CHAPTER 46

MATERIAL LIBERTY AND THE ADMINISTRATIVE STATE

Market and Social Rights in American and German Law

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VIRTUALLY every textbook on American administrative law features *Goldberg v. Kelly* as the leading statement of constitutional rights in the American administrative state.[2] There the US Supreme Court considered a challenge to the administration of a federal welfare law (Aid to Families with Dependent Children or AFDC) in New York City, and found that the recipients were being struck off the welfare rolls unconstitutionally. Famously, the Supreme Court abandoned the old rights versus privileges distinction in applying the US constitution's Due Process Clause. The Court held that public assistance, as much as land and money, are a form of 'property' protected by the guarantee of 'no deprivation of life, liberty or property without due process of law'. As a consequence, the Court held that the New York agencies entrusted with administering the AFDC were constitutionally required to afford individuals, before their benefits could be terminated, an extensive set of procedural rights to test the accuracy of the determination.

Goldberg v. Kelly is celebrated as the Supreme Court's embrace of the contemporary administrative state and the recognition of equal rights for all citizens in the operation

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[2] *Goldberg v. Kelly*, 397 US 254 (1970).

of the administrative state. Copiously quoting from the legal scholar Charles Reich, the Court said:

> It may be realistic today to regard welfare benefits as more like 'property' than a 'gratuity.' Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property. It has been aptly noted that '[s]ociety today is built around entitlement . . . Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen, routes for airlines and channels for television stations; long term contracts for defense, space, and education; social security pensions for individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, full deserved, and in no sense a form of charity.'[3]

Based on this equivalence between different types of material rights, the Court recognized that all individuals affected by administrative schemes, not just those with classic common law property, are entitled to constitutional safeguards.

But what the textbooks leave out is *Richardson v. Belcher*, decided by the Supreme Court a year later.[4] There, the Court considered a due process claim brought by Raymond Belcher, a fifty-three-year-old worker who had broken his neck while employed by the Pocahontas Fuel Co. in Lynco, West Virginia. Belcher had paid into the federal social insurance scheme for medical disabilities at the required level and for the required amount of time to qualify for benefits at the time of his accident. He also qualified for workmen's compensation, under West Virginia's workmen's compensation scheme. However, in 1965, after Belcher began contributing to the federal disability scheme, but before the accident that left him disabled, Congress enacted an 'offset' provision that reduced the federal disability entitlement based on the amounts being received under any applicable state workmen's compensation law. When Belcher's federal disability check was reduced based on the offset, he sought to rely on *Goldberg v. Kelly* to claim that disability was 'property' and that he had been unconstitutionally deprived of his property. The Court, however, summarily dismissed the argument by holding that while the constitution guaranteed *procedure* for benefits determinations, it did not afford any protection for the material *substance* of those benefits.[5]

The only remaining argument left in the case was an equal protection claim—that Congress had unfairly singled out workers like Belcher by applying the offset provision to them alone, and not to disabled workers receiving additional benefits through private and other types of insurance schemes. But again the Supreme Court gave short shrift to Belcher. Applying the extremely deferential standard (so-called 'rational basis' review) used for assessing economic classifications under the constitution's equal protection clause, the Court found that the offset was constitutional.

[3] ibid, 263 fn. 8. [4] *Richardson v. Belcher*, 404 US 78 (1971).
[5] ibid, 80–1 (citations omitted).

The Court summarily accepted the reasons for the classification offered by the government in the litigation—even though, as the three dissenting Justices pointed out, they were illogical in circumstances such as Belcher's. The doctrinal approach taken in *Richardson v. Belcher* has since persisted, in a long line of cases stretching from *Jefferson v. Hackney*,[6] to *United States Railroad Retirement Board v. Fritz*,[7] *Bowen v. Gilliard*,[8] and others.

The textbook silence on *Richardson v. Belcher* and its progeny is understandable. Why waste precious class time on legal theories that were squarely rejected by the Supreme Court decades ago? Yet it has contributed to a blind spot in our understanding of the American administrative state. The dicta of *Goldberg v. Kelly* aside, individual rights in the American administrative state are actually quite stunted. Justice is only formal procedure. Justice is not respect for the complex bundle of negative and positive material rights that are implicated in administrative programmes, for instance when the government requires individuals like Belcher to contribute to social insurance schemes in return for future payments if life circumstances force them to draw on the insurance scheme. It is not equal treatment of those who come within the scope of such administrative schemes. And it is not respect for the expectations reasonably formed by individuals as they interact with the programmes of the administrative state. To be sure, this is not a particularly nuanced rendition of American law. There are plenty doctrinal straws available for grasping. For individuals like Belcher, however, the result is the same: there is no constitutional right that can prevent the government from reducing his disability cheque, even though he contributed to federal disability insurance over the course of his working life; even though other disabled workers who, for all intents and purposes, appear identical to him receive their full disability cheque; and even though, prior to his accident, the law said that should he become disabled, federal disability insurance would be an entirely separate financial cushion from state workmen's compensation.

Comparative law is essential for illuminating the lopsided character of material rights in the American administrative state, tall on procedure but short on substance. As Seymour Martin Lipset (1997, 17), the great social scientist, wrote in his book *American Exceptionalism*, '[t]hose who know only one country know no country'. Lipset was not just a preeminent scholar of America, but also comparative politics, because he understood that the comparison was essential for conceptualizing and sharpening his analysis of American politics and society (Marks and Diamond 1992). The same is true of the law. This contribution turns to the law of Germany to draw out the limited protection in American law for the material rights that tend to be most directly affected by the revenue-raising, market-regulating, and benefits-providing programmes of the administrative state. These are classic *negative* rights, such as inter-

[6] *Jefferson v. Hackney*, 406 US 535 (1972).
[7] *United States Railroad Retirement Board v. Fritz*, 449 US 166, 188 (1980).
[8] *Bowen v. Gilliard*, 483 US 587 (1987).

ests in land and money; *positive* rights, such as claims to basic income and services; and the vast set of rights that fall *in between* because they require both private and public involvement, such as operating a business or receiving payments from contributory social insurance schemes. Collectively, I refer to these rights of control over material resources as material liberty.

Among the world's jurisdictions, Germany is a promising choice for comparison. It shares a roughly equivalent set of liberal democratic commitments, has a roughly similar economic and social system, and has historically been used as an example for American public administration (Rodgers 1998). Moreover, even though space constraints limit this chapter to the experience of Germany, in many respects German law is representative of the public law of other European jurisdictions, including France and Italy. It is also important to note that the German law canvassed in this chapter has equivalents in the doctrine of Europe's two regional courts, the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ), and these courts are driving convergence among their Member States. In other words, this chapter canvasses different features of German public law not only because they offer a productive contrast with American law, but because they are indicative of more general features of European public law and therefore suggest a broader contrast between American and European law.

The chapter draws on three aspects of German public law to throw into sharp relief the American absence of substantive protection for material rights American. First, German constitutional law contains material rights to occupational freedom, income from social insurance, and a minimum standard of living—in contrast with American law's focus on classic property like land and bank accounts. Second, the right to equality, which is vigorously litigated in German tax, regulatory, and benefits law, reveals the very limited bite of equal protection in American law with respect to economic classifications. Third, the German constitutional doctrine of legitimate expectations, which affords a certain degree of legal certainty and temporal stability for the various material interests implicated by administrative programmes, highlights the absence in American law of protection for firms and individuals affected by abrupt changes in regulatory entitlements and benefits.

The rest of this contribution proceeds as follows. The next section briefly deals with two conceptual issues important for the comparative analysis: the scope of public action covered by the concept of the administrative state; and the type of rights that come under the umbrella of material liberty. The chapter then presents the American public law on material rights and the heavily procedural cast of those rights. This is followed by a presentation of the key elements of German public law that promote substantive fairness for material rights and that bring to light the particularities of American law. The conclusion points to the implications for general comparative law theories of the common law tradition and for the possible future development of American law.

46.1 Conceptual Framework for Comparative Analysis

In doing comparative administrative law, one initial challenge is identifying the object of comparison—in the parlance of comparative law methodology, identifying the *tertium comparationis* (Bignami 2016). Comparing how public action is governed by law requires a careful definition of what public action is covered. The immense diversity in how administration has traditionally been organized across jurisdictions is one reason why comparative administrative law was until recently the poor cousin of comparative private law and comparative criminal law (Bell 2006). Over the past decades, however, there has been a certain degree of convergence in the organizational forms and tasks of public administration, which has facilitated and created demand for comparison (specifically with respect to the regulatory function, see Bignami 2016). This volume is one important reflection of this political and intellectual shift in the discipline.

The point of departure for the comparative analysis in this contribution is a typical set of government functions associated with administration and the administrative state, which then trigger a typical set of individual rights. Why, as an historical matter, did the US and European countries create bureaucracies in the late nineteenth and early twentieth centuries? The answer rests in the social upheavals of industrialization and urbanization and the need to curb the harmful excesses of robber-baron capitalism and afford the workers and urban dwellers of the time a certain degree of economic security and personal well-being (Rodgers 1998). Over a century later, even though globalization and de-industrialization have worked profound changes, the answer to the question of 'why administration' remains roughly the same. Although there are certainly others, three important types of government programmes further these aims—taxation, market regulation, and social insurance and public assistance (referred to jointly in the rest of this chapter as 'benefits'). The administrative state that is the focus of this contribution is the state that raises revenue, regulates markets, and manages benefits. Public administration is a pivotal actor in accomplishing these functions.

The individual rights most directly implicated by the administrative state are those connected to control over material resources. Material liberty includes the entire gamut of interests listed by the Supreme Court in *Goldberg v. Kelly* and includes negative and positive rights, as well as the vast area in between. Classic *negative* rights include interests in land, shares, bonds, and the money in a bank account. Classic *positive* rights are claims to basic income and services to permit survival and basic human dignity. The vast majority of material rights, however, fall *in between* because of the social and economic transformations associated with the rise of the administrative state and the degree of positive state action necessary for the exercise of even the most basic of Lockean liberal rights. In this analysis, activities such as trading in markets and drawing on public pension schemes involve such a mixture of private and public

that they are treated together as occupying the vast, conceptual grey area between negative and positive rights. Out of convenience, those material rights invoked by economic operators and implicated by regulation are called 'market rights', while the rights invoked in benefits programmes, both of the contributory and the public assistance varieties, are called 'social rights'.

46.2 American Law on Material Liberty

Having laid the conceptual groundwork, let us now turn to the law on the American side of the Atlantic. The American law examined here is the federal constitutional and administrative law that applies to taxation, regulation, and benefits. These programmes are sometimes implemented by the federal bureaucracy alone, but they can also involve actors at the state level, either in tandem with federal agencies or independently. The analysis of material rights in American law is divided, as foreshadowed in the introduction, into several components. The most basic components are procedural and substantive safeguards, and, as is elaborated below. the procedural element is far more developed than the substantive one. With respect to the substantive element of material rights, this can be split into three distinct forms of fair treatment. First, there are claims to an essential core of property that must be respected by the state. Second, there is the claim to being treated equally with respect to individuals who come within, or could potentially come within, the scope of the administrative programme. Third, there is the claim to stable enjoyment of material resources over time, which is related to the certainty of the legal environment for material rights—of the negative, positive, and in between varieties.

46.2.1 Procedural Fairness

Among federal sources of law, the most important one for procedural guarantees is the Due Process Clause of the US constitution, contained in the Fifth Amendment (which applies against federal actors) and the Fourteenth Amendment (which applies against state actors). This constitutional law is generally referred to as 'procedural due process'. In taxation and regulatory programmes, which affect classic property and market rights, the right to receive a constitutional minimum of process was established early on. One of the first cases to establish a procedural due process right in administration involved Colorado tax assessments.[9] Firms that were denied licences or that were disappointed with the rates set for their services were likewise found to have a right bring the matter to adversarial agency proceedings and ultimately the courts (Cass et al 2016, 584–7). With *Goldberg v. Kelly*, these procedural rights were extended to the recipients of public assistance.

[9] *Londoner v. Denver*, 210 US 373 (1908).

Subsequently, the Court fleshed out the scheme in *Mathews v. Eldridge*, which set down the formula for assessing the scope of constitutional procedure, a balancing test in which the importance of the constitutional 'life, liberty, or property' interest and the contribution the procedure makes to an accurate determination are weighed against the government interest in conserving resources and speedy resolution of the dispute.[10] These seminal cases have been followed by a number of others involving the issue of whether there is a 'legitimate claim of entitlement'[11] giving rise to a property interest and, once a property interest is recognized, what type of procedure is due.

As established in a pair of Supreme Court cases from the early 1900s, as a constitutional matter, only individualized determinations are afforded procedure. Generalized determinations affecting classes of persons and based on policy judgements are not. Or more accurately, as Justice Holmes wrote in the opinion for the Court, with respect to generalized determinations, only the rough and tumble procedure of elections and voting applies.[12] Since the 1960s, however, this limitation on procedure in setting down general rules has been subject to substantial reworking by the courts. In the context of generalized determinations by administrative agencies, i.e. rules and regulations, there is a duty to afford extensive procedure to regulated firms, potential programme beneficiaries, and other members of the affected public. These procedural requirements come under the guise of the comprehensive legal framework that exists for administrative agencies—the Administrative Procedure Act (APA) as interpreted by common law courts. They are considered so fundamental that some administrative law scholars argue that they have quasi-constitutional status (Metzger 2010).

To elaborate on the procedure for generalized determinations: The doctrinal labels are the procedure of 'notice, comment, concise statement of basis and purpose' and the judicial review standard of 'arbitrary and capricious' review. On its face, notice and comment appears minimalistic, but it has evolved into a comprehensive procedure that is distinguished from the procedure of individualized determinations largely by virtue of the fact that it is written and does not require an oral, trial-type hearing. 'Arbitrary and capricious' judicial review is a substantive, not procedural, standard of administrative rationality required of agency rules. But because of the so-called appellate model of judicial review (Merrill 2011), in which the factual record, policy analysis, and legal basis for decisions are to be developed primarily by administrative agencies, meeting the fairly demanding judicial standard that rules not be 'arbitrary and capricious' requires process in the agency too. This duty to engage in a back-and-forth exchange with potential litigants in the agency works to supplement notice-and-comment procedure and, in those instances where notice and comment does not apply, substitutes for it. Thus, of the original distinction between individualized determinations and rules, only rule-making by the legislature, i.e. Congress and state legislatures, remains free of due process constraints.

[10] *Mathews v. Eldridge*, 424 US 319, 335 (1976).
[11] *Board of Regents of State Colleges v. Roth*, 408 US 564, 577 (1972).
[12] *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 US 441, 445 (1915).

46.2.2 Substantive Fairness

46.2.2.1 *Essential core of material rights*

By contrast with procedural due process, so-called substantive due process imposes very few limits on taxation, regulatory, and benefits schemes and their interference with the core of material rights. In American constitutional law, substantive due process captures the theory that when the government wishes to act in a way that interferes with liberal rights it requires a reason and that, in some cases, given the importance of the right, it is difficult to offer a reason that will pass muster. Simplifying enormously, these rights include the ones listed in the Bill of Rights, such as the rights of assembly and speech, as well as the rights that have been recognized under the general phrase 'life, liberty, or property'. Although administrative schemes can affect all types of rights, they are most likely to implicate material rights because of their social and economic purposes. In substantive due process doctrine, material rights receive minimal protection and the courts have been very deferential to the legislature and bureaucracy.

With respect to the classic property rights and market activities burdened by taxation and regulatory programmes, the permissive doctrinal test that applies is what is sometimes called 'rational basis' or 'minimal scrutiny' review: as long as a plausible justification can be offered in the litigation for the statute or other type of state measure and there is a rational connection between the measure and the justification, it will pass constitutional muster.[13] Minimal scrutiny was first applied in the domain of federal taxation. *Brushaber v. Union Pacific Railroad* involved a challenge to the federal income tax law passed on 3 October 1913, providing for general yearly income tax from December to December of each year. The case was brought after the enactment of the Sixteenth Amendment doing away with the apportionment requirement and thus authorizing an income tax not allocated equally as between the states, but directly in relation to the US population. The Court noted that it is 'well settled that such clause [due process clause] is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words that the Constitution does not conflict with itself by conferring upon the one hand, a taxing power, and taking the same power away on the other, by the limitations of the due process clause'.[14] The Court went on to say that it could intervene only if the taxing provision 'was so arbitrary . . . that it was not the exertion of taxation but a confiscation of property; that is, a taking of the same in violation of the Fifth Amendment'.[15] As Boris Bittker, the renowned tax scholar, said decades ago 'this reservation of a residual judicial function in extreme cases became a virtual dead letter' (Bittker 1987, 11; see also Ordower 2006, 263; Mazza and Kaye 2006, 644).

The turn to light-touched judicial review came somewhat later in the case of market-regulating programmes. Around the time that the Court was deferring to tax legislation, it was busy striking Progressive and New Deal legislation based on liberty and property rights and a narrow vision of the police power. In *Lochner v. New York*, the most famous

[13] *Brushaber v. Union Pacific Railroad*, 240 US 1 (1916). [14] ibid, 24. [15] ibid.

of these cases, the Court struck a New York law regulating the working hours of bakers as a violation of the Due Process Clause and the substantive guarantee of liberty under the Due Process Clause to enter freely into contracts of employment.[16] This line of cases provoked President Roosevelt's notorious attempt to 'pack' the Court with six additional Justices who presumably would have ensured the constitutionality of the New Deal agenda (Ackerman 1998, 312–37). While the Court-packing bill was ultimately defeated in the Senate, the Court shortly thereafter reversed course and began upholding the ambitious regulatory programmes of the New Deal, abandoning several different doctrinal threads including the substantive due process jurisprudence of the Lochner era.[17]

At the same time, the Court articulated a new philosophy of judicial review. In *Carolene Products*, the Court easily dismissed a substantive due process challenge to a federal statute prohibiting the sale of milk that had been compounded with non-milk fats.[18] The Supreme Court declared that, in cases involving 'regulatory legislation affecting ordinary commercial transactions' it would generally presume constitutionality 'unless in light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators'.[19] By contrast, in famous footnote four, the Court indicated that it would engage in more searching scrutiny in three categories of constitutional cases: (1) those which involved rights specifically protected by the Bill of Rights; (2) restrictions on 'those political processes which can ordinarily be expected to bring about repeal of undesirable legislation' and associated rights such as the right to vote and the right to speech; and (3) legislation curbing the rights of 'discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities'.[20] Thus judicial review in the name of rights was linked to political rights and safeguarding the democratic process rather than to cordoning off a space for individual liberty, including material liberty.

In *Williamson v. Lee Optical*, the Supreme Court affirmed the *Carolene Products* approach and the permissive treatment of state action that burdens market rights.[21] There the challenge was to a state law that required a prescription from either a licensed optometrist or a licensed ophthalmologist for purchasing eyeglasses. The law had the effect of prohibiting opticians—who were qualified artisans but not licensed medical professionals—from providing the service directly to the consumer, even in straightforward cases such as the duplication of eyeglasses or the replacement of broken lenses. The Supreme Court found, using the light-touched standard for market rights, that 'the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the

[16] *Lochner v. New York*, 198 US 45 (1905).

[17] The seminal due process case is *West Coast Hotel Co. v. Parrish*, 300 US 379 (1937) in which the Court decided that the minimum wage set down in a Washington state statute was constitutional.

[18] *U.S. v. Carolene Products*, 304 US 144 (1938). [19] ibid, 152. [20] ibid, 152 fn. 4.

[21] *Williamson v. Lee Optical*, 348 US 483 (1955).

particular legislative measure was a rational way to correct it.'[22] Minimal scrutiny for regulatory programmes has remained a stable element of constitutional law until quite recently. In the past ten years or so, there has been a movement in conservative legal thought to dial back on *Carolene Products* and to return to a more demanding substantive due process test, in particular in the context of occupational licensing (see Sherry 2016, 564–5; Colby and Smith 2015; Graber 2006). However, the impact of this approach on the courts and the doctrinal evolution of judicial review of regulatory programmes remains to be seen.

As for benefits programmes and social rights, there has never been substantive due process separate from procedural due process or, as we shall see, equal protection. The Court has held that the right to 'life, liberty, or property' does not create positive state duties. There is no material right to a minimum set of resources necessary to enjoy the right to 'liberty'. The same logic also applies to payments from social insurance programmes. The early case of *Flemming v. Nestor* involved a challenge to a statutory provision requiring the termination of old-age benefits because the recipient was an alien deported for Communist activities.[23] The Court expressly held that social security taxes paid by workers and employers did not give rise to a claim to benefits equivalent to 'accrued property rights' and therefore the statutory denial of the benefit did not trigger substantive due process analysis.[24] Although the Court did assess the law under equality principles, the statute easily passed muster because of the extraordinarily deferential standard of review—extraordinarily deferential because there was no constitutionally guaranteed material right at stake, simply 'the withholding of a noncontractual benefit under a social welfare program'.[25]

46.2.2.2 *Equality*

In American constitutional law, the right to equality and non-discrimination is tied to the textual guarantee under the Fourteenth Amendment that no state shall 'deny to any person within its jurisdiction the equal protection of the laws'. When the challenge is to action by the federal government, the same guarantee has been read into the Due Process Clause of the Fifth Amendment. Both equal protection and due process, according to the Supreme Court, '[stem] from our American ideal of fairness'.[26] As with due process, government taxation is the area where the permissive treatment of classifications based on material resources appeared first in the Court's jurisprudence. In *Brushaber*, discussed above, most of the litigation centred on allegedly improper classes created in the federal income tax, resulting in unconstitutional discrimination. For instance:

> Discrimination and want of due process result, it is said, from the fact that the owners of houses in which they live are not compelled to estimate the rental value in making up their incomes, while those who are living in rented houses and pay

[22] ibid, 487–8. [23] *Flemming v. Nestor*, 363 US 603 (1960). [24] ibid, 610.
[25] ibid, 611.
[26] *Bolling v. Sharpe*, 347 US 497, 499–500 (1954), as analysed and replicated in S. Doc. 112–9, *The Constitution of the United States of America: Analysis and Interpretation* 1572–3 (2017).

> rent are not allowed, in making up their taxable income to deduct rent which they have paid.[27]

The Court, however, summarily dismissed the equal protection claim. It said that it would strike a classification only if it was 'so wanting in basis for classification as to produce such as gross and patent inequality as to inevitably lead to the . . . conclusion [that it is a confiscation of property]'.[28] Over a century later, tax is considered to be the policy area subject to the most deferential form of judicial review: '[T]he presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it' (Mazza and Kaye 2006, 656).

Mimicking the trajectory of substantive due process, deferential equal protection review emerged somewhat later in the regulatory arena. Both *Carolene Products* and *Williamson v. Lee Optical* involved not only substantive due process, but also equal protection claims. In *Carolene Products*, the milk-substitute producer complained that it was treated unequally with respect to butter-substitute producers, i.e. margarine, since the latter had not been prohibited from circulating in inter-state commerce. In *Williamson v. Lee Optical*, the opticians claimed that they were being treated unequally with respect to sellers of ready-to-wear glasses, who were not subject to the requirement of a prescription. In both cases, the equal protection claim was summarily dismissed.

The deferential treatment of equal protection challenges also applies in the benefits area. In the late 1960s and early 1970s, there were a number of challenges to classifications in benefits programmes. Those associated with personal liberties, such as the right to travel, were sometimes successful.[29] Absent the connection with a personal liberty, however, such claims only received rational basis scrutiny and they lost. In *Dandridge v. Williams*,[30] the litigants claimed that the State of Maryland's rules for administering AFDC were unconstitutional because they imposed an absolute maximum on welfare grants, thereby discriminating between children in large families and children in small families (those in large families could expect to receive lower per capita benefits under the programme) and depriving them of the satisfaction of their basic needs. The Supreme Court reviewed the Maryland regulation under the permissive rational basis test and found that the state's justification for the regulation was plausible and therefore the statutory maximum was permissible. Maryland gave a laundry list of standard state interests in the welfare arena: interests 'in encouraging gainful employment, in maintaining an equitable balance in economic status as between welfare families and those supported by a wage-earner, in providing incentives for family planning, and in allocating available public funds in such a way as fully to meet the needs of the largest possible

[27] *Brushaber*, 240 US at 24. [28] ibid. [29] See e.g. *Shapiro v. Thompson*, 394 US 618 (1969).
[30] *Dandridge v. Williams*, 397 US 471 (1970).

number of families'.[31] The Court easily found that the justification passed constitutional muster.

Following *Dandridge*, the Court held one year later in *Jefferson v. Hackney*[32] that the discriminatory allocation of funds by the State of Texas as between categories of the needy—children, the blind, the disabled, and the elderly—was constitutionally permissible. Texas administered the federal welfare programmes for these groups, and it also contributed state resources. To conserve resources, Texas used a formula that penalized children. There were a number of reasons why the formula led to this result, the most obvious one being that once individual need was calculated, there was a percentage reduction in what the welfare programme would provide for children (to receive 50 per cent, later 75 per cent) but no such reduction for the elderly. In accepting Texas's justification, the Court said:

> Since budgetary constraints do not allow payment of the full standard of need for all welfare recipients, the State may have concluded that the aged and infirm [blind and disabled] are the least able of the categorical grant recipients to bear the hardships of an inadequate standard of living. While different policy judgments are of course possible, it is not irrational for the State to believe that the young are more adaptable than the sick and elderly, especially because the latter have less hope of improving their situation in the years remaining to them.[33]

Of course, as the litigants pointed out, another possible reason for this discrimination was that the children and their families were disproportionately African-American and Mexican-American. Not only were they politically unpopular, but the other categories of the needy (disabled and elderly) could be expected to be more active at the voting booth. The Court, however, gave the argument short shrift.

As explained above, the Supreme Court treats contributory social insurance programmes as identical to public assistance programmes, and therefore discrimination claims suffer the same fate there too. One good illustration of this approach is *United States Railroad Retirement Board v. Fritz*.[34] At issue there was a special (and unusual, for the US) public retirement scheme for railway workers. Because of the decline of the industry, and the imbalance between retirees and the employees still contributing to the system, the retirement fund came under severe financial pressure. The solution enacted by Congress in 1974 was to eliminate so-called 'earned dual benefits': previously, employees who had worked in non-railway jobs and had made contributions to the general social security system as well as the Railroad Retirement Fund could collect retirement from both systems; after passage of the statute, they could only collect a single retirement annuity, calculated based on the social security component and the component attributable to railway employment. This change was aimed at eliminating a so-called 'windfall' that resulted from the administrative formula used in the two systems—the

[31] ibid, 483. [32] *Jefferson v. Hackney*, 406 US 535 (1972). [33] ibid, 549.

[34] *United States Railroad Retirement Board v. Fritz*, 449 US 166, 188 (1980); see also *Weinberger v. Salfi*, 422 US 749, 768 (1975).

higher retirement benefit that resulted for individuals who had split their working lives between railway and non-railway employment and those who had always worked for the railways. The statute contained grandfather provisions for those already receiving their pensions and for some who had qualified for retirement income under the old scheme but who had not yet reached retirement age. However, excluded from grandfathering were individuals who had qualified under the old scheme and had not yet reached retirement age, but who were no longer employed by the railways in 1974, when the statute was enacted. This difference in treatment between those employed and those not employed by the railways in 1974 is what triggered the equal protection challenge. This was a blatant form of special interest legislation, since the Congressional bill was prepared through negotiations between rail management and labor unions, and those no longer working in the railways were quite obviously not represented by either side (Sunstein 1985, 69). Nonetheless, the Court accepted the justification, advanced in the litigation but not in the legislative record, that those with a current connection to the industry were more likely to be career employees and therefore more likely to be among the intended beneficiaries of the retirement scheme.[35]

46.2.2.3 *Legal certainty*

The interest in consistency over time in the legal treatment of material resources is best captured in American law under the doctrinal label of retroactivity. Although there is some dispute as to how to define retroactivity, the Supreme Court has said: 'every statute which takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty or attaches a new disability, in respect to transactions or considerations already past must be deemed retrospective . . .'.[36] The most robust legal defence against retroactive legislation and regulation comes in the form of the canon of construction that creates a general presumption against retroactivity: statutes should be interpreted to apply prospectively only, unless there is a clear indication otherwise in the legislation.[37] If the state actor responsible for the retroactivity is an administrative agency, as opposed to the legislature, then administrative law doctrines of reasonableness such as 'arbitrary and capricious' review can also operate to defeat the retroactive action. By contrast, straight out constitutional challenges rarely succeed. They are analysed under the rubric of substantive due process and the minimal scrutiny test that requires that the state measure be 'rationally related to a legitimate legislative purpose'.[38] The difference in treatment between negative and other types of material rights is stark in this doctrinal arena: the burden caused by the abrupt changes in legal regime that retroactivity doctrine seeks to minimize is conceived as such generally only if the right is classic property such as land or money, not if the right is future earnings in a regulated industry or future payments from a benefits scheme.

Tax is the policy area where retroactivity is most commonly identified—but also commonly tolerated. The Court has consistently upheld federal income tax legislation

[35] *Fritz*, 449 US at 178.
[36] *Landgraf v. USI Film Products*, 511 US 244, 269 (1994).
[37] ibid, 272–3.
[38] *United States v. Carlton*, 512 US 26, 35 (1994).

that makes changes to tax rules and that extends to income generated before the date of enactment, generally during the same calendar year but sometimes also in the previous year (Mazza and Kaye 2006, 665–8).[39] Retroactive gift and estate taxes have been somewhat more controversial, but since the New Deal, they too have been uniformly allowed by the Supreme Court (Fatale 2018). In *United States v. Carlton*, the Court extensively considered the elimination of an estate tax deduction that was retroactively applied to transactions that occurred, and a tax return that was filed, more than one calendar year before the date of enactment. It found that Congress had a legitimate purpose in seeking to correct a tax law enacted one year earlier, which had led to 'significant and unanticipated revenue loss', and that the decision to prevent the loss 'by denying the deduction to those who had made purely tax-motivated stock transfers' was not 'unreasonable'.[40] The Court noted the 'modest period of retroactivity'. It also addressed the issue of 'detrimental reliance' on the predecessor rule and the 'lack of notice' of the 'new rule': the Court said that neither was an obstacle to retroactive application of the tax treatment, and that, in essence, such changes to the tax regime were intrinsic to the tax system and one of the inherent risks of being a taxpayer.

The Court has also acknowledged that regulatory programmes can impose retroactive burdens on the property rights of market actors but has generally sustained them based on the same minimal scrutiny. In *Usery v. Turner Elkhorn Mining*,[41] the lead case on the issue, a statute required coal mine operators to compensate their former employees, no longer working in the industry at the time when the law was passed, for black lung disabilities that they had contracted in the course of their employment. The Court upheld the retroactive imposition of liability on coal mine operators for the work-related disabilities of their former employees. It found the statute to be 'a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor, the operators and the coal consumers'.[42] In conducting the analysis, the Court summarily dismissed the supposedly fairer alternative measures advanced by the coal mines: 'whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension'.[43]

By contrast, with respect to market and social rights, there is rarely a finding of retroactivity, much less impermissible retroactivity. The firms that operate under regulatory schemes and the individuals that contribute to benefits schemes generally do not have a legally protected interest in the maintenance of the scheme over time, even though they undoubtedly make investments and adjust their behavior based on the scheme. That being said, the judicial treatment of regulatory entitlements has been somewhat more favourable than the treatment of benefits entitlements. There are regulatory cases in which a license holder is found to enjoy a 'vested right', which is compromised when the administrative agency changes the terms of the regulatory scheme and as a result alters the business that can be conducted under the licence. In such cases, the change can be

[39] *United States v. Darusmont*, 449 US 292, 296 (1981).
[40] *Carlton*, 512 US at 32.
[41] *Usery v. Turner Elkhorn Mining*, 428 US 1 (1976).
[42] ibid, 19.
[43] ibid.

found to be retroactive, and if it is not required by the law governing the agency, it can be struck by the court as 'arbitrary and capricious' agency action or as an impermissible interpretation of the agency's enabling statute.[44]

In benefits programmes, by contrast, there is no 'vested right' in receiving the benefit until it is actually paid as required under the scheme. Therefore, such schemes can be changed until the time of payment, without triggering retroactivity concerns. This is the reason why *United States Railroad Retirement Board v. Fritz*, the case involving the elimination of dual retirement benefits, was analysed exclusively as a potential violation of equality: even though the benefits had 'vested' in the sense that the recipients had satisfied the requirements of receiving both railway and social security retirement at the time that the law was enacted, the recipients had not yet reached the retirement age when the benefits were required to be paid. It is only in the unusual circumstances when a state actor seeks to claw back benefits that have already been paid that there are retroactivity concerns. In *Bowen v. Georgetown University Hospital*[45] the Court examined an administrative rule setting down the formula for calculating wages for purposes of calculating overall reimbursement to medical providers under the federal old-age health insurance programme (Medicare). The rule applied to services that had been provided prior to the issuance of the rule and that had already been reimbursed according to a different formula. Because the rule changed the amount of the benefit, requiring that medical providers repay the amounts in excess of the new benefit formula, the Court saw this as a particularly troubling form of retroactivity and found that the agency had exceeded its statutory authority in promulgating the rule. The finding was based on both the terms of the congressional statute delegating rule-making power to the agency and a canon of statutory construction containing a presumption against retroactivity.

46.3 German Law on Material Liberty

The next section follows the same structure in presenting German law on material liberty. In light of the analytical focus of this chapter, the account presented below does not seek to be comprehensive, but rather to bring out the points of contrast with American law. It also bears repeating the reasons offered earlier for my choice of Germany as the case for the comparative analysis. There are substantial underlying similarities in economic development and political organization, as well as social and political values, that make Germany an important source of legal knowledge for American lawyers and scholars. In addition, many aspects of the German law discussed below reflect the law of other European jurisdictions too. Historically, there has been considerable borrowing among European jurisdictions, and this trend has been accelerated over the past half-century with the rise of Europe's two regional courts, the ECtHR and the ECJ. Without

[44] See *Arkema Inc. v. EPA*, 618 F.3d 1 (DC. Cir. 2010).
[45] *Bowen v. Georgetown University Hospital*, 488 US 204 (1988).

doubt, it is important not to generalize about the rich varieties of material liberty that exist in European legal traditions. Nonetheless, the German experience can be used to suggest differences that separate American law from European public law more broadly speaking.

46.3.1 Procedural Fairness

Procedural fairness in German law is largely guaranteed through litigation of administrative decisions in the courts, not adversarial contestation within the bureaucracy as in American law. The administrative authorities responsible for tax, regulatory, and benefits determinations are bound to follow procedures that give the affected individuals a right to be heard (either on paper or in person) and to receive an explanation of the final administrative decision.[46] Many of the required statutory procedures, however, are designed to establish a hierarchical review process within the bureaucracy, aimed at achieving the right result, rather than creating a space for individuals to air their grievances and contest the contemplated decision. Most of the procedural guarantees come at a later stage, when the decision is challenged in court and the court can redo the determination from scratch, both on the facts and the law. German tax, administrative, and social courts operate following the inquisitorial model typical of the civil law tradition; the activist role for judges in criminal prosecutions and (civil) private disputes is mimicked in public law courts (Breunig 2017, § 86). Beyond the facts and the law, on questions of policy administrative discretion and judicial deference are confined to a discrete set of fact patterns such as civil service exams and promotions (Jacob and Lau 2015, 243).

This right to go to court and receive a comprehensive determination of fact and law is rooted in the constitutional guarantee to have 'recourse to the courts' in the event of a public authority's violation of a basic right[47] (Grewe 2020, 16–19). The Basic Law stipulates that '[j]udges shall be independent and subject only to the law'.[48] It further sets out the organization of the German judiciary, which is divided into different branches by subject area and reflects the different aspects of the administrative state considered in this chapter: Besides the Federal Constitutional Court, '[t]he Federation shall establish the Federal Court of Justice, the Federal Administrative Court, the Federal Financial Court and the Federal Social Court as supreme courts of ordinary, administrative, financial, labour and social jurisdiction'.[49] Thus the tax, regulatory, and benefits programmes that are litigated in generalist courts in America go to special branches of the judiciary in Germany. Individuals have a right to have their claims heard by their 'lawful

[46] For an explanation of these procedural guarantees in the German Administrative Procedure Act (which are largely replicated in the social and fiscal codes), see Singh 2001.

[47] Grundgesetz [GG] [Basic Law], Art. 19(4), translation at <http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html>.

[48] ibid, Art. 97(1). [49] ibid, Art. 95(1).

judge', meaning that the state may not establish ad hoc courts and must respect the Basic Law's allocation of jurisdiction among domestic courts, as well as between German courts and European and international courts.[50]

The main way in which German law limits what appears at first glance to be an overly generous promise of a full judicial determination of administrative matters is by limiting standing to individualized determinations. Generally speaking, only if there is such a determination can the individual obtain access to court (standing), including on the issue of the legality of any relevant administrative rules or legislative enactment. Individuals have a right of judicial recourse when they are the object of a *Verwaltungsakt* (administrative act), that is, a final agency decision addressed to them telling them what is or is not lawful. It is important to note, however, that in recent years there has been a softening of standing doctrine, under the influence of the evolving jurisprudence of the Federal Constitutional Court and the ECJ. In certain instances, even in the absence of an administrative act specifically addressed to them, individuals can sue the administration in court if they can establish a breach of their 'subjective rights', which turns on the fundamental interests recognized in private law, constitutional law, or legislative statute (in statutes, called a 'rights-protective norm'). In short, in recent years, standing has been expanded to allow for direct challenges to administrative rules or legislative enactments.

As Susan Rose-Ackerman and her co-authors (2015) have noted, in contrast with American law, there are relatively few due process requirements within the bureaucracy for enacting administrative rules. With the exception of zoning, land-use planning, and projects with environmental impacts, there is no legally required procedure of public notice and debate before the administration adopts rules and other types of generalized determinations. Moreover, in contrast with individualized determinations, access to the courts to obtain de novo consideration of the issues does not routinely serve as a surrogate for administrative procedure—because of the hurdles to standing discussed above.

46.3.2 Substantive Fairness

46.3.2.1 *Essential core of material rights—occupational freedom and social rights*

The German Basic Law contains similar guarantees for classic property rights as does American law. However, there are three material rights that in American law rarely, if ever, make their appearance but that are important in German law. The first is occupational freedom (*Berufsfreiheit*), which is a longstanding right that is protected under Article 12(1) of the Basic Law and that guarantees the right to freely choose and exercise an occupation. In their comparative textbook on German constitutional law, Donald

[50] ibid, Art. 101(1).

Kommers and Russell Miller (2012, 666) explain that 'occupational rights are ranked as fundamental not only for their value in promoting economic liberty but also for their intrinsic moral worth. Indeed, the Court has favored an elevated philosophy of work over mere prosperity. The choice and practice of an occupation are seen less as a means of earning a living than as a foundation for the development of the human personality. Work is a vocation as well as a job and necessary for personal growth and self-fulfillment.' The doctrinal test follows the general test for fundamental rights, which examines the scope of the protection of the right and the justification for the infringement, which in turn must satisfy various conditions, most notably the proportionality test of suitability, necessity, and balancing. An important twist in the context of occupational freedom is the distinction drawn between state measures that regulate the entry to the occupation and those that set down conditions on how the occupation is to be exercised. Under the so-called 'gradation theory' (*Drei Stufen-Theorie*), the former is subject to more stringent judicial review than the latter (Kommers and Miller 2012, 659–79).

On this right, the foundational case is the *Pharmacy Case*.[51] It involved a challenge to a Bavarian statute that set down criteria for granting permits to pharmacies, including economic viability and the potential harm to competitors. A pharmacy that was denied a permit sued based on the constitutionally guaranteed right to choose and exercise a profession. The Court, in holding for the pharmacy, assessed the liberty claim based on the proportionality principle and in doing so provided the first clear endorsement of the principle in constitutional law. Since then, the right to occupational freedom has been routinely litigated, generally first in administrative courts, because the right tends to be invoked against regulatory programmes, and then in the Constitutional Court. A couple of examples: In a challenge brought by a candy manufacturer to a federal regulation banning the sale of cocoa-like products because of the risk to consumers of confusing such sweets with real chocolate, the Court found that proportionality's necessity prong had been violated because of the availability of a less-restrictive measure to prevent consumer confusion—a labelling requirement.[52] More recently, the Court has found Länder laws banning smoking in public restaurants to be unconstitutional because of the failure of the statutory scheme to consistently promote the purported aim of protecting against smoke. In the case, it instructed the Länder either to extend the ban to all establishments (and not grant an exemption to larger establishments that could provide a separate room for smokers) or to provide an appropriate exemption for small as well as large establishments.[53]

Even more surprising from an American vantage point is the treatment of social rights. The second material right that is absent from American law, front and center of German law, is the right to to social insurance payouts. In 1959, the Federal Social Court first characterized the material rights guaranteed by social insurance schemes

[51] BverfG, 11 June 1958, Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 7, 377.

[52] BverfG, 16 January 1980, BVerfGE 53, 135.

[53] BverfG, 11 June 2008, BVerfGE 121, 317. Länder (or Land in the singular) are the states in Germany's federal system of government.

as a property right, covered by the general right to property under Article 14(1) of the Basic Law.[54] Two decades later, in 1980, the Federal Constitutional Court also held that social insurance rights were constitutional 'property'.[55] Interestingly, and connected to the constitutional centrality of occupational freedom, the Constitutional Court recognizes as 'property' only those social security rights that derive from the individual's work or contributions to the social security administration.[56] The legislature, of course, is allowed to interfere with the property and reduce social insurance payments. However, such reductions must be designed to make the social insurance burden bearable for the active working population, must be proportionate to that end, and must continue to afford substantial and adequate payments to the beneficiaries (Eichenhofer 2016, 164–5).

The third material right that is exceptional from an American vantage point is the right to public assistance. In one of its very first judgments, the Federal Administrative Court held that there was a legal entitlement to social help and that this entitlement was grounded in the postwar constitution's pivotal value of 'human dignity'.[57] Fifty years later, in the *Hartz IV Case*, the Constitutional Court also squarely embraced this view.[58] Based on human dignity (Article 1(1)) in conjunction with the social state (*Sozialstaat*) principle (Article 20(1)), the Court held that there is a guarantee of a 'subsistence minimum . . . ensuring to each person in need of assistance the material prerequisites that are indispensable for his or her physical existence and for a minimum of participation in social, cultural and political life'. In enacting a law that interferes with the right, the legislature is bound to assess, through a transparent and rational method, what resources are vital for existence and with respect to the actual needs of individuals. In *Hartz IV*, however, the Court also said that the legislature has extensive leeway and that it will only intervene if the benefits are patently insufficient.

The Court's light-touched approach in *Hartz IV* has led to doubts that there is an actual right to public assistance—as opposed to the fully acknowledged duty to comply with the social state principle, which however does not confer subjective rights that can be litigated in court (Eichenhofer 2016, 159–62; Kommers and Miller 2012, 623). It is certainly true that the Court does not command, from scratch, social policies to fulfil basic needs to housing, food, education, and the like. However, once the legislature acts, it faces certain legal guidelines aimed at safeguarding basic human needs. From an American perspective, the very fact of *Hartz IV* is surprising. In affirming the right, the Court held unconstitutional the provisions on the standard benefit for adults and children, because in calculating the level of the benefit, the legislature assumed without more that educational and other types of expenses could be excluded from the computation of the minimum benefit necessary for subsistence (Egidy 2011, 1962). Since then, there have been other challenges to public assistance programmes, and even though

[54] Bundessozialgericht [BSG] [Federal Social Court], 29 January 1959 BSGE 9, 127.
[55] BVerfG, 28 February 1980, BVerfGE 53, 257.
[56] BVerfG, BVerfGE 101 (59, 104).
[57] BVerfG, BVerwGE 1, 159. See Eichenhofer 2016 for a discussion of this law.
[58] BVerfG, BVerwGE, 125, 175.

only some have been successful, it is hard to discount the effect of the right and the prospect of judicial review on legislative output.[59]

46.3.2.2 *Equality*

Article 3 of the Basic Law contains provisions directed at both general (Article 3(1)) and specific forms of equality (Article 3(2) and (3)). Although many aspects of equality law are familiar from American law, the use of the general equality guarantee to scrutinize classifications based on material resources sharply contrasts with American law.[60] As demonstrated in this chapter's review of American equal protection, where market and social rights are at stake, the courts will accept virtually any government reason for the classification offered in the litigation, no matter how general or implausible. By contrast, in German law, there is protection for the right to equality for the entire range of material interests, and it serves to police the classifications drawn across the gamut of tax, regulatory, and benefits programmes.

As the Constitutional Court stated early on, the general right of equality requires that 'the substantially similar should not be arbitrarily treated as if they were different and the substantially dissimilar should not be arbitrarily treated as if they were the same'.[61] Any breach of this right requires a sufficient justification, which in the realm of most material interests is articulated as an 'objective reason'. This is considered a permissive standard relative to the test that applies in other circumstances—when the classification is based on one of the characteristics specifically listed in Article 3, such as sex or race, or when it affects a fundamental liberty protected elsewhere in the Basic Law. Nevertheless, the general right of equality has generated considerable litigation in the context of the administrative state and has required state actors to reconfigure administrative schemes in areas that American equal protection law generally leaves untouched (Benda 1979, 64–75; Kommers and Miller 2012, 740 fn.161).

To begin with tax, as a general matter, there are two types of equality that come into play—horizontal and vertical. In horizontal equity, similarly situated taxpayers are required to shoulder an equal tax burden. Vertical equity captures the idea that the tax burden should be distributed based on income level and should draw distinctions based on the more or less favourable economic circumstances of taxpayers. The general equality provision has been interpreted by the Constitutional Court to contain strict horizontal equity, but not vertical equity. Therefore, even though the Court is cognizant of vertical equity, especially in income tax cases, most of the jurisprudence focuses of horizontal equity.

[59] See e.g. BVerfG, 1 BvL 10/10, 1 BvL 2/11, 18 July 2012 (minimum benefit for asylum seekers unconstitutional); 1 BvL 10/12, 1 BvL 12/12, 1 BvR 1691/13, 23 July 2014 (minimum benefit for unemployed constitutional); 1 BvL 7/15, 6 May 2016 (dismissal of referral from social court concerning reductions of unemployment benefits due to breach of duties).

[60] For a comprehensive discussion of the difference in equality law, see Neuman 1999; see also Kommers and Miller 2012, 421.

[61] BVerfG, 23 October 1951, BVerfGE 1, 14, 52.

As has been noted by many commentators, when seen from the perspective of American law, the volume of tax litigation based on the equality right and the rate of success in these cases is impressive. To illustrate: The Court held unconstitutional a two-year limitation on deducting duplicate living expenses incurred because the taxpayer's place of work was distant from their place of residence.[62] The assumption behind the two-year limitation was that taxpayers would ordinarily relocate to their place of work. However, as the Court noted, this assumption was based on a single-earner family, not a dual-earner family where the maintenance of two residences was necessary to maintain both incomes. Since the legislation gave the same treatment to taxpayers that were situated differently, without a good justification, the Court found the provision unconstitutional. Joined to that case was a second one challenging a similar two-year limitation, but on the exclusion from income of supplementary payments from employers to compensate for the additional cost of a second residence. The second case was brought by a public officer who had been assigned to a work location distant from his place of residence. There the Court found that the law afforded dissimilar treatment of individuals in similar circumstances: individuals who were assigned to a single work location and who remained because there had been multiple extensions of the assignment (no exclusion after the two-year period); and individuals who were assigned to a series of different work locations (exclusion). A couple of further examples from recent years: calculating the tax due based on the number of gaming machines in amusement halls was found to be unconstitutional;[63] a provision of inheritance tax law privileging the transfer of business assets (compared to private assets) was held unconstitutional;[64] an income tax law provision denying the deduction of costs for a home office in cases where there was no other work space available was held unconstitutional.[65]

Moving to equal treatment for the market rights affected by regulatory programmes, these claims are often coupled with the right of occupational freedom. For instance, in the *Midwife Case* (1959), a law that required midwives to stop practicing after age seventy but allowed licensed obstetricians to continue working was challenged based on the general right of equality. The Court upheld the law because it found that the two professions were sufficiently different to justify the difference in the mandatory retirement age—doctors had longer training and were more closely monitored and supervised and therefore could be expected to meet high standards of physical and mental capacity necessary to ensure the important objective of protection of mothers and children (Kommers and Miller 2012, 426, discussing BVerfG, 1 BvR 71/57, 16 June 1959). In a more recent equal treatment case involving occupational freedom, the Court held that Hamburg's law on passive smoking violated the equality guarantee.[66] The law carved out an exception to the smoking ban for drinking establishments, which were allowed to provide smoking rooms, but not for eating establishments. The Court canvassed the

[62] BVerfG, 4 December 2002, BVerfGE 107, 27. This discussion is drawn from Ordower (2006), 303–8.

[63] BVerfG, 1 BvL 11/10, 1 BvL 14/10, 12 February 2014.

[64] BVerfG, 1 BvL 21/12, 17 December 2014.

[65] BVerfG, 2 BvL 13/09, 6 July 2010.

[66] BVerfG, 1 BvL 21/11, 24 January 2012.

legislative record and the submissions of the Federal Statistical Office, the German Cancer Research Centre, and the German Hotel and Restaurant Association and concluded that the unequal treatment was not 'objectively justified'. Equality challenges to regulatory schemes can also involve classic property and contract rights. For instance, the Constitutional Court rejected an equality challenge to the different treatment of natural persons and legal persons in the application of competition fines by cartel authorities.[67] In another case, it dismissed as unfounded a referral from a civil court involving a statutory provision stipulating a longer statute of limitations for consumer contracts than for other types of contracts.[68]

Similar to tax, there are copious equality challenges to benefits programmes. Many of these are successful in the Constitutional Court. For instance, a provision of the Asylum Seekers Benefits Act of 1993 was challenged based on equality: asylum seekers, unlike established residents, were required to first exhaust their receipts from any pain and suffering awards (in the case at hand, it was damages caused by a car accident) before becoming eligible for public assistance programmes. The Court held the provision to be unconstitutional. It found that there was no objective justification for limiting the eligibility of asylum seekers, since damages awards were designed to compensate for physical and mental pain, not to provide for the minimum level of subsistence as was the goal of the benefits statute.[69] In another case, a statute that denied child-raising benefits to non-EU citizens was found to be unconstitutional.[70] In yet another, the Court attached an interpretative reservation to a law that retroactively limited the pension rights of individuals who had worked abroad (as compared to pension beneficiaries who had paid German insurers and were not subject to such retroactive limitations).[71]

46.3.2.3 *Legal certainty and the protection of legitimate expectations*

German law on the consistent legal treatment over time of material resources maps on to the law defining the core of material liberty. Because classic property rights, occupational freedom, and social rights are all treated as veritable constitutional rights, the law that defines their substance is subject to constitutional limitations on dramatic changes that alter the content of the right. This stands in marked contrast with American law, where, as described above, there is a stark divide between classic property rights and all other types of material interests. To repeat, in American law, outside the realm of land, money, and contracts, changes in the legal treatment of material interests that implicate past conduct, decisions, and expectations are rarely billed as retroactive; and even if they are treated as retroactive, in straight up constitutional challenges (as opposed to statutory interpretation cases), they are generally defeated by the government interest in retroactive application of the public scheme.

[67] BVerfG, 1 BvL 18/11, 19 December 2012.
[68] BVerfG, 1 BvL 11/12, 12 September 2012.
[69] BVerfG, 11 July 2006, BVerfGE 116, 229.
[70] BVerfG, 1 BvL 14/07, 7 February 2012.
[71] BVerfG, 1 BvL 11/06, 1 BvL 12/06, 1 BvL 13/06, 1 BvR 2530/05, 21 July 2010.

There are three overlapping doctrinal concepts in Germany public law that protect the interest in temporal consistency in the law: legal certainty (*Rechtssicherheit*); retroactivity (*Rückwirkung*); and legitimate expectations (*Vertrauensschutz*). These are all related to one another and are derived from the overarching constitutional principle of the rule of law (*Rechtsstaatsprinzip*) in Article 20(1) of the Basic Law. In an early case, the Constitutional Court explained the interconnections as follows:

> retroactive laws are incompatible with the imperative principle of the rule of law, of which one of the essential elements is legal certainty, which materializes for the litigant in the first place in the form of the protection of his legitimate expectations.[72]

In other words, legitimate expectations is the doctrinal category that is used by individuals to contest legal change. Accordingly, the rest of this section concentrates on legitimate expectations.

The doctrinal test for determining whether there is a legitimate expectation is articulated in four steps (Fuhrmanns 2004, 68–88): First, there must be a law or administrative act (of the general, rule variety or individualized) that will give rise to expectations and that will induce individuals to make dispositions or decisions (known as *Vertrauenstatbestand* or *Vertrauensgrundlage*). Second, the individual must have knowledge of the law or administrative act and the individual must act in a manner so that a situation of actual trust is created (*Vertrauensbetätigung*). Third, the person's trust must be worthy of protection (*Schutzwürdigkeit des Vertrauens*), an inquiry which turns on the prior acts and knowledge of the person as balanced against the public interest. Fourth, the state must disappoint the trust, for instance through the revocation of a legal act.

Since legitimate expectations is the most exotic of the legal doctrines covered in this chapter, it is worthwhile briefly tracing its history. Legitimate expectations first emerged in the late 1950s, to prevent the revocation of benefits awards. Previously, benefits awards had been freely revocable if they were found to be illegal subsequent to the award (Bullinger 1999). In the late 1950s, however, the position of German administrative courts and legal scholarship changed, and the theory of legitimate expectations was developed to make benefits revocable only for compelling government reasons (Bullinger 1999; Fuhrmanns 2004, 9–65). Two of the seminal cases from the time involved widow's pensions that were reduced or revoked by the public administration because of irregularities. In the first, the administrative act determining the pension of an officer's widow was revoked, and replaced by another administrative act reducing the amount, with retroactive effect in the sense that the amounts paid in error under the previous administrative act were recouped. The Federal Administrative Court found that this retroactive effect violated legitimate expectations.[73] In the second case, the administrative act conferring a pension on the widow of a civil servant was revoked,

[72] BVerfG, 23 March 1971, BVerfGE 30, 367 (385).

[73] Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], 24 April 1959, BVerwGE 8, 261 (269).

with only future (ex nunc) effect, but that too was found to be a violation of legitimate expectations.[74] The court found that the consequences of the revocation were particularly burdensome for her since, relying on the act, the widow had moved from East Germany to West Berlin; moreover, the act was revoked because the administration had determined that she did not have a right to any pension under the law. This jurisprudence was later codified in 1976, when the Administrative Procedure Act (*Verwaltungsverfahrensgesetz*) was adopted, which governs proceedings in the public administration (see Sachs 2018, § 48 paragraph 16).[75] The relevant provisions have close analogues in the laws that govern the tax administration and the social security administration (see also Siebert 1990).[76]

In the 1970s, legitimate expectations migrated from the administrative courts to the Federal Constitutional Court. In the jurisprudence of the Court, legitimate expectations is grounded in the constitutional guarantee of the rule of law (*Rechtsstaatsprinzip* in Article 20(1)).[77] As a higher-order constitutional principle, it is applied not just to administrative acts, but to laws and administrative rules (which, in German law, are treated as norms equivalent to law). What is known as 'true retroactivity' (*Echte Rückwirkung*) is generally impermissible. It is not allowed unless one of the following conditions obtains: the persons concerned were able to anticipate the change; there are predominant compelling reasons of common welfare; the new law will help clarify an uncertain legal situation; or the burden on the persons concerned is negligible. True retroactivity is defined as a law that is backdated (from the time of adoption to the time of application) so as to regulate facts in the past that have been completed in the past (Grzeszick 2017, 80–7). By contrast 'false retroactivity' (*Unechte Rückwirkung*) is generally admissible, except if the retroactive law is not proportionate or the persons concerned were not able to anticipate the change and thus could not take it into account when making dispositions. False retroactivity is defined as a law that regulates facts in the past which have not yet been completed and which still have consequences in the present and future (Grzeszick 2017, 88–93). Even in cases of false retroactivity, however, the doctrine of legitimate expectations applies. And when the doctrinal test for legitimate expectations is satisfied, the legislator is constitutionally required to enact transitional rules, to ease the burden created by the abrupt change in the legal treatment of the constitutionally recognized interest.

This is how, in a seminal judgment from 1984,[78] the Constitutional Court has articulated the duty to respect legitimate expectations in the legislative and rule-making contexts:

[74] BVerwG, 28 October 1959, BVerwGE 9, 251.

[75] Verwaltungsverfahrensgesetz [VwVfG] [Administrative Procedure Act], §§ 48–49, <https://www.gesetze-im-internet.de/vwvfg/BJNR012530976.html>.

[76] Sozialgesetzbuch X [SGB X] [Social Law Book X], §§ 44–47, 18 January 2001, BGBl. I at 130, as amended, <http://www.gesetze-im-internet.de/sgb_10/SGB_10.pdf>; Abgabenordnung [AO] [Fiscal Code], §§ 130, 131, 175, <https://www.gesetze-im-internet.de/englisch_ao/>.

[77] BVerfG, 1 BvR 898/79, 12 December 1981.

[78] BVerfG, 2 BvL 19/82, 10 April 1984, BVerfGE 67, 1.

> Legal certainty and the protection of legitimate expectation, as part of the rule of law principle, place narrow limits on all acts of sovereignty which encumber *constitutionally guaranteed legal positions* . . . These limits must be observed by the legislator especially in regard to legal norms with retroactive effect, i.e. if the beginning of its temporal scope is normatively set to a date before the date on which the norm legally exists, i.e. has become valid . . . [identified above as 'true retroactivity'] But even for laws that affect present or not yet completed legal relations for the future and at the same time devalue the legal positions concerned, although they are generally admissible, constitutional limits may arise from the viewpoint of legitimate expectations depending on the circumstances . . . [identified above as 'false retroactivity'] One has to balance the reliance on the continued existence of the legal status according to the previous legal regulation and the importance of the legislative concern for the common good . . . However, the protection of legitimate expectations does not go so far as to protect the person concerned from any disappointment . . . The legislature, however, in the abolition or modification of protected legal positions, even if such action is constitutionally permissible, is because of the constitutional principle of proportionality required to take an appropriate transitional rule . . . In doing so, the legislature has a wide margin of discretion. In this respect, the Federal Constitutional Court only reviews the question whether the legislature has exceeded the limit of reasonableness in the case of an overall balance between the severity of the interference and the weight and urgency of the reasons justifying it, taking into account all circumstances . . . [79]

To conclude this discussion of the doctrine, it is important to underscore the Court's reference, in the above passage, to 'constitutionally guaranteed legal positions'. It demonstrates how, in legitimate expectations, whether there is a situation of trust is closely linked to the issue of whether there is a constitutionally protected interest. Thus we come full circle to the beginning of this chapter's analysis of German law, and the protection afforded for market and social rights.

The doctrine of legitimate expectations has real bite across the gamut of tax, regulatory, and benefits law. It has been established, similar to American law, that a rate increase during a tax year may be applied retroactively to the whole year. However, the Constitutional Court has ruled that 'a rate increase may not apply to a closed year unless taxpayers reasonably anticipate that an unset rate must become fixed' (Ordower 2006, 326) which suggests that under German law a longer period of retroactivity, like the one in *United States v. Carlton*, might be unconstitutional (Ordower 2006, 326–7). Moreover, the Constitutional Court fairly often requires transitional periods in tax legislation and bars the retroactive application of tax provisions. For instance, in recent years, it has attached an interpretive reservation to a change in a tax provision concerning a licence tax exemption for stock dividends.[80] It did the same for retroactive limitations on compensation granted under the income tax law regarding the taxing of exceptional

[79] ibid, paras 40–1(translated; emphasis and parenthetical explanations added).
[80] BVerfG, 1 BvL 6/07, 10 October 2012.

income.[81] And again for an extension, in income tax legislation, of the trade sale deadline for the treatment of speculative trading.[82]

In the regulatory domain, there are numerous examples of the Constitutional Court requiring that when the rules for regulated entities change, there be transitional rules for the benefit of individuals who exercised the trade or profession under the previous set of rules. For instance, when the law was changed to prohibit tax consultants from exercising commercial activities, the Court held that there should be transitional measures for consultants who did both.[83] When rules were enacted to allow only dentists to care for those insured by social security bodies, there had to be transitional measures for non-dentists.[84] Pharmacy assistants who had qualified by taking the pharmacist preliminary exam becoming a pharmacist before 1949 were entitled to continue working, even though the new law required that individuals working in pharmacies either pass the full pharmacist exam or choose the profession of pharmacy assistant.[85] A law setting out, for the first time, minimum qualifications for people who draft simple construction projects should have contained transitional provisions for those who had exercised profession legally in the past.[86]

Legitimate expectations also prevent drastic changes to benefits programmes. In this area, the distinction between social insurance and public assistance, explained earlier is important: contributory benefits are recognized as property under Article 14 and are given more protection than minimum subsistence, which has been established under a combination of Article 1 (dignity) and Article 20 (social state). This difference directly feeds into the consideration of whether, in the doctrinal test, trust is worthy of protection (*Schutzwürdigkeit des Vertrauens*).

Pensions law illustrates how legitimate expectations play out in the social insurance domain (Grzeszick 2017, 88–93). When new legislation or amendments are enacted that reduce pensions, those age groups close to retirement will usually be found to be have a legitimate expectation in the promised benefit.[87] As a result, reductions in pension benefits can only be implemented gradually—based on retirement start date or year of birth of the pension beneficiary.[88] Pension benefits which have already been granted generally cannot be revoked or reduced due to changes in the pension laws.[89] If there is an administrative act that stipulates a certain benefit amount, it is very difficult to change that amount going forward. Legitimate expectations are advanced in other types of programmes too, although certainly not always successfully.[90]

[81] BVerfG, 2 BvL 1/03, 2 BvL 57/06, 2 BvL 58/06, 7 July 2010.

[82] BVerfG, 2 BvL 14/02, 2 BvL 2/04, 2 BvL 13/05, 7 July 2010. [83] BVerfG, BVerfGE 21, 173.

[84] BVerfG, 25 February 1969, BVerfGE 25, 237. [85] BVerfG, 28 July 1971, BVerfGE 32, 1.

[86] BVerfG, 28 November 1984, BVerfGE 68, 272.

[87] Vertrauensschutz [Protection of legitimate expectations], Deutsche Rentenversicherung [German Pension insurance web site], <https://www.deutsche-rentenversicherung.de/Allgemein/de/Inhalt/5_Services/01_kontakt_und_beratung/02_beratung/07_lexikon/Functions/Lexikon.html?cms_lv3=240370&cms_lv2=422980>.

[88] ibid. [89] ibid.

[90] See e.g. BVerfG, 1 BvL 20/12, 5 December 2012 (change in child benefits law).

46.4 Conclusion

Marshalling this comparative law, it is now time to return to the facts of *Richardson v. Belcher*. What would the result be under German law? As German law stands today, the facts would likely be scrutinized under the right to property, equality, and legitimate expectations. Belcher would have been able to claim that since he had paid into the federal disability scheme, the government infringed his right to property when it changed the law to eliminate his disability benefits. He would have had a very good case that his right to equality was being infringed, by reducing only his federal disability cheque and not that of other categories of workers who were also receiving disability income from another source. Belcher would also have had a good case that his legitimate expectation in receiving benefits under the federal law had been impermissibly disappointed. The same goes for Fritz, in *United States Railroad Retirement Board v. Fritz*, the case on dual railway and social security pensions. Even the families and children receiving non-contributory public assistance in *Dandridge v. Williams* and *Jefferson v. Hackney* would have had strong constitutional claims—under dignity and the right to equality. The flimsy explanations given by Maryland and Texas for the discrimination between children in small and large families and between children and the elderly would be unlikely to pass constitutional muster.

This American constitutional silence is not just conspicuous for social rights, but also for classic property rights and market rights. There is no equivalent of German equality and legitimate-expectations challenges to tax laws (classic property rights) and there is no equivalent of German occupational freedom, equality, and legitimate-expectations challenges to licensing schemes and professional regulation (market rights).

In the line of cases that stretch from *Carolene Products* to *Richardson v. Belche*r and beyond, material liberty has been given short shrift in American public law. As the comparison with German law draws out, procedural fairness is well developed but substantive fairness is not. This peculiarity of American public law has implications for comparative law theories on the common law tradition. The comparative perspective can also contribute to normative debates on the future direction of material rights in American law.

First, the common law tradition: The importance of procedural rights bears the unmistakable imprint of the common law tradition and the importance of adversarial contestation for notions of fairness there. Theories that map the world into the common law and civil law traditions generally identify procedure as one of the key elements that defines the two and marks the dividing line between them: adversarial versus inquisitorial procedure for finding the facts and coming to the right outcome in civil and criminal proceedings (Chase and Varano 2012; Damaška 1986; Langer 2014; Samuel 2012). Comparative law scholarship has typically relied on the operation of private law and criminal law to identify the distinctive procedural features of the two traditions. But the analysis in this chapter demonstrates that common law adversarialism and civil law inquisitorial process also extend into their respective systems of public law.

The most obvious way in which the pattern holds is the more direct role, as compared to American judicial review, of the judges sitting on German tax, administrative, and social courts in investigating the facts of administrative determinations and deciding the policy and the law.[91] This chapter, however, has focused on a somewhat distinct form of adversarialism in the American law of the administrative state. In contrast with most other common law systems, the US has a highly developed tradition of supreme, constitutional law, which extends not just to the individualized determinations of the bureaucracy, but to the administrative regulations and statutory law that guide the bureaucracy.[92] That constitutional law has developed a concept of fairness that relies almost exclusively on adversarial procedure: the tax, regulatory, and benefits programmes of the administrative state are fair if they allow for the adversarial contestation of individualized and generalized administrative determinations within the bureaucracy; and if they operate under statutory laws that have been enacted by the legislature, elected through the democratic process. But American constitutional law eschews substantive fairness, based on a robust, autonomous understanding of the protections to be afforded to liberty in a complex society and economy. The early twentieth-century politics at the origins of the American administrative state are rooted in the recoginition that liberty, in the face of industrialization and urbanization, is impossible without a more active role for government in society. But American constitutional law shirks from assessing whether that material liberty, promoted and burdened by the administrative state, is respected in the operation of tax, regulatory, and benefits programmes.

The way in which the common law's penchant for adversarial process has permeated American public law is striking. At the same time, it is important not to reify legal traditions (Glenn 2014). The difference between *Goldberg v. Kelly* and the *Richardson v. Belcher* line of cases can be explained as much by the common law's attachment to adversarialism as by the changing politics of the Supreme Court, which took a decidedly conservative turn in the early 1970s (Sunstein 2004). This appreciation of the contingency of the current shape of material rights in American law thus raises the second, normative point that I close with—should American public law afford greater constitutional protection for material liberty?

At this juncture in American constitutional history, there are at least three possibilities for the law of material liberty. One option is to stick with precedent and its emphasis on adversarial procedure and procedural fairness. In his famous *Lochner* dissent, Holmes argued that a more robust definition of liberty would play favourites among market and social actors and would undermine the constitution's neutrality on economic matters.[93] Yet, as has been observed in other contexts, even procedure that is, on

[91] This procedural difference has been thoroughly explored in comparisons between UK and French administrative law (Allison 1996) and between UK and German administrative law (Singh 2001).

[92] In this discussion, constitutional law is used to signify judicial review of legislative acts by courts based on a written higher law. See Gardbaum 2013 for a discussion of the development of constitutional law in other common law jurisdictions.

[93] *Lochner*, 198 US at 65.

its face, neutral can often require such extensive resources that it works to the advantage of only a select few (Cole 1999).

The second possibility is to return to *Lochner* and to engage in more searching review of administrative schemes that burden the market rights that were recognized in the late nineteenth century as important for liberty. This doctrinal course of action has been advocated, with growing vigour, in conservative legal thought (Colby and Smith 2015). In view of the current Republican politics of judicial appointments this scenario is by no means far-fetched (Southworth 2018).

So far, however, the American debate has overlooked a third possibility—even-handed protection for all material rights. The availability and feasibility of this approach is vividly illustrated by this chapter's consideration of German law. The post-New Deal cases *Williamson v. Lee Optical*, *Flemming v. Nestor*, *Richardson v. Belcher*, and *Dandridge v. Williams* were all decided using the minimal scrutiny standard for reviewing statutes that burden material rights. German constitutional law, however, shows that it is possible to give more serious consideration to material rights and to give even-handed consideration to such rights, including occupational freedom, employment-based social insurance, and certain types of public assistance necessary for dignity and liberty. Not only would such an approach be possible, but it comports with a longstanding American tradition of social citizenship, dating back to nineteenth-century Populists and Progressives (Forbath 2001). Such a jurisprudence of material liberty would also further certain elements of the progressive agenda that is currently emerging on the left. Regardless of the outcome, comparative law offers a fruitful springboard for considering how constitutional law can advance the material security that is essential to liberty in the ideology of both the left and the right of the American political spectrum.

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