful,” the reviewing court is referring to societal judgments of wrongdoing.<sup>353</sup> In *Mugler v. Kansas*, for instance, the Supreme Court refused to find a taking despite serious economic loss to the plaintiff, a brewery owner, where the State of Kansas prohibited the manufacture of alcoholic beverages,<sup>354</sup> a measure that allegedly “represented the moral judgment of the people of Kansas at that time.”<sup>355</sup> Peterson does not propose “how judgments of wrongdoing are made,” but her thesis depends “on the assumption that people in our society constantly make judgments as to who is in the wrong in conflicts regarding economically valuable resources” and that “the results reached by the Court in its taking decisions are generally consistent with these societal judgments of wrongdoing.”<sup>356</sup>

Peterson is, therefore, not necessarily convinced by Justice Scalia’s argument that harm is in the “eyes of the beholder” or by Joseph Sax’s assertion that “neither takings cases nor nuisance law can be viewed as depending on judgments of blame or wrongdoing” since these cases usually involve “two conflicting land uses, neither of them in the wrong.”<sup>357</sup> The problem with this “Coasean mode of analysis,” she argues, is that it is inconsistent with “ordinary perceptions of the world.”<sup>358</sup> In the case of fire regulations imposed upon old wooden buildings in a city, for example, the question of whether “the house owner caused the harm by operating a fire trap” or the building has become a fire trap “because others have made the neighborhood a congested one” is not as difficult as Justice Scalia or Sax would

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352. See, e.g., Carol Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984); Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 97 n.2 (2002).

353. Peterson, *supra* note 72, at 86.

354. *Mugler v. Kansas*, 123 U.S. 623, 668 (1887).

355. Peterson, *supra* note 72, at 87.

356. *Id.* at 90. Peterson’s moral justification principle is distinct from the harm-benefit test, in which no taking occurs if the government is preventing A from causing harm to others but does occur if the government is requiring a landowner who has not caused harm to benefit others. *Id.* at 106. She also points out that harm is not always considered wrongful (in *Nollan*, for example, Peterson argues that the government had no reasonable basis for concluding that it would be wrong of the Nollans to build without providing lateral public beach access, and therefore, taking occurred even though A’s proposed conduct would have had an adverse impact on others), and wrongdoing does not always involve harming others (she gives the example of a state or local legislative body prohibiting the sale of liquor “because the people in that jurisdiction consider such conduct to be immoral, wholly apart from any judgment that such conduct causes harm in any tangible sense” and that “[l]aws embodying such moral judgments are generally assumed not to effect takings”). *Id.* at 90, 108.

357. *Id.* at 90 (quoting Sax, *supra* note 77, at 36-37).

358. *Id.* at 93.

suggest. Although this might be a difficult case “from a Coasean point of view,” Peterson argues that the Court would have no problem concluding the regulation did not affect a taking, given “widely shared judgments of wrongdoing”—people “generally regard a building that is a ‘firetrap’ as creating an undue risk of harm to others.”<sup>359</sup>

Thus, Peterson’s account of the Supreme Court’s takings cases posits a contextual inquiry by the Court that resembles the German courts’ dynamic notion of property. In her model, judgments of wrongdoing may change over time and vary geographically, and, therefore, what constitutes a taking also varies over time. “The moral justification principle takes this factor into account by focusing on whether the lawmakers reasonably believed the conduct at issue would be regarded as blameworthy *by the people of that jurisdiction at that time*.”<sup>360</sup> For instance, laws that once prohibited the manufacture or sale of alcohol no longer correspond to what lawmakers in most jurisdictions believe. On the other hand, a law that prohibited the owner of a historically significant building from destroying its exterior may once have been disfavored whereas today it seems more likely “that lawmakers in many localities could reasonably believe that their constituents would consider it wrong to destroy the exterior of a historically significant building.”<sup>361</sup> In reasoning reminiscent of the German doctrine of *Situationsgebundenheit*, Peterson also describes the case in which a given type of conduct is considered wrongful only in a particular location or under certain circumstances: “For example, a factory in a residential neighborhood may be viewed as a nuisance, although it would be readily acceptable in an industrial neighborhood. The judgment is merely that it is wrong to act in this manner in this particular location.”<sup>362</sup>

Even Peterson’s theory does not locate an affirmative obligation in property ownership under Supreme Court jurisprudence. Her theory would not, for instance, explain the German cases that require property owners to preserve their land as open space<sup>363</sup> or to expend resources to maintain historically significant structures.<sup>364</sup> It

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359. *Id.* at 91-92; *see also* Raff, *supra* note 45, at 682-83 (arguing that U.S. courts might be “edging toward an analysis in which the objective views and expectations of a reasonable and socially minded person are to be considered, and thus implicitly that there are social and environmental obligations in the use of property which may be rendered into positive law without infringing a constitutional guarantee of property”).

360. *Id.* at 110 (emphasis added).

361. Peterson, *supra* note 72, at 111; *see also* JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES 4 (1999) (“[P]ublic attitudes reflect an understanding that is in advance of legal theory. A sense that the fate of some objects is momentous for the community at large has certainly insinuated itself into the public consciousness. . . . [T]hey led to today’s historic-preservation laws.”).

362. Peterson, *supra* note 72, at 89.

363. *See, e.g., Bavarian Nature Protection Law case*, BVerwG 1993, 94 BVerwGE 1 (F.R.G.); *Green Space case*, BGH 1956, 23 BGHZ 30 (F.R.G.); *see also supra* Part V.A.6 (for a discussion of these cases).



does not assert an expansive social obligation, justified, as it is in Germany, by nothing more than one's general obligation as a citizen to consider one's relationship to the social order and community in exercising one's rights. Without the fulcrum notion of the positive guarantee—and what that is meant to protect (dignity and autonomy)—one's default position as a property owner under U.S. law is not limited, as it is in Germany, to some notion of a reasonable profit. Rather, owners can exploit their property, even under Peterson's theory, until the point that the community disapproves.

## 2. Meaning of Property to the Owner

In contrast to German law, U.S. law does not consider the injured landowner's relative political and economic power or the subjective meaning of property for that owner, at least partly because "our entrenched understanding of judicial legal discourse regards any consideration of these issues in deciding specific cases as crude and inappropriate."<sup>365</sup> *Hodel v. Irving* may be an exception to this general rule.<sup>366</sup> In *Hodel v. Irving*, the Supreme Court struck down a section of the Indian Land Consolidation Act that provided for undivided fractional interests in certain small allotments of land to revert to the tribe upon the death of the interest owner.<sup>367</sup> Although Hanoch Dagan argues that *Hodel* represents "an extreme example of cases where the plaintiff's political and economic power is so low that our egalitarian commitments may well require the use of a side-constraint,"<sup>368</sup> Dagan's interpretation has not been widely adopted. Even though "the same regulation can have different constitutional significance as applied to different claimants,"<sup>369</sup> there are few regulatory takings cases in which the Court considers the subjective meaning of property to its owners, and the Court rarely, if at all, upgrades

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364. In five of the German states, for example, owners can be compelled by administrative action to use their property in a certain way. KIESOW GOTTFRIED, DENKMALPFLEGE IN DEUTSCHLAND: EINE EINFÜHRUNG 96 (2000). There is also an express duty to make and keep up with repairs and improvements to structural elements as well as interior elements, in eight states. This even applies in some cases to damages incurred before the structure was placed under preservation protection. *Id.* at 100.

365. Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 782 (1999).

366. *See Hodel v. Irving*, 481 U.S. 704 (1987).

367. *Id.* at 712-13. The statute applied to lands that were less than 2% of the total acreage of a tract or earning less than \$100 for the owner during the previous year. *Id.* at 709.

368. Dagan, *supra* note 365, at 801. Dagan goes on to argue that the Court's implicit consideration of the relative economic and political power of the injured property owners in that case (the Native American holders of the small interests) reflects the fact that reservation Indians, who cannot vote in federal elections and do not have congressional representatives, are "excluded from the pluralistic give-and-take that requires representation in the political process" to such an extent that burdens on their ownership rights should be given special consideration. *Id.* at 800.

369. *Id.* at 801.

or downgrades its estimation of a regulatory burden based on the property owner's economic means or the significance of the property to the owner.<sup>370</sup>

## VI. LIMITS ON THE SOCIAL OBLIGATION OR *SOZIALPFLICHT*

"Ownership might obligate, but not so far as to give it up," states a prominent treatise on the *Grundgesetz*.<sup>371</sup> Indeed, an Article 14 claim often focuses on locating the "limitation limit" (*Schranken-Schranke*), which refers to the limit on the legislature's Article 14(1)(ii) discretion to determine the limits (*Schranken*) of property rights. According to the FCC, "[t]he common good is not only the justification, but also the limit for infringements on property rights."<sup>372</sup> In other words, property rights may be limited in the name of the *Sozialpflicht* but only as it furthers the public interest. Article 14's structure reflects the conceptual tension between justifying and limiting property regulation.<sup>373</sup> The same clause empowers the legislature to define property as an exercise of the *Sozialbindung*, or "social restriction," and limits this authority by unconstitutionally guaranteeing protection of certain core property rights, regardless of why they are limited.<sup>374</sup>

There are two central inquiries involved in locating the constitutional border—the absolute and essential core of the fundamental property right and the property guarantee (the *Kernbereich*)—for the "content and limit"-defining legislature: first, what the *Bestand* or "conditions"<sup>375</sup> of an owner's property entitlements are; and second, what part of that protection may not be infringed by the *Sozialbindung*.<sup>376</sup> In determining what a property owner may rely on as her protected "condition" of rights, courts look at how the owner has used the property until the point of regulation. Her rights are more likely to be positively guaranteed (and therefore off-limits for legislating away) if her property use meets the fundamental purposes for protecting property—if she has invested labor or capital in using her property and if her expectations for continued use are reasonable or socially responsible for the greater community.<sup>377</sup> Thus, in circumscribing the essential core (*Kernbereich*) of ownership rights, three categories enjoy the greatest protection: (1)

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370. Even here, Dagan's interpretation has not been widely adopted. Most scholars cite *Hodel v. Irving*, rather, for the proposition that the right to devise property to one's heirs is one of the most essential sticks in the bundle of property rights.

371. MAUNZ & DÜRIG, *supra* note 262, margin note no. 489 (author's translation).

372. *Id.* margin note no. 306; BVerfG 1988, 79 BVerfGE 174 (198) (F.R.G.).

373. As one prominent commentator (and sitting judge on the Constitutional Court) observes, this presents a conceptual tension: "How can Article 14 protect property from the legislator when its content is, in the first place, determined by the legislator?" VON DANWITZ, *supra* note 92, at 158-59 (author's translation).

374. See Grundgesetz [GG] art. 14(1) (F.R.G.).

375. This might also be translated as "stock" or "inventory."

376. PIEROTH, *supra* note 328, margin note no. 897.

377. *Id.*

*Sicherungseigentum*, those objects required to maintain a subsistence level; (2) *Leistungseigentum*, property acquired by an owner as a result of her own efforts, including both monetary contribution and labor; and (3) *Vertrauenseigentum*, a legal position that a reasonable owner would rely upon. The FCC considers both subjective elements (the uses that must remain for the individual owner) and objective elements (the essential uses that must remain for a legal position to still “deserve” the name “property”<sup>378</sup>) of the *Kernbereich*.<sup>379</sup>

### **A. Vested Property Rights**

The property guarantee does not cover mere expectation of future earnings or profit that an owner expects to acquire based on nothing more than an existing favorable situation (such as lack of pre-existing regulation or a general zoning designation of one’s parcel before a building permit has been applied for).<sup>380</sup> Only what has already been acquired or achieved through the actual investment labor (*eigene Leistung*) or capital (considered the equivalent of *eigene Leistung*)—what has been “set in motion” (*ins Werk gesetzt*)—is constitutionally protected.<sup>381</sup> Thus, because the property owner in the *Bavarian Nature Protection Law* case had nothing “in the works,”<sup>382</sup> he did not have any vested rights or entitlement to build on his property at the point that regulation was imposed.<sup>383</sup> Based on the general constitutional principle of *Vertrauensschutz* (protection of valuable expectations), Article 14 protects the owner who has created value on her land and reasonably relied on a certain legal situation.<sup>384</sup>

The *Planungswertausgleich*, a planning tool for recouping from owners part of the increase in property values created by government-funded improvements in redevelopment districts (*Sanierungsgebieten*), illustrates the principle of vested rights in its most extreme version.<sup>385</sup> The rationale for requiring a property owner to

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378. See BVerfG 1999, 100 BVerfGE 226 (229) (F.R.G.).

379. FELIX HAMMER, DIE GESCHICHTLICHE ENTWICKLUNG DES DENKMALRECHTS IN DEUTSCHLAND 39 (1995).

380. BADURA, *supra* note 123, at 220; BGH 1971, 55 BGHZ 261 (F.R.G.); BGH 1957, 23 BGHZ 235 (F.R.G.).

381. *Id.* In contrast, the FCC has found that a landowner’s reliance on the existing legal situation is not as great (and, therefore, the discretion of public authorities to interfere with private property rights is broader) for improvements or services provided by the state (*staatliche Leistung*). See MAUNZ & DÜRIG, *supra* note 262, at 402.

382. A footbridge erected without the proper building permit was discounted by the Court.

383. *Bavarian Nature Protection Law* case, BVerwG 1993, 94 BVerwGE 1 (F.R.G.); see also discussion of this case *supra* Part V.A.6.

384. *Gravel Mining* case, BVerfG 1981, 58 BVerfGE 300 (349) (F.R.G.).

385. This is codified in the BauGB [Federal Building Code] Aug. 18, 1997, § 154 (F.R.G.):

surrender some of her profits is that land-use regulation, rather than one's own efforts, are responsible for the increase in property value.<sup>386</sup> As one commentator explains,

If the law compensates an owner for the loss of a right, should he not be obliged to also compensate the public for benefits which have accrued to him directly and only from the enactment of a zoning ordinance? . . . If the enactment of an ordinance raises the market value 100% from one day to the next, then the "elimination of the planning profit" could limit those benefits arising not from individual efforts, but from the public concept of city planning.<sup>387</sup>

Although there were proposals in the German parliament in the 1970s to enact legislation requiring such reimbursement in a broad range of circumstances, this planning measure remains limited to the specific case of redevelopment districts rather than to all zoning measures that might increase the value of an owner's property.<sup>388</sup> Nevertheless, the *Planungswertausgleich* illustrates the importance of an owner's investment in a property use to determine when that right has vested, as well as the more general willingness of the courts and legislature to temper profits that are not considered vested.

### **B. The Special Case of Development Rights (*Baufreiheit*)**

Under German law, an owner is not necessarily entitled to any use, unless a positive law under Article 14(1)(ii) has made the use concrete and therefore protected

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- (1) A financial settlement towards the financing of redevelopment to correspond to the increase in the land value of the property as a consequence of redevelopment is due in favor of the municipality from owners of property within a formally designated redevelopment area . . . .;
  - (2) The rise in the land value of a property contingent on the redevelopment consists in the difference between the land value which would apply in respect of the property if redevelopment had been neither proposed nor implemented (initial value), and the land value ensuing in respect of the property from the reorganization in law and in fact of the formerly designated redevelopment area (final value).

386. MAUNZ & DÜRIG, *supra* note 262, margin note no. 414.

387. DOLZER, *supra* note 267, at 38.

388. *Id.*

by *Bestandschutz*.<sup>389</sup> Nevertheless, the majority opinion among scholars is that *Baufreiheit* (“freedom to build” or, more accurately, freedom to build *within the law*<sup>390</sup>) is part of one’s inherent right to use one’s property.<sup>391</sup> Practically speaking, this freedom is probably academic because the elimination of uses not explicitly permitted by the government (in the form of a building permit) is not compensable.<sup>392</sup> According to the FCC, there are no inherent building uses so strongly suggested by the nature or situation of property that they can extend further than the positive protection legislated under Article 14(1)(ii).<sup>393</sup> The notion of the *Kernbereich* represents a constitutional entitlement to some *use* of property, though it may be one that does not involve building.

Thus, *Baufreiheit* really only means that the right of an owner to build must be weighed against the common good and does not prevent substantial regulation of development.<sup>394</sup> The results of such a weighing of interests may even be that no building is allowed on a certain plot. In the *Chapel* case, for instance, preserving the landscape around an already-existing historic structure was accorded greater weight than the individual owner’s *Baufreiheit*.<sup>395</sup> Environmental protection also regularly supersedes the freedom to build.<sup>396</sup>

The question of development use is also unsettled under U.S. law, as suggested by the dialogue between the *Nollan* majority and Justice Brennan’s dissent in that case.<sup>397</sup> Although the *Nollan* plaintiffs purchased property after the passage of legislation requiring provision of public access in new development projects, the Supreme Court nevertheless held that conditioning the right to build on provision of this access would constitute a taking.<sup>398</sup> Though Justice Brennan referred to a

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389. See BVerwG 1998, 106 BVerwGE 228 (233) (F.R.G.); BVerwG 1986, 72 BVerwGE 362 (363) (F.R.G.).

390. PIEROTH, *supra* note 328, margin note no. 902.

391. VAN DER WALT, *supra* note 1, at 154; BVerfGE NvwZ-RR 1996, 483. Under the Federal Building Code, BauGB Aug. 18, 1997, BGBl. I at 2081, land is divided into three categories: (1) areas designated as development land within a building plan (*im Geltungsbereich eines Bebauungsplans*), *id.* § 30; (2) areas that allow development without a plan on parcels surrounded by developed areas (*innerhalb der im Zusammenhang bebauten Ortsteile*), *id.* § 34; and (3) areas that are, in principle, not open for development (*im Aussenbereich*), *id.* § 35. Therefore, only holders of section 30 and section 34 land may be said to have *Baufreiheit*.

392. MAUNZ & DÜRIG, *supra* note 262, margin note no. 405.

393. The Court held in the *Gravel Mining* case that there are “no ownership rights that, by the nature of the thing, supersede the normative content and limit determination of property, and can, regardless of each constitutive ascertainment of property, constitute protected legal positions.” BVerfG 1981, BVerfGE 58, 300 (F.R.G.).

394. MAUNZ & DÜRIG, *supra* note 262, at RdNr. 408.

395. BBauBL 1958, § 1385.

396. See, e.g., *Bavarian Nature Protection Law* case, BVerwG 1993, 94 BVerwGE 1 (F.R.G.); see also discussion of this case *supra* Part V.A.6.

397. Peterson, *supra* note 72, at 66.

398. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987).

development permit as a “benefit” in his *Nollan* dissent, the majority rejected this reasoning, holding that the “right to build on one’s own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a ‘government benefit.’”<sup>399</sup> Taken from the *Nollan* plaintiffs, under this conception, was the right to pursue economic value by building on their lot without providing public access. Although the property owners had never acquired the right to build without providing this public access under state law, the Court clearly considered this their “property.”<sup>400</sup>

### **C. Kernbereich and Privatnützigkeit**

Distinct from the notion of vested rights is the *Kernbereich* or core area. Certain essential rights, such as dominion or disposition over property (*Verfügungsbefugnis*) and an owner’s private use of the object (*Privatnützigkeit*), are analogous to the Anglo-Saxon conception of sticks in a bundle and are considered inviolable and protected regardless of pre-existing use or reliance.<sup>401</sup> The theory behind the *Kernbereich* is that, at some point, regulation can become so burdensome on one or both of those rights that it infringes the core of property ownership and compromises the property guarantee.<sup>402</sup> At this point, a regulation becomes unconstitutional. Any inquiry into the proportionality or general constitutionality of a regulatory or legislative property-defining measure must, therefore, be guided by the essential question of what uses remain in the hands of the owner.<sup>403</sup> In fact, defining or even recognizing the point at which *Kernbereich* uses have been eliminated is the central concern of contemporary constitutional property jurisprudence.

The loss of *Verfügungsbefugnis* has been relatively easy for courts to identify. Land-use regulation that depresses the value of property to such a great extent that it becomes impossible for owners to sell or transfer land in fee simple has been treated as equivalent to the loss of *Handlungsfreiheit*, the right to transfer property, and, therefore, considered an unconstitutional infringement of an owner’s disposition over property.<sup>404</sup>

Courts have had a more difficult time determining when *Privatnützigkeit* has been lost, however. The FCC defines private use as “the assignment of a property object to a rights bearer, who will use it as the basis of private initiative.”<sup>405</sup> Thus,

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399. *Id.* at 833-34.

400. Peterson, *supra* note 72, at 66.

401. HAMMER, *supra* note 379, at 101.

402. *Id.*

403. MAUNZ & DÜRIG, *supra* note 262, margin note no. 375.

404. *Id.*

405. *Id.* margin note no. 335-36 (“Article 14 guarantees property as the legally recognized willpower of the individual, as a means of shaping the social order . . . The individual must self-responsibly, autonomously and through private use participate in the building up and shaping of the legal and social order.” (author’s translation)).

the courts will protect private autonomy in the economic sphere if it is critical to realizing the purpose of property protection for the capitalist “social order” and for the individual owner.<sup>406</sup> Courts have identified two elements of *Privatnützigkeit*. The first element is an object’s abstract and inherent utility. These uses are objectively reasonable and socially just, based on the property’s natural situation and social function.<sup>407</sup> The second is the freedom of the particular property owner to choose among possible uses. These are the actual uses available to the owner based on the current legal order and her relationship to the object of protection.<sup>408</sup> Courts gauge societal consensus under the first element. Under the second element, courts subjectively analyze the purpose ownership serves for the individual—what one scholar describes as the “freedom potential,” or the financial basis left to the owner for self-governance and autonomy.<sup>409</sup>

In the *Bavarian Nature Protection Law* case, the Court determined, after examining both prongs of private use, that the *Kernbereich* had not been infringed.<sup>410</sup> The Court’s opinion emphasizes that the plot did not objectively suggest or seem suitable for recreational uses, that the property owner had not exercised such a use before or acquired the land for this purpose, and that he could still use the land for agriculture or forestry, apply for a variance, sell, or lease the parcel.<sup>411</sup> The owner still had private use of his property (*Privatnützigkeit*) because he could derive some utility from it, even if it was not a use particularly profitable to him.

However, even if a property owner must accept, as part of her non-compensable social obligation, that she will be denied the most profitable use of her property, owners may not be compelled to use property at a loss.<sup>412</sup> Under the private use requirement, the owner must be able to realize some profit on her property.<sup>413</sup> Thus, although courts have sanctioned regulations obligating owners to bear the cost for preservation or maintenance of historically or culturally significant property, it is generally considered unreasonable for owners of protected buildings to dip into personal savings (rather than the profits of property use) to fulfill the preservation obligation.<sup>414</sup> In a recent case before the FCC, the Court found that an industrial company, which was denied the right to tear down a historic villa under an

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406. *See id.*

407. *Id.*

408. *Id.*

409. HAMMER, *supra* note 379, at 39 (quoting BVerfG 1989, 79 BVerfGE 292 (304) (F.R.G.)).

410. BVerwG 1993, 94 BVerwGE 1 (5) (F.R.G.).

411. *Id.* at 7.

412. Haass, *supra* note 293, at 1056.

413. BVerfGE 38, 348 (370) (F.R.G.); BVerfGE 71, 230 (250, 253) (F.R.G.); BVerfGE 79, 29 (44) (F.R.G.) (“Although the property owner does not have a right to every possibility of exploitation, there is a claim to a reasonable yield.” (author’s translation)).

414. *See* Entscheidungen des Verwaltungsgerichtshof [VGH] [Court of Appeals] Mannheim, BR 562 Nr. 220, NuR 2000, 335 (337) (F.R.G.).

architectural preservation statute, had been deprived of private use of its property.<sup>415</sup> Despite maintenance costs of DM (Deutsche Mark) 300,000 per year as well as another DM 1,000,000 for legislatively mandated renovations, the villa had been empty since 1981 and the owner could find neither buyer nor lessee.<sup>416</sup> Since transfer of the villa had become impossible, the Court concluded that the company had lost the right of disposition.<sup>417</sup> With no other reasonable private use for the property, the owner was forced to bear a burden “without being able to enjoy in exchange any of the advantages of private use.”<sup>418</sup> Essentially, the Court held that the social obligation to preserve and restore the structure had become more expensive than its value to the owner, so that the name “property” no longer applied to the structure.<sup>419</sup>

Thus, in summary, differentiating a non-compensable (*entschädigungsfrei*) from a compensable (*ausgleichspflichtigen*) social obligation is based on the private use remaining despite regulation.<sup>420</sup> This distinction, as illustrated in the discussion above on ownership rights of tenants, is at least partially subjective. The Court examines the property uses remaining to a particular property owner, in light of property’s personhood-developing purpose for that owner.<sup>421</sup> Whether economically reasonable uses remain to the owner is determined with regard to property’s social function and relevance to non-owners, as well as its situationally bound limitations.<sup>422</sup>

In contrast, post-regulation uses remaining to the owner are not the central inquiry of U.S. takings jurisprudence. Instead, the U.S. Supreme Court seems to focus on the absolute impact of a land-use regulation—on the value taken, rather than the rights left over.<sup>423</sup> Furthermore, the Federal Circuit Court of Appeals recently

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415. BVerfG 1999, 100 BVerfGE 226 (F.R.G.).

416. *Id.* at 232.

417. BVerfG 1999, 100 BVerfGE 226 (F.R.G.).

418. *Id.*

419. *Id.* at 243.

Given the statutory preservation obligation on top of that [referring to the demolition prohibition and the effective loss of any reasonable private use], the [property] right becomes a burden that the owner has to bear alone, in the public interest, without being able to enjoying the advantages of private use in exchange. The legal position of the concerned then approaches the situation where it no longer earns the name “property.”

*Id.* (author’s translation).

420. MAUNZ & DÜRIG, *supra* note 262, margin note no. 408.

421. *Id.* margin note no. 337 (“[T]he determination of the functionally-appropriate use as an element or expression of private use is therefore not to be objectively elaborated, but rather requires a value-based decision that is dependent on the particular type of property.”).

422. *Id.* margin note no. 410.

423. For an extreme version of this approach, see *Dis. Intown Properties Ltd. v. Dist. of Columbia*, 198 F.3d 874, 884 (D.C. Cir. 1999) (Williams, J., concurring).



held that “the existence of economic injury is indispensable to demonstrating a regulatory taking.”<sup>424</sup> Although the Supreme Court still struggles to find the threshold beyond which regulation is unreasonable, the *Lucas* decision, an extreme version of regulatory burden, illustrates the Court’s approach to determining the impact of regulation.<sup>425</sup>

In *Lucas*, the plaintiff real estate developer brought a successful takings claim based on his intention to build homes similar to those on adjacent seafront parcels.<sup>426</sup> No law prohibited him from building on the land at the time of purchase, but two years later the state legislature passed an act barring Lucas and similarly-situated owners from erecting any permanent habitable structures on their lots in order to, among other purposes, prevent erosion of the state’s beach system.<sup>427</sup> Although the Supreme Court viewed this as a 100% deprivation of economically viable use of the plaintiff’s land, thus meeting the *Agins* test for a taking,<sup>428</sup> the

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From the perspective of ensuring that the government not engage in wasteful behavior, however, the focus on the uses of the land that *remain* is misplaced: “[W]hat is decisive is that which is taken, not that which is retained.” Whether the landowner is left with a limited use of the land or none at all is hardly relevant to that issue. And as the regulating government delineates the scope of regulation, the opportunity for strategic behavior is obvious.

*Id.* at 886 (quoting EPSTEIN, *supra* note 239, at 58).

424. *Seiber v. United States*, 364 F.3d 1356, 1370 (Fed. Cir. 2004) (citing *Hendler v. United States*, 175 F.3d 1374, 1385 (Fed. Cir. 1999)).

425. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

426. *Id.*

427. *Id.* at 1007. The Act allowed the construction of certain non-habitable improvements, such as wooden walkways and decks. S.C. Code Ann. § 48-39-290(A)(1)-(2) (1987). At the state supreme court level, the majority held that the statute was “properly and validly designed to preserve . . . South Carolina’s beaches.” *Lucas v. S.C. Coastal Council*, 404 S.E.2d 895, 896 (1991). Note, however, that the dissenting justices on the South Carolina Supreme Court disagreed with the majority’s application of the noxious-use rule to this case because they found that the primary purpose of the legislation was not to prevent a nuisance, but rather to promote tourism and create habitat for indigenous species, purposes which could not fairly be compared to nuisance abatement. *Id.* at 906 (Harwell, J., dissenting).

428. *Lucas*, 505 U.S. at 1019. Under the *Penn Central* test, three factors must be considered when measuring a regulatory taking: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the government action. *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Elaborating on the *Penn Central* test, the same Court articulated an additional two-part test, under which government action (1) that does not substantially advance legitimate state interests, or (2) that denies an owner economically viable use of his land, is usually considered a taking. *Agins v. City of Tiburon*, 447 U.S. 225, 260 (1980). Some commentators have interpreted the second part of this rule to mean that property rights guarantee investment-backed expectations as well as protection against deprivation of all commercial value (without inquiry into whether realization of that value is a reasonable

argument may be made that *Lucas* did not sustain a total deprivation because a total deprivation would have meant that the owner was denied the rights to occupy, use, exclude, and transfer his property. As Justice Blackmun pointed out in his dissent, the property owner could still “picnic, swim, camp in a tent, or live on the property in a movable trailer,” as well as probably sell the property to neighbors, nearby residents, or speculators.<sup>429</sup> However, the majority held that the property owner had lost his investment-backed expectation to be able to build on each lot.<sup>430</sup> While the holding does not suggest that the owner is entitled to extract the maximum profit from her property, the decision does illustrate the emphasis on the economic injury to a plaintiff in regulatory takings cases.

#### **D. What Property Is Not: *Bestand* Not *Wertgarantie***

In contrast to the United States, German constitutional property doctrine developed around the guarantee of a personal right. Neither every possible or economically reasonable use,<sup>431</sup> nor the chance to exploit every economically valuable use,<sup>432</sup> is protected. In general, worth is guaranteed only to the extent that it is necessary to secure freedom and autonomy in an economic sphere.

In order to distinguish property uses that secure freedom or autonomy from those that merely protect economic worth, the German courts consider the subjective meaning of already-existing property rights (the “condition,” or *Bestand*) for an owner. This analysis is illustrated by a recent FCC decision about the property owner’s responsibility to restore the contaminated soil on his plot to its natural condition, regardless of whether he caused the damage or even knew about it upon purchase.<sup>433</sup> In this case, the FCC reexamined the Court’s general guideline that a regulation is no longer proportionate if the owner’s costs to meet her social obligation surpass the property’s market value because this would represent the effective loss of the right to transfer.<sup>434</sup> However, this is not an absolute rule, the Court held, because the value that may be recovered on the market is not always an accurate gauge of the

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expectation). See, e.g., BERNARD H. SIEGAN, PROPERTY AND FREEDOM: THE CONSTITUTION, THE COURTS, AND LAND-USE REGULATION 14-19, 145 (1997).

429. *Lucas*, 505 U.S. at 1036 (Blackmun, J., dissenting). Justices Stevens and Souter also contended in separate opinions that the finding of no value was incorrect. *Id.* at 1061-62, 1067 (Stevens, J. & Souter, J., dissenting).

430. See *Lucas*, 505 U.S. 1003. In *Penn Central*, for example, the Supreme Court ruled that a plaintiff, denied the right by historic preservation legislation to significantly increase its profits by building a structure on top of the historic terminal, still had a viable economic use in the original structure and therefore had not suffered a taking. 438 U.S. at 138.

431. See *Gravel Mining* case, BVerfG 1981, 58 BVerfGE 300 (306) (F.R.G.).

432. See BVerfG 1975, 38 BVerfGE 348 (371) (F.R.G.).

433. BVerfG 2000, 102 BVerfGE 1 (20) (F.R.G.).

434. *Id.*

relationship between the owner and the property.<sup>435</sup> Fair market value does not necessarily reflect what the owner herself has actually invested in the property. Factors that cannot be attributed to the plaintiff, such as changes in planning law or in the worth of neighboring properties, may affect the overall value. Further, the owner may derive certain subjective benefits from the property that make it more valuable to her than to the market.<sup>436</sup> Courts should engage in this type of individualized analysis to determine the threshold of reasonable social obligation, the Court held, because if the property constitutes a significant portion of the owner's net worth and "therefore serves as the foundation of her private life and that of her family," the social obligation might be adjusted downwards.<sup>437</sup>

The scheme of remedies available to property owners for takings or disproportionate limitations of property rights also reflects the priority of the *Bestandsgarantie* (guarantee of one's existing "condition" of property rights) before the *Wertgarantie* (guarantee of the worth of property). As the FCC has said on a number of occasions, there is generally no inverse condemnation action for regulation.<sup>438</sup> Property owners, in other words, may not "tolerate and liquidate" by demanding money for an excessive limitation of property rights that has been suffered if the statute under which the regulation was carried out does not provide for the equalization payments.<sup>439</sup> The property owner may attack a regulatory action as an unconstitutional infringement of her property in the form of a facial challenge to a regulation or statute and obtain an injunctive remedy, but an unconstitutional definition of property by the legislature under Article 14(1)(ii) cannot be reinterpreted as an expropriation and cured by granting compensation, as it may be under U.S. law. Even if legislation provides for compensation to disproportionately burdened landowners, the Court has also stated on multiple occasions that *Ausgleichsleistungen* (equalization measures) may not be limited to money and that non-monetary compensation is in fact preferable, insofar as it secures property in the hands of the owner.

## VII. CONCLUSION

Private property plays a similar role in Germany and the United States. In both countries, legal recognition and protection of property rights represent a surrogate or symbol for freedom, actual and potential. Thus, at the core of both schemes of constitutional property protection is a strong neoclassical conception of

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435. *Id.*

436. *Id.*

437. *Id.* at 21 (author's translation). On the other hand, the property owner who has willingly taken on risk (in the sense that she caused damage or knew about it on purchase) might face a social obligation that is higher than the market value of the property. *Id.*

438. VAN DER WALT, *supra* note 1, at 146.

439. *See supra* Part III.C.4.

shielding one's personal sphere from the state's overreaching. However, in Germany, at both the doctrinal level and as an essential ingredient of constitutional culture, there is a rigorous and widely accepted notion of social obligations of property use. In contrast, courts in the United States have faced vigorous resistance from both property owners, as well as their legal and political advocates, to duties imposed on landowners by the state in furtherance of the public interest. Yet, despite the highly abstract and lofty rhetoric of German constitutional property decisions that proclaim a strong social obligation and little protection for excessive wealth, one might argue that the results of challenges to land-use regulation do not come out that differently in the two countries' courts and that popular understanding of property rights in the United States seems to underestimate the obligations that have become settled legal precedent.<sup>440</sup>

However, a survey of regulatory takings decisions in the two countries demonstrates several important differences between the two that collectively reflect a greater protection for economic value absent personhood interests in the United States. First, in Germany there is broad consensus among courts that the purpose of protecting property is both to preserve a market-based economy as well as to secure its participants' autonomy and dignity, and that protecting the market-based economy is not a substitute or proxy for protecting autonomy and dignity. Second, the clear statement of the purpose of protecting property, found in all Article 14 decisions, forms the basis for the concept of the *Kernbereich*, the core of rights that the German Constitution's positive property guarantee absolutely protects. Moreover, this *Kernbereich* is different for every owner. The Court's analysis is individualized, not only as to whether uses are reasonable and vested, but also to the extent that the Court determines whether the owner's use of and relationship to her property match the purposes for which property is protected. Finally, anything that is not within this *Kernbereich* may be sacrificed for the good of society and other owners.<sup>441</sup> This means that the scope of the *Sozialpflicht* is measured by the *Kernbereich*, which is in turn tied to a purpose of property protection that is both personal and economic.

In the United States, on the other hand, scholars and courts alike have been unable to settle on a core of property rights or a threshold beyond which exercises of the police power are unreasonable. Related, perhaps, is the fact that there is almost no judicial mention of the purpose of protecting property in U.S. law. Although it is never referred to by judges as such, there does seem to be a positive guarantee in U.S. law—one that is predominantly a guarantee of economic value, though certain statutes and public-use jurisprudence (both outside the scope of this paper) suggest that legislatures and courts at least recognize personhood interests even if they are not explicitly considered in *Penn Central's* regulatory takings analysis. Tying the

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440. And this has, indeed, been argued. See, e.g., John N. Drobak & Julie D. Strube, *The Constitutional Protection of Property Rights: Lessons from the United States and Germany*, available at <http://www.isnie.org/ISNIE00/Papers/Drobak-Strube.pdf>.

441. This is as long as such restriction is not unduly burdensome, as it was in the *Obligatory Sample* case. See *supra* Part III.C.4.

reasonableness threshold to fair market value has proved difficult for courts to administer, and has left lower courts confused as to what the property clause guarantees and what it prohibits.

Moreover, one important difference thus far unaddressed may be that many of the regulations challenged in the United States (such as the coastal protection measure in *Lucas* or the development moratorium in *Tahoe*) go unchallenged in German courts where they are accepted as routine planning measures under the complex regulatory structure codified in the *Baugesetzbuch*. The backdrop of the strong social state in Germany and public acceptance of general community interconnectedness and obligation might, therefore, explain many of the differences described here and perhaps limit the political viability of these doctrines in U.S. courts.

