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Property as a Fundamental Right in the United States and Germany: A Comparison of Takings Jurisprudence

Tonya R. Draeger
University of the Pacific, McGeorge School of Law

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* J.D., University of the Pacific, McGeorge School of Law, to be conferred 2002; B.A., American Literature and Psychology, University of Southern California. I would never have made it this far without the love and encouragement of my family. Not only through law school, but through every one of my endeavors your unbridled support has been welcomed guidance. I also would like to thank all of my friends, each of which had to put up with some of the stresses of publishing this Comment. Finally, to Leslie Sindelar, your belief and trust in me made one of my ultimate goals attainable.

I. INTRODUCTION

> Every Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his Property. . . . Thus Labour, [and not the state or the law], in the Beginning, gave a Right of Property.[1]

John Locke's idea that the right of property comes from the work of an individual and not the state lays the foundation for the United States' determination of property rights in conjunction with the government's eminent domain power.[2] The German Basic Law,[3] on the other hand, follows the writings of Jean-Jacques Rousseau, where the unmitigated pursuit of private property is looked upon with suspicion.[4] The German Basic Law attempts to balance an individual's property

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1. JOHN LOCKE, TWO TREATIES OF GOVERNMENT 287-88, 299 (Peter Laslett ed., Cambridge Univ. Press, 2d ed. 1960) (1690).

2. *See* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 32-40 (1991) [hereinafter GLENDON, RIGHTS TALK] (addressing the influence of Rousseau on European constitutions and Locke's influence on the United States).

3. *See infra* notes 133-38 and accompanying text.

4. *See* JEAN-JACQUES ROUSSEAU, DISCOURSE ON INEQUALITY 55 (Patrick Coleman ed., Oxford University Press 1984) (1755) ("You are lost if you forget that the fruits of the earth belong to all and that the earth itself belongs to no one").

rights with the need for property that benefits the public.[5] The difference in the foundation of Takings law between two economic superpowers lends itself to allow for a general comparison of the manner each country determines individual property rights in a takings analysis.[6]

This Comment compares United States and German theories of property rights to determine how each country balances the competing interests of their citizens and government. Part II of the Comment outlines the development of the United States' takings analysis, focusing on U.S. Supreme Court decisions introducing "tests" to guide the inquiry.[7] Part III introduces the German Basic Law and explains the development of present day expropriations. The purpose of this section is to lay a foundation for Germany's view of property rights. Part III also discusses the European Court of Justice (ECJ) and how it tries to incorporate Member States' constitutional guarantees into a community legal order for the individual states of the European Union. Part III considers the effects of the ECJ on German property law. Finally, Part IV compares the different aspects of a takings analysis in the United States and Germany using the Takings Clause from the U.S. Constitution as a guideline. Each element of the Clause will be compared with its German equivalent to show that the German Basic Law is distinct facially from the U.S. Constitution, but is similar in its application.

II. THE LAW OF EMINENT DOMAIN IN THE UNITED STATES

A. The History of the Takings Clause

The Fifth Amendment of the U.S. Constitution states that "no person shall . . . be deprived of . . . property without due process of law; nor shall private property be taken for public use, without just compensation."[8] The second part of this Amendment is commonly referred to as the Takings Clause. Its purpose is "to bar government from forcing some people alone to bear public burdens which, in all

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5. Grundgesetz [Constitution] art. 14 (F.R.G.).

6. Due to the further expansion of our borderless society it is important for practitioners to understand the property laws of other countries. With a greater number of international companies moving employees into foreign countries, there is a need to understand fundamental property rights of the individual in more than the United States.

7. *See* Mugler v. Kansas, 123 U.S. 623 (1887); *see generally* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978); Agins v. City of Tiburon, 447 U.S. 255 (1980). Because the United States has developed relatively clear cut rules when dealing with physical takings, the focus of Part II will rest on drawing the line between a regulatory taking and a valid act of the police power.

8. U. S. CONST. amend. V; *see also* Otto J. Hetzel and Kimberly A. Gough, *Assessing the Impact of Dolan v. City of Tigard on Local Governments' Land-Use Powers, in* TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* 219, 222 (1996) (setting forth the two clauses of this amendment while noting that the Fifth Amendment is directly applicable only to the federal government, but has been applied to the states by way of the Fourteenth Amendment which contains a due process clause identical to that provided in the Fifth Amendment); *see generally* Chicago, Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226 (1897) (applying the Fifth Amendment to the states through the Fourteenth Amendment).

fairness and justice, should be borne by the public as a whole."[9] The Takings Clause has fulfilled its purpose by developing requirements which place limits on the government's eminent domain power.[10]

1. Developing the Takings Clause

Today, the Takings Clause analysis includes regulatory as well as physical deprivations of property.[11] When James Madison originally proposed the clause it stated, "No person shall be . . . obliged to relinquish his property, where it be necessary for public use, without a just compensation."[12] Under this proposed, but eventually rejected, version of the Takings Clause, private property could be regulated by the government without compensation being paid to the property owner.[13] Madison intended the clause to apply only to "direct, physical taking of property by the federal government."[14] The rejected version of the Takings Clause did not provide protection to private property from extreme governmental regulation.[15] Instead, governmental regulation was seen as a power granted to the government regardless of its effects on private persons or their property.[16] The prevailing version balanced the need for governmental regulation with the need for just compensation.[17] This balance reflects Madison's feelings that a government

9. Armstrong v. United States, 364 U.S. 40, 49 (1960); *see also* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123 (1978); Nollan v. California Coastal Commission, 483 U.S. 825, 834 n.4 (1987). The Takings Clause does not explicitly identify the type of governmental action that will constitute a taking. Hetzel and Gough, *supra* note 8, at 222.

10. *See infra* notes 25-41 and accompanying text (discussing the components of the Takings Clause, such as, property must be taken for a public use and just compensation is required to be paid when property is taken, which limit the governments ability to arbitrarily take property).

11. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028 n.15 (1992) (applying the Takings Clause to a regulation which deprived the property owner of his intended use of the land); *see also* Loretto v. Telepromprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (presenting a permanent physical occupation of property).

12. James Madison, *Speech in Congress Proposing Constitutional* Amendments (June 8, 1789), *in* JAMES MADISON: WRITINGS 437, 442-43 (1999).

13. *See id.*; *see also* THEODORE J. NOVAK, ET. AL., CONDEMNATION OF PROPERTY § 1.6, at 6 ("a government may regulate use and enjoyment of the owner's property, or . . . deprive the owner of the beneficial uses of it, without compensation other than the sharing of the resulting general benefits").

14. William M. Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment,* 94 YALE L. J. 694, 710-11 (1985) (addressing James Madison's concern for the protection of physical property and not for the protection of property which is being restricted by a regulation imposed by the federal government).

15. *See* Hetzel and Gough, *supra* note 8, at 223.

16. *See* Treanor, *supra* note 14, at 694-700 (establishing the need for a just compensation clause in the Takings Clause in order to prevent the states from abridging individual property rights and to promote common interests without requiring restitution).

17. *See id.* at 712 (quoting James Madison that the requirement of just compensation evidences "pride . . . in maintaining the inviolability of property" by recognizing a "wide range of personal and property rights").

which provided compensation after taking real or personal property demonstrated its commitment to personal freedom.[18]

The modern Takings Clause "serves as a fulcrum upon which private property interests are balanced against the police power."[19] Under the police power, the government is permitted to regulate property in order to protect the health, safety, morals, and general welfare of the public.[20] Implementation of the police power infringes on property rights to prevent harm to a public interest, whereas eminent domain takes property for a public use.[21] Due to the different purpose of the exercise of the police power, unlike the power of eminent domain, no compensation is required when it causes imposition on or acquisition of private property.[22] Just compensation is only required where there are constitutional takings which infringe "beyond the authority permitted by governmental police powers."[23] Thus, the Takings Clause, as it is stands today, allows the government to regulate the use and enjoyment of private property, even if the regulation deprives the owner of some of the land's beneficial uses.[24]

2. *The Components of the Takings Clause*

The modern Takings Clause can be divided into four components: private property, public use, just compensation, and taking.[25] Private property is defined as "property—protected from public appropriation—over which the owner has

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18. *See* James Madison, *Property, Nat'l Gazette* (Mar. 29, 1792), *in* JAMES MADISON: WRITINGS 515, 515-16 (1999); *see also* Treanor, *supra* note 14, at 712 (presenting Madison's fear that to directly violate a person's property undermined an individual's right to personal freedom).

19. Douglas W. Kmiec, *At Last, the Supreme Court Solves the Takings Puzzle, in* TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* 107, 107 (1996) (noting that the balancing approach for a present day takings analysis is difficult due to the fact that "both property and the police power are indeterminate concepts that change over time and from place to place").

20. *See* Fertilizing Co. v. Hyde Park, 97 U.S. 659, 669 (1878). Northwestern Fertilizing Co. was organized pursuant to a charter which allowed it to manufacture and convert dead animals into agricultural fertilizer in Cook County, Illinois. *See id.* at 663. In March 1869 the charter was revised to give the local government the power to abate nuisances. *See id.* at 664. Fertilizing Co. was found to be a nuisance. *See id.* The Court found that the ordinance revising the charter was a valid act of the police power due to the need to protect others from injury. *See id.* at 668. The Court stated "pure air and the comfortable enjoyment of property are as much rights belonging to it as the right of possession and occupancy." *See id.* at 669; *see also* NOVAK, ET. AL., *supra* note 13, § 1.6 at 6.

21. *See* NOVAK ET. AL., *supra* note 13, § 1.6 at 6; *see also* Hetzel and Gough, *supra* note 8, at 222 ("The eminent domain power permits the government to acquire, confiscate, or otherwise take private property for public use without an owner's consent").

22. *See* Hetzel and Gough, *supra* note 8, at 222; *see also* NOVAK ET. AL., *supra* note 13, § 1.6 at 6.

23. Hetzel and Gough, *supra* note 8, at 222; *see also* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 198 (1985) (stating that "The issue of compensation . . . can be reached only if there has been a taking of private property, if it is for public use, and if the taking is not justified under the police power or by the doctrines of consent and assumption of risk").

24. *See* Hetzel and Gough, *supra* note 8, at 222 (explaining "The Bill of Rights, with the Fifth Amendment in its current form, was ratified in 1791").

25. *See* U.S. CONST. amend. V; *see also* Hetzel and Gough, *supra* note 8, at 223-24 (analyzing the Fifth Amendment by breaking its literal language into four distinct elements).

exclusive and absolute rights."[26] Whether property is personal or real, tangible or intangible, it is included within the definition of private property for purposes of a takings analysis.[27]

The next component of the Takings Clause, the public use requirement, though still a requisite in the modern day takings analysis, may have diminished in significance.[28] Eminent domain cases have repeatedly held that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation [may] be paid."[29] The Court has concluded where there is a rational relationship between the public purpose and the use of the eminent domain power, the action is not a taking.[30] Some scholars argue the public use requirement has lost all practical significance whenever an elected body authorizes the taking of private property because of the decisions in *Hawaii Housing Authority v. Midkiff*[31] and *Berman v. Parker*.[32] These cases hold that legislative action taking private property is conclusive of public use.[33]

The third component of the Takings Clause, just compensation, is the most obscure component of the Takings Clause because the Fifth Amendment neglects

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26. BLACK'S LAW DICTIONARY 1233 (7th ed. 1999); *see also* BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 97-98 (1977) (defining private property by distinguishing between things that belong to you and things that belong to others, and an individual's responsibility to use those things that belong to him in ways that do not injure others). "Private property *is* a fundamental institution of American life." *Id.* at 97 (*emphasis supplied*).

27. *See* NOVAK, ET. AL., *supra* note 13, § 2.2, at 10 (discussing how the Takings Clause delineates application to the taking of private property, which most read to mean real property, without announcing the application to different forms of property); *see also* Treanor, *supra* note 14, at 710-11 (implying that the originally proposed Taking Clause concerned only real property).

28. *See* Hetzel and Gough, *supra* note 8, at 224 (discussing the effects of *Berman v. Parker*, 348 U.S. 26 (1954) and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984)).

29. Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 241 (1984) (claiming that the public use element of the Fifth Amendment is "coterminous with the scope of a sovereign's police powers," thus arguing that the element of public use is one that falls within the power of the legislature with minimal review to be done by the courts).

30. *See id.*; *see also* Hetzel and Gough, *supra* note 8, at 224 (discussing the lack of practical significance that the public use requirement has after *Berman v. Parker*, 348 U.S. 26 (1954) and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984)).

31. 467 U.S. at 243-44 (stating that the "mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose"). The "government does not itself have to use property to legitimate taking; it is only the taking's purpose, and not its mechanics, that must pass scrutiny" under the Takings Clause. *Id.* at 244.

32. 348 U.S. at 31 (finding that the District of Columbia's urban renewal was a public use, although the resulting structures would be operated by private agencies). This case dealt with the District of Columbia Redevelopment Act which appropriated appellants department store in order to "develop a better balanced, more attractive community." *Id.* The Court went on to say that "if those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way." *Id.* at 33.

33. *See* Hetzel and Gough, *supra* note 8, at 224; *see also Berman*, 348 U.S. at 32 (stating, "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive").

to outline any standards of fairness to determine just compensation.[34] Due to the lack of standards set out in the Fifth Amendment, courts have implemented their own methods of determining the value of just compensation. Generally, just compensation is equivalent to the fair market value of the property at the time of the taking, calculated considering:

> The price that an informed and knowledgeable purchaser would offer a willing seller for the land and any buildings, structures, or other improvements considered to be a part of the property, with neither party being under any duress or compulsion. Market value is generally considered in terms of the property's highest and best use which would be reasonably possible in the near future.[35]

The factors used to determine fair market value include market demand, economic development in the area, specific plans to develop the land, particular uses permitted by zoning ordinances, perceived compatibility with neighboring areas, and the actual use of the property at the time of the taking.[36] However, because the Takings Clause is not limited to the physical seizure of land, the fair market value standard for the just compensation requirement remains difficult to apply.[37]

The last component of the Takings Clause is the taking itself. Some argue that a constitutional taking, requiring just compensation, occurs only when the government actually physically seizes private property.[38] However, the Supreme Court has found that takings are not limited to physical occupation by the government, but include circumstances when land has been unconstitutionally regulated.[39] Through the years the Supreme Court attempted to define a functional

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34. *See* United States v. Cors, 337 U.S. 325, 332 (1949). "The Court in its construction of the constitutional provision has been careful not to reduce the concept of 'just compensation' to a formula." *Id.*

35. NOVAK, ET AL., *supra* note 13, §§ 15.2,15.3, at 124-25 (citation omitted). "Although market value is the general rule, not all properties have an ascertainable market value and courts may look beyond the market value concept and base their awards on other concepts of value." *Id.* § 15.2, at 124; *see also Cors*, 337 U.S. at 332 (discussing how factors may be added or taken away to account for a "special value").

36. *See id.* § 15.3, at 125 (citation omitted).

37. Hetzel and Gough, *supra* note 8, at 223-24 (stating that some argue that the just compensation requirement of the Takings Clause should only apply to "physical seizures of private property by the government"); *see also* Treanor, *supra* note 14, at 711-12 (presenting the possibility that arguments made to limit just compensation to physical takings may be based on Madison's initial intention that the Takings Clause only apply to physical deprivations of property).

38. *See* Hetzel and Gough, *supra* note 8, at 225 (stating that the framers of the Constitution intended the just compensation requirement to apply only to physical takings).

39. *See id.* (arguing that the government does have the power to regulate property, through a valid act of the police power, but stating that there is a point where regulation is recognized as a compensable taking).

takings analysis that would govern the different categories of takings.[40] The Court did this by referring to precedent set by previously decided cases.[41]

B. The Development of a Takings Analysis

Defining what constitutes a "taking" under the Fifth Amendment has been problematic.[42] Justice Rehnquist acknowledged this when he stated:

> This Court has generally "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." Rather, it has examined the "taking" question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action—that have particular significance.[43]

The Supreme Court's inability to articulate a bright line test for determining when governmental regulation has crossed the line from a valid act of the police power into a taking requiring compensation, has caused uncertain jurisprudence in this area.[44]

Early takings law required the government to physically seize an individual's private property before the property owner was entitled to compensation.[45] Illustrative in *Mugler v. Kansas,*[46] where the Court found if a property owner was using his property in a way that damaged others, the government could prohibit the

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40. *Id.*

41. *See* Mugler v. Kansas, 123 U.S. 623 (1887); *see generally* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978); Agins v. City of Tiburon, 447 U.S. 255 (1980).

42. *See* Penn Cent. Transp. Company v. City of New York, 438 U.S. 104, 123 (1978). *Penn Central* involved exploitation of the airspace above Grand Central Terminal after it was designated a landmark. *Id.* at 104. The Court found that the restrictions imposed on UGP Properties, the contractor, were substantially related to the promotion of the general welfare and thus did not constitute a taking. *Id.* at 138.

43. Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979) (citation omitted). The Court held that the government's attempt to create a public right of access to the improved pond goes far beyond ordinary regulation involved in condemnation cases, thus the action amounted to a taking requiring just compensation. *Id.* at 178.

44. *See* Hetzel and Gough, *supra* note 8, at 225 n.43 (citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 n.7, for the proposition that "uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court").

45. *See* The Legal Tender Cases, 79 U.S. 457, 551 (1871). "[The Takings Clause] has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals." *Id.*

46. 123 U.S. 623.

use without compensating the owner.[47] The Court's holding demonstrates how early takings cases focused on nuisances created by property owners while disregarding the effect of government action on the value of the property[48]

1. The Beginning: Mugler v. Kansas *and* Pennsylvania Coal Co. v. Mahon

Mugler v. Kansas is a representative case of the Court's focus on nuisances created by property owners. The defendant, Peter Mugler, was criminally prosecuted for the violation of the prohibitory liquor law in the state of Kansas.[49] The Defendant built a brewery where he manufactured beer.[50] On appeal, Mugler argued that the state statute was unconstitutional and resulted in a taking of his private property.[51] The Court held that although the manufacturer's property was rendered practically worthless as a result of the regulation, the statute that prohibited the manufacture of liquor did not amount to a taking.[52] Instead, the Court determined that the regulation which prohibited the intended use of the property was a valid act of the police power because it guarded against an evil which threatened to injure the public welfare.[53] The *Mugler* decision and the later case of *Hadacheck v. Sebastian,*[54] established that a state has a substantial interest in preventing activities similar to public nuisances, and any such regulation may not require compensation.[55]

Since the issue of diminution in value was not included in the Court's analysis in *Mugler*, it was ripe for consideration by the time of *Pennsylvania Coal Co. v.*

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47. *See id.* at 668-69.

48. *See* Hetzel and Gough, *supra* note 8, at 225; *see also Mugler*, 123 U.S. 623 (analyzing restrictions on a brewery in terms of the damage it may cause to others); *see generally* Fertilizing Co. v. Hyde Park, 97 U.S. 659 (1878) (permitting restrictions on a fertilizing company in order to protect the health of other citizens in the vicinity).

49. *See Mugler*, 123 U.S. at 623.

50. *See id.*

51. *See id.* at 624.

52. *Id.* at 668-69. The Court stated,

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by any one, for certain forbidden purposes, is prejudicial to the public interests.

Id.

53. *See* id. at 661-62 (establishing that the police power is properly exercised in prohibiting the manufacture or sale of intoxicating liquors due to the implications that "excessive use of ardent spirits" has on public health, morals and safety).

54. 239 U.S. 394 (1915). Petitioner was convicted of a misdemeanor for the violation of a city ordinance which prohibited any person to operate a brickyard within described city limits. *Id.* at 404. The Court upheld the statute stating that to hold differently would "preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way, they must yield to the good of the community." *Id.* at 410.

55. *See* Mugler v. Kansas, 123 U.S. 623, 668-69 (1887); *see also* Hadacheck v. Sebastian, 239 U.S. 394, 410-11 (1915).

Mahon.[56] *Pennsylvania Coal* concerned the Kohler Act[57] which prevented the Pennsylvania Coal Company from mining under property in such a way as to disturb the supports located below the surface of the property that homes were built on.[58] The Court announced the general rule that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[59] To determine whether the regulation had gone too far the Court analyzed whether the law was a valid exercise of police power by balancing the public benefit against the private loss caused by the statute.[60] The Court found the private loss outweighed the public benefit and held the regulation was not a taking.[61] By concluding that the subsidence of a single home did not outweigh the private loss of the Pennsylvania Coal Company, the Court laid the foundation for a balancing approach to the takings analysis which was later defined in *Penn Central Transportation Co. v. New York City.*[62]

2. *A Balancing Approach:* Penn Central Transportation Co. v. New York City

Penn Central introduced the consideration of the diminution of property value to the takings analysis.[63] It involved the refusal of the New York City Landmarks Preservation Commission to approve plans for construction of a fifty-story office building over the Grand Central Terminal.[64] The *Penn Central* Court employed a

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56. 260 U.S. 393 (1922); *see also* Hetzel and Gough, *supra* note 8, at 226 (discussing how the value of property was determined to be a relevant factor in a takings analysis which led the Court to add diminution of value to its balancing approach).

57. *See Pennsylvania Coal Co.*, 260 U.S. at 412-13 (discussing the Kohler Act as forbidding the mining of anthracite coal in a such way as to cause the subsidence of, among other things, any structure used as a human habitation, with certain exceptions, including among them land where the surface is owned by the owner of the underlying coal and is distanced more than one hundred and fifty feet from any improved property belonging to any other person).

58. *Id.* at 412.

59. *Id.* at 415.

60. *See id.* at 413-14 (balancing the public benefit consisted of preventing subsidence of a single home, while the private loss consisted of destroying the company's support estate and making its business commercially impracticable). "For practical purposes, the right to coal consists in the right to mine it. What makes the right to mine coal valuable is that it can be exercised with profit." *Id.* at 414.

61. *See id.* at 416.

62. 438 U.S. 104 (1978) (holding that New York City's Landmarks Law is not a taking because the "restrictions imposed [by the regulation] are substantially related to the promotion of the general welfare and . . . permit reasonable beneficial use of the landmark site" while still allowing enhancement of the terminal site).

63. *See id.* at 130 (discussing that diminution in value in terms of diminished value in the property based on the use planned by the property owner).

64. *See id.* at 117-18 (stating that Grand Central Terminal had been designated a "landmark" under New York's Landmark Preservation Law on August 2, 1967). On January 22, 1968 Penn Central Transportation Co. entered into a renewable 50-year lease and sub-lease agreement with UGP Properties for Grand Central Terminal. *See id.* The appellants then applied for permission to construct an office building on top of the structure and submitted two separate plans. *See id.* at 116. Both were rejected. *Id.* The Commission stated, "[we have] no fixed rule against making additions to designated buildings—it all depends on how they are done . . . But to balance a 55-

three-pronged balancing test to determine whether the implementation of the Landmarks Preservation Law resulted in a "taking" of the appellant's land.[65]

The three factors considered by the Court included: "[t]he economic impact of the regulation on the claimant . . . the extent to which the regulation has interfered with distinct investment-backed expectations . . . [and] the character of the governmental action."[66] In the end, the Court found that "although the regulation interfered with the property's economic value, it did not prevent a reasonable return on investment."[67] After *Penn Central*, when determining whether regulations constitute a taking, diminution in value was consistently included.[68] Within the "diminution in value" analysis, the Court looks to the totality of the property interest at stake.[69] Thus, even if only a portion of the total property is affected by the "taking," such as the airspace rights in *Penn Central*, the Court must still engage in a balancing inquiry based on the totality of the property interest using the *Penn Central* factors.[70] The Supreme Court soon thereafter shifted toward a more definite takings principle and a categorical rule.[71]

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story officer tower above a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke." *Id.* at 117-18.

65. *See id.* at 124.

66. *Id.*

67. Hetzel and Gough, *supra* note 8, at 226; *see also Penn Cent. Transp. Co.*, 438 U.S. at 135 (stating that the owners could not establish a "taking" merely by showing that they had been denied the right to exploit the superadjacent airspace, irrespective of remainder of the parcel). The law did not interfere with owners' present use or prevent owner from realizing a reasonable rate of return on his or her investment, especially since preexisting air rights were transferable to other parcels in the vicinity. *Id.*

68. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027 (1992) (stating that allowing a State to eliminate all economically valuable use of one's land is inconsistent with the Takings Clause).

69. *See Penn Cent. Transp. Co.*, 438 U.S. at 130-31. The case states that:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole. *Id.*

70. Robert Freilich, Elizabeth A. Garvin, and Duane A. Martin, *Regulatory Takings: Factoring Partial Deprivations into the Taking Equation*, *in* TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* 165, 171 (1996) (citing the *Penn Central* totality rule as the general rule for defining relevant property). *But see* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 (1992) (discussing the Court's avoidance of determining the relevant property to be considered according to the totality rule because of the "rich tradition of protection at common law" of a fee simple interest in land); Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1179 (1994) (using only the 12.5 acres of land to be developed as the deprivation denominator rather than the entire 51 acres); Florida Rock Indus., Inc. v. United States, 45 Fed.Cl 21, 31-43 (1999) (challenging the totality rule generally).

71. *See* Agins v. City of Tiburon, 447 U.S. 255, 255 (1980) (discussing a situation where the plaintiffs claimed a taking after unimproved property they had purchased had been rezoned with density restrictions preventing their plans to develop the property).

3. *Finally, a Two-Pronged Test:* Agins v. City of Tiburon

In *Agins v. City of Tiburon,*[72] the Court announced the general two-pronged test that remains in use today:[73] a land use regulation does not effect a taking if it "substantially advances legitimate state interest" and does not "deny an owner economically viable use of his land."[74] Though this test appears straightforward, its application created difficulty for the courts.[75]

The *Agins* dispute centered around a modified zoning ordinance which placed the Agins' property in a more restrictive residential planned development and open-space zone.[76] The ordinance required property within the zone to be devoted to single-family dwellings, accessory buildings, and open-space uses.[77] Density restrictions limited the Agins to building one to five single family residences on their five-acre tract.[78] Instead of applying for a permit from the city to build, the Agins filed suit in state court alleging a taking of their property.[79] In affirming the California Supreme Court, the U.S. Supreme Court held that the ordinances did not constitute a taking.[80] In applying the two pronged balancing test, the Court concluded Tiburon's open-space ordinances substantially advanced a legitimate governmental goal, and did not deny the owner economically viable use of his

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72. *See id.*

73. Daniel J. Curtain, Jr., *Takings in the Land-Use Arena after Lucas and Dolan: How Far Is Too Far in Imposing Exactions?, in* TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* 83, 84 (1996); *see also* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 492-93 (1987) (holding that the Subsidence Act at issue seeks to further a substantial public interest and fails to show a significant diminution in value, thus no taking had occurred).

74. *Agins*, 447 U.S. at 260-61. The case also states that:

> The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Although no precise rule determines when property has been taken, the question necessarily requires a weighing of private and public interests.

Id.

75. *See generally* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (holding that a regulation requiring support estates to be left in the ground when mining coal promoted a substantial public interest and did not effect a substantial diminution in value); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (holding that conditioning a building permit on the obtainment of an easement across private property is not a valid regulation of land use); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (holding that when all economically beneficial use is taken from an individual's property, a taking has occurred); Dolan v. City of Tigard, 512 U.S. 374 (1994) (determining that the desire to improve conditions for the public is not enough to prevent a taking to be found).

76. *See Agins*, 447 U.S. at 257 (citing Tiburon, Cal., Ordinances Nos. 123 & 124 N.S. (June 28, 1973)).

77. *See id.*

78. *See id.* (noting that appellants never sought approval for development of their land under the zoning ordinances because shortly after the ordinances were enacted the city began eminent domain proceedings against appellants's land).

79. *See id.* (seeking $2 million in damages for inverse condemnation—the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted—and requesting a declaration that the zoning ordinances were facially unconstitutional).

80. *See id.* at 262 (noting that "[a]lthough the ordinances limit development, they neither prevent the best use of appellants' land, nor extinguish a fundamental attribute of ownership").

land.[81] Today, both *Agins* and *Penn Central* are an integral part of the takings analysis.[82]

C. Present Day Takings

In *Lucas v. South Carolina Coastal Commission*,[83] more than fifteen years after *Penn Central*, the Court reiterated the use of balancing factual inquiries in order to determine whether a taking has occurred.[84] However, in *Lucas v. South Carolina Coastal Council*, the Court recognized two instances in which the judiciary is not required to partake in a balancing of the *Penn Central* factors, which results in finding a taking as a matter of law.[85] The first instance occurs when a regulation compels a property owner to suffer a physical invasion of his property.[86] The second categorical rule, which was at issue in *Lucas*, involves regulation that "denies a [property owner] all economically beneficial or productive use [of his land]."[87] These categorical rules have led to, what the Court refers to as, per se takings.

1. Per se Takings

The case of *Loretto v. Teleprompter Manhattan CATV Corp.* recognized for the first time that a per se taking occurs when the character of the governmental action is a permanent physical occupation of a landowners property.[88] In *Loretto*, appellees

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81. *See id.* at 261-62 (recognizing that the governmental goal was to discourage premature and unnecessary conversion of open-space land to urban uses).

82. *See generally* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); Nollan v. California Coastal Commission, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994). Some scholars argue that the *Penn Central* factors and the *Agins* two-pronged test are the same. *Agins* has merely taken the economic impact of the regulation and a land owners investment backed expectations and combined them into one: a land use regulation does not deny the landowner economically viable use of his land. Interview with Raymond R. Coletta, Professor of Law, University of the Pacific, McGeorge School of Law, in Sacramento, California (February 14, 2001).

83. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1006-09 (1992) (determining whether South Carolina's Beachfront Management Act implemented a taking of David Lucas' land). Lucas had purchased undeveloped coastal property on the Isle of Palms in order to build single-family residences. *Id.* at 1008. The Act restricted the use of Lucas' property, thus not allowing him to build his single family homes. *Id.*

84. *See Lucas*, 505 U.S. at 1016 (recognizing the takings analysis as a balancing test by stating "the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land'"); *see also Agins*, 447 U.S. at 260.

85. *See Lucas*, 505 U.S. at 1015 (noting there are two categories of regulatory action which are compensable without a case-specific inquiry into the public interest advanced in support of the governmental action).

86. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (requiring compensation for a governmental regulation which allowed cable companies to place cables and cable boxes on an apartment building); *see also Lucas*, 505 U.S. at 1015 (referring to *Loretto* as the illustrative case for per se takings where governmental action has physically invaded a landowners property).

87. *Lucas*, 505 U.S. at 1015 (developing a categorical rule for permanent physical deprivations of all economic use of the relevant property by likening the loss of value to the physical loss of the property).

88. *See Loretto*, 458 U.S. 419 (1982). "We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Id.* at 426.

Teleprompter Corporation and Teleprompter Manhattan CATV received permission from the previous owner of Loretto's five story apartment building to install a cable and cable box on the building.[89] Initially, the cable lines installed on Loretto's building did not service his tenants.[90] Two years after Loretto bought the building, Teleprompter began providing CATV service to the building's tenants by dropping a cable line down the front of the building to the first floor.[91] On January 1, 1973, New York enacted the New York Executive Law which provided that a landlord may not "interfere with the installation of cable television facilities upon his property or premises."[92] Loretto filed suit in 1976 alleging Teleprompters installation was a trespass and that section 828 of the New York Executive Law was a taking without just compensation.[93]

The Supreme Court held that a permanent physical occupation authorized by the government was a per se taking, even though the physical and economic interference with the landowner's property was minimal.[94] The Court further stated when a per se taking was found, a balancing of interests was not required.[95] If a permanent physical invasion has not occurred, then the Court must undertake an ad hoc, multifactor inquiry into the "economic impact of the regulation, the extent to which it interferes with investment backed expectations, and the character of the government action."[96] Thus, if a per se taking is not found, finding a taking will depend on the result generated from a balancing of the *Penn Central* factors.[97]

Lucas v. South Carolina Coastal Council announced the second situation where a categorical rule is appropriate.[98] In *Lucas*, the Court stated a per se taking occurs "when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle."[99] *Lucas* involved the purchase of two residential lots on the Isle

89. *See id.* at 422 (describing the box as the size of a bread box and the cable lines as running down the front of the owners building).

90. *See id.*

91. *See id.* (stating that "CATV" is an abbreviation for "cable television").

92. *Id.* at 423 (stating that section 828 of the New York Executive Law provided that a landlord could not interfere with installation of cable on the premises and could not demand payment from a tenant or CATV in any amount in excess of what the State Commission on Cable Television determines to be reasonable).

93. *See id.* at 424.

94. *See id.*

95. *See id.* ("[A] permanent physical occupation authorized by the government is a taking without regard to the public interests that it may serve").

96. *Id.* (citations omitted).

97. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130-131; *see also* Daniel R. Mandelker, *Investment Backed Expectations in Takings Law*, *in* TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* 119, 126 (1996) ("When a per se taking does not occur, the *Penn Central* balancing test applies").

98. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (citing *Agins*, 447 U.S. at 260; *Nollan*, 483 U.S. at 834; *Keystone*, 480 U.S. at 495; Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 295-96 (1981)).

99. *Lucas*, 505 U.S. at 1019.

of Palms to be used for single-family homes.[100] In 1988, the South Carolina Legislature enacted the Beachfront Management Act, which barred Lucas, the petitioner, from erecting any permanent habitable structures on his two parcels because they were located in a "critical area."[101] Lucas filed suit in the South Carolina Court of Common Pleas, arguing that the legislation effected a taking of his property without just compensation.[102]

A state trial court found that the legislation rendered Lucas' parcels valueless.[103] The Supreme Court held that a per se taking occurs, absent a common law nuisance, when a landowner is denied all economically beneficial use of his land, "regardless of the governmental interest supporting the legislation."[104] Thus, like in *Loretto*, once a per se taking has been found the Court's inquiry ceases without a balancing of interest as outlined in *Penn Central.*

Some scholars believe the *Lucas* decision illustrated three key points. First, in order for the *Lucas* rule to apply, a landowner must be deprived of *all* economically beneficial use of the property.[105] If the *Lucas* per se rule does not apply, the court must analyze the governmental action under a balancing of the *Penn Central* factors.[106] Finally, regardless of whether the court must balance the *Penn Central* factors or apply the *Lucas* per se rule, the court must determine whether the property should be looked at in its entirety or by focusing on the part of the parcel that is being taken.[107]

2. *Determination of the Unit of Property to be Evaluated*

After the Court determined in *Lucas* that governmental action which leaves a parcel valueless constitutes a per se taking, the analytical focus shifted to defining the specific unit of property.[108] Traditionally, even if only a portion of the total

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100. *See id.* at 1006-07. At the time that Lucas purchased the lots they did not qualify as being in a "critical area." *Id.* at 1008.

101. *See id.* at 1007 (citing Beachfront Management Act, S.C.Code Ann. § 48-39-250 et. seq. (Supp. 1990)). Under the Act a "critical area" was defined to include beaches and immediately adjacent sand dunes. *Id.*

102. *See id.* at 1009.

103. *See id.*

104. *Id.* at 1015; *see also* G. Richard Hill, *Partial Takings after Dolan, in* TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* 189, 194 (1996).

105. *See* Freilich, *supra* note 70, at 171.

106. *See id.*; *see also Lucas*, 505 U.S. at 1019 n.8.; *see also* Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1179 (1994) (applying the *Penn Central* factors to the prohibition of construction on wetlands); Florida Rock Indus., Inc. v. United States, 45 Fed. Cl 21, 31-43 (1999) (applying the *Penn Central* balancing test to the disturbance of wetlands and the mining of subsurface minerals).

107. *See* Freilich, *supra* note 70, at 171.

108. *See* Raymond R. Coletta, *The Measuring Stick of Regulatory Takings: A Biological and Cultural Analysis*, 1 U. Pa. J. Const. L. 20, 21-22 (1998) (discussing the relevant property for the determination of economic impact in a takings analysis by looking to both the horizontal and vertical dimension of property).

property has been taken, when the Court began its balancing under the *Penn Central* factors, the unit of property being scrutinized was the total parcel:[109]

> '[T]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in *the parcel as a whole*. . . .[110]

After the totality rule was defined in *Penn Central*, determining the economic impact on a landowners property was done by looking at the parcel as a whole.[111] However, the *Lucas* case challenged the totality rule.[112]

In *Lucas*, Justice Scalia pointed out that it was unclear whether the Court should analyze a situation where a property owner loses a large percent of their property as the owner having "been deprived of all economically beneficial use of *the burdened portion of the tract*, or whether the owner suffered a mere diminution in value of the tract as a whole."[113] In the end, although Justice Scalia challenged "the utility of the totality rule," he refrained from announcing a new definition of the relevant mass of property to be considered.[114] Thus, the Court restated that "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good . . . he has suffered a taking."[115]

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109. *See* Freilich, *supra* note 70, at 172.

110. Penn Cent. Transp. Co. v New York City, 438 U.S. 104, 130-31 (emphasis supplied).

111. *See* Keystone Bituminous Coal Ass'n v. DeBedictus, 480 U.S. 470, 497 (1986) (citing Andrus v. Allard, 444 U.S. 51 (1979), the Court stated, "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety); *see also* Coletta, *supra* note 108, at 44 (stating, "there could be no doubt that by firmly cementing the principle of nonsegmentation in *Keystone*, the Supreme Court acknowledged nonsegmentation as the law of the land").

112. *See Lucas*, 505 U.S. at 1016 n.7 (stating Justice Scalia's questioning of the traditional view recognizing that "deprivation of all economically feasible use" is an imprecise test for takings because it "does not make clear the 'property interest' against which the loss of value is to be measured"); *see generally* Florida Rock Indus., Inc. v. United States, 45 Fed.Cl. 21 (1999) (postulating that the Fifth Amendment prohibits the uncompensated taking of private property without reference to the owner's remaining property interests). In *Florida Rock*, the Federal Circuit concluded that "a taking occurs when the government deprives the owner of a substantial part, but not essentially all, of the economic use or value of the property." Michael M. Berger, *Lucas v. South Carolina Coastal Council: Yes, Virginia, There Can be Partial Takings*, *in* TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* 148, 154 (1996).

113. Freilich, *supra* note 70, at 172; *see also Lucas*, 505 U.S. at 1016 n.7 (emphasis supplied).

114. Freilich, *supra* note 70, at 172 (discussing flaws in Justice Scalia's approach, such as: the ability of a court to divide the property into segments and then treat one single segment as the entire property, the implications of defining relevant property as less than the whole, and finally allowing Justice Scalia's view to prevail property owners to strategically parcel their property to ensure the finding of a taking); *see also* Coletta, *supra* note 108, at 61-62.

115. *Lucas*, 505 U.S. at 1019. The Court addresses, in a footnote, Justice Stevens disagreement with the requirement that all economically beneficial use be lost. *Id.* at 1019 n.8; *see also* Coletta, *supra* note 108, at 35-66 (arguing that although there have been a few cases which have tried to disturb the totality rule, when determining

Even though Justice Scalia did not abandon the use of the totality rule to determine the unit of property to be measured, lower courts became confused as to the proper standard to apply. Due to this confusion,[116] the Court clarified its definition of the totality rule in *Concrete Pipe and Products of California v. Construction Laborers Pension Trust for Southern California.*[117] Concrete Pipe's takings challenge centered around the idea that legislative regulations enacted after a contract was made could not effect that contractual agreement.[118] Concrete Pipe also claimed that by allowing the regulation to retroactively apply to their contract, a taking would result.[119] The Court reviewed Concrete Pipe's claim under the *Penn Central* factors, rejecting a *Lucas* per se claim.[120] In evaluating the economic impact, the Court explicitly rejected Concrete Pipe's attempt to segment the property,[121] stating:

> We rejected this analysis years ago in *Penn Central Transportation Co. v. New York City*, where we held that a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. To the extent that any portion of the property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question.[122]

Therefore, when the *Lucas* per se rule does not apply, because the owner has not been deprived of *all* use and value when viewed in light of the entire property, the court analyzes the governmental action under the ad hoc, factual inquiry delineated by *Penn Central* while looking at the property in its entirety.[123] Hence, although the

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whether a taking has occurred courts still look to the relevant parcel as being the parcel as a whole).

116. *See* Freilich, *supra* note 70, at 173 (stating "unfortunately, Justice Scalia's questioning of the totality rule in *Lucas* has led to considerable confusion about the proper definition of the deprivation denominator").

117. Concrete Pipe and Products of Cal. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602 (1993) (reaffirming the totality rule and the essence of its holdings in *Penn Central* and *Keystone*).

118. *See* Freilich, *supra* note 70, at 174.

119. *See id.*

120. *See Concrete Pipe*, 508 U.S. at 643- 44 (stating that Concrete Pipe is trying to "shoehorn its claim into" a *Lucas* analysis of destruction of all economically beneficial use of real property).

121. *See id.* at 643-45 (recognizing that in evaluating the economic impact, the relevant property is the property as a whole).

122. *Id.* (citing *Keystone*, 490 U.S. at 497, "Our test for regulatory taking requires us to compare the value that remains in the property, and one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction'") (citation omitted).

123. *See* Hetzel and Gough, *supra* note 8, at 228 (stating that more importantly, the categorical rule laid out in *Lucas* the Court's "acceptance of a balancing test for those cases that do not fall within the purview of [the] categorical rule"); *see also Penn Cent.*, 438 U.S. at 124 (stating the *Penn Central* factors as: the character of the governmental action, the economic impact on the property owner resulting from a loss of all reasonable use of value in the entirety of the property, and the regulation's interference with the property owner's investment backed expectations).

takings analysis in the United States has been reviewed and addressed in multiple cases since *Penn Central*, the balancing test remains the preferred analytical tool to determine whether a taking has occurred.[124]

III. GERMAN EXPROPRIATION

Similar to the United States, Germany's recognition of an individuals right to property traces back to its Basic Law.[125] Although both countries juxtapose the right to property with the right for governmental interference if compensation is paid, Germany adds social obligation as a limit on an individuals property rights.[126] This explicit difference in the two constitutions lays the foundation for the similarities and the differences between United States and German takings jurisprudence. In order to understand these comparisons, one must understand the background of German expropriation.[127]

A. Background of Property Rights in Europe

Generally, due to the recognition that an individual is merely one part of a larger community, European constitutions focus on the social function of private property when defining a person's property rights.[128] By placing the social function of property within their constitutions, constitutional status is given to society's right to regulate property without requiring the payment of compensation of the owner.[129] However, European constitutions attempt to balance individual rights to be free from government intrusions with community rights to regulate property for the common good.[130] Due to the fact that many European constitutions explicitly declare the

124. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); *see also* Loveladies Harbor v. United States, 28 F.3d 1171 (1994); Florida Rock Indust., Inc. v. United States, 45 Fed. Cl. 21 (1999)

125. *See* Grundegesetz art. 14 (F.R.G.); *see also infra* note 153.

126. *See* U.S. CONST. amend. V; *see also* Grundegesetz art. 14 (F.R.G.).

127. Expropriation is "a governmental taking or modification of an individual's property rights, especially by eminent domain." BLACK'S LAW DICTIONARY 602 (7th ed. 1999).

128. *See* GLENDON, RIGHTS TALK, *supra* note 2, at 32-40 (addressing the influence of Rousseau on European constitutions and Locke's influence on the United States). "Rousseau wrote that property rights are always subordinate to the overriding claims of the community; that an owner is a king of trustee or steward for the public good . . . ." *Id.* at 34.

129. *See* Otto Kimminich, *Property Rights*, *in* RIGHTS, INSTITUTIONS AND IMPACT OF INTERNATIONAL LAW ACCORDING TO THE GERMAN BASIC LAW 75, 85-86 (Christian Starck ed., 1987) (explaining that the social obligation on property "creates legal obligations of the owner concerning the use of his property").

130. *See* Joseph H.H. Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities*, 61 WASH. L. REV. 1103, 1128 (1986) (discussing property rights jurisprudence of the European Court of Justice).

creation of welfare states,[131] the government must balance giving to those who are in need without intruding on the rights of other individuals.[132]

1. Historical Influences on the Right of Property in German Constitutional Law

European political theory was influenced heavily by the writings of Jean-Jacques Rousseau.[133] European constitutions have been significantly shaped by Rousseau's refusal to place individual claims to possessive rights above societal claims to promote the public good.[134] Accordingly, Rousseau was willing to make individual property rights secondary to a community right to regulate for the common good.[135] The influences of these notions are seen in the German Constitution's attempt to define property in terms of its social function.[136] "By defining and, at the same time restraining, individual rights, collectivity, and individuality are counter-posed and balanced against one another in the Basic

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131. *See* Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U.CHI. L. REV. 519, 527-32 (1992) [hereinafter Glendon, Rights] (defining welfare state as an entitlement to individuals to call upon the government to affirmatively achieve social justice through necessary level of wealth redistribution).

132. *See* Gunter Durig, *An Introduction to the Basic Law of the Federal Republic of Germany*, *in* THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 11, 20 (Ulrich Karpen ed., 1988); *see also* Glendon, Rights, *supra* note 131, at 526-32 (discussing the concept of a welfare state in Europe).

133. *See* Durig, *supra* note 132, at 32. "Rousseau's writings evidenced a suspicion and distrust toward unmitigated pursuit of private property." Michael R. Antinori, *Does Lochner Live in Luxembourg?: An Analysis of the Property Rights Jurisprudence of the European Court of Justice*, 18 FORDHAM INT'L L.J. 1778, 1786 (1995) (contrasting the U.S. property rights ideology based on John Locke with the European political theory of Jean-Jacques Rousseau); *see also* ROUSSEAU, DISCOURSE ON INEQUALITY 55 (1984). Rousseau states that:

> The first man who, having enclosed a piece of land, thought of saying, 'This is mine', and came across people simple enough to believe him. How many crimes, wars, murders, and how much misery and horror the human race might have been spared if someone had pulled up the stakes or filled in the ditch, and cried out to his fellows: 'Beware of listening to this charlatan. You are lost if you forget that the fruits of the earth belong to all and that the earth itself belongs to no one!'

134. *See* GLENDON, RIGHTS TALK, *supra* note 2, at 32-40.

135. *See id.* at 34.

136. *See* Grundgesetz art. 14(2) (F.R.G.); *see also* Antinori, *supra* note 133, at 1789 (stating "the catalogue of individual rights in the German Constitution ("Basic Rights") reflects a balance of individual rights and community interests").

Law."[137] Hence, the German Constitution's explicit recognition of the social element of property tempers its individual property rights guarantees.[138]

2. *Balancing Rechstaat and Sozialstaat*

Germany balances its need for individual property rights and the importance of society's property rights in two separate ideologies. The German Constitution's commitment to safeguarding individual property rights is rooted in the *Rechstaat.*[139] The *Rechstaat* was designed to be the way a state functioned, not the actual form of state or form of the state's government.[140] A "state of reason" where the government looks to the collective will to determine what would be best, and then pursues it.[141] "One of the central promises of *Rechstaat* is freedom from state imposed interferences with individual property rights."[142] Three elements of the *Rechstaat* enable Germany to fulfill this promise.[143] First is the rejection of the state as something divinely ordained along with the recognition that a state exists for the benefit of each individual.[144] The second element sets forth the importance of "safeguarding and individual liberty and facilitating individual self-fulfillment."[145]

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137. Antinori, *supra* note 133, at 1789. The Basic Law entered into force on May 23, 1949 and was termed the "basic law" because the "Parliamentary Council did not want to bestow the dignified term 'constitution' on a document drafted to govern part of Germany for a transitional period that would only last until national reunification." DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 35 (1989). It was later decided that the Basic Law would be retained as an all-German constitution, with a continued designation as the Grundgesetz. *See id.* at 30. When the Basic Law was drafted, the German people attempted to "avoid the deficiencies of earlier constitutions and create a government based on human dignity and human rights." Klaus Stern, *General Assessment of the Basic Law—A German View, in* GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM 17, 19 (Paul Kirchhof and Donald P. Kommers eds., 1989).

138. *See* GLENDON, RIGHTS TALK, *supra* note 2, at 40 (establishing that individual rights were commingled with social responsibility); *see also* ERNST-WOLFGANG BOCKENFORDE, *The Origin and Development of the Concept of the Rechstaat, in* STATE, SOCIETY AND LIBERTY: STUDIES IN POLITICAL THEORY AND CONSTITUTIONAL LAW 48 (1990) (describing the *Rechstaat* as a product "which arose out of the constitutional thought of early liberalism in Germany"); *see also* KOMMERS, *supra* note 137, at 35 (stating that the *Sozialstaat* is regarded as "an important ingredient of Germany's constitutional tradition"). Both the *Rechstaat* and the *Sozialstaat* are considered conceptions of the social state which receive authoritative status. *Id.*

139. *See* BOCKENFORDE, *supra* note 138, at 47-48 (explaining that Rech means law and Staat means state). The *Rechstaat* is described as a state governed by reason; a state which realizes that human coexistence depends on the law of reason. *See id.* at 49; *see also* GLENDON, RIGHTS TALK, *supra* note 2, at 39. Article 14 of the German Basic Law provides: "Property and the right of inheritance are guaranteed." Grundgesetz art. 14(1) (F.R.G.).

140. *See* BOCKENFORDE, *supra* note 134, at 49.

141. *See id.* (citing Von Aretin, *Staatsrecht der konstitutionellen Monarchie*, vol. 1, p. 163).

142. Antinori, *supra* note 133, at 1790 (discussing the development of the German rule of law as working to provide a limit on the exercise of state in order to protect the individual from the state).

143. *See* BOCKENFORDE, *supra* note 138, at 49-50 (recognizing that the *Rechstaat* mirrors the work of Immanuel Kant).

144. *See id.* at 49 (defining a 'body politic,' *res publica*). "The starting-point and point of reference for the political order is the free, equal, self-determined individual and his earthly aims in life . . . ." *Id.*

145. *Id.* "Restriction of the objects and functions of the state to the liberty and security of the person and of property . . . ." *Id.*

The final element provides for a recognition of fundamental civil rights and a reliable administration of justice.[146] The *Rechstaat* then forms a state that insists on "freedom, equality, and autonomy of each individual" under a unified legal order.[147]

In addition to a tradition protecting the individual from interference by the state, Germany protects society's right to property in a second ideology, the *Sozialstaat*.[148] "*Sozialstaat*, calls for a state that will look after its citizens and distribute wealth to those in need; a state that will actively intervene in market and social orders to counter inequality of conditions."[149] The *Sozialstaat*, and its commitment to an active state, grew out of the belief that public authorities needed to restore a meaningful level of individual freedom before the guarantees of the *Rechstaat* became empty promises to the citizens.[150]

These two ideals, as the basis for German constitutional order, seem to provide unavoidable incoherence.[151]

> *Rechstaat* is bound up with direct and absolute guarantees of individual freedom from intervening government measures as a matter of constitutional right. Equally direct, absolute guarantees of *Sozialstaat* to active state assistance are not possible as a matter of constitutional right without dismantling the guarantees provided for by *Rechstaat*. For example, it is difficult to commit the constitutional order to directly enforceable rights to redistribute state action. To give some necessarily entails taking from others, and the two principles logically cancel each other out.[152]

The *Rechstaat* differs from the *Sozialstaat* because the promise of guaranteed individual property rights is explicitly defined in Article 14 of the Basic Law.[153]

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146. *See id.* at 50 (listing fundamental civil rights as civil liberty, equality before the law, and the guarantee of acquired property).

147. *See* KOMMERS, *supra* note 137, at 36; *see also* BOCKENFORDE, *supra* note 138, at 69 (concluding "the *Rechstaat* always seeks to limit and contain the power and supremacy of the state in the interests of individual liberty").

148. *See* KOMMERS, *supra* note 137, at 35 (explaining that the *Sozialstaat* stands for social justice and obligates the government to provide for the basic needs of all Germans).

149. Antinori, *supra* note 133, at 1790 (stating that the *Sozialstaat* is a recognition that the state may act as a friend or an enemy to personal freedom).

150. *See id.* (discussing the perception that "freedom may be restricted not only by the state but also through factual circumstances").

151. BOCKENFORDE, *supra* note 138, at 61-62 (discussing the disagreement of how the social element of the *Sozialstaat* may be incorporated into the constitutional framework of the *Rechstaat*).

152. Antinori, *supra* note 133, at 1791 (discussing the tension between the *Rechstaat* and the *Sozialstaat*).

153. Grundgesetz art. 14 (F.R.G.). Article 14 provides:

1) Property and the rights of inheritance are guaranteed. Their content and limits shall be determined by the laws.
2) Property imposes duties. Its use should also serve the public weal.
3) Expropriation shall be permitted only in the public weal. It may be effected only by or pursuant to a law which shall provide for the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests

Alleviation of social inequalities is not an individual right delineated in the Basic Law, therefore the legislature is left to define its substance.[154] To resolve the tension between these two traditions, a balancing of the principles behind them is done.[155]

Although the right to individual property is guaranteed in the Basic Law, the right is explicitly limited in the language of Article 14.[156] First, Article 14(1) establishes the state's power to define the content and limits of property.[157] Further, Article 14(2) contends that the ownership of property imposes individual duties and responsibilities to society.[158] Article 14 recognizes property functioning as both an individual right and as a benefit of society.[159] Therefore, Article 14 encompasses the dual functions of property found in the *Rechstaat* and *Sozialstaat* and supports both as equally important constitutional values.[160]

The combination of the right to individual property and the duties imposed in Article 14, provides a framework under which the legislature may pursue the *Sozialstaat*.[161]

> Limitations on individual rights provide sufficient berth for the legislature to pursue economic policies designed to achieve social justice. The legislature, in pursuing social justice as an economic policy, can activate the social function of property by calling upon the individual's duties to use their property in a manner that serves the common good. The values embodied in *Sozialstaat* become a justification to support legislation that allegedly interferes with individual property rights. At the same time, the legislature must respect individual rights.[162]

The promotion of a state that interferes in social orders to counter inequality among its citizens has found a balance through the framework of Article 14 in the Basic

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> of those affected. In case of dispute regarding the amount of compensation, recourse may be had to the ordinary courts.

Id.; *see also* KOMMERS, *supra* note 137, at 241 (establishing that the Basic Law is "largely silent with regard to the nature of social rights").

154. *See* KOMMERS, *supra* note 137, at 34-39; *see also* BOCKENFORDE, *supra* note 138, at 63-64.

155. *See* KOMMERS, *supra* note 137, at 34-39 (defining *Sozialstaat* to mean "social welfare state" and *Rechstaat* to mean "state based on the rule of law").

156. *See* Grundgesetz art. 14 (F.R.G.).

157. *See id.*

158. *See id.*

159. *See* Antinori, *supra* note 133, at 1793 (discussing the recognition and balancing of an interference by the state for the benefit of its citizens with an individuals right to property in Article 14).

160. *See* Gunnar Folke Schuppert, *The Right to Property*, *in* THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 107, 108-11 (Ulrich Karpen ed., 1988) (explaining the dual functions of property in terms of a personal function, which serves as a safeguard for the freedom of the individual, and a social function, where the use of property should serve the public welfare).

161. *See id.*; *see also* Antinori, *supra* note 133, at 1793.

162. Antinori, *supra* note 133, at 1793; *see also* Kimminich, *supra* note 129, at 86 (discussing the difference between expropriation and the social obligation of property); *see also* KOMMERS, *supra* note 137, at 251 (describing the limitations placed on individual property rights).

Law, the ideals of the *Rechstaat*, the protection of individual property rights, and the *Sozialstaat*.[163] The balance of the *Rechstaat* and *Sozialstaat* has been further interpreted by the German Courts.

3. German Courts

The German judiciary is divided into three court systems: the Federal Constitutional Court, the federal courts, and the courts of Lander.[164] In addition, there are administrative, labor, social, and finance courts.[165] The Federal Constitutional Court is the only court in Germany with jurisdiction over constitutional questions.[166] Therefore, anyone claiming his constitutional property rights have been violated may file a complaint directly with the Federal Constitutional Court.[167] Another German Court, the Federal Supreme Court, is the Germany's highest court for matters of general jurisdiction.[168] It receives claims outside the scope of the special courts.[169] "Ordinarily only one set of courts in Germany has jurisdiction over a give subject area of the law."[170] However, questions regarding property law have been divided between the administrative and ordinary courts.[171] Thus, a case dealing with property rights may be decided in any of the German Courts.[172]

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163. *See* KOMMERS, *supra* note 137, at 241-42. The *Rechstaat* and *Sozialstaat* then join together under the Basic Law. *Id.* The *Rechstaat*, protects the individual from the state and the *Sozialstaat* obligates the state to construct a just social order. *Id.*

164. *See* DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 25-30 (1994).

165. *See id.* at 150.

166. *See* Timothy L. Gartin, *Parity and the Litigation of Private Property Rights in the States and Germany: Evidence in Support of Chemerinsky's Litigant Choice Principle*, 15 N. ILL. U. L. REV. 747, 771 (1995).

167. *See* CURRIE, *supra* note 164, at 27.

168. *See* Gartin, *supra* note 166, at 772 (noting that the five special courts cover patent, administrative, tax, labor, and social insurance law).

169. *See id.*

170. KOMMERS, *supra* note 137, at 253 n.34.

171. *See id.* (discussing how the administrative courts have the authority to decide whether property has been taken and the ordinary courts must decide the amount of compensation). Due to the fact that the issue of a taking and the right to compensation overlap, both courts have been required to define a "public good" and a "compensable taking." *Id.*

172. *See id.* (stating that this results in the implementation of different doctrines to determine when a taking will be found); *see also* Schuppert, *supra* note 160, at 114.

4. Article 14 of the Basic Law

The three clauses of Article 14, the contents and limits clause,[173] the social function clause,[174] and the individual rights clause,[175] have been harmonized by the German Federal Constitutional Court ("German Court") through the institution of judicial review.[176] Without intervention of the German Court, the contents and limits clause grants the legislature the discretion to regulate private property without limitation.[177] However, the German Court limits the legislative power under Article 14 by requiring it to harmonize the dual functions of property. "In regulating property, the legislature must adhere to the constitutional principle that property should serve the common good and must pursue economic policies designed to achieve social justice. In addition, the legislature must regulate property with due respect for the constitutional value of autonomy underlying individual ownership."[178]

By defining property according to both the individual and social functions of property recognized by the Basic Law, the German Court can monitor whether the legislature is adequately balancing the competing values of individual property rights.[179] Different gradations of protection are then applied according to the type of property at issue.[180] Whether property serves a more individual or a more social function helps categorize the different types of proprietary interests.[181]

The core of an individual's constitutionally protected property rights in Germany are formed according to types of property that contribute to ensuring personal freedom, such as one's dwelling.[182] The outer limits of an individual's constitutionally protected property rights are formed by the types of property that serve important social purposes, such as corporate stock.[183] Legislation which

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173. Grundgesetz art. 14(1) (F.R.G.). "Property's content and limits shall be determined by the laws." *Id.*

174. *See id.* at art. 14(2). ("Property imposes duties. Its use should also serve the public weal").

175. *See id.* at art 14(1). ("Property and the rights of inheritance are guaranteed").

176. *See* KOMMERS, *supra* note 137, at 241-42, 250. The social function clause has been discussed under the guise of the *Sozialstaat*. *Id.* at 34-37. The individual's rights clause has also been discussed according to the tradition of the *Rechstaat*. *See id.* Because the Federal Constitutional Court has priority over constitutional questions the discussion of Article 14 relies on the Constitutional Courts findings. *See id.*

177. *See id.* at 256.

178. Antinori, *supra* note 133, at 1794-95; *see also* Schuppert, *supra* note 160, at 114 (hypothesizing that the legislature will only be successful at harmonizing the two constitutional demands of property if it combines both functions in a proportional way).

179. *See* KOMMERS, *supra* note 137, at 264; *see also* Mary Ann Glendon, *Comment on Part 4*, *in* GERMANY & ITS BASIC LAW: PAST, PRESENT, AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM 283, 283 (Paul Kirchof & Donald P. Kommers eds., 1989) [hereinafter Glendon, Comment] (comparing individual property rights in the United States with property rights in Germany).

180. *See* Glendon, Comment, *supra* note 179, at 285 (proclaiming that the legislature may define the contents and limits of ownership rights in shares of stock differently than a person's ownership rights for their dwelling place).

181. *See id.*

182. *See id.*

183. *See id.*

interferes with core constitutionally protected property rights is subject to strict constitutional review.[184]

> The German Court requires a greater degree of justification for legislation that touches the core of an individual's property right. With regard to types of property that serve a distinctively social function, however, the legislature's duty to the public outweighs its duty to the individual. Under the German Court's methodology, the existing private law is not of determinative import in defining the constitutionally protected property rights of an individual. Individuals do not necessarily have a constitutionally protected property right in the proprietary interests that they claim under the private law.[185]

Hence, an individual's constitutionally protected right to property depends on the property's function.[186]

B. The Introduction of the European Court of Justice and the European Community

Constitutional traditions and practices of the European Community Member States as well as the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention), lay the foundation for European constitutional theory pertaining to individual property rights.[187] If the ECJ is given the power to review Member States' legislation, economic policy decision-making powers could be shifted from the Member States to the ECJ.[188] The

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184. *See id.*; *see also* Schuppert, *supra* note 160, at 114-15. "Thus, the more a particular type of proprietary interest serves an individual function, and, thus, the closer it is to the core of the individual's constitutionally protected property rights, the greater the legislature's duty to the individual." Antinori, *supra* note 133, at 1795.

185. Antinori, *supra* note 133, at 1795-96; *see also* Schuppert, *supra* note 160, at 114-115; *see also* KOMMERS, *supra* note 137, at 265. Kommers, quoting the German Constitutional Court, notes:

> The concept of property as guaranteed by the Constitution must be derived from the Constitution itself. This concept of property in the constitutional sense cannot be derived from legal norms (ordinary statutes) lower in rank than the Constitution, nor can the scope of concrete property guarantee be determined on the basis of private law regulation.

Id.

186. *See* KOMMERS, *supra* note 137, at 253-54 (addressing the Parlimentary Council's earlier draft of the Basic Law which discussed the social obligation of property as entailing limits found in the living necessities of all citizens and the public order essential to society).

187. *See* GLENDON, RIGHTS TALK, *supra* note 2, at 32-40; *see also* European Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 221, *available at* http://conventions.coe.int/treaty/EN/cadreprincipal.htm [hereinafter European Convention] (copy on file with *The Transnational Lawyer*); *see also* Protocol No. 1 to the European Convention, Mar. 20, 1952, 213 U.N.T.S. 262 [hereinafter Protocol No. 1] (copy on file with *The Transnational Lawyer*) (Germany signed the Convention on April 11, 1950).

188. *See* Antinori, *supra* note 133, at 1783. German expropriation would be effected because the ECJ would have the final say on whether a taking had occurred. *Id.*

implementation of the ECJ should give citizens of Member States added protection from possible violations of fundamental rights.[189]

1. *The Difference Between European Constitutional Theory and the U.S. Constitution*

European constitutional theory concerning individual property rights is different from that of the United States in two respects.[190] First, European constitutional theory gives the societal right to regulate property equal priority with an individuals right to property.[191] "Conversely, the U.S. Constitution only recognizes the individual's right to property, and the societal right to regulate private property is a judicially imposed limit on an otherwise absolute individual right."[192] Second, in Europe, property rights encompass both an anti-redistributive principle and a distributive principle, including a positive right to claims upon the government for subsistence.[193] Individual property rights in the United States function as an anti-redistributive principle consisting of "negative" rights to be free from government interference.[194]

2. *Creation of Fundamental Rights in the European Community*

The ECJ references two sources in defining fundamental rights norms.[195] The ECJ draws on the constitutional traditions of the Member States as well as on international human rights treaties collaborated by the Member States.[196] The ECJ incorporates common constitutional tradition and other applicable provisions from human rights treaties into the Community Legal Order.[197] Therefore, the ECJ

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189. *See id.* (discussing the promise of the ECJ to review Community legislation in order to prevent violations of fundamental rights).

190. *See* GLENDON, RIGHTS TALK, *supra* note 2, at 32-40; Glendon, Comment, *supra* note 179, at 285; Glendon, Rights, *supra* note 131, at 519.

191. *See* Weiler, *supra* note 130, at 1128; *see also* Antinori, *supra* note 133, at 1781.

192. Antinori, *supra* note 133, at 1781; *see also* U.S. CONST. amend. XIV (stating "nor shall any State deprive any person of . . . property without due process of law"); U.S. CONST. amend. V (declaring "nor shall private property be taken for public use, without just compensation"); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 ("As long recognized, some values are enjoyed under an implied limitation and must yield to the police power").

193. *See* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 867-68 (1986) (contrasting the U.S. Constitution's negative liberties against European Constitution's positive rights).

194. *See* Jackson v. City of Joilet, 715 F.2d 1200, 1203 (7th Cir.), cert denied, 465 U.S. 1049 (1983).

> [The U.S. Constitution] is a charter of *negative* rather than positive liberties . . . . The men who wrote the Bill of Rights were not concerned that Government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 in the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic government services.

Id.

195. Weiler, *supra* note 130, at 1125-29.

196. *See id.*

197. *See id.*

protects fundamental rights according to a judge-made bill of rights, made by Member States, that functions as Community Law.

The ECJ also draws upon the European Convention for the Protection of Human Rights and Fundamental Freedoms.[198] The Convention uses common principles of the signatory states to codify fundamental rights.[199] However, due to differences regarding the inclusion of property rights, the majority of delegates agreed that the Convention should focus on the social function of ownership rather than an individual's personal property interest.[200] A Committee of Experts drafted the protocol guaranteeing the right to property, interpreted to encompass three distinct rules.[201] First, the Protocol establishes the general principle of peaceful enjoyment of property.[202] The next rule covers deprivations of property, and subjects them to conditions provided for by international law.[203] Finally, the third rule recognizes that Contracting States are entitled to enact laws the state deems necessary to control the use of property for the general good.[204]

After examination of the Protocol and the constitutional traditions of the Member States, the delegates concluded that the three rules of the Protocol reflected the general tendencies of the Member States and thus, should be included into the Community Legal Order.[205] With this foundation, the ECJ developed the basis of its "takings" analysis. The threshold question is whether to classify the limitation (regulation) as an expropriation or merely as a restriction on the use of property.[206] In order to answer the threshold inquiry the court must first determine whether the measure is a permanent, or a temporary interference with private property.[207] For the measure to be an expropriation, a permanent interference is a necessary, but not a sufficient, condition.[208] Next, the economic sacrifice required of the property owner

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198. *See* European Convention, *supra* note 187; *see also* Protocol No. 1 (adding property rights to the European Convention). Article 1 of Protocol No. 1 provides:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provision shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest . . . .

Id.

199. *See* R. Anthony Salgado, *Protection of National's Rights to Property Under the European Convention on Human Rights: Lithgow v. United Kingdom*, 27 VA. J. OF INT'L L. 865, 991 (1987) (discussing right of property).

200. *See* Antinori, *supra* note 133, at 1797-98 (discussing a disagreement among delegates as to whether an international court's review of limitations placed on private property would allow the court to define a state's economic policies).

201. *See id.* at 880-90.

202. *See* James v. United Kingdom, 8 E.H.R.R. 123, 139-40 (1986) (dealing with owners of a large estate being denied "rights of properties" through the enactment of the Leasehold Reform Act, as amended).

203. *See id.*

204. *See id.*

205. *See* Hauer v. Land Rheinland-Pfatz, Case 44/79, [1980] 3 C.M.L.R. 42.

206. *See id.* at 56.

207. *See id.*

208. *See id.*

is considered.[209] Legislative action which does not deprive the property of all "appreciable economic value" is not expropriation.[210] Furthermore, recognizing that Member States can restrict the use of property if restriction is deemed necessary for the protection of the general interest, the ECJ has laid out a "test" to determine the protection of individual property rights.[211]

The European Court of Human Rights (Court of Human Rights) developed the foundations for their "takings" analysis similar to the ECJ.[212] After the case of *Sporrong and Lonnroth v. Sweden*,[213] the Court of Human Rights determined that all interferences with private property must be judged in light of the general principle of the peaceful enjoyment of property.[214] The Court of Human Rights holding in *Sporrong* defines property by reference to all the proprietary interests of an individual.[215] The Court of Human Rights announced a two part test to determine the permissibility of interferences with private property under the Protocol.[216] "First, interferences with private property must pursue an aim in the general interest.[217] Second, the measure must balance the requirements of the general interest and the individual's property rights."[218] The Court of Human Rights, in a subsequent case, elaborated that the Member States have a large amount of discretion in determining whether a measure is in the public interest.[219] Furthermore, the Member State's determination will be upheld, unless the determination is manifestly without reasonable foundation.[220]

Although the implementation of the ECJ and the Court of Human Rights will not directly effect German takings law, it may effect property owners by providing added protection.[221] This added protection comes from an individuals ability to appeal a decision of the highest constitutional court in Germany, the Federal Constitutional Court, to the ECJ.[222] However, because Member States domestic laws make up the law governing the ECJ, it is hard to imagine a different outcome in the

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209. *See id.* at 57.

210. *See id.*

211. *See id.* at 65-66.

212. *See* Wolfgang Peukert, *Protection of Ownership under Article 1 of the First Protocol to the European Convention on Human Rights*, 2 HUM. RTS. L.J. 37, 38 (1981) (discussing the development of Court of Human Rights case-law).

213. *Sporrong and Lonnroth*, 52 Eur. Ct. H.R. (ser. A) at 26 (1982) (cited in Michael R. Antinori, *supra* note 129, at 1799-1801).

214. *See id.*

215. *See id.*

216. *See id.*

217. Antinori, *supra* note 133, at 1801 (stating that interferences with private property must not, with regard to the aim pursued, place a disproportionate burden on the individual).

218. *Id.* (discussing the requirement of compensation when the burden on the individual is disproportionate to the aim pursued).

219. *See James*, 8 E.H.R.R. 123.

220. *See id.* at 142-43.

221. *See supra* note 189 and accompanying text.

222. *See id.*

German Court and the ECJ. Therefore, the comparison of eminent domain and expropriation in Germany and the United States will focus on German legal doctrines.

IV. COMPARISON OF EMINENT DOMAIN IN THE UNITED STATES AND GERMANY

A. *Foundational Differences*

Both the United States and Germany place an individual's property rights within the realm of basic constitutional guarantees.[223] However, the U.S. Constitution places fewer limitations on an individuals right to own property than Article 14 of the Basic Law.[224]

> [The Basic Law] differentiates between (1) expropriation (paragraph 3 of the article), which requires a specific compensation procedure, reflecting a fair balance between public and private interests in the public weal, and (2) determination by law of the content and limits of property rights (paragraph 1 of the article), which does not require compensation.[225]

Conversely, the U.S. Constitution merely states that taking private property for a public use requires just compensation.[226] The language of the U.S. Constitution does not define the difference between a permissible act of police power, which does not require compensation, or a taking, which does require compensation.[227] Instead, the Supreme Court determines what constitutes a taking requiring just compensation.[228] The German Constitution also differs from the U.S. Constitution because it contains an explicit obligation on property owners to utilize their property for the benefit of the public.[229] This implicates Germany's "social obligation of property rights (Sozialpflichtigkeit des Eigentums, paragraph 2 of the article)."[230]

Article 14 creates a foundational difference in the conditions that underlie an individual's constitutionally protected property rights in the United States versus

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223. *See* U. S. CONST. amend. V; *see also* Grundgesetz art. 14 (F.R.G.).

224. *See* U.S. CONST. amend. V; Grundgesetz art. 14 (F.R.G.).

225. Carl-Heinz David, *Compensation Aspects of the "Takings Issue" in German and American Law: A Comparative View*, *in* Takings: Land-Development Conditions and Regulatory Takings after *Dolan* and *Lucas* 315, 318 (1996) (comparing the detailed clauses of Article 14 versus the implied elements in Amendment V).

226. *See* U.S. CONST. amend. V.

227. *See supra* notes 44-48 and accompanying text.

228. *See* Mugler v. Kansas, 123 U.S. 623 (1887); *see also* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978); Agins v. City of Tiburon, 447 U.S. 255 (1980).

229. *See* David, *supra* note 225, at 318.

230. *Id.*

those in Germany.[231] In the United States, a property owner has a bundle of property rights based solely on his ownership of property.[232] In contrast, property ownership in Germany is considered a "virtually comprehensive legal position."[233] Thus, private or public restrictions barring property uses are not contradictory to the German concept of ownership.[234] This follows Germany's fundamental property law which conditions an individual's property rights on whether the property in question serves an individual or social function.[235] This condition lays the foundation for the differences between United States takings jurisprudence and the laws of expropriation in Germany. Though fundamental differences exist, the countries share general commonalities in their taking analyses.

B. *Private Property and Public Use*

Defining property is a prerequisite to determining an individual's rights concerning that property. In both the United States and Germany, property rights, under a takings analysis, tend to focus on an individual's absolute right or dominance over an object.[236] The idea of dominance over property, or the right to exclude others, is referred to in the United States as one of the "most essential sticks in the bundle of rights that are commonly characterized as property."[237] In Germany, the legally permitted dominance over an object allows a property owner to deal with the object as the owner wishes.[238] This includes the right to exclude other persons from any influence over the property.[239]

Another similar aspect of property as defined in Germany and the United States is its broad meaning.[240] In both the German Basic Law and in the U.S. Constitution one may read "property" to be limited to real property.[241] However, the takings issue in both country's property laws extends to both tangible and intangible properties.[242]

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231. *See* KOMMERS, *supra* note 137, at 250 ("American fundamental law, does not impose duties on private property or provide that it serve the common good").

232. *See* Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (declaring that one of the most important property rights is the ability to exclude others); *see also* Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (stating that property rights are made up of a bundle of sticks).

233. David, *supra* note 225, at 319.

234. *See id.*

235. *See* KOMMERS, *supra* note 137, at 250.

236. *See* Kimminich, *supra* note 129, at 76 (stating that "German civil law defines property rights as the sum of legally permitted dominance over an object"); *see also Kaiser Aetna*, 444 U.S. at 176; *Dolan*, 512 U.S. at 384 (discussing the bundles of rights characterized as property).

237. *Kaiser Aetna*, 444 U.S. at 176, 180 n.11; *see also Dolan*, 512 U.S. at 384.

238. *See* Kimminich, *supra* note 129, at 76.

239. *See id.*

240. *See* NOVAK ET. AL., *supra* note 13, § 2.2, at 10; *see also* Kimminich, *supra* note 129, at 76; David, *supra* note 225, at 316.

241. *See infra* note 242.

242. *See* NOVAK ET. AL., *supra* note 13, § 2.2, at 10 (discussing the Takings Clauses application to personal or real, tangible or intangible property); *see also* Kimminich, *supra* note 129, at 76 (discussing the Basic Law as protecting ownership rights of material things as well as financial assets); *see also* David, *supra* note 225, at 316

In the United States, private property is looked at as one element of the Takings Clause and public use as another.[243] Germany on the other hand combines the right of private property with an individual's responsibility to use their property for the benefit of society.[244] The limitations of Article 14 allow the German legal system to place restrictions on property use for the benefit of the public welfare without "violat[ing] fundamental legal understandings about the nature of property rights or the constitutional rights of ownership."[245]

Article 14(2) of the Basic Law further proposes that limits on private property are permissible for the benefit of the general public by forming the constitutional basis for legislative acts restricting the exercise of property rights without requiring compensation.[246] Thus, "there is no right to compensation when the [restriction on private property] can be classified as an actualization of the social obligation of property."[247] This is similar to the distinction in the United States between the power of eminent domain and the police power.[248] In Germany, a person may lose his or her property rights if the Federal Supreme Court determines that the personal sacrifice is less than the social obligation of property.[249] Similarly, in the United States, governmental action which causes a loss of property, either physical or economic, is not deemed a taking requiring compensation if the restriction is an action of the police power.[250] Therefore, although the U.S. Constitution does not place the social obligation of property within the Fifth Amendment, as the German equivalent does in Article 14(2) of the Basic Law, the ability of governmental police power to regulate for the benefit of the general welfare places the same sorts of limitations on the definition of a taking.

The requirement that private property be taken for a public use or for the benefit of the public weal is an element of takings law in both jurisdictions.[251] However, the requirement of specificity, found in the German legal doctrine, has never been explicitly stated as a requirement for the taking of private property for a public use

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(stating that the constitutional doctrine of expropriation extends to other legal positions, such as copyrights and trademarks).

243. *See* Hetzel and Gough, *supra* note 8, at 223-224 (dividing the Takings Clause into four elements).

244. Grundgesetz art. 14 (F.R.G.).

245. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89 (1995); *see supra also* notes 168-82 and accompanying text (establishing that the contents and limits clause of Article 14, explicitly limits property rights).

246. *See* Kimminich, *supra* note 129, at 86 (discussing Article 14(2) as placing social obligations on the owner concerning the use of his property).

247. *Id.; see also supra* notes 139-63 and accompanying text (mentioning the balancing of individual property rights and social obligations in the *Rechstaat* and the *Sozialstaat*).

248. *See* Hetzel and Gough, *supra* note 8, at 222 (stating that the police power allows government to regulate property without paying compensation to protect the health, safety, morals, and general welfare of the public).

249. *See* Kimminich, *supra* note 129, at 89 (mandating the need for compensation when there has been an expropriation but not when property is taken in conjunction with its social obligation).

250. *See supra* notes 19-23, 39 and accompanying text (discussing the police power in relation to the development of what constitutes a taking).

251. *See supra* notes 223-24 and accompanying text.

in the United States.[252] Although not explicitly stated, the requirement that property being taken advances a legitimate state interest implies as much.[253] The public purpose need not be stated with specificity, but needs to be rationally related to the exercise of eminent domain power.[254] This implies that even though specificity of purpose is not a required element of the eminent domain power in the United States, in order for a taking to pass the public use clause of the takings analysis, the government needs to have a specific purpose that is rationally related to the reason the land is being taken. Thus, in order to take land for a public use, the government must be able to specify the plan for the land being expropriated.[255]

The need for the government to have a specific purpose for expropriated land stems from Germany's overall view of private property rights. Because Germany focuses on the balance between an individual's right to property and the social function of property, defining a specific purpose for property aids the court in determining the level of scrutiny under which the taken property should be judged.[256] The court is then able to apply different gradations of protection for property depending on whether it serves a more social or a more individual function.[257] Unlike Germany's levels of protection, the U.S. Constitution provides the same level of protection for an individual's property regardless of whether it serves an individual or social function.[258] Although the United States does not define an individual's constitutionally protected property rights according to its function, if the use and enjoyment of one's property adversely affects the right of others to use and enjoy their property, property rights limitations may follow.[259] This difference may be attributable to Germany's dedication to its function as a welfare state.

As a welfare state, Germany furthers its need to balance society and the individual by devoting itself to achieve social justice, even in the context of an individual's private property.[260] On the other hand, the United States concentrates

252. *See* David, *supra* note 225, at 322 (the German legal doctrine requires the public use to be specific due to the fact that it may be argued that every act of legislation is done for the public good).

253. *See* Agins v. City of Tiburon, 447 U.S. 255, 261-62 (1980) (allowing the City to zone an area as open space so that it may not be developed for urban uses).

254. *See* Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 241 (1984) (advocating the need for the eminent domain power to be rationally related to a conceivable public purpose).

255. *See* David, *supra* note 225, at 322. Stating "simply adding land, presently earmarked for no particular public purpose, to a municipality's land reserve to meet future land demand would not justify expropriation. However, . . . if the land were needed for a specific school development designated by a building zoning plan" the outcome would be different. *Id.*

256. *See supra* notes 179-86 and accompanying text.

257. *See id.*

258. *See* NOVAK, ET. AL., *supra* note 13, § 4.4 at 34 (stating that a property owner in the United States is protected both under the Fifth and Fourteenth Amendments from interference with "fundamental property rights").

259. *See id.* (outlining a property owner's rights as being; "the right to use or develop one's property, to exclude others from using it, and to sell the property for value").

260. *See supra* notes 256-60, *infra* notes 261-62 and accompanying text.

its efforts on an individual's rights[261] only using society as a justification for infringing on those rights when the infringement benefits the general welfare of the public and not for social justice.[262]

C. The Expropriation Doctrines

In Germany, the Federal Administrative Court, the Federal Supreme Court and the Federal Constitutional Court have developed tests or criteria for distinguishing between a taking and social obligation.[263] The tests have been referred to as threshold tests to distinguish constitutional from unconstitutional measures affecting property.[264] Recent reformation of the property rights doctrine by the Federal Constitutional Court may soon disregard these tests.[265] However, currently, these three courts each employ a different criteria. German courts use either the doctrine of intensity, the doctrine of individual sacrifice, the doctrine of situational commitment, or the private use test to determine when property has been unconstitutionally taken.[266]

1. The Doctrine of Intensity

Although there is a distinction between the United States and Germany's reasons and values behind the protection of private property, the foundational takings analysis recognized by the Federal Administrative Court in Germany (Bundesverwaltungsgericht),[267] is remarkably similar to that of the United States.[268] In the United States, the line drawn between a taking and a proper exercise of the police power focuses on whether the restriction "substantially advances legitimate state interests" and does not "deny an owner economically viable use of his land."[269] In the Federal Administrative Court, a restriction on an individual's property becomes expropriation when "the administrative measure directed against the property" and "the burden placed upon the owner . . . transgress the borderline of

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261. *See* U.S. CONST. amend. V (stating that persons shall not be deprived of "life, liberty, or property, without due process of law").

262. *See supra* notes 17-18 and accompanying text.

263. *See* LUNDMARK, LANDSCAPE, RECREATION, AND TAKINGS IN GERMAN AND AMERICAN LAW 225 (1997) (discussing the different "tests" each court in Germany uses in a takings analysis).

264. *See id.* at 226.

265. *See id.* at 225.

266. *See id.*

267. *See id.*

268. *See supra* notes 63-107 and accompanying text (discussing how the foundational takings analysis in the United States depends on the type of infringement that has occurred); *see also* Kimminich, *supra* note 129, at 87-88.

269. Agins v. City of Tiburon, 447 U.S. 255, 260-61 (1980) (weighing public and private interests).

the social obligation of property."[270] This is called the doctrine of intensity, the so called reasonableness test (Zumutbarkeitstheorie),[271] or the burden test.[272]

The doctrine of intensity functions so the reasonableness of a restriction varies according to the degree of social obligation that encumbers the property.[273] Social obligation allows restrictions on private property that are bearable and not unreasonable.[274] "The unbearableness of a harsh limitation of ownership in the sense of the unreasonableness theory reveals itself as proof that this restriction has exceeded the boundaries of social obligation, becoming an expropriative intrusion against property."[275] In order to determine what is unbearable and what is reasonable, the Federal Administrative Court attempts to assess the burden, the impact, and the intensity of a particular restriction.[276] The United States participates in a similar analysis by examining the economic impact of a regulation on the property owner, the extent to which the regulation has interfered with the owners investment backed expectations, and the character of the action involved.[277] The German assessment of the burden, impact, and intensity mirror the *Penn Central* factors in the United States. Hence, the analysis in both the United States and in the Federal Administrative Court of Germany begin with the balancing of the burden on the property owner with the interests of the state or society. However, because Germany's courts are not in agreement as to the use of the doctrine of intensity, the country employs three additional doctrines to determine whether the infringement by the government has crossed the line from taking property in conjunction with one's social obligation to expropriation.[278]

2. *The Doctrine of Individual Sacrifice*

One of the additional tests applied in a German takings analysis is the doctrine of individual sacrifice (Sonderopfertheorie)[279] which is used by the Federal Supreme

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270. Kimminich, *supra* note 129, at 87 (discussing the doctrine of intensity and the need for a dividing line between expropriation and social obligation in order to determine when compensation must be paid).

271. *See* LUNDMARK, *supra* note 263, at 232.

272. *See id.* (the test attempts to assess the burden, impact, or intensity of a restriction on a particular piece of property).

273. *See id.* ("social obligation of ownership means that the owner must, without compensation, accede to restrictions that are common, satisfactory, and reasonable").

274. *See id.*

275. *Id.*

276. *See id.* at 287 (comparing diminution of value with the reasonableness test).

277. *See* Penn Cent. Transp. Co. v City of New York, 438 U.S. 104, 124 (1978).

278. *See* Kimminich, *supra* note 129, at 87-88. (discussing the Federal Supreme Court's development of the "doctrine of individual sacrifice"). The Federal Administrative Court repudiated the "doctrine of individual sacrifice" and adheres to the "doctrine of intensity." *Id.* at 87. Finally, both courts adhere to the "doctrine of situational commitment." *Id.* at 88.

279. *See* LUNDMARK, *supra* note 263, at 226 (translating Sonderopfertheorie as Special Sacrifice Test).

Court (Bundesgerichtshof).[280] It characterizes expropriation as a "breach of the principle of equality because it forces [the individual property owner] to make a special sacrifice."[281] Thus, a taking exists if a restriction constitutes a "special sacrifice" for one owner and other owners similarly situated are not also burdened.[282]

Though on its face the idea of individual sacrifice seems to contradict the Takings Clause, the U.S. Supreme Court made a similar pronouncement regarding the priorities of individual rights and public duties.[283] In *Armstrong v. United States,* and *Nollan v. California Coastal Commission,* the Court stated the purpose of the Takings Clause was to "bar government from forcing some people alone to bear the public burdens which, in all fairness and justice, should be borne by the public as a whole."[284] What is not explicitly stated in this quotation is implied through reference to the Takings Clause. One person should not be required to bear a public burden "without just compensation."[285] Therefore, the doctrine of individual sacrifice, in Germany, allows the government to require a person to give up his or her individual property rights if they conflict with the public welfare so long as compensation is paid.[286] Similarly, the United States may require an individual to give up his or her property rights to protect the health, safety, morals, and general welfare of the public under the exercise of police power.[287] Though these doctrines are similar, differences surfaces as to when compensation is due by each government.

In the United States, valid acts of the police power do not require just compensation.[288] In Germany, administrative measures classified as an actualization of the social obligation of property do not require just compensation.[289] The social obligation theory appears to be the equivalent of the exercise of police power in the United States. However, in contrast, it appears the principle of sacrifice requires compensation any time an individual sacrifices his or her specific rights or

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280. *See* Kimminich, *supra* note 129, at 87; *see also* LUNDMARK, *supra* note 263, at 226. The doctrine of individual sacrifice is criticized because "special sacrifice" is seen merely as another expression for "unfair." *Id.*

281. Kimminich, *supra* note 129, at 87 (discussing the "historic" Federal Court decision on June 10, 1952 and the criticism of the doctrine due to its reliance on formal criterion); *see also* David, *supra* note 225, at 317 ("the principle of sacrifice states that if individual rights and benefits clash with public welfare rights and duties, the latter must take priority over the former; however, the state must compensate those who sacrifice their special right or advantages for the common good").

282. *See* LUNDMARK, *supra* note 263, at 226-27 (noting that "in effect, the special sacrifice test holds that all such limitations, no matter how harsh, are constitutional as long as they affect all similarly situated property owners equally").

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

284. *Id.*; *see also* Nollan v. California Coastal Commission, 483 U.S. 825, 834 n.4 (1987).

285. U.S. CONST. amend. V.

286. *See* LUNDMARK, *supra* note 263, at 289 (stating that "the payment of compensation is seen as the constitutionally required mechanism to restore the balance of equality among landowners").

287. *See supra* notes 17-18 and accompanying text; *see also* David, *supra* note 225, at 317; Kimminich, *supra* note 129, at 87-88.

288. *See* Hetzel and Gough, *supra* note 8, at 222 ("Unlike the power of eminent domain, an exercise of the police power does not require government compensation for its acquisition of, or imposition on, private property").

289. *See* Kimminich, *supra* note 129, at 86.

advantages for the common good.[290] If this is the case, the doctrine of individual sacrifice requires compensation regardless of where the line is drawn between the fulfillment of one's social obligation to property and expropriation.[291] Thus, if the United States adhered to a doctrine similar to the doctrine of individual sacrifice, a restriction based on the government's police power would trigger compensation.

3. *The Doctrine of Situational Commitment*

Another test applied in Germany to determine if a taking exists has been accepted by both the Federal Administrative Court and the Federal Supreme Court as a solution to the issue of equality found in both the doctrine of intensity and the doctrine of individual sacrifice.[292] The doctrine of situational commitment or situational limitations (Situationsgebundenheit)[293] rests upon the fact certain objects of property are "by nature burdened with a greater amount of social obligation than others."[294] Therefore, a property owner must take encumbrances burdening their property as part of the social obligation of ownership.[295] The doctrine's application is frequently seen in the areas of zoning and planning law, pollution control, conservation of nature, and the protection of historic sites.[296]

Although in the United States there does not appear to be a doctrine which is the exact equivalent to the doctrine of situational commitment, the U.S. Supreme Court in *Penn Central* used similar reasoning. In *Penn Central,* the Court found that although UGP Properties was not permitted to construct a multi-story office building on top of the terminal, the owner still enjoyed one reasonable use of his property so a taking had not occurred.[297] In making the determination that a taking did not occur when construction was prohibited on a landmark located on private property, the

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290. *See* David, *supra* note 225, at 317 (noting that the principle of sacrifice was codified in the Prussian General Land Law of 1794 and is considered no longer valid); *but see* Kimminich, *supra* note 129, at 87 (discussing the Federal Courts use of the doctrine of individual sacrifice).

291. *See* LUNDMARK, *supra* note 263, at 221-24 (describing the implementation of reimbursement for individual sacrifices which cause hardship). Notice that the idea of content regulation requiring reimbursement is not the same as a taking requiring compensation. *Id.*

292. *See* Kimminich, *supra* note 129, at 88 n.47 (stating that actualization of the social obligation burdens only a limited number of property owners).

293. *See* LUNDMARK, *supra* note 263, at 228.

294. Kimminich, *supra* note 129, at 88. This doctrine establishes "that the protected sphere of property rights cannot be determined by abstract reasoning; it requires that the owner's legal position be alterable, depending upon the settling and environment in which the property is located." *See id.* (citing Rudolf Dolzer, *Property and Environment: The Social Obligation Inherent in Ownership, in* IUCN ENVIRONMENTAL POLICY AND LAW PAPER NO. 12 25 (1976); *see also* LUNDMARK, *supra* note 263, at 228. "Every parcel is encumbered by its location, features, and function in nature. In other words, it bears the stamp of its 'situation.'" *Id.*

295. *See* LUNDMARK, *supra* note 263, at 228 (noting that the situational limitations placed on an owners property, "impose immediate constraints on the owner's rights of use and disposition" of the property).

296. *See* Kimminich, *supra* note 129, at 88.

297. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 104 (1978) (stating that "appellants cannot establish a "taking" simply by showing that they have been denied the ability to exploit the super-jacent airspace, irrespective of the remainder of appellants' parcel").

Court in essence found that the Terminal was burdened with a greater amount of social obligation than other private property due to its landmark status. Thus, the use of the remaining property is reasonable for the property owner, because he is still gaining revenue from the Terminal and is also reasonable for the locality, because it preserves a landmark site for the benefits of the public. Therefore, the U.S. Supreme Court seems to burden owners of historic landmarks with higher social obligations, similar to Germany's use of the doctrine of situational commitment, which is based solely on the nature of the property.

4. The Private Use Test

The final approach to the balancing of an individual's social obligation with the taking determination is the private use test (Privatnuzigkeitstheorie).[298] The Federal Supreme Court, the Federal Administrative Court, and the Federal Constitutional Court, with variations, use the Privatnuzigkeitstheorie.[299] This test states it is constitutionally permissible "to prohibit a proposed future use of property 1) the present use of the property is profitable, 2) the property has never been put to the proposed use; and 3) if the proposed use would not be compatible with the location or conditions of the property."[300] The private use test is unlike anything considered by the United States because it looks solely to the property to determine the constitutionality of taking the property, and not to the individual property owner.

D. Just Compensation

In both Germany and the United States the taking of property requires payment of compensation.[301] The key legal issue in the determination of compensation is whether the impact on an individual's land constitutes a taking or merely a determination of the content or social obligation of property rights.[302] Such a determination in the United States would be a valid exercise of the police power.[303] In the United States, the just compensation element of the Takings Clause acts as the

298. *See* LUNDMARK, *supra* note 263, at 229 (stating that the private use test is an improvement by the Federal Supreme Court of their situational limitations test).

299. *See id.* at 230.

300. *Id.* at 229-30 ("The dividing line between social obligation and expropriation or content regulation is always traversed if the private use of the subject property is destroyed as a result of permanent limitations in use").

301. *See* NOVAK ET. AL., *supra* note 13, § 4.4, at 35 (establishing that the "cardinal rule of condemnation is the requirement of just compensation"); *see also* Kimminich, *supra* note 129, at 89 (setting forth the unequivocal rule as requiring compensation for an expropriation).

302. *See* David, *supra* note 225, at 319 (discussing when compensation is an issue in Germany's expropriation analysis). "The constitutional protection of property rights . . . result[s] in the necessity of distinguishing between those restrictions or infringements imposed by government regulations or actions on private property rights that require compensation, and those that do not." *Id.* at 327.

303. *See id.*

only restriction on the governments eminent domain power.[304] However, in Germany, the taking of private property is also restricted by the contents and limits clause of Article 14.[305] Therefore, according to Article 14(3), a law that results in a taking of private property is constitutional only if the law simultaneously regulates the type and amount of compensation.[306] The regulation of compensation is found in several statutory provisions for regulatory interference with property rights.[307] In contrast, in the United States, just compensation is the fair market value of the property that has been taken considering the property in its totality.[308] Consequently, though both Germany and the United States require compensation to be paid for the taking of property, the United States depends on case law to determine if the action amounts to a taking while Germany focuses on statutory provisions.[309]

V. CONCLUSION

Although foundations for constitutionally protected property rights in the United States and Germany were based on the works of two different philosophers, in application, the two countries tend to focus on the same aspects of property ownership. While both countries require that property rights be constitutionally guaranteed, Germany and the United States also allow regulation of private property in order to benefit the public. The German Constitution explicitly states this social obligation, while the United States uses case law to discern the authority granted to the government in its police power. Under both practices, property may be infringed upon so long as it is legitimately based on a benefit to the public. Germany and the United States are also similar in the requirement that if the regulation of property crosses over the line between a justified act of the police power and the fulfillment of one's social obligation, the property has been taken. Once property is taken, compensation is required. Thus, both Constitutions declare that the right to property and the protection from unauthorized takings is a fundamental right.

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304. *See* Katharina Richter, *Compensable Regulation in the Federal Republic of Germany*, 5 ARIZ. J. INT'L. & COMP. L 34, 46 (1988). "The Fifth Amendment is not designed to limit the governmental interferences with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." First English Evangelical Church of Glendale v. Los Angeles, 107 S.Ct. 2378, 2386 (1987) (emphasis supplied).

305. *See supra* notes 173-86 and accompanying text.

306. *See* Grundgesetz art. 14(3)(F.R.G.); *see also* Richter, *supra* note 304, at 52 (noting that regulatory restrictions that are severe are valid under the "savings clause" of Article 14(3) because the Baugesetzbuth (BauGB), federal zoning legislation, sets forth the types and amount of compensation to be paid).

307. Richter, *supra* note 304, at 52 ("BauGB §§ 39-44 require damages for a loss or reduction of the value of property resulting from local land use decisions which fall short of an actual physical taking of property").

308. *See supra* notes 35, 108-24 and accompanying text.

309. *See* Richter, *supra* note 304, at 52-61 (outlining that statutes which require compensation for a reduction in the value of property due to a regulation).