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# Constitutional Taking Clauses: A Proposed Typology

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## I. Abstract

Although constitutional takings clauses have been the topic of substantial scholarship, the current literature lacks a methodological framework for understanding and analyzing takings clauses. Because there are so few cases of constitutional takings clauses to compare, applying "large n" quantitative methods to takings clauses would be difficult. Therefore, legal scholars need to use "small n" qualitative research methods.

Typologies can provide a framework for meaningful qualitative analysis. In the social sciences, typologies have been used to differentiate among different types of political regimes,[1] electoral

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1. *See* Juan J. Linz, *An Authoritarian Regime: Spain*, *in* CLEAVAGES, IDEOLOGIES AND PARTY SYSTEMS: CONTRIBUTIONS TO COMPARATIVE POLITICAL SOCIOLOGY (Erik Allardt and Yrjo Littunen, eds., 1964); Juan J. Linz, *Totalitarianism and Authoritarian*

shifts,[2] and economic growth strategies.[3] These typologies can then be used to frame research questions, develop theories, and test hypotheses.[4]

This Note proposes a typology that classifies takings clauses based on the political motivations of the takings clause's framers. Political motivation is a useful benchmark because it can affect both the scope of protected property rights and the degree to which the rights are enforced. I will use the Constitutions of South Africa, Germany, and the United States as touchstones for a typology of constitutional takings clauses, representing practical, reactionary, and philosophical takings clauses respectively.

## II. General Typology Features

Generally speaking, a typology (or classification) of the objects in a given domain D is created by creating a list of criteria such that every element of D satisfies exactly one of those criteria.[5] A typology must be designed with a distinct domain in mind. In this case, my typology covers constitutional takings clauses. For the purposes of the paper, I will use "constitutional" to mean "textually retrenched in a constitution."[6] There is also often a blurred line between takings clauses and property rights in general. Some constitutions protect property in ways other than demanding compensation for government expropriation of property.[7] These protections may be in addition to a takings clause or instead of one. Without foreclosing

*Regimes*, *in* HANDBOOK OF POLITICAL SCIENCE, VOLUME 3: MACROPOLITICAL THEORY (Fred Greenstein and Nelson Polsby, eds., 1975).

2. *See* JAMES L. SUNDQUIST, DYNAMICS OF THE PARTY SYSTEM: ALIGNMENT AND REALIGNMENT OF POLITICAL PARTIES IN THE UNITED STATES (1973).

3. *See* CHARLES BOIX, POLITICAL PARTIES, GROWTH AND EQUITY: CONSERVATIVE AND SOCIAL DEMOCRATIC ELECTORAL STRATEGIES IN THE WORLD ECONOMY (1998).

4. *See* JUAN L. LINZ & ALFRED STEPAN, PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE 55-64 (1996) (theorizing that regime type influences the probability and nature of regime change).

5. CARL G. HEMPEL, FUNDAMENTALS OF CONCEPT FORMATION IN EMPIRICAL SCIENCE 703 (1970).

6. The constitutional retrenchment of a right is often a question of degree: some constitutionally protected property rights are more easily "reached" and altered by non-constitutional legislative and executive forces. However, the purpose of this paper is not to delve into what "constitutional" means, or when the retrenchment of a right rises to a "constitutional" level.

7. Through a due process clause, for example.

the possibility that my typology could also be useful for classifying other types of property protection, the domain that my typology covers includes only constitutional takings clauses.

Typologies are generally constructed according to two virtues: exclusiveness and exhaustiveness.[8] A typology is exclusive if it sets forth criteria such that each element in the domain only fits one of the criteria in the typology.[9] A typology is exhaustive if each element in the domain fits at least one of the criteria of the typology.[10] A good typology is both exclusive and exhaustive: each element in the domain should fit one and only one of the typology's criteria. I have tried to create a typology that is both exclusive and exhaustive.

In addition, a distinction is often made between artificial and natural classifications.[11] Natural classifications are based on essential characteristics of the items under investigation, while artificial classifications are groupings determined by superficial criteria or external criteria.[12] Natural classifications are more useful, as they are often closely related to other logically independent characteristics.[13] I have attempted to create a natural typology by distilling the historical and political influences that engender a constitutional takings clause down to their essential character.

## III. The P/R/P Takings Typology

The criteria that constitute my typology are practical, reactionary, and philosophical takings clause motivations. These criteria constitute a practical/reactionary/philosophical or P/R/P typology.

A practical takings clause results from a short-term political bargain. It may result when a political actor has property that it wants protected, or wants to expropriate particular property. While all constitutional negotiations lead to confrontations, the "practical" takings clause is distinguished on the basis of the short-term, concrete interests that actors attempt to protect or expropriate.

A reactionary takings clause is a response to an egregious past property expropriations or egregious past property protections.

8. HEMPEL, *supra* note 1, at 703.
9. *Id.*
10. *Id.*
11. *Id.* at 704.
12. *Id.* at 705.
13. *Id.*

While the practical takings clause may be thought of as a short-term takings clause, a reactionary takings clause is a middle-term takings clause. There may be some time buffer between the end of the previous constitution and the new constitution. However, the time buffer is not so long as to cool the passions that were inflamed by the prior expropriations or protections. A reactionary response to egregious expropriations or protections is unlikely to motivate for a full-scale constitutional reformulation of the structure of government, and therefore may partially located within a larger long-term constitutional theory. However, this greater constitutional theory only provides the basis or foundation for the possibility of a reactionary takings clause.

A philosophical takings motivation is wholly part of a larger long-term constitutional theory. Philosophical thinkers and writers have a direct, substantial impact on the framers of a philosophical takings clause. It is impossible to "place" the property protection within a middle-term reactionary motivation or a short-term practical motivation. There is likely a time buffer between the end of the previous constitution and the new constitution and a cooling of revolutionary passions. The framers of a philosophical takings clause may consider themselves in terms of a longer expanse of history as opposed to their place within short-term revolutionary spirit.

## IV. The Practical Takings Clause: Section 28 of South Africa's Interim Constitution

Section 28 of South Africa's Interim Constitution was a "practical" takings clause. Section 28 of the Interim Constitution was not the result of a theoretical or socio-cultural impetus, but rather a short-term political bargain.[14] The negotiated transition to democracy in South Africa required a number of compromises between the parties to the first phase of constitution making, primarily the National Party (NP) and the African National Congress (ANC).[15] The concrete, short-term interests that clashed, as well as the compromises that this clash necessitated, make the takings clause contained in Article 28 of the Interim Constitution of South Africa a "practical" takings clause.

14. Peter N. Levenberg, *South Africa's New Constitution: Will It Last?*, 29 INT'L LAW 633, 640 (1995

15. David Schneiderman, *Investment Rules and the New Constitutionalism*, 25 LAW & SOC. Inquiry 757, 765 (Summer 2000).

The Interim Constitution was the first step towards the ultimate relinquishment of white minority power in South Africa.[16] The Interim Constitution was drafted through a multi-party negotiating process, in which various parties, including the NP and the ANC, submitted proposals for the basic framework of the Interim Constitution.[17] The Technical Committee and Ad Hoc Committees facilitated this process.[18] The Technical Committee served as the initial forum for proposals.[19] If the parties could not come to an agreement in the Technical Committee, issues could be referred to an Ad Hoc Committee for further negotiations and debate.[20]

It is difficult to reconcile the ANC's "populist socialist ideology"[21] with the concern of South African whites for private property protections. This issue was, and still is, a powerful shaping force in South African constitutional politics.[22] Levenberg writes, "given the players in the constitutional drama and the events that preceded it, it is not surprising that a primary tension in the Constitution was between concern on the part of the haves to protect their property rights and the populist socialist ideology of the ANC."[23] Protection of property rights was a hotly contested issue at the multiparty negotiations leading to the adoption of South Africa's interim Constitution.[24] It was ultimately the last issue decided: after consensus was reached on the rest of the interim Bill of Rights, the parties remained unable to agree on an interim property right.[25] It was only in the last days before the deadline, and after the establishment of an ad-hoc technical committee to formulate

16. *See* DION A. BASSON, SOUTH AFRICA'S INTERIM CONSTITUTION: TEXT AND NOTES 96-106 (1994); MATTHEW CHASKALSON & RICHARD SPITZ, THE POLITICS OF TRANSITION: THE HIDDEN HISTORY OF SOUTH AFRICA'S NEGOTIATED SETTLEMENT 322-25 (2000); *In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) S.A.

774 (S. Aft.).

17. VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 329-32 (1999)

18. *Id.*

19. *Id.*

20. *Id.*

21. Levenberg, *supra* note 14.

22 Jennifer Frankel, *The Legal and Regulatory Climate for Investment in Post-Apartheid South Africa: An Historical Overview*, 6 CARDOZO J. INT'L & COMP. L. 183, 200 (Spring 1998).

23. Levenberg, *supra* note 14.

24. F.G.T. Radloff, Land Registration and Land Reform in South Africa, 29 J. MARSHALL L. REV. 809, 821-22 (Spring 1996).

25. *Id.*

proposals, that the negotiating forum ratified § 28 of the Interim Constitution.[26]

The NP and its supporters argued strongly for the inclusion of such a clause to ensure land would not be nationalized and transferred to the land-hungry majority without compensation to current owners.[27] The NP was intent on ensuring that the property of existing white owners would be safe from the depredations of a future democratic government.[28] The ANC, on the other hand, was anxious that a constitutional right to property should not impede legislative programs addressing the massive disparities of wealth in society which were the legacy of apartheid.[29] In addition, within the ANC a land lobby was particularly concerned about the implications of a constitutional property right for a program of land restitution to assist the victims of force removals.[30] Within the ANC it was argued that "to entrench existing property rights in the new South African Constitution was to legitimize and entrench, as a human right, the consequences of generations of apartheid and dispossession."[31]

These conflicting concerns were expressed starkly in the parties' respective policy documents on a Bill of Rights. Clause 18 of the NP's Proposals on a Charter on Human Rights contained four major provisions: 1) each person has the right to property, 2) no person shall be deprived of property other than under a judgment or order of a court of law, 3) property may be expropriated for public purposes upon agreed compensation or cash market value, and 4) persons shall not be subjected to expropriatory taxes.[32] Chaskalson notes that it is difficult to think of any constitutional instrument which elevates the rights of property owners to a level which clause 18 of the NP's proposal would have done.[33] In contrast, the ANC sought to subordinate the rights of property owners to the needs of the general public.[34] In particular, the ANC's proposal provided for just, "equitable" compensation and required that compensation "not

26. *Id.*

27. Sam Rugege, *Land Reform in South Africa: An Overview*, 32 INT'L J. LEGAL INFO. 283, 287-88 (Summer 2004).

28. CHASKALSON, *supra* note 16, at 322.

29. *Id.*

30. *Id.*

31. Rugege, *supra* note 27.

32. CHASKALSON, *supra* note 16.

33. *Id.* at 323.

34. *Id.*

imped[e] legislation such as might be deemed necessary."[35] It also provided for a tribunal for land claims for dispossessed blacks.[36] Despite including a takings clause in its initial proposal, the ANC argued that a property protection clause should not be included in the Interim Constitution at all.[37]

While the ANC objected in vain to the inclusion of a property clause and other unnecessary rights in the interim Bill of rights, the NP concentrated on shaping the wording of the relevant clauses.[38] In the initial confusion around the role of the Technical Committee the NP were able to dictate the terms of the original debate over the wording of the property clause while the ANC contended that the Technical Committee had exceeded its mandate. By forestalling the prospects of a democratically elected constitutional assembly until the second phase of constitution making, the NP was able to insist on the protection of "rights in property."[39]

When the ANC finally accepted that it had to engage with the particulars of the property clause, it found that the debate around property had been cast as a debate over how much protection from a democratic state would be given to existing title holders.[40] Once the ANC realized that the Bill of Rights would contain a clause protecting existing property rights, it identified two main objectives: securing land reform and land restitution, and the ability to regulate for the common good.[41]

The final result was a takings clause that enshrined the concept of compensation for expropriation, while allowing courts flexibility in determining "equitable" levels of compensation. The final result also allowed distinguished between "expropriation," which requires compensation, and "deprivation," which requires none. Section 8 of the Interim Constitution reads:

> (1) Every person shall have the right to acquire and hold rights in property, and, to the extent that the nature of the rights permit, to dispose of such rights.
>
> (2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law.

35. *Id.*
36. *Id.* at 324.
37. *Id.*
38. *Id.*
39. Schneiderman, *supra* note 15.
40. CHASKALSON, *supra* note 16, at 324.
41. *Id.*

> (3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected.[42]

The short term concrete interests that the NP sought to protect (and that the ANC sought to expropriate) played the dominant role in shaping Section 8 of South Africa's Interim Constitution. The NP's short-term interests resulted in placing property protections on the negotiation table, while the ANC made the compromise of allowing the takings clause, while limiting its application to general regulation and the requirement of market value compensation. As a short-term political bargain, section 8 is an example of the "practical" takings clause criteria of the P/R/P typology.

## V. The Reactionary Takings Clause: The 14th Basic Law of the German Constitution

The 14th Basic Law of the German Constitution is an example of a "reactionary" takings clause. The entrenchment of the Basic Law of post-World War II Germany was a response to the disregard the Nazis had shown for human rights during the period of the Third Reich. In order to understand the German Basic Law, it is necessary to understand the attempts to protect property in earlier German Constitutions. This is because the Basic Law was a response to the failings of these previous attempts.

Constitutional protection of property dates back to Germany's failed 1848 Revolution. Indeed, among the motives of that abortive uprising was a desire on the part of the German people to secure individual freedoms, including the right to free speech, equality before the law, and private property. Article 164 of the 1849 Constitution states: "Property is inviolable. Expropriation of property may take place only if necessary for the common weal, only

42. S. Afr. Interim Const. § 28.

on a legal basis and against fair compensation."[43] These provisions demonstrate that the notion that the state must have only limited power to deprive its citizens of their property runs deep in the German constitutional tradition.[44]

The Reich Constitution of 1871, however, did not protect the right to property.[45] Hucko writes that the "Romantic Age of Revolutions had come to an end" and that pragmatism, not idealism, was the order of the day.[46] Moreover, at the time of the formal founding of the German Empire in 1871, the power to interfere with the exercise of the basic rights enumerated in the Constitution of 1849 was left to individual German states; protection against such interference would therefore logically come from state constitutions.[47] The protection of basic rights in the Reich Constitution "might have been interpreted as an attack on the autonomy of individual states."[48]

The Weimar Constitution of 1919 reinstated constitutional protection of property. Article 153 of the Weimar Constitution states:

> Property is guaranteed by the Constitution. Its extent and the restrictions placed upon it are defined by law. Expropriation may be effected only for the benefits of the general community and upon basis of law. It shall be accompanied by due compensation, save in so far as may be otherwise provided by a law of the Reich. The ownership of property entails obligations. Its use must at the same time serve the common good.[49]

In addition, Article 155 clarified the permissible purposes of expropriation, stating that that "landed property may be expropriated when required to meet the needs of housing, or for the purpose of land settlement, the bringing of land into cultivation or the improvement of husbandry."[50] The Weimar constitutional protections of private property were primarily driven by a desire to construct

43. Deutsche Verfassung vom 1849 (Constitution), Art. 164.

44. Jessica Heslop & Joel Roberto, *Property Rights in the Unified Germany: A Constitutional, Comparative, and International Legal Analysis*, 11 B.U. INTL'L L.J. 243, 245 (1993).

45. ELMAN M. HUCKO, THE DEMOCRATIC TRADITION: FOUR GERMAN CONSTITUTIONS 36 (1987).

46. *Id.*

47. *Id.*

48. *Id.*

49. Weimar Verfassung com 1919 (Constitution), Art. 153.

50. *Id.* at Art. 155.

legal obstacles to left-wing attempts at revolutionary reordering of property rights.[51]

Although compensation for expropriation was textually enshrined, Weimar era protection of property rights was qualified in many important respects. While in theory compensation was required for all takings, Reich legislation passed by a 2/3 vote could excuse the government from the duty of paying due compensation—and presumably from paying any compensation—for property expropriated from private landowners.[52] The Weimar Constitution of 1919 provided for legislative discretion to declare some takings non-compensable, provided the expropriation serves the common good. Protection for private property in the Weimar era may, therefore, be viewed as somewhat limited. Hucko writes that the "Weimar Constitution betrays a kind of 'value relativism' in that no right acknowledged therein was considered so fundamental to political society as to be immutable. Property rights, like all other individual rights, could be abolished by simple vote of the Parliament."[53]

It should be noted that although there were some cases were the 2/3 override vote by the Reichstag was attempted, it was never accomplished. The most notable cases regarded the discontinuance of payments to royalty that were deemed expropriation. Legislative measures to overrule the court's rulings were mobilized, but were unable to meet the 2/3 majority needed to overrule the court's constitutional conclusion.[54] However, the fact that constitutional protections could be reached by the Reichstag perhaps provided the necessary backdrop for the Reichsgericht's (the Weimar Supreme Court) most damaging failure: non-review of presidential emergency decrees.

While the Reichgericht had struggled to limit local and *Lander* authorities and the caprice of the parliamentary majority, it chose not to review the content of presidential emergency decrees. It declared that the president was only bound by Article 48, paragraph 2, the constitutional article providing for presidential emergency decrees.[55] The Reichsgericht essentially granted the president the power to

51. HUCKO, *supra* note 45, at 59.

52. Heslop, *supra* note 44, at 247.

53. HUCKO, *supra* note 45, at 60.

54. PETER C. CALDWELL, POPULAR SOVEREIGNTY AND THE CRISIS OF GERMAN CONSTITUTIONAL LAW: THE THEORY AND PRACTICE OF WEIMAR CONSTITUTIONALISM 158-59 (1997).

55. *Id.* at 160.

suspend basic rights at will. Caldwell writes, "The contrast between the court's distrust of the democratic legislature and its faith in the president could not have been more apparent."[56] This provided the constitutional underpinnings for Hitler's emergency decrees of 1933 that created the Nazi dictatorship and, along with the Reichstag fire, essentially destroyed the Weimar government.

As the Nazi consolidated their power, Nazi ideology provided the basis for judicial scholarship. The resulting scholarship provided a philosophical cloak for the Nazi's arbitrary acts and crimes, as well as the basis for judicial decisions.[57] Miller writes, "legal scholars began to indulge in polemics against human rights, guarantees of individual rights vis-à-vis the state, limitations of state powers, and the restraints upon the state to impose punishments."[58] Nazi ideology permeated the judiciary, and approved the basic violations perpetrated by Hitler's regime.

Jews were a primary target of the Nazi regime's authoritarian excess. Through a myriad of special legal provisions applicable largely only to Jews, the Nazi dictatorship exerted constant and continually increasing pressure at all levels to drive Jews from their property and from the economy as a whole.[59] Legal limits on Jews' economic and political freedom took many forms and were designed to drive them gradually from the mainstream of the German economy.[60] As time went on, however, the laws limiting the scope and exercise of economic and commercial rights were supplanted with laws authorizing the wholesale confiscation or forced sale of Jewish-owned property, whether real or personal.[61] In the years preceding the pogrom against the Jews initiated on November 9, 1938, the Nazis made concerted efforts to drive the Jews from Germany's economic life.[62]

The first legal basis for the outright expropriation of property by the Nazis was the Law Concerning the Confiscation of the Property

56. *Id.*

57. INGO MILLER, HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH 68 (1992).

58. *Id.* at 70.

59. Martin E.Elling, *Privatization in Germany: A Model for Legal and Functional Analysis*; 25 VAND. J. TRANSNAT'L L. 580, 588 (1992).

60. *Id.*

61. *Id.*

62. *Id.*

of Enemies of the People and State enacted in July 1933.[63] Although principally designed to allow the confiscation of property owned by communist activists, the Nazis also used the law against other disfavored groups, and against many Jews.[64] In 1938 German law required Jews and their non-Jewish spouses to register the entirety of their domestic and foreign property.[65] Failure to comply was punishable by large fines or even imprisonment. A series of law were subsequently passed in quick succession authorizing the forced sale and confiscation of most Jewish-owned property. Pursuant to the Decree on the Use of Jewish Property the forced sale and liquidation of real property, securities, jewelry, and art works was authorized.[66] A succession of ordinances enacted over the following years further defined and implemented the purpose of this decree.[67]

Following Germany's defeat in WWII, a new constitution was drafted which further enshrined individual rights. As Hucko writes, "no previous rulers in German history had treated human beings with such contempt, terrorized them so much and slaughtered so many of them as the Nazis had done. The establishment of a catalogue of basic rights at the beginning of the Basic Law was therefore a demonstrative response to this experience."[68] The Parliamentary Council, charged with drafting the new constitution, was guided in this by the earlier experience of the Weimar Republic. The possibility of restricting basic rights through parliamentary legislation had led to a watering down and undermining of basic rights. As a result, various safeguard were built into the Basic Law, such as the ban on individual exemptions from the basic rights, the inviolability of the catalogue's substance, their directly binding force also on the legislator, and their irremovability through government emergency measures.

63. Gesetz uber die Einziehung volks- und staatsfeindlichen Vermogens, 1933 RGBl. I 479.

64. Elling, *supra* note 59, at 589.

65. Verordnung ubner die Anmeldung des Vermodens von Juden, 1938 RGBl. I 414.

66. Verordnung uber den Einsatz des judischen Vermogens, 1938 RGBl. I 1709

67. Durchfuhrungscerordnung zur Verordnung uber den Einsatz des judischen Vermogens, 1939 RGBl. I 37; Anordnung aufgrund der Verordnung uber die Anmeldung des Vermogens von Juden, 1939 RGBl. I 282; Anordnung zur Durchfuhrung der Verordnung uder den Einsatz des judischen Vermogens, 1941 RGBl. 1 218; Verfahrensordnung der Reichskammer der Bildenen Kunste als Ankaufstelle fur Kulturgut, 1941 RGBl. I 245.

68. HUCKO, *supra* note 45, at 70.

The significance of the right to property and the principles governing its interpretation of Article 14 were set forth in the seminal German takings case, the Hamburg Flood Control Case.[69] In that case, the Reichsgericht acknowledged that property protection under the Basic Law went much further than under the Weimar Constitution.[70] In particular, the Reichsgericht emphasized that the Basic Law not only protects the market value of property, but also secures existing property in the hands of its owners.[71] The court stated that property is not merely a material interest, but also a personal one:

> Because the Weimar Constitution had no provisions for testing the constitutionality of expropriation laws, and because judicial review was [severely] restricted, the judiciary had to be concerned primarily with protecting property owners through compensation . . . By contrast, as already pointed out, the property guarantee under Article 14[I][2] must be seen in relationship to the personhood of the owner—i.e., to the realm of freedom within which persons engage in self-defining, responsible activity. The property right is not primarily a material but rather a personal guarantee.[72]

Constitutional protection of property rights in the German Basic Law was a response to the failures of the Weimar Constitution and the abuse perpetrated by the Nazi regime. German courts' interpretation of the German takings clause reflects the Basic Law's status as first and foremost a response to the violations of "personhood" under the Nazi regime. The German Basic Law, as a reaction to the failures of Weimar property protection as well as Nazi abuses, serves as an example of a reactionary takings clause.

## VI. The Philosophical Takings Clause: The Takings Clause of the Fifth Amendment to the United States Constitution

The Fifth Amendment of the United States Constitution is an example of a "philosophical" takings clause. Its inception was not the result of either a reaction to egregious past expropriations/protections or a short-term political bargain. Rather, the framers of the United States Constitution, particularly James Madison, were directly and

69. 6.3 Hamburg Flood Control Case (1968), 24 BFerfGE 367.
70. *Id.*
71. *Id.*
72. *Id.*

substantially influenced by political philosophers and thinkers. The takings clause in the United States was the product of a convergence of classical liberal and classical republican theory.

Liberal and republican ideologies resonated with the Founders, especially Madison, the author of the Bill of Rights. These ideologies converged at the Constitutional Convention, and the Takings Clause of the Fifth Amendment is one example of this convergence. Property protections, within both the liberal and republican paradigms, were originally popular as polemics against the abuses of the British Crown. The time "buffer" between the conclusion of the War of Independence and Madison's takings clause allowed revolutionary passions to cool. As a result, the more strident property protections that might have been demanded immediately after Independence were subordinated to Madison's desire to marry revolutionary ideals with long-term economic prosperity.[73] Madison's takings clause was the result of his philosophical, long-term view.

Classic liberal theory influenced the Founders greatly, in particular Locke's theory of property rights in the Two Treatises. The Two Treatises were an effective radical Whig political argument against the Tories and the power of the British Crown during the 1680s and 1690s.[74] It was Locke—in opposition to the abuses of the Crown and in defense of the principles of limited government, the natural rights of men, and the right to revolution—that Madison read, and it was in this context that the early American conceptions of property were situated.[75] Property was a general political term referring to all the personal and political rights of individuals with ownership of one's body and talents premised upon the natural freedom of individuals.[76] Thus, when Locke argued that the protection of property is the end or goal of government, or that each individual should have property, he was arguing that the social contract functions to protect the political liberties of individuals.[77] Many colonial American readings of Locke's theory of property

73. Had the Bill of Rights been part of the Articles of Confederation, the Takings Clause may have had a more reactionary flavor.

74. *See* RICHARD ASHCRAFT, REVOLUTIONARY POLITICS AND LOCKE'S TWO TREATISES OF GOVERNMENT 181-228 (1986); David Fellman, *The European Background of Early American Ideas Concerning Property*, 14 TEMPLE LAW QUARTERLY 503 (1940).

75. DAVID A. SCHULTZ, PROPERTY, POWER AND AMERICAN DEMOCRACY 15 (1992).

76. ASHCRAFT, *supra* note 62, at180-83

77. SCHULTZ, *supra* note 63, at 16.

noted this connection between personal political liberty and property ownership, and agreed with Locke that property deserves nearly absolute protection.[78]

Classic republicanism's tenets also gained political traction in the colonies based on their applicability to the revolutionary cause. Harrington's followers interpreted his doctrine of balance as an argument against executive patronage and power. This argument became an important ideological tool of opposition for the American colonials against King George III.[79] Harrington's views also surfaced in James Madison's Federalist #10, in which property distributions were described as the chief cause of faction in society.[80] However, Madison believed that inequalities in property, as rooted in the differences in human talents and faculties, could be rendered politically unimportant if the appropriate checks neutralize property interests' negative effects.[81]

Madison may have been most influenced, not by Locke or Harrington, but instead by Blackstone. In the years immediately preceding the drafting of the Takings Clause of the Fifth Amendment, Blackstone's views "split the difference" between classic liberalism and republicanism. In Volume I of the Commentaries, property is also described as an absolute right of Englishmen,[82] yet this right is a positive right, created and tempered by "the laws of the land" and subject to numerous legal restrictions as described in Volume II. Additionally, though in Commentaries II: 2 Blackstone described property ownership as an absolute dominion,[83] he also stated that legal ownership has no foundation in nature or natural law and that rules prescribing its use and transfer must be determined by society. Frederick Whelen suggests that Blackstone was not inconsistent when it came to his discussion of property: for the jurist property rights were absolute, but only within the lines

78. *See* G.E. Aylmer, *The Meaning and Definition of 'Property' in Seventeenth-Century England*, PAST AND PRESENT 87 (February 1980); STEVEN M. DWORETZ, THE UNVARNISHED DOCTRINE: LOCKE, LIBERALISM, AND THE AMERICAN REVOLUTION 27-30 (1990).

79. J.G.A. POCOCK, THE POLITICAL WORKS OF JAMES HARRINGTON 144 (1977).

80. ALEXANDER HAMILTON, THE FEDERALIST 56 (New York: Modern Library, 1937); *see also* Fellman, supra note 74, at 509-16.

81. SCHULTZ, *supra* note 75, at 18.

82. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND VOL. I 12 (1976).

83. *Id.* at 134.

prescribed by civil society and law.[84] Moreover, though first occupation may be the original reason that one had acquired use of property, continued or legal occupation rests upon rules of civil society. In short, one's absolute rights to property are tempered by the rights of others or by the public good.[85]

Blackstone's biographers claim that his influence was greater in America than in England and that numerous editions of the Commentaries were shipped to or printed in America.[86] For example, sixteen of the signers of the Declaration of Independence, including Madison, were known to have purchased and read the Commentaries.[87] At the Constitutional Convention the founders discussed terms such as "ex post facto laws" and "due process" in the sense that Blackstone had described these legal concepts.[88] But most important, some argue that it was Blackstone's influence that was especially important in early American legal history because judges and lawyers (in addition to many of the founders, such as Jefferson, Hamilton, and Adams) turned to him for reference as they sought to apply English property law to new American social and economic conditions.[89]

Madison envisioned a market economy and valued it for its freedom as well as the prosperity and national strength they thought it would bring. In contrast to Jefferson, Madison understood that a market economy is not an absence off a social order, but rather a particular type of social order. Madison wanted a government that would protect the foundation of that order: the freedom and security to acquire and exchange property. As Madison saw it, the role of the constitution was to ensure the foundation of a market-republic—with the freedom, justice, prosperity, and strength he thought it promised.[90]

84. Frederick Whelan, *Property as Artifice: Hume and Blackstone*, in NOMOS XXII: PROPERTY, 119-20 (J.R. Pennock & J.W. Chapman, eds., 1980),

85. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND VOL. II 374 (1976).

86. *See* DAVID LOCKMILLER, SIR WILLIAM BLACKSTONE 169-70 (1938); *see also* LEWIS C. WARDEN, THE LIFE OF BLACKSTONE 320-21 (1938).

87. WARDEN, *supra* note 86, at 323.

88. LOCKMILLER, *supra* note 86, at 174.

89. *See* Harry Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts*, *in* LAW AND AMERICAN HISTORY 360 (Donald Fleming & B. Bailys eds., 1971); *see also* Morton Horwitz, THE TRANSFORMATION OF AMERICAN LAW: 1780-1860 11 (1977).

90. JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 173-180 (1990).

Appleby writes that Jefferson saw the economy as "an escape from politics."[91] Madison viewed the creation of the market-republic not as an escape from politics, but as a marriage of politics and prosperity. Thus the takings clause that was enshrined in the Fifth Amendment is most properly viewed as a long-term, philosophical takings clause.

## VII. Additional Observations

The greatest flaw of the P/R/P typology is that it may not be perfectly exclusive. Reasonable minds could differ as to whether there is an important reactionary component in the South African Interim Constitution, as the ANC was interested in remedying past land dispossession. It could also be argued that the German Basic Law has a philosophical component, as constitutional protection of property had a lengthy history before it was enshrined in the Basic Law. However, regardless of these arguments, each constitutional creation, and each entrenchment of property rights, has a distinct character. Conflicting and complementing motivations may "seep in" to that character, but that does not change the essential character itself. The exclusivity problem is widespread in the social sciences and I have done my best to minimize it.

One way to further refine the P/R/P typology would be to more explicitly enumerate the hallmarks of each criterion. One way I have attempted to do this is with a temporal dimension: a practical takings clause has a short-term motivation, a reactionary takings clause has a middle-term motivation, and a philosophical takings clause has a long-term motivation. The P/R/P criteria may also be differentiated by the time buffer between a revolution and the constitutional drafting. Additional insights into markers of motivations that are characteristically "practical," "reactionary," and "philosophical" will further refine the P/R/P typology.

## VIII. Further Questions

The P/R/P typology may be useful for further analysis of takings clauses. In particular, it allows us to better formulate answers to important takings clause questions. Is there a predominant reason why property rights become entrenched in constitutions? The P/R/P typology would allow for a wide-ranging assessment of all

91. JOYCE APPLEBY, CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790S 37 (1984).

constitutional takings clauses. Perhaps a majority of takings clauses happen to fit one of the P/R/P criteria. What would that tell us about the nature of takings clauses themselves? Another important question is how property rights are enforced once they become entrenched. If the initial motivation for the takings clause is practical or reactionary, will the judiciary lose interest in enforcing the takings clause once the interests that led to the takings clause's creation have lost vigor? Or would a philosophical takings clause motivation lead to dogmatic or extreme results because there are no concrete interests to focus its application? Another important question is whether a takings clause may be reinterpreted by the judiciary and move from one category to another. If there is a particularly egregious property expropriation in a country, will that expropriation become the lodestar for all future takings jurisprudence? Could a takings clause shift from a philosophical or practical motivation to a reactionary one? This might help answer important questions about the role of judicial interpretation in general. The P/R/P provides a useful, concrete analytic tool for the assessment of constitutional takings clauses.