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Is a Taking Something Lost or Something Gained? Contrasting the Loss/Gain Focus of Takings Cases in the United States and Australia

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IS A TAKING SOMETHING LOST OR SOMETHING GAINED? CONTRASTING THE LOSS/GAIN FOCUS OF TAKINGS CASES IN THE UNITED STATES AND AUSTRALIA

*Duane L. Ostler**

I. INTRODUCTION

American takings law is loss oriented. The starting point of almost every takings case is the property owner and what he no longer has because of government action. The property owner is justifiably upset that he has lost something, and demands that government pay him for it. A property owner will never question whether this is the right focus. He simply assumes that "taking" means "loss." How could it be otherwise?

This is especially true in the context of "regulatory takings," which result when government action significantly diminishes property value without taking it. In this setting, American courts have focused on the loss or harm to the property owner—particularly on the degree of that loss—to determine whether a regulatory taking can even be found.[1] As noted in *Lingle v. Chevron U.S.A. Inc.*, each of the tests used by the courts to determine the existence of a regulatory taking "focuses directly upon the severity of the burden that government imposes upon private property rights."[2]

It can be argued that the word "taken" should not automatically mean loss. There are two sides to every story when property is taken; one side suffered a loss, but another presumably gained. Hence, "takings" pursuant to the Constitution could just as easily mean gain as loss.[3] As one scholar noted, "[t]he concern for 'fairness,' that is the leitmotif of *Penn Central*, focuses on . . . deprivation. A true takings test would focus not on what the owner has been deprived of (except as a measure of just compensation), but rather on what the government has taken."[4]

While the United States has never embraced such a "gain" orientation in respect to takings, there is a country that has. That country is Australia. This is primarily true in the federal regulatory takings context, when courts must

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1. 544 U.S. 528 (2005).
2. *Id.* at 539.
3. U.S. CONST. amend. V.
4. Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 BYU L. REV. 899, 901 (urging the U.S. Supreme Court to adopt a "something gained" view of the Takings Clause, just like that in Australia, as described in this article).

determine whether an act of government should be classified as a "taking" or an "acquisition" as takings are commonly referred to in Australia. The Australian Commonwealth Acquisition Clause bears many similarities to the Takings Clause in the Fifth Amendment of the United States Constitution, and was fashioned to provide essentially the same protections of due process/just terms fairness, public use or purpose, and compensation.[5] However, in recent years, Australian courts have focused on the "gain" element of the equation, rather than the loss or deprivation to the property owner.[6] For a taking to even be found by the Australian High Court, there must be a gain to someone from the government action.[7]

This article compares and contrasts the loss orientation of American takings law with the gain orientation of Australian takings law, primarily in respect to regulatory takings. It begins by tracing the evolution of the loss orientation for regulatory takings in United States' courts. Next, will be a discussion of the opposite approach as it has developed in the Australian High Court in recent years. Finally, a comparison of the strengths and weaknesses of the two approaches will be analyzed.

As these strengths and weaknesses are reviewed, it will be seen that the "loss" orientation is derived from a "rights" orientation of protecting individual property rights. This is essentially classical liberalism. The "gain" orientation is based on what is best for society, even at the expense of individual rights. This is essentially classical republicanism. Because of the risk of loss of individual rights from the "gain" approach, the "loss" approach is still probably the better of the two approaches. Although it is somewhat inefficient and costly, this approach better preserves individual freedoms.

It should be noted at the outset that this article will focus on federal constitutional rather than state constitutional takings clauses in each country. In America today, the standards and tests applied by the federal courts in respect to regulatory takings are dominant, since state courts must follow such standards.[8] The federal tests apply equally to takings by the federal government and takings by the states, since under the "incorporation doctrine," Fifth Amendment Takings

5. U.S. CONST. amend. V. (The relevant portion of the Fifth Amendment reads: ". . . nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."); *see* AUSTRALIAN CONSTITUTION s. 51(xxxi) ("The Parliament shall . . . have power to make laws . . . with respect to . . . the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws."); *see* Duane L. Ostler, *The Drafting of the Australian Commonwealth Acquisition Clause*, 28(2) UNIV. TASMANIA L. REV. 211 (2009) [hereinafter Ostler, *Acquisition Clause*] (discussing how the Australian acquisition clause was similar to the Fifth Amendment and was designed to provide essentially the same protections). However, some scholars have argued that the two clauses are radically different, and that the Australian clause was not derived from the Fifth Amendment. *See, e.g.*, Simon Evans, *Property and the Drafting of the Australian Constitution*, 29 FED. L. REV. 121, 11.C. (2001); *see also* PATRICK H. LANE, A MANUAL OF AUSTRALIAN CONSTITUTIONAL LAW 160 (4th ed. 1987).

6. P.J. Magennis v Commonwealth (1949) 80 CLR 382, 402 (Austl.).

7. Interestingly, the party receiving the gain does not have to be the government, *see* LANE, *supra* note 5, at 163 ("[T]he precise acquirer or use of the subject property is not specified by s. 51(xxxi); hence that acquirer or user need not be the Commonwealth or its agency."). The Australian High Court case espoused this rule in *P.J. Magennis* in 1949.

8. *See* Duane L. Ostler, *A Case of Non-identical Twins—Comparing the Evolution of Acquisition Law in Australia and the United States*, 10 CANBERRA L. REV. 66, 68 (2011) [hereinafter Ostler, *Non-identical Twins*].

Clause is applied directly to the states through the Fourteenth Amendment.[9] In Australia, only takings by the federal or Commonwealth government, including regulatory takings, are subject to the Australian Takings Clause.[10] The individual states do not have constitutional takings protections, and the takings standards established by the federal constitution do *not* apply to the states as they do in the United States.[11] Takings at the state level (including regulatory takings) are controlled almost exclusively by legislation.[12] Notwithstanding this difference, the highest federal courts in both countries have faced nearly the same questions regarding interpretation of the federal takings clause in respect to regulatory takings. In particular, the highest courts in both countries have had to decide whether to use the "something lost" or "something gained" approach to identify the existence of regulatory takings.

II. THE AMERICAN LOSS ORIENTATION

From the days of the founding, it was understood that state and federal takings clauses were designed to protect private citizens from losses at the hands of government. The focus was on individual rights and protection of those rights. Indeed, the various takings clauses were always to be found embedded within the federal and state bills and declarations of rights.[13] When takings are considered from the perspective of protection of individual rights, it is only natural that a loss orientation in favor of the property owner will result. Mr. Sergeant, an attorney for the plaintiff, stated in the 1820 Supreme Court case of *Satterlee v. Matthewson*,[14] "the fifth Amendment, restricting the exercise of the power of the eminent domain . . . ought always to be liberally construed in favour of the rights of the citizen."[15]

Because of this individual rights orientation, the Supreme Court cases which addressed the issue of whether takings were to have a loss or gain orientation have almost universally spoken in terms of loss. One of the earliest examples of this was the 1871 case of *Pumpelly v. Green Bay Co.*[16] In *Pumpelly*, a dam owner maintained that he had no liability for flooding damage to adjacent property caused

9. *See* JOSEPH A. MELUSKY & WHITMAN H. RIDGWAY, THE BILL OF RIGHTS: OUR WRITTEN LEGACY 29–31 (1993) (discussing the "incorporation" doctrine); *see* Ostler, *Non-identical Twins*, *supra* note 8, at 68; *see also* U.S. CONST. amend. V, XIV.

10. *See* Ostler, *Non-identical Twins*, *supra* note 8, at 68.

11. *Id.* at 95.

12. A review by the author of the constitutions of the six Australian states shows that none contain any takings protection clause. *See* AUSTRALIAN LEGAL INFORMATION INSTITUTE, http://www.austlii.edu.au (last visited Feb. 19, 2012). However, this does not mean that there are no protections in place for state takings. Each state also has a detailed 'Land Acquisition Act' which limits and describes the manner in which takings can occur. *Id.*; *see* Donna R. Christie, *A Tale of Three Takings: Taking Analysis in Land Use Regulation in the United States, Australia, and Canada*, 32 BROOK. J. OF INT'L L. 343, 386–90 (2007) (discussing regulatory takings at the state level, and how such takings are usually protected by way of individual legislation).

13. *See* Duane L. Ostler, *Bills of Attainder and the Formation of the American Takings Clause at the Founding of the Republic*, 32(2) CAMPBELL L. REV. 227, 231–36 (2010) [hereinafter Ostler, *Bills of Attainder*] (discussing the various types of state clauses).

14. 27 U.S. 380 (1829) (dealing with the competing title and leasehold interests in land).

15. *Id.* at 406.

16. 80 U.S. 166 (1871).

by the building of his dam.[17] He especially relied on the fact that nothing was taken from his neighbor, arguing that "there is no *taking* of the land within the meaning of the constitutional provision,"[18] since there were only consequential damages to the neighbor, and no physical property was appropriated. The court refused to buy this argument, noting:

> It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government . . . that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use.[19]

This statement highlights the idea, now commonly accepted in the United States, that a regulation can, by itself, affect a taking. Ever since that time, *Pumpelly* has been cited as one of the first recognitions of regulatory takings.[20] Hence, even where physical property is not taken or acquired, a taking can occur *based solely on the loss to the property owner*.[21] The Court refused to hold that a taking could not occur unless something was "gained."[22] Accordingly, the rights orientation of the takings protection trumped any notion that "something gained" should be just as important, or more important, than "something lost."[23] Indeed, elsewhere in its opinion the Court concluded that if something had to be gained in order for a taking to occur, the takings clause "would become an instrument of oppression rather than protection to individual rights."[24]

The private rights orientation of takings prevailed into the next century. The presumption was so powerful that "takings" only meant losses that the 1943 case of *United States ex rel. Tennessee Valley Authority v. Powelson* spoke of the concept solely in respect to compensation:[25] "[W]hile it is the owner's loss, not the taker's gain, which is the measure of compensation for the property taken, not all losses suffered by the owner are compensable under the Fifth Amendment."[26] The very

17. *Id.* at 177.
18. *Id.*
19. *Id.* at 177–78.
20. *See, e.g.*, San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 651 (1981); First English Evangelical Lutheran Church v. Cnty. of Los Angeles, 482 U.S. 304, 317 (1987). Notwithstanding this, one scholar has argued that there are earlier instances of regulatory takings. *See* Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211 (1996).
21. *Pumpelly*, 80 U.S. at 177–78.
22. *Id.*
23. *Id.* at 177.
24. *Id.* at 179.
25. 319 U.S. 266 (1943).
26. *Id.* at 281 (citations omitted). This concept was most recently expressed in Brown v. Legal Found. of Washington, 538 U.S. 216, 235–36 (2003).

next sentence offered an interesting clarification: "In absence of a statutory mandate the sovereign must pay only for what it takes, not for opportunities which the owner may lose."[27] The intent of these statements was to generally avoid compensating for consequential damages.[28] However, by linking the concept to what the government took rather than just what the property owner directly lost, the Court came very close to acknowledging a gain orientation as the focus in regulatory takings cases.

In other takings cases over the ensuing years, the United States Supreme Court would occasionally make similar comments regarding how "gain" rather than "loss" could potentially be the basis of a takings claim, and particularly that this could be the tool courts could use to identify the existence of a regulatory taking. Although, the idea was mentioned once in awhile, it was never taken seriously.

An example can be seen in the 1945 case of *United States v. General Motors Corp.*[29] At issue was a government takeover of a lease during World War II.[30] The Court noted:

> In its primary meaning, the term "taken" would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking.[31]

The Court then once more linked the concept of "loss" or "gain" in takings to regulation, noting that "Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking."[32] Whether the property owner suffered a "destruction" or mere "harm" to his property, the Court maintained a private rights-oriented loss interpretation in respect to regulatory takings.[33]

The 1946 case of *United States v. Causby* highlighted the issue once again.[34] In this case, a property owner sued under the Fifth Amendment for harm caused to his chicken farm due to low flying military aircraft; apparently, the chickens were so

27. *Id.* at 281–82 (citing United States v. Miller, 317 U.S. 369, 376 (1943)).

28. Consequential damages bear a very close relationship to regulatory takings, and indeed it is often hard to tell them apart. The majority rule in the United States is against compensation in such cases. *See* 26 AM. JUR. 2D § 211 (2004) ("[A]s 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."). However, in early American history, compensation was sometimes given in such cases, in circumstances that would probably more closely resemble the regulatory takings of today. *See* Kobach, *supra* note 20, at 1225.

29. 323 U.S. 373 (1945).

30. *Id.* at 374–75.

31. *Id.* at 378.

32. *Id.*

33. *Id.*

34. 328 U.S. 256 (1946).

upset at the noise that they refused to lay eggs.[35] Similar to *Pumpelly*, the government naturally pointed out that there was no physical taking of property, and that it had *gained* nothing since all flights were within the legal minimum height restrictions of the day.[36] The Court disagreed, finding that an "invasion" of the land was sufficient to justify a taking, including the invasion of air shock waves.[37] However, it was once again the loss to the property owner rather than any gain (or lack thereof) that determined the outcome of the case.[38]

In the 1949 case of *Kimball Laundry Co. v. United States*,[39] the Court stated "[b]ecause gain to the taker . . . may be wholly unrelated to the deprivation imposed upon the owner, it must also be rejected as a measure of public obligation [i.e., compensation] to requite for that deprivation."[40] This was a physical taking of a laundry during World War II on a temporary basis and the previous statement obviously reiterates the rule from *Tennessee Valley Authority*, discussed above, that compensation is to be based on the property owner's loss, rather than the government's gain.[41] In essence, the Court recognized the significantly different results that can occur if gain is the focus, rather than loss.[42] But the "gain/loss" question was again considered only in respect to compensation.[43]

The 1962 case of *Goldblatt v. Town of Hempstead* described how the "gain/loss" question intersected with the state's police power.[44] In this case, the town of Hempstead, New York, enacted an ordinance that essentially stopped a mining operation.[45] The mine owner naturally sued, arguing that the ordinance constituted a taking.[46] The Supreme Court disagreed, noting that the ordinance was a protective measure for the health and safety of the town's residents under the police power.[47] The Court stated:

> The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not . . . burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.[48]

35. *Id.* at 256–59.
36. *Id.* at 260.
37. *Id.* at 265–66.
38. *Id.*
39. 338 U.S. 1 (1949).
40. *Id.* at 5.
41. *Id.* at 3, 5.
42. *Id.* at 13.
43. *Id.*
44. 369 U.S. 590 (1962).
45. *Id.* at 590–91.
46. *Id.*
47. *Id.* at 592.
48. *Id.* at 593.

In so saying, the Court tacitly admitted that a gain had occurred—a gain of increased safety and health of the citizenry.[49] This was a general social gain, not a gain of an identifiable property interest or proprietary right.[50] In such cases, the gain not only outweighs the property owner's loss, but also justifies the denial of all compensation.[51]

The Court was simply expressing the concept that abatement of a nuisance under the state's police power is not a compensable taking.[52] This was not a new holding—similar findings had occurred in a number of cases since the 1800s.[53] However, as Professor David Thomas noted, in earlier years:

> [T]he police power was used mainly for the suppression of nuisance-causing activities that adversely affected public interests. In more recent generations, some have come to accept police power exercises to achieve a much wider range of social benefits. This more aggressive use of police power has naturally led to a much wider range of property interests being "taken" by regulation and supposedly not entitled to compensation. It may be fairly said that virtually all regulatory takings controversies today are generated by attempts to use police power in the modern, expanded fashion.[54]

Indeed, the Court in *Goldblatt* acknowledged that extending the nuisance rule of no compensation to other regulatory contexts was questionable.[55] Retreating from the strict rule of no compensation in all state police power cases by noting that there were times of significant loss in which compensation still may be required in such a case.[56] The Court stated "[t]his is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation. There is no set formula to determine where regulation ends and taking begins."[57]

The famous 1978 case of *Penn Central Transportation Co. v. New York City* expounded further on this concept.[58] Citing *Goldblatt*, the Court noted: "[b]ecause the restriction served a substantial public purpose, the Court thus held no taking had occurred. It is, of course, implicit in *Goldblatt* that a use restriction on real

49. *Id.*
50. *Goldblatt*, 369 U.S. at 593.
51. *Id.*
52. *Id.*
53. *See, e.g.*, Fertilizing Co. v. Hyde Park, 97 U.S. 659 (1878) (no compensation when a law shut down fertilizer company); Mugler v. Kansas, 123 U.S. 623 (1887) (no compensation when an anti-liquor law shut down pre-existing brewery); Gardner v. Michigan, 199 U.S. 325 (1905) (no compensation for the loss of garbage business due to new ordinance); Chicago & Alton R.R. v. Tranbarger, 238 U.S. 67 (1915) (no compensation when the railroad was required to eliminate open drains next to tracks).
54. David A. Thomas, *Finding More Pieces for the Takings Puzzle: How Correcting History Can Clarify Doctrine*, 75 U. COLO. L. REV. 497, 499–500 (2004).
55. *Goldblatt*, 369 U.S. at 594.
56. *Id.*
57. *Id.* at 594 (citations omitted).
58. 438 U.S. 104 (1978).

property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose."[59] Hence, the Court re-emphasized the importance of a bona fide *social welfare* gain in takings cases involving the police power and abatement of a nuisance.[60] Where a law claims to be for a legitimate social purpose, but in actuality is not, a taking will certainly be found.[61] Societal gain is an essential element in police power/nuisance cases, and can sometimes be enough to justify a taking with no compensation.[62]

Analyzing the facts at hand, the Court noted that New York City legitimately accomplished only its police power goals in preventing the plaintiff from building above Grand Central Station, but gained nothing else:

> [T]he Landmarks Law neither exploits appellants' parcel for city purposes nor facilitates nor arises from any entrepreneurial operations of the city. The situation is not remotely like that in *Causby* where the airspace above the property was in the flight pattern for military aircraft. The Landmarks Law's effect is simply to prohibit appellants or anyone else from occupying portions of the airspace above the Terminal, while permitting appellants to use the remainder of the parcel in a gainful fashion. This is no more an appropriation of property by government for its own uses than is a zoning law prohibiting, for "aesthetic" reasons, two or more adult theaters within a specified area, or a safety regulation prohibiting excavations below a certain level.[63]

However, the Court acknowledged that this was not a pure case of abatement of a nuisance in which no compensation would be given.[64] Rather, at issue were historic preservation and aesthetics.[65] Hence, even though social gain by the government justified the taking, a compensable taking could still be found if the loss or harm to the property owner were great enough.[66] The Court stated that, "We now must consider whether the interference with appellants' property is of such a magnitude that 'there must be an exercise of eminent domain and compensation to sustain [it].'"[67] Hence, once again, the traditional loss orientation relating to individual rights was recognized as the basis of takings law in America.[68] The majority in *Penn Central* concluded that the loss was not great enough to find a taking, although a strong dissent concluded otherwise.[69]

59. *Id.* at 127.
60. *Id.*
61. *Id.* at 124–26.
62. *Id.* at 138.
63. *Id.* at 135 (citations omitted).
64. *Penn Central*, 438 U.S. at 136–38.
65. *Id.*
66. *Id.*
67. *Id.* at 136 (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)).
68. *Id.* at 136–38.
69. *Id.* at 135–53.

In 1980, issues related to "gain" versus "loss" surfaced again in the case of *Agins v. City of Tiburon.*[70] The landowner in this case contended that, on its face, a new zoning ordinance was an unconstitutional taking since it limited what he could do with his land.[71] The takings claim at issue was therefore a "facial challenge" to the entirety of the ordinance, rather than an "as applied" challenge to the law only as applied to a particular property.[72] The Court refused to recognize a taking noting that, "[t]he determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest."[73] Hence, once more the focus was one of balancing losses and gains, as contrasted between society at large and the private property owner.[74] This point was emphasized by the Court's holding that a zoning law would constitute a taking if it did not "substantially advance legitimate state interests, or denies an owner economically viable use of his land."[75] The first clause focuses on societal gain; the second on private loss.[76] The fascinating aspect of this statement was the use of the word "or" which allowed courts to focus either on gain or loss as the orientation in finding a taking. This dual approach remained for 25 years, at least in zoning cases, until *Lingle* clarified the issue by eliminating the gain orientation.[77]

The 1981 case of *Hodel v. Virginia Surface Mining & Reclamation Ass'n* dealt once more with the connection between facial takings challenges and loss/gain in the takings context.[78] The Court noted that since no specific property was identified as being harmed, the claimant had only presented a facial challenge to a law which restricted its ability to pursue coal mining in Virginia.[79] Any "as applied" test, regarding how the law impacted specific property, was not ripe for review since the landowner had not exhausted his potential state remedies.[80] The Court stated that in a facial takings challenge the *only* test was the loss-oriented one, determining whether the law "denies an owner economically viable use of his land."[81] Obviously missing was the alternative gain-oriented test given in *Agins*; that a taking could also be found if the law did not substantially advance a legitimate state interest.[82] The omission was apparently purposeful, since the Court had

70. 447 U.S. 255 (1980).
71. *Id.* at 258.
72. *Id.*
73. *Id.* at 260.
74. *Id.*
75. *Id.* (citations omitted). The "substantially advances" concept was greatly expanded in the exactions context by the cases of Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) and Dolan v. City of Tigard, 512 U.S. 374 (1994). In both cases, the United States Supreme Court held that there was no taking when a local government required a developer to give a portion of his land for a public easement, as long as it was roughly proportionate to the negative impact of the development.
76. *Agins*, 447 U.S. at 260.
77. 544 U.S. 528 (2005). *See infra* text accompanying notes 109–11.
78. 452 U.S. 264 (1981).
79. *Id.* at 295–96.
80. *Id.*
81. *Id.* at 296.
82. *Id.* at 295–96.

handed down *Agins* only the year before.[83] In fact, *Agins* was cited as the source of the single loss-oriented facial takings test with the "substantially advances" language omitted.[84] The reason, as suggested years later in *Lingle*, was probably because the "substantially advances" test was to be limited to the zoning context.[85]

At any rate, by asserting only the "loss" test in facial takings, the Court indicated that a facial takings challenge required a showing that the law literally created a total loss to every property owner it touched in order to be found unconstitutional![86] This is an almost impossible standard to meet. Not surprisingly, the Court decided that because "the Act does not, on its face, prevent beneficial use of coal-bearing lands"[87] for other potential purposes, the coal company's challenge failed the facial test. It should be noted that the three "harm-based" tests for a regulatory taking in *Penn Central*[88] are "as applied" tests, in which the law "as applied" to the property owner is said to constitute a taking.

The 1982 case of *Loretto v. Teleprompter Manhattan CATV Corp.* added a new twist to the question of whether to focus on "losses" or "gains" in determining if a taking has occurred.[89] The issue was whether a taking occurred upon the installation of "about 36 feet of cable one-half inch in diameter and two 4' x 4' x 4' metal boxes" which altogether occupied "only about one-eighth of a cubic foot of space."[90] The Court established a "per se" rule that *any* permanent physical invasion such as this, no matter how small, constituted a taking.[91] Justice Blackmun in his dissent pointed out that this new rule flew in the face of recent takings holdings such as *Penn Central*, which examined takings from a loss oriented, harm-based standard.[92] Indeed, as Blackmun pointed out, there was hardly any loss suffered by the property owner here.[93] Hence, *Loretto* stands for the proposition that in a pure regulatory taking context the harm must be substantial.[94] However, where an actual physical invasion occurs, no matter how small, the loss or harm can be very slight.[95] This suggests that the real basis for finding a taking here was the government's gain of even a small physical area, rather than the property owner's loss.[96] Accordingly, *Loretto* was a rare, recent United States Supreme

83. *Id.* at 264.
84. *Hodel*, 452 U.S. at 295.
85. 544 U.S. 528, 540–41 (2005).
86. *Hodel*, 452 U.S. at 295–96.
87. *Id.* at 296.
88. 544 U.S. at 538–39. The tests from *Penn Central*, as summarized in *Lingle*, are: (1) the economic impact of the regulation on the property owner, and particularly (2) the degree to which the regulation interfered with the property owner's "distinct, investment-backed expectations," plus (3) the "character of the governmental action," as to whether it approached a physical invasion of land, or was an attempt to adjust "the benefits and burdens of economic life to promote the common good. *Id.*
89. 458 U.S. 419 (1982).
90. *Id.* at 443.
91. *Id.* at 436–37.
92. *Id.* at 444.
93. *Id.* at 433–44.
94. *Id.* at 426–27.
95. *Loretto*, 458 U.S. at 436–37.
96. *Id.*

Court case without a strong "loss" orientation because of the physical nature of the taking.[97]

The general rule that takings in the United States are based on losses rather than gains was stated in the 1984 case of *Ruckelshaus v. Monsanto Co.*[98] Indeed, this is probably the clearest statement ever made by the United States Supreme Court to this effect.[99] In this case, the owner of certain trade secrets was required to disclose them to the EPA in order to obtain a government license.[100] When the EPA indicated that it intended to publicly disclose the trade secrets, the owner brought a takings claim.[101] The Court found that trade secrets were indeed property, and that some of them were taken, mandating compensation.[102] In its opinion, the Court stated:

> The question of what constitutes a "taking" is one with which this Court has wrestled on many occasions. *It has never been the rule that only governmental acquisition or destruction of the property of an individual constitutes a taking*, for "courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking."[103]

Notwithstanding this clear statement of an exclusive "loss" orientation in all takings cases, the very next year the Supreme Court stated as one of its reasons for not finding a taking that "the United States has taken nothing for its own use."[104] The case was *Connolly v. Pension Benefit Guaranty Corp.*, and at issue was a penalty to employers who withdrew from pension plans.[105] The penalty was not found to be a taking.[106] The Court made no further comments on the gain/loss issue.[107] Seven years later in another pension case in which no taking was found, this statement was again quoted, but once again there was no discussion of losses or gains as the means to identify takings.[108]

97. *Id.*
98. 467 U.S. 986 (1984).
99. *Id.*
100. *Id.* at 998.
101. *Id.* at 999.
102. *Id.* at 1002–03.
103. *Id.* at 1004–05 (citing United States v. General Motors Corp., 323 U.S. 373, 378 (1945)) (emphasis added).
104. 475 U.S. 211 (1986).
105. *Id.*
106. *Id.*
107. *Id.*
108. Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602 (1993). Gain from the government was identified as being "merely incidental" to the regulatory scheme, and had no bearing on the takings question. *Id.* Interestingly, in Eastern Enters. v. Apfel, 524 U.S. 498 (1998), the Court summarized both *Connolly* and *Concrete Pipe*, and seemed to think it significant that in both cases "the government had not occupied or destroyed the employer's property." *Id.* at 528. This statement was apparently

The 2005 *Lingle* case strongly emphasized the harm-based "loss" orientation of American takings cases.[109] The Court noted that each of the regulatory takings tests used by the Court over the years "focuses directly upon the severity of the burden that government imposes upon private property rights."[110] The Court ruled that the "substantially advances" test from *Agins* is a due process test, not a takings test, therefore it has no place in a takings analysis.[111] Hence, no longer could courts choose between a gain orientation in determining the existence of a regulatory taking based on whether the law substantially advanced a legitimate state interest.[112] This solidified the concept that American regulatory takings jurisprudence is entirely loss oriented.[113] The Court expounded by noting the "substantially advances" formula suggests a means-ends test: "It asks, in essence, whether a regulation of private property is effective in achieving some legitimate public purpose . . . such a test is not a valid method of discerning whether private property has been 'taken' for purposes of the Fifth Amendment."[114]

The Court explained its reasoning, stating that "[i]nstead of addressing a challenged regulation's effect on private property, the 'substantially advances' inquiry probes the regulation's underlying validity."[115] The "validity" referred to is nothing more or less than the question of whether there is a legitimate, constitutionally acceptable gain, while the "effect on property" is the loss.[116] However, the Court left intact the rule that there was no taking in cases of abatement of nuisances under the police power in order to obtain a social welfare gain.[117] No taking will be found in nuisance cases "except . . . [where] 'background principles of nuisance and property law' independently restrict the owner's intended use of the property."[118]

In sum, the United States Supreme Court has repeatedly emphasized the "loss" element as essential in all regulatory takings.[119] While a gain orientation has sometimes been suggested as an alternative, the loss orientation has always won out in the end.[120] A regulatory taking will be found if the loss to the property from the government action is great enough.[121] This point is derived from the individual rights orientation of the Fifth and Fourteenth Amendments.[122] Where the takings clause is seen primarily as a protection of individual rights, a loss orientation is an

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offered as justification for the fact that no taking was found. Once again however, there was no further discussion of the point.

109. 544 U.S. 528 (2005).
110. *Id.* at 539.
111. *Id.* at 532.
112. *Id.*
113. *Id.*
114. *Id.* at 542.
115. *Lingle*, 544 U.S. at 543.
116. *Id.*
117. *Id.* at 544.
118. *Id.* at 538 (citing Lucas v. S. Carolina Coastal Council, 505 U.S. 1003, 1026–32 (1992)).
119. *See Lingle*, 544 U.S. at 546.
120. *Id.* at 547.
121. *Id.* at 548.
122. *Id.*

unavoidable consequence.[123] However, the strong loss orientation does not apply in respect to physical takings.[124] Where very small amounts of physical property are taken and therefore little loss to the property owner occurred, a taking may still be found.[125]

III. THE AUSTRALIAN COMPARISON

The Australian High Court has acknowledged the similarities between the Australian Takings Clause and that of the United States Constitution.[126] The Australian Takings Clause is found at sec 51(xxxi) of the Australian Constitution, and states that Parliament shall have power to make laws with respect to "the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws."[127] Although the wording is clearly different from the Fifth Amendment—being expressed as a grant of power rather than as a restriction on power—the intended scope of the clause was far more similar than one might think at first.[128] In spite of its expression as a grant of power, the context shows that Edmund Barton,[129] who proposed the clause, was far more interested in defining limits to the eminent domain power than providing an explicit grant of the power.[130] Indeed, he and many others at the convention never doubted the government's inherent power to take.[131] The Australian Constitutional Convention had discussed, and rejected, a proposed due process clause.[132] Hence, Barton knew that his proposed takings clause could not contain the words "due process." But, he also believed that any meaningful takings protection needed an effective fairness element; therefore, he inserted the phrase "just terms" to mean essentially the same thing as due process in the takings context.[133] Compensation was not mentioned, but was understood to be an essential element.[134] The "public use" protection was worded differently, as the necessity for

123. *Id.*

124. *Id.* at 548.

125. *Lingle*, 544 U.S. at 548.

126. *See, e.g.*, *Andrews v Howell* (1941) 65 CLR 255, 282 (opinion of Dixon, J.); *Wurridjal v Commonwealth* (2009) 237 CLR 309 (opinion of Kirby, J.).

127. *See* AUSTRALIAN CONSTITUTION s. 51(xxxi).

128. *Id.*; Ostler, *Acquisition Clause, supra* note 5 at 223–35.

129. Edmund Barton was one of the principal delegates at the Constitutional Convention, and came from Australia's largest state of New South Wales. *See* JOHN REYNOLDS, EDMUND BARTON (1948), for a more detailed discussion of his life and contributions.

130. *See* Ostler, *Acquisition Clause, supra* note 5, at 223–35.

131. *Id.* at 226–27.

132. *See Official Report of the National Australasian Convention Debates* 667, 690 (Third Session) (Melbourne: 1898).

133. In 1915, Justice Barton of the Australia High Court, explained what he had meant by "just terms." He noted "in some of the States of the American Union the power of expropriation is limited by their Constitutions to acquisition *on just terms*." *NSW v Commonwealth* (1915) 20 CLR 55, 78 (emphasis added). Significantly, *none* of the American state constitutions have *ever* used the phrase, 'just terms.' However, almost all of them use the phrase 'due process' or 'law of the land.' Clearly, Barton was referring to due process as the essence of the Australian concept of fairness embodied in 'just terms.' He had been unable to propose the use of the words 'due process,' since the Constitutional Convention had already explicitly rejected a proposed due process clause. *See Official Report of the National Australasian Convention Debates* 667, 690 (Third Session) (Melbourne: 1898).

134. *NSW*, (1915) 20 CLR 55, 78.

a public "purpose."[135] However, the context shows that the Australian founders had nearly the same intent with this part of the clause as the Fifth Amendment.[136] Hence, both the Australian and American takings clauses contain the basic three takings protections—fairness (due process or just terms), public use and compensation.

Early High Court cases interpreting the acquisition clause universally followed the pattern then existing in the United States; takings occurred where there was a loss to the property owner, rather than a gain by the Commonwealth or a third party.[137] Verbiage in the 1948 case of *Bank of New South Wales v Commonwealth* indicated that—just as in the U.S.—not only could the loss of physical property be classified as a taking, but a regulation which diminished property rights could be as well.[138] Justice Dixon stated:

> s. 51 (xxxi.) is not to be confined pedantically to the taking of title by the Commonwealth to some specific estate or interest in land recognized at law or in equity and to some specific form of property in a chattel or chose in action similarly recognized, but that it extends to innominate and anomalous interests and includes the assumption and indefinite continuance of exclusive possession and control for the purposes of the Commonwealth of any subject of property.[139]

Justice Dixon summed up this view by noting that the Australian Commonwealth takings clause "provides the individual or the State . . . a protection against governmental interferences with his proprietary rights without just recompense."[140] Just as in America, the focus was on the protection of individual rights.[141] With this idea in mind, regulatory takings were naturally seen as loss oriented, just as in the United States.[142]

However, starting in the early 1980s, the focus of the Australian High Court in takings cases became one of gain, rather than loss. The first such case to make this proposal was the 1983 case of *Commonwealth v Tasmania*, sometimes known as the "Tasmanian Dam" case.[143] At issue was whether the Commonwealth's denial of the State of Tasmania's proposed construction of a dam in a state park constituted a taking.[144] A majority of the justices said that no taking had occurred, primarily

135. Ostler, *Acquisition Clause*, *supra* note 5, at 235–38.
136. *Id.*
137. For cases in which this standard was followed, *see, e.g.*, *Andrews v Howell*, (1941) 65 CLR 255; *Grace Brothers Pty Ltd v Commonwealth*, [1946] HCA 11; (1946) 72 CLR 269.
138. [1948] HCA 7; (1948) 76 CLR 1. This case was subsequently appealed to the Privy Council in London, which upheld the Australia High Court's ruling. *See Commonwealth v Bank of New South Wales* (1949) 79 CLR 497; [1950] AC 235.
139. *Id.* at 349.
140. *Id.*
141. *Id.*
142. *Id.*
143. (1983) 158 CLR 1 (1983) 46 ALR 625.
144. *Id.*

because—in spite of how much the State of Tasmania claimed it lost from not being able to build its dam—neither the federal government nor anyone else had gained any "proprietary right."[145] There was a strong dissent from Justice Deanne, who noted that the power to prevent a proposed project "can constitute a valuable asset."[146] He then pointed out:

> [T]he Commonwealth has . . . obtained the benefit of a prohibition, which the Commonwealth alone can lift . . . the practical effect of the benefit obtained by the Commonwealth is that the Commonwealth can ensure, by proceedings for penalties and injunctive relief if necessary, that the land remains in the condition which the Commonwealth, for its own purposes, desires to have conserved. In these circumstances, the obtaining by the Commonwealth of the benefit acquired under the Regulations is properly to be seen as a purported acquisition of property for a purpose in respect of which the Parliament has power to make laws.[147]

Justice Deane's comments highlighted the issue of social welfare gain, which was sometimes mentioned in the American cases.[148] After all, by definition, *any time* government feels it is important enough to take an action that limits a property owner's rights, it must have had some motivation (some gain) for doing so.[149] The question was whether a police power/social welfare type of gain should be a factor in determining the existence of a regulatory taking.[150] What was significant was the High Court's conclusion in this case that social gain is *no* gain at all, by the government or anyone else.[151]

The High Court struggled with the "gain/loss" issue again in the 1994 case of *Georgiadis v Australian and Overseas Telecommunications Corp.*[152] In this case, a new law effectively took away a claimant's right to bring a worker's compensation suit.[153] There was much discussion on the High Court regarding whether a "proprietary right" had been gained, especially in light of the government's

145. *Id.*
146. *Id.* (Deanne, J., dissenting).
147. *Id.*
148. *See supra* discussion on the American Loss Orientation and text accompanying notes 50–69, 117.
149. (1983) 158 CLR 1.
150. *Id.*
151. *Id.*
152. [1994] HCA 6; (1994) 119 ALR 629; (1994) 179 CLR 297 (Austl.).
153. *Id.* U.S. courts also recognize that "a vested cause of action is property." Gibbes v. Zimmerman, 290 U.S. 326, 332 (1933). However, there is no property right in a particular *remedy* pertaining to that cause of action. *Id.* Furthermore, the Supreme Court has not clearly ruled on the issue of when vesting of the right occurs. The majority of the circuit courts hold that the right does not vest until a final, unreviewable judgment has been obtained. *See, e.g.*, Hammond v. United States, 786 F.2d 8, 12 (1986) (a right to a cause of action does not vest "until a final, unreviewable judgment is obtained"); Ileto v. Glock, 421 F. Supp. 2d 1274, 1299 (C.D. Cal. 2006) ("every circuit court to address the issue has . . . concluded that no vested property right exists in a cause of action unless the plaintiff has obtained a final, unreviewable judgment"). Unlike Australia, no takings case regarding a cause of action as a property right has been addressed by the U.S. Supreme Court.

argument that the right to sue was merely extinguished, and no one had "gained" it.[154] A majority of the Court (including Justice Deane) determined that a taking had indeed occurred, since the government had gained the money it otherwise would have had to pay in a worker's compensation claim.[155] Hence, the gain was quantified, rather than characterized as a social welfare gain.[156] Since a proprietary right had been gained, a taking had occurred.[157] Thus, the Court stuck precariously to the "gain of a proprietary right" argument.[158] In wording similar to that of *United States v. General Motors Corp.*,[159] the Court stated:

> "Taking" directs attention to whether there has been a divesting, a question which is answered by looking to the position of the person who claims that he has been deprived of his property. On the other hand, "acquisition" directs attention to whether something is or will be received. If there is a receipt, there is no reason why it should correspond precisely with what was taken. That is particularly so with "innominate and anomalous interests."[160]

The reference to "innominate and anomalous interests" is taken, of course, from Justice Dixon's statement in *Bank of New South Wales v Commonwealth*, and refers to regulatory takings.[161] This statement highlights better than any other the semantic nature of the issue.[162] The words "take" or "taking" tend to bring to mind the concept of a forced transfer between parties, with emphasis on the loss of the one losing the property.[163] The words "acquire" or "acquisition" tend to bring to mind some form of gain by the one receiving the property.[164] Hence, the fact the Fifth Amendment used the word "taken" and s. 51(xxxi) used the word "acquisition" has apparently had an impact on how reviewing courts have dealt with takings in each country.[165]

The majority in *Georgiadis* was well aware of the fine line it was drawing in deciding the case as it did.[166] Indeed, the Court acknowledged that, similar to balancing tests used in the United States to find a regulatory taking based on the severity of the loss, there was an undeniable element of "ad hoc" balancing in finding a regulatory taking based on gain.[167] The majority stated:

154. (1994) 179 CLR 297.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. 323 U.S. 373 (1945); *see also supra* text accompanying notes 29–33.
160. 46 ALR at 633; (1994) 179 CLR 297 (Austl.).
161. *See Commonwealth v Bank of New South Wales* (1949) 79 CLR 497.
162. (1994) 179 CLR 297.
163. *Id.*
164. *Id.*
165. *Id.*
166. (1994) 179 CLR 297.
167. *Id.*

> One consequence of s. 51(xxxi)'s operation through characterization and concern with substance is that there will inevitably be borderline cases in which the question whether a law bears the distinct character of a law with respect to the acquisition of property . . . is finely balanced. The present is such a case. On balance, we have reached the conclusion that [this case] does possess such a distinct character.[168]

The dissenters point out the inconsistencies in the majority's position, particularly in maintaining that something was "gained."[169] In his comments, Justice Toohey acknowledged the close parallels between the approach that something was gained or something was lost.[170] He said:

> No doubt the defendant has benefited from the operation of s.44 of the Act in that a person in the position of the plaintiff can no longer recover damages for non-economic loss. But that falls far short of saying that there was an acquisition of property by the defendant. *The dichotomy between extinguishment and acquisition cannot be pressed too far; the two are not necessarily incompatible.*[171]

The "something gained–something lost" debate continued to surface in subsequent Australian High Court cases.[172] The parties in takings cases were aware of the prior case law which said that some proprietary right had to be acquired in order for a taking to be found.[173] Those who asserted a taking, therefore, were always able to come up with some kind of "gain" to the government, while the government always argued lack of any gain, usually citing the "Tasmanian Dam" case as support.[174] The Court was left to decide whether the asserted "gain" was really the type of gain that made a difference in the regulatory takings context.[175]

An example is the 1997 case of *Newcrest Mining v Commonwealth*.[176] In this case, a new federal law prohibited mining in a national park in the Northern Territory.[177] Newcrest Mining held a lease to mine in the park, and was prevented from doing so.[178] Naturally, it brought suit, arguing a taking contrary to just terms.[179] The Commonwealth argued:

168. *Id.* at 308.
169. *Id.*
170. (1983) 158 CLR 1.
171. *Id.* at 32 (emphasis added).
172. *Newcrest Mining v Commonwealth*, (1997) 190 CL.R. 51 (Austl.); *Commonwealth v Mewitt*, (1997) 191 C.L.R. 471 (Austl.); *Commonwealth v WMC Resources*, (1998) 152 ALR 1 (Austl.).
173. *Id.*
174. (1949) 79 CLR 497.
175. (1983) 158 CLR 1.
176. [1997] HCA 38; (1997) 190 CLR 51; (1997) 147 ALR 42.
177. *Id.*
178. *Id.*
179. *Id.*

> [B]y making the proclamations it did not acquire any property in any of the leases . . . the prohibition produced no benefit of a proprietary nature for the Commonwealth or the Director. The proclamations may have prevented Newcrest from mining the land but neither the Commonwealth nor the Director received any corresponding advantage.[180]

Therefore, once again the government argued since no gain had occurred, no taking should be found.[181] This is very similar to the dam owner's argument in *Pumpelly v. Green Bay Co.*, or the argument of the Air Force in *United States v. Causby*.[182] The Justices in the opinion debated this point; some in favor, others against. Justice McHugh argued:

> [E]ven if there was effectively a diminution or extinguishment of all or part of Newcrest's interests, there was no gain by the Commonwealth . . . Both as a matter of substance and of form, the Commonwealth obtained nothing which it did not already have. In colloquial terms, Newcrest lost but the Commonwealth did not gain."[183]

On the other hand, Justice Brennan argued that the Commonwealth had indeed gained something: "What was acquired was the benefit of the extinguishment of Newcrest's rights to carry on operations for the recovery of minerals."[184] Clearly, Justice Brennan had changed his thinking since the Commonwealth received a very similar type of social benefit type of gain in the "Tasmania Dam" case, but he had claimed in that case the Commonwealth had gained nothing.[185] Ultimately, a slim majority of the justices found in favor of a "gain" rather than a "loss," and a taking was found.[186]

Subsequent Australian High Court cases continued to focus on the "something gained" criteria, frequently in the context of a law that limits or changes the right of a claimant to bring suit, as in *Georgiadis*.[187] Indeed, in the 1997 case of *Commonwealth v Mewitt*,[188] the specific issue was once again whether loss of a right to sue constituted a taking, and whether the *Georgiadis* decision should be overruled. A majority of the Court (including the dissenters from *Georgiadis*) said that *Georgiadis* should not be overruled, and that a taking had occurred when the government limited the right to sue.[189] Justice Dawson acknowledged that finding

180. *Id.* at 81.
181. *Id.*
182. *Causby*, 328 U.S. at 265.
183. 190 CLR 51.
184. *Id.* at 50.
185. *Id.*
186. *Id.*
187. (1983) 158 CLR 1.
188. [1997] HCA 29; (1997) 146 ALR 299 (Austl.).
189. *Id.*

the existence of a gain sufficient for a taking was largely a matter of opinion, on which the justices differed.[190] He stated:

> The difference between the majority and the minority [in *Georgiadis*] went not so much to principle as to its application in the particular circumstances, *the majority preferring a broader approach than the minority in determining what amounts to an acquisition of property within the meaning of s. 51(xxxi).*[191]

The loss/gain issue surfaced again in *Commonwealth v WMC Resources*.[192] At issue was a law which effectively terminated a seabed mining right held by a private company, in an area of the sea disputed between Australia and Indonesia.[193] This time, a majority of the Justices determined that no taking had occurred, even though the mining company had clearly lost something.[194] Each Justice addressed the question of whether any "gain" had occurred that would give rise to a taking.[195] Two found a gain; four did not.[196] The fact there could be such a divergence over whether a "gain" had occurred among such learned judges speaks volumes by itself.[197] In an interesting comparison between the rights-orientation of America's Fifth Amendment, contrasted with the Australian High Court's focus on gain rather than loss, Justice McHugh stated, "If s 51(xxxi) of the Australian Constitution was a guarantee of property rights in the way that the Fifth Amendment to the United States Constitution is a guarantee of property rights, the result of this case might well be different."[198]

In the 2000 case of *Smith v ANL Ltd*, the Court once again refused to overrule *Georgiadis*, and instead extended its reach.[199] Once more, a new law restricted a right to bring a claim against the government.[200] In *Smith*, however, the claimant did not lose the right as in *Georgiadis*,[201] but was subjected to a six month time limit in which to bring his claim.[202] The Court ruled this too was a taking.[203] The reason was summed up succinctly by Justice Gleeson, "[T]he appellant's pre-existing common law right was modified; and a corresponding benefit was

190. *Id.*
191. *Id.* at 310.
192. There were two such cases. In the first in 1996, the Federal Court of Australia, General Division, found a taking. *See Commonwealth v WMC Resources* (1996) 136 ALR 353 (Austl.). This decision was then appealed to the High Court, which reversed in 1998, finding no taking. *See Commonwealth v WMC* [1998] HCA 8; (1998) 152 ALR 1 (Austl.).
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. *Commonwealth v WMC* (1998) 152 A.L.R. 11, ¶ 149.
199. [2000] HCA 58; (2000) 176 ALR 449.
200. *Id.* at 498, ¶ 1.
201. *Georgiadis*, 119 ALR 629.
202. *Smith*, 204 CLR at 499, ¶ 5.
203. *Id.*

conferred on the respondent."[204] The benefit, of course, was government becoming free from claims once the six month time limit had passed. However, Justice Gleeson acknowledged that the government could try to dodge the "something gained" question by craftily writing its laws in a way that created an appearance of no gain.[205] The language he used unquestionably supported the private rights/loss orientation of the takings clause, as he noted "a guarantee protecting rights of private property could be rendered worthless by the adoption of a drafting technique that would produce, for the citizen affected, a result having no practical difference from the result of extinguishment."[206]

Two of the Justices in *Smith* choose to elaborate the problems and logical inconsistencies with the fixation on "something gained" as the touchstone for regulatory takings cases.[207] Justice Kirby noted that it is possible to find "something gained" in almost any taking: "[n]ot infrequently, property rights are acquired under federal law for the precise purpose of extinguishing them, that being the very object of the acquisition."[208] This reference appears to be, once more, in respect to a social welfare gain for the entire community.[209] Additionally, Justice Kirby acknowledged the extreme difficulty in finding a proper dividing line in cases of this type, noting that "[f]inding a touchstone to distinguish legislation which falls within, and that which falls outside, the requirements of s 51(xxxi) is not easy. No verbal formula provides a universal criterion."[210]

Justice Callinan noted that attempts to limit the "gain" sufficient for a taking to traditional, physical types of "property rights" was too simplistic.[211] He stated:

> [W]hat has been acquired may often be without any analogue in the law of property and incapable of characterization according to any established principles of property law. The powers of the State to take and effect property are far reaching and the means by which this may be done are almost innumerable.[212]

He then struck at the heart of the perceived difference between "something lost" and "something gained," in these words:

> There are also statements in some of the cases which place significance on a shade of perceived difference in meaning between the word "taken" in the Fifth Amendment to the United States Constitution and "acquisition" in s 51(xxxi) of the Australian Constitution . . . In my opinion there is little or no

204. *Id.* at 500, ¶ 7.
205. *Id.* at 500–01.
206. *Id.* at 500, ¶ 7.
207. *Id.*
208. *Smith*, 204 CLR at 521, ¶ 78.
209. *Id.*
210. *Id.* at 528–29, ¶ 100.
211. *Id.*
212. *Id.* at 542, ¶ 157.

> significance to be attached to any apparent shade of difference in meaning between the two words, "take" and "acquire."[213]

Justice Callinan then bluntly pointed out the logical inconsistency of the gain-oriented, "proprietary rights" nature of the Australian takings test.[214] He noted that acquisition cases always came to the courts on the claim that someone's proprietary right was at issue (i.e., something was lost).[215] Yet, the Court always flipped and reached its conclusion about the acquisition on whether there had been "something gained" by an entirely different party.[216] For Justice Callinan, the whole approach of the Australian High Court was schizophrenic.[217] He drove the point home with one more punch—if the High Court truly only found takings where something had been *gained*, why did it then value the taking (for purposes of compensation) based on what the property owner had lost?[218] Wouldn't the value gained be more accurate, if gain was really the best determining factor of the existence of the taking?[219]

Justice Callinan agreed with Justice Kirby that it was possible to find "something gained" if the court looked hard enough.[220] He noted that, in every recent taking case, "it is not difficult to see how the Commonwealth, or somebody else did derive some form of benefit . . ."[221] Thus, every taking case just boiled down to personal opinions of the Justices, since "[a] distinction may be very much in the eyes of the beholder."[222] For Justice Callinan, the "Tasmanian Dam" case was a prime example since there had been an obvious gain in the form of attainment of the Commonwealth's goal in stopping Tasmania's proposed dam.[223]

In the 2007 case of *Attorney General for the Northern Territory v Chaffey*, the Court seemed to retreat somewhat from the vigor of its prior "something gained" cases.[224] A Northern Territory statute effectively reduced a worker's compensation claim held by Mr. Chaffey.[225] He sued, alleging a violation of the takings clause applicable in the Northern Territory.[226] The Court ruled that no acquisition had occurred.[227] The distinction which allowed this conclusion was that workers compensation was based on a statutory grant, and was therefore not the type of

213. *Smith*, 204 CLR at 545–46, ¶¶ 164, 167.
214. *Id.* at 547, ¶ 168.
215. *Id.* at 543, ¶ 159.
216. *Id.* at 547, ¶ 168.
217. *Id.*
218. *Id.*
219. *Id.*
220. *Smith*, 204 CLR at 548, ¶ 173.
221. *Id.*
222. *Id.* at 550, ¶ 177.
223. *Id.* at 546, ¶ 166.
224. (2007) 231 C.L.R. 651.
225. *Id.* at 661, ¶¶ 11–12.
226. *Id.* at 659, ¶ 2, 661–62, ¶ 14; *see also Northern Territory (Self Government) Act 1978* (Cth) ss 5, 6, 50. It should be noted that the individual Australian states are not subject to the Commonwealth takings clause, but may provide their own takings limitations. *See NSW v Commonwealth* (1915) 20 C.L.R. 55, 78. However, the territories are subject to federal (Commonwealth) law.
227. *Att'y Gen.*, 231 CLR at 665–666, ¶ 30.

property right the "just terms" clause was meant to protect.[228] In other words, this was a mere statutory adjustment that incidentally affected someone's entitlement, rather than a taking.[229] This is a fine distinction which could obviously swallow the rule since in the process of statute-making, an "adjustment" to an "entitlement" could almost always be found. Indeed, just how was the workers compensation claim in *Georgiadis* any different?[230] Both Justice Kirby and Callinan once again noted their dissatisfaction with the current state of acquisition law, but reluctantly joined in the decision nonetheless.[231]

The most recent case to significantly discuss the "something gained" aspect of acquisition law was the 2009 case of *ICM Agriculture Party Ltd. v Commonwealth*.[232] Here, the government eliminated groundwater bore licenses and a new licensing requirement was imposed which allowed the removal of less water.[233] Those who had lost much of their water sued, asserting a taking.[234] In keeping with the "something gained" focus, three of the Justices quoted from a prior case, *Mutual Pools & Staff Party Ltd. v Commonwealth*,[235] acknowledging the difficulty of the "something gained" analysis:

> [T]he fact remains that s 51(xxxi) is directed to "acquisition" as distinct from deprivation. The extinguishment, modification or deprivation of rights in relation to property does not of itself constitute an acquisition of property. For there to be an "acquisition of property," there must be an obtaining of at least some identifiable benefit or advantage relating to the ownership or use of property. On the other hand, it is possible to envisage circumstances in which an extinguishment, modification or deprivation of the proprietary rights of one person would involve an acquisition of property by another by reason of some identifiable and measurable countervailing benefit or advantage accruing to that other person as a result.[236]

In short, someone's loss frequently meant that someone else had correspondingly gained.[237] Although the Justices were willing to admit that a loss by one usually corresponded to a gain by another, they were unwilling to find it here.[238] The bore licenses at issue related to water, "a natural resource, and the

228. *Id.*
229. *Id.* at 666, ¶ 32.
230. *Id.* at 671, n.82. None of the justices even attempted to answer this question. *Georgiadis* was only mentioned in footnotes, and not in the comments of any of the justices.
231. *Id.* at 671, ¶¶ 51–52.
232. 240 CLR 140.
233. *Id.* at 159, ¶ 6.
234. *Id.* at 160, ¶ 8.
235. [1994] HCA 9; (1994) 179 C.L.R. 155, 185 (Austl.). This was a somewhat convoluted case regarding a refund of a swimming pool tax and it dealt primarily with the distinction between taxes and takings.
236. *ICM*, (2009) 240 CLR at 179–80, ¶ 82.
237. *Id.*
238. *Id.* at 180, ¶ 84.

State always had the power to limit the volume of water to be taken from that resource."[239] In short, bore licenses cannot be categorized as a "proprietary right," whose gain would indicate the existence of an acquisition.[240] Justices Hayne, Kiefel, and Bell were essentially in agreement.[241] They noted:

> [T]here can be no *acquisition* of property unless some identifiable and measurable advantage is derived . . . That is, another must acquire "an interest in property, however slight or insubstantial it may be." The only possible recipient of an advantage in this matter is the State. Did it derive some advantage from replacing the bore licenses or reducing water entitlements?[242]

Their answer was a simple but emphatic "no."[243]

In sum, the Australian High Court initially viewed the Australian Commonwealth takings clause as a protection of private rights, in which regulatory takings could be found if a property owner suffered a "loss."[244] Beginning in 1983, the focus shifted.[245] Today, in order to find a federal constitutional taking, there must be an identifiable gain of a proprietary right.[246] If there is not, irrespective of any loss to the property owner, no taking will be found.[247] The High Court has struggled with this approach, as seen through its inconsistent and contradictory opinions. Exceptions to the rule have been found when government merely "adjusts entitlements," or acts in respect to matters in which there are no proprietary rights, such as in the case of water rights.[248]

IV. INTERPRETIVE CONSIDERATIONS

As discussed above, Courts in both countries have struggled over whether a taking is something gained, or something lost. Loss orientation prevails in the United States, and is never seriously questioned.[249] However, in Australia, originally a loss orientation was followed, but in recent years has been replaced with a gain orientation.[250] Hence, the highest courts in each country now interpret takings questions in radically different ways.

There are a number of problems inherent in each approach. When a taking is viewed as something lost, government faces continuous claims for compensation. This results in potentially large expenditures of public funds in cases where there

239. *Id.*
240. *Id.* at 181, ¶ 89.
241. *Id.* at 182, 201–02.
242. 240 CLR at 201–02 (citation omitted).
243. *Id.* at 202, ¶ 149.
244. *Bank of New South Wales*, (1948) 76 C.L.R. 1.
245. *Tasmania*, (1983) 46 A.L.R. 625.
246. *ICM*, (2009) 240 CLR at 179–80; *Mutual Pools*, (1994) 179 CLR at 185.
247. *See ICM*, (2009) 240 CLR at 181.
248. *See Att'y Gen.*, (2007) 231 CLR at 666; *ICM*, (2009) 240 CLR at 181.
249. *Lingle*, 544 U.S. 528 (2005).
250. *Bank of New South Wales*, (1948) 76 CLR 1; *see ICM*, (2009) 240 CLR at 181.

was little, if any, gain to anyone. The burden falls on society to continually reimburse individuals with little to show from it. On the other hand, if the focus is solely on something gained, individual rights may be abused and private property owners may find themselves footing the bill for public projects.

In reviewing these issues, a few key considerations arise repeatedly and must be considered. These issues are: republicanism versus liberalism; the meaning of the term "property;" and the challenge of quantification. Each issue will be discussed in turn, followed by a conclusion about which approach—gain or loss—is arguably the better one.

A. Republicanism v. Liberalism

At its heart, the question of "something gained/something lost" focuses on a simple theoretical question; which is more important: protecting individuals from invasions by society or protecting society from rampant individualism that may destroy the cohesion of society? This is the very essence of the debate between liberalism and republicanism. Speaking of republicanism at the time of America's founding, Gordon Wood stated, "[t]he sacrifice of individual interests to the greater of the whole formed the essence of republicanism . . . ."[251] Liberalism is the opposite and focuses on individualism as the pre-eminent concern, with societal goals being secondary.[252] William Michael Treanor expounded further on the theory of liberalism:

> Liberalism begins with the belief that individuals are motivated primarily, if not wholly, by self-interest and with the belief that rights are prepolitical. Government exists to protect those rights and the private pursuit of goals determined by self-interest. Republican thinkers, in contrast, see the end of the state as the promotion of the common good and of virtue. Rights, rather than being prepolitical, are created by the polity and subject to limitation by the polity when necessitated by the common interest. Whereas liberals are comfortable with economic self-interest, republicans have a profoundly ambivalent stance toward private property.[253]

Liberalism, with its focus on protecting individual rights, is closely tied to the analysis of "something lost."[254] A regulatory taking will only be found when the

251. GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 53 (1969); JAMES W. ELY, Jr., THE GUARDIAN OF EVERY OTHER RIGHT 33 (3d ed. 2008) ("[T]he theory of republicanism, influential during the revolutionary era, subordinated private interests to the pursuit of public welfare.").

252. *See generally* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 821 (1995) (describing differences between liberalism and republicanism).

253. *Id.*

254. Christie, *supra* note 12, at 353.

individual loss is great enough.[255] Republicanism, with its focus on the betterment of society as a whole, is tied to the "something gained" point of view.[256] Under this view a regulatory taking will be found only when society has gained something, regardless of how much loss any individual may have suffered.

The debate between liberalism and republicanism has continued for decades, and is not likely to end any time soon. It is noteworthy that both schools of thought recognize compensation for takings, albeit under different criteria.[257] As Treanor has said:

> Republican and liberal attitudes towards compensation should not be viewed as polar opposites. Under both schools of thought, compensation was considered the norm. The republican school, however, believed that the ultimate decision of whether to compensate the affected individual was to be resolved by the ordinary political process; the liberal believed that the obligation to compensate existed outside of that process and could not be compromised by it.[258]

Even though compensation is recognized under both of the theories, it is less likely to be awarded under republicanism than liberalism. There may be times that granting compensation would elevate the individual's needs above societal needs, which republicanism could never allow. Therefore, the two points of view are fundamentally at odds.

Viewing takings as losses tends to emphasize a "me" orientation—highlighting the needs and rights of the individual over those of society, as protection of the individual and his claimed property rights reigns supreme. Conversely, if the takings or acquisition clauses are not viewed as a protection, but are based on the concept that the government has the power and the right to take for the good of society, then a "something gained" orientation follows. The overall goals of society become more important than those of the individual, although individuals are still to be treated fairly by reasonable compensation for legitimate losses due to a taking. When the focus is on the good of society, the belief is that individuals should not hold society hostage and demand a hefty "ransom" every time they suffer a loss. Under this view, individuals should frequently not be compensated at all, or given only very little compensation since society's goals are far more important.

While the "loss" orientation of liberalism is the norm in the United States and was initially followed in Australia, it should be noted that courts in both countries have also followed a republicanism standard to an extent, since the highest courts in both countries have indicated that some circumstances fall outside the ambit of

255. *Id.* at 377.
256. *Id.* at 353.
257. Treanor, *supra* note 252, at 826, n.226.
258. *Id.*

traditional takings protections, and therefore no compensation should be given.[259] Even Justice Holmes' original statement in *Pennsylvania Coal*, on which all subsequent regulatory takings are based, is indeed influenced by this view.[260] He stated that, "while property may be regulated to a certain extent, if regulation goes *too far* it will be recognized as a taking."[261] The corollary to this statement is that regulations that do *not* go too far, do not constitute a taking, even though there may be a loss to a property owner. The reason is simple: "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[262] Social welfare gain can justify a taking to a point, but not in every case. It is a balancing act between what society should pay for and what individuals should pay for.

One possible solution to the dilemma would be to focus on the intent of the legislature. Acts of the legislature which are challenged under the Takings Clause may not have been viewed by the legislature at the time of their drafting as having anything to do with takings at all. Therefore, it could be argued that, unless government *knowingly* undertakes its action to purposefully sidestep the Takings Clause, such actions should not be compensable takings because society's needs should be greater than those of the individual. This is because society stands to lose every time a regulatory takings claim is brought in respect to "innocent" legislation, and the property owner wins. The situation is exacerbated when victorious property owners embolden other property owners to follow their example. When this occurs, society loses, individuals gain, and the courts are burdened with many takings cases. From the standpoint of republicanism's focus on what is best for society, regulatory takings should be reviewed only to consider whether the legislature knowingly intended to avoid the Takings Clause when it enacted the law at issue. Any review by the courts greater than this would be a judicial intervention in the legislative decision making process regarding what is *good* for society.

B. The Meaning of "Property"

At its foundation, the debate between liberalism and republicanism—and between "something lost" and "something gained"—focuses on the meaning of the word "property." As Laura Underkuffler-Freund stated, "[p]roperty describes the tension between [the] individual and [the] collective . . . [and that] tension . . . is a part of the concept of property, itself."[263] The importance of the meaning of

259. *See supra* text accompanying notes 52–62, 117–18 (addressing prevention of a nuisance under police power). *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1022 (1992) (citing Mugler v. Kansas, 123 U.S. 623 (1887)). A frequent example in Australia are laws which work a forfeiture of property as a penalty for criminal activity. *See, e.g.*, *Trade Practices Comm'n v Tooth & Co.*, (1979) 142 CLR. 397 (Austl.) (citing *Burton v Honan*, [1952] HCA 30; (1952) 86 CLR 169)).

260. 260 U.S. at 415.

261. *Id.* (emphasis added).

262. *Id.* at 413.

263. Laura Underkuffler-Freund, *Takings and the Nature of Property*, 9 CAN. J.L. & JURISPRUDENCE 161, 168 (1996).

"property" is significant in the "something gained" analysis, and how that analysis relates to regulatory takings. The whole idea of "something gained" assumes that some "property" was gained. This view has the potential to completely eliminate the existence of regulatory takings, as any gain of actual property negates the concept of compensation for mere harm to property. One Australian scholar noted, "there must be an acquisition, an actual acquiring, not a mere restriction on the use and enjoyment of proprietary rights."[264]

More fundamentally, this focus likewise eliminates the argument that the "gain" sufficient for a taking can constitute social welfare gain. What must be gained under this understanding is an actual, identifiable property right. It is easy to see the attraction of such a focus. The seemingly simple formula of finding a taking only where an identified property right is gained seems fairly straightforward and easy to apply, and seems to eliminate the problem of "regulatory takings." No wonder that the Australian High Court has gone down this road.

The problem with this approach is that it assumes an extremely narrow definition of "property." Indeed, the very way in which ~~it~~ property is defined relates to the existence of regulatory takings, since a broad definition will include interests that go far beyond what is usually considered to be traditional property.

The question of how to define property has been debated since the founding. Drafter of the Fifth Amendment James Madison stated that, "[a man has] property in the free use of his faculties and free choice of the objects on which to employ them."[265] Then, speaking specifically of takings, he stated:

> That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called . . . If there be a government then which prides itself in maintaining the inviolability of property; which provides that none shall be taken *directly* even for public use without indemnification to the owner, and yet *directly* violates the property which individuals have in their opinions, their religion, their persons, and their faculties; nay more, which *indirectly* violates their property, in their actual possessions, in the labor that acquires their daily subsistence, and in the hallowed remnant of time which ought to relieve their fatigues and soothe their cares, the inference will have been anticipated, that such a government is not a pattern for the United States.[266]

264. *See* LANE, *supra* note 5, at 163.

265. *The National Gazette* (March 29, 1792), *reprinted in* 6 THE WRITINGS OF JAMES MADISON 101 (Gaillard Hunt ed., 1900).

266. *Id.* at 102–03 (emphasis of the word "directly" in original; emphasis of the word "indirectly" added).

For Madison, then, property could even include broad concepts, such as a person's opinions and their faculties.[267] The "indirect" violation he referred to would appear to include regulatory takings.[268]

Theorists have grappled with the definition of "property" for decades, but have not reached a common consensus.[269] The simplest and most basic definition, one that is learned by virtually all first year law students, is that property is a "bundle of rights" in respect to the outward things of the world.[270]

However, Richard Epstein favors the view of 18th century legal jurist William Blackstone, who identified property as, "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[271] Additionally, Blackstone said property is "the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land."[272]

In contrast, Thomas Grey asserts that the concept of property has become so fractured that no meaningful definition can be found.[273] While on the other hand, Stephen Munzer notes that a number of scholars view property simply "as a set of social relations."[274] Leigh Raymond gives an articulation of this definition, by stating that property is "a social relationship giving an owner power over other individuals that restricts their control or use of an item or resource."[275] For Raymond, such a definition is necessary in today's world because of the modern creation of intangible property rights that do not fit historic property classifications.[276]

There is no question that modern industrialization and technology have altered the way "property" is defined. S. Friedman described how the passage of time has changed how property rights are viewed:

> The profound change in the conception of property that has taken place since the heyday of Roman law should be emphasized at the outset. Whilst property was originally regarded as an absolute right of an essentially individualistic character, at the present stage of

267. *See id.*
268. *See id.*
269. *See* Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV 371 (2003) (describing the different theories of the definition of property).
270. J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 712 (1996).
271. RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 22 (1985) (citing WILLIAM BLACKSTONE, COMMENTARIES 2 (1765)).
272. *Id.*
273. Thomas C. Grey, *The Disintegration of Property*, *in* NOMOS XXII: PROPERTY 69–85 (J. Roland & John W. Chapman eds. 1980); *see also* EPSTEIN, *supra* note 271, at 20–22; STEPHEN R. MUNZER, A THEORY OF PROPERTY 31–36 (1990).
274. Stephen R. Munzer, *Property as Social Relations*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 36 (Stephen R. Munzer ed., 2001). Among the scholars listed by Munzer who possess this view are: Felix S. Cohen, Robert L. Hale, Duncan Kennedy, Joseph William Singer, C.B. Macpherson and Jennifer Nedelsky.
275. LEIGH RAYMOND, PRIVATE RIGHTS IN PUBLIC RESOURCES 41 (2003).
276. *Id.*

> legal development this aspect has been considerably modified. The absolute right is replaced by a right that is only relative and is conditioned more and more by the needs of the community . . . The state is led to intervene in the field of private property to an ever greater extent in consequence of modern technical development. Modern methods of production and distribution based on the collective organization of the means of production have tended to destroy the individualistic framework of the right of property and have obliged governments to resort to new forms of planning and regrouping of economic forces . . . It follows therefore that States assume a right of disposal over private property to an ever increasing extent in spite of legal provisions which are nothing more than a reflection of obsolete economic conceptions.[277]

In light of the above, it is not surprising that the Supreme Court has adopted a relatively broad reading of "property."[278] In *Ruckelshaus v. Monsanto Co.*,[279] in addressing whether trade secrets constituted "property," the Court stated: "[t]his general perception of trade secrets as property is consonant with a notion of 'property' that extends beyond land and tangible goods and includes the products of an individual's 'labour and invention.'"[280]

The Australian High Court is also in agreement with a broad interpretation of "property."[281] Australian constitutional scholar Simon Evans has noted that over the years the High Court has interpreted "property" so broadly that it can mean almost anything:

> [T]he court has given the widest interpretation to "property." Property includes "innominate and anomalous interests," "any interest in property" and "every species of valuable right and Interest." The result is that the acquisition of a bare right to possession, of "money and the right to receive a payment of money," and of a chose in action; relief from the Commonwealth's liability in debt or damages and from a burden on the Commonwealth's radical title; and "the assumption and indefinite continuance of exclusive possession and control . . . of any subject of property" all fall within s. 51(xxxi).[282]

277. S. FRIEDMAN, EXPROPRIATION IN INTERNATIONAL LAW 6–7 (1953).
278. Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).
279. *Id.*
280. *Id.* at 1002–03 (citing WILLIAM BLACKSTONE, COMMENTARIES 405); *see generally* J. LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT, ch. 5 (J. Gough ed. 1947).
281. *See* Simon Evans, *Constitutional Property Rights in Australia: Reconciling Individual Rights and the Common Good*, *in* PROTECTING RIGHTS WITHOUT A BILL OF RIGHTS 200 (Tom Campbell, Jeffrey D. Goldsworthy & Adrienne S.A. Stone eds., 2006).
282. *Id.* at 200.

When such broad interpretations of "property" are utilized, the reason is usually to protect individual property rights. Indeed, Evans further noted:

> Extinguishment or modification of property rights may constitute an acquisition under s. 51(xxxi), even if no one acquires title to (or an interest in) the property rights that are extinguished or modified, so long as "some identifiable and measurable countervailing benefit or advantage" accrues to some other person (whether or not that person is the Commonwealth).[283]

Evans postulates that when the Australian acquisition clause is viewed as a *protection*, just as with the American Fifth Amendment, then a "something lost" focus must unavoidably follow.[284] Because of this, "the distinction between acquisition [something gained] and deprivation [something lost] has been progressively eroded" in Australia.[285]

V. THE CHALLENGE OF QUANTIFICATION

One of the attractions of the "something lost" analysis, and a corresponding problem of the "something gained" view, is that of quantification. Losses to private property owners from takings are rarely difficult to quantify in terms of a dollars and cents compensation. Indeed, if a claimant cannot prove that a government taking caused a financial loss, there is no takings claim.[286] On the other hand, gain is not always that easy to quantify, especially when the gain is to society as a whole. In *Penn Central*, for example, the loss to the property owner of rentable office space from the building it could not build is readily quantifiable.[287] In contrast, New York City's preservation of historical places is hard to express in dollars and cents. The same is true in most of the other recent U.S. and Australian takings cases.[288] Even with Australia's adoption of the "something gained" view, as Justice Callinan noted, the Australian High Court continues to compensate based on what is lost rather than what is gained.[289]

Tasmanian Dam highlights the difficulty of quantification as a factor in regulatory takings.[290] Since this case involved a government taking from a government, damages became a real problem.[291] Neither the loss to the State of Tasmania from not being able to build its dam, nor the "gain" of the

283. *Id.* at 199.
284. *See id.*
285. *Id.*
286. *See Penn Central*, 438 U.S. 104 (1978).
287. *Id.* at 116.
288. *See Lingle*, 544 U.S. 528; *ICM*, (2009) 240 CLR 140.
289. *Smith*, (2000) 204 CLR at 547.
290. *Tasmania*, (1983) 46 ALR 625.
291. *Id.*

Commonwealth from preventing its building, can be readily quantified.[292] Societal gains are hard to nail down in terms of dollars and cents.

In a way, quantification of individual losses is a misguided principal. From a republicanism perspective, quantification of individual harm is contrary to the common good, as it tends to fragment society into parties focused on individual gain, rather than to build cohesion in society as a collective group more interested in what is best for all. From this point of view, people should be willing to sacrifice for the overall good of society, rather than obsess over money and what they are entitled to or what they lost. The ultimate example of this is seen in the views of many of the Plains Indian tribes in America before the coming of the white man.[293] They avoided the takings problem by refusing to recognize individual rights to real property.[294] Since no one owned the land, it simply could not be "taken."[295]

As many of the cases in both countries indicated, the place of societal gain in the takings analysis is somewhat of a mystery.[296] Following *Agins*, United States' courts could find that there was *no* taking as long as the law in question substantially advanced a legitimate state goal.[297] This approach, very similar to the current approach in Australia, was terminated by the *Lingle* case.[298] However, nuisances may still be abated under the police power in America without being a taking.[299]

No one can deny that societal gains significantly impact the takings question, whether we want them to or not. Yet, in a way, the entirety of the takings question has to do with societal gain. Indeed, this article emphasizes this very point. The decision of whether to focus on "gain" or "loss" in regulatory takings is essentially a policy decision, based on whether societal or individual rights should prevail. The question should really be answered by the people, through the legislative branch of government. However, this policy decision has simply been assumed by the highest courts in each country.

VI. WHICH APPROACH IS BEST?

While there are many benefits and problems to both the "gain" and "loss" approach, it is the opinion of this author that the "something lost" view is probably more appropriate. When individual property rights are pitted against societal gain, it is safer to err on the side of preservation of individual rights. This is true even when the social losses due to such an individualized approach are taken into

292. *Id.*

293. *See* Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1592 (2001).

294. *Id.*

295. *See id.* However, they did recognize ownership of personal property. Furthermore, contrary to popular assumption, many other tribes in other locations in North America did indeed recognize a form of real property ownership. As for the Australian aborigines, by and large they had a legal structure that "included a system of land ownership." JOHN CARVAN, UNDERSTANDING THE AUSTRALIAN LEGAL SYSTEM 26 (4th ed. 2002).

296. *See Agins*, 447 U.S. 255 (1980); *Penn Central*, 438 U.S. 104 (1978).

297. *Agins*, 447 U.S. 255 (1980).

298. *Lingle*, 544 U.S. 528 (2005); *see also supra* text accompanying notes 109–118.

299. *Id.* at 544.

account. The main reason for this is summed up in a statement by George Turner, one of the Australian Founders at the Commonwealth Constitutional Convention in Melbourne in 1899.[300] In speaking of constitutional grants of power he said, "where there is a power, the body having that power would probably extend it to its utmost limit. If they go a little further than we intended or a little beyond the strict reading of the Act, how are we to stop them?"[301]

The "something gained" view of takings embraces social gains at the expense of personal rights. If such a principle were extended "to its utmost limit" as Turner stated, the results to individual rights could be devastating.[302] Adopting such an approach is simply too risky. One of the most important duties of government is to preserve individual rights, for without them society loses. Society is not a "thing," but a composite of individuals. A loss to one individual is not necessarily justified by a benefit to all. A society which treasures group goals above individual goals risks losing the very basis of its existence, for individual rights are the very foundation from which a society and its goals are derived.

An analogy can be made to the adversarial nature of legal proceedings in both the United States and Australia. A more inefficient and costly system could hardly be devised. Contending parties must waste thousands of dollars and hours in asserting their claims through arrogant attorneys who portray the opposing party as being totally bereft of mental capacity. Meanwhile, each attorney portrays his own client as a saint, the epitome of goodness. It is left to the judge or jury to decide who is right. As bothersome, costly, and annoying this process is, it is still better than the alternative (resorting to a back alley with bared fists) in preserving the rights and claims of individuals.

VII. CONCLUSION

The United States has for years followed a "loss" orientation towards regulatory takings cases, in which takings analysis has focused almost exclusively on what the property owner lost. In recent years, Australia has adopted a "something gained" orientation in regulatory takings cases, finding takings only when an identifiable gain to the government or some party has occurred. Both approaches have strengths and weaknesses. The "something lost" approach accords roughly with the liberalism theory of government, which champions individual rights over societal goals. The "something gained" approach accords with the republicanism theory of government, which prefers societal gains to individual ones. Because of the risk of government overreaching and loss of protection to individual property rights, the "something lost" approach is almost certainly the preferable one.

300. *Official Report of the National Australasian Convention Debates* 152 (Third Session) (Melbourne: 1898). The comment was made by George Turner, Premier of the State of Victoria.
301. *Id.*
302. *Id.*