

Translating Takings: The Similarities of the Constitutional Protection of Property Rights in the United States and Germany

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ABSTRACT

Constitutional limitations on a government's power to confiscate property, whether by an outright taking of title or by excessive regulation, are necessary both as a protection of an important personal right and as a foundation for economic growth. Both the Takings Clause of the United States Constitution and Article 14 of the Basic Law of Germany serve this purpose. The scholars who have compared them have shown how unlike they are by focusing on the vast differences in the terms of the two provisions and the divergence in the analysis used by the Supreme Court and the German Constitutional Court in interpreting them. The German Constitutional Court uses a more formal analysis and considers aspects of property ownership, such as personhood, which are not part of the Supreme Court's takings jurisprudence. This article will show that despite these differences, both courts render remarkably similar decisions in similar cases. Notwithstanding its rhetoric, the Constitutional Court ends up using a balancing test in its application of the "proportionality" principle, comparing the harm to the property owner against the benefit to society, while the Supreme Court does much the same. By focusing on outcomes, this article shows that the two clauses are effectively the same when applied by the two courts. This result is striking because Germany has a social democratic economy, while the United States has a free-enterprise market system.

*In Part I, the article gives an overview of takings law, using *Miller v. Schoene* to illustrate aspects of the doctrine. In doing this, the article provides new insights into that classic case. Part II examines the constitutional protection of property rights in Germany and compares the factors that underlie takings analysis in Germany and the United States. This part concludes by showing the similarity of the decisions of both courts in comparable cases. Part III explains the reasons for the similarity in outcomes in both courts, focusing on the harmony in liberal tradition, social concerns, and economic performance. Part IV argues that the lessons of the article have a universal application to countries with a market economy.*

INTRODUCTION

Constitutions can be different and yet the same. The wording of a section of a constitution may be quite different from the comparable section in another country's constitution, but the courts of the two countries may apply the sections in a similar fashion to reach the same results. That is the case with the sections of the United States Constitution (the "Constitution") and the German Constitution (the "Basic Law") dealing with eminent domain and the regulation of property rights.

This is a striking result because the German Basic Law is, in most ways, drastically different from the Constitution. The Basic Law, written in the aftermath of the tragedies and atrocities of World War II, reflects the traditional German conception of the state "not as merely an aggregate of the individuals who live in a given territory and coordinate their activities, but as a union of people who . . . [are] embedded in a community with shared values."¹ As the German Constitutional Court has explained: "The Basic Law's idea of man is not the idea of an isolated sovereign individual; rather, the Basic Law has decided the tension between individuals and society in favor of the individual being community related and community bound . . ."² This communitarian aspect of the Basic Law forms the foundation of the fundamental principle that Germany has a social market economy.³

Unlike Germany, the Lockean liberal tradition of the United States views people as atomistic, not part of a collective unless they create it.⁴ In this tradition and out of a concern for over-reaching government, much constitutional law focuses on limiting governmental power to protect the rights of people. That is the reason the Bill of Rights was added to the

1 MOSHE COHEN-ELIYA & IDDO PORAT, PROPORTIONALITY AND CONSTITUTIONAL CULTURE 45-46 (2013).

2 *Id.* at 46 (quoting *Luftsicherheitsgesetz* Case, 1 BvR 459/52, BVerfGE 4, 7-27 (July 20, 1954), www.servat.unibe.ch/dfr/bv004007.html [<https://perma.cc/2Y7H-PWKK>]).

3 Grundgesetz (Basic Law), art. 20(1), (translation at http://www.gesetze-im-internet.de/englisch_gg/index.html) [<https://perma.cc/PUV5-NE84>].

4 DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 3 (1984), which states: American thought consists of a continuous and generally unchallenged liberal tradition derived from or stated most clearly in the philosophy of John Locke. Liberal thought treats government as a device by which individual men can protect their own life, liberty and property. Governments are instituted by popular consent for this purpose and are limited to this purpose by arrangements such as separation of powers and representation, and by the right of revolution.

Louis Hartz, The Liberal Tradition in America 62 (1955) ("Here, then, is the master assumption of American political thought, the assumption from which all of the American attitudes discussed in this essay flow: the reality of atomistic social freedom. It is instinctive to the American mind."); FORREST McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 60-66 (1985) (Locke's influence on Patriots); MORTON WHITE, PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION 28-30 (1987) (Locke's influence on Hamilton).

constitution. Further, the United States does not have a social market economy. Ours is a more individual-oriented capitalist system.

The Takings Clause of the Fifth Amendment of the United States Constitution (hereinafter “Takings Clause”) is brief, while Article 14 of the German Basic Law (hereinafter “Article 14”) is more detailed. German constitutional analysis is more formal than United States constitutional jurisprudence. Article 14 deals with eminent domain and the regulation of property in three short paragraphs, while the Takings Clause deals with these issues in just twelve words. Despite the disparity in wording, the German Constitutional Court, and the United States Supreme Court (hereinafter “Supreme Court”) apply these provisions in a remarkably similar fashion. In one sense, this is a surprising result given the differences in the underlying principles of the two constitutions and the different treatment of other constitutional rights, such as free speech.

Modern comparative constitutional scholarship is concerned with the transplantation and influence of one country’s constitution on another’s. However, the similarity of Article 14 and the Takings Clause is not the result of Germany looking to the United States for ideas. The German Basic Law was not drafted with the Constitution as a guide. It was largely a German product.⁵ Yet, the two provisions produce comparable results.

A few scholars have examined Article 14 in comparison with the Takings Clause. All of their work focuses on the strikingly different language of the two provisions and the different kinds of analysis used by the German Constitutional Court and the Supreme Court. For example, a common theme is the claim that the United States is less protective of property rights than Germany because the Supreme Court uses the rational basis test to judge economic regulation while noneconomic rights are judged under higher standards.⁶ These commentators emphasize that the German Constitutional Court often relies on the notion that property rights must be protected because they are not just economic issues but part of the “personhood” of property owners, while the Supreme Court views property rights as strictly economic.⁷ While these analyses are accurate, they overlook the similar outcomes reached by the two courts in similar cases, notwithstanding the rhetorical differences.

This article demonstrates the similarities in the constitutional protection of property rights in the United States and Germany by focusing on the

⁵ See DAVID CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 8-10 (1994); Gunter Düring, *An Introduction to the Basic Law of the Federal Republic of Germany*, in *THE CONSTITUTION OF FEDERAL REPUBLIC OF GERMANY: ESSAYS ON THE BASIC RIGHTS AND PRINCIPLES OF THE BASIC LAW WITH A TRANSLATION OF THE BASIC LAW 11-23, 12* (Ulrich Karpen ed., 1988) (“The German Basic Law is a conscious historical reaction to the Third Reich and the Weimar Republic”).

⁶ See *infra* note 39 and accompanying text.

⁷ See *infra* notes 72-75 and accompanying text.

outcomes of judicial decisions. Although the opinion of a court is important because it provides explanations for the court's decision and guides future conduct, what matters most is the actual decision. To the parties and the public, it is the decision that is typically understood as "the law" rather than the opinion. As this article will show, notwithstanding the differences in the terms of the two constitutional provisions and analysis used by the courts, both courts come to similar results in similar cases.

This result leads to the important question of why two dissimilar constitutional provisions end up working the same way. The answer to that question is not just relevant to the comparison of the law of the United States and Germany, it raises the question of whether there are aspects of a society or an economy that lend themselves to similar legal results. As two respected comparative scholars once wrote: "the legal system of every society faces essentially the same problems and solves these problems by quite different means though very often with similar results."⁸ This article will explain the reasons for the congruence of the constitutional protection of property rights, reasons that apply to countries around the world, not just to the United States and Germany.

This article is organized as follows. Part I will show how the Supreme Court has remained steadfast in its use of the Constitution to protect property rights. In its explanation of the Takings Clause, the article will not just summarize the well-known criteria, but it will use the classic case of *Miller v. Schoene*⁹ to illustrate the key factors relevant to a court's takings analysis. Part II will examine the constitutional protection of property rights in Germany and will compare the factors that underly takings analysis in Germany and the United States. This part will conclude by showing the similarity of the decisions of both courts in similar cases. Part III will explain that the similarity in outcomes in both courts is not surprising given the market similarities of both countries and the similar history of a liberal respect for property rights.

A constitution sets out the basic principles of a society. It creates a structure for government and lays out the rights and duties of the highest order. It is a society's superior law, below which sits ordinary law. A constitution's basic principles of social and political cooperation also set an example for citizens by emphasizing the most important aspects of the society. The constitutional protection of property rights is an important aspect of social governance, in which the right to own and use property, to work and to better oneself economically, is one of the core essential human rights. Besides this aspect of human dignity, constitutional limitations on a government's power to confiscate property, whether by an outright taking

⁸ KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 34 (3d ed. 1998).

⁹ *Miller v. Schoene*, 276 U.S. 272 (1928).

of title or by excessive regulation, help create a trust in a government—a belief in the “credible commitment” of a government—that serves economic growth.¹⁰

THE CONSTITUTIONAL PROTECTION OF PROPERTY RIGHTS IN THE UNITED STATES

The Contract and Due Process Clauses

At the time of the drafting of the United States Constitution, both Lockean liberalism and republicanism were competing political theories.¹¹ Although the two theories conflicted on many issues, both gave significant importance to property rights.¹² It is not surprising that a number of different provisions of the Constitution protect property rights. The Framers were wealthy men who wanted to spur economic growth, of which they would be part.¹³ They wrote the Constitution to correct economic problems that had persisted under the Articles of Confederation, fearing commercial disintegration caused by state laws that compromised the payment of private debt, by allowing payment in paper currencies or commodities.¹⁴ Shays’ Rebellion figured prominently in the Framers’ concern, because many were

10 I am well aware that the words and formalism of a constitution will do little to accomplish these goals if the citizens lack respect for constitutional principles and the country lacks structures to enforce constitutional rights. As Judge Learned Hand said, “Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it.” *The Spirit of Liberty, Address Delivered on I Am An American Day* (May 21, 1944) (quoted in *In re Sawyer*, 260 F.2d 189, 226 (9th Cir. 1958)).

11 JOYCE APPLEBY, *CAPITALISM AND A NEW SOCIAL ORDER* 21 (1984) (discussing key differences between the republicanism and liberalism inspired by Locke and the overlap between those ideologies in the debate between federalist and anti-federalists).

12 See EPSTEIN, *supra* note 5, at 73-74 (1984) (portraying Madison’s view of property rights as derived from Locke); MCDONALD, *supra* note 5, at 70-87 (contrasting the republican theory of property rights with the Lockean view).

13 FORREST MCDONALD, *WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION* 38-92 (1958) (explaining the economic interests of the delegates to the Constitutional Convention).

14 See ALAN TAYLOR, *AMERICAN REVOLUTIONS: A CONTINENTAL HISTORY 1750-1804* 362 (2016) (“State fiscal policies worsened the economic pain borne by common farmers and artisans . . . By 1777, however, the profusion of paper bills produced rampant inflation, which especially hurt creditors, when debtors paid with money of depreciating value.”); see MCDONALD, *supra* note 5, at 173-79 (explaining the economic problems in New England); see also RICHARD B. MORRIS, *WITNESSES AT THE CREATION: HAMILTON, MADISON, JAY, AND THE CONSTITUTION* 171-77 (1985) (examining the strong impact of Shays’ Rebellion on the framing of the Constitution).

alarmed that it marked the beginning of a fearful trend.¹⁵ The United States Constitution was, in part, a response to the economic problems of the day.¹⁶

The Supreme Court has always interpreted the Constitution to provide some protection of property rights from government regulation. In the early days of the country, the Supreme Court used the Contract Clause to check state economic regulation.¹⁷ Chief Justice John Marshall made that clause “a mighty instrument for the protection of the rights of private property.”¹⁸ In the best-known case of that era, *Trustees of Dartmouth College v. Woodward*, the Marshall Court determined that a corporate charter was a contract protected by the clause.¹⁹ This meant that a state could not regulate a corporation in any way that would be inconsistent with the provisions of the corporate charter. Beginning with the Taney Court, the Supreme Court began to loosen the constraints on the states, and the states themselves began to draft corporate charters that expressly reserved rights for future state regulation. This reduced the ability of the states to regulate corporations. As the importance of the Contract Clause began to wane, the doctrine of economic substantive due process began to rise in importance. Beginning with the infamous *Dred Scott* case,²⁰ the Supreme Court began to use the notion of due process (contained in the Fifth Amendment of the Constitution) as a way to deal with economic matters.²¹ By 1886, when the Court decided the *Railroad Commission Cases*,²² it had expressed its view that excessive rate regulation amounted to “a taking of private property for public use without just compensation or without due process of law.”²³ The series of nineteenth century railroad rate regulation decisions by the

15 See, e.g., TAYLOR, *supra* note 14, at 368, which states:

Across the country, conservatives overreacted to Shays’s Rebellion, which they improbably described as a leveling movement meant to abolish all debts and confiscate great property to benefit the poor. Henry Knox assured Washington, “Their creed is that the property of the United States has been protected from confiscation . . . by the joint exertion of *all*, and therefore ought to be the *common property* of all.

See also McDONALD, *supra* note 5, at 178 (“The impact of this understanding—or, rather, misunderstanding—of [Shays’] rebellion can scarcely be overrated.”)

16 See TAYLOR, *supra* note 14, at 372 (“Almost everyone agreed that Congress needed new powers to levy taxes and regulate interstate and foreign commerce.”).

17 John Drobak, *Credible Commitment in the United States: Substantive and Structural Limits on the Avoidance of Public Debt*, in *FRONTIERS OF THE NEW INSTITUTIONAL ECONOMICS* 247, 248-52 (John Drobak & John Nye eds., 1997).

18 BENJAMIN FLETCHER WRIGHT, JR., *THE CONTRACT CLAUSE OF THE CONSTITUTION* 28 (1938); see Drobak, *Credible Commitment in the United States*, *supra* note 17, at 249-251.

19 *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 654 (1819).

20 *Dred Scott v. Sandford*, 60 U.S. 393, 450 (1856) (enslaved party).

21 “No person shall . . . be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V. This provision is part of the Bill of Rights, the ten amendments added to the Constitution to limit the power of the federal government and to make enactment of the Constitution possible. After the Civil War, the Fourteenth Amendment was enacted to make the Due Process Clause applicable to state governments.

22 *Stone v. Farmers’ Loan & Trust Co.*, 116 U.S. 307 (1886).

23 *Id.* at 331.

Supreme Court played an important role in the development of economic substantive due process, although the cases also contained the seeds of the regulatory takings doctrine.²⁴ The Takings Clause lay dormant for decades while economic substantive due process grew in importance during the early twentieth century.

In judging the constitutionality of legislation, the Supreme Court interpreted the Due Process Clause as requiring “that the end shall be accomplished by methods consistent with due process” and that “the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.”²⁵ This “means/ends” test gave the courts considerable discretion in reviewing the constitutionality of economic legislation. By the time of the New Deal, the Supreme Court had overturned a number of important, popular economic reforms, such as a limitation on working hours of bakers²⁶ and a minimum-wage law.²⁷ Facing a serious threat to his New Deal reforms, President Roosevelt contemplated enlarging the size of the Supreme Court to be sure that he would have majority support on the Court for his reforms.²⁸ Averting a constitutional crisis, the Supreme Court began to rule that economic reform legislation satisfied the Due Process Clause. Within a few years (and after changes in its composition),²⁹ the Supreme Court essentially abandoned the use of due process to judge the constitutionality of economic regulation.³⁰ The Court did not alter the means/ends test of due process. Rather, it decided to defer to the legislature’s determination that the objectives of a statute were legitimate

24 Richard J. Pierce, *Public Utility Regulatory Takings: Should the Judiciary Attempt to Police the Political Institutions?* 77 GEO. L.J. 2031, 2031 (1989); John N. Drobak, *From Turnpike to Nuclear Power: The Constitutional Limits on Utility Rate Regulation*, 65 BOSTON U. L. REV. 65, 70-81 (1985). See also RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 274 (1985) (stating that *Smyth v. Ames*, 169 U.S. 466 (1898)—a landmark ratemaking case—“was argued under the rubric of the [D]ue [P]rocess [C]lause, but the analysis was vintage eminent domain, for Justice Harlan viewed that the proper issue was whether the rate structure worked a taking of the railroad’s property for public use without just compensation”).

25 *Nebbia v. New York*, 291 U.S. 502, 525 (1934).

26 *Lochner v. New York*, 198 U.S. 45 (1905).

27 *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923).

28 See Johnna F. Purcell, *A Switch in Time to Destroy Nine*, 30 CORNELL J.L. & PUB. POL’Y 611, 617-19 (2021); Michael Nelson, *The President and the Court: Reinterpreting the Court-Packing Episode of 1937*, 103 ACAD. POL. SCI. 267, 279 (1988).

29 See David N. Mayer, *Substantive Due Process Rediscovered: The Rise and Fall of Liberty of Contract*, 60 MERCER L. REV. 563, 652, n.441 (2009) (stating that while the original court-packing plan failed, Roosevelt was able to replace many of the justices who died or retired in the next few years).

30 See e.g., *id.* at 652-53 (describing the Court’s effective throttling of economic due process through its adoption of the “minimal rational basis” test); James W. Ely, Jr., *Buchanan and the Right to Acquire Property*, 48 CUMB. L. REV. 423, 444 (2018) (“After 1937, the Supreme Court largely abandoned meaningful scrutiny of economic legislation under the due process clause of the Fourteenth Amendment.”).

and the means rational.³¹ Although the Supreme Court has continued to use due process as a way to judge the constitutionality of statutes that limit non-economic personal rights, such as same-sex marriage,³² the Supreme Court and the other federal courts have rarely found any economic legislation to violate the Due Process Clause since the time of the New Deal.³³ Many conservative commentators have criticized the Supreme Court for its abdication of economic review,³⁴ but the Supreme Court's current position is a consequence of what nearly everyone views as its excessive interference with economic reform in the first third of the last century.³⁵

Before the Supreme Court recanted its use of the Due Process Clause, it had already laid the foundation for another constitutional limitation on government regulation. In *Pennsylvania Coal Co. v. Mahon*,³⁶ decided in 1922, the Court held that excessive economic regulation was the equivalent of the confiscation of property and consequently violated the Takings Clause of the Fifth Amendment that prohibits the taking of property without the payment of just compensation.³⁷ Unlike the Due Process Clause, the Takings Clause cannot be used directly to prevent regulation. Rather, excessive regulation triggers the compensation requirement. To the extent that a government refuses to open its coffers to pay for the effects of excessive regulation, the practical effect of the two clauses is the same because the government will simply withdraw the challenged regulation.³⁸

The Supreme Court has never said that one constitutional clause replaces another as a check on government regulation. But as one clause fell in

31 *Nebbia*, 291 U.S. 502 is an example of this.

32 *Obergefell v. Hodges*, 576 U.S. 644 (2015).

33 *St. Joseph Abbey v. Castille* is one of those rare cases in which a federal court struck down an economic regulatory law as violative of the Due Process Clause. 712 F.3d 215 (5th Cir. 2013). The law limited the sale of caskets by only licensed funeral directors. *Id.* at 218. Prior to the Fifth Circuit's decision in *St. Joseph Abbey*, the Tenth Circuit had upheld a similar law. *Powers v. Harris*, 379 F.3d 1208, 1225 (10th Cir. 2004); see also *Brown v. Hovatter*, 561 F.3d 357 (4th Cir. 2009) (upholding on due process grounds Maryland laws regulating funeral home directors).

34 See e.g., Richard A. Epstein, *The Mistakes of 1937*, 11 *Geo. MASON U. L. REV.* 2 (1988) (arguing that the Supreme Court was wrong to reject the *Lochner*-era protections of economic liberties); Note, *Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered*, 103 *HARV. L. REV.* 1363 (1990) (arguing that the Court should return to its approach before *Carolene Products* which accords proper protection for economic liberties); Bernard H. Siegan, *Economic Liberties and the Constitution*, 24 *BUS. ECON.* 23 (1989) (arguing that protection of economic liberties accords with the original meaning of the Constitution); Walter Dellinger, *The Indivisibility of Economic Rights and Personal Liberty*, 2003-2004 *CATO SUP. CT. REV.* 9 (stating that strong protection of economic liberties by the Supreme Court is essential for the protection of other substantive rights).

35 See, e.g., Richard A. Epstein, *Toward A Revitalization of the Contract Clause*, 51 *U. CHI. L. REV.* 703, 704, n.8 (1984) (“[A]s a string of unanimous Supreme Court opinions suggests, there is almost universal agreement on the desirability of judicial passivity in economic matters.”).

36 *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

37 *Id.* at 415. “[N]or shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V. The Supreme Court incorporated the Takings Clause into the Due Process Clause of the Fourteenth Amendment to make it applicable to the states, as it has done for nearly all the amendments in the Bill of Rights.

38 *Infra* note 83.

prominence, another one always came forward. That was true with economic substantive due process following the demise of the Contract Clause and with the Takings Clause following the demise of economic due process. It appears that the Supreme Court is sensitive to the need for some constitutional check on economic regulation. When the prevalent clause became ineffective, the Supreme Court found another clause to serve that purpose. There are significant differences between each of the three clauses, so one clause has never wholly replaced another, but they all serve the same general purpose. The importance of the Contract Clause diminished because regulation comes in many forms besides state corporate charters. The Supreme Court's abuse of substantive due process led to the demise of that doctrine in the early part of the twentieth century. The cause of the demise of one clause is not important; what is important is that the Supreme Court found another part of the Constitution as a vehicle for parties to litigate whether economic regulation is excessive.

Part of the birth of a new clause stem from litigation strategy. When lawyers sue to protect property rights, they will search for laws that will support their cause. It made no sense to challenge economic regulation with due process after the Supreme Court decided *Nebbia v. New York*³⁹ in 1934, but *Pennsylvania Coal Co.* was a 1922 case setting out a new strategy. Since the courts have long protected property rights, the success of early cases using the new constitutional provision encouraged more litigation under that clause. In this manner, there is a common thread running through the Contract Clause, economic substantive due process and the Takings Clause that demonstrates a continued commitment by the Supreme Court to use the Constitution to protect property rights by constraining government regulation.⁴⁰

The Takings Clause

The Takings Clause of the Fifth Amendment to the U.S. Constitution is a short straightforward clause that provides simply: "nor shall private property be taken for public use, without just compensation."⁴¹ It has its roots in the Magna Carta.⁴² Similar clauses existed in the Massachusetts and Vermont constitutions and in the Northwest Ordinance prior to the adoption

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

40 When the day comes that the Takings Clause falls out of favor, it is likely that the Supreme Court will resurrect the Privilege and Immunities Clause to become the basis for protecting property rights.

41 U.S. CONST. amend. V.

42 "No free man shall be . . . dispossessed except by the legal judgment of his peers or by the law of the land." MAGNA CARTA, ch. 39 (1215); see William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 787 (1995).

of the Fifth Amendment.⁴³ Scholars are not certain, however, why the Takings Clause was included in the Fifth Amendment. The state conventions considering ratification of the Constitution proposed every part of the Bill of Rights except the Takings Clause.⁴⁴ James Madison added the Takings Clause when he drafted the proposed Bill of Rights for Congress.⁴⁵ Although Madison left no explanation for his decision, some believe that Madison was concerned that the apparatus of the federal government could be used by a majoritarian government to confiscate the property of landowners.⁴⁶ Others believe that the clause was written in response to the practice of impressing housing and supplies by both armies during the Revolutionary War.⁴⁷ In addition, some colonial governments had used the power of eminent domain to take title to land for roads and other public projects without paying compensation to owners.⁴⁸ This was consistent with republican political theory, since all citizens were expected to support the common good as the need arose. But the Fifth Amendment changed that. Regardless of the sources of the Takings Clause, it is undisputed that the clause was only an eminent domain provision dealing with the taking of title to or possession of property. That understanding lasted nearly a century, until the Supreme Court ruled in *Pumpelly v. Green Bay Co.*⁴⁹ in 1871 that a “taking” occurred when a farmer’s fields were permanently inundated because of a new dam on a nearby river.

While the federal courts confined the Fifth Amendment to eminent domain, they interpreted their own constitutions to require compensation for a broader range of governmental action. During the antebellum period, nearly all the original states and all the new states adopted takings clauses in their constitutions.⁵⁰ Using those state constitutions, as well as principles of natural law, state courts held an increasingly broad range of governmental actions compensable.⁵¹ These included the destruction of water rights and sources, the destruction of rights of access to roads (frequently resulting from the construction of railroad beds or from raising the grade of streets), and the need to build additional fencing for livestock as a consequence of

43 Treanor, *supra* note 42, at 825.

44 See EDWARD DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 161-63 (1957); Treanor, *supra* note 42, at 791.

45 See Treanor, *supra* note 42, at 837.

46 See, e.g., *id.* at 847-55.

47 *Id.* at 791-92 (quoting St. George Tucker, the editor of an 1803 edition of Blackstone’s Commentaries); see *Republica v. Sparhawk*, 1 U.S. 357, 363 (Pa. 1788) (upholding the impressment of provisions).

48 Treanor, *supra* note 42, at 787-88.

49 80 U.S. 166, 181 (1871).

50 The Carolinas were the only exceptions. See Kris Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211, 1230-31 (1996).

51 See Treanor, *supra* note 42, at 800.

the construction of new roads.⁵² These state court decisions were expanding the meaning of a government taking, but they all involved tangible, physical property. The great expansion of the taking concept in the nineteenth century came in the Supreme Court when it ruled in the *Railroad Commission Cases* in 1886 that a loss of profits, an intangible property right, could result in an unconstitutional taking.⁵³ This ruling dramatically changed the conception of the Takings Clause and laid the foundation for a new interpretation of the Takings Clause: not only did it govern eminent domain, but it also constrained government regulation.

In 1922, Justice Holmes wrote a characteristically pithy opinion in *Pennsylvania Coal Co. v. Mahon*,⁵⁴ which became the foundation of the modern regulatory taking doctrine. As he put it, an otherwise valid exercise of governmental regulation becomes unconstitutional under the Takings Clause if it “goes too far.” Since then, hundreds of cases and scholars have grappled with the question of when regulation goes too far.⁵⁵

The Modern Regulatory Takings Doctrine

As with many parts of the Constitution, the Takings Clause is so brief that its language leaves unanswered many questions about its application. As a result, the meaning of the clause derives from the many Supreme Court opinions applying the clause, making the constitutional analysis like common law analysis, with the judges giving meaning to the brief phrase. The Supreme Court has identified several factors that are relevant to the determination of whether a taking has occurred. Two related factors provide the foundation for the limitation on government regulation. The issue at the heart of the Takings Clause is whether we can fairly ask people to bear a regulatory burden as part of their obligations as citizens of the United States. All citizens benefit in innumerable ways from our government and society. The converse is that society can expect everyone to contribute in various ways to the common good. As the Supreme Court has said, the question is whether the burden imposed by a regulation can be “borne to secure ‘the advantage of living and doing business in a civilized community.’”⁵⁶ This notion, part of pre-Revolutionary republican political theory, is important because it puts the focus on the underlying question, yet it leaves considerable uncertainty about how the Takings Clause applies in particular contexts.

⁵² See *id.* at 792-94, 800.

⁵³ See Drobak, *From Turnpike to Nuclear Power*, *supra* note 24, at 71-73.

⁵⁴ *Pennsylvania Coal*, 260 U.S. 393.

⁵⁵ E.g., RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 114-15 (1985).

⁵⁶ *Andrus v. Allard*, 444 U.S. 51, 67 (1979) (quoting the dissent by Brandeis, J., in *Pennsylvania Coal*, 260 U.S. at 422).

A related consideration arises from the belief that the Takings Clause was “designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”⁵⁷ Wide-spread obligations are less apt to qualify as takings because many share the burdens, or, to put it another way, wide-spread obligations are often the things we expect citizens to bear. Nothing could be more of a taking than taxation, but everyone must pay taxes. Tax programs do not “single out” a few to bear public burden: the more narrowly targeted a governmental program, the more likely a few will be singled out, making it more likely that a taking will result. This principle also has a political economy dimension. The smaller the group that bears the burden of a government program, the less likely the group will have much influence in the legislature. As Justice Jackson wrote about the equal protection clause:

The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.⁵⁸

The singling out principle, like the Equal Protection Clause, works against arbitrary action by the government. Not only is the breadth of the burden of a government program relevant, so is the reciprocity between the benefits and burdens inherent in a program. Zoning is a good example of this because property owners are just as apt to benefit from zoning as to be burdened. In *Pennsylvania Coal*, the Court cited a program that required coal mining companies to leave coal pillars near the boundary of another mine, which also had to leave its boundary pillars in place. Calling this an “average reciprocity of advantage,” the Court noted that the requirement imposed mutual burdens and produced mutual benefits.⁵⁹

The Supreme Court has also focused on whether the regulation interferes with “reasonable investment-backed expectations.”⁶⁰ A person’s reasonable expectations are relevant to the compensation issue. In *Penn Central*

57 *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

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

59 *Pennsylvania Coal*, 260 U.S. at 415.

60 *Penn. Central Transp. Co. v. New York City*, 438 U.S. 104, 136 (1978). *See generally* Daniel R. Mandelker, *Investment-Backed Expectations in Takings Law*, 27 URB. LAW. 215 (1995).

Transportation Co. v. New York City, the Supreme Court used this notion to disallow compensation when New York refused to allow the construction of a large office building over Grand Central Station in order to preserve the look of the original building.⁶¹ Since the building was built as a railroad station and the station was still generating a fair return, the Court concluded that the prohibition on construction did not interfere with the owner's primary expectations and hence no compensation was required.⁶² This aspect of the takings doctrine gives greater protection to the status quo than to plans for development or new uses of property.

Although the Supreme Court has identified these various factors as relevant to the takings issue, the cases usually turn on a balance of the public benefit and the private harm.⁶³ In the vast majority of the cases, it appears that the Court will not award compensation if the justification for the law is great enough even if all the other factors point to compensation. A good example of this is *Andrus v. Allard*.⁶⁴ That case involved a federal law that banned the sale of Native American artifacts containing feathers of eagles and other migratory birds. Although federal law banned the killing of these birds, poachers were pushing eagles toward extinction.⁶⁵ In an attempt to help preserve these birds, Congress enacted the law to close the primary market for the birds' feathers.⁶⁶ Even with modern technology, it was impossible to distinguish a feather from a bird killed yesterday from one killed decades ago.⁶⁷ Preserving the American eagle, one of the most important symbols of the United States, was an important social goal.⁶⁸ On the other hand, there were only a handful of dealers in Native American artifacts. Even though each dealer suffered great pecuniary loss, the aggregate loss was insignificant compared to the benefit. Under the Court's balancing test, the outcome was easy: no "taking" and no compensation for the dealers.⁶⁹ This conclusion was seemingly at odds with the principle that

61 *Penn. Central Transp. Co.*, 438 U.S. at 136.

62 The train station was built with extra-large columns so that an office building could be built over the station sometime in the future. This could lead to a conclusion that the owner's expectations included the construction of an office building. However, the Court instead focused on the decades of use of the property as only a train station. *Id.* at 115, n.16.

63 See, e.g., Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1193-96, 1234-35 (1967); *Dolan v. City of Tigard*, 512 U.S. 374, 377 (1994); *Andrus*, 444 U.S. at 65 (1979).

64 See generally *Andrus*, 444 U.S. 51.

65 See Migratory Bird Treaty Act, DEFENDERS OF WILDLIFE, <https://defenders.org/migratory-bird-treaty-act> [<https://perma.cc/57MB-BJGD>] (last visited Mar. 10, 2025).

66 *Andrus*, 444 U.S. at 61-62.

67 *Id.* at 58 ("The legislative draftsmen might well view evasion as a serious danger because there is no sure means by which to determine the age of bird feathers; feathers recently taken can easily be passed off as having been obtained long ago.")

68 See *United States v. Wilgus*, 638 F.3d 1274, 1285 (10th Cir. 2011) (discussing the compelling interest of the federal government in preserving the bald eagle as a national symbol).

69 *Id.* at 67-68.

the few should not pay for a public gain, but it demonstrates that, when push comes to shove, the balancing test dominates takings analysis.

Although most of the regulatory takings cases use the multi-factor balancing test, laws that result in the physical occupation of land are considered per se takings that do not require balancing. This is a small category of cases. In *Loretto v. Teleprompter Manhattan CATV*, the Supreme Court found a per se taking as a result of a law that required landlords to allow a cable television company to attach cable wires to buildings and install some equipment on roofs.⁷⁰ Recently, the Court found a per se taking caused by a California law that allowed unions to have access to growers' fields as part of organizing efforts.⁷¹ The Court concluded that the access right was essentially an easement that burdened the property and so qualified as a physical occupation of property.⁷²

Miller v. Schoene

It is easy to recite the fundamentals that comprise the multi-factor takings test, but sometimes there are nuances in the application of the factors that affect the outcome of cases. The classic—and controversial—case of *Miller v. Schoene*,⁷³ illustrates these subtle aspects extremely well. Julia Miller was a widow who owned land in the Shenandoah Valley in Virginia containing a sizable number of old, ornamental red cedar trees. The most beautiful were the 200 trees that lined the drive from the highway to her house.⁷⁴ In 1914, Virginia enacted a law to protect apple orchards from cedar rust fungus that was devastating the apple industry. The fungus originated in spores produced by cedar trees which were carried by the wind to apple trees as far as two miles or more.⁷⁵ Although the rust quickly destroyed the fruit and, within a few years, the apple trees, it did no harm to the cedar trees.⁷⁶ The disease spreads rapidly throughout a region because the apple trees infect healthy cedar trees in the region, and the cycle continues.⁷⁷ At the time, there was no way to stop the disease other than destroying the infected cedar trees near the orchards.⁷⁸ The Cedar Rust Act

⁷⁰ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 (1982).

⁷¹ *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 152 (2021).

⁷² *Id.*

⁷³ *Miller*, 276 U.S. 272.

⁷⁴ Brief for Plaintiffs-in-Error at 5, *id.* (No. 199); Brief for Defendant-in-Error at 6, *id.* (No. 199).

⁷⁵ *Miller*, 276 U.S. at 278-79; *Kelleher v. Schoene*, 14 F.2d 341, 347 (W.D. Va. 1926).

⁷⁶ *Miller*, 276 U.S. at 278 (*citing* *Kelleher*, 14 F.2d at 341).

⁷⁷ *Id.*

⁷⁸ *Id.* at 278-79 (“The only practicable method of controlling the disease and protecting apple trees from its ravages is the destruction of all red cedar trees, subject to the infection, located within two miles of apple orchards.”); *Bowman v. Va. State Entomologist*, 128 Va. 351, 370 (1920) (explaining destroying the cedar trees was “absolutely necessary” to protect the apple trees); *Kelleher*, 14 F.2d at 348-49 (“Because of the nature of cedar rust, commercial apple orchards cannot exist in close proximity

empowered the state entomologist to do that. The Act limited compensation for the loss of cedar trees to the cut lumber and the cost of cutting, which was ultimately passed on to the orchards in the area.⁷⁹ When the state entomologist ordered Miller to cut down her trees because they were the source of cedar rust for neighboring orchards, she refused, prompting the entomologist to sue under the Cedar Rust Act.

The Supreme Court recognized that the state had no choice but to choose “between the preservation of one class of property and that of the other whenever both existed in dangerous proximity.”⁸⁰ If it had not acted, apple trees would have been destroyed; by its action cedar trees were destroyed. The Supreme Court concluded that it was constitutional for the state to preserve the property that was much more valuable to the state and its economy and to destroy the other, even without compensation to Miller.⁸¹

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

The real issue turns on the scope of the police power, which in turn depends upon whether there was sufficient justification for cutting down the trees. This last inquiry made it imperative for the court to decide whether the claimant’s cedar trees were in fact a nuisance to the apple trees Physical invasion seems difficult to establish, given that the fungus moved from the cedars to the apple trees either by their own motion or by the forces of nature and not by any act of the defendant, unless it could be said that the cedars were planted as a lure or a trap for fungus. If forced to decide the particular question—did the defendant’s cedars constitute a nuisance to apple trees in the vicinity? — I should, with some caution, answer no

In the absence of any wrong by the owners of the cedar trees, the decision not to compensate is nothing more than authorization to transfer property illicitly from one class of citizens to another, as the owner of the cedar trees is left with neither the thing, nor its value, when he has done no wrong.⁸²

to infected red cedar trees. This fact, at least in some sections, made an election between the destruction (or treatment) of infected cedar trees and the ruin of the orchards an unavoidable necessity.”).

⁷⁹ The language of the Act left some room for another construction, but the Virginia courts interpreted the statute to limit the amount of compensation to the costs of cutting and removal, in addition to the lumber. *See Miller v. State Entomologist*, 146 Va. 175, 192-95 (1926), *aff’d sub nom.*, *Miller*, 276 U.S. 272; TENTH REPORT OF THE STATE ENTOMOLOGIST AND PLANT PATHOLOGIST OF VIRGINIA, 1914-15, at 21-29 (hereinafter ‘TENTH REPORT’) (Opinion in *State Entomologist v. Glass*, Va. Cir. Ct. 1915).

⁸⁰ *Miller*, 276 U.S. at 279.

⁸¹ *Id.*

⁸² Epstein, *supra* note 35, at 114-15.

Epstein is correct that Miller did nothing wrong, but that conclusion alone cannot resolve the compensation issue. If it does, a vast number of governmental actions long thought to be constitutional would become unconstitutional because they impose financial harm on innocent people. The exercise of eminent domain harms everyone who receives fair market value for their property as just compensation. That measure undercompensates because people who lose their property did not choose to sell, which shows that they value their property more than what they would get in a sale. Of course, subjective valuation would raise problems of proof and encourage opportunistic behavior by property owners seeking to inflate their subjective valuation. Fair market value is an efficient rule, but it causes financial harm to many people who have done no wrong. Likewise, the brewery owner in *Mugler v. Kansas*,⁸³ who lost his business, after Kansas passed a prohibition law, did nothing wrong. He was producing a product that was legal when he began operations. Yet the Supreme Court did not require compensation. The same could be said about factories that pollute legally for years and then must install costly antipollution equipment to meet new laws, or about nuclear power plants that must be retrofitted to meet new safety standards. The list of people who do no wrong but must nonetheless suffer financial consequences is nearly endless. These are people we ask to contribute to the good of society, adding an additional price to the cost of their citizenship in our country.

One could also object to the Supreme Court's decision in *Miller v. Schoene* on political economy grounds.⁸⁴ Cedar tree owners had little voice in the legislative process that led to the passage of the Cedar Rust Act, while the apple growers were organized and had powerful state senators representing them in the legislature.⁸⁵ The growers' representatives introduced the bills, which passed quickly and virtually unanimously.⁸⁶ The votes were 88 to 0 in the Virginia House of Delegates and 23 to 3 in the Senate.⁸⁷ If one of the purposes of the Takings Clause is to check majoritarian decisions that impose on those at a disadvantage in the

83 *Mugler v. Kansas*, 123 U.S. 623, 664 (1887).

84 Cf. James M. Buchanan, *Politics, Property, and the Law: An Alternative Interpretation of Miller et al. v. Schoene*, 15 J. L. & ECON. 439 (1972); Warren J. Samuels, *Inter-relations Between Legal and Economic Processes*, 14 J. L. & ECON. 435 (1971).

85 Telephone Interview with Don Kludy, retired Virginia Entomologist (June 24, 1993).

86 See TENTH REPORT, *supra* note 79, at 6 ("The fruit growers, realizing that the future profits of their apple orchards were imperiled, succeeded in having a law enacted declaring the cedar a nuisance."); William A. Fischel, *The Law and Economics of Cedar-Apple Rust: State Action and Just Compensation in Miller v. Schoene* (Dartmouth Coll. Econ. Dep't., Working Paper, 2005), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=524982 [<https://perma.cc/P7UY-EFQ5>] ("A severe episode of cedar-rust damage occurred in Virginia's Shenandoah Valley (the state's primary apple-orchard region) during 1912. By then enough was known about its cause to unite apple growers to petition their lawmakers for the cedar-cutting law of 1914.").

87 Fischel, *supra* note 86, at 32; see also COMMONWEALTH OF VA., J. OF H.D., Sess. 368 (1914); COMMONWEALTH OF VA., J. OF S., Sess. 443 (1914).

legislative process, that concern should have influenced the outcome in *Miller v. Schoene*. Both apple growers and cedar tree owners were large in number and broadly dispersed throughout parts of the state. This raises collective action problems for both groups, except that the growers were already organized and had representatives at work for their interests in the legislature.⁸⁸ Apple growing was big business in Virginia, with more than \$20 million invested in orchards, making Virginia the third-largest apple-growing state in the country at that time.⁸⁹ Even if the cedar tree owners could have overcome their collective action problem, it is difficult to believe that things would have turned out differently. Although there were tens of thousands of people who owned cedar trees in Virginia, very few of them cared about losing them.⁹⁰ Most people considered them to be a weed or scrub tree. With such small opposition, the law surely would have passed as it did, without specifying compensation for the destroyed trees. The Cedar Rust Law was not effective in any county until the county supervisors adopted it.⁹¹ By the time the measure was taken to the counties, some cedar tree owners were well-aware of the scope of the law, so they tried to prevent implementation at the county level. The cedar tree owners were successful in only a couple of districts, which are subsections of counties.⁹²

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

Those arguments overlook important counterpoints. First, not all externalities get internalized. Nor should they be, because doing so can be costly. Moreover, if one wants to be true to this principle, positive externalities must be internalized as well as negative ones. It is difficult to measure this, but everyone in Virginia indirectly benefits from a strong state economy. Second, it is not so clear what expectations would be reasonable. Most cedar tree owners willingly cut down their trees to help the growers.⁹³

88 See *supra* notes 84-85.

89 *Kelleher v. Schoene*, 14 F.2d 341, 348 (W.D. Va. 1926).

90 See, e.g., ELEVENTH REPORT OF THE STATE ENTOMOLOGIST AND PLANT PATHOLOGIST OF VIRGINIA, 1916-17, at 8-9 (hereinafter 'ELEVENTH REPORT'); THIRTEENTH REPORT OF THE STATE ENTOMOLOGIST AND PLANT PATHOLOGIST OF VIRGINIA 1920-21, at 21 (hereinafter 'THIRTEENTH REPORT').

91 § 892 of the Cedar Rust Act, c. 36 subs. 1914 Va. Acts 52.

92 See, e.g., ELEVENTH REPORT, *supra* note 90, at 8; TWELFTH REPORT OF THE STATE ENTOMOLOGIST AND PLANT PATHOLOGIST OF VIRGINIA, 1918-19, at 15; THIRTEENTH REPORT, *supra* note 90, at 20-21 (1922).

93 TENTH REPORT, *supra* note 79, at 6 ("A number of land owners have shown a perfect willingness to cut their cedars when the disease has been explained to them."); FOURTEENTH REPORT OF THE STATE

Many felt that good neighbors willingly took that action because there was a near epidemic in the apple industry.⁹⁴ Further, the destruction of trees had been a common method to fight plant disease.⁹⁵ Usually, the trees that were destroyed were the ones that were diseased. Cedar rust was unusual because it did not harm the cedars. It is hard to know which is the better view of reasonable expectations: since it was common to fight plant disease by tree cutting, should we say that Miller should have recognized the risk that her trees would be destroyed someday, or should we say that Miller should not have anticipated the risk that her healthy trees might have to be destroyed? The expectations issue is hard to decide.

Based on the concern for singling out, *Miller v. Schoene* is the perfect case for compensation. Very few people had cedar trees that beautified their property; most considered the tree to have little value.⁹⁶ Since only Miller and a few others suffered greatly from the law, it is fair to say they are singled out for a disproportionate share of the cost of a program with public benefits. In that sense, Miller, and the few others like her deserve compensation. However, from another perspective, the Cedar Rust Act did not single anyone out. It was a broad-based program with enormous impact throughout Virginia. Between 1916 and 1925, more than 200,080 acres were cleared of cedar trees.⁹⁷ More than 5,000 farmers and other landowners had their trees cut.⁹⁸ Unlike most cedar tree owners, Miller suffered because her trees lined the drive from the highway to her house.⁹⁹ One other cedar owner who sued objected to the cutting because the trees made a nice grove that he used for picnics. In some ways, the greater harm to Miller and the few like her results from their own subjective evaluation of the importance of the cedar trees. As with the eminent domain evaluation problem, one could conclude that subjective evaluation should not be taken into account in making the compensation decision.

ENTOMOLOGIST AND PLANT PATHOLOGIST OF VIRGINIA, 1922-23, at 10 (1924) (hereinafter 'FOURTEENTH REPORT') ("[T]he actual number of cases on record was small because in most instances permission was given and the growers cut the cedars in their own neighborhoods.").

94 See Fischel, *supra* note 86, at 23-28 (explaining the voluntary cooperation by many of the neighbors in response to the plight of apple farmers).

95 See TENTH REPORT, *supra* note 79, at 23 (describing the creation of cedar cutting groups that formed to systematically destroy cedar trees in the area for some time before the proposed legislation).

96 See e.g., ELEVENTH REPORT, *supra* note 901, at 9); Brief for Defendant-in-Error, *supra* note 74.

97 See e.g., FOURTEENTH REPORT, *supra* note 93, at 12 (accounting for the number of acres cleared from September 1922 to June 1923 alone at a staggering 193,539); FIFTEENTH REPORT OF THE STATE ENTOMOLOGIST AND PLANT PATHOLOGIST OF VIRGINIA, 1924-25, at 8 (1926) (hereinafter 'FIFTEENTH REPORT') (estimating 61,818 acres cleared).

98 See FOURTEENTH REPORT, *supra* note 93, at 12 (estimating that 4,213 farms were affected); FIFTEENTH REPORT, *supra* note 97, at 8 (counting 589 farms).

99 See Brief for Plaintiffs-in-Error, *supra* note 74 ("[Miller had] two rows of red cedar trees comprising about two hundred in number, along each side of a roadway, leading from a public highway to the dwelling house on said tract, which trees are old and very ornamental and add greatly to the scenic value of the premises.").

A decision that Miller should receive compensation for her taking could lead to strategic behavior in similar cases by those who see a chance to make more money at the expense of the state.¹⁰⁰ Sometimes strategic behavior can be handled as an issue of proof. No one doubted that Miller found special value in her cedar trees. The testimony by experts on her behalf was that the trees increased the fair market value of her property by \$5,000 to \$6,000, compared to the \$100 she was given for the cost of removing the trees.¹⁰¹ However, in another case challenging the Cedar Rust Act, the property owner who valued his tree-shaded grove was unable to prove any damages. He valued highly the grove he used for picnics, but the experts who testified for the state concluded that the fair market value of his property increased after the trees were cut, because the area could now be used for farming.¹⁰² The use of the fair market value test may have been unfair to him, just as it is unfair to those who lose their property by eminent domain, but that test does minimize the risk of strategic behavior.

THE CONSTITUTIONAL PROTECTION OF PROPERTY RIGHTS IN GERMANY

The “Grundrechte,” the basic or fundamental rights, are listed in the first part of the “Grundgesetz,” the German Basic Law. Article 14 of the Basic Law establishes Germany’s constitutional protection of property in Germany. The article provides:

- (1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by law.
- (2) Property entails obligations. Its use shall also serve the public good.
- (3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute respecting the amount of compensation, recourse may be had in the ordinary courts.¹⁰³

Article 14 makes the ownership of property one of the basic rights, the core rights of the German people that are viewed to be “vested in people by

¹⁰⁰ ELEVENTH REPORT, *supra* note 90, at 9 (Most opponents selfishly seek reimbursement for themselves.).

¹⁰¹ See Brief for Plaintiff-in-Error, *supra* note 74, at 12-13, State Entomologist, 146 Va. At 191; Miller, 276 U.S. at 277 (“The plaintiffs in error appealed from the order to the Circuit Court of Shenandoah county which, after a hearing and a consideration of evidence, affirmed the order and allowed to plaintiffs in error \$ 100 to cover the expense of removal of the cedars”).

¹⁰² TENTH REPORT, *supra* note 79, at 17.

¹⁰³ Grundgesetz, *supra* note 3, at art. 14 (Ger.).

nature and rooted in the universal concept of human dignity.”¹⁰⁴ The Basic Law begins with the importance of human dignity: “Human dignity shall be inviolable.”¹⁰⁵ The human dignity clause, along with the rights to liberty and equality, which follow in the next two articles of the Basic Law, are not just three standalone rights; rather, they collectively inform the interpretation of the other basic rights.¹⁰⁶ Thus, the German courts construe Article 14 with these underlying principles of dignity, liberty, and equality in mind.

Article 14 has three provisions that deal with (1) the right to property, (2) the regulation of property rights, and (3) eminent domain. Unlike the brevity of the U.S. Takings Clause, Article 14 expressly guarantees property rights in section (1), but then section (1) as well as section (2) acknowledge the limits and regulation of these rights. Section (3), which applies to eminent domain, differs from the Takings Clause by specifying that the requisite compensation is to be fixed by balancing the interests of the public and the property owner.¹⁰⁷

The current constitutional protection of property rights has its roots in earlier German constitutions.¹⁰⁸ In addition, most of the Bundesländer, the German States, have constitutions with property rights protections.¹⁰⁹

¹⁰⁴ DONALD P. KOMMERS & RUSSELL A. MILLER, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 44 (3d ed. 2012).

¹⁰⁵ Grundgesetz, *supra* note 3, at art. 1.

¹⁰⁶ KOMMERS & MILLER, *supra* note 104, at 355.

¹⁰⁷ Grundgesetz, *supra* note 3, at art. 14(3).

¹⁰⁸ Predecessors of Grundgesetz, art. 14 from the 19th century are § 164(1) of the PAULSKIRCHENVERFASSUNG [CONSTITUTION OF ST. PAUL’S CHURCH], Mar. 28, 1849, and art. 9 of the PREUBISCHE VERFASSUNG [PRUSSIAN CONSTITUTION], Jan. 31, 1850. Under the WEIMARER VERFASSUNG [CONSTITUTION OF THE WEIMAR REPUBLIC], Aug. 11, 1919, property was protected in art. 153, which said that property was to be guaranteed by the constitution. “A Takings Clause allowed for expropriation, but only in accordance with law, in the public interest, and on the payment of compensation (Art 153), though alternative provision could be made by law.” See K.D. Ewing, *Economic Rights*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* (Michel Rosenfeld & Andras Sajó eds., 2012). Not surprisingly, under the National Socialists, Weimarer Verfassung art. 153 was repealed, and the system of property rights changed based on the national socialistic ideology. Karl Loewenstein, *Dictatorship and the German Constitution*, 4 U. CHI. L. REV. 537, 540 (1937).

¹⁰⁹ The only Bundesländer whose constitutions do not include a provision protecting property are Hamburg, Lower Saxony, and Schleswig-Holstein. Some constitutions refer to the article of the Grundgesetz. See VERF. BW. [Constitution of the State of Baden-Württemberg] art. 2(1); VERF. MV. [Constitution of the State of Mecklenburg-Western Pomerania] art. 5(3); VERF. NRW. [Constitution of the State of North Rhine-Westphalia] art. 4(1). Some repeats Article 14. See VERF. SA. [Constitution of the State of Saxony] arts. 31, 32; VERF.S. [Constitution of the State of Saxony-Anhalt] art. 18; VERF. TH. [Constitution of the Free State of Thuringia] art. 34. Others differ slightly. See VERF. BAY. [Constitution of the Free State of Bavaria] art. 103; VERF. VON BERLIN [Constitution of Berlin] art. 23; SVERF. [Constitution of the Saarland] art. 18. Some of the constitutions seem to signal less protection than that given in the Grundgesetz. While the Grundgesetz does not differentiate between political, social, and economic rights, some of the constitutions of the states do not mention the protection of property in the list of other fundamental rights but as an economic right. See VERF. BB. [Constitution of the State of Brandenburg] art. 41; VERF. HES. [Constitution of the State of Hesse] art. 45; VERF. TH. [Constitution of the Free State of Thuringia] art. 34. Alternatively, some locate them as part of the section of the economic and social system. See VERF. RP. [Constitution of Rhineland-Palatinate] art. 60. The constitution of two states stress the subordination of the protection of property under the public weal. See VERF. BRE. [Constitution of Bremen] art. 45; VERF. HES. [Constitution of the State of Hesse] art.

However, as in the United States, the federal Basic Law and its interpretation by the Federal Constitutional Court (the “Bundesverfassungsgericht”) and the lower German courts are paramount.

To put Article 14 in terms of the United States Constitution, it can be understood that Article 14 combines both substantive due process and takings. The Constitutional Court applies sections (1) and (2) to analyze whether the government has the constitutional authority to issue a law that regulates the particular content and limits of ownership, as would be the case in the United States under due process. In addition, the “content and limits” provision is akin to the question of whether regulation “goes too far” under the takings doctrine. Similar to the “goes too far” test, the Constitutional Court holds that “property can be regulated but not to an intolerable degree.”¹¹⁰ The Constitutional Court views section (3) as authorizing eminent domain, consistent with the eminent domain power under the Takings Clause.

Possible Differences Between the Two Provisions

A number of scholars have explained how the Federal Constitutional Court interprets Article 14 in ways that differ significantly from U.S. constitutional law. Many point out that the right to property is a fundamental right in Germany but not in the United States, implying that property rights are more important in Germany than in the United States.¹¹¹ This conclusion likely stems from the Supreme Court’s decision not to include property rights in its strict scrutiny analysis under the due process clause. In the infamous *Lochner* era, the Supreme Court was highly protective of both property and contract rights, a practice that became immensely controversial as the Court hindered President Roosevelt’s New Deal.¹¹² As the Court

45(2). One postulates the state’s efforts for a broad distribution of property. See VERF. BB. [Constitution of the State of Brandenburg] art. 41(3). The constitutions of the Bundesländer are seldom used, however.

¹¹⁰ KOMMERS & MILLER, *supra* note 104, at 639.

¹¹¹ CURRIE, *supra* note 5, at 290; Rebecca Lubens, *The Social Obligation of Property Ownership: A Comparison of German and U.S. Law*, 24 ARIZ. J. INT’L & COMP. L. 389, 389, 414-15 (2007); Gregory S. Alexander, *Property as a Fundamental Constitutional Right? The German Example*, 88 CORNELL L. REV. 733, 735-37 (2003); David P. Currie, *Lochner Abroad: Substantive Due Process and Equal Protection in the Federal Republic of Germany*, 11 SUP. CT. REV. 333, 339 (1989).

¹¹² See e.g., STEPHEN BREYER, *READING THE CONSTITUTION: WHY I CHOSE PRAGMATISM, NOT TEXTUALISM* 235 (2024) (“The *Lochner* Court recognized freedom of contract as a property right guaranteed by the due-process clause and relied on it to blunt Progressive Era and New Deal reforms - in an exercise of activist judicial power to minimize disruption of a system that had generated significant national prosperity.”); David N. Mayer, *The Myth of “Laissez-Faire Constitutionalism”: Liberty of Contract During the *Lochner* Era*, 36 HASTINGS CONST. L.Q. 217, 219-20 (2009) (“Progressive-era scholars and jurists such as Roscoe Pound, Learned Hand, and Charles Warren were not neutral in their analysis of liberty of contract; rather, as supporters of the Progressive movement, they were hostile to the individualist philosophy that they perceived in the courts’ protection of liberty of contract and their personal hostility to the philosophy colored their criticism of the jurisprudence.”); James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 CORNELL L. REV. 87, 91 (1993) (“Substantive due process in the *Lochner* era is depicted by standard critics as the unrestrained protection of economic rights that permitted the judiciary to import

changed its position, it evaluated economic regulation, *i.e.*, regulation of property rights, under only a rational basis test, while it evaluated government limits on other non-economic rights, like free speech and privacy, under the more demanding test of strict scrutiny.¹¹³ This second-class treatment of property rights under the due process clause probably leads to these commentators' conclusion that property rights are not as important in the United States as in Germany.

This is a misconception of our law. When the Court excluded property rights from strict scrutiny, it was acting in the shadow of the *Lochner* era, when property rights were paramount.¹¹⁴ Constitutional doctrine sometimes swings like a pendulum, with over-protection in the *Lochner* era leading to under-protection in response.¹¹⁵ This reaction to the controversy of the *Lochner* era is the primary reason for the Court's choice of favored rights.¹¹⁶ The exclusion of property rights from the set of protected fundamental rights also reflects the financial well-being of the Justices. The men on the Supreme Court were wealthy and less concerned about economic rights. If they had been poor, they would have realized that in the hierarchy of rights, it is more important to put bread on a table than to talk politics. But the Justices were not worried about putting bread on their own tables.

The rational basis test to evaluate economic regulation is a facet of the constitutional protections of due process. Under today's due process test, virtually any form of economic regulation will be found to be justified by a legitimate governmental end and a rational form of regulation.¹¹⁷ That does not mean, however, that property rights have slight constitutional protection. As the beginning of this Article explained, the Supreme Court has always been protective of property rights, albeit through different clauses of the Constitution. It is the Takings Clause, today, that is the constitutional

illegitimately laissez-faire, pro-business policy preferences into its explication of the constitutional text.”).

113 See Note, *The Constitutionality of Rent Control Restrictions on Property Owners' Dominion Interests*, 100 HARV. L. REV. 1067, 1068 (1987) (“Since the demise of the *Lochner* era, property rights have received considerably less constitutional protection than have personal liberty rights, such as freedom of speech and free exercise of religion, which receive preferential treatment through strict judicial scrutiny of restrictive governmental actions.”); Jeffrey D. Jackson, *Putting Rationality Back into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment*, 45 U. RICH. L. REV. 491, 520-30 (2011) (discussing the differential treatment of the post-*Lochner* court of economic rights and other constitutional rights).

114 See Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CAL. L. REV. 751, 778-80 (2009) (describing the positive public reaction to *Lochner* and arguing that the sentiment at the time was fearful of socialism and the threat of labor unions).

115 See *e.g.*, Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 478 (1909) (describing the change in judiciary protections of economic rights from intense protection before the turn of the twentieth century to weaker protection: “After 1900, the pendulum had clearly begun to swing the other way”).

116 See Nourse, *supra* note 114, at 779-85 (discussing the shift in rhetoric due in part to Theodore Roosevelt's campaign against Taft and his vilification of the *Lochner* Court).

117 See *supra* note 15 and accompanying text.

vehicle for protecting property rights. That clause is unaffected by the use of a rational basis test; it has its own law.

In addition to the constitutional protection of property rights under the Takings Clause, all courts provide significant protection by the common law and state statutes. Commentators who conclude that the United States does not treat property interests as a fundamental right overlook all these other judicial protections of property. The property law in the United States is a descendant of the strong property law in England. We have adopted forms of ownership that supply great protection of the property owner's interests. We have protected rights to use property through interests like fees, easements, covenants, and servitudes and through legal causes of action like trespass and ejectment. The Constitution does not mention these aspects of U.S. property law, but they are powerful recognition of the high regard the law in the United States has for property rights. To give one small example where U.S. law is much more protective of property rights than Germany under non-constitutional law, Germany allows people to use privately owned forests and countrysides for recreational purposes, subject to significant regulations.¹¹⁸ These "entrance rights" do not exist in the United States where people who enter onto private property, even just for recreational use, are subject to a suit for trespass.¹¹⁹ In addition, if you view property rights as encompassing commercial rights and not just rights to real and personal property, you can add in all the protections of commercial transactions under our laws. When you put together the protection of property interests under the Takings Clause with the case and statutory law dealing with property rights, it is wrong to conclude that our law does not treat property interests as a fundamental or basic right, even if it did not describe it as such. As a result, Germany and the United States are not as far apart concerning the importance of property rights as some scholars have concluded.

Another common theme in the comparison of the German and American law is the focus on the importance of property as part of personhood in German law, but not in our law. The decisions of the Constitutional Court often expressly refer to a personhood interest.¹²⁰ That is not surprising given the importance of the first Article of the Basic Law emphasizing the importance of human dignity.¹²¹ In addition, the Constitutional Court has explained that its recognition of personhood is, in part, a reaction to the

118 THOMAS LUNDMARK, *LANDSCAPE, RECREATION, AND TAKINGS IN GERMAN AND AMERICAN LAW* 65-83 (1997).

119 *Id.* at 84.

120 See KOMMERS & MILLER, *supra* note 104, at 633; Alexander, *supra* note 111, at 739; Lubens, *supra* note 111, at 406.

121 Grundgesetz, *supra* note 3, at art. 1.

constitution of the Weimar Republic. In the Hamburg Flood Control Case, the Federal Constitutional Court wrote:

It is essential to understand that the property right guaranteed by Article 14 has far-reaching significance, going well beyond the protection afforded by the Weimar Constitution . . . Because the Weimar Constitution had no provisions for testing the constitutionality of expropriation laws, and because judicial review was severely restricted, the judiciary had to be concerned primarily with protecting property owners through compensation. Thus, the basic right of property evolved into a demand for adequate compensation. By contrast, as already pointed out, the property guarantee under Article 14 (1) (2) must be seen in relationship to the personhood of the owner (i.e., to the realm of freedom within which persons engage in self-defining, responsible activity). The property right is not primarily a material but rather a personal guarantee. The basic right protects the individual against every unjustified infringement of the range of protected interests.¹²²

It is strange to conclude that judges in the United States, ranging from state trial judges to United States Supreme Court Justices, do not recognize that property interests are part of an individual's wellbeing.¹²³ Everyone is aware of the importance of property to people in the United States. Just because personhood is seldom expressed in the legal doctrines dealing with property, it does not mean that it is not part of our society's conception of the importance of property. In addition, some scholars conclude that the Takings Clause is only concerned with the economic interests of property owners,¹²⁴ but I do not think that is true either. The takings cases dealing with the physical encroachment on property are examples of a concern for something other than economic interests.¹²⁵ There was little economic harm to the landlords in New York City from the cable boxes and wires laid on their buildings.¹²⁶ The farmers who objected to union organizers entering

¹²² KOMMERS & MILLER, *supra* note 104, at 633.

¹²³ Eric Clayes has written that nineteenth century state judges applying state takings law viewed the equivalent of personhood as the underlying principle for takings analysis: "every owner is entitled to some zone of non-interference in which to use her possessions industriously, productively, and consistent with the health, safety, property, and moral needs of her neighbors." Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1556 (2003). He notes that this approach disappeared when the Supreme Court viewed takings from a utilitarian perspective.

¹²⁴ Alexander, *supra* note 111, at 745-46, 753-754; Lubens, *supra* note 111, at 389-390.

¹²⁵ See, e.g., Loretto, 458 U.S. 419.

¹²⁶ The compensation awarded to the plaintiff in *Loretto* was nominal compensation of one dollar. Loretto, 446 N.E.2d at 434-35 (on remand from the Supreme Court). I suspect that the landlords in *Loretto* objected so that they could earn income from the provision of cable service. See Mark Kelman, *Staying in the Takings Lane: The Compensation Issue in Cedar Point Nursery*, 2022 CARDOZO L. REV. DE-NOVO 129, 148, n. 11; Richard A. Epstein, *The Unfinished Business of Home v. Department of Agriculture*, 10 N.Y.U. J.L. & LIBERTY 734, 754-55 (2016).

their property did not suffer economic harm from the entry; they wanted to limit the union organizing.¹²⁷

The Constitutional Court uses the rhetoric of personhood, but its decisions are often like the decisions of the Supreme Court, even though the Supreme Court does not discuss personhood. For example, the opinion in the Hamburg Flood Control Case explained the importance of personhood, even though the outcome went against the property owners. One scholar explained the importance of personhood in the Constitutional Court's analysis in the Hamburg Flood Control Case¹²⁸ as follows:

German constitutional jurisprudence does not treat property as a market commodity, but as a civil, and one may say, *civic* right. The Court in the "Hamburg Flood Control Case" made it clear that the core purpose of property as a basic constitutional right is not economic but is personal and moral. The Court stated,

"To hold that property is an elementary constitutional right must be seen in the close context of protection of personal liberty. Within the general system of constitutional rights, its function is to secure its holder a sphere of liberty in the economic field *and thereby enable him to lead a self-governing life.*"

The last phrase signals the animating idea behind the constitutional role of property under the German Basic Law: self-governance. Property is a necessary condition for autonomous individuals to experience control over their own lives. Without property, they lack the material means necessary for a full and healthy development of their personality. The Court made the connection between property and personhood explicit in its opinion when it stated that "the property guarantee under Article 14(1) (2) must be seen in relationship to the personhood of the owner—that is, to the realm of freedom within which persons engage in self-defining, responsible activity [. . .]."

As the Constitutional Court's opinion makes clear, the German idea of the constitutional property right shares with the self-developmental tradition a conception of liberty that differs from the classical Anglo-American understanding of that term. . . The individual owner's freedom from external interference with his

¹²⁷ *Cedar Point Nursery*, 594 U.S. 139.

¹²⁸ Hamburg Flood Control Case, 24 BVerfGE 367 (1968) (*translated and summarized in* KOMMERS & MILLER, *supra* note 104, at 631-633) (hereinafter 'Hamburg Flood Control Case').

property is valued just because it is a precondition for him to act in a way that is necessary for realization of the self . . .

The German constitutional commitments to both human dignity and the *Sozialstaat* clearly influence the way in which the Constitutional Court understands the relationship between property and self-development. The Court views considerations of individual welfare as integrally related to the proper self-development of citizens, who are not isolated agents but members of society. Welfare is less a matter of guaranteeing that the distribution of wealth throughout society is morally optimal than it is of securing the material conditions necessary for the proper development of individuals as responsible and self-governing members of society.¹²⁹

Personhood is undoubtedly an important part of the Constitutional Court's analysis, but when push comes to shove, the Constitutional Court engages in a balancing approach much like the Supreme Court. The Hamburg Flood Control case involved the constitutionality of the city of Hamburg taking public ownership over lands that were designated as dike land. This was done as part of the city's flood control measures after a flood caused great damage in 1962. Although the law provided compensation to the owners of the property that was converted to public ownership, several owners sued claiming that the taking of their land violated Article 14. The Constitutional Court ruled that the government had the authority to condemn the property.¹³⁰ Notwithstanding the rhetoric of personhood in this opinion, the Constitutional Court's decision is just like the result that would have happened in the Supreme Court if a similar law were challenged. Without a doubt, the Supreme Court would rule that this kind of eminent domain would be constitutional under both the due process clause and the Takings Clause, even though the opinion would not say a word about the personhood aspect of property ownership.

The Constitutional Court's interpretation of sections (1) and (2) appears to preclude compensation for a regulatory taking in what would be the equivalent of an inverse condemnation lawsuit in the United States, *i.e.*, when a property owner sues the government seeking compensation for an alleged taking of property. At one time, the lower German courts allowed an award of monetary "equalization" to compensate a person whose property was affected by excessive regulation.¹³¹ This was based on a theory

¹²⁹ Alexander, *supra* note 111, at 746-748.

¹³⁰ Hamburg Flood Control Case, *supra* note 128.

¹³¹ LUNDMARK, *supra* note 118, at 209-10, 221-23; KOMMERS & MILLER, *supra* note 104, at 645, 825, n.55.

that the harm was effectively a tort caused by the government, which justified damages that were not inconsistent with Article 14.¹³² The practice of allowing equalization damages led one scholar to conclude in 1979 that regulatory takings were more likely to be compensated in Germany than in the United States.¹³³ However, in the Monument Protection Art Case, the Constitutional Court declared that excessive regulation leads to the unconstitutionality of the law, but not to compensation:

Should the legislature exceed its authority to define the content and limits of property, the resulting legislation is inapplicable. The relevant limitations or burdens imposed on the right of property are illegal and can be disregarded in favor of the superseding constitutional legal interest. To be clear, excesses that result from the Parliament's efforts to define the content and limits of property do not lead to a constitutional claim for compensation.¹³⁴

To put this in terms of our constitutional law, excess regulation would be unconstitutional and vacated under substantive due process but not triggering compensation under the Takings Clause. This is a significant difference in remedies between both countries. However, in some cases the result is the same in the United States as in Germany. If a plaintiff succeeds in an inverse condemnation suit and the court declares a statute to be an unconstitutional taking, sometimes the government will stop enforcing the regulation rather than paying compensation, although the government will have to pay compensation for the time in which the law was in effect. *Pennsylvania Coal* and *Cedar Point Nursery* are examples of situations in which the government stopped enforcing the law.¹³⁵ In *First English Evangelical Church*, the Supreme Court explained the various options available to a government that effects a taking without using its eminent domain power:

Once a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the

¹³² LUNDMARK, *supra* note 118, at 254-57 (“It is unclear where the doctrine of inverse condemnation should be classified in the Federal Constitutional Court’s newer doctrine of property rights. It does not constitute an intended encroachment upon property rights (gezielter Eingriff in das Eigentum) and therefore fails the technical test for a taking. But because the cause of action is not a direct taking, there is no requirement for legislation with a connection clause. Although the Underwater Gravel Extraction Case suggests otherwise, the weight of authority among commentators is that the doctrine of inverse condemnation is still vital and has not been rendered superfluous.”). *But see* CURRIE, *supra* note 5, at 293 (“More strikingly, the requirement that the statute itself provide for compensation has led the Constitutional Court to reject the familiar American doctrine of inverse condemnation entirely.”).

¹³³ KOMMERS & MILLER, *supra* note 104, at 825, nn. 49, 55.

¹³⁴ *Id.* at 647.

¹³⁵ *Pennsylvania Coal Co.*, 260 U.S. 393; *Cedar Point Nursery*, 594 U.S. at 150 (2021).

invalidated regulation, or exercise of eminent domain. Thus, we do not, as the Solicitor General suggests, “permit a court, at the behest of a private person, to require the [. . .] Government to exercise the power of eminent domain [. . .]” . . . We merely hold that, where the government’s activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.¹³⁶

In addition, when the Takings Clause arises in price regulation, such as utility regulation and rent control, the courts require that the prices be adjusted to prevent confiscatory prices; they do not order compensatory payments to the regulated firms.¹³⁷ In cases when the government can amend the law, withdraw the law, or adjust regulated price levels, these kinds of cases are similar to what would result from a finding that the law violated substantive due process.¹³⁸

Similarities in the Two Doctrines

Although the terms of the Takings Clause and Article 14 are so different, both the Supreme Court and the Constitutional Court have applied the clauses in similar ways. The Takings Clause allows the taking of property for a “public purpose,” while Article 14 allows expropriation only for the “public good.”¹³⁹ Both courts have shown considerable deference to legislative determinations of the public benefit of expropriations. For example, in a highly controversial decision, the Supreme Court upheld the condemnation of residential property as part of a plan of economic development designed to improve economic conditions in New London, Connecticut.¹⁴⁰ The development plan required the displacement of a number of long-term residents, including a grandmother who had lived her whole life in the house where she was born.¹⁴¹ The decision followed an

¹³⁶ First Eng. Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987).

¹³⁷ See Drobak, *From Turnpike to Nuclear Power*, *supra* note 24, at 65.

¹³⁸ The Supreme Court has suggested that principles of state sovereignty may prohibit claims for compensation from a state government or a state entity for the use of eminent domain. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 714 (1999). However, sovereign immunity does not apply to subdivisions of a state. *Id.*

¹³⁹ CURRIE, *supra* note 5, at 292 (“On its face the term [public weal, for which private property may be taken in Germany] seems broader than the ‘public use’ formulation that courts in the United States have so generously construed.”).

¹⁴⁰ *Kelo v. City of New London*, 545 U.S. 469 (2005).

¹⁴¹ *Id.* at 494. Although the residential property was taken, the development never materialized. Ilya Somin, *The Story Behind Kelo v. City of New London – How an Obscure Takings Case Got to the Supreme Court and Shocked the Nation*, WASH. POST (May 29, 2015), <https://www.washingtonpost.com/news/voikh-conspiracy/wp/2015/05/29/the-story-behind-the-kelo-case-how-an-obscure-takings-case-came-to-shock-the-conscience-of-the-nation/> [<https://perma.cc/74MH-Z533>].

earlier decision in which the Supreme Court upheld the use of eminent domain for urban renewal in a run-down area of Washington, D.C. even though the renewal plan required the condemnation of a department store that was not blighted but was a vibrant successful business.¹⁴²

The Constitutional Court generally defers to the legislature's determination of the "public good" requirement of Article 14. An example of this is the massive dislocation upheld by the Constitutional Court to allow the expansion of the Garzweiler open pit coal mine.¹⁴³ The mine is huge, spanning about 15 square miles.¹⁴⁴ In a highly controversial and politically contentious decision, the German government had allowed the coal company to use eminent domain to expand the mine and, as a result, displace thousands of people and scores of villages.¹⁴⁵ Like the Supreme Court, the Constitutional Court interprets the German constitution as preventing the government from using its eminent domain powers solely for the benefit of an individual.¹⁴⁶ However, as in the United States, the government can confer eminent domain power to an individual as long as the power is used for the public good.¹⁴⁷ In the *Garzweiler* case, the Constitutional Court found that the supply of coal to the market qualified as a sufficient public interest justifying the use of eminent domain.¹⁴⁸ At the time, lignite, a form of coal extracted in the Garzweiler mine, was used for 20 percent of

142 *Berman v. Parker*, 348 U.S. 26, 36 (1954). Similarly, the Supreme Court found a valid public purpose in an unusual case arising in Hawaii. A feudal ownership system used by the original settlers of Hawaii had by the 1960s evolved into 72 private landowners owning nearly 50 percent of the land in Hawaii. These landowners only leased their land, so a good portion of homeowners only had ground leases rather than fee ownership. In order to break up this concentration of ownership, the legislature set up a system where condemnation could be used to transfer fee ownership to the tenants. The legislature ordered the tribes to offer to sell the lots to their tenants out of a belief that ownership was better economically than leases. The Supreme Court found the goal of alleviating the economic consequences of concentrated land ownership to be a valid public purpose. *See Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

143 BVerfGE [Federal Constitutional Court], 1 BvR 3139/08 (BVerfGE 134, 242-357), Dec. 17, 2013, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2013/12/rs20131217_1bvr313908en.html [<https://perma.cc/78JB-5NT7>].

144 *Garzweiler Opencase Mine*, RWE, <https://www.rwe.com/der-konzern/laender-und-standorte/tagebau-garzweiler/> [<https://perma.cc/WB47-ZCPA>] (last visited Dec. 19, 2024).

145 Ingmar Bjorn Nolting, *The Eviction of Lützerath: The Village Being Destroyed for a Coalmine – A Photo Essay*, GUARDIAN (Jan. 24, 2023, 2:00 AM), <https://www.theguardian.com/artanddesign/2023/jan/24/eviction-lutzerath-village-destroyed-coalmine-a-photo-essay> [<https://perma.cc/8VHP-6GZN>].

146 BVerfGE 134, *supra* note 143, ¶ 178 ("The Constitution does not preclude expropriation for the benefit of private parties.").

147 Grist mills were one of the earliest private businesses to be given the power of eminent domain. Eminent domain has been used by railroads, utilities, irrigation authorities and even mines. For a summary of the history of the private use of eminent domain, *see* Justice Thomas's dissent in *Kelo v. City of New London*, 545 U.S. 469, 511-14 (2005).

148 BVerfGE 134, *supra* note 143, ¶¶ 201-04.

electrical generation in Germany.¹⁴⁹ In approving the expansion of the mine, the Constitutional Court wrote:

Pursuant to Art. 14..., it is reserved for the democratically legitimated legislature to determine those public interest objectives that will be enforced by expropriation if necessary.... Especially in light of the fact that the assessment of what objectives are especially important to society may change over time, the task of selecting which public interest objectives support an expropriation is reserved for the legislature alone.

The legislature has broad leeway in selecting public interest objectives. This latitude is subject only to limited review by the Federal Constitutional Court, because the Basic Law offers only a limited standard for determining the public good within the meaning of Art. 14.... In particular, the Basic Law provides no comprehensive, general definition of the public interest objectives that are able to justify an expropriation.¹⁵⁰

This standard of judicial review gives significant discretion to the legislature in determining when the use of eminent domain is allowed by the Basic Law, which is very similar to the Supreme Court's deference to the legislature in the meaning of "public purpose" in the Takings Clause.

There is a parallel to the massive dislocation in the *Garzweiler* decision in the United States. In *Poletown Neighborhood Council v. City of Detroit*,¹⁵¹ the Michigan Supreme Court approved the use of eminent domain to displace the large "Poletown" neighborhood in Detroit so General Motors could build a large auto plant. The new plant provided massive employment opportunities, including the retention of 6,000 jobs in the new plant and over 20,000 new jobs in related businesses.¹⁵² On the other hand, the disruption to the residents in Poletown was also huge. The project covered nearly 500 acres, and included "1,176 buildings, 143 businesses and other institutions (including sixteen churches, two schools, and one hospital), 1,362 households, and 3,438 people," primarily African American and Polish American, many of whom were elderly.¹⁵³ In both the *Garzweiler*

149 Joachim Lege, *Das Garzweiler-Urteil des Bundesverfassungsgerichts* [The Garzweiler Ruling of the Federal Constitutional Court] (Dec. 17, 2024), https://www.svkonline.de/fileadmin/user_folder/svk/Verlag/14-3_Lege_Garzweiler_komplett.pdf [<https://perma.cc/JYT3-8GTX>].

150 BVerfGE 134, *supra* note 143, ¶¶ 171-72.

151 *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), *overruled* by *County of Wayne v. Hathcock*, 684 N.W.2d 765, 769 (Mich. 2004).

152 John J. Bukowczyk, *The Decline and Fall of a Detroit Neighborhood: Poletown vs. G.M. and the City of Detroit*, 41 WASH. & LEE L. REV. 49, 61 (1984).

153 *Id.* at 62.

and the *Poletown* decisions, economic interests trumped family life; in both cases, the courts deferred to the political process.

Both the Supreme Court and the Constitutional Court have emphasized the importance of not allowing the use of eminent domain and regulation when the result would require a small number of individuals to bear the costs of a program that benefits the public. Although there are cases in the United States where this “singling out” principle loses out to other concerns, as in *Miller v. Schoene*, that principle is a major foundation of the Takings Clause.¹⁵⁴ That principle is also important in Germany, as Kommers and Miller point out:

[I]f the burden of a content and limits regulation falls heavily on an individual property owner, depriving him or her of the use of property, and if all benefits of the regulation are claimed by the public, an expropriation has occurred, and the state must compensate the owner. On the other hand, no compensation is due if a uniformly imposed regulation confers benefits on all owners while exacting limited costs for the sake of the common good. Considerations of equality undergird these approaches. Simply put, the state must provide compensation if it forces a single individual to sacrifice essential rights for the public good.¹⁵⁵

There are other similarities in the use of doctrine by the two courts. Neither court allows arguments based on the fracturing of property. For example, the owners of coal mines argued that they lost the value of the coal in pillars that they were not allowed to mine, but the Supreme Court explained that the diminution of the value of the entire mine was the appropriate analysis, not the value of the coal in the pillars.¹⁵⁶ Similarly, it is not the value of the lost air rights limited by regulation, but the diminution of the value of the entire parcel.¹⁵⁷ In a similar analysis, the Constitutional Court rejected a claim by the owner of a biogas park that contained 60 biogas plants who argued that the loss to individual plants in the park was the proper focus of the harm caused by regulation. The Court ruled that rather than looking at each plant, the correct analysis examined the harm caused to the entire park.¹⁵⁸ In addition, both countries use a similar process to decide the date on which to determine the value of property that is being taken by eminent domain. Using the date that condemnation proceedings

154 See *supra* note 73 and accompanying text.

155 KOMMERS & MILLER, *supra* note 104, at 638-39; see also LUNDMARK, *supra* note 118, at 246.

156 *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 50 (1987).

157 *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130 (1978).

158 BVerfGE, 1 BvR 3076/08 (BVerfGE 122, 374-97) (Feb. 19, 2009), https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2009/02/rs20090218_1bvr307608.html?nn=68080 [<https://perma.cc/6NTB-CAZ2>].

are filed will usually hurt the property owner because property values often fall with the announcement of the plans to use eminent domain.¹⁵⁹

Both courts have allowed the amortization of existing uses that become inconsistent with new zoning requirements or the changes in use of neighboring land.¹⁶⁰ As one German commentator has explained, “[i]n American as in German law, the constitution protects the continuation of legally established uses. The technical term employed in the United States is vested or non-conforming rights. As under German law, the exercise of such rights can be phased out over time or amortized.”¹⁶¹ By giving the owner a period of years to remove the non-conforming use, the courts of both countries minimize the financial impact of the legislation. In other similar actions, both courts allow the removal of nuisances even though the property owners have vested rights.¹⁶² *Miller v. Schoene*,¹⁶³ described above, is a good example of that.¹⁶⁴ In a case similar to *Miller*, the Constitutional Court upheld a law that prohibited a landowner from felling trees that were designated as protected resources, even though he had planted them to sell as timber before they were designated as protected.¹⁶⁵ Both courts have also permitted local governments to put a temporary moratorium on construction pending a land-use planning process.¹⁶⁶

Proportionality and Balancing

The primary reason for the similarity in the outcome of many cases in both countries stems from the courts’ use of a balancing methodology. Both courts essentially weigh the harm to property owners from regulation

159 Katharina Richter, *Compensable Regulation in the Federal Republic of Germany*, 5 ARIZ. J. INT’L & COMP. L. 34, 63 (1988) (“Compensation is required, not as of the date the restrictive regulation was adopted, but as of the date property damages have actually occurred.”); *See, e.g.*, BVerfGE, 1 BvR 2736/08 (Mar. 11, 2010), https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2010/02/rk20100223_1bvr273608.html?nn=68080 [<https://perma.cc/AP4B-7WQH>].

160 LUNDMARK, *supra* note 118, at 234 (citing BVerfGE, 1 BvL 77/78 (BVerfGE 58, 352) (July 15, 1981)).

161 *Id.*, at 301.

162 WILLIAM STOEBOCK & DALE WHITMAN, *THE LAW OF PROPERTY* 595-596 (3rd ed. 2000); LUNDMARK, *supra* note 118, at 233-234.

163 *Miller*, 276 U.S. 272.

164 The classic case cited for this rule in the United States is *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), which involved prohibiting the use of a privately owned tract of land as a brickyard. The most recent example at the Supreme Court level is *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). In Germany, “the ownership of property does not include the right to cause a public nuisance.” CURRIE, *supra* note 5, at 295; *see also* Lubens, *supra* note 111, at 389, 431 (2007) (discussing the “Green Space” decision, which was like *Hadacheck*).

165 Lubens, *supra* note 111, at 431-32 (discussing Die Öffentliche Verwaltung [DOV] 1957, § 669).

166 LUNDMARK, *supra* note 118, at 265-66; Lubens, *supra* note 111, at 425, n. 283; *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002).

against the social benefits of the regulation.¹⁶⁷ David Currie has concluded that “in light of the competing public and private interests recognized by the Basic Law itself, the Constitutional Court has applied a balancing test in determining the permissible scope of limitations on property.”¹⁶⁸ As explained above, the multi-factor test used by the Supreme Court for takings jurisprudence is essentially a balance of public benefit against private harm.¹⁶⁹ To the extent that German judges and United States Justices have similar views of the benefits and harms, similar cases in both countries are likely to come out the same.

Balancing in German legal doctrine results from the use of the proportionality principle. Proportionality has become a general principle which sets limits for all government action in the legislative, executive, and judicial process, not only in the context of GRUNDGESETZ Art.14. As one commentator has explained:

The Basic Law contains no explicit reference to proportionality but . . . the Federal Constitutional Court has evaluated proportionality to a high constitutional principle in its own right, serving as a major tool in assessing the validity of legislation impinging on fundamental rights. The Court has described proportionality reasoning as indispensable to a constitutional state. Accordingly, proportionality is not strictly an approach to *interpretation*; rather, the principle is employed to justify limits on democratic rights and fundamental freedoms.¹⁷⁰

Scholars place the source of the doctrine in the Prussian Civil Code in 1794.¹⁷¹ Over time, the doctrine spread to other parts of German law and became viewed as inherent in the notion of the rule of law.¹⁷² Today, proportionality is a crucial component of all constitutional analysis in

¹⁶⁷ “Some courts and commentators [in the United States] prefer to weigh the expected public use against the loss suffered by a single owner to determine if a particular public measure constitutes a taking without just compensation. This approach is that employed by German courts under the proportionality standard.” LUNDMARK, *supra* note 118, at 288.

¹⁶⁸ CURRIE, *supra* note 5, at 294-95; *see* Currie, *supra* note 111, at 343 (“Not surprisingly in light of the competing public and private interests recognized in the Basic Law itself, the Constitutional Court has applied a balancing test in determining the permissible scope of limitations on property.”). *See also* Lubens, *supra* note 111, at 393 (“balancing individual freedom against the interests of the general welfare”); GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT* 133 (1997) (“[T]he courts [must] maintain an equitable balance between the owner’s individual liberty interests and the well-being of the community.”).

¹⁶⁹ *See supra* notes 39-41 and accompanying notes.

¹⁷⁰ KOMMERS & MILLER, *supra* note 104, at 67; *see* AHARON BARAK, *PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS* 131 (Doron Kalir trans., 2012) (proportionality is a judicially created methodology principle as being inherent in the rule of law, resulting from the notion of basic rights itself, or stemming from particular articles in the Basic Law, such as art. 1(III) (binding nature of basic rights), art. 19 (II) (protection of the essence of basic rights), and art. 3 (equality)).

¹⁷¹ BARAK, *supra* note 170, at 177; COHEN-ELIYA & PORAT, *supra* note 2, at 25.

¹⁷² COHEN-ELIYA & PORAT, *supra* note 1, at 25-26.

Germany. It also has become an important part of constitutional analysis in many democracies throughout the world and in European Union law.¹⁷³

Proportionality is the methodology for harmonizing conflicting values in the Basic Law. As the late Constitutional Court Justice Konrad Hesse explained:

The principle of the constitution's unity requires the optimization of [the values in conflict]: Both legal values need to be limited so that each can attain its optimal effect. In each concrete case, therefore, the limitation must satisfy the principle of proportionality, that is, they may not go any further than necessary to produce a concordance of both legal values.¹⁷⁴

In applying the principle of proportionality, the Constitutional Court first inquires whether the legislature pursued a legitimate goal with the law. Then the Court asks whether the means are proportional in relation to the pursued goal. To meet the standards of the principle of proportionality, the means have to be suitable, necessary and reasonable or proportional in a narrow sense. As the Court puts it, the law is proportional “if the chosen methods are suitable and necessary to reach the pursued goal, and if, according to a balancing test between the heaviness of interference and the weight of justifying reasons, the limits of reasonableness are maintained.”¹⁷⁵

This application of the proportionality principle in Germany is very much like a combination of an economic due process and a taking analysis in the United States. It is the rare case when Congress or the German parliament enacts a law that does not serve a legitimate government objective or establish a reasonable means to reach that objective. That boils down the analysis in both countries to a balancing test. I think that the balancing procedure used by the Federal Constitutional Court and by the United States Supreme Court results in very similar decisions in similar cases in both countries.

Rent Control and Nuclear Power

One example is the cases dealing with the use of land. The Constitutional Court has rendered decisions in many landlord tenant cases that are similar to the decisions in cases in the United States.¹⁷⁶ That Court

¹⁷³ BARAK, *supra* note 170, at 182 (chart showing migration of proportionality from Germany to numerous countries).

¹⁷⁴ COHEN-ELIVA & PORAT, *supra* note 1, at 50.

¹⁷⁵ *E.g.*, BVerfGE, 2 BvR 1915/91 (BVerfGE 95, 183) (Jan. 22, 1997). The general approach to proportionality requires an analysis of four components: “proper purpose, rational connection, necessary means, and a proper relation between the benefit gained by realizing the proper purpose and the harm caused to the constitutional right.” BARAK, *supra* note 170, at 131. Some countries utilize only three of the four components, eliminating the necessary means element. *Id.* at 132.

¹⁷⁶ *See generally* KOMMERS & MILLER, *supra* note 104, at 639-40; Lubens, *supra* note 111, at 424-25.

has ruled that rent control is within the power of the government. In analyzing the legality of specific rent control laws, the Constitutional Court has weighed the interest of society and renters against the interest of property rights and landlords.¹⁷⁷ The Court has made it clear that landlords are not entitled to earn the highest possible income, but the law cannot force them to incur losses. The law that the Court reviewed pegged rent levels to the prevailing market rents and allowed up to a ten percent increase.¹⁷⁸ In another case, dealing with small gardens rather than apartments, the Constitutional Court found unconstitutional a law that was designed to protect low-income tenants who could not otherwise afford a small garden.¹⁷⁹ Small garden plots were historically an important part of German culture. However, the Court ruled that the limit on rents to a maximum of twice the local rate for land used to grow fruits and vegetables law was too restrictive on landlords, even considering the important social goals of the law.¹⁸⁰

Just like the Constitutional Court, the Supreme Court has explained that all price regulation requires balancing customer and investor interests.¹⁸¹ Landlords in the United States are not allowed to earn the highest profits from rent control, but they must earn a reasonable return. To achieve this, municipalities often rolled back rent levels to periods when the rental market was more competitive and then allowed annual rent increases, often pegged to a version of the consumer price index.¹⁸²

Rent control is less effective if landlords can withdraw their apartments from the rental market by converting them to condominiums or to other uses. The Constitutional Court has recognized the constitutionality of limits on a landlord's power to terminate a lease and to convert an apartment building to another use.¹⁸³ Likewise, the courts in the United States have allowed limits on the conversion of apartment buildings. For example, in *Nash v. City of Santa Monica*, a landlord asserted that the city's requirement of a removal permit violated substantive due process because it prevented him from evicting his tenants, demolishing the building and holding the undeveloped land for resale. He admitted that he could earn a fair return on investment from the controlled rents and that demolition would adversely

177 KOMMERS & MILLER, *supra* note 104, at 640.

178 BVerfGE, 1 BvR 1595/18 (July 18, 2019); *see* Tenancy and Rent Control Case, BVerfGE, 1 BvR 2270/73 (BVerfGE 37, 132) (Apr. 23, 1974); KOMMERS & MILLER, *supra* note 104, at 639-40; Lubens, *supra* note 111, at 424-25 n.281.

179 BVerfGE, 1 BvL 15/85 (BVerfGE 87, 114) (Sep. 23, 1992). *See* KOMMERS & MILLER, *supra* note 104, at 639; Lubens, *supra* note 111, at 427.

180 BVerfGE 87, *supra* note 179, at 114 (1992). *See* KOMMERS & MILLER, *supra* note 104, at 639.

181 John N. Drobak, *Constitutional Limits on Price and Rent Control: The Lessons of Utility Regulation*, 64 WASH. U. L. Q. 107, 108-09 (1986).

182 *Id.* at 139-47.

183 BVerfGE, 1 BvL 38/92 (BVerfGE 88, 87) (Jan. 26, 1993); KOMMERS & MILLER, *supra* note 104, at 639; Lubens, *supra* note 111, at 424-425 n.281, 427-428.

affect the supply of housing in Santa Monica. On appeal to the California Supreme Court, the landlord argued that the prohibition violated the “liberty” aspect of his right to withdraw from business. He claimed that the ordinance compelled him to be a landlord against his will, but the court found no compulsion because the landlord could cease being a landlord just by selling the property.¹⁸⁴

The courts in both countries have weighed consumer versus investor interests in cases dealing with changes in nuclear power generation. In the United States in the late 1970s, a number of electric utilities canceled plans to build nuclear power plants. This was done because the cost of constructing these plants increased dramatically due to heightened safety standards, while the demand for electricity proved to be lower than what everyone had expected. The decisions to cancel were not the result of mismanagement or negligence. That raised the problem of who should pay for the millions of dollars spent on planning and construction. The courts and utility commissions came up with a procedure that balanced investor and consumer interests. In typical utility pricing practice, rates are set to return the capital investment to the investors over the life of a plant by treating depreciation as an annual cost, while the investors earn a profit on the unreturned portion of their investment. This process eventually makes the investors whole. However, since the nuclear plant investments would never result in the construction of the plants, the rates were set to return the amount of the investments over a period of years through depreciation, but no profit was allowed on the portion of the investments that had not yet been returned through the rates. Although the investors never received a profit on their investment but only a return of their investment, the courts determined that this did not result in an unconstitutional taking.¹⁸⁵ This result was a fair balance of consumer and investor interests.

A comparable problem occurred in Germany with its decision to move away from nuclear power.¹⁸⁶ In 2002, the German parliament began the phase out of nuclear power by a law that gave the existing nuclear power plants the right to produce a designed amount of electricity production over a number of years. The amount was the result of negotiation between the plant operators and the government. The parliament chose to phase out the

184 See *Nash v. City of Santa Monica*, 688 P.2d 894 (1984), *superseded by statute*, Ellis Act, Cal. Gov’t Code § 7060 (Deering). There are other instances of these kinds of limitations being upheld; See Drobak, *Constitutional Limits on Price and Rent Control*, *supra* note 181, at 131-38.

185 See *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 310-13 (1989). See also Drobak, *Constitutional Limits on Price and Rent Control*, *supra* note 181, at 112-24.

186 *Press Release (No. 88/2016), The Thirteenth Amendment to the Atomic Energy Act is For the Most Part Compatible With The Basic Law*, BUNDESVERFASSUNGSGERICHT [Federal Constitution Court] (Dec. 6, 2016), <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-088.html?nn=148454> [<https://perma.cc/QT7N-3BSN>].

plants by designating a limit on total electrical production rather than setting dates for the closure of the plants. Individual power plants were allocated a residual electricity volume that could be transferred to newer nuclear power plants. Once these allocations were used up, the power plants had to be shut down. In 2010, a new parliament extended the time of usage of the nuclear power plants by an average of about 12 years. However, the nuclear power plant meltdown in Fukushima, Japan, in 2011, caused by a tsunami, prompted the German parliament to shorten the time to shutdown of all of its nuclear power plants. For the first time, it set a fixed date for the shutdown of all the plants regardless of the production allocations. This resulted in a shortened life of about 12 years on average for the power plants, effectively eliminating the earlier extension. German utilities sued, not to object to the phased shutdown of the plants, but to claim that the shortened time for nuclear production violated Article 14.

The Constitutional Court found no problem with the decision to phase out nuclear power earlier as a result of the risk demonstrated by the nuclear disaster in Japan.¹⁸⁷ However, the Court concluded that the earlier shutdown could not reasonably be imposed without compensation to the power plant owners insofar as it led to the owners not being able to use up substantial parts of the residual electricity volumes prescribed by the earlier laws.¹⁸⁸ In an opinion that could have been written by courts in the United States when dealing with canceled nuclear power plants, the Constitutional Court concluded that the 2002 and 2010 laws created legitimate expectations in the plant operators and the 2011 law destroyed them:

[T]he legislature must find a fair equilibrium and a balanced relationship between the owner's interests that are worthy of protection and the public good If the legislature wishes to expropriate a company's property for sufficiently weighty reasons of the public good, it is bound by the requirements of Art. 14 Sec. 3 GG. In contrast, if the legislature determines the content and limits of corporately held property by changing the legal situation, it must adhere to the principles of proportionality, legitimate expectation and equality. With regard to the protection of corporate investments, Art. 14 GG provides the same guarantees as to other owners. The legislature must respect in appropriate manner company assets and the investments undertaken in reliance on the legal situation.¹⁸⁹

187 BVerfGE, 1 BvR 2821/11, ¶¶ 281-286 (Dec. 6, 2016).

188 *Id.* ¶ 369.

189 *Id.* ¶ 270.

[The 2011 law] violates Art. 14 sec. 1 GG insofar as it does not provide for any transitional periods, compensation clauses or other settlement provisions for cases in which investments in nuclear power plants were devalued through the striking of the additional electricity output allowances allocated in 2010.¹⁹⁰

In Art. 14 sec. 1 GG, the principle under the rule of law of protecting legitimate expectations with regard to financial assets is distinctly refined. It protects trust in the reliability and predictability of the legal system created under the applicability of the Basic Law, and of the rights acquired on the basis of that system. The fundamental right to property therefore also protects a legitimate expectation of the continuance of the legal situation as a foundation for investments in, and the use of, property. Whether and to what extent such an expectation is legitimate depends on the circumstances of the particular case. There is no guarantee that all investment expectations will be fulfilled. In particular, Art. 14 sec. 1 GG generally provides no protection against changes in the legal environment for commercial activity or the effects of that environment on market opportunities. However, if the legislature directly suppresses or significantly restricts the further use of property, investments in such property made on the basis of the legitimate expectation that the legal situation will not change call for appropriate consideration, under the principle of proportionality . . .¹⁹¹

The declared basis for the [2010 law] was the legislature's political decision to continue using nuclear energy as a bridging technology for a longer period of time. The power plant operators were entitled to feel encouraged as a consequence to undertake investments in their plants and did not have to expect that within the same legislative period, the legislature would again distance itself from its fundamental decision in energy policy matters under the [2010 law].¹⁹²

All the same, even the paramount public interest grounds for an accelerated nuclear phase-out cannot absolve the legislature of the consequences of those investments that were undertaken during the short period of validity of the [2010 law] and in the

190 *Id.* ¶ 369.

191 *Id.* ¶ 372.

192 *Id.* ¶ 376.

legitimate expectation that the legislature itself had brought about in view of the prolongation of operational lifetimes.¹⁹³

The Constitutional Court recognized the ability of a legislative body to curtail nuclear power for the sake of safety but balanced the interest of the public against the interest of shareholders. Ultimately, both interests suffered, but the Constitutional Court limited the financial losses imposed on nuclear plant owners by the legislature. This result is similar to the sharing of the costs of canceled nuclear power plants between customers and investors in the United States.

REASONS FOR THE CONVERGENCE OF TWO DISSIMILAR CONSTITUTIONAL PROVISIONS

Much scholarship in comparative law is concerned with the migration of laws from one country to another. It seeks answers to the question of “[h]ow does a legal culture develop, diffuse, [and] influence other legal cultures?”¹⁹⁴ Similar societies with similar problems lead to this type of migration. The Takings Clause did not migrate to Germany, but the similarities between the two constitutional provisions can be explained the same way.

From a formalist perspective, Article 14 and the Takings Clause are vastly different, but from a perspective of realism, both provisions operate the same way. Although the opinion of a court is important because it provides explanations for the court’s decision and guides future conduct, what matters most is the actual decision. That gives us the best information about the meaning of the law. As David Gerber has explained:

The focus of [my] analysis is on the decisions within a legal system. Its core insight is that the central factor in all questions about law is the decisions that are made by legal actors. Decisions underline and constitute the forms and appearances that are typically thought of as ‘law.’ A focus on decisions with a legal system or set of legal systems is analogous in some ways to focus on the atomic and sub-atomic factors in the physical world. Decisions not only *constitute a legal regime*, but they also are the locus of change within a regime.¹⁹⁵

193 *Id.* ¶ 380.

194 MAURICE ADAMS & JOHN GRIFFITHS, *Against “Comparative Method”: Explaining Similarities and Differences*, in PRACTICE AND THEORY IN COMPARATIVE LAW 279, 280 (Maurice Adams & Jacco Bomhoff eds., 2012). See SUJIT CHOUDHRY, THE MIGRATION OF CONSTITUTIONAL IDEAS ix (2006) (“The migration of constitutional ideas has emerged as one of the dominant features of contemporary constitutionalism.”).

195 David J. Gerber, *Comparative Law and Global Regulatory Convergence: The Example of Competition Law*, in PRACTICE AND THEORY IN COMPARATIVE LAW 120, 128 (Maurice Adams & Jacco Bomhoff eds., 2012). See also David J. Gerber, *Systems Dynamics: Toward a Language of Comparative Law?*, 46 AM. J. COMP. L. 719 (1998).

It is the decisions of the Supreme Court and the Constitutional Court that are remarkably similar in many contexts in spite of the differences in the opinions.

Why is the constitutional protection of property rights in the United States and in Germany so similar even though the comparable language of the two constitutions is so different? One commentator has noted the factors that lead to similarities and difference in law between countries:

Acceptance of the value of comparative analysis [of law] is contingent upon the existence of certain key common characteristics between the institutions of the nations being compared. “Depending upon the scrutinized legal area, this acceptance is more likely to occur where the compared legal systems share socio-cultural, economic, or political factors.” Thus, the comparative practitioner must bear in mind the “long tradition of common history, religion, culture, and human values” of the nations and/or institutional bodies being compared. The sociological and cultural backgrounds of each nation are assumed to be reflected in the legal systems being compared. Thus, the legal system is the filter through which all the different social and cultural streams flow. As aptly put by Aharon Barak, Justice on the Supreme Court of Israel:

“Comparative law is not merely the comparison of laws. A useful comparison can exist only if the legal systems have a common ideological basis. The judge must be sensitive to the uniqueness of each legal system. Nonetheless, when the judge is convinced that the relative social, historical, and religious circumstances create a common ideological basis, it is possible to refer to a foreign legal system for a source of comparison and inspiration. Indeed, the importance of comparative law lies in extending the judge’s horizons.”¹⁹⁶

There are a number of explanations for the similarities between the U.S. and German takings law. First, both countries share a long history of concern for property rights, both as a matter of individual liberty and as a matter of economic growth. This historical concern appears in both the intellectual thought of the United States and Germany,¹⁹⁷ as well as in the

¹⁹⁶ Rex D. Glensy, *Which Countries Count?: Lawrence v. Texas and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT’L L. 357, 423-24 (2005) (quoting Kai Schadbach, *The Benefits of Comparative Law: A Continental European View*, 16 B.U. INT’L L.J. 331, 362 (1998) and Nisuke Ando, *The Future of Monitoring Bodies - Limitations and Possibilities of the Human Rights Committee*, in 1991-1992 CANADIAN HUMAN RIGHTS YEARBOOK 169, 172 (Toronto, Carswell 1992).

¹⁹⁷ The 1848 German Constitution explicitly protected the freedom of property from federal/state legislation although this document was not widely published or accepted despite its enactment into law. See H.W. KOCH, A CONSTITUTIONAL HISTORY OF GERMANY IN THE NINETEENTH AND TWENTIETH

legal treatment of property rights.¹⁹⁸ This similar history is not surprising since the political and legal theory of the United States grew out of the European tradition.¹⁹⁹ Second, both countries have similar societies and cultures that underlay their laws. From F.A. Hayek to Lawrence Friedman, many prominent legal philosophers believe that a country's law grows out of its culture.²⁰⁰ Both countries are liberal democracies that "share similar European intellectual and cultural influences; both are highly developed, advanced industrial societies coping with change and technological revolution; and both value individual freedom in the context of a stable society."²⁰¹

Third, both countries are first-world industrialized nations with similar economies that rely on private transactions in a market economy. The United States has the largest economy in the world measured by Gross Domestic Product, while Germany has the third largest.²⁰² Both countries have similar industrial sectors, featuring automobiles, chemicals,

CENTURIES 65 (1984). In addition, the Prussian Constitution of 1850 granted the protection of property. *Id.* at 82.

198 As for Germany, the Weimar Constitution written after the end of World War I protected property from appropriation (article 153) but failed to provide the same level of protection for personal rights. See JOHN FORD GOLAY, *THE FOUNDING OF THE FEDERAL REPUBLIC OF GERMANY 170-73* (1958) ("The constitutional articles themselves were superfluous, for they offered no protections to right beyond those already existing or which could be established by ordinary law. Toward the constitutional provisions on property rights, however, quite a different attitude was adopted."). After the World War II, Dr. Seebohm, a constitutional delegate, ensured that expropriation would not be allowed, and property rights protected in the post-WWII constitution. *Id.* at 193 ("Following the historical development after the so-called full compensation provision embodied in the Prussian Expropriates Law of 1874, the concept of 'adequate' compensation was introduced in the Weimar constitution. This concept received juridical acceptance and, in particular, was embodied in judgments of the Reich supreme court. It was also used in all the legislation adopted in the interval and appears in the constitution of Bavaria and Baden. It is of decisive importance for us that the concept of adequate compensation should be retained, for otherwise the danger exists that the place of this intelligible, judicially clarified concept will be taken by a wording which, although a reasonable interpretation would not theoretically preclude an adequate compensation, would in practice give room for any other interpretation, even to expropriation without compensation."). As for the United States, see RICHARD G. STEVENS, *THE AMERICAN CONSTITUTION AND ITS PROVENANCE* (1977) (examining the European philosophical and historical background of the Constitution); see also CARL J. RICHARD, *THE FOUNDERS AND THE CLASSICS* (1944); *THE FEDERALIST* NOS. 9, 78 (Alexander Hamilton), NOS. 43, 47 (James Madison) (discussing Montesquieu's *Spirit of Laws*).

199 In addition to the shared legal tradition with England and the rest of Europe, the Founding Fathers were well-versed in and often referred to the major works of Greco-Roman civilization. See generally RICHARD, *supra* note 198. The present German constitution is a fusion of classical-liberal, socialist, and Christian/natural law thought. See KOMMERS & MILLER, *supra* note 104, at 44-45.

200 See, e.g., F.A. HAYEK, *LAW, LEGISLATION AND LIBERTY: RULES AND ORDER* 72-93 (1973).

201 Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963, 965-66 (1997).

202 For 2025, the International Monetary Fund estimates the U.S. GDP to be \$30,500 billion and the German GDP to be \$4,740 billion. *World Economic Outlook (April 2025) – GDP, Current prices*, INT'L MONETARY FUND, <https://www.imf.org/external/datamapper/NGDPD@WEO/OEMDC/ADVEC/WEOWORLD> [https://perma.cc/H9DF-CRFF] (last visited Aug. 7, 2025); Germany is the Largest Economy in Europe. *GDP of European Countries in 2024*, STATISTA (Aug. 5, 2025), <https://www.statista.com/statistics/685925/gdp-of-european-countries> [https://perma.cc/HX8G-UK45].

pharmaceuticals, and electronics, among others.²⁰³ With robust financial sectors, both countries are top investment destinations.²⁰⁴ The service sectors, like healthcare, education, airline transportation, and legal and business consulting firms, are also similar.²⁰⁵ This kind of market economy cannot succeed without the legal protection of property rights. Not surprisingly, patent protection is important in both countries.²⁰⁶ With the commonality between the United States and Germany economies so striking, it should be no surprise that the takings laws are remarkably similar.²⁰⁷

203 For example, German firms include Volkswagen, BMW, Daimler Benz, and Porsche for automobiles; BASF, which is the largest chemical firm in the world; Bayer Ag for pharmaceuticals and chemicals; and Siemens and Bosch for electronics.

204 *Economic Key Facts Germany*, KPMG (July 2025), <https://kpmg.com/de/en/home/insights/overview/economic-key-facts-germany.html> [https://perma.cc/2GZR-L6LV] (last visited Aug. 9, 2025). Frankfurt is the center of European Banking, similar to Wall Street. It is home to the European Central Bank and the headquarters of Deutsch Bank AG.

205 For example, large German health care firms include Bayer and Merck. Munich, Heidelberg, Leipzig, and Tübingen are large universities, while the Max Planck Institutes are world famous for research. Lufthansa is a large global airline. Some large global law firms are important advocates in Germany, such as Clifford, Chance and Freshfields, while Gleiss Lutz and Noerr are well-known German law firms. The top three German management consulting firms are Roland, Berger, Simon-Kucher & Partners, and Detecon (a subsidiary of the large telecom company Deutsches Telekom). *The Ten Largest German Management Consulting Firms*, CONSULTANCY.EU (July 8, 2019), <https://www.consultancy.eu/news/2993/the-10-largest-german-management-consulting-firms> [https://perma.cc/VB2X-8EFU].

206 For the use of patents in Germany, see, e.g., Philippe Aghion, Peter Howitt & Susanne Prantl, *Patent Rights, Product Market Reforms, and Innovation*, 20 J. ECON. GROWTH 223, 223-224, 236-239 (2015); Bradley B. Allred & Walter G. Park, *The Influence of Patent Protection on Firm Innovation Investment in Manufacturing Industries*, 13 J. INT'L MGMT. 91, 91-92, 103-105 (2007); Knut Blind, et. al., *Motives to Patent: Empirical Evidence from Germany*, 35 RES. POL'Y 655, 655-656, 670-673 (2006).

207 Statutes and constitutional protections will diverge unless there are similar underlying conditions in the two countries. Examples of divergences can be seen even with identically worded statutes. See Taavi Annus, *Comparative Constitutional Reasoning: The Law and Strategy of Selecting the Right Arguments*, 14 DUKE J. COMPAR. & INT'L L. 301, 338 (2004) ("Legal transplants might not work when there are significant differences between the 'donor' and 'recipient' countries."). For example, the plea-bargaining systems in Germany, Italy, Argentina, and France were all influenced by the American system. See Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1, 3 (2004). However, "[n]ot only has each of these jurisdictions adopted . . . forms of plea bargaining different from one another," but the four systems "differ substantially amongst themselves because of decisions by legal reformers in each of these countries, the differing ways in which the practice has been introduced, and the resistance it has generated." *Id.* at 3-4. See also Edward J. Eberle, *Public Discourse in Contemporary Germany*, 47 CASE W. RESV. L. REV. 797 (1997) (discussing divergence of free speech protections in the United States and Germany arising out of differing cultural values placed on individualism versus human dignity); John C. Reitz, *Doubts About Convergence: Political Economy as an Impediment to Globalization*, 12 TRANSNAT'L L. & CONTEMP. PROBS. 139, 140 (2002) ("[T]he various religious-based traditions of law (Jewish, Islamic, or Hindu, for example) pose obvious barriers to convergence..."). Similar cultural norms can lead to convergence of differently worded statutes. For example, certain aspects of the labor law regimes of New Zealand and the United States have converged despite opposing regulatory goals. Ellen Dannin & Clive Gilson, *Getting to Impasse: Negotiations Under the National Labor Relations Act and the Employment Contracts Act*, 11 AM. U. J. INT'L L. & POL'Y 917, 963 (1996); see also Zachary Pall, *Light Shining Darkly: Comparing Post-Conflict Constitutional Structures Concerning Speech and Association in Germany and Rwanda*, 42 COLUM. HUM. RTS. L. REV. 5 (2010) (discussing convergence in free speech rights between Rwanda

Germans often refer to their economy as a “social market economy.”²⁰⁸ While Article 20(1) of the Basic Law defines Germany as a “social federal state,” the Constitutional Court has made it clear that the Basic Law does not mandate a particular kind of national economy.²⁰⁹ What Article 20 does is require the government to provide for the basic needs of all citizens, which requires a safety net for the poor, the scope of which is debatable.²¹⁰ Notwithstanding the “social” label, Germany has a market-oriented free-enterprise economy, like the United States. One commentator has pointed out the common misperception about the two economies:

Many European practitioners and scholars imagine that U.S. law is extremely protective of property, especially real property, rights. They assume that takings law would offer landowners extensive protection [. . .] and generous compensation rights [. . .]. On the American side, one often encounters the assumption that there is a ‘European approach’ to real property law, that this approach is grounded in the social view of property, and that it grants lesser protection of property rights in case of regulatory takings than U.S. law.²¹¹

As the author concluded, however, “[t]he comparative research shows that these views are no more than legal stereotypes.”²¹²

Economic growth depends on the environment that encourages investment. Many factors, like taxes and the quality of the workforce, are relevant to this type of environment. One of the most important factors is trust in a government that will protect property rights, not only from other individuals but also from the government’s own confiscation of property though both eminent domain and excessive regulation. The need for this type of protection of property rights is a well-established tenant of both the new institutional economics and development economics.²¹³ An important way to do this is by a constitutional limitation of the government’s ability to confiscate property.²¹⁴ Both the United States and Germany do this through their constitutions. The desire to limit expropriation to advance

and Germany); J. Robert Brown, Jr., *Bureaucratic Practices in Japan and the United States and the Regulation of Advertisements by Investment Advisors*, 12 UCLA PAC. BASIN L.J. 237, 238 (1994).

²⁰⁸ KOMMERS & MILLER, *supra* note 104, at 623.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 49-50.

²¹¹ Rachelle Alterman, *The U.S. Regulatory Takings Debate Through an International Lens*, 42/43 URB. LAW. 331, 349-50 (2010-2011).

²¹² *Id.* at 349.

²¹³ See, e.g., CLAUDE MENARD & MARY SHIRLEY, *ADVANCED INTRODUCTION TO NEW INSTITUTIONAL ECONOMICS* 35-41 (2022); John N. Drobak, *Coase on Property Rights*, in *THE ELGAR COMPANION TO RONALD H. COASE* 83 (Claude Menard & Elodie Bertrand eds., 2016).

²¹⁴ See, e.g., Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth Century England*, 49 J. ECON. HISTORY 803 (1989).

economic performance in both countries also explains the convergence between the two systems in the United States and Germany.

Finally, institutional factors lead to the convergence of outcomes in these two countries. Like the justices on the Supreme Court, the justices on the Constitutional Court are respected and experienced as lower-court judges, lawyers, law professors, or government officials prior to their election to the high court.²¹⁵ They are relatively free of political influence and biases.²¹⁶ This shared attitude and role with Supreme Court Justices makes it more likely that they will render similar decisions on similar issues. Since both countries have similar economies and government structures that affect the economies in similar ways,²¹⁷ governmental involvement in economic affairs raises the same issues for both courts. The justices in the United States are just as likely to be mindful of the economic consequences of their decisions as are the German justices, and vice versa.

The selection processes of the justices and the different sizes of the two courts do affect the outcomes in some types of cases, albeit not significantly for takings cases. The selection process in the United States is highly political. The stakes are higher for an appointment of one justice to a nine-member Court. In Germany, the appointment process is designed to achieve a court composed of justices with a broad range of views. Each house of the German Parliament elects eight justices, by a two-thirds majority vote, for the sixteen-member court. The Constitutional Court sits in two independent senates, with eight justices each. The selection process gives voice to the political parties and blocs.²¹⁸ One commentator has concluded that “the spirit of compromise and cooperation that prevails in Germany has, thus far, avoided the sensationalism, scandal, and personalization that sometimes seem to dominate U.S. Supreme Court appointments.”²¹⁹ Unlike the lifetime tenure of U.S. justices, German justices sit for 12-year terms.²²⁰ These factors make for a more centralist court in Germany and make it is less likely

215 See KOMMERS & MILLER, *supra* note 104, at 22-24.

216 In the German system, the Constitutional Court is the supreme guardian of the constitution, like the Supreme Court. See SABINE MICHALOWSKI & LORNA WOODS, *GERMAN CONSTITUTIONAL LAW: THE PROTECTION OF CIVIL LIBERTIES* 37 (1999).

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

218 See KOMMERS & MILLER, *supra* note 104, at 18-19, 23-24.

219 *Id.* at 24.

220 *Id.* at 22.

that the German court will become so distanced from contemporary ideas as the *Lochner* court did in the United States.²²¹

CONCLUSION

A market-based economic system cannot exist without the protection of property rights.

Investors need assurances that the government will not confiscate their investments nor fritter away their investments by excessive regulations. The law can create either an incentive or a disincentive to invest. There needs to be a “credible commitment” by a government that productive economic activities will not be destroyed or needlessly diminished. In addition, the confiscation of property hurts the dignity of the property owner; it is an invasion of a fundamental personal right. One way for a government to create a credible commitment to protect property rights is through a constitutional provision. Both the Takings Clause and Article 14 do that.

A common question in comparative law is asking whether a law is contextual or universal, that is, whether it is country specific or common to many countries.²²² There is one aspect of constitutional property rights that is common to nearly all countries: a government cannot take ownership of someone’s private property without paying some form of compensation.²²³ This is not just true for land and other personal property, but it also applies to massive confiscation, such as the nationalization of business firms and industries. The only exceptions are communistic countries with an economic system structured around public ownership. Without a doubt, the recognition of property rights transcends both liberal and social democratic constitutions,²²⁴ but there are uncertainty and disagreement over how protective governments must be in order to satisfy both economic and personal needs.

A lesson of this article is that countries with liberal traditions and economic systems like the United States and Germany are likely to have constitutional constraints on the excessive limitations of property rights. This kind of regulatory taking law is likely to be similar in Western and

221 Although the Takings Clause can result in the government’s withdrawal of a law, one could draw a lesson from the Constitutional Court disallowing a law under Article 14 and suggest the Supreme Court should protect property rights with a strict scrutiny standard under the Due Process Clause, rather than under the weaker rational relation test. But with only nine Justices on the Supreme Court who have lifetime tenure, extreme positions are more likely than with the Constitutional Court. To me, it makes sense for the Supreme Court to use the rational basis test. As this article explains, the Takings Clause provides sufficient protection of property rights in the United States.

222 See, e.g., RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* 188, 197 (2014).

223 See AJ VAN DER WALT, *CONSTITUTIONAL PROPERTY CLAUSES: A COMPARATIVE ANALYSIS* (1999) (describing the constitutional property clauses of more than 18 countries).

224 K.D. Ewing, *Economic Rights*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* (Michel Rosenfeld & András Sajó eds., 2012).

Central European countries. As a result, we can say that this type of law is universal throughout Europe and likely to be universal to other countries with similar market economies. Another lesson of this article tempers this conclusion, however. The cases from both countries also demonstrate that the protection of property rights is far from absolute. It needs to be balanced against the needs of society, but how to strike that balance varies from situation to situation and from country to country. That is the reason the similarities between the decisions of the Supreme Court and the Constitutional Court are important lessons for the rest of the world.

Two similar countries, with different constitutional provisions, have high courts that interpret the different provisions in a remarkably similar manner. That results from the Takings Clause and Article 14 serving the same economic purpose while, at the same time, protecting an important personal right. The comparison of Takings Clause jurisprudence with Article 14 jurisprudence is another example of the tenant that “the legal system of every society faces essentially the same problems and solves these problems by quite different means though very often with similar results.”²²⁵

225 ZWEIGERT & KÖTZ, *supra* note 8.