

Brooklyn Journal of International Law

Volume 32 | Issue 2

Article 2

2007

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Recommended Citation

Donna R. Christie, *A Tale of Three Takings: Taking Analysis in Land Use Regulation in the United States, Australia, and Canada*, 32 *Brook. J. Int'l L.* (2007).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol32/iss2/2>

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A TALE OF THREE TAKINGS: TAKING ANALYSIS IN LAND USE REGULATION IN THE UNITED STATES, AUSTRALIA, AND CANADA

Donna R. Christie *

I. INTRODUCTION

The roots of the American, Australian, and Canadian legal systems spring from a common English heritage. Similarly, their conceptions of property draw on a common heritage, including the Magna Carta¹ and the writings of Blackstone² and Locke,³ with the result that protection of property is a prominent feature of all three legal systems. When the government expropriates private property within these democratic societies, there is a presumption and, in some cases, a constitutional compulsion to compensate the owner.

Beginning in the 1920s, the U.S. Supreme Court deviated from the principle that compensation is only required when the government takes possession of or acquires a legal interest in property. In *Pennsylvania Coal Co. v. Mahon*,⁴ the Supreme Court held that regulating the use of property, in that case Pennsylvania Coal's mineral rights, may also require compensation if the regulation "goes too far."⁵ "Regulatory taking" claims did not become common, however, until the 1970s when land use and environmental regulation became pervasive; because these regulations seriously devalued or limited the use of land, property rights advocates, not only in the United States but also in Australia and Canada, began to seek more extensive protection. By the 1990s, cases in both Aus-

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1. MAGNA CARTA (1215), available at http://www.archives.gov/exhibits/featured_documents/magna_carta/translation.html.

2. *E.g.*, WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765).

3. *E.g.*, JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

4. 260 U.S. 393 (1922).

5. *Id.* at 415.

tralia and Canada seemed to follow *Mahon's* lead by requiring compensation when land use regulations seriously devalued mineral rights.

This article surveys and compares the development of the concept of regulatory taking in the United States, Australia, and Canada in the context of land use regulation. Part II discusses the seminal cases in the three countries, all coincidentally involving mineral rights. Part III examines the constitutional underpinnings of protection of property in the three countries. Finally, Part IV looks at each country's struggle to balance important public interests reflected in land use and environment regulation with protection of private property and to develop a consistent theory of regulatory taking.

II. THREE SEMINAL CASES

A. The United States: Pennsylvania Coal Co. v. Mahon

The provision in the Fifth Amendment of the U.S. Constitution stating that "private property [shall not] be taken for public use, without just compensation"⁶ limits the federal government's⁷ "tacit . . . pre-existing power"⁸ of eminent domain by requiring that such takings of property be compensated.⁹ Prior to 1922 and the Supreme Court's decision in *Pennsylvania Coal Co. v. Mahon*,¹⁰ this limitation had been generally understood as applying to circumstances where the government actually appropriated land or ousted the private land holder.¹¹ Justice Holmes' determination in *Mahon* that property might be "taken" without physical appropriation is credited with introducing the concept of regulatory tak-

6. U.S. CONST. amend. V.

7. In addition, "the Fifth Amendment . . . applies against the States through the Fourteenth Amendment." *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 623 n.1 (1981); *see also* *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 122 (1978); *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897).

8. *United States v. Carmack*, 329 U.S. 230, 241-42 (1946).

9. The so-called Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314 (1987). The Fifth Amendment also provides that no "person . . . shall . . . be deprived of property, without due process of law." U.S. CONST. amend. V.

10. 260 U.S. 393 (1922).

11. *See* *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) ("Prior to Justice Holmes' exposition . . . it was generally thought that the Takings Clause reached only a direct appropriation of property, or the functional equivalent of a practical ouster of [the owner's] possession.") (internal citations omitted).

ing¹²—what has been termed as “[b]y far, the most intractable constitutional property issue”¹³ of modern American jurisprudence.

In *Mahon*, the Pennsylvania Coal Company challenged the constitutionality of the Kohler Act, a Pennsylvania statute prohibiting the mining of coal in a manner that would cause subsidence of “any structure used as a human habitation”¹⁴ and other structures. These included roads and railroads; public buildings, such as schools and hospitals; and commercial buildings, such as factories and stores.¹⁵ The Mahons attempted to invoke the statute to prevent the coal company from mining under their home in a way that would remove support and cause it to sink.¹⁶ The landowners held the property, however, under a deed from the coal company which conveyed the surface rights, but expressly reserved the right to remove all the underlying coal. The deed also stated that the landowners assumed the risk of subsidence and waived all claims for damages arising from future coal mining.¹⁷ The trial court invalidated the statute as unconstitutional, but the Pennsylvania Supreme Court upheld the law as a valid exercise of the police power.¹⁸

Justice Holmes agreed with the coal company that the police power could not be stretched so far¹⁹ as to extinguish the existing property and contract rights of the company without compensation. Holmes’s often-quoted maxim “that while property may be regulated to a certain extent, if a regulation goes *too far* it will be recognized as a taking”²⁰ is far from self-explanatory. His less aphoristic commentary did little to clarify further the extent to which government regulation can interfere with property rights before compensation is required. Holmes explained as follows:

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due proc-

12. See William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of Mahon*, 86 GEO. L.J. 813, 822 (1998) (citing authorities for this conceptualization of *Mahon*).

13. Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 561 (1984).

14. *Mahon*, 260 U.S. at 413.

15. 1921 Pa. Laws 1198.

16. *Mahon*, 260 U.S. at 412.

17. *Id.*

18. *Id.*

19. See *id.* at 413.

20. *Id.* at 415 (emphasis added).

ess clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it 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. So the question depends upon the particular facts.²¹

While Holmes highlighted the complete diminution of value of the coal company's property rights, he also considered in his analysis the weight to be given the public interest element of the law.²² He adjudged, however, that the public interest in "a single private house"²³ was not "sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights."²⁴ Further, in considering the general validity of the statute, Holmes also discounted the overall public interest in a problem created by the "short sighted[ness]" of public officials who had used eminent domain to acquire surface rights without a right of support.²⁵ In holding that the Kohler Act was not a valid exercise of the police power, Holmes summed up with the reminder that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."²⁶

Justice Brandeis' equally famous dissent in the case focused on the public interest aspects of the Kohler Act in preventing harm to the citizens of the state. Brandeis argued that legislation restricting use of land to protect the public health, safety, or morals from threatened harms is not a taking.²⁷ Brandeis contrasted regulation intended to confer benefits on the public, noting that to legitimate such a restriction on individual landowners, a certain reciprocity of advantage might be necessary.²⁸ "But where the police power is exercised, not to confer benefits upon property owners, but to protect the public from detriment and danger, there is . . . no room for considering reciprocity of advantage."²⁹

21. *Mahon*, 260 U.S. at 413.

22. Holmes paid some lip service to the judgment of the legislative body in acting in the public interest by stating: "The greatest weight is given to the judgment of the legislature but it is always open to interested parties to contend that the legislature has gone beyond its constitutional power." *Mahon*, 260 U.S. at 413.

23. *Id.*

24. *Id.* at 414.

25. *Id.* at 415.

26. *Id.* at 416.

27. *Mahon*, 260 U.S. at 417 (Brandeis, J., dissenting).

28. *Id.* at 422.

29. *Id.*

*B. Australia: Newcrest Mining (WA) Limited v. The Commonwealth of Australia*³⁰

Australia's Constitution of 1901 in section 51(xxxi) authorizes the Commonwealth³¹ to acquire property on "just terms"³² for "any purpose in respect of which the Parliament has power to make laws" under that section.³³ The Australian High Court's *Newcrest Mining* decision in 1997 has been described as "the first time under Australian law [that] land use restrictions have been held to constitute an acquisition of property for which there is a constitutionally guaranteed right to compensation."³⁴ In the *Tasmanian Dam Case*,³⁵ the High Court had previously articulated the rule that section 51(xxxi) and the requirement of just terms does not apply merely because "legislation adversely affects or terminates a pre-existing right that an owner enjoys in relation to his property" without actually effecting the acquisition of an interest in the property by the Commonwealth.³⁶

In *Newcrest Mining*, the company held mining leases at Coronation Hill in the Northern Territory granted by the Commonwealth. Proclamations in 1989 and 1991 made under the National Parks and Wildlife Con-

30. (1997) 190 C.L.R. 513 (Austl.).

31. The states of Australia are not subject to the constitutional requirement to provide just terms. *See id.* at 650.

32. "Just terms" here differs from "just compensation" under the U.S. Constitution. In *Nelungaloo Proprietary Ltd. v. Commonwealth*, (1948) 75 C.L.R. 495 (Austl.), the High Court confirmed that just terms does not guarantee full compensation. Justice Dixon's opinion stated that just terms "appears to refer to what is fair and just as between the community and the owner . . . [u]nlike 'compensation,' which connotes full money equivalence." *Id.* at 569. It should be noted, however, that just terms often requires full compensation, and a significant number of justices on the High Court have taken the position that full compensation is a requirement. Tom Allen, *The Acquisition of Property on Just Terms*, 22 SYDNEY L. REV. 351, 371-75 (2000).

33. AUSTL. CONST. § 51(xxxi). The section specifically enumerates the areas in which Parliament has the "power to make laws for the peace, order, and good government of the Commonwealth." *Id.* § 51. The just terms clause is a restriction on Parliament's legislative authority in that "it forbids the making of laws with respect to the acquisition of property . . . on terms that are not just." *Mutual Pools & Staff Pty. Ltd. v. Commonwealth*, (1994) 179 C.L.R. 155, 169 (Austl.). By implication, section 51(xxxi) also limits the power of Parliament to enact laws for compulsory acquisition of property under other authorities, referred to as other "heads of power" in Australian jurisprudence. *See id.* at 177.

34. Karla Sperling, *Going Down the Takings Path: Private Property Rights and Public Interest in Land Use Decision-Making*, 14 ENVTL. & PLAN. L.J. 427, 431 (1997).

35. *Commonwealth v. Tasmania (Tasmanian Dam Case)*, (1983) 158 C.L.R. 1 (Austl.).

36. *Id.* at 145.

servation Act of 1975³⁷ had the effect of extending the Kakadu National Park to include land covered by a number of Newcrest Mining's unexpired mineral leases. The Act had been amended in 1987 to provide: "No operations for the recovery of minerals shall be carried on in Kakadu National Park."³⁸ The amendments further provided that "the Commonwealth is not liable to pay compensation to any person by reason of the enactment of this Act."³⁹ Newcrest Mining sought to have the proclamations invalidated on the grounds that they constituted an acquisition of Newcrest's property without provision of "just terms" as required by section 51(xxxi) of the Constitution.⁴⁰

In contrast to Holmes' succinct opinion for the U.S. Supreme Court in *Mahon*,⁴¹ the High Court decision in *Newcrest Mining* consisted of seven separate opinions spanning over one-hundred pages. The primary focus of the opinions, however, was not on whether there had been an acquisition of property by the Commonwealth, but rather on the issue of whether section 51(xxxi) was applicable at all to the proclamations. The Commonwealth argued that it acted under the plenary power over the Northern Territory conferred by section 122 of the Constitution which was not qualified by the requirement of just terms.⁴² Four of the seven justices—Toohy, Gaudron, Gummow, and Kirby—found, for varying reasons, that section 51(xxxi) was applicable and found the proclamations invalid for failure to provide just terms in respect of the acquired property. Dissenting Justice Brennan joined them in finding that the proclamations would have effected an acquisition of property requiring just terms if section 51(xxxi) had been applicable.⁴³

The issue of whether the proclamations actually acquired property received relatively little attention by the High Court. Only Justice McHugh, a dissenter, directly discussed the effect of the proclamations in terms of the *Tasmanian Dam Case*.⁴⁴ Justice McHugh expressed no doubt that the mining leases were property within the purposes of section 51(xxxi), but suggested that just terms refers not only to the payment of compensation, but also to the Commonwealth's receiving some "benefit

37. National Parks and Wildlife Conservation Act, 1975, c. 7(8) (Austl.).

38. National Parks and Wildlife Conservation Amendment Act, 1987, c. 6 (Austl.).

39. *Id.* at c. 7.

40. *See Newcrest Mining*, (1997) 190 C.L.R. at 531.

41. The *Mahon* decision is only five pages in length. *See Mahon*, 260 U.S. at 393.

42. *Newcrest Mining*, (1997) 190 C.L.R. at 531.

43. Justice Brennan found that the proclamations "acquired property" from Newcrest, but that section 122, rather than section 51, was applicable and did not require just terms. *Id.* at 534.

44. *Id.* at 573.

or advantage.”⁴⁵ McHugh reasoned that although Newcrest Mining’s right to mine was adversely affected, the Commonwealth received no proprietary interest in the minerals.⁴⁶ Even a total extinguishment of Newcrest’s interest required no compensation if there was no gain by the Commonwealth.⁴⁷ Regardless, McHugh concluded that Newcrest had not forfeited any property interest—its right to exploit those interests had been “merely . . . impinge[d]” upon by the proclamations.⁴⁸

Justice Gummow⁴⁹ conceded that the proclamations’ language did not effect a direct acquisition of property,⁵⁰ but he had no difficulty concluding that the results of proclamations were not simply an extinguishment of a statutory privilege under a licensing system⁵¹ or “merely an impairment of the bundle of rights constituting the property of Newcrest.”⁵² He stated that the Conservation Act had “the effect, as a legal and practical matter, of denying to Newcrest the exercise of its rights under the mining tenements . . . [resulting in] sterilisation of the rights constituting the property in question.”⁵³ The “identifiable benefit or advantage” acquired by the Commonwealth did not have to be identical to what was taken from Newcrest.⁵⁴ The benefit to the Commonwealth was not the right to the minerals prior to the expiration of the leases, but the ability to operate the park unhampered by any mineral operations by Newcrest.⁵⁵

Justice Kirby agreed that the prohibition on mining operations resulted in an acquisition of Newcrest’s mining tenements,⁵⁶ but his strong position on the relation of the Constitution to individual property rights distinguished his opinion. Kirby categorized property as a fundamental right,⁵⁷ and argued that the Constitution should be interpreted in a man-

45. *Id.* See also *The Tasmanian Dam Case*, (1983) 158 C.L.R. at 145 (“The emphasis in s. 51(xxxi) is not on a ‘taking’ of private property but on the *acquisition* of property for purposes of Commonwealth.”).

46. *Newcrest Mining*, (1997) 190 C.L.R. at 573.

47. *Id.*

48. *Id.*

49. Justice Gummow was joined by Justices Toohey, Gaudron, and Kirby on this issue.

50. *Newcrest Mining*, (1997) 190 C.L.R. at 633.

51. *Id.* at 635.

52. *Id.*

53. *Id.*

54. *Id.* at 634.

55. *Id.*

56. *Newcrest Mining*, (1997) 190 C.L.R. at 639.

57. *Id.* at 658–59.

ner that preserves fundamental rights⁵⁸ and produces a result that is not “manifestly unjust.”⁵⁹

*C. Canada: The Queen v. Tener*⁶⁰

Canada’s Constitution Act⁶¹ distributes power between the federal government and the provinces,⁶² and while the provinces have broad power to expropriate property pursuant to their authority over property and civil rights,⁶³ the federal government’s power of expropriation is limited to taking property in relation to its specific legislative authorities.⁶⁴ Unlike the United States and Australia, Canada has no federal constitutional provision to guarantee compensation for expropriation of property.⁶⁵ The federal government and all the provinces and territories have, however, enacted land expropriation acts⁶⁶ and other statutes to include compensation provisions. A right to compensation depends on whether there has been an expropriation of property within the scope of a specific law which provides for compensation.⁶⁷

58. “Where the Constitution is ambiguous, this Court should adopt the meaning which conforms to the principles of fundamental rights rather than an interpretation which would involve a departure from such rights.” *Id.* at 657. “Where there is an ambiguity in the meaning of the Constitution, as there is here, it should be resolved in favour of upholding such fundamental and universal rights.” *Id.* at 661.

59. *Id.* at 639.

60. [1985] 1 S.C.R. 533 (Can.).

61. Constitution Act, 1867, 30 & 31 Vict. Ch. 3 (U.K.), as reprinted in R.S.C., No. 5 (Appendix 1985).

62. *Id.* § 32.

63. See ERIC C.E. TODD, THE LAW OF EXPROPRIATION AND COMPENSATION IN CANADA 32 (1992).

64. *Id.*

65. *Id.* at 31–32. Professor Todd notes that section 1(a) of the Canadian Bill of Rights, which applies only to national legislation, does recognize “the right of the individual to . . . enjoyment of property and the right not to be deprived thereof except by due process of law.” *Id.* at 34. He states that due process, however, “seems to mean nothing more than ‘in accordance with the common law and statute law as it exists at any particular time.’” *Id.* (internal citations omitted). Further, section 2 of the Bill of Rights allows the Parliament, through express declaration in legislation, to infringe upon or abrogate rights. *Id.*

66. See Expropriation Act, R.S.C., ch. E-21 (1985) (Can.); Northwest Territories Expropriation Act, R.S.N.W.T., ch. E-11 (1988); Nova Scotia Expropriation Act, R.S.N.S., ch. 156 (1989); Ontario Expropriations Act, R.S.O., ch. E-26 (1990); Prince Edward Island Expropriation Act, R.S.P.E.I., ch. E-13 (1988); Quebec Expropriation Act, R.S.Q., ch. E-24 (1983); Saskatchewan Expropriation Act, R.S.S., ch. E-15 (1978); Yukon Expropriation Act, R.S.Y., ch. 81 (2002).

67. Further, Canadian common law provides no basis for compensation. See *infra* Part IV.C.

In *Tener*, the plaintiffs were successors in title to grants of mineral rights issued by the Crown in lands that in 1939 were incorporated into Wells Gray Provincial Park.⁶⁸ Originally, Wells Gray was designated a Class B park, which allowed for some mining exploration and development to continue.⁶⁹ With the Park Act⁷⁰ in 1965, holders of mineral rights were required to obtain a park use permit to exercise those rights within a park.⁷¹ Then in 1973, Wells Gray was upgraded to a Class A park,⁷² which under the Provincial Parks Act⁷³ meant that park use permits could be issued only when “necessary to the preservation or maintenance of the recreational values of the park involved.”⁷⁴ The Teners unsuccessfully applied for several permits between 1974 and 1977, and were finally notified in 1978 that no new exploration or development would be allowed in the park.⁷⁵ The Teners then filed suit seeking compensation for acquisition of the mineral claims, past expenditures on the claims, and the present value of the loss of opportunity to exploit the minerals.⁷⁶

Much of the *Tener* opinion is dedicated to a discussion of which act or acts were relevant and whether the acts provided for compensation. Justice Estey, writing for the majority of the Canadian Supreme Court,⁷⁷ reminded that there is a “longstanding presumption of a right to compensation”⁷⁸ and noted the principle stated in *Attorney-General v. De Keyser’s Royal Hotel, Ltd.*⁷⁹ that “[u]nless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation.”⁸⁰ The Park Act, it was concluded, provided authority for expropriation of land⁸¹ and incorporated

68. *Tener*, [1985] 1 S.C.R. at 553–54.

69. *Id.* at 555.

70. R.S.B.C., ch. 31 (1965) (Can.).

71. *Tener*, [1985] 1 S.C.R. at 554–55.

72. *Id.* at 555.

73. R.S.B.C., ch. 211 (1936) (Can.). In 1973, the Mineral Act, R.S.B.C., ch. 244 (1960) (Can.), was also amended to require authorization by the Lieutenant Governor in Council for exploitation of mineral rights in a park.

74. Park Act, R.S.B.C., ch. 31 § 9(1)(a).

75. *Tener*, [1985] 1 S.C.R. at 537–38.

76. *Id.* at 538.

77. Justice Estey wrote for the five-member majority. The two other justices also concurred in the majority’s conclusions.

78. *Tener*, [1985] 1 S.C.R. at 559.

79. [1920] A.C. 508, 542 (H.L.) (U.K.).

80. *Tener*, [1985] 1 S.C.R. at 559; *see also* *The Queen v. Fisherman’s Wharf Ltd.*, [1982] 144 D.L.R.3d 21, 28–33 (N.B.C.A.) (discussing the development of this principle in Canadian case law).

81. *Tener*, [1985] 1 S.C.R. at 559–60.

by reference the compensation provisions of the Ministry of Highway and Public Works Act.⁸²

In determining whether there had been an expropriation, the majority focused on what the government had acquired through the denial of permits, i.e., the benefit to the park.⁸³ “The denial of access to these lands . . . amounts to a recovery by the Crown of a part of the right granted to the respondents in 1937. This acquisition by the Crown constitutes a taking from which compensation must flow.”⁸⁴ Justice Estey carefully distinguished this type of regulation from zoning and regulation of activities on land which generally will not trigger compensation.⁸⁵ He stated that zoning and other land use regulations do not add to the value of public property, but that the denial of the permits did add value to the park and constituted an expropriation of the Teners’ interest in the land.⁸⁶ The case was therefore referred to a tribunal for determination of the amount of compensation.

III. IN THE BEGINNING: PROPERTY AND THE CONSTITUTIONS

A discussion of the degree to which property is recognized and receives protection may logically start with a nation’s conception of the role of property in its society and the extent to which property is given constitutional status.⁸⁷ There is a rich literature on the nature of property and the justification for private property,⁸⁸ but in the context of regula-

82. *Id.* at 560.

83. *Id.* at 565.

84. *Id.* at 563.

85. *Id.* at 557, 564. Justice Estey noted an exception when zoning is used to “depress the value of property as a prelude to the compulsory taking of the property for a public purpose.” *Id.* at 557.

86. *Id.* at 565.

87. With a plethora of emerging democracies in the last two decades, this historical issue has reemerged as a issue of contemporary debate. See Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997).

88. The literature is far too broad to summarize here, but for some of the most influential writings see GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT* (1997); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967); JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* (1998); RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); Ronald J. Krotoszynski, *Fundamental Property Rights*, 85 GEO. L.J. 555 (1997); Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319 (1987); Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097 (1981); JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* (1990); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982); Carol Rose, *Mahon Re-*

tory takings and the constitutions of the three countries discussed in this article, two models seem most relevant. The first model rejects the absolutist notions of Blackstone⁸⁹ and ascribes both private and public aspects to property.⁹⁰ The private aspects are bound up in the concept of personal liberty and autonomy, while the public aspect focuses on the role that property serves in society.⁹¹ If government follows a classically republican tradition, private property is subordinate to the public interest;⁹² liberalism, however, espouses that government exists to protect individual liberty and property.⁹³ The second, related model equates property with power. To the extent that the right of property may limit

constructed: Why the Takings Issue Is Still a Muddle, 57 S. CAL. L. REV. 561 (1984); Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); RICHARD SCHLATTER, *PRIVATE PROPERTY: THE HISTORY OF AN IDEA* (1951); William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972); Cass R. Sunstein, *On Property and Constitutionalism*, 14 CARDOZO L. REV. 907 (1993); Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127 (1990).

89. Blackstone defined the “right of property” as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.” WILLIAM BLACKSTONE, 2 COMMENTARIES *2. His discussions of property also included the following observations:

The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community.

WILLIAM BLACKSTONE, 1 COMMENTARIES *134–35.

90. Gregory Alexander explains that while property serves an individual function, “securing a zone of freedom for the individual in the realm of economic activity,” it also:

serve[s] the public good. This conception does not so much socialise ownership as it conceives the ends which property is to serve as being social. . . . That is, property is privately owned just insofar as this serves the common welfare, where the common welfare is conceived as more than merely the aggregate of individual preference satisfaction.

Gregory S. Alexander, *Constitutionalising Property: Two Experiences, Two Dilemmas*, in *PROPERTY AND THE CONSTITUTION* 88, 89–90 (Janet McLean ed., 1999) [hereinafter Alexander, *Constitutionalising Property*].

91. *See id.*

92. ELY, *supra* note 88, at 33 (“The sacrifice of individual interests to the greater of the whole formed the essence of republicanism.”).

93. “Government . . . is instituted no less for protection of property, than for the protection of individuals.” William Michael Treanor, *The Origins and Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 710 (1985) [hereinafter Treanor, *Origins of Just Compensation*].

the power of the government and the majority over individuals, property serves to preserve freedom and liberty.⁹⁴ This need to limit government and safeguard property is inconsistent with republicanism's faith in legislative bodies as the "voice of the people . . . to perceive the common good and to define the limits of individual rights."⁹⁵ While these conceptions of property are not necessarily contradictory, they do create what Professor Carol Rose calls a "fundamental tension."⁹⁶

The current constitutions of the United States, Australia, and Canada were each adopted approximately a century apart,⁹⁷ giving the framers of the latter two not only the benefit of the prolific scholarship on property, but also the ability to draw upon the constitutional history of the United States in considering the extent to which property would receive constitutional protection. Each country's constitutional history provides some insights into the perceptions of the country's Founders or Framers concerning the nature of property and degree of protection it would be afforded in their society.

A. The Constitutional Provisions of the United States

Neither the first state constitutions nor the Articles of Confederation included a just compensation clause.⁹⁸ During America's colonial and revolutionary period, compensation for government appropriation of land

94. See NEDELSKY, *supra* note 88, at 223 ("Property set bounds between a protected sphere of individual freedom and the legitimate scope of government authority."). Property and power also come together in the realm of democratic political participation, as property provides the power to participate effectively in the polity. See Treanor, *Origins of Just Compensation*, *supra* note 93, at 699.

95. Treanor, *Origins of Just Compensation*, *supra* note 93, at 701.

96. Rose, *supra* note 13, at 587-92. Laura Underkuffler-Freund posits that "[p]roperty describes the tension between individual and collective . . . [and that] the tension . . . is a part of the concept of property, itself." Laura Underkuffler-Freund, *Takings and the Nature of Property*, 9 CAN. J. L. & JURISPRUDENCE 161, 168 (1996); see also Gregory S. Alexander, *Takings and the Post-Modern Dialectic of Property*, 9 CONST. COMMENT. 259, 264 (1992) (discussing the incompatibility of "self-regarding" and "communitarian" views of property).

97. The United States Constitution was adopted by a constitutional convention in 1787 and came into force in 1788; the Australian Constitution came into effect in 1901; Canada's Constitution Act was adopted in 1982, but it describes the "Constitution of Canada" as comprising the Constitution Act, 1982 and thirty other acts and orders included in a schedule. Constitution Act § 52(2), 1867, 30 & 31 Vict. Ch. 3 (U.K.), as reprinted in R.S.C., No. 5 (Appendix 1985).

98. Expropriation without compensation in these times was common. See Treanor, *Origins of Just Compensation*, *supra* note 93, at 698 ("Loyalist property was seized. Undeveloped land was taken for roads. Goods of all types were impressed for military use.").

was not a firmly entrenched principle.⁹⁹ State legislatures confiscated the land of Loyalists, created obstacles to payment of British debts, issued paper money, and passed debtor relief laws.¹⁰⁰ The insecurity of property rights contributed to the dislocation of economic relations and instability of society, and led many political leaders to call for a stronger national government.¹⁰¹

The debate in the United States leading to the 1788 Constitution directly pitted liberal conceptions against the republican values of the revolutionary era.¹⁰² It had been no coincidence that the Declaration of Independence drafted by Thomas Jefferson referred to “life, liberty, and the pursuit of happiness” as “unalienable rights,”¹⁰³ rejecting Locke’s well-known formulation of “life, liberty, and property.”¹⁰⁴ Jefferson’s republican principles valued property “not as an end in itself but as a foundation for republican government.”¹⁰⁵ Property was among the private interests that should be subordinate to the common good.¹⁰⁶ But it was James Madison who set the agenda for the constitutional convention and who was the architect of the Bill of Rights. Jennifer Nedelsky aptly summarized the Madisonian and liberal Federalist views of property as follows:

[P]roperty was the central instance of rights at risk in a republic. It was property that had alerted them to the inherent vulnerability of minority rights in popular government, and thus property that became the focal point for the broader problem. And property was not just an abstract symbol. It was a right whose security was essential to the economic and political success of the new republic. If property could not be protected, not only prosperity, but liberty, justice, and the international strength of the new nation would ultimately be destroyed.¹⁰⁷

99. *Id.* at 695–98; see also William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 785 (1995) [hereinafter Treanor, *Takings Clause*]. But see ELY, *supra* note 88, at 25 (“The compensation principle, although recognized, was only imperfectly realized before the Revolution. Yet the colonists generally regarded just compensation as a fundamental principle.”).

100. See Treanor, *Origins of Just Compensation*, *supra* note 93, at 704.

101. See ELY, *supra* note 88, at 41.

102. See *id.* at 33–44.

103. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

104. See Treanor, *Origins of Just Compensation*, *supra* note 93, at 700.

105. See GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT* 27 (1997) [hereinafter ALEXANDER, *COMMODITY & PROPRIETY*].

106. NEDELSKY, *supra* note 88, at 29.

107. *Id.* at 6; see also ELY, *supra* note 88, at 42 (“Harboring little faith in the people, the [Federalist] framers were not democrats in any modern sense. Indeed, they viewed popular government as a potential threat to property rights.”).

Madison was unsuccessful, however, in inserting a statement of government's purpose in the Constitution that included protection of private property.¹⁰⁸ While the Constitution does include numerous provisions on economic interests relevant to property,¹⁰⁹ there is no specific "property clause" affirming a fundamental right of property.¹¹⁰

In the Bill of Rights, ratified three years after the Constitution,¹¹¹ Madison was able to incorporate specific protections for property.¹¹² As adopted, the Fifth Amendment provides, in relevant part, that "[n]o 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."¹¹³ The placement of property in the Fifth Amendment, rather than the First Amendment, raises questions about the degree of protection afforded by its inclusion in the Constitution. James W. Ely, Jr. argues that the placement of property in the Fifth Amendment along with the "criminal justice protections" creates a "close association of property rights with personal liberty,"¹¹⁴ linking property to fundamental civil rights.¹¹⁵ Richard Epstein, on the other hand, asserts that "all rights [in

108. ELY, *supra* note 88, at 54.

109. *Id.* at 43–47.

110. *See id.* at 46–47; Alexander, *Constitutionalising Property*, *supra* note 90, at 90.

111. The Constitution was ratified in 1788, while the Bill of Rights was ratified in 1791.

112. Interestingly, the just compensation clause was the only provision in the Bill of Rights that had not been requested by any of the states. *See* Treanor, *Origins of Just Compensation*, *supra* note 93, at 708–09.

113. U.S. CONST. amend. V.

114. ELY, *supra* note 88, at 54. Ely goes so far as to state that "[t]he Fifth Amendment explicitly incorporated into the Constitution the Lockean conception that protection of property is a chief aim of government." *Id.*

115. After the adoption of the Bill of Rights, Madison expanded upon his definition of property in an essay simply entitled "Property." In that essay, Madison expressly linked property and civil rights:

There he explicitly contended that the term "property" has two meanings: it simultaneously embraces a private, Blackstonian conception and a public, if not civic, conception. The private meaning is [Blackstone's] familiar legal conception of property Madison emphasized that a second, "juster" meaning must be added to this common-law understanding in which property "embraces every thing to which a man may attach a value and have a right." The first meaning includes a man's "land," "merchandize," and "money." The second sense extends the meaning of property to include a person's opinions and "the free communication of them." It also includes "the free use of [one's] faculties and the free choice of the objects on which to employ them." This second meaning encompasses what we today would think of as "civil" rights.

the Bill of Rights] are . . . fundamental.”¹¹⁶ Gregory Alexander, however, draws attention to the fact that “property [has] not been treated as a fundamental right, equal in status to the Due Process Clause’s liberty interest or rights under the Equal Protection Clause.”¹¹⁷ He observes that “[c]ourts treat liberty interests as ‘fundamental,’ vigorously protecting them against all governmental encroachments save those undertaken for ‘compelling’ reasons. Property interests, on the other hand, cannot resist any governmental encroachment that passes a weak ‘rationality’ standard.”¹¹⁸

ALEXANDER, *COMMODITY & PROPRIETY*, *supra* note 105, at 68. Laura S. Underkuffler also argues, to a different end than Ely, that the Framers had a broad view of property:

The most apparent difference between this [comprehensive] conception of property and most contemporary [absolutist] formulations is its explicit inclusion of a very broad range of individual interests under the rubric of property. The comprehensive approach to property goes far beyond property as physical objects and their analogs to include freedom of expression, freedom of conscience, free use of faculties, and free choice of occupations. The inclusion of a broad range of individual rights, liberties, powers and immunities in the conception of property changes the nature of property’s concreteness. Its concreteness lies not in an actual or symbolic tie to corporeal or incorporeal objects, but in the mediating function that property serves between individual rights and governmental power.

Underkuffler, *supra* note 88, at 139.

116. EPSTEIN, *supra* note 88, at 143.

117. Gregory S. Alexander, *Property as a Fundamental Constitutional Right? The German Example*, 88 CORNELL L. REV. 733, 734 (2003) [hereinafter Alexander, *Fundamental Rights*]; see also Alexander, *Constitutionalising Property*, *supra* note 90, at 91–92 (stating that “property is not treated in American constitutional law as a fundamental right,” and that the Fifth Amendment “merely provides that” the government may not take property except for a public purpose and with just compensation). Cf. C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741 (1986) (arguing that some property rights should receive more constitutional protection); Ronald J. Krotoszynski, *Fundamental Property Rights*, 85 GEO. L.J. 555 (1997) (same).

118. Alexander, *Fundamental Rights*, *supra* note 117, at 735; see also Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 332 (1996) (“Other doubts about property are raised in the double standard of rights introduced by the notorious footnote four of *United States v. Carolene Products*, according to which ‘mere’ economic rights like property take a constitutional back seat to the rights associated with political participation or the avoidance of majoritarian oppression.”); Laura S. Underkuffler-Freund, *Property: A Special Right*, 71 NOTRE DAME L. REV. 1033, 1043 (1996) (arguing that property must receive less protection than other rights, such as freedom of speech or religion). Professor Alexander’s understanding has recently been reinforced by *Kelo v. New London*, 545 U.S. 469 (2005), and *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005). In both cases, the Supreme Court refused to apply a higher standard review

In spite of this disagreement among modern scholars about whether or not the “constitutionalization” of property in the Fifth Amendment establishes its status as a fundamental right, most commentators agree that Madison and his contemporaries expected the just compensation clause to have limited legal consequences.¹¹⁹ Madison intended that his proposals for the Bill of Rights be noncontroversial,¹²⁰ and, for the most part, he simply incorporated rights already recognized in state constitutions or common law.¹²¹ In the case of the property provisions of the Fifth Amendment, he apparently succeeded in his intent, because there is no evidence of any debate or opposition.¹²² A just compensation provision that applied only to the federal government¹²³ and only to physical tak-

for property interests, rejecting a substantive due process role for the Court in reviewing legislative determinations.

119. See Treanor, *Origins of Just Compensation*, *supra* note 93, at 708, 710–13; see also John F. Beggs, *The Theoretical Foundations of the Takings Clause and the Utilization of Historical Conceptions of Property in the Ecological Age*, 6 FORDHAM ENVTL. L.J. 867, 894 (1995) (“[T]he inclusion of a takings clause in the Constitution was not a significant concern of the Framers and therefore no such provision was included in the document. Even after the Convention, none of the states actually lobbied for the inclusion of a takings clause in the Bill of Rights.”); John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099, 1132–33 (2000) (stating that, at the time it was ratified, not much was said about the Takings Clause, and the Framers’ silence indicates that they understood the takings clause to be a “confirmation of the status quo”); Charles P. Lord, *Stonewalling the Malls: Just Compensation and Battlefield Protection*, 77 VA. L. REV. 1637, 1668 (1991) (stating that the Framers did not contemplate the Takings Clause playing a part in health or safety regulations or nuisance law).

120. See Treanor, *Origins of Just Compensation*, *supra* note 93, at 710 n.92 (“Madison proposed only amendments that would not ‘displease the adverse side [the Anti-Federalists].’”).

121. ELY, *supra* note 88, at 53.

122. *Id.* at 55; Treanor, *Origins of Just Compensation*, *supra* note 93, at 713. In fact, “[t]here are apparently no records of discussion about the meaning of the clause in either Congress or, after its proposal, in the states.” Treanor, *Takings Clause*, *supra* note 99, at 791.

123. See ELY, *supra* note 88, at 54; Treanor, *Origins of Just Compensation*, *supra* note 93, at 708. In a later Article, Treanor suggested that:

Madison would have liked the Takings Clause to have regulated state, as well as federal, actions. As a practical matter, however, Madison could not achieve this end directly. The movement to secure a bill of rights came from Anti-federalists who wanted to limit the national government’s power. Madison’s proposal to include in the Bill of Rights an amendment preventing the states from infringing freedom of the press and freedom of conscience and from denying jury trials was defeated by the Senate. Presumably, an attempt to make a takings requirement—a fairly novel right—binding against the states would

ings¹²⁴ could not have been particularly controversial at the time since the “federal government did not, in fact, exercise its eminent domain power until the 1870s.”¹²⁵

Indeed, both Federalists and Anti-Federalists believed protection of private property was necessary to promote prosperity.¹²⁶ But the Federalists saw the people, particularly the unpropertied majority, as the greatest threat to property. Fearing “democratic excesses,” the Federalists sought reliance on the judiciary, rather than the legislatures, to protect property rights.¹²⁷ The Fifth Amendment property provisions were intended to

have met with a similar fate. . . . [I]t seems that for political reasons he did not try to extend the Takings Clause to the states.

Treanor, *Takings Clause*, *supra* note 99, at 843 n.308 (internal citations omitted). The just compensation requirement of the Fifth Amendment was not found to be applicable to the states until rather late in its history. Treanor explains as follows:

It is clear that the Takings Clause is now deemed applicable to the states through the Fourteenth Amendment. Because the line between substantive due process and incorporation was not always a clear one, the precise case that incorporated the Takings Clause is a matter of dispute. The standard citation is to *Chicago, B. & Q. Ry. v. Chicago*, 166 U.S. 226, 239 (1897). Justice Stevens, however, has argued that this was a substantive due process case. Professor Siegel has stated that incorporation occurred in *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1896). In *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, 399 (1894), the Court appears to hold that the Takings Clause is incorporated through the Fourteenth Amendment's Equal Protection Clause.

Id. at 860 n.369 (internal citations omitted).

124. *See id.* at 798 (“The predecessor clauses to the Fifth Amendment's Takings Clause, the original understanding of the Takings Clause itself, and the weight of early judicial interpretations of the federal and state takings clauses all indicate that compensation was mandated only when the government physically took property.”); *see also* Lord, *supra* note 119, at 1668 (observing that Madison did not intend for the compensation clause to apply to anything other than “direct, physical takings”); Bernard Schwartz, *Takings Clause—“Poor Relation” No More?*, 47 OKLA. L. REV. 417, 420 (1994) (“Madison's word choice indicates that he ‘intended the clause to apply only to direct, physical taking of property.’”); Mark Tunick, *Constitutional Protections of Private Property: Decoupling the Takings and Due Process Clauses*, 3 U. PA. J. CONST. L. 885, 886 n.10 (2001) (“[P]roposing texts of early amendments to the Constitution, Madison suggested the following formulation of the Takings Clause: ‘No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation.’”).

125. Treanor, *Origins of Just Compensation*, *supra* note 93, at 709 n.78. Until *Kohl v. United States*, 91 U.S. 367 (1875), which clearly recognized the right of the federal government to condemn land, the federal government had traditionally requested the states to condemn land for federal use.

126. ALEXANDER, *COMMODITY & PROPRIETY*, *supra* note 105, at 405 n.83.

127. *Id.* at 405–06.

provide judicially enforceable limitations on government.¹²⁸ In his speech to Congress proposing the Bill of Rights, Madison conjectured that “[i]ndependent tribunals of justice will consider themselves in a peculiar manner guardians of those rights”¹²⁹ In this respect, Ely notes, “Madison proved to be a good prophet.”¹³⁰

Although the liberal ideology of the Federalists dominated the constitutional debate in the United States, even this brief overview of the history and politics reveals that Madison was constrained by competing republican values from completely realizing his vision of property in the Constitution and Bill of Rights.¹³¹ Many scholars reject the notion advocated by neoconservatives that the Constitution embodies a monolithic, classical, liberal view of property.¹³² Both republican and liberal views of property are represented in the history and politics of the constitutional era and “have been present in [United States] property tradition at least since the adoption of the Constitution.”¹³³

B. Australia's Constitutional Property Provisions

The Australian Constitution was drafted during a series of conventions in the 1890s.¹³⁴ The provision of the Constitution dealing with compulsory acquisition of property¹³⁵ was developed late in the debates and arose from concerns distinctly different from those addressed by the

128. See ELY, *supra* note 88, at 56; Treanor, *Origins of Just Compensation*, *supra* note 93, at 710–11; Treanor, *Takings Clause*, *supra* note 99, at 837.

129. James Madison, *Amendments to the Constitution* (June 8, 1789), in 12 THE PAPERS OF JAMES MADISON 196, 207 (Charles F. Hobson et al. eds., 1979).

130. ELY, *supra* note 88, at 56.

131. See *supra* text accompanying notes 107–10.

132. See, e.g., EPSTEIN, *supra* note 88, at 107–70 (exemplifying the liberal, neoconservative conception of property).

133. Alexander, *Constitutionalising Property*, *supra* note 90, at 92; see also Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667 (1988) (“[T]he liberal conception is only incompletely embodied in our constitutional practice.”); Treanor, *Takings Clause*, *supra* note 99, at 818 (“The power of the republican view of property during [the framing] period shows that there was no consensus among the framers that majoritarian decisionmakers could not be trusted to determine the appropriate level of protection for property interests.”).

134. Simon Evans, *Property and the Drafting of the Australian Constitution*, 29 FED. L. REV. 121, 121 (2001) (Austl.) [hereinafter Evans, *Drafting*]. The Australian Constitution came into effect on July 9, 1900. COLIN HOWARD, AUSTRALIAN FEDERAL CONSTITUTIONAL LAW 2 (3d ed. 1985).

135. This Article's discussion will focus on the power of compulsory acquisition of property from persons by the Commonwealth under section 51(xxxi) of the Australian Constitution.

property provisions of the Fifth Amendment of the U.S. Constitution.¹³⁶ Having rejected without debate the proposition that property should be a subject matter of Commonwealth legislative authority,¹³⁷ some of the Framers expressed concern about whether provisions of the proposed Constitution or power incidental to express legislative authorities created authority for the Commonwealth to acquire property for public purposes.¹³⁸ The brief debates on the subject concluded that “there must be a power of compulsory taking property for the purposes of the Commonwealth.”¹³⁹ That power was provided by section 51(xxxi), which empowers the Commonwealth Parliament to enact laws for 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.” The terms “acquisition,” “property,” and “just terms” were not defined.

Justice Dixon of the Australian High Court has posited that the roots of section 51(xxxi) are found in the U.S. Constitution, stating: “The source of [section] 51(xxxi) is to be found in the fifth amendment of the Constitution of the United States, which qualifies the power of the United States to expropriate property by requiring that it should be done on payment of fair compensation.”¹⁴⁰ The constitutional debates and the context of the inclusion of section 51(xxxi), however, provide no evidence of this rationale.¹⁴¹ Neither by reference nor by context does the Australian provision relate to the circumstances surrounding the adoption of the Fifth Amendment. The Australian property provision is included in a section of the Constitution segregating and enumerating the powers of Parliament, rather than being included in a bill of rights providing spe-

136. See R.W. Baker, *The Compulsory Acquisition Powers of the Commonwealth*, in *ESSAYS ON THE AUSTRALIAN CONSTITUTION* 194 (2d ed. 1961); Evans, *Drafting*, *supra* note 134, at 128; P. H. LANE, *LANE'S COMMENTARY ON THE AUSTRALIAN CONSTITUTION* 216 (1986) (“The sole source of Commonwealth legislative power to acquire compulsorily is s. 51(xxxi).”).

137. Evans, *Drafting*, *supra* note 134, at 125–26. Land law and property law are primarily a state responsibility. Under other heads of authority, however, the Commonwealth does to some extent regulate property. Australian Constitution section 51(xxvi) has allowed regulation of indigenous property rights, while section 51(xxix) has allowed environmental regulation associated with international treaty obligations. *Id.* at 125 n.9.

138. See Allen, *supra* note 32, at 352–53 (“In Australia, there was some doubt whether the Commonwealth was sovereign, and hence whether it would have the power of eminent domain in the absence of an express provision to that effect.”); see also Evans, *Drafting*, *supra* note 134, at 128–29; R. L. Hamilton, *Some Aspects of the Acquisition Power of the Commonwealth*, 5 *FED. L. REV.* 265, 266–67 (1973) (Austl.).

139. Evans, *Drafting*, *supra* note 134, at 129.

140. *Andrews v. Howell*, (1941) 65 C.L.R. 255, 282 (Austl.); see also *Australian Apple & Pear Marketing Bd. v. Tonking*, (1942) 66 C.L.R. 77, 82 (Austl.).

141. Evans, *Drafting*, *supra* note 134, at 130.

cific recognition of individual rights.¹⁴² Section 51(xxxi) is a positive grant of power limited by the purpose of the acquisition and the requirement of “just terms.” The Fifth Amendment is stated in the negative, limiting an inherent right of government.¹⁴³ Section 51(xxxi) was intended to assure that the government had the authority to exercise eminent domain, while the Fifth Amendment was intended to limit an inherent power of eminent domain by creating rights in individuals. The wordings of the two provisions, though somewhat similar, have distinct differences.¹⁴⁴ Justice Dixon later noted that American experience and judicial decisions, though helpful, “cannot be applied directly to s. 51(xxxi).”¹⁴⁵

The lack of debate surrounding section 51(xxxi) does not mean that property was not a central political issue in development of the Australian Constitution, rather that the context was quite different from the U.S. experience. Fear of a democratic government that would subject property rights to redistribution at the will of an unpropertied majority was not a significant issue in the Australian debates.¹⁴⁶ Commentators have attributed the lack of formal protections for property and civil rights in the Australian Constitution to the Framers’ confidence in the “institution of responsible government.”¹⁴⁷ Indeed, one objection raised to the inclusion of “just terms” in section 51(xxxi) was that it was improper to include words in a constitution that suggest that the Parliament might not “act strictly on the lines of justice.”¹⁴⁸ Further, Australia did not go through a period of revolutionary upheaval with widespread confiscations of the property of British and Loyalists.¹⁴⁹ Rather, the protection of British property and encouragement of continued British investment in Australia was an issue of major concern for the country’s economic fu-

142. See LANE, *supra* note 136, at 225.

143. See *supra* text accompanying notes 6–9.

144. The references to “acquisition” rather than “taking,” and “just terms” rather than “just compensation” are significant departures from the Fifth Amendment. GRAHAM L. FRICKE, *COMPULSORY ACQUISITION OF LAND IN AUSTRALIA* 8–9 (2d ed. 1982); see also Baker, *supra* note 136, at 220 (stating that their “intentions and wording” are different).

145. *Grace Bros. Pty. Ltd. v. Commonwealth*, (1946) 72 C.L.R. 169, 290 (Austl.).

146. Evans, *Drafting*, *supra* note 134, at 131.

147. Hilary Charlesworth, *The Australian Reluctance About Rights*, 31 OSGOODE HALL L.J. 195, 197 (1993) (Can.). Charlesworth, however, argues that reliance on responsible government is inadequate to protect interests of minorities. *Id.* at 198.

148. Evans, *Drafting*, *supra* note 134, at 128; see also Robert C. L. Moffat, *Philosophical Foundations of the Australian Constitutional Tradition*, 5 SYDNEY L. REV. 59, 85–86 (1965) (“[T]he protections to individual rights provided by the traditions of acting as honourable men were quite sufficient for a civilised society.”).

149. See Evans, *Drafting*, *supra* note 134, at 131.

ture.¹⁵⁰ In light of the “longstanding British and colonial tradition” in Australia of providing compensation when the government compulsorily acquired property,¹⁵¹ the debate centered not on the issue of a compensation clause, but on the “clarity and certainty of property rights and the impartial determination of property disputes”¹⁵² and on whether issues concerning property and investment would be subject to appeal to Britain’s Privy Council.¹⁵³

While the debates contain numerous references to protection of life, liberty, and property as the proper role of government,¹⁵⁴ it is clear that property did not serve the symbolic role that it did in the Madisonian conceptualization of property as a proxy for personal liberty.¹⁵⁵ In his analysis of the drafting of section 51(xxxi), Simon Evans concludes that “it is difficult to fix on an American constitutional provenance for . . . [section 51(xxxi)] and attribute to the Framers an intention that it reflect an American constitutional guarantee”¹⁵⁶ and that there is “no basis in the Debates” to determine that the section was intended “as a broad guarantee of individual rights.”¹⁵⁷ Although section 51(xxxi) was the first provision of its kind in the constitution of a Commonwealth country,¹⁵⁸ Evans suggests that the section draws more on the British tradition than on the U.S. Constitution.¹⁵⁹ In England, although the King and, later, Parliament could have compulsorily acquired property through the power of eminent domain without compensation, R. W. Baker points out that there is no historical evidence of the British Crown or Parliament having done so.¹⁶⁰ Robert Moffat also agrees that Australia’s “legal and philosophical traditions have been largely inherited from England”¹⁶¹ and suggests that references in the constitutional debates to the U.S. Constitution were not for purposes of imitating the United States, but “simply happened to serve the purposes of the debaters who used it to bolster

150. *Id.* at 138–39.

151. *Id.* at 132.

152. *Id.* at 138.

153. *Id.* at 138–40.

154. *See id.* at 129.

155. *See supra* text accompanying note 107.

156. Evans, *Drafting*, *supra* note 134, at 132.

157. *Id.* at 131.

158. Thomas Allen, *Commonwealth Constitutions and the Right Not To Be Deprived of Property*, 42 INT’L & COMP. L.Q. 523, 525 (1993).

159. Evans, *Drafting*, *supra* note 134, at 132.

160. Baker, *supra* note 136, at 194. For this proposition, Baker relies on research compiled in the case *Attorney-General v. De Keyser’s Royal Hotel Ltd.*, (1920) A.C. 508 (H.L.) (U.K.).

161. Moffat, *supra* note 148, at 77.

their arguments.”¹⁶² Both Baker¹⁶³ and Moffat¹⁶⁴ warn, however, that English, as well as American, authority must be used cautiously in interpreting section 51(xxxi). “[T]he particular interrelationships of institutional operation, tradition, and legal philosophy which have developed in the Australian circumstance have been clearly, if not distinctly, its own.”¹⁶⁵

C. Canada's Rejection of the Constitutionalization of Property

Like Britain, Canada does not have a constitution embodied in a single document.¹⁶⁶ The British North America (BNA) Act of 1867,¹⁶⁷ which in 1982 was renamed the Constitution Act, 1867,¹⁶⁸ was the country's first constitutional framework document. The BNA Act was enacted by the British Parliament and created the Dominion of Canada, which continued to be a British colony.¹⁶⁹ The Act did not attempt to incorporate all of Canada's constitutional principles, but merely to provide the rules necessary to establish the confederation and allocate power between the federal Parliament and the provincial legislatures.¹⁷⁰ The preamble of the Act itself stated that Canada's Constitution was to be similar in principle to Britain's.¹⁷¹ The BNA Act provided no process for amending Canada's constitution domestically, so the country's constitutional law continued to draw on a number of sources, including British law and tradition.¹⁷²

It is hardly surprising then that the BNA Act contained no U.S.-style bill of rights or specific provisions for protection of property. The Fathers of the Confederation were, however, quite aware of the tensions between property and democracy, and strongly supported liberal conceptions assuring the primacy of property.¹⁷³ The Confederation Debates also reflect the concerns for protection of property from majority rule.¹⁷⁴

162. *Id.* at 79.

163. Baker, *supra* note 136, at 198–99.

164. See Moffat, *supra* note 148, at 88.

165. *Id.*

166. See PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA § 1.2 (1997).

167. Constitution Act, 1867, 30 & 31 Vict. Ch. 3 (U.K.), as reprinted in R.S.C., No. 5 (Appendix 1985).

168. HOGG, *supra* note 166, § 53(2).

169. *Id.* § 1.2.

170. *Id.*

171. *Id.*

172. *Id.*

173. See Alexander Alvaro, *Why Property Rights Were Excluded from the Canadian Charter of Rights and Freedoms*, 24 CAN. J. POL. SCI. 309, 313 (1991).

174. *Id.*

But rather than memorializing individual rights in the BNA Act, the Canadian Fathers chose to protect property by establishing a Senate whose members were appointed from the propertied class.¹⁷⁵ The Senate's veto power over legislation passed by the House of Commons was intended to guarantee that property rights would not be subjected to majoritarian rule.¹⁷⁶

Canada's Senate proved to be ineffective in this role. Time and inflation made the property ownership requirement virtually meaningless. Senators voted on the basis of party affiliation rather than other interests,¹⁷⁷ and the public resented the idea of an appointed body exercising a veto power over legislation enacted by elected officials.¹⁷⁸ The model of responsible government adopted by Canada dictates that the ministers and cabinet are responsible to the elected House of Commons, not the Senate.¹⁷⁹ With "no obvious place in this scheme of things," the Senate exercises restraint in "recognition that, as an appointed body, it has no political mandate to obstruct the House of Commons."¹⁸⁰ Thus, property rights in Canada were subordinated to the dictates of democratic institutions.¹⁸¹

Support for more explicit protection of property and other individual rights and freedoms did not emerge until after World War II.¹⁸² In 1960,

175. Constitution Act para. 17, 1867, 30 & 31 Vict. Ch. 3 (U.K.), as reprinted in R.S.C., No. 5 (Appendix 1985). Qualifications for appointment to the Senate included ownership of property at least "[f]our thousand [d]ollars over and above his [d]ebts and [l]iabilities." *Id.* para. 23(4). The nature of the Senate and the franchise in relation to property were major issues in the Australian constitutional debates. In the end, it was resolved that both the Senate and House of Representatives would be elected, and that franchise would be the same for both. Evans, *Drafting*, *supra* note 134, at 144–47.

176. See Alvaro, *supra* note 173, at 313–14.

177. See *id.* at 315 ("The Senate . . . became . . . a rubber stamp for Commons legislation and a burial ground for political patrons.").

178. See *id.*; see also HOGG, *supra* note 166, § 9.4(c).

179. HOGG, *supra* note 166, § 9.4(c). "If government policy is defeated by the House of Commons, then the government must resign and make way, either for a new government that can command the support of the House of Commons, or for an election that will provide a new House of Commons." *Id.*

180. *Id.*

181. Alvaro notes that the property debate continued on the question of whether the federal or provincial legislatures had jurisdiction over property issues, not on "whether or not property ownership ought to have been subordinated to the dictates of legislatures." Alvaro, *supra* note 173, at 316.

182. See *id.*; see also Philip W. Augustine, *Protection of the Right to Property Under the Canadian Charter of Rights and Freedoms*, 18 OTTAWA L. REV. 55, 61 (1986). Augustine notes that in addition to the political and academic support that arose after World War II for adoption of a bill of rights, some members of the Supreme Court of Canada between 1938 and 1957 had begun to formulate an "implied bill of rights" based

the Canadian Bill of Rights¹⁸³ was enacted, not as a constitutional measure, but as an ordinary statute applicable only to the federal government.¹⁸⁴ Section 1(a) of the Canadian Bill of Rights provides:

It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination . . . the following human rights and fundamental freedoms, namely:

(a) the right of the individual to life, liberty, security of the person and the enjoyment of property and the right not to be deprived thereof except by due process of law.¹⁸⁵

Federal legislation that conflicts with Bill of Rights protections is inoperative, unless the conflicting legislation expressly states that it operates notwithstanding the Bill of Rights.¹⁸⁶ Canadian courts have been reluctant to read the Bill of Rights broadly, however, because it is simply a statute, not a constitutional document. It does “not reflect a clear constitutional mandate to make judicial decisions having the effect of limiting or qualifying the traditional sovereignty of Parliament.”¹⁸⁷

Section 1(a) of the Bill of Rights contains no requirement that the federal government compensate for the appropriation of property, but the language bears a close resemblance to the Fourteenth Amendment of the U.S. Constitution, which provides in relevant part: “nor shall any State deprive any person of life, liberty, or property without due process of law.”¹⁸⁸ The Fourteenth Amendment similarly does not incorporate a specific obligation for states to compensate individuals when property is appropriated, but the U.S. Supreme Court has found that the requirement of “just compensation” can be implied from the due process clause.¹⁸⁹ One Canadian commentator notes, however, that:

on the Constitution Act, 1867. However, “the implied bill of rights was never recognized by a majority of the [Court], and never extended to the protection of the right to property.” *Id.* at 60–61.

183. The Canadian Bill of Rights, S.C., ch. 44 (1960).

184. Hogg states that the government was “reluctant to resort to the anachronistic [amendment] procedures” and that the provinces would not have agreed to a bill of rights that applied to them. HOGG, *supra* note 166, § 32.1. Alvaro cites the possibility of the weakening of democratic institutions by subjecting legislation to review by a non-elected court as an additional factor. *See* Alvaro, *supra* note 173, at 316–17.

185. The Canadian Bill of Rights, S.C., ch. 44 § 1(a) (1960).

186. *See* R. v. Drybones, [1970] S.C.R. 282 (Can.).

187. R. v. Therens, [1985] 1 S.C.R. 613 (Can.); *see also* R. v. Bryan, [1999] 134 Man. R.2d 61 (Man. C.A.) (“Since the Bill of Rights is not a true constitutional document, there is no mandate to set aside the will of Parliament through judicial review.”).

188. U.S. CONST. amend. XIV.

189. *See* Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897).

Not only is this American jurisprudence irrelevant because its legal foundation is fundamentally different than ours, but in addition, our legal tradition is quite different. Before the enactment of the Canadian Bill of Rights and the Charter, our courts followed the English concept of “due process of law” which because of the doctrine of parliamentary sovereignty prevented any review of legislative action¹⁹⁰

Courts interpreting the due process provision have also rejected the notion of importing the American concept of substantive due process into interpretation of section 1(a) of the Canadian Bill of Rights. In *R. v. Appleby (No. 2)*,¹⁹¹ the New Brunswick Supreme Court rejected the argument that due process should be interpreted under the Canadian Bill of Rights as having substantive, in addition to procedural, content.¹⁹² In *Curr v. The Queen*,¹⁹³ Justice Laskin of the Canadian Supreme Court demonstrated his wariness of applying American substantive due process analysis to the Canadian Bill of Rights, stating:

The very large words of s. 1(a), tempered by a phrase (“except by due process of law”) whose original English meaning has been overlaid by American constitutional imperatives, signal extreme caution to me when asked to apply them in negation of substantive legislation validly enacted by a Parliament in which the major role is played by elected representatives of the people.¹⁹⁴

Justice Laskin did not, however, totally exclude the possibility of reading substantive content into the due process rights if given “compelling reasons” and “objective and manageable standards” to guide the court.¹⁹⁵

The Canadian Supreme Court most recently addressed the question of the substantive content of section 1(a)’s property provisions in *Authorson v. Canada (Att’y General)*.¹⁹⁶ While stating that “Canadian courts have been wary of recognizing such protections,”¹⁹⁷ the Supreme Court again did not completely reject the proposition that section 1(a) may embody

190. Jean McBean, *The Implications of Entrenching Property Rights in Section 7 of the Charter of Rights*, 26 ALBERTA L. REV. 548, 567 (1988) (Can.).

191. [1976] 15 N.B.R.2d 650 (N.B.C.A.).

192. *Id.*; see also *Smith, Kline & French Laboratories Ltd. v. Can. (Att’y General)*, [1986] 1 F.C. 274 (Fed. Ct.).

193. [1972] S.C.R. 889 (Can.).

194. *Id.* at 902.

195. *Id.* at 899–900.

196. [2003] 2 S.C.R. 40 (Can.).

197. *Id.* at 56. The Court attributed this to the American experience during the Lochner era. *Id.* The Court also noted, however, that recent jurisprudence under the Charter of Rights and Freedoms might lead to more substantive protections. *Id.* at 58.

substantive property protections.¹⁹⁸ The Court was clear, however, that a right to compensation for expropriation of property was not among any possible protections. The Bill of Rights recognizes and protects only rights that existed in 1960 prior to its enactment.¹⁹⁹ The Court found that “[a]t that time it was undisputed, as it continues to be today, that Parliament had the right to expropriate property if it made its intention clear.”²⁰⁰ The Court bolstered its conclusion by referring to Justice Ridell’s oft-quoted statement in a turn-of-the-century case:

In short, the Legislature within its jurisdiction can do everything that is not naturally impossible, and is restrained by no rule human or divine. If it be that the plaintiffs acquired any rights, which I am far from finding, the Legislature had the power to take them away. The prohibition, “Thou shalt not steal,” has no legal force upon the sovereign body. And there would be no necessity for compensation to be given.²⁰¹

Consequently, property rights, which were not protected before 1960, receive no additional protection by the Bill of Rights from legislation that unambiguously provides for expropriation without compensation.

For those who had advocated a Canadian bill of rights, the 1960 enactment was a distinct disappointment: it applied only to the federal government and not to the provinces; it was merely a statute subject to repeal, amendment, or override by the Parliament; and its application and interpretation by the courts was narrow and non-interventionist.²⁰² Among those who sought more protections was Pierre Trudeau, Prime Minister of Canada for most of the period between 1968 and 1984.²⁰³ For the Trudeau government, amendment of the Constitution to include an effective bill of rights was a primary goal. This was achieved with en-

198. *See id.* (“It is unnecessary to decide now exactly what other substantive protections, if any, might be conferred by the *Bill of Rights*’ s. 1(a)’s property guarantees.”).

199. *Id.* at 52; *see also* *R. v. Miller*, [1977] 2 S.C.R. 680 (Can.) (holding that no absolute right to life existed prior to the Bill of Rights, so a death penalty statute was not inoperative); *R. v. Burnshine*, [1975] 1 S.C.R. 693 (Can.) (holding that a right to uniform sentencing across different regions of Canada did not exist prior to 1960, and was therefore not protected by the Bill of Rights).

200. *Authorson*, [2003] 2 S.C.R. at 58.

201. *Florence Mining Co. v. Cobalt Lake Mining Co.*, [1909] 18 O.L.R. 275, 279 (Ont. C.A.).

202. *See HOGG*, *supra* note 166, § 33.1. Hogg notes that in the twenty-two years between the Bill of Rights’ enactment and the Charter’s adoption, only one Supreme Court case held an act of Parliament to be inoperative for breach of the Bill of Rights. *Id.* § 32.5.

203. *See id.* § 33.1.

actment through constitutional procedures of the Charter of Rights and Freedoms as Part I of the new Constitution Act, 1982.²⁰⁴

The Charter is applicable to both the federal government and the provinces.²⁰⁵ Section 52(1) of the Constitution Act, 1982 provides that the Constitution is the “supreme law of Canada.” Section 52(3) “entrenches” the Charter by providing that it can only be changed through procedures laid out in the Constitution Act, 1982 and not through ordinary legislation.²⁰⁶ The entrenchment of the Charter laid the foundation for the courts rather than legislatures to exercise the primary responsibility for the protection of individual rights and freedoms. The scope of the Charter’s guaranteed rights is, however, limited by section 1 which “implicitly authorizes the courts to balance the guaranteed rights against competing societal values.”²⁰⁷ Section 1 provides:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.²⁰⁸

The Charter’s expanded degree of judicial review allows the courts to determine “whether the enacting legislative body has made an appropriate compromise between the civil libertarian values guaranteed by the Charter and the competing social or economic objectives pursued by the law.”²⁰⁹

Providing the ability for a non-elected court to overturn the decisions of democratically elected officials was not uncontroversial,²¹⁰ and the

204. *Id.*

205. *Id.*

206. *See id.* § 1.4.

207. *Id.* § 33.4(c).

208. Canadian Charter of Rights and Freedoms art. 1, Part 1 of the Constitution Act 1982 (Schedule B to the Canada Act 1982, ch. 11 (U.K.)) [hereinafter Canadian Charter of Rights and Freedoms].

209. HOGG, *supra* note 166, at § 33.4(c); *see also* Reference re Section 94(2) of the Motor Vehicle Act (*Motor Vehicle Act Reference Case*), [1985] 2 S.C.R. 486 (Can.).

210. The Canadian Supreme Court in *The Motor Vehicle Act Reference Case*, summarized the controversy as follows:

Yet, in the context of s. 7, and in particular of the interpretation of “principles of fundamental justice,” there has prevailed in certain quarters an assumption that all but a narrow construction of s. 7 will inexorably lead the courts to “question the wisdom of enactments,” to adjudicate upon the merits of public policy. From this have sprung warnings of the dangers of a judicial “super-legislature” beyond the reach of Parliament, the provincial Legislatures and the electorate. The Attorney-General for Ontario, in his written argument, stated that, “the judiciary is neither representative of, nor responsive to the electorate

controversy was perhaps most dramatically played out in the case of property rights. Section 7 of the Charter, as adopted, reads:

Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.²¹¹

The section has some conspicuous omissions. First, the right to enjoyment of property is not included as in section 1(a) of the Bill of Rights. Second, the words “due process” are omitted and replaced by the concept of “fundamental justice.” The Trudeau government originally proposed to include property rights within section 7. Attempts were made before enactment of the Charter to amend the section to entrench property rights, but proposed amendments were defeated.²¹²

While the precise influence of the U.S. Constitution on the protection of property rights in the Australian Constitution is not clear, there is no doubt of its effect in the case of the Constitution Act, 1982. In spite of the Canadian Supreme Court’s conservative interpretation of the Bill of Rights’ section 1 “due process” provision²¹³ and additional checks and balances included in the Charter,²¹⁴ Canada’s Department of Justice feared that inclusion of property rights and due process in a constitutional enactment might lead to “extreme substantive intervention” by the courts that would interfere with social and economic regulation.²¹⁵ The specter of the U.S. Supreme Court’s *Lochner* era²¹⁶ “cast its shadow over Canada as well”²¹⁷ and “demonstrated the hazard of granting to the

on whose behalf, and under whose authority policies are selected and given effect in the laws of the land.” This is an argument which was heard countless times prior to the entrenchment of the Charter but which has, in truth, for better or for worse, been settled by the very coming into force of the Constitution Act, 1982.

Motor Vehicle Act Reference Case, [1985] 2 S.C.R. at 497.

211. Canadian Charter of Rights and Freedoms, *supra* note 208, art. 7.

212. See Alvaro, *supra* note 173, at 320–26; Augustine, *supra* note 182, at 67–68; McBean, *supra* note 190, at 550.

213. The U.S. Supreme Court has rejected substantive due process analysis in the context of economic rights. See *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

214. See *supra* text accompanying notes 208–10 for a description of the limits imposed by section 1 of the Charter.

215. See Augustine, *supra* note 182, at 67.

216. For an excellent discussion of the influence of *Lochner* on the drafting of the Canadian Charter, see Sujit Choudhry, *The Lochner Era and Comparative Constitutionalism*, 2 INT’L J. CONST. L. 1, 16–27 (2004).

217. HOGG, *supra* note 166, § 44.7(b). Sujit Choudhry provides interesting insights into the meaning of *Lochner* to Canadian constitutional thought. He states that:

judges the power to review legislation on a ground as inherently indeterminate as substantive due process.”²¹⁸ The provinces viewed constitutional entrenchment of property rights as encroaching upon their jurisdictions,²¹⁹ and they were concerned that foreign ownership laws and land use regulation might be found by activist courts to violate property rights guarantees.²²⁰ The New Democratic party took the position that inclusion of property rights in section 7 would “generally render the provinces incapable of effectively legislating with respect to land utilization.”²²¹ Professor Peter Hogg concludes:

The framers of Canada’s Charter of Rights deliberately omitted any reference to property in s. 7, and they also omitted any guarantee of the obligation of contracts. These departures from the American model, as well as the replacement of “due process” with “fundamental justice” . . . were intended to banish *Lochner* from Canada.²²²

The banishment was not quite complete, because the Supreme Court of Canada has interpreted section 7 of the Charter as having substantive as well as procedural aspects in the interpretation of the term “fundamental justice.”²²³ In the *Motor Vehicle Reference Case*,²²⁴ the Court rejected the procedural/substantive dichotomy,²²⁵ stating that the Court had al-

[T]he *Lochner* era looms as parable or a cautionary tale. *Lochner* is regarded as a powerful symbol of deep and profound constitutional failure The invocation of *Lochner* operates rhetorically as an epithet, as a signal of potential danger. Indeed, the ongoing citation of *Lochner* . . . bears testimony to its rhetorical power.

Choudhry, *supra* note 216, at 53.

218. HOGG, *supra* note 166, § 44.10(a).

219. See Alvaro, *supra* note 173, at 319–20.

220. See McBean, *supra* note 190, at 550; see also A. J. van der Walt, *The Constitutional Property Clause: Striking a Balance Between Guarantee and Limitation*, in PROPERTY AND THE CONSTITUTION 109, 110 (Janet McLean ed., 1999).

221. See McBean, *supra* note 190, at 550.

222. HOGG, *supra* note 166, § 44.7(b).

223. The Court came to this conclusion in spite of clear evidence that the framers intended the phrase to be synonymous with “principles of fundamental justice” which is understood in Canadian jurisprudence to mean procedural due process. McBean, *supra* note 190, at 568–69.

224. [1985] 2 S.C.R. 486 (Can.).

225. Justice Lamer, writing for the majority, explained, as follows:

The substantive/procedural dichotomy narrows the issue almost to an all-or-nothing proposition. Moreover, it is largely bound up in the American experience with substantive and procedural due process. It imports into the Canadian context American concepts, terminology and jurisprudence, all of which are inextricably linked to problems concerning the nature and legitimacy of adjudica-

ways engaged in review of the content of legislation and that the Charter simply broadened the scope of that review.²²⁶ Justice Lamer stated the “interpretation should be . . . a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter’s protection.”²²⁷ Fundamental justice is guaranteed, however, only in relation to the rights incorporated in section 7. Professor Hogg asserts that the omission of property rights from section 7 precludes the interpretation of the terms “liberty” and “security” to include economic rights, “otherwise, property, having been shut out of the front door, would enter by the back.”²²⁸

The Bill of Rights was not repealed by the Charter, but it now has limited effect. Only two provisions of the Bill of Rights were not duplicated in the Charter: section 1(a), the due process clause which protects enjoyment of property; and section 2(e), which guarantees a fair hearing in designated circumstances.²²⁹ Section 1(a) remains operative and continues to provide procedural protections for property at the federal, but not provincial, level.

tion under the United States Constitution. . . . We would, in my view, do our own Constitution a disservice to simply allow the American debate to define the issue for us, all the while ignoring the truly fundamental structural differences between the two Constitutions. Finally, the dichotomy creates its own set of difficulties by the attempt to distinguish between two concepts whose outer boundaries are not always clear and often tend to overlap. Such difficulties can and should, when possible, be avoided.

Id. at 498.

226. *Id.* at 495–96.

227. *Id.* at 500.

228. HOGG, *supra* note 166, § 44.9; *see also* Augustine, *supra* note 182, at 75–76. Although discussion of the effects of the North American Free Trade Agreement (NAFTA) is beyond the scope of this Article, it should be noted that some scholars suggest that a new “back door” for property rights protection has been created by NAFTA. These scholars argue that NAFTA’s provisions on compensation to investors for direct or indirect expropriations will lead to an Americanization of Canadian constitutional law and the “potential rise of Canada’s own period of Lochnerism.” David Schneiderman, *NAFTA’s Takings Rule: American Constitutionalism Comes to Canada*, 46 U. TORONTO L.J. 499, 536 (1996) (Can.); *see also* Ricardo Grinspun & Robert Kreklewich, *Consolidating Neoliberal Reforms: Free Trade as a Conditioning Framework*, 43 STUD. IN POL. ECON. 33 (1994) (arguing that NAFTA is a “conditioning framework” through which external policies and constraints imposed by transnational actors become internalized outside the democratic process).

229. *See* HOGG, *supra* note 166, § 32.1.

The issue of constitutional property rights remains controversial in Canada,²³⁰ but relatively recently the Manitoba Court of Appeal succinctly assessed the current status of such rights: “Section 1(a) of the Canadian Bill of Rights, which protects property rights through a ‘due process’ clause, was not replicated in the Charter, and the right to ‘enjoyment of property’ is not a constitutionally protected, fundamental part of Canadian society.”²³¹

D. Overview

While the inclusion of property in a country’s constitution does not answer the question of whether compensation is required when government regulation affects only the value or use of property, simply the fact that property rights have been included in a nation’s constitution has consequences. Professor Nedelsky points out that “constitutionalizing property is *an extremely powerful symbol* of the public/private divide which designates governmental measures affecting property as public ‘interferences’ with a sacred private realm—which then bear the burden of justification.”²³² Furthermore, she contends that entrenchment of a constitutional property guarantee creates a protected sphere of private property that is increasingly insulated from regulation and that reinforces the myth of property as a pre-political and fundamental right.²³³ She also argues convincingly that it bolsters libertarian arguments that market forces, rather than state intervention, should control property use and distribution.²³⁴ Thus, Professor Nedelsky concludes that constitutional entrenchment of property creates an irresolvable conflict between protection of private property interests and promotion of public interests.²³⁵

The constitutionalization of property enshrines the courts, rather than legislative bodies, as the primary arbiters of the private property/public interest conflict. It is then within the competence of courts to determine the scope of private property protection through their definitions of “property” and interpretations of the meaning of “taking,” “acquisition,”

230. Some of the provinces, commentators, and legislators have continued to argue for inclusion of property protections in the Constitution. See Alvaro, *supra* note 173, at 328–29; Augustine, *supra* note 182, at 80; McBean, *supra* note 190, at 582–83.

231. R. v. Bryan, [1999] 134 Man. R.2d 61 (Man. C.A.).

232. Jennifer Nedelsky, *Should Property Be Constitutionalized? A Relational and Comparative Approach*, in PROPERTY LAW ON THE THRESHOLD OF THE 21ST CENTURY 417, 422 (G. E. van Maanen & A. J. van der Walt eds., 1996).

233. *See id.* at 422–23.

234. *Id.*

235. *Id.* at 426–28.

and “due process.”²³⁶ Property is shielded from redefinition and redistribution through democratic processes to the extent courts choose to apply constitutional property clauses as a “fundamental barrier-guarantee.”²³⁷

Property played a markedly different role in the constitutional history of the three countries. Although republican views are represented in U.S. constitutional history, there is no doubt that the Federalist framers did view property as a symbol of personal liberty—a metaphor for a realm of individual autonomy beyond the reach of the democratic will. The guarantees of the Bill of Rights were intended to be interpreted by the courts to protect the individual from an overreaching government. Australia’s Constitution, on the other hand, contains no bill of rights, only constitutional authorization to acquire property on just terms, buried deep in a long list of areas subject to federal government jurisdiction and regulation, and generally intended to empower the federal government within certain limits. There is little in the constitutional history to suggest that it was intended to serve the role of a constitutional guarantee that had been consecrated in a bill of rights.

Australia’s legal traditions concerning compulsory acquisition of property seem to be drawn largely from Britain, but another particularly fundamental constitutional tradition seems distinctly and importantly drawn from the American constitutional experience. The power of judicial review exercised by Australia’s High Court²³⁸ is “a striking and fundamental contrast with the power of the English courts.”²³⁹ Through its broad power of judicial review, Australia’s High Court has had the opportunity to interpret section 51(xxxi) as creating a constitutional guarantee of individual property rights,²⁴⁰ moving beyond the limited roots of the provi-

236. In the United States, for example, the Supreme Court expanded the protection of property through its interpretation of “due process” in the Fourteenth Amendment to include a requirement of compensation for state property acquisition. *See supra* note 7.

237. Van der Walt, *supra* note 220, at 125.

238. Neither the U.S. nor Australian constitutions specifically provide for judicial review. Australia’s constitutional debates, however, indicate that its framers intended the kind of review exercised by the U.S. Supreme Court. For example, speaking in the debates of the 1898 Convention, Sir Isaac Isaacs stated:

We are taking infinite trouble to express what we mean in this Constitution; but as in America so it will be here, that the makers of the Constitution were not merely the Conventions who sat, but the Judges of the Supreme Court. Marshall, Jay, Story, and all the rest of the renowned Judges, who have pronounced on the Constitution, have had just as much to do in shaping it as the men who sat in the original Conventions.

Moffat, *supra* note 148, at 84.

239. *Id.*

240. *See* LANE, *supra* note 136, at 222.

sion designed to assure that the federal government could exercise a limited power of eminent domain to acquire property.²⁴¹

Certain justices on the High Court and U.S. Supreme Court have recently expressed views that seem to reinforce Professor Nedelsky's concerns about the constitutionalizing of property leading to increasingly broad protections. Chief Justice Rehnquist of the U.S. Supreme Court indicated that he saw "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation."²⁴² Justice Kirby of the High Court has also stated that although the Australian Constitution "may sometimes fall short of giving effect to fundamental rights,"²⁴³ when ambiguous, the Constitution should be interpreted to protect such "universal and fundamental rights" as the right to a "legal process which includes provision for just compensation" for government acquisition of private property.²⁴⁴

Property has been broadly defined in both countries' constitutional contexts,²⁴⁵ but not to the extent that "use," in and of itself, is considered "property" that is constitutionally protected.²⁴⁶ Certainly, when the framers of the American and Australian Constitutions crafted their provisions for protection of property, they could not have imagined the current regulatory state and the extent to which property use and values might be affected by land use and environmental laws. Canada, however, drafted the Constitution Act, 1982 fully aware of the need for environmental and land use regulation in the modern world and the tensions that such regulations create with absolutist theories of private property. Further, Canada was cognizant of the history of U.S. courts in developing a theory of regulatory taking and in reviewing legislative actions on the basis of substantive due process. Canada's decision *not* to constitutionalize property

241. See van der Walt, *supra* note 220, at 129–30. Simon Evans' analysis also concluded that the provision, as it was originally included, was assumed to cover only the appropriation of land. See Evans, *Drafting*, *supra* note 134, at 130.

242. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

243. *Newcrest Mining*, (1997) 190 C.L.R. at 657.

244. *Id.* at 658.

245. P. H. Lane synthesizes from a number of High Court cases the following definition of property: "[P]roperty is the most comprehensive term that can be used . . . comprising any interest in any property . . . not only conventional estates and interests acknowledged at law and in equity whether in reality or in personalty, but also innominate and anomalous interests." LANE, *supra* note 136, at 222 (internal quotations omitted). The U.S. Supreme Court has defined property as "everything capable of private ownership." *San Francisco Nat'l Bank v. Dodge*, 197 U.S. 70, 90 (1905).

246. For example, general zoning laws that restrict certain uses of property do not normally require compensation. See *infra* Part IV.B.

manifested the nation's intention that both the public and private aspects of property should continue to be fully realized through federal and provincial legislative action. This is not to say that in Canada compensation for taking of property does not continue to be generally presumed,²⁴⁷ but that compensation as a constitutional guarantee is not considered fundamental to a just and democratic society.

IV. MODERN DEVELOPMENT OF THE REGULATORY TAKINGS DOCTRINE IN THE LAND USE CONTEXT

A. The United States Experience: The Search for Categorical Rules

Within four years of the U.S. Supreme Court's decision in *Mahon*,²⁴⁸ the Court decided the case of *Village of Euclid v. Ambler Realty Co.*,²⁴⁹ which found that governments could limit the use and affect the value of land through zoning ordinances that were not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."²⁵⁰ Because the property was alleged to have decreased in value by seventy-five percent, the case is often cited for the proposition that diminution of value alone does not establish a taking of property requiring compensation.²⁵¹ Recognizing the need for governments to be able to respond to the needs of a complex and evolving society,²⁵² the Court applied an extremely deferential, "fairly debatable" standard²⁵³ to judicial review of the means legislative bodies used to address such issues. Very little additional practical or theoretical guidance emerged from the Supreme Court in the next fifty years to assist governments or property owners in determining when a regulation "goes too far" and requires compensation until the 1970s, when land use and environmental regulations exploded.

247. See *infra* text accompanying notes 346–55.

248. See *supra* Part II.A for a discussion of the Court's decision in *Mahon*.

249. 272 U.S. 365 (1926).

250. *Id.* at 395. Two years later, however, in *Nectow v. Cambridge*, 277 U.S. 183 (1928), the Supreme Court did strike down a zoning ordinance as violative of due process. Citing *Euclid*, the Court found that the ordinance had "no foundation in reason and [was] a mere arbitrary or irrational exercise of [the police] power." *Id.* at 187 (citing *Village of Euclid*, 272 U.S. at 395).

251. See, e.g., *Penn Central Transp. Co.*, 438 U.S. at 131.

252. See *Village of Euclid*, 272 U.S. at 386–87.

253. *Id.* at 388.

With its *Penn Central Transp. Co. v. New York City*²⁵⁴ decision in 1978, the Supreme Court acknowledged the challenge of creating a “set formula”²⁵⁵ for determining when a regulation requires compensation and opted to continue the “essentially ad hoc, factual inquir[y]”²⁵⁶ that characterized the few earlier cases. The Court did, however, identify factors of “particular significance”²⁵⁷ in evaluating a takings claim, including the “economic impact of the regulation on the claimant . . . , particularly, the extent to which the regulation has interfered with distinct investment-backed expectations,”²⁵⁸ and the “character of the governmental action.”²⁵⁹ The identification of these factors, however, was only a prelude to the application of a complex and unpredictable balancing test to determine “when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.”²⁶⁰

In the next decade, the Supreme Court undertook to provide clearer guidelines for identifying regulatory action that required compensation under the Fifth Amendment. With *Agins v. City of Tiburon*²⁶¹ in 1980, the Court attempted to summarize the state of the law by pronouncing that the “application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests²⁶² or denies an owner economically viable use of his land.”²⁶³

254. 438 U.S. 104 (1978). *Penn Central* involved a claim that New York had taken the valuable “air rights” above Grand Central Station when, based on designation of the site as a landmark under New York City’s Landmarks Preservation Law, the city refused permission to build a fifty-five story office tower over the railroad terminal.

255. *Id.* at 124 (quoting *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962)).

256. *Id.*

257. *Id.*

258. *Id.*

259. The Court further described the effect of the character of the government action as follows: “A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.” *Penn Central Transp. Co.*, 438 U.S. at 124 (internal citations omitted).

260. *Id.*

261. 447 U.S. 255 (1980).

262. *Id.* at 260.

263. *Id.* (citing *Penn Central Transp. Co.*, 438 U.S. at 138 n.36). Rather than referring to *Mahon*, *Tiburon* oddly refers to the concession by the City of New York that *Penn Central* would be entitled to relief if the Terminal ceased to be economically viable. *Penn Central*’s footnote 13 describes the scheme of “relief” available under New York’s landmark legislation when the owner of a landmark cannot make “a reasonable return on the landmark site.” *Penn Central Transp. Co.*, 438 U.S. at 112 n.13. Possible relief included the acquisition of a protective interest in the property by the city through eminent domain. *Id.*

Two years later, in *Loretto v. Teleprompter Manhattan CATV Corp.*,²⁶⁴ the Supreme Court announced the first categorical taking rule: When government requires a property owner to suffer a permanent physical invasion of her property—no matter how minor—compensation must be provided.²⁶⁵ The Court created a second categorical taking rule in the 1992 case *Lucas v. South Carolina Coastal Council*.²⁶⁶ There the Court found a per se taking in the unusual circumstance where a regulation deprives an owner of all “economically beneficial uses” of the property.²⁶⁷

Then in 2005 in *Lingle v. Chevron U.S.A. Inc.*,²⁶⁸ the Supreme Court revisited the rules announced in *Agins* in order to clarify the distinction between regulatory takings and violations of due process. The Court succinctly surveyed the history of regulatory taking jurisprudence and concluded as follows:

Although our regulatory takings jurisprudence cannot be characterized as unified, these three inquiries (reflected in *Loretto*, *Lucas*, and *Penn Central*) share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights. The Court has held that physical takings require compensation because of the unique burden they impose: A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner’s right to exclude others from entering and using her property—perhaps the most fundamental of all property interests. In the *Lucas* context, of course, the complete elimination of a property’s value is the determinative factor. And the *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation’s economic impact and the degree to which it interferes with legitimate property interests.²⁶⁹

264. 458 U.S. 419 (1982).

265. *Id.* at 438, 441. The Court in *Loretto* held that a law requiring landlords to allow installation of cable facilities on apartment buildings constituted a taking.

266. 505 U.S. 1003 (1992). *Lucas* involved coastal regulations that limited or prohibited building within certain areas based on erosion and coastal hazard evaluations. All of Lucas’ lots fell within a zone where no habitable structures could be built, and the trial court had found that the property had been rendered “valueless.” *Id.* at 1007.

267. *Id.* at 1019. The Court also found, however, that the regulation would not constitute a per se taking if, based on background principles of property law and nuisance, the regulation proscribes a use that was not part of the owner’s title to begin with. The burden of establishing this exception is, however, on the government. *Id.* at 1027.

268. 544 U.S. 528 (2005).

269. *Lingle*, 544 U.S. at 539 (internal citations omitted).

The Court noted that “government regulation—by definition—involves the adjustment of rights for the public good,”²⁷⁰ but the role of the Takings Clause, the Court reiterated, is to “bar 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.”²⁷¹

The Court found that in *Agins* it had inappropriately commingled due process and takings inquiries. While takings analysis focuses primarily on the effect of a regulation on private property, the “substantially advances” formula of *Agins* “probes the regulation’s underlying validity.”²⁷² The Court concluded that *Agins*’s “substantially advances” test is “not a valid method of identifying regulatory taking for which the Fifth Amendment requires just compensation.”²⁷³ In striking down this part of the *Agins* formula, the Court rejected heightened substantive due process analysis of land use regulation. Such a rule, the Court stated:

would require courts to scrutinize the efficacy of a vast array of state and federal regulations—a task for which courts are not well suited. Moreover, it would empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies. . . . [W]e have long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation. The reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established.²⁷⁴

The unanimous decision in *Lingle* does not disturb the three primary theories for asserting a compensable taking: the two relatively narrow categorical taking circumstances—a physical occupation or a taking of

270. *Id.* at 538.

271. *Id.* at 542–43.

272. *Id.* at 543. The Court explained:

In stark contrast to the three regulatory takings tests discussed above, the “substantially advances” inquiry reveals nothing about the magnitude or character of the burden a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is distributed among property owners. In consequence, this test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property; it is tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause.

Id. at 542. The Court further noted that no amount of compensation can authorize a regulation that violates due process requirements. *Id.* at 543.

273. *Lingle*, 544 U.S. at 545.

274. *Id.* at 544 (internal citations omitted).

all value—and the *Penn Central* factors that the Court noted serve “as the principal guidelines for resolving regulatory takings claims.”²⁷⁵ The case does seem to signal, however, somewhat of a retreat in takings jurisprudence. Future regulatory takings cases will focus on whether a regulation is “functionally comparable to government appropriation or invasion of private property,” limiting analysis to “the magnitude [and] character of the burden a particular regulation imposes on private property rights . . . [and] how the regulatory burden is distributed among property owners.”²⁷⁶

The Supreme Court demonstrated in *Lingle* that the principles applicable to the law of regulatory taking can be succinctly summarized, but their application remains enigmatic. While the Court has identified two categories of regulations that will be considered per se takings, the categories are narrow and subject to exceptions that are as indeterminate in application as the *Penn Central* factors.²⁷⁷ In her concurring opinion in *Palazzolo v. Rhode Island*,²⁷⁸ Justice O’Connor emphasized that “essentially ad hoc, factual inquiries” would continue to be the norm in regulatory taking challenges, with *Penn Central* “provid[ing] important guideposts that lead to the ultimate determination of whether just compensation is required.”²⁷⁹ Significantly, Justice O’Connor noted that these guideposts include elements of the public interest as well as protection of private property: “The purposes served, as well as the effects produced, by a particular regulation inform the takings analysis.”²⁸⁰

275. *Id.* at 539.

276. *Id.* at 542. For a discussion of the Supreme Court’s apparent retreat from Justice Scalia’s views of property rights, see Laura Underkuffler, *Tahoe’s Requiem: The Death of the Scalian View of Property and Justice*, 21 CONST. COMMENT. 727 (2004).

277. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), where the Court found that even if the regulation denied all economic value of property (a per se taking), no compensation would be due if the prohibited use was not part of the owner’s title because the use was restricted by nuisance and other background principles of property law. The Court did not explain what constitutes a background principle of property law. For a discussion of the development of this concept, see Michael C. Blumm & Lucas Ritchie, *Lucas’s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENV’T L. REV. 321 (2005). In the case of finding an exception based on nuisance law, the complicated balancing test applied is at least as complex and unpredictable as *Penn Central*’s taking analysis. It has been suggested that “there is perhaps no more impenetrable jungle in the entire law than that which surrounds the word ‘nuisance.’” W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 616 (5th ed. 1984).

278. 533 U.S. 606 (2001).

279. *Id.* at 633–34.

280. *Id.* at 634.

B. Australia: Constitutional Protection Versus Responsible Government

Cases involving the just terms requirement of section 51(xxxi) of the Australian Constitution were rare until the 1990s, and few have involved regulation of land use. The legal inquiry necessary to determine whether a regulation requires compensation under the section is perhaps even more complicated than U.S. regulatory taking analysis. Because the Australian Constitution strictly circumscribes the authority of the federal government, analysis typically begins with an arduous consideration of whether a regulation is a valid exercise of federal authority within the scope of section 51 or some other head of power.²⁸¹ Section 51(xxxi) provides for compensation on just terms for acquisition of property for “any purpose in respect of which the Parliament has power to make laws” under section 51. There are cases, however, where regulation falls squarely within authority granted under the section, but an alleged or apparent appropriation of property will not require just terms.²⁸² In some cases, this is the result of inelegant constitutional drafting in placing the acquisition power in a long list of other constitutional authorities including taxation, confiscation of property for breach of laws, and confiscation of the property of enemy aliens.²⁸³ Compensation for such acquisitions of property would be “irrelevant or incongruous”²⁸⁴ and would undermine the objective of the law.²⁸⁵

In other cases where the just terms requirement has been found to be inapplicable, the High Court has not developed a consistent approach.²⁸⁶ Instead, the Court has relied upon a number of rationales to explain why just terms are not due in particular circumstances.²⁸⁷ Several of these ra-

281. See, e.g., *Tasmanian Dam Case*, (1983) 158 C.L.R. at 1.

282. See Simon Evans, *When Is an Acquisition of Property Not an Acquisition of Property?*, 11 PUB. L. REV. 183 (2000) [hereinafter Evans, *Acquisition of Property*].

283. See *id.* at 198.

284. *Mutual Pools*, (1994) 179 C.L.R. at 220.

285. See Evans, *Acquisition of Property*, *supra* note 282, at 187–89.

286. Like many commentators on Australian regulatory takings jurisprudence, Professor Evans has found the uncertainty surrounding the requirement of just terms problematic in that it “decreases the ability of governments, legislators, and legal advisers to predict confidently how the High Court will respond to proposed or enacted legislation.” *Id.* at 186. It should be noted that the finding that an acquisition requires just terms can have broad consequences. If an acquisition falls within the scope of section 51(xxxi) and just terms are not provided, then the legislation as well as the attempted acquisition is “null and void.” Baker, *supra* note 136, at 219.

287. Professor Evans catalogs these rationales as follows: (1) necessary to achieve the (non-acquisitory) objective of the power; (2) an adjustment of competing rights; (3) directed to prevention of a noxious use; (4) adversely affects or terminates rights rather than acquiring them; (5) interest allegedly acquired by the Commonwealth is not prop-

tionales could be relevant to the denial of just terms in the context of land use or environmental regulation. These include: the regulation prevents a noxious use of property rights;²⁸⁸ the regulation was a necessary or characteristic means to achieve an authorized objective, not chiefly directed at the acquisition of property;²⁸⁹ or the action adversely affects or terminates property rights rather than acquiring them.²⁹⁰ But only two section 51(xxxi) cases²⁹¹ have addressed regulations that are arguably categorized as land use regulation: *Newcrest Mining* and the *Tasmanian Dam Case*.

In the *Tasmanian Dam Case*, the Commonwealth sought to stop construction of a dam by the Tasmanian Hydro-Electric Commission on the basis that the dam would "inundate significant Aboriginal archaeological sites, and . . . cause damage to a wilderness area which is of great natural

erty; (6) acquisition was not "for any purpose in respect of which the Parliament has power to make laws"; (7) affects rights that are "inherently susceptible of statutory modification or extinguishment"; and (8) acquisition was under a head of power that authorizes laws that do not provide just terms. Evans, *Acquisition of Property*, *supra* note 282, at 186.

288. See *Trade Practices Comm'n v. Tooth & Co. Ltd.*, (1979) 142 C.L.R. 397, 415 (Austl.).

289. See *Mutual Pools*, (1994) 179 C.L.R. at 180-81; see also *Airservices Australia v. Canadian Airlines International Ltd.*, (1999) 202 C.L.R. 133, 180 (Austl.).

290. *Tasmanian Dam Case*, (1983) 158 C.L.R. at 145.

291. A third case, *Commonwealth v. Western Australia*, (1999) 196 C.L.R. 392 (Austl.), involved the establishment of a defense practice area in Western Australia under the Defense Regulations. The defense practice area included areas where conflicts might occur with provincial and private mining interests, but the majority of the justices found that no inconsistency or acquisition of property had yet occurred. Notable in the case, however, is Justice Callinan's proposal that a test be adopted for section 51(xxxi) that recognizes individual interests in property as compensable property. Justice Callinan adopted the following approach advanced by R. L. Hamilton:

A necessary first step in formulating a test for s. 51(xxxi) . . . is for Australian courts firmly to grasp the principle that the various separate rights of user of property are in themselves property. The court in Dalziel's case recognised that by taking away some rights of user, in particular the right to possession, the Commonwealth could make property practically worthless What needs to be recognised is that property is a bundle of rights, and each right in that bundle is itself property the subject of acquisition. Whenever the Commonwealth seeks to control the exercise of one of the rights in the bundle a question of acquisition is on the threshold.

Id. at 489. This approach, referred to in American legal literature as conceptual severance or the "denominator issue," has been generally rejected by the U.S. Supreme Court. See *Penn Central Transp. Co.*, 438 U.S. at 130-31 (holding that air rights were not a severable compensable property and that the impact of the regulation must be determined in relation to the property as a whole).

significance, and which satisfies the criteria for listing on the World Heritage List.”²⁹² After finding that the Commonwealth had authority to prohibit construction of the dam without the Tasmanian Minister’s consent, the Court addressed whether the denial of consent “effect[ed] an acquisition of property otherwise than on just terms.”²⁹³ Citing U.S. regulatory taking jurisprudence, Tasmania argued that although the Commonwealth legislation did not divest title of the land, it so restricted the use of the land and conferred such extensive rights of control over the property in the federal Minister that there had been an acquisition of property.²⁹⁴ Justice Mason found “no direct relevance to [section] 51(xxxi)” in the U.S. Supreme Court’s interpretation of the Fifth Amendment to find a compensable taking of property if a regulation goes too far in restricting use or abridging property rights.²⁹⁵ He contrasted the purposes of the constitutional provisions, noting that the American provision seems to be interpreted to assure appropriate allocation of the costs of regulation,²⁹⁶ while section 51(xxxi) focuses on the “acquisition of property for purposes of the Commonwealth.”²⁹⁷ Justice Mason acknowledged that maintaining the wilderness character of the land essentially dedicated the land for public use, i.e., protection and conservation, but emphasized that the Commonwealth did not acquire “a proprietary interest of any kind.”²⁹⁸ For the requirement of just terms to come “into play it is not enough that legislation adversely affects or terminates a pre-existing right that an owner enjoys in relation to his property; there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be.”²⁹⁹

Undoubtedly, the more recent *Newcrest Mining* case is difficult to reconcile with the *Tasmanian Dam Case*. A distinction may lie in the fact that the Commonwealth owned the land that benefitted from the regula-

292. *Tasmanian Dam Case*, (1983) 158 C.L.R. at 60.

293. *Id.* at 144.

294. *Id.*

295. *Id.*

296. *Id.* at 144–45 (“It seems that the Supreme Court has proceeded according to the view that the object of the clause is to prevent government from forcing some people alone to bear public burdens which should be undertaken by the entire public.”).

297. *Tasmanian Dam Case*, (1983) 158 C.L.R. at 145.

298. *Id.* at 146.

299. *Id.* at 145. Justices Murphy and Brennan joined Justice Mason in the conclusion that there had been no acquisition of property. Justices Wilson and Dawson and Chief Justice Gibbs did not decide on the issue, and Justice Deane found that the Act and regulations effected an acquisition. Justice Deane did state, however, that “laws which merely prohibit or control a particular use of, or particular acts upon, property plainly do not constitute an ‘acquisition.’” *Id.* at 283.

tion in *Newcrest*, but a clear, quantifiable benefit to the Commonwealth could not be established in the *Tasmanian Dam Case*. Commentators suggest that recent cases are interpreting “acquisition” of property more broadly.³⁰⁰ But even in an early section 51(xxxi) case, *Bank of New South Wales v. Commonwealth*,³⁰¹ the High Court had found section 51(xxxi) was “not to be confined pedantically to the taking of title by the Commonwealth to some specific estate or interest in land recognized at law or in equity . . . , but that it extends to innominate and anomalous interests.”³⁰² The Court there was interpreting *Minister of the Army v. Dalziel*³⁰³ which involved the question of whether just terms were required when the Army for an indefinite period took possession of vacant land used by Dalziel, a tenant, to operate a parking lot. Although the Army acquired no legal or equitable interest in the land, the acquisition of possession for an indefinite time was held to be an acquisition of property.³⁰⁴ *Dalziel* does, however, perhaps provide the best basis to distinguish *Newcrest Mining* and the *Tasmanian Dam Case*. In both *Dalziel* and *Newcrest Mining*, the Commonwealth took complete possession and control of the property, leaving the owner with none of the rights that constituted the property in question. In the *Tasmanian Dam Case*, Justice Mason of the High Court emphasized the continued possession and residuary rights of the state, explaining that:

[W]hat is important in the present context is that neither the Commonwealth nor anyone else acquires by virtue of the legislation a proprietary interest of any kind in the property. The power of the Minister to refuse consent under the section is merely a power of veto. He cannot positively authorize the doing of acts on the property. As the State remains in all respects the owner, the consent of the Minister does not overcome or override an absence of consent by the State in its capacity as owner. The fact that the Minister has a power of veto of any devel-

300. See Allen, *supra* note 32, at 355–58. Simon Evans states that “the distinction between acquisition and deprivation has been progressively eroded.” Simon Evans, *Constitutional Property Rights in Australia: Reconciling Individual Rights and the Common Good*, in PROTECTING RIGHTS WITHOUT A BILL OF RIGHTS 197, 199 (Tom Campbell et al. eds., 2006) [hereinafter Evans, *Constitutional Property Rights*]. Since *Mutual Pools*, the High Court has looked not to whether the government has acquired title, but to whether the government has gained “some identifiable and measurable countervailing benefit or advantage.” *Id.*

301. (1948) 76 C.L.R. 1 (Austl.).

302. *Id.* at 349.

303. (1944) 68 C.L.R. 261 (Austl.).

304. *Id.*

opment of or activity on the property does not amount to a vesting of possession in the Commonwealth.³⁰⁵

From this perspective, merely restricting the use of land by federal legislation or regulation does not engage the requirement of just terms. This comports with the notion that the interest the government receives must be able to be conceived as “property.” No property has been acquired if the “Commonwealth merely receives the satisfaction of its regulatory goals or if the economic position of the property owner is adversely affected.”³⁰⁶

Land use regulation is more generally the subject of state law, rather than federal law, and it has been recently reaffirmed that state parliaments are not constrained in enacting legislation by the requirement of just terms or just compensation. In *Durham Holdings Pty. Ltd. v. New South Wales*,³⁰⁷ the Parliament of New South Wales passed legislation that vested title in the Crown to all coal deposits within the state. Because the legislation did not provide full compensation to the holders of the largest coal deposits, including Durham Holdings, Durham sought to have the law invalidated.³⁰⁸ The just terms provision of the federal Constitution does not apply to the Australian states, and the High Court has held on numerous occasions that the state parliaments have the authority to acquire property even without payment of compensation.³⁰⁹ Durham argued, though, that the law must be read in light of the presumption in Australian law that the legislature does not intend to acquire property without compensation³¹⁰ and, further, that some common law rights are so fundamental and embedded in the legal system that parliament cannot override them.³¹¹ While acknowledging that a presumption against compulsory taking of property without compensation is a recognized principle of construction passed down from England and applied by Australian courts, the High Court also noted that the presumption could not stand in

305. *Tasmanian Dam Case*, 158 C.L.R. at 146.

306. Evans, *Constitutional Property Rights*, *supra* note 300, at 200.

307. (2001) 205 C.L.R. 399 (Austl.).

308. *Id.* at 399–400.

309. See *Commonwealth v. WMC Resources Ltd.*, (1998) 194 C.L.R. 1, 58 (Austl.); *Mabo v. Queensland*, (1988) 166 C.L.R. 186, 202 (Austl.); *Minister for Lands (N.S.W.) v. Pye*, (1953) 87 C.L.R. 469, 486 (Austl.); *Pye v. Renshaw*, (1951) 84 C.L.R. 58, 78–80 (Austl.); *P.J. Magennis Pty. Ltd. v. Commonwealth*, (1949) 80 C.L.R. 382, 403 (Austl.); *New South Wales v. Commonwealth*, (1915) 20 C.L.R. 54, 66 (Austl.).

310. *Durham Holdings*, (2001) 205 C.L.R. at 400.

311. *Id.* at 401, 409–10.

the face of a clearly expressed intent of the Parliament in this case not to provide full compensation to certain holders of coal mining rights.³¹²

The High Court also rejected any role for the courts in this case in reviewing or limiting, on the grounds of deeply rooted, common law rights, the legislative powers of Parliament acting within its constitutional powers.³¹³ While not denying the possible existence of some non-constitutional limits on the legislative power, the majority opinion overwhelmingly declined to recognize the definition of “just compensation” as being within that “field of discourse.”³¹⁴ Even Justice Kirby, who emphasized the fundamental nature of property rights in *Newcrest Mining*, stated: “It does not rest upon judicial pronouncements to accord, or withhold, recognition of the law in question by reference to the judge’s own notions of fundamental rights, apart from those constitutionally established.”³¹⁵ Justice Kirby further pointed out the incongruity of the High Court imposing such a constitutional limitation on states when only twelve years earlier in 1988, the electors in all Australian states had soundly rejected a proposal to amend the federal Constitution to make acquisitions by states subject to provisions similar to section 51(xxxi).³¹⁶

In spite of the absence of constitutional protections,³¹⁷ compensation for the effects of land use and environmental regulation on land value is a prominent feature of state land use and environmental laws in Australia. Legislation in Australian states often reflects acceptance of the principle that owners should be compensated for “injurious affection” to land. The term “injurious affection” was originally found in English legislation compensating an owner for damage or loss of enjoyment of re-

312. *Id.* at 400, 409.

313. *Id.* at 409–10, 427–28.

314. *Id.* at 410.

315. *Id.* at 427.

316. *Durham Holdings*, (2001) 205 C.L.R. at 427–28.

317. The Northern Territory is the only Australian state or territory with a compensation provision for acquisition of property comparable to the federal constitutional provision. See Northern Territory (Self-Government) Act, 1978, which provides:

Acquisition of property to be on just terms

(1) The power of the Legislative Assembly conferred by section 6 in relation to the making of laws does not extend to the making of laws with respect to the acquisition of property otherwise than on just terms.

(2) Subject to section 70, the acquisition of any property in the Territory which, if the property were in a State, would be an acquisition to which paragraph 51(xxxi) of the Constitution would apply, shall not be made otherwise than on just terms.

Id. § 50.

tained land caused by activities on a part of the land that had been taken by an eminent domain action or, in Australian terminology, on the land that had been resumed through compulsory acquisition.³¹⁸ In Australia, the concept of injurious affection has been applied more broadly to include cases where legislation or regulation affects the value of property without the government actually acquiring a property interest in any of the owner's land.³¹⁹ In this respect, compensation for regulatory taking is much more readily available in Australia than in the United States for mere limitations on use resulting in diminution of value of land by planning, zoning, or environmental regulation.

A comprehensive review of such state compensation provisions³²⁰ is beyond the scope of this article, but a few examples are instructive. Some provisions of planning and environmental legislation continue to use the term "injurious affection." For example, the Western Australia Town Planning and Development Act 1928³²¹ provides:

Any person whose land or property is injuriously affected by the making of a town planning scheme shall, if such person makes a claim within the time, if any, limited by the scheme (such time not being less than 6 months after the date when notice of the approval of the scheme is published in the manner prescribed by the regulations), be entitled to obtain compensation in respect thereof from the responsible authority³²²

318. See *Kettering Pty. Ltd. v. Noosa Shire Council*, (2004) 134 L.G.E.R.A. 99, 110–11 (Austl.).

319. *Id.*

320. For a relatively recent review that includes discussion of many of the state law provisions for such compensation, see EMILY CRIPPS, CARL BINNING & MIKE YOUNG, *OPPORTUNITY DENIED: REVIEW OF THE LEGISLATIVE ABILITY OF LOCAL GOVERNMENT TO CONSERVE NATIVE VEGETATION* (1999), available at <http://www.deh.gov.au/land/publications/opportunities/pubs/oppden.pdf>.

321. Town Planning and Development Act, 1928 (W. Austl.).

322. *Id.* § 11(1). An interesting feature of the Act is the "betterment" provision that authorizes sharing of the benefit if a land use planning scheme increases the value of the land. Although not apparently utilized, the "betterment" provision provides:

Whenever, by the expenditure of money by the responsible authority in the making and carrying out of any town planning scheme, any land or property is within 12 months of the completion of the work, or of the section of the work affecting such land, as the case may be, increased in value, the responsible authority shall be entitled to recover from any person whose land or property is so increased in value, one half of the amount of such increase.

Id. § 11(2).

The term “injurious affection” has often been difficult to interpret and apply,³²³ and other statutes have clarified the bases for compensation. For example, Victoria’s Planning and Environment Act, 1987³²⁴ states:

98. Right to compensation

(1) The owner or occupier of any land may claim compensation from the planning authority for financial loss suffered as the natural, direct and reasonable consequence of —

(a) the land being reserved for a public purpose under a planning scheme;

. . . .

(2) The owner or occupier of any land may claim compensation from a responsible authority for financial loss suffered as the natural, direct and reasonable consequence of a refusal by the responsible authority to grant a permit to use or develop the land on the ground that the land is or will be needed for a public purpose.³²⁵

Queensland’s Integrated Planning Act, 1997³²⁶ provides compensation in regard to development or changes in a planning scheme in the following circumstances:

5.4.2 Compensation for reduced value of interest in land

An owner of an interest in land is entitled to be paid reasonable compensation³²⁷ by a local government if —

(a) a change reduces the value of the interest; and

(b) a development application (superseded planning scheme) for a development permit relating to the land has been made; and

(c) the application is assessed having regard to the planning scheme and planning scheme policies in effect when the application was made; and

(d) the assessment manager, or, on appeal, the court —

(i) refuses the application; or

(ii) approves the application in part or subject to conditions or both in part and subject to conditions.

323. See, e.g., *Cornell v. Town of East Fremantle*, (2003) W.A.S.C. 163 (W. Austl.).

324. *Planning and Environmental Act, 1987* (Vict.).

325. *Id.* § 98.

326. *Integrated Planning Act, 1997*, ch. 5 (Queensl.).

327. It is important to note that the legislation does not provide for “full” or “just” compensation.

5.4.3 Compensation for interest in land being changed to public purpose

An owner of an interest in land is entitled to be paid reasonable compensation by a local government if because of a change, the only purpose for which the land could be used (other than the purpose for which it was lawfully being used when the change was made) is for a public purpose.³²⁸

Compensation may also be available in legislation regulating areas for nature protection. Tasmania's Threatened Species Protection Act of 1995³²⁹ creates the following compensation scheme:

45. Compensation

(1) A landholder is entitled to compensation for financial loss suffered directly resulting from an interim protection order or a land management agreement.

(2) A person who is required to comply with a notice under section 36 is entitled to compensation for financial loss as a result of being required to comply with that notice.

(3) The holder of a license, permit or other authority limited under section 38 is entitled to compensation for financial loss.

. . . .

(6) In making a determination [of compensation], the Minister must have regard to the following matters:

(a) the amount by which the value of the land will be increased or decreased as a result of the interim protection order;

(b) the amount of financial loss, including loss of profit, loss occasioned by breach of contract, loss of production and other consequential loss, to the landholder or other person which would result from compliance with the order;

(c) any increase in the value of the land which would result from the carrying out of works for the purposes of this Act;

(d) the cost of any works required to be carried out on the land;

(e) any change in the value of chattels or improvements which would occur because the land use or activity to which they relate is to be restricted or prohibited by the order;

(f) any other matter which the Minister considers relevant.³³⁰

328. Integrated Planning Act, 1997, ch. 5 §§ 5.4.2–5.4.3.

329. Threatened Species Protection Act, 1995 (Tas.).

Similarly, Queensland's Nature Conservation Act, 1992³³¹ provides compensation under the following circumstances:

67. Compensation when protected area declared

(1) This section applies if—

(a) a nature refuge is declared under section 49; or

(b) a regulation giving effect to a management plan for a World Heritage management area or international agreement area commences.

(2) If a land holder's interest in land is injuriously affected by a restriction or prohibition imposed under the declaration or regulation on the land holder's existing use of the land, the land holder is entitled to be paid by the State the reasonable compensation because of the restriction or prohibition that is agreed between the State and the land holder or, failing agreement, decided by the Land Court.³³²

The provision for compensation in a number of state land use and environmental statutes has not made property rights and regulatory taking less controversial in Australia. Recent High Court decisions confirming the right of states to acquire property without full compensation³³³ and the ability of states to condition subdivision and development of land on the transfer of property to the government³³⁴ have heightened concerns of property rights advocates as states have increasingly pursued land use and environmental regulation to protect biodiversity, sensitive ecosystems, and cultural heritage.³³⁵ Environmental advocates, on the other hand, feel that providing compensation for regulation of land raises serious policy issues, including creating an expectation of compensation for regulation in spite of the public interests at stake and creating a climate that inhibits effective regulation because of the financial consequences.³³⁶ But the controversy about the availability of compensation for regulations affecting land value is fought out primarily in the political process in Australian states, rather than in the courts.

330. *Id.* § 45.

331. Nature Conservation Act, 1992 (Queensl.).

332. *Id.* § 67.

333. *See Durham Holdings*, (2001) 205 C.L.R. at 399.

334. *See W. Austl. Planning Comm'n v. Temwood*, (2004) 221 C.L.R. 30 (Austl.).

335. *See, e.g.*, COALITION FOR PROPERTY RIGHTS, PROPERTY RIGHTS UNDER ATTACK IN WESTERN AUSTRALIA (2004), available at http://propertycouncil.gravitymax.com.au/advoc/page.asp?622=249054&E_Page=17720.

336. *See, e.g.*, AUSTRALIAN NETWORK OF ENVIRONMENTAL DEFENSE OFFICES, EDO SUBMISSION IN RESPONSE TO THE PRODUCTIVITY COMMISSION DRAFT REPORT INTO THE IMPACTS OF NATIVE VEGETATION & BIODIVERSITY REGULATIONS (2004), available at http://www.edo.org.au/edonsw/site/pdf/productivity_commission_draft_report.pdf.

C. Canada: A (Very) Limited Foray into Regulatory Taking

The Canadian experience in finding compensable regulatory takings, usually referred to in Canadian cases and literature as de facto expropriation, is extremely limited.³³⁷ Two cases in addition to *Tener*³³⁸ have found a compensable regulatory taking in the land use context.³³⁹ *Casamiro Resource Corp. v. British Columbia*³⁴⁰ and *Rock Resources, Inc. v. British Columbia*³⁴¹ are remarkably similar to *Tener* in that the cases involved the loss of the right to exploit Crown-granted mineral rights within a provincial park.³⁴² The majority opinion of the Canadian Supreme Court in *Tener* characterized the situation as the recovery by the Crown of an interest in land, i.e., the access rights which were necessary to recover the minerals, without which the claims were “virtually useless.”³⁴³ The court in *Casamiro* found the factual circumstances were equivalent to *Tener*’s and that the mineral rights had been reduced to “meaningless pieces of paper.”³⁴⁴ In *Rock Resources*, although the interest taken was classified as personalty, the court relied on *Tener*’s analysis

337. “A de facto expropriation, or as it is known in United States constitutional law, regulatory taking, does not have a long history or clearly articulated basis in Canadian law.” *Mariner Real Estate Ltd. v. Nova Scotia*, [1999] 177 D.L.R.4th 696, 712 (N.S.C.A.).

338. See *supra* Part II.C, for a discussion of the *Tener* decision.

339. In Canada, only five cases have found regulation of property rights a compensable expropriation of property. Three of these cases involved the extinguishment of mining rights by the creation of parks. The groundbreaking case was the decision of the Canadian Supreme Court in *Manitoba Fisheries Ltd. v. The Queen*, [1979] 1 S.C.R. 101, which required compensation for appropriation of the good will of a fish exporting firm when federal legislation created a monopoly in a statutory corporation to carry on such a business. In that case, the Supreme Court applied the maxim that compensation should be given if property is expropriated unless the statute clearly manifests the intention not to compensate. Professor Hogg notes that the “Crown corporation had in effect acquired the business of exporting fish,” and therefore arguably had acquired something. HOGG, *supra* note 166, § 28.5(d). Another case has held that destroying contract rights can be equivalent to taking property, and, relying on *Manitoba Fisheries*, awarded compensation. See *Wells v. Newfoundland*, [1999] 3 S.C.R. 199 (Can.).

340. [1991] 80 D.L.R.4th 1 (B.C.C.A.).

341. [2003] 229 D.L.R.4th 115 (B.C.C.A.).

342. *Id.*

343. *Tener*, [1985] 1 S.C.R. at 563–64. In *Casamiro*, the British Columbia Court of Appeal noted that in both *Tener* and *Casamiro*, the owner of the Crown-granted mineral claims had the right to the use and occupation of the surface, a right ancillary to the grant of a fee simple, a right granted by statute, and a right also in the nature of a profit a prendre. The surface rights were referred to in the *Tener* grants, but there was no Crown grant of the surface in either case. *Casamiro*, 80 D.L.R.4th at 19–20.

344. *Id.* at 22.

to find a taking.³⁴⁵ These cases create extremely limited circumstances in which a right to compensation has been recognized, and Canadian courts have rejected expansion of the doctrine in the realm of land use regulation beyond the narrow scope of these cases.

Initially, de facto expropriation cases must be distinguished from “administrative law challenges to the legality or appropriateness of planning decisions.”³⁴⁶ Similar to the U.S. Supreme Court’s decision in *Lingle*,³⁴⁷ the Nova Scotia Court of Appeal in *Mariner Real Estate* identified the issue in such circumstances as not whether the regulation constitutes an expropriation, but whether the regulation was lawfully enacted and not ultra vires.³⁴⁸ Further, in *Hartel Holdings Co. Ltd. v. Council of City of Calgary*,³⁴⁹ the Supreme Court of Canada stated that it is “clear that municipalities cannot abuse their powers by using them for an improper purpose.”³⁵⁰ Such actions do not give rise to a claim of de facto expropriation, however, but to damages for tort.

345. *Rock Resources*, 229 D.L.R.4th at 155. A fourth mineral rights case, *Cream Silver Mines Ltd. v. British Columbia*, [1993] 99 D.L.R.4th 199 (B.C.C.A.), denied compensation to the holder of mineral claims within a provincial park because Cream Silver held only “bare mineral claims” which were not registerable and did not include absolute access rights. Unlike the Crown-granted mineral rights granted in *Tener* and *Casamiro*, bare mineral claims are not considered “land” for purposes of the Park Act which expressly provided for expropriation of land with compensation. In Chief Justice Finch’s opinion in *Rock Resources*, he argued that *Manitoba Fisheries* did not distinguish personalty and realty in applying a presumption that the legislature intends compensation when property rights are taken. *Rock Resources*, 229 D.L.R.4th at 152.

346. *Mariner Real Estate Ltd.*, 177 D.L.R.4th at 717–18; see also *Canadian Pacific Railway Co. v. Vancouver (City)*, [2006] 1 S.C.R. 227 (Can.) (challenging a land use regulation as beyond the city’s statutory authority and subject to procedural irregularities).

347. See *supra* text accompanying notes 268–76, for a discussion of *Lingle*.

348. *Mariner Real Estate Ltd.*, 177 D.L.R.4th at 717.

349. [1984] 1 S.C.R. 337 (Can.).

350. *Id.* at 354. The Supreme Court provided the following examples in the case of down-zoning:

For example, in *Tegon Developments Ltd. v. Edmonton (City of)* (1977), 5 Alta. L.R. (2d) 63 (C.A.), affirmed [1979] 1 S.C.R. 98, the Edmonton City Council was disallowed from putting a freeze on the development of certain property in the hope that the province would designate the property under The Alberta Heritage Act. Similarly, in *Hauff v. Vancouver (City of)* (1980), 12 M.P.L.R. 125, the City of Vancouver’s attempt to pass a by-law for the express purpose of limiting property values with an eye to future acquisition was struck down.

Id. at 355. It should be noted that it is not considered bad faith to freeze zoning or further development in anticipation of subsequent acquisition of the land. So long as the actions are taken pursuant to a legitimate and valid planning purpose, “the resulting detriment to

The lack of a constitutional grounding for a right to compensation in Canada for government expropriation of property means that any right must found in the common law, a statute, or a rule of statutory interpretation. Eric C. E. Todd writes, however, that “[i]t has never been suggested that there was a common law right to compensation” in Canada.³⁵¹ The leading case on the issue, *Sisters of Charity of Rockingham v. The King*,³⁵² unambiguously states that “[c]ompensation claims are statutory and depend on statutory provisions. No owner of lands expropriated by statute for public purposes is entitled to compensation . . . unless he can establish a statutory right.”³⁵³

The first step in the analysis of a compensation claim, then, is to determine whether the government action is undertaken pursuant to a relevant statute authorizing the expropriation of property with compensation. If the statute does not provide for compensation, however, *Sisters of Charity* does not stand for the proposition that no compensation is due because the statute failed to provide explicitly for compensation. The rule of statutory interpretation that “unless the words of the statute clearly so demand,³⁵⁴ a statute is not to be construed so as to take away the property of a subject without compensation”³⁵⁵ reflects the British tradition that “[t]he Legislature cannot fairly be supposed to intend, in the absence of clear words shewing [sic] such intention, that one man’s property shall be confiscated for the benefit of others, or of the public.”³⁵⁶ Nevertheless, the government always has the prerogative “to override or disregard this ordinary principle”³⁵⁷ through clearly expressed intent.³⁵⁸ For example, the British Columbia Local Government

the appellant is one that must be endured in the public interest.” *Id.* at 354. The Canadian Supreme Court has held that such planned acquisitions can be legitimate reasons for refusal of building permits or rezoning applications. *See id.*

351. *See* TODD, *supra* note 63, at 35.

352. [1922] 2 A.C. 315 (P.C.) (appeal taken from Can.).

353. *Id.* at 322. In one case, however, the court discussed a principle it referred to as “the common law right to compensation for interference with a subject’s property.” *France Fenwick & Co. v. The King*, [1927] 1 K.B. 458, 467 (U.K.).

354. Apparently, a statute may “clearly so demand” that no compensation be afforded without expressly stating that proposition. For example, in *Cream Silver Mines*, Justice Southin rejected turning a “rule of statutory construction” into a common law rule concerning compensation, where the comprehensive Park Act had few express provisions for compensation. *Cream Silver Mines*, [1993] 99 D.L.R.4th at 208.

355. *De Keyser’s Royal Hotel, Ltd.*, [1920] A.C. at 542.

356. *Id.*

357. *Id.*

358. *See* *Authorson v. Canada (Att’y General)*, [2003] 2 S.C.R. 40 (Can.); *R. v. Appleby* (No. 2), [1976] 15 N.B.R.2d 650 (N.B.C.A.).

Act³⁵⁹ provides that “[c]ompensation is not payable to any person for any reduction in the value of that person’s interest in land, or for any loss or damages that result from the adoption of an official community plan or a bylaw under this Division or the issue of a [development] permit under Division 9 of this part.”³⁶⁰ When the intent of the legislative body is expressed this clearly, there is no room for interpretation.

The determination that compensation is available under a relevant statutory authority if the government expropriates property still leaves unanswered the questions of whether the interest allegedly expropriated is “property” and of whether a regulation that does not involve the government actually taking possession or occupying land will constitute a taking or de facto expropriation of land or an interest in land. Because most claims for compensation for land use regulations are brought under land expropriation acts,³⁶¹ an initial issue often is whether the property claimed to be taken is “land” or an interest in land within the meaning of those acts.³⁶² Expropriations acts are considered remedial statutes, and common law rules of interpretation dictate that such statutes must be given broad and liberal interpretation consistent with their purpose and be strictly construed in favor of the parties who rights are affected.³⁶³ Neither zoning of land uses in a community or “regulation of specific activity on certain land,” however, are considered to affect an interest of an owner in the land.³⁶⁴ In *Belfast Corp. v. O.D. Cars Ltd.*,³⁶⁵ which is favorably cited on a regular basis by Canadian courts, Viscount Simonds

359. R.S.B.C., ch. 323 (1996) (Can.).

360. *Id.* § 914(1). A number of other Canadian jurisdictions also have zoning or planning legislation containing such express limitations on compensation. *See, e.g.*, Planning Act, R.S.N.S., ch. 346 (1989) (N.S.); The Planning Act, R.S.A., ch. P-9 (1980) (Alta.); Agricultural Land Commission Act, R.S.B.C., ch. 36 (1979) (B.C.); The Planning and Development Act, R.S.S., ch. P-13 (1978) (Sask.); The Planning Act, C.C.S.M., ch. P-80 (1975) (Man.).

361. *See supra* text accompanying notes 65–67.

362. Canadian expropriation acts generally also provide compensation for “injurious affection” of land. Although property owners often make broader claims of the meaning the term, the term can only be applied as defined within the relevant act. In general, compensation for injurious affection only applies to damage to retained land when there has been a formal expropriation of land. *See* TODD, *supra* note 63, at 25.

363. *See* Dell Holdings Ltd. v. Toronto Area Transit Operating Auth., [1997] 1 S.C.R. 32, 44–45 (Can.). *But see* TODD, *supra* note 63, at 25–26 (“As Lord Pearson pointed out in *Rugby Water Board v. Shaw Fox* there are no common law principles in the law of expropriation. . . . [C]ompulsory acquisition and compensation for it are entirely creatures of statute.”).

364. *See Tener*, [1985] 1 S.C.R. at 564.

365. [1960] A.C. 490 (U.K.) (determining whether denial of a development permit under a Northern Ireland planning law constituted a taking of land).

contested that “the right to use property in a particular way was itself property,”³⁶⁶ but even if the word “‘property’ is given wide import,” he stated that “any one of those rights which in the aggregate constituted ownership of property could [not] itself and by itself aptly be called ‘property.’”³⁶⁷ This has been found to be true in Canada, even in cases where land development is blocked or frozen.³⁶⁸ Justice Estey’s statement in *Tener* that “compensation does not follow zoning either up or down”³⁶⁹ has become a virtual mantra for Canadian courts.³⁷⁰

Closely related is the well-established principle in Canadian jurisprudence that even significant and dramatic loss of value of the land by zoning, by refusal to rezone or to grant development or subdivision approval, or by freezing development pursuant to planning powers alone is not enough to establish a de facto expropriation.³⁷¹ “It is well settled that owners may be compelled to surrender some value or future value of their land to the local authority and no price has to be paid.”³⁷² Professor Hogg points out that:

[m]ost forms of regulation impose costs on those who are regulated, and it would be intolerably costly to compensate them.³⁷³ Moreover, much regulation has a redistributive purpose, it is designed to limit the rights of one group . . . and increase the rights of another A com-

366. *Id.* at 517.

367. *Id.* This statement can be compared to the U.S. *Penn Central* case where the Supreme Court held that a diminution in the value of property must be determined in relation to the nature and extent of the interference with the rights in the parcel as a whole. *Penn Central Transp. Co.*, 438 U.S. at 130.

368. See *Hartel Holdings Co. Ltd. v. Council of City of Calgary*, [1984] 1 S.C.R. 337 (Can.); *Soo Mill & Lumber Co. v. Sault Ste. Marie (City)*, [1975] 2 S.C.R. 78 (Can.); *Sanbay Developments Ltd. v. London (City)*, [1975] 1 S.C.R. 485 (Can.).

369. *Tener*, [1985] 1 S.C.R. at 557.

370. See, e.g., *Ghalioungui v. Mississauga*, [2005] 138 A.C.W.S.3d 769 (Ont. Super. Ct.); *Alberta (Minister of Public Works) v. Nilsson*, [2002] 118 A.C.W.S.3d 399 (Alta. C.A.); *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)*, [1999] 177 D.L.R.4th 696, 715 (N.S.C.A.); *Harvard Investments Ltd. v. Winnipeg (City)*, [1995] 107 Man. R.2d 114, 120 (Man. C.A.); *Steer Holdings Ltd. v. Manitoba*, [1992] 79 Man. R.2d 169, 179 (Man. Q.B.); *Salvation Army, Canada East v. Ontario (Minister of Government Services)*, [1986] 53 O.R.2d 704, 708–09 (Ont. C.A.); see also IAN ROGERS, CANADIAN LAW OF PLANNING AND ZONING 124 (2000) (stating that “[t]he law permits the appropriation of prospective development rights for the good of the community, but allows the property owner nothing in return”).

371. See TODD, *supra* note 63, at 22–23.

372. See ROGERS, *supra* note 370, at 124.

373. This sentiment was seconded by Justice Holmes in *Mahon* where he stated that “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.” *Mahon*, 260 U.S. at 413.

pensation regime would work at cross-purposes to the purpose of the regulation. Nevertheless, there is an indistinct boundary between regulating and taking.³⁷⁴

In *Mariner Real Estate*,³⁷⁵ Justice Cromwell of the Nova Scotia Court of Appeal noted that “the loss of economic value of land is not the loss of an interest in land within the meaning of the Expropriation Act.”³⁷⁶ Although *Tener* is sometimes characterized as standing for the proposition that a taking occurs when the regulation leaves the land with virtually no economic value, Justice Cromwell more aptly characterized the case as requiring a “virtual extinction of an identifiable interest in land.”³⁷⁷ The court opined that although severe loss of economic value might be evidence of the loss of “virtually all the normal incidents of ownership, . . . [i]t is not, however, the decline in market value that constitutes the loss of an interest in land, but the taking away of the incidents of ownership reflected in that decline.”³⁷⁸ This interpretation is consistent with the Canadian Supreme Court’s statement in *Tener* that “[e]xpropriation or compulsory taking occurs if the Crown or a public authority acquires from the owner an interest in property.”³⁷⁹

In *Harvard Investments Ltd. v. Winnipeg (City)*,³⁸⁰ Justice Twaddle of the Manitoba Court of Appeal described *Tener* as establishing “two elements to a [regulatory] taking: (i) the acquisition of an asset by the authority involved or its designate, and (ii) the complete extinguishment of the asset’s value to the owner.”³⁸¹ This test incorporates the final tenet of Canadian takings jurisprudence, as enunciated in *Steer Holdings*:

For there to be a statutory taking which gives rise to a claim for compensation, not only must the owner be deprived of the benefit in its property, there must also be a resulting enhancement or improvement conferred upon whatever entity the Legislature intended to benefit. Something must not only be taken away, it must be taken over.³⁸²

374. HOGG, *supra* note 166, § 28.5(d).

375. *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)*, [1999] 177 D.L.R.4th 696 (N.S.C.A.).

376. *Id.* at 724.

377. *Id.* at 728; *see also* 64933 *Manitoba Ltd. v. Manitoba*, [2002] 214 D.L.R.4th 37, 41 (Man. C.A.) (holding that “a ‘de facto’ expropriation made by government can give rise to an entitlement to compensation, but only if the effect of the government’s action is to essentially extinguish the claimant’s interest in land or property”).

378. *Mariner Real Estate Ltd.*, 177 D.L.R.4th at 727.

379. *Tener*, [1985] 1 S.C.R. at 556.

380. [1995] 107 Man. R.2d 114 (Man. C.A.).

381. *Id.* at 122.

382. *Steer Holdings*, [1992] 79 Man. R.2d at 174–75.

Other cases have also used language referring to the requirement that an expropriation requires the “enhancement or benefit” of public property.³⁸³ The nature of the enhancement or benefit the government must acquire is, however, far from clear. In *Tener*, Justice Estey seemed to distinguish a confiscatory taking from usual land use regulation by stating that “[t]he imposition of zoning regulation and the regulation of activities on lands . . . add[s] nothing to the value of public property.”³⁸⁴ But the context of the statement was to distinguish the purpose of the denial of Tener’s permit, i.e., “the action taken . . . was to enhance the value of the public park,”³⁸⁵ from the purposes of a legitimate land use regulation. Significantly, the Supreme Court in *Tener* also found that a legal interest—a right of access that was part of the mineral grant—had been recovered by the government.³⁸⁶

In *Mariner Real Estate*, the property owner argued that “where regulation enhances the value of public land, the regulation constitutes the acquisition of an interest in land.”³⁸⁷ There the private property had been designated as “beach” and protected under the Beaches Act.³⁸⁸ Permits for even single-family dwellings had been denied by the Minister. The property owners asserted that the protection of beaches and dunes for environmental and recreational purposes created a public benefit and enhanced the value of public beaches seaward of the high-water line.³⁸⁹ Relying on *Tener* and favorably citing the Australian High Court in *Newcrest Mining*, Justice Cromwell of the Nova Scotia Court of Appeal concluded that “for there to be a taking, there must be, in effect, . . . an acquisition of an interest in land and that enhanced value is not such an interest.”³⁹⁰ Similarly, in *Steer Holdings*, Justice Kroft of the Manitoba Court of Appeals granted the likelihood that blocking the development in that case “enhanced” a nearby public park and that preventing interference with a creek by construction served the “public interest.” He asserted, however, that “[t]his acknowledgment is not . . . tantamount to a finding that there has been the kind of confiscation and transferring of

383. See, e.g., *64933 Manitoba Ltd.*, [2002] 214 D.L.R.4th at 41–42 (“For there to be a statutory taking which gives rise to a claim for compensation, not only must the owner be deprived of the benefit in its property, there must also be a resulting enhancement or improvement conferred upon whatever entity the legislature intended to benefit.”).

384. *Tener*, [1985] 1 S.C.R. at 564.

385. *Id.*

386. *Id.* at 563–64. But see HOGG, *supra* note 166, § 28.5(d) (asserting that “[i]n *Tener*, the Crown acquired nothing”).

387. *Mariner Real Estate Ltd.*, 177 D.L.R.4th at 730.

388. R.S.N.S., ch. 32 (1989) (Can.).

389. *Mariner Real Estate Ltd.*, 177 D.L.R.4th at 701–02.

390. *Id.* at 732.

interest or benefit of the kind found by the Supreme Court in either *Manitoba Fisheries or Tener*³⁹¹ and found no legally recognized benefit had been transferred to the government or its beneficiary.

The Supreme Court of Canada most recently addressed de facto taking in *Canadian Pacific Railway v. Vancouver (City)*.³⁹² The unanimously adopted decision reinforced the approach of the provincial courts in assessing whether land use regulation would generally require compensation for diminution of economic value, but added little to the jurisprudence of regulatory taking in Canada. The City of Vancouver had adopted an official development plan (ODP) which designated a former railway corridor owned by Canadian Pacific Railway Co. (CPR), the "only such intact corridor existing in Vancouver,"³⁹³ as a public thoroughfare for transportation. The OPR effectively froze the redevelopment potential of the land, limiting the land to uses such as greenways, cycle paths, and nature trails.³⁹⁴ CPR argued that all reasonable use of its land had been taken and that it is presumed that the Legislature does not intend to take property without compensation.³⁹⁵

The Supreme Court stated that two requirements must be met to establish a de facto taking: "(1) an acquisition of a beneficial interest in the property or flowing from it, and (2) removal of all reasonable uses of the property."³⁹⁶ With little analysis, the court found that neither requirement had been made out by CPR.³⁹⁷ The court acknowledged that CPR did not have to establish that the city had accomplished a forced transfer of property, if the city acquired a "beneficial interest related to the property."³⁹⁸ CPR argued that the city had gained a de facto park because of the limitations on the use. The court concluded, however, that "[t]he City . . . gained nothing more than some assurance that the land will be used or developed in accordance with its vision, without even precluding the historical or current use of the land, . . . not the sort of benefit that can be construed as a taking."³⁹⁹ Further, the court found that all reasonable uses of the land had not be removed by the law. CPR could continue to use the land for a railway, could lease the land, or enter into pub-

391. *Steer Holdings*, [1992] 79 Man. R.2d at 177.

392. 2006 Can. Sup. Ct. LEXIS 5 (Feb. 23, 2006). For an excellent discussion of this case, see Russell Brown, *The Constructive Taking at the Supreme Court of Canada: Once More, Without Feeling*, 40 U.B.C. L. REV. (forthcoming 2007) (Can.).

393. *Canadian Pacific Railway*, 2006 Can. Sup. Ct. LEXIS 5, at *22.

394. *Id.* at *8.

395. *Id.* at *19–20.

396. *Id.* at *20.

397. *Id.*

398. *Id.*

399. *Id.* at *21.

lic/private partnerships. The court even characterized the OPR as “expand[ing] upon the only use the land has known in recent history.”⁴⁰⁰

The Supreme Court of Canada was equally dismissive of CPR’s argument concerning the presumption in favor of compensation and the application of the provincial Expropriation Act.⁴⁰¹ In granting planning and zoning authority to the city, the provincial legislature anticipated effects on property value and in section 569 of the Vancouver Charter provided that in such cases the property shall be deemed not to have been taken and “no compensation shall be payable.”⁴⁰² The court found that even if the facts supported a finding of a de facto taking in the case, the provisions of the Charter conclusively negated any inference of a compensable taking.⁴⁰³

The province’s Expropriation Act⁴⁰⁴ provides, however, that “[i]f an expropriating authority proposes to expropriate land, th[e] Act applies to [require compensation] and, if there is an inconsistency between any of the provisions of th[e] Act and any other enactment respecting the expropriation, the provisions of [the Expropriation Act] apply.”⁴⁰⁵ The court explained that the provisions the Vancouver Charter did not amount to an inconsistency, because the Expropriation Act does not apply unless there has been a taking. By statutorily deeming adverse affects on property by zoning and planning regulations not to constitute a taking or expropriation, the Charter removes any possibility of inconsistency and application of the Expropriation Act.⁴⁰⁶

V. CONCLUSION

The cases attributed with introducing the concept of regulatory taking to land use law in the United States, Australia, and Canada were all cases involving mineral rights that had been extinguished. The laws involved did not explicitly acquire an interest in the property and therefore fall generally within the scope of what we refer to as regulatory taking, but these cases do differ from typical land use regulation and perhaps provide poor examples of regulation that simply devalues or restricts use of land. By denying access to the minerals in those cases, the governments

400. *Canadian Pacific Railway*, 2006 Can. Sup. Ct. LEXIS 5, at *22.

401. *Id.*

402. *Id.* at *15.

403. *Id.* at *22–24.

404. British Columbia Expropriation Act, R.S.B.C., ch. 125 (1996).

405. *Id.* § 2(1).

406. *Canadian Pacific Railway*, 2006 Can. Sup. Ct. LEXIS 5, at *23–24.

took away the only thing of value⁴⁰⁷ to the owners of the mineral rights—the ability to take possession of the minerals. U.S. cases have often referred to the right to exclude as an essential or fundamental property right,⁴⁰⁸ but in the case of tangible property, the right to possess seems to be an even more indispensable characteristic of property. Whether these mineral rights cases are viewed as totally diminishing the use or value of the property interest or denying the owner the fundamental right of possession, they present circumstances that are relatively rare in the context of planning, zoning, and environmental regulation.

The case law provides virtually no evidence that Australian or Canadian courts have accepted the concept of regulatory taking in the general context of land use and environmental law. In both *Newcrest Mining* and *Tener*, in addition to finding a complete diminution of value or limitation on use by the owners, the courts found an acquisition of a property interest by the government, arguably removing these cases from realm of pure regulatory taking.⁴⁰⁹ In *Tener*, the Canadian Supreme Court carefully distinguished the case from land use planning and zoning,⁴¹⁰ and no Canadian case has found a compensable taking in the application of general land use planning or developments controls. In Australia, the *Tasmanian Dam Case* provides the most relevant precedent to apply to land use regulation, and that case is generally cited for proposition that mere regu-

407. This statement is based on Justice Holmes' view of the factual situation in *Mahon*. Justice Holmes characterized the Kohler Act in *Mahon* as resulting in a total diminution of the value of the coal company's affected mineral rights or support estate, and not a partial diminution of value of all the coal company's interests. See *supra* text accompanying notes 19–22. This kind of conceptual severance has been rejected in later U.S. taking jurisprudence. For example, in *Keystone Bituminous Coal Ass'n v. DeBenedictus*, 480 U.S. 470 (1987), a Pennsylvania statute similar to the one in *Mahon* was found not to constitute a taking. The coal that could not be mined to avoid subsidence could not be considered separately, but only in the context of the company's entire coal holdings. The coal that had to be left in place amounted to only a small percentage of the overall holdings, and the diminution of value was not sufficient to constitute a taking. *Id.* at 495–96; see also *Penn Central Transp. Co.*, 436 U.S. at 130–31. In the end, *Mahon*'s ongoing influence is in Justice Holmes' powerful rhetoric rather than in its providing a strong precedent based on the facts of the case.

408. See *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (The right to exclude is “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”); see also *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982).

409. *Newcrest Mining*, (1997) 190 C.L.R. at 634; *Tener*, [1985] 1 S.C.R. at 565; see also Evans, *Constitutional Property Rights*, *supra* note 300, at 200 (“The [High] Court has not accepted the American regulatory takings doctrine.”).

410. *Tener*, [1985] 1 S.C.R. at 563.

lation of land, even regulation that requires the property to be maintained in its natural state, does not require compensation.⁴¹¹

The emphasis in Australia and Canada on compensation depending upon an acquisition of property or a beneficial interest in property by government reflects British, rather than American, tradition. The ultimate reliance of Australian and Canadian courts in hinging their holdings upon a finding of whether the government receives a benefit or acquires a property interest, however, leaves a back door open for finding a compensable regulatory taking. The words “acquire” and “property” are peculiarly indeterminate in a legal sense. They are broad and malleable terms that may provide a surrogate for balancing public and private interests when the court adjudges, as in cases like *Newcrest Mining and Tener*, that the regulation “goes too far.”

The balancing inherent in regulatory taking analysis is not just a balancing of private property rights against the public interest. It is also a balancing of the role of courts with the role of legislatures. Canada’s lack of a constitutional mandate for compensation in the case of compulsory taking of property and its doctrine of parliamentary sovereignty make the role of the court clear and narrow. In *Mariner Real Estate*, Justice Cromwell of the Nova Scotia Court of Appeal explained as follows:

De facto expropriation is conceptually difficult given the narrow parameters of the court’s authority While de facto expropriation is concerned with whether the “rights” of ownership have been taken away, those rights are defined only by reference to lawful uses of land which may, by law, be severely restricted. In short, the bundle of rights associated with ownership carries with it the possibility of stringent land use regulation. . . . Canadian courts have no . . . broad mandate to review and vary legislative judgments about the appropriate distribution of burdens and benefits flowing from environmental or other land use controls. In Canada, the courts’ task is to determine whether the regulation in question entitles the respondents to compensation under the Expropriation Act, not to pass judgment on the way the Legislature apportions the burdens flowing from land use regulation.⁴¹²

Australia’s courts are similarly constrained in reviewing land use regulations enacted by state parliaments.⁴¹³ At the federal level in Australia and at both the state and federal levels in the United States, however, the courts find themselves in different role when reviewing the effects of legislation on constitutionally guaranteed rights. But it seems that these

411. *Tasmanian Dam Case*, 158 C.L.R. at 145–46.

412. *Mariner Real Estate Ltd.*, 177 D.L.R.4th at 712–13.

413. See *supra* text accompanying note 309.

roles are distinctly different in Australia and the United States. The *Tasmanian Dam Case* demonstrates that the High Court's review will generally be limited to the questions of whether the government acquired land or an interest in land through its authority under section 51(xxxi)⁴¹⁴ and, if so, whether the legislation provided just terms.⁴¹⁵ In applying the analysis outlined by the Supreme Court in *Penn Central*,⁴¹⁶ U.S. courts, on the other hand, find themselves re-evaluating the legislature's balancing of private property rights and the public interest served by a land use regulation, a role inconsistent with the British legal tradition inherited by Australia and Canada. Even U.S. courts, however, will not apply a heightened substantive due process analysis reserved for regulation affecting fundamental rights.

In *Village of Euclid v. Amber Realty Co.*,⁴¹⁷ the U.S. Supreme Court stated that "while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise."⁴¹⁸ Even if property is not considered a fundamental right, the constitutionalization of property has made it difficult for U.S. courts to evolve a view of property that conforms to the current conditions in a now densely developed country where external environmental impacts are better understood and quality of life and ecological integrity are often difficult to preserve without government intervention. With no constitutional restraint on Canada's regulators, however, their courts can demonstrate considerable pragmatism concerning land use regulation as illustrated in *Mariner Real Estate*, where Justice Cromwell stated:

Considerations of a claim of de facto expropriation must recognize that the effect of the particular regulation must be compared with reason-

414. It should be noted, however, that Australia's High Court may never get to this step of its analysis if the acquisition of property is found to be outside the scope of section 51(xxxi). In many ways, the analysis of this "complex and contested" issue substitutes for the balancing analysis applied by U.S. courts in regulatory taking analysis both in terms of the relevant substantive principles and its theoretical underpinnings. See Evans, *Constitutional Property Rights*, *supra* note 300, at 202-07. In fact, Professor Evans has proposed a test for determining whether an acquisition of property is within the scope of the section 51(xxxi) requirement of just terms that explicitly balances the effect of regulation on private property against the legitimate public interests served, a test that rings of the U.S. Supreme Court's *Penn Central* analysis. See Evans, *Acquisition of Property*, *supra* note 282, at 203.

415. See *supra* text accompanying notes 292-99.

416. *Penn Central Transp. Co.*, 438 U.S. at 124-25.

417. 272 U.S. 365 (1926).

418. *Id.* at 387.

able use of the lands in modern Canada, not with their use as if they were in some imaginary state of nature unconstrained by regulation. In modern Canada, extensive land use regulation is the norm and it should not be assumed that ownership carries with it any exemption from such regulation.⁴¹⁹

Although Australia's Constitution does provide protection for property at the federal level, the requirement that the government actually acquire a property interest or benefit leaves the government substantial freedom to regulate property up to the point where there is "an effective sterilisation of the rights constituting the property."⁴²⁰ Thus, for loss of value of land through "mere" regulation of land use, property owners find little protection in Australia's Constitution.⁴²¹

Finally, whether property is protected by a common law presumption of compensation, a statutory scheme, or a constitutional guarantee, all three countries continue to recognize the importance of private property in their societies.⁴²² In all three countries, compensation is generally available when land is physically acquired. And in all three countries, there are vigorous proponents of expanded protection of property rights. But while the concept of regulatory taking is, at most, extremely limited in Australian and Canadian jurisprudence, it is also not so fully realized in the United States that limited effects of regulation on the use or value of land must be compensated. In all three countries, when regulation falls short of actually acquiring or "sterilizing" property rights in land, it is the legislatures, rather than the courts, who bear primary responsibility for balancing society's interests with property rights.

419. *Mariner Real Estate Ltd.*, 177 D.L.R.4th at 717.

420. *Newcrest Mining*, (1997) 190 C.L.R. at 635.

421. See Evans, *Constitutional Property Rights*, *supra* note 300, at 200.

422. It is beyond the scope of this Article to discuss whether property is better protected in these countries through constitutional judicial review or through political institutions. For an excellent discussion of this issue, see Daniel H. Cole, *Political Institutions, Judicial Review, and Private Property: A Comparative Institutional Analysis*, 15 SUP. CT. ECON. REV. (forthcoming 2007).