PUTTING THE BRAKES ON RENT INCREASES: HOW THE UNITED STATES COULD IMPLEMENT GERMAN ANTI-GENTRIFICATION LAWS WITHOUT RUNNING AFOUL OF THE TAKINGS CLAUSE

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ABSTRACT

Germany has recently implemented two laws to affirmatively protect affordable rental housing in major cities: the *Mietpreisbremse*, a rental brake that regulates how steeply property owners can increase rents, and the *Milieuschutz* laws, which require owners to obtain special permission before renovating rental properties or converting them into owner-occupied condominiums. In contrast, the United States has repeatedly favored private landowners, establishing a framework of private property rights protection over assisting renters. This paper argues that Germany's anti-gentrification laws can serve as inspiration for the United States to establish that maintaining adequate and affordable rental housing is a valid use of a state's police power, which would allow states and municipalities to adopt laws like Germany's without running afoul of the United States' Takings Clause jurisprudence.

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INTRODUCTION

Across the world, gentrification is shifting the lives of millions of renters.[1] Gentrification is a process in which portions of cities are transformed from areas that service low-income populations towards spaces that, by servicing higher-income populations, generate more capital for investors.[2] A distinct part of the process of gentrification is the transition from low-income tenants, priced out by the change in the neighborhood, to a higher-income population of renters.[3] As developers identify neighborhoods with the largest potential to make profit, renovate buildings, and rapidly increase the rents, low-income tenants are pushed further and further away from familiar neighborhoods.[4]

When rents begin to rise unsustainably, low-income tenants have few options for maintaining housing and the stability of both their communities and lives. One option is for governments to intervene through partial decommodification of housing. By passing regulations that curb the effects of gentrification on rent prices and affordable

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1 *See generally* PETER MOSKOWITZ, HOW TO KILL A CITY: GENTRIFICATION, INEQUALITY, AND THE FIGHT FOR THE NEIGHBORHOOD (2017); DAVID MADDEN & PETER MARCUSE, IN DEFENSE OF HOUSING: THE POLITICS OF CRISIS (2016).

2 MOSKOWITZ, *supra* note 1, at 37–38.

3 *Id.* at 5–6. In 1979, MIT professor Phillip Clay identified the common phases of gentrification, which include a few "pioneering" gentrifiers moving into a space, and then a rush of gentrifiers and corporate real estate companies moving into a neighborhood, inevitably changing the socioeconomic landscape of the community.

4 *Id.* at 22.

housing stock, governments can preserve the options for low-income tenants, sustain vibrant communities, and offer a stable foundation on which individuals can maintain their livelihoods.[5]

Germany has recently implemented two laws to affirmatively protect affordable rental housing in their major cities: the *Mietpreisbremse* and the *Milieuschutz* laws. The *Mietpreisbremse* is a rental brake that regulates how steeply property owners can increase rents. The *Milieuschutz* laws require owners to apply for and obtain special permission before renovating rental properties or converting them into owner-occupied condominiums. In contrast, the United States has repeatedly favored private landowners, establishing a framework of private property rights protection over the assistance of renters. This paper argues that Germany's anti-gentrification laws can serve as inspiration for the United States, most likely at the individual state level, to establish laws that protect and maintain adequate and affordable rental housing.

Part I of this paper explores the current landscape of affordable housing protection in Germany, looking first at Germany's government structure and constitution, as well as the way the courts weigh social interests against individual property rights. This set the stage for Germany to pass both the *Milieuschutz* and the *Mietpreisbremse* laws. Part II of this paper examines the right to housing in the United States, which currently exists as more of a lofty goal than a substantial state interest. This part also explores the choice of the legislature and the judiciary to emphasize an individual right to property over the government's larger social obligations to maintain access to stable housing. This part specifically examines the United States' Takings Clause jurisprudence, which would pose the greatest threat to any attempt to enact anti-gentrification legislation. Part III of this paper examines a possible route to enacting anti-gentrification legislation similar to Germany's *Milieuschutz* and *Mietpreisbremse* laws in the United States. Specifically, this paper argues that protecting the right to housing is a valid use of a state's police power, which would allow states to enact reasonable regulations protecting affordable housing without running afoul of the Takings Clause.

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[5] MADDEN & MARCUSE, *supra* note 1, at 43.

I. BACKGROUND

A. GERMANY'S BASIC LAW

The German Constitution, *Grundgesetz für die Bundesrepublik Deutschland* (the Basic Law) went into effect in 1949, after the country was rebuilt as a Federal Republic in the aftermath of World War II.[6] The Basic Law begins with a Bill of Rights (*Grundrechtskatalog*), emphasizing that in the harrowing shadow of the Nazi regime, this new republic would protect human dignity.[7] The Bill of Rights catalogs specific human rights that all German government institutions, including state and local governments, are bound to protect.[8] Furthermore, Article 79(3) of the Basic Law states that "[a]mendments to this Basic Law affecting . . . the principles laid down in Articles 1 and 20 shall be inadmissible,"[9] thus preventing any amendment altering the Article 1 statement that "[h]uman dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."[10] The Basic Law provides that, when creating positive laws that may limit rights, those laws are to be measured against the higher-law norms of the rights of human dignity codified in the Basic Law.[11]

The right to human dignity, or personality, has repeatedly been given the utmost importance by the Federal Constitutional Court, the German court charged with adjudicating constitutional questions.[12] The Federal Constitutional Court weighs other constitutional rights against the guarantee of human dignity, and often those other private rights must yield to the right of human dignity.[13]

One example of this yielding is the *Mephisto* decision, in which the Federal Constitutional Court weighed in on a judgment that banned the distribution of a satirical novel based on the career of an actor who had attained fame during the Third Reich by appeasing the Nazi

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6 DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 8–10 (1994).

7 *Id.* at 10–11.

8 *Id.*; GRUNDGESETZ [CONSTITUTION], art.1–19, *translation at* http://www.gesetze-im-internet.de/englisch_gg/index.html.d

9 GRUNDGESETZ art. 79(3).

10 GRUNDGESETZ art. 1(1).

11 DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 38 (1989).

12 CURRIE, *supra* note 6, at 165.

13 CURRIE, *supra* note 6, at 15 n.86.

leaders.[14] One side argued that the book encroached on the deceased actor's right to human dignity per Basic Law Article 1; the other argued that the author had a right to artistic freedom per Basic Law Article 5(3).[15] The Federal Constitutional Court noted that "[it] must resolve conflict[s] relating to the guarantee of artistic freedom by interpreting the Constitution according to the value order established in the Basic Law" and the court held that the lower courts correctly weighed the conflicting rights in favor of the right of human dignity.[16]

1. Social Welfare State

Along with setting up the process of government, the Basic Law sets several substantive goals for the Republic.[17] Among those is the *Sozialstaat*, or the social welfare state, anchored by Articles 20 and 28 of the Basic Law, which essentially commits the Federal Republic to a social welfare state.[18] The *Sozialstaat* provisions in the Basic Law reflect the idea that it is not enough to protect citizens from third parties or the government—the government must also affirmatively promote the public good.[19] The *Sozialstaat* provisions of the Basic Law are understood to impose a duty on the legislature to create legislation that actively promotes the public good. If the lawmakers neglect this obligation, an individual has the option to file suit in the federal courts.[20] While *Sozialstaat* provisions have never been used alone to invalidate government action or inaction, they have a significant influence on the interpretation and application of existing laws.[21] Moreover, commentators have argued that once any social welfare program is established, the *Sozialstaat* principle may prevent the legislature from being able to significantly reduce or repeal the program.[22]

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[14] KOMMERS, *supra* note 11, at 309; *see also* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 9, 1971, 30 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 173.

[15] KOMMERS, *supra* note 11, at 309; *see also* GRUNDGESETZ art. 5(3).

[16] KOMMERS, *supra* note 11, at 310–12.

[17] *Id.* at 41.

[18] CURRIE, *supra* note 6, at 21.

[19] *Id.*

[20] *Id.* at 22–23.

[21] *Id.*

[22] *Id.* at 24. *But see* 82 BVERFGE 60, 80 (1990) (upholding a reduction of payments to relatively wealthy families because without the program, former recipients still possessed "the minimal requirements for an existence consistent with human dignity.").

2. The Right to Property

Basic Law Article 14 guarantees the right to private property.[23] However, because of the structure of the Basic Law and the hierarchy of established rights, the right to property is not absolute. Article 14(2) states that "[p]roperty entails obligations. Its use shall also serve the public good."[24] An earlier draft of the Article read "[o]wnership entails a social obligation. Its use shall find its limits in the living necessities of all citizens and in the public order to society," which suggests that there is much room to regulate private property in the public interest.[25] When regulating property, the legislature must balance the framers' emphasis on private property rights against fundamental values of the Constitution, such as human dignity and equality.[26] If asked to examine the constitutionality of any alleged intrusion into the right of property, the Federal Constitutional Court must review whether lawmakers have adequately considered and weighed the right to property against the principles of human dignity, personality, and equality along with the principles of proportionality, rule of law, and the social welfare state.[27]

B. THE *MILIEUSCHUTZ* LAWS

The *Milieuschutz* law, or the "milieu" protection law, was introduced in Germany in 1976 and is codified in the German Federal Building Code Section 172.[28] The aim of the law is to protect against tenant displacement by slowing the rapid development of neighborhoods, thus forcing a change in the milieu of communities.[29] The law states that:

> Either in a legally binding land-use plan or by some other statute, the municipality may designate areas in which
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> 1. in order to preserve the specific urban character of an area deriving from its urban pattern . . .

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[23] GRUNDGESETZ art. 14(1).

[24] GRUNDGESETZ art. 14(2).

[25] KOMMERS, *supra* note 11, at 260.

[26] *Id.* at 263–64.

[27] *Id.* at 264.

[28] BAUGESETZBUCH [BAUGB] [FEDERAL BUILDING CODE], § 172, *translation at* https://germanlawarchive.iuscomp.org/?=649; Konstantin A. Kholodilin, *Fifty Shades of State: Quantifying Housing Market Regulations in Germany*, 2015 DEUTSCHES INSTITUT FÜR WIRTSCHAFTSFORSCHUNG [DIW] 10.

[29] Julia Cornelius & Joanna Rzeznik, *National Report for Germany*, *in* TENLAW: TENANCY LAW AND HOUSING POLICY IN MULTI-LEVEL EUROPE 51 (2014).

> 2. in order to maintain the composition of the local residential population . . . or
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> 3. in the course of reorganization of the structure of urban development . . .
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> permission is required for the reduction of development, for alterations and changes in use in respect of physical structures. State governments are empowered to determine by legal ordinance valid for up to five years in respect of plots in areas affected by a statute issued pursuant to sentence 1 no. 2 that the establishment of individual ownership for personal use (condominium and part-ownership pursuant to section 1 of the Law on Apartment Ownership) in respect of buildings which are scheduled either wholly or in part for residential use may only proceed where permission has been obtained.[30]

The policy is motivated by a fear of gentrification, and the fear that allowing unrestricted renovations to rental housing would inevitably cause a rental increase that forces lower-income tenants out of their long-term neighborhoods, replacing those residents with high-income residents.[31] Under *Milieuschutz* laws, individual neighborhoods can be designated as *Milieuschutz* zones, and local authorities can develop and implement specific regulations limiting what property owners can do to change the rental housing they own and operate.

There are three groups of regulations that fall under the category of *Milieuschutz*, all with the goal of preserving affordable housing stock in neighborhoods.[32] The first group of regulations prohibits the demolition of apartments and the conversion of rental apartments into units used for non-housing purposes.[33] The second group of regulations allows local authorities to create limits to reconstruction of apartments, both in terms of modernization of individual units—such as the creation of an elevator, installation of a terrace or balcony, or adding heated flooring—and the combining of two smaller units into one larger apartment.[34] With these regulations, each individual local authority compiles its own list of prohibited renovations, and apartment owners must apply for a permit with the local authorities before conducting any

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[30] BAUGB § 172(1).

[31] Kholodilin, *supra* note 28, at 12.

[32] *Id.*

[33] *Id.*

[34] *Id.*

renovations.[35] The final set of regulations prevents the conversion of rental units into condominiums or other owner-occupied units.[36]

As the prices of rent rapidly increase, so too do the number of neighborhoods designated as *Milieuschutz* zones.[37] In Berlin, the city has been rapidly increasing the number of zones protected by *Milieuschutz*. As of 2015, city law prohibits condo conversions and high-end renovations in twenty-one *Milieuschutz* zones in Berlin.[38] Moreover, the laws allow for the expansion of zones in cases where the protections push developers and their prospective renovations from a block on the inside edge of a zone to one or two blocks over, effectively moving the problem just outside of the protected area.[39]

However, these laws have not been completely effective. Some tenants have described the laws as "toothless," arguing that it is too easy to either ignore the laws or find a loophole in the conversion application process.[40] An influx of residents moving to up-and-coming, hip neighborhoods in Berlin means that there is a lot of incentive for developers to ignore the *Milieuschutz* laws.[41] Moreover, because the implementation of the *Milieuschutz* laws relies on cities and local authorities enforcing the application and approval process, if city authorities cannot crackdown on developers ignoring the laws, there is very little that low-income tenants can do to prevent the gentrification of their neighborhoods.[42]

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[35] *Id.*

[36] *Id.* at 13.

[37] Kate Connolly, *'No Bling in the Hood . . .' Does Berlin's Anti-Gentrification Law Really Work?*, THE GUARDIAN (Oct. 4, 2016), https//www.theguardian.com/cities/2016/oct/04/does-berlin-anti-gentrification-law-really-work-neukolln.

[38] Christoph Stollowsky, *Senat Beschließt Besseren Schutz für Mieter* [*Senate Decides Better Protection for Tenants*], DER TAGESSPIEGEL (Mar. 3, 2015), https://www.tagesspiegel.de/berlin/gesetz-fuer-hausbesitzer-in-berlin-senat-beschliesst-besseren-schutz-fuer-mieter/11454082.html.

[39] Feargus O'Sullivan, *Why Berlin Is Cracking Down on Condo Conversions*, CITY LAB (Mar. 5, 2015), https://www.citylab.com/equity/2015/03/why-berlin-is-cracking-down-on-condo-conversions/386929/.

[40] Connolly, *supra* note 37.

[41] Leesha McKenny, *Addressing Housing Affordability, German Style*, THE SYDNEY MORNING HERALD (July 18, 2015), http://www.smh.com.au/nsw/addressing-housing-affordability-german-style-20150716-gie68u.html.

[42] *See id.*

C. *MIETPREISBREMSE*

In 2015, Germany passed the *Mietpreisbremse*, or the "rental price brake," a law limiting the amount of rent landlords can charge for residential housing units.[43] Section 556d of the German Civil Code reads as follows:

> Permitted Amount of Rent at the Beginning of the Rental Period; Power to Issue Statutory Instruments
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> (1) When a lease for a living space, which is located in the tight housing market of the specific area mentioned in the Ordinance in paragraph 2, has been completed, then the rent at the beginning of tenancy may rise at most 10% above the customary comparable rent (§ 558 Paragraph 2).
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> (2) The Provincial Governments will be authorized to dictate the areas with tight housing markets through regulation for a period of up to five years. Areas with tight housing markets are present, if the adequate supply of the population with rental apartments in a municipality or a part of the municipality with reasonable terms and conditions is especially vulnerable. This can be the case particularly, whenever
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> 1. Rents significantly increase more than the nationwide average,
> 2. Average home rental charges raise above nationwide average,
> 3. The resident population grows, without the necessary living spaces being constructed, or
> 4. there is little vacancy to fill the large demand.
> 5. An Ordinance related to sentence 1 must be put into effect by December 31st, 2020 at the latest. It must be justified. The justification must reveal the facts behind the reason for an isolated case of availability within an area with a tight rental market. Furthermore, one must show which arrangements must be made respectively by the provincial government as stated in sentence 1 of the ordinance in order to find a solution.[44]

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[43] Kholodilin, *supra* note 28, at 15.

[44] BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 556d, *translation at* http://www.gesetze-im-internet.de/englisch_bgb/index.html.

The *Mietpreisbremse* allows federal districts to designate areas as "tight" or "hot" rental markets.[45] Once an area is designated as a tight rental market, for the next five years, landlords are limited in the rent they can charge for each new lease term.[46] There are two types of rental housing that are exempt from the *Mietpreisbremse*: (1) new housing in which the construction was completed after October 1, 2014 for all lease terms that follow; and (2) newly "substantially modernized" units for the first lease term following the modernization.[47] For all other rental units in a tight rental market, any increase in rent is limited to 10 percent above the average local rent.[48] The local rent is calculated by an oversight body called a rental observatory, which sets a local rate for "simple," "medium," and "good" apartments in a given area.[49] Currently, the entire city of Berlin is considered a tight rental market.[50]

The *Mietpreisbremse* creates a cause of action for tenants who suspect that they are being charged an illegally high rate of rent. If the tenant prevails in a court case under *Mietpreisbremse*, they are entitled to the difference between the legal rate of rent and the current rate that their landlord is charging.[51] One issue with the current enforcement mechanism of the *Mietpreisbremse* is that the tenant is only eligible for a refund on their overpaid rent from the date of their first complaint, not from the date they first began paying an illegally high rent.[52] Additionally, by virtue of needing a place to live, a tenant is less likely to challenge or attempt to enforce the legality of their rental agreement for fear of landlord retaliation or loss of their living space. Furthermore, until a tenant not only files a complaint, but also prevails in court, that tenant is stuck paying illegally high rents.[53] Because of the scarcity in quality housing stock in Berlin, many tenants are willing to ignore the

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[45] Kholodilin, *supra* note 28, at 15.

[46] *Id*. at 44.

[47] *Id*. at 15.

[48] *Id.*

[49] Feargus O'Sullivan, *Berlin's New Rent Control Law Probably Isn't Working After All*, CITYLAB (Feb. 1, 2016), https://www.citylab.com/equity/2016/02/berlin-rent-control-cbre-report/458700/.

[50] *See* BVerfG, 1 BvR 1360/15, June 24, 2015, http://www.bverfg.de/e/rk20150624_ 1bvr136015.html.

[51] O'Sullivan, *supra* note 49; Feargus O'Sullivan, *Berlin and Hamburg Will Force Landlords to Disclose Previous Rents*, CITYLAB (May 11, 2016), https://www.citylab.com/solutions/2016/05/ berlin-rent-laws-landlords/482097/.

[52] O'Sullivan, *supra* note 51.

[53] *See id.*

fact that their landlord is charging illegally high rent in exchange for a good apartment.[54]

In an effort to increase the number of tenants holding their landlords accountable under the *Mietpreisbremse*, in 2016 Berlin began to require landlords to disclose previous rental rates to tenants.[55] The idea behind the change was that if tenants knew how much the previous rental rates were when they began a lease term, they would know immediately that they were being overcharged, giving more incentive to file a suit against their landlord.[56] In addition, the requirement to disclose the previous rental rates might act as a deterrent to landlords who were more willing to violate the law because, without any city body enforcing the law, they knew how unlikely it was that they would get caught.

1. Constitutional Challenges

Right after the Berlin Senate designated the entire city as a tight rental market under the *Mietpreisbremse*, an apartment owner filed a complaint alleging that the *Mietpreisbremse* violated his constitutional rights—specifically his right to human dignity, his right to personality, his right to choose his occupation, and his right to property.[57] His argument was, in part, that the Berlin Senate had improperly designated the city as a tight market, going beyond their statutory authority.[58] Based on procedural rules, the Federal Constitutional Court declined to make a decision on the constitutionality of the *Mietpreisbremse* in that case, leaving the law in place for any future challenges.[59]

More recently, however, a district court in Berlin ruled that the *Mietpreisbremse* was unconstitutional.[60] In an overcharge case brought by a tenant, the court went beyond deciding in the landlord's favor, declaring that the rent brake as a whole was unconstitutional.[61] The court

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[54] *Id.*

[55] *Id.*

[56] *See id.*

[57] BVerfG, 1 BvR 1360/15, June 24, 2015, http://www.bverfg.de/e/rk20150624_1bvr136015.html.

[58] BVerfG, 1 BvR 1360/15, June 24, 2015, http://www.bverfg.de/e/rk20150624_1bvr136015.html.

[59] *Id.*

[60] Philip Oltermann, *German Rent-Control Law Violates Constitution, Court Rules*, THE GUARDIAN (Sept. 20, 2017), https://www.theguardian.com/world/2017/sep/20/german-rent-control-law-violates-constitution-court-rules.

[61] Landgericht Berlin [LG] [District Court of Berlin] Sept. 14, 2017, 149/17, http://www.berlin.de/gerichte/kammergericht/presse/67-s-149-17-hinweisbeschluss-vom-14-09-2017-anonymisiert.pdf.

reasoned that the law discriminates against some landlords, making it incompatible with the constitution, specifically Article 3(1), which states that "[a]ll persons shall be equal before the law."[62] Because of the way the law is structured, allowing landlords to charge no more than 110 percent of the local average rate for similar apartments, landlords who are already in high-priced neighborhoods are at a significant advantage over landlords in more affordable neighborhoods.[63] Rather than rewarding restrained landlords who stayed within the community average, the court noted that the *Mietpreisbremse*, in the way it is structured, effectively rewards landlords who had already been charging higher rates of rent.[64]

While this specific case has not been submitted to the Federal Constitutional Court, this lower court's decision likely means that soon enough, the Federal Constitutional Court will be forced to answer the question of whether *Mietpreisbremse* is constitutional.

II. THE UNITED STATES AND THE RIGHT TO HOUSING

This section explores the United States' relationship to the right to adequate housing and the right to property. First, this section will examine one fundamental difference between constitutional jurisprudence in Germany and the United States—the use of negative rights as opposed to positive rights. Next this section will examine how the United States has yet to establish a national framework for enforcing and enshrining the right to adequate housing even though it has signed several international treaties that establish that right.[65] Standing in the way of prioritizing a right to adequate housing are the United States' longstanding right to property and the Takings Clause jurisprudence. While the Supreme Court has declined to consider rent control a per se

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[62] *Id*; see also GRUNDGESETZ art. 3(1).

[63] Press Release, Landgericht Berlin hält Vorschrift über Mietpreisbremse für verfassungswidrig (PM 55/2017) (Sept. 19, 2017) (on file with author).

[64] *Id.*

[65] *See* International Covenant on Economic, Social and Cultural Rights, art. 11(1), Dec. 16, 1966, 993 U.N.T.S. 3, 7 (entered into force Jan. 3, 1976); International Convention on the Elimination of All Forms of Discrimination Against Women, art. 14(2)(h), Dec. 18, 1979, 1249 U.N.T.S. 13, 20; Convention on the Rights of the Child, arts. 16(1) and 27(3), Nov. 20, 1989, 1577 U.N.T.S. 3, 49, 53; Convention relating to the Status of Refugees, art. 21, July 28, 1951, 189 U.N.T.S. 137, 166.

taking,[66] it is clear through the Court's jurisprudence that any attempt to limit a landlord's profits will be scrutinized.

A. NEGATIVE RIGHTS VERSUS POSITIVE RIGHTS

The Seventh Circuit once described the United States Constitution as "a charter of negative rather than positive liberties" born out of a concern not "that government might do too little for the people but that it might do too much for them."[67] The Seventh Circuit went on to say that "[t]he Fourteenth Amendment . . . sought to protect Americans from oppression by state government, not to secure them basic governmental services."[68] This interpretation of the United States Constitution is seemingly backed up by the language of many of the Amendments. The Fifth Amendment's Takings Clause, for example, says "nor shall private property be taken for public use, without just compensation," meaning "the government shall not"—an expression of a prohibition on government action, not an affirmative command.[69] Moreover, the language of many of the amendments—with words such as "deprive"—to some scholars suggests an aggressive approach, not just a failure to assist citizens.[70] There are a number of United States court cases that support this theory, each refusing to extend a constitutional amendment to compel positive government action.[71]

In Germany, however, the courts have been more willing to interpret the Basic Law to require affirmative protection of rights against both third parties and economic or physical conditions.[72] The Basic Law's structure is similar to that of the United States Constitution in that it sets out a list of rights—such as the "right to life,"[73] the "right to free development of personality,"[74] and "the right to freely choose their occupation or profession"[75]—that the government is not to violate. Unlike the U.S. Courts, though, the German Federal Constitutional Court

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66 *See* Pennell v. San Jose, 485 U.S. 1, 12 n.6 (1988).

67 Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983).

68 *Id.*

69 *See* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 864–65 (1986).

70 *See id.* at 865.

71 *See, e.g.*, United States v. Stanley, 109 U.S. 3 (1883); Harris v. MacRae, 448 U.S. 297 (1980).

72 *See* Currie, *supra* note 67, at 870.

73 GRUNDGESETZ art. 2(2).

74 GRUNDGESETZ art. 2(1).

75 GRUNDGESETZ art. 12(1).

has in multiple decisions established a firm commitment to the view that provisions guaranteeing rights against the government can also impose affirmative government duties to protect its citizens.[76] Moreover, as noted above, the German court uses a hierarchy of constitutional rights when addressing constitutional issues. The emphasis on human dignity in German constitutional jurisprudence can lead courts to interpret constitutional provisions to require positive government actions in order to help maintain those constitutional rights.[77]

There are cases, however, in which the United States Supreme Court interpreted negatively-framed rights to require state action that can be construed as a positive action to enforce rights.[78] In *Shelley v. Kraemer*, the Supreme Court prohibited a state from enforcing a racially restrictive covenant against black homeowners.[79] The respondent in that case argued that the state could enforce racially restrictive covenants towards all citizens.[80] The Court rejected that argument, stating that the constitutional rights established in the Fourteenth (Due Process) Amendment were "personal rights" and that "[t]he Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals."[81] While this is phrased negatively, it also infers a positive responsibility of the state to ensure that no private citizen's unconstitutional covenant is enforced. In cases like *Shelley*, the U.S. Supreme Court made clear that in some situations, state neutrality would not pass constitutional muster—if a state acted at all, it had to act against private discrimination.[82]

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[76] *See* Currie, *supra* note 69, at 871.

[77] *See* Luis Anibal Aviles Pagan, *Human Dignity, Privacy and Personality Rights in the Constitutional Jurisprudence of Germany, the United States and the Commonwealth of Puerto Rico*, 67 REV. JUR. U.P.R. 343, 347, 352 (1998).

[78] *See* Currie, *supra* note 69, at 886.

[79] *See id.* at 884.

[80] Shelley v. Kraemer, 334 U.S. 1, 22 (1948).

[81] *Id.*

[82] *See* Currie, *supra* note 69, at 884.

B. RIGHT TO ADEQUATE HOUSING

1. The Declaration on National Housing Policy

The United States has signed and ratified a number of treaties that call for a right to adequate housing for specific groups of individuals,[83] but lacks much of the framework for implementing that right on a national level. According to international standards, there are seven major elements to adequate housing: security of tenure; availability of services, materials, and infrastructure; affordability; accessibility; habitability; location; and cultural adequacy.[84] The United States federal government does not regulate housing with regards to these seven elements on a national level.[85] While it is true that most of the regulation of the tenant-landlord relationship would fall to the states, there is little in terms of guidance or assistance from the federal government to instruct states on how to secure the right to adequate housing.

In 1949, Congress did authorize the "Housing Act of 1949," which includes a declaration on national housing policy.[86] The declaration states:

> The Congress hereby declares that the general welfare and security of the Nation and the health and living standards of its people require . . . the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation . . . . The policy to be followed in attaining the national housing objective hereby established shall be: (1) private enterprise shall be encouraged to serve as large a part of the total need as it can; (2) governmental assistance shall be utilized where feasible to enable private enterprise to serve more of the total need; (3) appropriate local public bodies shall be encouraged and assisted

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[83] *See supra* note 65.

[84] General Comment 4, The right to adequate housing (Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114 (1991), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 18 (2003).

[85] *But see* 42 U.S.C. §§ 3601-3619 ("Fair Housing Act" which prohibits discrimination in rental housing based on race, color, religion, sex, national origin, disability, and familial status. While the FHA does not regulate the access to or enforce a general right to affordable or adequate housing, it does provide a federal cause of action for discrimination in access to housing based on protected classes).

[86] 42 U.S.C. § 1441 (2012).

> to undertake positive programs of encouraging and assisting . . . the production, at lower costs, of housing of sound standards of design, construction, livability, and size for adequate family life . . . . The Department of Housing and Urban Development, and any other departments or agencies of the Federal Government having powers, functions, or duties with respect to housing, shall exercise their powers, functions, and duties under this or any other law, consistently with the national housing policy declared by this Act and in such manner as will facilitate sustained progress in attaining the national housing objective hereby established, and in such manner as will encourage and assist (1) the production of housing of sound standards of design, construction, livability, and size for adequate family life; (2) the reduction of the costs of housing without sacrifice of such sound standards . . . (5) the stabilization of the housing industry at a high annual volume of residential construction.[87]

While the declaration states the type of lofty goals imagined by the international standards of the right to adequate housing, the declaration is just that—a goal. The declaration does not establish any rights for individual tenants, nor does it create any cause of action for tenants stuck in housing that does not meet the goals of the declaration.[88] Without the creation of actionable rights, the declaration falls flat. It leaves broad guidance for the states, but provides little in terms of enforcement mechanisms to check in on the states' progress, and offers no concrete protection for individual tenants.

2. Lindsey v. Normet

The U.S. Supreme Court has established that there is no constitutional right to adequate housing. In *Lindsey v. Normet*, a group of month-to-month tenants had refused to pay rent due to conditions issues in their apartments.[89] The landlord threatened to evict them pursuant to Oregon's Forcible Entry and Detainer Act.[90] The tenants filed a federal lawsuit seeking an injunction, arguing that Oregon's statute was unconstitutional.[91] The tenants argued in part that because the Oregon FEDA prevented tenants from bringing up counterclaims regarding the landlord's breach of duty to maintain the premises, it violated the

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87 *Id.*

88 *See* Perry v. Hous. Auth. of Charleston, 664 F.2d 1210, 1213 (4th Cir. 1981) (holding that § 1441 does not create an affirmative right or cause of action for tenants in public housing).

89 Lindsey v. Normet, 405 U.S. 56, 58 (1972).

90 *Id.* at 59.

91 *Id.* at 59–60.

Fourteenth Amendment's Equal Protection and Due Process clauses.[92] As part of the tenants' Equal Protection argument, they "contend[ed] that the 'need for decent shelter' and the 'right to retain peaceful possession of one's home' are fundamental interests which are particularly important to the poor and which may be trenched upon only after the State demonstrates some superior interest."[93] The tenants' argument that housing is a fundamental interest would have required the court to use strict scrutiny when examining the statute, rather than the broader rational basis standard.

The court rejected this argument. In its analysis, the court found that while the lack of stable and sanitary housing is an important social ill, the constitution did not protect the tenants from the Oregon statute.[94] The court held that it was unable to find that the Constitution guaranteed "access to dwellings of a particular quality," and that "absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions."[95] Going further in the pro-landlord direction, the majority noted that the Constitution does not protect the tenant's right to adequate housing, but *does* expressly protect "against confiscation of private property or the income therefrom."[96]

It is true that the Constitution does not explicitly mention a right to housing, however, the Supreme Court has read several rights into the Constitution that the document does not explicitly mention.[97] While *Lindsey v. Normet* is often characterized as a conclusion to the argument that the Constitution does not provide a right to housing, it is also possible to read the case more narrowly, as only establishing the lack of constitutional right to housing of a specific quality.[98] Thus, it is possible that *Lindsey v. Normet* does not close the door to a constitutional right to some form of shelter for all people.[99]

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[92] *Id*. at 64.

[93] *Id.* at 73.

[94] *Id.* at 74.

[95] *Id.*

[96] *Id.*

[97] NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY, "'SIMPLY UNACCEPTABLE": HOMELESSNESS AND THE HUMAN RIGHT TO HOUSING IN THE UNITED STATES 26 n.118 (2011) (the Supreme Court has read into the Constitution, for example, both a Right to Privacy and a Right to Travel).

[98] *Id.* at 28.

[99] *Id.* at 28.

In fact, several constitutional scholars argue that the Constitution ought to be read to provide for a right to minimum subsistence, which would include housing/shelter.[100] Some argue that the Equal Protection Clause of the Fourteenth Amendment requires the government to protect the subsistence needs of poor Americans; others argue that an affirmative obligation on the part of the federal government to provide for the basic human need of housing ought to be read into the general understanding of the Fifth and Fourteenth Amendments.[101]

3. States' Roles in Providing Affordable Housing

Regardless of aspirational interpretations, current constitutional jurisprudence does not recognize a tenant's right to housing of any quality. Moreover, aside from a handful of federal programs—including housing subsidies and public housing—most of the work to implement the goals set out in the declaration on national housing policy falls to the individual states.[102] States and local municipalities, through zoning or rent control ordinances, have the power to implement policies that prioritize affordable housing. However, even those ordinances are not safe from scrutiny due to the current Takings Clause jurisprudence.

C. THE TAKINGS CLAUSE

The Fifth Amendment of the U.S. Constitution states that "private property [shall not] be taken for public use, without just compensation."[103] This provides property owners the right to be secure in their ownership. The courts have established that there need not be a physical taking for the Takings Clause to be implicated—a regulation can constitute a taking if it interrupts the owner's property rights severely enough.[104]

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[100] *Id.* at 28.

[101] *Id.* at 28.

[102] *Id.* at 31–32. It should be noted that many of the government programs prioritize homeowners rather than renters. In 2008, for example, the homeowner tax breaks cost the federal government $144 billion, while the low-income housing program received only $46 million.

[103] U.S. CONST. amend. V. The Fifth Amendment was made applicable to the states through the Fourteenth Amendment.

[104] *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). In *Penn*, the court established three factors that it may use to decide whether a regulation is a taking: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has

Land use regulations, however, are not per se takings. If the land use regulation substantially advances a legitimate state interest and does not deny a landowner's economically viable use of his/her land, it is not a taking.[105] There must be an essential nexus between the legitimate state interest and any condition imposed by a regulation—if that nexus is lacking, then the regulation may be a taking.[106] If a nexus exists, the second inquiry by the court is whether the relationship between the condition imposed by a regulation and the impact on the landowner passes the "rough proportionality" test—the state interest furthered by the regulation must be related in nature and extend to the impact on the landowner.[107]

1. Lucas v. South Carolina Coastal Council

In *Lucas v. South Carolina Coastal Council*, the court furthered their regulatory takings jurisprudence by holding that a regulation that effectively eliminated any economically viable use of Lucas's land was a regulatory taking.[108] The court held when a regulation removes any use of land, it constitutes a taking unless the intended use of the land would have upset a fundamental principle of nuisance laws or real property rights.[109]

The *Lucas* holding and rationale makes it clear that the property need not be made valueless by a regulation for it to still qualify as a taking.[110] Indeed, at *Lucas*'s footnote 8, the Court argued that a landowner whose deprivation due to regulation is 95 percent of the economic use may still be able to challenge the regulation as a taking, because "the economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations are keenly relevant to takings analysis generally."[111]

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interfered with distinct investment-backed expectations; and (3) the character of the governmental action.

[105] *See* Agins v. Tiburon, 447 U.S. 255, 260 (1980).

[106] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).

[107] Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

[108] 505 U.S. 1003, 1027–28 (1992).

[109] *Id.*

[110] David L. Callies, *After Lucas and Dolan: An Introductory Essay*, *in* TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* 3, 5 (1996).

[111] *Lucas,* 505 U.S. at 1019 n.8 (internal quotations omitted).

Thus, the *Lucas* court suggests the new way the Supreme Court will deal with partial takings.[112] It is likely that some version of the "frustration of investment-backed expectations" rule will be the standard test for deciding partial takings.[113] In federal cases post-*Lucas*, many courts have used a version of the frustration test. In cases where the courts do not find that a partial taking has occurred, it appears common for either clear extenuating circumstances to exist, or for the initial investment-backed interest to have been unreasonable.[114] Thus, if the landowner had fair notice of the potential change in regulation and the effect on his/her land use, or if the landowner's economic interests were otherwise unreasonable, even under the more lenient standard of the frustration test, a regulation-inflected change in use may not constitute a taking.

2. Pennell v. San Jose

In *Pennell v. San Jose*, a group of landlords asked the Supreme Court to consider a rent regulation scheme a regulatory taking.[115] The city of San Jose had passed a rent control ordinance with the stated purpose of "alleviating some of the more immediate needs created by San Jose's housing situation. These needs include but are not limited to the prevention of excessive and unreasonable rent increase."[116] Within the mechanism determining the amount by which landlords could increase rent, the landlords were first entitled to an automatic rental increase of up to 8 percent—any increase greater than 8 percent could be appealed by a tenant and subject to a hearing before a Mediation Hearing Officer.[117] The ordinance set forth a list of factors that the hearing officer was to consider, which included six objective factors and a seventh, subjective factor: "hardship to tenant."[118] The landlords argued that the seventh subjective factor constituted a taking because it reduced the rent below the objectively "reasonable" amount established by the six objective factors.[119]

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[112] Callies, *supra* note 110, at 9.
[113] *Id*. at 14.
[114] *Id.* at 15.
[115] 485 U.S. 1, 4 (1988).
[116] *Id.*
[117] *Id.* at 5.
[118] *Id.*
[119] *Id.* at 9.

In *Pennell*, the Court never decided if the rent control ordinance was a regulatory taking. The majority opinion skirted the issue by deciding that in the absence of any current injury to the landlords caused by the ordinance, the landlords' takings clause arguments were premature and did not "present a concrete factual setting for the adjudication of the takings claim."[120] In a footnote, however, the Court noted that rental control is not per se a taking, and that the Court has consistently affirmed that individual states have the power to regulate the landlord-tenant relationship.[121]

While *Pennell* made it clear that rent control is not a per se taking, when rent control is placed within the *Lucas* test for a partial taking, it becomes less clear how the Court would adjudicate the issue of rent control schemes. What is consistently clear is that The Supreme Court values a landowner's right to the economic value of that landowner's property certainly more than it values any implicit constitutional right to housing (if such a right exists) so long as the landowner's expectations for the economic value are reasonable. If it is reasonable to expect market rate for an apartment, is it possible to control rent without it being a regulatory taking?

III. GERMAN LAWS UNDER AMERICAN JURISPRUDENCE

This section examines whether there could be justification for establishing laws like the *Milieuschutz* laws or the *Mietpreisbremse* under the United States' current Takings Clause jurisprudence, as described above. First, this section explores the fundamental differences between German and United States' Takings Clause jurisprudences, and why the difference in regard for human rights, when weighed against property rights, effects the ability of laws aimed at curbing gentrification to survive a constitutionality argument. This section positions *Milieuschutz* laws as potential zoning laws and whether they could survive a regulatory taking analysis. Finally, this section assesses *Mietpreisbremse*, and whether a rent control law could pass constitutional muster if it established more of a rent ceiling than the law at issue in *Pennell v. San Jose*.

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[120] *Id.* at 10.
[121] *Id.* at 12 n.6.

A. PRIVATE PROPERTY IN GERMANY AND IN THE UNITED STATES

Before analyzing the two types of anti-gentrification laws currently in place in Germany under United States Takings Clause jurisprudence, it is important to recognize the fundamental differences between the constitutional right to possess private property in Germany and in the United States.

European constitutions, generally, have more recognition of an individual as part of a larger community.[122] This naturally leads to a focus on the social function of private property when defining a person's property rights.[123] Because of the *Sozialstaat* embodied in the German constitution, any German constitutional rights analysis must also consider the state's requirement to look after its citizens and intervene in the market and social order if required to maintain equality.[124] Often, resolving the tension between the *Sozialstaat* obligations with the individual rights provided in the Basic Law requires an intricate balance.[125] Within property rights, this is seen directly in the text of Germany's Basic Law. Article 14 establishes the rights of the state to define and limit property.[126] Moreover, as noted, Article 14(2) explicitly adds that "[p]roperty entails obligations. Its use shall also serve the public good."[127] Thus, when interpreting Article 14, the German Constitutional Court considers the dual functions of property—both the individual and social functions outlined in Article 14—and applies different levels of protection based on the type of property involved.[128] When analyzing legislation that regulates property, the German Constitutional Court has found that when property serves a distinctively social function, the legislature's duty to the public outweighs its duty to the individual.[129]

In contrast, the right to property in the United States is a fundamental individual right with few restraints. The Takings Clause

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[122] Tonya R. Draeger, *COMMENT: Property as a Fundamental Right in the United States and Germany: A Comparison of Takings Jurisprudence*, 14 TRANSNAT'L LAW. 363, 379 (2001).

[123] *Id.*

[124] Michael R. Antinori, *Note: Does Lochner Live in Luxemborg?: an Analysis of the Property Rights Jurisprudence of the European Court of Justice,* 18 FORDHAM INT'L L.J. 1778, 1790 (1994).

[125] *Id.*

[126] GRUNDGESETZ art. 14.

[127] GRUNDGESETZ art. 14(2).

[128] Antinori, *supra* note 124, at 1795.

[129] *Id.*

"serves as a fulcrum upon which private property interests are balanced against the police power."[130] When necessary in order to protect the health, safety, morals, and general welfare of the public, the government can regulate private property interests without triggering the need for compensation.[131] A regulation justified by the police powers of a state will not be considered a taking, but any regulation of private property that falls outside of a state's police powers risks being considered a full or partial taking, which requires just compensation to the property owner.[132]

In general, United States courts have been more hesitant to heavily weigh public interests against the private right to property. In concluding that a regulation can be considered a taking if the regulation goes too far, the U.S. Supreme Court made clear that they held the right of private citizens to possess and control their own property to be an essential one.[133] In considering regulatory takings, the court will balance the public benefit against the private loss caused by the statute, using the two-pronged test first articulated in *Agins v. City of Tiburon*, which looks at whether a regulation "substantially advances legitimate state interest" and whether that regulation "den[ies] an owner economically viable use of his land."[134]

Unlike the German Constitution, the U.S. Constitution does not contain a provision that requires that an individual's property also be used for the public good. Through the Takings Clause jurisprudence, the court established that property *may* be regulated if that regulation does not unconstitutionally constrain the owner's use of the property and serves the public good. Absent a state regulation that passes constitutional muster, however, there is no clear way for courts to require landowners to use their property to benefit the public.

B. THE RIGHT TO HOUSING AS A VALID USE OF POLICE POWER

For either the *Milieuschutz*-style zoning regulations or a *Mietpreisbremse*-like rent control statute to pass a Takings Clause

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[130] Douglas W. Kmiec, *At Last, the Supreme Court Solves the Takings Puzzle*, *in* TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER DOLAN AND LUCAS 107, 107 (1996).

[131] Draeger, *supra* note 122, at 367.

[132] *Id.*

[133] See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 412–413 (1922).

[134] 447 U.S. 255, 260–61 (1980).

challenge, proponents would need to provide a valid use of police power as the reasoning behind the regulations. The state's police power is limited to uses providing for public safety, health, morals, or general welfare of the citizens.[135] While it is true that there is no formal statutory or constitutional right to housing, housing activists have long been working to realize "an American right to housing, even in the absence of a formal legal right."[136] These movements, often illegally occupying private property or working to reform local housing laws and policies, have associated the right to housing with "well-accepted constitutional norms"—such as equal opportunity and protection, privacy, and self-determination—creating the right to housing in the "American legal consciousness."[137] American activists, undeterred by the lack of a constitutional right to housing, emphasize that Americans, like all humans, "cannot achieve full freedom, equality, dignity, self-determination, and community without adequate housing."[138] These principles of equality and dignity are consistent with the United States Declaration of Independence, and the First, Thirteenth, and Fourteenth Amendments to the Constitution.[139]

Moreover, the principles of dignity and equality consistent with the right to housing have already woven themselves into the fabric of United States property laws. Basic democratic values limit the property rights that the United States will recognize—the government abolished feudalism, slavery, male control of property, and debtors' prisons.[140] Further, the United States has abolished self-help evictions and instituted requirements regarding habitability of rental units.[141] In short, "[p]roperty law establishes a baseline for social relations compatible with democracy, both as a political system and a form of social life"[142] and reflects more than just the importance of the individual right to property. Property law also reflects the values of any democratic society. In the

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[135] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1023 (1992).

[136] Lisa T. Alexander, *Occupying the Constitutional Right to Housing*, 94 NEB. L. REV. 245, 259 (2015).

[137] *Id*. at 248. "Legal consciousness describes 'how law is experienced and understood by ordinary people as they engage, avoid and resist the law and legal meanings.'" *Id.* at 248 n.19 (quoting PATRICIA EWICK & SUSAN S. SIBLEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE (1998)).

[138] *Id*. at 253.

[139] *See id.* at 260.

[140] Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287, 1304 (2014).

[141] *Id*. at 1304.

[142] *Id*.

United States, the human right to housing is, thanks in part to housing rights activists, arguably a part of these baseline values, even if not yet formally recognized.

Because the right to housing is so interconnected with fundamental constitutional principles of equality, preserving affordable and adequate housing can be said to be a valid use of police power. Having stable housing provides not only a reliable, safe place to sleep and live, but also becomes the foundation on which to build a livelihood. Without stable housing, maintaining stable work, education, and community engagement becomes increasingly more difficult. Further, as noted, limitations on property laws often reflect the democratic values of the community. If the right to housing reflects a value of the community, then preserving that right to housing is a valid act of the state's police power, in that it is regulating the general welfare of the community by specifically aiming to preserve what that community has already established as one of their values. As such, any regulation specifically aimed at maintaining the right to housing by keeping housing affordable can be said to be a valid use of police power.

C. *MILIEUSCHUTZ* AS ZONING REGULATIONS

Laws similar to the *Milieuschutz* laws in Germany would likely be classified as zoning laws. Typical zoning laws in the United States for residential properties may limit the height of a building or the number of families that can occupy a dwelling, the materials and methods of construction, and how much of the adjoining area must be left unused.[143] Zoning laws must find their justification in a use of the police power, which may vary from community to community.[144] For a zoning ordinance to be unconstitutional, the provisions of the ordinance must be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[145] Further, if the law is a part of a general land-use plan and does not single out individual parcels of land from their neighboring parcels, it is not discriminatory zoning.[146] Moreover, a diminution of land value alone does not turn a zoning law into a taking, so long as some economically viable use of the

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[143] *See, e.g.*, Euclid v. Ambler Realty Co., 272 U.S. 365, 379, 388 (1926).
[144] *Id.* at 387.
[145] *Id.* at 395.
[146] Penn Central Transp. Co. v. New York City, 438 U.S. 104, 132 (1978).

land remains and the zoning was enacted as a part of a valid use of police power.[147]

A *Milieuschutz*-style zoning regulation would pass a Takings Clause challenge. A primary aim of the *Milieuschutz* zoning requirements is to prevent landlords from making the types of development renovations to individual rental units that inherently raise prices and force out lower-income tenants. As such, the aim of the laws is to preserve access to affordable housing, which, as noted above, is a valid use of the police power. The requirement that property owners receive permission from a local authority before making the specific types of prohibited renovations is neither arbitrary nor unreasonable. A property owner would likely not be prevented from making necessary repairs, and the opportunity to apply to a local authority provides the property owner the ability to make his case as to why his repairs are necessary for more than simply increased property value. While property owners may argue that these zoning requirements diminish the economic value of their property, this alone would not be enough to consider the zoning regulations a taking. Moreover, if a rental unit had no economic value due to problems requiring repairs, those repairs would likely be the types of renovations that would be approved under a *Milieuschutz* zoning regulation, making the economic value argument one without merit. Finally, *Milieuschutz* regulations are not discriminatory—they would be enacted to cover entire jurisdictions, whether that be individual neighborhoods or entire municipalities. They would not distinguish amongst property owners, effecting all owners of rental properties. Finally, given the types of zoning regulations that already exist and have passed judicial scrutiny, regulating the type of renovations a property owner can make is not unreasonable. As such, a *Milieuschutz* zoning ordinance would not be considered a taking.

D. *MIETPREISBREMSE* AS A REGULATION OF PRIVATE PROPERTY

Likewise, *Mietpreisbremse* style rent control would pass a Takings Clause challenge. As noted, the Supreme Court stated in *Pennell v. San Jose* that rent control is not a per se taking.[148] Rent control, because it does not completely eradicate the economic viability of rental

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[147] *Id.* at 131.

[148] Pennell v. City of San Jose, 485 U.S. 1, 1 n.6 (1988).

properties, would also not be subject to the *Lucas* test for total takings.[149] As such, the test for determining whether a taking had occurred would be a balancing test between (1) the economic impact of the regulation; (2) the extent to which the regulation interfered with distinct investment-backed expectations; and (3) the character of the government action.[150]

Balancing these three factors, *Mietpreisbremse* would not be considered a taking. *Mietpreisbremse* does not prevent property owners from charging market value for their units; it simply prevents market value from drastically increasing between lease terms, by limiting rents to the comparable rates of neighboring units.[151] As such, the economic impact is very slight on property owners—while a property's value may not increase as drastically from year to year as it perhaps would without a rent control ordinance, there is nothing in the nature of *Mietpreisbremse* to suggest that property values would *decrease*. An argument that there's a great economic detriment to property owners is speculative at best.

As to the second factor, while certainly *Mietpreisbremse* would interfere with the value of rental properties, the only expectation that the rent control could directly impact would be the expectation that rents in gentrifying neighborhoods rise drastically between lease terms. While perhaps this is a valid investment-backed expectation, it still would not lead to *Mietpreisbremse* being categorized as a taking. The rent control would simply pause the market rate of rents, not lower them, and curbing potential growth in value is not the kind of interference that has been considered a taking, so long as economically viable uses of the property remain.[152]

Finally, looking to the third factor, as noted above, the government action with regards to regulating private property is constitutional if it is a valid exercise of police power. Maintaining housing prices—providing for more affordable housing, one of the UN's pillars of the human right to housing—is a valid exercise of police power. Thus, the character of the government action in a

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[149] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030-31 (1992).

[150] Murr v. Wisconsin, 137 S. Ct. 1933, 1943 (2017) (citing *Penn Central Transp. Co.*, 438 U.S. at 124).

[151] BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] §556d para. 1, *translation* at https://www.gesetze-im-internet.de/bgb/__556d.html.

[152] *See Murr*, 137 S. Ct. at 1943 ("our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property") (internal quote omitted).

Mietpreisbremse-style rent control regulation would not weigh in favor of the action being considered a taking. In total, the test for whether a partial taking has occurred through regulation, when applied to *Mietpreisbremse*, would show that the rent control passes any Takings Clause challenge.

IV. CONCLUSION

The Supreme Court's declaration that there is no constitutional right to adequate housing in the United States did not eliminate all possibilities for states to enact anti-gentrification legislation. The United States can and should look to Germany's balancing of the private right to property against the social responsibility of property ownership. The German *Milieuschutz* and *Mietpreisbremse* laws provide guidance on the types of regulations the United States could pass at the state or municipality level without running afoul of the Takings Clause. There is a growing concern in the United States, like many other places in the world, about a lack of adequate, affordable housing. It is this concern that would allow the United States, like Germany, to limit individual property rights in the name of democratic values and societal needs. By considering the right to affordable housing as a valid use of a state's police power, states and municipalities could enact zoning ordinances or rent control regulations that would pass constitutional muster.

Without government intervention, low-income tenants have little chance to stop the driving forces of gentrification and the removal of affordable housing in established communities. While the United States has a long history of valuing individual property ownership rights, the United States is not without options for protecting low-income renters. By looking to Germany for guidance, the United States can create regulations that curb the snowballing effects of gentrification without trampling on established constitutional jurisprudence.