PROPERTY IS A SOCIAL RIGHT: A COMPARISON OF AMERICAN, EUROPEAN AND AUSTRALIAN GOVERNMENTAL ACQUISITION JURISPRUDENCE AND PROPERTY THEORY

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PROPERTY—SOCIAL RIGHT—INDIVIDUAL RIGHT—COMPARISON—ABSOLUTE APPROACH—EMINENT DOMAIN—ACQUISITIONS—TAKINGS—EXPROPRIATION—CIVIL LAW—AMERICAN JURISPRUDENCE—NATIVE TITLE—PANDECTISTS—GERMAN CONSTITUTIONAL LAW

ABSTRACT

The question of 'what is property?' has plagued many a jurist, philosopher, and academic. This article explores an aspect of that question—whether property is a social or individual right. This is done by exploring the concept of property from a philosophical and comparative legal perspective within the substantive area of governmental acquisitions. Three approaches to the concept of property are set out. Firstly, the absolutist approach as it appears in the American jurisprudence. Secondly, the European approach and its philosophical basis. Lastly, this article examines the Australian approach to property as it compares to the absolutist and European approaches. While the importance of comparison is easy to overlook, this article furthers the position that by comparing the three approaches, a useful proposition can be stated—property is inherently a social right, not an individual right.

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I INTRODUCTION

Answering the question of 'what is property?' is a task 'not without its own difficulties'.[1] Gray and Gray have said that 'few concepts are quite so fragile, so elusive or so frequently misused as the notion of property'.[2] A number of additional, and respected, authors write of property's 'inextricable circularity',[3] remark about its similarity to the word love,[4] and have declared the concept of property a theft[5] or the root of all evil.[6] This article focuses on but one aspect of the larger question—whether property is social or individual. Through understanding the social-individual interplay, we can properly understand the basis of property.

To arrive at a conclusion on whether property can be considered to be an individual right or a social right, a number of theoretical approaches to defining property will be examined and compared. Part II of this article will examine the absolute approach prevalent in the jurisprudence of the United States. The absolute approach is characterised by a focus on individualism; a focus that will be illustrated below with reference to *Keystone Bituminous Coal Association v DeBenedictis* ('*Keystone*'),[7] a United States Supreme Court decision on takings.[8] Part III will examine the European approach and the major philosophical ideas that underpin it. In that part, the facts of *Keystone* will be analysed as if it were decided under the European approach.

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1 *Yarmirr v Northern Territory* (2001) 208 CLR 1, 38 (Gleeson CJ, Gaudron, Gummow and Hayne JJ) (citations omitted).

2 Kevin Gray and Susan Gray, *Elements of Land Law* (Oxford University Press, 5th ed, 2009) 86. See also *Yanner v Eaton* (1999) 201 CLR 351, 365–6 [17].

3 Stephen Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (Cambridge University Press, 2003) 173. See also Sarah Worthington, *Personal Property Law: Texts and Materials* (Oxford University Press, 2000) 665.

4 James Edelman, 'Two Fundamental Questions for the Law of Trusts' (2013) 129 *Law Quarterly Review* 66, 74.

5 Pierre-Joseph Proudhon, *Qu'est-ce que la propriété? Ou Recherche sur le principe du Droit et du Gouvernement* [What is property? Or An inquiry into the Principle of Law and Government] (Brocard, 1st ed, 1840) 2.

6 Alan Carter, *The Philosophical Foundations of Property Rights* (Harvester Wheatsheaf, 1989) 1.

7 *Keystone Bituminous Coal Association v DeBenedictis*, 480 US 470 (1987) ('*Keystone*').

8 'Takings' is used here as an equivalent to the concept of eminent domain. Throughout this article the preferred term for eminent domain is: (a) for American jurisprudence, taking; (b) for European jurisprudence, expropriation; and (c) for Australian jurisprudence, acquisition.

The difference in analysis and outcome shows that property under the European approach is inherently social, and not individual. The benefit of that treatment is also furthered. Finally, Part IV looks at the Australian approach and compares it to the preceding two approaches. This comparison will assist the author to develop the proposition, and conclude, that property is best treated as a social right, rather than an individual right.

II ABSOLUTE APPROACH

The absolute approach relies upon the assumption that property is 'something that is objectively definable or identifiable, apart from the social context,' representing 'the sphere of legitimate, *absolute* individual autonomy'.[9] From that assumption, the individual's right to their property is treated as superior to societal interests (or, arguably, the societal interests are not considered) because an absolute property right is, by its very nature, incapable of being impinged or fettered.[10] The absolutists use this version of property as a means to represent and protect the individual's autonomous sphere of influence into which no one else can enter.[11]

Simply, the absolute approach is one of the on-off variety: property is either held (requiring absolute protection from interference) or not held (requiring no protection from interference), there is nothing in between.[12] And so the absolutists' underlying question, when confronted with a property issue, is 'who owns the thing?'[13] The focus is always on the individual who then holds a right to unfettered and unimpeded possession, disposition, use, and abuse of corporeal and incorporeal things.[14] Immediately, the simplistic nature of

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9 Laura S Underkuffler, 'On Property: An Essay' (1990) 100(1) *Yale Law Journal* 127, 133 (emphasis added).

10 See generally Joseph William Singer and Jack M Beermann, 'The Social Origins of Property' (1993) 6 *Canadian Journal of Law and Jurisprudence* 217.

11 See especially Charles A Reich, 'The New Property' (1964) 73 *Yale Law Journal* 733, 771.

12 Joan Williams, 'Recovering the Full Complexity of Our Traditions: New Developments in Property Theory' (1996) 46(4) *Journal of Legal Education* 596, 599.

13 Joseph William Singer, 'The Reliance Interest in Property' (1988) 40 *Stanford Law Review* 611, 641.

14 Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (Harvard University Press, 1985). Admittedly, Epstein's interpretation of the absolute approach is an extreme one and would see even taxes that cannot be directly attributed to a public good constituting a taking under the *United States*

this approach reveals incoherencies—it is difficult to point to any right in the modern world which is truly incapable of being impinged or fettered in some way, whereas the absolute approach says property is incapable of being impinged or fettered.[15]

This incoherency is the problem with the absolute approach, that is, if something is property it must be afforded absolute protection, yet nothing can truly be afforded absolute protection (and on occasion infringement is not only lawful but necessary). Therefore, the only way to avoid infringing 'absolute property rights' is to argue that the right concerned is not property, for if one says the right is property it cannot be infringed. Therein lies the conundrum, the practical operation of which can readily be seen in judicial consideration of the state takings limb contained in Amendment V of the *United States Constitution*, which states that private property shall not 'be taken for public use, without just compensation'. *Keystone* is one such judicial consideration and further assists with demonstrating the problems posed by the ostensible adoption of the absolute approach.

A *Keystone*

In *Keystone*, the Supreme Court of the United States was petitioned by the plaintiffs who held fee simple estates in coal-laden, subsurface, Pennsylvanian land.[16] Importantly in this case, under Pennsylvanian law, the surface estate, mineral estate, and support estate are regarded as separate interests in land that can be conveyed apart from each other.[17] A law had been enacted to prevent subsidence (the sinking of the surface ground) by restricting mining below surface structures in order to pursue the societal aim

Constitution, but the underlying proposition is consistent with the absolute approach more generally: see, eg, Frank Michelman, 'Takings, 1987' (1988) 88 *Columbia Law Review* 1600, 1626–7.

15 For examples of property rights which are infringed through redistribution lawfully, see Williams (n 12) 601.

16 *Keystone* (n 7) 496.

17 Ibid 500–1.

of preventing subsidence damage to those structures.[18] As a result, the plaintiffs were unable to mine 27 million tons of coal in their support estate.[19] The plaintiffs sought to enjoin the regulatory body from preventing the plaintiffs' mining the 27 million tons of coal on the basis the law was unconstitutional under Amendment V of the *United States Constitution*; that it took their private property for public use without just compensation.[20]

The Supreme Court held that the '27 million tons of coal do not constitute a separate segment of property for takings law purposes'.[21] The majority's statements throughout indicate an ostensible use of the bundle of rights theory of property as a rendition of the absolute theory (essentially, the full bundle will be called property, but not any individual strand).[22] The Supreme Court held that the support estate was only one strand in the bundle (the full bundle consisting of either all three estates, or at least the support estate and one other).[23] Therefore, the support estate was held to not be property in and of itself.[24] This was despite the fact that the surface estate, mineral estate and support estate are separate interests conveyable in and of themselves,[25] and the fact the support estate was itself a bundle of rights.[26]

Here we see the problem of ostensible use of the absolute approach manifest. If the support estate (and the 27 million tons of coal therein) was property, it must be afforded absolute protection, yet the law restricting mining would infringe the right. Therefore, the only way to avoid infringing absolute property rights is to say the right concerned (the support estate) is not property—the alternative would have been to essentially allow subsidence to

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18 *Bituminous Mine Subsidence and Land Conservation Act of 1966*, 16 Pa Cons Stat § 1406.4 (Supp 1967); *Keystone* (n 7) 485–92.
19 Ibid 496.
20 *United States Constitution* amend V; ibid 470.
21 *Keystone* (n 7) 498.
22 Ibid 479–81, 497. See also Underkuffler (n 9) 142–3.
23 *Keystone* (n 7) 502.
24 Ibid 496.
25 Ibid 500–1.
26 Ibid 479.

occur at the public's peril. Importantly, the Supreme Court's analysis focuses on the interplay between these estates on the basis that if any or all are property it must be absolute. The Supreme Court was, for example, not able to approach the problem from the perspective that property entails social duties (like the European approach) and certainly not from the basis that property is a social right.

The illogical nature of the majority's finding (that a fee simple estate of enormous potential economic value is not property) is emblematic of how an absolute approach led to the law being manipulated 'surreptitiously'.[27] Certainly, the dissenting judgment of Rehnquist CJ in *Keystone* makes it clear that it is laudable for the majority to have held that 27 million tons of coal was not property.[28] Relevantly, Rehnquist CJ said the restrictive law:[29]

> will require petitioners to leave approximately 27 million tons of coal in place. There is no question that this coal is an identifiable and separable property interest … From the relevant perspective—that of the property owners—this interest has been destroyed every bit as much as if the government had proceeded to mine the coal for its own use. The regulation, then, does not merely inhibit one strand in the bundle, cf. *Andrus v. Allard*, supra, but instead destroys completely any interest in a segment of property.

Rehnquist CJ went on to point out that the majority's view of the support estate as a single strand in the bundle 'allows the Court to conclude that its destruction is merely the destruction of one "strand" in petitioners' bundle of property rights, not significant enough in the overall bundle to work a taking'.[30] The author suggests that the error in the majority's ways that Rehnquist CJ pointed to is an inkling of the Supreme Court's conflict between its 'ostensible use of an absolute conception of property and its actual use of

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27 Laura S Underkuffler-Freund, 'Takings and the Nature of Property' (1996) 9(1) *Canadian Journal of Law and Jurisprudence* 161, 204.
28 *Keystone* (n 7) 515.
29 Ibid 516, 518.
30 Ibid 518.

a broader conception'.[31] It follows then that the absolute approach is practically unworkable in the modern world and requires if anything an ostensible use and an actual use of some other approach. Consequently, classifying property as an individual right through the absolute approach is unworkable and approaches incorporating property as a social right are furthered below.

III EUROPEAN APPROACH

The property law of the Romans is widely accepted to be the *terminus a quo* (the 'starting point') of property law in continental Europe.[32] For this reason, the analysis of the European approach begins by setting out its Roman foundation. In Ancient Rome, when the nation was still an agrarian empire, *res corporales* ('corporeal things') involved in agriculture were afforded heightened protection and formality.[33] One such example of this heightened protection and formality can be seen by examining how interests in agrarian *res corporales* and non-agrarian *res corporales* were legally transferred. To affect the legal sale of agrarian *res corporales* (which included things such as land, work animals and slaves), the purchaser was required to pronounce a set phrase of acquisition in front of five Roman citizens while another person held a bronze balance. The purchaser was then required to strike the balance with an ingot held in the purchaser's right hand and deliver that ingot to the seller as purchase money.[34] In stark contrast, complete ownership in non-agrarian *res corporales* could be 'transferred by merely informal delivery of possession'.[35]

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31 Underkuffler (n 9) 129.

32 Ancient Greek law influenced Roman law, however, Roman law is widely accepted as the starting point: see especially John E Ecklund, *The Origins of Western Law: From Athens to the Code Napoleon* (Talbot Publishing, 2013) vol 1, 318; Peter Stein, *Roman Law in European History* (Cambridge University Press, 1st ed, 1999) 44. See also generally J M Kelly, *A Short History of Western Legal Theory* (Clarendon press, 1992).

33 Alan A Watson, *The Law of Property in the Later Roman Republic* (Oxford University Press, 1968) 16–20, 117; Max Kaser, *Römisches Privatrecht* [Roman Private Law] (C H Beck, 14th ed, 1986) 120.

34 Edward Poste, *Gai Institvtiones or Institutes of Roman Law by Gaius* [Institutes of Roman Law by Gaius] (Clarendon Press, 1904) 74–5.

35 Ibid 133.

This differential treatment of interests in agrarian and non-agrarian property demonstrates that Ancient Roman society protected that which it deemed worthy of protection, that is, an agrarian society will protect agrarian rights with greater vigour than other rights. This point is further reinforced by the fact that the Romans could not hold *dominus* ('dominium', 'ownership' or, alternatively, 'master') in *res incorporales* ('incorporeal things'), except for where that *res incorporales* was one of an agrarian nature.[36]

While the Romans' treatment of agricultural *res corporales* evidences that the Romans clearly protected rights in property in accordance with the Romans' societal values and interests, it must be noted that the right granted to a *dominus* over their property has widely been said to be the absolute right to use and abuse the property within the limits of the law.[37] That may seem on the face of it to be an absolute approach of the kind adopted in America, for the reason that it would grant to the property owner an absolute sphere of autonomy over the property concerned. However, importantly, this seemingly absolute approach is constrained and qualified by the notion that the right to use and abuse the property must be done so within *the limits of the law*. As is explored below, the European civil systems adopted the Roman *dominus* rights[38] and in so doing continued to limit property according to socially demarcated limits of the law. This concept of limiting property rights according to laws is explained below to be at least a limb of the social approach to property evident in the modern operation of expropriation.

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36 F De Zulueta, *The Institutes of Gaius: Part 2* (Oxford University Press, 1963) 62.

37 Joseph Declareuil, *Rome the Law-Giver* (Routledge, 1996) 158. Here, Declareuil wrote '*jus utendi et abutendi re sua, quatenus iuris ratio patitur*' [use and misuse the thing insofar as the right allows it]. See also Robert-Joseph Pothier, *Traité du droit de domaine de propriété, Par l'Auteur du Traité des Obligations* [Treaty of the Right of Domain and Property, by the Author of the Treaty of Obligations] (Chez Debure frères, 1776) and Proudhon (n 5) ch 2. Cf Shael Herman, 'The Uses and Abuses of Roman Law Texts' (1981) 29(4) *American Journal of Comparative Law* 671, 676–9.

38 Manlio Bellomo, *The Common Legal Past of Europe 1000-1800,* tr Lydia G Cochrane (CUA Press, 1995) 109.

A *Philosophical Foundations of the European Approach*

Before examining the European approach, it is first beneficial to outline the philosophical thought which underpins and informs it. This section will discuss the philosophical theories which led to and influenced the modern jurisprudence of the European approach. The theory developed by the Romanist German Historical School, especially the *Pandektenwissenchaft* (the 'Pandectists'), is of particular practical analytical relevance because it heavily influenced the modern German legal system (the German legal system is illustrative of the European approaches generally).[39]

Major philosophical works on property share a common social trait. Blackstone wrote that property is 'derived from society' and that maintaining societal expectations is contingent on property's protection.[40] Similarly, Locke theorised that societies were formed to protect the absolute liberty held by every individual in their person which would, through labour, imbue things with that absolute liberty making it property or, put simply, society came into being to protect property.[41] Rousseau, although he may lack a 'succinct … theory of property',[42] aligns with Locke and Blackstone on property's social origin. Impactfully he wrote, 'the first man who, having enclosed a piece of ground, bethought himself of saying "This is mine", and found people simple enough to believe him, was the real founder of civil society'.[43] According to Rousseau, as a natural extension of society having come into existence to protect property:[44]

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39 J Guttentag, *Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich: Sachenrecht* [Motives to Draft a Civil Law Book for the German Empire: Property Law] (1896) vol 3, 1, 3.

40 William Blackstone, 'Civil Liberty and Civil Rights' in Henry Ballantine (ed), *Blackstone's Commentaries* (Blackstone Institute, 1915) vol 15, 455, 468.

41 John Locke, *Second Treatise of Government*, ed Crawford Macpherson (Hackett, 1st rev ed, 1980) 27.

42 James McAdam, 'Rousseau: The Moral Dimensions of Property' in Anthony Parel and Thomas Flanagan (eds), *Theories of Property: Aristotle to the Present* (Wilfrid Laurier University Press, 1979) 181–202.

43 Jean-Jacques Rousseau, 'A Discourse on a Subject Proposed by the Academy of Dijon: What is the Origin of Inequality Among Men, and is it Authorised by Natural Law?' in G.D. Cole, *The Social Contract & Discourses by Jean-Jacques Rousseau* (J.M. Dent and Sons, 1923) 207.

44 Ibid 21.

> the right which each individual has to his own estate is always subordinate to the right which the community has over all: without this, there would be neither stability in the social tie, nor real force in the exercise of Sovereignty.

The common thread that unifies these ideas is that property is inextricably societal, that is, societal rights and interests can logically (in their view) take precedence over any individual property right. Savigny, as a forerunner to the German *Pandektenwissenchaft*,[45] opined that the *Volksgeist* (the 'spirit of the people') was the root of all law.[46] Property, therefore, would be contingent on and connected to the *Volksgeist* which had created the property rights.[47] This, as part of the Historical School and *Pandektenwissenschaft*, influenced the German *Grundgesetz* ('Basic Law', being the German constitution) and the European systems generally.[48] As will be shown, this idea that property is inextricably societal was and is firmly integrated into the European systems' conceptions of property.

B *European Approach*

The European civil systems are largely similar, though are distinct from the English common law.[49] For example, the civil codes restrict ownership in a proprietary context to *res corporales*[50] whereas the English common law is

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45 See generally Ernst Landsberg, *Geschichte der Deutschen Rechtswissenschaft* [History of the German Jurisprudence] (Oldenbourg, 1898) 1–49, 69–88.

46 Friedrich Charles von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*, tr Abraham Hayward (Littlewood, 2nd ed, 1831) 24. For a discussion of the historical school (of which the *Pandektwissenchaft* was a part), see generally Robert E Rodes, 'On the Historical School of Jurisprudence' (2004) 49 *American Journal of Jurisprudence* 165.

47 See, eg, Savigny (n 46) ch 2.

48 See generally Ecklund (n 32) vol 1, 318. See also Peter Stein, *Roman Law in European History* (Cambridge University Press, 1st ed, 1999) 44.

49 See generally Bellomo (n 38) 5.

50 See, eg, *Bürgerliches Gesetzbuch* [Civil Code] (Germany) art 90, which states '*sachen im Sinne des Gestezes sind nur körperliche Gegenständ*e' [only corporeal objects are things in the sense of the law]; 民法 [Civil Code] (Japan) art 85, which states 'この法律において「物」とは、有体物をいう' ['thing', in this law, means tangible things]; *Zivilgesetzbuch* [Civil Code] (Switzerland) art 713, which states '*Gegenstand des Fahrniseigentums sind die ihrer Natur nach beweglichen körperlichen Sachen sowie die Naturkräfte, die der rechtlichen Herrschaft unterworfen werden können und nicht zu den Grundstücken gehören*' [The object of ownership are physical moveable things and natural forces which can be subjected to legal domination and not part of land]. Cf *Burgerlijk Wetboek* [Civil Code] (Kingdom of the Netherlands) art 3:2, which states '*voor menselijke beheersing vatbare stoffelijke objecten*' [human objects subject to human control].

not concerned with tangibility—the English common law is such that a 'thing is no less a thing in law merely because it is intangible'.[51] As the civil systems are largely similar, this section will primarily explore the European approach to the concept of property with reference to the law of Germany, as the law of Germany is illustrative of, and comparable to, the law of other continental European jurisdictions. Intermittent reference to other civil systems will also be made for further comparative reference in the footnotes of this article.

The civil codes define property as a right that is inherently societally restricted. The German *Grundgesetz* guarantees property as a *Grundrecht* (a 'fundamental right'), which is limited by the law,[52] and other civil codes do the same.[53] Property is a guaranteed *Grundrecht* with the qualification that it carries with it responsibilities and must serve the public good.[54] The State can expropriate property for the public good,[55] but compensation is to be given and must be determined by establishing a fair balance between the interests of the public and the individual.[56] Here, the philosophical approach to

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51 Carleton Kemp Allen, 'Things' (1940) 28 *California Law Review* 421, 421–23.

52 *Grundgesetz fur die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany] art 14(1), which states '*Das Eigentum und das Erbrecht werden gewährleistet. Inhalt und Schranken werden durch die Gesetze bestimmt*' [Property and inheritance are guaranteed. The contents and limits are fixed by the law].

53 *Code Civil* [Civil Code] (France) art 544, which states '*La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements*' [Property is the right to enjoy and dispose of things in the most absolute manner, provided that they are not used as prohibited by laws or regulations]; *Codice Civile* [Civil Code] (Italy) § 832, which states '*Il proprietario ha diritto di godere e disporre delle cose in modo pieno ed esclusivo, entro i limiti e con l'osservanza degli obblighi stabiliti dall'ordinamento giuridico*' [An owner has the right to enjoy and dispose of things in a full and exclusive way, within the limits of the law and observing obligations established by the law]; *Zivilgesetzbuch* [Civil Code] (Switzerland) art 641, which states '*Wer Eigentümer einer Sache ist, kann in den Schranken der Rechtsordnung über sie nach seinem Belieben verfügen*' [Anyone who owns a thing can dispose of it at his discretion within the limits of the law]; 民法 [Civil Code] (Japan) art 206, which states '所有者は、法令の制限内において、自由にその所有物の使用、収益及び処分をす る権利を有する' [An owner has the right to freely use, deal with, and dispose of their property within the limits of the laws and regulations].

54 *Grundgesetz fur die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany] art 14(2), which states '*Eigentum verpflichtet. Sein Gebrauch soll zugleich dem Wohle der Allgemeinheit dienen*' [Property entails responsibilities. Its use shall simultaneously serve the public good].

55 The author notes that the German word, '*Enteignung*', used in the *Grundgesetz* conveys the concept of eminent domain. 'Expropriation' has been chosen in place of, and is to be distinct from, 'acquisition' as used when discussing English based systems. This is because it more accurately reflects that under German law, *Enteignung* requires the Government to physically take the property and not merely regulate it.

56 *Grundgesetz fur die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany] art 14(3), which states '*Eine Enteignung ist nur zum Wohle der Allgemeinheit zulässig. Sie darf nur durch Gesetz oder auf Grund eines Gesetzes erfolgen, das Art und Ausmaß der Entschädigung regelt. Die Entschädigung ist unter gerechter Abwägung der Interessen der Allgemeinheit und der Beteiligten zu bestimmen. Wegen der Höhe der Entschädigung steht im Streitfalle der Rechtsweg vor den ordentlichen*

property outlined above is reproduced. German law (and the civil systems generally) defines property as something that is subject to the rights of the society that created those rights. This is an obvious adoption of the philosophical approaches described above.[57] Therefore, the European approach does not differ all too much from that of the Roman law of *dominus*[58]—both give the proprietor an absolute right over a thing. This may seem to be at odds with the statement above that the European and Ancient Roman approach is not absolute, however, as Proudhon noted, the object of the seeming limitations is not to limit property, but to prevent the domain of one proprietor from interfering with that of another—it is a recognition that property exists in society and cannot be viewed as devoid of that necessary social context.[59]

It is through this that German law (and the civil systems generally) integrates the tension between property rights and the social context in which they exist.[60] This tension 'between the individual and the collective' has been said to be integral to a fully developed approach to property.[61] On the one hand, the *Grundgesetz* acknowledges and guarantees the liberal view of property, that is, the fundamental right of an individual to have authority over their property and domain. On the other hand, and unlike the absolute approach, the European approach does not stop there and also recognises the social function of property, that is, the fact the rights are created, and necessarily restricted by, society. It is this duality that leads to an approach which avoids the illogical consequences of ostensible use of the absolute approach. The

Gerichten offen' [Expropriation is permissible only to benefit the general public. It may be done only through or due to a law which governs the nature and extent of compensation. The compensation is to be determined with fair consideration of the interests of the general public and those involved. In case of a dispute as to the amount of compensation, legal action in the ordinary courts is open].

57 See generally Ecklund (n 32) vol 1 and Stein (n 48).

58 S P Scott, *The Civil Law Including the Twelve Tables, The Institute of Gaius, The Rules of Ulpian, The Opinions of Paulus, The Enactments of Justinian, and The Constitutions of Leo* (Lawbook, 2001) vol 1, 57.

59 Proudhon (n 5) ch 2 s 1.

60 Peter Badura, *Staatstrecht: Systematische Erläuterung des Grundgesetzes für die Bundesrepublik Deutschland* [Constitutional Law: Systematic Explanation of the Basic Law for the Federal Republic of Germany] (C H Beck, 3rd ed, 2003) 330–1.

61 Underkuffler (n 9) 147.

theoretical comparison partially draws out the deficiencies in the absolute approach but an explanation of the practical operation of each is useful. Just as with the discussion of the absolute approach, takings law (or, rather, expropriation law in the German sense) is a useful vessel through which to demonstrate the practical operation of the European approach.

C *Naßauskiesungbeschluss*

The landmark case in German expropriation law is the 1981 decision in relation to *Naßauskiesung* ('wet gravel') (hereinafter the '*Naßauskiesungbeschluss*').[62] The facts are markedly analogous to those in *Keystone*. In *Keystone*, a law was enacted that denied the plaintiffs' use of 27 million tons of coal in their estate. They alleged that a taking occurred without just compensation, but the Supreme Court of the United States found the estate was not property (see Part II(A) above). The approach adopted by the Supreme Court in *Keystone* and the approach adopted by the German Federal Constitutional Court in the *Naßauskiesungbeschluss* make evident the deficiencies in the absolute approach. We will see the European approach allowed the German Federal Constitutional Court to balance social interests without having to conclude that something that is obviously property is not property.

In the *Naßauskiesungbeschluss* the plaintiff owned land near Münster on which he operated a gravel pit. The plaintiff used underground water from his land in the course of operating the gravel pit. Reforms were enacted to the *Wasserhaushaltsgesetz* ('water resources law') after the plaintiff had been using his land in this way for decades.[63] An aspect of the reform required anyone using groundwater to have a permit to do so. This was, at least in part, enacted to address the rampant groundwater contamination resultant from

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62 Bundesverfassungsgericht [German Constitutional Court], 1 BvL 77/78, 15 July 1981 reported in (1981) 58 BVerfGE 300 ('*Naßauskiesungbeschluss*').

63 Ibid [65]–[68].

extensive gravel mining to support post-World War II reconstruction.[64] The plaintiff applied for a permit to continue but was denied on the basis that the use of the groundwater for a gravel pit may cause harm to the public water supply.[65] The plaintiff alleged that by denying the permit the plaintiff's property had been expropriated without the compensation guaranteed under art 14(3) of the *Grundgesetz*.

The German Federal Constitutional Court drew a clear line between the regulation of property (permissible under art 14(1)–(2) of the *Grundgesetz*) and the expropriation of property (permissible with compensation under art 14(3) of the *Grundgesetz*). The former is not compensable, but the latter is.[66] In reaching its decision, the Federal Constitutional Court recognised that the plaintiff's right to use the land as a gravel pit and use the groundwater under it was an *Eigentumsgarantie* ('guaranteed property right').[67] That is to say that, unlike the Supreme Court of the United States, the Federal Constitutional Court did not deny that property was property. From the basis that the rights affected are property, the Federal Constitutional Court then pointed to sentence 2 in art 14(1) of the *Grundgesetz*, which stated that '*Inhalt und Schranken werden durch die Gesetze bestimmt*' ('the content and limits [of property] are fixed by the law'), and held the permit requirement was such a law fixing the limits of property.[68] In doing so, the Federal Constitutional Court upheld the public policy aim without subverting common sense because the European approach to property (that property is a social right and it therefore can be limited to benefit society from time to time)[69] allowed it to do so.[70]

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64 Ibid [6].
65 Ibid [67].
66 Ibid [114].
67 Ibid [87], [118], [172]–[174].
68 Ibid [171]–[203].
69 Ibid [78].
70 Ibid [99], [203].

With the *Naßauskiesungbeschluss* set out, the differences between the European approach and the absolute approach may be illustrated by comparing the *Naßauskiesungbeschluss* to *Keystone*. Under the German constitutional framework, the law restricting sub-surface use would be categorised as either an acquisition of property for the public good requiring compensation or, alternatively, a mere delineation of the content and limits of property. The impugned legislation in *Keystone* restricted mining but did not take the coal from the plaintiffs and give it to the government. Therefore, under German law, it would not be an expropriation because nothing was physically taken.[71] Rather, the law in *Keystone* was establishing the content and limits for public good (preventing subsidence where buildings were situated), which is integral to property within the European approach. Here, the European approach achieves the same end as the Supreme Court's ostensible use of the absolute approach in *Keystone*, but it can do so without denying that 27 million tons of coal is property.

The European approach is underpinned by the premise that property is a social creation. It therefore balances the individual rights that are necessary to maintain personal liberty against essential societal interests without requiring the circumventive logic employed through the non-social absolute approach. Certainly then, entrenching a social conception of property is favourable to an absolute one—it can openly and logically balance valid interests against each other. Direct importation of this approach into Australia is of course impossible given the separate and unique histories which inform the civil and common law legal systems.[72] However, the Australian approach serves as a useful comparison and demonstrates that the European approach is not the only way to entrench a social approach to property into law.

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71 Bundesverfassungsgericht [German Constitutional Court], V ZR 200/97, 17 December 1998 reported in (1998) 140 BGHZ 223 [17].

72 Bellomo (n 38) 109; Frederick Pollock and Frederic Maitland, *The History of English Law: Before the Time of Edward I* (Cambridge University Press, 1st ed, 1895) vol 1.a.

IV AUSTRALIAN APPROACH

Early English common law was such that at least some property rights were absolute. In the 17th century, one's house was his or her 'castle and fortress'[73] into which it was then said that even the 'King of England cannot enter!'[74] This would certainly be an absolute approach—the state would not dare interfere or infringe upon the sanctity of one's castle. This guaranteed the absolute individual right of property in one's own home. However, the saying that a 'man's house is his castle'[75] does not hold true in modern Australian common law.

Unlike their European counterparts, the Australian constitutional framers relied little on theoretical discussion of property and favoured practicality.[76] Australian judgments also typically make limited reference to extensive philosophical justifications of property.[77] Furthermore, no recourse can be made to a code to define property in Australia as is the case in the civil systems and the *Australian Constitution* makes only five express references to property.[78] As one would expect, none of these provisions define property. Where Australian legislation does define property, the definitions are often circular and only operate to include personal and real property, interests or estates in personal and real property, and choses in action,[79] but this is to be expected in common law jurisdictions.[80] The reason for the absence of an adequate statutory definition of property is that in the context of the common

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73 *Semayne's Case* (1604) 77 ER 194, 195.

74 Henry Brougham, *Historical Sketches of Statesmen Who Flourished in the Time of George III* (Richard Griffin & Co, 1855) vol 1, 42.

75 Developed from the statement of Sir Edward Coke in *Semayne's Case* (n 73) 195. See also Edward Coke, *The First Part of the Institutes of the Laws of England* (R H Small, 19th ed, 1853).

76 Simon Evans, 'Property and the Drafting of the Australian Constitution' (2001) 29 *Federal Law Review* 121, 150.

77 Cf *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 208–12, [177]–[184] (Heydon J).

78 *Australian Constitution* ss 51(xxxi), 85, 98, 104, 114.

79 *Property Law Act 1969* (WA) s 7 (definition of 'property'); *Law of Property Act 2000* (NT) s 4 (definition of 'property'); *Property Law Act 1974* (Qld) sch 6 provides no definition; *Real Property Act 1900* (NSW) s 3 provides no definition; *Property Law Act 1958* (Vic) s 18 (definition of 'property'); *Law of Property Act 1936* (SA) s 7 (interpretation of 'property'); *Conveyancing and Law of Property Act 1884* (Tas) s 2 (interpretation of 'property'); *Civil Law (Property) Act 2006* (ACT) s 3 provides no definition.

80 Stephen Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (Cambridge University Press, 2003) 173.

law, particularly in Australia, 'abstract principles fashioned a priori are of but little assistance'.[81] In one regard, the absence of a rigid statement of property allows the law to closely reflect that property is societal and allows conceptions of property to evolve according to the societal requirements.

Generally, property in Australia is defined by the bundle of rights theory of property.[82] This theory operates in Australia such that for a court to find that a particular right or interest is property, the right or interest must be 'definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence'.[83] The fact that a right will take up a certain 'propertiness'[84] if it is identifiable by third parties or capable of assumption by third parties illustrates that property is a social right. The third parties are naturally members of society, so the bundle of rights theory forwards at the least the inception of property as contingent on social interests and expectations. As with the absolute and European approach, the Australian approach is easiest understood through practical examples. Below, the Australian approach to property is outlined through acquisition law and native title law.

A *Property Under Australian Acquisition Law*

Section 51(xxxi) of the *Australian Constitution* grants the Commonwealth power to make laws with respect to the acquisition of property on just terms for any purpose in respect of which the Commonwealth Parliament has power to make laws.[85] This provision is a correlative of the American and German

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81 *Commonwealth v Yarmirr* (2001) 208 CLR 1 [11] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), quoting *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399, 404 (Viscount Haldane).

82 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261; *Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210, 230–231 [44] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ).

83 *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175, 1247–1248, quoted in *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327, 342 (Mason J); *ICM Agriculture Pty Ltd v Commonwealth* (n 77) 218 [197] (Heydon J); *Smith v ANL Ltd* (2000) 204 CLR 493, 554–5 [190] (Callinan J).

84 Kevin Gray, 'Property in Thin Air' (1991) 50 *Cambridge Law Journal* 252, 259.

85 *Australian Constitution* s 51(xxxi).

guarantees to compensation discussed above in relation to *Keystone*.[86] The High Court has generally taken a broad approach to the definition of property when construing s 51(xxxi). For example, property encapsulated within the operation of s 51(xxxi) has historically included not only traditional property such as realty and personalty, but also 'every species of valuable right and interest'.[87] Furthermore, a law extinguishing the right to bring an action for damages can be an acquisition.[88] A great dissenting opinion suggests that s 51(xxxi) may even extend to protect all fundamental human rights from being eroded on terms other than just.[89] When answering the question of whether any law operates to authorise the acquisition of the property of an individual, there is, unlike the absolute approach, no precise test or 'universal criterion' to which a court will turn to determine what property is.[90] One may view that as an incoherency on the part of the High Court, in that it has failed to clearly delineate a definition of property for the purposes of s 51(xxxi). However, as the High Court has previously held per curium, property is necessarily defined differently depending on the context.[91] This allows property to transform according to social interests as described below.

In Australia's acquisition law we see an inherent reflection of the social aspects of property through the reflection of social expectations on the acquisition power. A characteristic feature of a sovereign power is, according to Rich J in *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, what the Americans name 'eminent domain'—the power to 'take to itself any property within its territory, or any interest therein, on such terms and for such

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86 *Andrews v Howell* (1941) 65 CLR 255, 282 (Dixon J); *The Australian Apple and Pear Marketing Board v Tonking* (1942) 66 CLR 77, 82–3.

87 *Minister of State for the Army v Dalziel* (n 82) 290.

88 *Smith v ANL Ltd* (2000) 204 CLR 493, 498–9 [3] (Gleeson CJ).

89 Ibid 530 [104] (Kirby J).

90 Ibid 528–9; *Nelungaloo Pty Ltd v Commonwealth* (1952) 85 CLR 545, 600; *Trade Practices Commission v Tooth and Co Ltd* (1979) 142 CLR 397, 408; *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 189; *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651, 667.

91 *Telstra Corporation Ltd v Commonwealth* (n 82) 230–1 [44] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ).

purposes as it thinks proper'.[92] Naturally, the sovereign power in Australia is representative of Australian society.[93] It follows that when the Australian legislature exercises its sovereign right of eminent domain as it thinks proper, it is essentially done in a way that Australian society thinks proper.[94] When an acquisition occurs, s 51(xxxi) of the *Australian Constitution* therefore operates to acknowledge the competition between society's interests and the individual's interests. It operates to acknowledge that society's interests cannot be absolute and cannot crush the individual's right to property and vice versa.

Importantly, unlike the United States Supreme Court, the Australian acquisitions jurisprudence does not resort to denying the existence of property in things which are clearly property. A key distinction is that whilst the *Australian Constitution* requires *acquisitions* be on just terms, the *United States Constitution* requires there to be no *taking* without just compensation.[95] Similarly to the German approach described above, the acquisitions provision in the *Australian Constitution* does not regulate *takings* but does regulate *acquisitions*.[96] The distinction is an important one and was enunciated eloquently by French CJ in *JT International v Commonwealth* (2012) 250 CLR 1, where his honour said:[97]

> Taking involves deprivation of property seen from the perspective of its owner. Acquisition involves receipt of something seen from the perspective of the acquirer. Acquisition is therefore not made out by mere extinguishment of rights.

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92 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 284 (Rich J).
93 *Australian Constitution* ss 7, 24.
94 Emer de Vattel, *The Law of Nations*, ed Richard Whatmore and Béla Kapossy (Liberty Fund, 2008) bk 1, ch 4.
95 Cf *Australian Constitution* s 51(xxxi) and *United States Constitution* amend V.
96 *JT International v Commonwealth* (2012) 250 CLR 1, 33 [41], 53 [118], citing *Commonwealth v Tasmania* (1983) 158 CLR 1, 145, approved in *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297, 315.
97 *JT International v Commonwealth* (n 96) 33 [42] (citations omitted).

As a result, to bring the Australian constitutional provision into play it is not enough that the legislation regulates a property right and in so doing restricts the right.[98] Rather, there must have been an acquisition 'whereby the Commonwealth or another acquires an interest in property'.[99] It is plain to see that this is the same as the delineation in Germany between a compensable expropriation and a mere regulation which is not compensable (albeit it is not as overt a statement in Australia as in Germany). Furthermore, Australian acquisition law involves striking a balance between competing social interests.[100] Here then, in the Australian approach, we see essentially the same European concept of property within the acquisition context. That is to say, the Australian approach establishes a *fair balance between the interests of the public and the individual* and does not hold property out as an absolute right but instead one which can kneel to the needs of the society that creates the property right (without denying that property is property).

B *Native Title*

The recognition of native title rights illustrates that that property in Australian law is societally delimited. Prior to the recognition of native title, an absolute view was adopted. Although later overruled by the High Court, Blackburn J held in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 that property implies the right to use, exclude others from, and alienate the thing.[101] Because the indigenous group did not absolutely exclude others from all parts of land and only excluded others from specific ritual sites, it was held that their interests in the land were not property.[102] The High Court later rejected this position in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 and adopted a more flexible definition of property, which better reflected collective social interests.

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98 *Commonwealth v Tasmania* (1983) 158 CLR 1, 145, cited in *JT International v Commonwealth* (n 96), 34 [42].
99 Ibid.
100 *JT International v Commonwealth* (n 96) 87 [236].
101 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 272.
102 Ibid 270–4.

In *Mabo v Queensland* (1989) 166 CLR 186, the High Court held, in finding that the traditional rights of the native peoples to be property rights, that property in this context meant 'rights of any kind in or over' the lands.[103] As developed in *Mabo v Queensland (No 2)*, it was the possessory, traditional, and lifelong rights of the native peoples in the land that amounted to a sufficient bundle of rights making them property.[104] Essentially, the author posits that what the High Court did was reveal that native title had existed and existed due to the fact that social groups held title in and had proprietary connections with native title lands. In *Mabo v Queensland (No 2)*, Brennan J directly alluded to the influence that changes in societal standards had in bringing about the recognition of native title as property.[105] This is the social approach to property manifest—acknowledging that society creates property and even that interests in land can vest not in an individual or a number of identified individuals but in a community.[106]

In essence, the High Court of Australia found that the common law of Australia recognises a form of native title which reflects the entitlement of indigenous inhabitants, in accordance with their laws or customs, to their traditional lands.[107] Further, the High Court held that, subject to the effect of a number of particular Crown leases, the land entitlement of the Murray Islanders in accordance with their laws or customs was preserved, as native title, under the law of Queensland.[108] This was so in cases where native title has not been extinguished. The Court also held that the general principle that the common law will only recognise a customary title if it is consistent with

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103 *Mabo v Queensland* (1989) 166 CLR 186, 217 (Brennan, Toohey, and Gaudron JJ).
104 Ibid 51 (Brennan J), 111 (Deane and Gaudron JJ), 207 (Toohey J).
105 Ibid 40 (Brennan J).
106 Ibid 50 (Brennan J), citing *Amodu Tijani v The Secretary, Southern Provinces* (1921) 2 AC 399, 403–4.
107 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 15 (Mason CJ and McHugh J), 57 (Brennan J), 110 (Deane and Gaudron JJ).
108 Ibid 65 (Brennan J).

the common law is subject to an exception in favour of traditional native title.[109]

Predicating its decision on Australia's ratification of the *Optional Protocol to the International Covenant on Civil and Political Rights*,[110] the High Court found that even if in earlier days there had been a refusal to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, 'an unjust and discriminatory doctrine of that kind can no longer be accepted'.[111] As long ago as 1921, in *Amodu Tijani v The Secretary, Southern Provinces* (1921) 2 AC 399, the Privy Council recognised not only usufructuary rights but also interests in land vested not in an individual or a number of identified individuals but in a community. In that case, Viscount Haldane observed:[112]

> The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of a community. Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment inter vivos or by succession. To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case.

Relying on this, the High Court of Australia concluded that if it is necessary to categorise an interest in land, arising out of individual rights of usufruct, as proprietary (in order that it survive a change in sovereignty), the interest possessed by a community that is in exclusive possession of land falls into that category.[113] Brennan J said it poignantly when he stated that 'it is not possible to admit traditional usufructuary rights without admitting a

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109 Ibid.

110 *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

111 *Mabo v Queensland (No 2)* (n 107) 42 (Brennan J).

112 *Amodu Tijani v The Secretary, Southern Provinces* (1921) 2 AC 399 403–4, cited in *Mabo v Queensland (No 2)* (n 107) [52] (Brennan J).

113 *Mabo v Queensland (No 2)* (n 107) 50–1 (Brennan J), 89 (Deane J and Gaudron J), 184, 195 (Toohey J).

traditional proprietary community title'.[114] While difficulties of proof of boundaries, or of membership of the community, or of representatives of the community, which was in exclusive possession might arise, these should not be used as a reason to deny the existence of a proprietary community title capable of recognition by the common law.[115] It is, therefore, a clear illustration that property is delimited by society in Australian law. The community can hold native title, native title is identified by the community's engagement with the land and ultimately the recognition was part of a social shift for the better.

V CONCLUSION

The tension between the individual and collective is part of property, and property is the intermediary between individual rights and the State exercising power. The absolute approach does not reflect those propositions and the problems entailed are multifarious. As illustrated in *Keystone*, the absolute approach is essentially unworkable and requires an ostensible use with some other approach actually used. In Europe, codification manages to balance those inherent social factors as a result of involving philosophical thought directly in their legislative process. They go as far as to constitutionally inhibit the fundamental right to property to the extent society may seek to do so from time to time. The European approach to property recognises and entrenches in property the social nature of the right.

Australian property law, as viewed through the lens of s 51(xxxi) and native title, duly reflects the requirement that on occasion the State may be required to infringe an otherwise absolute property right. By maintaining an imprecise and non-absolute approach to property, the High Court has rightly been able to uphold social interests. It follows that Australia has, in line with the great common law tradition, been flexible enough to have a social concept of

[114] Ibid 51 (Brennan J).
[115] Ibid 39–40 (Brennan J).

property. Without fashioning abstract principles a priori like in the European codes, Australia has avoided the pitfalls of the absolute approach. Nonetheless, Australia is, in regard to property in an acquisition context, wholly consistent with the 'general law of European nations'.[116]

[116] John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 641.