

THE EMINENT DOMAIN IN AUSTRALIA: THE
‘INDIVIDUAL RIGHTS’ APPROACH TO S
51(xxxi) OF THE *AUSTRALIAN CONSTITUTION*

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ABSTRACT

The interpretation of ‘acquisition of property on just terms’ in s 51(xxxi) of the *Australian Constitution* is contested. This thesis re-evaluates the historical, theoretical and comparative contexts of the placitum, and comprehensively examines the High Court’s s 51(xxxi) jurisprudence since Federation, in order to identify the best interpretation of the placitum – that is, one which is contextually coherent, doctrinally consistent and capable of resolving current interpretive controversies.

The genesis of s 51(xxxi) is traced to two traditions: the English constitutional protection of private property expressed in the theory of Locke and Blackstone, as reflected in nineteenth century legislative practice in England and the Australian Colonies; and the European public law theory of eminent domain, as constitutionalised in the United States. Both traditions required full market-value compensation in every individual case when private property was appropriated. This was the understanding of s 51(xxxi) reflected in the Convention Debates and other relevant historical materials, and these contexts were habitually referenced by the Framers of the *Australian Constitution*. To the extent that the American experience contained a more robust justification for the requirement of compensation, and had been rigorously enforced by the Courts, s 51(xxxi) followed the American model.

This is the interpretation of s 51(xxxi) adopted by the High Court for the first forty years: one focussed on the placitum’s purpose of protecting ‘individual rights’, and not on its role in conferring a ‘legislative power’. This changed after World War Two, when Justice (and later Chief Justice) Dixon led the Court away from its earlier jurisprudence and from the contextual understanding of s 51(xxxi), replacing the focus on the individual with a dominant concern to maximise legislative power. The s 51(xxxi) jurisprudence has never fully recovered from this deviation, despite increasing instances of reversion to aspects of the ‘individual rights’ approach over the ensuing years. To the extent that agreed difficulties remain in the Court’s interpretation of s 51(xxxi), this thesis demonstrates that the complete adoption of the ‘individual rights’ approach is the only contextually coherent and doctrinally consistent solution to those difficulties, given the historical, theoretical and comparative contexts of s 51(xxxi) and the development of the High Court’s jurisprudence interpreting the placitum.

DECLARATION

This work contains no material which has been accepted for the award of any other degree or diploma in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text.

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PART ONE:

INTRODUCTION

CHAPTER 1:

INTRODUCTION

I INTRODUCTION

Section 51(xxxi) of the *Australian Constitution* provides:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to ... *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.¹

What is required for an ‘acquisition of property’ to be ‘on just terms’? This was the critical question in *Grace Brothers Pty Ltd v Commonwealth* in 1946. For Dixon J, the placitum was not directed to the protection of the individual whose property might be compulsorily acquired, but was to be interpreted simply as a head of Commonwealth legislative power:

[T]he validity of any general law cannot ... be tested by inquiring whether it will be certain to operate in every individual case to place the owner in a situation in which in all respects he will be as well off as if the acquisition had not taken place.²

Justice Williams disagreed, insisting that s 51(xxxi) was indeed intended to protect each individual whose property might be compulsorily acquired by creating an individual right to full market-value compensation in every case:

It is no satisfaction to an owner who has not received a fair equivalent in money for property of which he has been dispossessed to know that another owner has received more than the real value of his land ... an owner [must] *in every instance* be fairly and justly compensated for the loss of his property.³

The adoption of these competing approaches over time, one focusing on s 51(xxxi) as a ‘legislative power’, the other viewing the placitum as a constitutional ‘individual right’ to full market-value compensation, created a schism in the High Court in its interpretation of s 51(xxxi). To this day, this division remains problematic for the High Court’s jurisprudence on the placitum, aspects of which have been criticized as ‘confused and unsatisfactory’,⁴ ‘close to incoherent’,⁵ and not providing ‘an acceptable degree of certainty.’⁶

¹ *Australian Constitution*, s 51(xxxi) [emphasis added].

² *Grace Brothers Pty Ltd v Commonwealth* (1946) 72 CLR 269, 290 (Dixon J) (‘Grace Brothers’).

³ *Ibid.*, 301-2 (Williams J) [emphasis added].

⁴ Simon Evans, ‘When is an Acquisition of Property Not an Acquisition of Property?: The Search for a Principled Approach to Section 51(xxxi)’ (2000) 11 *Public Law Review* 183, 184.

⁵ Simon Evans, ‘Constitutional Property Rights in Australia: Reconciling Individual Rights and the Common Good’ in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (2006) 197, 197.

⁶ George Williams, *Human Rights Under the Australian Constitution* (Oxford University Press, 1999) 153.

This thesis will demonstrate that one of these approaches in *Grace Brothers* was the interpretation of the placitum that the Framers of the *Australian Constitution* would have given. Moreover, it will be argued that this approach was consistent with the English constitutional theory that had been followed in nineteenth century legislation in England and across the Australian Colonies. It also implemented the continental public law theory of eminent domain that had been adopted in constitutions across the American federation (to whose jurisprudence the Framers turned). Finally, this approach in *Grace Brothers* was consistent with the majority view in every s 51(xxxi) case since Federation. The other approach ignored all of these sources of interpretive guidance, did not refer to a single relevant prior case authority, and embarked on an entirely new path in the interpretation of the placitum. Perhaps surprisingly, it was the great advocate of ‘strict and complete legalism’,⁷ Dixon J, who took the radical deviation, leading the Court onto a new path in its s 51(xxxi) jurisprudence.

This thesis undertakes a comprehensive and systematic analysis of s 51(xxxi) of the *Australian Constitution*, exploring the historical, theoretical and comparative contexts of the placitum, and examining more than a century of High Court judgments interpreting it. All of this evidence, it will be argued, supports the conclusion that the ‘individual rights’ approach to s 51(xxxi) is the best approach to the placitum. It is best because of its consistency with the contexts of the placitum; because it provides a theoretically coherent approach to s 51(xxxi) that resolves the interpretive problems identified by other commentators; and because it is a solution which can be accommodated within the evolutionary development of constitutional interpretation in line with common law principles. As the best interpretive approach to s 51(xxxi), the ‘individual rights’ approach should be fully endorsed and applied by the High Court.

II THE IMPORTANCE OF THE ACQUISITION OF PROPERTY AND OF COMPENSATION TO THE INDIVIDUAL

The appropriation of property and the provision of compensation to the individual remain topics of contemporary relevance.⁸ There was an (unsuccessful) attempt to

⁷ *Swearing in of Sir Owen Dixon as Chief Justice* (1952) 85 CLR xi, xiv.

⁸ Government interference with private property rights may be described variously as expropriation, appropriation, acquisition, taking, condemnation, requisition, compulsory purchase and resumption. This

amend the *Constitution* in 1988 to provide equivalent protection against State legislation as exists against Commonwealth laws in s 51(xxxi).⁹ A proposal for a nuclear waste repository¹⁰ in South Australia resulted in the State government proposing to turn the land into a public park¹¹ to prevent the Commonwealth from acquiring it.¹² Further, with the privatisation of operations formerly performed by the Commonwealth, the use of land for ‘non-federal’ purposes (such as a factory outlet shopping mall at an airport that does not service users of the airport) has also become an issue of contention.¹³

The key to the importance of s 51(xxxi) and the ‘acquisition of property on just terms’ is its significance to both governments and individuals: the government inevitably requires property that cannot be acquired through voluntary purchase in open markets, but affected individuals could be ruined if no compensation were provided.

The importance of the appropriation of property from the beginning of the nineteenth century onwards is a well-documented phenomenon of the Industrial Revolution,¹⁴ whether for purposes such as the construction of canals,¹⁵ railways,¹⁶ roads¹⁷ and

this thesis will refer to ‘acquisition’ when s 51(xxxi) is involved, ‘taking’ where American constitutional provisions using that phrase are involved, and ‘appropriation’ where the generic concept is meant.

⁹ See, eg: Brian Galligan, ‘The 1988 Referendums and Australia’s Record on Constitutional Change’ (1990) 43 *Parliamentary Affairs* 497. Compulsory acquisition of property by State governments is not the focus of this thesis.

¹⁰ The fate of a commercial proposal for a high-level nuclear waste dump is considered in: Ian Holland, ‘Waste Not Want Not? Australia and the Politics of High-Level Nuclear Waste’ (2002) 37 *Australian Journal of Political Science* 283. On the role of property in the nuclear cycle, see generally: Commonwealth of Australia, *Uranium Mining, Processing and Nuclear Energy — Opportunities for Australia? Report to the Prime Minister by the Uranium Mining, Processing and Nuclear Energy Review Taskforce* (2006) 28, 68, 99.

¹¹ The introduction into the South Australian Parliament of the Public Park Bill 2003 (SA) was proposed. See: Chris Bleby, ‘Can’t Get No Satisfaction’ (2004) 26(11) *Law Society Bulletin* 29, 29.

¹² This land dispute between the Commonwealth and South Australia was litigated (and determined) on administrative law grounds: *South Australia v Slipper* (2003) 203 ALR 473, rev’d (2004) 136 FCR 259. For a consideration of these decisions, see: Bleby, above n 11.

¹³ See, eg: *Kangaroo Point East Association v Balkin* [1995] 2 Qd R 135; *Ventana Pty Ltd v Federal Airports Corporation & Fairways Group Pty Ltd* (1997) 75 FCR 400; *Direct Factory Outlets Pty Ltd v Westfield Management Ltd [No 2]* (2005) 144 FCR 23; Geoffrey Lindell, ‘A Possible Limit on the Use of Commonwealth Places for ‘Non- Federal Purposes’: From Airports to Shopping Malls’ (2004) 15 *Public Law Review* 269, 269-70, 273; Henry Burmester, ‘Comment on Lindell on the Use of Commonwealth Places’ (2004) 15 *Public Law Review* 269, 275; David Rohr, ‘Commercial Developments at Australian Airports are Lawful - Case Note: *Westfield Management Ltd v Brisbane Airport Corp Ltd*’ (2005) 20(4) *Australian Property Law Bulletin* 46.

¹⁴ Indeed, it has been said that: ‘The English law of expropriation is a by-product of the Industrial Revolution’: Eric C E Todd, ‘The Mystique of Injurious Affection in the Law of Expropriation’ (1967) Centennial Edition *University of British Columbia Law Review / Université Laval Les Cahiers de Droit* 127, 131.

¹⁵ See, eg, Leah Moren Green, ‘Commentary: The Erie Canal and the American Imagination: The Erie Canal’s Effects on American Legal Development, 1817-1869’ (2005) 56 *Alabama Law Review* 1167.

telegraphs,¹⁸ or to serve industries as diverse as forestry,¹⁹ mining,²⁰ and milling.²¹ The appropriation of property continues to play an important role in social and economic development in the modern state. As Lord Nicholls has noted, '[c]ompulsory purchase of property is an essential tool in a modern democratic society. It facilitates planned and orderly development'.²² The large scale of projects in the twentieth and twenty-first centuries increases the importance of powers of compulsory acquisition.²³

The provision of compensation to the individual is an essential counterbalance to a government power of compulsory acquisition. English legal theory recognised this principle, which was encapsulated in Blackstone's comment that, when private property was required by the government:

the legislature alone, can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him *a full indemnification and equivalent* for the injury thereby sustained.²⁴

A similar concern for the individual was reflected in the continental public law theory of eminent domain that was incorporated into American constitutional law:

¹⁶ See, eg, the statement of the benefits of acquiring land for railways: 'more than any other mode of conveyance, they tend to annihilate distance, bringing in effect places far distant near to each other: tending in their magic influence to the extension of personal acquaintance, the enlargement of business relations, and cementing more firmly the bond of fellowship and union between the inhabitants of the States': *Bloodgood v Mohawk and Hudson Railroad Co*, 18 Wend 9, 48 (1837) (Senator Maison).

¹⁷ See, eg, the statement that, of all public purposes, 'inferior to none in its influence upon the comfort, convenience and prosperity of the people, and the security of the state, is the obligation to provide for the construction of public highways': *Giesy v Cincinatti, Wilmington and Zanesville Railroad Co*, 4 Ohio St 308, 324 (1854) (Ranney J).

¹⁸ See, eg: *Pensacola Telegraph Co v Western Union Telegraph Co*, 96 US 1 (1877).

¹⁹ For example, the acquisition of land at sites conducive to the construction of log harbours: *Boom Co v Patterson*, 98 US 403 (1878).

²⁰ The economic importance of access to land in the context of mining is considered in detail in Gerald Manners, 'Unresolved Conflicts in Australian Mineral and Energy Resource Policies' (1992) 158 *Geographical Journal* 129, 136-41. The concerns of the mining industry are illustrated in Australian Mining Industry Council, *Australia's Economic Future: Access to Land* (1990) and Australian Mining Industry Council, 'Shrinking Australia: Economics and Land Access' (July 1990) *The Mining Review* 17.

²¹ See, eg, *Harding v Goodlett*, 11 Tenn 40 (1832).

²² *Waters v Welsh Development Agency* [2004] 1 WLR 1304, 1306 (Lord Nicholls). Cf: Bruce L Benson, 'The Mythology of Holdout as a Justification for Eminent Domain and Public Provision of Roads' (2005) 10 *The Independent Review* 165 who argues against compulsory acquisition.

²³ Australian Law Reform Commission, *Lands Acquisition and Compensation*, Report No 14 (1980):

The role of government has grown during the 20th century. No longer is it sufficient for the government simply to maintain order and to defend the country. It must satisfy a wide range of social demands. The need for public resources, including land, has increased. The number of acquisitions is greater. Moreover, technology has increased the scale of particular projects. Modern aerodromes, defence projects, freeways and public utilities occupy substantial tracts of land: at x.

²⁴ William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765) vol I, 139 [emphasis added].

eminent domain ... is the rightful authority which must rest in every sovereignty ... to appropriate and control individual property for the public benefit, as the public safety, convenience, or necessity may demand. ... It is a primary requisite ... that compensation shall be made therefor.²⁵

These two features, the importance of a power of compulsory acquisition to achieve the aims of government, and the imperative that all affected individuals receive full compensation when this power is exercised, ensure that the compulsory acquisition of property is a topic of perennial importance.

III METHODOLOGY

This thesis pursues orthodox methods of legal inquiry. It is a fundamental assumption of the thesis that the interpretation of s 51(xxxi) must depend on more than an examination of the modern jurisprudence and commentary on the placitum. The words of s 51(xxxi) do not exist in an intellectual vacuum,²⁶ and the meaning of ‘acquisition of property on just terms’ must be derived from the placitum’s various contexts. As Tom Allen has noted, ‘the concepts that define the right to property – such as ‘property’, ‘taking’, ‘acquisition’ and ‘compensation’ – are not merely labels without substance’.²⁷ Allen did not identify the content of these concepts, but highlighted the importance of a contextual analysis of s 51(xxxi). This thesis pursues just such a contextual analysis, proceeding from the premise that s 51(xxxi) cannot be properly understood *except* in its historical, theoretical and comparative contexts. Part Two of this thesis therefore examines these contexts to elucidate the placitum’s meaning.

The methodologies of constitutional interpretation through historical, theoretical and comparative analysis are well accepted. Although the appropriate extent of history’s influence is debated,²⁸ its relevance is widely accepted.²⁹ For example, Zines doubts

²⁵ Thomas M Cooley, *A Treatise on the Constitutional Limitations which rest upon the Legislative Power of the States of the American Union* (Little, Brown, 1868) 524, 559.

²⁶ As has been observed, ‘the Commonwealth of Australia was not born into a vacuum. It came into existence within a system of law already established’: *Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508, 521 (Latham CJ).

²⁷ Tom Allen, ‘The Acquisition of Property on Just Terms’ (2000) 22 *Sydney Law Review* 351, 351.

²⁸ See, eg: Greg Craven, ‘Original Intent and the Australian Constitution – Coming Soon to a Court Near You?’ (1990) 1 *Public Law Review* 166; Daryl Dawson, ‘Intention and the Constitution – Who’s Intent?’ (1990) 6 *Australian Bar Review* 93; Paul Schoff, ‘The High Court and History: It Still Hasn’t Found(ed) What It’s Looking For’ (1994) 5 *Public Law Review* 253; Jeremy Kirk, ‘Constitutional Interpretation and a Theory of Evolutionary Originalism’ (1999) 27 *Federal Law Review* 323; Michael Kirby, ‘Constitutional Interpretation and Original Intent: A Form of Ancestor Worship’ (2000) 24 *Melbourne*

that ‘any case has been decided by the High Court on the basis that the meaning intended in 1900 should simply be ignored as totally irrelevant’.³⁰ Moreover, the High Court’s decision in *Cole v Whitfield* endorsed the use of history, including of the Convention Debates,³¹ ‘for the purpose of identifying the contemporary meaning of language used, [and] the subject to which that language was directed’.³² Similarly, references to theories that underlie constitutional provisions are well known in areas as diverse as federalism, separation of powers, and representative and responsible government.³³ It is also an accepted methodology of constitutional interpretation to seek guidance from other constitutional systems,³⁴ especially the United States,³⁵ even if Australians may undervalue ‘how significant the American idea of constitutionalism was to our own framers, and how important the United States was as a model’.³⁶

University Law Review 1; Jeffrey Goldsworthy, ‘Interpreting the Australian Constitution in Its Second Century’ (2000) 24 *Melbourne University Law Review* 677; John Williams, ‘The Emergence of the Commonwealth Constitution’ in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 1, 28; Leslie Zines, ‘Dead Hands or Living Tree?: Stability and Change in Constitutional Law’ (2004) 25 *Adelaide Law Review* 3; John M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) xxxi. This thesis does not argue for a strict originalism (as to which, see, eg: Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 5th ed, 2010) 291-4; Sir Anthony Mason, ‘Interpretation in a Modern Liberal Democracy’ in C Sampford and K Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (Federation Press, 1996) 13; Jeffrey Goldsworthy, ‘Originalism in Constitutional Interpretation’ (1997) 25 *Federal Law Review* 1) but rather regards the use of history as one of an array of tools of constitutional interpretation.

²⁹ It has been said that: ‘[t]o be a lawyer in Australia is, in a sense, to be a legal historian’: Kirby, above n 28, 8. ‘The idea of a constitution implies permanence and continuity. Even though there is little consensus as to precisely how or how much the intended meaning of a constitutional text should matter in contemporary constitutional analysis, there is a widely shared sense that the Framers’ meaning should carry some weight, or matter in some way’: Thomas Y Davies, ‘Recovering the Original Fourth Amendment’ (1999) 98 *Michigan Law Review* 547, 734.

³⁰ Zines, ‘Dead Hands or Living Tree’, above n 28, 15.

³¹ It is notorious that for many years the High Court refused to allow reference to the Convention Debates. See, eg, *Municipal Council of Sydney v Commonwealth* (1904) 1 CLR 208, 213-14 (Griffith CJ, Barton and O’Connor JJ, during argument); *Tasmania v Commonwealth* (1904) 1 CLR 329, 333 (Griffith CJ, during argument); Williams, above n 28, xxxi. The judicial imprimatur to rely on the Convention Debates was finally granted in *Cole v Whitfield* (1987) 165 CLR 360. See also: Helen Irving, ‘Federalism is a Feminist Issue: What Australians Can Learn from the United States Commerce Clause’ (2007) 28 *Adelaide Law Review* 159, 176. See also: *New South Wales v Commonwealth* (2006) 229 CLR 1, 90-8 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), 272-5 (Callinan J) (‘*WorkChoices*’).

³² *Cole v Whitfield* (1988) 165 CLR 360, 385 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

³³ The use of these four theories in the interpretation of the *Australian Constitution* is discussed in: *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 70-1 (Deane and Toohey JJ).

³⁴ See, eg: Cheryl Saunders, ‘The Use and Misuse of Comparative Constitutional Law’ (2006) 13 *Indiana Journal of Global Legal Studies* 37; Adrienne Stone, ‘Comparativism in Constitutional Interpretation’ [2009] *New Zealand Law Review* 45.

³⁵ This has been recognised by the Court from a very early stage: ‘[i]n fashioning the *Constitution* of a Federated Commonwealth the framers might assuredly be expected to consider the constitution and history of other federations’: *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1109 (Griffith CJ, Barton and O’Connor J).

³⁶ Helen Irving, ‘A Nation Built on Words: The Constitution and National Identity in America and Australia’ (2009) 33 *Australian Studies* 211, 213.

Logically, the use of the historical, theoretical and comparative contexts in constitutional interpretation is natural, as '[c]onstitutional provisions are inevitably read in the light of broader contexts – of legal doctrine, historical background, their presumed purpose, the subject matter in dispute, common sense, the English language, and so on'.³⁷ No one method of constitutional interpretation is elevated in the analysis undertaken in this thesis. Instead, it is argued that all of the methods employed in Part Two of this thesis – historical, theoretical and comparative analysis – support the argument that the 'individual rights' approach to s 51(xxxi) should be preferred.

Part Three of this thesis will undertake a traditional doctrinal analysis of the High Court's jurisprudence on s 51(xxxi) since Federation. It will also pursue what has been called evolutionary interpretation, a study of the *development* of a body of judicial interpretations.³⁸ In the context of this evolutionary interpretation, the potential significance of the judgment of Dixon J in *Grace Brothers* will be apparent even from the brief description given at the start of this Introduction.

The basis of the framework of doctrinal analysis developed in this thesis, which arises from the analysis of the High Court's s 51(xxxi) jurisprudence in Part Three, has already been seen above in the short extracts from *Grace Brothers*: the competing 'individual rights' and 'legislative power' approaches to the placitum.

The fundamental feature of the 'individual rights' approach to s 51(xxxi) is its overarching concern with the protection of the individual. Its interpretation of 'acquisition of property' is broad, so as to ensure that the requirement of 'just terms' extends to protect a wide range of individual property rights. Its interpretation of 'just terms' is similarly encompassing, requiring that each individual receive full market-value compensation to fully indemnify the individual against loss when society as a whole requires their property. This is consistent with English liberal constitutional theory. Finally, it regards s 51(xxxi) as an implementation of the theory of eminent

³⁷ Kevin Booker and Arthur Glass, 'The *Engineers Case*' in Lee and Winterton (eds), above n 28, 34, 43.

³⁸ See, eg, J Dyson Heydon, 'Theories of Constitution Interpretation: A Taxonomy' (Speech delivered as the Sir Maurice Byers Lecture, New South Wales Bar Association Common Room, 3 May 2007):

'the type of evolution involved has been called 'the method of the common law'. That is, as decision succeeds decision, each cautiously proceeding by analogy with or limited extension of the one before, a body of doctrine builds up ... The doctrine of stare decisis, coupled with the extent to which governments and citizens have relied on the evolved position, makes it highly unlikely that that position will be overruled': at 72.

domain in Australia, and uses the American eminent domain jurisprudence as a source of guidance in the interpretation of the placitum.

In contrast, the ‘legislative power’ approach is fundamentally concerned with s 51(xxxi) as a source of governmental power. Its interpretation of ‘acquisition of property’ is more complicated: ‘property’ is broadly understood to give government the greatest ability to access the resources it requires, but ‘acquisition’ is narrowly interpreted to preserve legislative freedom to engage in various interferences with property without the need to provide ‘just terms’. Its interpretation of ‘just terms’ is very different: there is legislative discretion to define what terms would be just which countenances a global (rather than individual) approach to evaluating the justice of the terms, the Court engages in only limited review of that discretion, and the interests of the community are balanced against those of the individual in determining the amount of compensation. To this approach, the American eminent domain is irrelevant.

The primary research question examined in this thesis is: to what extent does the interpretation of s 51(xxxi) reflect the meaning of the placitum that is understood from its historical, theoretical and comparative contexts? Naturally, this question entails a more complex set of sub-questions which will be examined in the thesis, and which are explored below under the heading ‘Structure of this Thesis’. However, it is appropriate first to examine the existing commentary on s 51(xxxi) in order to understand those perspectives that already exist and to locate the argument to be pursued in this thesis within the existing body of knowledge on the interpretation of s 51(xxxi).

IV EXISTING COMMENTARY ON S 51(xxxi)

A *Classic Constitutional Works*

Of the three ‘classic works of Australian constitutional scholarship’ published around the time of Federation,³⁹ Inglis Clark’s *Studies in Australian Constitutional Law* did not refer to s 51(xxxi), Harrison Moore’s *Constitution of the Commonwealth of Australia* addressed the placitum in less than one page under the heading ‘Auxiliary and

³⁹ John M Williams, ‘Introduction’ in A Inglis Clark, *Studies in Australian Constitutional Law* (Maxwell, 1901, 1997 reprint) vii. As Williams notes, these texts provide analysis of ‘a Constitution in pristine condition’: at vii.

Incidental Powers’,⁴⁰ and Quick and Garran’s *Annotated Constitution of the Australian Commonwealth* devoted only a little over two pages to it.⁴¹

For Harrison Moore, s 51(xxxi) was ‘a recognition of the power of ‘eminent domain’’, that could be ‘compared with’ the Fifth Amendment takings clause and similar provisions in the Constitutions of the American States.⁴² Quick and Garran also referred to s 51(xxxi) as conferring a right of ‘eminent domain’, again linking the requirement of ‘just terms’ to the Fifth Amendment takings clause.⁴³

Quick and Garran also stated that s 51(xxxi) was ‘intended to recognize the principle of the *immunity of private ... property* from interference by Federal authority, *except on fair and equitable terms*’,⁴⁴ adding that a law under the placitum ‘would be examinable by the High Court, and if on its face it appeared to be unjust it would be liable to be declared unconstitutional and void.’⁴⁵ For Quick and Garran, s 51(xxxi) granted an important protection to individual rights that would be enforced by the High Court.

Thus, although the early commentaries devoted little attention to s 51(xxxi), what was said indicated a recognition of the placitum’s purpose of protecting individual rights and, more importantly, indicated a link to the American concept of eminent domain.

B *Literature Prior to World War Two*

The literature before World War Two largely ignored s 51(xxxi).⁴⁶ What little academic commentary there was departed from the classic constitutional texts. Four

⁴⁰ Sir W Harrison Moore, *The Constitution of the Commonwealth of Australia* (Maxwell, 2nd ed, 1910, 1997 reprint) 487-8.

⁴¹ John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901) 640-2.

⁴² Moore, above n 40, 487-8. Although this book has been said to be ‘the most substantial work by an Australian academic lawyer before 1950’ (George Winterton, ‘Introduction’ in Moore, above n 40, v) on s 51(xxxi) it was very brief.

⁴³ Quick and Garran, above n 41, 641.

⁴⁴ *Ibid* [emphasis added].

⁴⁵ *Ibid*.

⁴⁶ E G Coppel et al, ‘Compulsory Acquisition of Land in Australia’ (1921) 3 *Journal of Comparative Legislation and International Law* 251-7 examined land acquisition legislation in each of the States, with some reference also to Commonwealth legislation, but did not consider s 51(xxxi) at all. Similarly, T R Bavin and H V Evatt, ‘Price-Fixing in Australia during the War’ (1921) 3 *Journal of Comparative Legislation and International Law* 202-12 examined the constitutional basis for price-fixing in Australia, but gave no consideration to s 51(xxxi). General disinterest in s 51(xxxi) is evidenced by the failure to consider the placitum in: Robert Gordon Menzies, ‘War Powers in the Constitution of the

pages were devoted to the topic of ‘eminent domain’⁴⁷ in Donald Kerr’s 1925 text. Kerr suggested a wide interpretation of ‘property’,⁴⁸ but a narrow view of ‘just terms’, claiming that: ‘Parliament would be the sole judge of the justice of its terms’.⁴⁹ The basis for this conclusion was explained in the author’s earlier thesis:

The King in the Commonwealth Parliament would be exercising his royal prerogative, and there is no statute expressly limiting that prerogative. The High Court it is submitted could not hold the acquisition in the case supposed to be unconstitutional because of the inadequate character of the compensation. Indeed it is submitted the matter would not be justifiable [sic].⁵⁰

Kerr cited no authority (neither judicial case nor theoretical analysis) to support this last statement. In light of the structural separation of powers in the *Australian Constitution*, his view is not compelling: the scope of prerogative power does not define the scope of legislative powers granted by s 51.⁵¹ Further, Kerr provided no explanation for rejecting the approach of Quick and Garran to this issue. The first edition of Wynes’ text, published in 1936, simply endorsed Kerr’s view: ‘it is not conceivable that the Courts would question the judgment of Parliament on this matter’.⁵²

Thus, the only commentaries on s 51(xxxi) before World War Two, those of Kerr and Wynes (addressing what was only a minor topic in general texts), did not examine any of the relevant judicial decisions and adopted doubtful interpretations of the platicum.

Commonwealth of Australia’ (1918) 18 *Columbia Law Review* 1-20; Commonwealth of Australia, *Report of the Royal Commission on the Constitution* (1929); Stephen Mills, ‘Thirty Years’ Working of the Australian Constitution’ (1933) 15 *Journal of Comparative Legislation and International Law* 1.

⁴⁷ Donald Kerr, *The Law of the Australian Constitution* (LawBook, 1925) 198-201.

⁴⁸ ‘All real and personal property within the Commonwealth is subject to expropriation’: Ibid 198. In the author’s LLD thesis, on which the book is based, this sentence was preceded by the observation that s 51(xxxi): ‘merely express[es] an elemental fact inherent in the very nature of government, and that the recital of the power in the Constitution in no way limits or cuts down its nature’: Donald Kerr, *The Judicial Interpretation of the Constitution of the Commonwealth* (LLD Thesis, University of Adelaide, 1919) 399.

⁴⁹ Kerr, ‘Law of the Australian Constitution’, above n 47, 199.

⁵⁰ Kerr, ‘Judicial Interpretation of the Constitution’, above n 48, 403.

⁵¹ Although the legislative power granted by s 51 may be relevant to defining the scope of the executive power granted by s 61, the converse is not true except in respect of s 51(xxxix). See: George Winterton, *Parliament, The Executive and the Governor-General* (Melbourne University Press, 1983) 94-6; Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 346-7, 359-60.

⁵² W Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia* (Law Book, 1936) 248. See also: William Anstey Wynes, *The Legislative and Executive Powers of the Commonwealth and States under the Commonwealth of Australia Act* (LLD Thesis, University of Adelaide, 1933) 391. He expanded on the quoted passage in both texts: in the thesis, as follows:

‘It is submitted that the view taken by the late Dr Kerr that a Commonwealth Act authorising acquisition of property and fixing a nominal sum for compensation would be a valid enactment is correct. No measure of justice is laid down in the Constitution, and it is not conceivable that the Courts would question the judgment of Parliament on this matter’: at 391. (Similarly, in the book at 248.)

This lack of analysis of decisions before World War Two is a significant gap in the existing literature that will be redressed in Chapter 5.

C Post-War Literature

The significant number of wartime s 51(xxxi) decisions generated further academic commentary. In contrast to the earlier works that did not consider the decisions of the High Court, the post-war literature consisted largely of descriptions of recently-decided cases. However, there was little or no attempt to analyse them in a way that would enable identification of fundamental approaches to s 51(xxxi).

In his 1948 text,⁵³ Nicholas noted that the interpretation given to ‘property’ had been ‘of the widest connotation’,⁵⁴ but that there had been ‘some fluctuation in the meaning attached by the Court to the words ‘just terms’’.⁵⁵ Nicholas was content to reiterate the approach of the majority in the most recent decisions, stating that ‘just terms’ involved ‘regard to the interests of the public as well as to those of the person dispossessed’⁵⁶ and that the Court ‘will not readily deny the justice of terms fixed by the Legislature’.⁵⁷ Describing eminent domain as a legislative power for the appropriation of property,⁵⁸ without making any reference to its role in protecting individual rights, Nicholas was also ambivalent about the relevance of American jurisprudence.⁵⁹ His was ultimately a brief summary of the latest authorities with no focus on fundamental analysis.

Bailey’s 1951 article surveyed the first fifty years of the *Australian Constitution*,⁶⁰ and described s 51(xxxi) as the strongest of the exceptions to a general principle that individual liberties were ‘to be secured ... through and by, rather than by formal limitations and prohibitions on, the Parliament.’⁶¹ He expressed the view that s 51(xxxi) ‘assumed no great importance until World War II’,⁶² but reached this

⁵³ H S Nicholas, *The Australian Constitution: An Analysis* (Law Book, 1948) 197-207.

⁵⁴ *Ibid* 201.

⁵⁵ *Ibid* 199.

⁵⁶ *Ibid* 200.

⁵⁷ *Ibid*.

⁵⁸ *Ibid* 198.

⁵⁹ *Ibid* 199.

⁶⁰ K H Bailey, ‘Fifty Years of the Australian Constitution’ (1951) 25 *Australian Law Journal* 314. Bailey was Commonwealth Solicitor-General, and a former law professor at the University of Melbourne.

⁶¹ *Ibid* 326.

⁶² *Ibid* 327-8.

conclusion without explicit analysis of the earlier decisions of the Court. Like Nicholas, Bailey simply recounted the majority position in the most recent cases. On the interpretation of ‘just terms’, this led Bailey to write that:

‘Compensation’ is, of course, a technical term, with the established meaning of ‘full pecuniary equivalent of the property taken’. Our own phrase, ‘just terms’, is less technical, leaving scope for the discretion of the Parliament. The justice of the ‘terms’ must be considered from the point of view of the community as well as of the dispossessed owner.⁶³

Bailey was ambivalent about the relevance of American authorities. As he conceded, s 51(xxxi) was ‘no doubt *inspired* by the terms of the Fifth Amendment’ and the requirement of ‘just terms’ was ‘a condition ... in a form *apparently based* on the Fifth Amendment’. Yet, he stated that the provisions ‘differ considerably both in detail and in general effect’.⁶⁴ Although Bailey concluded that ‘the Court is in [the] process of evolving a distinctive Australian contribution to the law of eminent domain’,⁶⁵ he did not seem to see that this involved a departure from one of the indispensable features of eminent domain: the protection of individual rights.

The first substantial commentary focussing solely on s 51(xxxi) was not published until 1952: an essay by Baker, who was a law professor at the University of Tasmania.⁶⁶ His focus was on recent cases, with limited reference to any decisions prior to *Andrews v Howell* in 1941.⁶⁷ Baker commended Williams J’s approach to ‘acquisition’ in *Dalziel* which focussed on ‘Dalziel’s side of the picture’⁶⁸ (consistent with the ‘individual rights’ approach) but also accepted a lesser definition of ‘just terms’ (consistent with the ‘legislative power’ approach), stating that ‘just terms’ was:

not always the same thing as the ‘just compensation’ provided for in the American Fifth Amendment ... Australian courts have construed ‘just terms’ in the light of reasonableness and fairness ... [having] regard to the interests of the community as well as those of the person dispossessed. ... the terms of acquisition are, within reason, matters for legislative judgment and discretion.⁶⁹

⁶³ Ibid 328.

⁶⁴ Ibid 327 [emphasis added].

⁶⁵ Ibid 328.

⁶⁶ R W Baker, ‘The Compulsory Acquisition Powers of the Commonwealth’ in Rae Else-Mitchell (ed), *Essays on the Australian Constitution* (LawBook, 1952) 156. On Baker, see: Frank M Neasey, ‘Robert Wilfred Baker’ (1985) 8 *University of Tasmania Law Review* 89.

⁶⁷ (1941) 65 CLR 255.

⁶⁸ Baker, above n 66, 164.

⁶⁹ Ibid 169-71. Baker noted, however, that in the end it is ‘for the courts to say whether in fact’ just terms have been provided: at 172.

Baker was also uncertain about the relevance of American authorities. He expressly noted differences between s 51(xxxi) and the Fifth Amendment takings clause,⁷⁰ but also made frequent reference to American cases,⁷¹ adding that '[n]early all the Justices of the High Court refer to the American decisions, but there is very little unanimity about their use.'⁷² Baker adopted Bailey's statement about 'a distinctive Australian contribution to the law of eminent domain',⁷³ concluding that s 51(xxxi):

has proved equal to the demands that the rapid development of a young and vigorous country has put on it. Whilst sufficient power has been given to Governments, ample protection has been given to individuals. ... [D]ue regard has been paid to the rights of individuals, but the interests of the general community have not been overlooked.⁷⁴

As with Bailey, however, there is movement away from eminent domain's function of protecting individual rights. Under eminent domain, the interests of the general community would not be taken into account again in the interpretation of 'just terms' (as will be shown in Chapter 3).

The second edition of Wynes' book, published in 1956, examined the jurisprudence on s 51(xxxi) that had developed in the intervening period since the first edition.⁷⁵ Wynes noted that 'acquisition of property' had not been narrowly construed,⁷⁶ and acknowledged that the Court had reviewed whether 'just terms' had been provided,⁷⁷ but identified 'some fluctuation in the meaning attached by the Court to the words 'just terms''.⁷⁸ Claiming that there were 'extreme difficulties ... once the power of inquiry into sufficiency [of terms] is admitted',⁷⁹ Wynes argued that 'there must be some limit to the extent to which the court can go in investigating the justice of the terms',⁸⁰ reviewing the most recent cases before suggesting a test of 'some reasonable basis of

⁷⁰ Ibid 163, 184.

⁷¹ Ibid 164, 165, 166, 172, 177-8.

⁷² Ibid 177. In a later edition, Baker was similarly ambivalent, referring to an American law review article (Joseph M Cormack, 'Legal Concepts in Cases of Eminent Domain' (1931) 41 *Yale Law Journal* 221) for support, but then adding eight lines of text distinguishing the relevance of United States authorities: R W Baker, 'The Compulsory Acquisition Powers of the Commonwealth' in Rae Else-Mitchell (ed.), *Essays on the Australian Constitution* (LawBook, 2nd ed, 1961) 193, 204.

⁷³ Baker, above n 66, 169, quoting: Bailey, above n 60, 328.

⁷⁴ Baker, above n 66, 184.

⁷⁵ W Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia* (LawBook, 2nd ed, 1956) 461-76.

⁷⁶ Ibid 463.

⁷⁷ Ibid 466-7. See also: at 473.

⁷⁸ Ibid 467; quoting Nicholas, above n 53, 199.

⁷⁹ Wynes (2nd ed), above n 75, 473.

⁸⁰ Ibid 473-4.

compensation’.⁸¹ Wynes approved Baker’s observation that ‘due regard has been paid to the rights of individuals, but the interests of the general community have not been overlooked’,⁸² and regarded eminent domain as ‘the right of taking private property for public use’⁸³ without addressing its role in protecting individual rights.

In summary, the post-war commentary on s 51(xxxi) was largely confined to recounting the majority position in the latest cases. It left some important gaps suggesting the need for further analysis. First, decisions prior to 1941 were not examined in detail. Secondly, the basis for the varying interpretations of ‘just terms’ adopted by the Justices was not explored. Thirdly, the significance of differing views on the relevance of the American Fifth Amendment takings jurisprudence, and the sufficiency of understandings of eminent domain, were issues not thoroughly scrutinised. This thesis addresses each of these gaps in the existing literature.

D *Modern General Commentary*

An increase in s 51(xxxi) cases since 1979 has been accompanied by a greater volume of commentary on the placitum.⁸⁴ With a few exceptions, general constitutional texts have usually dealt with the placitum at some length.⁸⁵ However, as comprehensive

⁸¹ Ibid 474.

⁸² Ibid 474-5.

⁸³ Ibid 461.

⁸⁴ In the first period after the post-war literature, scholars had much less reason to examine s 51(xxxi). Thus, Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) says comparatively little about s 51(xxxi). However, Sawer does note that the requirement of ‘just terms’ is ‘in form part of the definition of the power, not an individual guarantee of rights, but in practice it operates to protect the individual’: at 19. He identifies the lack of fundamental analysis of s 51(xxxi) in the cases, concluding that ‘most of these were concerned with highly detailed questions as to amount, payment of interest etc. in which familiar rules derived from well established bodies of compensation law outside the constitutional field were decisive’: at 55. Addressing the ‘just terms’ requirement, he notes that this involves ‘something like a money equivalent for the particular thing acquired ... but this requirement leaves a good deal of room for legislative discretion’: at 172. Finally, he downplays the significance of s 51(xxxi), stating that ‘co-operative Commonwealth-State action is indicated as the solution of many of the problems which S. 51(xxxi) may cause for the Commonwealth if acting alone’: at 173. Sawer also commented on a Northern Ireland appropriation case: Geoffrey Sawer, ‘More on O D Cars’ (1961) 14 *Northern Ireland Legal Quarterly* 483.

⁸⁵ See, eg: George Winterton, H P Lee, Arthur Glass and James A Thomson, *Australian Federal Constitutional Law: Commentary and Materials* (LawBook, 2nd ed, 2006) 610-30; Gabriël A Moens and John Trone, *Lumb and Moens’ The Constitution of the Commonwealth of Australia Annotated* (LexisNexis Butterworths, 7th ed, 2007) 174-87; Suri Ratnapala, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 2nd ed, 2007) 290-99. Some texts contained much less commentary: Percy Ernest Joske, *Australian Federal Government* (Butterworths, 3rd ed, 1976) 204-6; Michael Detmold, *The Australian Commonwealth: A Fundamental Analysis of Its Constitution* (LawBook, 1985) 192-3; Christopher Enright, *Constitutional Law* (LawBook, 1977) 335; Kevin Booker,

treatises on the law, their focus on s 51(xxxi) has been necessarily limited, and their purpose has been to explain the more recent cases rather than to engage in a fundamental analysis of the placitum.

In 1979, Lane⁸⁶ suggested that '[t]he purpose of s. 51(xxxi) is legislative and protective'.⁸⁷ However, he went on to observe that it may be:

misleading to concentrate on the second purpose ... the protection of the expropriated owner. For s. 51 (xxxi) is a legislative power, not a clause in a Bill of Rights focussing on the rights of the subject and guaranteeing him particular justice in every case.⁸⁸

After repeating this observation elsewhere in 1997,⁸⁹ Lane commented that:

you may see a talking up of powers outside s 51(xxxi), a talking down of the power in s 51(xxxi) with its limitation of just terms. Or you may see a talking up of the power in s 51(xxxi), a talking down of the prohibition in s 51(xxxi). But the emphasis is not new, and it points up the contrast between our s 51(xxxi) and the United States 5th Amendment.⁹⁰

What Lane is suggesting is occurring is the Court focusing on the 'legislative power' aspect of the placitum at the expense of the 'individual rights' aspect: 'that part of s 51(xxxi) which is the 'legislative power' is given a freer reign by the High Court'⁹¹ at the expense of the part devoted to 'the protection of individual rights, and the promotion of individual justice'.⁹² However, one difficulty with Lane's approach appears from another of his observations: '[i]ncidentally, the Court is particularly astute to prevent evasions of s. 51(xxxi)'.⁹³ Far from being incidental, this astuteness is arguably an indication of focus on the 'individual rights' aspect of s 51(xxxi), contrary to Lane's conclusion. Lane's newer text also makes express the rejection of American authorities that was implied by their absence from his earlier work.⁹⁴

Arthur Glass and Robert Watt, *Federal Constitutional Law: An Introduction* (LawBook, 2nd ed, 1998) 225-7.

⁸⁶ P H Lane, *The Australian Federal System* (LawBook, 2nd ed, 1979) 261-86.

⁸⁷ *Ibid* 261.

⁸⁸ *Ibid* 262. Lane later returns to consider the difference between s 51(xxxi) and the Fifth Amendment takings clause: at 280.

⁸⁹ P H Lane, *Lane's Commentary on the Australian Constitution* (LawBook, 2nd ed, 1997) 310.

⁹⁰ *Ibid* 314.

⁹¹ *Ibid* 326.

⁹² *Ibid* 325. The author's later note on s 51(xxxi) adds nothing to the foregoing analysis: P H Lane, 'Constitutional Law' (2002) 76 *Australian Law Journal* 154, 155-6.

⁹³ Lane, 'Australian Federal System', above n 86, 263.

⁹⁴ Lane, 'Commentary', above n 89, 325-6.

Howard⁹⁵ noted that the definition of ‘just terms’ has ‘proved elusive and may, owing to the wide variety of circumstances to which it has to be applied, be impossible’,⁹⁶ as ‘the standard of justice is not absolute’ and ‘a variety of terms may in the context be just’.⁹⁷ However, contrary to Lane, Howard concluded that the ‘individual rights’ aspect had been dominant: ‘The High Court has treated the requirement of just terms as *the point of s. 51(31)* and given it corresponding weight in the interpretation of the section’.⁹⁸ Joseph and Castan have also suggested that ‘the Court in recent times has turned more towards the ‘full compensation’ model rather than the ‘balancing all interests’ approach’.⁹⁹

The dual purpose view of s 51(xxxi) is now ‘orthodox and unchallenged’,¹⁰⁰ and has been accepted by Hanks, Zines,¹⁰¹ Joseph and Castan,¹⁰² and Blackshield and Williams.¹⁰³ The broad interpretation of ‘acquisition of property’ is also well established.¹⁰⁴ Further, the view that ‘just terms’ requires some form of ‘balance to be drawn between the interest of the individual whose property is to be acquired and the interest of the community’¹⁰⁵ is well accepted.¹⁰⁶ Because of this balancing, Zines has observed that the cases involve an interplay of ‘conflicting policies and values’.¹⁰⁷

⁹⁵ Colin Howard, *Australian Federal Constitutional Law* (LawBook, 3rd ed, 1985) 441-59.

⁹⁶ *Ibid* 451.

⁹⁷ *Ibid*.

⁹⁸ *Ibid* [emphasis added].

⁹⁹ Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (LawBook, 3rd ed, 2010) 401.

¹⁰⁰ Peter Hanks, ‘Constitutional Guarantees’ in H P Lee and George Winterton (eds), *Australian Constitutional Perspectives* (1992) 92, 110. See also: Peter Hanks, Patrick Keyser and Jennifer Clarke, *Australian Constitutional Law: Materials and Commentary* (LexisNexis Butterworths, 7th ed, 2004) 928-9; Peter Hanks, ‘Adjusting Medicare Benefits: Acquisition of Property?’ (1992) 14 *Sydney Law Review* 495, 495.

¹⁰¹ Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 578. An earlier work, Leslie Zines, ‘The Australian Constitution 1951 – 1976’ (1976) 7 *Federal Law Review* 89, did not consider s 51(xxxi).

¹⁰² Joseph and Castan, above n 99, 384.

¹⁰³ Blackshield and Williams, above n 28, 1233; Williams, ‘Human Rights Under the Australian Constitution’, above n 6, 138-9.

¹⁰⁴ Joseph and Castan, above n 99, 385, 390; Blackshield and Williams, above n 28, 1233; Williams, ‘Human Rights Under the Australian Constitution’, above n 103, 145-8; Graham L Fricke ‘Commonwealth’ in Graham L Fricke (ed), *Compulsory Acquisition of Land in Australia* (LawBook, 2nd ed, 1982) 6.

¹⁰⁵ Hanks, ‘Constitutional Guarantees’, above n 100, 115.

¹⁰⁶ Blackshield and Williams, above n 28, 1250.

¹⁰⁷ Zines, ‘The High Court and the Constitution’, above n 101, 580. Zines locates the clash of the different approaches to the interpretation of s 51(xxxi) identified in this thesis as the ‘individual rights’ and ‘legislative power’ approaches within the broader paradigm of the idea that ‘a constitutional guarantee should be given a generous interpretation’ and the opposing consideration that ‘the Commonwealth’s authority to regulate matters within its given powers’ should be preserved: at 580.

General texts on constitutional law have therefore accepted the dual purpose view of s 51(xxxi). Opinions differ as to which of the ‘individual rights’ and ‘legislative power’ aspects is in the ascendancy. What has not been addressed in these general commentaries on s 51(xxxi) is the nature of the balance that is to be struck between the ‘individual rights’ and ‘legislative power’ approaches. Further, the potential conflict between the broad interpretations of ‘acquisition of property’ (consistent with what this thesis identifies as the ‘individual rights’ approach) and the ‘balancing’ interpretations of ‘just terms’ (consistent with what this thesis identifies as the ‘legislative power’ approach) has not been examined. The central argument of this thesis, that the ‘individual rights’ approach alone should guide the interpretation of s 51(xxxi), has not been tested.

E *Modern Specific s 51(xxxi) Commentary*

In the modern era, a number of articles have focused more closely on s 51(xxxi),¹⁰⁸ although the placitum has still been afforded relatively little attention – of the many collections of essays on the *Australian Constitution* published in recent times, only one has contained a chapter specifically addressing s 51(xxxi).¹⁰⁹ These works will be considered in detail in Chapter 7,¹¹⁰ but will be sketched in broad outline here to identify the gaps in existing analysis which this thesis addresses.

¹⁰⁸ Of course, there are other commentaries that touch on s 51(xxxi) issues, but do so either tangentially or without contributing significantly to the understanding of the placitum (for example, because of their limited scope). These include: James McLachlin, ‘Constitutional Validity of Orders for Divestiture of Property under the Trade Practices Act’ (1990) 1 *Public Law Review* 120; Marcus Cox, ‘Case Notes: Acquiring Property on Just Terms’ (1994) 19 *Melbourne University Law Review* 768; Pat Brazil, ‘Newcrest Mining (WA) Limited and BHP Minerals Limited v Commonwealth of Australia and Director of National Parks and Wild Life’ (1997) 16 *Australian Mining and Petroleum Law Journal* 184; Gavan Griffith and Geoffrey Kennett, ‘Constitutional Protection Against Uncompensated Expropriations of Property’ [1988] *Australian Mining and Petroleum Law Association Yearbook* 49; D F Jackson and Stephen Lloyd ‘Compulsory Acquisition of Property’ [1988] *Australian Mining and Petroleum Law Association Yearbook* 75; John Gordon and Tim Hammond, ‘It’s the Constitution, it’s the vibe: *Smith v ANL* in the High Court’ (2001) 44 *Plaintiff* 24; Peter Anet, ‘Acquisition of Property: Past Cases, Future Directions’ (Paper presented at the Constitutional Law Conference, Sydney, 15 February 2002); Nicole Rogers, ‘Seeds, Weeds and Greed: An Analysis of the *Gene Technology Act* 2000 (Cth), Its Effect on Property Rights, and the Legal and Policy Dimensions of a Constitutional Challenge’ (2002) 2 *Macquarie Law Journal* 15; Kevin Gray, ‘There’s No Place Like Home’ (2007) 11 *Journal of South Pacific Law* 73.

¹⁰⁹ Evans, ‘Constitutional Property Rights in Australia’, above n 5.

¹¹⁰ One strand of commentary addresses the particular issue of s 51(xxxi)’s application to Indigenous property rights: Sean Brennan, ‘Native Title and the ‘Acquisition of Property’ under the Australian Constitution’ (2004) 28 *Melbourne University Law Review* 28; Sean Brennan, ‘Compulsory Acquisition of Native Title Land for Private Use by Third Parties’ (2008) 19 *Public Law Review* 179; Sean Brennan, ‘The Northern Territory Intervention and Just Terms for the Acquisition of Property’ (2009) 33 *Melbourne University Law Review* 957; Celia Winnett, ‘Just Terms’ or Just Money? Section 51 (xxxi),

Roger Hamilton's 1973 article in the *Federal Law Review*¹¹¹ noted presciently that 'the time has now come to start meeting the challenge of 'back door' acquisition by regulation'.¹¹² Chapter 7 will examine how the Court has met this challenge identified by Hamilton, and whether his reference to the American regulatory takings approach as a source of guidance¹¹³ was of any influence.

The most sustained analysis of s 51(xxxi) appears in a series of articles by Simon Evans.¹¹⁴ He examined the Convention Debates, which he concluded 'do not support the assertion that [s 51(xxxi)] was modelled on the American Takings Clause'¹¹⁵ and 'provide little assistance in resolving the current problems of s 51(xxxi) jurisprudence'.¹¹⁶ Chapter 4 of this thesis will argue that more assistance is available from the Convention Debates than Evans identified.

Evans' suggestion of a way forward for s 51(xxxi) is based on his identification of 'competing visions of the functions of property and the state'.¹¹⁷ He concluded that '[w]ithin the broad parameters of the text of section 51(xxxi), very different balances can be struck'.¹¹⁸ Similarly, Sean Brennan has written that s 51(xxxi):

inevitably draws our ultimate appellate court into substantive questions of distributive justice, morality and political economy as well as law. And that is a proposition overwhelmingly at odds with the way the High Court has typically defined its place in Australia's democracy.¹¹⁹

Native Title and Non-Monetary Terms of Acquisition' (2010) 33 *University of New South Wales Law Journal* 776; Matthew T Stubbs, 'The Acquisition of Indigenous Property on Just Terms: *Wurridjal v Commonwealth*' (2011) 33 *Sydney Law Review* 119. For the purposes of this thesis, it is not necessary to consider whether Indigenous property is a special case: the focus here is on the placitum's interpretation generally.

¹¹¹ Roger Hamilton, 'Some Aspects of the Acquisition Power of the Commonwealth' (1973) 5 *Federal Law Review* 265.

¹¹² *Ibid* 293.

¹¹³ *Ibid* 289.

¹¹⁴ Evans, 'When is an Acquisition of Property Not an Acquisition of Property?', above n 4; Evans, 'Constitutional Property Rights in Australia', above n 5; Simon Evans, 'From Private Property to Public Law: Comment and Book Review: Janet McLean (ed), *Property and the Constitution*' (2000) 28 *Federal Law Review* 155; Simon Evans, 'Property and the Drafting of the Australian Constitution' (2001) 29 *Federal Law Review* 121; Simon Evans, 'Should Australian Bills of Rights Protect Property Rights?' (2006) 31 *Alternative Law Journal* 19.

¹¹⁵ Evans, 'Property and the Drafting of the Australian Constitution', above n 114, 130.

¹¹⁶ *Ibid* 132. Evans' approach here was relied upon in: Donna R Christie, 'A Tale of Three Takings: Taking Analysis in Land Use Regulation in the United States, Australia and Canada' (2007) 32 *Brooklyn Journal of International Law* 343, 360-4.

¹¹⁷ Evans, 'When is an Acquisition of Property Not an Acquisition of Property?', above n 4, 201.

¹¹⁸ *Ibid* 204.

¹¹⁹ Sean Brennan, 'The State of Play in Acquisition of Property: *Theophanous v The Commonwealth*' (Paper presented at the Constitutional Law Conference, Sydney, 16 February 2007) 18.

Evans' conclusion was that judges should hesitate to invalidate legislation under the placitum because 'some of the moral dimensions of property are better addressed by legislators than courts interpreting s 51(xxxi)'.¹²⁰ In Chapter 7, evidence will be given to show that the 'individual rights' approach can resolve the difficulty identified by Evans and Brennan, thus providing a more conventional constitutional solution than the deference to the legislature suggested by Evans. Ultimately, it is the judges who have responsibility for the interpretation of the *Constitution*, and this responsibility cannot be abnegated in the hope of avoiding the interpretation of difficult provisions.

A more radical solution of narrowing s 51(xxxi)'s application in order to reduce very significantly its application has been proposed by Tom Allen¹²¹ and Rosalind Dixon.¹²² It will be argued in Chapter 7 that such an approach is not necessary (given the adoption of the 'individual rights' approach can address existing problems) and itself suffers from significant problems. While the solution proposed by these authors may reduce the instances in which s 51(xxxi) has to be interpreted, in fact it does not address the underlying interpretive issue at all.

The specific commentary on s 51(xxxi) in the modern era has proposed solutions to the interpretive difficulties that have been identified. Their merits will be assessed in Chapter 7, but ultimately this thesis rejects each of these proposals. What none of the existing literature examines is the critical question addressed by this thesis: whether the 'individual rights' approach provides the best interpretation of s 51(xxxi).

F *The Gaps in Existing Literature*

In summary, academic commentary on s 51(xxxi) is notable for its paucity, particularly in the first eighty years of the Australian Commonwealth. Further, much of what exists consists of mere re-statements of the result in recent cases with little fundamental analysis. To borrow from Windeyer J, commentary on s 51(xxxi) has often been 'in the

¹²⁰ Evans, 'Constitutional Property Rights in Australia', above n 5, 213.

¹²¹ Allen, above n 27; Tom Allen, *The Right to Property in Commonwealth Constitutions* (Cambridge University Press, 2000).

¹²² Rosalind Dixon, 'Overriding Guarantee of Just Terms or Supplementary Source of Power?: Rethinking s 51(xxxi) of the Constitution' (2005) 27 *Sydney Law Review* 639.

rear and limping a little'.¹²³ Even after the increase in cases and commentary in the modern era, the significant gaps that remain in the literature, and the problems associated with the interpretive solutions that have been suggested, invite further analysis.

Modern commentators accept that there are problems with the s 51(xxxi) jurisprudence, but their proposed solutions have not grasped what arguably are the real issues: they have variously tried to reduce the frequency of the placitum's application or to avoid judicial interpretation through deferring the significant questions to legislative determinations. This provides an impetus for this thesis' re-evaluation of the matter in order to elucidate the best interpretation of s 51(xxxi), one that is consistent with the placitum's contexts and doctrinally coherent.

This thesis will provide a new analysis of the historical, theoretical and comparative contexts of s 51(xxxi), which will considerably supplement the limited existing historical analysis (through the use of a broader range of sources and with much broader reference to the historical, theoretical and comparative contexts than previously undertaken). Further, the early decisions interpreting the placitum have been overlooked by the existing commentary, and will be examined in this thesis. Moreover, this thesis will consider the relative influence over time of the 'individual rights' and 'legislative power' approaches to s 51(xxxi), and will make the novel argument that the 'individual rights' approach alone should guide the interpretation and application of s 51(xxxi) of the *Australian Constitution*. The way in which this argument will be advanced will now be addressed.

V STRUCTURE OF THIS THESIS

Part Two of this thesis (Chapters 2, 3 and 4) examines the historical, theoretical and comparative contexts of s 51(xxxi) to identify the conceptual understanding of 'the acquisition of property on just terms' at the time of Australian Federation.

¹²³ 'Law, marching with medicine but in the rear and limping a little': *Mount Isa Mines v Pusey* (1970) 125 CLR 383, 395 (Windeyer J).

Chapter 2 analyses part of the historical and theoretical context of s 51(xxxi): the protection of individual rights of property in English constitutional theory and practice, as well as in the Australian Colonies. The focus is on understanding the theory and law regarding the acquisition of property with a view to ascertain what guidance comes from this for the interpretation of s 51(xxxi). It will be seen that individuals were protected through a requirement of full market-value compensation expressed in the English liberal theory articulated by Locke and Blackstone, and incorporated into the legislative practice of the English and Australian Colonial Parliaments, and although parliamentary supremacy meant that the acquisition of property *without* compensation *could* be undertaken in theory, this was rare in nineteenth century practice. These historical and theoretical contexts, of full market-value compensation being provided to the individual whenever property was acquired in England and the Australian Colonies, support the argument for the ‘individual rights’ approach to s 51(xxxi).

Chapter 3 examines aspects of the theoretical and comparative contexts of s 51(xxxi), the European public law theory of eminent domain and its constitutional implementation in the United States, in order to identify further guidance on the interpretation of s 51(xxxi). It will be demonstrated that the American eminent domain was important, first as an example of a power of appropriation accompanied by a judicially-enforced requirement of compensation, and secondly because its practical implementation showed both the diverse range of individual property rights that should be protected and the necessity of ensuring full market-value compensation for each affected individual. The evidence from these contexts also supports the argument of this thesis that the ‘individual rights’ approach to s 51(xxxi) is to be preferred.

Chapter 4 investigates the Convention Debates relating to s 51(xxxi) to address two issues. First, what were the conceptual understandings of ‘the acquisition of property on just terms’ at the time of the development of the *Australian Constitution*? Secondly, with reference to the contemporary sources, what evidence is there of the influence of the historical, theoretical and comparative contexts that were examined in Chapters 2 and 3? It will be seen that s 51(xxxi) was understood as a significant protection of individual rights requiring full market-value compensation. The importance of the historical, theoretical and comparative contexts will also be demonstrated, as will the fact that the American experience of judicial review of compensation was regarded as

showing how s 51(xxxi) would apply in Australia. Again, this supports the argument of this thesis in favour of the ‘individual rights’ approach to s 51(xxxi).

In sum, Part Two of this thesis gathers and analyses the evidence of the implications of the historical, theoretical and comparative contexts of s 51(xxxi), and identifies the significant coherence across these different sources of interpretive guidance. It is demonstrated that s 51(xxxi) was understood by the Framers as being consistent with both the protection of the individual in the English constitutional theories of Locke and Blackstone as well the American eminent domain, and followed the latter example in creating a constitutional individual right to full market-value compensation. This reflects the prime importance attached to the provision of full compensation to the individual as the *quid pro quo* of Parliament’s power to interfere with private property rights for the good of society. This contextual analysis therefore supports the argument of this thesis that the ‘individual rights’ approach to s 51(xxxi) is correct.

Part Three of this thesis undertakes a doctrinal analysis of the jurisprudence of the High Court in interpreting s 51(xxxi).¹²⁴ In particular, it investigates the degree to which the historical, theoretical and comparative contexts of the placitum have been incorporated in the Court’s jurisprudence, and identifies whether the ideal of the evolutionary development of constitutional interpretation has been respected.¹²⁵

A particular focus will be changes to the Court’s approach over time, and three distinct eras of jurisprudence are identified: the first, which extended until 1945, is considered in Chapter 5; the second, from 1946 to 1961, is examined in Chapter 6; and the modern era, commencing in 1979, is the focus of Chapter 7. There were comparatively few significant s 51(xxxi) cases in the first and second eras: eight principal decisions in each era. The largest volume of cases has been decided in the modern era: twenty two decisions are examined in Chapter 7. In part, this explosion of litigation in the modern era signals the interpretive problems posed by the existing s 51(xxxi) jurisprudence.

¹²⁴ Limited reference will be made to lower court decisions. This is required to ensure a manageable limit on the material to be analysed and reported, and is justifiable because any important approaches from lower courts will inevitably be considered by the High Court in later decisions.

¹²⁵ See above n 38.

Chapter 5 studies the first era of s 51(xxxi) jurisprudence, revealing the adoption of important features of the ‘individual rights’ approach. First, the requirement of ‘just terms’ was interpreted as an individual right to compensation limiting all heads of legislative power; secondly, s 51(xxxi) was applied to interferences with a wide variety of property interests; thirdly, it was concluded that ‘just terms’ required a legal right to full market-value compensation for every affected individual; and, fourthly, the American eminent domain was used as a guide to the interpretation of s 51(xxxi). In taking the ‘individual rights’ approach, the Court was simply confirming the interpretation of the placitum that Part Two has shown its historical, theoretical and comparative contexts suggested. The Justices continued to take this ‘individual rights’ view even when restricting the scope of the defence power in a time of total war.

Chapter 6 analyses the second era of s 51(xxxi) jurisprudence. It reveals that the ‘individual rights’ approach was rejected, and that Dixon J’s ‘legislative power’ approach instead grew eventually to achieve unanimous acceptance. This resulted in four important differences from the first era ‘individual rights’ approach. First, the Court concerned itself with the general effects of legislation rather than its impact on each individual; secondly, ‘just terms’ was subject to legislative definition and legislation was to be invalidated only if the terms were not reasonable; thirdly, the interests of the individual would be balanced against those of the community (meaning that full compensation was no longer required); and, fourthly, there was no regard to comparative or theoretical guidance from American eminent domain. Four areas are identified which support the argument of this thesis that the ‘individual rights’ approach to s 51(xxxi) should be preferred: two instances where the first era approach was continued (the wide definition of ‘property’ and the application of s 51(xxxi) to limit all heads of legislative power) and two new areas in which the ‘legislative power’ approach was not followed (the application of s 51(xxxi) to the ‘acquisition of property’ by any person under Commonwealth law, and the identification of instances of the ‘acquisition of property’ outside s 51(xxxi)).

Chapter 7 examines the modern jurisprudence on s 51(xxxi) and traces the relative influence of the ‘individual rights’ and ‘legislative power’ approaches to the placitum. It is shown that the ‘legislative power’ approach has been gradually eroded, with the ‘individual rights’ approach being critical to the development of the jurisprudence on

‘acquisition of property’ and to the identification of instances of ‘acquisition of property’ outside s 51(xxxi). It is also demonstrated that ‘just terms’ has not been given a consistent interpretation as a result of attempts to balance the two approaches, and that considerable contradiction exists in judicial attitudes towards American eminent domain. Solutions proposed by commentators to the problems of s 51(xxxi) jurisprudence are critiqued and are shown to suffer from difficulties of their own. The complete adoption of all aspects of the ‘individual rights’ approach is shown to provide a clear solution to the continuing interpretive issues of the s 51(xxxi) jurisprudence.

The contextual analysis of Part Two and the doctrinal analysis of Part Three of this thesis together demonstrate the primacy of the ‘individual rights’ approach to s 51(xxxi). Part Two shows that the ‘individual rights’ approach to s 51(xxxi) is indicated by each of the historical, theoretical and comparative contexts of the placitum. Part Three identifies that the ‘individual rights’ approach was taken in the first era of s 51(xxxi) jurisprudence. Although the second era turned to the ‘legislative power’ approach under the influence of Dixon J, it will be shown that the ‘individual rights’ approach remained influential in important respects. In the third era, the Court not only continued to use the ‘individual rights’ approach to advance its interpretations in key areas where it had remained influential in the second era, but it expanded the use of the ‘individual rights’ approach, in fact achieving a substantial, but as yet incomplete, return to the ‘individual rights’ approach to s 51(xxxi).

Finally, it will be argued that a complete return to the ‘individual rights’ approach in the interpretation of s 51(xxxi) can remedy the remaining areas of unsatisfactory jurisprudence on the placitum, returning the interpretation of the placitum to a position consistent with its historical purpose as intended by the Framers and with the guidance available from the theoretical and comparative contexts under the influence of which it was formulated. This is the means through which a more satisfactory jurisprudence on the ‘acquisition of property on just terms’ will be reached.

PART TWO:

THE HISTORICAL, THEORETICAL AND COMPARATIVE CONTEXTS OF S 51(xxxi)

CHAPTER 2:

THE APPROPRIATION OF PROPERTY IN ENGLAND AND THE AUSTRALIAN COLONIES

I INTRODUCTION

Section 51(xxxi) was the first provision in a written constitution in the British Commonwealth to protect private property from uncompensated compulsory acquisition.¹ This Chapter examines the historical and theoretical background, the compulsory acquisition of property in England and the Australian Colonies, which must inform the interpretation of ‘the acquisition of property on just terms’ in s 51(xxxi) and also seeks to establish whether the placitum represented a radical change or merely continued the existing legal position in England and the Australian Colonies.

Section II of this Chapter provides a brief overview of the protection of property under the English constitution, beginning from *Magna Carta* up until the time of Australian Federation. It outlines the legislative and common law protections against Royal encroachment on private property, traces the development in English liberal theory of the philosophical basis for protecting private property from legislative action, and examines the practical application of the restraint it imposed on legislative power in England, particularly in the late nineteenth century (immediately before Australian Federation). This section shows the English protection of individual rights of property from encroachment by the Monarch or Parliament which was generally given effect through the provision of full market-value compensation to the individual when a legislative power of appropriation was exercised. It will be argued that this ideal of full market-value compensation for the appropriation of private property informs the requirement of ‘just terms’ in s 51(xxxi).

Section III of this Chapter considers the position in the Australian Colonies prior to Federation. Despite the great differences between England and the Australian Colonies, the Australian experience of the appropriation of private property in the latter half of the nineteenth century was strikingly similar to the English practice of the same time. Indeed, it will be shown that in all Australian jurisdictions the relevant legislation was either identical to or based extremely closely on the law that applied in England, and this provides strong support for the argument that the English ideal of full market-value compensation was replicated in Australia.

¹ See: Thomas Allen, ‘Commonwealth Constitutions and the Right Not to be Deprived of Property’ (1993) 42 *International and Comparative Law Quarterly* 523, 525.

The purpose of this Chapter is to identify what the English and Australian Colonial experience indicates about the meaning of ‘the acquisition of property on just terms’. It will be demonstrated that the protection of private property under English constitutional theory, and in the practice of appropriation in England and the Australian Colonies, supports the argument of this thesis that s 51(xxxi) is a protection of individual rights requiring the payment of full market-value compensation to all affected individuals.

II THE PROTECTION OF PRIVATE PROPERTY IN THE ENGLISH CONSTITUTION

A *Protections of Private Property from Executive Action*

The protection of private property in the English constitution can be traced back at least to *Magna Carta* (1215) which restricted Royal authority to dispossess a person of their private property: ‘No free man shall be ... disseised ... except by the lawful judgment of his peers and by the law of the land.’² The scope of this protection was expanded in later confirmations of *Magna Carta*: in 1217, the property was extended from freehold to include ‘free tenements, franchises and free customs’;³ and in 1354 it was altered to protect not only free men but men ‘of whatever estate or condition’.⁴

Without debating the significance of this provision,⁵ or that of *Magna Carta* generally,⁶ three points may be noted. First, *Magna Carta* is significant because it proposed a

² *Magna Carta* (1215), as translated in A E Dick Howard, *Magna Carta: Text and Commentary* (University Press of Virginia, 1964) 43.

³ William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John with an Historical Introduction* (Maclehose, 2nd ed, 1914) 383 (translation of: ‘de libero tenemento suo vel libertatibus vel liberis consuetudinibus suis’). For the similar 1225 version, see: J C Holt, *Magna Carta* (Cambridge University Press, 2nd ed, 1992) 507-8. Comparable phrasing remained in the 1354 version: Paul Vinogradoff, ‘Clause 39 – Nulles Liber Homo’ in Henry Elliot Malden (ed), *Magna Carta Commemoration Essays* (Royal Historical Society, 1917) 78, 83; John Baker, ‘Human Rights and the Rule of Law in Renaissance England (2004) 2 *Northwestern University Journal of International Human Rights* 3, [15] <<http://www.law.northwestern.edu/journals/jihr/v2/3>>.

⁴ Vinogradoff states that in the version of 1331 (5 Edw III, c 9) *liber homo* (free man) had been replaced with *homme* (man), observing that ‘the omission of the qualifying epithet is not likely to have been accidental’: Vinogradoff, above n 3, 82. Moreover, the version of 1354 (28 Edw III, c 3) adopted the wording *Nul homme de quel estate ou condicion il soit* (no man of whatever estate or condition he be), of which Vinogradoff notes ‘this elaborate formula was evidently meant to remove all doubts as to the general application of the rule’: at 82. Whether ‘free man’ was intended to be restrictive at all has been questioned: F Maurice Powicke, ‘Per Iudicium Parium vel per Legem Terrae’ in Malden (ed), above n 3, 96, 108; Geoffrey de Q Walker, *The Rule of Law: Foundation of Constitutional Democracy* (Melbourne University Press, 1988) 96.

⁵ See, eg: C H McIlwain, ‘Due Process of Law in Magna Carta’ (1914) 14 *Columbia Law Review* 27, 51.

restriction on Royal powers generally rather than merely the replacement of the monarch with another of unlimited powers.⁷ According to James Bryce, it was ‘the starting-point of the constitutional history of the English race’.⁸ Secondly, its extensive reiteration shows the ongoing acceptance of a constitutional norm protecting private property from Royal encroachment.⁹ Thirdly, although only Royal power was restricted,¹⁰ this is the genesis of later, broader, protections of private property.¹¹

In addition to the restrictions contained in *Magna Carta* and other legislation, the common law displayed profound respect for individual property rights and constrained the prerogative powers in relation to private property within narrow bounds. In *The King’s Prerogative in Saltpetre*,¹² it was insisted that ‘the ministers of the King who dig for saltpetre are bound to leave the inheritance of the subject in so good plight as

⁶ It has been argued that *Magna Carta* is of limited significance beyond its resolution of specific grievances between the King and barons: ‘The whole thing is a sham: in form a free grant of a sovereign king to his subjects in perpetuity: in fact a baronial walk-over, which ... could never have endured’: V H Galbraith, ‘Runnymede Revisited’ (1966) 110 *Proceedings of the American Philosophical Society* 307, 309; and that the document is of merely ‘symbolic interest’: J Alder, *Constitutional and Administrative Law* (Macmillan, 2nd ed, 1994) 39. Cf: ‘[t]he interests of the people and of the barons ... were drawn into the closest harmony’ by their mutual sufferings under the abuses of King John: Thornton M Hinkle, ‘Magna Charta’ (1899) 8 *Yale Law Journal* 262, 267; *Magna Carta* is of ‘eternal iconic status’: Danny Danziger and John Gillingham, *1215: The Year of Magna Carta* (Hodder and Stoughton, 2003) 5.

⁷ ‘The Charter must be read as a criticism of a system of government, not of the behaviour of a single monarch’: J C Holt, ‘The Barons and the Great Charter’ (1955) 69 *English Historical Review* 1, 2. Thus, King John made ‘a solemn concession in perpetuity’: J C Holt, ‘The Making of Magna Carta’ (1957) 72 *English Historical Review* 401, 417. As such, *Magna Carta* ‘affected, not only their own privileges and immunities, but those of the future citizens of a constitutional monarchy’: Hinkle, above n 6, 263.

⁸ James Bryce, ‘Preface’ in Malden (ed), above n 3, i, xiii.

⁹ See eg: Walker, above n 4, 95. *Magna Carta* was confirmed more than 30 times by successive kings by 1400: Hinkle, above n 6, 269. It contained specific protections of property, including Chapter 28 of the 1215 version: ‘No constable or any other of our bailiffs shall take any man’s corn or other chattels unless he pays cash for them at once’, and Chapters 30 and 31 of the 1215 version: ‘No sheriff or bailiff of ours or anyone else is to take horses or carts of any free man for carting without his agreement; Neither we nor our bailiffs shall take other men’s timber for castles or other work of ours, without the agreement of the owner’: Holt, above n 3, 459. It is unnecessary here to assess determine the validity of the claim that the majority of provisions in *Magna Carta* protected property: Gottfried Dietze, *Magna Carta and Property* (University Press of Virginia, 1965) 32-38.

¹⁰ *Magna Carta* is a method for ‘maintaining the rights of the subject against an arbitrary prerogative’: Arthur L Goodhart, *Law of the Land* (University Press of Virginia, 1966) 23. See also: Powicke, above n 4, 103. Similarly, ‘insistence on due process of law – or the law of the land – was designed to protect against executive (or judicial) overreaching’: John V Orth, ‘Taking from A and Giving to B: Substantive Due Process and the Case of the Shifting Paradigm’ (1997) 14 *Constitutional Commentary* 337, 338.

¹¹ ‘[F]rom that moment the lawyers can trace the continuous development of both the English and American constitution’: Galbraith, above n 6, 307; *Magna Carta* was ‘a seed which was to come to full flower in the Enlightenment’: Howard, above n 2, 22. It is also significant in itself. In the *Petition of Right* (1628), Parliament reminded Charles I that: ‘in the eight-and-twentieth year of the reign of King Edward III, it was declared and enacted by authority of parliament, that no man, of what estate or condition that he be, should be put out of his land or tenements ... without being brought to answer by due process of law’. *Petition of Right* (3 Cha 1, c 1) IV, quoted in: Bruce Frohnen (ed), *The American Republic: Primary Sources* (Liberty Fund, 2002) 98.

¹² (1606) 12 Co Rep 12.

they found it'.¹³ In many circumstances, this meant that no digging for saltpetre could occur.¹⁴ In all other instances, there was an obligation to 'repair ... in so good plight as it was before' any affected buildings.¹⁵ Thus, even the Royal prerogative was narrowly constrained by the common law to prevent any injury to private property rights.

The protection of private property from executive action at common law is further evidenced in other celebrated decisions, including *Semayne v Gresham*¹⁶ where Sir Edward Coke wrote that 'the house of every one is to him as his castle and fortress',¹⁷ thus requiring the sheriff to knock and ask to be let in before breaking down doors, and *Entick v Carrington*¹⁸ where the executive was denied the power to issue search warrants.¹⁹

¹³ Ibid 12.

¹⁴ Digging would not be permitted where it would require the cutting of timber (ibid), nor if it would 'undermine, weaken, or impair any of the walls or foundation of any houses', nor in any 'mansion-house which serves for the habitation of man', nor in 'any barn employed for the safe custody of any corn, hay, & c. of the owner' (ibid 13).

¹⁵ Ibid 14.

¹⁶ (1604) 5 Co Rep 91a.

¹⁷ Ibid 93a. The expression 'a man's home is his castle' can be traced back at least to the sixteenth century: William Cuddihy and B Carmon Hardy, 'A Man's House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution' (1980) 37 *William and Mary Quarterly* 371, 371. The phrase must now be interpreted inclusively so that women's property rights enjoy the same protection as men's. This has not always been the case: the long historical tradition of the subjugation of women's property rights in America is addressed in: Marylynn Salmon, 'The Legal Status of Women in Early America: A Reappraisal' (1983) 1 *Law and History Review* 129; Norma Basch, 'The Emerging Legal History of Women in the United States: Property, Divorce, and the Constitution' (1986) 12 *Signs: Journal of Women in Culture and Society* 97. For modern United States judicial consideration of the expression 'a man's home is his castle' in the context of the Fourth Amendment, see: *Minnesota v Carter* 525 US 83 (1998), 94 (Scalia J), 100 (Kennedy J); *United States v On Lee* 193 F.2d 306 (1951), 315-16 (Frank J). But cf: Thomas Y Davies, 'Recovering the Original Fourth Amendment' (1999) 98 *Michigan Law Review* 547. The Fourth Amendment protection against 'unreasonable search and seizure' has been described as 'an American extension of the English tradition that a man's house was his castle': Cuddihy and Hardy, at 371. Hence the statement that a home is 'a fortress of privacy surrounded with moats of constitutional and common law protection' creating for the individual 'a bulwark against the force of the state ... a place of respite from the cruel world': Rodney A Smolla, 'Do-Not-Call List' Testimony Before the Senate Committee on Commerce, Science, and Transportation' (2004) 10(4) *Richmond Journal of Law and Technology* 3, <<http://law.richmond.edu/jolt/v10i4/article43.pdf>>. See also: Margaret Jane Radin, 'Property and Personhood' (1982) 34 *Stanford Law Review* 957, 991-2.

The modern Australian popularity of the expression 'a man's home is his castle' may be due to the film *The Castle* (1997). For a brief discussion of the legal issues in the film, see: Francesca Dominello, 'Popular Images of Court' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 546-7. A more detailed consideration of the relevant social and legal issues is: William P A MacNeil, 'It's the vibe!': The Common Law Imaginary Down Under' in Leslie Moran et al (eds), *Law's Moving Image* (Cavendish, 2004) 30. It has been suggested '[a]ny serious literary work on the High Court could not be complete without a reference to *The Castle*': Justin Gleeson, 'Book Review' (2002) *Bar News* 58.

¹⁸ (1765) 19 St Tr 1030, 1066 (Lord Camden CJ).

¹⁹ The protection against interference in the form of search and seizure was expressed memorably by William Pitt (The Elder), who reminded Parliament in 1763 that:

'The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain may enter—but the

In England, from *Magna Carta* onwards, and through both statutory and common law restrictions, the ability of the executive government to interfere with private property was significantly limited. This is an important illustration of an underlying belief in the importance of protecting individual property rights from encroachment by the state.

B *A Theoretical Basis for Protecting Private Property from Legislative Actions*

Although restrictions on Royal interferences with private property rights have been shown, an issue of greater importance for this thesis is the protection of private property rights from encroachment by Parliament. The theoretical justification for restrictions on legislative power was first clearly articulated in the writings of John Locke.²⁰ In his *Second Treatise of Government*, Locke noted that:

a man's property is not at all secure, though there be good and equitable laws to set the bounds of it between him and his fellow subjects, if he who commands those subjects have the power to take from any private man what part he pleases of his property, and use and dispose of it as he thinks good.²¹

From this, Locke conceptualised a protection of private property from legislative interference:²²

The reason why men enter into society is the preservation of their property; and the end while they choose and authorise a legislative is that there may be laws made, and rules set, as guards and fences to the properties of all the society, to limit the power and moderate the dominion of every part and member of the society ... it can never be supposed to be the will of the society that the legislative should have a power to destroy that which every one designs to secure by entering into society.²³

Locke, perhaps more than any other writer, articulated the importance of private property in liberal constitutionalism.

King of England cannot enter!—all his forces dare not cross the threshold of the ruined tenement!': William Pitt, The Elder, Speech to Parliament of March 1763 on an Excise Bill, quoted in Henry Peter Brougham, *Historical Sketches of Statesmen Who Flourished in the Time of George III* (Lea & Blanchard, vol 1, 1839) 52.

²⁰ Reference to Locke as a source of constitutional protections of property in the English tradition is made on the basis that: '[o]ver the ensuing centuries others have restated, embellished, extrapolated, and extravagantly modified many of Locke's thoughts in this regard, but he remains the foundation': Mark J Rankin, 'The Immorality of Unlimited Wealth: The Lockean Limits to the Acquisition and Accumulation of Private Property' (2000) 4 *Flinders Journal of Law Reform* 39, 40.

²¹ John Locke, *The Second Treatise of Government* (1690), [138]; reproduced in Peter Laslett (ed), *Two Treatises of Government* (Cambridge University Press, 1963) 406.

²² This is not to suggest that Locke's notion of property was absolute, as to which see: C B Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford University Press, 1962) 211-14; Rankin, above n 20, 47; but cf: Jeremy Waldron, 'Enough and As Good Left for Others' (1979) 29 *Philosophical Quarterly* 319. See also: Thomas C Grey, 'Property and Need: The Welfare State and Theories of Distributive Justice' (1976) 28 *Stanford Law Review* 877.

²³ Locke, above n 21, [222], reproduced in Laslett (ed), above n 21, 460. Similarly: 'the preservation of property' is 'the end of government, and that for which men enter into society': at [138]/406.

Locke's writings had a striking influence on the decision in *Entick v Carrington*,²⁴ where Lord Camden CJ wrote (without express reference to Locke) that:

The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole.²⁵

There is one vital difference between this judgment in *Entick v Carrington* and Locke's writings. While the first sentence from Lord Camden CJ is entirely consistent with Locke, the second sentence implies an important qualification: private property rights can be taken away or abridged by law for the benefit of society as a whole. The tension between the constitutional ideal of the protection of private property as expressed by Locke, and the reality of parliamentary supremacy as Dicey would later explain it,²⁶ was inherent in English constitutional arrangements.²⁷

The same tension is evident in Blackstone's *Commentaries on the Laws of England*, published in the same year as *Entick v Carrington* was decided. Blackstone revered private property:

So great, moreover, is the regard of the law for private property, that it will not authorise the least violation of it; no, not even for the general good of the whole community ... In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no.²⁸

However, this respect for private property was limited: Blackstone wrote that government could interfere with private property 'by the laws of the land',²⁹ an acknowledgement of parliamentary supremacy: '[s]o long therefore as the English constitution lasts, we may venture to affirm, that the power of parliament is absolute and without control.'³⁰

²⁴ L B Curzon, *Jurisprudence* (Cavendish, 3rd ed, 2001) 55.

²⁵ *Entick v Carrington* (1765) 19 St Tr 1030, 1066 (Lord Camden CJ).

²⁶ 'The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament': Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) 39. For the history and philosophy of parliamentary supremacy, see: Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press, 1999).

²⁷ Thus, it has been noted that: '[t]he emergence of parliamentary supremacy in England denied to the property of Locke a place above the legislature': Walton H Hamilton, 'Property – According to Locke' (1932) 41 *Yale Law Journal* 864, 875.

²⁸ William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765) Vol I, 139.

²⁹ *Ibid* 134.

³⁰ *Ibid* 162.

How were these competing ideals of private property and parliamentary supremacy to be accommodated? As Blackstone explained, the solution was a constitutional principle requiring full compensation for the appropriation of property by the Parliament. Thus, Blackstone wrote that, when private property is required for a public purpose:

the legislature alone, can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a *full indemnification and equivalent* for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.³¹

Blackstone was unequivocal about the strength of this requirement of compensation: a ‘full indemnification and equivalent’ was needed. Further, Blackstone’s insistence that the appropriate paradigm was one analogous to individuals bargaining in a free market, rather than a transaction between sovereign and citizen, indicates both that full market-value compensation was to be provided and that no reduction in compensation was to be made on account of the fact that the appropriation was being undertaken by the legislature. This analogy strips the attribute of power away and injects the transaction with the fairness or equality of bargaining players in a fair marketplace. This requirement of full market-value compensation allowed the theory articulated by Locke of the need for the protection of private property to be reconciled with the sovereignty of Parliament.³²

C *The Practical Application of a Requirement of Full Market-Value Compensation*

The practical application of this theoretical requirement of full market-value compensation was achieved through two channels. The first was the common law. From as early as *Sir Francis Barrington’s Case*³³ in 1610, the common law protected the individual through the presumption of statutory interpretation that Parliament does

³¹ Ibid 139 [emphasis added]. See also: Dicey, above n 26, 48; Keith Davies, *Law of Compulsory Purchase and Acquisition* (Butterworths, 2nd ed, 1975) 7. The origin of this statement by Blackstone is, in part, the writings of Montesquieu, as to which see: F A Mann, ‘Outlines of a History of Expropriation’ (1959) 75 *Law Quarterly Review* 188, 205.

³² The theorising of acquisition was also addressed by continental theorists, with a slightly different emphasis, as will be seen in Chapter 3. However, there is scant evidence of those continental theorists directly influencing Locke or Blackstone.

³³ (1610) 8 Co Rep 136b.

not intend to appropriate property without compensation.³⁴ The justification for this presumption reflected the same deep concern for individual rights of property that was expressed by Locke:

The Legislature cannot fairly be supposed to intend, in the absence of clear words shewing such intention, that one man's property shall be confiscated for the benefit of others, or of the public, without any compensation being provided for him in respect of what is taken compulsorily from him. Parliament in its omnipotence can, of course, override or disregard this ordinary principle if it sees fit to do so, but, it is not likely that it will be found disregarding it, without plain expressions of such a purpose.³⁵

The common law's contribution to the protection of individual rights of property from legislative abrogation was its application of this presumption that Parliament does not intend to appropriate property without compensation. The application of the presumption in numerous English common law decisions in the late nineteenth and early twentieth centuries indicates its currency at the time of Australian Federation.³⁶

The second, and more significant, channel through which the theoretical requirement of full market-value compensation for the appropriation of property was executed was through legislative practice. It has been stated that the requirement of full market-value compensation in England 'may be said to be a constitutional principle, to the extent

³⁴ Holding that the property rights of commoners were not disturbed by legislation which granted rights to others without addressing the rights of the commoners, Coke wrote that: 'when an Act makes any conveyance good against the King, or any other person or persons in certain, it shall not take away the right of any other, although there be not any saving in the Act': *ibid* 137b.

³⁵ *London and North Western Railway Co v Evans* [1893] 1 Ch 16, 28 (Bowen LJ). Cited with approval in *De Keyser's Royal Hotel* [1920] AC 508, 542 (Lord Atkinson), 579 (Lord Parmoor).

³⁶ Thus: 'it is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged to so construe it': *A-G ex rel Whitechapel Board of Works v Horner* (1884) 14 QBD 245, 257 (Brett MR); cited with approval in *A-G v De Keyser's Royal Hotel Ltd* [1920] AC 508, 579 (Lord Parmoor) ('*De Keyser's Royal Hotel*'). See also: *Western Counties Railway Co v Windsor and Annapolis Railway Co* (1882) 7 App Cas 178, 188 (Lord Watson). Subsequent cases applied this presumption of interpretation: 'their Lordships are also influenced by the consideration that the effect of the appellant's construction would be to take away the respondent's property without any compensation. Such an intention should not be imputed to the Legislature unless it be expressed in unequivocal terms': *Commissioner of Public Works (Cape Colony) v Logan* [1903] AC 355, 363-4 (Lord Davey). And see: *Central Control Board (Liquor Traffic) v Cannon Brewery Co Ltd* [1919] AC 744, 752 (Lord Atkinson). This principle applied to injurious affection as well, as emphasised in a unanimous 1871 decision of the Exchequer Chamber, where it was stated that:

'Unless it is perfectly clear that the language of the different Acts is not sufficiently ample or extensive to embrace the case in question, we ought to hold that a party whose property is injuriously affected, and to a very great extent, by the operations of a public body, shall be entitled in a court of law to compensation': *R, on the Prosecution of Thomas Flight v The Vestry of St Luke's, Chelsea* (1871) 7 QB 148, 153 (Kelly CB, with whom Willes and Keating JJ, Channell, Pigott, and Cleasby BB agreed) ('*Vestry of St Luke's, Chelsea*').

such can exist without a constitution'.³⁷ Although parliamentary sovereignty meant that no *justiciable* limit on legislative power could apply, 'the principle that property should be taken only ... upon payment of compensation remained significant.'³⁸ In English legislative practice from the seventeenth century onwards, full market-value compensation *was* paid to the individual when their property was appropriated.³⁹

The House of Lords decision in *Attorney-General v De Keyser's Royal Hotel Ltd*⁴⁰ at the conclusion of World War I concerned the exercise of the Royal prerogative to take property during wartime. The report records that a search was undertaken for authorities which supported any appropriation of property without compensation in English history, and that none could be found,⁴¹ not even in the times of the Stuart monarchs before the Glorious Revolution.⁴² The result was that:

Many documents are forthcoming which relate to the taking of land ... by agreement and on payment of compensation. None can be found relating to taking land as of right and without any compensation at all, even in time of war.⁴³

This extraordinary claim, that there was *never* an appropriation of private property without compensation in England, is overstated. Apart from the fact that to be absolutely comprehensive would be impossible,⁴⁴ some counter-examples disprove the

³⁷ William B Stoebuck, 'A General Theory of Eminent Domain' (1972) 47 *Washington Law Review* 553, 554. Indeed, it is one part of the mystique of the English constitution that parliamentary sovereignty has not negated the emergence of constitutional conventions that are respected by the parliament as a matter of course. Similarly, another 'peculiarity of English history' is 'not that the common law is supreme, but that it is so practised as to seem supreme, and that other expressions of sovereign power ... are universally admitted to be temporary and abnormal': Powicke, above n 4, 121.

³⁸ Tom Allen, *The Right to Property in Commonwealth Constitutions* (Cambridge University Press, 2000) 15. In this quotation, and others that follow, the author indicates *compensation* without specifying whether that is full market-value compensation or some lesser amount. However, the theory is clear that it is full market-value compensation that is required. When the actual legislative practice is addressed, it will be seen that full market-value compensation was implemented: see below at 42 – 46.

³⁹ In the published version of a lecture delivered at Gray's Inn in 1622, Stoebuck found an indication that compensation was regarded as necessary as a matter of principle: Robert Callis, *Reading Upon the Statute of Sewers* (Thomas Basset, 1685) 104; quoted in: Stoebuck, above n 37, 577. Stoebuck also examined English appropriation practice in the period up to the seventeenth century (at 561-6). He dated the earliest appropriation statute to 1427 (6 Hen VI, c 5 – see Stoebuck at 565), and the earliest appropriation statutes explicitly providing for compensation to 1514 and 1539 (6 Hen VIII, c 17; 31 Hen VIII, c 4 – see Stoebuck at 566, 579).

⁴⁰ [1920] AC 508 ('*De Keyser's Royal Hotel*').

⁴¹ There was some disagreement about the significance of this historical search, as to which see: *ibid* 524 (Lord Dunedin), 539 (Lord Atkinson), 563 (Lord Sumner), 573 (Lord Parmoor).

⁴² 'If no precedents can be found prior to the year 1688 of a claim to use and occupy the land of the subject for an indefinite time without the payment of compensation, it would be improbable that such precedents would be found at a later date': *ibid* 573 (Lord Parmoor). See also: at 539 (Lord Atkinson).

⁴³ *Ibid* 563 (Lord Sumner).

⁴⁴ 'One must stop short of saying that [payment of compensation] was invariably practiced, because data to support that kind of statement will never be assembled': Stoebuck, above n 37, 583.

absoluteness of this statement.⁴⁵ However, it is enough to be able to conclude that ‘private property has rarely, if ever, been taken in England without compensation’.⁴⁶ Any rare instances of uncompensated appropriation of property do not derogate from the general principle that full compensation was paid for the appropriation of private property in England.⁴⁷

By the eighteenth and nineteenth centuries, the legislative practice was that each appropriation of property was carried out by the passage of a Private Act, which achieved the appropriation and dealt with the compensation to be paid.⁴⁸ In assessing each Private Bill, Parliament followed a procedure that ‘retained the mixed judicial and legislative character of ancient times’:⁴⁹ the determination of compensation was carried out in a quasi-judicial manner (interested parties appeared, legally represented, before parliamentary committees who heard objections to the provisions of the Bill). It has been observed that the Private Bill procedure involved petitions:

⁴⁵ First, the dissolution of the monasteries by Henry VIII. Whether this was an aberrance or something more common is debated. Goldsworthy argues that ‘the Reformation Parliament frequently overrode title to property’: Goldsworthy, above n 26, 58. McIlwain, however, describes the legislation as ‘the most revolutionary ... in the whole statute book, without clear precedent before 1536’: Charles H McIlwain, ‘Book Review’ (1942) 56 *Harvard Law Review* 148, 148. Goldsworthy acknowledges that property was ‘universally regarded as one of the most precious and inviolable of all the rights that subjects possessed’ (at 58), but explains that in the sixteenth century a fiction relating to consent provided justification for parliamentary interference with property rights: ‘The right of subjects to their property was regarded as inviolable, but they were free to consent to its transfer. The fiction that the consent of Parliament was tantamount to the consent of every subject meant that property rights could be transferred or altered by the King in Parliament, but not by the King alone’: at 69. Secondly, the Inclosure legislation whose effects peaked in the late eighteenth and early nineteenth centuries. See: James Alfred Yelling, *Common Field and Enclosure in England, 1450-1850* (Macmillan, 1977) 227-32; James Boyle, ‘The Second Enclosure Movement and the Construction of the Public Domain’ (2003) 66 *Law and Contemporary Problems* 33, 33-36. ‘The essence of inclosures was the extinction of various rights in land, under compulsory powers, in order to make possible the re-allocation of that land with a view to applying more efficient methods of farming’: Davies, above n 31, 8. On the valuing and protection of property by law in eighteenth century England generally, see: Douglas Hay, ‘Property, Authority and the Criminal Law,’ in *Albion’s Fatal Tree: Crime and Society in Eighteenth-Century England* (A Lane, 1975).

⁴⁶ Mann, above n 31, 199.

⁴⁷ Mann has noted of the principle of compensation: ‘[n]o doubt exceptions to and deviations from [it] ... have occurred and will continue to occur, but they are unlikely to affect its nature or strength’: *ibid* 188-9. More recently, the provision of compensation has been described as an ‘invariable practice’: E C S Wade and A W Bradley, *Wade and Phillips’ Constitutional Law* (Longmans, 7th ed, 1965) 509.

⁴⁸ For discussions of the position in England prior to the passing of the *Lands Clauses Consolidation Act 1845*, see: Cathy Marr, *Public Works Takings of Maori Land, 1840-1981* (Treaty of Waitangi Tribunal, 1997) 15-20; A W B Simpson, ‘Constitutionalizing the Right of Property: The US, England and Europe’ (2008) 31 *University of Hawai’i Law Review* 1, 11-13. For example, the *Liverpool and Manchester Railway Act 1826* (7 Geo IV, c 49) provided for the appropriation of land for the first modern passenger and freight railway in the United Kingdom. When it opened in 1830, it ushered in the railway age in Britain: Harold Perkin, *The Age of the Railway* (Panther, 1970) 73. The previous legislative practice, and reasons for the adoption of the Act, are described in: *Metropolitan District Railway Co v Sharpe* (1880) 5 App Cas 425, 430 (Lord Selborne), 435-6 (Lord Hatherley).

⁴⁹ Charles Howard McIlwain, *The High Court of Parliament and Its Supremacy* (Yale University Press, 1910) 219. See also: at 125, 222-3.

before special committees of both houses, where the procedure was quasi-judicial and often adversarial. At these proceedings, two fundamental principles of the right to property governed the decision to grant the compulsory powers. First ... compensation had to be paid. ... Secondly ... a public case had to be made that the conferral of the powers was in the public interest.⁵⁰

This parliamentary determination of compensation through the Private Bill procedure was replaced by a general procedure for the assessment of compensation by the courts under the *Lands Clauses Consolidation Act 1845* (Eng) ('the Act').⁵¹ One of three Clauses Consolidation Acts passed in 1845 (the others dealt with Companies Clauses and Railways Clauses),⁵² the purpose of the Act was to consolidate 'in One general Act, sundry provisions usually introduced into Acts of Parliament relative to the Acquisition of Lands required for Undertakings or Works of a public nature, and to the Compensation to be made for the same.'⁵³ An important impetus for the passage of these Clauses Consolidation Acts was the growth in the number of Private Bills for the construction of railways.⁵⁴ In addition to promoting expediency, however, the Act brought about an important transfer of responsibility for the assessment of compensation in individual cases from Parliament to the Courts. Instead of the Parliament itself considering compensation on each Private Bill, the Parliament now established general provisions that would be applied in future cases by the Courts.⁵⁵

The Act distinguishes between 'Purchase of Lands by Agreement'⁵⁶ and 'Purchase and taking of Lands otherwise than by Agreement',⁵⁷ setting out rules relating to each. It is the rules relating to this latter category, described in this thesis as appropriation, and

⁵⁰ Allen, above n 38, 15.

⁵¹ 8 & 9 Vict, c 18. See: Frank A Sharman, 'The History of the Lands Clauses Consolidation Act 1845 – I' [1986] *Statute Law Review* 13; Frank A Sharman, 'The History of the Lands Clauses Consolidation Act 1845 – II' [1986] *Statute Law Review* 78; Davies, above n 31, 15-16.

⁵² *Railway Clauses Consolidation Act 1845* (8 & 9 Vict, c 20); *Companies Clauses Consolidation Act 1845* (8 & 9 Vict, c 16).

⁵³ *Lands Clauses Consolidation Act 1845*, recital. See also: Sharman, 'History – II', above n 51.

⁵⁴ Sharman, 'History – II', above n 51, 87-9. See also: O Cyprian Williams, *The Historical Development of Private Bill Procedure and Standing Orders in the House of Commons* (His Majesty's Stationery Office, London, 1948) vol I, 107-8.

⁵⁵ Earlier examples of this practice of passing consolidation Acts include the *General Turnpike Act 1773* (13 Geo III, c 84) and the *General Inclosure Act 1801* (41 Geo III, c 109). It has been noted that 'many subjects of early private bills have, by the operation of general acts, passed outside the range of private legislation': Williams, above n 54, 24. A further step was taken in the *General Inclosure Act 1845* (8 & 9 Vict, c 118), which removed the need for a Private Bill, placing the decision to approve an application in statutory Inclosure Commissioners: see Davies, above n 31, 14-15.

⁵⁶ *Lands Clauses Consolidation Act 1845* ss 6-15.

⁵⁷ *Ibid* ss 16-68.

described in the Act variously as the ‘Purchase and taking of Lands’,⁵⁸ the ‘Acquisition of Lands’,⁵⁹ and the ‘taking of Lands’,⁶⁰ that are relevant to this analysis of the payment of compensation for the appropriation of land under the Act.

The Act first required notice to be given to any persons with an interest in the affected land.⁶¹ If no voluntary agreement had been reached within twenty-one days, the Act prescribed machinery for the individual determination of compensation:⁶² if less than £50 were sought, compensation would be settled by two Justices;⁶³ for greater amounts, the party seeking compensation could elect for arbitration⁶⁴ or a jury verdict.⁶⁵ The Act provided for the vesting of title subsequent to the payment of compensation.⁶⁶ The compensation, the ‘Value of the Land’⁶⁷ plus damages for severance or injurious affection,⁶⁸ was defined in s 63 (which still remains in force in its original terms):

In estimating the Purchase Money or Compensation to be paid ... regard shall be had ... not only to the *Value of the Land* to be purchased or taken ... but also to the Damage, if any, to be sustained by the Owner of the Lands by reason of the severing of the Lands taken from the other Lands of such Owner, or otherwise injuriously affecting such other Lands.⁶⁹

In applying this provision, nineteenth century judges emphasised that this measure resulted in full market-value compensation: one noted that ‘[t]he Legislature has made the most careful and minute provisions for the payment of *compensation for everything taken*, and, indeed, for everything injuriously affected.’⁷⁰ Another concluded:

⁵⁸ Ibid recital to ss 16-68.

⁵⁹ Ibid recital.

⁶⁰ Ibid Long Title, s 2.

⁶¹ Ibid s 18.

⁶² Ibid s 21.

⁶³ Ibid s 22.

⁶⁴ Either by an agreed arbitrator, or jointly by one arbitrator nominated by each party: *ibid* s 25.

⁶⁵ Ibid s 23.

⁶⁶ Ibid s 75.

⁶⁷ Ibid s 63. Alternatively ‘Value of Lands’ in s 49.

⁶⁸ This thesis does not explore injurious affection, except to note that compensation for such losses was included: *Vestry of St Luke’s, Chelsea* (1871) 7 QB 148. A helpful general description of the principle is that injurious affection extends to cover ‘many kinds of deleterious effects on the value of land left in a dispossessed owner’s hands and arising out of the compulsory acquisition and use of other parts of it’: *Kettering Pty Ltd v Noosa Shire Council* (2004) 207 ALR 1, 8 (McHugh, Gummow, Hayne, Callinan and Heydon JJ). See further: Douglas Brown, ‘The Changing Faces of Injurious Affection’ (1972) 10 *University of Western Australia Law Review* 336; Eric C E Todd, ‘The Mystique of Injurious Affection in the Law of Expropriation’ (1967) Centennial Edition *University of British Columbia Law Review / Université Laval Les Cahiers de Droit* 127.

⁶⁹ *Lands Clauses Consolidation Act 1845*, s 63 [emphasis added]. A review of case law on s 63 is provided in: J H Balfour Browne and Charles E Allan, *The Law of Compensation* (Butterworth, 2nd ed, 1903) 96-109.

⁷⁰ *Hammersmith and City Railway Co v Brand* (1869) LR 4 HL 171, 192 (Bramwell B) [emphasis added].

it is impossible to read the Lands Clauses Consolidation Act without seeing that it was the intention of the legislature that *full compensation* should be given *in all cases* where lands are taken under the powers of the Act.⁷¹

Moreover, it was held that ‘the words of the Act should be construed liberally, so as to give *full compensation* for all that is taken’⁷² plus ‘compensation for the damage that will be done ... to what is left’.⁷³ The focus was on ensuring a full indemnity for each individual: ‘[t]he fundamental principle in assessing compensation is to discover what the person will lose by having his land or his interest in it taken from him.’⁷⁴

Like Blackstone at an earlier time, judicial interpretation emphasised the fullness of compensation by analogy to voluntary sale. Thus, in one of the earliest cases interpreting the legislation, it was held that:

a jury in assessing compensation ... have to consider the real value of the land, and may take into account not only the present purpose to which the land is applied, but also any other more beneficial purpose to which in the course of events at no remote period it may be applied, *just as an owner might do if he were bargaining with a purchaser in the market.*⁷⁵

Once again, the idea was that the owner was forced merely to accept a change in the nature of their asset, suffering no other loss from the taking. Thus it was said that:

the legislature, in compelling a man to part with his land against his will, did not mean to put him as an unwilling seller, and, on a compulsory sale, in a worse position as regards compensation for such land than he would have been in as a willing seller prepared to sell on reasonable terms for the purpose required.⁷⁶

This maintained the fiction that the transaction was analogous to a free market exchange.

⁷¹ *Cowper Essex v Local Board for Acton* (1889) 14 App Cas 153, 176 (Lord Macnaghten) [emphasis added].

⁷² *Duke of Buccleuch v Metropolitan Board of Works* (1870) LR 5 Exch 221, 241 (Blackburn J, with whom Keating, Lush and Mellor JJ agreed) [emphasis added].

⁷³ *Cowper Essex v Local Board for Acton* (1889) 14 App Cas 153, 169 (Lord Bramwell). Indeed, it was noted that ‘the depreciation in value must be the measure of compensation if the owner is to be compensated fairly’: at 178 (Lord Macnaghten).

⁷⁴ Browne and Allan, above n 69, 97.

⁷⁵ *R v Brown* (1867) LR 2 QB 630, 631 (Cockburn CJ). The classic statement would later be that: ‘The owner is ... entitled to be paid the full price for his lands, and any and every element of value which they possess must be taken into consideration’: *Re Lucas and the Chesterfield Gas and Water Board* [1909] 1 KB 16, 30 (Fletcher Moulton LJ). A brief discussion of some relevant cases is in: Todd, above n 68, 147-50.

⁷⁶ *Duke of Buccleuch v Metropolitan Board of Works* (1870) LR 5 Exch 221, 254 (Montague Smith J, with whom Willes and Brett JJ agreed). Similarly, ‘the price to be given is the price which would be charged by a vendor, who consented to that sacrifice which the legislature have forced upon him’: at 245 (Blackburn J, with whom Keating, Lush and Mellor JJ agreed). This ideal was expressed most clearly in what would later be regarded as the classic statement of the assessment of compensation under the Act: ‘The owner receives for the lands he gives up their equivalent, i.e., that which they were worth to him in money. His property is therefore not diminished in amount, but to that extent it is compulsorily changed in form’: *Re Lucas and the Chesterfield Gas and Water Board* [1909] 1 KB 16, 29 (Fletcher Moulton LJ).

The provisions of the *Lands Clauses Consolidation Act 1845* (Eng) created mechanisms which ensured general application of the principle stated by Blackstone that an individual whose property is appropriated receive a ‘full indemnification and equivalent’. Indeed, judicial interpretations specifically noted that the Act gave effect to ‘the simplest and one of the most obvious suggestions of common sense and justice ... that a person whose property is taken from him unwillingly is to be *indemnified from all expense*’.⁷⁷ As shown above, judicial interpretations also confirmed that the compensation available under the Act was *full market-value compensation*.⁷⁸ Thus, at the time of Australian Federation, English constitutional theory and legislative practice, developed and applied over centuries, insisted on full market-value compensation for the appropriation of individual rights of property by the Parliament, and had adapted a mechanism that ensured attention would be focused on the needs of individual case.

III THE APPROPRIATION OF PRIVATE PROPERTY IN THE AUSTRALIAN COLONIES

Not surprisingly, English law was often transferred to the Colonies.⁷⁹ Was this the case with respect to the compulsory acquisition of property? This final section of this Chapter analyses the extent to which the Colonies followed the nineteenth-century English legislation, with reference to extracts from relevant Colonial statutory provisions that are collated in Appendix I to this Chapter.

⁷⁷ *Metropolitan District Railway Co v Sharpe* (1880) 5 App Cas 425, 439 (Lord Hatherley) [emphasis added]. Similarly: the Act reflected: ‘the universal principle, founded not upon any arbitrary policy but upon natural reason and justice ... that if compulsory powers are exercised against the owners of property ... the costs ... shall necessarily be ... paid, so as to indemnify the person against whom those compulsory powers are exercised’: at 432-3 (Lord Selborne). Lord Nicholls recently described the fullness of compensation under the Act: ‘nothing could be simpler or fairer. In exchange for his land the owner should receive its financial equivalent’: *Waters v Welsh Development Agency* [2004] 1 WLR 1304, 1309. See also: David Widdicombe and Victor Moore, ‘A General Survey of English Law’ in J F Garner (ed) *Compensation for Compulsory Purchase: A Comparative Study* (United Kingdom National Committee of Comparative Law, 1975) 15, 15-16: ‘the owner had the right to be put so far as money could do so, in the same position as if his land had not been taken from him’.

⁷⁸ See also: Widdicombe and Moore, above n 77, 19.

⁷⁹ ‘The laws and practices of imperial Britain laid the foundation of the Australian legal system’: Alex C Castles, *An Australian Legal History* (LawBook, 1982) 1; ‘[t]he colonial parliaments often merely copied new British statutes as they were passed’: Bruce Kercher, *An Unruly Child: A History of Law in Australia* (Allen & Unwin, 1995) 125. Cf: Paul Finn, ‘Statutes and the Common Law’ (1992) 22 *University of Western Australia Law Review* 7, 7: ‘[t]here was much in our legislation that was derivative, but beyond the private and commercial law arenas its provenance was by no means British’.

The first Australian Colony to pass general legislation for the appropriation of property was the fledgling Province of South Australia. Its *Lands Clauses Consolidation Ordinance* of 1847⁸⁰ was an almost exact copy of the English Act of two years earlier.⁸¹ Compensation under the South Australian Act was determined in the same way as under the English Act, as s 63 of both Acts is relevantly identical, providing for the payment of ‘the value of the land’ plus damages for severance and injurious affection.

The Colony of Tasmania similarly adopted a *Lands Clauses Act* in 1857.⁸² Again, it was substantially a copy of the English Act, and s 32 of the Tasmanian Act adopted the same formulation for determining compensation as used in s 63 of the English Act, ‘the value of the land’ plus damages for severance and injurious affection.⁸³

The Colony of Victoria enacted legislation for the appropriation of private property in the *Public Works Act 1865*. Part VII of the Act dealt with ‘the taking of lands required for public works’,⁸⁴ and substantially copied the English Act, its compensation provision (s 321) being an identical reproduction of s 63 of the English Act. When this machinery was replaced by the *Lands Compensation Act 1869* (Vic),⁸⁵ the new compensation provision (s 35) still determined compensation on the same basis as s 63 of the English Act.⁸⁶

⁸⁰ Ordinance No. 6, 1847.

⁸¹ As in England, companion legislation relating to railways was also passed: *Railway Clauses Consolidation Ordinance* (SA), Ordinance No 7, 1847.

⁸² *Lands Clauses Consolidation Act 1857* (Tas) (21 Vict, No 11). The delay is possibly explained by the fact that parliamentary self-government had come only in 1865 when the *Constitution Act 1864* (18 Vict, No 9) was assented to (the Colony was also newly renamed, having been known as Van Dieman’s Land until 1 January 1856). For a very brief comment on the Act, see: B H Crawford, ‘Tasmania’ in Graham L Fricke (ed), *Compulsory Acquisition of Land in Australia* (LawBook, 2nd ed, 1982) 244, 244.

⁸³ The one innovation added to the end of the clause was the explicit requirement that compensation also cover ‘every expense which the owner may have to incur, or has incurred, in the repair or construction of fences in consequence of his land having been so taken’: *Lands Clauses Consolidation Act 1857* (Tas) (21 Vict, No 11) s 32.

⁸⁴ *Public Works Act 1865* (Vic) (29 Vict, No 289), Heading to Pt VII.

⁸⁵ *Lands Compensation Act 1869* (Vic) (33 Vict, No 344).

⁸⁶ This section introduced two innovations: valuation of the interest at the time that notice of the land being required was given (so as to exclude compensation being inflated by an increase in the value of the land due to the project being undertaken); and, setting off any increase in the value of land not acquired against the compensation for injurious affection (the concept of betterment, as to which see eg: Barry Denyer-Green and Navjit Ubhi, *Development and Planning Law* (Estates Gazette, 3rd ed, 1999) 295-8; Andrew Baum and Gary Sams, *Statutory Valuations* (Routledge, 2nd ed, 1990) 200-1). Neither of these changes affects the underlying proposition that compensation was determined, in all essential aspects, in the same way in the legislation of the Australian Colonies as it was under the English Act.

The *Public Works Lands Resumption Act 1878* (Qld) also substantially copied the English Act: under s 42 compensation was determined according to the same formula, the ‘value of the land’ plus damages for severance and injurious affection.⁸⁷ Prior to that legislation, there was provision for the appropriation of land in the *Railways Act 1864* (Qld),⁸⁸ with compensation determined according to s 46, once again in the terms of s 63 of the English Act: the ‘value of the land’ plus damages for severance and injurious affection.

In the Colony of New South Wales, the *Lands for Public Purposes Acquisition Act 1880* contained similar machinery, and s 18 provided for the determination of the amount of compensation as had s 63 of the English Act, the measure of compensation being ‘the value of the land taken’ plus damages for severance and injurious affection.⁸⁹ The *Public Works Act 1888* (NSW) adopted this same basis for determining compensation.⁹⁰

In Western Australia, the *Railways Act 1878* provided a power of appropriation for the purposes of railway construction,⁹¹ and s 22 adopted its measure of compensation from s 63 of the English Act: the ‘value of such land’ plus damages for severance and injurious affection.⁹² Western Australia became the first Colony to adopt a different

⁸⁷ Two additions in the Queensland legislation, paralleling those in the Victorian legislation considered above, were that any enhancement in the value of lands not acquired was to be taken into account, and that value was to be calculated at the time notice was given: *Public Works Lands Resumption Act 1878* (Qld) (42 Vict, No 5) s 42. Again, these changes do not affect the argument advanced in this Chapter.

⁸⁸ 27 Vic, No 8 and 28 Vic, No 24 and to be read together and are collectively given the short title *Railways Act 1864* by s 14 of the latter statute.

⁸⁹ *Lands for Public Purposes Acquisition Act 1880* (NSW) (44 Vic, No 16) s 18.

⁹⁰ *Public Works Act 1888* (NSW) (51 Vic, No 37) s 24.

⁹¹ Earlier, more specific, legislation had also provided for compensation: ‘[i]n all cases in which any land is taken ... all proper compensation shall be made to the owner of such land’: *Perth Drain Act 1874* (WA) (38 Vict, No 14) s 2.

⁹² One change was made, as the value was to be determined ‘without reference to any alteration in such value arising from the establishment of the railway’: *Railways Act 1878* (WA) (42 Vict, No 31) s 22. One difference in Western Australia was the existence of significant portions of land that had been granted with an express reservation that up to one-twentieth of the land could be resumed without compensation (see, eg: Standing Committee on Public Administration and Finance, Legislative Council, Parliament of Western Australia, *The Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia* (2004) 76-7). However, these reservations were not universal, and for land grants within town sites, the *Resumption of Town Lands (Compensation) Ordinance 1854* (WA) (17 Vict, No 6) provided for compensation, either by acceptance of compensation as notified by the Colonial Secretary (s 2) or, if that amount was not accepted, by three impartial Commissioners appointed under that Act (s 4). This Western Australian position is a limited exception to the general principle, cf: ‘it cannot be, and for some centuries has not been, doubted that it is by virtue of its sovereignty, by public or constitutional law rather than by virtue of ownership that the supreme authority in the State has the power to take private property’: Mann, above n 31, 192. A similar

form of words when the *Lands Resumption Act 1894* replaced the ‘value of the land’ with ‘[t]he probable and reasonable price at which such land in fee simple, with any improvements thereon, may be expected to sell at the time when taken’.⁹³ However, this new definition merely paraphrased existing judicial interpretations of ‘value of the land’ under the English Act,⁹⁴ and was followed by a formulation of damages for severance and injurious affection, so it was still consistent with s 63 of the English Act.⁹⁵ Western Australia’s partial change of wording, therefore, involved no departure from the meaning of the English Act.

In summary, legislation for the appropriation of property in the Australian Colonies consistently followed the English model, providing for compensation based on s 63 of the *Lands Clauses Consolidation Act 1845* (Eng). As has been shown earlier in this Chapter, this was a formula for full market-value compensation, and it was faithfully, even slavishly,⁹⁶ copied in the Australian Colonial legislation. That the Australian legal system was influenced by its English progenitor is not surprising, but the degree to which the provisions of the English Act were replicated throughout the Australian Colonies is highly significant. In the Australian Colonies, as well as in England, the appropriation of private property by Parliament required full market-value compensation to the individual through a mechanism that took into account all the circumstances of each case.

IV CONCLUSION

This Chapter has demonstrated that, from as early as *Magna Carta*, the English legal system recognised the importance of protecting individual rights of property. Restrictions imposed on Royal authority by both legislation and the common law were

reservation was also applied in very early times in Pennsylvania, as to which see: Stoebeck, above n 37, 558-9.

⁹³ *Lands Resumption Act 1894* (WA) (58 Vict, No 33), s 10(a). As to this, see: P G Foss, ‘Western Australia’ in Fricke (ed), above n 82, 215, 219. This legislation continued resumption without compensation *if* that was provided for in the original grant of land, with s 9(1) exempting such resumptions from the payment of compensation under the Act and s 9(2) providing for compensation to be paid only in respect of the excess land taken if more than the area specified in the reservation was taken.

⁹⁴ See above at 44 – 46.

⁹⁵ The *Public Works Act 1902* (WA) later departed from the English model by adding two additional elements to the compensation payable: a solatium of 10% and interest: *Public Works Act 1902* (WA), s 63. As to this legislation, see: P G Foss, ‘Western Australia’ in Fricke (ed), above n 82, 215, 215-6, 220.

⁹⁶ Castles noted ‘a strong, generally an almost slavish, reliance on British statutes’: Castles, above n 79, 453.

an important foundation on which Lockean constitutional theory built its ideal of protecting private property from *legislative* abrogation.

The constitutional practice that accommodated the competing ideals of protection for individual rights of private property and the sovereignty of Parliament was the requirement of full market-value compensation to the individual. This practice was given full expression in the seminal statute dealing with the appropriation of private property, the *Lands Clauses Consolidation Act 1845* (Eng), s 63 of which provided for the payment of full compensation (the ‘value of the land’ plus damages for severance and injurious affection) when an individual’s private property was appropriated, determined by provisions for the assessment of compensation in each individual case. This was to be calculated by an independent judicial or arbitral process that focused on the position of each individual. This reflected a fundamental assumption, later expressed by Lord Moulton as:

the feeling that it was equitable that burdens borne for the good of the nation should be distributed over the whole nation and should not be allowed to fall on particular individuals has grown to be a national sentiment.⁹⁷

This English practice was faithfully copied in Australia, with all Australian Colonies providing full market-value compensation for the appropriation of private property by adopting the formula used in the *Lands Clauses Consolidation Act 1845* (Eng). At the end of the nineteenth century, every Australian Colony had legislation guaranteeing individuals whose property was appropriated the same full measure of compensation as in England, the ‘value of the land’ appropriated, plus damages for severance and injurious affection.

The material examined in this Chapter provides important context for s 51(xxxi) from the English and Australian Colonial experience. It has not been systematically examined by previous Australian commentators on s 51(xxxi). Some historical material was referred to by Heydon J in *ICM Agriculture*,⁹⁸ where his Honour also noted that Griffith CJ applied the presumption of statutory interpretation that Parliament does not

⁹⁷ *De Keyser’s Royal Hotel* [1920] AC 508, 553 (Lord Moulton). The course of legislation providing compensation ‘indicated unmistakably that it is the intention of the nation that ... the burden shall not fall on the individual, but shall be borne by the community’: at 554 (Lord Moulton). This followed ‘the whole trend of our constitutional history for over two hundred years’: at 562 (Lord Sumner).

⁹⁸ *ICM Agriculture v Commonwealth* (2009) 240 CLR 140, 209-11 (Heydon J) (*‘ICM Agriculture’*).

intend to appropriate property without compensation.⁹⁹ The important task of assessing the influence of this historical experience in England and the Australian Colonies on the Framers of the *Australian Constitution* will be undertaken in Chapter 4 of this thesis, although the potential importance of this uniform practice of requiring full market-value compensation for each affected individual is readily apparent.¹⁰⁰

The hypothesis that arises from this Chapter is that s 51(xxxi)'s requirement of 'just terms' demands full market-value compensation independently determined in each individual case, adopting within the *Australian Constitution* the English theory and the English and Australian Colonial legislative practice. If this is found to be true in Chapter 4, that will support the argument of this thesis that the 'individual rights' approach to s 51(xxxi) is to be preferred. First, however, Chapter 3 will examine the public law theory of eminent domain which evolved in parallel with the English theory, and its constitutionalisation in the United States, the influence of which will also be weighed in Chapter 4.

⁹⁹ 'According to Griffith CJ, one of the framers of the Constitution, though not of s 51(xxxi), the necessary intent had to be 'expressed in unequivocal terms incapable of any other meaning': *ICM Agriculture* (2009) 240 CLR 140, 207 (Heydon J), quoting: *Commonwealth v Hazeldell Ltd* (1918) 25 CLR 552, 563 (Griffith CJ and Rich J). See also: D C Pearce and Robert S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 6th ed, 2006) 178-9.

¹⁰⁰ Indeed, as La Nauze noted of the *Australian Constitution*: '[a]s an instrument of government any Constitution would necessarily assume the continuity of an inherited system of legal precedents and conventions': J A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 270.

V APPENDIX I: LEGISLATIVE PROVISIONS FOR COMPENSATION
FOR THE APPROPRIATION OF PROPERTY

Jurisdiction	Legislation	Provision for Compensation (relevant extract)
England	<i>Lands Clauses Consolidation Act 1845</i>	‘In estimating the Purchase Money or Compensation to be paid ... regard shall be had ... not only to the Value of the Land to be purchased or taken ... but also to the Damage, if any, to be sustained by the Owner of the Lands by reason of the severing of the Lands taken from the other Lands of such Owner, or otherwise injuriously affecting such other Lands’: s 63.
South Australia	<i>Lands Clauses Consolidation Ordinance 1847</i>	‘That in estimating the purchase money or compensation to be paid ... regard shall be had ... not only to the value of the land to be purchased or taken ... but also to the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands’: s 63.
Tasmania	<i>Lands Clauses Act 1857</i>	‘In estimating the purchase money or compensation to be paid ... regard shall be had ... not only to the value of the land to be purchased or taken ... but also to the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands ... as also to every expense which the owner may have to incur, or has incurred, in the repair or construction of fences in consequence of his land having been so taken’: s 32.[Addition of compensation for fences.]
Victoria	<i>Public Works Act 1865</i>	‘In estimating the purchase money or compensation to be paid ... regard shall be had ... not only to the value of the land to be purchased or taken ... but also to the damage (if any) to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands’: s 321.
	<i>Lands Compensation Act 1869</i>	‘In estimating the purchase money or compensation to be paid ... regard shall be had ... not only to the value of the land to be purchased or taken ... but also to the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from other lands of such owner or otherwise injuriously affecting such other lands ... and they shall assess the same accordingly to what they shall find to have been the value of such lands estate or interest at the time notice was given of such lands being required ... and shall take into consideration the enhancement in value of the adjoining land belonging to the person to whom compensation is to be made or any other benefit or advantage which such person may or shall obtain by reason of the making of such works or undertaking in reduction of such compensation’: s 35. [Addition of date of determination and betterment.]
Queensland	<i>Railways Act 1864</i>	‘In estimating the purchase money or compensation to be paid ... regard shall be had ... not only to the value of the land to be purchased or taken ... but also to the damage (if any) to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner or otherwise injuriously affecting such other lands ... and they shall assess the same according to what they shall find to have been the value of such lands estate or interest at the time notice was given of such lands being required’: s 46. [Addition of date of determination.]

Queensland (continued)	<i>Public Works Lands Resumption Act 1878</i>	'In estimating the purchase money or compensation to be paid ... regard shall be had ... not only to the value of the land to be purchased or taken but also to the damage (if any) to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner or by reason that such other lands are injuriously affected in any other respect ... and regard shall also be had to the enhancement by the execution of the work of the value of other parts of the lands ... And [they] shall assess the value of the lands taken according to what they shall find to have been such value at the time notice was given of such lands being required': s 42. [Addition of date of determination and betterment.]
New South Wales	<i>Lands for Public Purposes Acquisition Act 1880</i>	'In estimating or assessing the compensation to be paid under this Act regard shall be had ... not only to the value of the land taken ... but also to the damage (if any) to be sustained by the claimant by reason of the severing of the lands taken from other lands or other injuries suffered by him by reason of the exercise of the powers expressed or incorporated in this Act and they shall assess the same according to what they shall find to have been the value of such lands estate or interest at the time of the resumption thereof or the extent of the damage or injury sustained': s 18. [Addition of date of determination.]
	<i>Public Works Act 1888</i>	'For the purpose of ascertaining the purchase money or compensation to be paid ... regard shall ... be had ... not only to the value of the land to be purchased or taken, but also to the damage (if any) to be sustained by the owner of the lands by reason of the severing of the lands taken from other lands of such owner, or otherwise injuriously affecting such other lands ... and they shall assess the same according to what they shall find to have been the value of such lands, estate or interest at the time notice was given of such lands being required ... Provided ... they shall take into consideration and give effect to by way of set-off or abatement any enhancement in the value of any land belonging to such owner adjoining the land taken or severed therefrom by the construction of the authorized work': s 24. [Addition of date of determination and betterment.]
Western Australia	<i>Railways Act 1878</i>	'In estimating the purchase money or compensation to be paid ... regard shall be had ... to the value of such land at the time of its being taken or resumed, and without reference to any alteration in such value arising from the establishment of the railway; and to the damage, if any, sustained by the owner of such land by reason of the severance of such land from the other lands of such owner or by reason of such other lands being otherwise injuriously affected': s 22 [Reworded without any substantial change in meaning, addition of date of determination.]
	<i>Lands Resumption Act 1894</i>	'In estimating the amount of compensation to be paid in respect of any land taken ... regard shall be had solely to the matters following, that is to say: - (a) The probable and reasonable price at which such land in fee simple, with any improvements thereon, may be expected to sell at the time when taken; and (b) The damage, if any, sustained by the owners of such land by reason of the severance thereof from the other adjoining lands of such owner, or by reason of such other lands of such owner being otherwise injuriously affected by the taking': s 10. [Substitution of explicit reference to hypothetical sale instead of 'value of the land'.]

CHAPTER 3:

AMERICAN EMINENT DOMAIN

I INTRODUCTION

Whilst s 51(xxxi) was the first constitutional requirement of compensation for the compulsory acquisition of property in the British Commonwealth, there were earlier examples in the United States. Although Australians tend to undervalue ‘how significant the American idea of constitutionalism was to our own framers, and how important the United States was as a model’,¹ Gleeson CJ has reminded us that the Framers ‘looked mainly to the experience of the United States for guidance in framing the terms of their federal agreement’.²

Surprisingly little attention has been paid to American eminent domain by Australian commentators on s 51(xxxi). This Chapter examines the public law theory of eminent domain and its implementation in America to provide a fuller elucidation of the theoretical and comparative contexts of s 51(xxxi). The understanding of American eminent domain that is developed will also facilitate the assessment in Chapter 4 of the influences on the drafting of s 51(xxxi) of its various contexts.

Eminent domain, ‘a term unknown to the English law’,³ was defined in Judge Cooley’s influential American text, *A Treatise on the Constitutional Limitations which Rest upon the Legislative Power of the States of the American Union* (1868):

eminent domain ... is the rightful authority which must rest in every sovereignty ... to appropriate and control individual property for the public benefit, as the public safety, convenience, or necessity may demand. ... It is a primary requisite, in the appropriation of lands for public purposes, that compensation shall be made therefor.⁴

Although the similarity between eminent domain and the English theory and practice of providing compensation for the appropriation of property will be readily apparent, there are some important differences. First, in America, eminent domain was enshrined in the

¹ Helen Irving, ‘A Nation Built on Words: The Constitution and National Identity in America and Australia’ (2009) 33 *Australian Studies* 211, 213.

² Murray Gleeson, ‘Global Influences on the Australian Judiciary’ (Speech delivered at the Australian Bar Association Conference, Paris, 8 July 2002) <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_global.htm>.

³ Arthur Lenhoff, ‘Development of the Concept of Eminent Domain’ (1942) 42 *Columbia Law Review* 596, 598.

⁴ Thomas M Cooley, *A Treatise on the Constitutional Limitations which rest upon the Legislative Power of the States of the American Union* (Little, Brown, 1868) 524, 559.

constitution, something not possible in England under a sovereign parliament.⁵ Secondly, there were some differences of emphasis between the theories that will be discussed below. The purpose of this Chapter is to determine what the American experience can tell us about the ‘acquisition of property on just terms’ in s 51(xxxi).

Section II of this Chapter traces the emergence of eminent domain theory, from its origins in ancient times to its development by European public law scholars in the seventeenth and eighteenth centuries. This theory has certain points of emphasis that differ from that of Locke and Blackstone examined in Chapter 2. This Chapter focusses on explicating the theory of eminent domain before examining its implementation in the United States on the basis of the insight of Stoebuck that:

constitutional eminent domain clauses are not ends in themselves, nor are they beginnings. They are formal, concise statements of principle recognized and enshrined, but not invented, by the constitution maker. The real significance and meaning of these principles, therefore, depends on the discovery of their historical and theoretical development, rather than solely on the interpretations of the constitutions.⁶

Section III of this Chapter examines the implementation of eminent domain theory through individual constitutional rights to compensation in the American State and federal Constitutions. The best-known of these is the Fifth Amendment takings clause: ‘Nor shall private property be taken for public use without just compensation.’⁷ The American takings jurisprudence is analysed up to the time of Australian Federation.⁸ Three particular issues will be addressed in order to understand fully the meaning of eminent domain. First, how was the theory of eminent domain applied? Secondly, what

⁵ ‘The plenary power of Parliament discourages the treatment of English constitutional questions in any but the most practical fashion. The only guide to what Parliament may do is what Parliament has done ... That there is no eminent domain sub nomine in England is because the power is included, and the right to compensation lost, in the absolutism of Parliament’: Carman F Randolph, ‘The Eminent Domain’ (1887) 3 *Law Quarterly Review* 314, 323. Similarly: Lenhoff, above n 3, 598 n 15: ‘The English Parliament, by virtue of its omnipotence and its freedom from any legal control, may wield any power of taking’.

⁶ William B Stoebuck, ‘A General Theory of Eminent Domain’ (1972) 47 *Washington Law Review* 553, 556.

⁷ *Constitution of the United States of America*, Fifth Amendment. The jurisprudence interpreting this provision is known as the takings jurisprudence.

⁸ This examination of the takings jurisprudence considers the period up to 1897, providing a survey of the takings jurisprudence at the time of the drafting of the *Australian Constitution*. Further, this limit has the advantage of preserving the full diversity of views reflected in the eminent domain jurisprudence of American State courts, before the harmonizing influence of the last decision considered, in which the Supreme Court extended the federal takings clause requirements to the States (by interpreting the due process clause of the Fourteenth Amendment ‘nor shall any State deprive any person of life, liberty, or property, without due process of law’ as requiring the payment of compensation whenever ‘private property is taken for the State or under its direction for public use’: *Chicago, Burlington and Quincy Railroad Co v Chicago*, 166 US 226, 241 (1897)).

was the scope of property rights protected? Thirdly, what do the practical requirements for the calculation and securing of compensation tell us about the fullness of compensation that is required by eminent domain?

II THE DEVELOPMENT OF EMINENT DOMAIN THEORY

The conceptual foundation of American eminent domain differed from the theory articulated by Locke and Blackstone. Its origins were to be found elsewhere, predominantly in continental Europe. American constitutional commentators have even traced eminent domain back to ancient societies. An early instance of eminent domain, the exercise by a King of a power of appropriation of private property upon the payment of compensation, is recorded in the Old Testament:

And Ahab spake unto Naboth, saying, Give me thy vineyard, that I may have it for a garden of herbs, because it is near unto my house: and I will give thee for it a better vineyard than it; or, if it seem good to thee, I will give thee the worth of it in money.⁹

The existence of eminent domain in ancient Greek and Roman societies is uncertain,¹⁰ although it has been noted that it is ‘impossible to believe that the construction of the Roman roads, extending in a straight line from one end of the Empire to the other, or of the Roman aqueducts, was at the mercy of the owners of land through which they were to pass’.¹¹ It has also been claimed, without specific evidence, that ‘some rule of

⁹ 1 Kings 21:2. Ahab, the King of Samaria, desired the property of Naboth, and was prepared to offer a substitute or monetary compensation. Naboth declined to sell (1 Kings 21:3), whereupon he was stoned to death (1 Kings 21:13), along with his sons (2 Kings 9:26), acts which facilitated the uncompensated appropriation of his vineyard by Ahab. Despite these disastrous consequences for Naboth, the divine retribution suffered by Ahab and his descendants indicates an underlying understanding of the wrongfulness of Naboth’s dispossession (1 Kings 21:19-26; 1 Kings 22:34-38). However, the divine retribution might be seen more as an indication of moral condemnation of the murders of Naboth and his sons than of the uncompensated appropriation of his property that it facilitated. It may also be noted that violence, rather than law, was used to deliver up the property, as to which see: William D McNulty, ‘Eminent Domain in Continental Europe’ (1912) 21 *Yale Law Journal* 555, 555; Stoebuck, above n 6, 553. The reign of Ahab has been dated to 874 – 853 BC, as to which see: Edwin Richard Thiele, *The Mysterious Numbers of the Hebrew Kings* (Paternoster Press, 2nd ed, 1961) 11.

¹⁰ No scholarship suggests any universal understanding of the appropriation of private property in Greece, nor whether compensation was required. At most, there are statements relating to equality under law, notably in Plato’s *The Republic*: ‘justice is the giving to each man what is proper to him’: Plato, *The Republic*, book I, steph 332; in Benjamin Jowett, *The Dialogues of Plato: Translated into English with Analyses and Introductions* (Oxford University Press, 3rd ed, 1892) vol 3, 7. For a specific instance of compensated appropriation in Greece, see: McNulty, above n 9, 556.

¹¹ J Walter Jones, ‘Expropriation in Roman Law’ (1929) 45 *Law Quarterly Review* 512, 521. A counterexample in Rome itself, where private property was not appropriated despite considerable inconvenience, is referred to in James Kent, *Commentaries on American Law* (Little, Brown, 12th ed, 1873) vol 2, 437. The legal basis of any such power, and whether compensation was required, remain uncertain, as to which see: McNulty, above n 9, 555-8; Errol E Meidinger, ‘The ‘Public Uses’ of Eminent Domain: History and Policy’ (1980) 11 *Environmental Law* 1, 6-8; Stoebuck, above n 6, 553-4. Again, expressions of general principles of fairness exist, but creativity is required to suggest a rule that

compensation must have been recognized ... by those nations which enjoyed a high civilization'.¹²

A consistent theory of eminent domain emerged in the writings of the public lawyers of continental Europe from the seventeenth century onwards. The first aspect of eminent domain, a power to subordinate private property rights to the needs of the community, was expressed by Hugo Grotius in *The Law of War and Peace* (1625):

the property of subjects belongs to the state under the right of eminent domain; in consequence the state ... can use the property of subjects, and even destroy it or alienate it ... for the sake of the public advantage; and to the public advantage those very persons who formed the body politic should be considered as desiring that private advantage should yield.¹³

Eminent domain was located more clearly as an attribute of sovereignty by Samuel von Pufendorf in *Of the Law of Nature and Nations* (1672):

The Sovereign Power ... was erected for the common Security, and that alone will give a Prince a sufficient Right and Title, to make use of the Goods and Fortunes of his Subjects, whenever necessity requires; because he must be supposed to have a right to every thing without which the public Good cannot be obtain'd.¹⁴

Eighteenth century public lawyers took a similar view, Cornelius van Bynkershoek writing in *Questions of Public Law* (1737):

That authority by which the sovereign stands out above his subjects jurists call the right of *eminent* or *pre-eminent domain* ... this eminent authority extends to the person and the goods of the subjects, and all would readily acknowledge that if it were destroyed, no state could survive. Through this power ... even the property of individuals [may be] appropriated if the sovereign see fit.¹⁵

Similarly, Baron de Montesquieu's *The Spirit of the Laws* (1748) acknowledged that there would be instances 'when the public has occasion for the estate of an individual',¹⁶ and Emmerich de Vattel's *The Law of Nations* (1758) defined eminent

'compensation should be paid by the community ... according to the old Justinian maxim of justice *'suum cuique tribuere'* [to each their due]': Ugo Mattei, *Basic Principles of Property Law: A Comparative Legal and Economic Introduction* (Greenwood Press, 2000) 197. That maxim may have been more in the nature of 'pious hope' than 'legal principle': Max Radin, 'Fundamental Concepts of the Roman Law' (1924) 12 *California Law Review* 393, 394. A brief account of the relationship between the Greek and Roman positions is given in: Antony Flew, "'Social Justice' Isn't Any Kind of Justice' (1993) *Philosophical Notes* No 27, 2.

¹² McNulty, above n 9, 556.

¹³ Hugo Grotius, *The Law of War and Peace* (1625) book 3, ch 20, VII (Francis W Kelsey trans, 1925 ed) 385 [trans of: *De Jure Belli ac Pacis*].

¹⁴ Samuel von Pufendorf, *Of the Law of Nature and Nations* (1672) book VIII, ch 5, s 7 (Basil Kennett trans, original ed 1703, 1987 reprint) 221 [trans from: *De Jure Naturae et Gentium*].

¹⁵ Cornelius van Bynkershoek, *Questions of Public Law* (1737) vol 2, c 15 (Frank Tenney trans, 1930) 218 [trans of: *Quaestorium Juris Publici*].

¹⁶ Charles-Louis de Secondat, Baron de Montesquieu, *The Spirit of the Laws* (1748) book 26, ch 15 (Thomas Nugent trans, first published 1750, 1914 rev ed, J V Pritchard (ed)) vol 2, 224 [trans of: *De l'Esprit des Lois*].

domain as: ‘The right which belongs to the State, or to the sovereign, to make use of all property within the State for the public welfare in a time of need.’¹⁷ In short, therefore, European public lawyers agreed that one aspect of eminent domain was a power to appropriate private property to the public benefit.

A second aspect of eminent domain, the requirement of compensation to the individual, was regarded as an essential component of eminent domain by each of these writers. Grotius wrote that:

a right gained by subjects can be taken from them ... by the force of eminent domain ... the first requisite is public advantage; then, that compensation from the public funds be made ... to the one who has lost his right.¹⁸

Pufendorf similarly imposed a requirement of compensation:

It is agreeable to natural Equity, that when Contributions are to be made for the preservation of a particular thing, by such as enjoy it in Common, that every Man should pay only his own Quota, and that one should not be forced to bear more of the Burthen than another. ... [When] the Publick may have necessary occasion to make use of something in the possession of one or more of the private Subjects, the Sovereign power may seize upon it for the necessities of the Commonwealth; but then, all that is above the proportion that was due from the Proprietors, must be refunded to them by the rest of the Subjects.¹⁹

This distinction between an individual’s due contribution to the maintenance of society, and their extraordinary loss when their property is appropriated, was the basis for eminent domain’s requirement of compensation. Vattel used a similar idea to distinguish eminent domain from taxation. He wrote that ‘taxes should be so adjusted that all the citizens shall pay their share in proportion to their ability to pay and to the advantages they derive from the State’:²⁰ taxation is an individual’s fair contribution to the maintenance of society. In contrast, appropriation of property involves more than an individual’s just proportion, hence ‘justice requires that compensation be made to the ... individual from the public treasury’²¹ to ensure that ‘the burdens of the state [are] borne equally by all, or in just proportion’.²² Vattel’s distinction between eminent domain and taxation, and Pufendorf’s contrast between an individual’s due contribution

¹⁷ Emmerich de Vattel, *The Law of Nations* (1758) book 1, ch 20, [244] (Charles G Fenwick trans, 1916 ed) 96 [trans of: *Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains*].

¹⁸ Grotius, above n 13, book 2, ch 14, VII (Francis W Kelsey trans, 1925 ed) 385. Similarly, in a later passage Grotius wrote of the compensation requirement that ‘the state is bound to repair the losses of individuals, at the public expense’: book 3, ch 20, VII (A C Campbell trans, 1901 ed) 387-8.

¹⁹ Pufendorf, above n 14, book 8, ch 5, s 7 (Basil Kennett trans, original ed 1703, 1987 reprint) 222.

²⁰ Vattel, above n 17, book 1, ch 20, [240] (Charles G Fenwick trans, 1916 ed) 95.

²¹ *Ibid* 96.

²² *Ibid*.

and their extraordinary loss when a power of appropriation is exercised, provide the basis for eminent domain's requirement of compensation which ensures that no individual is required to make a disproportionate sacrifice.²³

Eighteenth century European writers stressed that nothing less than full market-value compensation was permissible. Bynkershoek stated that a prince exercising a power to take property should do so 'upon *payment of the price* from the common treasury'. He admonished that: '[h]e who convinces himself that he can act differently is a bandit rather than a prince'.²⁴ Similarly, Montesquieu wrote:

If the political magistrate would erect a public edifice, or make a new road, he must *indemnify* those who are injured by it: *the public is in this respect like an individual, who treats with an individual*. It is fully enough that it can oblige a citizen to ... alienate his possessions.²⁵

These are important passages: eminent domain requires full market-value compensation to indemnify the individual; the state is entitled to no discount on compensation, but is to be treated as if it were an individual bargaining for the property in a free market.

In conclusion, the theory of eminent domain developed by European public law writers was well established by the eighteenth century, and involved a power to appropriate property conditioned with a requirement of full market-value compensation. Europe provided its own examples of constitutional recognition of eminent domain, including in the French *Declaration of the Rights of Man and of the Citizen* (1789).²⁶ However, in Europe there was no framework for its enforcement in individual cases. The adoption of eminent domain in the United States went further – judicial review was available to

²³ Similarly, 'compensation exists to insure that no more of an individual's property rights will be taken from him than represents his just share of the cost of government. That is the purpose and the function of the compensation requirement': Stoebuck, above n 6, 588.

²⁴ Bynkershoek, above n 15, 219.

²⁵ Montesquieu, above n 16, book 26, ch 15 (Thomas Nugent trans, first published 1750, 1914 rev ed, J V Pritchard (ed)) vol 2, 224.

²⁶ 'Property is an inviolable and sacred right, no one may be deprived of it, except where public necessity, in accordance with law, shall clearly require it, and on the condition of prior just compensation': *Déclaration des droits de l'homme et du citoyen* (1789) art 17 <http://www.legisnet.com/france/constitutions/declaration_de_1789.html>. This is the author's translation of: 'La propriété étant un droit inviolable et sacré, nul ne peut en être privé, si ce n'est lorsque la nécessité publique, légalement constatée, l'exige évidemment, et sous la condition d'une juste et préalable indemnité'. An alternative translation is: 'Since the right to private property is sacred and inviolable, no one can be deprived of it except in certain cases legally determined to be essential for public security; in such cases a fair indemnity must first of all be granted': John A Rohr, *Founding Republics in France and America* (University Press of Kansas, 1995) 275.

make the individual right protected by eminent domain a reality.²⁷ Further, although academic commentators have variously theorised the influence of the French provision on the American,²⁸ the examination of the American cases and commentary in the next section of this Chapter will show that it was the continental theory of eminent domain to which the Americans referred, not to the French experience. In turn, as Chapter 4 will show, the Australians approached eminent domain through the American experience. This American adoption of eminent domain will now be examined.

III AMERICAN CONSTITUTIONALISATION OF EMINENT DOMAIN

A *Constitutional Adoption*

The theory of eminent domain has been incorporated into American constitutions since the American revolution. The first requirement of compensation implementing eminent domain²⁹ was contained in the 1777 constitution of the Vermont Republic:³⁰

²⁷ The lack of enforcement by judicial review in Europe led to a criticism that the references of the public law writers: 'to a right of an individual to receive compensation were in the nature of moral suggestions, rather than statements of law': Lenhoff, above n 3, 596. However, the lack of judicial review of legislation detracts from the enforcement, rather than the existence, of the principle. As to the relative strength of enforcement of the American and French provisions, see: Mattei, above n 11, 31-32, 195 but cf 200.

²⁸ One author claimed that the constitutional protection of private property: '[f]rom France ... found its way directly to America': Mattei, above n 11, 196. However, the French Declaration of 1789 cannot have influenced the eminent domain clauses in the Constitutions of Vermont (1777) and Massachusetts (1780) (see Appendix II to this Chapter). The link between the American and French provisions has been suggested to be extremely close. As, for example, the claim that the French Declaration was 'written by the Marquis de Lafayette, assisted by Thomas Jefferson': James Thuo Gathii, 'Commerce, Conquest and Wartime Confiscation' (2006) 31 *Brooklyn Journal of International Law* 709, 718 n 46. Certainly a common ideal lies behind both clauses. The relationship between French and American constitutional thought in the late eighteenth Century is examined in: Vincent Robert Johnson, 'The Declaration of the Rights of Man and of Citizens of 1789, the Reign of Terror, and the Revolutionary Tribunal of Paris' (1990) 13 *Boston College International and Comparative Law Review* 1, 2-13. The influence and involvement of Americans in the drafting of the French Declaration is examined in: Iain McLean, 'Thomas Jefferson, John Adams, and the Déclaration des droits de l'homme et du citoyen' in Robert Fatton Jr and R K Ramazani (eds), *The Future of Liberal Democracy: Thomas Jefferson and the Contemporary World* (Palgrave Macmillan, 2004) 13.

²⁹ Some provisions in earlier constitutions arising from the American revolution contained a lesser protection of private property based on the notion of 'delegated consent' through legislative approval. The revolutionary 'no taxation without representation' ideal was reflected in the following provisions: individuals 'cannot be taxed or deprived of their property for public uses without their own consent or that of their representatives so elected': *Virginia Declaration of Rights* (1776) art 6; 'no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives': *Constitution of Pennsylvania* (1776), Declaration of the Rights of the Inhabitants of the Commonwealth or State of Pennsylvania, art 8; 'no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people': (second) *Constitution of New Hampshire* (1784) art 12. The clause from *Magna Carta* that was examined

private property ought to be subservient to public uses, when necessity requires it; nevertheless, whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money.³¹

The Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts, part of the Massachusetts Constitution of 1780, similarly provided that:

no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people ... And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.³²

Subsequently, similar eminent domain clauses were adopted throughout the American Union. As shown in Appendix II to this Chapter, by 1897 all but two of the original 13 States, and all of the States subsequently admitted, had adopted a constitutional eminent domain clause.³³ The universality of acceptance of eminent domain's requirement of compensation to the individual is further evidenced by the fact that, in the two States that had no express constitutional requirement of compensation, the courts had implied such a requirement and had struck down statutes not providing compensation.³⁴ The Fifth Amendment takings clause, part of the Bill of Rights

in Chapter 2 was reflected in the following provisions: 'That no freeman ought to be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land': *Constitution of Maryland* (1776) art 21. Similar clauses appeared in: *Constitution of North Carolina* (1776) art 12; (second) *Constitution of South Carolina* (1778) art 61; and more substantially modified versions in: *Constitution of New York* (1777) art 13; (second) *Constitution of Delaware* (1792) art 1, s 7. The above provisions were eventually superseded by constitutional requirements of compensation in all except two States, as shown in Appendix II to this Chapter. Moreover, some courts had earlier implied a requirement of compensation from the delegated consent clauses, as to which see below n 34 and J A C Grant, 'The 'Higher Law' Background of the Law of Eminent Domain' (1930) 6 *Wisconsin Law Review* 67. Whilst the legal basis for these implications varied, they reflected a common understanding that compensation was an indispensable element of eminent domain: '[i]t never could have been the intention of the Constitution to authorize the Legislature to take from a citizen his property and leave him ... to lobby the Legislature appealing to their magnanimity, justice or mercy, to provide him a compensation for his property taken for public use': *Bloodgood v Mohawk and Hudson Railroad Co*, 18 Wend 9, 38 (1837) (Senator Maison).

³⁰ Vermont was admitted as the fourteenth State of the Union in 1791.

³¹ *Constitution of Vermont* (1777) ch 1, art 2. See also: Gerard J Mangone, 'Private Property Rights: The Development of Takings in the United States' (2002) 17 *International Journal of Marine and Coastal Law* 195, 200.

³² *Constitution of the Commonwealth of Massachusetts* (1780) pt I, art 10.

³³ See Appendix II at the end of this Chapter for full details of each relevant provision.

³⁴ New Hampshire courts implied a requirement of compensation as a matter of natural law: 'There is no doubt, that when this power is exercised, a just compensation is to be made. The constitutions of some of the states expressly declare, that such compensation shall be made. And natural justice speaks on this point, where our constitution is silent': *Bristol v New-Chester*, 3 NH 524, 535 (1826). The same result was later reached by a different route, where it was said that the constitutional requirement of delegated consent (see above n 29): 'has always been understood necessarily to include, as a matter of right, and as one of the first principles of justice, the further limitation, that in case his property is taken without his consent, due compensation must be provided': *Proprietors of Piscataqua Bridge v New-Hampshire*

proposed by Congress in 1789 and adopted in 1791, is also an eminent domain clause. Accordingly, it has been noted that ‘the several States and the Federal Government are at one in their recognition of the eminent domain’.³⁵ The resulting American takings jurisprudence will now be examined, because the practical application of eminent domain in the United States can provide insights into the understandings of the concepts of eminent domain that go beyond mere statements of theory.

B Recognition of a Sovereign Power of Appropriation

A sovereign power of appropriation flowed naturally from acceptance of the European public law theory of eminent domain. Relying on Grotius, Pufendorf and Vattel, the great American constitutional scholar James Kent identified eminent domain as an ‘inherent sovereign power’,³⁶ adding that ‘the interest of the public is deemed paramount to that of any private individual’.³⁷ In the passage extracted in the introduction to this Chapter, Judge Cooley similarly accepted eminent domain as a ‘rightful authority which must rest in every sovereignty ... to appropriate and control individual property for the public benefit’.³⁸ A few years later in *Kohl v United States*,³⁹

Bridge, 7 NH 35, 66 (1834). Yet another justification for reaching this same result was adopted subsequently:

‘the anxious care taken in different parts of our own constitution to protect private property from all danger of violation, clearly shows the framers of that instrument to have been as far as possible from any intention to repudiate the well established maxim of universal law, that private property cannot be taken for public use without just compensation to the owner; a maxim recognized in all just and enlightened governments, and which has been assumed as fundamental and unquestionable in all cases where the point has arisen incidentally in this State’: *In Re Mt Washington Road Co*, 35 NH 134, 142 (1857).

North Carolina courts displayed initial unease about the juridical basis of implying a requirement of compensation: ‘the natural right and justice of compensation, and the nature of our free institutions, were also relied on as sufficient in themselves to create the supposed restriction on this power. But the sense of right and wrong varies so much in different individuals, and the principles of what is called natural justice are so uncertain, that they cannot be referred to as sure standard of constitutional power’: *Raleigh & Gaston Railroad Co v Davis*, 19 NC 451, 459-60 (1837) (although the Court stressed that this view was expressed in *obiter* as full compensation was available under the relevant statute: at 461). By 1859, it was decided that private property ‘cannot be taken from the owners by the government, except in the exercise of the power of eminent domain, and then only for public use, with a provision for the just compensation’: *State v Glen*, 52 NC 321, 334 (1859), based on (as in New Hampshire) a broad interpretation of the delegated consent provision: at 331. Subsequently, alternative reasoning was adopted: ‘the principle is so grounded in natural equity, that it has never been denied to be a part of the law of North Carolina’: *Johnston v Rankin*, 70 NC 550, 555 (1874). See also: *Staton v Norfolk & Carolina Railroad Co*, 111 NC 278, 282 (1892).

³⁵ Randolph, above n 5, 318.

³⁶ Kent, above n 11, vol 2, 434-5.

³⁷ *Ibid.*

³⁸ Cooley, above n 4, 524. A very similar definition was given by Judge Cooley in: *Trombley v Humphrey*, 23 Mich 471, 474 (1871).

³⁹ 91 US 367 (1875).

the first federal takings case,⁴⁰ Strong J also relied on Vattel and Bynkershoek, as well as Kent and Cooley, to hold that eminent domain was:

distinct from and paramount to the right of ultimate ownership. ... The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law.⁴¹

Justice Strong upheld two Acts of Congress of 1872 pursuant to which the federal government had acquired land in Cincinnati to construct a post office. Not only were these statutes declared constitutional, but it was held that the federal government could exercise its power of eminent domain notwithstanding the unwillingness of the property holders to sell, and notwithstanding the State legislating to prohibit such a sale.

The ‘necessity’ of which Strong J wrote was also emphasised by Cooley J. He wrote that eminent domain ‘springs from no contract or arrangement between the government and the citizen,’⁴² but instead is founded upon:

the absolute necessity that the means in the government for performing its functions and perpetuating its existence should not be subject to be controlled or defeated by the want of consent of private parties, or of any other authority.⁴³

A striking feature of the cases addressing necessity is the acknowledgement that the judgment of the necessity for an acquisition was entirely within the discretion of the legislature.⁴⁴ This could not be questioned in court because it was exclusively for the legislature ‘to determine whether the benefit, which the public were to derive from such

⁴⁰ Despite no federal power of eminent domain being exercised until 1875, there was little doubt of its existence. Indeed, in *Trombley v Humphrey*, 23 Mich 471 (1871), Cooley J stated that the United States could ‘without question seize the property of individuals’ exercising its power of eminent domain: at 476. The objection that such a power had never been exercised was dismissed very shortly: ‘We attach no importance to the circumstance that no law of congress can be shown empowering the general government to condemn lands for light-house purposes. When congress discovers a necessity for such legislation there can be little doubt of its adoption’: at 479. Moreover, the power gained rapid acceptance after its first exercise: the following year in *United States v Fox*, 94 US 315 (1876), Field J wrote that: ‘[i]t is not pretended that the United States may not acquire and hold real property in the State ... in the exercise of their power of eminent domain, upon making just compensation’ thereby suggesting that such a procedure enjoyed long historical precedent: at 320.

⁴¹ *Kohl v United States*, 91 US 367, 371-2 (1875). Justice Strong acknowledged an alternative justification, that an inference can be drawn from the takings clause of the Fifth Amendment that property may be taken by the United States upon making just compensation: at 372-3.

⁴² *Trombley v Humphrey*, 23 Mich 471, 474 (1871).

⁴³ Cooley, above n 4, 526. See also: eminent domain is ‘the offspring of political necessity, and is inseparable from sovereignty unless denied to it by its fundamental law’: *Searl v School District No 2 in Lake County*, 133 US 553, 562 (1890) (Fuller CJ).

⁴⁴ A broad view of necessity was also taken. Necessity was not limited to property without which desired outcomes could not be reached (*Giesy v Cincinatti, Wilmington and Zanesville Railroad Co*, 4 Ohio St 308, 326-7 (1854)), but extended to property which was merely expedient to achieve a legislative goal (*Gilmer v Lime Point*, 18 Cal 229, 250 (1861) (Baldwin J); *Heyward v New York*, 7 NY 314, 325 (1852)).

improvements, were of sufficient importance to justify the exercise of this right of eminent domain, in thus interfering with the private rights of individuals'.⁴⁵

The Americans accepted eminent domain's recognition of sovereign power on the basis that 'the necessary functions of government ought not to be paralyzed by the will of a single individual, nor the interests of all be made subservient to the whim or caprice of one'.⁴⁶ Moreover, the necessity of any particular appropriation was entirely a matter for the discretion of the legislature – this was a recognition of the sovereign power in eminent domain. This was, however, the full extent of sovereign power. Any affected individual would be protected by the second aspect of eminent domain: a constitutional individual right to compensation that was beyond the discretion of the legislature.

C Imposition of a Constitutional Individual Right to Compensation

In the United States, great weight was placed on the individual right to compensation drawn from eminent domain theory. Kent wrote that the requirement of compensation 'is founded in natural equity, and is laid down by jurists as an acknowledged principle of universal law'. His basis for this assertion was the writings of Grotius, Pufendorf and Vattel.⁴⁷ Similarly, Baker's text noted that '[b]y the general law of European nations and the common law of England private property cannot be taken by the government for public use without compensation'.⁴⁸ Vattel's use of the distinction between eminent

⁴⁵ *Bloodgood v Mohawk and Hudson Railroad Co*, 18 Wend 9, 13 (1837) (Chancellor Walworth). See also: *People v Smith*, 21 NY 595, 598 (1860); *Gilmer v Lime Point*, 18 Cal 229, 252 (1861); *Ford v Chicago and Northwestern Railroad Co*, 14 Wis 609, 617 (1861) (Dixon CJ); *Water Works Co of Indianapolis v Burkhart*, 41 Ind 364, 369-70 (1872); *Boom Co v Patterson*, 98 US 403, 406 (1878); *United States v Jones*, 109 US 513, 519 (1883); *Shoemaker v United States*, 147 US 282, 298 (1893); *United States v Gettysburg Electric Railway Co*, 160 US 668, 685 (1896).

⁴⁶ *Giesy v Cincinatti, Wilmington and Zanesville Railroad Co*, 4 Ohio St 308, 324-5 (1854) (Ranney J). Similarly, Strong J wrote that a power of eminent domain in a government is 'essential to its independent existence and perpetuity' which 'cannot be preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed': *Kohl v United States*, 91 US 367, 371 (1875). The reference to 'other authority' added an additional justification: without a federal power of eminent domain, a State might prohibit the sale of land to the federal government with the result that 'the constitutional grants of power may be rendered nugatory': at 371. Judge Cooley similarly wrote: 'no government could perpetuate its existence and further the prosperity of its people, if the means for the exercise of any of its sovereign powers might be withheld at the option of individuals': *Trombley v Humphrey*, 23 Mich 471, 474 (1871).

⁴⁷ Kent, above n 11, vol 2, 435. This passage is also quoted with approval in: Joseph Story, *Commentaries on the Constitution of the United States* (Little, Brown, 5th ed, 1891) vol 2, 569-70.

⁴⁸ Andrew Jackson Baker, *Annotated Constitution of the United States* (Callaghan, 1891) 184.

domain and taxation to explain the requirement of compensation was also influential in the United States.⁴⁹ It was noted that:

Taxation exacts money, or services from individuals, as and for their respective shares of contribution to any public burthen. Private property taken for public use by right of eminent domain, is taken, not as the owner's share of contribution to a public burthen, but as so much beyond his share.⁵⁰

Accordingly, eminent domain required compensation because 'the citizen is compelled to surrender ... something beyond his due proportion for the public benefit.'⁵¹

Adopting the name and elements of eminent domain, and relying on European public law writers to define it, the Americans were nonetheless conscious of the broad similarity of eminent domain with the English constitutional theory of Locke and Blackstone. Although eminent domain was not identical to the English constitutional theory, Blackstone was read with great interest in America.⁵² The English constitutional

⁴⁹ The similarity between eminent domain and taxation was first noted:

'Private property may be constitutionally taken for public use in two modes; that is to say, by taxation and by right of eminent domain. These are rights which the people collectively retain over the property of individuals, to resume such portions as may be necessary for public use. The right of taxation and the right of eminent domain rest substantially on the same foundation': *People v Mayor of Brooklyn*, 4 NY 419, 422 (1851) (Ruggles J). See also: *People v Smith*, 21 NY 595, 598 (1860); *Detroit and Howell Railroad Co v Salem*, 20 Mich 452, 513 (1870) (Graves J); J I Clark Hare, *American Constitutional Law* (Little, Brown, 1889) 332; Stoebuck, above n 6, 572.

The difference was identified by reference to the amount each individual should fairly have to contribute to the maintenance of society:

'Taxation operates upon a community or upon a class of persons in a community and by some rule of apportionment. The exercise of the right of eminent domain operates upon an individual, and without reference to the amount, or value exacted from any other individual, or class of individuals': *People v Mayor of Brooklyn*, 4 NY 419, 422 (1851) (Judge Ruggles).

Therefore, 'compensation exists to insure that no more of an individual's property rights will be taken from him than represents his just share of the cost of government': Stoebuck, above n 6, 588.

As the Supreme Court later acknowledged: 'The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed 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': *Armstrong v United States*, 364 US 40, 49 (1960); quoted with approval in *Dolan v City of Tigard*, 512 US 374, 384 (1994).

⁵⁰ *People v Mayor of Brooklyn*, 4 NY 419, 424 (1851) (Ruggles J). Similarly, 'while taxation distributes the burden among all, the entire charge may, under the right of eminent domain, be thrown on an individual': Hare, above n 57, 332.

⁵¹ Cooley, above n 4, 559. Eminent domain 'is accordingly attended with a moral, and, under the organic law of the United States, a legal obligation to compensate the person who is deprived of his property for the general good': Hare, above n 49, 332.

⁵² 'Nearly twenty-five hundred copies of Blackstone's Commentaries were absorbed by the colonies on the Atlantic seaboard before they declared their independence. James Kent, aged fifteen, found a copy and (to use his own words) was inspired with awe; John Marshall found a copy in his father's library': Frederic William Maitland, 'English Law and the Renaissance' in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History* (Little, Brown, 1907) vol 1, 168, 204. 'Virtually every man in England and the American colonies who aspired to a career in law studied this comprehensive textbook ... [at the time of the Revolution] the American colonists educated in the law had read Blackstone. Some had even attended his lectures at Oxford': Mangone, above n 31, 197-8.

theory of the sanctity of private property resonates through Paterson J's charge to the jury in *Vanhorne's Lessee v Dorrance*⁵³ in 1795:

the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man. ... its security was one of the objects, that induced them to unite in society. No man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry. The preservation of property then is a primary object of the social compact ... Every Person ought to contribute his proportion for public purposes and public exigencies; but no one can be called upon to surrender or sacrifice his whole property, real and personal, for the good of the community, without receiving a recompence in value. This would be laying a burden upon an individual, which ought to be sustained by the society at large. The English history does not furnish an instance of the kind; the Parliament, with all their boasted omnipotence, never committed such an outrage on private property ... Such an act would be a monster in legislation, and shock all mankind. ... divesting one citizen of his freehold, and vesting it in another, without a just compensation ... is inconsistent with the principles of reason, justice, and moral rectitude; it is incompatible with the comfort, peace, and happiness of mankind; it is contrary to the principles of social alliance in every free government; and lastly, it is contrary both to the letter and spirit of the Constitution. In short, it is what every one would think unreasonable and unjust in his own case.⁵⁴

Joseph Story also acknowledged that the Fifth Amendment takings clause was 'an affirmance of a great doctrine established by the common law for the protection of private property.'⁵⁵ In a passage redolent of the spirit of Locke, he continued:

in a free government almost all other rights would become utterly worthless if the government possessed an uncontrollable power over the private fortune of every citizen. One of the fundamental objects of every good government must be the due administration of justice; and how vain it would be to speak of such an administration, when all property is subject to the will or caprice of the legislature and the rulers.⁵⁶

The broad consistency of the theory of eminent domain with the English constitutional theory was noted by American constitutional scholars,⁵⁷ and the Supreme Court.⁵⁸

⁵³ 2 US (2 Dallas) 304 (1795).

⁵⁴ *Ibid* 310 (Paterson J). Paterson was an Associate Justice of the Supreme Court of the United States, sitting alone in this case as a federal circuit judge. The protection of private property from government interference should be distinguished from the separate question of the rights of owners to exclude other individuals from their property, as to which see: Eric T Freyfogle, *On Private Property: Finding Common Ground on the Ownership of Land* (2007) 29-60.

⁵⁵ Story, above n 47, vol 2, 568-9, referring to Blackstone's *Commentaries* (see Chapter 2).

⁵⁶ Story, above n 47, vol 2, 570.

⁵⁷ 'Compensation has accordingly gone hand in hand with the right of taking property for public purposes in all civilized countries, and been regarded as essential to its legitimate exercise, even under despotic rule. They were treated as inseparable by the Continental jurists, and such is the principle and practice of the English government': Hare, above n 49, 348. See also: Baker, above n 48, 184. The influences of both European eminent domain theory and the English constitutional theory of Locke and Blackstone are evident. This is not to deny that more immediate pragmatic motivations may well also have had a role to play in the inception of the Fifth Amendment takings clause: St George Tucker (ed), *Blackstone's Commentaries, with Notes of Reference to the Constitution and Laws of the Federal Government of the United States, and of the Commonwealth of Virginia* (William Young Birch &

American eminent domain clauses reflected a common understanding⁵⁹ that ‘when the public interest requires the sacrifice of private property, a very clear principle of justice requires also a compensation to be given for the injury.’⁶⁰

The acceptance, in American eminent domain, of a power of appropriation conditioned by an individual right to compensation, respected both the needs of society and the rights of the individual:

Important as are the interests of each man, they must sometimes yield to the interests of all; and the Government, which acts for the whole, must be permitted to work out its general object, though sometimes at the expense of the natural rights of individuals. But in exercising this paramount power the Constitution wisely guards the citizen from oppression, and therefore has prescribed a principle of justice for the regulation of State action. When she interposes this sovereign dominion over private property, she makes adequate compensation to him for what she takes of his separate property for the benefit of the general society. In this manner his interest is made consistent with the power and efficiency of the Government and with the common weal.⁶¹

The requirement of compensation enabled it to be said that the constitutional arrangements held ‘private property inviolate, but subservient to the public welfare’,⁶² as compensation gave effect to ‘the duty of government ... never to sacrifice the individual to the community ... without indemnifying him for the loss.’⁶³

Eminent domain, both in theory and in its American implementation, differed from the English experience not only because of its constitutionalisation in the United States. There was also a difference in emphasis: the recognition of a robust sovereign right to appropriate demanded a clearer statement of the corresponding individual right to

Abraham Small, 1803) vol 1, 305-6. See also: William Michael Treanor, ‘The Original Understanding of the Takings Clause and the Political Process’ (1995) 95 *Columbia Law Review* 782, 791-2.

⁵⁸ The takings clause was said to offer ‘protection and security to the rights of the individual as against the government’ implementing both a continental principle ‘which has received the commendation of jurists, statesmen, and commentators’ and also an English principle ‘placing the just principles of the common law on that subject beyond the power of ordinary legislation’: *Pumpelly v Green Bay and Mississippi Canal Co*, 80 US (13 Wallace) 166, 177 (1871) (Miller J, for the Court). His Honour also added an historical justification, noting that ‘invasion of private right under the pretext of the public good ... had no warrant in the laws or practices of our ancestors’: at 178.

⁵⁹ They were ‘made pursuant to an existing ethos shared by judges along with constitution makers’: Stoebuck, above n 6, 555.

⁶⁰ *Town Council of Akron v McComb*, 18 Ohio 229, 232 (1849). Similarly: ‘[l]et the city take all that is necessary, convenient and becoming this great and flourishing capital, but let compensation go hand in hand with the public benefit’: *Stetson v Faxon*, 36 Mass (19 Pickering) 147, 162 (1837).

⁶¹ *Gilmer v Lime Point*, 18 Cal 229, 253-4 (1861).

⁶² *Town Council of Akron v McComb*, 18 Ohio 229, 232 (1849).

⁶³ Hare, above n 49, 387.

compensation. Links to the English theory were strong, but American eminent domain placed the rights of the individual on a firmer conceptual and constitutional basis.

Two further issues are essential for a proper understanding of the American eminent domain, and will be addressed in the following two sections. First, the scope of the individual property rights recognized. Secondly, the level of compensation required.

D The Range of Property Rights Protected

The rigor of the protection of individual rights will be affected by the scope of the property protected. If a narrow interpretation of ‘property’ is given, the protection provided to the individual by the requirement of compensation will be limited. Unsurprisingly, given its theoretical background, American eminent domain jurisprudence defined ‘property’ broadly, ensuring that a wide range of individual rights of property were protected through its guarantee of compensation. All forms of interest in real property were included:

The term ‘property,’ as applied to lands, comprehends every species of title inchoate or complete. It is supposed to embrace those rights which lie in contract, those which are executory, as well as those which are executed.⁶⁴

Moreover, eminent domain clauses also applied to property more generally.⁶⁵ The passage from *Vanhorne’s Lessee v Dorrance* extracted earlier⁶⁶ referred to ‘property, real and personal’,⁶⁷ establishing that the application of eminent domain clauses was ‘as extensive in regard to personal as to real property’.⁶⁸ An even more expansive statement was set out in the 1854 Massachusetts decision in *Boston and Lowell Railroad Co v Salem and Lowell Railroad Co*:

property is *nomen generalissimum*, and extends to every species of valuable right and interest, and includes real and personal property, easements, franchises and incorporeal hereditaments.⁶⁹

⁶⁴ *Soulard v United States*, 29 US (4 Pet) 511, 512 (1830) (Marshall CJ).

⁶⁵ ‘It was not until almost the second half of the last century that, with the unparalleled transformation of the economic structure of this country, a concept of the scope of property within the protection of the due process clause finally arose. Theretofore, expropriation had practically coincided with the acquisition of land’: Lenhoff, above n 27, 607. ‘[W]hile takings law has substantially developed in the case of expropriation of immovable property, its principles are by no means limited to land law’: Mattei, above n 11, 199.

⁶⁶ See above at 69.

⁶⁷ *Vanhorne’s Lessee v Dorrance*, 2 US (2 Dallas) 304, 310 (1795) (Patterson J).

⁶⁸ *Bloodgood v Mohawk and Hudson Railroad Co*, 18 Wend 9, 58 (1837).

⁶⁹ *Boston and Lowell Railroad Co v Salem and Lowell Railroad Co*, 68 Mass (2 Gray) 1, 35 (1854). The adaptation of this passage in Australia is shown in Chapter 5, section IVD.

Later, in *James v Campbell* in 1881, the Supreme Court confirmed that ‘property’ extended to a patent, which:

confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate or use, without compensation, land which has been patented to a private purchaser.⁷⁰

This was confirmation that the takings clause extended to intangible property. Other cases confirmed that ‘there is no kind of private property, whatever may be its nature or origin, that can be taken for public use without just compensation being made’.⁷¹ This was consistent with eminent domain’s focus on individual rights: ‘every valuable right is equally entitled to protection’.⁷² In short, eminent domain clauses were applied to the taking of all forms of individual property, including real, personal and intangible property, thereby ensuring that a wide range of individual rights enjoyed the protection provided by the requirement of compensation.

E The Measure and Calculation of Compensation

While the provision of compensation is deemed indispensable, the theoretical foundations of eminent domain require the compensation to be at full market value. This view is supported by an examination of the case law. The American eminent domain jurisprudence insisted on full market-value compensation: ‘a fair equivalent in money’.⁷³ To quantify the amount of compensation, market value would be estimated:⁷⁴

the owner is entitled to receive its fair market value at the time it is taken -- as much as he might fairly expect to be able to sell it to others for, if it was not taken ... It is to be valued precisely as it would be appraised for sale.⁷⁵

This implemented the notion that the government was treated as an individual bargaining in a free market, where full, that is market-value, compensation would need to be paid. In so doing, the American eminent domain approached compensation in a similar manner to the British theory and practice.

⁷⁰ *James v Campbell*, 104 US 356, 357-8 (1881) (Bradley J). See also: *Schillinger v United States*, 155 US 163, 173 (1894).

⁷¹ *Hill v United States*, 149 US 593, 604 (1893) (Shiras J).

⁷² Hare, above n 49, 359.

⁷³ *Bloodgood v Mohawk and Hudson Railroad Co*, 18 Wend 9, 35 (1837) (Senator Maison).

⁷⁴ As written recently: ‘where a state offers fair market value compensation to the property owner in the face of an economic loss, the balance of power between a private right and governmental authority envisioned by the foundation generation of the Constitution, and codified in the Fifth Amendment, operates effectively’: Nathaniel Segal, ‘After El-Shifa: The Extraterritorial Availability of the Takings Clause’ (2005) 13 *Cardozo Journal of International and Comparative Law* 293, 299-300.

⁷⁵ *Giesy v Cincinatti, Wilmington and Zanesville Railroad Co*, 4 Ohio St 308, 331 (1854).

Further, market value would depend not merely on the present use of the property, but on its potential for other uses, the appropriate question being: ‘what is the value of the property for the most advantageous uses to which it may be applied?’⁷⁶ As the Supreme Court held in the leading case of *Boom Co v Patterson* in 1878:

In determining the value of land appropriated for public purposes, the same considerations are to be regarded *as in a sale of property between private parties*. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted ... having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.⁷⁷

In *Boom Co v Patterson*, the value of the land to be provided as compensation rested not only on its current use as just over thirty four acres of average farm land, but also on its potentially much greater value if converted into a log harbour.⁷⁸ The underlying principle remained one of indemnity: ‘the owner shall be placed pecuniarily where he stood before the power was exercised’.⁷⁹

Not only was full compensation to be provided to each affected individual, but it was also held that the individual ‘is not bound to trust to the justice of the government to make provision for such compensation by future legislation’.⁸⁰ Instead, courts insisted that ‘an appropriate remedy must be provided and upon an adequate fund’,⁸¹ in order that compensation be ‘as absolutely certain, as that the property is taken’.⁸² Where there was no compliance with this requirement, the takings were invalidated.

⁷⁶ *Re Furman Street*, 17 Wend 649, 670 (1836) (Bronson J).

⁷⁷ *Boom Co v Patterson*, 98 US 403, 407-8 (1878) (Field J, for the Court) [emphasis added].

⁷⁸ The Court noted that the land comprised a line of islands in the Mississippi River in Minnesota which ‘formed a line of shore, with occasional breaks, for nearly a mile parallel with the west bank of the river, and distant from it about one-eighth of a mile’: *ibid* 405. The court found that by using booms to connect the islands to each other, and at the downstream end to connect the island to the bank of the river, a log harbour of immense dimensions could be created very expeditiously. It was specifically for this purpose that the Boom Co sought to take the land. The value of the land for the purposes of constructing a log harbour was far greater than its value as agricultural land, and this potential use was held to be relevant in determining the market value of the land, and thus the amount of compensation to be paid.

⁷⁹ Hare, above n 49, 415.

⁸⁰ *Bloodgood v Mohawk and Hudson Railroad Co*, 18 Wend 9, 17 (1837) (Chancellor Walworth).

⁸¹ *Ibid* 18 (Chancellor Walworth). This had the consequence that, when property was being taken by an individual or corporation to whom the government had delegated its power of eminent domain, it was: ‘indispensable that the law should not only provide for an assessment of the damages, but should secure the appropriation of a definite and certain fund out of which such damages shall be paid’: *Orr v Quimby*, 54 NH 590, 593-4 (1874); referring to: *Ash v Cummings*, 50 NH 591, 621 (1872). As alternatively expressed in Massachusetts, the owner whose property was taken must be provided ‘prompt and certain compensation, without ... any risk or unreasonable delay’: *Connecticut River Railroad Co v County Commissioners of Franklin*, 127 Mass 50, 56 (1879). See also: *Loweree v City of Newark*, 38 NJL 151, 154 (1875).

⁸² *Bloodgood v Mohawk and Hudson Railroad Co*, 18 Wend 9, 35 (1837) (Senator Maisson). Whilst eminent domain did not ‘require that compensation shall be actually paid in advance of the occupancy of

In sum, the application of eminent domain's requirement of compensation in America emphasised the importance of providing a complete indemnity through the provision of full market-value compensation for the taking of property. The influence of American eminent domain for s 51(xxxi) of the *Australian Constitution* will be examined in Chapter 4 of this thesis, although its potential significance will already be apparent.

IV CONCLUSION

Despite the overall importance of the American example as an influence on the Framers of the *Australian Constitution*, no Australian commentator has undertaken a systematic assessment of the significance of American eminent domain to s 51(xxxi). This chapter has shown that the eminent domain theory of continental public law writers was implemented in eminent domain clauses in the State and federal Constitutions of the United States. The requirement of compensation in eminent domain theory paralleled that contained in the English theory of Locke, but with two critical differences. First, in America the requirement of compensation was elevated to the level of a constitutional requirement that was enforced by the courts engaging in judicial review of legislation. Secondly, the resulting cases applying the requirement of compensation revealed important details about the scope of eminent domain clauses.

The American implementation of constitutional eminent domain clauses accepted the two key features of eminent domain: a sovereign power to appropriate and a concomitant individual right to full market-value compensation to ensure that no individual rights were sacrificed to the advancement of society. Compared to the English constitutional theory and legislative practice, the American doctrine of eminent domain placed greater emphasis on the absoluteness of the individual right to full market-value compensation as a necessary redress for the sovereign power of appropriation. American eminent domain did not privilege the individual above the community: the sovereign power of appropriation was acknowledged, and the courts insisted that determining whether it was necessary to exercise that power was entirely a matter for the legislature. That was the full recognition of sovereign power. However,

the land to be taken' nevertheless the owner was 'entitled to reasonable, certain and adequate provision for obtaining compensation before his occupancy is disturbed': *Cherokee Nation v Southern Kansas Railway Co*, 135 US 641, 659 (1890). See also: *Gilmer v Lime Point*, 18 Cal 229, 260 (1861); *Petition of the United States for the Appointment of Commissioners*, 96 NY 227, 237 (1884).

the right to compensation was interpreted with reference to the individual *alone*: there would be no scope for further exercise of discretion by the sovereign power, but instead an exclusive focus on ensuring full market-value compensation in every individual case. The individual right to full market-value compensation was the *quid pro quo* for the exercise of the sovereign power of appropriation.

American eminent domain jurisprudence provided practical guidance as to two relevant issues of implementation. First, all forms of property – real, personal and incorporeal – were protected: no species of property lay outside the protection of eminent domain’s requirement of compensation. Secondly, compensation was to be calculated by estimating the market value of the property appropriated, taking into account all of the property’s potential valuable uses. Payment of the compensation thus calculated was to be secured by the provision of a certain, legal entitlement to receive it. These two approaches were critical if the individual’s property rights were to be fully respected.

Chapter 2 of this thesis demonstrated the development of the English and Australian Colonial practice that full compensation would be provided whenever private property was appropriated through a mechanism that allowed focus on each individual case. This Chapter has shown the development of a similar requirement of full market-value compensation for the appropriation of property in eminent domain theory, and that theory’s elevation to constitutional status in America. The similarities and differences between these situations are important. Both the English and American approaches implemented a theory of full market-value compensation, but the American approach went further not only in constitutionalising eminent domain but also in the robustness of its justification of the requirement of full market-value compensation to the individual. The task of Chapter 4 will be to examine the Convention Debates and other relevant historical material in Australia to investigate the influence of these historical, theoretical and comparative contexts on the incorporation of s 51(xxxi) in the *Australian Constitution*.

V APPENDIX II: CONSTITUTIONAL PROPERTY CLAUSES
IN THE AMERICAN STATES

Original State	Year Adopted	Constitutional Property Clause (relevant extract)
Massachusetts	1780	‘whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor’: pt I, art 10.
Pennsylvania	1790	‘nor shall any man’s property be taken or applied to public use without ... just compensation being made’: art 9, s 10.
Connecticut	1818	‘The property of no person shall be taken for public use without just compensation therefor’: art 1, s 11.
New York	1821	‘nor shall private property be taken for public use without just compensation’: art 7, s 7.
Virginia	1830	‘The legislature shall not pass ... any law whereby private property shall be taken for public uses without just compensation’: art 3, s 11.
Delaware	1831	‘nor shall any man’s property be taken or applied to public use without ... compensation being made’: art 1, s 8.
Rhode Island	1842	‘Private property shall not be taken for public uses, without just compensation’: art 1, s 16.
New Jersey	1844	‘Private property shall not be taken for public use without just compensation’: art 1, s 16.
Maryland	1851	‘The legislature shall enact no law authorizing private property to be taken for public use, without just compensation’: art 3, s 46.
Georgia	1865	‘private property shall not be taken, save for public use, and then only on just compensation’: art 1, s 17.
South Carolina	1868	‘Private property shall not be taken or applied for public use ... without the consent of the owner or a just compensation being made therefore’: art 1, s 23:
New Hampshire		Implied by judicial decision in 1826: <i>Bristol v New-Chester</i> , 3 NH 524, 535 (1826).
North Carolina		Implied by judicial decision in 1859: <i>State v Glen</i> , 52 NC 321, 334 (1859).
State Subsequently Admitted	Year Admitted / Adopted	
Vermont	1791 / 1777	‘whenever any particular man’s property is taken for the use of the public, the owner ought to receive an equivalent in money’: ch 1, art 2.
Kentucky	1791 / 1792	‘nor shall any man’s property be taken or applied to public use without ... just compensation being previously made to him’: art 12, s 12.
Tennessee	1796	‘no man’s particular services shall be demanded or property taken, or applied to public use, without ... just compensation being made therefor’: art 11, s 21.
Ohio	1803 / 1851	‘where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money’: art 1, s 19.
Louisiana	1812 / 1845	‘nor vested rights be divested, unless for purposes of public utility, and for adequate compensation previously made’: art 109.
Indiana	1816	‘no man’s particular services shall be demanded, or property taken, or applied to public use, without ... just compensation being made therefore’: art 1, s 7.
Mississippi	1817	‘nor shall any person’s property be taken or applied to public use, without ... just compensation being made therefor’: art 1, s 13.

Illinois	1818	'nor shall any man's property be taken or applied to public use, without ... just compensation being made to him': art 8, s 11.
Alabama	1819 / 1865	'private property shall not be taken or applied for public use, unless just compensation be made therefore': art 1, s 25.
Maine	1820 / 1819	'Private property shall not be taken for public use without just compensation; nor unless the public exigencies require it': art 1, s 21.
Missouri	1821 / 1820	'no private property ought to be taken or applied to public use without just compensation': art 13, s 7.
Arkansas	1836 / 1868	'Private property shall not be taken for public use without just compensation therefor': art 1, s 15.
Michigan	1836 / 1835	'The property of no person shall be taken for public use, without just compensation therefor': art 1, s 19.
Florida	1845 / 1838	'private property shall not be taken or applied to public use unless just compensation be made therefor': art 1, s 14.
Texas	1845	'no person's property shall be taken or applied to public use, without adequate compensation being made': art 1, s 14.
Iowa	1846	'Private property shall not be taken for public use without just compensation': art 1, s 18.
Wisconsin	1848	'The property of no person shall be taken for public use without just compensation therefor': art 1, s 13.
California	1850 / 1849	'nor shall private property be taken for public use without just compensation': art 1, s 8.
Minnesota	1858 / 1857	'Private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured': art 1, s 13.
Oregon	1859 / 1857	'Private property shall not be taken for public use ... without just compensation': art 1, s 19.
Kansas	1861 / 1855	'where private property shall be taken for public use, a compensation therefore shall first be made in money': art 1, s 20.
West Virginia	1863 / 1862	'Private property shall not be taken for public use without just compensation': art 1, s 6.
Nevada	1864	'nor shall private property be taken for public use without just compensation having been first made or secured': art 1, s 8.
Nebraska	1867 / 1866	'The property of no person shall be taken for public use without just compensation therefor': art 1, s 13.
Colorado	1876	'private property shall not be taken or damaged, for public or private use, without just compensation': art 1, s 15.
North Dakota	1889	'Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner': s 14.
South Dakota	1889	'Private property shall not be taken for public use, or damaged, without just compensation': art 6, s 13.
Montana	1889	'Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner': art 1, s 14.
Washington	1889	'No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner': art 1, s 16.
Idaho	1890 / 1889	'Private property may be taken for public use, but not until a just compensation ... shall be paid therefor': art 1, s 14.
Wyoming	1890 / 1889	'Private property shall not be taken or damaged for public or private use without just compensation': art 1, s 33.
Utah	1896 / 1895	'Private property shall not be taken or damaged for public use without just compensation': art 1, s 22.

CHAPTER 4:

THE CONVENTION DEBATES AND THE INSERTION OF S 51(xxxi)

I INTRODUCTION

This Chapter identifies the contemporary understanding of the ‘acquisition of property on just terms’ in s 51(xxxi), and examines evidence of the influence of the historical, theoretical and comparative contexts on the placitum. It does so through an examination of the drafting history of the *Australian Constitution*, the Convention Debates, and other relevant statements by the Framers. The evidence will demonstrate that the consistent guidance from the contexts of s 51(xxxi) that were examined in Chapters 2 and 3, that full market-value compensation to every affected individual is required when private property is appropriated, was a strong influence on contemporary understandings of the ‘acquisition of property on just terms’ in s 51(xxxi).

Only one significant article has examined the Convention Debates in relation to s 51(xxxi). In it, Simon Evans described the consideration given to s 51(xxxi) as a ‘perfunctory discussion’ which was ‘brief and largely unrevealing’.¹ Evans concluded: ‘[t]here is nothing in the Debates that identifies the contemporary meaning of ‘property’ or ‘acquisition’ or ‘just terms’. There is little that takes the reader beyond the words of the section itself.’² Further, Evans commented that:

the Framers’ assumptions about property and constitutionalism are unstated and unexplored. There is no discussion of what property is; why compensation is appropriate when the Commonwealth acquires property; or whether this requirement should be entrenched.³

Whilst Evans accepted that these issues ‘lay firmly in the background’,⁴ this thesis examines that background to bring out the significance of what was said. Although at first blush the Debates may seem unrevealing, this Chapter shows that when viewed in the light of the historical, theoretical and comparative contexts set out in Chapters 2 and 3, they in fact provide more evidence as to the meaning of ‘acquisition of property on just terms’ in s 51(xxxi). Further, when supplemented with a greater range of relevant materials, the historical record is richer than previously recognised.

This Chapter examines three areas. First, the reasons behind the inclusion by the Framers of s 51(xxxi). Secondly, whether there is any evidence to indicate that ‘just

¹ Simon Evans, ‘Property and the Drafting of the Australian Constitution’ (2001) 29 *Federal Law Review* 121, 129, 132.

² *Ibid* 130.

³ *Ibid* 132.

⁴ *Ibid*.

terms' means that the placitum requires an individual right to full market-value compensation. Thirdly, the evidence as to whether the Framers were in fact influenced by the historical, theoretical and comparative contexts of the placitum that were examined in Chapters 2 and 3.

It will be concluded that 51(xxxi) incorporated a requirement of full market-value compensation to each individual property owner. This was consistent with the English constitutional theory, the English and Australian Colonial legislative practice, the public law theory of eminent domain and the American eminent domain jurisprudence. Like the American model, s 51(xxxi) placed the theory of eminent domain beyond legislative abrogation by providing for judicial review to ensure that full market-value compensation was in fact provided to every affected individual.

II A POWER OF APPROPRIATION FOR THE COMMONWEALTH PARLIAMENT

A *Early Suggestions*

In the records of the Federation movement in Australia, the first reference to a legislative power of appropriation appeared in the *Manual of Reference to Authorities for the Use of the Members of The National Australasian Convention*, prepared for use at the 1891 Convention in Sydney by the South Australian delegate Richard Chaffey Baker. Under the heading 'Public Debt and Public Works', Baker wrote:

If there are any works which it is considered desirable should belong to the Union, such as telegraph lines, post-offices or railways, let them be purchased at a valuation and paid for.⁵

Although Baker was advocating keeping financial dealings between the States and federal government to a minimum,⁶ he nonetheless conceded that there should be a federal power of compulsory acquisition. That compulsion was envisaged is evidenced by the use of the words 'purchased at a valuation' – there would be no need for a valuation in a voluntary sale where the parties would agree a price.

⁵ Richard Chaffey Baker, *A Manual of Reference to Authorities for the Use of the Members of The National Australasian Convention* (W K Thomas, 1891) 152-3.

⁶ *Ibid* 150-3.

Despite this reference in Baker's *Manual*, a power of appropriation was not considered at the Melbourne Conference of 1890, nor at the Sydney Convention of 1891. In 1897, on the penultimate day of the Convention in Adelaide,⁷ Bernhard Ringrose Wise (from New South Wales) highlighted, 'so that it may be considered before the next Convention meets', the lack of 'any sufficient power ... to take over public works situated within one State, but which in the opinion of the Federal Parliament can be properly utilised to the advantage of the whole Commonwealth.'⁸ When the Convention met in Sydney later in 1897, this issue was not discussed. The proceedings were brief and the Premiers' preceding visits to London for the Imperial Conference⁹ and the impending Victorian election campaign¹⁰ were distractions. Like many issues not resolved in Sydney,¹¹ the appropriation of property awaited resolution at the Convention's final sessions in Melbourne. The above information was not considered by Evans.¹² Although it is brief, it is significant in showing that compulsory acquisition was in the contemplation of the Framers through the decade leading to Federation, not merely as an afterthought at the very end of the drafting process.

⁷ See: John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901) 640.

⁸ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 22 April 1897, 1199 (Bernhard Wise). Wise's suggestion included a requirement of 'the consent of that State'. When Barton proposed s 51(xxxi) in Melbourne without a requirement of consent, Isaacs noted that this would 'reverse the principle that has been adopted in the Bill that a State should not be compelled to give up any portion of its territory': *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 25 January 1898, 153 (Isaac Isaacs). In discussions relating to the provision that became s 52(i) (exclusive legislative power with respect to 'the seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes') John Cockburn stated that '[i]t is quite right that the Federal Parliament should have no power without the consent of the state concerned to take territory': 28 January 1898, 257-8. Barton had spoken earlier in the debate of two different situations: 'acquisition of land by the consent of the state' and 'such compulsory acquisition as might be justified by any law': at 256. O'Connor explained this 'great distinction' as being between appropriation of territory (for the national capital) on the one hand, and the appropriation of land for public purposes on the other. Both O'Connor and Henry Higgins rejected Cockburn's suggestion that the consent of the State should be required in all cases, advocating instead that consent be required only with respect to land acquired for the national capital: at 258-9. No requirement of consent was included in s 51(xxxi), nor finally with respect to the seat of government: s 124 of the Melbourne Bill provided merely that the seat of government be 'within territory vested in the Commonwealth' without providing for that vesting: at 2543. This provision became (after revision by the Premiers in 1899, as to which see: J A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 239-47) s 125 of the Constitution, which provided that the seat of government be within territory which 'shall have been granted to or acquired by the Commonwealth, and shall be vested in and belong to the Commonwealth' with only brief consideration of the acquisition: 'such portion thereof as shall consist of Crown lands shall be granted to the Commonwealth without any payment therefor': *Australian Constitution*, s 125.

⁹ See: Bernhard Ringrose Wise, *The Making of the Australian Commonwealth* (Longmans, Green, 1913) 238.

¹⁰ See: Quick and Garran, above n 7, 187.

¹¹ See, eg: La Nauze, above n 8, 192.

¹² See: Evans, 'Property and the Drafting of the Australian Constitution', above n 1.

B *The Proposal of s 51(xxxi)*

At the Melbourne Convention on Tuesday, 25 January 1898, Edmund Barton (from New South Wales, and Chair of the Drafting Committee) moved to insert a power to make laws with respect to: ‘The acquisition of property on just terms from any state or person for the purposes of the Commonwealth.’¹³ Barton noted the absence of any ‘express provision in the Constitution for the acquisition by the Commonwealth of any property the acquisition of which might become necessary’ and asked members for their views as to whether the express incidental power would ‘give a sufficient power of legislation for that purpose’.¹⁴ The scope of the express incidental power is not presently relevant;¹⁵ however, it is important to identify why a power of appropriation was seen to be necessary (Barton asked not *whether* there should be such a power, but whether that power had *already* been granted). After discussion, Barton concluded that he was convinced ‘that power must be given to the federal authority ... to legislate upon the subject as I have suggested in the sub-section’,¹⁶ giving the example that:

When you hand over such powers as are included in the naval and military defence of the Commonwealth, you unfairly and unwisely restrict those powers, if you make it necessary to procure separate legislation for the acquisition of any lands required for the purposes of defence, because you make the federal authority subject to the dictation of the state authority in regard to each transfer.¹⁷

In short, there were pragmatic federal reasons for the inclusion of s 51(xxxi): a power of appropriation was necessary to ensure the federal government could fully carry out its functions without reliance on assistance from the States.

A similar view was expressed by John Quick (from Victoria): the Commonwealth ‘would be crippled in its future operations if express power were not given.’¹⁸ Like

¹³ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 25 January 1898, 151 (Edmund Barton).

¹⁴ *Ibid.*

¹⁵ Opinion favoured the view that a specific clause *was* necessary to grant a power of appropriation: this was implied by Wise’s suggestion in Adelaide that a power be inserted (above n 8), and was expressly stated in Melbourne by Barton (see below n 16), Quick (*Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 25 January 1898, 151-2), Glynn (at 152) and O’Connor (28 January 1898, 258), notwithstanding Isaacs (25 January 1898, 152; 28 January 1898, 261), Cockburn (at 258) and Walker (at 260) suggesting the express incidental power would be sufficient.

¹⁶ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 25 January 1898, 154 (Edmund Barton).

¹⁷ *Ibid.*

¹⁸ *Ibid.* 152 (John Quick). In the context of the large-scale acquisitions for major Commonwealth projects in modern times, it is difficult to fault the argument that a legislative power of appropriation was essential. For example, 435 properties were acquired for the 1974 expansion of Brisbane Airport, as to

Barton, Quick worried that the Commonwealth could be prevented from obtaining property it needed by a reluctant vendor (an individual or a State). Patrick Glynn (from South Australia) also supported the insertion of an express power of appropriation.¹⁹

The only objection to an express power of appropriation came from Sir George Turner, Premier and Treasurer of Victoria during its recovery from the financial crisis of the 1890s. In keeping with his frugal financial management of Victoria,²⁰ and later of the Commonwealth,²¹ Turner's objection related to cost. He was 'not at all satisfied that it would be advisable to insert this new sub-section' because 'these powers of purchasing property ... may enable the Commonwealth to incur enormous expenditures' which would reduce the surplus returned to the States, to the detriment of State Treasuries.²²

Barton responded to Turner's concerns, arguing that if:

you allowed the acquisition to be carried out by contract, as it would have to be without a clause of this kind, it would be more expensive, and would entail a greater diminution of the surplus returned to the state.²³

Barton's argument here was that the Commonwealth could be forced to pay high prices for property if sellers were aware of the Commonwealth's need to purchase their property and its inability to achieve that result other than by agreement. This argument, that a power of appropriation would prevent price-gouging by private owners, supplemented Quick's more extreme concern that owners would be able to frustrate Commonwealth operations by refusing to sell their property at any price. At this point, both Turner and his Victorian colleague Isaac Isaacs sought, and received, more time

which see: Australian Law Reform Commission, *Lands Acquisition and Compensation*, Report No 14 (1980) x. The ALRC noted that the Commonwealth need for property expanded over time, and that: 'technology has increased the scale of particular projects. Modern aerodromes, defence projects, freeways and public utilities occupy substantial tracts of land. A single project may require the acquisition of hundreds of separate properties': at x.

¹⁹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 25 January 1898, 152 (Patrick Glynn).

²⁰ In Victoria, it has been said of Turner that 'the faithful solicitor cut expenditure to the minimum': Geoffrey Serle, 'Turner, Sir George (1851 - 1916)' in *Australian Dictionary of Biography* (Melbourne University Press, 1990) vol 12, 294.

²¹ 'The first Federal Treasurer, Sir George Turner, a practising lawyer, was less interested in points of law than in endeavours to avoid unnecessary Government expenditure. Cautious and a believer in the policy of 'safety first' ... [a]s Premier and Treasurer of Victoria he was the type that was needed to straighten the finances during a troublous period, and he well deserved the credit he received for his careful management of the public money. Similar competency was shown by him during the early years of the Commonwealth. In those days expenditure was restricted. I can recall the look of horror that came into his face when Sir John Forrest, referring to a proposed public work, grandiosely remarked, 'What's a million?' as if a million were but a few pence': Sir John Kirwan, *My Life's Adventure* (Eyre and Spottiswoode, 1936) 177-8.

²² *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 25 January 1898, 152 (Sir George Turner).

²³ *Ibid* 152 (Edmund Barton).

for consideration.²⁴ It was clear, already, that the predominant view was that the Commonwealth should have an express legislative power of appropriation, subject to Turner's concern about cost.

Although not examined by Evans, there is considerable importance in a subsequent discussion relating to what became s 52(i) of the *Constitution*.²⁵ Isaacs (at the time Victorian Attorney-General) agreed that there should be a power of appropriation (although his view was that an express power was unnecessary to achieve this). Isaacs described with approval the American position that 'for the purpose of carrying out the powers expressly given to the federal authority in the Constitution, the right of eminent domain is an essential attribute'.²⁶ He read to the Convention a long quotation from the decision of the Supreme Court of the United States in *Kohl v United States*:²⁷

power to appropriate lands or other property ... for its own uses, and to enable it to perform its proper functions ... is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed. The powers vested by the Constitution in the General Government demand for their exercise the acquisition of lands in all the states. These are needed for forts, armories, and arsenals, for navy yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses; If the right to acquire property for such uses may be made a barren right by the unwillingness of property holders to sell, or by the action of a state prohibiting a sale to the Federal Government, the constitutional grants of power may be rendered nugatory, and the Government is dependent for its practical existence upon the will of a state, or even upon that of a private citizen. This cannot be.²⁸

This passage both outlined the importance of a power of appropriation and provided evidence of a link between the inclusion of s 51(xxxi) in the *Australian Constitution* and the experience of American eminent domain (a topic addressed more fully below).

C *The Inclusion of s 51(xxxi)*

The proposed clause dealing with the 'acquisition of property on just terms', set aside for further consideration on 25 January, returned to the Convention inside its last

²⁴ Ibid 152 (Sir George Turner), 153 (Isaac Isaacs).

²⁵ *Australian Constitution* s 52(i): 'exclusive power to make laws ... with respect to ... the seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes'.

²⁶ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 28 January 1898, 261 (Isaac Isaacs).

²⁷ 91 US 367 (1875). This case is discussed in Chapter 3, section IIIB.

²⁸ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 28 January 1898, 260 (Isaac Isaacs); quoting *Kohl v United States*, 91 US 367, 371 (1875).

fortnight of sitting, on the morning of Friday, 4 March 1898. Richard O'Connor (from New South Wales, and a member of the Drafting Committee)²⁹ moved its insertion, stating that:

Some question has been raised as to whether the Commonwealth has the power inherently of acquiring property under just terms of compensation; that is to say, whether it is not driven to bargain and sale only. It is quite clear that there must be a power of compulsorily taking property for the purposes of the Commonwealth.³⁰

This was endorsed by Simon Fraser (from Victoria),³¹ and Turner's financial objection was not pressed.³² After one question,³³ the record states: 'The new sub-section was agreed to.'³⁴ As with all decisions that day, no division of representatives was taken.

From this examination of the Convention Debates, it is clear that one of the reasons for s 51(xxxi) being inserted was to put beyond doubt that the Commonwealth enjoyed a power of appropriation.³⁵ So much was also stated in Quick and Garran's *Annotated Constitution of the Australian Commonwealth*:

it was not considered advisable to allow the right of eminent domain in the Commonwealth to be dependent upon any implied or incidental power. ... all

²⁹ The Drafting Committee was composed of Barton, O'Connor and Sir John Downer (from South Australia), assisted by Robert Garran (who, although not a delegate, attended in the capacity as secretary to Sir George Reid, the Premier of New South Wales, and served as secretary of the Drafting Committee) (see, eg: *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 17 March 1898, 2519-20 (Edmund Barton); R S Parker, 'Garran, Sir Robert Randolph (1867 - 1957)' in *Australian Dictionary of Biography* (Melbourne University Press, 1981) vol 8, 622-25).

³⁰ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1874 (Richard O'Connor).

³¹ To O'Connor's statement, Fraser responded 'Certainly': *ibid* 1874 (Simon Fraser).

³² The reason for this is not known, but Turner's acceptance of the placitum is likely to have been important to its acceptance: fellow Victorian Alfred Deakin said that Turner was 'the financial adviser by whom all were swayed': J A La Nauze (ed), Alfred Deakin, *The Federal Story: The Inner History of the Federal Cause 1880-1900* (Melbourne University Press, 1963) 88.

³³ 'Mr Fraser: Are the terms to be stated?'

Mr O'Connor: No, you do not want to state the terms in the Constitution. Of course an Act will have to be passed by the Commonwealth Parliament elaborating this enactment, and no doubt proper provision will be made in that Act for the method of acquiring lands, and the mode in which lands shall be obtained for the purposes of the Commonwealth': *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1874 (Richard O'Connor and Simon Fraser).

³⁴ *Ibid* 1874.

³⁵ 'The section was included in the Constitution to remove any doubts that the Commonwealth Parliament lacked the power of eminent domain': Simon Evans, 'Constitutional Property Rights in Australia: Reconciling Individual Rights and the Common Good' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate, 2006) 197, 208; 'par (xxxix) was included by the Framers only for more abundant caution': Rosalind Dixon, 'Overriding Guarantee of Just Terms or Supplementary Source of Power?: Rethinking s51(xxxix) of the Constitution' (2005) 27 *Sydney Law Review* 639, 655; 'members of the Convention were motivated by an abundance of caution': Roger L Hamilton, 'Some Aspects of the Acquisition Power of the Commonwealth' (1973) 5 *Federal Law Review* 265, 267; 'the Founding Fathers preferred to make it plain': Graham L Fricke, 'Commonwealth' in Graham L Fricke (ed), *Compulsory Acquisition of Land in Australia* (LawBook, 2nd ed, 1982) 5.

possible doubt as to the right of the Commonwealth to acquire property for federal purposes has been removed by this sub-section.³⁶

In the Convention Debates, a power of appropriation was regarded as necessary by Barton, Quick, Glynn and Isaacs in January, O'Connor and Fraser in March; in prior years, Baker and Wise had expressed the same view. Turner's lone objection related to the perceived danger of imprudent financial expenditure by the Commonwealth, rather than any disagreement with the need for a legislative power of appropriation to meet the Commonwealth's needs.

The Commonwealth's use of its power of appropriation in the early years of the Federation bears out the views of the Framers that such a power was necessary. After the transfer of property associated with the transfer of State departments to the Commonwealth,³⁷ the first Commonwealth acquisition of property in fact resulted from a gift of land at Cumnock in New South Wales to expand a post office in December 1901.³⁸ The Commonwealth also acquired properties by consensual purchase or tender during 1902 and 1903.³⁹ However, Parliament had ensured through one of its earliest Acts that the Commonwealth could compulsorily acquire property.⁴⁰ The first exercise of that power was in January 1904.⁴¹ Since then, the frequency of its exercise has

³⁶ Quick and Garran, above n 7, 640-1.

³⁷ The transfer of property provided for in s 85 of the Constitution took place, for property relating to the transferred executive departments of Naval and Military Defence and Posts, Telegraphs and Telephones, on 1 March 1901 (Commonwealth, *Gazette* No 8, 14 February 1901, 19 (Posts, Telegraphs and Telephones); Commonwealth, *Gazette* No 9, 20 February 1901, 21 (Naval and Military Defence)).

³⁸ Commonwealth, *Gazette* No 63, 13 December 1901, 271.

³⁹ The first recorded purchase of property by the Commonwealth was land for a Post and Telegraph Office at the newly-proclaimed mining town of Tarcoola in the remote north of South Australia, for which the South Australian government received £150: Commonwealth, *Gazette* No 47, 3 October 1902, 509. For a history of mining at Tarcoola, see: K A A Hein, R A Both and Y Bone, 'The Geology and Genesis of the Tarcoola Gold Deposits, South Australia' (1994) 29 *Mineralium Deposita* 224, 224-5. Expanding property requirements for Post and Telegraph Offices were handled throughout 1902 by the calling of tenders for the lease, or construction and lease, of suitable property: Commonwealth, *Gazette*: No 4, 24 January 1902, 18; No 19, 18 March 1902, 193; No 25, 30 May 1902, 232; No 30, 27 June 1902, 299; No 34, 18 July 1902, 321; No 37, 1 August 1902, 448; No 56, 28 November 1902, 590; No 59, 19 December 1902, 624. In 1903, numerous Commonwealth acquisitions of property were Gazetted, although all appear to be consensual sales rather than compulsory acquisitions. Many of the 1903 acquisitions were Gazetted with a notation as to the price paid, indicating a sale by voluntary contract. See: Commonwealth, *Gazette*: No 20, 9 May 1903, 265-6 (2 acquisitions); No 29, 27 June 1903, 339-40 (2 acquisitions with prices stated); No 31, 4 July 1903, 348; No 32, 11 July 1903, 358-9 (4 acquisitions); No 37, 8 August 1903, 425; No 46, 12 September 1903, 541. Some did not indicate a price, but were appropriations from State Governments and contained no indication that the sale was other than by consent. See: Commonwealth, *Gazette*: No 14, 4 April 1903, 182 (2 acquisitions); No 29, 27 June 1903, 339-40 (1 acquisition without price stated).

⁴⁰ *Property for Public Purposes Acquisition Act 1901* (Cth). See below at 95.

⁴¹ The first compulsory acquisition by the Commonwealth, Gazetted on 9 January 1904, involved land for defence purposes at Fort Largs in South Australia: Commonwealth, *Gazette*: No 2, 9 January 1904, 3. Ironically, the *Gazette* notice was issued in the name of Sir George Turner, the only Framer who had questioned the propriety of the Commonwealth being given a legislative power of appropriation (Turner

increased: in 1904, there were 13 compulsory acquisitions;⁴² by the latter part of the twentieth century, the average had reached over 300 per year.⁴³ In this respect, s 51(xxxi) has achieved one of its key purposes – permitting the Commonwealth Parliament to engage in the compulsory ‘acquisition of property’ for its purposes. However, this was not the placitum’s only purpose: such ‘acquisition of property’ was to be ‘on just terms’, and it is this requirement that is now examined.

III RE-APPRAISAL: ‘JUST TERMS’ AS AN INDIVIDUAL RIGHTS PROTECTION

Modern commentators have not found significant historical evidence about the meaning of the requirement of ‘just terms’. Haig Patapan claimed that s 51(xxxi) ‘was certainly not a measure to ensure that acquisition was to be on just terms ... the section was essentially a power allocating federal measure and not a civil liberties provision’.⁴⁴ Similarly, Simon Evans, on the basis of the most detailed previous review of the Convention Debates, suggested that ‘[t]here is no discussion of ... why compensation is appropriate when the Commonwealth acquires property; or whether this requirement should be entrenched’.⁴⁵ Evans went even further to claim that ‘[t]he modern tendency to regard s 51(xxxi) as a broad guarantee of individual rights has no basis in the Debates’.⁴⁶ Although the genealogy of the expression ‘just terms’ is unclear, the evidence demonstrates that ‘just terms’ was to be a guarantee of individual rights requiring full market-value compensation. With the exception of brief considerations of Turner’s objection by Evans and Patapan, and of the drafting of s 85 by Evans, none of the material which follows here has been addressed by commentators.

was acting on behalf of the Minister of State for Home Affairs (Sir John Forrest)). The Commonwealth’s resort to compulsory acquisition is rapid compared with the United States, where the first direct federal taking occurred as late as 1875, in *Kohl v United States*, 91 US 367 (1875).

⁴² Twelve further appropriations were Gazetted in 1904, although purchase by consent remained the most common method of acquisition: Commonwealth, *Gazette*: No 8, 6 February 1904, 90; No 14, 5 March 1904, 143-4 (2 appropriations); No 59, 8 October 1904, 1080-3 (7 appropriations); No 66, 12 November 1904, 1190. In February 1905, the process was formalised with regulations passed to establish common forms and notices (based on *Gazette* notices from 1904) to be used for compulsory and consensual acquisitions: *Property for Public Purposes Acquisition Regulations 1905* (Cth).

⁴³ The Australian Law Reform Commission (ALRC) identified 2667 appropriations for the period July 1971 – June 1979, an average of 333 per year: Australian Law Reform Commission, above n 18, 13.

⁴⁴ Haig Patapan, ‘The Dead Hand of the Founders? Original Intent and the Constitutional Protection of Rights and Freedoms in Australia’ (1997) 25 *Federal Law Review* 211, 221. See also: Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009) 280.

⁴⁵ Evans, ‘Property and the Drafting of the Australian Constitution’, above n 1, 132.

⁴⁶ *Ibid* 131.

A Guidance from the Debates on s 51(xxxi) and s 52(i)

Rosalind Dixon wrote that in the Convention Debates ‘[t]here was certainly no explicit suggestion ... that s51(xxxi) was inserted as a *limit* on Commonwealth power’.⁴⁷ However, there is evidence to contradict this claim. As noted above, a requirement of compensation was implicit in Baker’s *Manual*, which referred to property being ‘purchased at a valuation and paid for’.⁴⁸ In debate on the provision that became s 52(i), O’Connor stated that a general power of appropriation (which became s 51(xxxi)) should be granted, so that if property were required for Federal purposes ‘the Commonwealth would have the power ... to acquire compulsorily *on fair terms*’.⁴⁹ Introducing s 51(xxxi) when it was inserted, O’Connor used the phrase ‘acquiring property *under just terms of compensation*’.⁵⁰ Quick and Garran’s treatment confirms that the requirement of ‘just terms’ was:

intended to recognize the principle of the immunity of private and provincial property from interference by the Federal authority, except on fair and equitable terms, and *this principle is thus constitutionally established and placed beyond legislative control*.⁵¹

These passages, not referred to in the modern commentary of Evans or Dixon, clearly show that ‘just terms’ was intended to create a constitutional right to compensation.

One of Turner’s objections to s 51(xxxi) has already been noted: the Commonwealth could incur ‘enormous expenditure’.⁵² This indicates that he regarded ‘just terms’ as a requirement of compensation (a point not taken by Evans or Patapan). However, Turner had another, more fundamental, objection to the requirement of ‘just terms’, stating:

they are not proper words to put into the Constitution. We assume that the Federal Parliament will act strictly on the lines of justice.⁵³

How significant is this objection? Existing commentaries regard it as evidence of Turner’s faith that compensation would be provided. Evans describes it as ‘the familiar objection to protecting rights in the Constitution’.⁵⁴ Justice Heydon has stated that:

⁴⁷ Dixon, above n 35, 657.

⁴⁸ Baker, above n 5, 152-3.

⁴⁹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 28 January 1898, 258 (Richard O’Connor) [emphasis added].

⁵⁰ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1874 (Richard O’Connor) [emphasis added].

⁵¹ Quick and Garran, above n 7, 641 [emphasis added].

⁵² *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 25 January 1898, 152 (Sir George Turner).

⁵³ *Ibid* 153 (Sir George Turner).

⁵⁴ Evans, ‘Property and the Drafting of the Australian Constitution’, above n 1, 128.

So deeply was the age of federation steeped in respect for property rights that [Turner said] ... with all the innocent naiveté of someone who could not foresee how far 20th century governments all over the world were to go in seeking to make property rights precarious, that the proposed provision for just terms was unnecessary: ‘We assume that the Federal Parliament will act strictly on the lines of justice’.⁵⁵

On this view, Turner was so confident that compensation would be provided that he regarded it as insulting to suggest it was necessary to insert a ‘just terms’ requirement.⁵⁶

Was Turner merely being naïve? His considerable experience and success in the turbulent world of Colonial politics and finances makes it unlikely. An alternative hypothesis, which fits with Turner’s earlier financial objection, is that Turner did not want to expose the Commonwealth to potential expenditure by requiring ‘just terms’. After all, no such *constitutional* stricture applied in Victoria. The parsimonious Turner, whom Deakin said ‘had no enthusiasms except for economy and to him the Commonwealth Bill appealed no more on the emotional side than a measure for municipal rating’⁵⁷ might have wished to preserve a freedom for the Commonwealth to appropriate property without compensation.

Importantly, on either view, Turner was confirming ‘just terms’ as a constitutional right to compensation. Whether he regarded this as unnecessary (it being unthinkable that appropriation might be carried out without compensation) or fiscally undesirable (it being inappropriate to risk the expenditure involved in guaranteeing compensation), it is clear that Turner saw ‘just terms’ as imposing a constitutional requirement of compensation: he objected to it doing so, but not one member of the Convention supported his objection.

Thus, O’Connor, Turner, and Quick and Garran, all regarded ‘just terms’ as requiring compensation. However, none of the Framers expressly stated that this must be full market-value compensation: they simply referred to ‘compensation’.⁵⁸ It is, therefore,

⁵⁵ *ICM Agriculture v Commonwealth* (2009) 240 CLR 140, 211 (Heydon J).

⁵⁶ Similarly, ‘for some delegates, just terms were assumed irrespective of their statutory confirmation’: Patapan, above n 44, 221.

⁵⁷ Deakin, above n 32, 93.

⁵⁸ Of course, as Dixon J later noted, compensation ‘connotes full money equivalence’: *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495, 569 (Dixon J).

necessary to consider whether any evidence suggests that ‘just terms’ in s 51(xxxi) was envisaged as a requirement of nothing less than full market-value compensation.

In response to Turner’s objection, Barton argued that:

if you give this power to acquire landed property on just terms, you would have the compensation regulated by the provisions of an Act which would probably involve arbitration or the verdict of a jury.⁵⁹

This reveals four implicit understandings of ‘just terms’. First, the mechanism for determining compensation would be an independent fact-finding process such as ‘arbitration or the verdict of a jury’. Secondly, the position of *every* individual would be considered – arbitrators and juries determine claims by assessing individual circumstances. Thirdly, there is no hint of anything less than full compensation – there is no precedent for an arbitrator or jury to determine something *other* than the market value of property. Fourthly, there was a link to the Australian Colonies, each of which, as Chapter 2 demonstrated, had an appropriation statute based on the *Lands Clauses Consolidation Act 1845* (Eng).⁶⁰ Barton’s statement adopted not only the procedure of the English legislation, but also its very words: ‘If any Party shall be entitled to any Compensation ... such Party may have the same settled either by *Arbitration or by the Verdict of a Jury*, as he shall think fit’.⁶¹ That Barton indicated this same mechanism would apply under s 51(xxxi) evidences knowledge of the existing English and Colonial legislation and practice, and an assumption that it would continue. No one disagreed. Indeed, no one commented, indicating an unstated common understanding of these familiar mechanisms for the determination of full market-value compensation.⁶²

Quick and Garran, in addition to referring to ‘the right of eminent domain’,⁶³ referred to s 51(xxxi) as containing ‘the constitutional requirement of just compensation’.⁶⁴ The link to the American Fifth Amendment takings clause is plain: ‘just terms’ in s 51(xxxi) is described by Quick and Garran as ‘just compensation’, the phrase used in the American takings clause to require full market-value compensation.

⁵⁹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 25 January 1898, 152 (Edmund Barton).

⁶⁰ The compensation clauses in each Australian Colony are listed in Appendix I to Chapter 2, and examined in Chapter 2, section III.

⁶¹ *Lands Clauses Consolidation Act 1845* (Eng) s 68 [emphasis added].

⁶² As demonstrated in Chapter 2, this compensation encompassed ‘the Value of the Land’ plus damages for severance and injurious affection: *ibid* s 63.

⁶³ Quick and Garran, above n 7, 640.

⁶⁴ *Ibid* 982.

The evidence thus indicates the understanding in 1901 that ‘just terms’ is a constitutional guarantee of compensation to individual property owners. While there is no explicit reference to full market-value compensation, three pieces of evidence support this reading. First, Turner’s concern about the possibility of ‘enormous expenditure’, and his statement that ‘just terms’ was unnecessary (indicating, at least on one view, an assumption that full compensation would be provided as a matter of course). Secondly, Barton’s explanation of the need for ‘arbitration or the verdict of a jury’ – implying determination, by an impartial body, of the market value of the property that is acquired, and linking ‘just terms’ to the English and Colonial practice. Thirdly, Quick and Garran’s reference to ‘just compensation’, the full market-value compensation required by the Fifth Amendment takings clause. In the next sections, the drafting history of s 85 and parliamentary statements of the Framers are examined, seeking any further evidence to confirm the above conclusion.

B *Guidance from the Drafting and Debates on s 85*

Views about compensation also appear from debates on the provision that became s 85 of the *Australian Constitution*.⁶⁵ The earliest version of this clause, in Sir Samuel Griffith’s draft Bill of 24 March 1891, required the payment of a ‘fair value’ determined, in default of agreement, ‘in such manner as the Federal Parliament may prescribe’.⁶⁶ During the 12-hour session of the Constitutional Committee on 30 March 1891, this method was changed: in default of agreement, ‘fair value’ would be determined ‘in the manner in which land taken by the Government of the State for public purposes is ascertained under the laws of the State’.⁶⁷ Evans noted this,⁶⁸ but

⁶⁵ The provision dealt with the transfer to the Commonwealth of the property of a State used in connection with a department of the State transferred to the Commonwealth at its establishment, both in the case of property ‘used exclusively in connexion with the department’ as well as that ‘not exclusively used’ by the department. Different procedures were adopted in each circumstance. The discussion here relates to the treatment of property ‘used, but not exclusively used in connexion with the department’.

⁶⁶ See: John M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) 135, 149.

⁶⁷ The draft Constitution on which Sir Samuel Griffith worked that day, including Griffith’s hand-written alteration in the margin, is reproduced in: *ibid* 262, 282. The requirement of ‘fair value’ and the method of determining it were not further amended in 1891 (the final Bill is contained in: *Official Report of the National Australasian Convention Debates*, Sydney, 9 April 1891, 959-60; reproduced in: *ibid* 413, 429) nor was it affected by changes made in Adelaide in 1897 (the version of the section returned by the Finance Committee in Adelaide is reproduced in: *ibid* 487, 488). When the clause was omitted and replaced with a redrafted provision in Melbourne in 1898, it had changed from ‘fair value’ to ‘value’, but this was of no moment. The change reflected concerns expressed that ‘fair value’ might require payment of ‘the value in cash’: *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1902 (Edmund Barton). Delegates wished to preserve an option for the

saw no significance in it. What, though, was the provision in each State? As Chapter 2 demonstrated, each Colony's legislation copied s 63 of the *Lands Clauses Consolidation Act 1845* (Eng), providing full market-value compensation determined under a mechanism which addressed each individual case.

Further, at the Melbourne Convention in 1898, Barton said that it was proper for the *Constitution* to make it 'necessary for the Commonwealth to *pay the proper valuation* of that which its necessities require that it should take over' because it was fair 'to make a man pay for what he gets'.⁶⁹ Barton here placed the Commonwealth when it appropriated property in the same position as any individual operating in the marketplace, just as the English theory of Locke and Blackstone, as well as the continental theory of eminent domain and its American implementation, had done.⁷⁰ Barton's reference to the Commonwealth paying for what it gets indicates that the Commonwealth should, like any other individual, pay full market-value compensation for property appropriated by it. The drafting history of s 85, and Barton's comments on it, thus provide further evidence that the Framers required the appropriation of property to be accompanied by full market-value compensation.

C *Guidance from Parliamentary Statements of the Framers*

Moving the insertion of s 51(xxxi) on 4 March 1898, O'Connor stated that

an Act will have to be passed by the Commonwealth Parliament elaborating this enactment, and no doubt proper provision will be made in that Act for the method of acquiring lands, and the mode in which lands shall be obtained for the purposes of the Commonwealth.⁷¹

Commonwealth to make non-cash settlements (such as the taking over of State debts) to meet what would otherwise be a very large initial expenditure for the Commonwealth: 16 February 1898, 1001-7. Thus: 'it will be open to the Parliament under this section to provide that compensation may be made ... in any ... way which will give to the State the value agreed upon or ascertained': Quick and Garran, above n 7, 822. That no change in the amount of compensation was intended is evidenced by the fact that, in their description of this section, Quick and Garran wrote that: 'The general principle embodied in this section is that the lands, buildings, and other public property used by the transferred departments shall be taken over by the Commonwealth, and paid for at their fair value': at 820. In any event, even when the provision had referred to 'fair value', delegates had referred to it as merely 'value': 15 February 1898, 998 (John Quick and Sir John Forrest); as well as 'fair valuation' and 'proper valuation': 999 (Edmund Barton).

⁶⁸ Evans, 'Property and the Drafting of the Australian Constitution', above n 1, 131-2.

⁶⁹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 15 February 1898, 999 (Edmund Barton) [emphasis added].

⁷⁰ See Chapters 2 and 3.

⁷¹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1874 (Richard O'Connor).

On 27 June 1901, Senator O'Connor introduced that legislation into the Parliament.⁷² The thirteenth statute of the Commonwealth, granted Royal Assent on 13 December 1901,⁷³ was the *Property for Public Purposes Acquisition Act 1901* (Cth).⁷⁴ Reference to the Parliamentary debates relating to this Bill can identify the views on s 51(xxxi) held by those members of the Parliament who were also Framers of the *Constitution*.⁷⁵

Senator O'Connor's Second Reading speech expressed the function and scope of the 'just terms' requirement:

the principle must be observed of *equality of sacrifice*. Although it may be necessary to interfere with the private rights of individuals, the law should carefully guard the rights of those individuals, so that they shall *suffer no more and pay no more than the rest of the community* for the general benefit.⁷⁶

This 'equality of sacrifice' principle echoed eminent domain theory⁷⁷ and its American practice.⁷⁸ O'Connor noted that the Bill had been 'carefully prepared' to ensure that 'the interests of the individuals concerned, are fairly and justly dealt with',⁷⁹ adding:

⁷² The first sitting of the Parliament of the Commonwealth had been held on 9 May 1901.

⁷³ See: *Commonwealth of Australia Gazette* No 64, 20 December 1901, 273.

⁷⁴ The *Property for Public Purposes Acquisition Act 1901* (Cth) was superseded by the *Lands Acquisition Act 1906* (Cth), which stood until repealed by the *Lands Acquisition Act 1955* (Cth). The 1906 Act 'follows to a great extent the language as well as the method' of the 1901 legislation: *R v Registrar of Titles (Vic); Ex parte Commonwealth* (1915) 20 CLR 379, 398 (Higgins J).

⁷⁵ In *New South Wales v Commonwealth* (2006) 229 CLR 1 ('*WorkChoices*'), the joint judgment referred to the early decision of the Court in *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 ('*Huddart Parker*') not merely as an important decision of the Court on s 51(xx), but also because:

'the decision is important for what it reveals concerning assertions made about what the framers of the Constitution intended ... all five members of the Court had been leading participants in the Constitutional Conventions. All are properly seen as among the framers of the Constitution': at 79 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

The judgments in *Huddart Parker* were considered by the majority to have gained independent importance as indications of the views of the Framers of the *Australian Constitution*. Similarly, Kirby J wrote that:

'So far as the founders of the Commonwealth are concerned, some of whom were among the original Justices of this Court, the proof of the pudding may be seen in what they did and wrote and obviously assumed and believed when questions concerning the ambit of the corporations power came up for decision': at 200.

⁷⁶ Commonwealth, *Parliamentary Debates*, Senate, 4 July 1901, 2017 (Richard O'Connor, Vice-President of the Executive Council) [emphasis added]. Senator O'Connor's Second Reading speech also explained why a legislative power of appropriation was granted: such a power is 'essential to the Commonwealth. It must hold property ... and it will, in certain cases, be driven probably to acquire property by some compulsory process': Commonwealth, *Parliamentary Debates*, Senate, 4 July 1901, 2017 (Richard O'Connor, Vice-President of the Executive Council). Similarly, he argued that 'it is impossible to conceive the possibility of any Commonwealth constituted as ours is, being able to carry on its business, unless it has some power to compulsorily acquire the land upon which it is to carry out its administration.' Commonwealth, *Parliamentary Debates*, Senate, 11 September 1901, 4684 (Richard O'Connor, Vice-President of the Executive Council).

⁷⁷ '[T]he burdens of the state should be borne equally by all, or in just proportion': Emmerich de Vattel, *The Law of Nations* (1758) Book 1, Ch 20, para 244 (Charles G Fenwick trans, 1916 ed) 96 [trans of: *Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains*]. See Chapter 3, section II.

The principle upon which all these acquisitions of land are based is that when we take land for public purposes and for the benefit of the community at large, it is not fair that an individual, one member of the public benefited, should pay for all the benefit. We must try and equalize the sacrifice as much as we can. Therefore we pay him *the fair value of his land*.⁸⁰

This statement is important: ‘value of ... land’ is the measure of compensation in s 63 of the *Lands Clauses Consolidation Act 1845* (Eng), judicially interpreted to require full market-value compensation and implemented in legislation in each of the Australian Colonies. Like the comment of Barton discussed above, O’Connor’s descriptions serve to link the purpose of the requirement of ‘just terms’ to the English and Colonial practice as well as the American eminent domain, both of which require full market-value compensation in each individual case.

O’Connor’s statement of the principle of equality of sacrifice was embraced by other Senators, including Sir John Downer.⁸¹ Sir William Lyne’s Second Reading speech in the House of Representatives also endorsed the principle: ‘Where any injury is done to the individual, the Commonwealth should compensate him.’⁸² The universality of the principle was noted by Sir Josiah Symon, who described the Bill as ‘a measure to give effect to a principle that prevails in every self-governing State’.⁸³ Not only was the principle accepted, but the method was familiar. O’Connor said that the Bill ‘follows very well-worn lines of legislation ... Similar provisions have been in force not only in England but in many of these States for a great many years.’⁸⁴ He stated merely that the

⁷⁸ ‘Eminent domain differs from taxation in that, in the former case, the citizen is compelled to surrender to the public something beyond his due proportion for the public benefit’: Thomas M Cooley, *A Treatise on the Constitutional Limitations which rest upon the Legislative Power of the States of the American Union* (Little, Brown, 1868) 559. See Chapter 3, section II.

⁷⁹ Commonwealth, *Parliamentary Debates*, Senate, 4 July 1901, 2021 (Richard O’Connor, Vice-President of the Executive Council).

⁸⁰ Commonwealth, *Parliamentary Debates*, Senate, 17 July 1901, 2626 (Richard O’Connor, Vice-President of the Executive Council) [emphasis added].

⁸¹ Commonwealth, *Parliamentary Debates*, Senate, 4 July 1901, 2028 (Sir John Downer). Views expressed by non-Framers indicate general acceptance of this point. See, eg: at 2028 (Major Gould). Gould also noted without dissent that there would be ‘no question as to the desirability of passing a Bill of this character’ and that consequently ‘criticism will be rather in regard to matters of detail than matters of principle’: at 2025. Senator Playford (not a Framer of s 51(xxxi)) because it was considered only in 1897 and 1898, although he had been a member of the Sydney Convention of 1891: *Official Report of the National Australasian Convention Debates*, Sydney, v) noted that, when land is to be appropriated, Parliament should deal with the owner of the land ‘fairly and liberally’: Commonwealth, *Parliamentary Debates*, Senate, 18 July 1901, 2699 (Thomas Playford). See also: Commonwealth, *Parliamentary Debates*, Senate, 12 July 1901, 2484 (Edward Harney).

⁸² Commonwealth, *Parliamentary Debates*, House of Representatives, 1 October 1901, 5395 (Sir William Lyne, Minister for Home Affairs).

⁸³ Commonwealth, *Parliamentary Debates*, Senate, 4 July 1901, 2021 (Sir Josiah Symon).

⁸⁴ *Ibid* 2018 (Richard O’Connor, Vice-President of the Executive Council).

Bill contained ‘all the usual and necessary machinery’.⁸⁵ Similarly, Lyne commented that he would not take long to explain the Bill ‘because it is to a very large extent composed of an amalgamation of the provisions of existing State laws.’⁸⁶

In a debate between Patrick Glynn and Alfred Deakin over the constitutionality of a provision in the Act relating to underground works,⁸⁷ Glynn noted that:

The provision, of course, is one which could have been passed by a Parliament such as the Parliaments of the various States before Federation; but our powers on the subject are limited ... the acquisition must be upon just terms.⁸⁸

Although Deakin convinced the House that Glynn’s concern about this particular provision was unfounded,⁸⁹ this exchange confirmed the understanding that legislation not providing ‘just terms’ would be liable to be struck down.

These Parliamentary statements by the Framers provide more evidence of the meaning of s 51(xxxi). The requirement of ‘just terms’ was understood (in Glynn and Deakin’s discussion) as a judicially-enforceable limit on the power of the Parliament. Moreover, there is further evidence for ‘just terms’ requiring full market-value compensation: the ‘equality of sacrifice’ principle stated by O’Connor and supported by Downer and Lyne was an expression of the sentiment underlying English and Australian Colonial practice as well as American eminent domain, each of which includes a requirement of full market-value compensation; as well as the indications of continuity with existing State legislation (which required full market-value compensation).

Perhaps the ultimate proof was in the legislation itself: compensation would be determined as the ‘value of the land’ plus damages for severance and injurious

⁸⁵ Ibid 2021 (Richard O’Connor, Vice-President of the Executive Council).

⁸⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 1 October 1901, 5394, (Sir William Lyne, Minister for Home Affairs).

⁸⁷ *Property for Public Purposes Acquisition Act 1901* (Cth) s 10:

- (1) For the purposes of constructing any underground work, land under the surface may be acquired under this Act without acquiring the surface.
- (2) In such case, no compensation shall be allowed or awarded unless –
 - a. the surface of the overlying soil is disturbed; or
 - b. the support to such surface is destroyed or injuriously affected...
 - c. any mine, underground working [etc] ... in or adjacent to such land is thereby injuriously affected.

⁸⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 2 October 1901, 5459 (Patrick Glynn).

⁸⁹ Deakin argued that: ‘If no damage is done it is perfectly just to carry out a work without compensating the owner of the land’: *ibid* 5506 (Alfred Deakin, Attorney-General). If no authority to cause damage was conferred, any later damage caused would be actionable in tort: *Perth Corporation v Halle* (1911) 13 CLR 393.

affection:⁹⁰ the formula was copied from s 63 of the *Lands Clauses Consolidation Act 1845* (Eng). When the Framers drew up legislation under s 51(xxxi), it implemented this formula for full market-value compensation, which applied not only in England but, as Chapter 2 showed, had been adopted in all of the Australian Colonies.

D *Conclusion: 'Just Terms' as an Individual Right to Full Market Value Compensation*

Previous commentators have understated both the quantity and significance of the historical evidence as to the meaning of the requirement of 'just terms'. The evidence about the meaning of the requirement of 'just terms' contained in s 51(xxxi) is not extensive, but it is important and sufficient to allow some conclusions to be drawn.

It was never doubted that 'just terms' imposed a restriction on legislative power requiring compensation to the individual. This was stated by O'Connor, Turner and Barton in the Convention Debates (Turner regarded this as undesirable, but was in no doubt that this *was* an individual right to compensation), this was the conclusion reached by Quick and Garran, and was clearly expressed by Glynn and Deakin in the parliamentary debate.

Although the phrase used was always 'compensation', the evidence supports the stronger hypothesis that 'just terms' requires full market-value compensation. First, there was Turner's concern about 'enormous expenditure'. Secondly, Barton's indication of a requirement of an individual determination, by an impartial body, of the market value of property acquired ('arbitration or the verdict of a jury'), as well as the fact that this links to the English and Colonial practice which required full market-value compensation. Thirdly, the link drawn to American eminent domain and its requirement of full market-value compensation by Quick and Garran's use of the phrase 'just compensation' in describing s 51(xxxi). Fourthly, the use of State legislation for the determination of compensation under s 85. Fifthly, Barton's comments expressing the ideal of full market-value compensation ('pay the proper

⁹⁰ *Property for Public Purposes Acquisition Act 1901* (Cth) s 19(1):

'In estimating the compensation to be paid, regard shall in every case be had, by the valuers or the Justice, not only to the value of the land taken, but also to the damage (if any) caused – (a) by the severing of the land taken from other land of the claimant; or (b) by the exercise of any statutory powers by the Minister otherwise injuriously affecting such other land'.

valuation’) and suggestion of placing the Commonwealth in the position of any individual bargaining for sale (‘make a man pay for what he gets’). Sixthly, O’Connor’s parliamentary comment statement of the principle of ‘equality of sacrifice’, endorsed by Downer, Lyne and Symon, as well as O’Connor’s reference to the payment of the ‘value’ of property acquired, and O’Connor and Lyne’s comments emphasising the similarity to longstanding English and Colonial legislation.

In summary, not only was s 51(xxxi)’s requirement of ‘just terms’ understood as a limit on Commonwealth legislative power, there is considerable evidence to support the stronger conclusion that ‘just terms’ requires full market-value compensation. In the light of this evidence, previous academic commentary warrants re-consideration.

IV THE INFLUENCE OF THE HISTORICAL, THEORETICAL AND COMPARATIVE CONTEXTS ON S 51(xxxi)

The influence of the historical, theoretical and comparative contexts of s 51(xxxi) is readily apparent in the above analysis. The significance of these contexts appears each time statements were made explicitly or implicitly linking s 51(xxxi) to English and Australian Colonial practice or to American eminent domain, or expressing principles reflecting the protection of private property under the English constitutional theory of Locke and Blackstone or the theory of eminent domain. However, the argument that s 51(xxxi) was influenced by American eminent domain still faces three challenges. First, Evans’ view that the American experience is very different to the Australian. Secondly, that more recent Australian commentators have adopted partial understandings of eminent domain. Thirdly, the fact that the Framers generally rejected calls for the insertion of individual rights protections in the *Australian Constitution*. Each of these will now be examined, and it will be argued that none of them justifies a rejection of the contexts of s 51(xxxi) as important guides to its interpretation.

A *Evans’ Challenge to the Relevance of American Eminent Domain*

Evans sought to distinguish s 51(xxxi) from the Fifth Amendment takings clause, arguing that: ‘The Debates do not support the assertion that the section was modelled on the American Takings Clause. ... Not only is the language of the sections very

different, so too are their respective historical contexts.’⁹¹ These three claims – of textual and historical differences, and a lack of evidence from the Convention Debates, will be addressed in turn, and re-evaluated in light of the evidence of the influence of the historical, theoretical and comparative contexts of s 51(xxxi).

1 *Textual Differences*

The textual differences highlighted by Evans are as follows:

One is framed as a legislative power subject to a limitation, the other as a guarantee of individual rights; one refers to ‘acquisition’, the other to ‘tak[ing]’; one refers to ‘just terms’, the other to ‘just compensation’; and one limits the purposes of acquisition to ‘any purpose in respect of which the Parliament has power to make laws’, the other to takings ‘for public use’.⁹²

Evans was not the first to put this view.⁹³ Each of these suggested textual differences will now be examined to assess whether they represent significant and deliberate alterations or are merely minor drafting matters of no great consequence in terms of meaning.

That s 51(xxxi) is ‘a legislative power subject to a limitation’ whereas the Fifth Amendment takings clause is ‘a guarantee of individual rights’, attributes too much substance to a difference of form. Although one role of s 51(xxxi) was to ensure that the power of appropriation would not rest on an implication, the fact that one part of the placitum grants power does not of itself deny that a guarantee of individual rights is imposed by ‘just terms’ in s 51(xxxi) in order to protect every affected individual when that power is exercised, as it is by the similar phrase ‘just compensation’ in the Fifth Amendment takings clause.

Although ‘acquisition’ and ‘taking’ are different words, the selection of one rather than the other in s 51(xxxi) also indicates no fundamental difference of meaning. First, ‘acquisition’ was used interchangeably in the Convention Debates with phrases

⁹¹ Evans, ‘Property and the Drafting of the Australian Constitution’, above n 1, 130.

⁹² Ibid 130 n 50.

⁹³ Hamilton noted that: ‘Much care needs to be exercised when seeking to apply principles of constitutional law applicable in other jurisdictions to the Australian situation ... not only is the wording of the provisions different but the whole course of interpretation has often followed different lines’: Hamilton, above n 35, 285. However, he went on to examine US decisions (at 285-7) and conceded that ‘U.S. cases may have some persuasive authority in the Australian courts; they may even be of practical importance’ (at 289).

including ‘resume’ and ‘take over’,⁹⁴ ‘purchase’,⁹⁵ ‘take’,⁹⁶ and ‘buy’.⁹⁷ Secondly, in the judgment from *Kohl v United States* quoted by Isaacs to the Melbourne Convention, Strong J used ‘appropriation’ and ‘acquisition’ to describe ‘taking’.⁹⁸ Thirdly, parliamentary statements (on a Bill using the word ‘acquisition’) treated ‘taking’ as interchangeable: O’Connor said that ‘we *take* a man’s land’⁹⁹ and ‘we *take* land for public purposes’;¹⁰⁰ Senator Harney stated that ‘you *take* away a person’s land’¹⁰¹ and Senator Playford that ‘[w]e *take* the man’s land’.¹⁰² Fourth, the *Lands Clauses Consolidation Act 1845* (Eng) itself used ‘acquisition’ and ‘taking’ interchangeably.¹⁰³ These examples suggest that no significant difference of principle lay in the choice of the word ‘acquisition’, and that this was not a deliberate device to distinguish s 51(xxxi) from the Fifth Amendment takings clause.

Evans’ third proposition was that ‘just terms’ and ‘just compensation’ are distinct.¹⁰⁴ However, once again this is not supported by the historical evidence. Quick and Garran clearly perceived no difference when they referred to s 51(xxxi) as ‘the constitutional requirement of just compensation’.¹⁰⁵ Again, the Debates reveal an interchangeable use of terms, with ‘just terms’ being described as ‘fair terms’¹⁰⁶ and ‘just terms of compensation’.¹⁰⁷

⁹⁴ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 25 January 1898, 151-2 (John Quick).

⁹⁵ *Ibid* 152 (Sir George Turner).

⁹⁶ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 28 January 1898, 257-8 (John Cockburn), 261 (Isaac Isaacs), 4 March 1898, 1874 (Richard O’Connor).

⁹⁷ *Ibid* 258 (Henry Higgins).

⁹⁸ *Ibid* 260 (Isaac Isaacs); quoting *Kohl v United States*, 91 US 367, 371 (1875). See: Chapter 3, section IIIB.

⁹⁹ Commonwealth, *Parliamentary Debates*, Senate, 18 July 1901, 2701 (Richard O’Connor, Vice-President of the Executive Council) [emphasis added].

¹⁰⁰ Commonwealth, *Parliamentary Debates*, Senate, 17 July 1901, 2606 (Richard O’Connor, Vice-President of the Executive Council) [emphasis added].

¹⁰¹ Commonwealth, *Parliamentary Debates*, Senate, 12 July 1901, 2484 (Edward Harney) [emphasis added].

¹⁰² Commonwealth, *Parliamentary Debates*, Senate, 18 July 1901, 2699 (Thomas Playford) [emphasis added].

¹⁰³ Relevant provisions from the *Lands Clauses Consolidation Act 1845* (Eng) include: ‘Purchase and taking of Lands’ (recital to ss 16-68), ‘Acquisition of Lands’ (recital), ‘taking of Lands’ (Long Title, s 2), ‘compulsory taking of Land’ (s 16), ‘take’ (s 18), ‘purchased or taken’ (s 58, s 63).

¹⁰⁴ Similarly, R W Baker, ‘The Compulsory Acquisition Powers of the Commonwealth’ in Rae Else-Mitchell (ed), *Essays on the Australian Constitution* (2nd ed, 1961) 193, 205: ‘just terms’ and ‘just compensation’ are ‘not always the same thing’ and ‘although American decisions have been of some assistance, in the main the working out of what are just terms has been an Australian problem’.

¹⁰⁵ Quick and Garran, above n 7, 982.

¹⁰⁶ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 28 January 1898, 258 (Richard O’Connor).

¹⁰⁷ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1874 (Richard O’Connor).

The fourth proposition, that ‘any purpose in respect of which the Parliament has power to make laws’ is distinct from ‘public use’, is also not supported by the historical evidence.¹⁰⁸ The Debates reveal various terms being used in discussion of the s 51(xxxi) formula, including: ‘purposes of the Commonwealth’,¹⁰⁹ ‘purpose[s] of general concern’,¹¹⁰ ‘ordinary public purposes’ and ‘public purposes’.¹¹¹

Therefore, the textual arguments advanced by Evans are not persuasive in light of the historical records revealing that each alleged difference was in fact seen as insignificant. The argument that s 51(xxxi) was drafted to be different from the Fifth Amendment takings clause is thus not convincing.

2 *Historical Difference*

Evans’ second argument was that there is an important historical difference between the American and Australian constitutional provisions because the Fifth Amendment takings clause was motivated by ‘James Madison’s fears for the property rights of the minority if political power were entrusted to the propertyless majority’.¹¹² Whereas, in Australia, ‘there is no comparison with [this] background’.¹¹³ While this may be correct, Evans has not gone far enough into the underlying historical background.

His view undervalues the contexts of both the United States and Australian provisions. On the American side, Evans does not acknowledge the broad similarity of the English constitutional theory of Locke and Blackstone with the ideal given effect in the

¹⁰⁸ The first consideration of the topic limited the purpose to ‘public works’: Baker, above n 5, 152-3. This was extended in s 51(xxxi) to become ‘for any purpose in respect of which the Parliament has power to make laws’. As O’Connor noted, this was to have the effect of ‘restricting the power to acquire land to acquisition for the public purposes of the Commonwealth’: *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 28 January 1898, 258 (Richard O’Connor). Other speakers indicated the understanding that a limitation was involved, although the words of limitation varied, including property: ‘which might become necessary’: 25 January 1898, 151 (Edmund Barton); ‘which may be required for the purposes of the Commonwealth’ 151-2 (John Quick); for ‘any purpose of general concern’ 153 (Isaac Isaacs); for ‘purposes of general concern’ 28 January 1898, 256 (Edmund Barton); for ‘the ordinary public purposes of the Commonwealth’ and ‘public purposes of the Commonwealth’ 258 (Richard O’Connor); and for ‘public purposes ... the purposes committed to it by the Constitution’ 260 (Isaac Isaacs). The purpose provision is, after the requirement of just terms: ‘[t]he second limit to the power of the Commonwealth to acquire private or provincial property’: Quick and Garran, above n 7, 642.

¹⁰⁹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 25 January 1898, 151-2 (John Quick).

¹¹⁰ *Ibid* 153 (Isaac Isaacs), 28 January 1898, 256 (Edmund Barton).

¹¹¹ *Ibid* 28 January 1898, 258 (Richard O’Connor), 260 (Isaac Isaacs).

¹¹² Evans, ‘Property and the Drafting of the Australian Constitution’, above n 1, 131.

¹¹³ *Ibid*.

American takings clause.¹¹⁴ Focussing on Madison¹¹⁵ also denies the American position its proper context as an implementation of the European public law theory of eminent domain.¹¹⁶ On the Australian side, Evans again does not acknowledge the importance of English constitutional theory and American eminent domain as relevant contexts. Evans' omission to acknowledge the similar historical, theoretical and comparative contexts of s 51(xxxi) and the Fifth Amendment takings clause diminishes his argument regarding historical differences.

3 *Additional Evidence from the Convention Debates of the Influence on s 51(xxxi) of the American Context*

Evans' third argument was that the Debates do not support a link between the Australian and American provisions. Some evidence supporting the link to eminent domain has already been examined, including Barton's comment that 'a man [should] pay for what he gets'¹¹⁷ and O'Connor's principle of 'equality of sacrifice' and exposition that an individual should 'pay no more than the rest of the community for the general benefit'.¹¹⁸ This section analyses further evidence from the Convention Debates of American eminent domain's influence on s 51(xxxi).

During discussions on s 52(i) in the Melbourne Convention, the following exchange occurred:

Dr. Cockburn: Would there not be some right of *pre-eminent powers* in the Federal Parliament, unless it was restricted by this Act, to take any land anywhere it chose?

Mr. Isaacs: Yes; so there ought to be.

Dr. Cockburn: I do not think there ought to be.¹¹⁹

¹¹⁴ See: Chapter 3, section IIIC.

¹¹⁵ In any event, Madison's views were not as simple as Evans' statement implies. Consider: 'Give all power to property; and the indigent [will] be oppressed. Give it to the latter and the effect may be transposed': James Madison, 'Observations on the 'Draught of a Constitution for Virginia'' in Robert A Rutland and Charles F Hobson (eds), *The Papers of James Madison* (University of Virginia Press, 1977) vol 11, 285, 287. For more on Madison's views of property, see: William Michael Treanor, 'The Original Understanding of the Takings Clause and the Political Process' (1995) 95 *Columbia Law Review* 782, 836-55.

¹¹⁶ See Chapter 3, section II.

¹¹⁷ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 15 February 1898, 999 (Edmund Barton).

¹¹⁸ Commonwealth, *Parliamentary Debates*, Senate, 4 July 1901, 2017 (Richard O'Connor, Vice-President of the Executive Council).

¹¹⁹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 28 January 1898, 257 (Isaac Isaacs), 257-8 (John Cockburn) [my emphasis].

Despite their differences as to its desirability, Cockburn and Isaacs both agreed about what Cockburn described as a ‘right of pre-eminent powers’. Isaacs expanded on this phrase with an argument that the Commonwealth would enjoy a right of eminent domain as an incident of its sovereignty,¹²⁰ reading to the Convention the lengthy passage quoted above from Supreme Court’s decision in *Kohl v United States*.¹²¹

In subsequent discussions on this point, which involved Charles Kingston (Premier of South Australia), George Reid (Premier of New South Wales), Deakin, Barton, O’Connor, Higgins, Symon and James Walker (also of New South Wales),¹²² not one delegate sought to distinguish the proposed position in Australia from American eminent domain: its relevance was accepted without dissent. Certainly Wise would have known about eminent domain, having spent time with Inglis Clark and ‘a shelf full of Clark’s American constitutional literature’.¹²³ Isaacs and Cockburn also referred to the concept in the passages extracted above. Moreover, Isaacs had described eminent domain to the Convention as a whole. None of these instances provoked even a lone suggestion that American eminent domain was not relevant to s 51(xxxi).

Quick and Garran described s 51(xxxi) as a codification of eminent domain which:

expressly confers on the Commonwealth, through the Federal Parliament, the right – technically called the right of ‘eminent domain’ – to compulsorily take property, both private and provincial, for Federal purposes.¹²⁴

Their exposition on s 51(xxxi) directly referred to the *American Constitution*,¹²⁵ contained statements of the principles established by twelve American eminent domain cases,¹²⁶ and included eight references to an American constitutional text book.¹²⁷

¹²⁰ Ibid 260 (Isaac Isaacs).

¹²¹ Ibid; quoting *Kohl v United States*, 91 US 367, 371 (1875). See above at 86.

¹²² See: *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 28 January 1898, 256-61.

¹²³ Wise spent the 1892-3 Christmas vacation in Hobart with Andrew Inglis Clark, and the Barton Papers contain a letter from Wise, dated 13 January 1893, in which he declares that: ‘For the last three weeks we’ve been at a farm house half way up Mt Wellington, where I have a shelf full of Clark’s American constitutional literature’. He adds the hope that his learning on the American Constitution ‘may be usefully felt’ in drafting the Australian Constitution: Papers of Sir Edmund Barton, National Library of Australia, MS51, Series 1: Correspondence 1827-1921, Item 190: from Bernhard R Wise.

¹²⁴ Quick and Garran, above n 7, 640. They continued: ‘it was not considered advisable to allow the right of eminent domain in the Commonwealth to be dependent upon any implied or incidental power’: at 640-1. Section 51(xxxi) was twice more referred to as a power of eminent domain in their discussion of s 125: at 981-2.

¹²⁵ Ibid 640.

¹²⁶ *Mitchell v Harmony*, 54 US (13 Howard) 115 (1851); *Pumpelly v Green Bay and Mississippi Canal Co*, 80 US (13 Wallace) 166 (1871); *United States v Russell*, 80 US (13 Wallace) 623 (1871); *Olcott v Supervisors*, 83 US (16 Wallace) 678 (1873); *Kohl v United States*, 91 US 367 (1875); *Newport and Cincinnati Bridge Co v United States*, 105 US 470 (1882); *New Orleans Water-works Co v St Tammany Water-works Co*, 14 F 194 (1882); *United States v Jones*, 109 US 513 (1883); *United States v Great*

Indeed, the only reference in Quick and Garran's interpretation of s 51(xxxi) that is *not* to an American authority is a reference to existing Colonial laws, an acknowledgment of the consistency of eminent domain with existing Colonial practice.¹²⁸

One explanation of the acceptance of the American approach in Australia may be the extraordinary influence of James Bryce's *The American Commonwealth*, which was probably *the* most influential book for the Framers.¹²⁹ Bryce referred to the constitutional protections in the American States against laws which encroach on 'the personal liberty of the citizen' and 'the full enjoyment of private property',¹³⁰ noting the danger in a democracy of the tyranny of the majority resulting in private property rights being violated.¹³¹ Bryce gave his imprimatur to constitutional safeguards of individual property rights, noting that in the United States: '[i]n all such fundamentals the majority has prudently taken the possible abuse of its power out of the hands of the legislature'. Although Evans used Madison's concern about the tyranny of the majority to distance s 51(xxxi) from the Fifth Amendment, the guidance from Bryce – the great interpreter of the American experience to the Framers of the *Australian Constitution* – supported the imposition of protections of individual property rights.

Taken together, there is sufficient evidence in the Convention Debates to support the argument that s 51(xxxi) was regarded as performing the same function as American eminent domain, which was itself broadly consistent with the English constitutional theory and English and Australian Colonial practice. In light of this historical evidence, Evans' arguments of textual and historical difference between the American and Australian positions, and of no evidence to support the link, must be re-evaluated.

Falls Manufacturing Co, 112 US 645 (1884); *Searl v School District No 2 in Lake County*, 133 US 553 (1890); *Cherokee Nation v Southern Kansas Railway Co*, 135 US 641, 659 (1890); *Bauman v Ross*, 167 US 548 (1897). See: Quick and Garran, above n 7, 640-2.

¹²⁷ Andrew Jackson Baker, *Annotated Constitution of the United States* (Callaghan, 1891). See: Quick and Garran, above n 7, 641-2.

¹²⁸ 'In each State, at the present time, such machinery and procedure already exist for provincial purposes, in the shape of Acts known as Lands Clauses Compensation Acts, or Lands for Public Purposes Acquisition Acts': Quick and Garran, above n 7, 641.

¹²⁹ See: John Williams, 'The Emergence of the Commonwealth Constitution' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 1, 14, 24-5; La Nauze, above n 8, 18.

¹³⁰ James Bryce, *The American Commonwealth* (Macmillan, 1888) vol 3, 136.

¹³¹ 'Some think a law tyrannical which forbids a man to exclude others from ground which he keeps waste and barren, while others blame the law which permits a man to reserve, as they think tyrannically, large tracts of country for his own personal enjoyment': *ibid* 137.

B Clarifying the Meaning of Eminent Domain

In advocating a link to American eminent domain, it is necessary to distinguish an unfortunate tendency in modern scholarship to treat eminent domain as a label that can be applied to any legislative power of appropriation, irrespective of whether compensation is required, and divorced from any underlying theory of individual rights.

There has been no systematic analysis of the concept of eminent domain in the context of s 51(xxxi) by Australian scholars, but the term has been used occasionally. With the exception of Tom Allen,¹³² Australian commentators have treated eminent domain as a generic label for any power of appropriation. Thus, Bailey in 1951 stated that the High Court was ‘in the process of evolving a distinctive Australian contribution to the law of eminent domain’¹³³ without any reference to the content of that concept. Similarly, Nicolas,¹³⁴ Hamilton¹³⁵ and Evans¹³⁶ have all treated eminent domain as if it only involved a legislative power of appropriation.

These approaches give an incomplete, and therefore inadequate, account of eminent domain. In continental and American theory, eminent domain was never conceived of as a bare power of appropriation. Indeed, this misses its critical feature: the requirement of full market-value compensation to the individual as the *quid pro quo* for exercise of the power of appropriation. As the American commentator Arthur Lenhoff wrote:

¹³² Allen made limited use of the American understanding of eminent domain. In the context of judicial statements from the High Court indicating that one of the purposes served by s 51(xxxi) is the protection of the citizen, Allen noted that the Supreme Court of the United States has held that: ‘[the] takings clause of the Fifth Amendment requires compensation so that the government cannot ‘forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole’’: Tom Allen, ‘The Acquisition of Property on Just Terms’ (2000) 22 *Sydney Law Review* 351, 358; quoting from *Dolan v City of Tigard*, 512 US 374, 384 (1994), itself quoting *Armstrong v United States*, 364 US 40, 49 (1960). From this starting point, Allen explored modern United States jurisprudence in the context of defining the scope of ‘property’ protected under the two clauses.

¹³³ K H Bailey, ‘Fifty Years of the Australian Constitution’ (1951) 25 *Australian Law Journal* 314, 328. This statement was later quoted with approval in R W Baker, ‘The Compulsory Acquisition Powers of the Commonwealth’ in Rae Else-Mitchell (ed), *Essays on the Australian Constitution* (LawBook, 1952) 156, 169.

¹³⁴ H S Nicholas, *The Australian Constitution: An Analysis* (Law Book, 1948) 198.

¹³⁵ Hamilton, above n 35, 265.

¹³⁶ ‘At the core of the power conferred by s. 51(xxxi) is the power to acquire *title* to the property of a private person or a State. Section 51(xxxi) thus confirms that the Commonwealth possesses the power of eminent domain’: Simon Evans, ‘Constitutional Property Rights in Australia’, above n 35, 197, 199.

the idea of eminent domain implies protection of the individual against the extensive power of the state, rather than an aid to destructive activities which, though socially valuable, may leave the injured landowner remediless.¹³⁷

At the time of Australian Federation, eminent domain was still understood to be more than a label: Isaacs read to the Convention from *Kohl v United States*;¹³⁸ Cockburn, Isaacs and Kingston discussed eminent domain's source in sovereignty and analysed whether the nature of Australian sovereignty would see eminent domain implied;¹³⁹ and Quick and Garran examined American cases and commentary to give s 51(xxxi), which they viewed as a codification of eminent domain,¹⁴⁰ its content.¹⁴¹ In advocating the relevance of eminent domain to s 51(xxxi), this thesis relies on the traditional understanding of eminent domain in the United States as outlined in Chapter 3, incorporating as it did traces of the English respect for private property as well as the continental theory.

C *The Exceptional Nature of s 51(xxxi)*

The ready acceptance by the Framers of the incorporation of s 51(xxxi) stands out in contrast to the controversy surrounding the unsuccessful proposal to insert a guarantee against the deprivation 'of life, liberty, or property without due process of law' based on the Fourteenth Amendment to the *Constitution of the United States*.¹⁴² O'Connor moved the insertion of the Australian 'due process' provision,¹⁴³ but was challenged immediately by Cockburn:

Why should these words be inserted? They would be a reflection on our civilization. Have any of the colonies of Australia ever attempted to deprive any person of life, liberty, or property without due process of law? ... People would say – 'Pretty things these states of Australia; they have to be prevented by a provision in the Constitution from doing the grossest injustice.'¹⁴⁴

¹³⁷ Arthur Lenhoff, 'Development of the Concept of Eminent Domain' (1942) 42 *Columbia Law Review* 596, 607.

¹³⁸ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 28 January 1898, 260 (Isaac Isaacs); quoting *Kohl v United States*, 91 US 367, 371 (1875).

¹³⁹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 28 January 1898, 257, 260-1 (Isaac Isaacs), 257-8 (John Cockburn), 260 (Charles Kingston).

¹⁴⁰ Quick and Garran, above n 7, 640-1, 981-2.

¹⁴¹ *Ibid* 640-2.

¹⁴² This proposal is examined in: John M Williams, 'With Eyes Open': Andrew Inglis Clark and our Republican Tradition' (1995) 23 *Federal Law Review* 149, 175-8; John M Williams, 'Race, Citizenship and the Formation of the Australian Constitution: Andrew Inglis Clark and the '14th Amendment'' (1996) 42 *Australian Journal of Politics and History* 10. See also: La Nauze, above n 8, 229.

¹⁴³ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, 688 (Richard O'Connor).

¹⁴⁴ *Ibid* 688 (John Cockburn).

Cockburn's statement was strongly supported, and O'Connor's arguments in favour of the 'due process' clause faced staunch opposition.¹⁴⁵ Cockburn added that the provision would be '[v]ery necessary in a savage race',¹⁴⁶ Isaacs objected that '[i]t is an admission that it is necessary',¹⁴⁷ and John Gordon (from South Australia) asked '[m]ight you not as well say that the states should not legalize murder?'¹⁴⁸ The proposal was defeated.¹⁴⁹ As Barton later explained in *The Godfathers of Federation*:

Of course the leaders knew, and the people whom they addressed knew, that if you gave a people freedom of action it was out of the question to promise that it should do this thing or should not do that thing in the future without exercising its own free will from time to time. Hence the free electors whom the leaders addressed would have made short work of those leaders if their speeches any more than their Constitution had attempted to set bounds to the exercise of the popular judgment in the future.¹⁵⁰

The vigorous rejection of a 'due process' clause stands in marked contrast with the benign acceptance of s 51(xxxi)'s requirement of 'just terms'. As Evans has noted, the 'due process' clause was defeated 'not out of any lack of solicitude for property rights but largely out of concerns that it would prohibit racially discriminatory state legislation'.¹⁵¹ The Framers' respect for property was exemplified by Symon's comments about a great desire to protect the 'sacred rights of property' under the

¹⁴⁵ O'Connor first argued that '[t]he simple object of this proposal is to insure that no state shall violate what is one of the first principles of citizenship': *ibid* 688 (Richard O'Connor). O'Connor then argued:

'We are making a Constitution which is to endure, practically speaking, for all time. We do not know when some wave of popular feeling may lead a majority in the Parliament of a state to commit an injustice by passing a law that would deprive citizens of life, liberty, or property without due process of law. If no state does anything of the kind there will be no harm in this provision, but it is only right that this protection should be given to every citizen of the Commonwealth. I cannot understand any one objecting to this proposal': at 688.

O'Connor's final plea to the Convention was:

'We need not go far back in history to find cases in which the community, seized with a sort of madness with regard to particular offences, have set aside all principles of justice. If a state did behave itself in that way, why should not the citizens of the Commonwealth ... be protected? It should also be put in this Constitution, not necessarily as an imputation on any state or any body of states, but as a guarantee for all time for the citizens of the Commonwealth that they shall be treated according to what we recognise to be the principles of justice and of equality': at 689.

¹⁴⁶ *Ibid* 689 (John Cockburn).

¹⁴⁷ *Ibid* 689 (Isaac Isaacs).

¹⁴⁸ *Ibid* 689 (John Gordon).

¹⁴⁹ The result was a rejection by 23 votes to 19: *ibid* 690.

¹⁵⁰ Sir Edmund Barton, *The Godfathers of Federation* appears in draft form in: Papers of Sir Edmund Barton, National Library of Australia, MS51, Series 5: Speeches, Articles 1898-1901, Item 976, 2. This item is wrongly classified in the Barton Papers, as in it Barton refers to his experience in the Commonwealth Parliament and to being constrained in his observations by his judicial role (at 5). Elsewhere, the National Library website indicates that it was written in 1907: National Library of Australia, *Edmund Barton – High Court Judge* <<http://www.nla.gov.au/barton/pages/highcourt-04.html>>. It was subsequently published in the Brisbane *Daily Mail*, as to which see: Geoffrey Bolton, *Edmund Barton* (Allen & Unwin, 2000) 330-1; James A Thomson, 'Review Essay: The Founding Father? Edmund Barton and the Australian Constitution' (2002) 30 *Federal Law Review* 407, 443 n 176.

¹⁵¹ Evans, 'Property and the Drafting of the Australian Constitution', above n 1, 141.

Australian Constitution.¹⁵² Turner was alone in raising his concern regarding ‘just terms’, but he enjoyed no support and did not press his objection. Being an individual right to full market-value compensation in a *Constitution* that otherwise eschewed the creation of individual rights,¹⁵³ s 51(xxxi) is exceptional. Its presence is testimony to the strength of the influence of the historical, theoretical and comparative contexts of s 51(xxxi), each of which supported the right enshrined in the placitum.

D *The Influence on s 51(xxxi) of its Historical, Theoretical and Comparative Contexts*

As Evans noted, the Convention Debates on s 51(xxxi) were comparatively brief.¹⁵⁴ This brevity of discussion might be explained in part by the exigencies of the circumstances of the Convention: meeting in Melbourne from 20 January onwards, by March the Convention had suffered through long deliberations in sustained heat,¹⁵⁵ and still had considerable business to conclude. However, the Framers were not careless – the brevity of treatment of s 51(xxxi) was not an oversight, but reflects the existence of a shared understanding of the underlying principles.

When s 51(xxxi) was considered in its contexts – the historical context of the experience of English and Colonial practice, the theoretical context of Locke and Blackstone in England and of eminent domain theory, and the comparative context of American eminent domain – there was a remarkable coherence. Each indicated that ‘just terms’ protected individual rights of property by requiring the provision of full market-value compensation to every affected individual. These joint influences were

¹⁵² *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 983 (Josiah Symon). That these comments are illustrative, not exceptional, is demonstrated in Evans ‘Property and the Drafting of the Australian Constitution’, above n 1, 140-1.

¹⁵³ There are statements indicating that securing liberty was an important motivation for the Framers, including Symon’s comments at the close of the Melbourne Convention:

‘We who are assembled in this Convention are about to commit to the people of Australia a new charter of union *and liberty*; we are about to commit this new Magna Charta for their acceptance and confirmation, and I can conceive of nothing of greater magnitude in the whole history of the peoples of the world than this question upon which we are about to invite the peoples of Australia to vote. The Great Charter was wrung by the barons of England from a reluctant king. This new charter is to be given by the people of Australia to themselves [emphasis added]’: *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 17 March 1898, 2507 (Josiah Symon).

¹⁵⁴ Evans, ‘Property and the Drafting of the Australian Constitution’, above n 1, 129, 132.

¹⁵⁵ ‘The weather in Melbourne during several weeks of the final and longest session of the Convention must be noticed, for in that session frayed tempers became evident and towards the end business was rushed in a desire to have done and get home ... In places the text of the Constitution reflects those wilting days’: La Nauze, above n 8, 203.

acknowledged in Quick and Garran's description of the requirement of 'just terms' as 'consistent with the common law of England and the general law of European nations.'¹⁵⁶ The Debates may have been underdeveloped, but projecting the contexts onto the words used reveals much important historical evidence that has been previously overlooked.

V CONCLUSION

This Chapter has demonstrated that, viewed in the light of s 51(xxxi)'s historical, theoretical and comparative contexts, the Federation records *do* contain valuable evidence as to the meaning of 'acquisition of property on just terms'. The views of the Framers, expressed in the Convention Debates, in contemporary writings and in relevant parliamentary debates, provide insight into s 51(xxxi)'s functions of providing a legislative power of appropriation and creating an individual right to full market-value compensation. The evidence of this Chapter shows that, although the discussions were brief, they indicated reference to a shared understanding about the appropriate principles to govern the compulsory acquisition of property.

The influence of the historical, theoretical and comparative contexts of s 51(xxxi) was profound, explaining the paucity of discussion on the placitum and the exceptional nature of s 51(xxxi) as an individual right in a *Constitution* where, generally, faith was placed in Parliament. What did 'acquisition of property on just terms' mean? Section 51(xxxi) ensured that the Commonwealth enjoyed a power of appropriation, and simultaneously created an individual right to full market-value compensation. The placitum encapsulated in the *Australian Constitution* the English and Colonial legislative practice (its historical context), the English constitutional theory of Locke and Blackstone, and continental eminent domain theory (its theoretical context) and American eminent domain (its comparative context).

Part Three of this thesis will undertake a comprehensive and systematic analysis of the jurisprudence of the High Court interpreting s 51(xxxi). The broad aim of this is to investigate the extent to which the understandings that have been revealed in Part Two of this thesis are evident in the way in which the Justices have approached the

¹⁵⁶ Quick and Garran, above n 7, 641.

interpretation of s 51(xxxi). It will also examine whether these various contexts have been capable of assisting in the interpretation of the placitum. Finally, it will investigate whether the history of interpretation of the placitum demonstrates a respect for what Heydon J has described as the conventional common law approach, in which a body of doctrine builds up ‘as decision succeeds decision, each cautiously proceeding by analogy with or limited extension of the one before’.¹⁵⁷

¹⁵⁷ J Dyson Heydon, ‘Theories of Constitution Interpretation: A Taxonomy’ (Speech delivered as the Sir Maurice Byers Lecture, New South Wales Bar Association Common Room, 3 May 2007) 72.

PART THREE:

THE HIGH COURT'S S 51(xxxi)
JURISPRUDENCE

CHAPTER 5:

THE FIRST ERA:

THE 'INDIVIDUAL RIGHTS' APPROACH

I INTRODUCTION

The Commonwealth passed the *Property for Public Purposes Acquisition Act 1901* as its thirteenth statute.¹ The legislative power granted by s 51(xxxi) having been exercised, it was only a matter of time before cases arising under that statute were brought before the High Court and hence its development of a s 51(xxxi) jurisprudence commenced. The purpose of Part Three of this thesis is to examine the interpretation and application of s 51(xxxi). In particular, it investigates the degree to which the Court's jurisprudence has drawn upon the historical, theoretical and comparative contexts of the placitum that were identified in Part Two. Part Three is also especially concerned to identify the development of the law over time, to determine whether and where there have been deviations from these contextual understandings of s 51(xxxi), to establish why these have occurred, and to examine the consequences of any such deviations.

In Part Two of this thesis, the broad similarity between the English theory articulated by Locke and Blackstone and the American eminent domain has been emphasised. However, one important difference noted was that parliamentary supremacy meant the English parliament was able in practice to deviate from this theory.² The examination in Part Three of this thesis is not concerned with tracing the twentieth century evolution of English legislative practice (nor with tracing American twentieth century developments). Instead, it will analyse the consistency of the Australian approaches with the contextual understandings at the time of Federation that were identified in Part Two of this thesis. In particular, Part Three will focus on the use of American eminent domain as a critical feature. The s 51(xxxi) jurisprudence is, for this thesis, divided into three main eras: the first, from Federation until 1945, is examined in Chapter 5; Chapter 6 analyses the second era from 1946 to 1961; and the modern era commencing in 1979 is the subject of Chapter 7.

This first Chapter of Part Three will examine the High Court's interpretation of s 51(xxxi) in the first era to examine the issues outlined above. In short, this Chapter will

¹ See Chapter 4, section IIIC. Before the passing of this legislation, as noted by Barton J in *Commonwealth v New South Wales* (1906) 3 CLR 807, 821, 'the Commonwealth was totally unable ... to acquire land, simply by reason of the fact that it had not made any law for that purpose'.

² See: Chapter 2, section IIB-C; Chapter 3, section IIIC.

examine whether the ‘individual rights’ approach was taken in the first era. This Chapter is further divided chronologically into three sections: pre-World War Two cases, early wartime decisions from 1941-1943, and later wartime cases.³

Within each section, four issues will be addressed to illuminate the consistency of the Court’s interpretation of s 51(xxxi) with the ‘individual rights’ approach. First, the issue of the relationship of the placitum to the other heads of legislative power. In particular, whether s 51(xxxi) operates to prevent the Commonwealth from compulsorily acquiring property in any circumstances without providing ‘just terms’. If the ‘individual rights’ approach is to be taken, the placitum must be able to limit all exercises of legislative power. Secondly, whether ‘just terms’ requires full market-value compensation to each affected individual, as the ‘individual rights’ approach would maintain, or whether the Parliament has some discretion in this area. Thirdly, this Chapter examines how broadly ‘acquisition of property’ is interpreted, and whether the ‘individual rights’ approach informs this interpretation. Fourthly, the issue of whether the link between s 51(xxxi) and American eminent domain is maintained,⁴ thus evidencing the ‘individual rights’ approach’s view that the provisions share a common heritage entailing the relevance of American eminent domain to the interpretation of s 51(xxxi). In contrast, the alternative approach would be to treat s 51(xxxi) as a provision *sui generis* to be interpreted without reference to American eminent domain.

From a consideration of the cases and the above issues, it will be argued that the first era of s 51(xxxi) jurisprudence, lasting until the end of 1945, saw a majority of the High Court take the ‘individual rights’ approach to s 51(xxxi). This demonstrates in the first era the evolutionary development of the law, taking into account the historical, theoretical and comparative contexts of the placitum. In so doing, they maintained what this thesis has argued is the best view of s 51(xxxi), both in terms of its consistency with the contexts of the placitum and because of its doctrinal coherence.

³ A number of other wartime cases concerned the valuation of property and turned chiefly or entirely on statutory, rather than constitutional, interpretation. Because they did not advance doctrinal understandings of s 51(xxxi), they are noted here only for the sake of completeness: *Geita Sebea v Territory of Papua* (1941) 67 CLR 544; *Syme v Commonwealth* (1942) 66 CLR 413; *Minister of State for the Army v Parbury Henty & Co Pty Ltd* (1945) 70 CLR 459.

⁴ As Menzies noted at the conclusion of World War I, the question of the relationship between the American and Australian constitutions ‘has far more than a merely academic interest; for on it will depend much constitutional law’: Robert Gordon Menzies, ‘War Powers in the Constitution of the Commonwealth of Australia’ (1918) 18 *Columbia Law Review* 1, 3.

II THE BEGINNING OF A S 51(xxxi) JURISPRUDENCE

From the outset, it had been understood that the High Court would be able to engage in judicial review of legislation.⁵ However, in the early years, cases that arose concerning s 51(xxxi) did not challenge the validity of legislation, but instead addressed whether or not an individual had been appropriately recompensed in particular circumstances. Given how many of the Framers were members of the Commonwealth Parliament, this is not surprising: their legislation met the requirement of full market-value compensation to each individual that they had inserted in s 51(xxxi).⁶

Before World War Two, s 51(xxxi) cases concerned matters of detail such as the actual valuations of property,⁷ or incidental matters such as stamp duty and registration of transfer.⁸ Nonetheless, these decisions reveal important insights into the interpretive approach of the early High Court to s 51(xxxi). These views are of particular significance because a number of the Justices were Framers of the *Australian Constitution*. As indicated in Chapter 1, there was only scant commentary on s 51(xxxi) before World War Two, and what did exist did not discuss any of the judicial decisions. Further, the post-war literature only considered the cases after 1941. These early s 51(xxxi) cases have, therefore, not previously been the subject of academic analysis.

A ‘Just Terms’ as a Constitutional Individual Right

If s 51(xxxi) was to protect the property rights of the individual, it was essential that the requirement of ‘just terms’ be recognised as a limit on all heads of legislative power. Otherwise, it could be avoided simply by legislating under another head of power, leaving the individual exposed to uncompensated appropriation.

⁵ Bradley Selway and John M Williams, ‘The High Court and Australian Federalism’ (2005) 35 *Publius* 467, 473-4.

⁶ See: Chapter 2, section IIIC. For the relevant compensation provisions of the *Property for Public Purposes Acquisition Act 1901* (Cth) and the *Lands Acquisition Act 1906* (Cth), see below n 18.

⁷ See, eg: *Spencer v Commonwealth* (1907) 5 CLR 418 (‘*Spencer*’); *Harris v Minister for Public Works (NSW)* (1912) 14 CLR 721; *Minister of State for Home Affairs v Rostron* (1914) 18 CLR 634; *Minister for Home and Territories v Lazarus* (1919) 26 CLR 159 (‘*Lazarus*’); *In re Smith and Minister for Home and Territories* (1920) 28 CLR 513 (‘*Re Smith*’); *Minister for Home and Territories v Smith* (1924) 35 CLR 120.

⁸ *Commonwealth v New South Wales* (1906) 3 CLR 807, 815 (Griffith CJ); *Commonwealth v New South Wales* (1918) 25 CLR 325. Cf: *Commonwealth v New South Wales* (1923) 33 CLR 1, 27-8 (Knox CJ and Starke J) (‘*Royal Metals Case*’).

From the beginning, the High Court Justices made it clear that s 51(xxxi)'s requirement of 'just terms' operated as an individual right that limited all heads of legislative power. In *Commonwealth v Woodhill*, Isaacs J wrote that all Commonwealth acquisitions of property are 'subject to the provision as to 'just terms'',⁹ leaving no scope for its avoidance through legislation under any other head of power. Further, in two cases challenging the validity of State legislation, Justices of the High Court expressed views about s 51(xxxi) whilst contrasting the compulsory acquisition powers of the States and the Commonwealth.¹⁰ In the *Wheat Case*,¹¹ Barton J observed that:

In some of the States of the American Union the power of expropriation is limited by their Constitutions to acquisition on just terms. So in our Federal Constitution ... must the terms be just.¹²

For Barton J, indirectly relying on the United States, any Commonwealth law for the 'acquisition of property' would have to provide 'just terms'. Similarly, in *Peanut Board v Rockhampton Harbour Board*, Starke J wrote that:

The constitutional power of a State compulsorily to acquire, with or without compensation, all property within its territorial limits, is undoubted. The Commonwealth power is not so ample: it may acquire property on just terms.¹³

No other Justices dissented from these statements in the early cases, which implied that s 51(xxxi)'s requirement of 'just terms' was a broad restriction on Commonwealth legislative power. As such, it was of an entirely different nature to anything in the Australian States, where legislative powers were unrestricted according to principles of parliamentary sovereignty. As Isaacs J noted, the guarantee in s 51(xxxi) ensured that:

⁹ *Commonwealth v Woodhill* (1917) 23 CLR 482, 490 (Isaacs J). This case addressed the scope of the jurisdiction granted to the Supreme Court of New South Wales by the *Lands Acquisition Act 1906* (Cth).

¹⁰ Thus, 'If the State needs his property it may take it, and, at its will and tempered only by its sense of justice, may take it with or without compensation': *Duncan v Queensland* (1916) 22 CLR 556, 621 (Isaacs J), quoted with approval in: *Peanut Board v Rockhampton Harbour Board* (1933) 48 CLR 266, 312 (McTiernan J) ('*Peanut Board*'). Similarly, Powers J stated that the Queensland Parliament 'had the power to authorize the Crown to acquire any property or any interest or right in property with or without paying compensation': *Duncan v Queensland* (1916) 22 CLR 556, 649. 'There is no over-riding constitutional power forbidding the several States from exercising eminent domain, otherwise than on grant for compensation': Donald Kerr, *The Law of the Australian Constitution* (LawBook, 1925) 201. It was noted that, in the States, there would be the common law presumption of statutory interpretation that: 'the legislature did not intend to take private property for public use without paying fair and reasonable compensation': *Boxall v Sly* (1911) 12 CLR 63, 77 (O'Connor J). Similarly: 'the Courts ... should presume, unless the contrary intention is expressed in unequivocal terms, that Parliament did not intend to take away a man's property without compensation': *Royal Metals Case* (1923) 33 CLR 1, 66 (Higgins J).

¹¹ *New South Wales v Commonwealth* (1915) 20 CLR 54 ('*Wheat Case*'). This was a challenge to the *Wheat Acquisition Act 1914* (NSW).

¹² *Wheat Case* (1915) 20 CLR 54, 78 (Barton J).

¹³ *Peanut Board* (1933) 48 CLR 266, 280 (Starke J). This was a challenge to the *Primary Producers' Organization and Marketing Act 1926* (Qld).

while, on the one hand the Commonwealth possesses all necessary powers for the public welfare, on the other ... the owner, whoever he may be, gets the just price or compensation ... for his interest in the land.¹⁴

In summary, these early statements showed a clear expectation that the Commonwealth could not avoid the requirement of ‘just terms’ by undertaking an ‘acquisition of property’ under any other head of power. It was not inevitable that s 51(xxxi) would be given this application. The joint judgment in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* advocated a broad interpretation of Commonwealth power: ‘where the affirmative terms of a stated power would justify an enactment, it rests upon those who rely on some limitation or restriction upon the power, to indicate it in the Constitution’.¹⁵ The conclusion that s 51(xxxi)’s requirement of ‘just terms’ operated to restrict every other head of legislative power implied that ‘just terms’ created an individual right to compensation, and meant that an essential condition for the adoption of the ‘individual rights’ approach to the placitum was met.

B *The Meaning of ‘Just Terms’*

The early Commonwealth legislation, the *Property for Public Purposes Acquisition Act 1901* (Cth) and the *Lands Acquisition Act 1906* (Cth), provided ‘just terms’ by converting rights and interests in the property acquired under it into rights to receive ‘compensation’,¹⁶ which was to be calculated according to the formula expressed in the *Lands Clauses Consolidation Act 1845* (Eng) and later adopted in the Australian Colonies.¹⁷ That compensation was defined as the ‘value of the land’ plus damages for severance and injurious affection¹⁸ ensured that it was full market-value compensation

¹⁴ *R v Registrar of Titles (Vic); Ex parte Commonwealth* (1915) 20 CLR 379, 396 (Isaacs J).

¹⁵ (1920) 28 CLR 129, 154 (Knox CJ, Isaacs, Rich and Starke JJ) (*‘Engineers Case’*).

¹⁶ *Property for Public Purposes Acquisition Act 1901* (Cth) ss 6, 7, 9; *Lands Acquisition Act 1906* (Cth) ss 15-17. As Isaacs J later described it: ‘[o]wnership in land is converted into personalty, namely, what is there called a ‘claim for compensation,’ in the sense of a right to compensation. That is then the former owner’s transformed right’: *Commonwealth v Woodhill* (1917) 23 CLR 482, 491-2. See also the views of Knox CJ and Starke J: ‘[t]he rights of every owner, whether the State or a subject, are converted into claims for compensation’: *Royal Metals Case* (1923) 33 CLR 1, 21.

¹⁷ See: Chapter 2, Appendix II.

¹⁸ *Property for Public Purposes Acquisition Act 1901* (Cth) s 19(1):

‘In estimating the compensation to be paid, regard shall in every case be had, by the valuers or the Justice, not only to the *value of the land* taken, but also to the damage (if any) caused – (a) by the *severing* of the land taken from other land of the claimant; or (b) by the exercise of any statutory powers by the Minister otherwise *injuriously affecting* such other land’ [emphasis added].
Lands Acquisition Act 1906 (Cth) s 28(1):

to each affected individual, satisfying the requirement of ‘just terms’ contained in s 51(xxxi). The validity of this legislation was confirmed in a number of cases where the central issue was not the consistency of the legislation with the requirement of ‘just terms’ in s 51(xxxi), but whether or not the full market-value compensation provided for in the statute had been paid in particular circumstances.

The earliest compensation case, *Spencer*, confirmed the requirement of full market-value compensation. At first instance, Higgins J noted that the valuation must have ‘regard to all the potentialities of the site’.¹⁹ On appeal,²⁰ Griffith CJ stressed that it was full market-value compensation, holding that the valuation would be determined by answering the hypothetical question: ‘What would a man desiring to buy the land have had to pay for it on that day to a vendor willing to sell it for a fair price but not desirous to sell?’²¹ He continued, noting that compensation required the determination of:

what, according to the then current opinion of land values, a purchaser would have had to offer for the land to induce such a willing vendor to sell it, or, in other words, to inquire at what point a desirous purchaser and a not unwilling vendor would come together.²²

Justice Barton, in seeking to identify ‘what sum of money will place the dispossessed man in a position as nearly similar as possible to that he was in before,’²³ was emulating the ideal of indemnity expressed in both English theory and American eminent domain.²⁴ He also used a hypothetical purchaser test, valuing the land at:

what it is worth to a man of ordinary prudence and foresight, not holding his land for merely speculative purposes, nor, on the other hand, anxious to sell for any compelling or private reason, but willing to sell as a business man would be to

‘In determining the compensation under this Act, regard shall be had (subject to this Act) to the following matters: The *value of the land* acquired; The damage caused by the *severance* of the land acquired from other land of the person entitled to compensation; and The enhancement or *depreciation in value of other land adjoining the land taken* or severed therefrom of the person entitled to compensation by reason of the carrying out of the public purpose for which the acquired land was acquired’.

¹⁹ *Spencer* (1907) 5 CLR 418, 422 (Higgins J). For this proposition, his Honour referred to two English authorities under s 63 of the *Lands Clauses Consolidation Act 1845* (Eng): *Ripley v Great Northern Railway Co* (1875) 10 Ch App 435 and *In re Gough and Aspatria, Silloth and District Joint Water Board* [1903] 1 KB 574. For discussion of the same principle in American eminent domain in *Boom Co v Patterson*, 98 US 403 (1878), see: Chapter 3, section IIIE.

²⁰ The appeal was upheld on procedural grounds as the rules relating to payment into Court had been overlooked at first instance: *Spencer* (1907) 5 CLR 418, 430 (Griffith CJ), 434-5 (Barton J), 439 (Isaacs J).

²¹ *Ibid* 432 (Griffith CJ).

²² *Ibid*. His Honour referred to no authority for these propositions. They are, however, consistent with the interpretations of s 63 of the *Lands Clauses Consolidation Act 1845* (Eng) that were examined in Chapter 2, section IIC.

²³ *Spencer* (1907) 5 CLR 418, 435 (Barton J). His Honour was quoting with approval from: *Russell v Minister of Lands* (1898) 17 NZLR 241, 780.

²⁴ See: Chapter 2, sections IIB-IIC ; Chapter 3, sections IIIC, IIIE.

another such person, both of them alike uninfluenced by any consideration of sentiment or need.²⁵

Justice Isaacs stated that the compensation should be ‘the money equivalent to the loss he has sustained by deprivation of his land’,²⁶ to be given the value ‘which a hypothetical prudent purchaser would entertain, if he desired to purchase it for the most advantageous purpose for which it was adapted’.²⁷ Justice Isaacs’ prudent purchaser was also in possession of perfect information:²⁸ the guarantee of individual rights was all the more real because of his Honour’s emphasis on the market value being reached under conditions where no possible element of value or benefit was overlooked.

Each of the Justices in *Spencer* adopted a hypothetical purchaser test in order to calculate the market value of the land appropriated, taking into account any potential use of the land. Moreover, Barton and Isaacs JJ, focussing on the position of the individual whose property had been appropriated, sought to place them ‘in a position as nearly similar as possible’²⁹ by paying ‘the money equivalent to the loss’.³⁰ In so doing, their Honours insisted on what Blackstone in the English theory had described as a ‘full indemnification and equivalent’ for each individual,³¹ an ideal that was also reflected in eminent domain theory as constitutionally implemented in the United States.³²

Later cases followed the four principles that have been identified in *Spencer*. First, compensation would be assessed in respect of each individual. As Isaacs J stated in *R v Registrar of Titles (Vic); Ex parte Commonwealth*: ‘[t]he Constitution permits acquisition of land only on just terms ... that is, terms that are just to *all* whose interests are permitted to be acquired.’³³ In the *Royal Metals Case*, Isaacs J added a reminder that legislation under s 51(xxxi) must, in order to be valid, ensure that ‘‘just terms’ are

²⁵ *Spencer* (1907) 5 CLR 418, 437-8 (Barton J).

²⁶ *Ibid* 441 (Isaacs J).

²⁷ *Ibid* 440-1 (Isaacs J).

²⁸ *Ibid* 441 (Isaacs J): ‘perfectly acquainted with the land, and cognizant of all circumstances which might affect its value, either advantageously or prejudicially, including its situation, character, quality, proximity to conveniences or inconveniences, its surrounding features, the then present demand for land, and the likelihood, as then appearing to persons best capable of forming an opinion, of a rise or fall for what reason soever in the amount which one would otherwise be willing to fix as the value of the property’.

²⁹ *Ibid* 435 (Barton J).

³⁰ *Ibid* 441 (Isaacs J).

³¹ William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765) vol I, 139. See: Chapter 2, section IIB.

³² See: Chapter 3, sections IIIC, IIIE.

³³ *R v Registrar of Titles (Vic); Ex parte Commonwealth* (1915) 20 CLR 379, 392 (Isaacs J) (*‘Registrar of Titles’*) [emphasis added].

available by law'.³⁴ Indeed, legislative recognition of the importance of individual determination of compensation may be found in the extensive provisions for individual calculation and payment of compensation in the Commonwealth legislative scheme³⁵ giving effect to the acquisition by the Imperial government of the Australian wool clip.³⁶

Secondly, each individual had to receive the full equivalent of what was lost. In *MacDermott v Corrie*, Barton ACJ held that 'the owner is entitled to be repaid the loss of the value to him'³⁷ and Isaacs J required 'an equivalent in money of the property taken ... or of the damage occasioned.'³⁸ Further, the Court later adopted the principles stated by Fletcher Moulton LJ in *In re Lucas and Chesterfield Gas and Water Board*:

The owner receives for the lands he gives up their equivalent, i.e., that which they are worth to him in money. His property is therefore not diminished in amount, but to that extent it is compulsorily changed in form.³⁹

This was the classic interpretation of s 63 of the *Lands Clauses Consolidation Act 1845* (Eng), emphasising the concept of indemnity expressed in the English theory by Blackstone.⁴⁰ Its adoption to define the requirement of 'just terms' in s 51(xxxi) is an illustration of the strength of the link between s 51(xxxi) and English constitutional theory.

³⁴ *Royal Metals Case* (1923) 33 CLR 1, 47 (Isaacs J).

³⁵ This comprised the *War Precautions Act 1914* (Cth), the *War Precautions (Sheepskins) Regulations 1916* (Cth) and the *War Precautions (Wool) Regulations 1916* (Cth).

³⁶ For a history of the wool clip acquisition, see: Ernest Scott, *Australia During the War* (Angus and Robertson, 7th ed, 1941) 526-9, 571-81. The provisions instituted a system by which each parcel of wool delivered was appraised and its value determined (see: *John Cooke & Co Pty Ltd v Commonwealth* (1921) 31 CLR 394, 413-4 (Knox CJ, Gavan Duffy and Starke JJ) (High Court) and (1924) 34 CLR 269, 272 (Viscount Cave) (Privy Council)). The High Court Justices noted that '[t]he appraisal clauses ensured a fair and just apportionment among the wool suppliers of the moneys paid by the Imperial Government': at 403. 'The normal course of preparing, cataloguing and showing the wool was followed, but instead of being sold at auction it was appraised by Government representatives and thereupon became the property of the Imperial Government, to be shipped as freight space became available': F R Beasley, 'Produce Pools in Australia - II' (1928) 10 *Journal of Comparative Legislation and International Law* (3rd series) 259, 260. The carrying out of the appraisal has been explained as follows:

'the values of different classes of wool were determined by the committee's staff of appraisers. These experts were in fact men who had been in the employment of the established brokers' firms and wool houses of Australia, experienced in the classification and valuation of wool. None better could have been found for the purpose anywhere in the world': Scott, 576.

³⁷ *MacDermott v Corrie* (1913) 17 CLR 223, 234 (Barton ACJ); aff'd (1914) 18 CLR 511.

³⁸ *MacDermott v Corrie* (1913) 17 CLR 223, 247-8 (Isaacs J).

³⁹ *In re Lucas and Chesterfield Gas and Water Board* (1909) 1 KB 16, 29; adopted in: *MacDermott v Corrie* (1913) 17 CLR 223, 250 (Isaacs J); *Minister of State for Home Affairs v Rostron* (1914) 18 CLR 634, 637 (Isaacs J); *Re Smith* (1920) 28 CLR 513, 525 (Powers J).

⁴⁰ See: Chapter 2, section IIB.

Thirdly, a hypothetical purchaser test was used to value the property acquired. As Powers J held in *Re Smith*, the Court will determine ‘what a willing and prudent purchaser would have paid, and a not unwilling seller would have accepted, for the land’.⁴¹

Fourthly, any potential uses of the land would be included in the calculation of its value. Thus, in *Lazarus*,⁴² Isaacs and Rich JJ directed consideration to the value of the land ‘in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities’,⁴³ and Barton J took into account ‘the land ... with all the potentialities of it, with all the actual use of it’.⁴⁴ Similarly, in *Re Smith*, Powers J determined the value of the land ‘with all its potentialities and its existing advantages including the use of it and the right to use it for the most advantageous purpose’.⁴⁵

The application of these four principles demonstrates the unanimous view of the early High Court Justices that ‘just terms’ was a requirement of full market-value compensation to each individual whose property was appropriated. This was an early confirmation of the ‘individual rights’ approach to s 51(xxxi).

C *The Scope of ‘Acquisition of Property’*

The interpretation of ‘acquisition of property’ was not a critical issue in early s 51(xxxi) cases.⁴⁶ Nonetheless, the *Royal Metals Case* established that ‘property’ was used in the broadest sense.⁴⁷ In their judgment, Knox CJ and Starke J held that ‘property’ included ‘land belonging to any State with all the minerals or metals that may be contained in such land’,⁴⁸ and observed further that ‘property’ was ‘the most comprehensive term that can be used. No limitation is placed by the Constitution on the

⁴¹ *Re Smith* (1920) 28 CLR 513, 528 (Powers J).

⁴² (1919) 26 CLR 159.

⁴³ *Lazarus* (1919) 26 CLR 159, 165 (Isaacs and Rich JJ), quoting from *Fraser v City of Fraserville* [1917] AC 187, 194.

⁴⁴ *Lazarus* (1919) 26 CLR 159, 163 (Barton J), quoting from *Commissioners of Inland Revenue v Glasgow and South-Western Railway Co* (1887) 12 App Cas 315, 320-1 (Lord Halsbury).

⁴⁵ *Re Smith* (1920) 28 CLR 513, 528 (Powers J).

⁴⁶ Two early comments addressed ‘acquisition’. Justice Higgins ‘assumed’ that acquisition ‘might include a power to acquire a lease’: *Registrar of Titles* (1915) 20 CLR 379, 399; Isaacs J stated that it ‘includes modes of acquisition, and the legislation may select the mode most convenient to the Commonwealth’: *Royal Metals Case* (1923) 33 CLR 1, 55.

⁴⁷ Giving content to the early observation that s 51(xxxi) confers upon the Commonwealth ‘large powers of legislation’: *Commonwealth v New South Wales* (1906) 3 CLR 807, 826 (O’Connor J).

⁴⁸ *Royal Metals Case* (1923) 33 CLR 1, 20 (Knox CJ and Starke J).

property in respect of which Parliament may legislate'.⁴⁹ Similarly, Isaacs J held that '[n]o implied limitation can be placed on the fullest meaning that can be given to the word 'property''.⁵⁰ As any limitation on 'property' in s 51(xxxi) would impair the protection offered to individual owners, this conclusion was also important to the 'individual rights' approach.

D *The Link to American Eminent Domain*

The early Justices were familiar with the historical, theoretical and comparative contexts of s 51(xxxi), and found it natural to explain the application of the placitum by reference to the American eminent domain. In the *Wheat Case*, Griffith CJ referred to Cooley's *Constitutional Limitations*,⁵¹ and Barton J used 'eminent domain' and 'taking' when describing the Australian position, as well as using 'just terms' to describe the American requirement of 'just compensation'.⁵² In *Peanut Board* Starke J wrote that State power, 'to acquire property as the public safety, necessity, convenience, or welfare demands is uncontrolled'.⁵³ Although not referenced, the link to Cooley's text is apparent – its definition of eminent domain was: 'the rightful authority, which exists in every sovereignty ... to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience, or welfare may demand.'⁵⁴ These references to American eminent domain show the familiarity of the Justices with the doctrine, and its incorporation into their interpretive approach to s 51(xxxi).⁵⁵

⁴⁹ *Royal Metals Case* (1923) 33 CLR 1, 20-1 (Knox CJ and Starke J).

⁵⁰ *Ibid* 37 (Isaacs J). Justice Isaacs indicated that this was a portion of his judgment with which Rich J agreed (although Rich J did not end up taking part in the judgment of the case, being overseas at the time it was partially re-argued). A similar approach was taken in early academic commentary: 'All real and personal property within the Commonwealth is subject to expropriation for Federal purposes': Kerr, above n 10, 198.

⁵¹ '[T]he power to expropriate private property ... is generally, and I think rightly, regarded – to use the apt words of an American Court (see Cooley on Constitutional Limitations, 7th ed., p. 753n.) – as a power inherent in sovereignty': *Wheat Case* (1915) 20 CLR 54, 66 (Griffith CJ).

⁵² *Wheat Case* (1915) 20 CLR 54, 78 (Barton J).

⁵³ *Peanut Board v Rockhampton Harbour Board* (1933) 48 CLR 266, 280 (Starke J).

⁵⁴ Thomas M Cooley, *A Treatise on the Constitutional Limitations which Rest upon the Legislative Power of the States of the American Union* (6th ed, 1890) 643-4 [emphasis added].

⁵⁵ The Court was generally more open to American jurisprudence in its early years. See: *D'Emden v Pedder* (1904) 1 CLR 91, 113 (Griffith CJ):

'When ... we find embodied in the Constitution provisions undistinguishable in substance, though varied in form, from provisions of the Constitution of the United States which had long since been judicially interpreted by the Supreme Court of that Republic, it is not an unreasonable inference that its framers intended that like provisions should receive like interpretation'.

On the early High Court's use of American authorities, and the Privy Council's resistance to it, see: Menzies, above n 4, 1-3.

E *Conclusions from the Early Jurisprudence*

In summary, while relatively few cases examined s 51(xxxi) before World War Two,⁵⁶ they reveal sufficient indications of the early High Court's views on the placitum to reach a meaningful conclusion. Four important elements of the 'individual rights' approach to s 51(xxxi) were established in this early jurisprudence. First, the requirement of 'just terms' in s 51(xxxi) applied to limit all heads of legislative power, and could not be avoided merely by legislating under some other head of power. Secondly, 'just terms' required that each individual receive full market-value compensation, calculated using a hypothetical purchaser test. Thirdly, 'property' was interpreted broadly, ensuring a broad application of the protection of 'just terms'. Fourthly, judicial comments and interpretive approaches demonstrated a indispensable link between s 51(xxxi) and American eminent domain. The early High Court, therefore, took the 'individual rights' approach to s 51(xxxi), remaining consistent with the placitum's historical, theoretical and comparative contexts.

III EARLY WARTIME INTERPRETATIONS OF S 51(xxxi)

These early understandings of s 51(xxxi) would be challenged during World War Two. This section examines three early wartime cases: *Andrews v Howell*,⁵⁷ *Australian Apple and Pear Marketing Board v Tonking*,⁵⁸ and *Johnston Fear & Kingham & The Offset Printing Co Pty Ltd v Commonwealth*.⁵⁹ The first two decisions determined the validity of the *National Security (Apples and Pears Acquisition) Regulations 1939* (Cth), the latter the *National Security (Supply of Goods) Regulations 1939* (Cth),⁶⁰ as these early cases arose from the Commonwealth's compulsory acquisition of apples, pears and a printing press.

⁵⁶ Contentious appropriations of property, such as those involved in World War I commodity pooling, often occurred under State legislation. The experience of produce pooling in Australia is addressed in: F R Beasley, 'Produce Pools in Australia – I' (1928) 10 *Journal of Comparative Legislation and International Law* (3rd series) 74 and Beasley, above n 36; the related issue of price fixing during World War One is examined in: T R Bavin and H V Evatt, 'Price-Fixing in Australia during the War' (1921) 3 *Journal of Comparative Legislation and International Law* (3rd series) 202.

⁵⁷ (1941) 65 CLR 255.

⁵⁸ (1942) 66 CLR 77 ('*Tonking*').

⁵⁹ (1943) 67 CLR 314 ('*Johnston Fear*').

⁶⁰ Made by the Governor-General pursuant to s 5 of the *National Security Act 1939* (Cth).

A 'Just Terms' as a Constitutional Individual Right

In *Andrews v Howell* and *Tonking*, the Commonwealth claimed that it could acquire property under the defence power, free from the restriction of 'just terms'.⁶¹ If successful, this argument would have swept away the 'individual rights' approach to s 51(xxxi).

In *Andrews v Howell*, Starke J rejected the Commonwealth's claim, recognizing the absoluteness of the protection offered by s 51(xxxi):

An express power to acquire property on just terms ... indicates a legislative intent that property shall not be acquired by the Commonwealth ... unless on those terms. ... the provisions of the Constitution, in my opinion, preclude the Commonwealth from acquiring any property from any person otherwise than on just terms.⁶²

A similar view was implied by Rich ACJ proceeding directly to address whether 'just terms' had in fact been provided.⁶³ Justice Dixon, however, contemplated a narrower application of s 51(xxxi). He intimated that the placitum would not apply to an acquisition of property 'in which the Commonwealth Executive is not interested and which it does not desire to use for any governmental purpose'.⁶⁴ However, in the end Dixon J did not finally decide the issue. Nor did McTiernan J.⁶⁵ With Rich ACJ and Starke J rejecting the argument that 'just terms' were not required in legislation enacted under the defence power, Dixon J's comment here remained a lone speculation.

The same issue arose again in *Tonking*, when Starke and Dixon JJ did not sit.⁶⁶ At first instance, Williams J proceeded on the basis that 'just terms' were required.⁶⁷ On appeal, both Latham CJ and Rich J took the same view. Again, McTiernan J left the question open.⁶⁸ Taking into account the views expressed on this subject in *Andrews v Howell*, now four Justices (Latham CJ, Rich, Starke and Williams JJ) regarded s

⁶¹ *Andrews v Howell* (1941) 65 CLR 255, 261; *Tonking* (1942) 66 CLR 77, 91-2.

⁶² *Andrews v Howell* (1941) 65 CLR 255, 268 (Starke J).

⁶³ *Ibid* 264 (Rich ACJ). Chief Justice Latham was on diplomatic posting in Japan. See, eg: Stuart Macintyre, 'Latham, Sir John Greig (1877 - 1964)' in *Australian Dictionary of Biography* (Melbourne University Press, 1986) vol 10, 5.

⁶⁴ *Andrews v Howell* (1941) 65 CLR 255, 281-2 (Dixon J).

⁶⁵ *Ibid* 288 (McTiernan J).

⁶⁶ Justice Dixon was acting as the Australian representative in Washington DC. See eg: Kenneth Hayne, 'Dixon, Owen' in Tony Blackshield, Michael Coper and George Williams (eds), *Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 219.

⁶⁷ *Tonking* (1942) 66 CLR 77, 81-9 (Williams J).

⁶⁸ *Ibid* 115 (McTiernan J).

51(xxxi)'s requirements as applicable to all Commonwealth acquisitions of property, with Dixon J alone in suggesting a contrary approach.

A year later in *Johnston Fear*, the Commonwealth abandoned its argument that s 51(xxxi)'s requirements did not limit other heads of power.⁶⁹ Nonetheless, three Justices explicitly addressed the issue. Justice Starke elaborated on the approach his Honour had taken in *Andrews v Howell*:

the express power to make laws for the acquisition of property on just terms ... makes it plain that the general powers of the Parliament, e.g., the defence power, to legislate with respect to the subjects confided to it must not be interpreted as authorizing legislation for the acquisition of property.⁷⁰

Justice Williams stated that the requirement of 'just terms' could not be avoided by legislating under another other head of power (even defence).⁷¹ So too did Latham CJ:

the power to legislate with respect to defence cannot be interpreted as including a power to make laws for the acquisition of property upon any terms which commend themselves to Parliament, whether they are just or not. ... an express and specific power to make laws is given by par. xxxi. and that power is limited by the inclusion of the words 'on just terms.' ... the only power of the Commonwealth Parliament to legislate with respect to the acquisition of property for defence purposes is that conferred by s. 51 (xxxi).⁷²

Johnston Fear thus settled the issue: s 51(xxxi)'s requirement of 'just terms' would limit all heads of legislative power. The reinforcement in the early wartime decisions of the earlier view that s 51(xxxi) limited all other heads of power was essential to the maintenance of the 'individual rights' approach to the placitum: if other heads of power allowed the requirement of 'just terms' to be avoided, the result for the individual would be similar to s 51(xxxi) being struck out of the *Constitution*.

B *The Meaning of 'Just Terms'*

The compensation provisions of the *National Security (Apples and Pears Acquisition) Regulations 1939 (Cth)*⁷³ were challenged for failing to provide 'just terms' in *Andrews v Howell* and *Tonking*.

⁶⁹ *Johnston Fear* (1943) 67 CLR 314, 317 (Latham CJ).

⁷⁰ *Ibid* 325 (Starke J).

⁷¹ *Ibid* 331 (Williams J).

⁷² *Ibid* 318 (Latham CJ).

⁷³ *National Security (Apples and Pears Acquisition) Regulations 1939 (Cth)*. First, the Minister of Commerce was empowered to publish acquisition orders in the *Gazette*, whereupon fruit would 'become the absolute property of the Commonwealth' and any individual's property rights would be 'converted into claims for compensation': reg 12. There was then an entitlement 'to be paid such amount of compensation as the Minister, on the recommendation of the board, determines': reg 17.

In *Andrews v Howell*, the majority continued the ‘individual rights’ approach of the early cases. Rich ACJ held that ‘just terms’ required each individual to have ‘an *absolute right* to a compensation determined in a fair manner’.⁷⁴ Both Starke and McTiernan JJ found that ‘just terms’ had been provided, for Starke J because a ‘right to compensation ... recoverable, by due process of law’⁷⁵ satisfied s 51(xxxi),⁷⁶ and for McTiernan J because the regulations ‘safeguard the right of *any person* whose fruit is expropriated to a fair assessment of his claim for compensation’.⁷⁷ These Justices therefore insisted on the responsiveness to individual circumstances that was a hallmark of the ‘individual rights’ approach.

Remarkably, without any argument addressing this point, and without referring to any previous authority, Dixon J adopted a radically different approach to ‘just terms’. While he recognised the importance of examining the application of a law to determine whether ‘just terms’ had been provided, he then went on to say that:

if it appeared *from the terms of the enactment that the legislature had considered that a particular form or measure of compensation was just*, the court would give great weight to the conclusion of the legislature.⁷⁸

This focus on the words of the statute (rather than on its impact on each affected individual), and the deferential approach to Parliament’s interpretation of ‘just terms’, were marked departures from every previous judicial interpretation of s 51(xxxi). For the first time, Parliament was to be given some element of discretion in defining ‘just terms’, and it was Dixon J who proposed this change. His Honour’s reasons for doing so were not patent here, but will be explored in Chapter 6. Applying this deferential test to the facts, unsurprisingly Dixon J was ‘not prepared to say that it appears *on the face of the regulations* that the terms of the acquisition are unjust.’⁷⁹

Justice Dixon’s cautious suggestion of a deferential approach to Parliamentary interpretations of ‘just terms’ was not endorsed by any other Justice in *Andrews v Howell*. Further, in *Tonking*, Dixon J’s approach was rejected by the majority. At first instance, Williams J followed Isaacs J in the *Royal Metals Case* in requiring ‘that the

⁷⁴ *Andrews v Howell* (1941) 65 CLR 255, 264 (Rich ACJ) [emphasis added].

⁷⁵ *Ibid* 269 (Starke J).

⁷⁶ *Ibid* 270 (Starke J).

⁷⁷ *Ibid* 288 (McTiernan J) [emphasis added].

⁷⁸ *Ibid* 282 (Dixon J) [emphasis added].

⁷⁹ *Ibid* 284 (Dixon J) [emphasis added].

court can see that ‘just’ terms are available by law’.⁸⁰ His Honour added that ‘just terms’ meant that: ‘the statute or regulations must provide for the claimant receiving the *full value* of his property.’⁸¹ Moreover, Williams J required ‘a proper equivalent *in every case* for the value of the property taken’.⁸²

On appeal, Rich J addressed at length the unsatisfactory nature of Dixon J’s approach in *Andrews v Howell*. According to Rich J, review of whether the terms of an ‘acquisition of property’ were in fact ‘just terms’ was an example of the general principle that:

When by law a body is invested with authority which is made subject to limitations, inhibitions, conditions or other qualifications, neither the body itself, nor any other body which is not legally superior to that law can exempt it from compliance with them, or exclude a court of justice having jurisdiction in that behalf from determining whether they have been complied with if an exercise of the power is challenged for non-compliance, unless, of course, the law which imposes the qualifications, provides for its determination in some other way.⁸³

This statement expresses the idea later captured in Fullagar J’s phrase in *Australian Communist Party v Commonwealth* that ‘the stream cannot rise higher than its source’.⁸⁴ Applying this to s 51(xxxi), Rich J held that:

It is by the Constitution itself that the acquisition is required to be on just terms, and, since Parliament is bound by the Constitution, by no artifice or device can it withdraw from the determination by a court of justice the question whether any terms which it has provided are just.⁸⁵

Justice Rich pointedly noted that s 51(xxxi) provided Parliament with a power to make laws with respect to the ‘acquisition of property’ on ‘just terms’, ‘not, it is to be observed, on such terms as to it seem just’.⁸⁶ This was a clear and powerful rejection of the approach of Dixon J in *Andrews v Howell*.

Determining the adequacy of compensation, Rich J again approved the statement of Isaacs J in the *Royal Metals Case* that ‘just terms’ must be available as a matter of legal right.⁸⁷ Applying this requirement, Rich J stated that ‘[e]ach individual grower’ must be granted ‘a legal right to be paid *the full value* of his fruit’, cautioning that ‘some

⁸⁰ *Royal Metals Case* (1923) 33 CLR 1, 47 (Isaacs J); quoted in: *Tonking* (1942) 66 CLR 77, 84 (Williams J).

⁸¹ *Tonking* (1942) 66 CLR 77, 85 (Williams J) [emphasis added].

⁸² *Ibid* [emphasis added].

⁸³ *Ibid* 103 (Rich J).

⁸⁴ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 258 (Fullagar J).

⁸⁵ *Tonking* (1942) 66 CLR 77, 106 (Rich J).

⁸⁶ *Ibid* 104 (Rich J).

⁸⁷ *Ibid*.

growers must not be underpaid so that other growers may be overpaid – any regulations which allow this to be done must be unjust.’⁸⁸ Moreover, his Honour emphasized that ‘compensation must be *a full and perfect equivalent for the property taken*’.⁸⁹

Chief Justice Latham adopted a similar approach. His Honour held that s 51(xxxi) required the provision of some ‘means of obtaining, as of right, compensation upon just terms’.⁹⁰ Referring to American jurisprudence for the principle that the Fifth Amendment taking clause required ‘just compensation, not inadequate compensation’,⁹¹ Latham CJ interpreted ‘just terms’ as requiring ‘fair and adequate compensation.’⁹² Moreover, his Honour held that in order to provide ‘compensation upon just terms’ the regulatory scheme would have to grant a legal right to compensation that amounted to ‘payment ... of the *value of the property* acquired’ (echoing ‘value of the land’, the full market-value compensation provided for in s 63 of the *Lands Clauses Compensation Act 1845* (Eng))⁹³ before it could be regarded as granting the ‘right to obtain fair and adequate compensation’⁹⁴ required by s 51(xxxi).

Justice McTiernan was alone in *Tonking* in supporting the deferential review of ‘just terms’ suggested by Dixon J in *Andrews v Howell*. He did so despite Weston KC (for the Commonwealth) not attempting to support that approach.⁹⁵ Nonetheless, McTiernan J referred to the payment of ‘[c]ompensation which is just according to the regulations’,⁹⁶ and raised no objection to the Parliament declaring that ‘just terms’ could be determined by the Minister on the recommendation of the Board.⁹⁷

Thus, the result of these two apple and pear cases was that the ‘individual rights’ approach to ‘just terms’ was supported strongly by Rich ACJ in *Andrews v Howell* and Latham CJ, Rich and Williams JJ in *Tonking*. Their Honours insisted both that there must be a legal right to the ‘just terms’, and that ‘just terms’ require full market-value

⁸⁸ Ibid 107 (Rich J) [emphasis added].

⁸⁹ Ibid 106 (Rich J) [emphasis added].

⁹⁰ Ibid 99 (Latham CJ).

⁹¹ *Jacobs v United States*, 290 US 13, 16 (1933) (Hughes CJ, for the Court).

⁹² *Tonking* (1942) 66 CLR 77, 98 (Latham CJ).

⁹³ Ibid 96 (Latham CJ) [emphasis added].

⁹⁴ Ibid 99 (Latham CJ).

⁹⁵ He conceded that the question to be asked was ‘[w]hat is just compensation in the opinion of the Court?’: *ibid* 92 (Latham CJ).

⁹⁶ Ibid 113 (McTiernan J).

⁹⁷ Ibid 112-15 (McTiernan J).

compensation to each individual.⁹⁸ In each case, a minority of one, Dixon J in *Andrews v Howell* and McTiernan J in *Tonking*, suggested a greater degree of deference to the legislative judgement – a view which put at risk the ‘individual rights’ approach as it had been recognised in the historical, theoretical and comparative contexts of the placitum and in all earlier decisions on s 51(xxxi).

The issue of the interpretation of ‘just terms’ again arose in *Johnston Fear*, where the challenged regulation provided for the payment of the ‘price’ of goods acquired by the Commonwealth, but the ‘price’ was not to exceed a maximum fixed by the Commonwealth Prices Commissioner,⁹⁹ and would not take into account any consequential losses.¹⁰⁰ Invalidating the regulations, four Justices strongly endorsed the ‘individual rights’ approach to ‘just terms’, identifying three critical flaws in the regulation.

First, the payment of the ‘price’ of goods was not sufficient. As Latham CJ explained:

price cannot take into account any circumstances which may make it just in a particular case that a person whose goods are compulsorily taken from him should receive as compensation something more than the fixed price of the goods.¹⁰¹

Although Latham CJ admitted that ‘as a general rule’ the payment of the ‘price’ would be sufficient,¹⁰² his Honour observed that there would be exceptions to this general rule to which the regulations did not respond. They were therefore invalid, as:

‘Just terms’ involve *full and adequate compensation* for the compulsory taking. There are cases in which the payment of a ‘price’ for goods (as the term price must be interpreted in these Regulations) does not provide a just measure of compensation. The Regulations provide only for a price to be paid *in all cases*, and, therefore, do not satisfy the constitutional requirement of just terms.¹⁰³

To limit compensation to the price of the goods was also fatal for Rich J,¹⁰⁴ and for Williams J who explained that ‘just terms’ in s 51(xxxi) requires ‘a *full measure of compensation*.’¹⁰⁵

⁹⁸ Further, support for these propositions may be implicit in Starke J’s requirement that there be a ‘right to compensation ... recoverable, by due process of law’: *Andrews v Howell* (1941) 65 CLR 255, 269.

⁹⁹ *National Security (Supply of Goods) Regulations 1939* (Cth) reg 5.

¹⁰⁰ The Plaintiff claimed not only the ‘price’ of the press (£10,432) but also for loss of profits of £9,900: *Johnston Fear* (1943) 67 CLR 314, 315.

¹⁰¹ *Ibid* 322 (Latham CJ).

¹⁰² *Ibid*.

¹⁰³ *Ibid* 323 (Latham CJ) [emphasis added].

¹⁰⁴ *Ibid* 323-4 (Rich J).

¹⁰⁵ *Ibid* 333 (Williams J) [emphasis added].

Secondly, the regulations also failed in allowing a maximum price to be set. For Latham CJ, it was ‘inconsistent with the idea of just terms that a maximum compensation for goods taken should be fixed without any regard to the circumstances of a particular case’.¹⁰⁶ Justice Starke similarly objected to this setting of a maximum price, writing that:

This enables the Commonwealth to fix the price of goods. But it cannot do so either directly by legislation or indirectly through its Prices Commissioner, for this in substance would make it the judge of its own cause and permit it to determine for itself the price that should be paid for the goods.¹⁰⁷

The ability to set a maximum price was also impermissible for Rich and Williams JJ.¹⁰⁸

Thirdly, the regulations failed to provide compensation to every affected individual. As Rich J noted, compensation was available only to a person ‘who deals in or has control of’¹⁰⁹ the goods. His Honour objected that this demonstrated ‘a total disregard of the rights or claims of the owner or other persons interested’ in the goods, indicating ‘a failure to observe one of the cardinal principles of justice’.¹¹⁰ Justice Williams agreed that the regulations were invalid because they did not ‘ensure that *all persons interested in the goods*’¹¹¹ were awarded their ‘*full measure of compensation*’.¹¹²

In summary, Latham CJ, Rich, Starke and Williams JJ all found the regulations in breach of s 51(xxxi).¹¹³ Their Honours’ reasons identified three critical failures: ‘price’ did not amount in *all* cases to the full market-value compensation required by s 51(xxxi), the ability to set a maximum price could also breach this requirement, and not *all* affected individuals were given a right to compensation. The result in *Johnston Fear* not only confirmed the approach taken by the majority in *Andrews v Howell* and *Tonking* that s 51(xxxi) required the provision of a legal right to full market-value compensation, but it made express that this right must be extended to *all* individuals having *any* form of interest in the property acquired. Notwithstanding the different approach of Dixon J in *Andrews v Howell* and McTiernan J in *Tonking*, these three

¹⁰⁶ Ibid 322 (Latham CJ).

¹⁰⁷ Ibid 327 (Starke J).

¹⁰⁸ Ibid 323-4 (Rich J) 333-4 (Williams J). Justice Williams noted that this measure of compensation was apparently adopted from a British statute, and wrote: ‘But the Imperial Parliament can acquire property for public purposes on any terms it thinks fit’: at 334. The Commonwealth could not.

¹⁰⁹ *National Security (Supply of Goods) Regulations 1939* (Cth), reg 4(1).

¹¹⁰ *Johnston Fear* (1943) 67 CLR 314, 324 (Rich J).

¹¹¹ Ibid 333 (Williams J) [emphasis added]. ‘[A] person who deals in or has control of goods need not necessarily be a person having the sole or even any proprietary interest in the goods’: at 332.

¹¹² Ibid 333 (Williams J) [emphasis added].

¹¹³ Justice McTiernan avoided ruling on s 51(xxxi): *ibid* 330.

early wartime decisions strongly affirmed the ‘individual rights’ approach to ‘just terms’ in s 51(xxxi).

C *The Scope of ‘Acquisition of Property’*

Little express consideration of ‘acquisition of property’ occurred in these decisions. The Court treated apples, pears and printing presses as ‘property’ within s 51(xxxi), thereby confirming that ‘property’ included personal property. The broad interpretation of property required by the ‘individual rights’ approach was maintained in these decisions.

D *The Link to American Eminent Domain*

There is evidence of American influence in *Andrews v Howell*: two American takings cases were referred to by the appellant,¹¹⁴ and an explicit link was drawn by Dixon J:

The source of sec. 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.¹¹⁵

However, this is paradoxical, given Dixon J then departed radically from the American position, both in his Honour’s suggestion that s 51(xxxi)’s requirement of ‘just terms’ might not apply to this ‘acquisition of property’¹¹⁶ (which is inconsistent with eminent domain’s role as an individual protection) and also in his adoption of a deferential approach to Parliament’s interpretation of ‘just terms’¹¹⁷ (again, inconsistent with eminent domain’s protection of individual rights).¹¹⁸

The acknowledgement of the American eminent domain doctrine in *Tonking* was even more clear. Justice Williams stated that: ‘Placitum xxxi. is taken from the Fifth Amendment of the American Constitution’,¹¹⁹ and his Honour’s interpretation of ‘just

¹¹⁴ *Andrews v Howell* (1941) 65 CLR 255, 259. These were: *Chicago Burlington & Quincy Railroad v Chicago*, 166 US 226 (1896); *United States v Great Falls Manufacturing Co*, 112 US 645 (1884).

¹¹⁵ *Andrews v Howell* (1941) 65 CLR 255, 282 (Dixon J).

¹¹⁶ *Ibid* 281-2 (Dixon J).

¹¹⁷ *Ibid* 282 (Dixon J).

¹¹⁸ Justice Starke refused to follow a passage from *Cooley* (above n 54), but this was because the relevant American proposition was ‘founded upon principles deduced by the Supreme Court of the United States from the ‘due process’ clause of the American Constitution ... which has no counterpart in the Australian Constitution’: *ibid* 270 (Starke J).

¹¹⁹ *Tonking* (1942) 66 CLR 77, 82 (Williams J).

terms’ was dominated by seven American authorities.¹²⁰ Similarly, Rich J wrote of ‘the words in the Fifth Amendment to the United States Constitution ‘just compensation’, from which the words ‘just terms’ in the Australian Constitution are derived’.¹²¹ His Honour adopted, to describe s 51(xxxi), the account of the Fifth Amendment takings clause in Joseph Story’s *Commentaries on the Constitution of the United States*: ‘[t]his limitation or restriction is an ‘affirmance of a great doctrine established by the common law for the protection of private property’’.¹²² Justice Rich also interpreted ‘just terms’ by reference to American takings cases.¹²³ While Latham CJ made no express statements regarding the relevance of American cases, he nonetheless also determined the content of the requirement of ‘just terms’ with reference to the American takings jurisprudence.¹²⁴ The lone Justice to ignore American eminent domain was McTiernan J, with *Andrews v Howell* being the only authority referred to by his Honour.

The record of arguments in *Johnston Fear*¹²⁵ reveals that the authorities referred to were *Andrews v Howell* and *Tonking*, two of the Court’s other earlier compensation decisions,¹²⁶ one English case,¹²⁷ and Cooley’s *Constitutional Limitations* together with four American takings cases.¹²⁸ Thus, argument in relation to the interpretation of s 51(xxxi) still placed heavy reliance on American decisions. So too did their Honours’ judgments. Chief Justice Latham referred to four cases (none recorded as being cited by counsel): two American¹²⁹ and two English.¹³⁰ The continuing relevance of American

¹²⁰ Ibid 82-3, 85 (Williams J). The cases relied on by his Honour were: *United States v Jones*, 109 US 513, 519 (1883); *Monongahela Navigation Co v United States*, 148 US 312 (1893); *Bauman v Ross*, 167 US 548, 593 (1897); *Seaboard Air Line Railway Co v United States*, 261 US 299, 304 (1923); *Richmond Screw Anchor Co v United States*, 275 US 331, 345 (1928); *Jacobs v United States*, 290 US 13, 16, 17 (1933); *Yearsley v W A Ross Construction Co*, 309 US 18, 21 (1940).

¹²¹ *Tonking* (1942) 66 CLR 77, 106 (Rich J).

¹²² Ibid 104 (Rich J), quoting from: Joseph Story, *Commentaries on the Constitution of the United States* (Little, Brown, 3rd ed, 1858) vol II, 596, [1790]. Justice Rich also acknowledged the English heritage of s 51(xxxi), which his Honour said ‘is in accordance with Magna Carta’ (at 104), also quoting from: William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 4th ed, 1770) vol IV, 417.

¹²³ *Tonking* (1942) 66 CLR 77, 106 (Rich J). The cases relied on by his Honour were: *Monongahela Navigation Co v United States*, 148 US 312 (1893); *Seaboard Air Line Railway Co v United States*, 261 US 299, 304 (1923); *Jacobs v United States*, 290 US 13, 16, 17 (1933).

¹²⁴ See above at 132.

¹²⁵ *Johnston Fear* (1943) 67 CLR 314, 315-16.

¹²⁶ *Minister of State for Home Affairs v Rostron* (1914) 18 CLR 634 (see above n 39) and *Re Smith* (1920) 28 CLR 513, 522, 523 (see above n 39, n 41, n 45).

¹²⁷ *Liesbosch, Dredger v SS Edison (Owners)* [1933] AC 449, 464.

¹²⁸ *United States v Jones*, 109 US 513, 519 (1883); *Monongahela Navigation Co v United States*, 148 US 312 (1893); *Bauman v Ross*, 167 US 548, 593 (1897); *Seaboard Air Line Railway Co v United States*, 261 US 299, 304 (1923).

¹²⁹ *Johnston Fear* (1943) 67 CLR 314, 322 (Latham CJ): *Chicago, Milwaukee and St Paul Railway Co v Minnesota*, 134 US 418 (1890); *Baltimore and Ohio Railroad Co v United States*, 298 US 349, 364 (1936).

eminent domain for Latham CJ is also evident in the statement that ‘just terms’ require ‘full and adequate compensation’,¹³¹ an adaptation of the test his Honour derived from the American takings jurisprudence in *Tonking*.¹³² Although neither Rich nor Williams JJ referred to cases other than *Andrews v Howell* and *Tonking*, their approaches had already been shaped by American authorities in *Tonking* and remained consistent with them. Justice Starke predominantly relied on American authorities in the interpretation of s 51(xxxi): two of these had been cited by counsel;¹³³ however, two had not,¹³⁴ and the latter included one handed down by the Supreme Court just weeks before the High Court’s hearing in this case.¹³⁵

The link between s 51(xxxi) and American eminent domain remained strong in *Johnston Fear*, as it had been in *Andrews v Howell* and *Tonking*. In these early wartime cases, the arguments of counsel and the judgments of the Court continued to rely heavily on American eminent domain to interpret s 51(xxxi). In this respect also, the ‘individual rights’ approach remained dominant.

E Conclusion on the Early Wartime Cases

The social context of the early wartime cases is notable. *Andrews v Howell* in 1941 was decided against the background of a nation descending into total war.¹³⁶ In 1942, when the Court was sitting in Sydney hearing *Tonking*,¹³⁷ Australia was in a situation of unprecedented military difficulty: invasion was seriously feared.¹³⁸ The allies had

¹³⁰ *Johnston Fear* (1943) 67 CLR 314, 322 (Latham CJ); *Rickets v Metropolitan Railway Co* (1865) 34 LJQB 257, 261; *Jubb v Hull Dock Co* (1846) 9 QB 443, 455.

¹³¹ *Johnston Fear* (1943) 67 CLR 314, 323 (Latham CJ).

¹³² The statement in that case had been ‘fair and adequate compensation’: *Tonking* (1942) 66 CLR 77, 98 (Latham CJ); quoting: *Jacobs v United States*, 290 US 13, 16 (1933) (Hughes CJ, for the Court).

¹³³ *Johnston Fear* (1943) 67 CLR 314, 326 (Starke J); *United States v Jones*, 109 US 513, 519 (1883); *Bauman v Ross*, 167 US 548, 593 (1897).

¹³⁴ *Johnston Fear* (1943) 67 CLR 314, 328 (Starke J); *Mitchell v United States*, 267 US 341 (1925); *United States ex rel Tennessee Valley Authority v Powelson*, 319 US 266, 282-3 (1943).

¹³⁵ *United States ex rel Tennessee Valley Authority v Powelson*, 319 US 266 (1943) was handed down on 17 May 1943; *Johnston Fear* (1943) 67 CLR 314 was heard on 24-25 June and judgment delivered on 11 August.

¹³⁶ Prime Minister Menzies’ national broadcast on 17 June 1941 had issued the ‘prospectus of an unlimited war effort’. See: Paul Hasluck, *Australia in the War of 1939–1945, Series 4 – Civil, Volume I, The Government and the People, 1939–1941* (Australian War Memorial, 1952) 363.

¹³⁷ Justice Williams at first instance heard argument in March and April and delivered judgment in May; the appeal was argued in August and judgment delivered in October.

¹³⁸ Paul Hasluck, *Australia in the War of 1939–1945, Series Four – Civil, Volume II – The Government and the People, 1942–1945* (Australian War Memorial, 1970) 72. The situation in 1942 is also described in: Brian Galligan, *Politics of the High Court* (University of Queensland Press, 1987), 120-1.

surrendered in Singapore on 15 February, and Prime Minister Curtin announced the following day that: ‘The fall of Singapore opens the Battle for Australia’.¹³⁹ Bombing raids on Australia were occurring (although the public was not told the full seriousness of the first attack on Darwin on 19 February).¹⁴⁰ May and June saw Japanese midget submarines in Sydney harbour,¹⁴¹ the shelling of Sydney and Newcastle by Japanese submarines, and serious attacks on shipping along the East coast.¹⁴² Sydney’s war preparations included blackouts, the removal of coastal signage,¹⁴³ even barbed wire defences on beaches.¹⁴⁴ Curtin publicly stated: ‘We are at a stage in our history when the struggle for survival as a nation overrides every other consideration.’¹⁴⁵

Despite this extraordinary situation, the Court displayed a remarkable fidelity to the ‘individual rights’ approach to s 51(xxxi). First, the placitum limited every other head of power (even the defence power), so the requirement of ‘just terms’ could not be evaded: this was the settled view of Latham CJ, Rich, Starke and Williams JJ; only Dixon and McTiernan JJ left the question open.

Secondly, ‘just terms’ required that every individual with any interest in acquired property have a right to full market-value compensation. The requirement of a legal right was endorsed explicitly by Rich ACJ and implicitly by Starke J in *Andrews v Howell*, and by Latham CJ and Williams J in *Tonking*. That full market-value compensation was required was implied by Rich ACJ and Starke J in *Andrews v Howell*, expressly indicated by Latham CJ, Rich and Williams JJ in *Tonking*, and confirmed by Latham CJ, Rich and Williams JJ in *Johnston Fear*. That every individual with any interest in the property must receive ‘just terms’ was made clear by Latham CJ, Rich and Williams JJ in *Johnston Fear*. The dissenting approach of Dixon J in *Andrews v Howell* and McTiernan J in *Tonking* would have allowed Parliament some discretion in defining ‘just terms’. For a clear majority, the ‘individual rights’ approach

¹³⁹ John Curtin (Press Release, 16 February 1942); quoted in Galligan, above n 138, 120.

¹⁴⁰ See, eg: Hasluck, ‘1942-1945’, above n 138, 70, 89.

¹⁴¹ See: Peter Grose, *A Very Rude Awakening: The Night the Japanese Midget Subs Came to Sydney Harbour* (Allen & Unwin, 2007) 201-2.

¹⁴² Kate Darian-Smith, ‘War and Australian Society’ in Joan Beaumont (ed), *Australia’s War, 1939-45* (Allen & Unwin, 1996) 54, 54. See also: Hasluck, ‘1942-1945’, above n 138, 72, 172-3; Grose, above n 141, 205-6.

¹⁴³ Hasluck, ‘1942-1945’, above n 138, 125-8.

¹⁴⁴ Grose, above n 141, 5; Alan Krell, *The Devil’s Rope: A Cultural History of Barbed Wire* (Reaktion, 2002) 107.

¹⁴⁵ Curtin’s comments, in February 1942, are quoted in: Hasluck, ‘1942-1945’, above n 138, 116.

to s 51(xxxi) was indispensable: the placitum required no less than the granting, to every affected individual, of a legal right to full market-value compensation.

Thirdly, the link between s 51(xxxi) and American eminent domain was expressly acknowledged and thus maintained. The American takings jurisprudence dominated both the argument and the judgments on the interpretation of s 51(xxxi). Explicit statements of the link were made by Rich and Williams JJ, and American cases were determinative in the approaches of Latham CJ, Rich, Starke and Williams JJ. Indeed, Dixon J made the first express reference to the link, although his Honour's interpretive approach almost immediately abandoned it.

Although the Court was generally reluctant to limit Commonwealth power during the war,¹⁴⁶ s 51(xxxi) is a notable exception. Despite an extraordinary military situation, and the Court's generally expansive view of the scope of the defence power,¹⁴⁷ in these three early wartime s 51(xxxi) cases their Honours¹⁴⁸ steadfastly maintained the 'individual rights' approach to s 51(xxxi). The judgment of Latham CJ in *Johnston Fear* is particularly poignant:¹⁴⁹ he invalidated defence regulations for providing inadequate compensation just months after his son had been lost on war service.¹⁵⁰

IV LATER WARTIME INTERPRETATIONS OF S 51(xxxi)

The later wartime cases on s 51(xxxi) were *Minister of State for the Army v Dalziel*,¹⁵¹ which concerned the compulsory acquisition of an interest in land, and *Commonwealth v Huon Transport Pty Ltd*¹⁵² and *Marine Board of Launceston v Minister of State for*

¹⁴⁶ 'The High Court can claim with justice that in this war, as in the last, its decisions have shown a statesmanlike approach to the problems of total war': Geoffrey Sawer, 'The Defence Power of the Commonwealth in Time of War' (1946) 20 *Australian Law Journal* 295, 296.

¹⁴⁷ Thus, war 'gives by the very nature of the circumstances a paramount authority to the defence power': *Farey v Burvett* (1916) 21 CLR 433, 454 (Isaacs J).

¹⁴⁸ Both Latham CJ and Williams J had military backgrounds: Zelman Cowan, 'Latham, John Greig' in Blackshield, Coper and Williams (eds), above n 66, 419; Graham Fricke and Simon Sheller, 'Williams, Dudley' in Blackshield, Coper and Williams (eds), 713.

¹⁴⁹ It has been observed that generally Latham CJ: 'was sympathetic to an expansive view of Commonwealth legislative power, especially in the defence context': Cowan, above n 148, 421.

¹⁵⁰ His son was lost on 15 April 1943 (Macintyre, above n 63, 6); *Johnston Fear* was heard in Melbourne on 24-25 June and judgment was delivered in Sydney on 11 August.

¹⁵¹ (1944) 68 CLR 261 ('*Dalziel*').

¹⁵² (1945) 70 CLR 293 ('*Huon Transport*').

*the Navy*¹⁵³ which both involved the requisitioning of shipping. In these decisions, the Justices largely continued the ‘individual rights’ approach to s 51(xxxi).

A ‘Just Terms’ as a Constitutional Individual Right

The later wartime cases confirmed the conclusion that s 51(xxxi)’s requirement of ‘just terms’ limited all heads of power. In *Dalziel*, even McTiernan J, who had previously left the question open, accepted that this question had been resolved.¹⁵⁴

B The Meaning of ‘Just Terms’

In *Dalziel*, the Court was urged to depart from the ‘individual rights’ approach to ‘just terms’ that had been taken by the majority in all earlier cases. Fullagar KC, for the Commonwealth, argued that ‘[t]here must be a measure of discretion in Parliament as to what are just terms.’¹⁵⁵ Such a discretion would have two consequences. First, taking a cue from Dixon J in *Andrews v Howell*, full compensation might not be required ‘under the defence power or under marketing or pooling legislation’.¹⁵⁶ Secondly, ‘[i]f Parliament lays down general terms of acquisition which are found not to do ideal justice in a particular case there is not, for that reason alone, an acquisition on unjust terms’,¹⁵⁷ because ‘[i]f the terms, *generally speaking*, are just, then the acquisition is on just terms.’¹⁵⁸

The Commonwealth’s invitation to adopt this new approach to ‘just terms’ was declined by the majority, with only Starke J in dissent. For Rich J, s 51(xxxi) was ‘a provision of a fundamental character designed to protect citizens from being deprived

¹⁵³ (1945) 70 CLR 518 (*Marine Board*).

¹⁵⁴ His Honour wrote that:

‘The specific and explicit limitation on the power with which this placitum vests the Parliament would be frustrated by an interpretation of the Constitution which attributed to it any concurrent implied power to legislate which was not subject to the same limitations. To avoid this result it is necessary to adopt the interpretation that the only power with which the Constitution vests the Parliament to legislate on the subject of the acquisition of property is the express and limited power in s. 51 (xxxi).’ *Dalziel* (1944) 68 CLR 261, 294 (McTiernan J).

See also: at 275-6 (Latham CJ), 295 (McTiernan J), 306 (Williams J).

¹⁵⁵ *Ibid* 265 (Fullagar KC) (during argument).

¹⁵⁶ *Ibid*.

¹⁵⁷ *Ibid* 265-6.

¹⁵⁸ *Ibid* 268 [emphasis added].

of their property ... except upon just terms'.¹⁵⁹ Similarly, Latham CJ maintained that s 51(xxxi) required that legislation for the acquisition of property 'contain provisions which, in the opinion of a court, constitute just terms for the taking,'¹⁶⁰ adding that s 51(xxxi) 'is plainly intended for the protection of the subject',¹⁶¹ and requires 'just compensation *in every case*'.¹⁶² Justice Williams wrote that:

the determination of what is adequate compensation must vary so greatly in different circumstances that it would be extremely difficult to provide a detailed legislative scheme that would be just *in all cases* to which it was intended to apply.¹⁶³

In this passage, Williams J highlighted an important procedural consequence of the requirement that 'just terms' be guaranteed to *every* individual: no legislative determination is likely to provide 'just terms' and therefore the consideration of individual circumstances suggests a need for assessment of compensation by a Court or tribunal of some kind.¹⁶⁴ This picked up on the requirement of individual assessment of compensation determined by a judicial or arbitral process that has been seen in both the English theory and practice and in American eminent domain.¹⁶⁵

Justice Starke alone adopted an approach which deferred to Parliament's definition of 'just terms', writing that:

the terms of acquisition are, within reason, matters for legislative judgment and discretion. It does not follow that terms are unjust merely because 'the ordinary established principles of the law of compensation for the compulsory taking of property' have been altered, limited or departed from, any more than it follows that a law is unjust merely because the provisions of the law are accompanied by some qualification or some exception which some judges think ought not to be there. The law must be *so unreasonable as to terms that it cannot find justification in the minds of reasonable men*.¹⁶⁶

This was a radical departure from previous authority on s 51(xxxi), including Starke J's own previous judgments where he regarded 'just terms' as requiring full market-value compensation.¹⁶⁷ It was, however, reminiscent of the approach suggested by Dixon J in *Andrews v Howell*.¹⁶⁸

¹⁵⁹ Ibid 284-5 (Rich J).

¹⁶⁰ Ibid 282 (Latham CJ).

¹⁶¹ Ibid 277 (Latham CJ) [emphasis added].

¹⁶² Ibid 282 (Latham CJ).

¹⁶³ Ibid 308 (Williams J) [emphasis added].

¹⁶⁴ In the event of a non-judicial determination being chosen, his Honour suggested that the legislation 'should contain machinery for questions of law being determined by a court': *ibid*.

¹⁶⁵ See: Chapter 2, section IIC; Chapter 3, section IIIE.

¹⁶⁶ *Dalziel* (1944) 68 CLR 261, 291 (Starke J) [emphasis added].

¹⁶⁷ In *Andrews v Howell* (1941) 65 CLR 255, Starke J's criticism was that the terms provided were likely to be too generous, rather than insufficient: at 271; in *Johnston Fear* (1943) 67 CLR 314, his Honour

The two ship requisition cases turned on the question of whether ‘just terms’ required interest to be paid. Both are significant because the Justices’ used divergent approaches to answering this question. In *Huon Transport*, the Court determined that full market-value compensation was required for the use of ships requisitioned during the war, and calculated it using a hypothetical purchaser test.¹⁶⁹ Although this was consistent with the ‘individual rights’ approach, their Honours disagreed about whether the payment of interest was required.

For Rich and Williams JJ, the ‘individual rights’ approach to ‘just terms’ required that interest be paid to those whose property was compulsorily acquired. Justice Williams relied on an earlier precedent, *James Patrick & Co Pty Ltd v Minister of State for the Navy*, where he had required interest to ‘ensure’ that the individual receives ‘a full equivalent for the property taken’.¹⁷⁰ His Honour also quoted from an English case to the effect that withholding interest would ‘be going against common sense, justice, and honesty.’¹⁷¹ For Williams J, ‘just terms’ should not be construed ‘in a narrow and pedantic sense’:¹⁷²

compensation, to be fair and adequate, requires that the owner should be constructively placed in possession, as from the date of dispossession, of a sum of money representing the capital value of the property of which he has been deprived; so that, if there is any delay ... it is necessary, if he is to be fully compensated, that he should be paid interest from the date of dispossession until he receives the principal sum.¹⁷³

The necessity of ensuring a full indemnification was also critical to Rich J’s approach:

When a person is deprived of property, no terms can be regarded as just which do not provide for payment to him of the value of the property as at date of expropriation, together with the amount of any damage sustained by him by reason of the expropriation, over and above the loss of the value of the property taken. The amount so ascertained is no more than the just equivalent of the property of which he has been deprived. If it is paid to him synchronously with the act of deprivation, he receives full recompense. If, however, as is invariably the case, the property is taken in the first instance, and a considerable time elapses before any payment of

found the ability of the Minister to specify a maximum price breached the requirement of just terms: at 327-8.

¹⁶⁸ *Andrews v Howell* (1941) 65 CLR 255, 282 (Dixon J).

¹⁶⁹ *Huon Transport* (1945) 70 CLR 293, 302-3 (Latham CJ), 305-11 (Rich J), 312 (Starke J), 316-19 (Dixon J), 327-8 (McTiernan J), 330-1 (Williams J).

¹⁷⁰ *James Patrick & Co Pty Ltd v Minister of State for the Navy* (1944) 50 ALR 254, 259 (Williams J) (‘*James Patrick*’) [emphasis added].

¹⁷¹ *Huon Transport* (1945) 70 CLR 293, 335-6 (Williams J); quoting *Fletcher v Lancashire and Yorkshire Railway Co* (1902) 1 Ch 901, 908 (Buckley J), itself quoting *Rhys v Dare Valley Railway Co* (1874) LR 19 Eq 93, 95 (Bacon VC).

¹⁷² *Huon Transport* (1945) 70 CLR 293, 337 (Williams J); quoting: *James v Commonwealth* (1936) 55 CLR 1, 43 (Lord Wright).

¹⁷³ *Huon Transport* (1945) 70 CLR 293, 335 (Williams J).

compensation is made, the expropriation involves him in further loss, because he is deprived both of the opportunity of obtaining revenue from the property that once was his and of earning income or getting benefits by the use of the money to which he has become entitled in place of the property. Just terms therefore involve, as a matter of elementary fairness, the payment to him of interest on the money to which he is entitled for the time during which it is withheld from him.¹⁷⁴

Thus for Rich and Williams JJ, interest was required by s 51(xxxi) to give the full and complete indemnification required by ‘just terms’: the ‘individual rights’ approach.

In contrast, Dixon J declined to follow either *James Patrick* and *Tonking*, in which Williams J had awarded interest (in *Tonking*, this had been upheld by the Full Court).¹⁷⁵ Instead, Dixon J relied on the House of Lords decision in *Swift & Co v Board of Trade*,¹⁷⁶ which interpreted regulations under the *Defence of the Realm Act 1914* (UK) as not providing interest. From this interpretation of an English defence regulation, which had been criticized as inconsistent with English constitutional theory and previous legislative practice,¹⁷⁷ Dixon J concluded that interest was not part of ‘compensation’ in English law, and could not therefore be required by s 51(xxxi).¹⁷⁸ His Honour offered no further explanation as to why the interpretation of an English regulation should guide the application of s 51(xxxi) of the *Australian Constitution*.

Justice Starke made inconsistent comments regarding the provision of interest. Resolving the case on a matter of statutory interpretation, and not addressing s 51(xxxi), Starke J acknowledged that the claim for interest was ‘[o]n its face ... a fair claim’,¹⁷⁹ and referred to a Canadian case that had awarded interest.¹⁸⁰ However, his Honour followed *Swift* in refusing to award interest,¹⁸¹ but then added that: ‘the

¹⁷⁴ Ibid 306-7 (Rich J).

¹⁷⁵ Ibid 324 (Dixon J).

¹⁷⁶ [1925] AC 520 (*‘Swift’*).

¹⁷⁷ Dissenting in the Court of Appeal, Scrutton LJ expressly considered the position of affected individuals:

‘The owner of property seized does not receive full compensation if he loses the property in one year and only receives the value of the property at the time of loss five years afterwards. He has lost the use of and income from his property for five years; for five years the Crown would have had both the bacon and its price, and the owner would have no compensation for the loss of his bacon or its value for five years’: *Swift* (1924) 18 Ll L Rep 287, 291.

This was rejected by the House of Lords, as noted (with apparent agreement) by both Starke and Dixon JJ: *Huon Transport* (1945) 70 CLR 293, 315 (Starke J), 326 (Dixon J).

¹⁷⁸ Justice Dixon wrote that ‘it is, I think, difficult to say that [s 51(xxxi)] makes it necessary for the legislature to give more than the full content of ‘compensation,’ as compensation is understood in English law’: *Huon Transport* (1945) 70 CLR 293, 326.

¹⁷⁹ Ibid 315 (Starke J).

¹⁸⁰ *International Railway Co v Niagara Parks Commission* [1941] AC 328.

¹⁸¹ *Huon Transport* (1945) 70 CLR 293, 315 (Starke J). His Honour distinguished the Canadian case on the basis that it had involved ‘compulsory taking of land’ rather than ‘requisition of goods’: at 315.

Commonwealth will, I hope, see its way to do what is fair and just in the circumstances.¹⁸² This intimation that the failure to provide interest was not ‘fair and just’ makes his Honour’s failure to consider s 51(xxxi) striking.

The result in *Huon Transport* was that Rich and Williams JJ regarded ‘just terms’ as requiring interest, upholding the ‘individual rights’ approach; Dixon J did not award interest; Starke J refused to award interest, but said this was not ‘fair and just’, without considering s 51(xxxi); and Latham CJ and McTiernan J held on the facts that there had been no compulsory acquisition.¹⁸³ In sum, a majority of 4:2 refused to award interest, but no clear view emerged on s 51(xxxi).

The question of interest arose again in *Marine Board*.¹⁸⁴ Once more, the ‘individual rights’ approach was applied by Rich and Williams JJ to find that ‘just terms’ required interest,¹⁸⁵ Williams J emphasising that ‘interest is required to make the *compensation full and adequate*, or in other words ‘just’’.¹⁸⁶

However, this time Latham CJ departed from the ‘individual rights’ approach. Acknowledging that previous decisions indicated that s 51(xxxi) required interest,¹⁸⁷ and that American eminent domain provided ‘powerful support’ for this result,¹⁸⁸ Latham CJ wrote that ‘the delay in payment, though causing loss, is not something which is itself the subject matter of compensation for the taking’.¹⁸⁹ According to Latham CJ, the provision of interest:

is a proposition relating not to the subject of liability to pay on just terms for property taken, but to the indemnification of the owner of the property against loss arising from delay in payment. I agree that it may not be just that the Commonwealth should at the same time have both the use of the vessel and the use of the money which should have been paid to the owner of the vessel ... But ... the damage caused by the delay and measured by the assessment of interest is due to the delay and not to the acquisition.¹⁹⁰

¹⁸² Ibid 315 (Starke J).

¹⁸³ Ibid 303 (Latham CJ), 327 (McTiernan J).

¹⁸⁴ (1945) 70 CLR 518.

¹⁸⁵ Ibid 527 (Rich J), 536 (Williams J).

¹⁸⁶ Ibid 537 (Williams J) [emphasis added].

¹⁸⁷ Ibid 524 (Latham CJ). His Honour referred to: *James Patrick* (1944) 50 ALR 254 (Williams J); *Tonking* (1942) 66 CLR 77; and the judgments of Rich and Williams JJ in *Huon Transport* (1945) 70 CLR 293 (examined above).

¹⁸⁸ *Marine Board* (1945) 70 CLR 518, 524 (Latham CJ).

¹⁸⁹ Ibid 526 (Latham CJ).

¹⁹⁰ Ibid.

For Latham CJ, therefore, ‘just terms’ did not require interest, even though this result might not be just: a significant departure from the ‘individual rights’ approach.

Justice Starke again relied on *Swift* for the proposition that ‘[i]t cannot be said that terms are unjust if the full value of the property taken or requisitioned is given’¹⁹¹ irrespective of how long the individual must wait to receive that payment. Justices Dixon and McTiernan relied on equitable principles, holding that interest was required because if this ‘acquisition of property’ had been undertaken pursuant to a contract rather than under statutory compulsion, equity would have decreed specific performance of that contract.¹⁹² Their Honours did not explain why equitable principles relating to specific performance were determinative of the interpretation of s 51(xxxi). Curiously, while Dixon and McTiernan JJ ruled that interest was not required in *Huon Transport*, in *Marine Board* their Honours held that interest *was* required, although for the individuals affected the situations would have been indistinguishable.

In *Marine Board*, therefore, Rich and Williams JJ applied the ‘individual rights’ approach and required interest; Latham CJ rejected that approach and did not. The other Justices largely ignored s 51(xxxi): Starke J finding, based on *Swift*, that interest was not required; Dixon and McTiernan JJ applying equitable principles to justify reaching the opposite conclusion to that reached by their Honours in *Huon Transport*.

These later wartime cases saw a challenge to the ‘individual rights’ approach to ‘just terms’. In *Dalziel*, the ‘individual rights’ approach was maintained by Latham CJ, Rich, McTiernan and Williams JJ, with Starke J alone in accepting legislative discretion to interpret ‘just terms’. The result in *Huon Transport*, where all the Justices awarded full market-value compensation, in some ways reaffirmed the ‘individual rights’ approach. However, in both *Huon Transport* and *Marine Board*, there were significant departures from the ‘individual rights’ approach to the question of whether ‘just terms’ required interest. Although the ‘individual rights’ approach was maintained by Rich and Williams JJ, and had not been overruled by any new majority view of s 51(xxxi), it was not maintained as strongly in these later wartime cases.

¹⁹¹ Ibid 528 (Starke J).

¹⁹² Ibid 530 (Dixon J), relying on *Huon Transport* (1945) 70 CLR 293, 323 (Dixon J) and *Minister of State for the Navy v Rae* (1945) 70 CLR 339, 349 (Dixon J). See also: at 535 (McTiernan J).

C *The Scope of 'Acquisition of Property'*

The scope of interpretation of 'acquisition of property' is important, because it determines the reach of the protective operation of s 51(xxxi)'s requirement of 'just terms'. In *Dalziel*, Fullagar KC, for the Commonwealth, sought to confine s 51(xxxi) to 'the acquisition of some legal or equitable estate or interest in property' not including 'mere temporary possession or occupation'.¹⁹³ This would have left the taking possession of Dalziel's weekly tenancy under the *National Security (General) Regulations 1939* (Cth) outside s 51(xxxi). This argument was rejected by all Justices except Latham CJ.

Once again, Rich and Williams JJ used the 'individual rights' approach to justify this result. For Rich J, as noted above, s 51(xxxi) was 'a provision of a fundamental character designed to protect citizens from being deprived of their property by the Sovereign State except upon just terms',¹⁹⁴ and a broad interpretation of 'property' must be maintained because:

there is nothing in the placitum to suggest that the legislature was intended to be at liberty to free itself from the restrictive provisions of the placitum by taking care to seize something short of the whole bundle [of property rights] owned by the person whom it was expropriating.¹⁹⁵

Justice Rich noted that:

the Minister has seized and taken away from Dalziel everything that made his weekly tenancy worth having, and has left him with the empty husk of tenancy. In such circumstances, he may well say:-

'You take my house, when you do take the prop That doth sustain my house; you take my life, When you do take the means whereby I live.'¹⁹⁶

The quotation is from Shakespeare's *The Merchant of Venice*.¹⁹⁷ Justice Rich was highly critical of the Commonwealth's argument, noting that if it:

¹⁹³ *Dalziel* (1944) 68 CLR 261, 265.

¹⁹⁴ *Ibid* 284-5 (Rich J).

¹⁹⁵ *Ibid* 285 (Rich J). His Honour would not accept any interpretation of s 51(xxxi) that 'whilst preventing the legislature from authorizing the acquisition of a citizen's full title except upon just terms ... leaves it open to the legislature to seize possession and enjoy the full fruits of possession, indefinitely, on any terms it chooses, or upon no terms at all': at 286 (Rich J).

¹⁹⁶ *Ibid* 286 (Rich J).

¹⁹⁷ As circumstances turn unexpectedly against Shylock, he learns that, far from extracting his promised pound of flesh, he is to forfeit his wealth and is expected to beg the Duke to spare his life. Shylock proclaims that his life should not be spared at all if he is to forfeit his wealth: 'Nay, take my life and all, pardon not that,' is the line preceding the quotation in the judgment of Rich J: William Shakespeare, *The Merchant of Venice*, Act IV, Scene I, Lines 371-374 in Stanley Wells and Gary Taylor (General Eds), *The Oxford Shakespeare: The Complete Works* (Oxford University Press, 1988) 447.

were allowed to prevail, the Commonwealth Parliament could authorize the Executive to take possession of not only all or any of the private property of citizens but also the property of the States and keep it indefinitely without paying a farthing of compensation to any one. To accede to this argument would be in effect to strike placitum xxxi. out of the Constitution.¹⁹⁸

Similarly, Williams J held that ‘property’ was used ‘in the amplest connotation of the term’,¹⁹⁹ and that ‘entry into possession of land is an acquisition of an interest in the land’²⁰⁰ because the Commonwealth had negated ‘the principal purpose’ for which Dalziel had entered into his tenancy.²⁰¹ Their Honours relied on the ‘individual rights’ approach to justify their broad interpretations of ‘acquisition of property’.

Broad interpretations of ‘acquisition of property’ were also adopted by Starke and McTiernan JJ,²⁰² but without clear explanations of their Honours’ underlying approaches. However, in accepting a narrow interpretation of ‘property’ which his Honour limited to recognised legal estates or interests in property,²⁰³ Latham CJ implicitly rejected the ‘individual rights’ approach.²⁰⁴

The broad interpretations of ‘acquisition of property’ are not as important as the reasoning employed by the Justices.²⁰⁵ For Rich and Williams JJ, this was another instance where the ‘individual rights’ approach dictated the meaning of s 51(xxxi); it is unclear which approach was employed by Starke and McTiernan JJ; but Latham CJ reached a result inconsistent with the ‘individual rights’ approach.

¹⁹⁸ *Dalziel* (1944) 68 CLR 261, 287 (Rich J).

¹⁹⁹ *Ibid* 305 (Williams J); quoting: *Royal Metals Case* (1923) 33 CLR 1, 37 (Isaacs J).

²⁰⁰ *Dalziel* (1944) 68 CLR 261, 299 (Williams J).

²⁰¹ *Ibid* 305 (Williams J).

²⁰² *Ibid* 290 (Starke J), 295 (McTiernan J).

²⁰³ *Ibid* 276:

‘The Commonwealth cannot be said to have acquired land unless it has become the owner of land or of some interest in land. If the Commonwealth becomes only a possessor but does not become an owner of land, then, though the Commonwealth may have rights in respect to land, which land may be called property, the Commonwealth has not in such a case acquired property’.

²⁰⁴ His Honour’s view that ‘acts ... including taking possession and user of land which may cause loss or damage to persons interested in property’ could be outside s 51(xxxi) (*ibid* 273) is incompatible with the ‘individual rights’ approach to the placitum.

²⁰⁵ In the only other case to address ‘acquisition of property’ in the period under consideration, all Justices accepted that *Dalziel* had decided that ‘the taking of possession of property is an acquisition of property within the meaning of s. 51 (xxx.) of the Constitution’: *Australasian United Steam Navigation Co Ltd v Shipping Control Board* (1945) 71 CLR 508, 521 (Latham CJ, with whom McTiernan J agreed: at 527) (*‘United Steam’*). See also: 526 (Rich J), 527 (Starke J), 528 (Williams J).

D *The Link to American Eminent Domain*

The relationship between s 51(xxxi) and American eminent domain was a critical issue in these later wartime cases. An attempt to distinguish the two provisions was at the heart of the arguments advanced for the Commonwealth by Fullagar KC in *Dalziel*:

The language of s. 51 (xxxi.) of the Constitution stands out in very marked contrast to that of the Fifth Amendment of the Constitution of the United States of America and a reasonable inference would be that the framers of the Commonwealth Constitution deliberately avoided the language used in the Fifth Amendment.²⁰⁶

He referred to two textual differences, ‘just compensation’ instead of ‘just terms’²⁰⁷ and ‘taking’ instead of ‘acquisition’,²⁰⁸ and argued that the underlying purpose was different: the takings clause was ‘in a negative form’ giving ‘a constitutional guarantee’;²⁰⁹ whereas ‘[t]he real purpose of s. 51 (xxxi.), and the reason why it was expressed in an affirmative form and put into the list of powers, was to make quite certain that there should not be any doubt that the Commonwealth ... should be able to acquire property.’²¹⁰

No part of Fullagar KC’s argument of difference was accepted by Rich and Williams JJ. For Rich J, s 51(xxxi) implemented eminent domain²¹¹ and was a ‘provision of a fundamental character designed to protect citizens from being deprived of their property by the Sovereign State except upon just terms’.²¹² ‘Acquisition of property’ would be interpreted broadly, otherwise the protection to individuals would be weakened: ‘[t]o accede to this argument would be in effect to strike placitum xxxi. out of the Constitution.’²¹³ Section 51(xxxi) was a guarantee of individual rights like the Fifth Amendment takings clause, and American jurisprudence remained a legitimate

²⁰⁶ *Dalziel* (1944) 68 CLR 261, 264. The importance of textual differences was examined and rejected in Chapter 4, section IVA(I). Further, in arguing this case, Fullagar KC is recorded as referring to the Commonwealth carrying out a taking of property (rather than acquisition of property) on several occasions, including his statements that: ‘[a] taking and a payment of compensation to be assessed by an administrative body is in itself a taking not on unjust terms’ and that under s 51(xxxi) ‘[t]here may be a taking on terms ... not necessarily on payment of full compensation ... which will still be a taking on just terms, e.g., in pooling cases’: at 266. His opponent McKillop similarly used the expressions interchangeably, noting that ‘[i]n *Attorney-General v De Keyser’s Royal Hotel Ltd* the members of the Judicial Committee dealt indifferently with the terms ‘taking possession’ and ‘acquisition’ as though they were interchangeable terms’: at 268.

²⁰⁷ *Dalziel* (1944) 68 CLR 261, 264.

²⁰⁸ *Ibid* 265.

²⁰⁹ *Ibid* 264.

²¹⁰ *Ibid* 265.

²¹¹ ‘The subject of eminent domain is dealt with by ... s. 51 (xxxi.)’: *ibid* 284 (Rich J).

²¹² *Ibid* 284-5 (Rich J).

²¹³ *Ibid* 287 (Rich J).

source of interpretive guidance. Similarly, given Williams J had explicitly linked s 51(xxxi) to the Fifth Amendment takings clause in *Tonking*,²¹⁴ and that his approach in *Dalziel* remained consistent with American eminent domain and relied on earlier cases in which this doctrine had been influential, he also did not accept the argument that the American eminent domain was not to be used in the interpretation of s 51(xxxi).

The suggested difference between the Australian and American positions was only partially accepted by Latham CJ and McTiernan J. Nothing in the judgment of Latham CJ expressly distinguished American eminent domain. His Honour had previously relied on American authorities,²¹⁵ and still used the language of individual protection, writing that s 51(xxxi) 'is plainly intended for the protection of the subject, and should be liberally interpreted'.²¹⁶ This was, however, only partially implemented. His Honour's interpretation of 'acquisition of property' as not applying to the deprivation of possession was inconsistent with the 'individual rights' approach: as Latham CJ himself acknowledged, 'the right to possession is the most valuable attribute of ownership.'²¹⁷ Conversely, his Honour's approach to 'just terms' was consistent with American doctrine of eminent domain, maintaining the importance of full market value compensation to each individual.²¹⁸ Chief Justice Latham's approach to s 51(xxxi) was now fragmented – his Honour's 'individual rights' interpretation of 'just terms' clashed with the narrow interpretation of 'acquisition of property' that he adopted.

Justice McTiernan accepted that s 51(xxxi) differed from the takings clause in providing an express power 'to make law appropriating property for public use' instead of relying on an inherent or implied power for that purpose, and consequently acknowledged 'a need for caution in the application of the American decisions regarding the power of eminent domain and the safeguards upon its exercise.'²¹⁹ However, McTiernan J stated that 'just terms' was a 'specific and explicit limitation'²²⁰ which 'hedges the legislative power'²²¹ granted by s 51(xxxi), adding that the Fifth Amendment takings clause 'expresses a rule of political ethics akin to that which is

²¹⁴ (1942) 66 CLR 77, 82 (Williams J).

²¹⁵ *Tonking* (1942) 66 CLR 77, 98 (Latham CJ).

²¹⁶ *Dalziel* (1944) 68 CLR 261, 277 (Latham CJ).

²¹⁷ *Ibid* 277 (Latham CJ).

²¹⁸ See above at 141.

²¹⁹ *Dalziel* (1944) 68 CLR 261, 295 (McTiernan J).

²²⁰ *Ibid* 294 (McTiernan J).

²²¹ *Ibid*.

recognized by the limitations in s. 51 (xxxii).²²² It was this common ideal that explained McTiernan J's references to five American takings cases to interpret s 51(xxxii),²²³ showing that he regarded the American eminent domain as being of continuing relevance to the interpretation of the placitum.

The only Justice to indicate that s 51(xxxii) was significantly different from the Fifth Amendment takings clause was Starke J, who wrote that:

The constitutional power given to the Commonwealth by s. 51 (xxxii.) is a legislative power and not, as in the Fifth Amendment of the Constitution of the United States of America, a provision that private property shall not be taken for public use without just compensation.²²⁴

Acceptance of this difference involved a departure from Starke J's reliance on American authorities in *Johnston Fear*,²²⁵ and drove his adoption of a reasonableness review of Parliament's discretion in defining 'just terms',²²⁶ a radical departure from American eminent domain.²²⁷

Despite deviating from the takings jurisprudence on 'just terms', Starke J's approach to 'acquisition of property' was not merely consistent with American eminent domain, but was actually derived from it. Thus in *Dalziel*, he gave this definition of 'property':

Property, it has been said, is *nomen generalissimum* and extends to every species of valuable right and interest including real and personal property, incorporeal hereditaments such as rents and services, rights of way, rights of profit or use in land of another, and choses in action²²⁸

Compare that definition with the following text:

property is *nomen generalissimum*, and extends to every species of valuable right and interest, and includes real and personal property, easements, franchises and incorporeal hereditaments.²²⁹

²²² Ibid 294-5 (McTiernan J).

²²³ Ibid 294 (McTiernan J) referred to: *Kohl v United States*, 91 US 367 (1875); *Mississippi and Rum River Boom Co v Patterson*, 98 US 403 (1878); *United States v Gettysburg Electric Railway Co*, 160 US 668 (1895); *Chicago, Burlington & Quincy Railroad Co v City of Chicago*, 166 US 226 (1896); and at 296 referred to *Backus v Fort Street Union Depot Co*, 169 US 557, 571 (1897).

²²⁴ *Dalziel* (1944) 68 CLR 261, 291 (Starke J).

²²⁵ See above at 137.

²²⁶ *Dalziel* (1944) 68 CLR 261, 291 (Starke J).

²²⁷ Justice Starke still referred to an American takings case as establishing a rule relating to compensation for lost business profits. *Mitchell v United States*, 267 US 341 (1925) (Brandeis J, for the Court) was relied upon for the proposition that the owner of a business 'cannot claim compensation or damages for losses to his business or for its destruction consequent on the taking of his property': *Dalziel* (1944) 68 CLR 261, 292 (Starke J).

²²⁸ *Dalziel* (1944) 68 CLR 261, 290 (Starke J).

²²⁹ *Boston and Lowell Railroad Co v Salem and Lowell Railroad Co*, 68 Mass (2 Gray) 1, 35 (1854) ('*Boston and Lowell Railroad Co*'). The case involved the interpretation of the eminent domain clause in Article 10 of the Massachusetts Declaration of Rights, which provided that: 'Whenever the public

This latter passage is a quotation from an 1854 judgment of Shaw CJ of the Supreme Court of Massachusetts. Coincidence is an unlikely explanation for the striking similarities between these two judgments. Justice Starke's interpretation of 'property' in *Dalziel* was based on an unattributed adoption of a decision of the Supreme Court of Massachusetts interpreting that State's constitutional eminent domain clause, which in turn appeared to be an adaptation of *Coke on Littleton*.²³⁰ Ironically, in *Dalziel* American eminent domain was of the strongest influence on the interpretation of s 51(xxxi) for Starke J despite his Honour expressly rejecting that source of guidance.

In *Dalziel*, therefore, Justices Rich, McTiernan and Williams all continued to rely on American eminent domain in the interpretation of s 51(xxxi). The position for the remaining Justices was less clear: Latham CJ contradicted the 'individual rights' approach to 'acquisition of property' (but still followed that approach to 'just terms') and Starke J expressly rejected American eminent domain, but relied on it (without attribution) to interpret 'property' in s 51(xxxi).

exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor'.

²³⁰ Justice Isaacs in the *Royal Metals Case* said that: '[t]he word 'land' is, as has been said, *nomen generalissimum*' (*Royal Metals Case* (1923) 33 CLR 1, 31). The language of both Isaacs and Starke JJ parallels *Coke on Littleton*: 'Land in the legall signification comprehendeth any ground, soile or earth whatsoever, as Meadowes, Pastures, Woods, Moores, Waters, Marshes, Furses and Heath, *Terra est nomen generalissimum, & comprehendit omnes species terrae*': Sir Edward Coke, *The First Part of the Institutes of the Lawes of England: Or A Commentary upon Littleton* (1608) 4a; reprinted in Steve Sheppard (ed), *The Selected Writings and Speeches of Sir Edward Coke* (Liberty Funds, 2003) vol II, 606.

Justice Isaacs maintained the original context (land) taking only the first part of Coke's latin phrase '*terra est nomen generalissimum*' and rendering it as 'land is ... *nomen generalissimum*'. However, the second part of Coke's phrase (*comprehendit omnes species terrae*) did not appear in Isaacs' judgment. Justice Starke's source was not Isaacs J, nor was it purely *Coke on Littleton*.

Chief Justice Shaw, however, adopted all of Coke's phrase, taking '*Terra est nomen generalissimum, & comprehendit omnes species terrae*' and rendered it as 'property is *nomen generalissimum*, and extends to every species of valuable right and interest'. These exact words, which are a distinct adaptation of Coke's phrase for eminent domain purposes and not a direct translation (which would be: 'Land is an extremely general noun and comprehends all species of land': Sheppard (ed), vol II, 606), were incorporated into the judgment of Starke J in *Dalziel*, with Starke J also adopting Shaw CJ's extension of the phrase beyond land to 'real and personal property' including 'incorporeal hereditaments'.

Similar language is used in the dissenting judgment of Shiras J (with whom Gray and Peckham JJ agreed) in a later decision of the Supreme Court of the United States where his Honour wrote that property: 'includes everything that is the subject of ownership. It is a *nomen generalissimum*, extending to every species of valuable right and interest, including things real and personal, easements, franchises, and other incorporeal hereditaments': *Scranton v Wheeler*, 179 US 141, 170 (1900); citing *Boston and Lowell Railroad Co*, 68 Mass (2 Gray) 1, 35 (1854). It will be noted, however, that the paraphrase adopted by Shiras J is expressed in different terms to the phrase apparently quoted from *Boston and Lowell Railroad Co* by Starke J, which indicates the Massachusetts decision as the likely source relied upon by Starke J.

In *Huon Transport*, the relationship between s 51(xxxi) and American eminent domain remained a subject of disagreement. Once again, the link was maintained by Rich and Williams JJ. Stating an ‘individual rights’ approach to ‘just terms’, Rich J referred both to *Tonking*²³¹ and the American takings jurisprudence.²³² Of the reliance by Starke and Dixon JJ on *Swift*, Rich J wrote that:

With all respect, I fail to see what light the technical rules of one branch of a particular system of municipal law can be regarded as throwing on a non-technical phrase, such as ‘just terms,’ when found in a constitutional charter.²³³

Rejecting that interpretation of ‘just terms’ based on the interpretation of an English defence regulation, Rich J maintained that s 51(xxxi) should be interpreted in accordance with American eminent domain.²³⁴

The link to the American takings jurisprudence was also maintained by Williams J, who noted that s 51(xxxi) ‘if it is not taken from, has at least a close affinity in language to’ the Fifth Amendment takings clause.²³⁵ Justice Williams relied on *James Patrick*, in which his Honour’s approach was consistent with American eminent domain²³⁶ and where he had used the Australian terms ‘just terms’ and ‘acquisition’ interchangeably with the American terms ‘just compensation’ and ‘taking’.²³⁷ Further, Williams J also expressly rejected *Swift*: noting that *Swift* drew a distinction between compensation for the acquisition of real and personal property, Williams J stated that s 51(xxxi) ‘as one would expect, makes no distinction in the condition that the terms must be just whether the legislation authorizes the acquisition of real or personal property or both.’²³⁸ Moreover, his Honour explained that *Swift* was irrelevant:

The Imperial Parliament is a legislature with untrammelled powers, and can legislate to acquire property on any terms it thinks fit. *Swift’s Case* ... is in no sense an authority that legislation which does not provide for the payment of interest upon the amount of compensation from the date that an owner is dispossessed of his property is legislation which contains just terms for the acquisition of property, and it throws

²³¹ *Huon Transport* (1945) 70 CLR 293, 307 (Rich J).

²³² Justice Rich referred to James Kent, *Commentaries on American Law*, vol II, 339 note (Rich J did not indicate which edition, and he used the * page numbering which was common to all editions from the 2nd onwards) and *Seaboard Air Line Railway Co v United States*, 261 US 299 (1923).

²³³ *Huon Transport* (1945) 70 CLR 293, 309 (Rich J).

²³⁴ *Ibid* 307 (Rich J).

²³⁵ *Ibid* 335 (Williams J).

²³⁶ In *Huon Transport*, Williams J wrote that the American takings clause requirement of ‘just compensation’ was ‘intended to provide that when a subject was deprived of his property by compulsory process he was entitled to be placed, so far as money could do so, in exactly the same position as though he had not been dispossessed’: *ibid*, 335.

²³⁷ His Honour used ‘just compensation’ in *James Patrick* (1944) 50 ALR 254, 256, and ‘taking’ at 255-8.

²³⁸ *Huon Transport* (1945) 70 CLR 293, 337 (Williams J).

no real light, therefore, upon the proper interpretation to be placed upon these words in the placitum.²³⁹

Of Dixon J's attempt to explain the decisions in *James Patrick* and *Tonking* as being consistent with '[t]he considerations upon which courts of equity have proceeded in allowing interest in the compulsory purchase of land',²⁴⁰ Williams J retorted that: '[a]ssuming that the orders *could* be justified on these grounds, they were *in fact* based on the broader ground that the payment of interest was required to make the compensation just'.²⁴¹ Rejecting the approaches of Starke and Dixon JJ, Williams J maintained the link between s 51(xxxi) and the American doctrine of eminent domain.

Although Latham CJ and McTiernan J found s 51(xxxi) inapplicable, both indicated some relevance of American eminent domain. Nothing said by Latham CJ indicated a departure from his approach in *Tonking* of interpreting 'just terms' by reference to the American takings jurisprudence: indeed, Latham CJ's references in *Huon Transport* were to *Spencer* and five United States authorities.²⁴² Notwithstanding the inconsistency of Latham CJ's approach to 'acquisition of property' in *Dalziel* with American eminent domain, in *Huon Transport* he continued to rely on American authorities regarding 'just terms'. Justice McTiernan, as in *Dalziel*, noted the difference between s 51(xxxi) and the Fifth Amendment takings clause.²⁴³ In the earlier case, despite making similar statements McTiernan J still relied on American authorities; here the only references were to Australian cases,²⁴⁴ but his Honour's judgment evidenced no change of approach.

A significant departure from American eminent domain was signalled in *Huon Transport* by Dixon J, who refused to follow *James Patrick* and *Tonking* because they were:

guided by the principles governing in America the ascertainment of the 'just compensation' to which the citizen whose property is taken by the Government

²³⁹ Ibid 336 (Williams J).

²⁴⁰ Ibid 324 (Dixon J).

²⁴¹ Ibid 337 (Williams J) [emphasis added].

²⁴² *United States v Russell*, 80 US (13 Wallace) 623 (1871); *Schillinger v United States*, 155 US 163 (1894); *United States v Lynah*, 188 US 445, 464 (1903); *Tempel v United States*, 248 US 121 (1918); *United States v North American Transportation and Trading Co*, 253 US 330, 337 (1920). His Honour referred to the English case of *Liesbosch, Dredger v Edison SS (Owners)* [1933] AC 449, 465 (Lord Wright) but only as to the difficulty of valuing the use of a ship.

²⁴³ *Huon Transport* (1945) 70 CLR 293, 327 (McTiernan J).

²⁴⁴ *Spencer* (1907) 5 CLR 418; *Andrews v Howell* (1941) 65 CLR 255; *Tonking* (1942) 66 CLR 77.

becomes entitled under the interpretation there placed upon the Fifth Amendment of the Constitution of the United States.²⁴⁵

His Honour rejected this link to the American takings jurisprudence, writing that:

Our Constitution, when it refers to ‘just terms’, is placing a qualification on the legislative power it bestows to acquire property compulsorily. But ... Section 51 (xxxii.) has not the effect of transferring into our Constitution the Fifth Amendment, nor all the glosses placed upon it.²⁴⁶

Not only would Dixon J not accept guidance from American cases, his Honour disregarded earlier Australian authorities because of their use of American eminent domain jurisprudence.²⁴⁷ Justice Starke made no express comments on s 51(xxxii) in *Huon Transport*, but in not reviewing ‘just terms’ despite acknowledging an unfair result, Starke J continued the approach indicated in *Dalziel* (in which his Honour had turned away from American eminent domain in the interpretation of ‘just terms’).

In *Huon Transport*, the weight of opinion remained with the relevance of American eminent domain to s 51(xxxii): this was the strong view of Rich and Williams JJ, and was also the approach taken, albeit partially, by Latham CJ and McTiernan J. The minority of Starke and Dixon JJ both desired to break from American eminent domain.

Disagreement over the relevance of the American eminent domain to s 51(xxxii) persisted in *Marine Board*. Support for the link came from the Plaintiff’s counsel referring to American authorities,²⁴⁸ and Rich and Williams JJ did not deviate from their Honours’ previous approach. Chief Justice Latham again gave mixed signals, writing that:

This Court is not bound by the decisions of the Supreme Court of the United States, but the authorities mentioned must be recognized as affording very strong persuasive support for the view submitted on behalf of the claimant.²⁴⁹

His Honour also examined the takings jurisprudence, concluding that it provided ‘powerful support’ for the claimant’s case.²⁵⁰ However, Latham CJ in the end deviated

²⁴⁵ *Huon Transport* (1945) 70 CLR 293, 324 (Dixon J).

²⁴⁶ *Ibid* 326 (Dixon J).

²⁴⁷ *Ibid* 324-5 (Dixon J).

²⁴⁸ *Phelps v United States*, 274 US 341, 343 (1927); *Liggett & Myers Tobacco Co v United States*, 274 US 215 (1927); *Russian Volunteer Fleet v United States*, 282 US 481, 489 (1931); *Marine Board* (1945) 70 CLR 518, 519-20 (Reynolds KC, in argument).

²⁴⁹ *Marine Board* (1945) 70 CLR 518, 524 (Latham CJ). His Honour went on to show that English law was generally not so favourable: at 525.

²⁵⁰ *Seaboard Air Line Railway Co v United States*, 261 US 299, 304, 306 (1923); quoted in: *Marine Board* (1945) 70 CLR 518, 524 (Latham CJ). His Honour also referred to: *De Witt Garrison Brown v United States*, 263 US 78 (1923); *Phelps v United States*, 274 US 341 (1927); *Jacobs v United States*, 290 US 13 (1933).

from American eminent domain in not insisting on the payment of interest. Justice Starke issued a blunt denial of the relevance of American eminent domain, writing that: ‘American authorities were referred to, but it is enough to say that the Court is governed by English law and ... the law of other countries has no bearing upon the case in hand.’²⁵¹ Nothing about the relationship (or lack thereof) between s 51(xxxi) and the Fifth Amendment takings clause was said by Dixon and McTiernan JJ.

Marine Board saw Rich and Williams JJ maintain the link between s 51(xxxi) and American eminent domain. Justice Starke took the opposite view, as had Dixon J in *Huon Transport*. Chief Justice Latham was receptive to American authorities, but adopted a result incompatible with them; McTiernan J noted a need for caution in their use in *Huon Transport*, but did not resile from the reliance he had placed on American jurisprudence in *Dalziel*. The fact that the relevance of American eminent domain was now contested is itself significant – for the first time in the Court’s history, it could not be said that a clear majority of the Justices consistently interpreted s 51(xxxi) by reference to American eminent domain. From the judgments examined thus far, no clear picture emerges as to why there was an increasing reluctance to use American eminent domain in the interpretation of s 51(xxxi). In Chapter 6, however, this issue will be addressed in detail.

E *Conclusions from the Later Wartime Cases*

In the interpretation of ‘just terms’ in the later wartime cases, the majority continued to apply the ‘individual rights’ approach, requiring the provision of a legal right to full market-value compensation for each individual: this was the approach of Latham CJ, Rich, McTiernan and Williams JJ in *Dalziel*, although Starke J would have reviewed ‘just terms’ only to see if the legislative provision had been unreasonable in determining the terms. However, the question of whether interest was required by ‘just terms’ saw divisions of opinion on the Court: in *Huon Transport*, Rich and Williams JJ held that it was, while Starke and Dixon JJ held that it was not; in *Marine Board*, Latham CJ also found that interest was not required by s 51(xxxi), although this was a dissenting view on the facts. A drift away from the ‘individual rights’ approach was evident for at least a minority of Justices. The interpretation of ‘acquisition of property’

²⁵¹ *Marine Board* (1945) 70 CLR 518, 529 (Starke J).

remained broadly consistent with the ‘individual rights’ approach (with the exception of Latham CJ in *Dalziel*), although only Rich and Williams JJ demonstrably relied upon the ‘individual rights’ approach to justify the interpretation of ‘property’.

The use of American eminent domain continued to drive the majority’s interpretation of the placitum, although significant disagreements developed around this. Justices Rich and Williams continued to interpret s 51(xxxi) by reference to American eminent domain, strongly resisting all challenges to this view. The other Justices were not as resolute. Although McTiernan J noted a need for caution in the use of American authorities in both *Dalziel* and *Huon Transport*, his Honour in *Dalziel* also noted the common ethos reflected in the two provisions and used the American takings jurisprudence to interpret ‘just terms’. In *Dalziel*, Latham CJ was both inconsistent (on ‘acquisition of property’) and consistent (on ‘just terms’) with American eminent domain, and mixed signals continued from his Honour in *Marine Board*. Justice Starke in *Marine Board* expressly rejected American authorities, as his Honour had done in *Dalziel* in the interpretation of ‘just terms’, but this thesis has revealed (for the first time) that in *Dalziel*, Starke J relied (without acknowledgment) on an American eminent domain case to interpret ‘property’. Justice Dixon in *Huon Transport* was the only Justice to conclusively reject American eminent domain. Although, therefore, significant challenges had arisen to the Court’s approach of interpreting s 51(xxxi) using American eminent domain, no majority had yet formed to overrule that approach.

The ‘individual rights’ approach to s 51(xxxi) was still applied in the later wartime cases, but by the close of the war the relationship between s 51(xxxi) and American eminent domain was being seriously questioned for the first time, and a significant number of Justices were drifting away from aspects of the ‘individual rights’ approach.

V CONCLUSION

This Chapter has analysed the first era of the High Court’s s 51(xxxi) jurisprudence, which extended until 1945. This material has been the subject of very little academic commentary. The cases examined in the first section of this chapter have been almost completely ignored on the basis of a common misconception that s 51(xxxi) ‘assumed

no great importance until World War II'.²⁵² Moreover, the post-war commentary was heavily influenced by the earliest decisions of the second era of s 51(xxxi) jurisprudence, starting from 1946: constitutional commentators tended to ignore the first era cases and focus only on the very latest decisions. Thus, the assessments of 'just terms' by Bailey in 1951 and Baker in 1952 were contrary to the first era jurisprudence without even acknowledging it;²⁵³ Nicholas (1948) and Wynes (1956) at least adverted to the first era of s 51(xxxi) jurisprudence noting that 'there has been some fluctuation in the meaning attached by the Court to the words 'just terms''.²⁵⁴ Nicholas, Bailey and Baker were each ambivalent about the relationship between s 51(xxxi) and the Fifth Amendment takings clause, and proceeded as if the Court had always been uncertain about the relationship.²⁵⁵ Further, Nicholas, Bailey and Baker all treated 'eminent domain' as meaning only a legislative power of appropriation of property:²⁵⁶ Bailey's statement, quoted with approval by Baker, that 'the Court is in process of evolving a distinctive Australian contribution to the law of eminent domain'²⁵⁷ was applied by these authors to describe changes so significant they are better seen as Australian *departures* from eminent domain.²⁵⁸

²⁵² K H Bailey, 'Fifty Years of the Australian Constitution' (1951) 25 *Australian Law Journal* 314, 327-8. Similarly, R W Baker, 'The Compulsory Acquisition Powers of the Commonwealth' in Rae Else-Mitchell (ed), *Essays on the Australian Constitution* (LawBook, 1952) 156 addressed very little material pre-dating *Andrews v Howell* (1941) 65 CLR 255.

²⁵³ Bailey wrote, in apparent ignorance of the material examined in this Chapter:

'Compensation' is, of course, a technical term, with the established meaning of 'full pecuniary equivalent of the property taken'. Our own phrase, 'just terms', is less technical, leaving scope for the discretion of the Parliament. The justice of the 'terms' must be considered from the point of view of the community as well as of the dispossessed owner': Bailey, above n 252, 328.

Baker, in a passage descriptive of the later approach, similarly wrote that:

'just terms' is not always the same thing as the 'just compensation' provided for in the American Fifth Amendment ... Australian courts have construed 'just terms' in the light of reasonableness and fairness ... [having] regard to the interests of the community as well as those of the person dispossessed. ... the terms of acquisition are, within reason, matters for legislative judgment and discretion': Baker, above n 252, 169-71.

²⁵⁴ H S Nicholas, *The Australian Constitution: An Analysis* (Law Book, 1948) 199; quoted in: W Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia* (Law Book, 2nd ed, 1956) 467.

²⁵⁵ Nicholas, above n 254, 199. Bailey acknowledged that s 51(xxxi) was 'no doubt inspired by the terms of the Fifth Amendment' and that 'just terms' was 'a condition ... in a form apparently based on the Fifth Amendment', yet he concluded that the two provisions 'differ considerably both in detail and in general effect': Bailey, above n 252, 327. Similarly, Baker emphasised the differences between s 51(xxxi) and the Fifth Amendment takings clause (Baker, above n 252, 163, 184), but nonetheless frequently used American cases (at 164, 165, 166, 172, 177-8), and noted that '[n]early all the Justices of the High Court refer to the American decisions' (at 177).

²⁵⁶ Nicholas, above n 254, 198.

²⁵⁷ Bailey, above n 252, 328; quoted with approval in Baker, above n 252, 169.

²⁵⁸ For example, Baker identifies as a 'distinctive Australian contribution' to eminent domain the adoption of a deferential review of 'just terms' that is entirely *inconsistent* with eminent domain theory and its American practice: Baker, above n 252, 169-70.

Contrary to this sparse academic literature, and notwithstanding evidence in the later wartime cases of increasing fracturing of the Court's approach, the first era of s 51(xxxi) jurisprudence was the era of the 'individual rights' approach. This Chapter has demonstrated its application in four key areas. First, s 51(xxxi) was held to limit all heads of power: even legislation under the defence power had to comply with s 51(xxxi)'s requirement of 'just terms'. Secondly, the requirement of 'just terms' was interpreted to require the provision of a legally-enforceable right to full market-value compensation for each affected individual, including the provision of interest if there is a delay between the acquisition and the payment of compensation. Thirdly, 'acquisition of property' was interpreted broadly (as required by the 'individual rights' approach) with the 'individual rights' approach being the preferred justification for that interpretation. Fourthly, s 51(xxxi) was interpreted by reference to the American eminent domain jurisprudence.

The 'individual rights' approach to s 51(xxxi) – evidenced by the application of the placitum to limit all heads of power, the interpretation of 'just terms' as requiring a legal right to full market-value compensation for each affected individual, its use to explain the interpretation of 'acquisition of property', and the continued reliance on American eminent domain in the interpretation of the placitum – was maintained by the Court even at the height of the war, demonstrating the strength of the Justices' commitment in the first era to the 'individual rights' approach to s 51(xxxi). In taking the 'individual rights' approach, the Court confirmed the interpretation of the placitum that Part Two of this thesis has shown its historical, theoretical and comparative contexts suggested.

The task for Chapter 6 of this thesis will be to trace the influence of this trend away from the 'individual rights' approach in cases after the war, and to identify what caused the Court to turn away from its earlier decisions on the placitum and depart from the guidance available from the historical, theoretical and comparative contexts of s 51(xxxi) that had previously informed the Court's interpretation of the placitum.

CHAPTER 6:

THE SECOND ERA:

THE 'LEGISLATIVE POWER' APPROACH

I INTRODUCTION

Chapter 5 demonstrated that the first era s 51(xxxi) jurisprudence adopted the ‘individual rights’ approach to the placitum, insisting on a legal right to full market-value compensation for each affected individual, even during wartime. Yet, towards the end of the first era there was evidence of divergence, with some Justices appearing to turn away from aspects of the ‘individual rights’ approach.

This Chapter examines the second era of the High Court’s jurisprudence on s 51(xxxi), comprising eight decisions handed down between 1946¹ and 1961.² Its focus is to identify why the Court eventually departed from the ‘individual rights’ approach, and to explore and analyse the source and content of, and justifications proffered for, the new ‘legislative power’ approach which replaced it. Further, this Chapter compares the explanatory power of the two approaches in resolving s 51(xxxi) cases. It will be argued that Dixon J was the catalyst for the Court’s change of approach, and it will be shown that his Honour led the development of the new approach. It will be further argued that Dixon J’s new approach both lacked a sufficient justification to turn away from the interpretation of s 51(xxxi) suggested by its historical, theoretical and comparative contexts, and introduced interpretive inconsistencies which have resulted in unsatisfactory doctrine interpreting the placitum. The few academic commentaries that have addressed these second era cases did not attempt the fundamental analysis of the jurisprudence that will be undertaken in this Chapter’s comparison of the competing ‘individual rights’ and ‘legislative power’ approaches to s 51(xxxi).

¹ *Grace Brothers Pty Ltd v Commonwealth* (1946) 72 CLR 269 (‘*Grace Brothers*’).

² *A-G (Cth) v Schmidt; Re Döhnert Müller Schmidt & Co* (1961) 105 CLR 361 (‘*Schmidt*’). The six cases on s 51(xxxi) decided in the interim that will be examined in depth in this Chapter are: *McClintock v Commonwealth* (1947) 75 CLR 1; *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495 (‘*Nelungaloo*’); *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 (‘*Bank Nationalisation Case*’); *P J Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382 (‘*Magennis*’); *Burton v Honan* (1952) 86 CLR 169; *Commissioner of Taxation v Clyne* (1958) 100 CLR 246 (‘*Clyne*’).

Some other decisions involving s 51(xxxi) may be noted here. In *R v Taylor; Ex parte Federated Ironworkers’ Association of Australia* (1949) 79 CLR 333, an argument relating to s 51(xxxi) was belatedly added but rejected in the unanimous judgment as ‘absurd’: at 339. In *Allpike v Commonwealth* (1948) 77 CLR 62, the Court read down the definition of ‘war service estate’ in s 4 of the *War Service Estates Act 1942* (Cth) avoiding the need to address a s 51(xxxi) argument. In *Federal Council of the British Medical Association in Australia v Commonwealth* (1949) 79 CLR 201, Latham CJ found that ‘just terms’ had been provided, as ‘a prevailing retail price is obviously a fair price and therefore amounts to just terms’: at 241; Dixon J held that there had been no compulsory acquisition: at 270. Emphasising that there was no ‘acquisition of property’ merely by the setting of a price at which goods could be sold voluntarily, Dixon J wrote that: ‘[t]he protection which s. 51 (xxxii.) gives to the owner of property is wide. It cannot be broken down or avoided by indirect means. But it is a protection to property and not to the general commercial and economic position occupied by traders’: at 270.

Section II of this Chapter analyses the ‘legislative power’ approach to s 51(xxxi) advanced by Dixon J in *Grace Brothers*. This is supplemented by an examination of Dixon’s extra-curial writings and other relevant secondary literature to locate the genesis of this new approach. Section III then examines the acceptance of Dixon’s ‘legislative power’ approach and the demise of the ‘individual rights’ approach. It seeks to identify the critical differences between the two approaches and compare their respective explanatory power, based on their application in five decisions in the second era (before the ‘legislative power’ approach was unanimously accepted). The reasons for the eventual unanimous adoption of the ‘legislative power’ approach are also addressed. Section IV of this Chapter examines two new issues relating to s 51(xxxi) which arose during the second era: first, the application of the placitum to an ‘acquisition of property’ by a body other than the Commonwealth; and, secondly, the question of whether there are ‘acquisitions of property’ outside s 51(xxxi) to which the placitum’s requirement of ‘just terms’ does not apply.

It will be argued that Dixon J’s ‘legislative power’ approach did not appreciate the exceptional nature of s 51(xxxi), and failed to engage with its broader historical, theoretical and comparative contexts. It will also be argued that the ‘legislative power’ approach proves less useful than the ‘individual rights’ approach to resolving s 51(xxxi) issues. Both points support the argument of this thesis that the ‘individual rights’ approach is the best interpretive approach to s 51(xxxi).

II THE ‘LEGISLATIVE POWER’ APPROACH

A *The Elements of the ‘Legislative Power’ Approach*

Justice Dixon outlined the new ‘legislative power’ approach to s 51(xxxi) in *Grace Brothers*, which involved a challenge to a compulsory acquisition under the *Lands Acquisition Act 1906* (Cth). As Dixon J articulated it, s 51(xxxi) was ‘an express grant of specific power’ where ‘just terms’ is not an independent restriction but ‘forms part of the definition of the power’:³

The legislative power given by s. 51 (xxxii.) is to make laws with respect to a compound conception, namely, ‘acquisition-on-just-terms.’ ‘Just terms’ doubtless

³ *Grace Brothers* (1946) 72 CLR 269, 290 (Dixon J).

forms a part of the definition of the subject matter, and in that sense amounts to a condition which the law must satisfy. But the question for the Court when validity is in issue is whether the legislation answers the description of a law with respect to acquisition upon just terms.⁴

With these few words, Dixon J converted s 51(xxxi), which had been accepted by a majority in the first era as a constitutional guarantee of ‘individual rights’, into a mere matter of ‘legislative power’.

The ‘legislative power’ approach of Dixon J deviated in four important respects from the ‘individual rights’ approach outlined to date in this thesis. First, s 51(xxxi) did not focus on the individual:

the validity of any general law cannot, I think, be tested by inquiring whether it will be certain to operate in every individual case to place the owner in a situation in which in all respects he will be as well off as if the acquisition had not taken place. The inquiry rather must be whether the law amounts to a true attempt to provide fair and just standards of compensating or rehabilitating the individual.⁵

Under this view, there would not need to be an individual determination of compensation that accounts for the circumstances of each and every case. The situation of any particular individual would be an irrelevant matter of the practical consequences of the law rather than a determinant of its consistency with, and therefore validity under, s 51(xxxi) and its requirement of ‘just terms’.⁶

Secondly, although Dixon conceded that ‘the Court must, of course, examine the justice of the terms provided’,⁷ he qualified this by noting that ‘it is a legislative function to provide the terms, and the Constitution does not mean to deprive the legislature of all discretion in determining what is just’.⁸ His Honour suggested that the test for the validity of legislation enacted under s 51(xxxi) was ‘whether the provisions made might reasonably be regarded as just’.⁹ The focus was to be on the terms of the law, not on their application in individual circumstances.

⁴ Ibid.

⁵ Ibid. Justice Dixon wrote that the Court would not test the validity of a provision ‘by imagining conditions in which its operation might cease to be just’: at 292.

⁶ Cf: *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1, 14 (Taylor J): ‘where a challenge is made to a statute on the ground that it is not a law with respect to a particular legislative subject matter it is irrelevant to ... examine the indirect consequences which may, ultimately, result from it’.

⁷ *Grace Brothers* (1946) 72 CLR 269, 291 (Dixon J).

⁸ Ibid 291 (Dixon J).

⁹ Ibid. This was a small step further than his Honour took in *Andrews v Howell* (1941) 65 CLR 255, 282 (Dixon J). See: Chapter 5, section IIIB.

Thirdly, Dixon J emphasised that there must be a ‘balance’ between the interests of the individual and the community: ‘just terms’ required terms which are ‘fair and just as between [the individual] and the government’,¹⁰ but did not ‘demand a disregard of the interests of the public or of the Commonwealth.’¹¹ Applying this new approach, Dixon J found that ‘just terms’ had been provided, or rather, that it was open to the Parliament to regard as just the terms it had fixed: neither determining compensation based on value at a date preceding acquisition,¹² nor limiting the payment of interest,¹³ resulted in a violation of the requirement of ‘just terms’ as approached by Dixon J.

The fourth departure from the ‘individual rights’ approach was that American eminent domain could only ‘be used with care and ... cannot be applied directly to s. 51 (xxxii).’¹⁴ This departure is the *sine qua non* of his Honour’s new approach to ‘just terms’. In *Grace Brothers*, not only did Dixon J reject American authorities, remarkably he did not refer to a single previous authority on s 51(xxxii),¹⁵ although his approach built on suggestions he had made in earlier cases.

B *The Fundamental Differences Involved in the ‘Legislative Power’ Approach*

Grace Brothers is where Dixon J’s approach to s 51(xxxii) decisively turned away from the interpretive guidance that this thesis has argued is to be found in the historical, theoretical and comparative contexts of the placitum. The rejection of these contexts led Dixon J to a new source of guidance: recent ‘British’ precedents.¹⁶ His Honour examined statutes that had adopted ‘different ways of meeting the same difficulty as the Commonwealth Parliament had in mind’ in Victoria, Tasmania and Ontario, asking ‘Are we to say that these statutes are based on unjust conceptions?’¹⁷ Given legislative

¹⁰ *Grace Brothers* (1946) 72 CLR 269, 290 (Dixon J).

¹¹ *Ibid* 291 (Dixon J).

¹² *Ibid* 292 (Dixon J).

¹³ Interest was ‘eminently a matter for the legislature to decide’: *ibid* 293 (Dixon J). Cf: Chapter 5, section IVB.

¹⁴ *Grace Brothers* (1946) 72 CLR 269, 290 (Dixon J). His Honour did note that s 51(xxxii) was ‘reminiscent of the Fifth Amendment’: at 290.

¹⁵ The critical passages in Dixon J’s judgment contain no references to authority at all: *ibid* 289-90.

¹⁶ *Ibid* 291 (Dixon J).

¹⁷ *Ibid* 292 (Dixon J).

precedent in those jurisdictions, Dixon J wrote that ‘we cannot say that it was not fairly open to the Parliament to regard that provision as a just expedient.’¹⁸

The first error in this argument is that none of the jurisdictions to which his Honour referred has a constitutional requirement of ‘just terms’. The Australian States were under no such limitation, a point repeatedly emphasised throughout the first era jurisprudence.¹⁹ Similarly, the decision of the Supreme Court of Canada to which Dixon J referred²⁰ did not involve consideration of whether the measure in question was just or not. The elevation of the principles common to the British and American experiences to the status of a constitutional guarantee of individual rights occurred only in America. This point was well understood by the Framers, who looked to American eminent domain jurisprudence for guidance on how s 51(xxxi) would be applied.

Secondly, this thesis has identified the underlying coherence of the English constitutional theory of Locke and Blackstone with eminent domain theory. However, it has also identified a critical point of distinction: in England, as in the Australian Colonies, the theoretical requirement of full market-value compensation was not put beyond legislative modification. Under the doctrine of parliamentary supremacy, no question could arise of determining that legislation was unjust and therefore unconstitutional. Justice Dixon did not give consideration to this distinction between the British and American experiences: his Honour interpreted s 51(xxxi) using a very limited sample of expressions of twentieth century legislative will in British jurisdictions, not pausing to examine their consistency with English constitutional theory or even the dominant British legislative practice of the nineteenth century.

Thirdly, Dixon J describes s 51(xxxi) as involving a ‘compound conception’ of ‘acquisition-on-just-terms’.²¹ This links acquisition and compensation together, but in so doing engenders confusion between those two elements. Eminent domain sees a closeness between these two aspects, but only in the sense that the sovereign power of appropriation is inextricably linked to the guarantee of full market-value compensation

¹⁸ Ibid.

¹⁹ See: Chapter 5, section IIA.

²⁰ *Toronto Suburban Railway Co v Everson* (1917) 54 SCR 395.

²¹ *Grace Brothers* (1946) 72 CLR 269, 290 (Dixon J).

to the individual. This does not, however, involve any blurring of the two concepts.²² The best illustration of this distinction is given by the cases addressing ‘necessity’. American courts did not interfere with the determination of the sovereign power as to whether or not the power of appropriation should be exercised.²³ However, that recognition of sovereign power exhausted its role: the requirement of compensation involved no further consideration of sovereign power, but simply and critically a focus on ensuring full market-value compensation to every affected individual. Contrary to Dixon J’s approach, the concept of sovereign power under eminent domain renders non-justiciable only the determination of whether a compulsory acquisition should take place, but not the level of compensation required to be paid.

C *Source of the ‘Legislative Power’ Approach*

The departures from the ‘individual rights’ approach involved in the new ‘legislative power’ approach to s 51(xxxi) stated by Dixon J in *Grace Brothers* are clear. However, his Honour’s judgment did not fully elaborate the source of the new ideas it implemented. This next section will seek to illuminate the source of these new ideas.

1 *Rejection of American Eminent Domain*

Justice Dixon advanced three justifications in *Grace Brothers* for departing from American eminent domain. First, the takings clause ‘cannot be dissociated from the due process clause’.²⁴ Without elaboration, it is difficult to follow the reasoning of Dixon J here. As a textual matter, it is no more difficult to separate the takings clause from the due process clause than from any of the other clauses in the Fifth Amendment; indeed, punctuation performs just that clarifying purpose.²⁵ And, as a matter of judicial interpretation, there is a distinction between takings cases and due process cases.²⁶

²² See: Chapter 3, sections IIIB-IIIC.

²³ That an exercise of the legislative power granted by s 51(xxxi) could not be challenged on the basis that there was not ‘a sufficiently concrete and immediate’ need for it by the Commonwealth was confirmed in *W H Blakeley & Co Pty Ltd v Commonwealth* (1953) 87 CLR 501, 518 (Dixon CJ, McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ).

²⁴ *Grace Brothers* (1946) 72 CLR 269, 290 (Dixon J).

²⁵ ‘No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private

Secondly, Dixon J claimed that the takings clause was introduced ‘for the purpose of protecting the subject or citizen’ whereas s 51(xxxi)’s purpose was ‘primarily to make certain that the Commonwealth possessed a power compulsorily to acquire property’.²⁷ Chapter 2 demonstrated that this *was* a purpose of s 51(xxxi), but the inclusion of the requirement of ‘just terms’, as Dixon J acknowledged, served a different purpose: ‘to prevent arbitrary exercises of the power at the expense of a State or the subject’.²⁸ Justice Dixon’s claim of a difference in purpose between s 51(xxxi) and the Fifth Amendment therefore rests on there being a distinction between the takings clause’s purpose of ‘protecting the subject or citizen’ and s 51(xxxi)’s purpose of preventing ‘arbitrary exercises of the power at the expense of a State or the subject’. This is, at best, an extremely fine distinction on which to rest a fundamental change in constitutional interpretation.

Thirdly, Dixon J indicated that the takings clause could not be separated

from the general principles of American constitutional law animating what is called the Bill of Rights. The framers of the Australian Constitution preferred to leave those principles, in the main, to constitutional convention and tradition, as they have been left in England, rather than to follow the American course of expressing them in the paramount law.²⁹

This statement appears to be consistent with Dixon J’s departure from the ‘individual rights’ approach to s 51(xxxi). However, whatever may be the case in relation to other areas of the *Australian Constitution*, this statement was incorrect regarding s 51(xxxi). As demonstrated by Chapters 2 to 4, the historical circumstances and conceptual understanding of compulsory acquisition at the time of the drafting of the *Australian Constitution* showed that ‘constitutional convention and tradition, as they have been left in England’ were precisely based upon the notion that compulsory acquisition must be accompanied by an individual right to full market-value compensation – a right recognised in English theory and legislative practice.

A lack of further explanation by Dixon J in *Grace Brothers* begs an examination of his extra-curial writings to assess the persuasiveness of this suggestion in *Grace Brothers*

property be taken for public use, without just compensation’: *Constitution of the United States of America*, Amendment V.

²⁶ Cf: *Agins v City of Tiburon*, 447 US 255 (1980). But see later: *Lingle v Chevron USA, Inc*, 544 US 528 (2005). See also: Robert G Dreher, ‘Lingle’s Legacy: Untangling Substantive Due Process from Takings Doctrine’ (2006) 30 *Harvard Environmental Law Review* 371.

²⁷ *Grace Brothers* (1946) 72 CLR 269, 290-1 (Dixon J).

²⁸ *Ibid.*

²⁹ *Ibid* 290 (Dixon J).

that s 51(xxxi) should be understood as part of the broader approach of the Framers of the *Australian Constitution* eschewing the creation of individual rights.

2 *Evidence from Dixon's Extra-Curial Writings and Addresses*

Dixon acknowledged, in an address given in Melbourne in 1935, that the Australian Framers 'found the American instrument of government an incomparable model. They could not escape from its fascination ... [T]hey copied it in many respects with great fidelity.'³⁰ Indeed, Dixon later accepted that this link meant 'that to Australians no small part of the constitutional law of the United States must be of first importance.'³¹ The combination of American constitutional ideas and the inheritance of a British legal system placed Australia in a unique position. In his 1942 address to the American Bar Association in Detroit, *Two Constitutions Compared*, Dixon said that Australians:

naturally stand midway between the two great common law systems, that of England and that of America. We study them both; we feel that, in some measure, we understand them both, and we seek guidance from them both.³²

Indeed, Dixon's view was that:

Australian lawyers ... occupy a mid position, a position of great advantage in Anglo-American jurisprudence. From it they can see that, fundamentally, it represents but one system of legal conceptions. It is a system from which have sprung the greatest principles of justice and of right that have ever governed the conduct of men.³³

Notwithstanding this commonality, Dixon identified one significant difference:³⁴ 'our steadfast faith ... in plenary legislative powers distributed, but not controlled'.³⁵ This meant that Australia did not provide express protections of individual rights, unlike the United States where:

men have come to regard formal guarantees of life, liberty and property against invasion by government, as indispensable to a free constitution. Bred in this doctrine you may think it strange that in Australia ... the cherished American practice of placing in the fundamental law guarantees of personal liberty should prove unacceptable to our constitution makers. But so it was ... With the probably

³⁰ Owen Dixon, 'The Law and the Constitution' in Severin Woinarski (ed), *Jesting Pilate* (LawBook, 1965) 38, 44.

³¹ Owen Dixon, 'The Honourable Mr Justice Felix Frankfurter – A Tribute from Australia' in Severin Woinarski (ed), *Jesting Pilate* (LawBook, 1965) 181, 181.

³² Owen Dixon, 'Two Constitutions Compared' in Severin Woinarski (ed), *Jesting Pilate* (LawBook, 1965) 100, 103.

³³ *Ibid* 104-5.

³⁴ Where there was difference, Dixon was not inclined to follow American innovation: '[i]t was the Anglo Saxon part of the American heritage with which he felt comfortable': James J Spigelman, 'Australia's Greatest Jurist: Philip Ayres' Owen Dixon' (2003) 47 *Quadrant* 44, 45.

³⁵ Dixon, 'Two Constitutions Compared' above n 32, 102.

unnecessary exception of the guarantee of religious freedom, our constitution makers refused to adopt any part of the Bill of Rights of 1791.³⁶

It is striking that, in 1942, Dixon identified religious freedom (which he dismissed as ‘probably unnecessary’) as the *only* exception to the general proposition that individual rights were not created in the *Australian Constitution*. At that time, s 51(xxxi) was still viewed by the majority of the Court as a guarantee of individual rights linked to the American eminent domain, although Dixon did not share that interpretation.³⁷

In his later address *Government under the Australian Constitution* in Melbourne in November 1944, Dixon observed that Americans think of their system of government as ‘outstandingly democratic’ and Australians regard their system as an ‘advanced democracy’, but have a different conception of democracy.³⁸ Australian democracy trusted the wisdom of the majority: ‘the central point of Australian political beliefs has been faith in the soundness of the opinion of the majority of the electors as a means of solving any large political question.’³⁹ In contrast, he identified the American conception of democracy as being less trusting of the majority:

The American tradition, founded upon, and developed by, a long course of history, has concentrated much more on the position of the individual, upon the protection of his natural rights from the abuse of power, and upon the formulation of guarantees against the encroachment ... upon the liberty of the citizen.⁴⁰

Dixon’s statements in this respect are faithful to the views of his law teacher at the University of Melbourne, Sir William Harrison Moore, who had been educated in England in the late nineteenth century:⁴¹

In one notable matter, the Australian Constitution differs markedly from that of the United States. In America, the checks and balances devised by the Fathers of the Constitution were deemed an insufficient restraint of power, and were immediately supplemented by a comprehensive Bill of Rights, which placed the liberties of the citizen under the protection of the Constitution, and secured them against any attack by the Federal Government ... From the Australian Constitution such guarantees of

³⁶ Ibid 101-2.

³⁷ The Court’s approach is examined in Chapter 5, as is Dixon J’s dissent in *Andrews v Howell* (1941) 65 CLR 255.

³⁸ Owen Dixon, ‘Government under the Australian Constitution’ in Severin Woinarski (ed), *Jesting Pilate* (LawBook, 1965) 106, 106.

³⁹ Ibid. Sir Owen emphasised that Australia had chosen an alternative means of protecting individual liberties – the doctrine of responsible government: ‘In Great Britain we developed the Cabinet and parliamentary system partly as a means to check the abuse of absolute executive power. In the United States, however, reliance was placed on an overriding law preserving against governmental actions, whether executive or legislative, the primary rights of the citizen’: at 111.

⁴⁰ Ibid 106. Dixon might have agreed with the observation made during his time in Washington, that: ‘judicial review represents an attempt by the American Democracy to cover its bet’: Edward S Corwin, ‘Book Review’ (1942) 56 *Harvard Law Review* 484, 487.

⁴¹ See: Daryl Dawson and Grant Anderson, ‘Dixon, Sir Owen (1886 - 1972)’ in *Australian Dictionary of Biography* (Melbourne University Press, 1996) vol 14, 7-8.

individual right are conspicuously absent ... The great underlying principle is, that the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power.⁴²

Harrison Moore's influence on Dixon is apparent from their common identification of the guarantee of freedom of religion as the *only* exception to this general principle.⁴³

Harrison Moore and Dixon did not identify s 51(xxxi) as an exception to the Framers' general philosophy that the protection of individual rights was not necessary. In his text, Harrison Moore devoted only one paragraph to s 51(xxxi), referring to it as a 'power of 'eminent domain'' but with no mention of eminent domain's function of protecting the individual.⁴⁴ Justice Dixon similarly found nothing of assistance in eminent domain theory as implemented in America.⁴⁵ Curiously, in light of this, Dixon *did* later describe s 51(xxxi) as a guarantee of individual rights. In a 1957 article in the *Yale Law Journal* he explained the evolution of the *Australian Constitution*:

a draft constitution was produced and agreed upon which adopted American federalism as its basis ... it was not the federalism as it was perfected in 1791 by the adoption of the Bill of Rights, but that of the Constitution of the United States as it had stood immediately before that date. To British colonies at the end of the Victorian era guarantees of personal liberty seemed unnecessary. An exception was made in the case of religious freedom *and of expropriation without just terms*. But for the rest there were no constitutional guarantees of individual rights.⁴⁶

This recognition of s 51(xxxi) as an exception to the general principle came long after Dixon J's judicial interpretation had taken a different path. In adopting the 'legislative power' approach to s 51(xxxi) in *Grace Brothers*, Dixon J saw the placitum in light of

⁴² William Harrison Moore, *The Constitution of the Commonwealth of Australia* (John Murray, 1902) 328-9. Harrison Moore also viewed the American provisions as being influenced by a 'spirit of distrust': at 329. It has previously been observed that Harrison Moore's view of this distinction became 'part of the constitutional philosophy of Harrison Moore's one-time student, Sir Owen Dixon': Fiona Wheeler, 'Framing an Australian Constitutional Law: Andrew Inglis Clark and William Harrison Moore' (1997) 3 *Australian Journal of Legal History* 237, 245. Harrison Moore's view on this point has been described by Wheeler as conceiving 'democracy as the guardian of the individual': at 246. Indeed, she said that this view of the difference between the American and Australian Constitutions is one of the 'recurring themes' of Harrison Moore's book: at 244. The similarity between Harrison Moore and Dixon is further evidenced by references to both passages together that appear in *Nationwide News Pty Ltd v Wills* (1991) 177 CLR 1, 43-4 (Brennan J) and *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 136 (Mason CJ).

⁴³ Moore, above n 42, 329; Dixon, 'Two Constitutions Compared', above n 32, 102.

⁴⁴ Moore, above n 42, 159-60. See also: Sir W Harrison Moore, *The Constitution of the Commonwealth of Australia* (Maxwell, 2nd ed, 1910, 1997 reprint) 487-8.

⁴⁵ One of the revelations of recent times is the claim that 'Dixon would often write a judgment straight through without authorities' returning later (if at all) to 'decorate' it with references to precedent: Frank Brennan, 'Tales from the Bench' (2003) July-August *Eureka Street* 37, 37-9. Such an approach could facilitate the over-broad application of general principles at the expense of more specific authorities. However, Dixon was himself critical of judgments lacking in intellectual rigour (for example, he disliked *ex tempore* judgments: Philip Ayres, *Owen Dixon* (Miegunyah Press, 2003) 49).

⁴⁶ Dixon, 'The Honourable Mr Justice Felix Frankfurter', above n 31, 181 [emphasis added].

the general proposition that individual rights did not need constitutional protection. It was only after the ‘legislative power’ approach had triumphed, that Dixon (in 1957) acknowledged extra-curially that s 51(xxxi) was an exception to this general rule.

D *Conclusion: The ‘Legislative Power’ Approach to s 51(xxxi)*

The ‘legislative power’ approach regards s 51(xxxi) as a grant of power with respect to ‘acquisition-on-just-terms’ where ‘just terms’ forms part of the definition of the power.⁴⁷ The inspiration for this approach appears to be the general proposition, stated in *Grace Brothers* by Dixon J, repeated in his Honour’s extra-curial writings, and apparently influenced by Harrison Moore, that the Framers of the *Australian Constitution* chose not to insert in it protections of individual rights. It was not until 1957 that his Honour identified s 51(xxxi) as an exception to this general principle, by which time Dixon J had fundamentally changed the Court’s approach to the placitum.

The ‘legislative power’ approach resulted in important changes to the interpretation of ‘just terms’: the terms would be assessed cumulatively (across all affected individuals) rather than individually; would be open to legislative discretion in their definition and reviewed by the Court only if unreasonable; and would incorporate a balancing of the interests of the individual against those of the community as a whole. Further, American eminent domain would no longer be a source of comparative guidance.

III THE ‘INDIVIDUAL RIGHTS’ AND ‘LEGISLATIVE POWER’ APPROACHES JUXTAPOSED

A *The Rise of the ‘Legislative Power’ and Demise of the ‘Individual Rights’ Approaches*

Five key cases during the post-war reconstruction period saw the competing ‘legislative power’ and ‘individual rights’ approaches applied by different Justices, allowing the explanatory power of the approaches to be compared.

⁴⁷ *Grace Brothers* (1946) 72 CLR 269, 290 (Dixon J).

1 *Grace Brothers*

The challenged provisions of the *Lands Acquisition Act 1906* (Cth) required compensation to be assessed at 1 January preceding the date of acquisition⁴⁸ and limited interest to 3% per annum.⁴⁹ It was argued that compensation should be calculated ‘at the date of acquisition’⁵⁰ and that interest should be at the market rate.⁵¹

It has already been seen that Dixon J upheld the validity of the legislation. Chief Justice Latham, Starke and McTiernan JJ each adopted positions consistent with some of the four key features of the ‘legislative power’ approach. First, the fairness of legislation would be assessed on a general basis. As Latham CJ wrote, ‘criticism of the justice of terms of acquisition of property depending upon the circumstances of particular cases could often be advanced’⁵² but a statute would not be invalid merely ‘because in particular cases it was possible to devise a more just scheme’.⁵³

Secondly, the justice of the terms would be assessed against a standard of reasonableness. For Latham CJ, legislation would be invalid only if ‘a reasonable man could not regard the terms of acquisition as being just’.⁵⁴ Justice Starke had already adopted that view in *Minister of State for the Army v Dalziel*, and in *Grace Brothers* quoted it: to be invalid, ‘[t]he law must be so unreasonable as to terms that it cannot find justification in the minds of reasonable men’.⁵⁵ Similarly, McTiernan J wrote that:

⁴⁸ *Lands Acquisition Act 1906* (Cth) s 29 (1). Similarly, *Property for Public Purposes Acquisition Act 1901* (Cth) s 19(1). The purpose of this provision was, clearly enough, to prevent speculation in land that was to be subject to compulsory acquisition, resulting in increased cost. This was pointed out in the Parliamentary debates on the 1901 legislation: Commonwealth, *Parliamentary Debates*, Senate, 4 July 1901, 2020 (Richard O’Connor, Vice-President of the Executive Council); House of Representatives, 2 October 1901, 5491 (Mr Isaacs). Further, Higgins referred to this provision as curing the evils of land speculation such as had occurred during Haussmann’s rebuilding of Paris: at 5489.

⁴⁹ *Lands Acquisition Act 1906* (Cth) s 40. Similarly, *Property for Public Purposes Acquisition Act 1901* (Cth) s 20(2). The Parliamentary debates on this point engaged in a series of comparisons with the prevailing market rate of interest, indicating that this figure was an attempt to set an amount of interest consistent with the market rate at the time. See: Commonwealth, *Parliamentary Debates*, Senate, 4 July 1901, 2631, 17 July 1901, 2631, 18 July 1901, 2691-703.

⁵⁰ *Grace Brothers* (1946) 72 CLR 269, 279 (Latham CJ).

⁵¹ *Ibid* 281 (Latham CJ).

⁵² *Ibid* 279 (Latham CJ).

⁵³ *Ibid* 279-80 (Latham CJ).

⁵⁴ *Ibid* 280 (Latham CJ). Applying this standard, Latham CJ was ‘not prepared to hold that [the date of valuation] is so obviously unjust as to invalidate the Act’: at 280.

⁵⁵ (1944) 68 CLR 261, 291 (Starke J) (*‘Dalziel’*), quoted in *Grace Brothers* (1946) 72 CLR 269, 285 (Starke J). See: Chapter 5, section IVB.

‘Parliament has a discretion ... to enact the just terms which it thinks fit’ which would not be invalidated by the Court if they ‘might reasonably be regarded as just’.⁵⁶

Thirdly, the interests of the individual would be balanced against those of the community. Thus, Latham CJ wrote that ‘[j]ustice involves consideration of the interests of the community as well as of the person whose property is acquired.’⁵⁷ Similarly, Starke J described as ‘radically unsound’ the contention that ‘the power conferred upon the Parliament is wholly for the protection and benefit of an owner ... without any regard to the interests of the community as a whole.’⁵⁸

Fourthly, Starke J insisted that there should be no recourse to American eminent domain.⁵⁹ The majority held that valuing property at 1 January,⁶⁰ and limiting interest to 3%,⁶¹ was reasonable, and the legislation was therefore valid.

With Rich J not sitting, Williams J alone maintained the ‘individual rights’ approach, and dissented, finding the provisions invalid. He objected to the fixing of 1 January as the date of assessment, pointing out that: ‘to substitute an arbitrary date for the actual date of acquisition is liable to work injustice in many cases.’⁶² As Williams J explained:

It is no satisfaction to an owner who has not received a fair equivalent in money for property of which he has been dispossessed to know that another owner has received more than the real value of his land. It is only if the value is assessed at the date of acquisition that an owner will *in every instance* be fairly and justly compensated for the loss of his property.⁶³

Thus, for Williams J, there would be no general assessment of fairness. Further, he adhered to the full market-value compensation requirement, insisting on a valuation of the property ‘with all its existing advantages and all its possibilities’ determined by the application of the hypothetical purchaser test:⁶⁴ neither legislative discretion to define ‘just terms’ nor a balancing of the interests of the individual against those of the

⁵⁶ *Grace Brothers* (1946) 72 CLR 269, 295 (McTiernan J).

⁵⁷ *Ibid* 280 (Latham CJ).

⁵⁸ *Ibid* 285 (Starke J). His Honour acknowledged that the proposition ‘finds some support in the opinions of members of this Court’.

⁵⁹ *Ibid*, quoting from: *Dalziel* (1944) 68 CLR 261, 291 (Starke J).

⁶⁰ *Grace Brothers* (1946) 72 CLR 269, 280 (Latham CJ), 286 (Starke J), 295-6 (McTiernan J).

⁶¹ *Ibid* 282 (Latham CJ), 286 (Starke J), 296 (McTiernan J). Justice Starke even stated that this objection was ‘frivolous’: at 286.

⁶² *Ibid* 301 (Williams J).

⁶³ *Ibid* 301-2 (Williams J) [emphasis added].

⁶⁴ The valuation would be ‘at a sum which a reasonably willing vendor would have been agreeable to accept and a reasonably willing purchaser would have been agreeable to pay rather than fail to obtain the property in a friendly negotiation’: *ibid* 301 (Williams J).

community would be acceptable. Finally, Williams J relied on the approach he had taken in earlier judgments, including *Huon Transport* where he derived this approach from United States authorities.⁶⁵ Each of the four aspects of the ‘individual rights’ approach to s 51(xxxi) was therefore maintained by Williams J in *Grace Brothers*.

The application of the ‘legislative power’ approach instead of the ‘individual rights’ approach did not result in great injustice in *Grace Brothers*: compensation was determined using the usual full market-value formula (albeit that the valuation was at a date some months prior to the acquisition) and interest was paid. Nonetheless, the reasoning of the Justices disclosed a significant departure from the previous ‘individual rights’ approach to s 51(xxxi). Moreover, the judgments provided surprisingly little explanation for this significant jurisprudential shift, even though *Grace Brothers* was the first case in which the ‘legislative power’ approach had been applied by a majority.

2 *McClintock v Commonwealth*

That the ‘individual rights’ and ‘legislative power’ approaches delivered different outcomes was again evidenced in *McClintock v Commonwealth*, which concerned the compulsory acquisition of pineapples.⁶⁶ Justice Williams (with whom Rich J agreed)⁶⁷ maintained the ‘individual rights’ approach, requiring that full market-value compensation be paid so that each individual receive ‘the equivalent in money’.⁶⁸ As the Fruit Industry Sugar Concession Committee’s ‘function was not to assess compensation, but to fix a price for a different purpose altogether’ without regard to ‘the market value’ of acquired pineapples, Williams J held that s 51(xxxi)’s guarantee of ‘just terms’ had not been met, and the legislation was invalid.⁶⁹ Conversely, Starke J

⁶⁵ *Huon Transport* (1945) 70 CLR 293, 335 (Williams J).

⁶⁶ Justice Dixon was not sitting, and Latham CJ (with whom McTiernan J agreed: *McClintock v Commonwealth* (1947) 75 CLR 1, 30) avoided s 51(xxxi) by finding that there had been no compulsory acquisition but merely a contractual sale: the plaintiff had ‘voluntarily, without any compulsion, delivered pineapples ... believing that he was bound to do so’: at 18. It is difficult to accept that delivery could be voluntary when made under the belief that it was legally required: it had never been suggested that s 51(xxxi) only applied to seizure of property by force. The approach to s 51(xxxi) did not determine this issue: Starke J took the ‘legislative power’ approach and Williams J the ‘individual rights’ approach, but both concluded there had been a compulsory acquisition. As Starke J wrote, the regulation ‘compels a grower to deliver his pineapples to canners at a fixed price. Such a transaction is a forced sale and results in the acquisition of property’: at 24. See also: at 36 (Williams J).

⁶⁷ *Ibid* 20 (Rich J).

⁶⁸ *Ibid* 38 (Williams J).

⁶⁹ *Ibid*.

adopted the ‘legislative power’ approach,⁷⁰ concluding that the compensation available was sufficient because it was not such ‘that a reasonable man would regard as unjust’.⁷¹

3 *Nelungaloo*

A striking juxtaposition of the ‘individual rights’ and ‘legislative power’ approaches occurred in the judgment of Dixon J in *Nelungaloo*, which concerned a challenge to the *Wheat Tax Act 1946* (Cth) which taxed compensation paid under the *National Security (Wheat Acquisition) Regulations 1939* (Cth).⁷² Justice Dixon explained how the ‘legislative power’ approach would apply,⁷³ but felt bound to follow the ‘individual rights’ approach taken in *Tonking* where the validity of similar regulations had been upheld,⁷⁴ admitting that the decision to depart from his preferred approach caused ‘unusual difficulty’⁷⁵ and led to an ‘embarrassing’ situation.⁷⁶

The ‘individual rights’ approach that was actually applied by Dixon J was straightforward: the *Wheat Tax Act 1946* (Cth) was invalid, because compensation had been awarded to meet the requirement of ‘just terms’, and no ‘award of compensation less a sum of money withheld ... can be considered by a Court still to give a recompense sufficient to comply with the requirement of just terms’.⁷⁷ Describing ‘the root of the general principles governing compensation’, Dixon J gave a clear explanation of the theory underlying the ‘individual rights’ approach to s 51(xxxi):

the public purpose for which the thing taken is to be used should be carried out at the expense of the whole community of which the owner or owners are members, they in their capacity of owners being placed in the same pecuniary position as if the public purpose had not involved their property and necessitated its taking.⁷⁸

This is what the English theory of Locke and Blackstone, and the continental theory of eminent domain as constitutionally implemented in America, would have required.

⁷⁰ Ibid 24 (Starke J), quoting: *Grace Brothers* (1946) 72 CLR 269, 291 (Dixon J).

⁷¹ *McClintock v Commonwealth* (1947) 75 CLR 1, 26 (Starke J).

⁷² Made under the *National Security Act 1939* (Cth). The regulations operated in the same way as those upheld in *Andrews v Howell* (1941) 65 CLR 255 and *Australian Apple and Pear Marketing Board v Tonking* (1942) 66 CLR 77 (‘*Tonking*’), as to which see: Chapter 5, section IIIB.

⁷³ *Nelungaloo* (1948) 75 CLR 495, 559-70 (Dixon J).

⁷⁴ Ibid 571 (Dixon J).

⁷⁵ Ibid 570 (Dixon J).

⁷⁶ Ibid 559 (Dixon J).

⁷⁷ Ibid 583 (Dixon J).

⁷⁸ Ibid 558 (Dixon J).

The ‘legislative power’ approach that Dixon J would have preferred to apply was quite different. Full market-value compensation was unnecessary, as: ‘[u]nlike ‘compensation,’ which connotes full money equivalence, ‘just terms’ are concerned with fairness.’⁷⁹ His Honour articulated this concept of fairness as resting: ‘on the somewhat general and indefinite conception of just terms, which appears to refer to what is fair and just between the community and the owner of the thing taken.’⁸⁰ Accordingly, compensation to place the owner in the same pecuniary position as if their property had not been appropriated was not required. It was sufficient if payment gave effect to ‘conceptions formed in Australia of a sufficiently profitable return for wheat’.⁸¹ Further, that s 51(xxxi) implemented a unique ideal of fairness justified the rejection of American authorities: ‘[w]hen the question is one of fairness in any community ... the standard must depend upon the life and experience of that community, rather than upon the changing fortunes of other countries and the exigencies which beset them.’⁸²

The contrast between the ‘individual rights’ and ‘legislative power’ approaches is striking. In Dixon J’s own words, the ‘individual rights’ approach gave effect to ‘a very well understood expression’⁸³ with the clear purpose of ‘plac[ing] in the hands of the owner expropriated the full money equivalent of the thing of which he has been deprived’;⁸⁴ whereas the ‘legislative power’ approach viewed ‘just terms’ as a ‘somewhat general and indefinite conception’ which implemented a standard of ‘fairness’ that depended upon ‘the life and experience’ of the community.⁸⁵ Perhaps unintentionally, his Honour contrasted the relative certainty and ease of application of the ‘individual rights’ approach with the relative uncertainty and difficulty of the ‘legislative power’ approach.

⁷⁹ Ibid 569 (Dixon J). In the field of general compensation law, his Honour accepted that compensation required monetary equivalence. Thus, determining the amount of compensation under the *Public Works Act 1912* (NSW), Dixon CJ held that ‘compensation should be the full monetary equivalent’: *Turner v Minister of Public Instruction* (1956) 95 CLR 245, 264 (Dixon CJ). See also: at 268.

⁸⁰ *Nelungaloo* (1948) 75 CLR 495, 569 (Dixon J).

⁸¹ Ibid 569 (Dixon J). Of this lower standard, Dixon J acknowledged that: ‘The difficulties of such a judgment in war time are great and the criticisms which may be made at any time of such a test are only too manifest’: at 569.

⁸² Ibid.

⁸³ Ibid 571 (Dixon J).

⁸⁴ Ibid.

⁸⁵ Ibid 569 (Dixon J).

The ‘individual rights’ approach was maintained by Williams J, who used the American phrase ‘just compensation’⁸⁶ in place of ‘just terms’, indicating that full market-value compensation was required, and employed the hypothetical purchaser test to determine the amount of compensation payable.⁸⁷ Similarly, Rich J applied the ‘individual rights’ approach, invalidating the tax on the grounds that ‘if £X is a fair measure of the value of property taken from an owner by the Commonwealth, it is inconsistent with the idea of just terms that this sum should be reduced by a tax.’⁸⁸ Curiously, the ‘individual rights’ approach was also applied by Starke J who found that the tax was invalid because the compensation provided was to meet the requirement of ‘just terms’ and the tax ‘takes away from the plaintiff or diminishes the compensation or the just term ... required by the provision of the Constitution.’⁸⁹ His Honour also referred to s 51(xxxi) as demanding payment of ‘the true and real value of the wheat.’⁹⁰ Although he had adopted the ‘legislative power’ approach to ‘just terms’ in *Dalziel*,⁹¹ *Grace Brothers* and *McClintock v Commonwealth*, in *Nelungaloo* Starke J implemented the ‘individual rights’ approach.

However, although deciding the case on other issues, Latham CJ confirmed two features of the ‘legislative power’ approach: first, Parliament enjoyed discretion in the definition of ‘just terms’; and, secondly, the interests of the public could be weighed against the interests of the individual.⁹²

⁸⁶ Ibid 505 (Williams J).

⁸⁷ His Honour wrote that:

‘the value of the property taken must be ascertained by estimating the sum which a reasonably willing vendor would have been prepared to accept and a reasonably willing purchaser would have been prepared to pay for the property at the date of the acquisition. ... the plaintiff is entitled to receive the sum which a prudent purchaser would have been willing to give for the property sooner than fail to obtain it’: ibid 507 (Williams J).

⁸⁸ Ibid 544 (Rich J).

⁸⁹ Ibid 554 (Starke J).

⁹⁰ Ibid 547 (Starke J).

⁹¹ *Dalziel* (1944) 68 CLR 261, 291 (Starke J). See: Chapter 5, section IVB.

⁹² ‘Neither a duty to provide just terms for the acquisition of property nor an obligation to pay fair compensation involves a complete exclusion of all consideration of the interests of the community, or, more particularly, of the laws which protect such interests. Justice and fairness to the community are not precise standards; but laws directed to those objectives, if their terms are clear, are not open to such criticism. The necessity of paying compensation under the law and of giving just terms to persons whose property is acquired under the law does not in my opinion compel the community to submit to the exaction of the uttermost farthing’: *Nelungaloo* (1948) 75 CLR 495, 541 (Latham CJ). In brief judgments, McTiernan and Webb JJ did not address s 51(xxxi), but agreed with Latham CJ that the appeal should be dismissed: at 584-6 (McTiernan J), 586-8 (Webb J).

In sum, in *Nelungaloo* the ‘individual rights’ approach was maintained by Rich and Williams JJ, and was even applied by Starke and Dixon JJ, although Dixon J would have preferred the ‘legislative power’ approach, aspects of which were adopted by Latham CJ. The Court’s fractured approach to s 51(xxxi) was not resolved, indeed the Justices’ reasons were quite disparate.⁹³ Subsequently, an appeal to the Privy Council was rejected on jurisdictional grounds.⁹⁴ However, Lord Normand noted that, although Dixon J had been inclined to find the regulations valid under the ‘legislative power’ approach,⁹⁵ ‘the argument against the validity of reg. 19 was formidable and ... could not have been disposed of without the most serious consideration.’⁹⁶ At the least, this implied that their Lordships were uncertain about the correctness of Dixon J’s new ‘legislative power’ approach to s 51(xxxi).

4 *The Bank Nationalisation Case*

In the *Bank Nationalisation Case*, the main s 51(xxxi) challenge was to provisions of the *Banking Act 1947* (Cth) removing directors of private banks, giving the Commonwealth Bank power to appoint directors in their place, and empowering those nominee directors to negotiate the sale of the assets of the private bank to the Commonwealth Bank.⁹⁷

All of the Justices agreed that there had been an ‘acquisition of property’.⁹⁸ Surprisingly, Dixon J’s reasoning emphasised ‘individual rights’ considerations. He referred to shareholders being ‘in a real sense, although not formally, stripped of the possession and control of the entire undertaking.’⁹⁹ This constituted an ‘effective deprivation ... of the reality of proprietorship’,¹⁰⁰ making the provisions ‘a circuitous device to acquire indirectly the substance of a proprietary interest without at once

⁹³ As Dixon J later noted ‘the plaintiff was defeated by a combination of reasons none of which separately commanded the assent of any four of the seven judges who passed judgment upon the plaintiff’s claims’: *Nelungaloo Pty Ltd v Commonwealth* (1952) 85 CLR 545, 580 (*‘Nelungaloo [No 3]’*).

⁹⁴ The Privy Council held that it had no jurisdiction because the appeal involved an ‘inter se’ matter and was barred, in the absence of a certificate from the High Court, by s 74 of the *Australian Constitution*: *Nelungaloo Pty Ltd v Commonwealth* (1950) 81 CLR 144 (*‘Nelungaloo [No 2]’*).

⁹⁵ *Nelungaloo [No 2]* (1950) 81 CLR 144, 152.

⁹⁶ *Ibid* 153.

⁹⁷ *Banking Act 1947* (Cth) ss 17-19.

⁹⁸ This issue was also addressed by the other Justices: *Bank Nationalisation Case* (1948) 76 CLR 1, 206-18 (Latham CJ), 264 (Rich and Williams JJ), 319 (Starke J).

⁹⁹ *Bank Nationalisation Case* (1948) 76 CLR 1, 349 (Dixon J).

¹⁰⁰ *Ibid*.

providing the just terms guaranteed by s. 51 (xxxix).'¹⁰¹ This involved greater focus on the individual than his Honour's previous judgments. Further, accepting the broad interpretation of 'acquisition of property' reached in *Dalziel*, Dixon J used 'individual rights' language in the *Bank Nationalisation Case*, describing s 51(xxxix) as serving:

a double purpose. It provides the Commonwealth Parliament with a legislative power of acquiring property: at the same time as a condition upon the exercise of the power *it provides the individual ... affected with a protection against governmental interferences with his proprietary rights without just recompense.*¹⁰²

Indeed, he wrote that s 51(xxxix) 'should be given as full and flexible an operation as will cover the objects it was designed to effect.'¹⁰³ In the interpretation of 'acquisition of property', therefore, Dixon J did not depart from the 'individual rights' approach.

The Justices, in unanimously invalidating the power to appoint nominee Directors to oversee the sale of the assets of the private banks,¹⁰⁴ nonetheless applied divergent interpretations of 'just terms'. The 'individual rights' approach was taken by Rich and Williams JJ, who noted that the sale 'would not necessarily be a sale on just terms' giving every individual a legal right to full market-value compensation.¹⁰⁵ This alone was sufficient for them to invalidate the provision. Conversely, Starke and Dixon JJ took the 'legislative power' approach. Rejecting an argument that compensation would be eroded due to inflationary effects, Dixon J stated that any depreciation would need to be 'so substantial as to violate any conception of the justice of the terms' before legislation would be invalid under s 51(xxxix).¹⁰⁶ Similarly, Starke J wrote that 'the obligation to provide [just] terms ... is 'a legislative function ... and the Constitution does not mean to deprive the legislature of all discretion in the matter''.¹⁰⁷ He noted that only legislative determinations that were not reasonable would breach s

¹⁰¹ Ibid.

¹⁰² Ibid 350 (Dixon J) [emphasis added].

¹⁰³ Ibid.

¹⁰⁴ For Latham CJ, it was unjust 'that an authority with powers of compulsory purchase should appoint managers of the property to be acquired' who 'have the power to bind the owner of the property as to the amount of compensation to be paid': *ibid* 218. Similarly McTiernan J, who noted that 'in order to come up to that standard [of just terms], independent approval of the terms of sale would be necessary': at 395.

¹⁰⁵ Ibid 264 (Rich and Williams JJ).

¹⁰⁶ Ibid 341 (Dixon J).

¹⁰⁷ Ibid 300 (Starke J), quoting from: *McClintock v Commonwealth* (1947) 75 CLR 1, 24 (Starke J); which in turn was quoting from: *Grace Brothers* (1946) 72 CLR 269, 291 (Dixon J). However, Starke J did accept that: 'Ultimately, it is the function of the Courts to determine whether 'just terms' have or have not been provided': at 300.

51(xxxi),¹⁰⁸ adding that “[j]ust terms’ do not require a disregard of the interests of the public or of the Commonwealth’.¹⁰⁹

However, Starke J also adopted one element of the ‘individual rights’ approach, writing that “‘just terms’ require that a party whose property is acquired shall have the *pecuniary equivalent* of the property acquired’.¹¹⁰ For this proposition, he cited *Tonking* and *Johnston Fear*,¹¹¹ ignoring the profound inconsistency between the ‘individual rights’ approach applied in those cases and the ‘legislative power’ approach he otherwise adopted in the *Bank Nationalisation Case*. In evidencing support for both approaches, the judgment of Starke J in the *Bank Nationalisation Case* contradicts itself and illustrates the confused state of s 51(xxxi) jurisprudence at this point.

The subsidiary questions, whether a tax on compensation monies was valid and whether interest was required, saw further disagreement. The tax was only examined by Latham CJ and McTiernan J, who disagreed.¹¹² However, taking into account views expressed in *Nelungaloo*,¹¹³ a majority of Justices had held that a tax on compensation monies was invalid under s 51(xxxi). On interest, Rich and Williams JJ,¹¹⁴ and even Starke J,¹¹⁵ applied the ‘individual rights’ approach to hold that it was required; Latham CJ, Dixon and McTiernan JJ applied the ‘legislative power’ approach to hold that it was not.¹¹⁶ Although all six Justices in the *Bank Nationalisation Case* found the legislation invalid under s 51(xxxi), a rare outcome given the doctrinal uncertainty at

¹⁰⁸ ‘The law must not be so unreasonable as to terms that it cannot find justification in the minds of reasonable men’: *Bank Nationalisation Case* (1948) 76 CLR 1, 300 (Starke J).

¹⁰⁹ *Ibid*, citing: *Grace Brothers* (1946) 72 CLR 269, 291.

¹¹⁰ *Bank Nationalisation Case* (1948) 76 CLR 1, 300 (Starke J) [emphasis added], citing: *Tonking* (1942) 66 CLR 77, 85; *Johnston Fear & Kingham & The Offset Printing Co Pty Ltd v Commonwealth* (1943) 67 CLR 314, 323, 324, 327 (*Johnston Fear*’).

¹¹¹ See: Chapter 5, section IIIB.

¹¹² *Bank Nationalisation Case* (1948) 76 CLR 1, 219 (Latham CJ), 396 (McTiernan J).

¹¹³ A tax on compensation monies was held invalid in: *Nelungaloo* (1948) 75 CLR 495, 544 (Rich J), 554 (Starke J), 583 (Dixon J).

¹¹⁴ *Bank Nationalisation Case* (1948) 76 CLR 1, 277 (Rich and Williams JJ).

¹¹⁵ Justice Starke wrote that ‘[i]t would not be just that the Commonwealth Bank or any other body should at one and the same time enjoy the benefits flowing from the acquisition of the shares ... and those flowing from unpaid compensation moneys’: *ibid* 316. Further, his Honour insisted on a legal right to interest: “‘Just terms’ in the present case require that a right to interest should be given and not some merely discretionary authority to award interest’: at 317. This conclusion is even more surprising given Starke J’s previous approach to interest. In *Huon Transport* (1945) 70 CLR 293, 315, his Honour applied *Swift & Co v Board of Trade* [1925] AC 520, holding that interest was not required; in *Marine Board* (1945) 70 CLR 518, 528, his Honour took a similar approach; and in *Grace Brothers* (1946) 72 CLR 269, 286 Starke J labeled the objection to a low cap on interest as ‘frivolous’. In the *Bank Nationalisation Case* (1948) 76 CLR 1, 301, Starke J cited the judgment of Rich J in *Huon Transport*, although in that case Starke J had disagreed with Rich J on this very issue.

¹¹⁶ *Bank Nationalisation Case* (1948) 76 CLR 1, 228 (Latham CJ), 343 (Dixon J), 397 (McTiernan J).

the time,¹¹⁷ the Court remained deeply divided over which conceptual approach to s 51(xxxi) it should adopt.

5 *The Soldier Settlement Cases*

Fundamental differences of approach persisted in *Magennis*, which concerned the co-operative legislative scheme for the war service land settlement agreements.¹¹⁸ The challenge arose because the legislation ordered the value of the land for compensation purposes to be calculated as at 10 February 1942,¹¹⁹ notwithstanding the increase in value that had occurred in the intervening seven years, producing (as Dixon J noted) ‘a value which doubtless is as remote from the present in amount as it is in time’.¹²⁰

In *Magennis*, the ‘individual rights’ approach was again maintained by Williams J, with whom Rich J agreed.¹²¹ For Williams J, the date limit was ‘obviously inequitable’,¹²² resulting in acquisition ‘on a semi-confiscatory basis’.¹²³ Therefore, the law was invalid under s 51(xxxi) which requires ‘that the owner shall receive the *full equivalent in money* for the value of the property of which he is deprived’.¹²⁴ Surprisingly, a similar approach was taken by Latham CJ, who held that s 51(xxxi) ‘requires the terms actually to be just and not merely to be terms which the Parliament may consider to be just’,¹²⁵ departing from the test of reasonableness previously applied by his Honour in *Grace Brothers*.¹²⁶ Conversely, the ‘legislative power’ approach was adopted by Webb J:

The courts will not readily deny that terms provided by the Commonwealth Parliament are just, and in this matter regard will be had to the interest of the public

¹¹⁷ A commentary in 1953 said that the treatment of s 51(xxxi) in the *Bank Nationalisation Case* displayed ‘unanimity ... quite striking in view of their conflict as to the other points raised in the legal argument’: Edward McWhinney, ‘Judicial Positivism in Australia – The Communist Party Case’ (1953) 2 *American Journal of Comparative Law* 36, 41 n 20.

¹¹⁸ The relevant legislation was the *War Service Land Settlement Agreements Act 1945* (Cth).

¹¹⁹ This limitation was enacted by the State in s 4 of the *Closer Settlement (Amendment) Act 1948* (NSW), implementing the terms of the War Service Land Settlement Agreements between the Commonwealth and New South Wales of 12 November 1945. For a brief reflection on the operation of the land settlement programs, see: D P Mellor, *Australia in the War of 1939–1945, Series Four – Civil, Volume V – The Role of Science and Industry* (Griffin Press, 1958) 698-9.

¹²⁰ *Magennis* (1949) 80 CLR 382, 407 (Dixon J). His Honour concluded that there had been no ‘acquisition of property’ under the Commonwealth legislation (finding it to have occurred only under New South Wales legislation), so did not need to further consider s 51(xxxi): at 410. Similarly, at 415-16 (McTiernan J).

¹²¹ *Ibid* 406 (Rich J).

¹²² *Ibid* 418 (Williams J).

¹²³ *Ibid* 419 (Williams J).

¹²⁴ *Ibid* 419 (Williams J) [emphasis added].

¹²⁵ *Ibid* 397 (Latham CJ).

¹²⁶ *Grace Brothers* (1946) 72 CLR 269, 279-80.

as well as to the interest of the owner. The question is whether the terms provided can reasonably be regarded as just.¹²⁷

In *Magennis*, as in the cases preceding it in the second era, profound differences of approach were evident, and considerable doctrinal confusion remained.

6 *Conclusion on the Divided Court*

In these five cases, the ‘individual rights’ and ‘legislative power’ approaches were applied by different Justices. There was considerable doctrinal confusion in the identification of a majority view and in the views of individual Justices over time: Rich and Williams JJ consistently applied the ‘individual rights’ approach; Latham CJ and Starke J both switched to the ‘legislative power’ approach but then back to the ‘individual rights’ approach; Dixon J consistently favoured the ‘legislative power’ approach but in *Nelungaloo* did not apply it; and Webb J’s only judgment adopted the ‘legislative power’ approach.

On the facts of the *Bank Nationalisation Case* and *Magennis*, the ‘individual rights’ and ‘legislative power’ approaches produced the same outcome: ‘just terms’ had not been provided. However, in *Grace Brothers*, *McClintock* and *Nelungaloo*, the ‘individual rights’ and ‘legislative power’ approaches dictated a different result. The difference was quantified in *McClintock*, where the pineapple grower received £324 4s. 5d. less under the ‘legislative power’ approach.¹²⁸ Moreover, the difference is qualitatively important: in both *McClintock* and *Nelungaloo*, the ‘legislative power’ approach allowed compensation to be determined by an executive tribunal that was not obliged to ensure fairness in each individual case and could set the price to be paid much lower than the prevailing market value. The resulting potential for individuals to

¹²⁷ *Magennis* (1949) 80 CLR 382, 429 (Webb J). Even under this test, however, Webb J found the legislation invalid: at 429. Minor reconstruction of the war service land settlement scheme, distancing the Commonwealth from the States’ acquisitions of property on unjust terms, ensured that its validity was upheld by the unanimous High Court in *Pye v Renshaw* (1951) 84 CLR 58 (Dixon, Williams, Webb, Fullagar and Kitto JJ). It has been noted that the federal context here allowed s 51(xxxi)’s requirements to be ‘readily circumvented’: Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 4th ed, 2006) 1276. Indeed, as a result of this, Sir John Latham later recommended that the *Australian Constitution* be altered to impose a ‘just terms’ requirement on the States: John Latham, ‘The Constitution in a Changing World’ (1961) 1 *University of Tasmania Law Review* 529, 530. However, the reference to s 51(xxxi) being ‘readily circumvented’ has been dropped from the latest version of Blackshield and Williams’ text, being replaced with the statement that ‘the reasoning in *ICM Agriculture* [(2009) 240 CLR 140] confined the effect of *Pye v Renshaw* to a very narrow scope’: Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 5th ed, 2010) 1099.

¹²⁸ *McClintock v Commonwealth* (1947) 75 CLR 1, 41 (Williams J).

receive much less than full market-value compensation stands in marked contrast to the Court's previous vigilance in the application of s 51(xxxi), and contradicts the insights derived in this thesis from the historical, theoretical and comparative contexts of the placitum.

B *The Ascension of the 'Legislative Power' Approach*

In the cases examined so far, even those Justices who looked upon the 'legislative power' approach favourably (Latham CJ, Starke and McTiernan JJ) did not fully adopt it. The ascension of Dixon CJ as *the* interpreter of s 51(xxxi) was achieved in practice through the process of judicial retirement and replacement: as the composition of the bench changed, each newly-appointed Justice adopted the interpretation favoured by Dixon.¹²⁹ Justice Williams, appointed in 1940, was the last to disagree with Dixon.¹³⁰ When Webb J was appointed in 1946, he adopted the 'legislative power' approach,¹³¹ as did Fullagar and Kitto JJ, both appointed in 1950 (to replace the retiring Rich and Starke JJ).¹³² Thereafter, precedent would dictate adherence to the 'legislative power' approach. Justice Taylor, appointed in 1952 (to replace the retiring Latham CJ) accordingly also adopted Dixon CJ's 'legislative power' approach to s 51(xxxi).¹³³

The 1949 decision in *Magennis*, where the 'individual rights' approach to s 51(xxxi) was applied by Latham CJ, Rich and Williams JJ, was the last instance of its application in the interpretation of 'just terms' in the second era. The (unsuccessful) application for a certificate to allow an appeal to the Privy Council in *Nelungaloo [No 3]* saw new adherence to the 'legislative power' approach: McTiernan J accepted the

¹²⁹ Ritter has stated that, because of the closeness of Dixon to Prime Minister Menzies, and the Prime Minister's long tenure, eventually 'the Court was packed with appointments approved of by Dixon': David Ritter, 'The Myth of Sir Owen Dixon' (2005) 9 *Australian Journal of Legal History* 249, 252.

¹³⁰ Although a member of the Dixon Court, Williams J, who resisted Dixon's approach to s 51(xxxi), did not sit in *Burton v Honan* (1952) 86 CLR 169. In *Clyne* (1958) 100 CLR 246, Williams J merely indicated agreement with the judgment of Dixon CJ. At this point, Williams' health was failing and he was soon to retire – his Honour was content with the result and there was no need to restate his opposition to the 'legislative power' approach given there was no doubt that s 51(xxxi) did not apply to require 'just terms' in this case. (As to his health and retirement, see: Graham Fricke and Simon Sheller, 'Williams, Sir Dudley (1889 - 1963)' in *Australian Dictionary of Biography* vol 16 (Melbourne University Press, 2002) 550, 551.)

¹³¹ *Magennis* (1949) 80 CLR 382, 429 (Webb J); *Burton v Honan* (1952) 86 CLR 169, 182 (Webb J). His Honour delivered a short separate judgment to similar effect as Dixon CJ in *Clyne* (1958) 100 CLR 246, 269-70 (Webb J).

¹³² *Burton v Honan* (1952) 86 CLR 169, 182 (Kitto J); *Clyne* (1958) 100 CLR 246, 272 (Kitto J); *Schmidt* (1961) 105 CLR 361, 373 (Fullagar J), 373 (Kitto J).

¹³³ *Clyne* (1958) 100 CLR 246, 272 (Taylor J); *Schmidt* (1961) 105 CLR 361, 373 (Taylor J).

distinction ‘between just terms and just compensation’, being that ‘the interests of the Commonwealth as well as of the subject enter into the question whether the terms of a law expropriating the owners of property are just terms’;¹³⁴ and Kitto J noted that: ‘[t]he standard of justice postulated by the expression ‘just terms’ is one of fair dealing between the Australian nation and an ... individual’¹³⁵ and accepted Dixon J’s view that ‘just terms’ ‘must depend upon the life and experience of that community’.¹³⁶ This emphasis on the uniqueness of the standard in s 51(xxxi) subtly re-directed attention away from the placitum’s historical genesis, comparative context and the theoretical background underpinning its creation.

Dixon, elevated to Chief Justice in April 1952, became the Court’s intellectual leader on s 51(xxxi). In *Burton v Honan* (1952), *Clyne* (1958) and *Schmidt* (1961), Dixon CJ delivered a judgment with which the other Justices unanimously agreed.¹³⁷ The history of s 51(xxxi) jurisprudence had witnessed a profound change, from *Andrews v Howell* in 1941 where Dixon J was a lone dissident suggesting a new deferential approach to reviewing legislation for compliance with s 51(xxxi)’s requirements, to *Burton v Honan*, *Clyne* and *Schmidt*, where Dixon CJ’s ‘legislative power’ approach was unanimously accepted. In discarding the ‘individual rights’ approach, Dixon J in effect severed s 51(xxxi) from its history in the classical liberal tradition, from its closest comparator in the United States, from its underlying theory of eminent domain, and from previous judicial interpretations.

The primary influence on Dixon J in the development of the ‘legislative power’ approach to s 51(xxxi) was his view that the Framers of the *Australian Constitution* deliberately eschewed the creation of individual rights.¹³⁸ Even if this is true in general, there is contrary evidence for s 51(xxxi),¹³⁹ as Dixon J himself later acknowledged.¹⁴⁰

¹³⁴ *Nelungaloo [No 3]* (1952) 85 CLR 545, 584 (McTiernan J).

¹³⁵ *Ibid* 600 (Kitto J).

¹³⁶ *Ibid*; quoting with approval from: *Nelungaloo* (1948) 75 CLR 495, 569 (Dixon J).

¹³⁷ In *Burton v Honan* (1952) 86 CLR 169, Dixon CJ’s judgment gained unanimous agreement: at 181 (McTiernan J), 182 (Webb J) and 182 (Kitto J). In *Clyne* (1958) 100 CLR 246, Dixon CJ’s judgment was generally accepted: at 268 (McTiernan J), 268 (Williams J), 272 (Kitto J), 272 (Taylor J), although Webb J delivered a short judgment to similar effect: at 269-72. In *Schmidt* (1961) 105 CLR 361, Dixon CJ’s was the leading judgment with which others unanimously agreed: at 373 (Fullagar J), 373 (Kitto J), 373 (Taylor J), 377 (Windeyer J); Taylor J added some additional comments (at 373-7) with which Windeyer J agreed (at 377).

¹³⁸ See above at 167-171.

¹³⁹ See Chapters 2-4.

¹⁴⁰ See above n 46.

There was little in the judgments of the other Justices to indicate whether they endorsed Dixon J's reasons, although their Honours certainly adopted Dixon J's 'legislative power' approach. The most powerful influence on this adoption is likely to have been Dixon J himself, whose influence is well known:¹⁴¹ it has been observed that Dixon 'came to have an intellectual dominance over the Court'.¹⁴² Moreover, Dixon was known to circulate draft judgments as soon as he completed them.¹⁴³ As Menzies J noted, 'when [Dixon] was concerned that a decision should go in a particular way, his aim was to get his own judgment out first for circulation to other members of the Court'.¹⁴⁴ Further, with a divided jurisprudence, Dixon was a more likely Justice to be followed by new appointees than either Rich or Williams JJ. This general influence of Dixon J on his judicial colleagues is likely to have been an important factor contributing to the acceptance of his Honour's preferred approach to s 51(xxxi).¹⁴⁵

In addition to the influence of Dixon himself, the 'legislative power' approach was also consistent with some broader jurisprudential trends that may have made it more acceptable. First, the turning away from American precedents was consistent with the

¹⁴¹ Sir Anthony Mason regarded Dixon as 'the most influential Justice to sit on the High Court': Sir Anthony Mason, 'The High Court of Australia: A Personal Impression of Its First 100 Years' (2003) 27 *Melbourne University Law Review* 864, 872. Dixon was also ranked as the most influential Justice in an empirical study comprising several numerical citation-based measures of judicial influence and prestige: Russell Smyth, 'Who Gets Cited - An Empirical Study of Judicial Prestige in the High Court' (2000) 21 *University of Queensland Law Journal* 7. A practical example is given by Spigelman: when Dixon CJ held that the High Court was no longer bound by the authorities of the House of Lords in *Parker v The Queen* (1963) 111 CLR 610, 632, '[u]nlike all other steps in attaining legal independence from England, there was not a hint of disputation, given the eminence of the source': Spigelman, above n 34, 44. Dixon's general reputation and influence has been addressed elsewhere. Certainly, Dixon is regarded as one of the great common lawyers: see, eg: Kenneth Hayne, 'Dixon, Owen' in Tony Blackshield, Michael Coper and George Williams (eds), *Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 219. Indeed, it has even been suggested that: 'It is not a matter of asking whether Dixon was right but rather of understanding why he was right': Sir John Young, 'Launch Speech - Owen Dixon', by Philip Ayres <<http://www.mup.unimelb.edu.au/pdf/0-522-85045-6.pdf>> 3. But cf: 'Dixon was a remarkable figure whose catalogue of achievements is necessarily impressive, but the mythology functions by exaggerating the man, turning him into a paradigm': Ritter, above n 129, 263.

¹⁴² Colin Howard, 'Sir Owen Dixon and the Constitution' (1973) 9 *Melbourne University Law Review* 5, 5.

¹⁴³ Ayres, above n 45, 57.

¹⁴⁴ Douglas Menzies, 'Sir Owen Dixon' (1973) 9 *Melbourne University Law Review* 1, 3.

¹⁴⁵ The judge most influenced by Dixon J on s 51(xxxi) appears to have been McTiernan J: indeed, on this point, Starke J might have been right about McTiernan being a 'parrot' for Dixon: Letter from Sir Hayden Starke to Sir John Latham, 22 February 1937, cited in: Clem Lloyd, 'Not Peace but a Sword! — The High Court under J G Latham' (1987) 11 *Adelaide Law Review* 175, 181. See also: Ayres, above n 45, 78; Russell Smyth, 'Explaining Voting Patterns on the Latham High Court 1935-50' (2002) 26 *Melbourne University Law Review* 88, 95. Justice McTiernan's acceptance in *Marine Board* (1945) 70 CLR 518 of the equitable-specific-performance approach of Dixon J in *Huon Transport* (1945) 70 CLR 293, and his Honour's acceptance in *Grace Brothers* (1946) 72 CLR 269 of the 'legislative power' approach suggested by Dixon J in that case, provide some evidence of Dixon's intellectual influence over McTiernan in the interpretation of s 51(xxxi).

broader departure from American influence after *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*,¹⁴⁶ although the reasons given for the departure in the *Engineers Case* are not transferrable to s 51(xxxi),¹⁴⁷ and none of the judgments on the placitum referred to it. Secondly, the trend towards a more legalistic and textual interpretation of the *Constitution*¹⁴⁸ would support replacing the theory of eminent domain with the text alone: ‘acquisition-on-just-terms’.¹⁴⁹ However, whatever the role of these broader influences, in the end the ‘legislative power’ approach triumphed because the other Justices agreed with Dixon J. The lone dissident in *Dalziel*, Dixon J in the ensuing years pressed the ‘legislative power’ approach until it eventually became the High Court’s orthodox and uncontested approach to s 51(xxxi).

¹⁴⁶ ‘American authorities, however illustrious the tribunals may be, are not a secure basis on which to build fundamentally with respect to our own Constitution’: *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 146 (Knox CJ, Isaacs, Rich and Starke JJ) (*Engineers Case*). Similarly: ‘no more profound error could be made than to endeavour to find our way through our own Constitution by the borrowed light of the decisions, and sometimes the dicta, that American institutions and circumstances have drawn from the distinguished tribunals of that country’: at 148. However, their Honours conceded that American decisions ‘may, and sometimes do, afford considerable light and assistance’ albeit in respect of ‘secondary and subsidiary matters’: at 146.

¹⁴⁷ Its context was the determination of ‘the respective rights of the Commonwealth and States’ (at 146), not the rights of the individual against the Commonwealth; and its fundamental basis was two concepts irrelevant to s 51(xxxi): ‘the common sovereignty of all parts of the British Empire’ and ‘the principle of responsible government’ (at 146). Moreover, the *Engineers Case* gave primacy to ‘the judicial authorities ... in the contemplation of those who, whether in the Convention or in the Imperial Parliament, brought our Constitution into being’ (at 148); as Chapter 4 demonstrated, the Framers looked to American judicial authorities when they considered s 51(xxxi).

¹⁴⁸ Thus: ‘It may be that the Court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism’: *Swearing in of Sir Owen Dixon as Chief Justice* (1952) 85 CLR xi, xiv. On the relationship between legalism and textualism, see: David Tucker, ‘Textualism: An Australian Evaluation of the Debate between Professor Ronald Dworkin and Justice Antonin Scalia’ (1999) 21 *Sydney Law Review* 567; William Rich, ‘Approaches to Constitutional Interpretation in Australia: An American Perspective’ (1993) 12 *University of Tasmania Law Review* 150; Kenneth R Mayer and Howard Schweber, ‘Does Australia Have a Constitution – Part II: The Rights Constitution’ (2008) 25 *University of California at Los Angeles Pacific Basin Law Review* 265.

¹⁴⁹ *Grace Brothers* (1946) 72 CLR 269, 290 (Dixon J). The predominance of text in constitutional interpretation was also emphasised in the *Engineers Case* (1920) 28 CLR 129, 142: ‘it is the chief and special duty of this Court faithfully to expound and give effect to [the Constitution] according to its own terms, finding the intention from the words of the compact, and upholding it throughout precisely as framed’. This proposition was qualified by a quotation from *A-G (Ontario) v A-G (Canada)* [1912] AC 571, 583 (Lord Loreburn): ‘if the text is explicit the text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous ... recourse must be had to the context and scheme of the Act.’ This passage was quoted repeatedly by Isaacs J: *Engineers Case* (1920) 28 CLR 129, 150; *Commonwealth v Limerick Steamship Co Ltd* (1924) 35 CLR 69, 107-8 (Isaacs and Rich JJ); *Ex Parte Nelson (No 1)* (1928) 42 CLR 209, 228 (Isaacs J).

IV NEW CHALLENGES IN THE APPLICATION OF S 51(xxxi)

In the second era of s 51(xxxi) jurisprudence, the Court had to address two new challenges in the application of the placitum: whether it applied to a law for the ‘acquisition of property’ by a person other than the Commonwealth; and whether there were instances of the ‘acquisition of property’ which fall outside s 51(xxxi) and therefore do not require ‘just terms’. Although the ‘legislative power’ approach had been accepted in general, interestingly the new areas remained susceptible to the ‘individual rights’ approach, demonstrating its superior explanatory power.

A ‘Acquisition’ by Whom?

Under the ‘individual rights’ approach, s 51(xxxi) would apply to the ‘acquisition of property’ by any person pursuant to Commonwealth law, because of its focus on the affected individual (who lost their property) rather than the Commonwealth (who did not receive it). This was the approach of the majority in the second era of s 51(xxxi). As in all of their Honours’ interpretations of s 51(xxxi), Rich and Williams JJ used the ‘individual rights’ approach and held that the placitum applied to any acquisition of property under Commonwealth law.¹⁵⁰ The ‘individual rights’ approach was also used by Latham CJ to reach the same conclusion in *Magennis*:¹⁵¹

the constitutional provision could readily be evaded if it did not apply to acquisition by a corporation constituted by the Commonwealth or by an individual person authorized by a Commonwealth statute to acquire property ... the constitutional provision would be quite ineffective if by making an agreement with a State for the acquisition of property upon terms which were not just the Commonwealth Parliament could validly provide for the acquisition of property from any person to whom State legislation could be applied upon terms which paid no attention to justice.¹⁵²

This same result could, however, be reached with the ‘legislative power’ approach. In *McClintock v Commonwealth*, Starke J adopted the ‘legislative power’ approach,¹⁵³ but still held that s 51(xxxi) ‘is not confined to laws for the acquisition of property by the

¹⁵⁰ *Jenkins v Commonwealth* (1947) 74 CLR 400, 406 (Williams J); *McClintock v Commonwealth* (1947) 75 CLR 1, 36 (Williams J) (with whom Rich J agreed: at 20); *Bank Nationalisation Case* (1948) 76 CLR 1, 250 (Rich and Williams JJ); *Magennis* (1949) 80 CLR 382, 423 (Williams J) (with whom Rich J agreed: at 406).

¹⁵¹ *Magennis* (1949) 80 CLR 382, 402 (Latham CJ).

¹⁵² *Ibid* 401 (Latham CJ). His Honour noted that: ‘The constitutional provision is not limited in terms to laws providing for the acquisition of property by the Commonwealth itself. The words are general—‘with respect to the acquisition of property’’: at 401.

¹⁵³ *McClintock v Commonwealth* (1947) 75 CLR 1, 24 (Starke J), quoting: *Grace Brothers* (1946) 72 CLR 269, 291 (Dixon J).

Commonwealth alone’,¹⁵⁴ justifying this result not by considering the position of individual property owners, but by focusing on Commonwealth power: legislation under s 51(xxxi) could authorise the acquisition of property by any person in the absence of any ‘constitutional provision denying this power’.¹⁵⁵

Justices Dixon, McTiernan and Webb preferred not to determine this question.¹⁵⁶ Although this was not an instance where the ‘individual rights’ and ‘legislative power’ approaches generated different results, it is notable that the ‘individual rights’ approach was used by more of the Justices to resolve this issue. This is important for the future, not only as an indication that the ‘individual rights’ approach had continuing relevance to the interpretation of s 51(xxxi), but because the jurisprudence in this new area posed no barrier to a future return to the ‘individual rights’ approach.

B *The ‘Acquisition of Property’ Outside s 51(xxxi)*

The three cases that concluded the second era jurisprudence addressed the novel issue of whether certain instances of the ‘acquisition of property’ were outside s 51(xxxi) and therefore not subject to its requirement of ‘just terms’. These cases will be examined for two reasons. First, to identify whether there was any reversion to the ‘individual rights’ approach in this area. Secondly, because this issue provides important definition to the significance of s 51(xxxi) – if too many instances of the ‘acquisition of property’ are outside the placitum, then its protection to individual rights becomes nugatory. It will be demonstrated that, notwithstanding the overall influence of the ‘legislative power’ approach, its influence in these new areas was limited.

Although Dixon J in *Andrews v Howell* had been reluctant to treat s 51(xxxi)’s requirement of ‘just terms’ as a freestanding guarantee that limits all heads of

¹⁵⁴ *McClintock v Commonwealth* (1947) 75 CLR 1, 23 (Starke J).

¹⁵⁵ *Ibid.*

¹⁵⁶ Justice Dixon did not resolve the issue: in the *Bank Nationalisation Case*, Dixon J was doubtful about whether the Commonwealth Bank was a separate entity, so did not need to resolve the question (at 348); in *Magennis* his Honour merely alluded to the issue again without resolving it (at 411). Justice McTiernan in the *Bank Nationalisation Case* (1948) 76 CLR 1 applied s 51(xxxi) to a law for the acquisition of property by the Commonwealth Bank, having held this to be a separate entity from the Commonwealth, but did not explain why (at 396). A cautious approach was taken by Webb J, who held merely that s 51(xxxi) applied at least to ‘an acquisition by the State exercising its powers of acquisition by agreement with the Commonwealth’: *Magennis* (1949) 80 CLR 382, 430. The question would be resolved in the third era, see: Chapter 7, section IIB.

Commonwealth legislative power,¹⁵⁷ by the *Bank Nationalisation Case* his Honour had accepted this operation and stated that s 51(xxxi) ‘serves a double purpose’: it is both ‘a legislative power of acquiring property’ and ‘a protection against governmental interferences with ... proprietary rights without just recompense.’¹⁵⁸ Because of this second purpose, Dixon J applied s 51(xxxi) to limit all heads of legislative power:

when a constitution undertakes to forbid or restrain some legislative course, there can be no prohibition to which it is more proper to apply the principle embodied in the maxim *quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud*. In requiring just terms s 51(xxxi) fetters the legislative power by forbidding laws with respect to acquisition on any terms that are not just.¹⁵⁹

Quoting these passages in *Schmidt*, Dixon CJ observed that s 51(xxxi) prevents other heads of power from being read as allowing for the acquisition of property:

when you have ... an express power, subject to a safeguard, restriction or qualification, to legislate on a particular subject or to a particular effect, it is in accordance with the soundest principles of interpretation to treat that as inconsistent with any construction of other powers conferred in the context which would mean that they included the same subject or produced the same effect and so authorized the same kind of legislation but without the safeguard, restriction or qualification.¹⁶⁰

The strict ‘individual rights’ approach was not embraced by Dixon CJ, but this conclusion was based on the acknowledgement that one purpose of s 51(xxxi) is the protection of individual property rights. This was, at least, an important caveat to Dixon CJ’s ‘legislative power’ approach.

Burton v Honan was a s 51(xxxi) challenge to provisions of the *Customs Act 1901* (Cth) that forfeited property to the Crown upon conviction of a person for illegally importing it, even if it was in the hands of an innocent third party. As explained by Dixon CJ:

the whole matter lies outside the power given by s 51(xxxi). ... It is nothing but forfeiture imposed ... for the purpose of vindicating the Customs laws. It has no

¹⁵⁷ See: Chapter 5, section IIIA.

¹⁵⁸ *Bank Nationalisation Case* (1948) 76 CLR 1, 349 (Dixon J); quoted in: *Schmidt* (1961) 105 CLR 361, 371 (Dixon CJ).

¹⁵⁹ *Bank Nationalisation Case* (1948) 76 CLR 1, 349-50 (Dixon J); quoted in: *Schmidt* (1961) 105 CLR 361, 371-2 (Dixon CJ). The latin maxim may be translated as: ‘When anything is prohibited, everything by which the thing is accomplished is also prohibited’: James A Ballentine (ed), *A Law Dictionary* (Bobbs-Merrill, 1916) 405. The modern interpretations of that phrase by the High Court express the principle as either: ‘the adoption of a circuitous device with a view to avoiding the need to comply with a constitutional requirement will be of no avail’: *Caltex Oil (Aust) Pty Ltd v Best* (1990) 170 CLR 516, 523 (Mason CJ, Gaudron and McHugh JJ); or, more frequently, ‘it is not permissible to do indirectly what is prohibited directly’: *Caltex Oil (Aust) Pty Ltd v Best* (1990) 170 CLR 516, 522 (Mason CJ, Gaudron and McHugh JJ), *Re Pacific Coal Pty Ltd; Ex Parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346, 360 (Gleeson CJ), *New South Wales v Commonwealth* (2006) 229 CLR 1, 131 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) (*‘WorkChoices Case’*).

¹⁶⁰ *Schmidt* (1961) 105 CLR 361, 371-2 (Dixon CJ).

more to do with ... s 51(xxxi) than has the imposition of taxation itself, or the forfeiture of goods in the hands of the actual offender.¹⁶¹

His Honour thus identified two instances of the compulsory ‘acquisition of property’ outside s 51(xxxi):¹⁶² taxation and forfeiture. In *Burton v Honan*, no justification for this was advanced for taxation, but forfeiture was justified because it had historical precedents which showed forfeiture to be necessary ‘to ensure the strict and complete observance of the Customs laws, which are notoriously difficult of complete enforcement in the absence of strong provisions supporting their administration.’¹⁶³ The ‘legislative power’ focus here is clear – Dixon CJ focused on the reasons why forfeiting property in the hands of innocent third parties was conducive to efficient enforcement of legislation, ignoring the potential impact on affected innocent individuals.

A justification for taxation being outside s 51(xxxi) was given by Dixon CJ in *Clyne*:

it seems absurd to say that, within the meaning of s 51(xxxi), the sums paid or payable as provisional tax constitute property acquired for a purpose in respect of which Parliament has power to make laws. The purpose of the power itself which is conferred by s 51(ii) is to acquire money for public purposes.¹⁶⁴

Reading the two placita together, Dixon CJ found that any ‘acquisition of property’ as a result of taxation under s 51(ii) is outside s 51(xxxi): the purpose of taxation is to raise revenue, and this purpose would be defeated if s 51(xxxi) required the money to be

¹⁶¹ *Burton v Honan* (1952) 86 CLR 169, 181-2.

¹⁶² An alternative reading of Dixon CJ’s approach here must be rejected. Rosalind Dixon has argued that Dixon CJ meant that there could be acquisitions of property under other heads of power, to which s 51(xxxi) would be irrelevant: Rosalind Dixon, ‘Overriding Guarantee of Just Terms or Supplementary Source of Power?: Rethinking s 51(xxxi) of the Constitution’ (2005) 27 *Sydney Law Review* 639, 641, 654. In particular, she argued that Dixon CJ in *Burton v Honan* (1952) 86 CLR 169 held that s 51(xxxi) was ‘inapplicable wherever a law was either within the scope of a power which necessarily encompassed a power to acquire property or within the scope of the implied incidental power’: at 654. If that were the case, the forfeiture could be justified as being incidental to the trade and commerce power (s 51(i)) or the taxation power (s 51(ii)), without any need to consider s 51(xxxi). This interpretation of Dixon CJ in *Burton v Honan* is inconsistent with the views expressed by his Honour in other judgments. In the *Bank Nationalisation Case* (1948) 76 CLR 1, Dixon J held that ‘an acquisition of property ... of course must be supported under s. 51 (xxxi.) or not at all’, adding that ‘s. 51 (xxxi.) is itself dependent upon other legislative powers, in the sense that the acquisition upon just terms ... must be for a purpose ‘in respect of which the Parliament has power to make laws’’: at 352. But this did not mean that an acquisition of property could occur under the other power alone. Indeed, Dixon J held that, had the legislation ‘not been in conflict with the requirement of just terms’ contained in s 51(xxxi), then there would have been ‘no great difficulty’ in upholding its validity under the banking power (s 51(xiii)): at 352; see also: at 335. But that was not possible: the banking power must be ‘combined, of course, with par. (xxxi.) to sustain the expropriation of shares or assets’: at 330. In the *Bank Nationalisation Case*, the legislation failed because upholding it as an exercise of the banking power considered alone would ‘defeat the constitutional requirement imposed by s. 51 (xxxi.) that the acquisition of property shall only be upon just terms’: at 344. Moreover, the possibility that an ‘acquisition of property’ could occur under another head of power without the need for recourse to s 51(xxxi) was subsequently expressly rejected by Dixon CJ in *Schmidt* (1961) 105 CLR 361, 371: see below nn 166-171.

¹⁶³ *Burton v Honan* (1952) 86 CLR 169, 178-9.

¹⁶⁴ *Clyne* (1958) 100 CLR 246, 263.

immediately returned as compensation to satisfy the requirement of ‘just terms’. This distinction between eminent domain and taxation had been previously recognised in Vattel’s notion of disproportionate sacrifice,¹⁶⁵ although Dixon CJ did not refer to it.

In *Schmidt*, Dixon CJ again accepted that there would be instances of the ‘acquisition of property’ outside s 51(xxxi), acknowledging that they were not yet settled.¹⁶⁶ He noted not only taxation¹⁶⁷ and ‘forfeiture or penalty’,¹⁶⁸ but added further examples: laws dealing with property in the administration of a bankruptcy,¹⁶⁹ the condemnation of prize,¹⁷⁰ and the disposal of the proceeds of the property of enemy aliens.¹⁷¹ However, these were not blanket exceptions, as Dixon CJ noted of bankruptcy:

no one would doubt that, under the power to make laws with respect to bankruptcy, property of the bankruptcy may be sequestrated and property of others which has been left in his order and disposition may be vested in the Official Receiver and that s 51(xxxi) has no bearing on the matter. At the same time, if a law was made under which a piece of land was acquired for a Bankruptcy Office, s 51(xxxi) would govern the legislation and not s 51(xvii).¹⁷²

This explanation revealed a further challenge: although it might be true that ‘no one would doubt’ the result, what reason accounted for it? The explanation suggested by Dixon CJ, for all of the instances of the ‘acquisition of property’ that had now been identified as being outside s 51(xxxi), was that the placitum:

covers laws with respect to the acquisition of real or personal property for the intended use of any department or officer of the Executive Government of the Commonwealth in the course of administering laws made by the Parliament in the exercise of its legislative power.¹⁷³

Attempting to provide a more general definition, Dixon CJ added:

Prima facie it is pointed at the acquisition of property by the Commonwealth for use by it in the execution of the functions, administrative and the like, arising under its laws ... [T]he restriction involved in the words ‘on just terms’ applies ... to the use or application of the property in or towards carrying out or furthering a purpose comprised in some other legislative power.¹⁷⁴

¹⁶⁵ See: Chapter 3, section II.

¹⁶⁶ *Schmidt* (1961) 105 CLR 361, 372.

¹⁶⁷ *Ibid* 373; citing: *Clyne* (1958) 100 CLR 246, 263.

¹⁶⁸ *Schmidt* (1961) 105 CLR 361, 372.

¹⁶⁹ *Ibid*.

¹⁷⁰ *Ibid* 373.

¹⁷¹ *Ibid*.

¹⁷² *Ibid* 372.

¹⁷³ *Ibid*.

¹⁷⁴ *Ibid*.

Adopting a phrase from the jurisprudence on the immunity of Crown corporations,¹⁷⁵ Dixon CJ stated the test that s 51(xxxi) does not apply to ‘anything which lies outside the very general conception expressed by the phrase ‘use and service of the Crown’’.¹⁷⁶

This ‘use and service of the Crown’ test was Dixon CJ’s solution to the problem of identifying which instances of the ‘acquisition of property’ would be outside s 51(xxxi). However, it arguably failed to provide satisfactory explanations for even the five instances of ‘acquisition of property’ outside s 51(xxxi) recognised by his Honour in *Schmidt*. The new test did explain forfeiture or penalty (imposed as an aid to the enforcement of laws aimed at other ends, not for the ‘use and service of the Crown’) and bankruptcy (where the property of a bankrupt is interfered with to achieve a settlement of competing claims on that property, not for the ‘use and service of the Crown’). However, it was insufficient to explain the condemnation of prize, which serves the dual purpose of depriving the enemy of transport resources (which is not for the ‘use and service of the Crown’) and boosting the transport resources of the nation (which is for the ‘use and service of the Crown’).¹⁷⁷ Moreover, it seemed not to explain taxation (as Dixon CJ noted in *Clyne*, the *purpose* of the taxation power ‘is to acquire money for public purposes’),¹⁷⁸ nor *Schmidt* itself (diverting the proceeds of enemy property towards meeting reparations due to the Crown directly put the property into the ‘use and service of the Crown’).

C *The ‘Individual Rights’ Approach and the Resolution of New s 51(xxxi) Issues*

In resolving these new issues and holding that s 51(xxxi) applied to the ‘acquisition of property’ by any person and that there were instances of the ‘acquisition of property’

¹⁷⁵ The phrase ‘use and service of the Crown’ was employed in: *Grain Elevators Board (Vic) v Dunmunkle Corp* (1946) 73 CLR 70, 83 (Dixon J); *Bank Nationalisation Case* (1948) 76 CLR 1, 358 (Dixon J). In that context, to determine whether or not Crown immunity was enjoyed, the function of the Crown corporation was assessed, the requirement being that: ‘the public purposes [which its functions serve] must be such as are required and created by the government of the country, and are therefore to be deemed part of the use and service of the Crown’: *Mersey Docks & Harbour Board Trustees v Cameron* (1865) 11 HLC 443, 505 (Lord Westbury); quoted in: *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)* (1956) 93 CLR 376, 382-3 (Williams, Webb and Taylor JJ).

¹⁷⁶ *Schmidt* (1961) 105 CLR 361, 373.

¹⁷⁷ ‘[M]erchant-shipping is used in war for purposes of transport; so long as it belongs to the subjects of the enemy, it adds to his strength, while the capture of merchant shipping at once reduces the enemy’s power and adds to the power of the belligerent and hence becomes a legitimate operation of war’: *Schiffahrt-Treuhand GmbH v Her Majesty’s Procurator-General* [1953] AC 232, 262.

¹⁷⁸ *Clyne* (1958) 100 CLR 246, 263.

outside s 51(xxxi), the Court evidenced the ongoing significance of the ‘individual rights’ approach to the placitum. First, although both the ‘individual rights’ and ‘legislative power’ approaches were capable of explaining why s 51(xxxi) applies to the ‘acquisition of property’ by any person under Commonwealth law, the majority of the Justices preferred the ‘individual rights’ approach. Secondly, Dixon CJ’s explanation of why s 51(xxxi) applies to limit all heads of legislative power revealed an important caveat to his Honour’s approach – this result could only be explained by acknowledging an ‘individual rights’ purpose of the placitum. Thirdly, in the identification and justification of instances of ‘acquisition of property’ outside s 51(xxxi), the ‘legislative power’ approach was unable to provide a suitable test: the ‘use and service of the Crown’ test lacked sufficient explanatory power to explain the existing instances identified in *Schmidt*.

Thus, there was evidence of some ongoing relevance of the ‘individual rights’ approach, and none of these decisions was inconsistent with it.¹⁷⁹ Further, the weakness of the ‘legislative power’ approach in its inability to clarify instances of the ‘acquisition of property’ outside s 51(xxxi) gives a substantial reason for undertaking an investigation of whether the ‘individual rights’ approach can provide better explanations – a matter to be examined in Chapter 7.

V CONCLUSION

The second era of s 51(xxxi) jurisprudence saw the rejection of the ‘individual rights’ approach and the eventual unanimous adoption of the ‘legislative power’ approach to s 51(xxxi) taken by Dixon J. The resulting departure from the historical, theoretical and comparative contexts of the placitum also marked a significant break from the first era of s 51(xxxi) jurisprudence. The differences in approach were highlighted in three cases (*Grace Brothers*, *McClintock* and *Nelungaloo*) where the competing approaches were applied to reach different outcomes: the latitude allowed to Parliament by the ‘legislative power’ approach resulted in the potential for the rights of the individual to be seriously violated, in marked contrast with the stricter ‘individual rights’ approach.

¹⁷⁹ However, questions might be raised about forfeiture in the hands of innocent third parties. See: Chapter 7, section IIIB(2).

However, no contemporary commentaries proclaimed (or decried) the Court's new approach.¹⁸⁰ Nicholas and Wynes both described the broad 'individual rights' view of 'acquisition of property',¹⁸¹ and the narrower 'legislative power' view of 'just terms',¹⁸² but made no attempt to reconcile the two different approaches that were being utilized, or to explain why different judgments adopted these approaches. Similarly, both Bailey and Baker made comments consistent with the 'individual rights' approach,¹⁸³ but undermined them by adopting the 'legislative power' approach stated in the most recent cases,¹⁸⁴ rejecting American eminent domain¹⁸⁵ and narrowly interpreting 'just terms'.¹⁸⁶ Bailey's indication that s 51(xxxi) had 'assumed no great importance until World War II',¹⁸⁷ significantly confined his analysis to recent cases. This limited focus was continued by Baker. All four authors treated eminent domain as signifying only a legislative power of appropriation,¹⁸⁸ ignoring its incorporation of individual rights protection, and thus excluded much useful American guidance from consideration. Conversely, commentary in a published 1959 lecture by the Chief Justice of Tasmania, Sir Stanley Burbury, was based on the first era 'individual rights' approach, the reasoning of which no longer commanded acceptance on the Court.¹⁸⁹ No later

¹⁸⁰ Only six contemporary commentaries examined s 51(xxxi): H S Nicholas, *The Australian Constitution: An Analysis* (LawBook, 1948) 197-207; K H Bailey, 'Fifty Years of the Australian Constitution' (1951) 25 *Australian Law Journal* 314, 326; R W Baker, 'The Compulsory Acquisition Powers of the Commonwealth' in Rae Else-Mitchell (ed), *Essays on the Australian Constitution* (LawBook, 1952) 156; W Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia* (LawBook, 2nd ed, 1956); Stanley Burbury, 'The Common Law and the Welfare State' (1959) 1 *Tasmanian University Law Review* 165; Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967). A number of possible explanations exist for this paucity of reaction. One relevant factor is that the legal academy in Australia at the time was very small compared to today, and there were very few law journals in existence in Australia in which reaction could have been published. See: John Gava, 'Law Reviews: Good for Judges, Bad for Law Schools?' (2002) 26 *Melbourne University Law Review* 560, 563. Further, dissenting judges did not often take the opportunity to revisit the issues of their dissent in public fora: cf, Daryl Dawson, 'Southey Memorial Lecture 1983: The Constitution – Major Overhaul or Simple Tune-Up?' (1984) 14 *Melbourne University Law Review* 353.

¹⁸¹ Nicholas, above n 180, 201; Wynes, above n 180, 463.

¹⁸² Nicholas, above n 180, 200; Wynes, above n 180, 467, 473-5.

¹⁸³ Bailey, above n 180, 327; Baker, above n 180, 164, 165, 166, 172, 177-8.

¹⁸⁴ Bailey, above n 180, 328. The references were to: *Grace Brothers* (1946) 72 CLR 269, 280 (Latham CJ), 285 (Starke J), 291 (Dixon J); *Nelungaloo* (1948) 75 CLR 495, 541 (Latham CJ).

¹⁸⁵ Bailey, above n 180, 327-8; Baker, above n 180, 163, 184.

¹⁸⁶ Bailey, above n 180, 328; Baker, above n 180, 169-71.

¹⁸⁷ Bailey, above n 180, 327-8.

¹⁸⁸ Nicholas, above n 180, 198; Bailey, above n 180, 328; Baker, above n 180, 169; Wynes, above n 180, 461.

¹⁸⁹ Thus, Burbury, above n 180, quoted (at 168) from *Tonking* (1942) 66 CLR 77, 106 (Rich J) a passage linking s 51(xxxi) to the American eminent domain, a link that had been rejected in the interim; Burbury also treated 'just compensation' as synonymous with 'just terms' (at 172) despite the rejection of this link and the change in interpretation recognised by the other commentators; and he wrote of the 'fundamental assumption that the community will pay ... the full money equivalent' in compensation for

commentary has attempted to systematically address this significant gap in the existing literature by studying either the first era cases or the significant volume of continuing ‘individual rights’ interpretations during the second era.

Further, contemporary academic assessments of s 51(xxxi) generally confined themselves to providing a descriptive account of the most recently decided cases without examining the underlying fundamental approaches. Sawyer’s later text highlighted a lack of fundamental analysis of s 51(xxxi) in the cases,¹⁹⁰ and identified some of the contradictions in the ‘legislative power’ approach,¹⁹¹ but did not attempt to advance an alternative approach. No criticism is made of the commentaries as summaries of the latest jurisprudence: the point is that they did not attempt the analysis of fundamental approaches that has been undertaken in this chapter.

The ‘legislative power’ approach to s 51(xxxi), introduced by Dixon J in *Grace Brothers*, involved four key differences from the ‘individual rights’ approach: first, it would no longer be necessary to ensure that every individual was treated fairly, so long as the result was fair in general; secondly, Parliament would enjoy discretion to define ‘just terms’ which would be invalidated only if not reasonable; thirdly, there would be a balancing of the interests of the individual against those of the community; and, fourthly, American eminent domain would no longer be relevant to the interpretation of s 51(xxxi). These new interpretations were driven by Dixon J’s view that s 51(xxxi) was not an exception to the general choice by the Framers of the *Australian Constitution* to avoid individual rights protections.

Adopting the ‘legislative power’ approach to s 51(xxxi), Dixon J separated the interpretation of the placitum from its historical, theoretical and comparative contexts, blurred the conceptual distinction between the sovereign power of appropriation and the individual right to full market-value compensation, and looked to the twentieth century legislative practice of British jurisdictions instead of longstanding English

the appropriation of property (at 173) when the Court no longer upheld this view. Burbury failed to address the second era of s 51(xxxi) jurisprudence at all.

¹⁹⁰ Sawyer, above n 180, 55: ‘most ... were concerned with highly detailed questions as to amount, payment of interest etc. in which familiar rules derived from well established bodies of compensation law outside the constitutional field were decisive’.

¹⁹¹ Sawyer wrote that ‘just terms’ is ‘in form part of the definition of the power, not an individual guarantee of rights, but in practice it operates to protect the individual’ (ibid 19), and that it requires ‘something like a money equivalent for the particular thing acquired ... but ... leaves a good deal of room for legislative discretion’ (at 172).

constitutional theory and practice. The consequences of these changes in the interpretation of s 51(xxxi) remain as challenges for the High Court today.

Not only has this departure from the ‘individual rights’ approach been shown to be problematic in departing from the contexts of the placitum and in exposing individual rights to potential violation, but this chapter has provided further support for the argument that the ‘individual rights’ approach to s 51(xxxi) is preferable. First, although both approaches were capable of explaining why s 51(xxxi) applied to the ‘acquisition of property’ by any person under Commonwealth law, the majority of the Justices preferred the ‘individual rights’ approach to explain this result. Secondly, to explain why s 51(xxxi) applied to limit other heads of legislative power, even Dixon J had to accept that an ‘individual rights’ purpose was part of s 51(xxxi). Thirdly, in identifying and justifying instances of ‘acquisition of property’ outside s 51(xxxi), the ‘legislative power’ approach was unable to provide a suitable test to apply: the ‘use and service of the Crown’ test lacked sufficient explanatory power to address the majority of the instances identified in *Schmidt*. Consequently, notwithstanding the general acceptance of the ‘legislative power’ approach, the ‘individual rights’ approach remained relevant to the interpretation of s 51(xxxi) in important respects.

Chapter 7 of this thesis will examine the modern s 51(xxxi) cases to identify the extent to which the ‘individual rights’ and ‘legislative power’ approaches have been applied, and to investigate which of these approaches has yielded the best interpretation of the placitum in the modern era.

CHAPTER 7:

THE THIRD ERA:

THE RECURRING INFLUENCE OF THE 'INDIVIDUAL RIGHTS' APPROACH

I INTRODUCTION

The ‘individual rights’ approach to s 51(xxxi) was not entirely removed in the second era, notwithstanding the Dixon Court’s general adoption of the ‘legislative power’ approach to the placitum. This Chapter will demonstrate that the modern era has seen a renaissance of the ‘individual rights’ approach, partly attributable to the adoption of important parts of this approach by Deane J. This return to the ‘individual rights’ approach has been gradual, and remains incomplete, but it is an important trend. This third era of s 51(xxxi) jurisprudence commenced with *Trade Practices Commission v Tooth & Co Ltd* in 1979.¹ Since that time, a further twenty-one cases have raised significant s 51(xxxi) issues,² the largest number of any era.³

The analysis and critique of the modern cases undertaken in this Chapter will examine the extent to which the ‘individual rights’ and ‘legislative power’ approaches have been used in the modern era, expose the problems that have resulted from the use of the ‘legislative power’ approach and demonstrate the benefits that have arisen in those areas where the ‘individual rights’ approach has been adopted. Further, the analysis reveals evidence of important unacknowledged borrowing from American eminent domain. This Chapter will also examine the relevant academic commentary on s 51(xxxi), demonstrate the significant problems with the solutions advanced by other commentators, and show that the adoption of the ‘individual rights’ approach provides the solution to the remaining difficulties of s 51(xxxi) jurisprudence. It therefore completes the argument of this thesis that the ‘individual rights’ approach provides the best interpretation of s 51(xxxi), being consistent with the historical, theoretical and comparative contexts of the placitum and doctrinally coherent. The ‘individual rights’ approach should thus be fully endorsed and applied by the High Court.

¹ (1979) 142 CLR 397 (*TPC v Tooth*). This was the first significant decision on s 51(xxxi) since *A-G (Cth) v Schmidt; Re Döhnert Müller Schmidt & Co* (1961) 105 CLR 361 (*Schmidt*). In the interim, some cases touched on s 51(xxxi), but were of little importance: *Teori Tau v Commonwealth* (*Teori Tau*) (1969) 119 CLR 564 concerned the interpretation of s 122 of the *Australian Constitution* and its relationship to s 51(xxxi), rather than involving the interpretation of the placitum itself; *Forbes v Traders Finance Corporation Ltd* (1971) 126 CLR 429 did not involve any discussion of s 51(xxxi) despite engaging in detailed consideration of forfeiture; *Cheatley v The Queen* (1972) 127 CLR 291 applied previous decisions with little comment; and in *Commissioner of Taxation (Cth) v Barnes* (1975) 133 CLR 483, s 51(xxxi) ‘was suggested but faintly argued’: at 494 (Barwick CJ, Mason and Jacobs JJ).

² The twenty-two significant s 51(xxxi) cases of the modern era are listed in Appendix III to be found at the end of this Chapter.

³ The modern era has been described as ‘a second life’ for s 51(xxxi): Tom Allen, ‘The Acquisition of Property on Just Terms’ (2000) 22 *Sydney Law Review* 351, 351.

It will be recalled that this thesis has identified four key differences between ‘individual rights’ and ‘legislative power’ approaches.⁴ This Chapter will use these key differences to identify the extent to which each of these approaches has been utilised in the modern era. In section II, the areas of remaining influence from the second era will be examined to see if the ‘individual rights’ approach continued to guide their interpretation. Section III will examine areas that were further developed or arose for the first time in the modern era and determine which approach proved most useful. After the second era dramatically changed the interpretation of the requirement of ‘just terms’, section IV will investigate whether the modern era saw any return to the ‘individual rights’ approach. Section V will address how far the American doctrine of eminent domain, with its focus on the constitutional rights of the individual, has been used in the interpretation of s 51(xxxi) in the modern cases.

Finally, on the basis of the foregoing analysis and with reference to the modern commentary on s 51(xxxi), section VI of this Chapter identifies the remaining areas of inconsistent 51(xxxi) jurisprudence, analyses solutions proposed by other commentators, and justifies the ‘individual rights’ approach as the only appropriate solution that will resolve the current areas of difficulty and provide a coherent and appropriate interpretation of s 51(xxxi).

II CONTINUATION OF THE ‘INDIVIDUAL RIGHTS’ APPROACH

Chapter 6 concluded that, even in the second era when the ‘legislative power’ approach prevailed, three important aspects of the ‘individual rights’ approach were followed: the broad interpretation of ‘property’, the application of s 51(xxxi) to the ‘acquisition of property’ by *any* person under Commonwealth law, and the application of s 51(xxxi) to restrict all heads of legislative power (a matter never again challenged before the Court, although it has been challenged by commentators, as the final section of this Chapter will show). The ‘individual rights’ approach continued to drive these same interpretations in the modern era.

First, the breadth of interpretation given to ‘property’ during the first and second eras was most clearly indicated in the formulation adopted by Starke J in *Dalziel*:

⁴ See: Chapter 6, section IIA.

Property, it has been said, is *nomen generalissimum* and extends to every species of valuable right and interest including real and personal property, incorporeal hereditaments such as rents and services, rights of way, rights of profit or use in land of another, and choses in action.⁵

In the third era of s 51(xxxi) jurisprudence, this broad interpretation of ‘property’ was confirmed.⁶ Indeed, ‘property’ within s 51(xxxi) was held to encompass choses in action,⁷ including statute-barred causes of action,⁸ as well as interests ‘which fall short of ownership and for durations of control falling short of permanency’,⁹ and also legally-recognised Aboriginal and Torres Strait Islander property rights.¹⁰

Secondly, cases in the second era had recognised that s 51(xxxi) applies to a compulsory ‘acquisition of property’ by *any* person pursuant to Commonwealth law. This is essential to the ‘individual rights’ approach, as otherwise the Commonwealth could legislate (under another head of power) for the ‘acquisition of property’ without providing ‘just terms’ so long as it received no property itself, radically reducing the protection offered by s 51(xxxi). Justice Murphy challenged this view in the *Tasmanian Dam Case*, where his Honour wrote that: ‘[t]he transfer of property from one person to

⁵ *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 290 (Starke J) (*‘Dalziel’*).

⁶ See, eg: *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480, 509 (Mason CJ, Brennan, Deane and Gaudron JJ) (*‘Tape Manufacturers Case’*); *Commonwealth v Mewett* (1997) 191 CLR 471, 535 (Gummow and Kirby JJ – with whom Brennan CJ agreed: at 491) (*‘Mewett’*); *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 201 (Hayne, Kiefel and Bell JJ), 218-22 (Heydon J) (*‘ICM Agriculture’*). The two instances where rights were held *not* to be ‘property’ within s 51(xxxi) arose not from narrow definitions of ‘property’ but from factual understandings of the particular nature of the rights in question. Thus, Brennan J in *Health Insurance Commission v Peverill* (1994) 179 CLR 226, 245 (*‘HIC v Peverill’*) held that Dr Peverill’s ability to claim a medicare benefit under the *Health Insurance Act 1973* (Cth) did not mean that the Commonwealth was obliged to accept the claim, and that this was not property. (Cf: at 235 (Mason CJ, Deane and Gaudron JJ).) Similarly, in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (*‘ACTV’*), the right in question did not amount to ‘property’ because it was ‘a right to the services of the broadcaster ... not a proprietary right’: at 166 (Brennan J) (with whom McHugh J agreed: at 245). As Dawson J indicated: ‘The licence which may be regarded as property remains. All that occurs is that certain services which the licence holder is able to provide for reward cannot be provided or must be provided without reward’: at 199.

⁷ *Commonwealth v Tasmania* (1983) 158 CLR 1, 282-3 (Deane J) (*‘Tasmanian Dam Case’*); *Tape Manufacturers Case* (1993) 176 CLR 480, 509 (Mason CJ, Brennan, Deane and Gaudron JJ); *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297, 314 (Dawson J), 320 (Toohey J), 325 (McHugh J) (*‘Georgiadis’*); *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 176 (Brennan J), 184 (Deane and Gaudron JJ), 200 (Dawson and Toohey JJ), 222 (McHugh J) (*‘Mutual Pools’*); *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 602-3 (Gummow J) (*‘Newcrest Mining’*); *Smith v ANL Ltd* (2000) 204 CLR 493, 500 (Gleeson CJ), 504 (Gaudron and Gummow JJ), 522 (Kirby J), 532 (Hayne J) (*‘Smith’*).

⁸ *Mewett* (1997) 191 CLR 471, 509 (Dawson J – with whom Toohey J (at 512) and McHugh J (at 532) agreed), 535 (Gummow and Kirby JJ).

⁹ *Commonwealth v Western Australia* (1999) 196 CLR 392, 457-8 (Kirby J).

¹⁰ *Wurridjal v Commonwealth* (2009) 237 CLR 309, 410 (Kirby J) (*‘Wurridjal’*).

another ... does not amount to an acquisition within par xxxi. Unless the Commonwealth gains some property ... there is no acquisition within the paragraph.’¹¹

No other Justice in the modern era accepted this view, which had been previously rejected in *TPC v Tooth*¹² by reference to ‘individual rights’ considerations.¹³ In that case, Aickin J emphasised that:

It would be a serious gap in the *constitutional safeguard* which is the manifest policy of par (xxx) if the Parliament could legislate for compulsory acquisition of property *without just terms* by ... persons or bodies having no connexion with the government.¹⁴

Similarly, Mason J explained that:

As a matter of policy and *protection* it makes very little sense to say that the Commonwealth cannot pass laws for its acquisition of the citizen’s property without giving just terms but it can pass laws for the acquisition of the citizen’s property by others without giving any compensation at all.¹⁵

For Barwick CJ, the result was also dictated by the purpose of s 51(xxxi), being:

to ensure that in no circumstances will a law of the Commonwealth provide for the acquisition of property except upon just terms. Section 51 (xxx) is a *very great constitutional safeguard*, not confined to the protection of the citizen from confiscation of his property by the State. It ensures that no one may, by virtue of a Commonwealth statutory provision, acquire his property except upon just terms.¹⁶

These statements all pointed to the ‘individual rights’ approach to the placitum. Accordingly, in the *Tasmanian Dam Case*, Mason, Brennan and Deane JJ all rejected Murphy J’s attempt to narrow the placitum’s application.¹⁷ Moreover, in the *Tape Manufacturers Case*, the Court unanimously held that s 51(xxxi) applies to the ‘acquisition of property’ by *any* person pursuant to Commonwealth law,¹⁸ a result always reaffirmed subsequently.¹⁹

¹¹ *Tasmanian Dam Case* (1983) 158 CLR 1, 181 (Murphy J).

¹² *TPC v Tooth* (1979) 142 CLR 397, 403 (Barwick CJ), 407 (Gibbs J), 426 (Mason J), 445 (Aickin J). Justice Stephen noted that s 51(xxxi) extends at least ‘some distance beyond ... the acquisition of property by the Commonwealth’: at 424-5.

¹³ Justice Gibbs did not provide a justification, simply referring to previous judgments that dictated this result: *ibid* 407-8 (Gibbs J), referring to: *McClintock v Commonwealth* (1947) 75 CLR 1, 23-24 (Starke J), 36 (Williams J); *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 250 (Rich and Williams JJ) (‘*Bank Nationalisation Case*’); *P J Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382, 401-2 (Latham CJ), 423 (Williams J), 429-30 (Webb J).

¹⁴ *TPC v Tooth* (1979) 142 CLR 397, 452 (Aickin J) [emphasis added].

¹⁵ *Ibid* 426 (Mason J).

¹⁶ *Ibid* 403 (Barwick CJ).

¹⁷ ‘[A] law can be a law with respect to the acquisition of property ... notwithstanding that the acquisition is not by the Commonwealth’: *Tasmanian Dam Case* (1983) 158 CLR 1, 282 (Deane J). See also: at 145 (Mason J), 247 (Brennan J).

¹⁸ *Tape Manufacturers Case* (1993) 176 CLR 480, 510-11 (Mason CJ, Brennan, Deane and Gaudron JJ), 526 (Dawson and Toohey JJ) (with whom McHugh J agreed: at 528). In the interim, it was noted that s 51(xxxi) ‘extends at least to some acquisition by entities other than the Commonwealth’: *Clunies-Ross v*

In these two areas where the influence of the ‘individual rights’ approach remained after the second era, the broad interpretation of ‘property’ and the application of s 51(xxxi) to the ‘acquisition of property’ by *any* person under Commonwealth law, the third era cases followed the reasoning and interpretation of s 51(xxxi) provided by the ‘individual rights’ approach.

III ACCEPTANCE OF THE ‘INDIVIDUAL RIGHTS’ APPROACH IN NEW AREAS

The influence of the ‘individual rights’ approach increased in the modern era when it was adopted in the interpretation of ‘acquisition of property’ and to assist with the identification of instances of ‘acquisition of property’ outside s 51(xxxi).

A *The ‘Identifiable and Measureable Advantage’ Test for the ‘Acquisition of Property’*

Difficult questions arise in the interpretation of s 51(xxxi) when the ‘acquisition of property’ does not involve a formal estate,²⁰ but the receipt of some lesser benefit. In the *Tasmanian Dam Case*, it was argued that there had been an ‘acquisition of property’ because legislation ‘so restricts the use of land that it assumes the owner’s rights for an indefinite period’.²¹ This argument was rejected by three of the four Justices who addressed the issue.²² For Mason, Brennan and Murphy JJ, there had been no ‘acquisition of property’ because nothing acquired by the Commonwealth was proprietary in nature.²³ Justice Deane disagreed, adopting a new test to determine whether there had been an ‘acquisition of property’.

Commonwealth (1984) 155 CLR 193, 202 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ) (1984) 155 CLR 193.

¹⁹ *Mutual Pools* (1994) 179 CLR 155, 189 (Deane and Gaudron JJ); *Smith* (2000) 204 CLR 493, 506 (Gaudron and Gummow JJ); *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133, 193 (Gaudron J) (*Airservices*).

²⁰ In *TPC v Tooth* (1979) 142 CLR 397, the ‘exclusive dealing’ provisions of the *Trade Practices Act 1974* (Cth) s 47(9)(a) were held to involve an ‘acquisition of property’, but this was hardly controversial as they required the renewal of leases in certain circumstances: ‘[a] law which provides a means whereby a person may obtain a term or tenancy in land ... is undoubtedly a law with respect to the acquisition of property’: at 402 (Barwick CJ). See also: at 426, 433 (Mason J).

²¹ *Tasmanian Dam Case* (1983) 158 CLR 1, 24 (R J Ellicott QC, during argument).

²² The dissenting Justices did not need to address the application of s 51(xxxi): *ibid* 119 (Gibbs CJ), 204 (Wilson J), 323 (Dawson J).

²³ *Ibid* 145-6 (Mason J), 247-8 (Brennan J), 181-2 (Murphy J).

The issue of the breadth of the interpretation of ‘acquisition of property’ had been noted in Roger Hamilton’s 1973 article in the *Federal Law Review*. He posited the hypothetical situation of a Commonwealth law preventing the construction of a multi-storey office block on land that was otherwise designated as suitable for such a building, noting that it was ‘doubtful whether the right taken away would be regarded as property’.²⁴ Indeed, on the analysis of Mason, Brennan and Murphy JJ in the *Tasmanian Dam Case*, it would not be. Hamilton foresaw the emergence of the problem of whether regulation could ever become acquisition under s 51(xxxi):

Problems arise, however, when considering some of the less obvious features of ownership ... particularly if the exercise of those features is regulated rather than taken over by the Commonwealth. This leads to the crucial question of where ‘regulation’ ends and ‘acquisition’ begins.²⁵

Hamilton concluded that ‘the time has now come to start meeting the challenge of ‘back door’ acquisition by regulation’.²⁶ This challenge was taken up by Deane J in the *Tasmanian Dam Case*, where his Honour referred to Hamilton’s article.²⁷

On the facts of the *Tasmanian Dam Case*, the challenge posed to the effectiveness of s 51(xxxi) by regulation was clear. The other Justices agreed that ‘the freedom’ of Tasmania as a property owner was impaired,²⁸ and indeed that ‘the law gives the Commonwealth control over certain activities which might otherwise occur on the land’²⁹ to the point that ‘[i]n terms of its potential for use, the property is sterilized’.³⁰ As Deane J noted, ‘[t]he benefit of land can, in certain circumstances, be enjoyed without any active right in relation to the land being acquired or exercised’.³¹ If s 51(xxxi) could be avoided by imposing legislative restrictions on the use of property, providing there was no receipt of a proprietary right, then the placitum’s value as a

²⁴ Roger L Hamilton, ‘Some Aspects of the Acquisition Power of the Commonwealth’ (1973) 5 *Federal Law Review* 265, 271. Previously, Baker noted that the interpretation in *Dalziel* (1944) 68 CLR 261 was ‘indeed a wide interpretation ... that would presumably cover almost any interest in any property’: R W Baker, ‘The Compulsory Acquisition Powers of the Commonwealth’ in Rae Else-Mitchell (ed), *Essays on the Australian Constitution* (LawBook, 2nd ed, 1961) 193, 204. Baker hypothesized that it was ‘a distinct possibility’ that the destruction of an easement or the violation of a building covenant might constitute an ‘acquisition of property’: at 204. These instances, however, remained very close to the facts of *Dalziel*, not addressing the broader question of whether regulation could ever result in an ‘acquisition of property’.

²⁵ Hamilton, above n 24, 273.

²⁶ *Ibid* 293.

²⁷ Albeit this was for a different proposition: *Tasmanian Dam Case* (1983) 158 CLR 1, 282 (Deane J).

²⁸ *Ibid* 248 (Brennan J).

²⁹ *Ibid* 181-2 (Murphy J).

³⁰ *Ibid* 145 (Mason J).

³¹ *Ibid* 283 (Deane J).

protection of ‘individual rights’ would be severely restricted. As a leading American constitutional text had indicated well before Australian Federation:

if the beneficial use and enjoyment of property are prevented by acts done under an authority conferred by law, the property is as effectually taken as though the title were condemned.³²

The challenge was to identify how to determine whether an ‘acquisition of property’ resulted when no proprietary right was received. To address this issue, Deane J turned to the American ‘regulatory takings’ doctrine, which had been referred to by Stephen J in *TPC v Tooth*.³³ Notably, these were the first judgments on s 51(xxxi) to use an American decision to interpret s 51(xxxi) since *Huon Transport* in 1945.³⁴ In *Pennsylvania Coal*,³⁵ the Supreme Court of the United States identified the difficulty of distinguishing regulation from taking of property under the Fifth Amendment:

Every restriction upon the use of property ... deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the State of rights in property without making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking.³⁶

In that case, Holmes J observed that: ‘while property may be regulated to a certain extent, if regulation goes too far it will be recognised as a taking’.³⁷

Justice Deane adapted this American doctrine with sensitivity to the difference between ‘acquisition of property’ in s 51(xxxi) and ‘taking’ in the Fifth Amendment. In Australia, it was not enough that an individual suffer some sort of loss, as ‘[t]he mere extinguishment or deprivation of rights in relation to property does not involve acquisition’.³⁸ However, the ‘regulatory takings’ doctrine could assist in determining whether there had been an ‘acquisition of property’, as Deane J explained:

Difficult questions can arise when one passes from the area of mere prohibition or regulation into the area where one can identify some benefit flowing to the Commonwealth or elsewhere as a result of the prohibition or regulation. ... Where ... the effect of prohibition or regulation is to confer upon the Commonwealth or another *an identifiable and measurable advantage* or is akin to applying the property,

³² J I Clark Hare, *American Constitutional Law* (Little, Brown, 1889) 388.

³³ Justice Deane quoted with approval Stephen J’s use of the ‘regulatory takings’ doctrine in *TPC v Tooth* (1979) 142 CLR 397 (see below, Section IIIB(3)), indicating he would apply ‘a similar approach’: *Tasmanian Dam Case* (1983) 158 CLR 1, 284 (Deane J).

³⁴ *Commonwealth v Huon Transport Pty Ltd* (1945) 70 CLR 293 (‘*Huon Transport*’).

³⁵ *Pennsylvania Coal Co v Mahon* 260 US 393 (1922) (‘*Pennsylvania Coal*’).

³⁶ *Ibid* 417 (Brandeis J).

³⁷ *Ibid* 415 (Holmes J). An earlier discussion of similar principles occurred in: *Mugler v Kansas*, 123 US 623, 668-9 (Harlan J), 678 (Field J) (1887).

³⁸ *Tasmanian Dam Case* (1983) 158 CLR 1, 283 (Deane J).

either totally or partially, for a purpose of the Commonwealth, it is possible that an acquisition for the purposes of s 51(xxxi) is involved.³⁹

Justice Deane provided an example of the application of this new ‘identifiable and measurable advantage’ test for the ‘acquisition of property’:

if the Parliament were to make a law prohibiting any presence upon land within a radius of 1 kilometre of any point on the boundary of a particular defence establishment and thereby obtain the benefit of a buffer zone, there would, in my view, be an effective confiscation or acquisition of the benefit of use of the land in its unoccupied state notwithstanding that neither the owner nor the Commonwealth possessed any right to go upon or actively to use the land affected.⁴⁰

The ‘acquisition of property’ constituted the advantage the Commonwealth received which corresponded with the reduction in Tasmania’s proprietary rights.

Applying the ‘identifiable and measurable advantage’ test in the *Tasmanian Dam Case*, Deane J concluded that prohibitions on destructive activities and dam-building, whilst ‘far from insignificant’, were not so great as to ‘enter the area of acquisition of property.’⁴¹ However, more extensive prohibitions, including that ‘no building or other substantial structure can be erected; no tree can be cut down or removed; no vehicular track can be established’ and that no works could be carried out,⁴² did go too far. These more extensive provisions ‘effectively preclude development and what would, in an ordinary context, be described as ‘improvement’ of the land’ with the result that the owner is ‘effectively excluded from putting the land to any active use at all’.⁴³ The Commonwealth had acquired property within s 51(xxxi) as:

The range of the prohibited acts is such that the practical effect of the benefit obtained by the Commonwealth is that ... the land remains in the condition which the Commonwealth, for its own purposes, desires to have conserved. ... the obtaining by the Commonwealth of the benefit acquired under the Regulations is properly to be seen as a purported acquisition of property.⁴⁴

Although this conclusion could be reached using the analogy drawn between these restrictions and a restrictive covenant (which ‘is incorporeal but it is, nonetheless, property’),⁴⁵ the conclusion was in fact reached because regulation of the use of property had gone too far, and become an ‘acquisition of property’ under the ‘identifiable and measurable advantage’ test.

³⁹ Ibid 283 (Deane J) [emphasis added].

⁴⁰ Ibid 283-4 (Deane J).

⁴¹ Ibid 285 (Deane J).

⁴² Ibid 286 (Deane J).

⁴³ Ibid.

⁴⁴ Ibid 287 (Deane J).

⁴⁵ Ibid 286-7 (Deane J).

While Deane J's new approach did not commend itself to other members of the majority in the *Tasmanian Dam Case*, his 'identifiable and measurable advantage' test planted a seed which would later grow. In a series of cases beginning with *Mutual Pools*, a majority of Justices accepted and applied the 'identifiable and measurable advantage' test,⁴⁶ emphasising the importance of ensuring that s 51(xxxi)'s purpose of protecting individual rights was maintained.⁴⁷ In a succession of dissenting judgments by Dawson and Toohey JJ,⁴⁸ their Honours insisted that a 'financial or monetary advantage'⁴⁹ was not covered by s 51(xxxi), there needing instead to be receipt of 'property or [an] interest in property'.⁵⁰ This division ended with the 'identifiable and measurable advantage' test being unanimously accepted in *Mewett*.⁵¹ In all subsequent decisions, the 'identifiable and measurable advantage test' has been accepted unanimously,⁵² even though there has not been unanimous agreement on its application to the facts.⁵³ When Justices have commented about the foundation for this test, it has been to emphasise its basis in protecting individual rights.⁵⁴

⁴⁶ *Mutual Pools* (1994) 179 CLR 155, 173 (Mason CJ), 185 (Deane and Gaudron JJ); *HIC v Peverill* (1994) 179 CLR 226, 236 (Mason CJ, Deane and Gaudron JJ). In *Georgiadis* (1994) 179 CLR 297, it was added that: '[i]f there is a receipt, there is no reason why it should correspond precisely with what was taken': at 304-5 (Mason CJ, Deane and Gaudron JJ).

⁴⁷ *Mutual Pools* (1994) 179 CLR 155, 220 (McHugh J); *Georgiadis* (1994) 179 CLR 297, 306 (Mason CJ, Deane and Gaudron JJ). It has been noted that this test has seen 'the distinction between acquisition and deprivation ... progressively eroded': Simon Evans, 'Constitutional Property Rights in Australia: Reconciling Individual Rights and the Common Good' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate, 2006) 197, 199.

⁴⁸ *Tape Manufacturers Case* (1993) 176 CLR 480, 527 (Dawson and Toohey JJ – with whom McHugh J agreed: at 528); *Mutual Pools* (1994) 179 CLR 155, 195-7, 204 (Dawson and Toohey JJ); *Georgiadis* (1994) 179 CLR 297, 315 (Dawson J); 321 (Toohey J); *Victoria v Commonwealth* (1996) 187 CLR 416, 573 (Dawson J) ('*Industrial Relations Act Case*').

⁴⁹ *HIC v Peverill* (1994) 179 CLR 226, 251 (Dawson J).

⁵⁰ *Ibid* 256 (Toohey J).

⁵¹ *Mewett* (1997) 191 CLR 471, 503 (Dawson J – with whom Toohey J (at 512) and McHugh J (at 532) agreed), 531 (Gaudron J), 552 (Gummow and Kirby JJ – with whom Brennan CJ agreed: at 491).

⁵² *Newcrest Mining* (1997) 190 CLR 513, 634 (Gummow J) (with whose reasons Gaudron J (at 561) and Toohey J (at 560) agreed and with whose orders Kirby J also agreed: at 661-2); *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1, 30 (Toohey J), 96 (Kirby J) ('*WMC Resources*'); *Commonwealth v Western Australia* (1999) 196 CLR 392, 457-8 (Kirby J); *Airservices* (1999) 202 CLR 133, 245 (McHugh J); *Smith* (2000) 204 CLR 493, 500 (Gleeson CJ), 512 (Gaudron and Gummow JJ), 526 (Kirby J), 548 (Callinan J); *ICM Agriculture* (2009) 240 CLR 140, 179 (French CJ, Gummow and Crennan JJ), 201 (Hayne, Kiefel and Bell JJ), 233 (Heydon J).

⁵³ In *Newcrest Mining* (1997) 190 CLR 513, the majority found that the Commonwealth derived a benefit from being 'freed from the rights of Newcrest to occupy and conduct mining operations': at 634 (Gummow J – with whom Gaudron, Toohey and Kirby JJ agreed: see above n 52). Justice McHugh dissented because 'the Commonwealth obtained nothing which it did not already have. In colloquial terms, Newcrest lost but the Commonwealth did not gain': at 573. In *ICM Agriculture* (2009) 240 CLR 140, the majority found that the modification of rights to groundwater involved no 'countervailing benefit or advantage': at 180 (French CJ, Gummow and Crennan JJ), 202 (Hayne, Kiefel and Bell JJ). In dissent, Heydon J identified benefits flowing to the State (at 234-5).

⁵⁴ In *Newcrest Mining* (1997) 190 CLR 513, 595 (Gummow J – with whom Gaudron, Toohey and Kirby JJ agreed: see above n 52); *Commonwealth v Western Australia* (1999) 196 CLR 392, 487-8 (Callinan J);

The ‘identifiable and measureable advantage’ test grew from its genesis in Deane J’s nuanced adaptation of the American ‘regulatory takings’ doctrine in the *Tasmanian Dam Case* to reach unanimous acceptance. Its origins have not been noted since the *Tasmanian Dam Case*, and its American heritage remains unacknowledged. This is a significant new area in which the ‘individual rights’ approach, informed by American eminent domain jurisprudence, has guided the interpretation of s 51(xxxi).⁵⁵

B *Instances of the ‘Acquisition of Property’ Outside s 51(xxxi)*

In Chapter 6, it was seen that the second era cases had begun the task of identifying instances of the ‘acquisition of property’ outside s 51(xxxi).⁵⁶ The importance for this thesis is not in the instances identified,⁵⁷ but in what they reveal about the relative use and utility of the ‘individual rights’ and ‘legislative power’ approaches to s 51(xxxi).

Smith (2000) 204 CLR 493, 500 (Gleeson CJ), 506, 513-14 (Gaudron and Gummow JJ), 520, 527 (Kirby J), 541-2 (Callinan J).

⁵⁵ The Court has accepted that in some instances ‘the degree of impairment of the bundle of rights constituting the property in question may be insufficient to attract the operation of s 51(xxxi)’: *Smith* (2000) 204 CLR 493, 505 (Gaudron and Gummow JJ). This is consistent with the ‘individual rights’ approach. The Full Court of the Federal Court of Australia in *Waterhouse v Minister for the Arts and Territories* (1993) 43 FCR 175 (‘*Waterhouse*’) held that a restriction on the export of an important Australian painting did not amount to an ‘acquisition of property’ because the owner was ‘free to retain, enjoy, display or otherwise make use of the painting ... free to sell, mortgage or otherwise turn the painting to his advantage, subject to the requirement of an export permit ... to take it out of Australia’: *Smith* at 505 (Gaudron and Gummow JJ), paraphrasing *Waterhouse* at 185 (Black CJ and Gummow J). In *Smith*, Gaudron and Gummow JJ noted that the decision in *British Medical Association v Commonwealth* (1949) 79 CLR 201 was another example of such reasoning, but did not endorse its result, noting that the legislation was ‘held invalid on other grounds’ and ‘today perhaps would be thought to be nearer the line of invalidity’: at 505. In *Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210 (‘*Telstra*’), remarkable for being the first *ever* unanimous judgment of seven Justices in a case raising important issues of interpretation for s 51(xxxi), the Court applied this logic in concluding that provisions of the *Trade Practices Act 1974* (Cth) requiring Telstra to provide other companies with access to infrastructure at a particular price did not involve an ‘acquisition of property’ because ‘the engagement of the impugned provisions ... does not impair the bundle of rights constituting the property in question in a manner sufficient to attract the operation of s 51(xxxi)’: at 233-4 (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ). Allen has noted that the bundle of rights approach has been adopted, but has not addressed its consequences for this issue of sufficient impairment: Allen, ‘The Acquisition of Property on Just Terms’, above n 3, 355.

⁵⁶ The last resistance to the idea that there could be an ‘acquisition of property’ outside s 51(xxxi) appeared in the dissent of Aickin J in *TPC v Tooth* (1979) 142 CLR 397, 453. His Honour insisted that instances previously regarded as an ‘acquisition of property’ outside s 51(xxxi) simply involved ‘the passing of the legal title ... to the Commonwealth ... [where] the processes involved are not such as would ordinarily in 1900 or today be described as the ‘acquisition of property’’: at 453. This has not been followed by any Justice. Indeed, ‘the notion that some forms of acquisition lie outside the scope of s 51(xxxi) was strongly reaffirmed’ in the Mason Court decisions on s 51(xxxi): Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 5th ed, 2010) 1235.

⁵⁷ Michael Coper has observed that instances of the ‘acquisition of property’ outside s 51(xxxi) were ‘all excluded for undoubtedly sound reasons of policy, the common basis of which is perhaps more easily

1 Rejection of the ‘Use and Service of the Crown’ Test

In *Schmidt*, Dixon CJ suggested that s 51(xxxi) would apply only to an ‘acquisition of property’ for the ‘use and service of the Crown’.⁵⁸ The only endorsement of this test in the modern era came from Murphy J in *TPC v Tooth*,⁵⁹ where it was rejected by the majority.⁶⁰ For Mason J, it was ‘at variance with the policy which underlies par (xxxi) and the protection which it gives to the citizen’.⁶¹ Similarly, Stephen J objected that it ‘comes perilously close to depriving [s 51(xxxi)] of all application in those cases in which regulatory laws operate so harshly that an owner’s enjoyment of his property is virtually set at nought’.⁶² The ‘individual rights’ approach therefore led to the rejection of Dixon CJ’s ‘use and service of the Crown’ test by the majority in *TPC v Tooth*, the last case in which any Justice endorsed it.⁶³

The ‘use and service of the Crown’ test was not followed by any new overarching explanation for the various instances of ‘acquisition of property’ outside s 51(xxxi).⁶⁴ As Kirby J noted in *Smith*, ‘[f]inding a touchstone to distinguish legislation which falls

felt than expressed’: Michael Coper, *Encounters with The Australian Constitution* (CCH, 1987) 346. Less charitably, Sean Brennan has described these categories as ‘an untidy array of legal hurdles’ that have been ‘strewn across the path of disgruntled divestees seeking just terms from the courts’: Sean Brennan, ‘The State of Play in Acquisition of Property: *Theophanous v The Commonwealth*’ (Paper presented at the 2007 Constitutional Law Conference, Sydney, 16 February 2007) 8. As Simon Evans noted, ‘[o]ne of the great challenges for section 51(xxxi) jurisprudence is to deliver a coherent and principled account of why some laws that effect an acquisition of property do not attract the obligation to provide just terms’: Simon Evans, ‘When is an Acquisition of Property Not an Acquisition of Property?: The Search for a Principled Approach to Section 51(xxxi)’ (2000) 11 *Public Law Review* 183.

⁵⁸ *Schmidt* (1961) 105 CLR 361, 373.

⁵⁹ *TPC v Tooth* (1979) 142 CLR 397, 434 (Murphy J). His Honour wrote that s 51(xxxi) should not be regarded as ‘a far reaching restriction of the legislative power’ applicable to any laws which ‘provide for alteration of property rights and obligations between citizens’ as this would ‘put into question many laws of the Parliament which have not so far been questioned’. This attempt to narrowly constrain s 51(xxxi) is at odds with his Honour’s extension of the rights of the individual in other contexts, as to which see, eg: *Blackshield and Williams*, above n 56, 1257-9.

⁶⁰ *TPC v Tooth* (1979) 142 CLR 397, 408 (Gibbs J), 423 (Stephen J), 426 (Mason J).

⁶¹ *Ibid* 426 (Mason J).

⁶² *Ibid* 423 (Stephen J).

⁶³ The ‘use and service of the Crown’ test was referred to by Dawson and Toohey JJ, but their Honours merely noted that s 51(xxxi) appears ‘*primarily* to refer to the acquisition of real or personal property which itself is intended to be used by the government in administering laws made by the Parliament’: *Mutual Pools* (1994) 179 CLR 155, 198 [emphasis added].

⁶⁴ Chief Justice Mason suggested that instances of the ‘acquisition of property’ outside s 51(xxxi): ‘are all cases in which the transfer or vesting of title to property or the creation of a chose in action was subservient and incidental to or consequential upon the principal purpose and effect sought to be achieved by the law so that the provision respecting property had no recognizable independent character’: *ibid* 171 (Mason CJ).

However, this attempt to provide an overarching justification was not influential in later decisions (even those of Mason CJ himself).

within, and that which falls outside, the requirements of s 51(xxxi) is not easy. No verbal formula provides a universal criterion.⁶⁵ Instead of searching for an overarching explanation, judgments have identified discrete instances of the ‘acquisition of property’ outside s 51(xxxi). These will now be examined in order to identify the influence of the ‘individual rights’ and ‘legislative power’ approaches, and determine which provides the most stable interpretation of the placitum.

2 *Instances Unaffected by the Competing Approaches*

Some instances of the ‘acquisition of property’ outside s 51(xxxi) are unaffected by which approach is taken, and are noted here for the sake of completeness. First, where ‘just terms’ are ‘inconsistent or incongruous’,⁶⁶ including where the ‘acquisition of property’ results from forfeiture or penalty,⁶⁷ the imposition of statutory liens⁶⁸ or compensation.⁶⁹ Secondly, where ‘just terms’ are excluded by the express terms or subject matter of another head of power,⁷⁰ including bankruptcy⁷¹ and intellectual property laws.⁷² A combination of these two explanations has been held to also account for taxation⁷³ and the condemnation of prize and disposal of the property of enemy

⁶⁵ *Smith* (2000) 204 CLR 493, 528-9 (Kirby J).

⁶⁶ *Mutual Pools* (1994) 179 CLR 155, 187 (Deane and Gaudron JJ).

⁶⁷ *TPC v Tooth* (1979) 142 CLR 397, 408-9 (Gibbs J – with whom Murphy J agreed: at 434); *R v Smithers*; *Ex parte McMillan* (1982) 152 CLR 477, 487 (the Court) (‘*Smithers*’); *Tape Manufacturers Case* (1993) 176 CLR 480, 510 (Mason CJ, Brennan, Deane and Gaudron JJ); *Mutual Pools* (1994) 179 CLR 155, 170 (Mason CJ), 187 (Deane and Gaudron JJ), 200 (Dawson and Toohey JJ), 222 (McHugh J); *Re Director of Public Prosecutions*; *Ex parte Lawler* (1994) 179 CLR 270, 276 (Mason CJ), 278 (Brennan J), 285 (Deane and Gaudron JJ), 289 (Dawson J, with whom Toohey J agreed: at 291), 293 (McHugh J) (‘*Lawler*’); *Georgiadis* (1994) 179 CLR 297, 306 (Mason CJ, Deane and Gaudron JJ); *Theophanous v Commonwealth* (2006) 225 CLR 101, 115 (Gleeson CJ), 124 (Gummow, Kirby, Hayne, Heydon and Crennan JJ) (‘*Theophanous*’). But cf: *Airservices* (1999) 202 CLR 133, 309 (Callinan J) where his Honour held that forfeiture in the hands of innocent third parties was not outside s 51(xxxi).

⁶⁸ *Airservices* (1999) 202 CLR 133, 253 (McHugh J), 297 (Gummow J). But cf: at 193-4 (Gaudron J).

⁶⁹ *Tape Manufacturers Case* (1993) 176 CLR 480, 510 (Mason CJ, Brennan, Deane and Gaudron JJ).

⁷⁰ *Mutual Pools* (1994) 179 CLR 155, 169-70 (Mason CJ), 187 (Deane and Gaudron JJ); *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134, 160 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) (‘*Nintendo*’).

⁷¹ *Mutual Pools* (1994) 179 CLR 155, 170 (Mason CJ); *Lawler* (1994) 179 CLR 270, 284 (Deane and Gaudron JJ); *Georgiadis* (1994) 179 CLR 297, 306 (Mason CJ, Deane and Gaudron JJ); *WMC Resources* (1998) 194 CLR 1, 100 (Kirby J).

⁷² *Nintendo* (1994) 181 CLR 134, 160 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

⁷³ The ‘express terms or subject matter’: *Tape Manufacturers Case* (1993) 176 CLR 480, 508-9 (Mason CJ, Brennan, Deane and Gaudron JJ); *Mutual Pools* (1994) 179 CLR 155, 170-1 (Mason CJ), 187 (Deane and Gaudron JJ), 198-9 (Dawson and Toohey JJ). The ‘inconsistent or incongruous’: *Mutual Pools*: at 219-20 (McHugh J). The result has been frequently endorsed: *Lawler* (1994) 179 CLR 270, 284 (Deane and Gaudron JJ); *Georgiadis* (1994) 179 CLR 297, 306 (Mason CJ, Deane and Gaudron JJ); *Newcrest Mining* (1997) 190 CLR 513, 596 (Gummow J); *Airservices* (1999) 202 CLR 133, 194 (Gaudron J). However, as Dawson and Toohey JJ pointed out in *Mutual Pools*: ‘the acquisition of property for taxation purposes -- for example, to acquire a building for use as a taxation office’ would be an ‘acquisition of property’ within s 51(xxxi): at 198.

aliens.⁷⁴ Thirdly, ‘rights derived purely from statute *and* of their very nature inherently susceptible to the variation or extinguishment which had come to pass’.⁷⁵ These instances were supplemented in the modern era by an important new test based on the ‘individual rights’ approach, the ‘genuine adjustment’ test adapted by Deane J from the American regulatory takings doctrine.

3 *The ‘Genuine Adjustment’ Test*

In *TPC v Tooth*, Stephen J held that where an ‘acquisition of property’ was merely ‘an incidental means of better attaining a quite different goal’,⁷⁶ s 51(xxxi) would not necessarily apply.⁷⁷ To identify the dividing line, Stephen J adopted the ‘regulatory takings’ doctrine,⁷⁸ although his Honour’s reference to the American position was through the medium of the decision of the House of Lords in *Belfast Corporation v O D Cars Ltd*⁷⁹ which had accepted American guidance.

As noted above, the Supreme Court of the United States in *Pennsylvania Coal* considered the relevance of a ‘goes too far’ test.⁸⁰ In that case, it also held that:

Every restriction upon the use of property ... deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the State of rights in

⁷⁴ The ‘inconsistent or incongruous’ test has been applied to explain this result: *Lawler* (1994) 179 CLR 270, 285 (Deane and Gaudron JJ). Alternatively, it has been said that such a power is ‘inherent’ in the aliens power (s 51(xix)): *WMC Resources* (1998) 194 CLR 1, 100 (Kirby J). A similar justification was adverted to in: *Mutual Pools* (1994) 179 CLR 155, 170 (Mason CJ). Notably, in *Mutual Pools* McHugh J pointedly did not endorse *Schmidt*, instead stating that ‘[t]he nature of the law considered’ in that case ‘was no doubt more debatable’: at 222.

⁷⁵ *Newcrest Mining* (1997) 190 CLR 513, 634 (Gummow J) [emphasis added]. See also: *Georgiadis* (1994) 179 CLR 297, 306 (Mason CJ, Deane and Gaudron JJ); *HIC v Peverill* (1994) 179 CLR 226, 237 (Mason CJ, Deane and Gaudron JJ); *Mewett* (1997) 191 CLR 471, 502-3 (Dawson J – with whom Toohey J (at 512) and McHugh J (at 532) agreed), 552 (Gummow and Kirby JJ); *WMC Resources* (1998) 194 CLR 1, 16 (Brennan CJ), 29 (Toohey J), 36 (Gaudron J), 70 (Gummow J), 91 (Kirby J); *A-G (NT) v Chaffey* (2007) 231 CLR 651, 664 (Gleeson CJ, Gummow, Hayne and Crennan JJ), 671 (Kirby J), 671-2 (Callinan J), 672-5 (Heydon J) (*‘Chaffey’*); *Wurridjal* (2009) 237 CLR 309, 361 (French CJ), 382-3 (Gummow and Hayne JJ), 420 (Kirby J), 464 (Crennan J); *ICM Agriculture* (2009) 240 CLR 140, 179 (French CJ, Gummow and Crennan JJ). Justice McHugh, however, sought to hold that *all* statutory entitlements ‘must be taken to be subject to the condition that it may be altered, reduced or revoked at any time’ and were outside s 51(xxxi): *HIC v Peverill*: at 263; *Georgiadis*: at 325, 328; *WMC Resources*: at 51-2.

⁷⁶ *TPC v Tooth* (1979) 142 CLR 397, 412 (Stephen J).

⁷⁷ *Ibid* 413 (Stephen J).

⁷⁸ *Ibid* 413-6 (Stephen J).

⁷⁹ [1960] AC 490 (*‘O D Cars’*).

⁸⁰ *Pennsylvania Coal*, 260 US 393, 415 (1922) (Holmes J); quoted in: *O D Cars* [1960] AC 490, 519 (Viscount Simonds); quoted in: *TPC v Tooth* (1979) 142 CLR 397, 414 (Stephen J). The ‘regulatory takings’ doctrine is also discussed above at 205.

property without making compensation. But *restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking*.⁸¹

That is, an interference with property rights would not be a ‘taking’ if the public interest served by the regulation justified the interference with private rights.⁸²

In *O D Cars*, Northern Ireland town planning legislation was challenged for taking property without compensation contrary to s 5(1) of the *Government of Ireland Act 1920* (UK). Viscount Simonds endorsed the approach taken in *Pennsylvania Coal*, stating that there were no ‘better examples’ of ‘the manner in which great judges among the English-speaking peoples overseas have dealt with’ the problem.⁸³ On the facts of *O D Cars*, their Lordships found that the town planning legislation was a permissible regulation that justified the restriction on property rights involved,⁸⁴ but accepted that more serious restrictions on property rights might involve ‘in substance, though not in form, ... a ‘taking’ of the land affected for the benefit of the public’.⁸⁵

In *TPC v Tooth*, Stephen J referred to an American legal encyclopaedia for the proposition that ‘the Court must consider the extent of the public interest to be protected and the extent of regulation essential to protect that interest’⁸⁶ to determine if the Fifth Amendment takings clause applied. Adapting the American approach to s 51(xxxi), Stephen J noted that the challenged provisions were ‘directed only to the prevention of a noxious use of proprietary rights’,⁸⁷ observing that:

Not only is there no question of the acquisition of property for its own sake; whatever restraints the section does impose upon the free exercise of proprietary

⁸¹ *Pennsylvania Coal*, 260 US 393, 417 (1922) (Brandeis J) (emphasis added); quoted in: *O D Cars* [1960] AC 490, 519 (Viscount Simonds); quoted in: *TPC v Tooth* (1979) 142 CLR 397, 414 (Stephen J).

⁸² See: *Pennsylvania Coal*, 260 US 393, 413-15 (1922) (Holmes J). The test will not always be easy to apply: Brandeis J dissented on its application to the facts of this case: at 416-22.

⁸³ *O D Cars* [1960] AC 490, 518 (Viscount Simonds).

⁸⁴ *Ibid* 520 (Viscount Simonds). This was paraphrased in: *TPC v Tooth* (1979) 142 CLR 397, 414 (Stephen J). Viscount Simonds also drew support for this conclusion from *Slattery v Naylor* (1888) 13 App Cas 446, a New South Wales case in which the Judicial Committee of the Privy Council upheld a municipal by-law regulating land use which had the effect of banning further burials in an existing cemetery. In that case, Lord Hobhouse stated that:

‘It may well be that a plot of ground, having been originally far from habitations, and suitably used as [a] burying-place ... has been reached by the growing town, and has so become unsuitable for the purpose. ... the bye-law in question is not ultra vires, because ... it unfortunately has, the effect of taking away an enjoyment of property for which alone that property was acquired and has been used’: at 450.

⁸⁵ *O D Cars* [1960] AC 490, 525 (Lord Radcliffe). This was paraphrased in *TPC v Tooth* (1979) 142 CLR 397, 414 (Stephen J).

⁸⁶ *TPC v Tooth* (1979) 142 CLR 397, 414-5 (Stephen J), quoting from: 29A *Corpus Juris Secundum* ‘Eminent Domain’ §6.

⁸⁷ *TPC v Tooth* (1979) 142 CLR 397, 415 (Stephen J).

rights apply only where, and to the extent to which, but for their existence, the aim of the legislature would be defeated.’⁸⁸

Weighing the public interest served (the suppression of exclusive dealing) against the impact on private property rights (restricting noxious assertions of property rights), Stephen J held that the challenged provisions were outside of s 51(xxxi).

After *Pennsylvania Coal*, the ‘regulatory takings’ doctrine was not applied in a majority judgment on the takings clause until *Pennsylvania Central Transportation Co v New York City* in 1978:⁸⁹ its return to prominence in America might explain its appearance the following year in Australia. Although the ‘regulatory takings’ doctrine was rejected in *TPC v Tooth* by the only two other Justices to discuss it,⁹⁰ the significance of Stephen J’s judgment is its demonstration of the potential relevance of the American ‘regulatory takings’ doctrine to s 51(xxxi).

In the *Tasmanian Dam Case*, Deane J approved Stephen J’s adoption of the ‘regulatory takings’ doctrine in *TPC v Tooth*,⁹¹ articulating a new test, that where an ‘acquisition of property’:

represents *no more than the adjustment of competing claims between citizens in a field which needs to be regulated in the common interest*, such as zoning under a local government statute, it will be apparent that no question of acquisition of property ... for the purposes of s 51(xxxi) is involved.⁹²

The inspiration for this new test is clear from an extended quotation from Stephen J in *TPC v Tooth*,⁹³ and from the new test’s obvious similarity with the ‘regulatory takings’ test: balancing the regulation’s justification against its impact on individual rights to determine if it ‘goes too far’ and attracts the operation of s 51(xxxi). On the facts of the *Tasmanian Dam Case*, Deane J held that restrictions which prevented any active use of

⁸⁸ Ibid 416 (Stephen J).

⁸⁹ 438 US 104 (1978) (*Pennsylvania Central*). In *United States v Commodities Trading Corp*, 339 US 121, 133-4 (1950), Frankfurter J (in dissent) endorsed the ‘regulatory takings’ approach, quoting from *Pennsylvania Coal*, and describing the limits of its application as follows:

‘The value of private property is not immutable; especially is it not immune from the consequences of governmental policies. In the exercise of its constitutional powers, Congress by general enactments may in diverse ways cause even appreciable pecuniary loss without compensation... When [the diminution] 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’: at 413.

This was the only reference to *Pennsylvania Coal* by any Justice of the US Supreme Court between 1936 and 1957: Robert Brauneis, ‘The Foundation of Our Regulatory Takings Jurisprudence: The Myth and Meaning of Justice Holmes’s Opinion in *Pennsylvania Coal Co. v. Mahon*’ (1996) 106 *Yale Law Journal* 613, 665.

⁹⁰ *TPC v Tooth* (1979) 142 CLR 397, 405 (Barwick CJ), 427-8 (Mason J).

⁹¹ *Tasmanian Dam Case* (1983) 158 CLR 1, 284 (Deane J).

⁹² Ibid 283 (Deane J) [emphasis added].

⁹³ Ibid 284 (Deane J).

the land were within s 51(xxxi) because the interference with property rights went beyond the mere ‘adjustment of competing claims’: regulation had gone too far, so the ‘acquisition of property’ was within s 51(xxxi).⁹⁴

Justice Deane’s ‘adjustment of competing claims between citizens in a field which needs to be regulated in the common interest’ test⁹⁵ was rephrased in the *Tape Manufacturers Case*, where Mason CJ, Brennan, Deane and Gaudron JJ held that a law providing for ‘a *genuine adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity*’ was outside s 51(xxxi).⁹⁶ Thereafter, the ‘genuine adjustment’ test enjoyed broad acceptance by the Justices,⁹⁷ although its application to the facts did not lead to unanimous decisions in all cases.⁹⁸

The significance of the ‘genuine adjustment’ test to this thesis lies in its genesis in the American ‘regulatory takings’ doctrine. Although the majority judgment in the *Tape Manufacturers Case* did not refer to ‘regulatory takings’, the trajectory is clear. First, the adoption of the ‘regulatory takings’ doctrine by Stephen J in *TPC v Tooth*; secondly, its more nuanced adaptation by Deane J in the *Tasmanian Dam Case* to state the ‘adjustment of competing claims’ test; thirdly, the incorporation of this test into the majority’s ‘genuine adjustment’ test in the *Tape Manufacturers Case*. This test’s heritage in the American ‘regulatory takings’ doctrine has not been noted in judgments or academic commentary: this is another important unrecognised instance of the influence of the American takings jurisprudence on the interpretation of s 51(xxxi).

⁹⁴ Ibid 286-7 (Deane J).

⁹⁵ Ibid 283 (Deane J).

⁹⁶ *Tape Manufacturers Case* (1993) 176 CLR 480, 510 (Mason CJ, Brennan, Deane and Gaudron JJ) [emphasis added].

⁹⁷ *Mutual Pools* (1994) 179 CLR 155, 171 (Mason CJ), 189-90 (Deane and Gaudron JJ); *HIC v Peverill* (1994) 179 CLR 226, 236 (Mason CJ, Deane and Gaudron JJ); *Georgiadis* (1994) 179 CLR 297, 306-8 (Mason CJ, Deane and Gaudron JJ); *Nintendo* (1994) 181 CLR 134, 161 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Airservices* (1999) 202 CLR 133, 300 (Gummow J – with whom Hayne J agreed on this point: at 304), 197 (Gaudron J); *Chaffey* (2007) 231 CLR 651, 670 (Kirby J); *ICM Agriculture* (2009) 240 CLR 140, 232-3 (Heydon J). But cf: *Airservices* at 248 (McHugh J); *Smith* (2000) 204 CLR 493, 550-2 (Callinan J). Some reservations were also expressed in: *Chaffey* at 668 (Kirby J); *ICM Agriculture* at 226-8 (Heydon J). Although using language not employed in the Australian decisions, this test has been described as affecting a ‘distinction between a regulatory deprivation of property in terms of the police power and a compulsory acquisition of property in terms of the power of eminent domain’: A J Van der Walt, *Constitutional Property Clauses: A Comparative Analysis* (Kluwer, 1999) 56.

⁹⁸ In *Airservices* (1999) 202 CLR 133, Gummow J (with whom Hayne J agreed on this point: at 304) found that any ‘acquisition of property’ was outside s 51(xxxi) under this test (at 126), whilst Gaudron J found s 51(xxxi) applicable (at 197).

The use of American regulatory takings doctrine in the development of the ‘identifiable and measureable advantage’ test for the ‘acquisition of property’ and the ‘genuine adjustment’ test for instances of the ‘acquisition of property’ outside s 51(xxxi) are two examples in the modern era of the ‘individual rights’ approach being important to the interpretation of s 51(xxxi). These are instances of the Court returning to its earlier view that the American eminent domain jurisprudence is relevant to the interpretation of the placitum. As such, this is evidence of the start of a return to the previous approach of interpreting s 51(xxxi) with reference to its historical, theoretical and comparative context. The signal offered by these sources of guidance has always remained on, and the Court is now starting to tune back in to it.

IV INTERPRETATION OF ‘JUST TERMS’

The interpretation of ‘just terms’ is an area of critical difference between the ‘individual rights’ and ‘legislative power’ approaches. The ‘individual rights’ approach required a legal right to full market-value compensation for each affected individual,⁹⁹ whereas the ‘legislative power’ approach made only a general (not an individual) assessment of the terms, allowed legislative discretion to determine the justice of the terms which would be invalidated only if not reasonable, and permitted a balancing of the interests of the individual against those of the community.¹⁰⁰ Despite the relative lack of focus on ‘just terms’,¹⁰¹ an examination of its interpretation¹⁰¹ is essential to compare the use and usefulness of the competing approaches to s 51(xxxi).

⁹⁹ See: Chapter 5, sections IIB, IIIB, IVB.

¹⁰⁰ See: Chapter 6, sections IIA, IIIA.

¹⁰¹ Indeed, in the first s 51(xxxi) case of the modern era, *TPC v Tooth* (1979) 142 CLR 397, the special case under appeal did not provide sufficient information to determine whether or not ‘just terms’ were available, and their Honours ended up acting on conflicting assumptions about whether they were. Justice Aickin noted that the ‘vital matter’ of whether ‘just terms’ had been provided had not been considered in the formulation of the special case, his Honour observing that: ‘[i]t cannot be regarded as satisfactory that a case should be dealt with by the Court adopting an unexpressed assumption common to the parties. The mode of procedure adopted appears unsuitable for raising a constitutional issue’: at 444. This led to the confusing result, only partly explained by differences of statutory interpretation, that two Justices proceeded as if ‘just terms’ *had not* been provided (at 401 (Barwick CJ), 444 (Aickin J)), while four held that ‘just terms’ *had* been provided: at 407, 409 (Gibbs J), 422 (Stephen J), 433 (Mason J), 434 (Murphy J). This lack of attention to the requirement of ‘just terms’ is partly explained by the fact that many cases have turned on whether there has been an ‘acquisition of property’, and if so whether it is within s 51(xxxi), it being clear that the requirement of ‘just terms’ would not be satisfied: *Smithers* (1982) 152 CLR 477; *ACTV* (1992) 177 CLR 106; *Tape Manufacturers Case* (1993) 176 CLR 480; *Mutual Pools* (1994) 179 CLR 155; *HIC v Peverill* (1994) 179 CLR 226; *Lawler* (1994) 179 CLR 270; *Georgiadis* (1994) 179 CLR 297; *Nintendo* (1994) 181 CLR 134; *Newcrest Mining* (1997) 190 CLR 513; *Mewett* (1997) 191 CLR 471; *Airservices* (1999) 202 CLR 133; *Smith* (2000) 204 CLR 493; *Theophanous* (2006) 225 CLR 101; *ICM Agriculture* (2009) 240 CLR 140. In other cases, the only

A *The First Return of the ‘Individual Rights’ Approach*

The first examination of ‘just terms’ in the modern era was undertaken by Deane J in the *Tasmanian Dam Case*.¹⁰² His Honour’s first comment on the subject – ‘[t]he compensation which would represent ‘just terms’ for that acquisition of property would be the difference between the value of the ... land without and with the restrictions’¹⁰³ – evoked the provision of full market-value compensation to the individual owner that is the hallmark of the ‘individual rights’ approach. However, Deane J also issued a caution about the limits of the Court’s review:

It is implicit in s 51(xxxi) that it is for the Parliament to determine what is the appropriate compensation in respect of an acquisition. *If that compensation satisfies the requirement of ‘just terms’*, the Court will not declare the terms unjust and the law in excess of power for the reason that the Court entertains an opinion that other terms would have been fairer or more appropriate.¹⁰⁴

These passages are enigmatic in that they indicate legislation would not be invalidated merely because the Court could think of fairer terms, but also suggest that a full indemnity (difference in value) is paid. The references provided here by Deane J are surprising: no mention of Dixon J (the great leader of second era jurisprudence) but instead Starke J in *Dalziel* (where his Honour was the lone dissident on this point, while Latham CJ, Rich, McTiernan and Williams JJ all maintained the ‘individual rights’ approach),¹⁰⁵ McTiernan J in *Grace Brothers* (far from the leading judgment),¹⁰⁶ and Starke J in *McClintock v Commonwealth* (where his Honour was alone in this view, Rich and Williams JJ adhering to the ‘individual rights’ approach).¹⁰⁷ Although Deane J’s suggestion of judicial restraint is supported by the judgments referred to, these were curious authorities on which to rely.

The caution noted by Deane J seemed to have little impact on his Honour’s application of the requirement of ‘just terms’. Because of the operation of waiting periods and generous time allowances for compulsory processes in the legislation, some claimants could have to wait over eighteen months before being able to access the Federal Court

question was whether the placitum applied, clearly adequate compensation being available if it did: *WMC Resources* (1998) 194 CLR 1; *Commonwealth v Western Australia* (1999) 196 CLR 392; *Telstra* (2008) 234 CLR 210; *Wurridjal v Commonwealth* (2009) 237 CLR 309.

¹⁰² His Honour was the only Justice to find that there had been an ‘acquisition of property’.

¹⁰³ *Tasmanian Dam Case* (1983) 158 CLR 1, 287 (Deane J).

¹⁰⁴ *Ibid* 289 (Deane J) [emphasis added].

¹⁰⁵ See: Chapter 5, section IVB.

¹⁰⁶ See: Chapter 6, section IIA, IIIA(1).

¹⁰⁷ See: Chapter 6, section IIIA(2).

for the determination of compensation.¹⁰⁸ Justice Deane concluded that this possible delay in the assessment of compensation, taken together with the failure to provide for interest to be paid for this delay, made the provisions ‘quite unacceptable and unfair’¹⁰⁹ and breached the requirement of ‘just terms’.

Justice Deane did not apply a *purely* ‘individual rights’ approach here. However, any practical influence of the ‘legislative power’ approach was limited. Two factors point to the importance of the ‘individual rights’ approach to Deane J’s interpretation of ‘just terms’ in this case: his Honour’s express reference to payment of the difference in value (invoking the full market-value compensation ideal); and his Honour’s insistence on the provision of interest on compensation monies where there was a delay – interest having been a requirement of the ‘individual rights’ approach that had been discarded by the ‘legislative power’ approach (as discussed in Chapters 5 and 6).¹¹⁰ The first judgment to address ‘just terms’ in the modern era therefore evidenced a significant turning back to the ‘individual rights’ approach to the interpretation of ‘just terms’.

B *Growing Influence of the ‘Individual Rights’ Approach*

Evidence of the influence of the ‘individual rights’ approach to ‘just terms’ can be discerned in a number of the judgments of the modern era, although some of these have either addressed only some of the ‘individual rights’ aspects or indeed have incorporated elements of the ‘legislative power’ approach as well.

In *WMC Resources*, the Commonwealth argued that ‘just terms’ had been provided because an exchange of letters promised those who had lost property (when their exploration permits were abolished) ‘favourable consideration’ (for the issue of permits under a replacement scheme).¹¹¹ This was not sufficient for either Toohey or Kirby JJ because it created no ‘enforceable rights’, whereas ‘just terms’ had to be legally enforceable:¹¹² one aspect of the ‘individual rights’ approach to ‘just terms’.

¹⁰⁸ See: *Tasmanian Dam Case* (1983) 158 CLR 1, 288-9 (Deane J).

¹⁰⁹ *Ibid* 291 (Deane J).

¹¹⁰ See: Chapter 5, section IVB; Chapter 6, section IIIA.

¹¹¹ *WMC Resources* (1998) 194 CLR 1, 103 (Kirby J). In fact, this ‘favourable consideration’ appears to have been only an opportunity to match the highest bid made for a licence under the new scheme, which seems neither especially favourable nor obviously economically fair. See: at 104 (Kirby J).

¹¹² *Ibid* 104 (Kirby J). See also: at 32 n 109 (Toohey J).

However, Kirby J did not insist on the full market-value compensation that is required by the ‘individual rights’ approach: his Honour described an interpretation of ‘just terms’ as requiring payment of a ‘pecuniary equivalent’¹¹³ as ‘unduly narrow’¹¹⁴. His Honour added, though, that ‘just terms’ required that the Commonwealth ‘ensure economic fairness to the party whose property has been acquired’,¹¹⁵ and said that to determine if this ‘economic fairness’ had been provided ‘it is necessary to consider the ... comparative position of the property owner before and after the acquisition’.¹¹⁶ Justice Kirby was very close to the ‘individual rights’ view in this, but hesitated to take the final step and insist on full pecuniary equivalence. Justice Toohey hinted that he was prepared to take that step, noting that:

The Commonwealth emphasised that ‘just terms’ imposes a requirement of fairness rather than equivalence. However, where terms depart from equivalence this may be a strong indication that they are not fair, not just.¹¹⁷

Both Toohey and Kirby JJ were influenced by the ‘individual rights’ approach to ‘just terms’, holding that ‘just terms’ must be legally enforceable, although Kirby J did not insist upon full pecuniary equivalence.

In *Commonwealth v Western Australia*, Kirby J was again strongly influenced by the ‘individual rights’ approach, rejecting the ‘legislative power’ idea that ‘just terms’ required merely ‘not unreasonable’ terms,¹¹⁸ and holding that the purpose of s 51(xxxi):

is to ensure, in the interests of the community at large, that a State or other owner of property compulsorily acquired by the Commonwealth for its purposes is *not required to sacrifice that property for less than it is worth*. Unless it is shown that what is gained is *full compensation for what is lost*, the ‘terms’ provided by the Commonwealth are not ‘just’.¹¹⁹

However, again this broad statement of the ‘individual rights’ approach was slightly tempered: Kirby J later added (in the manner of the ‘legislative power’ view) that ‘because it is part of the ‘composition’ of the legislative power in question, a measure of latitude will be accorded to the Parliament in respect of the provisions it makes’.¹²⁰ It was, however, a very small measure of latitude when applied to the facts: his Honour

¹¹³ *Bank Nationalisation Case* (1948) 76 CLR 1, 300 (Starke J).

¹¹⁴ *WMC Resources* (1998) 194 CLR 1, 103 (Kirby J).

¹¹⁵ *Ibid* 102 (Kirby J).

¹¹⁶ *Ibid* 103 (Kirby J).

¹¹⁷ *Ibid* 32 (Toohey J).

¹¹⁸ *Commonwealth v Western Australia* (1999) 196 CLR 392, 461 (Kirby J).

¹¹⁹ *Ibid* 455 (Kirby J) [emphasis added].

¹²⁰ *Ibid* 460-1 (Kirby J).

interpreted ‘reasonable compensation’ in subordinate legislation as including interest in order to meet s 51(xxxi)’s requirement of ‘just terms’.¹²¹

Justice Callinan in *Commonwealth v Western Australia* also took a very ‘individual rights’ approach, but again qualified it: with a reference to ‘just terms’ requiring only ‘a true attempt to provide fair and just standards of compensating or rehabilitating the individual’.¹²² However, Callinan J applied the requirement of ‘just terms’ even more strictly than Kirby J: for Callinan J the lack of a ‘stated entitlement to interest’ where there is no ‘immediate right to payment’ breached the requirement of ‘just terms’.¹²³

A pattern was emerging with the Justices noting the authorities that suggest a measure of legislative discretion, but in fact insisting on full market-value compensation (or something very close to it) in their application of the ‘just terms’ requirement.¹²⁴ Similarly, in *Smith* Gaudron and Gummow JJ noted that ‘[i]t is trite that the decisions of this Court allow to the Parliament a measure of latitude’¹²⁵ in defining ‘just terms’. In fact, however, the latitude allowed was very narrow: their Honours insisted on every individual receiving just terms, stating that ‘[i]t is to stretch beyond its legal endurance the concept of ‘just terms’ to have regard to what, *in general*, would have been the position of employees’,¹²⁶ and invalidated the legislation for failing to meet ‘the constitutional requirement of just terms’¹²⁷ because while some employees were ‘bestowed an advantage ... [o]ther employees would be prejudiced’¹²⁸ rendering the

¹²¹ Interpreting *Defence Force Regulations 1952* (Cth) reg 57(1)(b): *Commonwealth v Western Australia* (1999) 196 CLR 392, 462 (Kirby J).

¹²² *Commonwealth v Western Australia* (1999) 196 CLR 392, 490 (Callinan J); quoting: *Grace Brothers Pty Ltd v Commonwealth* (1946) 72 CLR 269, 290 (Dixon J) (*‘Grace Brothers’*).

¹²³ *Commonwealth v Western Australia* (1999) 196 CLR 392, 490 (Callinan J). Justice Callinan also went *beyond* the ‘individual rights’ approach in one respect: his Honour did not permit the assessment of compensation by the Administrative Appeals Tribunal because appeals to the Federal Court were limited to questions of law: at 490. The ‘individual rights’ approach does not insist on judicial determination of compensation.

¹²⁴ The few passing references to ‘just terms’ in *Airservices* (1999) 202 CLR 133 also leaned towards the ‘individual rights’ approach. Thus, McHugh J referred to ‘just terms’ as being equivalent to ‘fair compensation’ (at 219-21) and ‘fair value’ (at 253) and Gummow J used the language of ‘fair compensation’ (at 300).

¹²⁵ *Smith* (2000) 204 CLR 493, 512 (Gaudron and Gummow JJ). Their Honours noted that ANL Limited had relied on a passage emphasising this point from the judgment of Dixon CJ in *Grace Brothers* (1946) 72 CLR 269.

¹²⁶ *Smith* (2000) 204 CLR 493, 513 (Gaudron and Gummow JJ) [emphasis added].

¹²⁷ *Ibid* 514 (Gaudron and Gummow JJ).

¹²⁸ *Ibid* 513 (Gaudron and Gummow JJ).

operation of the legislation ‘from one employee to the next too capricious to meet the constitutional requirement of just terms’.¹²⁹

Consistently with his Honour’s approach in earlier judgments, Kirby J in *Smith* wrote that ‘just terms’ required ‘legal means of securing entitlements *approximately equivalent* to those which the appellant had lost’.¹³⁰ Although not speculating on how approximate this equivalence could be, Kirby J invalidated the legislation on the same ground as Gaudron and Gummow JJ: the legislation was ‘scarcely ‘just’ in *all of the instances* to which the impugned legislation would apply.’¹³¹

The judgments in *WMC Resources, Commonwealth v Western Australia* and *Smith* evidence the growing acceptance of the ‘individual rights’ approach in the interpretation of ‘just terms’.¹³² Despite making references to the legislative discretion of Dixon J’s ‘legislative power’ approach, their Honours in fact subverted these references by insisting on many important aspects of the ‘individual rights’ approach in resolving these cases: it was held that ‘just terms’ must be *legally enforceable* and must ensure that *every affected individual* receives something at least very close to full market-value compensation, plus interest. The next section will examine those judgments that have gone further and completely rejected the ‘legislative power’ view, replacing it with the full rigour of the ‘individual rights’ approach.

C Full Endorsement of the ‘Individual Rights’ Interpretation

In *Georgiadis*, the Commonwealth argued that the substitution of a new workers’ compensation scheme for previous common law rights of action provided ‘just terms’ in that it ‘provided monetary and other benefits without proof of negligence and

¹²⁹ Ibid 514 (Gaudron and Gummow JJ).

¹³⁰ Ibid 531 (Kirby J) [emphasis added].

¹³¹ Ibid.

¹³² Although not directly addressing the content of ‘just terms’, an important issue regarding the application of the requirement of ‘just terms’ to the acquisition of Indigenous property was raised (but not resolved) in *Wurridjal* (2009) 237 CLR 309. Justice Kirby suggested that Indigenous rights to the traditional use of property might require more than just monetary compensation: at 425-6. This possibility was also entertained by Heydon J (at 426) but was rejected by Kiefel J (at 471). See: Matthew T Stubbs, ‘The Acquisition of Indigenous Property on Just Terms: *Wurridjal v Commonwealth*’ (2011) 33 *Sydney Law Review* 119, 124-7; Celia Winnett, ‘Just Terms’ or Just Money? Section 51 (xxxii), Native Title and Non-Monetary Terms of Acquisition’ (2010) 33 *University of New South Wales Law Journal* 776, 798-805. See also: Wing Hsieh, ‘Section 51(xxxii) of the *Australian Constitution* and the Compulsory Acquisition of Native Title’ (Honours Thesis, The University of Adelaide, 2009).

provided for speedy rehabilitation for injured workers and incentives for their early return to work'.¹³³ Justice Brennan rejected this claim, emphatically declaring the 'individual rights' approach to 'just terms':

If a worker is entitled at common law to a lump sum award in damages, it is not within the power of the Commonwealth under s 51(xxxi) *to limit the amount* which it or a statutory authority may have to pay the worker *or to delay the worker's entitlement* to payment. In determining the issue of just terms, *the Court does not attempt a balancing of the interests of the dispossessed owner against the interests of the community at large*. The purpose of the guarantee of just terms is to ensure that the owners of property compulsorily acquired by government presumably in the interests of the community at large are *not required to sacrifice their property for less than its worth*. *Unless it be shown that what is gained is full compensation for what is lost, the terms cannot be found to be just*.¹³⁴

This passage evidences the fullness of Brennan J's adoption of the 'individual rights' approach to s 51(xxxi). First, his Honour rejects any conception of the balancing of the interests of the individual against those of the community: the purpose of the requirement of 'just terms' is to protect the interests of the individual only, as eminent domain theory insists. Secondly, full market-value compensation is required: the Commonwealth may not 'limit the amount' (here Brennan J footnotes the judgments of Latham CJ and Starke J in *Johnston Fear*,¹³⁵ both taking 'individual rights' approaches), nor force the individual to accept less than their property's 'worth', nor provide less than 'full compensation for what is lost'. Thirdly, the Commonwealth cannot delay an entitlement to payment without the provision of interest.¹³⁶

While Brennan J did not refer to the relationship between s 51(xxxi) and the American eminent domain, his Honour's judgment in *Georgiadis* is remarkable for its complete rejection of the 'legislative power' approach to 'just terms' and its clear statement of so many aspects of the 'individual rights' approach.

The approach of Brennan J in *Georgiadis* influenced (as will be seen below) the approach of Gleeson CJ in *Smith* emphasising the 'individual rights' approach. First, his Honour noted the importance of focussing *only* on the individual: 'it is the position of the appellant, not other injured seafarers considered collectively, or the public

¹³³ *Georgiadis* (1994) 179 CLR 297, 310 (Brennan J).

¹³⁴ *Ibid* 310-11 (Brennan J) [emphasis added][references omitted].

¹³⁵ *Johnston Fear & Kingham & The Offset Printing Co Pty Ltd v Commonwealth* (1943) 67 CLR 314, 322 (Latham CJ), 327 (Starke J) ('*Johnston Fear*').

¹³⁶ Justice Brennan here referenced the insistence on interest in the *Tasmanian Dam Case* (1983) 158 CLR 1, 291 (Deane J).

generally, that is to be addressed'.¹³⁷ Secondly, Gleeson CJ quoted with approval the passage extracted above from the judgment of Brennan J in *Georgiadis*, adding that:

The guarantee contained in s 51(xxxi) is there to protect private property. It prevents expropriation of the property of individual citizens, without adequate compensation, *even where such expropriation may be intended to serve a wider public interest*. A government may be satisfied that it can use the assets of some citizens better than they can; but if it wants to acquire those assets in reliance upon the power given by s 51(xxxi) it must pay for them, or in some other way provide just terms of acquisition.¹³⁸

In supporting the approach of Brennan J in *Georgiadis*, in stating that the purpose of the requirement of 'just terms' is 'to protect private property' (emphasising that there is to be no balancing of the interests of the community at large), and in making clear that *every* individual must be assured of full compensation, the judgment of Gleeson CJ in *Smith* was an important instance of the 'individual rights' approach to s 51(xxxi) being taken, with no reference to any 'legislative power' ideas.

The judgment of Callinan J in *Smith* also contained no traces of the 'legislative power' approach to 'just terms'. His Honour simply described s 51(xxxi) as a 'constitutional guarantee'¹³⁹ protecting individuals 'against governmental interference with proprietary rights without just recompense',¹⁴⁰ adding that:

It is unthinkable that in a democratic society, particularly in normal and peaceful times that those who elect a government would regard with equanimity the expropriation of their or other private property without proper compensation. What the public enjoys should be *at the public, and not a private expense*. The authors of the Constitution must have been of that opinion when they inserted s 51(xxxi) into the Constitution.¹⁴¹

With further comments describing 'just terms' as 'proper compensation' and 'just recompense',¹⁴² Callinan J also indicated that financial equivalence *was* required: 'just terms' required '[a] valuation of what the appellant has lost'.¹⁴³ Although no reference was made by Callinan J to the judgment of Brennan J in *Georgiadis*, his Honour's judgment in *Smith* provides another instance of a purely 'individual rights' approach being taken in the interpretation of 'just terms' in the modern era.

¹³⁷ *Smith* (2000) 204 CLR 493, 500 (Gleeson CJ).

¹³⁸ *Ibid* 501 (Gleeson CJ) [emphasis added].

¹³⁹ *Smith* (2000) 204 CLR 493, 542 (Callinan J).

¹⁴⁰ *Ibid* 543 (Callinan J).

¹⁴¹ *Ibid* 541-2 (Callinan J) [emphasis added].

¹⁴² *Ibid* 543 (Callinan J).

¹⁴³ *Ibid* 557 (Callinan J).

The judgment of Brennan J in *Georgiadis* also influenced Heydon J in *ICM Agriculture*. In dissent, Heydon J held that there had been an ‘acquisition of property’ within s 51(xxxi). He alone addressed ‘just terms’, noting pointedly:

The liberality to be employed in the construction of s 51(xxxi) extends to each of its integers, not just one or two. ‘Property’ is to be liberally construed. But so is ‘acquisition’. So is the expression ‘just terms’.¹⁴⁴

The reference immediately following this comment is to the judgment of Brennan J in *Georgiadis*. The point made here by Heydon J parallels one strand of the argument of this thesis: if an ‘individual rights’ approach is appropriate for the interpretation of ‘acquisition of property’, it is also appropriate for the interpretation of ‘just terms’.

Justice Heydon went further, noting that ‘at least on one line of authority, the legislation ‘must provide for the claimant receiving the full value of his property’ – ‘adequate compensation’ or ‘full value’’.¹⁴⁵ His Honour quoted the following passage:

When a person is deprived of property, no terms can be regarded as just which do not provide for payment to him of the value of the property as at date of expropriation, together with the amount of any damage sustained by him by reason of the expropriation, over and above the loss of the value of the property taken. The amount so ascertained is no more than the just equivalent of the property of which he has been deprived.¹⁴⁶

This passage is as significant for its source, the judgment of Rich J in *Huon Transport*,¹⁴⁷ as for its insistence on full market-value compensation. Together with references at this point of Heydon J’s judgment to each of Rich and Williams JJ in *Tonking*¹⁴⁸ (and again to Brennan J in *Georgiadis*), this is a return to the first era jurisprudence, and to the ‘individual rights’ approach that was maintained by the Court throughout World War Two, led by Rich and Williams JJ.

In addressing the facts of *ICM Agriculture*, Heydon J emphasised further aspects of the ‘individual rights’ approach to ‘just terms’. First, his Honour held that *ex gratia* payments could not suffice as ‘‘just terms’ must depend on law, not grace and favour’.¹⁴⁹ Secondly, Heydon J rejected as a ‘controversial and somewhat obscure construction of s 51(xxxi)’ the Commonwealth’s argument that ‘just terms’ ‘did not

¹⁴⁴ *ICM Agriculture* (2009) 240 CLR 140, 213 (Heydon J) [references omitted].

¹⁴⁵ *Ibid* 216 (Heydon J) [references omitted].

¹⁴⁶ *Ibid* 216-7 (Heydon J).

¹⁴⁷ *Commonwealth v Huon Transport Pty Ltd* (1945) 70 CLR 293, 306-7 (Rich J).

¹⁴⁸ *Australian Apple and Pear Marketing Board v Tonking* (1942) 66 CLR 77, 85 (Williams J), 106-7 (Rich J) (*‘Tonking’*).

¹⁴⁹ *ICM Agriculture* (2009) 240 CLR 140, 235 (Heydon J).

call for ‘full money equivalence’ ... and that it was sufficient that there be ‘fair dealing between the Australian nation and the plaintiffs’’.¹⁵⁰ Thirdly, even if such an argument were to be accepted, Heydon J read references to ‘fair dealing’ as meaning merely that non-monetary benefits might offset any deficiency in monetary compensation in order to avoid offending the requirement of ‘just terms’. On the facts, the ‘structural adjustment payments’ did not fully meet the reduction in the value of the Plaintiff’s property,¹⁵¹ and finding no suitable non-monetary benefits to bridge the gap,¹⁵² Heydon J found that ‘just terms’ had not been provided.¹⁵³

The judgments of Brennan J in *Georgiadis*, Gleeson CJ and Callinan J in *Smith* and Heydon J in *ICM Agriculture* represent a complete rejection of all aspects of the ‘legislative power’ approach to ‘just terms’. Moreover, their Honours strongly emphasised several important aspects of the ‘individual rights’ approach, including: the rejection of any idea of balancing the interests of the individual against those of the community; insistence on the payment of full market-value compensation to *all* affected individuals *as a matter of legal right* including interest for any delay in the payment of compensation; and the use of first era Australian judgments (albeit that the link to the American eminent domain jurisprudence that informed these judgments was not expressly noted).

D *The Renaissance of the ‘Individual Rights’ Approach*

The modern era has, therefore, seen a significant rejection of the ‘legislative power’ approach to ‘just terms’ that came to prominence in the second era. Engaging in a global assessment of whether ‘just terms’ has been provided has been rejected in favour of addressing the position of each affected individual. Balancing the interests of the individual against those of society as a whole has also been rejected in favour of considering only the interests of the individual in assessing compensation.

The only aspect of the ‘legislative power’ approach to ‘just terms’ to have received *any* support in modern judgments is the idea that there is some legislative discretion in the

¹⁵⁰ Ibid 235 (Heydon J).

¹⁵¹ Ibid.

¹⁵² Ibid 235-7 (Heydon J).

¹⁵³ Ibid 235 (Heydon J).

determination of ‘just terms’. Even this has been undermined by consistently strict applications of ‘just terms’ that in fact allow very little discretion. Moreover, no judgment has suggested that discretion allows any substantial departure from full market-value compensation. Further, every Justice who has had the occasion to consider it indicated that ‘just terms’ must be legally enforceable by each individual, and their Honours have also required the provision of interest: an important feature of the ‘individual rights’ approach. Even these comments about legislative discretion, the very last vestige of the ‘legislative power’ approach, have been refuted by Gleeson CJ, Brennan, Callinan and Heydon JJ, who have referred back to first era s 51(xxxi) cases and taken completely ‘individual rights’ approaches to the interpretation of ‘just terms’: for their Honours, full market-value compensation is indispensable under s 51(xxxi).

In sum, the modern era has seen a very substantial return to the ‘individual rights’ approach to ‘just terms’, requiring that each individual have an enforceable right to full market-value compensation (or at least something *very* close to it: some Justices have hesitated to take the final step of excluding *any* legislative discretion).

V INFLUENCE OF AMERICAN EMINENT DOMAIN

The modern era has seen increasing judicial willingness to return to the use of American eminent domain in the interpretation of s 51(xxxi), both through express comments to this effect and with important instances of implicit influence.

A *Express Comments on American Jurisprudence*

The first decisions of the modern era did not favour the use of American jurisprudence, with a majority of Justices maintaining the second era view that there were significant differences between s 51(xxxi) and the Fifth Amendment takings clause.¹⁵⁴ This

¹⁵⁴ *TPC v Tooth* (1979) 142 CLR 397, 405 (Barwick CJ), 414 (Stephen J), 427-8 (Mason J); *Tasmanian Dam Case* (1983) 158 CLR 1, 144 (Mason J), 248 (Brennan J). But cf: *Clunies-Ross v Commonwealth* (1984) 155 CLR 193, 204-5 a case which turned on the interpretation of ‘acquire land for a public purpose’ in the *Lands Acquisition Act 1955* (Cth) s 6, not s 51(xxxi), where Murphy J wrote that ‘eminent domain, the acquisition of property by the sovereign for public purposes ... is recognized as a necessary feature of government, and in many modern constitutions is qualified by provisions for just compensation’. His Honour also referred (at 208-9) to the decision of the Supreme Court of the United States in *Hawaii Housing Authority v Midkiff*, 467 US 229 (1984) which was handed down only months

distinction was also essential to the approach to ‘acquisition of property’ advocated by Dawson and Toohey JJ in a series of dissenting judgments.¹⁵⁵

However, later cases revealed increasing confidence in comparative reference to American eminent domain. In *Newcrest Mining*, Kirby J noted that Quick and Garran identified the roots of s 51(xxxi) in eminent domain theory,¹⁵⁶ adding that ‘[t]he Framers had recourse to the provisions of the Fifth Amendment to the United States Constitution’ when discussing s 51(xxxi).¹⁵⁷ In *WMC Resources*, Kirby J described s 51(xxxi) in terms reflecting the theory of eminent domain when he observed that the Parliament could not pursue its ‘larger national interest ... at someone else’s economic cost’.¹⁵⁸ Similarly, Gummow J in *Newcrest Mining* referred to the scope of ‘eminent domain’ in the United States (as stated by the Supreme Court) in interpreting s 122 of the *Australian Constitution*.¹⁵⁹ Later, in *WMC Resources*, he interpreted the category of ‘acquisition of property’ outside s 51(xxxi) comprised of statutory rights inherently liable to modification by reference to American authority.¹⁶⁰ In that case, McHugh J also relied on American authorities.¹⁶¹ There still remained judicial references to differences between the Australian and American provisions.¹⁶²

The most recent judicial pronouncements on the relationship between s 51(xxxi) and American eminent domain have not found any significant distinction. Thus, Callinan J in *Smith* referred to earlier judgments ‘which place significance on *a shade of perceived difference* in meaning between the word ‘taken’ in the Fifth Amendment to the United

before and which had not been cited by counsel, evidencing some willingness to use American jurisprudence.

¹⁵⁵ See above nn 48-50. *Georgiadis* (1994) 179 CLR 297, 315 (Dawson J); *WMC Resources* (1998) 194 CLR 1, 28 (Toohey J).

¹⁵⁶ *Newcrest Mining* (1997) 190 CLR 513, 639 (Kirby J); quoting John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901) 640: ‘a right of eminent domain for federal purposes’.

¹⁵⁷ *Newcrest Mining* (1997) 190 CLR 513, 649 (Kirby J).

¹⁵⁸ *WMC Resources* (1998) 194 CLR 1, 101-2 (Kirby J).

¹⁵⁹ *Newcrest Mining* (1997) 190 CLR 513, 594 (Gummow J). His Honour’s reference was to: *Cherokee Nation v Southern Kansas Railway Co*, 135 US 641, 655-9 (1890).

¹⁶⁰ *WMC Resources* (1998) 194 CLR 1, 73 (referring to: *Dames & Moore v Regan*, 453 US 654 (1981) and Laurence Tribe, *American Constitutional Law* (Foundation Press, 2nd ed, 1988) §9-7 (who referred to: *Norman v Baltimore & Ohio Railroad Co*, 294 US 240, 308 (1935)).

¹⁶¹ *WMC Resources* (1998) 194 CLR 1, 53 (McHugh J). His Honour, pursuing his absolute approach that all statutory rights could be abolished outside s 51(xxxi) (see above n 75), referred to: *United States v Teller*, 107 US 64, 68 (1882) (Woods J); *Lynch v United States*, 292 US 571, 577 (1934) (Brandeis J); *US Railroad Retirement Board v Fritz*, 449 US 166, 174 (1980).

¹⁶² *Georgiadis* (1994) 179 CLR 297, 304-5 (Mason CJ, Deane and Gaudron JJ); *WMC Resources* (1998) 194 CLR 1, 28 (Toohey J), 58 (McHugh J), 93 (Kirby J).

States Constitution and ‘acquisition’ in s 51(xxxi) of the Australian Constitution’.¹⁶³ Rejecting that inference, Callinan J declared that ‘there is little or no significance to be attached to *any apparent shade of difference in meaning* between the two words, ‘take’ and ‘acquire’’.¹⁶⁴ Justice Heydon in *ICM Agriculture* emphasised the underlying similarity of the two provisions, writing that:

Like the Fifth Amendment to the United States Constitution, s 51(xxxi) has the effect of barring ‘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.’¹⁶⁵

This comment also served to link s 51(xxxi) to the theory of eminent domain through emphasising the common idea represented in both constitutional provisions.

The trend in the modern era has, therefore, been towards a greater openness to the use of American eminent domain jurisprudence in the interpretation of s 51(xxxi),¹⁶⁶ reverting back to the ‘individual rights’ view of the first era.

B *Three Important Influences of American Jurisprudence*

Three important influences of the American eminent domain jurisprudence exist within what are now well-accepted interpretations of s 51(xxxi). The first is the broad interpretation stated by Starke J in *Dalziel* that ‘property’ includes ‘every species of valuable right and interest including real and personal property, incorporeal hereditaments ... and choses in action’.¹⁶⁷ This passage was endorsed in the modern era, as it had been in the second era, and remains Australian orthodoxy without any reference having ever appeared to its source in American jurisprudence.¹⁶⁸

¹⁶³ *Smith* (2000) 204 CLR 493, 545 (Callinan J) [emphasis added].

¹⁶⁴ *Ibid* 546 (Callinan J) [emphasis added]. Intriguingly, having been at pains to justify their legitimacy, his Honour did not actually refer to any American authorities. In *Airservices* (1999) 202 CLR 133, Callinan J had used a decision of the Supreme Court of the United States which gave the history of the concept of deodand (*Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663, 680-2 (1974)(Brennan J)), although Callinan J concluded that deodand was irrelevant (at 315).

¹⁶⁵ *ICM Agriculture* (2009) 240 CLR 140, 209 (Heydon J); quoting from: *Armstrong v United States*, 364 US 40, 49 (Black J) (1960).

¹⁶⁶ For example, Allen has suggested that the application of the ‘genuine adjustment’ test could be assisted by reference to three factors identified as relevant in American jurisprudence: ‘the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action’: Allen, ‘The Acquisition of Property on Just Terms’, above n 3, 361; quoting: *Eastern Enterprises v Apfel*, 524 US 498, 523-4 (1998) (O’Connor J).

¹⁶⁷ *Dalziel* (1944) 68 CLR 261, 290 (Starke J).

¹⁶⁸ *Boston and Lowell Railroad Co v Salem and Lowell Railroad Co*, 68 Mass (2 Gray) 1, 35 (1854). See: Chapter 5, section IVD.

The second and third instances of important American influence are in the modern era's 'identifiable and measureable advantage test' for the 'acquisition of property' and 'genuine adjustment' test for identifying instances of the 'acquisition of property' outside s 51(xxxi). The first step in the development of this test from American eminent domain came with the reference to the 'regulatory takings' doctrine stated in *Pennsylvania Coal* by Stephen J in *TPC v Tooth*, where his Honour observed:

That the American experience should provide guidance in this area is testimony to the universality of the problem sooner or later encountered wherever constitutional regulation of compulsory acquisition is sought to be applied to restraints, short of actual acquisition, imposed upon the free enjoyment of proprietary rights.¹⁶⁹

Endorsing this reference to American eminent domain in the *Tasmanian Dam Case*,¹⁷⁰ Deane J referred also to the further decision in *Pennsylvania Central*,¹⁷¹ and used the American doctrine in the development of both the 'identifiable and measureable advantage',¹⁷² and 'adjustment of competing claims between citizens in a field which needs to be regulated in the common interest',¹⁷³ tests.

When this latter test was rephrased as the 'genuine adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity',¹⁷⁴ test in the majority judgment in the *Tape Manufacturers Case*, there was no reference to Deane J in the *Tasmanian Dam Case*, nor to Stephen J in *TPC v Tooth*, nor to the American 'regulatory takings' doctrine. Similarly, although the 'identifiable and measureable advantage' test has been extensively applied and supported, its source in the American 'regulatory takings' doctrine has gone unacknowledged.¹⁷⁵ Interestingly, one commentator has noted Tasmania's reference to the 'regulatory takings' jurisprudence in the *Tasmanian Dam Case*, but then only noted Mason J's rejection of the doctrine, not addressing the approach of Deane J at all (nor of Stephen J in *TPC v Tooth*). As a result, she found 'virtually no evidence that Australian ... courts have accepted the concept of regulatory taking'.¹⁷⁶

¹⁶⁹ *TPC v Tooth* (1979) 142 CLR 397, 415 (Stephen J).

¹⁷⁰ *Tasmanian Dam Case* (1983) 158 CLR 1, 284 (Deane J).

¹⁷¹ 438 US 104 (1978); cited by: *Tasmanian Dam Case* (1983) 158 CLR 1, 284 (Deane J).

¹⁷² *Tasmanian Dam Case* (1983) 158 CLR 1, 283 (Deane J).

¹⁷³ *Ibid* 286-7 (Deane J).

¹⁷⁴ *Tape Manufacturers Case* (1993) 176 CLR 480, 510 (Mason CJ, Brennan, Deane and Gaudron JJ).

¹⁷⁵ Evans similarly has written that '[t]he Court ... has not accepted the American regulatory takings doctrine': Evans, 'Constitutional Property Rights in Australia', above n 47, 200. The only exception he identified to this statement was the judgment of Stephen J in *TPC v Tooth*: at 200 n 18.

¹⁷⁶ Donna R Christie, 'A Tale of Three Takings: Taking Analysis in Land Use Regulation in the United States, Australia and Canada' (2007) 32 *Brooklyn Journal of International Law* 343, 383.

The trend in the modern era towards greater willingness to engage with American eminent domain in the interpretation of s 51(xxxi) is thus supplemented by the implicit support given to this link by the three important (yet generally unacknowledged) areas in which this comparative guidance has already influenced the interpretation of the placitum. The American eminent domain has therefore started to return towards the level of influence it had in the first era of s 51(xxxi) jurisprudence, although this development has taken place with little acknowledgment by the Justices, and without any commentary addressing it.

VI THE STATE OF S 51(xxxi) JURISPRUDENCE: PROBLEMS AND SOLUTIONS

This Chapter's systematic analysis of the modern era s 51(xxxi) jurisprudence will now be supplemented by a consideration of the academic commentary on this body of decisions. This section's examination of the literature will facilitate conclusions on a number of outstanding issues. First, when combined with the jurisprudential analysis undertaken thus far, the overall state of the s 51(xxxi) jurisprudence will be addressed, and those areas in which the Court's interpretation remains unsatisfactory will be identified. Secondly, the solutions that have been proposed by commentators will be assessed, and it will be seen that each remains problematic in important respects. Thirdly, the adoption of the 'individual rights' approach will be demonstrated to be the solution to the remaining problems of the s 51(xxxi) jurisprudence.

A *The Scope of the Problems*

The interpretation of s 51(xxxi) by the High Court has varied over time, and this thesis has divided it into three distinct eras: the first, in which the 'individual rights' approach was dominant; the second, when the 'legislative power' approach was dominant; and the third, during which the 'individual rights' approach has enjoyed a resurgence. Even within each era, the dominant approach has not always been adopted unanimously by the Justices. In the modern era, this diversity of interpretation has led commentators to criticise the Court's approach to s 51(xxxi). Evans has called the modern jurisprudence 'confused and unsatisfactory',¹⁷⁷ and even 'close to incoherent',¹⁷⁸ and George Williams

¹⁷⁷ Evans, 'When is an Acquisition of Property Not an Acquisition of Property?', above n 57, 184.

has stated that it has not achieved ‘an acceptable degree of certainty.’¹⁷⁹ Some Justices have also noted difficulties.¹⁸⁰ This section will therefore identify which areas of the s 51(xxxi) jurisprudence remain deficient.

Although individual judgments, and perhaps cases, might be subjected to legitimate criticism,¹⁸¹ there is much satisfactory jurisprudence. Current interpretations of ‘acquisition of property’, including the definition of ‘property’, the application of s 51(xxxi) to the ‘acquisition of property’ by *any* person, and the use of the ‘identifiable and measureable advantage’ test of ‘acquisition’, have resulted in a clear jurisprudence which is also consistent with the historical, theoretical and comparative contexts of s 51(xxxi) examined in Part Two of this thesis.

Current majority understandings of those instances of ‘acquisition of property’ outside s 51(xxxi) are also consistent with the ‘individual rights’ approach, as well as the placitum’s historical context, its theoretical genesis and the comparative experience in the United States.¹⁸² Challenging factual situations have been handled by the ‘genuine adjustment’ of competing rights and interests test; supplemented by the other three categories of ‘acquisition of property’ outside s 51(xxxi) that have been identified: statutory rights that are inherently liable to modification; heads of legislative power whose express terms or subject matter exclude the application of s 51(xxxi)’s requirement of ‘just terms’; and, instances where ‘just terms’ would be an ‘inconsistent or incongruous notion’.¹⁸³

¹⁷⁸ Evans, ‘Constitutional Property Rights in Australia’, above n 47, 197.

¹⁷⁹ George Williams, *Human Rights Under the Australian Constitution* (Oxford University Press, 1999) 153.

¹⁸⁰ See, eg: ‘I am not sure that a completely satisfactory explanation has yet been given of the principles by which it is to be determined which laws do, and laws do not, fall within s51(xxxi)’: *TPC v Tooth & Co Ltd* (1979) 142 CLR 397, 402 (Gibbs J); *Chaffey* (2007) 231 CLR 651, 667 (Kirby J), 672 (Callinan J); *Smith* (2000) 204 CLR 493, 543-55 (Callinan J).

¹⁸¹ Simon Evans’ article ‘When is an Acquisition of Property Not an Acquisition of Property?’, above n 57, was a response to the decision in *Airservices* (1999) 202 CLR 133 in which the approaches of the Justices were divergent and might justly be called ‘confused and unsatisfactory’.

¹⁸² Rosalind Dixon has described the modern jurisprudence’s identification of instances of ‘acquisition of property’ outside s 51(xxxi) as ‘a significant advance’ (Rosalind Dixon, ‘Overriding Guarantee of Just Terms or Supplementary Source of Power?: Rethinking s 51(xxxi) of the Constitution’ (2005) 27 *Sydney Law Review* 639, 651) but suggests that this issue remains ‘problematic to some greater or lesser degree’ (at 651).

¹⁸³ There have been unsuccessful attempts to introduce concepts of proportionality to identify instances of the ‘acquisition of property’ outside s 51(xxxi): *Mutual Pools* (1994) 179 CLR 155, 179-81 (Brennan J), 219 (McHugh J); *Lawler* (1994) 179 CLR 270, 277-8 (Brennan J), 292-3 (McHugh J); *WMC Resources* (1998) 194 CLR 1, 50 (McHugh J); *Airservices* (1999) 202 CLR 133, 181 (Gleeson CJ and

However, some areas of the modern jurisprudence remain problematic. First, the interpretation of ‘just terms’. Although the ‘individual rights’ approach has enjoyed a resurgence, some Justices have been reluctant to remove the last vestige of legislative discretion in the definition of ‘just terms’ by requiring full market-value compensation. This permits a balancing of interests which contradicts the guidance available from the historical, theoretical and comparative contexts of s 51(xxxi) examined in Part Two of this thesis, and involves a blurring of the distinction drawn in eminent domain theory between the sovereign power to determine that an appropriation of property is necessary and the individual right to compensation that the exercise of such a sovereign power demands for the protection of those affected.

The second problematic area encompasses judicial comments rejecting the use of American eminent domain jurisprudence in the interpretation of s 51(xxxi). These again represent an unjustified departure from the first era jurisprudence and the broader contextual genesis of s 51(xxxi), and are also inconsistent with the important actual influences of this comparative context in the interpretation of ‘acquisition of property’.

Modern commentators have noted problems in the s 51(xxxi) jurisprudence, which the next section of this Chapter will analyse and critique. First, Evans’ conclusion, that greater judicial deference to Parliament is required, will be addressed. Secondly, the suggestion from Allen and Dixon that s 51(xxxi) issues should be avoided by radically

Kirby J). None of these attempts has gained acceptance, and the only mention of such an approach in recent cases was an express rejection: *ICM Agriculture* (2009) 240 CLR 140, 229-30 (Heydon J). It has been suggested that the use of proportionality reasoning in those judgments ‘comes very close to the proportionality test’ used in Canada, the European Union, Germany and South Africa: Van der Walt, above n 97, 72. In Allen, ‘The Acquisition of Property on Just Terms’, above n 3, these suggested uses of proportionality are described less favourably: ‘a very loose, impressionistic type of proportionality’ (at 367) that is ‘applied with a high level of deference’ (at 369) with the result that: ‘so long as the legislation does not offend the judges’ sense of what is fair and reasonable, as well as their sense of the limits on their ability to determine social issues, the legislation can stand’ (at 367). Evans has also criticized this suggestion, noting that it ‘can rationalise existing findings about the scope of s 51(xxxi) ... but it is difficult to see it being a useful predictive or diagnostic tool’: Evans, ‘When is an Acquisition of Property Not an Acquisition of Property?’, above n 57, 189.

Given the Court’s rejection of direct proportionality analysis, references by commentators to s 51(xxxi) involving tests of proportionality must be treated with caution. Thus, Joseph and Castan’s statement:

‘occasions where an acquisition of property may be effected by Commonwealth law without the payment of just terms ... have been justified in numerous ways by various High Court justices, [but] it is apparent that the general test adopted to identify such acquisitions is one of proportionality’: Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (LawBook, 3rd ed, 2010) 406.

This can best be accepted as a description of the assessment of whether a measure constitutes a ‘genuine adjustment’ under that test: its application to the other three categories of ‘acquisition of property’ outside s 51(xxxi) would present considerable difficulties.

reducing the scope of its application will be considered. Finally, the complete adoption of the ‘individual rights’ approach to s 51(xxxi) that is advocated in this thesis will be examined. It will be argued that this last option alone provides the appropriate solution to the remaining difficulties in the High Court’s s 51(xxxi) jurisprudence.

B *Evans’ Solution: Judicial Deference*

1 *Competing Visions and the Case for Judicial Deference*

Simon Evans’ suggested solution to the interpretive difficulties of s 51(xxxi) relies on three premises. First, that ‘some measure of reasoning based on moral values extrinsic to the *Constitution* will be required to interpret s 51(xxxi)’;¹⁸⁴ a rejection of a purely textualist approach to the placitum.¹⁸⁵ Evans suggests that ‘members of the Court should openly expose the moral values that drive the dispute’.¹⁸⁶

Evans’ second premise is that the interpretation of s 51(xxxi) inevitably involves the balancing of two ‘competing visions of the functions of property and the state’ derived from property theory.¹⁸⁷ The first vision ‘treats property as inviolable’.¹⁸⁸ The second ‘treats property as subject to redistribution in the public interest’.¹⁸⁹ Evans concludes that what is required is a balance between the two visions:

It is unlikely that one should give way completely to the other: the modern liberal-democratic state requires stability of property for its markets and assumes the legitimacy of the redistribution of property to support (amongst many other things) welfare programmes and environmental regulation.¹⁹⁰

Evans later recasts these ‘competing visions’ as conflicting needs for ‘stability of entitlements’ and ‘flexibility and modification of entitlements in light of changed circumstances’.¹⁹¹

The third of Evans’ premises is that no guidance exists in the constitutional text or context as to how these competing visions of property are to be balanced under s

¹⁸⁴ Evans, ‘Constitutional Property Rights in Australia’, above n 47, 210.

¹⁸⁵ Cf: Dixon J’s statement that s 51(xxxi) gave effect to a ‘compound conception’ of ‘acquisition-on-just-terms’: *Grace Brothers* (1946) 72 CLR 269, 290 (Dixon J).

¹⁸⁶ Evans, ‘Constitutional Property Rights in Australia’, above n 47, 211.

¹⁸⁷ Evans, ‘When is an Acquisition of Property Not an Acquisition of Property?’, above n 57, 201.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ Evans, ‘Constitutional Property Rights in Australia’, above n 47, 198.

51(xxxi). He does not undertake the extensive examination of the historical, comparative and theoretical contexts of the placitum that comprised Chapters 2 and 3 of this thesis. Evans did seek guidance from the Convention Debates,¹⁹² but concluded (contrary to the argument in Chapter 4 of this thesis) that they provided ‘little assistance’ in the interpretation of s 51(xxxi).¹⁹³

Evans’ proposed solution arises logically from these three premises: if the interpretation of s 51(xxxi) requires the application of extrinsic moral values and depends upon the interplay of competing visions of property, and there is no textual or contextual guidance as to how they should be balanced, then the Parliament should be entitled to deference towards its determination of how those competing visions should be balanced in any particular situation. Evans, therefore, suggests ‘an interpretive approach that directly recognises the primacy of political institutions in resolving the conflict between stability and flexibility’.¹⁹⁴ He advocates that Justices should ‘recognise the Court’s limitations as a site for moral deliberation’,¹⁹⁵ and suggests that ‘some measure of deference to legislative judgements is appropriate’¹⁹⁶ to ‘appropriately give primacy to the legislature’s determination of the rights issues that are impacted by the legislation under review’.¹⁹⁷ Evans concludes that:

some of the moral dimensions of property are better addressed by legislators than courts interpreting s 51(xxxi), not least because of the greater deliberative capacity of legislatures and the epistemic advantages that they may enjoy.¹⁹⁸

Evans’ solution is therefore for courts to display deference to the legislature, applying s 51(xxxi) to invalidate legislation only with great reluctance.¹⁹⁹

2 *Difficulties with Evans’ Approach*

The greatest difficulty with Evans’ proposed solution is that the most important of the premises on which he relies is arguably mistaken. Even if the first two premises are

¹⁹² Simon Evans, ‘Property and the Drafting of the Australian Constitution’ (2001) 29 *Federal Law Review* 121.

¹⁹³ *Ibid* 150.

¹⁹⁴ Evans, ‘Constitutional Property Rights in Australia’, above n 47, 198.

¹⁹⁵ *Ibid* 211.

¹⁹⁶ *Ibid*.

¹⁹⁷ *Ibid* 212.

¹⁹⁸ *Ibid* 213.

¹⁹⁹ An analogy might be drawn to the limited review of whether a law is ‘deemed necessary’ for the people of any race within the races power (s 51(xxvi) of the *Australian Constitution*). In *Kartinyeri v Commonwealth* (1998) 195 CLR 337, Gummow and Hayne JJ found that this deeming was a matter of legislative discretion that would be rejected by the Court only in the case of ‘manifest abuse’: at 378.

accepted, assuming that that some measure of moral reasoning extrinsic to the text of the *Constitution* will be required and that there exist two competing visions of property, the third premise, that nothing in the text or context of s 51(xxxi) indicates how these competing visions should be balanced, is, as this thesis has argued, deeply problematic.

The root of Evans' 'competing visions' approach is reflected in a quotation he extracted from Gregory Alexander:

The institution of private ownership of property historically has rested on multiple and diverse normative visions, and it does so still to this day. This pluralist and contestable character of private property seems highly unlikely ever to give way to a unitary conception, in which property is understood to serve one and only one purpose. Property remains inherently contestable. So long as it remains so, the questions whether it should be constitutionally protectible, to what extent, and by what means will remain essentially political questions, implicating competing political visions.²⁰⁰

The problem with relying on this statement is its context: Alexander was addressing questions of constitutional design, writing for 'constitution-makers and revisers'.²⁰¹ Identifying the 'competing visions' of property might well be relevant to the political questions of how a constitution *should* be framed. However, once the constitution *has been* framed, it should not be assumed that the provision itself does not embody the result of the weighing of the 'competing visions' of property.

The Framers of the *Australian Constitution* had before them historical examples of both of the 'competing visions' of property. They had witnessed what Evans refers to as 'the mythic place of property in the common law',²⁰² and were therefore aware of the vision of property as private and inviolable. But, they had also witnessed the debates over the granting of licences or leases to 'squatters' and the subsequent re-distribution of rights through land selection in the Australian Colonies from the 1840s onwards,²⁰³ and were equally aware of the vision of property as redistributable and public.

²⁰⁰ Gregory Alexander, 'Constitutionalising Property: Two Experiences, Two Dilemmas' in Janet McLean (ed), *Property and the Constitution* (Hart, 1999) 88, 108; quoted in: Evans, 'When is an Acquisition of Property Not an Acquisition of Property?', above n 57, 201-2.

²⁰¹ The piece begins by referring to the fact that a 'remarkable number of nations around the world' were involved in processes of either 'revising their constitutions or writing new constitutions': Alexander, above n 200, 88.

²⁰² Evans, 'When is an Acquisition of Property Not an Acquisition of Property?', above n 57, 200.

²⁰³ See, eg: John B Hirst, *The Strange Birth of Colonial Democracy: New South Wales 1848-1884* (Allen & Unwin, 1988) 120-31, 134-56; Bruce Kercher, *An Unruly Child: A History of Law in Australia* (Allen & Unwin, 1995) 118-23, 126-9; C M H Clark, *A History of Australia, vol.4: The Earth Abideth For Ever, 1851-1888* (Melbourne University Press, 1978) 165-219; Alex C Castles, *An Australian Legal History* (LawBook, 1982) 457-64; A Davidson and A Wells, 'The Land, the Law and the State: Colonial Australia 1788-1890' (1984) 2 *Law in Context* 89-114.

It is here that the broader contexts of s 51(xxxi) examined in Part Two of this thesis provide important new guidance. The Framers accepted the necessity of a legislative power for the appropriation of private property, because the vision of property as private and inviolable could not be fully adopted without hampering the operations of the future Commonwealth. Equally, however, the Framers had before them the English and Australian experiences implementing Locke and Blackstone's theories as well as the American example of the protection of private property by constitutional eminent domain clauses, so the vision of property as redistributable and public could no more be adopted than its rival proposition.

Clear guidance was available from how these 'competing visions' of property had been successfully balanced in England, in the Australian Colonies and in the United States. As demonstrated in Chapter 2, the balance between the 'competing visions' of property was reflected in the English constitutional practice, also adopted in the Australian Colonies, that the compulsory acquisition of property required the payment of full compensation to every affected individual.

Moreover, as Chapter 3 revealed, the American experience provided guidance about the application of the theory of eminent domain in a written constitution imposing judicially-enforced limits on legislative power. The 'competing visions' of property were explicitly addressed in the most influential commentary on the American experience, Bryce's *The American Commonwealth*:

Some think a law tyrannical which forbids a man to exclude others from ground which he keeps waste and barren, while others blame the law which permits a man to reserve, as they think tyrannically, large tracts of country for his own personal enjoyment.²⁰⁴

Bryce also addressed how these competing visions had been reconciled. Referring to the protections contained in the constitutions of the American States against encroachment on 'the full enjoyment of private property', Bryce noted that '[i]n all such fundamentals the majority has prudently taken the possible abuse of its power out of the hands of the legislature.'²⁰⁵ These provisions put it beyond the power of the American legislatures to give full effect to the vision of property as redistributable and public by requiring compensation to every affected individual; they equally excluded the full application of the competing vision of property as inviolable and private by

²⁰⁴ James Bryce, *The American Commonwealth* (Macmillan, 1888) vol 3, 137.

²⁰⁵ *Ibid* 136.

recognising a sovereign power of appropriation. The compromise between these two competing visions of property was, of course, the requirement embodied in the theory of eminent domain of full market-value compensation whenever property was appropriated.

Evans argues that, '[w]ithin the broad parameters of the text of section 51(xxxi), very different balances can be struck',²⁰⁶ and that 'the spare text ... provides no secure criteria for resolving the conflict and the moral principles which might be called in aid are deeply contested.'²⁰⁷ Indeed, Evans suggests that 'complexity and contestedness is probably inevitable' because s 51(xxxi) is an 'attempt to mediate' a 'perennial ... and ... irreducibly moral' conflict between the 'competing visions' of property.²⁰⁸

This thesis has argued that an alternative approach provides a better solution to the dilemma articulated by Evans: s 51(xxxi) itself represents the balance struck between the two 'competing visions' of property. If s 51(xxxi) merely provided for 'the acquisition of property' without containing the requirement of 'just terms', it could be argued that the 'competing visions' were to be balanced by the Parliament. However, as Gleeson CJ has noted:

If para (xxxi) were intended to be no more than an express conferral of a power of acquisition that would otherwise be implicit in other paragraphs of s 51, then that would not explain the presence of the qualification. It is an important limitation on power.²⁰⁹

Interpreting s 51(xxxi) it is not necessary for the Court to make moral judgements between the two 'competing visions' of property that Evans suggests are in perennial conflict. The requirement of 'just terms' implements the same resolution of that conflict that is contained in the English constitutional theory of Locke and Blackstone, in the nineteenth century English and Australian Colonial legislative practice, in eminent domain theory, and in American constitutional eminent domain clauses: a legislative power of compulsory acquisition is recognised, but is subject to the provision of 'just terms' that requires full market-value compensation be paid to every affected individual.

²⁰⁶ Evans, 'When is an Acquisition of Property Not an Acquisition of Property?', above n 57, 204.

²⁰⁷ Evans, 'Constitutional Property Rights in Australia', above n 47, 198.

²⁰⁸ Ibid 198.

²⁰⁹ *Theophanous* (2006) 225 CLR 101, 113 (Gleeson CJ).

Evans' 'competing visions' approach is therefore based on the false premise that no contextual guidance indicates how the 'competing visions' of property are to be reconciled under s 51(xxxi). When understood in its broader historical, theoretical and comparative context, the placitum itself resolves this difficulty.

C *Proposed Solutions Outside s 51(xxxi)*

A reduction in the scope of s 51(xxxi)'s application has been proposed by academic commentators Allen and Dixon as the solution to the placitum's interpretive difficulties. Two suggested means for achieving this reduction in application will now be examined.

1 *Narrowing the Interpretations of 'Acquisition' and 'Property'*

This thesis has demonstrated that the Court's interpretation of 'acquisition of property' implements the 'individual rights' approach to s 51(xxxi) by applying the placitum broadly to provide maximum protection to the individual: 'acquisition' has been held to include acquisition by *any* person under Commonwealth law; 'acquisition' has also been held to occur not only where a property right is transferred, but also in situations where an 'identifiable and measureable advantage' is derived from interference with the property rights of another; and 'property' has been held to encompass property rights of any nature, including real, personal and intangible property. This has achieved the broad application of s 51(xxxi)'s rights-protective requirement of 'just terms' that is *required* by the 'individual rights' approach.

Academic commentary has found a narrowing of the interpretations given to 'acquisition' and 'property' to be attractive. Simon Evans noted that a narrowing of these interpretations would 'return to the apparently limited scope and purpose that the Framers intended for s 51(xxxi)' which he regards as being to provide a legislative power and not a constitutional guarantee.²¹⁰ Tom Allen also suggested this narrowing of approach, again on the basis of his view of the Framers' understandings.²¹¹ Rosalind Dixon was also 'broadly sympathetic' to narrowing the interpretation of 'acquisition'

²¹⁰ Evans, 'Constitutional Property Rights in Australia', above n 47, 208.

²¹¹ Allen, 'The Acquisition of Property on Just Terms', above n 3, 380.

and ‘property’.²¹² The historical evidence does not support these commentators’ assertions about the Framers intending a narrow scope for ‘acquisition of property’. In the Convention Debates, Barton stated that s 51(xxxi) would extend to ‘*any property* the acquisition of which might become necessary’,²¹³ and Quick and Garran indicated that property was to extend to real and personal property²¹⁴ and even intangible property.²¹⁵ In any event, even though Evans and Dixon had entertained the possibility of a narrow interpretation of ‘acquisition of property’ as a solution, ultimately they both rejected it. Dixon stated that this contradicted the principle that ‘a broad ... approach is ... to be preferred when interpreting ... a grant of constitutional power’ and that narrower interpretations would be ‘difficult to maintain in any principled manner’.²¹⁶ Evans noted that the text itself imposed no such restrictions and should not be narrowly read, and that it was also ‘too late’ to depart from the jurisprudence on this point.²¹⁷ Allen did not reject the potential narrowing of ‘acquisition’ and ‘property’, but his key point that s 51(xxxi) had been applied too broadly is better reflected in the approach that will be examined below.²¹⁸

Therefore, although narrower interpretations of ‘acquisition’ and ‘property’ have been considered by commentators, on balance they have rejected them. Instead, an alternative means of narrowing the application of s 51(xxxi) has been proposed.

2 *Removing s 51(xxxi)’s Effect on Other Powers*

Evans, Allen and Dixon have all considered reductions in the scope of s 51(xxxi)’s application. For Evans, the solution came in an approach of judicial deference, and he rejected the alternative of removing s 51(xxxi)’s effect on other powers. His reason was that the interpretive principle, that the presence of s 51(xxxi) removes the power to acquire property without ‘just terms’ from all other heads of legislative power, has been applied in every s 51(xxxi) judgment for over a century.²¹⁹

²¹² Dixon, above n 182, 653.

²¹³ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 25 January 1898, 151 (Edmund Barton) [emphasis added].

²¹⁴ ‘[L]and, places, buildings and chattels’: Quick and Garran, above n 156, 949.

²¹⁵ *Ibid* 593-7 (copyright), 597 (patents), 599 (trade marks).

²¹⁶ Dixon, above n 182, 653.

²¹⁷ Evans, ‘Constitutional Property Rights in Australia’, above n 47, 208.

²¹⁸ Allen, ‘The Acquisition of Property on Just Terms’, above n 3, 380.

²¹⁹ *Schmidt* (1961) 105 CLR 361, 371-2. The only instance in which it has even been questioned was the lone dissent of Dixon J in *Andrews v Howell* (1941) 65 CLR 255, 281-2. Evans stated: ‘I assume that it is

Undaunted by the weight of authority, Allen and Dixon both proposed a change to the understanding of s 51(xxxi)'s relationship to other heads of legislative power. Allen's argument was that the Court 'should not find it necessary' to apply s 51(xxxi) to protect 'economic or proprietary rights' that could be protected under ss 92 and 117,²²⁰ so s 51(xxxi) should be applied in fewer situations.²²¹ Dixon argued that this could be reconciled with orthodox constitutional interpretation if the interpretive principle stated by Dixon CJ in *Schmidt* were overturned, and s 51(xxxi) were held to apply *only* where an 'acquisition of property' could not be justified as even incidental to any other head of power.²²² As Dixon indicated, this reading would mean that s 51(xxxi) 'will ultimately apply ... in a very limited number of cases'.²²³

Formidable difficulties arise from the marginalisation of s 51(xxxi) proposed by Allen and Dixon. First, their method of avoiding s 51(xxxi) is unsatisfactory. The placitum requires not only that any 'acquisition of property' be 'on just terms', but it *also* expressly applies to any 'acquisition of property' which is 'for any purpose in respect of which the Commonwealth has power to make laws'. If an 'acquisition of property' were sufficiently connected to another head of power to contemplate characterising it as falling within that other power, then it would *also* fall within s 51(xxxi) as an acquisition 'for any purpose in respect of which the Commonwealth has power to make laws'. This important point was not expressly addressed by Allen or Dixon.

Secondly, Allen and Dixon both sought to imply an alternative protection of property. This not only underscores the value of s 51(xxxi), but also suffers from the problem that there is no textual basis for their implications. Moreover, the test of proportionality suggested by Allen,²²⁴ and the 'rights-attentive approach to determining whether a law is *'reasonably appropriate and adapted'* to an end within power' advocated by

too late to decide that section 51(xxxi) does not give rise to any negative implication affecting the scope of the other heads of legislative power. Nonetheless, the advantages of deconstitutionalising property should be noted': Evans, 'When is an Acquisition of Property Not an Acquisition of Property?', above n 57, 198 n 63.

²²⁰ Allen, 'The Acquisition of Property on Just Terms', above n 3, 362-3.

²²¹ Ibid 352.

²²² Dixon, above n 182, 654.

²²³ Ibid 655.

²²⁴ Allen, 'The Acquisition of Property on Just Terms', above n 3, 352.

Dixon,²²⁵ are incompatible with the court's normal approach to characterisation of legislation. They require the extension of a proportionality test for the validity of legislation beyond the two 'exceptional situations' identified by Allen (purposive powers and express rights protections)²²⁶ to apply to all legislation – a significant departure from orthodox methods of constitutional interpretation.²²⁷

Rosalind Dixon argued that any 'acquisition of property' currently subject to s 51(xxxi) – excluding powers such as taxation which had been held to be outside the placitum – would be within the incidental, rather than core, part of each legislative power: and therefore subject to a proportionality requirement for validity on orthodox interpretive principles.²²⁸ However, this use of the incidental power was specifically rejected by Dixon CJ in *Burton v Honan*, where his Honour was satisfied that the challenged law had 'a reasonable connection' to 'the subject of the power under which the legislature purported to enact' and was therefore within the scope of the incidental power.²²⁹ As Dixon CJ emphasised:

the justice and wisdom of the provisions which it makes in the exercise of its powers over the subject matter are matters entirely for the Legislature and not for the Judiciary. ... In the administration of the judicial power in relation to the Constitution there are points at which matters of degree seem sometimes to bring forth arguments in relation to justice, fairness, morality and propriety, but those are not matters for the judiciary to decide upon.²³⁰

This passage from Dixon CJ makes clear his Honour's rejection of the possibility of challenging laws for the 'acquisition of property' on the basis that an unfairness of terms takes the law outside the scope of the incidental power (as distinct from any consequences that might be involved for s 51(xxxi)). Moreover, Rosalind Dixon is creating a strict dichotomy where none exists. This can be demonstrated by the following example. As Dixon CJ explained in *Schmidt*:

no one would doubt that, under the power to make laws with respect to bankruptcy, property of the bankruptcy may be sequestrated and property of others which has been left in his order and disposition may be vested in the Official Receiver and that s 51(xxxi) has no bearing on the matter. At the same time, if a law was made under

²²⁵ Dixon, above n 182, 641. She also describes this solution as a 'low-level proportionality-style analysis': at 640.

²²⁶ Allen, 'The Acquisition of Property on Just Terms', above n 3, 365.

²²⁷ See, eg: *Leask v Commonwealth* (1996) 187 CLR 579, 602-4 (Dawson J), 634-5 (Kirby J); Blackshield and Williams, above n 56, 769-78.

²²⁸ Dixon, above n 182, 659.

²²⁹ *Burton v Honan* (1952) 86 CLR 169, 179 (Dixon CJ).

²³⁰ *Ibid.*

which a piece of land was acquired for a Bankruptcy Office, s 51(xxxi) would govern the legislation and not s 51(xvii).²³¹

Rosalind Dixon's approach treats bankruptcy as being entirely outside s 51(xxxi),²³² so directly contradicts this distinction drawn by Dixon CJ. Similar problems would arise for the taxation, patent and marriage powers (other powers listed by Rosalind Dixon as being entirely outside s 51(xxxi)).²³³

Avoiding the application of s 51(xxxi), as advocated by Allen and Rosalind Dixon, requires the overturning of the principle that has always guided the interpretation of the placitum – that it restricts all other Commonwealth heads of legislative power. It is also inconsistent with the text of the placitum which indicates that it applies to any 'acquisition of property' which is 'for any purpose in respect of which the Commonwealth has power to make laws'. Further, both authors advocate replacing s 51(xxxi)'s protective requirement of 'just terms' with a test of proportionality which appears inconsistent with orthodox constitutional interpretation. These are very substantial obstacles to the acceptance of their proposed marginalisation of s 51(xxxi).

All of these proposals suffer from a further defect. As Dixon admits, her suggestion does not 'provide a theory which would help answer, in a deeper substantive sense, how the members of the Court should in fact go about striking the balance between proprietary and other interests'.²³⁴ The marginalisation of s 51(xxxi) suggested by Allen and Dixon does not advance understandings of the placitum, but works only by avoiding having to interpret and apply s 51(xxxi). Evans' proposal suffers from a similar defect – it does not clarify understandings of s 51(xxxi), but simply suggests that the Court should be much less vigorous in its application of the placitum. In this way, the solutions proposed by commentators are not in fact solutions at all – they are merely means of avoiding the difficulty (by limiting the number of cases in which the interpretation of s 51(xxxi) arises) which do not advance understandings of 'the acquisition of property on just terms' in a way that will facilitate the future application of s 51(xxxi).

²³¹ *Schmidt* (1961) 105 CLR 361, 372.

²³² Dixon, above n 182, 664.

²³³ *Ibid* 659.

²³⁴ *Ibid* 662.

D *The ‘Individual Rights’ Solution*

This thesis has argued that not all of the criticism of the s 51(xxxi) jurisprudence is justified, given the advances made in the modern jurisprudence in the interpretation of the ‘acquisition of property’ and identification of instances when an ‘acquisition of property’ will be outside s 51(xxxi). However, problems do remain in the interpretation of ‘just terms’ and with statements rejecting American eminent domain jurisprudence.

The existing proposals for solving s 51(xxxi)’s interpretive challenges have been examined, but it has been shown that each faces considerable difficulties. Evans’ suggestion of judicial deference is based on the false premise that no contextual guidance indicates how the ‘competing visions’ of property are to be reconciled under s 51(xxxi). Narrowing the interpretation of ‘acquisition’ and ‘property’ has been rejected even by those who have entertained the possibility. The marginalisation of s 51(xxxi) is inconsistent with the text of the placitum, requires a major departure from the opinion of every Justice who has considered s 51(xxxi) over the course of its history, and the suggested approaches to take over the work done by the placitum cannot be reconciled with orthodox principles of constitutional interpretation. Would the adoption of the ‘individual rights’ approach provide a better solution to the remaining problems of the s 51(xxxi) jurisprudence, without succumbing to the difficulties involved in these other proposals?

The ‘individual rights’ approach to ‘just terms’, which demands full market-value compensation to each affected individual, would have three key advantages. First, it is consistent with the guidance available from the historical, theoretical and comparative contexts of s 51(xxxi) examined in Part Two of this thesis. Secondly, it is consistent with the interpretations given during the first era of s 51(xxxi) jurisprudence. Thirdly, it avoids the indeterminate balancing of individual rights against the public interest, the problem that (under the guise of ‘competing visions’ of property) caused Simon Evans to advocate judicial deference to the legislature.

Two possible objections to the adoption of the ‘individual rights’ approach to ‘just terms’ must be considered. First, it might be claimed that this approach elevates the interests of the individual above those of society as a whole. This complaint fails to

recognise that the interests of the individual have *already been balanced* against those of society as a whole. The legislative power to compulsorily carry out the ‘acquisition of property’ *is* the recognition of the community’s interests, whereas the provision of full market-value compensation is the protection to individual interests: this is the critical insight from s 51(xxxi)’s historical genesis, theoretical background and comparative context. As Montesquieu wrote:

If the political magistrate would erect a public edifice, or make a new road, he must indemnify those who are injured by it: the public is in this respect like an individual, who treats with an individual. *It is fully enough that it can oblige a citizen to ... alienate his possessions.*²³⁵

To attempt to balance society’s interests again when assessing ‘just terms’ involves double-counting.

Secondly, it might be objected that the ‘individual rights’ approach involves a departure from existing precedents. However, no clear position has been reached – as many judgments can be identified to support the ‘individual rights’ approach to ‘just terms’ as the ‘legislative power’ approach, and the trend in the modern era has very clearly been towards the ‘individual rights’ approach. Consequently, adopting the ‘individual rights’ approach simply involves the choice of one existing strand of the jurisprudence over another, rather than a dramatic departure from orthodox principles of constitutional interpretation, and there are good reasons for making this choice. Therefore the ‘individual rights’ approach to ‘just terms’ and its interpretation as requiring the provision of full market-value compensation has the three advantages identified above, with no objections to this course that provide sufficient justification not to adopt it.

Another aspect of the ‘individual rights’ approach, which regards American eminent domain as relevant to the interpretation of s 51(xxxi), has three key advantages. First, it is consistent with the guidance available from the historical, theoretical and comparative contexts of s 51(xxxi) examined in Part Two of this thesis, and with the interpretations given during the first era of s 51(xxxi) jurisprudence. Secondly, it addresses the current situation in which numerous important aspects of the s 51(xxxi) jurisprudence are based on American eminent domain whilst at the same time this

²³⁵ Charles-Louis de Secondat, Baron de Montesquieu, *The Spirit of the Laws* (1748) book 26, ch 15 (Thomas Nugent trans, first published 1750, 1914 rev ed, J V Pritchard (ed)) vol 2, 224 [trans of: *De l’Esprit des Loïs*] [emphasis added]. See: Chapter 3, Section II.

influence goes unacknowledged. Thirdly, it opens up American eminent domain as an additional source of guidance on the interpretation of s 51(xxxi).

Two possible objections to the adoption of the ‘individual rights’ approach to the relevance of American eminent domain jurisprudence must be considered. First, it might be suggested that ‘[b]ecause of the differences between the Constitution of Australia and those of other countries, it is impossible to treat judicial observations elsewhere as entirely analogous to the Australian case’.²³⁶ This argument can be made against reference to *any* sort of comparative jurisprudence, but should be accepted only in the case of *undiscriminating* reference to such guidance. What is advocated here is not a careless disregard for the High Court’s s 51(xxxi) jurisprudence, nor for the text of the placitum itself. Instead, regard to comparative jurisprudence should be sensitive to the differences between provisions, just as the difference between ‘taking’ and ‘acquisition’ was respected by Deane J’s adaptation of the American regulatory takings jurisprudence to s 51(xxxi). Broad anti-comparative sentiment does not justify the rejection of sensitive reference to comparative jurisprudence.

Secondly, some might conjecture that the use of American eminent domain constitutes a departure from current authorities. Judgments expressly linking s 51(xxxi) to the Fifth Amendment takings clause, although dominant in the first era, ceased in the second era. However, the third era has seen increasing openness to the use of American eminent domain in the interpretation of s 51(xxxi). Moreover, jurisprudence in error should be departed from, and three good reasons have been identified above to justify this departure in favour of the ‘individual rights’ approach: guidance from the placitum’s historical, theoretical and comparative contexts; consistency with interpretations given during the first era; and the avoidance of the indeterminate balancing of individual rights against the public interest. Moreover, the existing jurisprudence is self-contradictory in distancing the two provisions whilst basing many important interpretations of s 51(xxxi) on American eminent domain without express acknowledgement. Whatever rejection of precedent is involved in returning to an ‘individual rights’ view of the relevance of American eminent domain is justified. Thus, the recognition of the relevance of American eminent domain required by the

²³⁶ *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, 645 (Kirby J). See also eg: *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 125 (Mason CJ, Toohey and Gaudron JJ).

‘individual rights’ approach to s 51(xxxi) would bring the significant advantages identified above, and the potential arguments against it are not compelling.

In summary, the remaining areas of unsatisfactory s 51(xxxi) jurisprudence are the interpretation of ‘just terms’ and the denial of the relevance of American eminent domain. A return to the ‘individual rights’ approach, through the interpretation of s 51(xxxi)’s ‘just terms’ provision as requiring full market-value compensation and through the use of the American takings jurisprudence as a source of comparative guidance in the interpretation of the placitum, provides the solution to these remaining problems with the s 51(xxxi) jurisprudence.

VII CONCLUSION

The High Court’s modern s 51(xxxi) jurisprudence, arising from twenty two significant decisions on the placitum since 1979, is undoubtedly complex and imperfect. However, these modern era cases saw considerable advances in the interpretation of s 51(xxxi). Further, to the extent that confusion remains, often this is the result of the Court attempting to give effect to second era authorities reflecting the ‘legislative power’ approach whilst simultaneously being drawn towards the implementation of the ‘individual rights’ approach.

Section II of this Chapter examined two instances where the ‘individual rights’ approach was still taken in the second era and saw that it continued to guide interpretations in the modern era. The first instance is the broad interpretation of ‘property’ exemplified in the judgment of Starke J in *Dalziel*. The third era cases confirmed and logically extended this broad interpretation of ‘property’ to include intangible property such as choses in action, thus applying the ‘individual rights’ approach. The second instance is the interpretation that s 51(xxxi) applies to the ‘acquisition of property’ by *any* person pursuant to Commonwealth law. The modern cases confirmed this application, again by reference to the ‘individual rights’ approach.

In section III, two areas of the modern jurisprudence were examined to determine whether the ‘individual rights’ approach was applied to resolve new issues. First, there was the question of whether regulation of the use of property could amount to an

‘acquisition of property’, and if so in what circumstances. This question was resolved by Deane J’s adaptation of the American regulatory takings doctrine in the *Tasmanian Dam Case* to develop the ‘identifiable and measureable advantage’ test, an important new instance of the ‘individual rights’ approach guiding the interpretation of s 51(xxxi). Secondly, there was the issue of which instances of the ‘acquisition of property’ fall outside s 51(xxxi). In this respect, the ‘individual rights’ approach provided guidance in the development of the new ‘genuine adjustment’ test. This too was inspired by the American regulatory takings jurisprudence, adopted first by Stephen J in *TPC v Tooth*, then adapted by Deane J in the *Tasmanian Dam Case*. Therefore, the ‘individual rights’ approach has provided guidance in the development of two significant new interpretations of s 51(xxxi) in the modern era: the ‘identifiable and measureable advantage’ test for ‘acquisition of property’ and the ‘genuine adjustment’ test for instances of the ‘acquisition of property’ outside s 51(xxxi).

The interpretation of ‘just terms’ was also elaborated in the third era, as section IV of this Chapter demonstrated. Although references to legislative discretion, which is consistent with the ‘legislative power’ approach, persisted in some judgments, that ideal was subverted through the very strict application of ‘just terms’ to achieve practical results very close to the ‘individual rights’ approach. Other judgments abandoned the ‘legislative power’ approach entirely, and adopted the requirements of the ‘individual rights’ approach: an enforceable right to full market-value compensation for every affected individual, with interest for any delay. The modern era thus saw a trend back towards the ‘individual rights’ approach to ‘just terms’.

Further, as section V of this Chapter showed, the trend in the modern era was towards a greater willingness to consider American eminent domain in the interpretation of s 51(xxxi). Not only were some Justices prepared to draw a link between the American and Australian provisions expressly, but the influence of the American eminent domain in the development of the ‘identifiable and measureable advantage’ test for the ‘acquisition of property’ and the ‘genuine advantage’ test for instances of the ‘acquisition of property’ outside s 51(xxxi), as well as in the broad interpretation of ‘property’, demonstrated the significant practical influence of American eminent domain in the modern era.

Taking into account this analysis of the modern jurisprudence, section VI of this Chapter addressed solutions to the remaining problems of s 51(xxxi) jurisprudence. Evans' suggestion of greater judicial deference was examined, but it was argued that his proposal rests on a premise which ignores the historical, theoretical and comparative contexts of the placitum that were examined in Part Two of this thesis. The proposals of Allen and Dixon to marginalise s 51(xxxi) were also analysed, but it was shown that these involved radical departures from all existing approaches, were inconsistent with the text of the placitum, and potentially conflicted with orthodox principles of constitutional interpretation.

The 'individual rights' approach advocated in this thesis was then examined as a solution to the s 51(xxxi) jurisprudence. This approach is consistent with the historical, theoretical and comparative contexts of s 51(xxxi) examined in Part Two of this thesis. It represents a return to the interpretations given during the first era of s 51(xxxi) jurisprudence, and avoids the indeterminate balancing of individual rights against the public interest that has caused difficulties in recent years for the Court and for commentators. Potential objections were examined but found not to justify a refusal to adopt the 'individual rights' approach to the placitum.

The overall direction of the modern jurisprudence has been towards the 'individual rights' approach to s 51(xxxi), exemplified in the broad interpretation of key elements of 'acquisition of property', the use of American eminent domain in the identification of instances of the 'acquisition of property' outside s 51(xxxi), and the return towards a full market-value compensation interpretation of 'just terms'. The Court in the modern era has been drawn to return to the 'individual rights' approach of the first era cases – just as the historical, theoretical and comparative contexts examined in Part Two of this thesis suggest it should. This return to the 'individual rights' approach has provided solutions to key difficulties in the interpretation of s 51(xxxi); further, acceptance and application of all aspects of the 'individual rights' approach will resolve the remaining problems that have been identified in the s 51(xxxi) jurisprudence.

VIII APPENDIX III: LIST OF SIGNIFICANT THIRD ERA S 51(xxxi) CASES*

Trade Practices Commission v Tooth & Co Ltd (1979) 142 CLR 397
R v Smithers; Ex parte McMillan (1982) 152 CLR 477
Commonwealth v Tasmania (1983) 158 CLR 1
Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106
Australian Tape Manufacturers Association Ltd v Commonwealth (1993) 176 CLR 480
Mutual Pools & Staff Pty Ltd v Commonwealth (1994) 179 CLR 155
Health Insurance Commission v Peverill (1994) 179 CLR 226
Re Director of Public Prosecutions; Ex parte Lawler (1994) 179 CLR 270
Georgiadis v Australian and Overseas Telecommunications Corporation (1994) 179 CLR 297
Nintendo Co Ltd v Centronics Systems Pty Ltd (1994) 181 CLR 134
Victoria v Commonwealth (1996) 187 CLR 416
Newcrest Mining (WA) Ltd v Commonwealth (1997) 190 CLR 513
Commonwealth v Mewett (1997) 191 CLR 471
Commonwealth v WMC Resources Ltd (1998) 194 CLR 1
Commonwealth v Western Australia (1999) 196 CLR 392
Airservices Australia v Canadian Airlines International Ltd (1999) 202 CLR 133
Smith v ANL Ltd (2000) 204 CLR 493
Theophanous v Commonwealth (2006) 225 CLR 101
Attorney-General (NT) v Chaffey (2007) 231 CLR 651
Telstra Corporation Ltd v Commonwealth (2008) 234 CLR 210
Wurridjal v Commonwealth (2009) 237 CLR 309
ICM Agriculture Pty Ltd v Commonwealth (2009) 240 CLR 140

* This list excludes cases that addressed s 51(xxxi) only peripherally, which are noted here for completeness. In *R v Ludeke; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1985) 159 CLR 636, it was argued that regulations imposed on unions amounted to an 'acquisition of property'. The unanimous judgment stated that: '[t]he case is so clear that it is unnecessary to consider the authorities in which the effect of s 51(xxxi) of the Constitution has been discussed': at 653 (Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ). In *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, Deane J mentioned s 51(xxxi) (at 251), but only to illustrate the application of *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31. *Durham Holdings v New South Wales* (2001) 205 CLR 399 related only to the powers of the Parliament of New South Wales, and contained no relevant analysis of s 51(xxxi). In *Paliflex Pty Ltd v Chief Commissioner of State Revenue (NSW)* (2003) 219 CLR 325, a case about s 52(i) of the *Australian Constitution*, it was noted that where: 'acquisition is the product, not of the exercise of powers of compulsion, but of agreement then ... s 51(xxxi) will have no application': at 349 (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ). In *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232 ('*Griffiths*'), the joint judgment stated that: 'rights under common law native title are true legal rights which are recognized and protected by the law ... any legislative extinguishment of those rights would constitute an expropriation of property ... for the purposes of s 51(xxxi)': at 245 (Gummow, Hayne and Heydon JJ (with whom Gleeson CJ (at 237) and Crennan J (at 275) agreed)), quoting from: *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 111 (Deane and Gaudron JJ). *Griffiths*, however, turned on the interpretation of statutory provisions for the compulsory acquisition of native title, not s 51(xxxi).

PART FOUR:
CONCLUSION

CHAPTER 8:

THE EMINENT DOMAIN IN AUSTRALIA: THE PRIMACY OF THE 'INDIVIDUAL RIGHTS' APPROACH TO S 51(xxxi)

I SECTION 51(xxxi): ‘THE ACQUISITION OF PROPERTY ON JUST TERMS’

It has long been accepted that the Commonwealth has a legitimate need, and a corresponding sovereign power, to compulsorily acquire property to achieve its policy objectives. Inevitably, when such a power is exercised, the individual whose property is appropriated is at risk of suffering a great loss that is not shared by others. This thesis has examined the way in which the competing interests of society and affected individuals are addressed in s 51(xxxi) of the *Australian Constitution*. Because of the relatively limited attention paid to s 51(xxxi) by scholars and commentators since Federation, and the problematic nature of the solutions proposed by them, a clear understanding of the placitum is imperative and a matter of urgency given the admitted doctrinal confusion that currently exists.

The thesis has demonstrated the manner in which s 51(xxxi) has been understood, interpreted and applied from its genesis to the present time. The history of the interpretation of the placitum by the High Court reveals a lack of consistency which has been acknowledged by modern commentators. However, scholars have been unable to provide a contextually coherent and doctrinally consistent solution. It has been argued that their proposals either depart from orthodox principles of constitutional interpretation or implicitly avoid the problem by attempting merely to limit the number of instances in which s 51(xxxi) applies. This thesis has undertaken a thorough re-examination of the placitum’s contexts and jurisprudence to advocate an orthodox approach to the interpretation of s 51(xxxi), which is both consistent with its historical, theoretical and comparative contexts, and also adheres to the common law doctrinal method by avoiding substantial overruling of previous decisions.

Part Two of this thesis analysed the various contexts within which s 51(xxxi) was included in the *Australian Constitution*, and Part Three examined the interpretation of the placitum by the High Court since Federation. The purpose of this dual enquiry was first to identify the Framers’ conceptual understanding of the principles governing ‘the acquisition of property on just terms’ at the time of the development of the *Australian Constitution*, and then to examine both the extent to which this understanding has been

utilised, and the interpretive value deriving from its use, over the course of the High Court's interpretation and application of s 51(xxxi).

This Conclusion draws together the evidence that has been gathered throughout this thesis to make the argument that the 'individual rights' approach to s 51(xxxi) is the best interpretive approach, being both contextually coherent and doctrinally consistent.

II THE CONTEXTUAL COHERENCE OF THE 'INDIVIDUAL RIGHTS' APPROACH

As demonstrated in Part Two of this thesis, the 'individual rights' approach is the only contextually coherent interpretation of s 51(xxxi), given the historical and theoretical understandings that underpinned its inception and the parallel adoption of similar provisions in comparative jurisdictions. Indeed, as Part Two revealed, there is a remarkable unanimity of guidance for the interpretation of the placitum that arises from its historical, theoretical and comparative contexts. If there is value in 'identifying the contemporary meaning of language used, [and] the subject to which that language was directed', as *Cole v Whitfield*¹ suggests, then the interpretive guidance provided by these contexts is unambiguous. The understanding of 'the acquisition of property on just terms' at the time of Australian Federation was that it recognised an essential sovereign power of appropriation, but provided an important individual right to full market-value compensation to every individual affected by any such appropriation of property.

The protection of private property in the English constitutional tradition can be traced back at least as far as *Magna Carta* (1215), but it was the English constitutional theory of Locke and Blackstone, in the seventeenth and eighteenth centuries, that expressed the philosophical basis of the ideal of ensuring a complete indemnity to every individual affected by a compulsory acquisition of property through the requirement of full market-value compensation. Their use of an analogy to market transactions emphasised the necessity of a focus on each individual transaction to provide full market-value compensation in every case. This requirement of full market-value

¹ *Cole v Whitfield* (1988) 165 CLR 360, 385 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

compensation determined in each individual case was implemented through legislative practice in the nineteenth century, not only in England (under both the Private Bill procedure and subsequently the *Lands Clauses Consolidation Act 1845* (Eng)), but also in all of the Australian Colonies, whose legislation faithfully mirrored the compensation provisions of the English legislation. At the time of Australian Federation, the constitutional theory of Locke and Blackstone was reflected in legislative practice in England and the Australian Colonies which implemented the understanding that an ‘acquisition of property on just terms’ was one accompanied by full market-value compensation to every affected individual.

The other important model of government which the Framers looked to at the time of Australian Federation was that of the United States of America. The treatment of the appropriation of property in the American federal and State constitutions was broadly consistent with the English model, with two important differences. First, the United States adopted the continental theory of eminent domain as an additional, and even more robust, philosophical basis for the absolute requirement of full market-value compensation to every individual whose property was appropriated. Second, in America eminent domain was put beyond the power of the legislature through its constitutionalisation. By the time of Australian Federation, the American eminent domain jurisprudence had resulted in a robust protection of individual property rights through the application of eminent domain clauses to protect real, personal and intangible property rights by requiring full market-value compensation in every individual case. American eminent domain therefore provided theoretical and comparative guidance reaffirming that an ‘acquisition of property on just terms’ was one that involved full market-value compensation to every individual.

The Convention Debates and other contemporary accounts reveal the profound influence of all these contexts on the understanding of s 51(xxxi) at the time of Australian Federation. Viewed in light of the contextual guidance, the historical record relating to s 51(xxxi) is richer than suggested by other commentators. There is no doubt that the requirement of ‘just terms’ contained in s 51(xxxi) was understood as an important individual right to compensation, which could not be avoided by the Commonwealth Parliament when it legislated for the ‘acquisition of property’. Moreover, there is substantial evidence that ‘just terms’ was understood to require full

market-value compensation. To the extent that American eminent domain was more robust in its constitutional mandate of an individual right to full market-value compensation, historical evidence indicates that it was this stronger American model of protection that was intended for, and implemented in, s 51(xxxi).

Part Two of the thesis has, therefore, demonstrated that the clear and unambiguous inheritance from the placitum's historical, theoretical and comparative contexts was that s 51(xxxi) provides a constitutional individual right to full market-value compensation for every individual whose property is compulsorily acquired under Commonwealth law. This was also the professed objective of the Framers. Section 51(xxxi) was based on the model of American eminent domain, but was also consistent with the English constitutional theory and nineteenth century legislative practice in England and the Australian Colonies. The 'individual rights' approach is, therefore, the only contextually coherent approach to the interpretation of s 51(xxxi).

III THE DOCTRINAL CONSISTENCY OF THE 'INDIVIDUAL RIGHTS' APPROACH

The 'individual rights' approach is also the most doctrinally consistent approach to s 51(xxxi). The first era of s 51(xxxi) jurisprudence, comprising some forty years of decisions up to 1945, has largely been ignored in commentaries on the placitum. This is a critical omission, because the first era was an 'individual rights' era in which the Court's interpretation of s 51(xxxi) focused on the position of the individual and drew upon the sources of contextual guidance identified in Part Two of this thesis. The key features of the 'individual rights' approach were as follows. First, s 51(xxxi) was held to grant an individual right that prevented any other head of legislative power from being used to make a law for the 'acquisition of property' without 'just terms', a view reinforced in wartime cases limiting even the defence power. Secondly, 'acquisition of property' was interpreted broadly to apply to the acquisition of *any* proprietary interest in *any* form of property. Thirdly, 'just terms' required a legal right to full market-value compensation for every affected individual, and legislation was invalidated if it could be shown that even one individual would not receive full market-value compensation. Fourthly, American eminent domain was used in the interpretation of s 51(xxxi), including (as this thesis has revealed) in Starke J's influential interpretation of

‘property’ in *Dalziel*, which was drawn directly from an American eminent domain case.²

Towards the end of the first era, there was evidence of a fracturing of judicial approach. This was an indication of an impending change in the Court’s interpretation, and the second era (from 1946 to 1961) saw the ‘legislative power’ approach to s 51(xxxi) rise to unanimous acceptance under the influence of Justice (and later Chief Justice) Dixon. The ‘legislative power’ approach involved radical departures from the traditional ‘individual rights’ approach in two key respects.

First, ‘just terms’ was depleted of much of its practical importance: the focus was to be on the overall fairness of challenged legislation, not its impact on any particular individual; Parliament was given discretion to define what ‘just terms’ were, with invalidity only arising if the terms could not reasonably be regarded as just; and, more critically, in assessing the justice of the terms there would be a further balancing of the interests of affected individuals against those of the community at large.

Secondly, the American takings jurisprudence was deemed to be no longer relevant to the interpretation of s 51(xxxi). Eminent domain had always strictly maintained the distinction between recognising a sovereign power of appropriation and ensuring a concomitant individual right to full compensation. In Dixon J’s judgments, this crucial distinction became blurred, and in some instances was entirely disregarded. This was consistent with Dixon J’s interpretive approach generally: that is, that the Framers of the *Australian Constitution* avoided the creation of individual rights. However, that interpretive approach is contradicted by the historical evidence surrounding s 51(xxxi) presented in this thesis. Moreover, none of the judgments of the second era provided any real justification for their departures from either the contextual understandings of the placitum or from the first era s 51(xxxi) jurisprudence.

Even at the height of the ‘legislative power’ approach in the second era of s 51(xxxi) jurisprudence, the ‘individual rights’ approach remained influential in key respects. The continuing acceptance of the broad interpretation of ‘property’ stated by Starke J in

² *Dalziel* (1944) 68 CLR 261, 290 (Starke J), displaying remarkable similarity to: *Boston and Lowell Railroad Co v Salem and Lowell Railroad Co*, 68 Mass (2 Gray) 1, 35 (1854).

Dalziel, and the operation of s 51(xxxi) to prevent the ‘acquisition of property’ without ‘just terms’ under other heads of legislative power, were both instances where ‘individual rights’ reasoning was preferred. The application of s 51(xxxi) to the ‘acquisition of property’ by *any* person pursuant to Commonwealth legislation is another instance where the ‘individual rights’ approach was utilised to inform the interpretation of the placitum. In these three areas, the ‘legislative power’ approach never entirely displaced the ‘individual rights’ approach.

The third era of s 51(xxxi) jurisprudence (since 1979) has seen further reversions back to the ‘individual rights’ approach to the placitum. The ‘identifiable and measurable advantage’ test for the ‘acquisition of property’ and the ‘genuine adjustment’ test for identifying instances of the ‘acquisition of property’ outside s 51(xxxi) were both adapted from American eminent domain by Deane J in the *Tasmanian Dam Case*. Each of these new interpretations shows the power of the ‘individual rights’ approach to resolve contemporary s 51(xxxi) issues.

Despite the retention of some aspects of the ‘individual rights’ approach, there remain two areas of problematic s 51(xxxi) jurisprudence. First, in the interpretation of ‘just terms’ the ‘legislative power’ approach has persisted, with frequent references to Dixon J’s view that there is some legislative discretion in determining what terms would be just. This is inconsistent with the contextual understandings of s 51(xxxi), and has been subverted in practice through very strict judicial applications of ‘just terms’. Moreover, the judgments of Brennan J in *Georgiadis*,³ Gleeson CJ and Callinan J in *Smith*⁴ and Heydon J in *ICM Agriculture*⁵ have each fully endorsed the ‘individual rights’ approach to ‘just terms’. The interpretation of ‘just terms’, therefore, remains contested.

Secondly, the relevance of American eminent domain is not settled. Judicial comments dismissing its relevance are inconsistent with the contextual understanding of the placitum, and contradict the fact that s 51(xxxi) has been interpreted with significant, but largely unacknowledged, assistance from American doctrine. Both of these problematic areas are resolved if the ‘individual rights’ approach is taken.

³ *Georgiadis* (1994) 179 CLR 297, 310-11 (Brennan J).

⁴ *Smith* (2000) 204 CLR 493, 500-1 (Gleeson CJ).

⁵ *ICM Agriculture* (2009) 240 CLR 140, 213-17, 235 (Heydon J).

This thesis has argued that the ‘individual rights’ approach is not merely one of many potential solutions to the remaining areas of problematic s 51(xxxi) jurisprudence, but it is *the* solution, which not only is consistent with orthodox principles of constitutional interpretation, but also serves to resolve the remaining controversies. Alternative solutions proposed by Simon Evans, Tom Allen and Rosalind Dixon all have significant difficulties, some not being solutions at all but rather mere attempts to invoke the placitum less frequently, others involving either an unacceptable abdication of the judicial responsibility to interpret the words of s 51(xxxi) or a radical departure from orthodox methods of constitutional interpretation. The ‘individual rights’ approach raises none of these difficulties: it resolves the remaining problematic areas of s 51(xxxi) jurisprudence by drawing unambiguous guidance from the circumstances surrounding its introduction into the *Australian Constitution*, and is thus the only interpretation of the placitum which is not only contextually coherent but also doctrinally consistent.

IV THE EMINENT DOMAIN IN AUSTRALIA: THE PRIMACY OF THE ‘INDIVIDUAL RIGHTS’ APPROACH TO S 51(xxxi)

This thesis has argued that the full adoption of the ‘individual rights’ approach is the appropriate solution to the remaining difficulties with the High Court’s s 51(xxxi) jurisprudence. Two developments are required to achieve this. First, the interpretation of ‘just terms’ should return to the ‘individual rights’ view that a right to full market-value compensation is required for every affected individual. It would not be necessary to overrule the *ratio decidendi* of any case to achieve this result; it would merely be necessary to abandon the references which have been frequently made to the *obiter dicta* of Dixon J in *Grace Brothers* and similar subsequent cases.

Secondly, the Court should acknowledge the current depth of the influence of American eminent domain, and be open to the potential guidance that can be derived from the use of American precedents in the interpretation of s 51(xxxi): not indiscriminately, but through a process of careful adaptation like that deployed by Deane J in the modern era. If the Court were open to this approach, the American eminent domain jurisprudence could provide a rich source of assistance in the resolution of interpretive issues under s 51(xxxi).

Each of these two steps is consistent with orthodox constitutional interpretation, requiring merely a choice between two inconsistent approaches reflected in the existing jurisprudence, and representing a return to the interpretation of s 51(xxxi) with reference to its historical, theoretical and comparative contexts. The changes involved in returning to the ‘individual rights’ approach resolve the doctrinal confusion that remains in the s 51(xxxi) jurisprudence, and return the interpretation of s 51(xxxi) to its real basis – the protection of individual rights when a sovereign power of appropriation is exercised.

The ‘individual rights’ approach currently guides the Court’s interpretations on many important s 51(xxxi) issues, including the broad interpretation of ‘property’, the placitum’s operation to prevent the ‘acquisition of property’ without ‘just terms’ under other heads of legislative power, its application to the ‘acquisition of property’ by any person pursuant to Commonwealth legislation, the ‘identifiable and measurable advantage’ test for the ‘acquisition of property’, and the ‘genuine adjustment’ test for identifying instances of the ‘acquisition of property’ outside s 51(xxxi). The ‘legislative power’ approach to s 51(xxxi) introduced in the second era was always an unwarranted abandonment of contextual understandings of the placitum and an unjustified departure from the High Court’s own jurisprudence of the first era. The remaining interpretive problems surrounding s 51(xxxi) can be resolved through only one means: a complete return to the ‘individual rights’ approach to the placitum.

The ‘acquisition of property on just terms’ had a clear meaning when it was written into the *Australian Constitution*, and it is that meaning which has provided the solutions to the interpretive problems encountered by the High Court over more than a century. Adoption of the ‘individual rights’ approach to s 51(xxxi) is a justified and appropriate recognition that the placitum is a constitutional implementation of eminent domain in Australia which creates nothing more or less than an individual right to full market-value compensation when the Commonwealth exercises its power of compulsory acquisition of property.

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Bauman v Ross, 167 US 548 (1897)
Baxter v Commissioners of Taxation (NSW) (1907) 4 CLR 1087
Beckett v Midland Railway Co (1866) LR 1 CP 241
Belfast Corporation v O D Cars Ltd [1960] AC 490
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