A CASE OF NON-IDENTICAL TWINS – COMPARING THE EVOLUTION OF ACQUISITION LAW IN AUSTRALIA AND THE UNITED STATES

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ABSTRACT

This paper argues that the early relationship Australia and the United States had with Great Britain shaped acquisition law along different lines. However, despite these founding differences, in practice both countries have tended to resolve acquisition disputes in essentially the same ways.

I INTRODUCTION

Acquisitions and takings in Australia and the United States today is an area of law that is complex and frequently contested.[1] While initially not a significant area of contention in either country, acquisition law has arisen in modern times as a major area of litigation. Corresponding rules have been developed in both countries by legislatures and courts to deal with the many nuances and unusual fact situations that can arise.

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But the modern law had to come from somewhere. There is a reason things are the way they are, and how and why things developed as they did. How did acquisitions law in these two countries initially develop? More specifically, what did courts and legislatures in Australia and the United States draw on when they initially fashioned their laws regarding acquisitions in the 1800s? Are there similarities of development between the two countries during the nineteenth century? Since both countries are part of the British diaspora which derived their legal systems from that in England, one would think that the early development of acquisition law in each country would be similar. If they were different during that time, what accounts for the differences? This article seeks to provide some answers to these questions.

Restricting comparison to the development of acquisition law during the 1800s was done for a reason. Of particular interest for comparison purposes is the period up to the Civil War in the United States, as contrasted with the entirety of the 1800s in Australia. This was a time in both countries of primarily individual state or colonial power, rather than centralised or federal power. During this era, the States in the United States and the colonies in Australia were largely independent in how they dealt with acquisitions.[2] Hence, most of the laws and cases regarding acquisitions during this period were at the State or colonial level, rather than the Federal or national

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[1] 'Acquisitions' and 'takings' are used in this article as general expressions for what is commonly known as 'expropriations,' or the exercise of the power of eminent domain—circumstances in which government acquires private property by compulsion.

[2] An exception in the United States are Bills of Attainder. Article 1, s 10 of the Federal Constitution barred the states from enacting Bills of Attainder—legislative Acts that took private property, usually on the basis that the property owner was a wrongdoer who was 'attainted'. Hence, in the antebellum period in the United States the Federal Government did retain this one method to check the states from egregious abuses of the acquisition power. For a further discussion on this point, see: Duane L. Ostler, 'Bills of Attainder and the Formation of the American Takings Clause at the Founding of the Republic,' (2010) 32 *Campbell Law Review* 227.

level.[3] A review of the state and colonial cases during this time provides a truer comparison of the reactions in each country to acquisition questions, without the influence or oversight of a national government.

In the aftermath of the Civil War in the United States, the States were not able to exercise the same level of control over their acquisition cases as they had before. This was largely due to the new Fourteenth Amendment, which applied Federal due process and acquisition standards directly to the states for the first time. Under what came to be known as the 'incorporation doctrine,' many parts of the Federal Bill of Rights which had never previously applied to the states were 'incorporated' into the new Fourteenth Amendment, which *did* apply directly to the states. This 'incorporation' included the Fifth Amendment due process and takings clauses.[4]

In Australia, the colonial period ended with Federation in 1901. While appeals from the colonies to the Privy Council in Great Britain were always possible in the 1800s, such appeals were extremely rare in acquisition cases.[5] It is true that even after Federation, there was no equivalent in Australia of a Fourteenth Amendment, which would apply acquisition law to the new Australian States. Therefore, the Australian

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[3] The 'federal' or centralised authority in Australia in the days before the Commonwealth was formed was the home government in Great Britain. Appeals of Australian State court decisions could be made to the Privy Council in England. Such appeal rights were not terminated until 1986, on passage of the 'Australia Acts'. See: John Waugh, *The Rules: An Introduction to the Australian Constitutions* (Melbourne University Press, 1996) 98.

[4] Many sources discuss the 'incorporation' doctrine whereby the Fourteenth Amendment as subsumed other amendments within its orbit. A brief overview of this process and the cases whereby 'incorporation' occurred is given in: Joseph A. Melusky & Whitman H. Ridgway, *The Bill of Rights: Our Written Legacy* (Krieger Publishing Co., 1993) 29-31.

[5] Of the 135 Australian acquisition cases found by the author in the 1800s, only three were appealed to the Privy Council: the 1856 case of *Lord v. City Commissioners*, found in J. Gordon Legge (ed), *A Selection of Supreme Court Cases in New South Wales from 1825 to 1862* (Sydney, Government

States continued to retain significant power in respect to acquisitions. However, the new State/Federal structure, and the potential for influence of the Commonwealth acquisition clause with its 'just terms' requirement was very real. [6]

In sum, the antebellum period in the United States compares quite well to the ante-federation period in Australia, during which acquisition law in both countries was primarily a state or colonial affair, and was controlled almost exclusively by state or colonial law, rather than federal law. The formation of basic acquisition law is seen most clearly in this era prior to strong federal control. In a word, the differences we see during this period were greater and the similarities more similar, since State and colonial actions were not usually modified by Federal oversight.

The first part of the article will provide a background comparison of the two countries, and will discuss some important ways in which they were similar or different. Following this will be a detailed discussion of three examples of the comparative development of acquisition law in the two countries. These examples are: (1) constitutions and statutes; (2) crown grants; and (3) injurious affection. The article concludes with some general observations about how and why acquisition law in the two countries during the 1800s was sometimes very similar, and at other times was very different.

Printer, 1896) 912-931; the 1864 case of *Dumaresq v. Robertson* at 1387-1397; and *Cooper v Stuart* [1889] 14 App Cas 286.

[6] The Commonwealth acquisition clause provides that Parliament shall have power to make laws for 'the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws'. See: *Commonwealth Constitution* s 51(xxxi).

A historical review of the early acquisition cases in the 1800s establishes the foundation on which acquisition law has been built after that time. Acquisition law in both countries as it has evolved in the twentieth century has drawn repeatedly on this earlier foundation. Of course, the development of acquisition law in the twentieth century is a separate study in and of itself. However, an understanding of the development of acquisition law in Australia and the United States in the 1800s can help us better understand the later development, and to more clearly see the underpinnings on which acquisition law was derived.

II DIFFERENCES AND SIMILARITIES BETWEEN THE COUNTRIES

Before embarking on a comparison of acquisition cases between Australia and the United States, it is helpful to review the common attributes shared by these countries which could potentially influence the development of their respective laws. There are a number of striking similarities between Australia and the United States. There are also many differences. Reviewing these similarities and differences can aid in understanding why acquisition law developed as it did in each country.

By the summer of 1787, settlers had lived in the British American colonies for over 150 years.[7] Australia, on the other hand, did not have any white settlers until the

[7] A detailed description of this colonisation is given in: Herbert E. Bolton and Thomas M. Marshall, *The Colonisation of North America 1492-1783* (Macmillan Co., 1920).

arrival of the first convict ships in Botany Bay, in January 1788.[8] It was during the summer of 1787, while the American founding fathers were hammering out their Constitution through the Philadelphia heat[9] that the first convict ships from Great Britain sailed toward the new prison colony of New South Wales.[10] This initial settlement was a result of the British inability to send anymore of its prisoners to the American colonies, and the increasing burden of prisoners that had grown steadily in number since the American Revolution began.[11]

Hence, the timing of settlement differed greatly between the two countries. This in turn affected their development, primarily due to differences in the relationship colonists in each country had with the home government in Great Britain. As we shall see, the British Government changed the way it dealt with its colonies, resulting in different reactions by the colonists to the home government.

The original settlers of the British American colonies in the 1600s set up home governments that often acted quite independently of the mother country from the outset, and were often quite different from each other. The puritan governments in New England, for example, differed markedly from the colonies in the south, which

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[8] For a contemporary, first-hand account of this landing, see the description of W. Tench, a captain of the Marines, in: M. Clark, *Sources of Australian History* (Oxford University Press, 1971) 77-78.
[9] Probably the best discussion of the formation of the United States Constitution is given in Madison's notes; see James Madison, *Notes of Debates in the Federal Convention of 1787* (1987) (first published as vol. 2-3 of The Papers of James Madison, 1840).
[10] A.C.V. Melbourne, *Early Constitutional Development in Australia* (University of Queensland Press, 1963) 1-4.
[11] Ibid. It should be noted that an overpopulation of convicts in Britain was only the first of several motivations for settling Australia. Historians have identified four 'waves' of settlement in Australia, some of which overlapped: (1) transportation of convicts between 1788 and 1856; (2) free and assisted migration between 1830 and 1856; (3) gold seekers between 1850 and 1870; and (4) planned migration

consisted largely of plantations.[12] While royal charters from the King provided the basis for settlement of many of the colonies and their first laws, the colonists were left much more on their own to establish their home governments.[13]

But with the advent of the French and Indian war in the 1760s, things changed. This war was primarily a dispute with France over which country would dominate North America. The war was very costly, and the home government in Great Britain felt that it was only fair for the American colonists to pay some of this cost, since they had been protected by the Crown's armies during the war. Accordingly, the home government started to impose taxes on the American colonies to raise revenue. The American colonists were not accustomed to such controls, and resisted all such attempts. The home government in Great Britain did not take this resistance well, reacting with still more attempts at control. This in turn led to more rebellion by the American colonists, and eventually to revolution. [14]

In Australia on the other hand, the first governments were set up directly by England and run by penal governors appointed and closely controlled by the Crown. These governors initially wielded almost unlimited power. Only gradually was the Governor's power reduced, and representative government introduced. However, when representative government was begun, the home government in Great Britain

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between 1860 and 1890. See Donald Denoon, Philippa Mein-Smith and Marivic Wyndham, *A History of Australia, New Zealand and the Pacific* (Victoria, Blackwell Publishing, 2000) 87.

[12] Bolton and Marshall, above n 7, 154-162.

[13] Ibid.

[14] For a general discussion of these events, and the effect of the French and Indian War see: Claude Halsted Van Tyne, *The American Revolution 1776-1783* (Harper & Bros., 1905) 270; Esmond Wright, *Causes and Consequences of the American Revolution* (Quadrangle Books, 1966) 88-89.

did not assert as much control as it had in the American colonies.[15] Hence, a key difference between the two countries was the level of control each experienced from the home government in Great Britain, during their time as colonies. This distinction was partly a function of time. By the mid-1800s when the Australian colonists began to desire home rule, Great Britain's policy toward its colonies was far different than it had been 80 years before in the American colonies. The home government in Great Britain had come to believe that the most effective way to deal with colonies was to let them govern themselves as much as possible.[16]

In sum, Great Britain did not control its American and Australian colonies in the same way. In fact, the method of control by the home government in Great Britain was almost the exact opposite in each country. In the American colonies, control was mostly minimal for many years, but increased greatly at the very time the colonists wanted more self-governance. In Australia, it was the opposite. This initial lack of control over British American colonists resulted in their becoming quite independent, since they were born and raised in an environment largely free of British control. Their resistance to such control resulted in revolution. In the Australian colonies, the situation was vastly different. The home government in Great Britain had controlled the new colonies much more closely at the outset, yet was also willing to yield control to the colonists when they sought for it. Because of this different approach, rebellion was kept largely in check. This is a key difference in the founding of each country, which will be discussed in greater detail below.

[15] For a comprehensive overview of this gradual change, see: Melbourne, above n 10, 1-126.

But the level of governmental control by Great Britain was not the only difference between these two countries. Another was population. The settlement of the United States started over 150 years earlier than that in Australia, but population growth in the United States outstripped that of Australia even when this earlier start is taken into account. The United States census of 1830 indicates that there was a white population of 12,866,020. In contrast, Australia in 1828 had only 58,197 white settlers.[17] The significant indigenous population in both countries was not included in these early censuses.[18] Hence, Australia had 0.45% of the white population of the United States at that time. In the years that followed initial settlement, gold rushes and various encouragements to immigrate contributed to population growth in both countries.[19] While population grew in both countries over the next one hundred years, and the percentage of Australians to those in the United States did increase, the difference between the populations was still great. By 1900 for example, the population of the United States had grown to 76,212,168, while Australia had a population in 1898 of 3,664,715.[20] Hence, Australia at the end of the nineteenth century had 4.8% of the

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[16] John Hirst, *Australia's Democracy: A Short History* (Allen & Unwin, 2002) 200.

[17] Information in this paragraph is from the Australian Bureau of Statistics and the US Census Bureau. The US census data was gathered on decimal years starting in 1800, while the Australian data was gathered every ten years, on years ending in 8. While there is therefore a two year difference in the dates on which the population was counted, the years are still close enough to provide some basis for comparison.

[18] The Aboriginal population in Australia in 1788 was estimated to be approximately 750,000 persons. See: Stuart Macintyre, *A Concise History of Australia* (Cambridge University Press, 2009) 13. The Native American (Indian) population in the United States in 1830 was estimated to be 313,130. See: Lewis Cass, 'Removal of the Indians' (1830) 30 *North American Review* 62-64. It should also be noted that, pursuant to Art. 1, s 2 of the United States Constitution, only 3/5 of the black population were counted in the United States census of 1830. Of course, Australia had no comparable slave population.

[19] Much has been written in both countries on the history of settlement and immigration. For a short overview of the process in Australia, see: Barbara A. West and Frances T. Murphy, *A Brief History of Australia* (Infobase Publishing, 2010) 41-86. For a detailed discussion of immigration and settlement in the United States, see Samuel Eliot, *History of the United States, from 1492 to 1872* (Boston, William Ware & Co., 1874).

[20] See the Australian Bureau of Statistics and the US Census Bureau. Census data indicates that by this point in time blacks and Native American Indians were fully counted in the United States census, but were for the most part still not included in the Australia census.

population of the United States. Today, a little over a century later, the vast population difference continues. The United States' population estimated as of July 2011 was 311,691,720, while in Australia it was 22,642,506. Hence Australia at the present time has 7.2% of the population of the United States.[21]

But this is still not all. While the two countries are close to the same size in terms of square kilometres or miles, they differ more markedly than one would think in terms of their geography. The United States contains vast stretches of fertile farmland from the eastern seaboard all the way to the Great Plains at the feet of the Rocky Mountains. Much of the interior of Australia on the other hand is desert land.[22] This desert expanse somewhat resembles the desert stretches of the Rocky Mountain southwest in the United States, but is much larger.[23] There simply appeared to be more attraction and economic opportunity for poor farmers in the United States than there ever was in Australia. Indeed, this significant difference in available farmland provides a probable explanation for the great population differences between the two countries, and certainly explains their differences regarding population distribution. Most Australian colonisation occurred on the coast, and to this day the vast majority

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[21] See: The Australian Bureau of Statistics <www.abs.gov.au>; *U.S. POPClock Projection* (2011) U.S. Census Bureau <www.census.gov/population/www/popclockus.html>. These numbers include all Aborigines and Native Americans.

[22] H.C. Allen noted that Australia 'is a dry continent; aridity is the transcendent difficulty of Australia, and almost all her ills are connected with and subsidiary to it. No less than eighty-seven percent of the [Australian] continent has an average rainfall of less than 30 inches … the United States has about five times as much temperate land with a rainfall of over 20 inches as Australia, and Australia about five times as much arid country with a rainfall of less than 10 inches as America.' See: H.C. Allen, *Bush and Backwoods: A Comparison of the Frontier in Australia and the United States* (Michigan State University Press, 1959) 6-7.

[23] See: Ibid for a detailed comparison of geographical and other differences and similarities between the two countries.

of Australians live along the coast.[24] United States history is a story of continual westward migration, resulting in greater population of the interior.[25] In the final analysis, geography joined population and different levels of control by the home government in Great Britain as an aspect of the two countries that makes them very different from each other.

And what of the acquisition cases in each country? Not surprisingly, there have been far more 'takings' cases in the United States than 'acquisition' cases in Australia.[26] For example, there were over five hundred acquisition cases in the United States between the late 1700s and the civil war in the 1860s.[27] In Australia during the same period there were only 31 such cases.[28] After the Civil War, the acquisition cases in the United States grew exponentially. John Lewis, in the introduction to his first treatise on Eminent Domain indicates that by 1888 there had been 6,000 takings cases in the United States, including all cases before and after the Civil War to that date. Of

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[24] Ibid, 5-11. Allen noted that 'Australia is essentially still a land peopled upon the perimeter and empty within.' As for current population distribution, the Australian Bureau of Statistics indicates that more than two thirds of Australians today live in major cities, all of which are located along the coast. See: Australian Bureau of Statistics, 'Population Distribution' <www.abs.gov.au>.

[25] See: Allen, above n 22, 4-5. The National Oceanic and Atmospheric Administration of the United States Department of Commerce indicates that slightly more than half of the United States population lives near the coast. See: National Oceanic and Atmospheric Adminsitration: United States Department of Commerce <www.noaa.gov>.

[26] Another point of difference between the two countries is terminology. In the United States, expropriations, or exercise of the governmental power of eminent domain, is usually expressed as a 'taking'. This is probably because of the use of the word 'take' in the Fifth Amendment to the United States Constitution, which defines limits on the expropriation power. In Australia, the term is 'acquisition,' which was probably derived from the 1845 *Land Clauses Acquisition Act* in Great Britain, which served as the model for Australian colonial acquisition statutes. The term has been perpetuated in the *Commonwealth Constitution* which speaks of acquisitions on 'just terms'. See: *Commonwealth Constitution*, s 51(xxxi). In this article, the term 'acquisition' will be used for ease of reference.

[27] The numbers given here are the author's best estimate based primarily on his review of antebellum cases reported in Carman F. Randolph, *The Law of Eminent Domain in the United States* (Little, Brown & Co., 1894).

that 6,000, fully half had occurred within the 14 years prior to 1888; or in other words between 1874 and 1888.[29] By the time of Lewis' second edition 12 years later in 1900, the number of eminent domain cases had again doubled, jumping to 12,800.[30] By 1909, when Lewis compiled his third and final edition of his treatise, the number had increased to 18,000.[31] Today, it would be a significant challenge to obtain an accurate count of all acquisition cases in the United States, both State and Federal, since there are so many.

In the Australian colonies by contrast, the total number of acquisition cases through the mid-1890s was a mere 135 cases.[32] While there have been many more Australian cases since then, the numbers are still significantly less than in the United States. Hence, it can readily be seen that there is a vast difference between the two countries in the number of their acquisition cases.

In spite of the differences between the two countries noted above, and the great difference in the number of acquisition cases between them, there is still much room for comparison. With a few exceptions, most of the acquisition cases in the two countries during the 1800s dealt with very similar issues. The acquisition of lands to

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[28] The numbers given here are the author's best estimate based on his personal, detailed review of the cases in the reported digests for all the Australian states, and also Australian newspaper reports of cases.
[29] John Lewis, *A Treatise on the Law of Eminent Domain in the United States* (Chicago, Callahan & Co., 3rd ed, 1909), Preface to First Edition, v-vii.
[30] Ibid, Preface to Second Edition, iii-iv.
[31] Ibid, Preface to Third Edition, iii.
[32] The numbers given here are the author's best estimate based on his personal, detailed review of the cases in the reported digests for all the Australian states, and also Australian newspaper reports of cases. The author concedes that classification of cases into the category of an acquisition is a subjective process, and that a review by a different researcher may yield a slightly different number. However, it is unlikely that any such review would deviate significantly from the authors' conclusion of 135 cases.

build new roads or railroads, or to widen roads or change the grade of roads and railroads was the primary source of acquisition cases in both countries. Hence, the main catalyst for acquisitions in both countries was the progress of new transportation systems designed to conquer vast distances in a large nation. This stands in contrast with acquisition law in the twentieth century, in which both countries have seen an explosion in cases where a property owner does not lose actual land due to advances in transportation, but rather his property is devalued by an action of the government. Such 'regulatory' acquisitions are the hallmark of the modern era, and a comparison of such cases between the two countries would certainly give important insights into acquisition law today.[33] However, such is not the purpose of this paper, which focuses instead on what happened earlier, during the 1800s, when the basics of acquisition law in each country were defined. These basics were then the building blocks on which the courts of the twentieth century were able to develop acquisition law in the modern era.

A comparison of the acquisition cases between the two countries in the 1800s provides a fascinating insight into how legislators, jurists and the public viewed acceptable limits to governmental involvement in private affairs. Much of the law followed similar lines of reasoning and reached similar results. However, there were a few areas in which the acquisition law in the two countries was different from the

[33] Many books and law review articles discuss the modern case law in this area. One example in the United States is: William B. Stoebuck, *Nontrespassory Takings in Eminent Domain* (Michie Co, 1977). In Australia, a chapter on Severance, Enhancement and Injurious Affection can be found in: Alan A. Hyam, *The Law Affecting Valuation of Land in Australia* (The Federation Press, 4th ed, 2009), 438-458. See also: M Raff, 'Toward an Ecologically Sustainable Property Concept,' in E Cooke (ed), *Modern Studies in Property Law* (Hart Publishing, 2005) Vol 3. There has also been a great deal of case law on the subject, in both countries. A principal case in the US is *United States v Causby*, 328 US 256 (1946).

very beginning, which will be discussed in greater detail below. As will be seen, the background differences between the countries of population and geography did *not* have that great of an impact on the development of acquisition law. Rather, the main difference seems to have been what could be called 'founding philosophy'. As used in this paper, 'founding philosophy' means the colonists reaction in each country to the different levels of control exerted by the home government in Great Britain, as explained above. As will be seen in the later sections of the paper, in those acquisition cases that did not involve a difference in founding philosophy, the judicial response tended to be very close to the same in both countries during the 1800s.

The remaining portions of this paper will review three specific ways that Australian and United States acquisition law in the 1800s either differed or was very nearly the same. It will be seen that each country shared common acquisition questions in this early era. When their response to these common problems differed, it was usually because the problem at hand somehow raised issues related to 'founding philosophy'—colonial reactions to the level of control by Great Britain when each country was founded. In those cases where the difference in the founding philosophy of the two countries was not involved, courts in each country tended to decide their acquisition questions in roughly the same way, although sometimes using different terminology. In short, both countries tended to resolve their acquisition issues in surprisingly similar ways, unless the structural details of their early beginnings differed.

In Australia, a principal case is *Newcrest Mining (WA) Ltd v Commonwealth of Australia* (1997) 147

In particular, this paper will compare the following three areas of acquisition law between the two countries prior to the year 1900: (1) the initial source of general acquisition protections, or in other words, whether such protections were found in these early days in legislation or individual state constitutions; (2) Crown grants of land; and (3) injurious affection—whether claimants were successful in receiving compensation for harm to adjacent, non-acquired property. While there are other topic areas in respect to acquisitions which could be reviewed, these three areas provide the most intriguing discussion of the greatest differences and similarities between the two countries in the nineteenth century.

A Constitutions and statutes

The first area of significant difference between the two countries regarding acquisition law has to do with statutes and constitutions. It is this very difference that highlights the unique and different nature of the 'founding philosophy' of each country, which was the result of the colonist's reaction to control by the Home Government in Great Britain.

At the outset it must be acknowledged that acquisitions are by their very nature events which occur by way of a written legislative Act—a statute. Parliament makes a determination that certain land is needed, and passes an Act to take it. This is clearly tremendous power. If uncontrolled, Parliament could take whatever it wanted, whenever it wanted to take it, and would not be accountable to anyone. Obviously

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controls are needed. It is the source of these controls that formed the primary distinction between Australia and the United States in the development of their acquisition law in the 1800s.

Colonial governments in both countries initially protected the public from unwarranted acquisitions in essentially the same way. They would insert into an acquisition Act—for example, a statute taking private property for a road—certain protections derived from the British common law. These protections were: (1) that there would be compensation for the acquisition; (2) that the acquisition needed to be for a public use or purpose; and (3) a provision of some form of due process or 'just terms' fairness. This last served to guarantee to the property owner that acquisition laws would be fair, and would give him or her an opportunity to object in the courts. The earliest colonial legislation dealing with acquisitions in both the United States and Australia almost always contained these common law protections.[34] Of course, colonial times in North America predated colonial times in Australia by roughly 150 years, so the Americans practiced these principles first.

However, even at this early stage, the British American colonists showed their tendency to view acquisitions from a different perspective, such as would later be

[34] For examples in the American Colonies, see: James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* (Oxford University Press, 3rd ed, 2008), 13-14, 23-25; Stoebuck, above n 29, 10. An Australian example is found in the *Public Roads Act 1833* (NSW), which provided compensation and described the process of acquiring private land for roads. This Act is found at: 4 William IV, No. 11, contained in *A Collection of the Statutes of Practical Utility, Colonial and Imperial, in force in New South Wales …* (Sydney: T. Richards, Government Printer, 1879) vol 2, 2038-50. Claims for compensation and the process for commissioners to determine damages are contained in ses 6 and 7, at 2040-41. For a further discussion of early acquisition Acts in Australia and how they followed the common law, see: Douglas Brown, *Land Acquisition* (Butterworths, 1st ed, 1972).

seen in their generalised constitutional takings protection language. As one scholar noted regarding acquisitions during the American colonial period in the 1600s and 1700s:

> Unlike the English system of the time, in which taking and compensation were provided for in each statute authorising [a] particular project, the colonial system, at least where there were statutes and probably elsewhere, was a general system for all road projects. That, of course, continues to be a feature of American eminent domain and has since become the English practice, as well.[35]

Hence, the American colonists tended to make generalised acquisition statutes from their earliest colonial days, which provided general rules with broad coverage. Great Britain and Australia came to adopt this practice during the 1800s, while Australia was in its formative colonial period.[36]

The American Revolution brought about a fundamental change in acquisition law in the United States. No longer were acquisition protections within statutes considered adequate by themselves to protect property owners, whether the statutes were general in scope or not. Many felt that an additional safeguard should be put in place. The change consisted of a two-step process that greatly altered the entire perspective of acquisition law in the United States. Both of these steps of change had to do with constitutions.

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[35] Stoebuck, above n 33, 10.
[36] The English adopted this practice with passage of the *Land Clauses Consolidation Act 1845*, 8 & 9 Vict. c. 18 [8 May, 1845]. See discussion below for how the Australian colonies in turn adopted this Act.

At the start of the revolution, since the rebels had rejected Parliamentary control, the American colonies started calling themselves states and began seeing themselves as distinct, sovereign bodies, accountable only to God. In May 1776, the American Continental Congress recommended to the colonies that they should 'adopt such Government[s] as shall, in the Opinion of the Representatives of the People, best conduce to the Happiness and Safety of their Constituents'.[37] These new written State constitutions did not have to be reviewed and approved by Parliament or the Continental Congress, or any other higher body. Indeed, the Continental Congress was largely a recommendatory body in any event. It is significant that there was no review and approval process of the new state constitutions by any superior body—such as Parliament in Great Britain, which would later review the constitutions formed by each of the Australian States.

The new American State constitutions tended to cover more than just the skeletal structure of government, as if they were truly independent sovereign entities like the nations of Europe. While the majority of the state legislatures drafted and passed their first state constitutions as legislative Acts,[38] the constitutions so passed tended to be broader in coverage than those later passed in Australia. They usually included a declaration of rights—an understandable trend, due to the dispute with British

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[37] Willi Paul Adams, *The First American Constitutions* (Rowman & Littlefield Publishing Group, 2001) 59, citing Worthington C. Ford, et al (eds), *Journals of the Continental Congress 1774-1789* (Washington, D.C.: U.S. Government Printing Office, 1904-1937) Vol 4, 342.

[38] Ibid, 61-91. Eight state legislatures passed a constitution (sometimes including a declaration of rights) in addition to their other legislative duties. These states were: Connecticut, Georgia, New Hampshire, New Jersey, New York, North Carolina, South Carolina and Virginia: Ibid. Four states held constitutional conventions rather than letting the state legislature write the new constitution. These states were: Delaware, Maryland, Massachusetts and Pennsylvania. Massachusetts was the only state to initially submit its constitution to the popular approval of the people at large, rather than just approval

Imperial power over rights and freedom. Acquisition protections were usually included along with other safeguards within these declarations of rights. Indeed, virtually all of the American States included 'law of the land' or 'due process' clauses in their early constitutions, to protect private citizens from arbitrary acquisitions,[39] and some included a specific reference to 'takings'.[40] In Australia however, such declarations were apparently not considered to be as important, since none of the Australian State constitutions included such language.[41]

This was the first step in the United States for fundamentally changing acquisition law—the creation of constitutional acquisition protections in each state. But significant as such a change seemed, in the majority of the states this was actually little removed from the colonial practice of generalised acquisition laws. After all, in the majority of the states the new Constitution was just another legislative Act, passed by the legislature along with other statutes, in response to a call from the Continental Congress. The fact that it was called a 'constitution' rather than a 'statute' was of no

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by the constitutional convention or the legislature. The final state, Rhode Island, merely retained its colonial charter until 1842: Ibid.

[39] The 'law of the land' and 'due process' language in each of the early American state constitutions can be reviewed in: Francis Thorpe (ed), *The Federal and State Constitutions, Colonial Charters, and other Organic Laws of the States, Territories, Colonies now or Heretofore Forming part of the United States* (Government Printing Office, 1909). In this context, the expression 'law of the land' is taken from Chapter 39 (later 29) of the Magna Carta of 1215, which provides that, 'No freeman shall be taken or [and] imprisoned or disseised or outlawed or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or [and] the law of the land': W. McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* (J. Maclehose & Sons, 2nd ed, 1914) 375.

[40] Only two States initially had language providing compensation for takings—Massachusetts and Vermont. See: Thorpe, above n 39.

[41] Only recently has there been a movement by the Australian States to adopt bills of rights. Victoria became the first state to do so, with its adoption of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), which took effect on 1 January 2007. Acquisitions are not dealt with in the Charter, and indeed property rights are mentioned only once, in s 20, which states, 'A person must not be deprived of his or her property other than in accordance with law.' Hence, this charter of rights refers right back to pre-existing acquisition law in Victoria. The charter can be found at: Austlii <www.austlii.edu.au>.

great significance. But a deeper change was brewing under the surface. This change found its chief expression in the federal constitutional convention in Philadelphia in the summer of 1787. An often overlooked aspect of this convention was expressed in its final words, found in Article VII: 'The Ratification *of the Conventions* of nine States, shall be sufficient for the Establishment of this Constitution …' (emphasis added). *The ratifying source was not the state legislatures, but was the people themselves*, in specially organised ratifying conventions. The state legislatures were bypassed in the process.

Why were the State legislatures bypassed? Because of a fundamental distrust of such legislatures by the founders of the new federal constitution. James Madison was one of the chief of these founders, and strongly urged a method of oversight by the Federal Government of Acts of the individual State legislatures. This was because '[e]xperience had evinced a constant tendency in the states to … [among other things] oppress the weaker party within their jurisdictions'.[42] Madison urged adoption of a 'legislative veto', which would have allowed the Federal Congress to review and either approve or disapprove of every legislative act of the States.[43] As for the Federal Legislature, it would be controlled and limited by the constitution itself, which set

[42] Gaillard Hunt (ed), *The Writings of James Madison* (New York: G.P. Putnam's Sons, 1900) Vol 3, 121.
[43] David O. Stewart, *The Summer of 1787: The Men Who Invented the Constitution* (Simon & Schuster, 2007) 52-53. The proposal for a legislative veto was contained in the 6th resolution of the Virginia Plan, which stated that the national legislature would have the power 'to negative all laws passed by the several States contravening, in the opinion of the National Legislature the articles of Union': James Madison, *The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America* (Gaillard Hunt & James Brown Scott, 1987) Vol 2, 24.

specific limits on its power. Madison's suggestion was overruled,[44] but the distrust of legislatures in the United States remained.

Indeed, this distrust was largely the result of the Acts of the British Parliament that led to the revolutionary war in the first place. The American colonists had been upset that their rights were determined by a distant body that held unfettered power, and in which there were no voting representatives from the colonies. They tended to overlook the fact that they were still Englishmen who retained the rights guaranteed to all Englishmen—a point repeatedly made by the loyalists among them who urged reconciliation with the Crown.[45] But for the rebels, reconciliation was not enough. They revolted instead. The initial lack of British control of the American colonies had proven fatal. When control was attempted later, after the colonists had grown used to independence and free dealings, it was highly resented.

Yet in spite of their rejection of the British Parliament, the new American state legislatures lost little time in likewise establishing themselves as omnipotent bodies, copying the British model. Many citizens were incensed at this practice, and felt that something needed to be done to check the power of the state legislatures. They found their solution in the creation of written constitutions as the supreme law of the land, which rose above the power of the legislatures. The primary example was, of course,

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[44] The delegates replaced Madison's proposed 'legislative veto' with a 'judicial veto' based on limits on state power in Article 1, Section 3, which would be reviewed and enforced by the courts. As stated by Governor Morris, 'a law that ought to be negatived will be set aside in the Judiciary department and if that security should fail; may be repealed by a National law': Hunt, above n 42, Vol 3, 489.

[45] For a more detailed discussion of the position of the loyalists, see: Claude Halsted Van Tyne, *The Loyalists in the American Revolution* (The Macmillan Co, 1902).

the Federal Constitution, which clearly stated that it was the supreme law of the land,[46] and that Congress was not omnipotent as was the Parliament in Great Britain.[47]

Within a few short years after the Federal Convention in 1787, virtually all of the States redrafted their constitutions. When they did so, they followed the lead of the Federal constitutional convention in Philadelphia in 1787, and of State constitutional conventions in Delaware and Massachusetts prior to 1800, in which the revised constitution *was not created as a legislative Act.* The Constitution and its declaration of rights were drafted by an independent constitutional convention and ratified by a vote of the people, so that the Constitution would not be dependent for its existence on the legislature. Rather, it would be superior to legislation, and the State legislature would thereafter be subject to it.[48] Because of this, generalised acquisition protections in the American States became constitutionally based, rather than being legislatively based. This was a unique change from the acquisition legislation that had existed before. By this means, acquisition protections were elevated to a higher status.

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[46] This 'supremacy clause' is found at Article VI, section. 1(2).

[47] Limitations on the power of the congress are contained in Article 1 of the Constitution. It should be noted that Parliamentary supremacy in Great Britain as it existed in the 1800s has not continued to the present day, largely due to its involvement in the European community. The British *Human Rights Act* 1998 (UK) protects private property by invoking Article 1 of the 6th Protocol of 20 March 1952 (Paris) to the *European Convention for Protection of Human Rights and Fundamental Freedoms* of 4 November 1950 (Rome). British governmental action is also subject to review in the European Court of Justice. Two expropriation cases involving the United Kingdom in the context of milk quotas are: *Wachauf v The State* [1989] ECR 2609, [1991] 1 CMLR 328; *R. v Ministry of Agriculture, Fisheries and Food* [1994] 3 CMLR 547.
However, the Parliamentary supremacy of the individual Australian states in respect to acquisitions still remains today. See: *Durham Holdings Pty Ltd v New South Wales* [2001] HCA 7; 205 CLR 399 (2001) ¶56 ('… so far as the powers of a Parliament of a State of Australia to permit the acquisition of property without the payment of compensation are concerned, a long line of opinions in this Court upholds the existence of that power … These decisions equate the power of a Parliament of a State to the uncontrolled legislative authority enjoyed by the Parliament of the United Kingdom in its own sphere.')

[48] See: Adams, above n 37, 72-73, 83-90. Delaware's constitutional convention of 1776 dissolved itself after its work was done, stating that 'we are not vested with the legislative power': Ibid, 74. The

Madison explained this 'essential difference between the British Government and the American Constitutions' by noting that:

> [The British] Parliament is unlimited in its power; or, in their own language, is omnipotent. Hence, too, all the ramparts for protecting the rights of the people—such as their Magna Charta, their Bill of Rights, &c.—are not reared against the Parliament, but against the royal prerogative ... In the United States the case is altogether different. The People, not the Government, possess the absolute sovereignty. The legislature, no less than the executive, is under limitations of power ... the great and essential rights of the people are secured against legislative as well as against executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws.[49]

Hence, in respect to acquisitions in the United States, an additional constitutional layer of protection was added that went beyond those given in an acquisition statute. Courts were charged with verifying that the constitutional as well as the statutory protections were complied with. As expressed by an American scholar writing in 1894:

> [R]egard must be paid to the radical difference between English and American statute law. The lawmaking power in this country is subject to constitutional restrictions. Parliament is a law unto itself. Therefore the only question to be put in an English court is—What does the Act mean? In this country a further question may be put. Is the Act constitutional?[50]

Massachusetts constitution of 1780 was submitted to popular vote before it could be adopted: Ibid, 83-90.

[49] Hunt, above n 42, Vol 6, 386-387.

[50] Randolph, above n 27, 8. As noted above, the supreme nature of Parliamentary power in Britain has changed in recent years due to European influences. See: above n 47.

So naturally, when courts in the United States in the 1800s reviewed acquisitions, they did so first and foremost from a constitutional standpoint. Such constitutional provisions were considered to be self-executing, and were not dependent on enabling legislation to be enforced.[51] While individual legislative acquisition Acts still usually specified procedures and discussed public use and compensation, such legislation was first reviewed by the courts in light of constitutional principles—was the acquisition legislation constitutional or not? Only if it was could the court proceed to a discussion of whether the act had been properly followed.

In sum, acquisition protections in the United States were now considered to be constitutionally based, rather than statutorily based, or based on the common law.[52] The legislature's power to acquire was overshadowed by the individual's constitutional right to be protected from the acquisition. The focus shifted from legislative authority to that of personal protection. Courts were the bodies charged with making this additional determination of constitutionality.

The additional layer of constitutional protections in the United States created an additional body of law, and therefore an additional hurdle that had to be dealt with. Review of an acquisition by the courts in the United States was no longer a simple matter of looking to see if the statute had been followed. A more extensive review was also required, as to whether the acquisition and the statute that required it were constitutionally sound. This double review required additional time and pleadings,

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[51] Irving L. Levey, *Condemnation in U.S.A.* (C. Boardman Co., 1969) 9, citing: *Trippe v Port of New York Authority*, 35 Misc 2d 744, 231 NYS2d 818.
[52] See Randolph, above n 27, 8.

and perpetuated the idea that the written Constitution was the ultimate word on acquisition law, and could not be defied by the legislature. Accordingly, acquisition law in the United States has traditionally required more questions and more hurdles.

In Australia, things were altogether different. In 1845, the British Parliament enacted the *Land Clauses Consolidation Act 1845*,[53] which was the first British statute to provide general acquisition standards and requirements applicable to all acquisitions. With this statute in place, it was no longer necessary for each legislative acquisition Act to spell out all of the acquisition requirements in detail. Rather, reference only needed to be made to the *Land Clauses Consolidation Act* to cover the general details of the acquisition. In the ensuing years, each of the Australian State legislatures enacted their own modified version of this Act.[54]

As for State constitutions, the Parliament in Great Britain enacted the *Australian Constitution Act No. 2 1850*,[55] which provided for the establishment by each colonial legislature of constitutions and separate colonial governments in New South Wales, Victoria, Van Diemen's Land (Tasmania), South Australia and Western Australia. The Act indicated that the main purpose of the new constitution was to lay out a structure of government, and no mention was made of broader issues such as a declaration of rights. Each new constitution had to be reviewed and approved by

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[53] *Land Clauses Consolidation Act 1845*, 8 & 9 Vict. c. 18 [8 May 1845]. The official title of this Act is surprisingly clear: 'An Act for consolidating in One Act certain Provisions usually inserted in Acts authorising the taking of Lands for Undertakings of a public Nature.'

[54] Brown, above n 34, 12-14. As an example, the Tasmanian Act acknowledged that 'it is based upon and closely follows the *Lands Clauses Consolidation Act 1845* (Imperial), 8 & 9 Vict.,, c. 18.' See: *Tasmanian Land Clauses Act, 1857*, found in *The Public General Acts of Tasmania, 1826-1936* (Butterworths, 1936) vol 6, 31.

[55] *Australian Constitution Act No. 2 1850*, 13 & 14 Vict. c.59, sec. 32.

Parliament in Great Britain. However, the Act also granted the colonial Governors and Legislative Councils in each of these colonies the power to later modify the constitutional structure put in place by the new constitutions if they did not like it. There was no allowance for a referendum of the people on the matter, but the Governor and Legislative Council were to make such changes on their own.[56]

Starting in 1855, the Australian colonial legislatures began forming their self-governing constitutions.[57] None of them inserted compulsory acquisition language in the body of their constitutions, inasmuch as such protections continued to be found in the individualised legislative Acts, or more particularly in the version of the *Land Clauses Consolidation Act* adopted in the relevant colony. This should come as no surprise since the Australian State Constitutions were themselves legislative Acts, and were not created by way of a constitutional convention of the people as in the United States. It is true that each Constitution also contained amendment procedures which had to be followed by the legislature, and which would not have been part of normal legislation.[58] While this added an extra step for constitutional change not found in normal legislation,[59] the Constitution was still not enshrined as the ultimate law as in the United States, since it was the legislature, and not the people, who had the power

[56] Ibid. The power of colonial legislatures to modify their constitutions was reaffirmed in the *Colonial Laws Validity Act 1865*, which stated that 'every colonial legislature shall have … full power within its jurisdiction … to alter the constitution thereof …': *Colonial Laws Validity Act 1865*, 28 & 29 Vict. C 63, s 5.
[57] Melbourne, above n 10, 399, 392-432.
[58] The amendment procedures were known as 'manner and form' provisions. For a discussion of the colonial constitutions and how they evolved, see R.D. Lumb, *The Constitutions of the Australian States* (University of Queensland Press, 2nd ed, 1965).
[59] The various amendment procedures of the State Constitution Acts can be reviewed in: www.austlii.edu.au.

to make amendments.[60] Most importantly, since there were no acquisition standards specified in the constitutions, Australian State Parliaments retained ultimate power over all acquisitions through ongoing legislation.[61]

The Parliament in Great Britain quickly demonstrated its intention to carefully review the new Australian state constitutions submitted to it in the 1850s. When New South Wales and Victoria included in their new constitutions that their Parliaments would have power to deal with Crown lands, the British Parliament concluded that they had exceeded their authority in doing so, since such a power had not been provided in the *Australian Constitution Act of 1850*. Consequently, the British Parliament had to pass new Acts to acknowledge that these colonies would have authority over Crown lands.[62] Clearly, any acquisitions or Bill of Rights type of language inserted by the colonies into their constitutions would also have exceeded the mandate of Parliament's 1850 Act. However, none of the Australian states attempted to insert such language.

Since acquisitions were not covered or discussed in the new State constitutions, Australian State Parliaments still retained all power over acquisitions, just as in the British model of the time. This concept was expressed most ably in 1915 by Edmund Barton, of Australia's High Court.[63] This was the same man who was the driving

[60] None of the manner and form provisions provided for approval by the voters. Ibid.
[61] See *Durham Holdings Pty Ltd v. New South Wales* (2001) 205 CLR 399.
[62] These Acts are found at: 18 & 19 Vict. c 54 & 55.
[63] Edmund Barton, from New South Wales, was one of the main proponents of the federation movement in the late 1890s. After federation, he served as Australia's first Prime Minister, and then as

force behind adoption of the acquisition language found in s 51(xxxi) of the Commonwealth Constitution in 1900.[64] Unlike the individual states, the Commonwealth Constitution *does* have an acquisition limitation.[65] However, it applies only to acquisitions by the Commonwealth, not the States.[66]

Speaking in 1915 as a member of Australia's High Court regarding the power of the Australian states 'to expropriate real property by statute', Barton noted that:

> If the property is taken without compensation, that is to say, if it is confiscated, the question which arises is constitutional only in the political and not in the legal sense. In other words a statute passed by a Sovereign Parliament is equally within the legal rights of the legislature whether it nakedly confiscates property or takes it upon terms of payment more or less. That is the position in the United Kingdom, and the right flows from the Sovereignty of Parliament … the power to make laws is unlimited in New South Wales save by territorial jurisdiction, and, since January 1901, by the Federal Constitution in some respects.[67]

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a justice of the High Court. For a more complete discussion of Barton's contributions, see: John Reynolds, *Edmund Barton* (Angus & Robertson, 1948).

[64] For a discussion of the creation of the commonwealth acquisition clause, and the purposes behind it, see: Duane L. Ostler, 'The Drafting of the Commonwealth Acquisition Clause' (2009) 28(2) *Tasmania Law Review* 211.

[65] The Commonwealth acquisition clause provides that parliament shall have power to make laws for 'The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws': *Commonwealth Constitution*, s 51(xxxi). Additionally, unlike the individual state constitutions, the *Commonwealth Constitution* contains amendment procedures that require not only approval of both houses of Parliament, but also approval by persons in the States and Territories who are entitled to elect the House of Representatives. See: *Commonwealth Constitution*, s 128. Hence, in some respects, the Australian *Commonwealth Constitution* more closely resembles the Federal and State constitutions in the United States.

[66] Because the Commonwealth was subject to this limitation but the States were not, the Commonwealth, in later years, adopted the creative practice of sometimes providing funding to the states in exchange for their acquisition of property on behalf of the Commonwealth, regardless of whether the acquisition was conducted on just terms. See: *Pye v Renshaw* (1951) 84 CLR 58. This practice has recently been ruled unconstitutional by the High Court. See: *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140.

[67] *NSW v Commonwealth* (1915) 20 CLR 54, 78.

Barton expounded further: 'The *New South Wales Constitution Act* empowers the Parliament of that State to make laws for its 'peace, welfare, and good government in all cases whatsoever'. The grant includes of course the power of expropriation (or eminent domain, if that term is more pleasing), *according to the sole judgment of the Parliament* of the State on the question of the public welfare.[68] Barton then noted the difference between this position and the way things stood in the United States. He stated that '[i]n some of the States of the American Union the power of expropriation is limited *by their Constitutions* to acquisition on just terms'.[69] Since 'just terms' was not mentioned in any of the American State Constitutions,[70] this was a direct reference to the due process and takings protection language in those constitutions, and how these protections served to restrict the legislature in its exercise of the acquisition power. Barton noted that the Commonwealth as a national body had recently adopted a similar limitation: '[s]o in our *Federal Constitution* not only must the terms be just, but the power is limited to the purposes in respect of which the Parliament has power to make laws.' Such was not the case in the Australia states, since:

> the power of the Parliament to assume or resume … property is as absolute quoad New South Wales as the power of the Parliament of the United Kingdom in its sphere, with this qualification only, that the power of any State of the Commonwealth must be exercised subject to the *Federal Constitution*.[71]

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[68] Ibid (emphasis added).
[69] Ibid (emphasis added).
[70] See Ostler, above n 64, 233.
[71] *NSW v. Commonwealth* (1915) 20 CLR 54, 78.

Barton concluded by noting that there was nothing in the *Commonwealth Constitution* that restricted New South Wales from its acquisition of wheat during the First World War.[72]

Hence, in the 1800s there was a fundamental difference regarding the constitutional or legislative basis of acquisitions in the states in the two countries. The reason for this was the different circumstances in each country regarding the creation of state acquisition legislation and the state constitutions. In the American states, generalised acquisition protections were primarily provided by the Constitution. While acquisition legislation was also enacted in all the States, the constitutional acquisition protections continued to reign supreme. In the Australian States however, acquisitions were governed by legislation rather than the Constitution. The Australian State constitutions were legislative Acts, amendable by the respective state legislatures rather than the people, and contained no reference to acquisitions.[73] Just as in England, the Australian state parliaments retained ongoing authority over their constitution, and were not subordinate to it.[74] Hence, when Australian courts reviewed

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[72] Ibid.

[73] The clearest expression of this is found in *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, in which the court justified a significant reduction in compensation that clearly would not have met the just terms standard under the *Commonwealth Constitution*. As recently as 2007, the Supreme Court of New South Wales declared in *Authorised Officer Christine Tumney (NSW Food Authority) v Nutricia Australia Pty Ltd* [2007] NSWSC 1215 (2 November 2007) that the NSW Constitution was an 'uncontrolled constitution', or in other words, one that can be changed at will by parliament without the involvement of the people. As noted above however, the *Commonwealth Constitution* is a different story. Section 128 of that Constitution describes an amendment procedure that requires not only Parliamentary approval, but also the favourable vote of a majority of electors in a majority of the Australian states.

[74] This continues to be the case in Australia today. Acquisitions are still not discussed in the various Australian State constitutions, but are dealt with only in legislation. The state constitution Acts can be reviewed in: Austlii <www.austlii.edu.au>. The Australian state Parliaments still retain unlimited power to acquire, even without compensation. See: above n 73.

acquisitions they looked only to the acquisition Act and not also to the Constitution as in the United States.

To what extent did this difference in the source of acquisition protections impact the law in Australia and the United States? While clearly there was a difference between whether acquisitions are constitutionally or legislatively based in the two countries, it is noteworthy that the same protections of due process, public use and compensation continued to exist in both countries. In Australia, at the State level these protections were found in the generalised acquisition Acts which were originally derived from the 1845 *Land Clauses Consolidation Act* of Great Britain.[75] At the Commonwealth level after 1901, these protections were found in s 51(xxxi) of the *Commonwealth Constitution*. In the United States, these protections were constitutionally protected at both the state and federal level, and also found in legislation. But the substance of the protections were the same, regardless of where they were found. This is again because both countries derived their acquisitions viewpoint from the British common law, and under the common law these three elements are necessary protections when private land is taken.[76] Indeed, the concept is embodied in the Magna Carta.[77] Hence, both

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[75] *Land Clauses Consolidation Act 1845*, 8 & 9 Vict c 18. Each colony had to adopt its own version of this Act, since the laws of the mother country did not apply in Australia after 1828, unless they were directed specifically at the colonies, or unless they were adopted by the respective colonies. Melbourne, above n 10, 36, 116-117.

[76] The British legal writer William Blackstone is usually credited with this common law interpretation. St. George Tucker, in his American re-write of Blackstone's commentaries in 1803, stated that the due process and takings protections were common law maxims, which the passage of the Fifth Amendment 'rendered a fundamental law of the government of the United States'. 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 & Small, 1803) Vol 1, 350. In 2009, Chief Justice French of the High Court of Australia stated that interpretation of the Australian *Commonwealth Constitution* 'can be informed by common law principles in existence at the time of federation. There is a principal long pre-dating federation that, absent clear language, statutes are not to be construed to effect acquisition of property without compensation. The principal was recognised by Blackstone.': *Wurridjal v Commonwealth* [2009] HCA

countries continued in the 1800s to carry on the British traditional view regarding acquisitions, but in different forms.

Although the protections tended to be the same, the source of protections had a subtle but profound effect on the thinking of the population. In the United States, people knew that their individual rights and liberties—including property rights—were protected by way of a document that could not easily be changed. These constitutional property protections were 'paramount to laws' enacted by the legislature as Madison said,[78] including acquisition laws. This added constitutional protection of property rights has created an entirely new body of law. An example can be seen in the case of *Chicago B & Q Railroad Co. v City of Chicago*.[79] The city argued that the acquisition question 'was one of local law merely'.[80] The Court disagreed, noting that 'a state may not, by any of its agencies, disregard the [constitutional] prohibitions of the Fourteenth Amendment'.[81]

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2 (February 2 2009), 76. Chief Justice French was most likely referring to the following statement by Blackstone in 1765: '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. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without the consent of the owner of the land … In this and similar cases 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.': William Blackstone, *Commentaries on the Laws of England* (Oxford, 1765, facsimile reprint, 1979) Vol 1, 134-135

[77] See: above n 39. 'Law of the land' and 'due process of law' were considered similar if not identical concepts, since the time of Sir Edward Coke, influential jurist and legal scholar in England: E. Coke, *Institutes of the Lawes of England* (1797) (Garland ed. 1979) Vol 2, 50.

[78] Hunt, above n 42, Vol 6, 386-387.

[79] *Chicago B & Q Railroad Co. v City of Chicago* 166 US 226 (1897).

[80] Ibid, 233.

[81] Ibid, 234.

The Australian States, on the other hand, did not discuss in their constitutions the Government's right to acquire private property. Such private property rights were for the most part protected the same way they were in Great Britain in the 1800s, by virtue of unwritten protections in the common law. The courts stood as guardians of those rights similar to the United States. But because the Australian State Parliaments retained unlimited power, at least in theory, Australians recognised that their property rights were ultimately subject to Parliamentary power.[82]

B Crown grnats

Another distinction between the acquisition law as it developed in the two countries in the nineteenth century had to do with the original land grants in the colonies, sometimes referred to as 'Crown grants'. Of course, the land in both countries initially belonged to the Crown from the date of settlement. Later, of course, it was passed on to private landowners. The original grant of land by the Crown to a private party, and sometimes the grant from that original recipient to other parties, often contained certain conditions, such as a reversion of the land to the Crown if certain conditions of settlement were not met, or that a portion of the land was reserved for public roads. Hence, an acquisition was contemplated and provided for years before it took place.

[82] While acquisition law in Australia has changed since the 1800s, this point of view has continued to persist among many of the populace to this day. Expressions of it can be seen in popular culture, such as the 1997 movie, *The Castle*. As Emmet J stated in *Spencer v The Commonwealth* (2008) FCA 1256 (26 Aug. 2008), 'A State can acquire land or other property, by resumption or otherwise, on any terms authorised by its Parliament, *whether just or unjust*. If a State Act provides for resumption of land on terms which are thought not to be just, that is of no consequence legally: it cannot affect in any way the validity of the State Act or of what is done under it'. The Australian High Court recently gave leave for an appeal of this case. See: *Spencer v. Commonwealth* [2010] HCA 28 (1 September 2010).

But when the actual acquisition took place years later, the reservation in the grant was often forgotten or overlooked by the landowner. By this time, he considered the land to have been his and resented any acquisition of it—especially without compensation—just because such acquisition had been provided for long ago in the Crown grant. He then brought suit, contesting the Crown grant.

In the United States, there were only a handful of such early land grant cases,[83] all of which were in Pennsylvania, and which tended to occur early in the century and then diminished in numbers as time went on. The other states simply disassociated themselves from the original Crown grants early in their history due to the revolution, and therefore had no Crown grant cases at all. In Australia on the other hand, there were a significant number of Crown grant cases throughout the 1800s.[84] This is in stark contrast to all other classifications of acquisition cases between the two countries, in which the American cases always significantly outnumber their Australian counterparts. This numeric difference is once again a direct result of the founding differences of the two countries, inasmuch as property law in Australia

[83] It should be noted that the United States acquired a number of territories during its expansion in the 1800s, mostly from Mexico and Spain. Many of these newly acquired lands had pre-existing land grants, often derived from the crown of Spain, or the Mexican government. A body of law has developed in the United States regarding how such grants are dealt with. For example, see: William W. Morrow, *Spanish and Mexican Private Land Grants* (Bancroft-Whitney Co, 1923). Obviously Australia has no parallel for such grants, since it has acquired very little territory in its history from other nation States. The present section confines itself to a comparison of the grants in the original colonies in each country, which were derived from the British crown.

[84] In terms of specific numbers, nearly 20% of the few Australian acquisition cases in Australia in the 1800s were Crown grant cases. Nor were these Australian Crown grant cases isolated to the early days of the Commonwealth as one would expect. As the decades marched on, one would think that crown grant disputes would diminish as property repeatedly changed hands and distanced itself farther and farther from its crown grant beginnings. However, the number of Australian Crown grant cases in the decades of the 1800s remained remarkably consistent. There were four such cases in the 1820s (the decade between 1821-1830, inclusive), three in the 1830s, four in the 1840s, four again in the 1860s, three in the 1870s, five in the 1880s and one in the 1890s. These numbers are the author's best estimate

continued to respect the original Crown grants, while the States in the United States generally ignored the original grants after ties to the Crown were severed in the Revolution.

It should be acknowledged that some of the differences between the two countries regarding Crown grants may also result from the timing of the Crown grants. The Crown grants in Australia occurred in the early 1800s, only a short time before the cases in question. The original grants of land in the American colonies however dated mostly from two hundred years before, in the 1600s and were of many different types.[85] In Pennsylvania the grants which resulted in later acquisition litigation were grants by William Penn in 1681, of land he had received from the Crown. The linkage between these land grants by Penn and the law of eminent domain was, in the words of one scholar, 'peculiar to Pennsylvania'.[86] He further explained as follows:

> It had been the original intention of William Penn to lay out all the streets in the cities and towns and the great roads and highways from town to town … and not until that was done to grant lands to individuals, thereby obviating the taking of lands from private owners for streets and roads. This was found practicable in one great city (within the original limits of

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based on his personal, detailed review of the cases in the reported digests for all the Australian states, and also Australian newspaper reports of cases.

[85] One historian noted that there were three principal types of grants from the Crown in respect to the American colonies, which grants had more to do with their political organisation than their lands. The three types were the provincial, the proprietary and the charter. Provincial governments were governed by commissions created by the King. There were six states with such governments: New Hampshire, New York, Virginia, North Carolina, South Carolina and Georgia. Proprietary governments were based on land grants from the crown to individuals, such as William Penn and Lord Balitmore. The colonies with this form of governance were: Pennsylvania, Delaware and Maryland. Charter governments were based on letters patent which created a governmental corporation, in which the grantees had some control over the land. The colonies with this type of government were: Massacuhsetts, Rhode Island and Connecticut. The main point is that the process of land acquisition tended to vary based on when and how the colony was organised, rather than following a single, consistent method as in Australia. See: Thomas Donaldson (ed), *The Public Domain, its History, With Statistics* (Government Printing Office, 1881) 465-466.

> Philadelphia) and accordingly was done. It was found impracticable, however, to thus lay out the great roads and highways … in other towns, since at that time no other cities or towns were planned definitely. Hence Penn abandoned this scheme of laying out roads and streets … To make it unnecessary to compensate private owners when land was taken later for public roads and streets, each grantee was compensated for such later taking at the time of the original grant by the addition of six percent [of land added] to each grant for which no payment was made by the grantee. Consequently when land was taken later for roads and streets no compensation was required, compensation already having been made.[87]

Hence, in this land grant from William Penn, an extra six acres of land out of every one hundred was added to the grant, with the condition that it was specifically reserved to be used later for roads. It was this 6% reservation for roads that became the subject of litigation in Pennsylvania when the land became valuable many years later, when the free gift of extra acreage was mostly forgotten.

The approach to these types of cases by Pennsylvania courts is described quite well in a trio of cases at the turn of the century, around 1800.[88] In each case, the 6% reservation in the grant essentially took the property out of the typical acquisition pattern. Basically speaking, because of the language of the original grant, Pennsylvania courts did not consider that there was an acquisition at all, and therefore obviously no compensation was needed. The only exception was for the value of improvements placed on the land. Compensation was considered to have already been given many years earlier when the extra 6% of land was given for free. Hence, the

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[86] Harold S. Irwin, 'Constitutional Right to Compensation for Injuries to Property in Opening or Grading Roads in Pennsylvania,' (1931) 35 *Dick. L. Rev*. 192, 193.
[87] Ibid, 193.

property owner had use of this free land for many years—land which he otherwise could not have used, and which presumably he made money from. While property owners nonetheless sought compensation because they had come to consider the extra 6% of land to be 'theirs,' such claims were unsuccessful unless the land taken for roads exceeded 6%, or unless valuable improvements had been placed on the land taken for roads. Such compensable improvements usually consisted of houses, grain or orchards.[89]

Noteworthy among these early cases was one in 1802, *M'Clenachan v Curwin*.[90] The main issue was whether ruling in favour of the 6% land grant from William Penn violated the constitutional prohibition of acquiring private property without compensation. After all, the grant had been given one hundred years before the American Revolution. The Constitution with its 'takings' protection language was much newer and, it was argued, should compel compensation in any event. Essentially the claimant was asking the court to break with recognition of the British link in the chain of title, since the revolution had arguably severed any connection with the Crown or William Penn. The argument failed. The Court indicated that the State Legislature had succeeded to the rights of William Penn under his grant, and that it did not consider 'the legislatures applying a certain portion of every man's land for the purposes of laying out public roads and highways, without compensation, as any

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[88] The cases are: *Breckbill v. Turnpike*, 3 Dall. 496 (Pa. 1799); *Feree v. Meily*, 3 Yeates 153 (Pa. 1801); and *M'Clenachan v. Curwin*, 3 Yeates 362 (Pa. 1802).
[89] Ibid.
[90] Ibid

infringement of the constitution; such compensation having been originally made in each purchaser's particular grant'.[91]

Indeed, recognition of the original Penn grants—now assumed by the Legislature—was the law in Pennsylvania not only around the year 1800, but also from then until now. For example, twenty years after the first round of litigation on the issue, the 6% rule was again upheld in the 1830 case of *Commonwealth v Fisher*.[92] The same thing happened twenty two years after that in the 1852 case of *Plank-Road Co. v Thomas*.[93] Indeed, this 'six percent rule' is still the law in Pennsylvania today. In the 1958 case of *Creasy v Stevens*,[94] the Court discussed this rule, concluding that it would apply and no compensation would be given where land was physically taken and 'actually used for road construction'.[95] Again however, none of the other American States have followed this pattern. In all the rest of the states, the revolution created a break between the original Crown-based grants and state assumption of control over public lands. Any reservation in the original grant could therefore be safely ignored.

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[91] Ibid.
[92] *Commonwealth v Fisher*, 1 Pen. & W. 462 (Pa. 1830). The Court noted that '[f]rom the first settlement of this country … the invariable usage and law was … to add six acres for every hundred, for roads, &c. … that whenever the Commonwealth thought a public road necessary … it might make it without interfering with the private right of any individual. The right of the state to take six acres out of every hundred acres sold, is not an implied right but an express reservation.': Ibid, 464-465.
[93] *Plank-Road Co. v Thomas*, 20 Pa. 91 (1852). The Court stated that 'every grant of land within this Commonwealth, from the first settlement down to the present day, has contained an express reservation to the state, of six acres out of every hundred, for roads. The legislature may authorise the land so reserved … without paying the value of it … The six percent belongs to the state, and she may constitutionally appropriate it to the use it was meant for.': Ibid, 93-94.
[94] *Creasy v Stevens*, 160 F. Supp 404 (W.D. PA. 1958) (overruled on other grounds in *Martin v Creasy*, 360 U.S. 219 (1959)).
[95] Ibid, 416. Because what was taken in *Creasy* was *access* to a pre-existing state road, rather than physical land, the court granted compensation.

In the Australian Crown grant cases, the courts ruled similar to those in Pennsylvania. Again, the main difference was not in the rulings of courts in the two countries in respect to whether compensation should be paid when roads were acquired pursuant to a reservation in a land grant. Rather, the difference was in whether such grants with their conditions and reservations were even recognised at all. In Australia, virtually all of the states continued to recognise Crown grants throughout the nineteenth century, and continue to recognise them even today if the need arises.[96]

The Australian position is given in the 1876 New South Wales case of *Allen v Foskett*,[97] in which the Court stated bluntly that '[i]t is clear that where a right of road is reserved in the grant, no compensation can be claimed'.[98] This refusal of the courts to compensate for reserved land was upheld even where long periods of time passed between the grant and the acquisition for the road. For example, the famous 1886 New South Wales case of *Cooper v Stuart*,[99] dealt with a Crown grant that was made in 1823. This Crown grant included a reservation of 10 acres anywhere in the grant 'as might be required for public purposes.' The reservation was exercised by the Crown in 1882, fully 59 years after its issuance. The Court ruled that the reservation was still valid irrespective of the rule against perpetuities, laches, acquiescence or

[96] Many cases over the years have dealt with reservations in original crown grants. A recent example can be found in: *Cadia Holdings Pty Ltd & Anor v State of New South Wales & Anor* [2008] NSWSC 528 (30 May 2008) (Dispute about original reservation in subsurface minerals in Crown grant).
[97] *Allen v Foskett* (1876) 14 SCR (NSW) 456.
[98] Ibid, 460. However, this case is unique in that the government overlooked its right to obtain the road under the reservation and instead obtained it under a road Act which required compensation. The Court ruled that compensation was therefore required, even though it would not have been required if the government had acted under the reservation rather than the road Act.
[99] *Cooper v Stuart* [1886] 7 SWLR 1 (NSW) (eq).

delay. This case was appealed to the Privy Council in England, which—in addition to its famous 'terra nullius' repudiation of Aboriginal title—upheld the reservation.[100]

However, colonial governments in Australia were required to provide compensation if the Crown grant reservation was found to not apply for some reason. For example, in the 1899 Western Australian case of *Dixon v Throssell*,[101] it was held that compensation was required if the resumption was for a purpose other than those listed in the reservation. In *Ex Parte Smart*,[102] the Registrar General on his own initiative inserted reservation wording in the grant, which wording devalued the land. The Court held that the Registrar had exceeded his authority and ordered him to issue a new certificate without the reservation, which would of course be subject to compensation if acquired.

Just as in the United States, the Australian courts held that compensation must be paid if improvements had been installed on the land acquired. This is seen in *Stewart v Cheyne*,[103] in which the Court said compensation must be given for a house on the acquired property if the claimant could prove that it was his house. Since he was unable to do so, his claim of compensation was denied.

In sum, court decisions in respect to original land grants were nearly the same in both countries. Courts in each country ruled that there was no acquisition if government

[100] [1889] 14 App Cas 286.
[101] *Dixon v Throssell* [1899] 1 WALR 193.
[102] *Ex Parte Smart* [1867] 6 SCR 188 (NSW) (law).

took land for a road reserved in a land grant, unless the land taken exceeded the land reserved in the grant, and unless there were improvements installed on the land. The main difference between the two countries in respect to such grants had to do, again, with the nature of the founding of each country. Because the American colonies broke with Great Britain, most states ignored the original land grants from Great Britain. Only Pennsylvania was an exception, which continues to recognise the original land grants of William Penn to this day. In Australia on the other hand, there was no break with Great Britain and therefore all of the states continued to honour the original Crown grants throughout the nineteenth century.

C Injurious affection and consequential damages

When the early acquisition cases of the two countries are compared in which differences in founding philosophy have no impact, the outcomes in the two countries tend to be surprisingly similar. This is true whether the cases were in respect to railroads or highways or flooding or whatever else may have been the motive for the acquisition.[104] The three basic acquisition protections in the British common law—compensation, public use or purpose and due process or just terms fairness—were almost always respected and upheld. This tended to be the result regardless of whether the source of the protection was statutory or constitutional.

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[103] Found in *Launceston Advertiser*, 13 January 1842 (Supreme Court of Van Diemen's Land, Montagu J, 6 January 1842), contained in: *Decisions of the Nineteenth Century Tasmanian Superior Courts* <http:// www .law.mq.edu.au/sctas>.

[104] The author reviewed and compared a very large number of Australian and United States cases in respect to acquisitions for railroads, roads, flooding and other issues, and found no significant difference between the holdings of the cases in the two countries. Courts in both countries granted compensation under similar terms, as long as the acquisition was for an acceptable public purpose, and basic procedural fairness had been complied with.

A sample of the case law in one particular area—injurious affection—provides a demonstration of this similarity in legal result. This was one of the issues that was increasingly litigated in both countries in the 1800s, and had to do with the extent to which adjacent parcels of land, harmed somehow by the acquisition, should be the subject of a compensation award. In the years since 1900, this has become a heavily contested and litigated area, particularly in respect to what have come to be known as 'partial takings' or 'regulatory takings' in the United States.[105] But as we shall see, it was also a hot issue even in the nineteenth century. Since there was no actual physical acquisition, courts understandably reached differing results on whether harm to adjacent land constituted a compensable acquisition. But the decisions were not static. As we shall see, opinions tended to change as the century progressed, such that compensation for this type of injury began to be more commonly accepted. Most importantly for comparative purposes between the two countries, this was an instance where differences in their founding, population or geography did not come into play. As such, the courts in each country were free to establish rules without influence from such factors. Interestingly, courts in both countries tended to forge essentially the same rules. In Australia, this type of scenario is known as 'injurious affection,' while in the United States it was usually identified as 'consequential damages'.[106] One of the main areas in which the issue arose in the nineteenth century in both countries had

[105] See above n 33.

[106] Consequential damages must be distinguished from severance damages, suffered by adjoining property to that taken. As stated in 26 Am.Jur.2d sec. 330 'Eminent Domain' (2004), 'Severance damages suffered by a remainder should be distinguished from economic damage caused by the intended results of the condemnation of the parcel taken; the latter are consequential damages attributable to the taking and not the severance of the remainder.'

to do with the raising or lowering of the grade of roads, although it often arose in other contexts as well.

For example, when faced with grade-change cases, courts in South Australia, Queensland and New South Wales each ruled that because there was only a negative impact on land rather than a physical acquisition, no compensation should be paid.[107] Hence, courts in these States initially repudiated the concept of injurious affection. As stated in the 1870 South Australian case of *Stephens v Gawler*,[108] 'it was intended that private individuals might be made to suffer injury for the public good'.[109]

The thinking was different in other states, however. In the 1873 Victorian case of,[110] the Court found that landowners had a vested expectancy interest in the street level, and therefore compensation should be granted. Similar results were reached in other Victorian cases.[111] The reasoning for such a holding was expressed quite well in the 1900 West Australian case of *Annois v Mayor and Councillors of East Freemantle*,[112] in which the court said:

> It appears to us that it was not the intention of the legislature when they gave a discretionary power to town Councils to make and improve streets, that a householder should be cut off

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[107] Road raising and lowering cases included: *Stephens v Corporation of Gawler* [1870] 4 SALR 83; *Hobbs v The Municipality of Brisbane* [1876] 1 QLR 58, 6 QSCR 214; *Robinson v The Borough of Ashfield* [1880] 2 SCR 169 (NSW). Cases with similar results but that did not deal with road grades included: *Lord v City Commissioners*, 26 April, 1 and 3 May, 1856, found in Legge, above n 5, 912-931; *Nosworthy v Hallett* (1869) 3 South Australia Law Reports 52.
[108] *Stephens v Gawler* (1870) 4 South Australia Law Report 83.
[109] Ibid.
[110] *Sinclair v United Shire of Mt. Alexander* (1873) 4 AJR 28 (VIC).
[111] See *King v The Mayor &c, of Kew* (1884) 10 VLR 183; *Kilpatrick v The Mayor & c., of Prahran*, (1885) 11 VLR 203, 6 ALT 272.
[112] *Annois v Mayor and Councillors of East Freemantle* (1900) 2 WALR 10.

> from the street, without anything being done which would lessen or mitigate the injury to his property.[113]

Opinions on this issue sometimes changed over time. The best example of this is found in South Australia, which in 1870 repudiated injurious affection, but by 1890 began to embrace it. In the 1890 South Australian case of *Lucas v The Commissioner of Railways*,[114] the claimant's property was devalued due to construction of a bridge. The Judge said:

> There is no doubt that the plaintiff's demand is a bona fide one. His evidence is that the actual cost of the house was £349, and that he is willing to sell it now, damaged as it is, for £60, and as I am convinced that the property will always be liable to injury from a like cause, so long as the works remain as at present, I do not think his claim of £150 at all excessive.[115]

American courts had the same mixed results as their Australian counterparts, with some state courts granting compensation for harm caused by changing the level of a road, while others denied it. The terminology was a little different, as United States' courts usually called this phenomenon 'consequential damages' rather than 'injurious affection.' An example is the 1851 Pennsylvania case of *O'Connor v Pittsburgh*,[116] in which the court ruled against compensation to the Catholic Church, which had built a church house with the expectation that the existing street grade would stay the same. Courts in other States agreed that no compensation should be granted where only consequential damages were at issue and there had been no physical acquisition, since

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[113] Ibid.
[114] *Lucas v The Commissioner of Railways* (1890) 24 South Australia Law Report 24.
[115] Ibid, 31.
[116] *O'Connor v Pittsburgh*, 18 Pa. 187 (1851).

individual property owners should bear such burdens alone.[117] For example, in an 1849 New York railroad case, the Court said:

> The prohibition of the Constitution is against taking private property for public use without making compensation; and not against injuries to such property, where it is not taken. Contingent future damages, or incidental and consequential injuries, of indefinite amount, not capable of estimate, do not come within the rule.[118]

Sometimes the debate was taken to the Federal Courts, which tended to agree with the majority rule that consequential damages in acquisition cases were not allowed. Perhaps the 1858 Federal case of *Smith v Washington*[119] explained it best when the Court stated that:

> Private interests must yield to public accommodation; one cannot build his house on the top of a hill in the midst of a city, and require the grade of the street to conform to his convenience, at the expense of that of the public.'[120]

The majority rule in the United States was in full accord with that of Australia. This rule was perhaps best expressed by the statement in *Stephens v Gawler*[121] noted above, that 'it was intended that private individuals might be made to suffer injury for the public good'.[122] Courts in the United States sometimes made reference to British law on this subject when it tended to support their position. Such was the case in

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[117] See, eg, *Rounds v Mumford*, 2 R.I. 154 (1852); *Whittier v Portland and Kennebec Railroad*, 38 Me. 26 (1854); *Reynolds v Shreveport*, 13 La. Ann. 426 (1858).
[118] Ibid.
[119] *Smith v Washington*, 61 U.S. 135 (1858).
[120] Ibid, 148. To this day the majority rule in the United States is against compensation in such cases. 'As a general rule, in the absence of a constitutional or statutory provision to the contrary, a … governmental agency is not liable to an abutting owner for consequential damages resulting from the grading or changing of the grade of the street or highway in front of his or her premises.' See: 26 Am.Jur.2d sec. 211'Eminent Domain' (2004).
[121] *Stephens v Gawler*, 4 So. Australia LR 83 (1870).

Smith v Washington where the Court asserted that '[t]he law on this subject is well settled, both in England and this country'.[123]

However, just as in Australia, courts in some States in the United States disagreed with the mainstream position and awarded compensation. For example, in the 1860 Missouri case of *Lackland v North Missouri Railroad Company*,[124] the court ruled that compensation was a matter of right when a railroad company changed the grade of a street or blocked a street. The Court in the 1853 Vermont case of *Sabin v The Vermont Central Railroad*,[125] did not even rely on a statute to support its grant of consequential damages, but stated that the damages 'must include, not only all direct loss, in being deprived of the use of the land taken, but all consequential damage to the remaining lands'.[126]

The law in England and opinions of the Federal courts were sometimes referred to in discussions of the minority position as well, which recognised consequential damages. For example, in the 1856 Wisconsin case of *Goodall v Milwaukee* the court referred to the laws of England,[127] stating that '[t]he system of England is so different in many respects from that adopted in most of the states of the Union, that the adjudicated cases of that country furnish but little aid in determining the question here involved'.[128] Then the Goodall court referred to the ultimate authority—the federal

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[122] Ibid.
[123] *Smith v Washington*, 61 U.S. 135, 148 (1858).
[124] *Lackland v North Missouri Railroad Company*, 31 Mo. 180 (1860).
[125] *Sabin v The Vermont Central Railroad*, 25 Vt. 363 (1853).
[126] Ibid.
[127] *Goodall v Milwaukee* 5 Wis. 32 (1856).
[128] Ibid, 52.

courts. It cited an 1821 United States Supreme Court case, *Goszler v Corporation of Georgetown,*[129] which held that compensation for any harm caused by government changing the grade of streets was required. The Court glossed over the fact that this case dealt with a specific Act of Congress granting compensation in spite of the majority rule.

In sum, in both the United States and Australia, the individual States diverged in whether compensation should be granted when there was no physical acquisition but adjacent property was harmed. In both countries, courts in a larger number of States ruled against compensation in such cases, but a respectable number of states ruled the other way. Significantly, population, geography and the founding of each country seemed to have no impact on this issue, and therefore the courts in each country were free to establish their laws on this question based on what they thought worked best. With no outside influence to modify their rulings, the holdings and the reasoning of the state courts on this issue in the two countries was nearly the same, demonstrating a similar mindset in both countries. What is most fascinating about this similarity is how the establishment of a majority and minority position was also the same. In both countries, the majority of states ruled against compensation for injurious affection, while the minority of states ruled the other way. Both countries therefore were nearly identical in their indecision and disagreement on this issue.

[129] *Goszler v Corporation of Georgetown* 19 U.S. 593 (1821).

III CONCLUSION

A comparison of early acquisition law in Australia and the United States in the 1800s provides a fascinating insight into the struggles legislatures and courts face when governments take land, and how those struggles are resolved. The acquisition law in Australia and the United States from the earliest days in both countries was surprisingly similar. Where there were differences in the law as it evolved in these early days, such differences usually did not result from geography or population. Rather, the difference was usually due to differing 'founding philosophies' of the two countries, due to the differing levels of control each country experienced from Great Britain during their colonial period. Because of these differences in founding philosophy, the source of acquisition protections in each country—whether based on statutes or constitutions—is markedly different. Also greatly impacted by founding philosophy were cases involving Crown grant reservations.

However, courts in the two countries tended to reach similar results where there were no founding philosophy issues to impact the decision. An example can be seen in respect to development of the law regarding injurious affection. Courts in each country resolved the injurious affection question in similar ways, and even developed the same majority and minority rules between the various states.

Thus it can be seen that the relationship each country had with Great Britain, and the resulting founding of each country, had a profound impact on the thinking of the populace, and tended to shape acquisition law along different lines. But when the

founding differences are set aside, the Australians and Americans tended to resolve those struggles in essentially the same ways. In short, the jurists in these two countries appear to have been quite similar in their thinking.