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The von Maltzan Case: Property Rights After Three Generations

Richard M. Buxbaum*

I. Introduction

Norbert Horn's scholarly interests and mastery range from Roman Law to bond covenants. One book, Das Zivil- und Wirtschaftsrecht im neuen Bundesgebiet,[1] stands out among his writings for its subject matter. In this work *Horn* treated one particularly difficult issue: the disparate treatment of those whose property was expropriated by the Soviet occupiers of their Zone before the establishment of the German Democratic Republic in 1949, as compared with those who lost their property as a result of that government's nationalization and confiscation policies after its establishment. Specifically, it was the refusal of the post-unification Bundestag to afford the right of restitution (or appropriate compensation in lieu thereof) to the former group, while accepting this principle for claims of the latter group, that provoked a controversy lasting 15 years. It was a disparity that led *Horn* to a carefully argued position challenging the constitutionality of the legislation that established this disparate treatment.[2] He did so on the basis of an argument that in US doctrinal terms would be called an equal protection argument, and it is this aspect of his critique that provides the basis for this contribution.

It attempts to contextualize the problem in a comparative sense by looking at some similar developments in US law. Of course, the underlying context – the temporary loss of state sovereignty, and the complex issues of successor-state responsibility for the actions of those foreign authorities exercising sovereignty in the interregnum – is not one that has a direct US analogy or informed its domestic constitutional law.[3] Yet some cases and

* I thank my colleagues *David Caron, Daniel Farber,* and *Philip Frickey* for their comments; and *Daniel Farber* in particular for his help in considering US analogies, as will be more evident below.

[1] First edition, Cologne, 1991; second edition, Cologne, 1993 (references are to the first edition).

[2] Id. at 58ff; see also 233 et seq.

[3] With some minor exceptions arising out of the Civil War. Thus, in New Orleans v. The Steamship Co., 87 U.S. 387 (1874), the Supreme Court confirmed the validity, post-war, of

discussions found in US history – and for that matter in current US debates over reparations for slavery – bear on the matter and permit further consideration of the outcomes before the German Federal Constitutional Court and the European Court of Human Rights. I believe these comparative materials enrich the doctrinal analysis of the arguments and considerations arising from this restitution/compensation issue. They provide doctrinal support for the position *Horn* took on this matter; and at the same time, perhaps paradoxically, they confirm the power of the facts on the ground to shape the law's response to claims of unequal treatment in this politically charged field.

The position *Horn* took on the issue of restitution or compensation for property expropriated before 1949 is both clear and nuanced. He begins with the Joint Declaration of the Federal Republic and the German Democratic Republic of June 15, 1990, which incorporated the position apparently taken by the former Occupying Power, the Soviet Union in the unilateral statement of the GDR that it saw no possibility to revise the expropriation measures of the occupation period. The Federal Republic "took note" of this impossibility "in light of the historical development", but conceded, in the same document, that the occupation-era expropriations could no longer be undone [sind nicht mehr rückgängig zu machen]. The Federal Republic also, however, stated that a future all-German parliament must be able to reserve a final decision concerning possible measures of compensation.[4] *Horn* appropriately characterized this as a "flexible and careful formulation", and further pointed out that the reference to future "measures of compensation" did not expressly exclude restitution of the particular property earlier expropriated.[5] This is a critical point in his or any similar analysis. Most of these assets expropriated before 1949, and of course all immovables, had become the property of the later German Democratic Republic in its various organizational forms. As a result, the unified state might not only choose compensation for the early expropriations, but might also choose state-owned properties, whether the same or other property, for return to this category of claimants in lieu of compensation.

The fact that the German Democratic Republic continued to own these properties distinguished the situation from the situation involving the immediate postwar confiscatory measures of the Western Occupation Authorities. Their actions generally did not affect title to real property situated in the territory of the later Federal Republic. As a result, one might be able to

a wartime seizure of wharf property and its transfer to a new, private owner. I owe the reference to *Daniel Farber*, who discusses it in Lincoln's Constitution (Chicago 2003) at 154 et seq.

[4] The German word, "Ausgleichung", might more literally be translated as "equalization" but in the context I prefer "compensation".

[5] *Horn* supra n. 1, at 57 et seq.

distinguish the early decisions of the Federal Constitutional Court in the 1950s, concerning the Western Occupation Authorities' seizure of privately owned German property situated in their and in neutral countries.[6] This combination of circumstances allowed for a nuanced argument that could reconcile the guarantee of property rights of Article 14 of the Basic Law with the legally relevant political considerations the Federal Republic felt it had to take into account in the context of the Two-plus-Four Treaty that lay behind the Joint Declaration and later legislative scheme. In essence, that is indeed the position *Horn* seemed to formulate.

As is well known, the Federal Constitutional Court did not go down the road *Horn* had laid out. In two famous cases it rejected what a US legal scholar would call a claim that property could not be taken by the state without the due process of law. It also rejected what would be termed an equal-protection claim, a claim based on the apparent discrimination between the disfavored and favored dispossessed classes of owners.[7] The final chapter of that legal odyssey was written in March of 2005, when the Grand Chamber of the ECHR issued its judgment in von Maltzan v. Germany,[8] essentially tracking these two German decisions though paying less attention to this equal-protection aspect of the problem, the aspect I wish to highlight here.

II. Burden Sharing and Discrimination

Discrimination in the degree of sacrifice of property demanded from particular individuals or classes in the name of the common good is not a new issue. Nor is the unavoidably intertwined issue of the conflict between sacrifice of life, health, or liberty on the one hand and the sacrifice of property on the other. However, the Constitutional Court of the 1990s as well as the ECHR had to face this challenge in a context far different from that facing the former court in earlier times, when similar questions, came before it in the wake of the formation of the Federal Republic in 1949.[9] In 1990, to be

[6] See the principal cases of this earlier set, Judgment of the Federal Constitutional Court of March 21, 1957, BVerfGE 6, 290; Judgment of January 13, 1976, BVerfGE 41, 126. For an analogous argument entertained more positively by the US Supreme Court after the settlement of the Iranian Hostage situation through the Algiers Accords, see Dames & Moore v. Regan, 453 U.S. 654 (1981); I have briefly discussed this result, again in comparative terms, in "Equalization of burdens", II FS *Jayme* 1051 (Munich 2004).

[7] Judgment of April 23, 1991, BVerfGE 84, 90; Decision of April 18, 1996, BVerfGE 94, 12.

[8] Decision of March 2, 2005, available at http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=von%20%7C%20Maltzan%20%7C%20Germany&sessionid=5507546&skin=hudoc-en.

[9] See especially the Judgment of January 13, 1976, BVerfGE 41, 126.

sure, the ability of the German state to meet a higher standard of compensation was not the same issue it had been in 1952. On the other hand, the international political context after both the Partial Transfer of Sovereignty Agreement of 1952–1954 and the Two-plus-Four Treaty of 1990 was at least arguably identical (though this identity was seriously challenged in the second of the two Constitutional Court decisions of the 1990s).[10] And it was this political context, supported if not required by the further political/economic choices the newly unified German state had to make between allocating its fiscal resources to individual satisfaction or to the reconstruction of a debilitated East German economy that justified, for both courts, the legislative solution.

The difference between the two eras and their constitutional treatment, however, lies not only in the arguable difference between the respective facts on the ground. It lies also in the fact that the earlier situation did not generate a significant equal protection argument; after all, the Federal Republic had not nationalized the private sector after 1949. The German Democratic Republic did; and it is the undoing of that unique situation that created the problem of disparate legislative treatment of the two classes of victims. *Horn* raises this point as well, briefly discussing whether the proposed exclusion of the pre-1949 confiscations from any more favorable future treatment the post-1949 confiscations might be granted might violate the anti-discrimination norm of Article 3.[11] If the political (and treaty) context did not prohibit restitution let alone compensation in the case of pre-sovereignty expropriations, the differential treatment of the pre- and post-1949 situations by the later legislation would be most flagrantly apparent in the discrimination rather than in the takings context.

It is this disparate treatment that may be the more interesting one to explore in comparative terms. I do so in the hope that a consideration of the varied factual situations the US Supreme Court has had to consider under the US Constitution's version of art. 3 Basic Law may illuminate our common problem: how to apply the prohibition of unjustified discrimination to the range of classification issues this kind of legislation inevitably creates.

To put the German context first: The principal decisions of the Federal Constitutional Court address this issue in an unavoidably awkward way – unavoidable because at the time of the first round of the litigation, at the beginning of the 1990s, the issue was still abstract. The claimants in this first round failed in their attempt to obtain a mandate of equal treatment at the

[10] Somewhat similar considerations are at least implied in the refusal of the ECHR and the ICJ to consider the merits in the *Liechtenstein* case (Prince Hans-Adam of Liechtenstein v. Germany, Decision of the Grand Chamber of the ECHR, July 12, 2001, in Archiv für Völkerrecht 40:2, 243 (2002); Case Concerning Certain Property (Liechtenstein v. Germany), ICJ Decision of February 10, 2005, available at www.icj-cij.org).

[11] *Horn* supra n. 1, at 64.

level of compensation (let alone of restitution) for the pre- and post-1949 victims of expropriations. The court accepted the direct applicability of the "equal-protection" clause of the Basic Law but immediately relativized it by placing these compensation issues under the protective umbrella of the new Article 135a(2) of the Basic Law, allowing the Federal Republic to repudiate private- and public-law claims against the former German Democratic Republic which the Federal Republic might have inherited upon unification. Only because the legislature did authorize restitution and in-lieu compensation for post-1949 expropriations was it obliged, held the court, to provide for some compensation for the earlier cases, but the level of that compensation lay, within undefined limits,[12] in its discretion.

Why it felt so (and "felt" is the appropriate verb) becomes my text, below. The court began by recalling the right of the legislature to consider its fiscal burdens when setting compensation framework conditions, basing this on the earlier postwar precedents dealing with the equalization of burdens arising in consequence of the war. But so far as the time-based discrimination is concerned, it returned to the kind of prudential considerations that makes doctrinal consistency in the search for equality an illusory project:

> "The legislator thus may take account of the total volume of the damages to be made good – which include not only damage to property. In weighing property damage one must consider that in the time in question other goods – life, health, liberty and career advancement – also were damaged."[13]

So far as the decision of the ECHR is concerned, it adds little to this analysis. Most of the *von Maltzan* decision addresses the first – the due process – point; namely, the obligation of Germany to compensate the pre-1949 victims at a level meeting minimal due process standards. The decision of the ECHR, like that of the Constitutional Court, paid relatively little attention to the second aspect of the issue. In general terms, the engagement by both courts with the arguably discriminatory treatment of the pre-1949 victims is less thorough and less intensive than that with the absolute issue of restitution or compensation for pre-sovereignty expropriations. Yet this discrimination aspect lends itself better to comparative analysis capable of reflecting national differences in constitutional interpretation than does the often-discussed comparison of compensation for expropriation and nationalization per se.

[12] But once all or nothing solutions are (properly) rejected, these "limits" themselves of course can only be found in constitutional terms by judicial rules of thumb. See the Decision of October 10, 2001, BVerfG, 1 BvL 17/00, http://www.bverfg.de/; and the views of the four judges dissenting from the plurality opinion in the Judgment of April 11, 2000, BVerfGE 102, 254 (314ff).

[13] Id. at 130 et seq.

III. Constitutional Framing of the Discrimination Problem

Like all foundational principles, "equality" is a slippery concept.[14] Indeed, its unreflective use has led Anglo-American scholars in recent years to pay particular attention to its inherently circular or self-referential quality.[15] While constitutional language, authoritatively foundational, escapes these difficulties by its level of abstraction, there are, even at that level, textual differences among varying formulations. These are worth tracking as they are specified more concretely in implementing legislation and that legislation, in turn, is reviewed by courts charged with applying constitutional norms to these laws.

How should Article 14 of the European Convention on Human Rights, Article 3(1) of the German Basic Law, and section 1 of Amendment XIV to the US Constitution, all bearing on the prohibition of discrimination, be understood at the most abstract level? In the first case, the answer was clear well before *von Maltzan* repeated it: ECHR Article 14 is – by and large! – of ancillary nature only. A right not otherwise granted or a prohibition not otherwise precluded in the Convention's text cannot be the subject of a complaint of discrimination in its grant or prohibition.[16] The "by and large" qualification of course refers to the delicate effort of the ECHR in the *Belgian Language* case[17] to set limits on any governmental claim of possessing unfettered discretion in sensitive areas of human rights – on this, more later.

The German case lies somewhat differently, because of the effort to square a triangle: to raise the concept of "equality" to a proto-constitutional

[14] "[I]t is not very clear what would count as providing an adequate foundation of a substantive moral theory ... Some who find no difficulty at all in intrinsically evaluating 'utility,' or 'interest' of individuals, or some idea of 'equal treatment,' find it intolerably arbitrary to begin with an assertion of rights ... But any moral theory would have to begin with some primitive diagnosis of value ... I accept fully that one has to dig for foundations, but there is a substantial issue involved in deciding when to stop digging."

Amartya Sen "Rights and Capabilities", reprinted in *same* Resources, Values, and Development, 307ff (Cambridge: Harvard U. Press 1984), as cited in *Jedediah Purdy* "A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates", 72 U.Chi.L.Rev. 1237, 1258 (2005).

[15] The briefest list would include *Ronald Dworkin* Sovereign Virtue: The Theory and Practice of Equality (Cambridge: 2000); *Jeremy Waldron* God, Locke, and Equality (Cambridge: 2002); *Robin West* Re-imagining Justice (Aldershot: 2003); *Eric Rakowski* Equal Justice (Oxford 1991); and *Eric Heinze* The Logic of Equality (Burlington: 2003). See also the debate unleashed by *Peter Westen* "The Empty Idea of Equality", 95 Harv. L. Rev. 537 (1982).

[16] The effort to adopt an autonomous Equal Protection Clause as an additional Protocol (12) of the Convention has not yet led to a change in this regard. See generally *Luzius Wildhaber* "Protection Against Discrimination Under the European Convention on Human Rights – A Second-Class Guarantee", 2 Baltic Yearbook of International Law 71 (2002).

[17] Eur. Court H. R., Case "relating to certain aspects of the laws on the use of languages in education in Belgium (merits)", Judgment of July 23, 1968, Reports of Judgments and Decisions No. 6 (1968).

level binding the legislative power; to tie "equality" to the equally fundamental reference point of "freedom"; and to provide a reciprocal flow of influence and thus of constraint between the basic norms of dignity, freedom, and equality on the one hand and the positive rights collectively gathered under the "social-state" norms of Articles 20 and 28 on the other.[18] In particular, all three basic norms may have to be read as hortatory rather than mandatory when the context is that of the allocation of scarce fiscal resources.[19]

The US cases of course have also had to face this question of balance. In doctrinal terms, the US position may seem to lie at the other extreme from that of the foundational texts of both Germany and the ECHR, and to provide a more central role to the Equal Protection Clause. But that is illusory; Tribe's introduction to the foundational problems associated with constitutional placement of the equal-protection clause puts the point most succinctly:

> "[E]quality ... [may be] prized because of its indirect role in enhancing freedom, ... [or] as a crucial but independent variable, or view[ed] as dangerous because of its asserted tension with liberty ... Neither in theory nor in operation ... can a norm of equality be given real content without imposing significant constraints upon ... [majoritarian] substantive choices ... [A substantive] model of equality makes non-circular commands and imposes non-empty constraints only to the degree that we are willing to posit substantive ideals to guide collective choice."[20]

With this doctrinal posture in place, it becomes clear from the jurisprudence of all three tribunals that – the questionable distinction between benefits and takings aside – it is the nature of the right allegedly harmed by a discriminatory grant of benefits that is the critical point of distinction. An especially privileged right may be such because of explicit textual protection or because, even in the absence of that formal protection, it has a socio-cultural history that leads courts to feel its violation more acutely. Closely related to the privileged characterization of a right is the remedial question: typically, whether it is privileged doctrinally in the sense that impact on it requires a

[18] See generally *Christian Starck* Art. 3 Abs. 1, in *von Mangoldt/Klein/Starck*, Bonner Grundgesetz Kommentar (4th ed. 1999) esp. at 315ff, 323 et seq. The brief overview of this triad of values in the first decision of the Federal Constitutional Court on this material, April 23, 1991, BVerfGE 84, 90, at 120f also is directly relevant to this point.

[19] As a result, in all three systems the effort to meet these essentially irreconcilable goals tends, at least on questions of property, to lead to a first problematic distinction – to the question whether the prohibition of discrimination is less likely to succeed when it is posed as a challenge to an allegedly discriminatory grant of rights or benefits than when it is posed as a "takings" challenge, even when such a challenged taking also implicates the fisc because of the constitutional requirement of compensation.

[20] *Laurence Tribe* American Constitutional Law 1436 (2d ed., Mineola, 1988).

stricter justification of a legitimate legislative goal or whether the right is absolutely immune from legislative intrusion no matter what legislative goal is being pursued.

These distinctions were developed in the European Convention context through the Court's judgment in the *Belgian Language* case. At issue was the role of Article 14 in augmentation of the right of French-speaking school pupils to education in that language, a right that could not easily be gleaned from the text of Article 2 of the Protocol (right to education) even when combined with the right to a private and home life provided by Article 8 of the Convention. The ECHR seemed to give Article 14 an expansive interpretation:

> "While it is true that this guarantee [against discrimination] has no independent existence in the sense that under the terms of Article 14 it relates solely to 'rights and freedoms set forth in the Convention', a measure which in itself is in conformity with the requirements of the Article enshrining the right or freedom in question [education] may however infringe this Article when read in conjunction with Article 14 if it is of a discriminatory nature."
>
> "Thus, persons subject to the jurisdiction of a Contracting State cannot draw from Article 2 of the Protocol the right to obtain from the public authorities the creation of a particular kind of educational establishment; nevertheless, a State which had set up such an establishment could not, in laying down the entrance requirements, take discriminatory measures within the meaning of Article 14."[21]

As later ECHR cases demonstrate, however, it is the particularly sensitive and central right to education that raised the supposedly ancillary nature of Article 14's anti-discrimination protection to this more autonomous status. When other rights less critical to the citizen's participation in the governance of a democratic state were involved – in other words, when property rights were involved – the Court limited its own role of testing legislation under this standard to a different level of review.[22] As already stated, it is the nature of the right assertedly impacted by disparate legislative treatment that drives the review, and that generates the degree of respect for legislative judgment acceptable to those charged with constitutional oversight.

[21] Id. at 33. The analogy to the US situation is striking: The state has no constitutional duty to provide public education, but if it does, the equal-protection clause applies. Griffin v. County School Board, 377 U.S. 218 (1964); but compare Palmer v. Thompson, 403 U.S. 217 (1971), accepting a city's closing of its public swimming pools rather than accept their desegregation, on public-safety grounds.

[22] See generally *Jochen Abr. Frowein* and *Wolfgang Peukert* Europäische Menschenrechtskonvention – EMRK-Kommentar, 467 ff (2d. ed. Kehl: 1996). The only ECHR judgment to the contrary noted there, Pine Valley Developments Ltd. v. Republic of Ireland, Series A No. 222 (Judgment of November 29, 1991), is basically an estoppel case and does not suggest a different general conclusion.

All three jurisdictions have had to struggle to keep this conflict between an absolute and a relative concept of equality in productive tension; to keep away from either extreme. Particularly in the case of intrusions on claims of property rights, however, the two national judiciaries have more leeway in checking legislative and administrative actions against some "substantive ideals" than does the ECHR, if only because they are direct constitutional actors. The ECHR, at a remove from that national setting, is doubly constrained – politically and not only textually – when second-guessing the national courts' reading of their own constitutions in their own context.[23] It seems appropriate, therefore, to place some paradigmatic property-rights cases from the two national constitutional courts at the beginning of the inquiry. While the German situation of 1949 and 1990 is unique in its state-formation and state-succession context, the doctrines that arose out of more common situations of legislative discrimination still provide a good basis for beginning a comparative inquiry.

IV. The American Equal-Protection Doctrine and Property Rights

Considering the historical context within which *von Maltzan* arose, it is an irony that one of the principal US cases expanding on the judicial treatment of legislative action under an equal-protection challenge involves the country's own history of conquest, forced expropriation and eventual reparations. In Delaware Tribal Business Committee v. Weeks,[24] a group of Delaware Indians whose ancestors had not joined the larger tribe in its forced removal to Oklahoma,[25] but had remained at their temporary stopping place in Kansas, challenged the US Government's failure to include them in the distribution of a reparations fund the Oklahoma Delawares and Absentee Delawares had won in the US courts more than a century after the event. The Congressional appropriations statute, whether by inadvertence or by

[23] *Frowein/Peukert*, id. at 468, while disagreeing with the position of the ECHR Commission on the merely ancillary nature of art. 14 (a position later, however, confirmed by the Court in *von Maltzan*), accept the need for the European Convention authorities to defer to the German court's judgment on the justification for the different treatment of the early expropriations.

[24] 430 U.S. 73 (1977).

[25] To which a third component of the Delawares – the "Absentee Delawares" – had migrated earlier.

design,[26] omitted these Kansas Delawares from the distribution of the reparations award.

On a preliminary issue marginally reminiscent of the German situation, the Supreme Court rejected the private defendants' argument that the dispute was a non-justiciable political question, an argument based on the plenary power of the Congress to control tribal property.[27] The court distinguished its prior rulings of non-justiciability in the context of Congress' treaty-making power with Indian tribes:[28]

> " ... *Lone Wolf* ..., however pertinent to the question ... of congressional power to abrogate treaties ... has not deterred this Court, particularly in this day, from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment ..."[29]

The merits, however, were another matter:

> "The question is therefore what judicial review of [the relevant statute] is appropriate in light of the broad congressional power to prescribe the distribution of property of Indian tribes. The general rule emerging from our decisions ordinarily requires the judiciary to defer to congressional determination of what is the best or most efficient use for which tribal funds should be employed ... Thus, Congress may chose to differentiate among groups of Indians in the same tribe in making a distribution ..., or on the other hand to expand a class of tribal beneficiaries entitled to share in royalties from tribal lands, ..., or to devote to tribal use mineral rights under allotments that otherwise would have gone to individual allottees ... The standard of review most recently expressed is that the legislative judgment should not be disturbed as long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians ..."[30]

The US equal-protection doctrine, while not particularly coherent, bases the standard of review on the nature of the right claimed to have been invaded; that is, applies a generalized version of the principle enunciated by the ECHR in the *Belgian Language* decision. In general it distinguishes between the "suspect categories" – familiar from the time of their origin in the

[26] The omitted Kansas Delawares were the descendants of only 11 families, and had been paid some monies in 1866, though not as much (the Court assumed) as they would have obtained had they been included in the current distribution. This may have been the reason for their omission – the Court did not find the record clear on this point.

[27] The Government, interestingly enough, did not join in this argument but accepted the justiciability of the dispute.

[28] Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

[29] 430 U.S. at 84.

[30] Id. at 84f; citations and internal quotations omitted.

post-Civil War amendments[31] that expanded the rights of due process to include race, now statutorily expanded to encompass ethnicity, national origin, and gender – and the other, particularly economic, categories. For equal-protection challenges in the latter group the so-called "rational basis" test raises the bar for successful attacks, though again in a way that can hardly be called coherent. Given that situation, one way to compare US doctrine as it might illuminate *von Maltzan* and at the same time provide some generalization in normative terms for this sensitive subject is to lay out the facts of the more relevant cases, providing where available a cognate German or ECHR decision.[32]

The appropriate German case to place alongside *Delaware Tribal Business Committee* arose in the aftermath of the Second World War. A 1957 statute implementing the constitutional right of support found in art. 131 of the Basic Law created a complex system to deal with the pension rights of surviving spouses of civil servants (*Beamten*)[33] whose actions during the Third Reich subjected or would have subjected them to loss of their pensions. Civil servants classified in the lower ranges of the Denazification regime received their pensions in full or in part, and their surviving spouses of course also received this continuing benefit. Others, who had been classified as more culpable and denied pensions, had the right to a review process that often resulted in a reclassification in a lower and thus better category. The claimants in the case leading to the decision paraphrased here[34] fell into two categories. Some were the widows of civil servants who had been classified in a non-pensionable high category and who had died during the pendency of their appeal for a lower classification and thus for some or higher pension benefits. Others were the widows of civil servants who had had a lower clas-

[31] Though these, in particular the 14th Amendment, address the states, the jurisprudence these amendments generated has been incorporated into the Fifth Amendment to bind the federal government, with some marginal variations.

[32] At a more abstract level, the recent formulation by the German Federal Constitutional Court in its decision of July 5, 2004 (1 BvR 1271/04, available at http://www.bverfg.de/entscheidungen/rk20040705_1bvr127104.html) provides a good summary:

> "Aus dem allgemeinen Gleichheitssatz ergeben sich je nach Regelungsgegenstand und Differenzierungsmerkmalen unterschiedliche Grenzen für den Gesetzgeber, die vom bloßen Willkürverbot bis zur strengen Bindung an Verhältnismäßigkeiten reichen. Bei einer Ungleichbehandlung von Personengruppen unterliegt der Gesetzgeber regelmäßig einer strengen Bindung. Dies gilt auch dann, wenn eine Ungleichbehandlung von Sachverhalten mittelbar eine Ungleichbehandlung von Personengruppen bewirkt. Das Bundesverfassungsgericht prüft dann im einzelnen nach, ob für die vorgesehene Differenzierung Gründe von solcher Art und solchem Gewicht bestehen, dass sie die ungleichen Rechtsfolgen rechtfertigen können."

[33] While the term is not fully analogous, I translate "Beamten" as "civil servants" to emphasize their security of employment.

[34] Decision of December 12, 1967, BVerfGE 22, 387.

sification but on the basis of new facts discovered only after their death were reclassified upwards, leading to the termination of their surviving spouses' pensions. The statute did not provide for any avenue of challenge or relief for the survivors in these situations, and it was this disparity of treatment that led to the constitutional challenge, a challenge declared justiciable by the Constitutional Court but rejected on the merits in terms similar to those used in the described opinion of the US Supreme Court:

> "A violation of the equal-protection norm is not involved. In applying this norm one always needs to ask whether the complainant (and her class) is placed in a worse position than another comparable group of persons by the challenged statute in the absence of a legally adequate basis – that is, arbitrarily ...
>
> "The complainants and their cohort compare themselves ... with those survivors of civil servants against whom [a different procedure] is used ... If the process [initiated under the earlier version of the disciplinary proceeding] was carried through without success the support-eligible survivors are assured of the continued pension, whereas the complaining survivors under the [new version of the] process must still face the possibility of a later denial of their rights. That, however, is no constitutionally objectionable discriminatory treatment. The equal-protection norm does not require that the survivors of civil servants who died before the completion of a disciplinary proceeding should in the context of the fate of their pension claims be treated like the survivors of civil servants who had been acquitted in [the earlier version] of the disciplinary process. It was and remains the intention of the legislator to deny benefits under the law implementing art. 131 Basic Law to those whose rule violations or equivalent behavior justifies removal from office – and this in any case also includes a violation of the principles of humanity or the rule of law.[35]

Interestingly enough, several of the US analogies to this case involve yet other consequences of World War II. Thus, in Jacobs v. Barr,[36] the equal-protection challenge of a US citizen of German ancestry to the payment of

[35] Id. at 415, 417 (my translation). For a contextually similar case, and similar argument, see the recent case of United States v. Wittje, 422 F.3d 479 (7th Cir. 2005), summarily rejecting an equal-protection challenge by a former Waffen SS member to a move to revoke his citizenship on the ground that the early Displaced Persons Act, under which he originally gained entry without disclosing his membership in the organization, made no exception for involuntary membership, whereas the later-enacted general immigration statute did make that distinction and thus permitted similarly situated immigrants to obtain legal entry: "It cannot be seriously disputed that the Congress had a rational basis (all that is needed in this case) for such a restriction when it enacted the DPA or even now. Immigration to this country is a privilege, not a right ..." (id. at 486).

[36] 959 F.2d 313 (D.C. Cir. 1992).

compensation only for the detention of Japanese-Americans during the war but not to interned German-Americans was rejected on the basis of Congressional findings of the difference between the race-based mass internment of the former and the individually based detention of the latter group (although the plaintiff was a minor at the time of his detention). A recent analysis takes this even further, arguing that even a mass internment would not require similar compensation for the German-American internees.[37] " ... [It] would be seen as just another instance of the government's prerogative, familiar from the domain of economic legislation, to proceed 'one step at a time', prioritizing its remedial programs in light of budget constraints and other policy considerations."[38]

Probably the most interesting US case to present to a European audience, because of its doctrinal struggles and its relationship to property rights (and thus to the value premises of the court), is Zobel v. Williams.[39] The State of Alaska enjoyed the benefit of a substantial increase in funds derived from mineral exploitation, and enacted a statute to distribute some of this income on an annual basis while retaining a substantial share in a capital fund. The formula provided each adult citizen one unit of account for each year of residence in Alaska since 1959 (when it became a state); thus, recent arrivals would receive less than long-time residents. The Supreme Court struck down the statute on a number of grounds, but in essence issued two opinions. One focused on the negative impact of the statute on the constitutional right of interstate migration, using equal-protection arguments only as a helpmeet; the other saw the equal-protection problem as the critical issue because the statutory scheme had only a weak and indirect effect on this migration right. As a result, two different modes of analysis were used, and in their pairing become an interesting lens through which to view the discrimination claim in *von Maltzan*.

The challenge to the statute came not from parties who had moved to the state after enactment of the statute, but from those who had arrived in the state at various times after 1959 but before the enactment date. The majority opinion by Justice *O'Connor* began not with the heightened scrutiny a law barring or inhibiting interstate travel – a constitutionally protected right – might deserve, but with a baseline derived from ordinary economic cases:

> "When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause ... Generally, a law will survive that scrutiny if the distinction it makes rationally furthers a

[37] *Eric Posner & Adrian Vermeule* "Reparations for Slavery and Other Historical Injustices", 103 Colum. L.Rev. 689, 722 (2003).

[38] Id. at 722.

[39] 457 U.S. 54 (1982).

legitimate state purpose. Some particularly invidious distinctions are subject to more rigorous scrutiny ... The State ... asserts that the law need only meet the minimum rationality test. In any event, if the statutory scheme cannot pass even the minimal test ..., we need not decide whether any enhanced scrutiny is called for."[40]

This excerpt implicitly adds a third analytical component, interesting in comparative terms, to the previously identified issues of law classification and rights classification. It is not the constitutional sensitivity of the right that yields the appropriate level of judicial review but the distance between the state's claimed purposes and the means chosen for their implementation – a shadow of *Lerche's Verhältnismäßigkeit* argument,[41] which indeed has made its way into US law under the "least onerous alternative" rubric.[42] That concept was directly applied in *Zobel.* The state justified its differential payment formula on three grounds. The first, a financial incentive for migration to Alaska, was disregarded because it was "not rationally related to the distinctions Alaska seeks to make between newer residents and those who have been in the State since 1959."[43] The second rationale, prudent management of the capital fund rather than making a one-time distribution that might result in its recipients then leaving the state, was rejected with what amounted to the second-guessing of the legislature:

"Even if we assume that the state interest is served by increasing the dividend for each year of residency beginning with the date of enactment, is it rationally served by granting greater dividends in varying amounts to those who resided in Alaska during the 21 years prior to enactment? We think not."[44]

Only the third – compensating old-timers for their contributions to the state's welfare during the earlier, presumably more difficult years – might connect with a timing distinction. Here the Supreme Court brought a different consideration into play, one that will resonate with those familiar with current European problems relating to migration within the Union:

"If the states can make the amount of a cash dividend depend on length of residence, what would preclude varying university tuition on a sliding

[40] Id. at 60.

[41] *Peter Lerche* Übermaß und Verfassungsrecht (Cologne 1961). For its use in the jurisprudence of the ECHR on interference with property rights, see *Frowein/Peukert* supra n. 22, esp at 453f; *Ali Riza Çoban* Protection of Property Rights Within the European Convention on Human Rights 204ff (Aldershot 2004).

[42] Indeed, in particular in the context of the Equal Protection Clause. See, e.g., Carrington v. Rash, 380 U.S. 89 (1965).

[43] 457 U.S. at 61.

[44] Id. at 63.

scale based on years of residence – or even limiting access to finite public facilities, eligibility for student loans, for civil service jobs, or for government contracts by length of domicile? Could states impose different taxes based on length of residence? Alaska's reasoning could open the door to state apportionment of other rights, benefits, and services according to length of residency. It would permit the states to divide citizens into expanding numbers of permanent classes. Such a result would be clearly impermissible."[45]

Since it is in the nature of case adjudication to face and resolve slippery-slope arguments, this approach to the context posed by the Alaskan statute did not bode well for the development of a coherent equal-protection doctrine. That, indeed, is what happened, as the Supreme Court's struggle with two further fact situations demonstrates.

The first set of situations is illustrated by the cases arising out of compensation of Native American tribes for historical land expropriations. Consider again the *Delaware Tribal Business Committee* situation, a case that one might well believe would fall *a priori* under the condemnation of *Zobel.* As was noted, the opposite occurred. Yet in Hodel v. Irving,[46] the Supreme Court considered a much less egregious situation and applied the heavy artillery of the Due Process Clause to it in a context implicating if not requiring a judgment that equal protection also was at issue. Before the court was a federal statute that tried to cure the extreme splintering of certain Indian lands as each successive generation's members obtained ever smaller (and undivided) interests in land allotments originally made to their ancestors. The statute prohibited succession by descent or testamentary disposition (though not by sale), and provided for the land's escheat without compensation if the fractional interest of the current owner was below a minimum proportion of the whole original parcel and earned its current owner less than a minimal amount annually. The court declared this to be a violation of the Just Compensation Clause of the federal constitution, even though it recognized that many inroads on the freedom to pass on property by descent would not be compensable: e.g., "it would be permissible for the United States to prevent the owners of such interests from further subdividing them among future heirs on pain of escheat ... [and it] may [even] be appropriate to minimize further compounding of the problem by abolishing the descent of such interests by rules of intestacy ..." While this case was not reviewed under equal-protection standards, its enshrinement of *de minimis* property rights as absolutely protectable by definition implies that a distinction based upon trivial versus non-trivial holdings would violate that

[45] Id. at 64.

[46] 481 U.S. 704 (1987).

clause's protection even though the state purpose was rational (indeed commendable), the relation of means to ends suitable, and the nature of the right itself not in a sensitive ("suspect") category.[47]

A second set of situations arises out of the practice of states of the Union to give veterans of the Armed Services preferences in hiring for state positions, though of course these also implicate the federal-state division of powers. In Attorney General of New York v. Soto-Lopez,[48] a New York statute provided for this hiring preference[49] but only to those veterans who had been New York residents at the time of entering military service, not to those who became residents afterwards. The court struck down the statute, in part because of its impact on "the constitutional right of interstate migration", another member of the mentioned "protected categories", but did so in the context of an equal-protection review:

> "Because the creation of different classes of residents raises equal protection concerns, we have also relied upon the Equal Protection Clause in these cases. Whenever a state law infringes a constitutionally protected right, we undertake intensified equal protection scrutiny of that law. [fn: Of course, regardless of the label we place on our analysis – right to migrate or equal protection – once we find a burden on the right to migrate the standard of review is the same. Laws which burden that right must be necessary to further a compelling state interest.]."[50]

In that review, each rationale provided by New York for the statute was examined for both logical and factual weaknesses, an exercise I will spare the reader, since it involved, again, little more than the court's second-guessing about these policy judgments.[51] The important point, however, is

[47] One of the few cases in which the ECHR found a burden placed on small-property holders discriminatory despite a rational argument for the statute under challenge (requiring only owners of small parcels to transfer hunting rights to a hunting organization in order to pool adequate hunt fields) is strikingly similar. See Chassagnou v. France, Judgment of April 29, 1999, Reports 1999/II, discussed in *Çoban* supra n. 42 at 242et seq.

[48] 476 U.S. 898 (1986).

[49] Typically these preferences take the form of extra "points" on civil-service entrance examinations, but the also typical extreme clustering of the scores within a narrow range in effect makes the practice an absolute preference.

[50] 476 U.S. at 904.

[51] But an example from a related case, Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985), involving a trivial property-tax mitigation, is worth quoting as an example:

> "Those who serve in the military during wartime inevitably have their lives disrupted, but it is difficult to grasp how New Mexico residents serving in the military suffered more than residents of other States who served, so that the latter would not deserve the benefit a State bestows for <u>national</u> military service. Moreover, the legislature provided this economic boon years after the dislocation occurred. Established state residents, by this time, presumably had become resettled in the community and the modest tax exemption hardly bears directly on the transition to civilian life long after the war's end.

that except for the state-residency aspect, veterans' preferences have been a common feature of differential legislative grants of benefits unrelated to that service. These preferences go beyond job-security provisions, guaranteeing the right of a veteran to return into a previous position in the private as well as the public sector. They include such elements as property-tax relief, income-tax relief, and general civil-service hiring preferences of the type condemned in *Soto-Lopez*. They have been justified as legitimate compensation "in some measure for the disruption of a way of life ... and to express gratitude."[52] Indeed, they can even trump other legislative policies, in particular the prohibition of discrimination on grounds of sex or gender categorization. In the notorious case of Personnel Administrator of Massachusetts v. Feeney,[53] the Supreme Court rejected a challenge to a state veterans' hiring preference scheme that admittedly operated "overwhelmingly to the advantage of males." Following its disposition of a challenge to similar legislation because of its racially disparate outcome, the court provided this guideline:

> "When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionally adverse, a twofold inquiry is ... appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, covert or overt, is not based on gender, the second question is whether the adverse effect reflects <u>invidious</u> gender discrimination. In this second inquiry, impact provides an 'important starting point,' but purposeful discrimination is 'the condition that offends the Constitution'."[54]

Thus, even an equal-protection claim involving a sensitive right and open to challenge on the kind of overbreadth effects used in *Hooper*[55] nonetheless was rejected – rather obviously because of the court's political reluctance to open the door to judicial engagement with the multitude of issues in every conceivable social context in which disparate impact in racial and gender terms might be claimed.

> Finally, the benefit of the tax exemption continues for the recipient's life. The annual exemption, which will benefit this limited group of resident veterans long after the wartime disruption dissipated, is a continuing bounty for one group of veterans rather than simply an attempt to ease the veteran's return to civilian life."

[52] Russell v. Hodges, 470 F.2d 213, 218 (2d Cir. 1972). The leading case approving this overall approach is Regan v. Taxation With Representation of Washington, 461 U.S. 540 (1983).

[53] 442 U.S. 256 (1979).

[54] Id. at 274.

[55] As in *Hooper* the benefit of the hiring preference remained available no matter how long after the end of military service a veteran applied for the civil-service position.

Given this welter of conflicting outcomes in a variety of contexts that bear on the central issue of this paper, it becomes difficult to avoid the discomforting fact that the equal-protection norm is not easily reduced to coherent doctrinal form. If this is indeed the case, can a principled value-based policy be called upon to validate results that on their face are as stark as the pre-unification expropriation situation with which we are concerned here? Put more bluntly, might it be legitimate and appropriate to contest the strength of the property rights when we seek retrospectively to undo or mitigate earlier injustices that had effects on property rights but that also had effects, though of a different nature, on other rights of life and liberty?

V. The Generational Aspect of Property

Contemporaneous recasting of theories of property rights are much in evidence in Anglo-American jurisprudential writings, though it is yet unclear whether this work would justify the denial of equal-protection challenges to the legislation at issue in *von Maltzan* and *Delaware Tribal Business Committee*. Would it at least, however, bring the jurisprudence I have illustrated into more doctrinal and systemic coherence? It is a tempting approach, largely because of the emergence of recent post-Marxist critical theory, not only in the Anglo-American realm, focused specifically on the institution of property and animated by concerns about the impacts on freedom and equality of modern forms of production in a globalizing economy. This field of critique, its launch generally credited to *Amartya Sen*, involves among other elements an effort to come to a new reading of the classic proponents of the liberty value inherent in property, in particular *Adam Smith* and *John Locke*.

At least in the Anglo-American philosophical discourse the notion of property rights as human rights is based on *Locke*'s famous insight that labor in creating or improving any *res* (even, indeed especially, land) generates the right of ownership.[56] This "labor theory" of property rights, however, not only was always understood as needing modification when harm to others was at issue but it also and always has led to special efforts, though more in modern times than in *Locke*'s, to modify it for application to the attenuated form it takes through inheritance and other means of generational transfer. And if even in times of stability the social acceptance of the liberty basis of property rights became attenuated through property's passage through generations, then the added instability of war and destruction, the

[56] I borrow here from an excellent recent work reviewing both original and current literature on this topic: *A. John Simmons* The Lockean Theory of Rights (Princeton 1992), esp. Chapters Five ("Property Rights") and Part 4 of Chapter 4 ("Rights and the Family" – "The Family and Property").

difficulty of achieving clear social and therefore legal consensus on the absolute re-creation of the status quo ante, and the perennial struggle over the allocation of scarce resources further that attenuation and make the justification of compromise even more compelling.

In the context of our particular focus, however, even the most critical view of the right to property and the correspondingly most expansive view of social justifications for its limitations provide little guidance when discrimination within the class of property owners is the issue. One possible line of justification for such intra-class distinctions might lie in the simple fact of size and wealth; indeed, this is one of the principal openings found in Locke's own work. Thus, in the context of *von Maltzan*, though not of *Delaware Tribal Business Committee*, one justification for the different temporal treatment might be found in a crude correlation between the (typical? average?) size of the landed estates confiscated early and that of those properties confiscated late. But even assuming some such crude correlation, fortified by the Communist ideologies of the time, had been made in 1945, it could not have been resorted to in 1991 without generating a poisonous political discourse; and of course it was not made.[57]

A second, related but somewhat less freighted "factual" argument at this "typical/average" level of judgment might lie in a possible distinction between the types of property expropriated – agricultural land early, commercial properties late. This might have justified a crude but politically feasible and constitutionally acceptable distinction in compensation schemes as well as a judgment call that the more profound changes in the forms of agricultural lands over the decades as compared with those for commercial units justified a blanket rejection of restitution possibilities for the former. Again, of course, this approach was not and could not have been taken, if only because the "ideal-typical" sets of cases do not exist.[58] The only other property-based distinction that then suggests itself is the purely generational one: all other things being equal, the farther back the original wrong the less the obligation to correct it. But this falls into a different and less palatable realm of "theory"; and it is directly in conflict with *Locke*'s view of the equal sanctity of originally acquired and inherited property.

The branch of political philosophy concerned with the distinction between corrective and distributive justice has generated one argument that

[57] The careful and dispassionate review of the policies of the time, engaged in by the Federal Constitutional Court in its Decision of October 26, 2000, 2 BvR 955/00, indirectly accepts the existence of these correlations at the time ("Junkerland in Bauernhand") but only for the purpose of providing the context for the Joint Declaration and its recital of the alleged Soviet position on this subject in 1990.

[58] Alone the variety of properties which were the subject of the challenges rejected in the Constitutional Court's Decision of November 22, 2000, BVerfGE 102, 254 suggests the impracticability of such an approach.

goes some distance towards justifying the disparate treatment of the pre- and post-1949 victims of expropriation, though it does not directly translate into legal doctrine. As *Kutz*[59] formulates it, a revolutionary regime change that rejects prior property rights transforms the baseline from which those rights spring. Therefore, a later restorative transformation, returning to a legal regime that again honors private property rights, is the equivalent of a blank slate. No principle of corrective justice requires restitution / compensation for the previously dispossessed owners, though principles of distributive justice may give some of them a claim on the new society's scarce resources in the sense that victims of any disaster have such principled claims for support. To that specific degree the revolutionary regime is deemed legitimate, even if by definition it was not legitimately formed under the foundational principles of the predecessor regime. Only uncompensated expropriation occurring under a constitutional regime that claims to protect property rights would, on the contrary, be illegitimate, and principles of corrective justice would require the victims of such acts to be granted restitution independent of burden-sharing principles.

That is a controversial and possibly untenable proposition, but a narrower version of it may be more acceptable within the framework of this particular political-theory discourse. We can disagree with *Kutz* in the specific situation of the expropriation acts of the German Democratic Republic, but use the baseline concept in another way. The one "revolutionary" regime that legitimately transforms the baseline of property rights is that of wartime conquest, occupation, and – the critical point – the indefinite (though not necessarily permanent) supplanting of the defeated and dissolved government. That is how *Kelsen* and the occupation powers characterized the postwar situation in both parts of the former Reich.[60] The expropriations under that regime would therefore be free from later restitution claims within this context of corrective justice, and compensation to the victims of those acts therefore limited to the burden-sharing claims allowed by principles of distributive justice. The difficulty with the argument, at this theoretical level, is at another point. In a sense, the German Democratic Republic too was "born" in revolution – was not under its original constitutional regime required to compensate those whose properties it then expropriated. It too was the child of conquest and its consequences. Why, then, is

[59] *Christopher Kutz* "Justice and Reparations: The Cost of Memory and the Valve of Talk", 32 Phil. + Public Affairs 277 (2004), at 296ff.

[60] *Hans Kelsen* "The Legal Status of Germany", 39 Am. J. Int'l L. 518 (1945), based on his formal correlation of "state" with "sovereign". For a view distinguishing "state" and "government", *Max Rheinstein* "The Legal Status of Occupied Germany", 47 Mich. L. Rev. 23 (1948) is a standard citation. The German view, of course, was closer to the latter position; see the contemporaneous report of *Eberhard Menzel* "Zur völkerrechtlichen Lage Deutschlands", Europa-Archiv 2:1009 (1947).

restitution or equivalent compensation for its seizures required under my narrower version of *Kutz*'s position?

It can only be required because unification retroactively placed it under the legal framework of the Federal Republic, so that the original baseline is recharacterized, after 1990, as one that respected private property rights even though it then, indeed immediately, dishonored them. It is only the retroactive power of the unification that underlies and could possibly justify this argument. If we were to carry this argument over into legal doctrine, the analogy would be to the East German espionage trials and the judgment of the Federal Constitutional Court grappling with the retroactivity issue.[61]

I doubt, however, that an argument from this perspective will suffice to provide a sense of coherence to the equal-protection jurisprudence this turbulent period has generated. In short, the failure of equal-protection challenges to the differential treatment in the posited case cannot readily be laid to justifiable distinctions derived from concepts of property rights. Yet it is equally clear that in this field the sympathies of the judges, and of the larger society, tend to be less engaged than they are in those fields in which the relation of equality to liberty is more direct.[62] We are thus left with the realistic if not professionally satisfying conclusion that doctrinal coherence in this sensitive field cannot be expected. Indeed, the US jurisprudence, derived from less sensitive contexts, suggests an even deeper problem. Equality is difficult to understand without specification, and it is difficult to specify. It is this larger lesson, derived from a larger set of events, which justifies my point of departure. A wider framing of these equal-protection challenges indeed does enrich the doctrinal understanding of the compensation issue. It also, however, provides further evidence that the force of circumstances may generate contradictions that doctrinal coherence cannot harness.

[61] The foundational case (not that of *Wolf*) is the Decision of May 15, 1995, BVerfGE 92,277, and the Comment of *K. Arndt* in 48 (1995): 1803. The *Wolf* case itself went off on more procedural issues; see the BGH Judgment of October 18, 1995, in NJW 49 (1996), 1160.

[62] Paradoxically, this does not preclude granting property rights more attention than rights to life and health in a different generational sense. Property survives its original owner-victim in a way easier to reassert by successors than in cases of wrongful death or injury. Consider only the solution of the Gesetz zur Errichtung einer Stiftung "Erinnerung, Verantwortung und Zukunft" of August 2, 2000, BGBl II, p. 35 (2000), based on U.S.-Germany: Agreement concerning the Foundation "Remembrance, Responsibility and the Future" of July 17, 2000, U.S.-F.R.G. 39 I.L.M. 1298 (2000): A claimant for compensation for forced labor had to survive until 1999 to be eligible to file, whereas any direct descendant of the original victim of a property seizure was eligible to file a claim therefore.

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