Fordham International Law Journal

Volume 42, *Issue* 4 2019 *Article* 1

Balancing Justice Needs and Private Property in Constitutional Takings Provisions: A Comparative Assessment of India, Australia, and the United States

Krithika Ashok* Paul T. Babie†

John V. Orth‡

*

†

‡

ARTICLE

BALANCING JUSTICE NEEDS AND PRIVATE PROPERTY IN CONSTITUTIONAL TAKINGS PROVISIONS:

A COMPARATIVE ASSESSMENT OF INDIA, AUSTRALIA, AND THE UNITED STATES

Krithika Ashok,[*] *Paul T. Babie,*[**] *& John V. Orth*[***]

ABSTRACT

This Article explores the relationship between justice needs and private property in the constitutional takings provisions of the Indian, Australian, and American constitutions. Building upon established scholarship, it develops a theoretical framework within which to consider the way in which a state balances the requirement to provide minimal levels of justice for its citizens through the re-distribution of goods and resources with the need to protect the private property of individuals. We summarize this framework in what we refer to as the "Justice Needs-Protection of Private Property Continuum." Using the framework developed, the Article provides an outline of the takings provisions found in the Indian, Australian, and American constitutions. Part I examines Article 300A of the Constitution of India, which contains the scope of the power of compulsory acquisition exercised by the Indian state. Part II assesses Section 51(xxxi) of the Australian Constitution which, unlike its American and Indian counterparts, operates as both a grant of power to the federal government, as well as a limitation imposed upon that power, which may, it seems, operate so

* Assistant Professor of Law, Jindal Global Law School, O.P. Jindal Global University, India; JSD Candidate, University of Chicago Law School.

** Adelaide Law School Professor of the Theory and Law of Property, Adelaide Law School, The University of Adelaide, Australia.

*** William Rand Kenan Jr. Professor of Law, UNC School of Law, The University of North Carolina at Chapel Hill, USA. We are grateful to James Morgan (LLB, Adelaide 2018), Mitchell Brunker (LLB, Adelaide 2019), and Kyriaco Nikias (LLB, Adelaide 2019) for outstanding research assistance, and to Nigel Williams for preparing the diagrams.

as to provide some minimal protection for individual private property interests. Part III considers the Takings Clause of the Fifth Amendment to the United States Constitution which, as interpreted by the Supreme Court, provides perhaps the most robust means among the three jurisdictions considered for protecting the individual private property interests as against state takings. The Conclusion offers comparative reflections on the nature of the takings provision found in each jurisdiction.

ABSTRACT.....999
I. INTRODUCTION.....1000
II. INDIA: ARTICLE 300A.....1006
III. AUSTRALIA: SECTION 51(XXXI).....1019
IV. UNITED STATES: THE FIFTH AMENDMENT.....1030
V. CONCLUSION: COMPARATIVE REFLECTIONS..1036

I. INTRODUCTION

Every system of government implements a means of allocating scarce goods and resources amongst its citizens. Political theory, starting with Plato, addresses this allocative question as part of the overarching mechanism of governance, typically referring to whatever means are adopted as a system of property.[1] For the most part, that subset of political theory known as property theory has developed ideal-typical forms of property, generally known as private, state-public, and common.[2] Virtually all such theorizing fixes the theoretical substantive content of these ideal types and, having done so, offers some justification for the allocation of scarce resources according to one of the ideal types.[3] Property theory, then, concerns itself with the substantive content of and justifications for the implementation of the ideal types in a given system of governance, be it capitalist or socialist/communist, or some hybrid of the two. And every system of

1. *See* generally JEFFREY ABRAMSON, MINERVA'S OWL: THE TRADITION OF WESTERN POLITICAL THOUGHT (2010); J.W. HARRIS, PROPERTY AND JUSTICE (1996).

2. For more on the content of these ideal-typic forms, *see generally* Paul T. Babie, John V. Orth, & Charlie Xiao-chuan Weng, *The Honoré-Waldron Thesis: A Comparison of the Blend of Ideal-Typic Categories of Property in American, Chinese and Australian Land Law*, 91 TULANE L. REV. 739 (2017).

3. For justifications typically given for property, *see generally* BRUCE H ZIFF, PRINCIPLES OF PROPERTY LAW (7th ed., 2018).

governance exhibits some blend of the ideal types; this is known as its system of property, which tends to become a part of its legal structure. The theory of property, when so implemented, becomes the state's law of property.[4]

As part of a state's law of property, some consideration is typically also given to the re-allocation or re-distribution of goods and resources initially allocated to others according to law, so as to meet some minimal level of justice for all citizens. J.W. Harris refers to this dimension of property law as its "[e]xpropriation [r]ules," "whereby part or all of the privileges and powers constituting a person's ownership of something may be stripped from him against his will."[5] The state may establish such rules as a means of enforcing the payment of debts in processes of civil execution or bankruptcy, or as part of family law, or criminal law, or, as part of equity, as a means of preventing unconscionable conduct.[6] But "[m]ost significantly of all, the governments of modern States have asserted the power, enshrined in law, to tax money and other property-holdings owned by citizens, and to purchase property-holdings compulsorily."[7] The reason for such rules is simply because "[i]f property institutions are justifiable at all, then at least some of the rules whereby what a person owns may be taken from him against his will are justified. . . . [because] justice has inevitable costs."[8]

For Harris, "justice costs" are those which arise as part of a community's "obligations to discharge basic needs," and may be of two types: direct and indirect.[9] In the former category, one finds those arrangements that emerge when "citizens or groups . . . , in justice, demand . . . from their fellows . . . that they not be subjected to unprovoked violence, [which gives rise to the] . . . need [for] legislators, prosecutors, police, soldiers, judges, and social workers."[10] The most practical method of providing for such services is through expropriatory taxation of money for the payment of salaries.[11] Indirect justice costs, by contrast, include "collective goods," such as roads, parks, museums, and so forth, and basic needs, such as those provided

4. For more on this blend, *see* Babie, Orth, & Weng, *supra* note 2.
5. *See* HARRIS, *supra* note 1, at 37.
6. *See* HARRIS, *supra* note 1, at 37, 38.
7. *See* HARRIS, *supra* note 1, at 38.
8. *See* HARRIS, *supra* note 1,
9. *See* HARRIS, *supra* note 1, at 279.
10. *See* HARRIS, *supra* note 1,
11. *See* HARRIS, *supra* note 1, at 280.

for in Article 25(1) of the Universal Declaration of Human Rights, which reads:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services and the right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his control.[12]

The justice costs of a state, therefore, both direct and indirect, must be met through Harris's expropriation rules, which allow for some re-allocation or re-distribution of existing property holdings to the state. And while every state accomplishes such re-allocation differently, two typical features emerge. First, one finds some form of paramount law, usually in a constitution, which provides for a balancing of the interests/rights of those whose property interests are taken, expropriated or compulsorily acquired by the state with those of the state in meeting its justice costs. And, second, having provided the means by which the competing interests involved in an expropriation, the constitution or other paramount law establishes the branch of government charged with mediating disputes between the property holder whose interest is taken and the state in seeking to meet its justice costs through the application of the constitutional provision so established for that purpose. Most states task the judicial branch with this mediating role. The role of the courts, in every jurisdiction which provides for governmental action so as to redistribute property to meet the minimal requirements of justice, is, as Justice Kennedy recently wrote, "to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"[13]

What emerges, then, is a tension between, on the one hand, the power of the state to take property interests so as to meet its minimal justice (direct and indirect) costs, and, on the other, the protection of private property interests held by citizens. We plot those two positions at opposite ends of a Continuum.[14] The closer a state moves, in its paramount law (i.e., its constitution) and its law of property towards

12. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 25(1) (Dec. 10, 1948).

13. Murr v. Wisconsin, 137 S.Ct. 1933, 1943 (2017) (citing Palazzolo v. Rhode Island, 533 U.S. 606, 617–18 (2001) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

14. *See infra* Diagram 1.

either end of the Continuum, the greater the paramountcy a state places on that interest: either meeting the justice needs of the community as a whole, at one end of the Continuum, or providing strong protection for individual private property interests, at the other. We call that end of the Continuum where paramountcy is given to the state's power compulsorily to acquire a "Strong Power of the State Compulsorily to Acquire Property to Meet Justice Needs," and that position at the opposite end a "Strong Protection for Private Property." The center of the Continuum is that position where there is a balance between the two, and therefore we refer to that as the "Balance Between the State's Power Compulsorily to Acquire Property to Meet Justice Needs and the Protection of Private Property."

Any state can be plotted along this Continuum, at least initially, on the basis solely of its paramount law and its law of property. But once that initial position is established, a state may adjust that position through the interpretation of its paramount law and its law of property by government. This may occur through any of executive, legislative, or judicial activity of the state in question; most typically, though, judicial interpretation and application of the paramount law and the law of property results in the most dramatic shifts of placement on the Continuum. Of course, because judicial interpretations and applications change over time, a state's precise placement along the Continuum remains in constant flux depending on a then contemporary interpretative approach regarding the paramount law and the law of property. We call this the "Justice Needs-Protection of Private Property Continuum."

Diagram 1. Justice Needs-Protection of Private Property Continuum

In this Article, we compare the placement of three constitutional federal democracies—India, Australia, and the United States—along the Continuum, revealing the ways in which the judiciary balances the

need for governmental action to redistribute goods and resources so as to meet minimal community justice needs/costs as against the individual rights established by the property law of the state in those goods and resources. In each case, two outcomes follow: first, the relevant constitution contains a provision which establishes the form of protection for the established individual property interests of citizens combined with some criteria which must be met if the state is to take, expropriate, or compulsorily acquire either the goods or resources the subject of the individual property rights or the property rights themselves; and, second, the judiciary, through its interpretations of that constitutional provision, adjusts the balance between the two interests of the individual and the state. In our conclusion, we indicate where, generally, each of the jurisdictions considered here might fall along the Continuum, given the initial placement through the constitutional provision and its interpretation by one or more of the other branches of government.

While we provide a brief overview of the operation of the relevant constitutional provisions in India, Australia, and the United States, our primary focus is the purpose for which property in land may be taken by the state (although the approach is generally also applicable to other forms of property, both tangible and intangible). Each nation deals differently with the question of purpose, thus providing rich comparative detail to the variable ways in which a state balances the need to meet minimal justice needs/costs against the protection of individual private property. Each jurisdiction uses different nomenclature to define what Harris refers to as the stripping of property interests from an individual for the purpose of meeting a state's minimal justice needs/costs. In the United States, this is referred to as a "taking,"[15] while in India and Australia, a "compulsory acquisition" (or sometimes "expropriation").[16] While both terms mean the same thing, so as not to alter beyond recognition the language familiar to people in each of those jurisdictions, we use the relevant nomenclature for the state's stripping of individual private property interests for the

15. *See generally* Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles--Part I--A Critique of Current Takings Clause Doctrine*, 77 CALIF. L. REV. 1299 (1989); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles--Part II--Takings as Intentional Deprivations of Property without Moral Justification*, 78 CALIF. L. REV. 53 (1990).

16. For India, *see generally* P. K. SARKAR, LAW OF ACQUISITION OF LAND IN INDIA (2008). For Australia, *see generally* MARCUS JACOBS, LAW OF COMPULSORY LAND ACQUISITION (2d ed., 2015).

jurisdiction under discussion. Thus, to be clear, when speaking of the relevant law for the United States, we use "taking," of India and Australia, "compulsory acquisition" or "expropriation"; but in doing so, in each case, we mean the state's stripping of individual private property interests or the goods and resources subject to them so as to meet minimal justice needs/costs.

The Article contains four parts. Part I examines Article 300A of the Constitution of India ("Indian Constitution"), which contains the scope of the power of compulsory acquisition exercised by the Indian state. While the Indian Constitution originally sought to protect individual property rights, much like the US Constitution, gradually, the need to undertake social and economic reform—justice needs—began to take precedence over individual rights. This led to a dilution of the constitutional protections for individual property rights, but without simultaneously instituting a system of accountability to ensure that the state serves *genuine* justice needs when exercising its broad powers to acquire land. We see that the Indian position on the Continuum is a product of both judicial interpretation and application and legislative refinement.

Part II assesses Section 51(xxxi) of the Australian Constitution which, unlike its American counterpart, operates as both a grant of power to the Commonwealth or federal government, as well as a limitation imposed upon that power which may, it seems, operate so as to provide some minimal protection for individual private property interests. We say minimal protection because the limitation, unlike the Fifth Amendment to the US Constitution, is at least formally considered a limitation on legislative competence rather than as an individual right. Australia's approach—seemingly favoring the community and its justice needs/costs—emerges entirely from judicial interpretation and application.

Part III considers the Takings Clause of the Fifth Amendment to the US Constitution ("Takings Clause") which, as interpreted by the US Supreme Court, provides perhaps the most robust means among the three jurisdictions considered for protecting the individual private property interests as against state takings. Like Australia, this position has been reached almost entirely as a consequence of judicial interpretation and application of the Takings Clause.

Our Conclusion offers comparative reflections on the nature of the constitutional provision found in each jurisdiction, suggesting a placement on the Justice Needs-Protection of Private Property

Continuum, bearing in mind, of course, that our placements are nothing more than a tentative and contingent suggestion, given the potential for ongoing shifts due to changing interpretation and application of the relevant constitutional protection and the property law of the state. As we noted above, the placement of each of the states considered here and, indeed, of any state which might be plotted along the Continuum, is in constant flux.

II. INDIA: ARTICLE 300A

The right to property in India is, at present, protected under Article 300A of the Indian Constitution, which provides that "no person shall be deprived of their property, save by authority of law."[17] A literal reading of this constitutional provision suggests an intention to protect the landowner only from executive fiat, imposing minimal restrictions on the power of the state to acquire land. This is in sharp contrast to the language adopted in the Indian Constitution in 1950. At that time, the Indian Constitution explicitly made the exercise of eminent domain subject to the twin requirements of public purpose and compensation. Article 31 provided, in addition to the requirement that a law be enacted, that "no property . . . shall be acquired for public purposes . . . unless the law provides for compensation."[18] This provision however became the subject of a series of legal and political battles, as a result of which the language of this provision underwent several changes at the hands of the legislature through constitutional amendments.[19] At their core, these battles represented the clash between the reform agenda of a newly constituted, socialist state on the one hand, and individual property rights on the other. They culminated eventually, in 1978, with the right to property being relegated to the status of a mere statutory right.[20] In other words, the preconditions for the exercise of eminent domain were now to be dictated by statute alone, the enactment of which being the only mandate under Article 300A of the Indian Constitution.

The primary rationale behind this amendment was to protect the *remaining* fundamental rights,[21] a need that arose out of the back-and-

17. INDIA CONST. art. 300A.

18. INDIA CONST. art. 31.

19. Namita Wahi, *Property*, *in* THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION, 943-44 (Sujit Choudhry, Madhav Khosla & Pratap Bhanu Mehta eds., 2016).

20. INDIA CONST., *amended by* The Constitution (Forty-fourth Amendment) Act, 1978.

21. *See* GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION 421 (1999).

forth, during the same time, between the judiciary and legislature on the breadth of the powers of the latter to amend the Indian Constitution. In the aftermath of the Emergency,[22] the successor government was amenable to imposing some limits on the power of the legislature to amend the Indian Constitution, particularly the fundamental rights.[23] It however felt very differently about the right to property,[24] to protect which—worse, equate it with other fundamental rights—was thought decidedly anti-poor.[25] This ultimately led to the withdrawal of the constitutional protection that had been accorded to property rights.

In recent times, however, compulsory acquisition, particularly for industry and infrastructure, has resulted in widespread displacement among tribal and other economically marginalized communities; and has thus also been a major source of political conflict. There has evidently been a shift in the priorities of the Indian state in terms of allocation of resources, with the gradual shift away from socialism; but it is the permissive attitude of the judiciary that has made it possible to accommodate such diverse priorities. To illustrate this, we focus on the judicial construction of "public purpose," a prerequisite for the exercise of eminent domain. We suggest that the judiciary, by allowing the legislature the sole prerogative of defining public purpose, has failed to ensure that the dilution of property rights is accompanied by allocation of resources to genuine justice requirements.

The judiciary is called upon to decide on the meaning of "public purpose" both when the constitutional validity of land acquisition legislation is in question, as well as when examining whether executive action is within the strictures of the authorizing law. In relation to the first task, "public purpose" has been read into Article 300A as a precondition for a law that deprives a person of their property to be valid;[26] and before that, it was explicitly stated as a condition under

22. In 1975, Mrs. Gandhi declared a state of Emergency in India, quick on the heels of the Allahabad HC invalidating her election. During this time, Mrs. Gandhi's government introduced a series of constitutional amendments to protect her own election from challenge and 'to trim' the judiciary. Most significantly, the Constitution (Forty-Second Amendment) Act, 1976 introduced an amendment to shield all constitutional amendments from judicial review, nullifying therefore the decision in *Kesavananda Bharati v. State of Kerala*, which laid down the 'basic structure' doctrine. AUSTIN, *supra* note 21, at 370–74.

23. AUSTIN, *supra* note 21, at 421–26.

24. AUSTIN, *supra* note 21, at 421–26.

25. AUSTIN, *supra* note 21, at 425–26.

26. K.T. Plantation v. State of Karnataka, (2011) 9 SCC 1 (India).

Article 31(2) of the Indian Constitution.[27] As a result, any legislation that authorizes the acquisition of land can be challenged as unconstitutional, if it does not serve any legitimate public purpose.[28] Nonetheless, if one examines the history of the Supreme Court of India ("SCI"), it would be apparent that there have been only a few cases where the constitutionality of the legislation has been challenged successfully, on the grounds that it does not serve any *public purpose*.[29] In other words, the public purpose requirement has not constrained the ability of the state to flex its eminent domain muscles.

The primary reason is that acquisition laws in India have largely been made immune to judicial review through a series of constitutional amendments.[30] This may appear paradoxical at first, but the fledgling Indian state, conceived as one with a socialist bent,[31] aspired to undertake agrarian reform, in addition to nationalizing key industries. Individual property rights were therefore seen as a hindrance, and subservient to the aspiration reflected in the Indian Constitution, to achieve social and economic justice—the justice requirements. This sentiment was seen in the introduction of Articles 31A, 31B and 31C, the scope of which we discuss below.

Nearly as soon as the Indian Constitution was adopted, feudal landlords began to employ the individual rights guaranteed thereunder so as to resist the efforts of the state to acquire land that was not personally cultivated by them for the purpose of redistribution among the landless tillers. These land reforms were aimed particularly at putting an end to the exploitative revenue system that was in place during British rule; which permitted landlords to impose exorbitant revenue rates on the tillers (often through layers of parasitical intermediaries), even while they paid tax at fixed rate.[32] To ensure that these acquisition laws were not struck down by the judiciary, the Constitution (First Amendment) Act, 1951 introduced Article 31A, to shield land reform laws from constitutional challenge, and Article 31B,

27. State of Bihar v. Sir Kameshwar Singh, (1952) 1 SCR 889 (India); INDIA CONST., *amended by* The Constitution (Fourth Amendment) Act, 1955.

28. INDIA CONST. arts. 32, 226.

29. NAMITA WAHI, ANKIT BHATIA, ET AL., LAND ACQUISITION IN INDIA: A REVIEW OF SUPREME COURT CASES FROM 1950 TO 2016 (2017), at 26.

30. P.K. Tripathi, *Right to Property after 44th Amendment - Better Protected than Ever Before*, AIR 49, 51 (1980).

31. AUSTIN, *supra* note 22, at 425-26.

32. Sukumar Das, *A Critical Evaluation of Land Reforms in India (1950-1995)*, *in* 5 LAND REFORMS IN INDIA: AN UNFINISHED AGENDA, 30 (B.K. Sinha & Pushpendra eds., 2000).

to protect *any* law incorporated into the Ninth Schedule of the Indian Constitution by a constitutional amendment.[33] Article 31C was introduced later, through the Constitution (Twenty-Fifth Amendment) Act, 1971 (but again, in furtherance of the socialist objectives of the Indian state);[34] and explicitly saves laws directed at furthering particular Directive Principles of State Policy,[35] namely redistribution of resources and prevention of concentration of wealth.[36] Therefore, interestingly, the Indian Constitution itself provided for the justice requirements that limited individual property rights.

The result was the SCI has hardly had opportunity to closely scrutinize land acquisition laws, whether to determine the underlying public purpose or otherwise, even at a time when property rights received constitutional protection. Moreover, the result of these exemptions (although of noble intention) has been to aid in cultivating, over time, a rather permissive attitude within the judiciary towards compulsory acquisition by the state. Therefore, an examination of the jurisprudence on eminent domain reveals that even before Article 31(2) was deleted from the Indian Constitution, the right to property (or any of the other fundamental rights, such as equality and liberty, in their application to land acquisition) was denuded of much substance. Even in the rare case where the judiciary had opportunity to examine whether the land acquisition law satisfies the public purpose requirement, it chose to defer to the legislature on principle. It consistently maintained, from *State of Bihar v. Maharaja Kameshwar Singh*,[37] the earliest case on eminent domain, to *KT Plantation v. State of Karnataka,*[38] that the

33. INDIA CONST. art. 31A, *amended by* The Constitution (First Amendment) Act, 1951; INDIA CONST. art. 31B, *amended by* The Constitution (Ninth Schedule) Act, 1955.

34. INDIA CONST. art. 31C, *amended by* The Constitution (Twenty-Fifth Amendment) Act, 1971.

35. The Directive Principles of State Policy were principles meant to guide the governance of the country, and are therefore not justiciable. They reflect the socialist and revolutionary content of the Constitution.

36. INDIA CONST. art. 31C. Article 39 of the Constitution of India states:

> Certain principles of policy to be followed by the State: The State shall, in particular, direct its policy towards securing: [. . .] (b) that the ownership and control of the material resources of the community are so distributed as best to sub-serve the common good; (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment [. . .].
>
> INDIA CONST. art. 39.

37. *See* State of Bihar v. Sir Kameshwar Singh, (1952) 1 SCR 889 (India).

38. *See* K.T. Plantation v. State of Karnataka, (2011) 9 SCC 1 (India).

legislature is the best judge of the meaning of public purpose, and absolved itself of the burden of defining the term. The SCI, suggesting that it would be "undesirable" to define public purpose,[39] only ever attempted define public purpose in the most general terms—as a purpose that is beneficial to the community,[40] or that which is not private.[41] In other words, the judiciary has failed to discharge its obligation to mediate the competing interests involved in expropriation. This also left future courts without any conceptual understanding of the term public purpose, and kept the state permanently free from scrutiny. Further, considering that the chief protocol in the reasoning employed by the courts has been deference to the legislature, its explication of the so-called public purpose served by the law at hand has also often been based on, not any *a priori* understanding of the term, but simply the claims of the legislature. It would therefore also be inappropriate to treat any of these cases as carrying any precedential value on the question of what is public purpose.

This permissive attitude of the judiciary is seen not only in its treatment of the question of public purpose, but also in its interpretation of the scope of exemption provisions. For instance, in *KT Plantation v. State of Karnataka,*[42] the SCI when interpreting the immunity granted under Article 31A to laws authorizing the acquisition of estates, the court gave an expansive reading to the term "agrarian reforms" to include the mere preservation and protection of the rich forestry and cultivation on privately owned land.[43] It was all the more curious considering that the objects and reasons stated in the law in question suggested an equally, if not greater, concern for preserving valuable paintings and artifacts that were also on the premises. Similarly, the SCI has been loath to interfere with the operation of Article 31B, despite the immense possibility of abuse.[44] At the time of its introduction, the Ninth Schedule was populated with a short list of thirteen land reform laws.[45] It has now expanded to a list of over two

39. *See* Sooraram Pratap Reddy v. District Collector, (2008) 9 SCC 552 (India).

40. *See* Somavanti v. State of Punjab, 1963 S.C.R. (3) 774; *see also* Sooraram Pratap Reddy v. District Collector, (2008) 9 SCC 552 (India).

41. *See* State of Bombay v. R.S. Nanji, (1956) SCR 18 (India).

42. *See* KT Plantation v. State of Karnataka*,* (2011) 9 SCC 1 (India).

43. *Id.*

44. I.R. Coelho v. State of Tamil Nadu, AIR 2007 SC 861 (India).

45. Wahi, *supra* note 19.

hundred laws,[46] several of which do not pertain to land reform. While the SCI did decide that the laws inserted into the Ninth Schedule could not alter the "basic structure"[47] of the Indian Constitution,[48] it did not impose any criteria that must be fulfilled by the law to justify its insertion in the Ninth Schedule.[49] Moreover, the laws inserted in the schedule before 1973, when the basic structure doctrine was propounded, cannot be challenged on any grounds.[50] The SCI was unwilling to "[upset] settled claims and titles" and it was hardly any consolation that, in the opinion of the court, laws from that period "*mostly* pertain to laws of agrarian reform."[51]

With Article 31C, once again, it is seen that the SCI has been lenient towards the state in its interpretation of the scope of Article 31C. For instance, in *Bhim Singhji v. Union of India,*[52] the court was easily satisfied that the acquisition of property held in excess of a prescribed ceiling limit deserved the protection of Article 31C.[53] However, it did not consider that the enactment simultaneously empowered the government to dispose the land thus acquired "for any purpose relating to or connected with industry . . . ." Except for Justice Talzapurkar, none of the judges saw this provision as militating against the very purpose, the justice requirement, sought to be protected by Article 31C.[54]

In addition to examining the constitutional validity of land acquisition laws, the judiciary is also tasked with examining whether executive action taken to acquire land is within the strictures of the

46. INDIA CONST. art 31B.

47. While the constitutional provision on the powers of the Parliament to amend the Indian Constitution does not specify any limits on their amending powers, the SCI in *Kesavananda Bharati v. State of Kerala* laid down that certain basic features of the Indian Constitution cannot be altered. AIR 1973 SC 1461. In the past, the SCI has decided that, for instance, secularism, democracy, judicial review, and rule of law are part of the basic structure of the Indian Constitution. The right to property, however, has never been considered part of the basic structure. Hence with respect to the laws inserted in the Ninth Schedule, it is only when it violates the "essence" of the right to equality, the right to life or individual liberties that it can be struck down. *See generally* Madhav Khosla, *Constitutional Amendment*, *in* THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 232-250 (Sujit Choudhry, Madhav Khosla & Pratap Bhanu Mehta eds., 2016).

48. I.R. Coelho v. State of Tamil Nadu, AIR 2007 SC 861 (India).

49. *Id*.

50. Waman Rao v. Union of India, (1981) 2 SCC 362 (India).

51. *Id* at 397.

52. (1981) 1 SCC 166 (India).

53. *Id.*

54. *Id.*

authorizing law. A holistic understanding of the jurisprudence of Indian eminent domain, then, requires an examination of the manner in which the judiciary interprets these laws, particularly, their definition of public purpose. It is not possible here to examine all of these acquisition laws; instead, we focus on the Land Acquisition Act, 1894 ("LAA 1894"),[55] for two main reasons: first, most acquisition of land by the Indian state has taken place under this law; and, second, the law is of colonial heritage, and arguably carries with it a certain conviction in the legitimacy, and breadth, of the power of the state to acquire land. It was only recently that the LAA 1894 was replaced by the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 ("LARR 2013").[56] The LARR 2013 is considered to be somewhat friendly to the interests of landowners, when compared to the LAA 1894,[57] even though it does not significantly alter the balance of powers between the state and landowners.[58]

The LAA 1894 contains a definition of public purpose and requires that before the government acquire land for its own use, it be satisfied that the land is required "for a public purpose."[59] Despite this, the law barely acted as a restraint on the ability of the government to acquire private lands.[60] This was because it contained a rather broad definition of public purpose, which "included" *inter alia* planned development, town planning, and residential purposes, for carrying out health and education schemes, and for a state-owned corporation or public office.[61] The SCI therefore promptly held that the definition is an inclusive one.[62] In fact, one could go so far as to argue that the statutory definition is not of any relevance, considering the frequent

55. Land Acquisition (Amendment) Act, 1984, No. 68, Acts of Parliament, 1984 (India).

56. The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, No. 30, Acts of Parliament, 2013 (India).

57. Wahi*, supra* note 19.

58. Usha Ramanathan, *Land Acquisition, Eminent Domain and the 2011 Bill*, (2011) 46(44–5) ECON. & POL. WKLY.*,* 10–4 (2011); Mihir Desai, *Land Acquisition Law and the Proposed Challenges,* 46(26–27) ECON. & POL. WKLY.*,* 95–100 (2011); Michael Levien, *Rationalising Dispossession: The Land Acquisition and Resettlement Bills*, 46(11) ECONOMIC & POLITICAL WEEKLY, 66–71 (2011).

59. Land Acquisition (Amendment) Act, 1984, No. 68, Acts of Parliament, 1984 (India), § 3(f).

60. Sebastian Morris & Ajay Pandey, *Towards Reform of Land Acquisition Framework in India*, 42(22) ECON. & POL. WKLY.*,* 2083–90 (2007).

61. Section 3(f), Land Acquisition Act, 1894.

62. Somavanti v. State of Punjab, 1963 S.C.R. (3) 774.

suggestion from the judiciary that public purpose is not static and cannot be defined, [63] even when dealing with cases under the LAA 1894. Furthermore, once again, we see that the judiciary has been loath to interfere with the determination of public purpose made by the government.[64] This is also the result of the statutory presumption, under Section 6(3), that a declaration by the government that the land is required for a public purpose will be conclusive evidence of the same.[65] Accordingly, the courts have held that the question of "public purpose" is not justiciable and is unwilling to intervene unless the executive has acted in colorable exercise of its powers under the legislation.[66]

Not surprisingly, then, a recent study found that the SCI had invalidated the acquisition of land for lacking a public purpose in only thirteen of seventy-nine cases, in which this ground was raised, of a total of 1,300 cases on land acquisition.[67] Thus, we see again that while theoretically the state can only acquire private lands to serve a public purpose, in practice, the state is not subject to judicial scrutiny on this count, and barely held accountable. This perhaps was inevitable considering that the law was drafted by a colonial state; yet, the LAA 1894 continued to operate for more than sixty years after India gained independence in 1947 without shifting the balance of power away from the state. Apart from the statutory presumption in favor of the determination of public purpose made by the government, this point is further established by the fact that the LAA 1894 *seemingly* permitted acquisition of land other than for a public purpose.[68] Namely, the LAA 1894 provides that land may be acquired "for a public purpose *or* for a company,"[69] and lays down a distinct procedure for each type of acquisition.[70] While the "public process" procedure became applicable when the acquisition was funded either wholly or in part by the state, the procedure for the latter became applicable when the acquisition was

63. Daulat Singh Surana v. First Land Acquisition Collector, (2007) 1 SCC 641 (India).
64. Sooraram Pratap Reddy v. District Collector, (2008) 9 S.C.C. 552.
65. Somavanti v. State of Punjab, (1963) SCR (3) 774 (India).
66. *Id.*
67. *See* WAHI, *supra* note 29.
68. Devinder Singh v. State of Punjab, (2008) 1 SCC 728 (India).
69. Land Acquisition (Amendment) Act, 1984, No. 68, Acts of Parliament, 1984 (India).
70. Land Acquisition (Amendment) Act, 1984, No. 68, Acts of Parliament, 1984 (India), § 3(f).

entirely funded by the acquiring company.[71] Either the LAA 1894 did not perceive any contradiction between the muscle of the state being employed to compel landowners to part with their property for a private entity, and the doctrine of eminent domain; or it was never honestly committed to the doctrine. The Punjab High Court, however, did notice this contradiction and struck down the procedure for acquisition of land for a company as being unconstitutional; suggesting that it had no validity following the constitutional embargo on the acquisition of land for a private purpose.[72] This decision was, though, reversed by the SCI.[73]

In part, the court relied on the observations in *Babu Barkya Thakur v. State of Bombay*[74] that the LAA 1894 *mandated* that acquisition of land for a company, under Part VII, serve some public purpose.[75] This was drawn from a reading Sections 40 and 41 of the LAA 1894, which required that the government execute an agreement with the company to employ the land either to provide housing to its workmen or for the construction of works that are likely to prove useful to the public.[76] In any case, the court concluded that the LAA 1894 was exempted under Article 31(5) of the Indian Constitution, as "existing law," from the twin requirements for the exercise of eminent domain.[77] Therefore, if anything, the deletion of Article 31 pursuant to the Forty-Fourth Amendment, should have led to a reassessment of the validity of the procedure for acquisition for a company under the LAA 1894.

The SCI did, though, attempt to partly restore balance when it came to the power of the state to acquire land for a company by interpreting the requirement under Section 40(b) of the LAA 1894, that the "work [be] likely to prove useful to the public," in a restrictive manner.[78] It held that the requirement is fulfilled only if the public has the right to *use* the work itself, and not merely the product of it.[79] In

71. Jhandu Lal v. State of Punjab, (1961) 2 SCR 459 (India); Somawanti v. State of Punjab, (1963) SCR (3) 774 (India); Pratibha Nema v. State of Madhya Pradesh, AIR 2003 SC 3140 (India).

72. Jhandu Lal v. State of Punjab, (1961) 2 SCR 459 (India).

73. *Id.*

74. (1961) 1 SCR 128 (India).

75. *Id*.

76. Land Acquisition (Amendment) Act, 1984, No. 68, Acts of Parliament, 1984 (India).

77. Jhandu Lal v. State of Punjab, (1961) 2 SCR 459 (India).

78. R.L. Arora v. State of UP, 1962 Supp (2) SCR 149 (India).

79. *Id.*

this decision of the court, which was celebrated in many quarters,[80] the court refused to accept that the legislature could have intended that individuals "be compelled to part with their lands for private profit of others who might be owners of companies, through the Government, simply because the company might produce goods which would be useful to the public."[81] The legislature quickly responded by amending the LAA 1894 to include among the permitted uses for an acquiring company, the "construction of some building or work for a company, which is engaged or is taking steps for engaging itself in any industry or work which is for a public purpose."[82] The SCI however read the requirement of public purpose as attaching to the work or building to be constructed.[83] As a result, it was necessary to establish the public purpose that would be served by the specific work or building to be constructed by the company on the acquired land; it was not sufficient to establish that the company, or the industry in which it operated, was in the public interest.[84] As such, the judiciary rendered the "company" route unattractive because it restricted the manner in which the company could utilize the land.

While this may have been one step forward, the SCI quickly took matters back by (more than) two steps with its decision in *Somawanti v. State of Punjab*.[85] It reiterated that the determination of public purpose by the government is not justiciable, but also it held that even a nominal contribution to the acquisition cost by the state would be sufficient for it to access the "public purpose" route.[86] This meant that the state could acquire land for a company with effectively less scrutiny under the "public purpose" route, and without the need to impose conditions on the manner in which the land must be utilized. In this decision, therefore, the SCI upheld an acquisition for setting up a factory to manufacture refrigerator compressors, simply deferring to the opinion of the government that it was a public utility.[87] This decision was unfaithful to the presumption underlying the decisions in

80. Colin Gonsalves, *Judicial Failure on Land Acquisitions for Companies*, 45(32) ECON. & POL. WKLY. 37–42 (2010).

81. R.L. Arora v. State of UP, 1962 Supp (2) SCR 149 (India).

82. *Id*.

83. R.L. Arora v. State of UP, (1964) 6 SCR 784 (India).

84. R.K. Agarwalla v. State of West Bengal, AIR 1965 SC 995 (India).

85. (1963) SCR (3) 774 (India).

86. Somawanti v. State of Punjab, 1963 SCR (3) 774 (India).

87. Somawanti v. State of Punjab, 1963 SCR (3) 774 (India).

both *Jhandu Lal v. State of Punjab*[88] and *R.L. Arora v. State of Bombay*[89] that undertaking useful economic activity does not in itself amount to public purpose. We see again, therefore, that the permissive attitude of the judiciary predates the deletion of the constitutional protection against arbitrary deprivation of property.

Thereafter, the SCI has on several occasions found land acquisition for industrial development or for setting up of industrial estates and parks as amounting to a public purpose,[90] regardless of whether the immediate beneficiary is a private entity.[91] This has been the outcome despite an amendment to the *LAA 1894* in 1984 to exclude "acquisition of land for a company" from the purview of the definition of "public purpose" in Section 3(f).[92] In fact, the SCI suggested that "facilitating the setting up of an industry in private sector [is] imbued with the character of public purpose acquisition if the government comes forward to sanction the payment of a nominal sum towards compensation."[93] As a result, the state has been described as an "estate agent for companies"[94] In other words, we see that the expropriation rules are relaxed to the extent that the state is able to exercise its powers to serve private interests, rather than simply justice costs.

Recently, this issue was examined afresh in a challenge to the acquisition of farmland in West Bengal, under the "public purpose" route, for Tata Motors Limited to set-up a factory.[95] This particular land acquisition had triggered a massive political conflict in the State, which eventually forced the project to be relocated to the State of Gujarat.[96] While the two-judge bench of the SCI invalidated the acquisition, both judges proffered different reasons. Interestingly, Justice V. Gopal Gowda concluded that the land was acquired entirely at the instance of the company but "in the guise of an acquisition for public purpose."[97] Therefore, he invalidated the acquisition for not complying with the

88. (1961) 2 SCR 459 (India).

89. (1964) 6 SCR 784 (India).

90. Arnold Rodricks v. State of Maharashtra, (1966) 3 SCR 885 (India); Narayan Govind Gavate v. State of Maharashtra, AIR 1977 SC 183 (India).

91. State of Bombay v. Bhanji Munji, AIR 1955 SC 41 (India); Sooraram Pratap Reddy v. District Collector, (2008) 9 SCC 552 (India).

92. Land Acquisition (Amendment) Act, 1984, No. 68, Acts of Parliament, 1984 (India), § 3.

93. Pratibha Nema v. State of Madhya Pradesh, AIR 2003 SC 3140 (India).

94. *See* Gonsalves, *supra* note 80.

95. Kedar Nath Yadav v. State of West Bengal, (2017) 11 SCC 601 (India).

96. *Id*.

97. *Id.*

requirements under the "company" route. He nonetheless "admitted" that the acquisition of land to set up industrial units was understandable,[98] only that he urged the state to strictly follow procedure "where the brunt of this development is borne by the weakest sections of the society."[99]

This also points to the rather spurious distinction that has been created between the "private" and "public" spheres, for the sake of defining public purpose. For instance, where local tradesmen were being uprooted from their place of business, at a popular pilgrimage site, for the safety and convenience of the devotees,[100] the court upheld their eviction suggesting that private interest must give way to *public* interest.[101] Similarly, in another case, the acquisition of land for setting up a dockyard was upheld as being in the *public* interest, even though several workers were losing their jobs as a result.[102] The absurdity of the judicial construction of the "public" is perhaps most evident in cases where the landowners have in turn argued that the land is already being used for a similar public purpose. For instance, where land was being acquired to set up a fertilizer factory (apparently a public purpose), it was argued that the land was already being utilized for manufacturing building material.[103] The courts, however, had previously rejected similar arguments on the ground that it was the prerogative of the state to prioritize different public utilities.[104]

Further, it appears that the inchoate yet mythical nature of public interest has largely permitted the state to conflate the interests of the public with that of the elite. For instance, the SCI permitted the establishment of a financial district at the cost of small farmers who depended on the land for a livelihood.[105] Similarly, alongside constructing an expressway, farmland was acquired along the proposed route for *commercial, amusement, industrial, institutional and residential purposes*.[106] In a similar vein, the judiciary has also

98. *Id*.
99. *Id*.
100. Sayyed Ratanbhai Sayeed v. Shirdi Nagar Panchayaat, (2016) 4 SCC 631 (India).
101. *Id*.
102. Scindia Employees Union v. State of Maharashtra, (1971) 1 SCC 85 (India).
103. Abdul Husein Tayabali v. State of Gujarat, (1968) 1 SCR 597 (India).
104. Somavanti v. State of Punjab, AIR 1963 SC 151 (India).
105. Sooraram Pratap Reddy v. District Collector, (2008) 9 S.C.C. 552.
106. *Id*.

permitted the acquisition of land for constructing tourist complexes,[107] and even a hotel-cum-golf resort.[108]

While of course the LAA 1894 is now replaced by the LARR 2013, it does not significantly alter the power structure put in place by the former. In other words, while the LARR 2013 is a step forward, in that it requires enhanced compensation and efforts at rehabilitating the landowners, it does little to alter the current discourse on "public purpose." Firstly, it again permits the government to acquire land for a private company, and without any of the restrictions from the LAA 1894 on the manner in which the land may be utilized. Secondly, it defines "public purpose" in broad terms to include, for instance, infrastructure projects, industrial corridors, mining activities, and tourism projects, which leaves little scope for the judiciary to import the "public use" test that was employed by the SCI in *R.L. Arora v. State of Uttar Pradesh*.[109] It is likely therefore to continue to "permit the transfer of resources to the private sector," except with "some solace for the displaced."[110]

One significant gain found in LARR 2013, though, is the requirement of prior consent of eighty percent of affected families to proceed with the land acquisition.[111] The process of acquisition for a company therefore at least bears *some* resemblance now to an ordinary market transaction insomuch as it depends on consent, although not of *all* those affected. Still, worryingly, there have already been some efforts by the present government to dilute this requirement.

What we are left with, then, is a position whereby acquisitions of property in India are at least ostensibly treated as though necessary for meeting the justice requirements/costs of the state. Whether such needs are truly being met, however, is another matter. Instead, through judicial interpretation, while private property may readily be acquired by the state for what is treated as a public purpose, the actual benefit to the community in terms of justice needs may be slight, with a corresponding diminution of the protection provided for private

107. State of Haryana v. Eros City Developers Private Limited; Sooraram Pratap Reddy v. District Collector, (2008) 9 SCC 552.

108. Royal Orchid Hotels v. G. Jayaram Reddy, (2011) 10 S.C.C. 608.

109. 1962 Supp (2) S.C.R. 149.

110. Mihir Desai, *Land Acquisition Law and the Proposed Challenges,* 46(26–27) ECON. & POL. WKLY. 95*,* 95–100 (2011).

111. Land Acquisition (Amendment) Act, 1984, No. 68, Acts of Parliament, 1984 (India), § 2(2)(b)(i).

property. We will see a similar outcome in Australia, both of which can be contrasted as with the strong protection of private property in the United States.

III. AUSTRALIA: SECTION 51(XXXI)

As is the case with India, and as we will see when we turn to the United States, the place of property, and especially of land, is deeply ingrained in the Australian psyche. Whereas the depth of feeling about property in India is found in judicial interpretation and is exemplified in the United States in the factual story of Mrs. Kelo's Little Pink House in *Kelo v. City of New London*,[112] the Australian sentiment can be traced to a fictional account found in *The Castle*, a comedy film which follows the battle of Daryl Kerrigan in the High Court of Australia (the equivalent of the Supreme Court of the United States) to prevent his house from being compulsorily acquired for use as an airport.[113] Before the High Court, Kerrigan summarizes the successful argument against acquisition:

> I'm really starting to understand how the Aborigines feel . . . . This house is like their land. It holds their memories. The land is their story. It's everything. You can't just pick it up and plonk it down somewhere else. This country's gotta stop stealing other people's land.[114]

Sometimes fact imitates fiction: The Federal Court decision in *French v. Gray*,[115] for instance, involved a challenge to an attempt by the Australian Commonwealth (federal) government compulsorily to acquire Graham French's farm in South Australia for military purposes.[116] A real-life Daryl Kerrigan, French won the case, but "lamented the time and money lost in the long process," concluding that the government "shouldn't be able to rip people's lands off them for no good reason . . . it's just wrong."[117]

---

112. 545 U.S. 469 (2005).

113. THE CASTLE (Village Roadshow 1997).

114. Dave Crewe, *The Castle: Cheat Sheet,* S.B.S. AUSTRALIA (Apr. 11, 2017), https://www.sbs.com.au/movies/article/2017/04/10/castle-cheat-sheet [https://perma.cc/P4RT-HRGA].

115. *French v Gray* [2013] F.C.A. 263 (27 March 2013) (Austl.).

116. *Id.*

117. Tory Shepherd, *Their home is their castle - Corunna Station will stay in the hands of the French family after Federal Court victory*, ADELAIDE NOW (Nov. 8, 2013), http://www.adelaidenow.com.au/news/south-australia/their-home-is-their-castle-corunna-

Section 51(xxxi) of the Australian Constitution provides a means for the Commonwealth to acquire private property to meet justice costs as well as a protection for private property interests such as those claimed by the fictional Daryl Kerrigan and the factual Graham French.[118] The provision reads:

> 51 Legislative powers of the Parliament . . .
>
> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:
>
> . . .
>
> (xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;[119]

The heading and opening clause of Section 51 are important, for two reasons. First, in its terms, the Australian Constitution applies only to the Commonwealth, or federal government, and not to the States or Territories[120] which comprise the Australian federation. While the States are subject to their own legislatively imposed limitations upon the power compulsorily to acquire property,[121] we are concerned here only with comparing the constitutions of the United States, India, and Australia. Unlike India, where legislation plays a significant role in

---

station-will-stay-in-the-hands-of-the-french-family-after-federal-court-victory/story-fni6uo1m-1226756092281 [https://perma.cc/XKE6-2ZJX].

118. *See generally* Simon Evans, *When is an acquisition of property not an acquisition of property?: The search for a principled approach to section 51(xxxi)*, 11 PUBLIC L REV. 183 (2000).

119. *Australia Constitution* s 51.

120. The Northern Territory and the Australian Capital Territory are territories of the Commonwealth of Australia, with the relationship between the Commonwealth and a Territory governed by the Constitution of Australia, s 122. The Commonwealth has exercised its power to establish self-government in both Territories by enacting the *Northern Territory (Self-Government) Act 1978* (Cth) (Austl.) and the *Australian Capital Territory (Self-Government) Act 1988* (Cth) (Austl.), respectively.

121. *See*, *e.g.*, *Desane Properties Pty Ltd v State of New South Wales* [2018] NSW 553 (1 May 2018) (interpreting the relevant New South Wales legislation, the *Land Acquisition (Just Terms) Compensation Act 1991* (NSW)). For representative examples of the Commonwealth, Territory, and State legislation, see *Land Acquisition Act 1989* (Cth); *Lands Acquisition Act* (NT); *Land Acquisition and Compensation Act 1986* (Vic); Michael Crommelin, *Land Title, Acquisition and Management in Australia* [2011] U. OF MELBOURNE LEGAL STUD. RES. PAPER NO. 587, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2060700 [https://perma.cc/3GLV-H8AX]; GARY NEWTON & CHRISTOPHER CONOLLY, LAND ACQUISITION (7th ed. 2017); MARCUS JACOBS, LAW OF COMPULSORY LAND ACQUISITION (2d ed. 2015).

determining when compulsory acquisition of land is justified, in Australia, legislation enacted by the Commonwealth—the Land Acquisition Act 1989 (Cth)—merely establishes the process, and not the justifiability of such acquisitions. The Commonwealth legislation itself is subject to the terms of Section 51(xxxi), which establishes the standard for testing the justifiability of compulsory acquisition of land. And, second, because, taken together—and unlike the Fifth Amendment to the US Constitution, which is framed only as a limitation on power[122]—the heading and opening clause of Section 51 make clear that Sub-Section xxxi effects *both* a grant of power and a limitation upon it.

There is little available evidence which reveals what precisely the framers had in mind when they included Section 51(xxxi) in the Constitution. Sir John Quick (one of the framers of the Australian Constitution) and Sir Robert Garran (the secretary of the framers drafting committee)—who published an annotated edition of the Australian Constitution contemporaneously with its promulgation in 1901 which remains the authoritative account of the conventions and debates which ultimately produced the Australian Constitution[123]—provide little historical background.[124] Few authors since have shed any light on these origins, although in *JT International SA v. Commonwealth*, Justice (now Chief Justice) Kiefel supports the view that while "[t]here appears to have been little discussion of this provision in the Convention Debates[,] . . . [i]t was drafted to meet the concern that there might have been some uncertainty as to whether the Commonwealth had legislative power to acquire property."[125]

Quick and Garran provide historical support for Justice Kiefel's view, focusing their attention on the fact that the Australian and American constitutional provisions are not the same; rather, the words "the acquisition of property" "expressly confer[] on the

122. *See generally* GEORGE WILLIAMS, SEAN BRENNAN AND ANDREW LYNCH, BLACKSHIELD AND WILLIAMS AUSTRALIAN CONSTITUTIONAL LAW AND THEORY: COMMENTARY AND MATERIALS (7th ed. 2018).

123. *See generally* SIR JOHN QUICK AND SIR ROBERT GARRAN, THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH (1955).

124. Indeed, it is likely the case that Quick and Garran provide little by way of historical background because there simply is no extant contemporaneous account of the debates which produced Section 51(xxxi). *See* Simon Evans, *Property and the Drafting of the Australian Constitution*, 29(2) FED. L. REV. 121 (2001). *But see* R. L. Hamilton, *Some Aspects of the Acquisition Power of the Commonwealth*, 5 FED. L. REV. 265 (1973).

125. *J.T. International SA v Commonwealth* [2012] 250 CLR 1, 112–13 (Austl.).

Commonwealth, through the Federal Parliament, the right—technically called the right of 'eminent domain'—to compulsorily take property, both private and provincial, for Federal purposes." This, Quick and Garran argue, is the functional equivalent not of the US Fifth Amendment, but of the Necessary and Proper Clause contained in Article I which, they note, vests in the federal government the right of eminent domain, which "may be exercised within the States, when necessary, for the enjoyment and exercise of the powers conferred upon the Government by the Constitution."[126] And while the Australian Constitution contains a "ways and means" power in Section 51(xxxix), it was not considered advisable by the drafters to use it to allow the right of eminent domain to be exercised upon any implied or incidental power.[127] The operation of Section 51(xxxi) therefore hinges upon the question of sovereignty:

> Although the American courts [as of 1901] have given . . . decisions [concerning the necessary and proper clause and the takings power] it must be remembered that they were given under the Constitution of a sovereign State. The Commonwealth is not a sovereign State, but a federated community possessing many political powers approaching, and elements resembling, sovereignty, but falling short of it. Its Parliament can only exercise delegated powers carved out for it, and assigned to it, by the sovereign Parliament of Great Britain and Ireland. No implied power will be founded on any conception of latent unexpressed sovereignty, as in the case of the Government of the United States. Hence all possible doubt as to the right of the Commonwealth to acquire property for federal purposes has been removed by this sub-section [s 51(xxxi)], which renders it unnecessary to resort to the "ways and means" sub-sec. xxxix.[128]

On its terms, then, Section 51(xxxi) comprises both an express grant of Commonwealth legislative power to acquire property and a limitation upon that power. The leading High Court treatment of the provision, *Bank of New South Wales v. Commonwealth* confirms this textual understanding.[129] Having started from the textual understanding

126. QUICK & GARRAN, *supra* note 123, at 640-41.

127. *See* QUICK & GARRAN, *supra* note 123, at 640-41; *see also* Rosalind Dixon, *Overriding Guarantee of Just Terms of Supplementary Source of Power? Rethinking s 51 of the Constitution*, 27 SYDNEY L. REV. 638 (2005).

128. *See* QUICK & GARRAN, *supra* note 123, at 641.

129. *Bank of New South Wales v Commonwealth* [1948] 76 CLR 1, 349, *aff'd JT International SA v Commonwealth* [2012] 250 CLR 1, 113 [313] (Austl.).

of a grant of power and a limitation, the High Court has, through interpretation and application, defined the scope of operation of both components.

In order to set the parameters of the grant of power compulsorily to take property, the High Court focusses on the meaning of "acquisition" and of "property." In relation to the former, the Court applies a "deprivation-corresponding benefit test," which requires not only that a party—either a person, a State, or a Territory[130] (although not a private third party[131])—must lose property rights—but also that another party—which may or may not be the Commonwealth, provided that such party, including a State or a Territory,[132] is acting pursuant to an exercise of Commonwealth legislative power—must acquire a corresponding benefit.[133] As such, the mere deprivation of property[134] or the adjustment of an entitlement to a resource pursuant to a license[135] is insufficient to constitute an acquisition for the purposes of this power, although the egregiousness of the loss may sometimes influence the courts as to whether such a loss and corresponding benefit is found.[136]

But in applying the deprivation-corresponding benefit test, the High Court has made clear that a "regulatory taking" fails to constitute an acquisition.[137] *Cunningham v. The Commonwealth*, involved a challenge brought by several former members of the Commonwealth Parliament against legislation which altered retirement allowances and

130. *See generally State of South Australia v Honourable Peter Slipper M.P.* ('*Nuclear Waste Dump Case*') [2004] 136 FCR 164 (Austl.); *see also generally* A.J. Brown, *When Does Property Become Territory? Nuclear Waste, Federal Land Acquisition and Constitutional Requirements for State Consent*, 28 ADELAIDE L. REV. 113 (2007); *see generally* Dennis Rose, *The 10-Point Plan – Its Constitutional Validity,* 17(3) AUST. MINING & PETROLEUM L. J. 216 (1998).

131. *See generally* Tom Allen, *The Acquisition of Property on Just Terms*, 22 SYDNEY L. REV. 351 (2000).

132. *See* Sean Brennan, *Section 51(xxxi) and the Acquisition of Property under Commonwealth-State Arrangements: The Relevance to Native Title Extinguishment on Just Terms*, 15(2) AUST. INDIGENOUS L. REV. 74 (2011).

133. *See* Duane Ostler, *Gain as loss: The High Court's approach in regulatory acquisition cases* 26(1) BOND L. REV. 66 (2014); Duane Ostler, *The Drafting of the Australian Commonwealth Acquisition Clause* 28(2) U. OF TASMANIA L. REV. 211 (2009); Duane Ostler, *A Case of Non-Identical Twins – Comparing the Evolution of Acquisition Law in Australia and the United States,* 10(1) CANBERRA L. REV. 66 (2011).

134. *P.J. Magennis Pty. Ltd v Commonwealth* [1949] 80 CLR 382 (Austl.).

135. *I.C.M. Agriculture Pty Ltd v The Commonwealth* [2009] 240 CLR 140 (Austl.).

136. *See generally* Ostler, *supra* note 133.

137. *See generally* Pamela O'Connor, *The Changing Paradigm of Property and the Framing of Regulation as a "Taking,"* 36(2) MONASH U. L. REV. 50 (2010).

travel benefits, arguing that because such rights constituted property, any variation fell within the prohibition of Section 51(xxxi).[138] The High Court held these benefits to be statutorily created property interests "inherently subject to variation" or "inherently defeasible"—by which was meant that such rights were susceptible to later modification or extinguishment without compensation—and therefore not capable of animating the protection of Section 51(xxxi).[139]

So as to establish the scope of what might be acquired by the Commonwealth, the High Court has developed a broad definition of "property."[140] *Minister of State for the Army v. Dalziel* establishes that "'property' in s 51(xxxi) is a general term which refers to any tangible or intangible thing which the law protects under the name of property. The acquisition of the possession of land is an instance of the acquisition of property."[141] And recent judicial authority suggests that this definition of property may include a "spiritual connection" to land as part of native title held by Australian Aboriginal and Torres Strait Islander peoples.[142]

Having set the parameters of the power to acquire, the High Court has focused on the words "on just terms" and "purpose in respect of which" to set the limits to Commonwealth legislative activity taken in furtherance of it. Purely as a matter of textual analysis, these two sets

---

138. *Cunningham v The Commonwealth* [2016] 259 CLR 536 (Austl.).

139. *Cunningham v The Commonwealth* [2016] 259 CLR 536 (Austl.). The High Court applies the same approach to statutorily created mining and water licenses. *Newcrest Mining (WA) Ltd v Commonwealth* [1997] 190 CLR 513 (Austl.); *Commonwealth . WMC Resources Ltd* [1998] 194 CLR 1 (Austl.); *Phonographic Performance Company of Australia Limited v Commonwealth* [2012] 246 CLR 561 (Austl.); *see also* Margaret Brock, *When is property inherently defeasible for the purposes of s 51(xxxi)?*, 21(2) AUST. PROP. L. J. 180 (2012); Gavan Griffith & Geoffrey Kennett, *Constitutional Protection Against Uncompensated Expropriations of Property*, *in* AUSTRALIAN MINING AND PETROLEUM LAW ASSOCIATION YEARBOOK 49 (1998); D.F. Jackson & Stephen Lloyd, *Compulsory Acquisition of Property*, *in* AUSTRALIAN MINING AND PETROLEUM LAW ASSOCIATION YEARBOOK 75 [1998].

140. *See generally* Pamela O'Connor, *The Changing Paradigm of Property and the Framing of Regulation as a "Taking,"* 36(2) MONASH U. L. REV. 50 (2010).

141. *Minister of State for the Army v Dalziel* [1944] 68 C.L.R. 261, 295 (Austl.).

142. *See Northern Territory v Griffiths* [2019] HCA 7 (Austl.); *see also Griffiths v Minister for Lands, Planning and Environment* [2008] 235 CLR 232, 253-57 (Austl.); *Queensland v Congoo* [2015] 256 CLR 239 (Austl.); D.F. Jackson & Stephen Lloyd, *Compulsory Acquisition of Property*, *in* AUSTRALIAN MINING AND PETROLEUM LAW ASSOCIATION YEARBOOK 75 (1998); Robert French & Patricia Lane, *The common law of native title in Australia, in* FEDERAL JUDICIAL SCHOLARSHIP 10 (2002); Sean Brennan, *Native Title and the Acquisition of Property under the Australian Constitution*, 28 MELBOURNE U. L. REV. 28 (2004); Wing Hsieh, *Section 51(xxxi) of the Australian Constitution and the Compulsory Acquisition of Native Title*, 32 ADELAIDE L. REV. 287 (2011); Brennan, *supra* note 132.

of words, read together, might be assumed to establish an individual right to private property. The Privy Council[143] (while that body remained the final court of appeal for Australia) seemed to adopt an individual right view, and Quick and Garran wrote:

> It was declared that private property should not be taken for public use without just compensation. This is regarded not as a grant but a restriction on the implied power. So the power of the Federal Parliament to take property . . . is limited by the condition that it must be exercised "on just terms." This condition is consistent with the common law of England and with the general law of European nations. It is intended to recognize the principle of the immunity of . . . property from interference by the Federal authority, except on fair and equitable terms, and this principle is thus constitutionally established and placed beyond legislative control.[144]

And "purpose in respect of which" establish "[t]he second limit to the power of the Commonwealth to acquire . . . property . . . , that it must only take if for purposes in respect of which the Parliament has power to make laws."[145] By this, Quick and Garran meant those powers expressly conferred upon the Commonwealth Parliament by Section 51, implying that these words are something in the nature of an individual right to private property. The High Court of Australia, however, consistently suggests that both sets of words comprise a limit on Commonwealth legislative power and not the creation or protection of an individual right to private property.[146]

Notwithstanding the High Court's approach, though, in its invocation, Section 51(xxxi) appears to protect an individual right to private property. In fact, the High Court itself seems to view the relationship between the power conferred and the limitation imposed as balancing community and individual interests.[147] Justice Kiefel, for instance, wrote in *JT International SA v. Commonwealth* that " . . . s

143. *See James v Commonwealth* [1936] 55 CLR 1, 43–44 (Austl.).

144. QUICK & GARRAN, *supra* note 123, at 641.

145. *See* QUICK & GARRAN, *supra* note 123, at 642.

146. *See* N. K. F. O'Neill, *Constitutional Human Rights in Australia*, 17(2) FED. L. REV. 85 (1987); Matthew Stubbs, The Eminent Domain in Australia: The 'Individual Rights' Approach to s 51(xxxi) of the Australian Constitution (2001) (PhD Thesis, The University of Adelaide); Paulina Fishman, *Section 51(xxxi): A constitutional guarantee to disappoint property owners,* 6 PROP. L. REV. 27 (2016).

147. *See* Tom Allen, *The Acquisition of Property on Just Terms*, 22 SYDNEY L. REV. 351 (2000).

51(xxxi) . . . serve[s] a dual purpose: to provide the Commonwealth with that power and to provide the individual or the State affected with protection against governmental interferences with their proprietary rights without proper recompense."[148] As such, the words "on just terms" tend to be treated as an individual guarantee of private property, while the words "purpose in respect of which" as the action which triggers or enlivens the operation of that guarantee.

In *Nelungaloo Pty Ltd v. Commonwealth*, the Court considered the nature of the just terms guarantee, holding that the arrangements for acquisition of property must either be "fair" or at least such that a legislature could reasonably consider the arrangements as being "fair." Fairness in this context must account for the interests of all parties affected by the acquisition, as opposed only to the interests of the holder of the property so acquired,[149] and compensation can take non-monetary forms,[150] although it need not be restricted to the value of the property acquired at the date it was taken.[151]

At a minimum, the action which triggers or enlivens the just terms guarantee includes any of the legislative powers which the Commonwealth Parliament possesses pursuant to Section 51.[152] In *Mutual Pools & Staff Pty Ltd v. Commonwealth*, Mason CJ wrote that the relevant words "confine the exercise of the power to an implementation of a purpose within the field of Commonwealth legislative power. They are not to be read as an exclusive and exhaustive statement of the Parliament's powers to deal with or provide for the involuntary disposition of or transfer of title to an interest in property."[153] As such, the just terms guarantee must be read into other legislative powers which, by their exercise, purport to acquire property.[154]

---

148. *J.T. International SA v Commonwealth* (2012) 250 CLR 1, 112-3 [313] (Kiefel J.) (Austl.).

149. *Nelungaloo Pty Ltd v Commonwealth* [1947] 75 CLR 495 (Austl.).

150. *Wurridjal v Commonwealth* [2009] 237 CLR 309 (Austl.); *see also* Celia Winnett, *Just Terms or Just Money? Section 51(xxxi), Native Title and Non-Monetary Terms of Acquisition*, 33 U. OF NEW SOUTH WALES L. J. 776 (2010).

151. *Grace Bros Pty Ltd v The Commonwealth* [1946] 72 CLR 269 (Austl.).

152. *Johnston Fear & Kingham & The Offset Printing Company Pty Ltd v Commonwealth* [1943] 67 CLR 314, 318 (Austl.); *see also Trade Practices Commission (Cth) v Tooth & Co Ltd* [1979] 142 CLR 397, 403 (Austl.).

153. *Mutual Pools & Staff Pty Ltd v Commonwealth* [1994] 179 CLR 155, 169 (Austl.).

154. *Id.* at 169.

It is necessary, then, to determine whether the exercise of Commonwealth power triggers or enlivens the just terms guarantee. Some powers exclude the guarantee because "[a]lthough s. 51(xxxi) abstracts the power of acquisition from other legislative powers in s. 51, it cannot be interpreted so broadly as to render meaningless the legitimate use and operation of other powers conferred by s. 51."[155] Two types of such exclusion exist. First, some powers found in Section 51, by their express terms, do not require compliance with the guarantee; the acquisition of state railways and bankruptcy being the axiomatic examples.[156] Second, the grant of another legislative power found in Section 51 may imply, by its terms, incongruity or inconsistency with the just terms guarantee;[157] while taxation[158] and criminal and civil penalties and exactions represent the paradigmatic cases,[159] many other instances exist, including war-time requisitions,[160] acquisition of Aboriginal and Torres Strait Islander traditional lands,[161] and the imposition of a pecuniary penalty by way of civil proceedings and the acquisition by the Controller of Enemy Property of the property of subjects of a former enemy to be applied to reparations payable by an enemy State.[162]

Provided that the power so exercised does not fall within one of the categories which excludes the operation of just terms, it is necessary to determine that it is, in fact, an exercise of power which triggers or enlivens the guarantee. This presents more difficulty than one might expect. Again, the High Court proceeds by considering those laws which fail to enliven the guarantee. In *Clunies-Ross v. Commonwealth*, the High Court declined to decide whether Section 51(xxxi) was "confined to the making of laws with respect to acquisition of property for some purpose related to a need for or proposed use or application

155. *Id.* at 219.

156. *Id.* at 170.

157. See *R v Smithers, Ex parte McMillan* [1982] 152 CLR 477, 487 (Austl.); *Re Director of Public Prosecutions; Ex parte Lawler* [1994] 179 CLR 270, 285 (Austl.); *Theophanous v. Commonwealth* [2006] 225 CLR 101 (Austl.).

158. *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 170–71 (Austl.).

159. *R v Smithers, Ex parte McMillan* [1982] 152 CLR 477, 487 (Austl.); *see also Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270, 278–81 (Brennan J.), 285 (Deane and Gaudron JJ.), 295 (McHugh J.).

160. *See*, *e.g.*, *Andrews v. Howell* (1941) 65 CLR 255; *Minister of State for the Army v. Dalziel* (1944) 68 CLR 261.

161. *See*, *e.g.*, *Commonwealth v New South Wales* (1923) 33 CLR 1 (Austl.).

162. *Mutual Pools & Staff Pty Ltd v Commonwealth* [1994] 179 CLR 155, 187-88 (Austl.).

of the property to be acquired . . . ."[163] Still, three approaches may be discerned. The first, in *ICM Agriculture Pty Ltd v. Commonwealth*[164] and *Spencer v. Commonwealth*,[165] seeks to characterize a law so as to determine whether it does or does not fall within a power triggering the guarantee.[166] *Mutual Pools & Staff Pty Ltd v. Commonwealth*[167] represents a second approach; there, Justices Deane and Gaudron, while suggesting that a precise test could not be applied so as to determine whether a law falls within the scope of Section 51(xxxi), it was possible to identify several laws that would not bear the character of a law with respect to the acquisition of property:

> One such category consists of laws which provide for the creation, modification, extinguishment or transfer of rights and liabilities as an incident of, or a means for enforcing, some general regulation of the conduct, rights and obligations of citizens in relationships or areas which need to be regulated in the common interest. Another category consists of laws defining and altering rights and liabilities under a government scheme involving the expenditure of government funds to provide social security benefits or for other public purposes.[168]

This "categorisation" approach means that while some laws may have the acquisition of property as an incidental consequence, that acquisition is not sufficient to impart upon the law the character of a law with respect to Section 51(xxxi), thus enlivening the just terms guarantee.

A third approach, not yet adopted by a plurality of the High Court, involves the requirement that the Commonwealth power be exercised for a public purpose. *Griffiths v. Minister for Lands* involved an exercise of power pursuant to the *Crown Lands Act* (NT)[169] which, it was argued, enlivened the operation of Section 43 of the *Lands Acquisition Act* (NT), permitting the Minister to acquire land "for any purpose whatsoever" (language very similar to Section 51(xxxi) but applicable to the Northern Territory[170]). The appellants argued that

163. *Clunies-Ross v Commonwealth* [1984] 155 CLR 193, 200 (Austl.).

164. *ICM Agriculture Pty Ltd v Commonwealth* [2009] 240 CLR 140 (Austl.).

165. *Spencer v Commonwealth* [2010] 241 CLR 118 (Austl.).

166. *See generally* Stephen Lloyd, *Compulsory Acquisition and Informal Agreements: Spencer v. Commonwealth*, 33 SYDNEY L. REV. 137 (2011).

167. *Mutual Pools & Staff Pty Ltd v Commonwealth* [1994] 179 CLR 155 (Austl.).

168. *Id.* at 189-90.

169. NT is the abbreviation for Northern Territory.

170. For more on the territories, see *supra* note 120.

notwithstanding the use of "for any purpose whatsoever," the Minister was not empowered to acquire land from one person solely to enable it to be sold or leased by the Northern Territory for the private use of another person.[171] While the majority resolved the issue in favour of the Northern Territory as a matter of statutory interpretation in accordance with Section 51(xxxi) jurisprudence,[172] Justice Kirby, in dissent, wrote that "[t]he public purpose of all compulsory acquisitions under federal or Territory law has a constitutional origin."[173] Justice Kirby concluded that a compulsory acquisition for *private* purposes may therefore fall outside the public purposes requirement implicit in Section 51(xxxi).[174] While writing in a dissent not then or since adopted by a majority of the High Court, Justice Kirby claims to be summarizing both the implication of Section 51(xxxi), and the relevant jurisprudence of the High Court as to those instances which will enliven the just terms guarantee. As such, a "public purpose" requirement for a compulsory acquisition may represent a third approach to the operation of the just terms guarantee.

Section 51(xxxi) of the Australian Constitution is both a grant of power so as to allow the Commonwealth to meet its justice needs/costs, and a limitation upon that grant so as to provide at least some minimal level of protection for private property which may be so acquired. It is rare, though, for the Commonwealth to rely solely upon that grant so as to effect a compulsory acquisition; rather, the Commonwealth typically relies upon some other power found in Section 51. A compulsory acquisition having occurred, the courts, in an effort to balance the interests of the community with those of the individual, consider the purpose (pursuant to a relevant head of Commonwealth legislative power) in respect of which the property is acquired so as to determine whether the just terms guarantee (which provides, at least impliedly, an individual right to private property) has been enlivened. And given the fact that the power relied upon by the Commonwealth for such acquisition is seldom that found in Section 51(xxxi), but much more frequently a power that is for one reason or another excluded from the operation of the just terms guarantee, it is equally unusual for the High Court to find that the guarantee is enlivened. Thus, as occurs in

171. *Griffiths v Minister for Lands, Planning and Environment* [2008] 235 CLR 232, ¶ 19 (Austl.).

172. *Id.* at ¶ 30.

173. *Id.* at ¶ 84.

174. *Id.* at ¶ 86.

India, whether such acquisition is truly for the purpose of meeting the justice requirements/costs of the Commonwealth, it is treated as such, at least ostensibly, by the High Court.

IV. UNITED STATES: THE FIFTH AMENDMENT

Any discussion of compulsory acquisition of property in the United States must begin with the relevant clauses of the Fifth Amendment to the US Constitution: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."[175] These two clauses are commonly referred to, respectively, as the Due Process Clause and the Takings Clause. Although often treated separately, the two clauses are obviously closely related and are not always rigorously distinguished from one another.[176] The Due Process Clause forbids the government from depriving any person of property "without due process of law"; or, stated positively, allows government infringement of property rights only if consistent with the requirements of due process. The Takings Clause forbids the government from taking private property for public use without just compensation; or, stated positively, allows compulsory acquisition of private property but only for "public use" and with "just compensation."

Almost all state constitutions contain provisions similar to the Takings Clause.[177] At one time, these state constitutional protections were more significant because the Fifth Amendment in the federal Bill of Rights was long held to apply only to actions of the federal

175. U.S. CONST. amend. V.

176. One scholar, who seemingly reviewed all the prior due process cases, reported that the US Supreme Court did not always limit the word "taking" to cases arising under the Takings Clause and "deprivation" to cases under the Due Process Clause. *See* FRANK R. STRONG, SUBSTANTIVE DUE PROCESS OF LAW: A DICHOTOMY OF SENSE AND NONSENSE 202 n. 414 (1986).

177. *See*, *e.g.*, N.J. CONST. art. I, § 20 ("Private property shall not be taken for public use without just compensation."). North Carolina is today the last state without a Takings Clause in its constitution. *See* PHILIP NICHOLS, 1 THE LAW OF EMINENT DOMAIN § 4.8 (Julius L. Sackman & Russell D. Van Brunt eds., 3d ed. 2000). Notwithstanding the absence of a Takings Clause, the North Carolina Supreme Court has held that compulsory acquisition without compensation is unconstitutional as a violation of "natural equity." *See* Johnston v. Rankin, 70 N.C. 550 (1874). Today, the source of the restraint is located in the clause guaranteeing the protections of the "law of the land." N.C. CONST. art. I, § 19 ("No person shall . . . be in any manner deprived of his life, liberty, or property, but by the law of the land."). *See* Finch v. Durham, 384 S.E.2d 8 (N.C. 1989).

government.[178] Then in 1897 in Chicago, *Burlington and Quincy Railroad Co. v. Chicago*[179] the US Supreme Court ruled that compensation for private property taken for public use was a requirement of the Due Process Clause of the Fourteenth Amendment, adopted in 1868, which applies to actions by the states.[180] Today the case is commonly described as "incorporating" the Takings Clause of the Fifth Amendment into the Fourteenth Amendment, and is viewed as the first in a series of cases that over the next half century applied most of the guarantees in the federal Bill of Rights to the states through the Fourteenth Amendment.

Although state constitutional provisions are today largely overshadowed by the federal clauses, much of the basic law of eminent domain was originally made by state courts. From early in American history, states had delegated the sovereign power of eminent domain to private companies engaged in providing useful improvements, such as canals. But it was with the advent of the railroad that delegation of the state's power of compulsory acquisition became widespread.[181] At first, the delegation was in private acts of incorporation of individual railroads.[182] Later, general railroad laws granted all carriers the power of eminent domain,[183] greatly accelerating the development of the law upon the subject. As the leading legal historian of American railroads has written: "Railroads provided much of the impetus for judges to fashion takings jurisprudence."[184] In the rush to secure the benefits of the new means of transportation, the exact nature of the interest taken—

178. Barron v. Baltimore, 32 U.S. 243, 250-51 (1833) ("We are of opinion, that the provision in the fifth amendment to the constitution, declaring that private property shall not be taken for public use, without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states.").

179. 166 U.S. 266 (1897).

180. U.S. CONST. amend. XIV ("No state shall . . . deprive any person of life, liberty, or property without due process of law.").

181. The companies usually tried to acquire the needed property by voluntary sale, but bargaining was always in the shadow of compulsory acquisition.

182. *See*, *e.g.*, An Act to Incorporate the Wilmington & Raleigh Rail Road Company, N.C. Priv. L., ch. 78, arts. 14, 18 (1833).

183. *See*, *e.g.*, An Act to Provide for the Incorporation of Railroad Companies, no. 82, Laws of Michigan, 1855.

184. JAMES W. ELY, RAILROADS AND AMERICAN LAW 189 (2001).

easement or fee simple[185]—was sometimes uncertain, a problem that continues to cloud property titles to this day.[186]

The prime motivation of the Takings Clause of the Fifth Amendment and the analogous state constitutional provisions was the protection of private property, viewed as "the guardian of every other right"[187] and as a contributing cause of prosperity.[188] The constitutions guaranteed "just compensation," generally the fair market value of what was taken, the amount to be determined by a court, often aided by a jury, not by the legislature.[189] Much of the basic law concerning just compensation was laid down by state courts during the Railroad Era.[190] Where the rail line bisected a larger parcel, additional compensation for severance damages might be claimed.[191] Whether and to what extent to allow the railroads credit for benefits conferred by access to an improved means of transportation proved particularly challenging. At first, railroads often received offsets for benefits to the general service area, but over the course of the nineteenth century the rule emerged that only special benefits to the affected landowner could be considered in the calculation.[192] The complex economics involved in valuing what was taken continue to raise challenging questions to this day.

By far the most momentous development of takings jurisprudence concerned the public use requirement. As noted above, the Fifth Amendment does not refer to compulsory acquisition for a "public purpose," but rather to compulsory acquisition for a "public use." It was early determined that public use is not synonymous with public

185. *Id*. at 197–98. To complicate matters further, it is possible that only a determinable interest, "so long as used for railroad purposes," whether of easement or fee, was taken. *Id.*

186. *Compare* King Assocs. L.L.P. v. Bechtler Development Co., 632 S.E.2d 243 (N.C. 2006) (finding that deed conveyed a fee simple) *with* Brown v. Penn Cent'l Corp., 510 N.E.2d 641 (Ind. 1987) (finding that deed created an easement).

187. ARTHUR LEE, AN APPEAL TO THE JUSTICE AND INTERESTS OF THE PEOPLE OF GREAT BRITAIN, IN THE PRESENT DISPUTE WITH AMERICA 14 (4th ed. 1775); *see also* Murr v. Wisconsin, 137 S.Ct. 1933, 1943 (2017) ("Property rights are necessary to preserve freedom, for property ownership empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them.").

188. *See generally* James Ely, *"That Due Satisfaction Be Made:" The Fifth Amendment and the Origins of the Compensation Principle*, 36 AM. J. LEGAL HIST. 1 (1992).

189. *See*, *e.g.*, Olson v. United States, 292 U.S. 246, 255 (1934) (holding that the condemnee is entitled to be placed "in as good a position pecuniarily as if his property had not been taken.").

190. *See generally* Kelo v. City of New London, 545 U.S. 469 (2005).

191. *See generally id.*

192. ELY, *supra* note 184, at 193.

ownership. Use by the public, as shippers or passengers, was held to be adequate.[193] As Thomas Cooley, the leading constitutional scholar of the day, recognized, the judicial response to the railroad cases led to a general weakening of restraints upon the exercise of eminent domain.[194] Over time, the use-by-the-public test proved difficult to administer: How many people had to have access to the property that was taken? And at what price? In addition, the changing role of government in economic development made the test increasingly impractical. In consequence, the requirement of public use was replaced in judicial interpretation by the more relaxed requirement of public purpose. What that meant was addressed in *Berman v. Parker*,[195] decided in 1954, in which the US Supreme Court held that the requirement was satisfied by any government purpose permitted by the police power, the general authorization to act on behalf of public health, safety, and welfare.[196] It may be said today that it is the purpose of the taking, not the use of what was taken that is important.

The most difficult question concerning "public purpose" was whether it would be satisfied if a government took private property and transferred it to another private party. "Taking the property of A and giving it to B" had long been the paradigm case of a violation of due process.[197] But in 2005, in *Kelo v. City of New London*,[198] a sharply divided US Supreme Court upheld such a taking as part of a comprehensive redevelopment plan.[199] The case arose in the fraught context of depriving sympathetic homeowners of their property for the purpose of turning it over to a corporation that promised to bring jobs and benefits to the community.[200] Although the majority of justices approved the taking, they were careful to point out that they were deciding only the minimum requirements of the Fifth Amendment and that the states were free to impose stricter standards.[201]

Although the Court's decision in *Kelo* was consistent with precedent and respectful of state and local decision making, it was

193. *See generally Kelo*, 545 U.S. 469.

194. THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 36 (1880).

195. 348 U.S. 26 (1954).

196. *Id.*

197. *See* JOHN V. ORTH, DUE PROCESS OF LAW: A BRIEF HISTORY 33–50 (2003).

198. 545 U.S. 469 (2005).

199. *Id.*

200. *Id.*

201. *Id.*

greeted with widespread criticism. Many states promptly accepted the Court's invitation by adopting statutes and even constitutional amendments to limit compulsory acquisition.[202] Defenders of property rights continue to protest the decision to this day, producing a popular book about one of the properties condemned, *The Little Pink House*, in 2009,[203] followed in 2018 by a feature-length film of the same name.[204]

While the taking in *Kelo* followed the usual procedure of an action brought by the condemning authority against named property owners, it sometimes happens that property owners themselves commence an action, claiming that the government has already taken their property or an interest in it. Because of the reversal of the usual parties, this is commonly referred to as "inverse condemnation."[205] In *United States v. Causby*,[206] a leading case from 1946 concerning air rights, property owners prevailed in an action to recover damages from the United States for the value of an easement taken by the military's regular low-altitude flights over their property.[207]

Although *Causby* involved the taking of an easement, a familiar property right, inverse condemnation has also been successfully invoked in a case brought by Native Americans claiming a taking of their ancestors' right to pass property by devise or inheritance.[208] Because state courts sometimes reject claims of inverse condemnation by holding that the property right in question never existed or was previously extinguished,[209] the suggestion has been made that there may be such a thing as a "judicial taking."[210]

---

202. *See* Donald E. Sanders et al., *The Aftermath of Kelo,* 34 REAL ESTATE L. J. 157 (2006).

203. JEFF BENEDICT, THE LITTLE PINK HOUSE: A TRUE STORY OF DEFIANCE AND COURAGE (2009).

204. THE LITTLE PINK HOUSE (Brightlight Pictures 2018).

205. Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective of Penn Central Transportation Co. v. City of New York*, 13 WM. & MARY BILL RTS. J. 679 (2005).

206. United States v. Causby, 328 U.S. 256 (1946).

207. The easement in *Causby* is now commonly referred to as an avigational easement.

208. Hodel v. Irving, 481 U.S. 704 (1987).

209. *See*, *e.g.*, State ex rel. Thornton v. Hay, 462 P.2d 671 (Or. 1969) (finding that the public had acquired an easement over ocean beaches by custom).

210. *See*, *e.g.*, Stevens v. City of Cannon Beach, 510 U.S. 1207 (Scalia, J., dissenting from the denial of a petition for a writ of certiorari) (involving title to the same real property that was involved in *State ex rel. Thornton v. Hay*). *Cf.* Palazzolo v. Rhode Island, 533 U.S. 606, 626 (2001) ("States do not have the unfettered authority to 'shape and define property rights and reasonable investment-backed expectations,' leaving landowners without recourse against unreasonable regulations.").

While inverse condemnation describes cases of actual taking, it is also possible for government action to reduce the market value of private property by regulations restricting use. Although commonly referred to as "regulatory takings," these cases do not involve government acquisition of title to the affected property.[211] More properly understood as a deprivation of an interest in property protected by the Due Process Clause, regulatory takings demonstrate the extent to which the two clauses—Due Process and Takings—continue to influence one another.

In one of the earliest cases to recognize a regulatory taking, *Pennsylvania Coal Co. v. Mahon*,[212] decided in 1922, the US Supreme Court struck down a statute that prohibited a mining company from removing coal that might cause a subsidence, damaging structures on the surface. Writing for the Court, Justice Oliver Wendell Holmes extended the traditional definition of "taking" by declaring that when the diminution of a property's value "reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act."[213] In short, he stated, "If regulation goes too far it will be recognized as a taking."[214] But only a few years later, in the 1926 case of *Village of Euclid v. Ambler Realty Co.*,[215] the Court upheld a zoning ordinance that restricted use and thereby lowered property values, making clear that regulations that diminish value to a lesser extent do not constitute a taking.[216]

For the last century, the justices have struggled to determine when regulations go "too far." At times, the Court has seemed inclined to favor "community rights" over individual ownership. In the leading case of *Penn Central Transportation Co. v. New York*,[217] decided in 1978, it upheld a municipal regulation that prohibited a landowner from modifying a building deemed historic, emphasizing the building's esthetic value to the public and denying that the owner had any "investment-backed expectations" of being permitted to change the use

211. Joseph William Singer, *Justifying Regulatory Takings*, 41 OHIO N.U.L. REV. 601 (2015).

212. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

213. *Id.* at 413.

214. *Id.* at 415.

215. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

216. *Id.*

217. Penn Cent. Transp. Co. v. New York, 438 U.S 104 (1978).

of the property.[218] More often than not, regulations are upheld unless they are so restrictive that they render the property essentially valueless.[219]

Worries persisted that the rights of individual property owners were being sacrificed, and in 1982, the Court held that a regulation that required a "permanent physical occupation of property," even of only a very small portion, for the benefit of other persons, was a prohibited taking.[220] In a later case, the Court raised the prospect of damage awards for excessive regulation by holding that a property owner may be entitled to compensation for the temporary loss of use when restrictions on the use of property were later held to be invalid.[221] Expressive of the new judicial solicitude for the rights of property owners were decisions that invalidated certain conditions imposed on the grant of building permits.[222] Today, the test is often whether the regulation appears to force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[223]

V. CONCLUSION: COMPARATIVE REFLECTIONS

What we have found is that the final appellate courts in all three jurisdictions have played and play a paramount role in balancing the interests of the community in the form of justice needs/costs and the individual right to private property However, while the Indian and Australian courts seem to favor the interests of the state/community over those of the individual—albeit for very different reasons—the US Supreme Court tends to side much more frequently with the holder of private property. As such, the individual right seems to have a priority

218. *Penn Cent. Transp. Co.*, 438 U.S at 123-28; *see also Murr*, 137 S.Ct. at 1943; *Palazzolo*, 533 U.S. at 617.

219. See *Murr*, 137 S.Ct. at 1942; *Palazzolo*, 533 U.S. at 617; Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992).

220. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

221. First English Evangelical Lutheran Church of Glendale v. Cty. of Los Angeles, 482 U.S. 304 (1987).

222. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (holding that a state agency's grant of a building permit conditioned on the landowner's dedication of an easement to the public was a taking that required compensation); Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (holding that city planners had the burden of showing that there was a "rough proportionality" between the condition of the required dedication of a portion of the property for flood control and traffic improvements and the particular harm caused by the proposed development).

223. *Murr*, 137 S.Ct. at 1950 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

in American law not recognized in India and Australia. This results in very different placements along our Continuum for each of the three jurisdictions.

Each of the three jurisdictions considered here reveal variable methods of balancing the need to meet justice costs with the protection of private property. In Diagram 2, we place the three jurisdictions along the Justice Needs-Protection of Private Property Continuum. The placement of each nation begins with its constitutional compulsory acquisition provision and is subject to movement based upon judicial and legislative interpretation and application of that provision.

Diagram 2. Positions of India, Australia, and the United States on the Justice Needs-Protection of Private Property Continuum

The United States focusses primarily on the limitation on the takings power, and treats it as an individual right, thereby establishing a broader ambit of protection to private property. Thus, while it might have started somewhere around the middle of the Continuum, as did Australia, judicial interpretation has pushed much further towards the protection of private property end. Armed with the power of judicial review and backed in many cases by a strong public commitment to property rights, the courts have enforced the constitutional restraints on the exercise of the government's power of eminent domain. Property may be taken only for "public use" and with "just compensation." Although the public use requirement was relaxed in the interest of facilitating improvements in infrastructure and in response to the government's expansive exercise of its police power, the courts have remained vigilant in enforcing the requirement of just compensation. To prevent uncompensated government takings, the courts recognized

actions for inverse condemnation. And to prevent the uncompensated deprivation of property rights by excessive government regulations, the courts recognized regulatory takings and scrutinized the fairness of specific requirements.

Australia provides seemingly extensive federal government control, focusing on the power compulsorily to acquire rather than the limitation on that power. While section 51(xxxi) would seemingly place the Australian position somewhere at the middle of the Justice Needs-Private Property Continuum, the consistent interpretation of the provision by the High Court, treating it as a strong grant of power, tends to move it in the direction of stronger provision for meeting justice costs. So, too, does the treatment of the limitation as acting to restrain legislative activity as opposed to an individual right, although some protection remains for private property when the exercise of such power enlivens the just terms guarantee. The High Court has accomplished this position through the use of a very wide definition of property coupled with a close textual reading of "just terms" and "purpose in respect of which" contained in section 51(xxxi), such that many acquisitions which would constitute a taking if dealt with in the United States, are considered acceptable adjustments of private property rights in Australia. This results in what might otherwise appear to a be a placement at the middle of our Continuum to an oscillation around the middle range of that Continuum, moving from greater protection for the interests of the community through the Commonwealth power compulsorily to acquire property to greater protection for individual private property, depending upon the purpose (pursuant to the exercise of a Commonwealth legislative power) in respect of which the property is acquired.

India reveals a third position on the Continuum, close to that of Australia, but arrived at through the joint action of both the judicial and the legislative branches of the Indian federal government. What is unique about the Indian placement is that while the ostensible rationale for its position on the state power end—that such acquisitions are for public purposes—the true rationale is quite different: rather than for public purposes, the underlying reality behind such acquisitions is elite economic interest. India's placement, then, demonstrates two important points about the Continuum. On the one hand, both the judiciary and the legislature can shift a jurisdiction's position on the Continuum. More importantly, though, on the other hand, it demonstrates how such

shifts of position may appear to be for one reason, but in fact be for quite different purposes altogether.

Examining and therefore placing India, Australia, and the United States along our Continuum proves a valuable exercise, for two reasons. First, and most obviously, it allows for a deeper consideration of the ways in which a state may act so as to meet the minimal justice requirements for its citizens through the re-distribution of private property. While we find that every state attempts to achieve some minimal level of justice in the allocation of goods and resources, the priority attached to this function, and the reasons given for exercising it, are often very different. This in turn has implications for the strength of a correlative individual right to private property. And, second, the exercise of plotting these three jurisdictions along our Continuum demonstrates how a similar exercise is possible with any state's law of compulsory acquisition.