MEMORIAL:
DAVID CURRIE AND GERMAN CONSTITUTIONAL LAW

Republication - Lochner Abroad: Substantive Due Process and Equal Protection in the Federal Republic of Germany

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[Editors' Note: This article originally appeared as David P. Currie, Lochner *Abroad: Substantive Due Process and Equal Protection in the Federal Republic of Germany*, 1989 SUPREME COURT REVIEW 333-372 (1989). It is republished here with the permission of the editors of the *Supreme Court Review*, the University of Chicago Press and Professor Currie's family.]

> [T]here exists some strange misconception of the scope of this [due process] provision. . . . [I]t would seem, from the character of many of the cases before us, and the arguments made in them, that the clause. . . is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant. . . of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded.[1]

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[1] Davidson v. New Orleans, 96 U.S. 97, 104 (1878) (Miller, J.). This and other American decisions noted in this article are discussed in Currie, The Constitution in the Supreme Court: The First Hundred Years

A. Introduction

As Justice Miller's famous lament suggests, wishful thinkers have sought since the beginning to find a way of making the United States Supreme Court ultimate censor of the reasonableness of all governmental action. Justice Chase thought he had discovered the magic wand in natural law,[2] Justice Bradley in the Privileges or Immunities Clause,[3] Justice Goldberg in the Ninth Amendment.[4] Miller battled bravely, but he had lent significant support to the enemy with his freewheeling opinion in *Loan Association v. Topeka*.[5] The fire was kept flickering in dissent[6] and in majority opinions upholding laws against due process and equal protection challenges only because they were reasonable.[7] It burst into full flame in *Lochner v. New York*[8] in 1905, and for the next quarter century the Supreme Court was indeed what Justice Miller had denied it should be: ultimate censor of the reasonableness of all governmental action.[9]

In the mid-1930s substantive due process went into eclipse. As Justice Stone predicted in his celebrated footnote,[10] for the next half century the Supreme Court limited itself largely to enforcement of the specific provisions of the Bill of Rights, protection of the integrity of the political process, and defense of discrete and insular minorities.[11]

(1985) (cited below as The First Hundred Years), and Currie, The Constitution in the Supreme Court: The Second Century (forthcoming Univ. of Chicago Press 1990) (cited below as The Second Century).

[2] Calder v. Bull, 3 Dall. 386, 387(1798) (separate opinion). 0-226-09571-1/90/1989-0011$02.00

[3] Slaughter-House Cases, 83 U.S. 36, 116—24(1873) (dissenting opinion).

[4] Griswold v. Connecticut, 381 U.S. 479,486—93(1965) (concurring opinion).

[5] 87 U.S. 655 (1875).

[6] *E.g.*, Munn v. Illinois, 94 U.S. 113, 136—54(1877) (Field, J.).

[7] *E.g.*, Mugler v. Kansas, 123 U.S. 623, 661—72 (1887); Missouri Pac. Ry. v. Mackey, 127 U.S. 205, 208—10 (1888).

[8] 198 U.S. 45.

[9] *See* THE FIRST HUNDRED YEARS, chs. 2, 4, 5, 7.

[10] United States v. Carolene Products Co., 304 U.S. 144, 152—53 n.4 (1938).

[11] *See generally* THE SECOND CENTURY, chs. 8—16.

https://doi.org/10.1017/S2071832200000821 Published online by Cambridge University Press

In the days of Chief Justice Warren, however, general reasonableness review began a cautious comeback—sometimes without much attention to the textual basis of the decision[12] or behind such smoke-screens as cruel and unusual punishment[13] and the "penumbras" of actual constitutional provisions.[14] The once dreaded specter of substantive due process was trotted out of the closet in *Roe v. Wade*,[15] while serious enforcement of the equality principle was extended beyond race to other more or less "suspect" classifications such as sex, alienage, and illegitimacy,[16] and to those affecting such "fundamental" interests as voting, free expression, and interstate travel.[17]

So far the genie has been kept partly in the bottle by the Court's relative restraint in defining what is suspect or fundamental. Justice White may have sounded a welcome call for retreat with his reminder that "the Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."[18] Yet the debate over general judicial oversight is far from over, despite the once apparent finality of the New Deal resolution. It may therefore prove enlightening to examine the experience of another modern nation with somewhat similar constitutional traditions in wrestling with the same issue—the Federal Republic of Germany.

The Basic Law (Grundgesetz) of the Federal Republic was forty years old in 1989. It establishes a democratic federal state with a parliamentary system, judicial review by independent judges, and a bill of rights.[19] In many fundamental respects it is similar to the Constitution of the United States, and the resemblance is not purely

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[12] *E.g.*, Slochower v. Board of Higher Education, 350 U.S. 551, 558—59(1956). See also the earlier decision in Wieman v. Updegraff, 344 U.S. 183, 190—92 (1952).

[13] Robinson v. California, 370 U.S. 660, 666—68 (1962).

[14] Griswold v. Connecticut, 381 U.S. 479, 484—86(1965).

[15] 410 U.S. 113, 152—56 (1973).

[16] Craig v. Boren, 429 U.S. 190 (1976); Graham v. Richardson, 403 U.S. 365 (1971); Levy v. Louisiana, 391 U.S. 68 (1968).

[17] Reynolds v. Sims, 377 U.S. 533 (1964); Carey v. Brown, 447 U.S. 455 (1980); Shapiro v. Thompson, 394 U.S. 618 (1969).

[18] Bowers v. Hardwick, 478 U.S. 186, 194 (1986).

[19] Art. 1—20, 28, 93, 97, 100(1) GG.

coincidental.[20] At the same time there are a great many differences in detail, which help to make the Basic Law a fertile field for comparative study.

The Bill of Rights (Grundrechtskatalog) is central to the Basic Law.[21] It is more detailed than ours. In addition to familiar articles guaranteeing freedom of religion (Art. 4) and expression (Art. 5) and the sanctity of the home (Art. 13),[22] there are specific provisions codifying some of the rights our Supreme Court has protected under more open-ended provisions: marriage and the family (Art. 6), private schools (Art. 7), travel (Art. 11), occupational freedom (Art. 12). I shall discuss some of these latter provisions at the outset. More interesting from the standpoint of the judicial function are decisions of the German Constitutional Court (Bundesverfassungsgericht) doing what our Supreme Court did in *Lochner*: protecting additional substantive rights on the basis of general provisions that correspond to our Due Process and Equal Protection Clauses.

There are several such provisions. Article 2(2) contains a general guarantee of life, limb, and (physical) liberty.[23] Article 14 not only imposes familiar limits on condemnation but also includes a general guarantee of property. Article 3 provides both general and specific assurances of equality. Article 1, which is commonly described as the central provision of the entire constitution[24] and which is explicitly protected from amendment,[25] declares that "[t]he dignity of man shall be inviolable." Most interesting of all for present purposes is Article 2(1)'s enigmatically phrased right to "free development of personality," which has been interpreted to embrace everything not dealt with more specifically elsewhere.

From these open-ended provisions, in conjunction with even more general conceptions derived from other articles of the Basic Law—in particular the "social state"

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[20] *See, e.g.*, STEINBERGER, 200 JAHRE AMERIKANISCHE BUNDESVERFASSUNG 32—39 (1987); GOLAY, THE FOUNDING OF THE FEDERAL REPUBLIC OF GERMANY (1958), *passim*.

[21] *See, e.g.*, SCHULZ, URSPRÜNGE UNSERER FREIHEIT 217 (1989), citing remarks by Carlo Schmid in the debates of the constitutional convention.

[22] *See also* Art. 8 (freedom of assembly), 9 (freedom of association), 10 (privacy of telecommunications), 17 (right of petition).

[23] Detailed procedural protections for those taken into custody or accused of crime are provided in Articles 103 and 104.

[24] *See, e.g.*, 6 BVerfGE 32, 41 (1957); Häberle, *Die Menschenwürde als Grundlage der Staatlichen Gemeinschaft*, *in* 1 HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 815, 860 (Isensee & Kirchhof eds., 1987) (cited below as HANDBUCH DES STAATSRECHTS).

[25] Art. 79(3) GG.

(Sozialstaat) and what may be literally but incompletely translated as the rule of law (Rechtsstaat)[26]—the Constitutional Court has fashioned a set of tools that constitute it as that which, notwithstanding Justice Miller's warning, our Supreme Court was for the first third of this century: ultimate censor of the reasonableness of governmental action.

B. Marriage, the Family, and Private Schools

"Marriage and the family," says Article 6(1), "shall enjoy the special protection of the state." The paragraphs that follow contain specific provisions for parents and children, motherhood, and persons born out of wedlock. Thus Article 6 provides explicit protection for some of the interests our Supreme Court has accorded the benefits of heightened scrutiny under the Fourteenth Amendment.[27]

Article 6 is commonly applied in conjunction with the general equality provision of Article 3 to assure intensive scrutiny of classifications disfavoring marriage or the family.[28] Sometimes Article 6 is applied independently to strike down discrimination against the classes it protects, as a more specific equality provision. Married couples may not be assessed higher income taxes than if they were single; [29] orphans may not be denied welfare benefits simply because they are married;[30] a broker who helps a prospective renter find an apartment may not be denied a fee because she is married to the landlord's manager.[31]

Although Article 6(5) appears to entrust protection of illegitimates to the legislature,[32] it was understood from the beginning to embody a principle that bound the

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[26] *See* Art. 20, 28 GG.

[27] *See*, *e.g.*, Moore v. City of East Cleveland, 431 U.S. 494 (1978); Zablocki v. Redhail, 434 U.S. 374 (1977); Levy v. Louisiana, 391 U.S. 68 (1968).

[28] *See* text at notes 266—67.

[29] 6 BVerfGE 55, 70—84 (1957).

[30] 28 BVerfGE 324, 347—61 (1970). *See id*. at 356, finding in Art. 6(1) a "strict prohibition of differentiation respecting government benefits according to family status alone."

[31] 76 BVerfGE 126, 128—30 (1987). *See id*. at 128: "Article 6(1) forbids [the state] to disadvantage married persons simply because they are married."

[32] "Illegitimate children shall be provided *by legislation* with the same opportunities. . . as are enjoyed by legitimate children." Not until 1969, under a threat by the judges to implement article 6(5) themselves, did the legislature comply with its mandate. See 25 BVerfGE 167, 172— 88 (1969); BGBI. I, 1243 (1969). *Cf.* Art. 117(1) GG, which provided a four-year grace period for legislative correction before Article 3's provisions for sex equality became enforceable. See 3 BVerfGE 225 (1953), discussing these latter provisions.

courts in their interpretation of existing laws,[33] and more recently the Court has begun to determine the consistency of statutory measures with the constitutional provision itself.[34] In accordance with its language, Article 6(5) has been held not only to limit outright discrimination against illegitimates[35] but also to justify[36] and even to require[37] special privileges to compensate for the disadvantages with which illegitimates are saddled; for otherwise they could not enjoy the actual equality of opportunity to which Article 6(5) entitles them.

The rights conferred by Article 6, moreover, go beyond mere protection against discrimination. Article 6(1) has been interpreted to permit parents who are separated to opt for joint custody of their children[38] and to allow people to visit relatives in jail. [39] Article 6(2)'s guarantee of parental rights has been read to ensure parents a significant role in determining which school their children attend and what course of study they pursue[40] as well as access to information about their educational performance.[41] Furthermore, in the course of concluding that the excusable failure of a pregnant woman to meet a statutory deadline for notification did not justify denying her immunity from loss of employment, the Constitutional Court strongly hinted that Article 6(4)'s provision for the protection and care of mothers might require the state to provide such immunity if it did not do so on its own.[42]

Article 7, which establishes the framework for public and private education in the Federal Republic, explicitly guarantees "the right to establish private schools" (Art.

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[33] *See* 8 BVerfGE 210, 217 (1958).

[34] See, *e.g.*, 44 BVerfGE 1, 22 (1976).

[35] *E.g.*, 74 BVerfGE 33, 38—43(1986) (inheritance). *Cf.* the line of cases beginning with Levy v. Louisiana, 391 U.S. 68 (1968).

[36] *See* 17 BVerfGE 280, 283—86 (1964) (longer period of child support from father).

[37] *See* 8 BVerfGE 210, 214—21 (1958) (judicial proceeding to establish paternity).

[38] 61 BVerfGE 358, 371—82(1982) (insisting upon a "particular" (besondere) justification for such a limitation of parental rights and finding none). See also 36 BVerfGE 146, 161—69(1973) (marriage may not be forbidden because of husband's previous sexual relationship with bride's mother). In either of these cases the court could have reached the same result on equality grounds but did not.

[39] 42 BVerfGE 95, 100—103 (1976).

[40] 34 BVerfGE 165, 182—99(1972).

[41]59 BVerfGE 360, 381—82 (1982).

[42] 52 BVerfGE 357, 366 (1979). See Art. 6(4) GG: "Every mother shall be entitled to the protection and care of the community."

7(4)).[43] Like the various provisions of Article 6, this paragraph has been invoked to justify intensive scrutiny of classifications affecting the exercise of the right.[44] More notable when viewed from this side of the Atlantic was the conclusion in the same case—in the teeth of contrary legislative history that informed the first half of the opinion—that Article 7(4) required the state to subsidize private schools. Otherwise, said the Court, the explicit right to establish such schools would be hollow; for the requirement of the same paragraph that private institutions not promote "segregation of pupils according to the means of the parents" made it impossible for them to survive without public support.[45]

As some of these examples suggest, Articles 6 and 7 are among several provisions of the Basic Law that have been held to create not merely traditional rights against government intrusion (Abwehrrechte) but positive governmental duties to protect or support the individual (Schutzpflichten) as well. Other examples will be noted as we proceed, but despite their striking contrast with the prevailing understanding of our Constitution[46] they are not the principal focus of this paper.[47] What is most significant for present purposes is that Articles 6 and 7 explicitly codify some of the rights our Supreme Court has found to be "fundamental" for due process and equal protection purposes and thus add legitimacy to judicial review of governmental action affecting private education and the family.

C. Property

"Property and inheritance," says Article 14(1), "are guaranteed." Their "content and limits" are determined by statute (*id.*). "Property imposes duties," and its "use

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[43] *Cf.* Pierce v. Society of Sisters, 268 U.S. 510(1925) (finding such a right protected by the Due Process Clause). For special limitations on private elementary schools in Germany, see Art. 7(5) GG.

[44] See 75 BVerfGE 40, 69—78 (1987), finding preferential treatment of religious schools and the exclusion of subsidies for adult education contrary to Art. 7(4) in conjunction with Art. 3.

[45] *Id.* at 58—66. Contrast the Court's conclusion, 20 BVerfGE 56, 96—112(1966), that general subsidies for political parties were inconsistent with Article 21(I)'s guarantee of party autonomy. Our Supreme Court is keenly aware of the danger that conditional subsidies can pose to individual freedoms (*see* Speiser v. Randall, 357 U.S. 513(1958)), but it has refused to outlaw spending itself simply because the power might sometime be abused. *See* Buckley v. Valeo, 424 U.S. 1(1976). There is some truth in the arguments that underlie both the private school and political party decisions; but there is a certain tension between the conclusions that subsidies are constitutionally forbidden and that they are constitutionally required.

[46] *Cf.* DeShaney v. Winnebago County Department of Social Services, 109 S. Ct. 988(1989); Harris v. McRae, 448 U.S. 297 (1980).

[47] For discussion of affirmative government duties under the two constitutions, *see* Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864(1986).

should also serve the public weal" (Art. 14(2)). Condemnation is permitted only for the public good and pursuant to statutes providing just compensation (Art. 14(3)).

The right to property occupies a prominent position in German constitutional law. The Constitutional Court put the point most plainly in an important 1968 opinion:[48]

> Property is an elementary constitutional right that is closely connected to the guarantee of personal liberty. Within the general system of constitutional rights its function is to secure its holder a sphere of liberty in the economic field and thereby enable him to lead a self-governing life. . . . The guarantee of property is not primarily a material but rather a personal guarantee.

Thus property rights are by no means relegated to an inferior position in West Germany, as they have been in the United States.[49] Economic independence is understood to be essential to every other freedom,[50] and property rights are taken very seriously. The explicit constitutional references to the social obligations of property have been held to permit considerable regulation. Article 14 has nevertheless been applied not only to prevent unjustified takings in the narrow sense but also to prevent unreasonable limitations of property rights that fall short of a traditional taking.

I. Takings

The Constitutional Court has made clear that takings cannot be justified simply by providing adequate compensation. Article 14 is basically a guarantee of property itself, not of its equivalent in money.[51] Consequently the Court has scrutinized at-

[48] Hamburg Flood Control Case, 24 BVerfGE 367, 389,400 (1968).

[49] *Contrast* Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) ("preferred position" for First Amendment rights); Kovacs v. Cooper, 336 U.S. 77, 95—96 (1949) (Frankfurter, J., concurring) ("those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements"). This is not to deny that even in Germany there are subtle differences in the levels of judicial scrutiny according to how intimately the right in question is bound up with the development of personality. *See* Denninger, *Art. 1, in* I KOMMENTAR ZUM GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND Para. Nr. 11, 14 (Schmidt-Bleibtreu and **Luchterhand eds.,** 1984) (cited below as Luchterhand), and cases cited.

[50] *Cf.* HAYEK, THE ROAD TO SERFDOM 103—4(1944).

[51] *See* 24 BVerfGE 367, 400 (1968).

tempted takings carefully to ensure that constitutional limitations other than the compensation provision have been observed.

The requirement that condemnation be authorized by statute (Gesetzesvorbehalt) reflects a fundamental principle that we shall encounter repeatedly in the course of this journey: Individual rights may be restricted, if at all, only in accordance with laws made by the popularly elected legislature. This principle is by no means unknown to Anglo-American law. It informed Justice Black's monumental opinion for the Supreme Court in *Youngstown Sheet & Tube Co. v. Sawyer*,[52] and it represents an early and often neglected aspect of the Due Process Clauses.[53] In Germany it is explicit in a number of bill of rights provisions, and it has been found implicit as a general principle in the rule of law.[54] When takings have been attempted without adequate statutory authority, they have been struck down.[55]

There have been few decisions of the Constitutional Court on the question of what constitutes the "public weal" (Wohl der Allgemeinheit) for which private property may be taken. On its face the term is broader than the "public use" formulation that American courts have so generously construed.[56] The Constitutional Court had no difficulty in upholding takings for the purpose of refugee settlement [57] and the transmission of private power to serve the general public.[58] More interesting challenges were posed by cases involving a private cable car for recreational purposes[59]

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[52] 343 U.S. 579, 582—89 (1951).

[53] *See id*. at 646 (Jackson, J., concurring) (arguing that the President's duty to take care that the laws be faithfully executed and the Due Process Clause "signify about all there is of the principle that ours is a government of laws, not of men": "One [clause] gives a governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no farther"); Corwin, *The Doctrine of Due Process of Law before the Civil War*, 24 HARV. L. REV 366 (1911).

[54] *See* 49 BVerfGE 89, 126 (1978): "The general principle that lawmaking authority is reserved to the legislature (Gesetzesvorbehalt) requires a statutory basis for executive acts fundamentally (wesentlich) affecting the freedom and equality of the citizen."

[55] 56 BVerfGE 249, 261—66 (1981) (cable car); 74 BVerfGE 264, 284—97 (1987) (automobile test track).

[56] *See*, *e.g.*, Berman v. Parker, 348 U.S. 26 (1954); Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984).

[57] 46 BVerfGE 268, 288—89 (1977).

[58] 66 BVerfGE 248, 257—59 (1984), explaining (at 257) that condemnation on behalf of a private enterprise was permissible at least "when the enterprise [was] subject to a statutory obligation promoting the general welfare and. . . conducted for the benefit of the public."

[59] 56 BVerfGE 249 (1981).

and a test track for a private automaker.[60] The first provoked a strongly worded separate opinion deploring years of inattention to the public weal requirement; [61] approval in the second might seriously erode the distinction between private and public interest.[62] Both cases, however, went off on the ground of lack of statutory authority; the limiting case has yet to be decided.[63]

The Constitutional Court has also had little to say on the question of what constitutes just compensation. Article 14 provides that compensation is to be determined by "an equitable balance" between public and private interests;[64] not surprisingly, the Court has taken this to mean that full market value is not necessarily required.[65] More strikingly, the requirement that the statute itself provide for compensation has led the Constitutional Court to reject entirely the familiar American doctrine of inverse condemnation. If government action has the effect of taking property without compensation, the remedy is disallowance, not damages; for otherwise the state would have to pay compensation the legislature had not authorized, contrary to the constitutional allocation of powers.[66] The Constitutional Court therefore tests laws regulating property not under the taking provisions but for their consistency with

[60] 74 BVerfGE 264 (1987).

[61] 56 BVerfGE at 266, 269—95 (separate opinion of Böhmer, J.), concluding (at 287) that the condemnation in question was "for the benefit of a private undertaking designed solely for private profit." For Justice Böhmer's narrow view of the permissible scope of condemnation for private companies, see *id.* at 293.

[62] *Cf.* Charles Wilson's notorious comment that "what's good for General Motors is good for the country." The argument in the German case was that the test track (for Daimler-Benz) would create jobs and stimulate the economy. "Condemnation for the benefit of private persons. . . that serves the public weal only indirectly and presents an enhanced danger of abuse to the detriment of the weak," the Court observed, "poses particular constitutional problems." 74 BVerfGE at 287.

[63] *See generally* Papier, *Art. 14*, *in* 2 GRUNDGESETZKOMMENTAR Para. Nr. 495—509 (Maunz, Dürig, *et al.* eds., rev. to 1989) (cited below as Maunz/Dürig).

[64] *See* Art. 14(3) GG: "Die Entschädigung ist unter gerechter Abwägung der Interessen der Allgemeinheit und der Beteiligten zu bestimmen."

[65] *See* 24 BVerfGE 367, 420—22 (1968). For criticism of this conclusion *see* Leisner, *Eigentum*, *in* 6 HANDBUCH DES STAATSRECHTS § 149, Para. Nr. 180—83 (1989). For an introduction to the extensive jurisprudence of the civil courts on the question of the level of compensation, *see* Papier, *Art. 14*, in 2 Maunz/Dürig, Para. Nr. 510—60.

[66] *See* 4 BVerfGE 219, 230—37 (1955); 58 BVerfGE 300, 322—24 (1981). For discussion of the impact of the latter decision upon the civil courts' practice of awarding common-law or statutory compensation for wrongful takings, *see* Papier, Art. 14, in 2 Maunz/Dürig, Para. Nr. 597— 638; for criticism of the Constitutional Court's position, see Leisner, *in* 6 HANDBUCH DES STAATSRECHTS § 149, Para. Nr. 173—79.

the general guarantee of property;[67] and nonconfiscatory taxes are generally held not to be limitations on property at all.[68]

Even when the explicit requirements of statutory authority, public weal, and just compensation appear to be met, the Constitutional Court has made clear that condemnation is an exceptional remedy that may be employed only as a last resort. Property may not be taken until efforts to buy it on the open market have failed;[69] property that has been condemned reverts to its former owner when it is no longer needed.[70] Property thus may be condemned only when and to the extent necessary. These results might be justified by narrow interpretation of the explicit term "public weal."[71] It may be more appropriate, however, to view them as applications of the more general principles of proportionality and least burdensome means which—as we shall see—the Court has found implicit in the rule of law.[72]

II. Limitations on Property

Less familiar to those versed in American law than the limitations on actual takings imposed by Article 14(3) are the restrictions on regulation imposed by Article 14(1)'s assurance that "property. . . [is] guaranteed." The provision acknowledging the lawmakers' authority to determine the "content and limits" of property has not been taken to place property rights wholly at legislative disposal; the property guarantee is more than a mere Gesetzesvorbehalt. On the other hand, the further

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[67] The civil and administrative courts, on the other hand, have developed an extensive jurisprudence for determining when regulation amounts to a taking; the problem has proved as refractory in Germany as it has in the United States. *See* Papier, Art. 14, *in* 2 Maunz/Dürig, Para. Nr. 291—450, arguing (Para. Nr. 449) for a test based upon the severity of the restriction (*cf*. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)); Leisner, *in* 6 HANDBUCH DES STAATSRECHTS § 149, Para. Nr. 148—51, arguing that such a test should be complemented by special concern for those made to bear an undue share of the total burden (*Sonderopfertheorie*).

[68] *See*, *e.g.*, 4 BVerfGE 7, 17 (1954) (upholding a special assessment for relief of the troubled iron, steel, and coal industries). Compare the dictum that the state of Hessen could demand free copies of all books published there in the interest of improving its library—so long as the burden of doing so was not disproportionate to the profitability of the publication. 58 BVerfGE 137, 144—52 (1981). *See id*. at 144, explaining that, like a tax, the law imposed no duty to convey a particular piece of property to the government. *See also* HESSE, GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND Para. Nr. 447 (15th ed. 1985), arguing that taxation is the "exposed flank" of the property guarantee.

[69] 45 BVerfGE 297, 335 (1977).

[70] 38 BVerfGE 175, 185 (1974).

[71] *See* Leisner, *in* 6 HANDBUCH DES STAATSRECHTS § 149, Para. Nr. 170.

[72] *See* Papier, *Art. 14*, *in* 2 Maunz/Dürig, Para. Nr. 507—9.

provisions that "property imposes duties" and that "[i]ts use shall also serve the public weal" make clear that property rights are by no means absolute.[73] Not surprisingly in light of the competing public and private interests recognized by the Basic Law itself, the Constitutional Court has applied a balancing test in determining the permissible scope of limitations on property: Like condemnation measures, definitions and limitations of property must conform with the proportionality principle.[74]

As in the United States, the ownership of property does not include the right to cause a public nuisance; the state may prevent mining companies from depleting groundwater supplies[75] and may destroy dogs suspected of rabies.[76] But the social duties of property in Germany, like various public interests in this country, justify limitations that go far beyond the simple case of preventing affirmative harm to others. Renters may be protected from unusual or sudden rent increases[77] as well as against eviction[78] and the diversion of rental property to other uses.[79] Farm and forest lands may be protected against sales that appear detrimental to the interests of agriculture or forestry.[80] For the well-being of the wine industry, the legislature may forbid the growing of grapes on unsuitable soil.[81] To promote recreation it may establish associations to administer private fishing rights and distribute the profits to their former owners.[82] To assure an adequate and safe public water supply it may go so far as to abolish private rights to the use of groundwater, so

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[73] These clauses are viewed as concrete applications of the general Sozialstaat principle of Articles 20 and 28. They were derived from more intrusive limitations in Articles 153—55 of the Weimar Constitution of 1919, in which social provisions were far more prominent. *See* Schneider, *Die Reichsverfassung vom 11. August 1919*, *in* 1 HANDBUCH DES STAATSRECHTS §3, Para. Nr. 37—38 (1987).

[74] *See*, *e.g.*, 21 BVerfGE 150, 154—55 (1967).

[75] 10 BVerfGE89, 112—14 (1959).

[76] 20 BVerfGE 351, 355—62 (1966). *See also* 25 BVerfGE 112, 117—21 (1969) (upholding a prohibition of construction on dike lands). *Cf.* Mugler v. Kansas, 123 U.S. 623, 661—72 (1887); Miller v. Schoene, 276 U.S. 272 (1928). On the issue of flood-plain zoning in this country, see Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

[77] 37 BVerfGE 132, 139—43 (1974); 71 BVerfGE 230, 246—51 (1985). *Cf.* Block y. Hirsch, 256 U.S. 135 (1921).

[78] 68 BVerfGE 361, 367—71 (1985).

[79] 38 BVerfGE 348, 370—71 (1975).

[80] 21 BVerfGE 73, 82—85 (1967); 21 BVerfGE 87, 90—91 (1967); 21 BVerfGE 102, 104—5 (1967).

[81] 21 BVerfGE 150, 154—60 (1967).

[82] 70 BVerfGE 191, 199—213 (1985).

long as landowners are given a grace period in which to phase out existing uses.[83] To promote industrial peace and democracy it may give workers the right to participate in management decisions (codetermination)[84] — but so far, at least, only because the owners retain ultimate control.[85] It may even redefine the balance of public and private interests in copyrighted material retroactively, by shortening the statutory period of protection of already copyrighted works from 50 to 25 years. [86]

At the same time, however, the Constitutional Court has found in the general property guarantee substantive limits on regulation reminiscent of those imposed by our Supreme Court during the *Lochner* era. The public interest in protection of renters cannot justify depriving owners of the right to terminate garden leases[87] or to recapture rented premises for their own residential use.[88] The public interest in preserving a viable agricultural economy cannot justify prohibiting the purchase of agricultural land for investment purposes, [89] the breakup of large holdings as such,[90] or the use of trademarked place names on wine bottles.[91]

Of particular interest are decisions concluding, despite initial holdings to the contrary,[92] that government benefits may constitute property for purposes of Article 14.[93] This conclusion is reminiscent of the Supreme Court's position, in the line of

[83] 58 BVerfGE 300, 338—53 (1981). *Cf.* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

[84] 50 BVerfGE 290, 339—52 (1979) (stressing the social function and the impersonal nature of shareholder interests in industrial facilities).

[85] *Id.* at 351. *See* Papier, *Art. 14*, *in* 2 Maunz/Dürig, Para. Nr. 430, arguing that the power to decide how property is to be used is central to Art. 14 and thus that the owners must retain the last word. *Cf.* Trustees of Dartmouth College v. Woodward, 4 Wheat. 518 (1819).

[86] 31 BVerfGE 275, 284—85, 291—92 (1971). Retroactive redefinition of the date on which the period of protection began to run, however, was held impermissible. *Id.* at 292—95.

[87] 52 BVerfGE 1, 29—40 (1979).

[88] 68 BVerfGE 361, 374—75 (1985).

[89] 21 BVerfGE 73, 85—86 (1967).

[90] 26 BVerfGE 215, 221—28 (1969).

[91] 51 BVerfGE 193, 216—21 (1979).

[92] *E.g.*, 2 BVerfGE 380, 399—403 (1953) (compensation for victims of Nazi wrongs). Property, said the Court, did not include "claims that the state affords its citizens by statute in fulfillment of its duty to provide for their welfare," for if it did welfare laws could never be repealed. *Id.* at 402.

[93] *E.g.*, 16 BVerfGE 94, 111—18 (1963) (retirement benefits); 53 BVerfGE 257, 289—94 (1980) (same); 69 BVerfGE 272, 298—306 (1985) (health insurance). For justification of this development, *see* HESSE, Para. Nr. 443—45.

cases beginning with *Goldberg v. Kelly*,[94] that certain "entitlements" to state assistance are protected by the Due Process Clauses. The test for determining which benefits qualify as property mirrors the Supreme Court's insistence that the law give the claimant a right rather than leaving the matter to official discretion,[95] but the German cases are more restrictive; the benefits must also be based upon the claimant's own contributions and must be designed to provide minimum conditions for survival.[96]

The German decisions, however, do not merely insist upon a fair hearing before individuals are deprived of benefits that qualify as property. It is true that the Constitutional Court has found a requirement of fair procedure implicit in the substantive property guarantee. [97] But the decisions sometimes protect welfare rights against unreasonable legislative impairment as well. In one case, for example, the Court held that a new rule doubling the waiting period required to qualify for unemployment benefits could not constitutionally be applied to persons who had already satisfied the original requirement. [98] This is a step our Court has been unwilling to take, although we have had difficulty explaining why. Perhaps the answer is that the legislature meant to limit only administrative and not legislative

[94] 397 U.S. 254 (1970).

[95] *E.g.*, 63 BVerfGE 152, 174 (1983). *Cf.* Board of Regents v. Roth, 408 U.S. 564 (1972).

[96] *See* 69 BVerfGE 272, 300 (1985). *See id*. at 305—6 and 72 BVerfGE 9, 18—21 (1986), respectively applying this test to conclude that rights to medical and unemployment insurance constituted property. *Cf.* Snidach v. Family Finance Corp., 395 U.S. 337, 341—42 (1969) (limiting pretrial wage garnishment on due process grounds because garnishment of wages may "drive a wage-earning family to the wall").

[97] *See, e.g.*, 46 BVerfGE 325, 333—37 (1977) (transfer of property pursuant to judicial sale must be postponed to permit judicial challenge to adequacy of price); 53 BVerfGE 352, 358—61 (1980) (striking down unreasonable burden imposed upon landlord in showing that increased rent did not exceed prevailing rate). *Cf.* 35 BVerfGE 348, 36 1—63 (1973) (adequate opportunity for judicial review, including provision of counsel in cases of poverty, implicit in property provision). *Cf.* Mapp v. Ohio, 367 U.S. 643 (1961), and Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (both suggesting that judicial remedies may be implicit in substantive constitutional provisions).

[98] 72 BVerfGE 9, 22—25 (1986). As in the case of conventional property, limitations on existing rights are not forbidden outright. See, *e.g.*, 53 BVerfGE 257, 308—11 (1980) (permitting application of a new provision for division of retirement benefits on divorce to persons married under the old scheme, subject to an extended hardship clause); 69 BVerfGE 272, 304—07(1985) (upholding increase in cost of medical insurance for those already insured). Yet the Court has gone so far as to suggest that the property guarantee may require the state actually to *increase* benefits to counteract inflation, which reduces their real value. *See* 64 BVerfGE 87, 97—103 (1983) (holding that such adjustments need not be made annually). *Contrast* Legal Tender Cases, 79 U.S. 457 (1871) (rejecting due process challenge to inflationary issue of paper money); Atkins v. United States, 556 F.2d 1028 (Ct. Cls. 1977) (concluding that Article III's ban on reduction of judicial salaries did not require cost of living increases).

withdrawal of benefits; the legislature is after all still free under the American cases to define the substantive scope of the right.[99]

Most interesting from the American point of view is the 1971 decision of the Constitutional Court striking down a statute that authorized schools to use copyrighted material free of charge. [100] This decision was not based upon impairment of preexisting rights conferred by statute or common law. Rather the Court seems to have found the right to profit from the fruits of one's labors secured by the Constitution itself: "In accord with the property guarantee the author has in principle the right to claim compensation for the economic value of his work…"[101] The Constitution of the United States does not create property; the Due Process and Takings Clauses protect only against infringement of property rights created by other laws. [102] The copyright decision suggests that, like "liberty" in our Due Process Clauses,[103] property in the Basic Law has a dimension independent of ordinary law; Article 14, the Court seems to be saying, constitutionalizes the Lockean principle of *Pierson v. Post*.[104]

The text of the Basic Law lends support to this interpretation: Property is not merely protected against "deprivation" or "taking," it is "guaranteed." Of course the creator of economic values does not have an unlimited right to exploit them. The copyright decision itself, invoking the explicit legislative authority to determine the content and limits of property, acknowledged that the author's interests would prevail only "insofar as the interests of the general public do not take priority."[105]

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[99] For doubts as to whether an American legislature *could* bind itself not to revoke a welfare program, *see* Crenshaw v. United States, 134 U.S. 99, 104—8 (1890) (permitting Congress to repeal a law providing tenure for federal employees); Stone v. Mississippi, 101 U.S. 814, 815— 20 (1880) (permitting modification of a twenty-five-year charter to conduct a lottery on the ground that the state had no power to promise not to exercise its police power). If government benefits are based upon contract, however, they may be protected by the Contracts Clause of Art. I, §10 — though under recent decisions only against unreasonable legislative impairments. *See* United States Trust Co. v. New Jersey, 431 U.S. 1 (1977); Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) (striking down law impairing private pension contracts).

[100] 31 BVerfGE 229 (1971).

[101] *Id*. at 243. *See also id.* at 240—41 (defining "the essential elements of copyright as property within the meaning of the Constitution"); Rittstieg, *Art. 14/15*, *in* 1 Luchterhand, Para. Nr. 110a.

[102] *See* Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

[103] *See* Ingraham v. Wright, 430 U.S. 651, 672—74 (1977) (right to bodily integrity).

[104] 3 Cai. R. 175 (N.Y. Sup. Ct. 1805); *see* LOCKE, SECOND TREATISE OF GOVERNMENT 15 (Barnes & Noble ed. 1966).

[105] 31 BVerfGE at 243.

Indeed the same opinion held that the public interest justified permitting schools to use copyrighted material without the author's consent so long as adequate royalties were paid.[106] A later decision limited the applicability of Lockean theory by upholding a statute providing for state ownership of archeologicaldiscoveries,[107] and the Court in so holding seemed to say that the Constitution did not create property rights after all. [108] Whatever its current status or justification, however, the copyright case indicates one of several ways in which the German Constitutional Court has gone beyond current American practice in the constitutional protection of property.[109]

D. Occupational Freedom

Article 12(1) codifies the occupational freedom once recognized by the Supreme Court in such cases as *Lochner:*

> All Germans shall have the right freely to choose their trade, occupation, or profession, their place of work and their place of training. The practice of trades, occupations, and professions
> may be regulated by or pursuant to statute.

Like the right to property, occupational freedom is taken very seriously in Germany as an element of individual autonomy and an essential basis of other freedoms.[110]

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[106] *Id*. at 242.

[107] 78 BVerfGE 205, 211—12 (1988). *Cf.* the English common law of treasure trove, *noted in* CASNER & LEACH, CASES AND TEXT ON PROPERTY 35 (3d ed. 1984).

[108] 78 BVerfGE at 2l1, citing earlier cases: Art. 14(1) "guarantees only those rights which the owner already has."

[109] *See generally* Rittstieg, *Art. 14/15*, *in* 1 Luchterhand, Para. 37, concluding that the judges have become more protective of property interests since the early 1970s; Leisner, *in* 6 HANDBUCH DES STAATSRECHTS §149, Para. Nr. 102—17, 133—42, arguing that the Court has done too little to protect property.

[110] *See*, *e.g.*, 7 BVerfGE 377, 397 (1958): "[Article 12(1)] guarantees the individual more than just the freedom to engage independently in a trade. To be sure, the basic right aims at the protection of economically meaningful work, but it views work as a 'vocation.' Work in this sense is seen in terms of its relationship to the human personality as a whole: It is a relationship that shapes and completes the individual over a lifetime of devoted activity; it is the foundation of a person's existence through which that person simultaneously contributes to the total social product." *Cf.* text at note 48 *supra*, discussing property. In recent years our Supreme Court has not seen it that way. *See*, *e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955). Serious due process protection of the right to a livelihood in the United States has been limited to instances in which the individual's very existence was threatened, and then to a guarantee of fair hearing. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

The right extends to preparation for—as well as exercise of—an occupation.[111] Like property, it may be limited basically only in accordance with statute.[112] Even statutory limitations, moreover, have been subjected to sometimes demanding scrutiny under the pervasive proportionality principle, and quite a number of them have been struck down. Statutory limitations, moreover, have been subjected to sometimes demanding scrutiny under the pervasive proportionality principle, and quite a number of them have been struck down.

The leading case remains the seminal 1958 *Pharmacy* decision,[113] which established varying degrees of judicial review (Stufentheorie) according to the severity of the intrusion. To begin with, regulation of how a profession is practiced is easier to justify than limitation of entry into the profession itself: [114]

> The practice of an occupation may be restricted by reasonable regulations predicated on considerations of the common good. The freedom to choose an occupation, however, may be restricted only insofar as an especially important public interest compellingly requires. . .—[and] only to the extent that protection cannot be accomplished by a lesser restriction on freedom of choice.

Moreover, entry limitations such as educational requirements designed to protect the public from unqualified practitioners are easier to justify than those irrelevant to individual ability; and the desire to protect existing practitioners from competi-

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[111] *See, e.g.*, 33 BVerfGE 303 (1972) (striking down limits on admission to public universities). This case is discussed at notes 140—47 *infra*.

[112] For decisions invalidating limitations on occupational freedom not adequately authorized by statute, *see, e.g.*, 22 BVerfGE 114, 119—23 (1967) (disqualification of attorney); 38 BVerfGE 373, 380—85 (1975) (ban on deposit boxes for prescriptions in outlying areas); 41 BVerfGE251, 259—66 (1976) (expulsion from vocational school); 43 BVerfGE 79, 89—92 (1976) (ban on representation of codefendants by members of same law firm); 54 BVerfGE 224, 232—36(1980) (ban on doctors' discussing disciplinary proceedings with patients); 63 BVerfGE 266, 288—97 (1983) (exclusion of Communist from bar); 65 BVerfGE 248, 258—64 (1983) (requirement that price be marked on goods offered for sale). The Court has also made clear, however, that limitations may be based upon customary law existing before the adoption of the Basic Law in 1949. 15 BVerfGE 226, 233 (1962). *See also* Scholzin, *Art. 12*, *in* 1 Maunz/Dürig, Para. Nr. 315—16.

[113] 7 BVerfGE 377 (1958).

[114] *Id.* at 405.

tion, the Court said, could "never" justify an entry restriction.[115] On the basis of this calculus the Constitutional Court has achieved results reminiscent of those reached by the Supreme Court during the *Lochner* period.

As under the reign of *Lochner*,[116] a great many limitations of occupational freedom have been upheld—some of them rather intrusive. Compulsory retirement ages may be set for chimney sweeps[117] and midwives.[118] The sale of headache remedies may be restricted to pharmacists,[119] and the latter may be forbidden to own more than one store.[120] Shops may be required to close on Saturday afternoons, Sundays, holidays, and in the evening;[121] nocturnal baking may be prohibited.[122] The legislature may outlaw the erection or expansion of flour mills[123] and limit the amount of flour produced.[124] The state may monopolize building insurance[125] and employment agencies.[126] It may require employers to hire the handicapped,[127] limit the

[115] *Id.* at 406—8. The language of Article 12 might be taken to suggest that the mere exercise of a profession was subject to unlimited legislative regulation, the choice of profession to none at all. Citing the difficulty of drawing clear lines between choice and exercise, the explicit authorization to regulate access to certain professions in Art. 74(19), and the debates of the constitutional convention, the Court found that choice and exercise of an occupation constituted poles of a continuum: Art. 12 guaranteed a unitary freedom of occupational activity that was subject at any point to reasonable regulation, but what was reasonable varied according to the severity of the limitation. See *id.* at 400—403.

[116] *See* THE SECOND CENTURY, chs. 2,4,5.

[117] 1 BVerfGE 264, 274—75 (1952).

[118] 9 BVerfGE 338, 344—48(1959).

[119] 9 BVerfGE 73, 77—81 (1959).

[120] 17 BVerfGE 232, 238—46 (1964).

[121] 13 BVerfGE 237,239—42 (1961).

[122] 23 BVerfGE 50, 56—60 (1968).

[123] 25 BVerfGE 1, 10—23 (1968) (stressing that these limitations were a temporary response to a serious glut on the flour market).

[124] 39 BVerfGE 210, 225—3 7 (1975).

[125] 41 BVerfGE 205, 217—28 (1976) (inferring from the limitation of federal legislative competence to "private" insurance in Art. 74(11) GG that provisions respecting public insurance were not to be measured against Art. 12).

[126] 21 BVerfGE 245, 249—60 (1967).

[127] 57 BVerfGE 139, 158—65 (1981).

number of notaries,[128] and require them to serve welfare applicants without charge.[129]

At the same time, throughout its history the Constitutional Court has struck down as unwarranted infringements on occupational freedom an impressive array of restrictions that would pass muster without question in the United States today. The state may not limit the number of drugstores on the ground that there are already enough of them[130] or license taxicabs only in cases of special need.[131] It may not require vending machines to be shut down after stores are closed[132] or require barbers who close on Saturday afternoon to shut down on Monday morning too.[133] It may ban neither door-to-door sales of veterinary medicines[134] nor C.O.D. shipments of live animals. [135] It may not require that retailers be competent to practice their trade,[136] forbid doctors to specialize in more than one field or to perform services outside their specialties,[137] or ban the collection of dead birds for scientific purposes.[138] Finally, in perfect contrast to the decision that sealed the death of economic due process in the United States, it may not forbid the manufacture and sale of healthful food products on the ground that they might be confused with chocolate.[139]

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[128] 17 BVerfGE 371, 376—81 (1964) (stressing the public functions that notaries performed).

[129] 69 BVerfGE 373, 378—8 1 (1985) (finding the burden trivial).

[130] 7 BVerfGE 377, 413—44(1958).

[131] 11 BVerfGE 168, 183—90 (1960). *Cf.* New State Ice Co. v. Liebmann, 285 U.S. 262 (1932).

[132] 14 BVerfGE 19, 22—25(1962).

[133] 59 BVerfGE 336, 355—59(1982).

[134] 17 BVerfGE 269, 274—80(1964).

[135] 36 BVerfGE 47, 56—65 (1973).

[136] 19 BVerfGE 330, 336—42 (1965).

[137] 33 BVerfGE 125, 165—71 (1972).

[138] 61 BVerfGE 291, 317—19(1982).

[139] 53 BVerfGE 135, 145—47 (1980). *Cf.* Carolene Products Co. v. United States, 323 U.S. 18 (1944). The German court did concede that more stringent measures respecting margarine might be permissible to preserve the viability of the crucial dairy industry (53 BVerfGE at 146), but the second *Carolene Products* decision was based on the danger of confusion alone (323 U.S. at 27—31). The chocolate decision and others noted above demonstrate that, despite the suggestion of Scholz, *Art. 12*, *in* I Maunz/Dürig, Para. 322, that judicial review under Art. 12(1) has become less intensive than it was in the days of the drugstore case, it has by no means lost its bite. None of this is to say that there is actually more occupational freedom in West Germany than in the United States. Notwithstanding the lack of judicial interest in the area, legislators in this country seem somewhat less inclined to inhibit such freedom than

Here too, as in connection with familial rights and private schools, there are strong indications that the Basic Law may impose affirmative duties on government. The most notable decision is that in the so-called *Numerus Clausus* case,[140] where, despite insisting that it was not deciding whether Article 12(1) required the state to set up institutions of higher learning, the Constitutional Court flatly declared that the right to obtain a professional education was worthless if the state did not provide one, and therefore that access to public education was not a matter of legislative grace. "In the field of education," said the Court, "the constitutional protection of basic rights is not limited to the function of protection from governmental intervention traditionally ascribed to basic liberty rights."[141]

While recognizing that financial constraints limit any constitutional duty to expand educational facilities, and acknowledging the breadth of legislative discretion in this regard,[142] the Court has applied Article 12(1) in conjunction with the general equality provision of Article 3 and the Sozialstaat principle[143] to scrutinize with great care any restrictions on access by qualified applicants to existing facilities. A university in one state is forbidden to discriminate against residents of another.[144] Even relatively poor grades are no excuse for excluding applicants who satisfy minimum standards when there is unused capacity,[145] and the Court has gone so far as to review the adequacy of teaching loads in order to determine whether there is

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their German counterparts, as Americans seem more mistrustful of government in general. In Chicago, for example, it is possible to sell groceries after 2 P.M. on Saturday; it is baica1ly illegal in Germany.

[140] 33 BVerfGE 303 (1972).

[141] *Id.* at 330—32. "The more involved a modern state becomes in assuring the social security and cultural advancement of its citizens," the opinion added, "the more the complementary demand that participation in governmental services assume the character of a basic right will augment the initial postulate of safeguarding liberty from state intervention. This development is particularly important in the field of education." *Id. See* Scholz, *Art. 12*, *in* 1 Maunz/Dürig, Para. 63, explaining that where the state has a practical monopoly (as it has of higher education in West Germany), exclusion comes close in practical effect to prohibition.

[142] *See* 33 BVerfGE at 332—36.

[143] *See id.* at 331. It is common practice for the Constitutional Court to base a decision on the combined effect of two or more provisions. *See also* Denninger, *Art. 1*, *in* Luchterhand, Para. Nr. 23—25, explaining that, although the Sozialstaat principle is not generally directly enforceable by private suit, it places upon the state "shared responsibility for the creation and maintenance of the factual conditions necessary for the exercise of freedoms guaranteed by the Bill of Rights."

[144] *See* 33 BVerfGE at 351—56.

[145] 39 BVerfGE 258, 269—74(1975).

room for additional students.[146] Thus the judges exercise a substantial degree of supervision over university administration in the interest of equal access to professional education. [147]

Closely related to the occupational freedom guaranteed by Article 12(1) is the requirement of Article 33(5) that public employment be regulated "with due regard to the traditional principles of the professional civil service." A major victory of the powerful civil servants' lobby over Allied efforts at reform,[148] this provision preserves to a significant extent the privileged position of the German civil servant.

Article 33(5) requires only "due regard" for traditional principles, not unswerving adherence to them. [149] One of its basic components is "suitable compensation" for public service, which has led to invalidation of insufficient provisions for retirement benefits[150] and to a requirement of extra pay for civil servants with children.[151] The Court has also employed Article 33(5) to reinforce the conclusion that other branches may not be given discretion to limit judicial salaries [152] and to protect traditional prerogatives we might be inclined to think less significant: the right of judges, teachers, and professors to titles befitting their dignified positions.[153]

Not long ago all of this (with the exception of matters affecting judges, whose independence is guaranteed by Article III) would have been a matter of legislative grace in the United States under the privilege doctrine.[154] Even today it is difficult to see

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[146] 54 BVerfGE 173, 191—207(1980); 66 BVerfGE 155, 177—90(1984).

[147] Moreover, like other substantive provisions, Article 12(1) has been read to guarantee adequate procedures to assure vindication of the right itself See, *e.g.*, 39 BVerfGE 276, 294—301 (1975) (right to file complaint protesting rejection of application for university admission); 52 BVerfGE 380, 388—91 (1979) (right to warning as to the importance of answering questions during bar examination).

[148] *See* BENZ, VON DER BESATZUNGSHERRSCHAFT ZUR BUNDESREPUBLIK 113—16, 208—9 (1985).

[149] 3 BVerfGE 58, 137 (1953). For criticism of this conclusion, *see* Maunz, *Art. 33*, *in* 2 Maunz-Dürig, Para. Nr. 58.

[150] 8 BVerfGE 1, 22—28 (1958); 11 BVerfGE 203, 210—17(1960).

[151] 44 BVerfGE 249, 262—68 (1977) (invoking Art. 3 3(5) in conjunction with Art. 6 and the Sozialstaat principle).

[152] 26 BVerfGE 79, 91—94 (1969) (also invoking the guarantee of judicial independence in Article 97(1)).

[153] 38 BVerfGE 1, 11—17 (1974) (judges); 62 BVerfGE 374, 382—91 (1982) (teachers); 64 BVerfGE 323, 351—66 (1983) (professors). *See also* 43 BVerfGE 154, 165—77 (1976), holding that Article 33(5) required a hearing before dismissal even of probationary public workers.

[154] *Cf.* Holmes's famous comment in McAuliffe v. New Bedford, 155 Mass. 216, 220, 29 N.E. 517 (1892), that "there is no constitutional right to be a policeman."

how an American court could have reached any of the results just noted, since none of the provisions struck down by the German Court involved indirect limitations on protected interests such as expression or religion.[155] Thus while Article 12(1) of the Basic Law specifically guarantees the freedom from state interference with private occupations that our Supreme Court once protected under the rubric of substantive due process, Article 33(5) goes beyond anything the Supreme Court ever did by affording significant substantive protections to public employees as well.

E. Life, Liberty, Dignity, and Personality

I. Life and Liberty

Article 2(2) contains a general guarantee of life, bodily integrity, and personal liberty:

> Everyone shall have the right to life and to inviolability of his person. Personal liberty (die Freiheit der Person) shall be inviolable. These rights may be encroached upon only pursuant to statute.

The liberty protected by Article 2(2) is freedom from bodily restraint;[156] other liberties are protected by other provisions.

The last sentence of Article 2(2) should by now be familiar; only the legislature may authorize incursions on interests protected by this provision.[157] However, not every law suffices to justify physical restraint or invasion of bodily integrity. Article 104 specifies a number of procedural limitations on arrest and imprisonment. Article 103 requires courts to afford a hearing, permits punishment only on the basis of preexisting statutes that afford fair warning, and forbids double jeopardy. Article 102 abolishes the death penalty. Article 19(2) draws the outer boundary of legislative restriction of any basic right: "In no case may the essential content of a basic right be encroached upon."

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[155] *Contrast* Perry v. Sindermann, 408 U.S. 593 (1972).

[156] *See* Dürig, *Art. 2(2)*, *in* I Maunz/Dürig, Para. Nr. 1, 49.

[157] *See* Lorenz, *Recht auf Leben und körperliche Unversehrtheit*, *in* 6 HANDBUCH DES STAATSRECHTS, § 128, Para. Nr. 36.

Despite early expectations,[158] this last provision has played little part in the decisions. It did form the principal basis of the Court's 1967 conclusion that a person could not be committed to a mental hospital for mere "improvement":[159]

> It is not among the tasks of the state to "improve" its citizens. The state therefore has no right to deprive them of freedom simply to "improve" them, when they pose no danger to themselves or to others. . . . Since the purpose of improving an adult cannot constitute a sufficient ground for the deprivation of personal liberty, [the statute] encroaches upon the essential content of the basic right....

The same opinion went on, however, to state an alternative ground that, because of its greater stringency, has generally made it unnecessary to inquire whether a restriction invades the "essential content" of a basic right. Quite apart from the limitation imposed by Article 19(2), the institutionalization of an individual who endangered neither himself nor others offended "the principle of proportionality (Verhältnismässigkeit), which is rooted in the rule of law."[160]

The Basic Law nowhere mentions the proportionality principle, and the Court has equivocated as to its source. Some early decisions seemed to find it implicit in the basic rights themselves, or in the provisions permitting legislatures to limit them.[161] One prominent commentator attributed it to the guarantee of "essential content" in Article 19(2). [162] As the quotation above suggests, proportionality is now commonly understood to be one aspect of the Rechtsstaat principle implicit in the various provisions of Article 20 and made explicit as to the Länder in Article 28(1). [163]

The basic idea behind the proportionality principle is that, even where the legislature is specifically authorized to restrict basic rights, the restrictions may go no

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[158] *See* Dürig, *Art. 2(1)*, in I Maunz/Dürig, Para. Nr. 31—32, 62—63.

[159] 22 BVerfGE 180, 218—20(1967).

[160] *Id*. at 220.

[161] *See*, *e.g*., 17 BVerfGE 108, 117 (1963): "Respect for the basic right of bodily integrity demands respect across the board for the principle of proportionality in passing upon the validity of incursions into this right."

[162] *See* Dürig, *supra* note 158.

[163] *See also* 30 BVerfGE 1, 20 (1970); Hill, *Verfassungsrechtliche Gewährleistungen gegenüber der staatlichen Strafgewalt*, *in* 6 HANDBUCH DES STAATSRECHTS §156, Para. Nr. 21.

further than necessary.[164] The decisions have broken down this general principle into three elements reminiscent of the American tests both for substantive due process and for the necessity and propriety of federal legislation: The limitation must be adapted (geeignet) to the attainment of a legitimate purpose; it must be necessary (erforderlich) to that end; and the burden it imposes must not be excessive (unzumutbar).[165] Necessity for this purpose is narrowly defined: As in certain instances of strict scrutiny in the United States, the legislature must choose the least burdensome means of achieving its goal.[166]

The upshot is intensive scrutiny of the reasonableness of measures impinging upon the interests protected by Article 2(2). Pretrial incarceration is permitted only when necessary to investigate the case[167] or when there is a grave risk of recurrence,[168] and it may not last too long.[169] Persons accused of crime may be institutionalized to determine their mental competency[170] and subjected to an electroencephalogram[171] but not to a spinal tap in connection with a relatively minor offense.[172] One may not

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[164] *See* 30 BVerfGE at 20. *See also* Denninger, *Art. 1*, in 1 Luchterhand, Para. Nr. 12, finding in the basic rights and the Rechtsstaat principle protection against unnecessary as well as nonstatutory limitations of protected interests and quoting from a property case that "the general welfare is not only the basis but also the limit" of governmental intrusion.

[165] *See* 78 BVerfGE 232, 245—47 (1988). *Cf.* McCulloch v. Maryland, 4 Wheat. 316, 421 (1819); Mugler v. Kansas, 123 U.S. 623, 661—62 (1887) (both stressing the legitimacy of the end and the appropriateness of the means).

[166] *Id*. at 245. *Cf.* Shelton v. Tucker, 364 U.S. 479, 488 (1960); Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951). This general formulation does not exclude varying levels of scrutiny according to the seriousness and intimacy of the intrusion. *See* Denninger, *supra* note 49; *supra* notes 113—15 (discussing the *Pharmacy* case).

[167] 19BVerfGE 342, 347—53 (1965).

[168] 35 BVerfGE 185, 190—92 (1973).

[169] 20 BVerfGE 45, 49—51 (1966).

[170] 1702 BVerfGE 121, 122—23 (1953).

[171] 17 BVerfGE 108, 114—15 (1963).

[172] 16 BVerfGE 194, 198—203 (1963). *See also* 17 BVerfGE 108, 117—20(1963).

be punished for another's wrongs,[173] put on trial when dangerously ill,[174] or evicted when suffering from depression.[175]

Article 2(2) has also been the most prolific source of decisions recognizing the affirmative duty of the state to protect the individual from harm inflicted by third parties. The critical case was the famous abortion decision, which produced a result the polar opposite of that our Supreme Court had reached two years earlier in *Roe v. Wade*: Far from giving the woman a right to terminate her pregnancy, the Basic Law demands in principle that abortion be made a crime; the German constitution requires what our Constitution forbids.[176]

Two conclusions at variance with the prevailing American understanding inform the German decision. The first is that life begins before birth,[177] the second that fundamental rights are not simply a guarantee against governmental intrusion.[178] Article 1(1) makes the latter point clear with regard to the right of human dignity, which the state is expressly directed to "respect and protect."[179] Article 1(1) was invoked along with Article 2(2) in the abortion case,[180] and since the more specific bill of rights provisions are commonly viewed at least in part as concrete aspects of

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[173] *Cf.* 20 BVerfGE 323, 330—36 (1966), finding a violation of the general freedom of action guaranteed by Article 2(1) in the punishment of a faultless voluntary association, which had no rights protected by Art. 2(2).

[174] 51 BVerfGE 324, 343—50 (1979). This decision was based not on fair trial considerations but on the danger to the defendant's health.

[175] 52 BVerfGE 214, 219—22 (1979).

[176] *See* 39 BVerfGE 1 (1975); Roe v. Wade, 410 U.S. 113 (1973).

[177] *See* 39 BVerfGE at 37-42.

[178] *Id.* At 42-51. *Contrast* DeShaney v. Winnebago County Department of Social Services, 109 S. Ct. 998, 1003 (1989): "[N]othing in the language [or history] of the Due Process Clause…requires the State to protect the life, liberty, and property of its citizens against invasion by private actors."

[179] In one of its very first opinions, while taking a narrow view of the protective duty imposed by Article 1(1), the Constitutional Court expressly acknowledged it: "The second sentence [of Article 1(1)…obliges the state indeed to the positive act of 'protection,' but that means protection against attacks on human dignity by other people, such as humiliation, stigmatization, persecution, ostracism, and the like-not protection from material want." 1 BVerfGE97, 104 (conceding that the social state principle of Art. 20 required the legislature to assure "tolerable living conditions" for the needy but insisting that "only the legislature can do what is essential to make the social state a reality" (*id.* at 105)). Later decisions respecting the government's obligation under more specific bill or rights provisions to support or provide education (see text at notes 44-45 and 140-42 *supra*) have cast considerable doubt upon this narrow interpretation. *See generally* Denninger, *Art. 1*, *in* 1 Luchterhand, Para. Nr. 23-28.

[180] 39 BVerfGE at 41, 51.

human dignity,[181] the "protect and respect" clause may well have influenced the interpretation of Article 2(2) as well. [182]

There were dissents in the abortion case, but the dissenting Justices conceded the state's duty to protect fetal life, arguing only that criminal penalties were not an indispensable means to this end.[183] Moreover, subsequent decisions have affirmed the state's constitutional duty to protect against the hazards of nuclear power plants,[184] aircraft noise,[185] terrorism,[186] and chemical weapons.[187] Acutely aware of the danger of constitutionalizing ordinary tort law as well as other matters basically committed to other branches, the Court has afforded legislative and executive organs wide leeway in determining how to fulfill their protective duties; not since the abortion decision has it found government action deficient to protect life and limb. [188] Moreover, even the abortion case permitted destruction of the fetus for medical, eugenic, ethical, and social reasons,[189] and there is reason to think that in practice the "social" exception may largely have swallowed the rule. Yet the positive duty to protect the individual against harm from third parties remains a vital principle of German constitutional law. Notwithstanding their strikingly contrasting outcomes,

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[181] *See* Art. 1(2) GG, declaring that the German people acknowledge human rights because of the inviolability of human dignity; Dürig, *Art. 1*, *in* 1 Maunz/Dürig, Para. Nr. 10, 55.

[182] *See id*. at Para. Nr. 102.

[183] *See* 39 BVerfGE at 68-95 (Rupp-von Brünneck and Simon, JJ., dissenting). *See also* Denninger, *Art. 1*, in 1 Luchterhand, Para. Nr. 33-34.

[184] 49 BVerfGE 89, 140-44 (1978); 53 BVerfGE 30, 57-69 (1979)

[185] 56 BVerfGE 54, 73-86 (1981).

[186] 46 BVerfGE 160, 164-65 (1977). *Cf.* 55 BVerfGE 349, 364-68 (1980) (involving the adequacy of German efforts to secure the release of the aged Nazi leader Rudolf Hess from Allied imprisonment).

[187] 77 BVerfGE 170, 214-16, 222-30 (1987).

[188] *See also* 66 BVerfGE 39, 60—61 (1983) (rejecting an attack on the stationing of nuclear missiles in West Germany on the ground that, to whatever extent German officials were responsible for the decision, the question of how best to defend the country was committed to the discretion of the political branches). One may be tempted to conclude from the later decisions that the Court has effectively withdrawn from the position it took in the abortion case. However, the decisions may all be reconcilable on the merits. It is easy enough to disagree over the proper balance of interests in nuclear-safety cases or the best way to prevent harm to present and future kidnap victims; despite the obvious shortcomings of criminal penalties it is difficult to see how anything less would have a significant impact upon abortion. *See* 39 BVerfGE at 52—64.

[189] *See* 39 BVerfGE at 49—50.

both *Roe v. Wade* and its German counterpart are prime examples of intrusive judicial review based on open-ended constitutional provisions. [190]

II. Human Dignity

Article 2(2) is indeterminate as to the limits of legislative intervention, but not as to the nature of the rights it protects. Articles 1(1) and 2(1) are indeterminate in both respects.

Article 1(1) provides that "[t]he dignity of man shall be inviolable." Obviously this language leaves a great deal of latitude for interpretation. The Constitutional Court attempted to define its essence in a major 1977 opinion:[191]

> It is contrary to human dignity to make the individual the mere tool [blosses Objekt] of the state. The principle that "each person must always be an end in himself" applies unreservedly to all areas of the law; the intrinsic dignity of the person consists in acknowledging him as an independent personality.

If this helps, well and good. Concrete examples may help too.

Earlier cases, the opinion continued, had established that it was inconsistent with human dignity to impose punishment without fault[192] or to inflict cruel or disproportionate penalties.[193] Life imprisonment, the Court concluded, was permissible only on condition that the possibility of release was never foreclosed: "[T]he state strikes at the very heart of human dignity if [it] treats the prisoner without regard to the development of his personality and strips him of all hope of ever regaining his freedom."[194] On other occasions the Court has invoked the dignity clause in

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[190] *See* GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 33 (1987).

[191] 45 BVerfGE 187, 228 (1977) (Life Imprisonment Case). For more detail along the same lines, *see* Dürig, *Art. 1(1)*, *in* 1 Maunz/Dürig, Para. Nr. 28.

[192] 45 BVerfGE at 228, citing 20 BVerfGE 323, 331 (1966), which had based this conclusion on Art. 2(1) in conjunction with the Rechtsstaat principle.

[193] 45 BVerfGE at 228, citing 1 BVerfGE 332, 348 (1952); 25 BVerfGE 269, 285—86(1969).

[194] 45 BVerfGE at 245; *see also id.* at 228—29. As the quotation suggests, this decision was not based entirely on Article 1(1). See *id.* at 223, noting the obvious involvement of Article 2(2)'s right to personal liberty; *id.* at 239, concluding that the "interest in rehabilitation flows from Article 2(1) in tandem with Article 1." In early days doubts had been expressed whether Article 1(1) was directly enforceable at all,

conjunction with other bill of rights provisions to protect informational privacy[195] and the right to have birth records reflect the results of a sex-change operation. "Human dignity and the constitutional right to the free development of personality," said the Court in the latter case, "require that one's civil status be classified according to the sex with which he is psychologically and physically identified."[196]

Commentators agree that human dignity also forbids such atrocities as torture, slavery, and involuntary human experiments; not surprisingly, they differ as to such matters as the death penalty (which at present Article 102 expressly forbids), artificial insemination, and suicide.[197] The open-endedness of the dignity provision is compounded by the Court's explicit conclusion that the meaning of human dignity may change over [198]

> The history of criminal law shows clearly that milder punishments have replaced those more cruel in character and that the wave of the future is toward more humane and differentiated forms of punishment. Thus any decision defining human dignity in concrete terms must be based on our present understanding of it and not on any claim to a conception of timeless validity.

In short, human dignity is a rather flexible concept.

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partly because Article 1(3) made only the "following" basic rights binding on government organs as "directly enforceable law." *See, e.g.*, Dürig, *Art. 1(1)*, *in* 1 Maunz/Dürig, Para. Nr. 4, 7 (adding, in Para. Nr. 13, 16, that it hardly mattered since the dignity principle had to be employed as a standard in interpreting other constitutional provisions as well as the ordinary law). For the contrary view, see Podlech, *Art. 1(1)*, *in* 1 Luchterhand, Para. Nr. 61. To this date the Constitutional Court has never invalidated government action on the basis of Article 1(1) alone.

[195] *See*, *e.g.*, 27 BVerfGE 1, 6(1969) (Microcensus): "It would be inconsistent with the principle of human dignity to require a person to record and register all aspects of his personality even though such an effort is carried out in the form of a statistical survey; [the state] may not treat a person as an object subject to an inventory of any kind." The census questions in issue, which pertained to vacation habits, were held permissible.

[196] 49 BVerfGE 286, 298(1978).

[197] *Compare* Dürig, *Art. 1(1)*, *in* 1 Maunz/Dürig, Para. Nr. 30-41; Podlech, *Art. 1(1)*, *in* 1 Luchterhand, Para. Nr. 43—55.

[198] 45 BVerfGE 187, 229 (1977). *Cf.* the discussion of changing standards of cruel and unusual punishment in Furman v. Georgia, 408 U.S. 238 (1972).

In the cases so far discussed, Article 1(1) was invoked in traditional fashion to protect the citizen against government intrusion. In the well-known *Mephisto* decision, on the other hand, the dignity clause provided the principal justification for permitting government limitation of the artistic freedom guaranteed by Article 5(3)—an injunction against publication of a novel impugning the memory of a deceased actor.[199] The later *Lebath* case took this reasoning a giant step further: As the abortion case had made clear,[200] Article 1(1) directed the state not only to respect human dignity but affirmatively to protect it against third parties; it followed that the constitution not only permitted but required an injunction against publication of information respecting the plaintiff's past crimes. [201]

III. The Development of Personality

We come now to Article 2(1), which epitomizes substantive due process in the Federal Republic:

> Everyone shall have the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral code.

"Free development of personality" (die freie Entfaltung der Persönlichkeit) is no more self-defining in German than it is in English. Literally it seems to suggest something akin to a right of privacy, an intimate sphere of autonomy into which the state is forbidden to intrude. Various aspects of privacy are indeed embraced within Article 2(1), but any such limiting construction was firmly rejected in the seminal *Elfes* decision in 1957. The free development of personality, the Court argued, could not be limited to "that central area of personality that essentially defines a human person as a spiritual-moral being, for it is inconceivable how development within this core area could offend the moral code, the rights of others, or even the constitutional order. . ." Rather the Court construed the provision to guarantee a "general right of freedom of action" (allgemeine Handlungsfreiheit)—citing the debates of the constitutional convention for the conclusion that "linguistic rather than legal considerations prompted the framers to substitute the current

[199] 30 BVerfGE 173 (1971). *See id*. at 195: "[T]he values embodied in Article 1(1) influence the guarantee [of artistic freedom.]" All Justices agreed on the general principle that in such a case the interest in artistic freedom must be balanced against that in reputation; the injunction itself was affirmed by an equally divided Court.

[200] *See* 39 BVerfGE 1, 41, 51 (1975); *supra* notes 175—83.

[201] 35 BVerfGE 202 (1973) (relying on Art. 1(1) in conjunction with Art. 2(1)).

language for the original proposal" that "'[e]very person is free to do or not to do what he wishes.'"[202] Casting Article 2(1) loose from its restrictive terminology—like the freeing of "liberty" in the Fourteenth Amendment from its history in *Allgeyer v. Louisiana*[203]—opened the door to judicial review of all restrictive governmental action.

What this review would produce in practice depended upon interpretation of the three limits Article 2(1) places upon freedom of action, "the rights of others, . . . the constitutional order, [and] the moral code." The first and last are easy enough to understand, if not always to apply: The rights of others justify banning such activities as arson and trespass; the moral code has been held, as in the United States, to authorize punishment for sodomy. [204] More difficult to determine was the meaning of the second limitation, which leaves unprotected those activities which "offend against the constitutional order."

This term or something very like it appears in several other articles in connection with constitutional limitations on subversive activities. [205] In those articles, in order not unduly to encroach upon legitimate political opposition, it has been given a restrictive meaning. [206] In the quite different context of Article 2(1) "the constitutional order" has been interpreted more broadly. The general right to freedom of action, the Court stated in *Elfes*, was limited both by the Basic Law itself and "by every legal norm that conforms procedurally and substantively with the Constitution."[207]

This interpretation, like the decision that the Privileges or Immunities Clause of our Fourteenth Amendment forbade impairment only of rights already protected by

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[202] 6 BVerfGE 32, 36—37 (1957), citing the explanation given by Dr. von Mangoldt at the constitutional convention, PARLAMENTARISCHER RAT, VERHANDLUNGEN DES HAUPTAUSSCHUSSES 533 (1949). This interpretation has met with some criticism from the commentators. *See*, *e.g.*, Hesse, Para. Nr. 425—28. For a more approving view, *see* Dürig, *Art. 2*, *in* 1 Maunz/Dürig, Para. Nr. 3, 10, 11.

[203] 165 U.S. 578 (1897).

[204] *See* 6 BVerfGE 389, 432—37 (1957); 36 BVerfGE 41, 45—46 (1973). *Cf.* Bowers v. Hardwick, 478 U.S. 186 (1986). For criticism of the German decisions, *see* Podlech, *Art. 2(1)*, *in* Luchterhand, Para. Nr. 64. *Contrast* 49 BVerfGE 286, 298—301 (1979), upholding the right to have birth records corrected to reflect a sex-change operation: "[T]he sexual change secured by the complainant cannot be considered immoral."

[205] *See* Art. 9(2), 18, 21(2) GG.

[206] *See, e.g.,* 5 BVerfGE 85 (1956) (Communist Party case). *See also* Art. 20(3), which in using similar language requires the legislature to follow only the constitution itself. *See* 6 BVerfGE at 38.

[207] 6 BVerfGE 32, 38 (1957). *See also id*. at 38—40, invoking legislative history. For an argument in favor of a narrower interpretation, *see* Dürig, *Art. 2(1)*, *in* 1 Maunz/Dürig, Para. 18—25.

other federal laws,[208] provoked the question whether Article 2(1) added anything at all. At a minimum, as the cases have shown, it provided affected individuals with standing to attack laws passed without legislative authority[209] or delegating excessive rulemaking power to the executive.[210] More important and more interesting was the reminder in *Elfes* that a law qualified as part of the constitutional order only if it conformed with "the principles of the rule of law and the social welfare state."[211]

While the Sozialstaat principle standing alone has never yet been held to invalidate governmental action or inaction, the rule of law has given Article 2(1) much of its bite. As we have seen, even in the absence of express provisions such as those applicable to bodily restraint, condemnation, and occupational freedom, the Rechtsstaat principle has been held to permit restrictions of liberty only in accordance with statute,[212] and limitations on general freedom of action lacking a sufficient legal basis have been struck down.[213] The Rechtsstaat principle also contains a significant limitation on delegation of policymaking authority that goes beyond that made explicit by Article 80(1),[214] requires fair warning[215] and fair procedure,[216] and imposes meaningful limitations on retroactivity.[217] Most important, as

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[208] Slaughter-House Cases, 83 U.S. 36 (1873).

[209] *E.g.*, 26 BVerfGE 246, 25 3—58 (1969) (striking down statute for want of federal competence to regulate use of the title of Engineer).

[210] *E.g.*, 20 BVerfGE 257, 268—7 1 (1966) (invalidating a provision for fees in antitrust proceedings for violation of the delegation limits of Art. 80(1)).

[211] 6 BVerfGE 32, 41 (1957).

[212] *See supra* notes 51—54.

[213] *E.g.*, 56 BVerfGE 99, 106—09 (1981) (reversing a decision that forbade a lawyer to appear as counsel against a municipality if his partner was a member of the municipal council for want of "a legal basis in the governing provisions of ordinary law").

[214] *See, e.g.*, 8 BVerfGE 274, 324—27 (1958), most pertinently invoking the separation of powers provision of Art. 20(2): "If the authority of the executive is not sufficiently defined, it no longer can be said to execute the law. . . but takes over [the legislature's] function." *See also* 49 BVerfGE 89, 126—30 (1978), enunciating the strict requirement that the legislature itself make all "essential" decisions regarding the peaceful use of nuclear power. Article 80(1) applies only to the delegation of authority to adopt regulations under federal law. Despite the plain words and purpose of Art. I, § 1 of our Constitution, the Supreme Court has struck down none of the numerous essentially unlimited delegations of federal legislative power since Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[215] *See* 5 BVerfGE 25, 31—34(1956). *Cf.* United States v. Cohen Grocery Co., *255* U.S. 81 (1921).

[216] *E.g.,* 26 BVerfGE 66, 71—72 (1969) (permitting victim to intervene in criminal proceeding); 38 BVerfGE 105, 111—18 (1974) (affirming a witness's right to counsel under certain circumstances); 57 BVerfGE 117, 120—21 (1981) (relying on the rule of law in conjunction with the explicit guarantee of a judicial hearing

we have also seen, the German conception of the rule of law embodies the pervasive principle of proportionality.[218] It is this principle, in connection with the broad interpretation of "personality" in *Elfes*, that has enabled the German Court to act as censor of the reasonableness of all governmental action.

As in the United States during the *Lochner* era, most challenged measures have passed muster. National security was held to justify the law limiting issuance of passports in *Elfes*;[219] price regulations were upheld because they were reasonable. [220] At the same time, a number of restrictions on the general freedom of action have been struck down for want of proportionality. The state may not prohibit intermediaries from seeking to match willing drivers with people who are looking for rides.[221] A person in pretrial custody may not be denied a typewriter. [222]As noted in connection with the human dignity provision, persons who have undergone sex change operations are entitled to have birth records corrected to reflect their new

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in Art. 103(1) to hold that a filing deadline was satisfied when the document arrived at court); 64 BVerfGE 135, 145—57 (1983) (discussing to what extent proceedings must be translated for a defendant who cannot communicate in German); 65 BVerfGE 171, 174—78 (1983) (no appellate argument in the absence of defense counsel). Why these opinions did not rely solely on Article 103(1) was not always made clear. But see 38 BVerfGE at 118: "Art. 103 (1) basically guarantees only a hearing as such, not a hearing with the assistance of counsel"; 64 BVerfGE at 145—46 and cases cited, explaining that the essence of an Article 103(1) hearing was the right to know the basis of the charge and to respond. Cf. Goss v. Lopez, 419 U.S. 565 (1965), stressing the same elements in determining what constituted due process in connection with a suspension from school.

[217] *See*, *e.g.*, 13 BVerfGE 206, 212—14 (1961) (invalidating a law increasing the tax on land sales previously made); 21 BVerfGE 173, 182—84 (1967) (holding that a prohibition on combining tax counseling with certain other activities could not be applied immediately to persons who had been engaged in both before the statute was passed). Retroactivity in the first of these cases was in the Court's terms "genuine" (*echt*), since the law attached consequences to past acts themselves. In the second it was "spurious" (*unecht*), since the law merely disappointed expectations by diminishing the value produced by past actions. Not surprisingly, the Court has been considerably more lenient in passing upon spurious than upon genuine retroactivity. *See*, *e.g.*, 19 BVerfGE 119, 127—28 (1965) (permitting taxation of securities that had been tax-exempt when purchased). Also not surprisingly, there have been difficulties in distinguishing genuine from spurious retroactivity. *E.g.*, 72 BVerfGE 175, 196—99 (1986) (upholding increase in interest payable in the future on preexisting loans). For criticism of the distinction as engendering more confusion than clarity, see 48 BVerfGE 1, 23 (1978) (Steinberger, J., dissenting).

[218] *See especially supra* notes 159—66.

[219] 6 BVerfGE 32, 41—44 (1957).

[220] 8 BVerfGE 274, 327—29 (1958).

[221] 17 BVerfGE 306, 313—18 (1964).

[222] 35 BVerfGE 5, 9—11 (1973). A television set, however, is not required. 35 BVerfGE 307, 309—10 (1973) (rejecting a claim based upon the freedom to inform oneself from generally available sources, Art. 5(1)).

gender.[223] Parents may not be given power to bind minor children by contract;[224] the filing of criminal charges in good faith may not be treated as a tort.[225] In one of the best known cases of this nature the Constitutional Court found it unreasonable to require those who sought to hunt with falcons to demonstrate competence in the use of firearms. Not only did the required skills have "no connection either with the care of falcons or with the practice of falconry," but any hunter who discharged a weapon during the chase would frighten away his own falcon. [226]

Article 2(1) and the proportionality principle have also been employed on a number of occasions to secure a general right of "informational self-determination" (informationelle Selbstbestimmung), or freedom from unwarranted publicity. First elaborated in the *Microcensus* case in 1969,[227] this right has been held to limit divulgence of divorce files,[228] medical records,[229] and private recordings of conversations. [230] Most recently it has led the Court to require greater restraint and confidentiality in connection with both the census[231] and legislative investigations,[232] and even to forbid general dissemination of the names of individuals who had been stripped of contracting authority as spendthrifts[233]—although one might have thought publicity essential to protection of those with whom the spendthrift might deal. In this as in so many other respects the German Court has gone beyond its American counterpart; while freedom from certain disclosures is afforded in this country by the First, Fourth, and Fifth Amendments,[234] we have as yet no general right to informa-

[223] 49 BVerfGE 286, 298—301 (1979).

[224] 72 BVerfGE 155, 170—73 (1986) (giving a correspondingly narrow interpretation to the countervailing provision for parental rights in Article 6(2)).

[225] 74 BVerfGE 257, 259—63 (1987) (making the Lockean argument that the citizen, having surrendered his natural right to self help, is entitled to seek state protection).

[226] 55 BVerfGE 159, 165—69 (1980).

[227] 27BVerfGE 334, 350-55 (1970).

[228] 27 BVerfGE 344, 350—55 (1970).

[229] 32 BVerfGE 373, 378—86 (1972).

[230] 34 BVerfGE 238, 245—51 (1973).

[231] 65 BVerfGE 1, 41—70 (1983).

[232] 77 BVerfGE 1, 38—63 (1987).

[233] 78 BVerfGE 77, 84—87 (1988).

[234] *See* U.S. Const., Amend. 4 ("The right of the people to be secure. . . against unreasonable searches and seizures shall not be violated"), 5 ("nor shall any person. . . be compelled in any criminal case to be a witness against himself"); NAACP v. Alabama, 357 U.S. 449 (1957).

tional privacy—much less a governmental duty to prevent private revelations of past crimes, such as the German Court established in the *Lebach* case in 1973.[235]

Article 2(1), in conjunction with the proportionality principle, is thus the heart of substantive due process in Germany.

F. Equality

"All persons," says Article 3(1), "shall be equal before the law." Relying on Article 1(3)'s statement that the Bill of Rights binds legislative as well as executive and judicial authorities, the Constitutional Court made clear at the outset that—in contrast to a similarly worded clause in the 1850 Prussian Constitution—Article 3 forbade not only unequal administration of the laws but unequal legislation, too.[236]

It could hardly have been the intention of those who wrote this provision to forbid all distinctions between persons—to require that murderers go unpunished or blind children be allowed to practice brain surgery. Taking a cue from decisions interpreting predecessor provisions, the Court in its very first substantive decision concluded that Article 3(1) required equal treatment only when inequality would be arbitrary (willkürlich).[237] Thus, as in the United States, the equality provision forbids only those classifications which are without adequate justification; but the Constitutional Court has taken the need for such justification very seriously.

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[235] 35 BVerfGE 202, 218—44 (1973), also noted at note 201 *supra*. *Cf.* Briscoe v. Reader's Digest, 93 Cal. 866, 483 P.2d 34 (1971) (permitting but not requiring damages for a strikingly similar disclosure on strikingly similar grounds). It seems questionable whether our Supreme Court would even permit the assessment of damages in such a case after Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (holding the state could not forbid publication of the name of a rape victim identified by public judicial record). As in the case of occupational freedom, however, it would be dangerous to conclude from the more extensive constitutional protection of informational privacy in the Federal Republic that Germans are in fact freer than Americans in this regard. Citizens of the Federal Republic are required both to possess identity cards and to register their place of residence; a legislator who voted for either measure in this country might well find himself out of a job. *See* Gesetz über Personalausweise vom 21. April 1986, BGBl. I S. 548; Velderechtsrahmengesetz vom 16. Aug. 1980, BGBl. I S. 1429, *in* 1 VERFASSUNGS-UND VERWALTUNGSGESETZ DER BUNDESREPUBLIK DEUTSCHLAND Para. Nr. 255—56 (Sartorius ed.)

[236] 1 BVerfGE 14, 52 (1951) (Southwest Reorganization Case). *Cf.* Constitution for the Prussian State (1850), Art. 4. *See also* the 1925 decision of the Reichsgericht (111 RGZ 320, 322— 23), recounting the earlier understanding and leaving open the question whether the comparable provision in Art. 109 of the 1919 Weimar Constitution should be more broadly construed; Stein, *Art. 3*, *in* 1 Luchterhand, Para. Nr. 5—6.

[237] 1 BVerfGE 14, 52 (1951). *See also* 111 RGZ 320, 329 (1925) (reaching the same conclusion under the analogous clause of the Weimar Constitution). For the suggestion that the inspiration for this interpretation came from the United States and from Switzerland, *see* Stein, *Art. 3*, in 1 Luchterhand, Para. Nr. 6.

I. Classifications Expressly Prohibited

Article 3(3) gives specific content to the general equality requirement by listing a number of bases of classification that basically cannot be justified: "No one may be prejudiced or favored because of his sex, his parentage, his race, his homeland and origin, his faith, or his religious or political opinions."[238] In contrast to the United States, where race decisions have formed the heart of equal protection jurisprudence, the sex discrimination provision is the only one of these specific prohibitions that has played a significant role in the German cases.[239]

There have been many sex discrimination decisions, and they long antedate our Supreme Court's first forays into the field.[240] Article 117(1) gave legislatures until 1953 to eliminate gender distinctions from the civil code and other laws, but in that year the Constitutional Court affirmed its authority to strike down nonconforming provisions as soon as the grace period expired.[241]

The Court has made clear from the beginning that the specific requirement of sex equality demands heightened scrutiny of classifications based on gender. Merely rational grounds that might suffice under the general equality provision cannot

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[238] Article 3(2) reinforces the ban on sex discrimination by adding that "[m]en and women shall have equal rights." *See* Dürig, *Art. 3(3)*, in 1 Maunz/Dürig, Para. Nr. 4, equating the meanings of the two sex equality provisions and explaining their origins.

[239] *See* 2 BVerfGE 266, 286 (1953) (upholding restrictions on travel by East German refugees because based not on their homeland (Heimat) but on the social and economic difficulties presented by a large influx of persons); 5 BVerfGE 17, 21—22 (1956) (permitting reference to East German law to determine age of majority for East German); 48 BVerfGE 281, 287—88 (1978) (permitting relief for Spanish Civil War veterans to be limited to those living in the Federal Republic on the ground that "Heimat" meant geographical origin and "Herkunft" (origin) social class); 63 BVerfGE 266, 302—05 (1983) (Simon, J., dissenting) (complaining that the ban on political discrimination had been largely ignored). *See also* Dürig, *Art. 3(3)*, *in* 1 Maunz/Dürig, Para. Nr. 75, 87, 46, confirming that the "homeland" provision was designed to protect refugees and that "origin" refers to social class, and explaining that the inclusion of "ancestry" forbids nepotism, among other things. *Contrast* Kotch v. Pilot Commissioners, 330 U.S. 552 (1947) (rejecting an equal protection challenge to a system under which only "relatives and friends" of established pilots were accepted as apprentices). Thus the list of suspect classifications is somewhat longer in West Germany than it is in the United States.

[240] The Supreme Court first invalidated sex discrimination in Reed v. Reed, 404 U.S. 71 (1971) (striking down a preference for males to administer decedents' estates).

[241] 3 BVerfGE 225, 237—48 (1953) (rejecting objections, which look strange to American eyes, that judicial enforcement of the constitutional prohibition might offend higher-law principles of predictability and separation of powers). For development of the interesting notion of unconstitutional constitutional provisions, *see* 1 BVerfGE 14, 32—33 (1951); 3 BVerfGE at 230—36.

justify sex discrimination; a "compelling" reason is required.[242] Compelling reasons for this purpose have been specifically defined: "Differential treatment of men and women. . . is permissible only if sex-linked biological or functional differences so decisively characterize the matter to be regulated that common elements can no longer be recognized or at least fade completely into the background."[243]

The reference to biological differences is readily understandable and would justify sex distinctions for such purposes as procreation and marriage.[244] Recognition of the legitimacy of "functional" distinctions, on the other hand, seemed to create the risk of perpetuating stereotypes based on traditional male and female roles.[245]

In fact, some early decisions applying the gender provision were not promising. The Court permitted the state to limit the work done by women in the interest of protecting their health,[246] place the primary duty of financial support of illegitimate children on fathers,[247] and require widowers but not widows to prove dependency in order to obtain benefits upon the death of a spouse.[248] In accordance with explicit language now found in Article 12a,[249] the Court upheld a military draft of men only. [250] Most strikingly, in 1957 the Justices went so far as to uphold a law that punished homosexual activity only between men—on the armchair sociological ground that female homosexuals tended to be quiet about it and thus posed less of a threat to society.[251]

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[242] *See*, *e.g.*, 15 BVerfGE 337, 343—44 (1963); 48 BVerfGE 327, 337 (1978).

[243] 39 BVerfGE 169, 185—86 (1975).

[244] *See* Dürig, *Art. 3(2)*, *in* 1 Maunz/Dürig, Para. Nr. 13; Stein, *Art. 3*, *in* 1 Luchterhand, Para. Nr. 81.

[245] *See* the criticism of the "functional" criterion in Dürig, *Art. 3(2)*, *in* 1 Maunz/Dürig, Para. Nr. 18.

[246] 5 BVerfGE 9, 11—12 (1956) (finding differential treatment justified by "the objective biological and functional differences between men and women").

[247] 11 BVerfGE 277, 281 (1960).

[248] 17 BVerfGE 1, 17—26 (1963). *Contrast* Frontiero v. Richardson, 411 U.S. 677 (1973) (striking down a similar provision in the United States several years later).

[249] "Men who have attained the age of eighteen years…"

[250] 12 BVerfGE 45, 52—53 (1960 (invoking Art. 12(3) and 73 Nr. 1, which then contained the limitation later placed in Article 12a). *Cf.* Rostker v. Goldberg, 453 U.S. 57 (1981) (upholding a similarly selective draft without benefit of such an explicit provision).

[251] 6 BVerfGE 389, 420—32 (1957). The Court adhered to this decision as late as 1973. *See* 36 BVerfGE 41, 45—46 (1973) (upholding ban on homosexual acts between men and boys). Apparently it did not occur to anyone to argue that it was unequal to permit men to have sexual relations with women but not with other men; the distinct contention that the prohibition infringed Article 2(1)'s right to free development

From a very early date, however, the Court also began to strike down gender classifications, and the trend has intensified with the passage of time. As early as 1959 the Justices invoked Article 3 in conjunction with the familial rights guaranteed by Article 6 to invalidate a law giving fathers the last word on childrearing;[252] four years later they gave legislators two years to do away with a preference for men in the inheritance of farms.[253] Later decisions have established that mothers must sometimes share the cost of child care,[254] that a father's citizenship cannot determine that of his child,[255] that married couples may elect the wife's maiden name,[256] and that a "housework day" for single workers may not be prescribed for women only.[257] In 1967 the Court struck down a dependency requirement for widowers' benefits in the civil service, distinguishing its earlier decision on the ground that here, in contrast to the private sector, pensions were generally based upon services rendered rather than need.[258] In 1975 it added that changing patterns of women's employment would soon require a similar conclusion in the case of other pensions as well.[259]

Sex classifications continue to be upheld in some cases. A 1976 decision permitted men for the time being to receive greater retirement benefits than women because their wages were higher.[260] Mothers may still be given preferential custody of children born out of wedlock.[261] Most recently, invoking the Sozialstaat principle,

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of personality was rejected on the ground that "homosexual activity unmistakably offends the moral code." 6 BVerfGE at 434. See text at note 204 *supra*.

[252] 10 BVerfGE 72—89 (1959).

[253] 15 BVerfGE 337, 342—46, 352 (1963).

[254] 26 BVerfGE 265, 273—77 (1969). The Court specifically reaffirmed its earlier decision (see note 247 *supra*) that fathers could generally be required to support illegitimate children as a counterweight to the mother's duty to rear them; but it saw no reason to distinguish between parents when the child lived with neither one.

[255] 37 BVerfGE 217, 244—59 (1974). Nor may it determine the law governing marital property (63 BVerfGE 181, 194—96 (1983)) or divorce (68 BVerfGE 384, 390 (1985)).

[256] 48 BVerfGE 327, 337—40 (1978).

[257] 52 BVerfGE 369, 373—79 (1979).

[258] 21 BVerfGE 329, 340—54 (1967).

[259] 39 BVerfGE 169, 185—95 (1975).

[260] 43 BVerfGE 213, 225—230 (1977). For the limits of this holding, *see* 57 BVerfGE 335, 342—46 (1981).

[261] 56 BVerfGE 363, 387—90 (1981).

the Court has expressly endorsed a variant of affirmative action in this field: Women may be given special benefits to compensate for disadvantages having a biological basis.[262] As in the United States, however, sex is treated as a relatively suspect classification in Germany—along with race, religion, and the other bases of distinction enumerated in Article 3(3).

II. The General Equality Provision

The list of forbidden bases of classification in Article 3(3) is not exhaustive. Despite its initial definition of forbidden distinctions as those that were arbitrary[263] and repeated professions of judicial restraint, [264] the Constitutional Court has also applied the general equality clause of Article 3(1) to strike down an impressive variety of measures.

To begin with, the Court has scrutinized with especial care those classifications affecting interests specifically protected by other provisions of the Basic Law. Often it has done so on the basis of the other provisions themselves.[265] On other occasions the substantive provisions have been drawn upon to give content to the general prohibition of Article 3(1). Thus the Court has been quick to condemn discrimination against married persons[266] or families with children [267] under Article 3(1) in conjunction with the applicable paragraphs of Article 6. It has done the same in cases respecting inequalities affecting the academic[268] and occupational[269] freedoms guaranteed by Articles 5(3) and 12(1), the traditional rights of civil servants under

[262] 74 BVerfGE 163, 178—81 (1987) (upholding earlier optional retirement for women on the ground that their traditionally disadvantaged position in the workplace was attributable in part to anticipated and actual interruptions during pregnancy, birth, and childrearing and raising the question whether such a measure might even be constitutionally *required*). *Cf.* the explicit requirement of Article 6(5) (discussed *supra* notes 31—38) that the legislature act affirmatively to assure equality of actual opportunity for illegitimate children.

[263] *See supra* 237.

[264] *E.g.*, 12 BVerfGE 326, 337—38 (1961).

[265] *See*, *e.g.*, the marriage and family decisions discussed *supra* notes 28—31.

[266] *E.g.*, 13 BVerfGE 290, 295—318 (1962) (deductibility of salary paid to owner's spouse); 67 BVerfGE 186, 195—99 (1984) (unemployment compensation when both spouses out of work).

[267] *See* 61 BVerfGE 319, 343—44, 351—54 (1982) (requiring cost of child care to be considered in determining taxable income).

[268] *E.g.*, 56 BVerfGE 192, 208—16 (1981). *See also* the cases discussed *supra* notes 142—46 *supra*.

[269] *E.g.*, 37 BVerfGE 342, 352—60 (1974).

Article 33(5), [270] the right to operate private schools under Article 7(4),[271] and above all the right to participate in elections.[272] In several of these cases,[273] as in those passing upon classifications made suspect by Article 3(3), the Court explicitly required an unusually strong justification for discrimination. In 1986 it expressly generalized the principle: "If the rule to be tested under Article 3(1) affects other interests protected by the Bill of Rights, the legislature's freedom of action is more narrowly circumscribed."[274] These decisions closely resemble those reached under the fundamental rights strand of equal protection analysis in the United States. [275]

As in the United States, there is some tendency to extend this heightened scrutiny to classifications affecting other interests deemed fundamental—such as the right to have birth records altered to reflect a sex-change operation—which are not specifically enumerated in the Basic Law.[276] Indeed it has often been said that classifications made in tax laws require special justification because of the severity of their impact. [277] A surprising number of such distinctions have actually been found

[270] 56 BVerfGE 146, 161—69 (1981).

[271] 75 BVerfGE 40, 71—78 (1987).

[272] *E.g.*, 1 BVerfGE 208, 241—60 (1952) (exclusion of party receiving less than 7.5% of vote from proportional representation in legislature); 3 BVerfGE 19, 23—29 (1953) (requirement of 500 petition signatures for Bundestag candidate of party not already represented); 6 BVerfGE 273, 279—82 (1957) (nondeductibility of contributions to unrepresented parties); 7 BVerfGE 99, 107—08 (1957) (denial of public television time to unrepresented party); 16 BVerfGE 130, 138—44 (1963) (unequal population of election districts); 41 BVerfGE 399, 412—23 (1976) (exclusion of independent candidate from reimbursement of election expenses); 44 BVerfGE 125, 138—66 (1977) (government propaganda for parties in ruling coalition). Some of these decisions were based in part upon the explicit guarantee of "equal" Bundestag elections in Article 38 or on Article 21(1)'s guarantee of the rights of political parties; others add references to the guarantee of democracy in Articles 20 and 28. *Cf.* Justice Stone's suggestion—which has been followed—of heightened scrutiny of measures impairing the integrity of the democratic process. United States v. Carolene Products Co, 304 U.S. 144, 152—53 n.4 (1938).

[273] *E.g.*, 1 BVerfGE 208, 249, 255, 256 (1952) (elections); 37 BVerfGE 342, 352—54 (1974) (occupational freedom); 67 BVerfGE 186, 195—96 (1984) (marriage).

[274] 74 BVerfGE 9, 24 (1986).

[275] *See*, *e.g.*, Carey v. Brown, 447 U.S. 455, 461—62 (1980) (freedom of speech); Niemotko v. Maryland, 340 U.S. 268 (1951) (free exercise of religion).

[276] 60 BVerfGE 123, 133—35 (1982) (striking down a provision limiting this right to persons at least 25 years old). *Cf.* Reynolds v. Sims, 377 U.S. 533, 561—62 (1964) (subjecting limitations on the value of votes to strict scrutiny although the right to vote was nowhere generally guaranteed).

[277] *See*, *e.g.*, 21 BVerfGE 12, 27 (1966); 35 BVerfGE 324, 335 (1973). For a rare protest against the notion of strict scrutiny in tax cases generally, see 15 BVerfGE 313, 318 (1963).

wanting: discriminatory taxation of chain stores,[278] preferential treatment of vertically integrated firms under the value-added tax,[279] nondeductibility of partners' salaries[280] and of child-care expenses,[281] to name only a few.[282] These decisions stand in sharp contrast to modern decisions in the United States; the Supreme Court has not scrutinized classifications in tax laws with much care since the New Deal revolution.[283]

Moreover, although the Constitutional Court has sometimes said that legislatures have particularly broad discretion in determining how to spend public funds,[284] one dissenting Justice, in language reminiscent of that of Justice Thurgood Marshall, has argued for heightened scrutiny of discriminatory welfare provisions under the influence of Article 20's social state principle.[285] Indeed, in contrast to the American cases, the German decisions lend her considerable support. Among other things, the Constitutional Court has found fault with the exclusion of unemployment benefits for students[286] and for persons formerly employed by their parents,[287] limitations on aid for the blind[288] or disabled,[289] and the denial of retire-

[278] 19 BVerfGE 101, 111—18 (1965). But see 29 BVerfGE 327, 335—36 (1970) (permitting discriminatory taxation of multiply owned saloons).

[279] 21 BVerfGE 12, 26—42 (1966).

[280] 13 BVerfGE 331, 338—55 (1962).

[281] 68 BVerfGE 143, 152—55 (1984).

[282] Note also the intensive scrutiny practiced in an early decision striking down an exaction for support of the fire department that was imposed only upon men between the ages of 18 and 60 who had not served as firemen, 9 BVerfGE 291, 302 (1959): "[A]s a special assessment [the exaction] would have to be limited to those who derived special benefits from the fire department; as a substitute for service it could reach only those under a duty to serve; as a general tax it could not be imposed only on men between 18 and 60 years of age." A revised exaction limited to those who were eligible for fire duty but had not served was later upheld, 13 BVerfGE 167 (1961).

[283] *See*, *e.g*, Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973), upholding a personal property tax imposed on property not owned by individuals without a serious effort to justify the distinction. *See generally* Gunther, *Foreword: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). For a recent exception to this pattern, *see* Allegheny Pittsburgh Coal Co. v. County Commission, 109 S.Ct. 633 (1989).

[284] *E.g.*, 17 BVerfGE 210, 216 (1964).

[285] *See* 36 BVerfGE 237, 248—50 (Rupp-von Brünneck, J., dissenting). *Cf*. Dandridge v. Williams, 397 U.S. 471, 520—23 (1970) (Marshall, J., dissenting).

[286] 74 BVerfGE 9, 24—28 (1986).

[287] 18 BVerfGE 366, 372—80 (1965) (noting the severity of the exclusion and the impact of the Sozialstaat principle).

[288] 37 BVerfGE 154, 164—66 (1974).

ment benefits to persons living abroad.[290] Some of these decisions may be explainable on the ground that the classification impinged upon some other fundamental right; but the overall impression is that the Constitutional Court is rather strict in scrutinizing classifications in the distribution of welfare benefits as such.

Indeed, without regard to the various categories of heightened scrutiny already discussed, recent opinions have exhibited a marked tendency to replace the deferential arbitrariness standard originally enunciated with the apparently more aggressive search for a reason "sufficient to justify" the challenged distinction. [291]Decisions in the past few years suggest that, whatever formulation is employed, review under the general equality provision is never as toothless as it has become in economic cases in the United States. In striking down limitations on the assessment and award of agency or court costs[292] without intimating that the distinctions either embodied suspect classifications or impinged upon fundamental rights, for example, the Constitutional Court conjured up memories of the vigorous way in which the Equal Protection Clause was enforced in economic cases during the *Lochner* era in this country.[293]

Furthermore, in more recent decisions the notion of arbitrariness has tended to come loose from its moorings and to enjoy an independent life of its own. Originally a test for the legitimacy of legal distinctions, arbitrariness began to appear, despite cogent warnings in dissent,[294] as a ground for condemning official action—especially judicial action—without mention of inequality at all.[295] Thus the equality

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[289] 39 BVerfGE 148, 152—56 (1975) (finding such a limitation not yet unconstitutional but warning that it soon may be).

[290] 51 BVerfGE 1, 23—29 (1979) (holding that they must at least be given their contributions back).

[291] *See, e.g.*, 74 BVerfGE 9, 29—30 (1986) (dissenting opinion) (pointing out the general and unannounced change in the governing standard).[291]

[292] 50 BVerfGE 217, 225—33 (1979); 74 BVerfGE 78, 94—96 (1986). *See also* 54 BVerfGE 277, 293—97 (1980) (holding in contrast to our certiorari practice that the highest civil court could not decline jurisdiction of meritorious cases simply because of its overloaded docket).

[293] *Cf., e.g.*, Gulf, C. & S.F. Ry. v. Ellis, 165 U.S. 150 (1897) (striking down a provision that imposed attorney fees in actions for livestock losses only if the defendant was a railroad). *See generally* THE SECOND CENTURY, chs. 2, 5,7.

[294] *See* 42 BVerfGE 64, 79—83 (1976) (Geiger, J., dissenting).

[295] *E.g.*, 57 BVerfGE 39, 41—42 (1981); 58 BVerfGE 163, 167—68 (1981); 62 BVerfGE 189, 191—94 (1982); 62 BVerfGE 338, 343 (1982); 71 BVerfGE 202, 204—05 (1985). A plausible explanation may be that to deviate from the law in a particular case is to apply it unequally. *See* 54 BVerfGE 117, 124—26 (1980); Dürig, *Art. 3(1), in* 1 Maunz/Dürig, Para. Nr. 52.

clause of Article 3(1) bade fair to become a guarantee of substantive and procedural due process as well—though there was hardly any need for another such provision in view of the broad interpretation already given the right to free development of personality under Article 2.

Finally, although the Constitutional Court has sometimes said that Article 3 imposes no duty to rectify inequalities existing apart from governmental action,[296] other opinions have more than hinted that it may outlaw de facto inequality under some circumstances. The first was an opinion, reminiscent of *Griffin v. Illinois*, relying on Article 3(1) to require the assignment of counsel to an indigent party at state expense[297]—one of the very few areas in which our Supreme Court has come close to recognizing positive rights to government support. Most arresting in this regard was the decision that allowing taxpayers unrestricted deductions for political contributions gave an unfair advantage to wealthy contributors and the parties they tended to support[298]—with an explicit dictum to the effect that progressive taxation was constitutionally required.[299] This is but one more example of the ways in which the equality clauses, like other provisions of the Basic Law, have been employed to make the Constitutional Court ultimate censor of the reasonableness of all governmental action.

G. Conclusion

What is one to make of all this? What one will; my aims are descriptive and comparative. For better or worse, the German Constitutional Court is in the business of determining the reasonableness of governmental action—and, to a significant degree, of inaction as well. In exercising this authority the Court has delved repeatedly into details of the organization and practices of higher education[300] and broad-

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[296] *See*, *e.g.*, 1 BVerfGE97, 107 (1951).

[297] 2 BVerfGE 336, 339—41 (1953). *Cf. Griffin*, 351 U.S. 12 (1956). *See also* 1 BVerfGE 109, 111 (1952) (finding assignment of counsel required by the more general requirements of democracy and the social state); 54 BVerfGE 251, 266—73 (1980) (requiring state-assigned guardian forward without funds).

[298] 8 BVerfGE 51, 63—69 (1958).

[299] *Id.* at 68—69: "[I]n the tax field a formally equal treatment of rich and poor by application of the same tax rate would contradict the equality provision. Here justice requires that in the interest of proportional equality a person who can afford more pay a higher percentage of his income in taxes than one with less economic power."

[300] In addition to the cases on university admissions noted above, see the line of decisions beginning with 35 BVerfGE 79 (1973), invoking Art. 5(3)'s guarantee of academic freedom to assure faculty control of basic questions relating to research and curriculum.

casting,[301] passed upon such minutiae as the appropriate titles of teachers and judges, and joined our Supreme Court in composing a detailed (though strikingly different) abortion code. Moreover, while the German court has so far generally been deferential to other branches in determining how and how far to protect citizens against want or third parties, the abortion and private school subsidy cases demonstrate the potential for constitutionalizing vast additional areas of tort, criminal, and welfare law. The tendency of the German decisions has been progressive rather than reactionary, and the notion of affirmative rights to governmental protection is essentially foreign to our jurisprudence; but the basic principle of freewheeling judicial review is reminiscent of that which gave us *Scott v. Sandford*, *Lochner v. New York*, and *Roe v. Wade*.

Whether the German judges were justified in finding that the Basic Law conferred such sweeping judicial authority I leave to those brought up in the system. I have explained at some length elsewhere why I believe our Constitution does not,[302] but both the language and the history of the two documents differ significantly. That familial and occupational rights are entitled to some constitutional protection in Germany, for example, is obvious from the text; so is the disfavored position of discrimination on grounds of sex. Only to a limited extent, therefore, are the German decisions directly relevant to the interpretation of our Constitution.

More important for us is what the German decisions have to say about the desirability of empowering politically insulated judges to make open-ended judgments about the reasonableness of government action. Some may find in the German experience confirmation of the dangers of unchecked judicial intervention, others proof of the need for broad judicial review. Unlike their American counterparts during the *Lochner* years, the German judges do not seem often to have blocked desirable or even fairly debatable reforms; they do seem to have spared their compatriots a flock of unjustified restrictions on liberty and property. Whether this record affords a basis for confidence that either American or German judges would exercise such a power wisely in the long run is another matter; so is the question whether so broad a power, however wisely exercised, is consistent with one's conception of democracy. Phil Kurland had a word for it, as he has on so many important matters: "Essentially because [the Supreme Court's] most important function is anti-majoritarian, it ought not to intervene to frustrate the will of the majority ex-

[301] The seminal decision on broadcasting was 12 BVerfGE 205 (1961), where the Court interpreted Art. 5(l)'s provision that "freedom of reporting by means of broadcasts. . . [is] guaranteed" to require the state to regulate broadcasting in such a way that various social and political interests had the opportunity to utilize the medium and to participate in its governance. For later decisions applying and refining these requirements, see, *e.g.*, 57 BVerfGE 295 (1981); 73 BVerfGE 118 (1986).

[302] *See generally* THE FIRST HUNDRED YEARS and THE SECOND CENTURY.

cept where it is essential to its functions as guardian of interests that would otherwise be unrepresented in the government of the country." [303] Reasonable people will continue to differ on this fundamental question; their ability to do so is an important aspect of the free democratic order established by the constitutions both of the United States and of the Federal Republic.

[303] KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT 204 (1970).

https://doi.org/10.1017/S2071832200000821 Published online by Cambridge University Press