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NEW ZEALAND JOURNAL OF PUBLIC AND INTERNATIONAL LAW

The New Zealand Centre for Public Law was established in 1996 by the Victoria University of Wellington Council with the funding assistance of the VUW Foundation. Its aims are to stimulate awareness of and interest in public law issues, to provide a forum for discussion of these issues and to foster and promote research in public law. To these ends, the Centre organises a year-round programme of conferences, public seminars and lectures, workshops, distinguished visitors and research projects. It also publishes a series of occasional papers.

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THE POLITICS OF PROPERTY IN CONSTITUTIONAL REFORM: A CRITICAL RESPONSE TO SIR GEOFFREY AND DR BUTLER

Oliver Hailes*

Sir Geoffrey Palmer QC and Dr Andrew Butler propose a constitutional right to property to place restrictions on deprivation and create entitlement to compensation for expropriation. The proposal fails to flesh out its significance when there are now no limits on Parliament's ability to legislate in a way that affects property rights. I begin by summarising present protections, which are largely political not legal. I then examine uncertainties arising from the proposed wording before reviewing past debates to show there is no consensus for such a right. Protection of individual private property obscures its nature as the product of coercive social relations underwritten by state power. Constitutional property should be viewed not as a universal human right but rather as a political achievement to secure protection for the commodity form of property. New Zealand needs to maintain arrangements that permit novel property experiments and robust regulation, especially in the light of issues such as the climate crisis.

I INTRODUCTION

Sir Geoffrey Palmer QC and Dr Andrew Butler's proposal of a written, codified constitution for Aotearoa New Zealand has created something of a buzz in the Thorndon bubble.[1] Unlike the official inquiries that roll around every few years,[2] they have drafted a 60-page document to prompt a proper discussion about the way the state should operate in the twenty-first century. The proposed

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1 Geoffrey Palmer and Andrew Butler *A Constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2016).

2 See for example Constitutional Arrangements Committee *Inquiry to review New Zealand's existing constitutional arrangements* (10 August 2005); and Constitutional Advisory Panel *New Zealand's Constitution: A Report on a Conversation* (November 2013).

constitution would be entrenched supreme law and only capable of being amended or overridden by 75 per cent of all members of the House of Representatives or by a majority of the electorate in a referendum. The text is ambitious in scope. If adopted fully, it would mandate a home-grown Head of State, judicial review of primary legislation, legislative approval before entry into international agreements, and a four-year parliamentary term.

Within the written constitution they also propose the adoption of an entrenched right to property in an expanded bill of rights, placing restrictions on the deprivation of property and creating an entitlement to compensation in the event of an expropriation. This novelty has not received the attention it deserves. New Zealand's constitution presently places no formal limits on Parliament's ability to legislate in a way that affects property rights and, as Tom Allen observes, "the inclusion and form of a property clause is often one of the most contested issues in the drafting of new constitutions or constitutional amendments".[3]

This article examines the proposed right and advances three recurring arguments in response: first, a technical argument concerning the legal uncertainties to arise as a result of the proposal; secondly, a political argument that there is no consensus to recognise let alone entrench such a right; and thirdly, a deeper and properly constitutional argument regarding the role of property as a vehicle for allocating coercive power over resources and people. A right to property would sit at the intersection of public and private power, providing a fulcrum for concentrations of wealth to lever the state away from policies that disfavour profitability and capital accumulation.

My aim, however, is neither to advance a standard defence of democratic decision-making against strong judicial review nor to recite a naïve critique of private property. I instead defend the underexplored potential of property law from liberal constitutionalism in the light of projects seeking to reclaim the concept of property from its perceived environmental and distributional detriments. Having left the concept undefined, the proposed right is likely to reinforce the dominant and intuitive conception of property in New Zealand's capitalist economy – the commodity – and the social power of those who disproportionately enjoy its benefits. For this reason, I pick apart the legal structure of property rights before exploring the political consequences of entrenching a right to property in a written constitution.

I begin in part II by outlining the present subordination of property rights to Parliament's legislative supremacy. In part III, I turn to Sir Geoffrey and Dr Butler's explanation for why New Zealand should entrench a right to property. The paucity of reasons animates the rest of the article. In part IV, their wording is examined to highlight uncertainties such as entitlement to compensation and the distinction between expropriation and deprivation. In part V, I explore how past parliamentary proposals reveal deep disagreement about the place of property in constitutional

3 Tom Allen "The right to property" in Tom Ginsburg and Rosalind Dixon (eds) *Comparative Constitutional Law* (Edward Elgar, Cheltenham, 2011) 504 at 504.

reform. In part VI, the concept of property is examined to expand on the conception assumed by Sir Geoffrey and Dr Butler's proposal. I argue property should be viewed not as a purely private right wielded against the state but rather as the product of coercive social relations underwritten by state power, which is why property law must serve a range of values beyond private wealth maximisation. Part VII introduces the concept of "the commodity form of constitutional property" in order to emphasise the promotion of capital accumulation as the principal impetus for the global proliferation of property protections. But in the light of issues such as climate change, New Zealand needs to maintain an openness to alternative property forms and robust regulation. Ultimately I recommend the rejection of a right to property.

II PROPERTY RIGHTS UNDER NEW ZEALAND'S CONSTITUTION

The power to acquire property for public use is accepted as an inherent component of state sovereignty.[4] In the United States it is based on the doctrine of eminent domain; whereas, under the English common law, the power of compulsory acquisition rests on the doctrine of parliamentary sovereignty.[5] Yet the taking of property clashes with dominant ideas about the function of government in a society of private owners. It is thus unsurprising that most constitutions place some restrictions on this power.

Property can be protected through clauses in constitutions enforced by the courts against legislative or executive action. The United States Constitution, for instance, prevents property being taken for public use without just compensation;[6] and the Federal Government of Australia may only acquire property "on just terms".[7] Such clauses impose conditions on the power to take property without an owner's consent and are often interpreted to require compensation at market value.[8] They may be triggered by the physical taking of title or regulatory taking through government actions that limit the owner's ability to use or dispose of their interest. The nationalisation of private

4 At 504.

5 AWB Simpson "Constitutionalizing the Right of Property: The US, England and Europe" (2008) 31 U Haw L Rev 1 at 2–11.

6 The Fifth Amendment to the United States Constitution provides that "[n]o person shall … be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

7 Constitution of Australia, s 51(xxxi).

8 Allen, above n 3, at 504; and Bryce Wilkinson *A Primer on Property Rights, Takings and Compensation* (New Zealand Business Roundtable, Wellington, 2008) at 23.

banks, whereby the shares are vested in the state, is an example of a physical taking;[9] whereas environmental restrictions on the use of coastal land would constitute a regulatory taking.[10]

In the Westminster tradition, however, property rights are subject to Parliament's general lawmaking power: "In Canada, and other former British colonies, the original form of constitutional protection was through executive and legislative review of laws affecting property, rather than a justiciable property clause."[11] New Zealand retains that approach, having rejected formal constraints on the state's ability to regulate both the ownership and use of property.[12] Requirements to compensate tend to be legislated for on a piecemeal basis, or sometimes not at all. New Zealand nevertheless enjoys a reputation for extraordinary protection, ranking second out of 128 countries in the 2016 International Property Rights Index.[13] This is a short answer to the assumption that property is unlikely to enjoy security and stability without a formal right enabling judicial review.[14] As Gregory Alexander notes, the status of property in a legal system depends also on "background and nonconstitutional legal and political traditions and culture".[15] However, Alexander invokes an unduly narrow version of what counts as constitutional, as we will find when situating the protection of property within New Zealand's unique arrangements.

A Present Protections

New Zealand long has provided protection against uncompensated takings under its unwritten constitution. The common law, for instance, places property in a position of relative privilege when interpreting legislation. The courts thwarted attempts last century to extend the scope of the Town and Country Planning Act 1953 by refusing to adopt "a meaning which takes away existing rights of property owners" further than that required by "the plain language of the statute, or the attainment of its object according to its true intent, meaning and spirit".[16] And in *Colonial Sugar Refining Co v Melbourne Harbour Trust* the Privy Council affirmed the presumption that "a statute should not be

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9 See for example *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1; aff'd [1950] AC 235 (PC).

10 *Lucas v South Carolina Coastal Council* 505 US 1003 (1992).

11 Allen, above n 3, at 504.

12 Contrast the United Kingdom since ratification of the European Convention on Human Rights and the enactment of the Human Rights Act 1998 (UK): see Simpson, above n 5, at 16–26.

13 Sary Levy-Carciente *International Property Rights Index 2016* (Property Rights Alliance, 2016).

14 Allen, above n 3, at 505.

15 Gregory S Alexander *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (University of Chicago Press, Chicago, 2006) at 29.

16 *Clifford v Ashburton Borough* [1969] NZLR 446 (SC) at 448; aff'd *Ashburton Borough v Clifford* [1969] NZLR 927 (CA) at 943 per McCarthy J.

held to take away private rights of property without compensation unless the intention to do so is expressed in clear and unambiguous terms".[17]

These interpretative presumptions stem from a deeply rooted concern to secure property from government interference.[18] The rights of private owners can even survive a "mere" change in sovereignty.[19] As Lord Camden declared with Lockean flair: "The great end, for which men entered into society, was to secure their property".[20] But that catch cry has never managed to oust the priority of legislation. In *Cooper v Attorney-General*, Baragwananth J noted New Zealand has no right to property: "Our constitutional safeguard for property rights is that of Ch 29 of Magna Carta."[21] The 1297 version of Magna Carta, incorporated by s 3(l) of the Imperial Laws Application Act 1988, simply states "No freeman shall be … disseised of his freehold, or liberties, or free customs … but by lawful judgment of his peers, or by the law of the land". Clearly an Act of Parliament – the supreme source of the law of the land – will suffice to disseise a freeman of his freehold. And the intention not to compensate might be the "irresistible inference from the statute read as a whole".[22]

While the courts cannot prevent the taking of property through legislation, there may be a constitutional convention against expropriation without just compensation.[23] The Regulatory Impact Analysis Handbook asks policymakers to consider whether options "[t]ake or impair existing private property rights".[24] The Legislation Advisory Committee (LAC) Guidelines also recognise as one of New Zealand's basic constitutional principles and values that new legislation should "respect property rights" such that the state "should not take a person's property without good justification".[25] Sir Geoffrey believes the framework for compulsory acquisition under the Public Works Act 1981

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17 *Colonial Sugar Refining Co v Melbourne Harbour Trust Commissioners* [1927] AC 343 (PC) at 359.

18 Michael Taggart "Expropriation, Public Purpose and the Constitution" in Christopher Forsyth and Ivan Hare (eds) *The Golden Metwand and the Crooked Cord: Essays in Honour of Sir William Wade QC* (Clarendon Press, Oxford, 1998) 91; and Matthew Smith "Property Rights" in *New Zealand Judicial Review Handbook* (2nd ed, Thomson Reuters, Wellington, 2016) 337.

19 *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 (PC) at 407–408, applied in *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA) at [15].

20 *Entick v Carrington* (1765) 19 Howell State Tr 1029 at 1066.

21 *Cooper v Attorney-General* [1996] 3 NZLR 480 (HC) at 483.

22 *Westminster Bank v Beverley Borough Council* [1971] AC 508 (HL) at 529 per Lord Reid.

23 See Geoffrey Palmer "Westco Lagan v A-G" [2001] NZLJ 163 at 168.

24 The Treasury *Regulatory Impact Analysis Handbook* (July 2013) at [1.17]. Government departments are required to undertake impact analyses for any policy initiative: Cabinet Office *Cabinet Manual 2017* at [5.75].

25 Legislation Advisory Committee *Legislation Advisory Committee Guidelines* (October 2014) at 14.

demonstrates respect for this "recognised principle that the state should not appropriate private property for a public purpose without just compensation".[26] A number of other statutes require compensation for takings in similar circumstances.[27] But the specific nature of such provisions, and the requirement that they be positively included in legislation, highlights how protection from takings remains subject to the supremacy of Parliament.

The LAC Guidelines go on to note that statutes "may allow restrictions on the use of property for which compensation is not always required".[28] This reflects the fact that New Zealand does not recognise a takings doctrine that protects owners from regulatory erosion of their property rights, as confirmed by the Supreme Court in *Waitakere City Council v Estate Homes Ltd*.[29] The Court rejected a claim that a condition of subdivision consent requiring construction of an arterial road, causing some land to be vested in the Council as road reserve, amounted to a taking.[30] While affirming the existence of the presumption in favour of ensuring fair compensation is paid whenever statutes expropriate property, the Court characterised the consent condition simply as a form of regulation.[31] There must be forced acquisition of rights under a power belonging to the state that allows the landowner "no choice" before this principle of statutory interpretation can be invoked.[32] In a voluntary development subject to a consent process, "the landowner must decide for himself whether the right to subdivide will be bought too dearly at the price of complying with the conditions".[33]

There have been clever attempts through litigation to introduce stronger judicial protections. In 2000, McGechan J heard some lofty arguments to that end in *Westco Lagan Ltd v Attorney-General*.[34] Containing "as rich a mixture of constitutional issues as it is possible to assemble in a single case in a country with an unwritten constitution", the case dealt with the looming termination of the right to log native trees on the West Coast of the South Island – a conservation policy adopted by the Labour Party prior to its 1999 election.[35] Upon taking office, the Government introduced the

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26 Palmer, above n 23, at 163.

27 Resource Management Act 1991, s 86; Health Act 1956, s 87(1); Greater Christchurch Regeneration Act 2016, ss 110–117; and Biosecurity Act 1993, s 100I.

28 Legislation Advisory Committee, above n 25, at 14.

29 *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149.

30 At [46].

31 At [45]–[47].

32 At [51]–[52].

33 At [53] quoting *Lloyd v Robinson* (1962) 107 CLR 142 at 154.

34 *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC).

35 Palmer, above n 23, at 163–164.

Forests (West Coast Accord) Bill 2000 to cancel an agreement for perpetual supply of rimu for sawmilling, including an express provision preventing compensation.[36] The plaintiff applied for an interim injunction to stop the Clerk of the House from presenting the Bill to the Governor-General for Royal assent, claiming the agreement conferred property rights that could not be expropriated without compensation due to Magna Carta and through extension of the right to be secure against unreasonable search and seizure under s 21 of the New Zealand Bill of Rights Act 1990 (NZBORA).[37] This line had been mooted by Hammond J in *Lumber Specialties Ltd v Hodgson*, a case concerning the same legislative reform;[38] and Dr Butler had explored its plausibility in an earlier article.[39] But McGechan J rejected these arguments in "a ringing affirmation of the independence and sovereignty of Parliament", to borrow the Judge's phraseology.[40]

As it stands, therefore, property rights are a weighty consideration in the exercise of executive, legislative and judicial power. Yet lawmaking remains democratic in its embrace of the vast range of stakeholders affected by policy options. While the constitutional constraints on takings are widely respected, they are largely political not legal. Property is but one factor in a complex mix and Parliament has the final say as to whether compensation is forthcoming.

B Contemporary Concerns

This relationship between legislative supremacy and the subordinate status of property rights has been subject to recent debate. The Human Rights Commission recommended the inclusion of a right to property in NZBORA due to the experience of homeowners in areas declared unsuitable for residential occupation after the Canterbury earthquakes, although the Commission is vague as to what protection such a right would provide beyond the Government's offer to purchase red-zoned properties.[41] In clearer terms, Richard Boast and Neil Quigley identify three problems with the present approach to takings: first, it allows the state to regulate real, corporate and intellectual property in a way that effectively confiscates private assets without compensation; secondly, it

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36 *Westco Lagan Ltd*, above n 34, at [2].

37 At [1] and [3].

38 *Lumber Specialties Ltd v Hodgson* [2000] 2 NZLR 347 (HC) at 374.

39 Andrew S Butler "The scope of s 21 of the New Zealand Bill of Rights Act 1990: Does it provide a general guarantee of property rights?" [1996] NZLJ 58. See also Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [18.7].

40 *Westco Lagan Ltd*, above n 34, at [97].

41 Margaret MacDonald and Sally Carlton *Staying in the red zones: Monitoring human rights in the Canterbury earthquake recovery* (New Zealand Human Rights Commission, October 2016) at 8–9 and 44. Sir Geoffrey suggests a right to property "would have given a sharper legal focus to … human rights arguments and prevented the government from taking the positions it took": see Geoffrey Palmer "The proposed constitution, property and Christchurch" A Constitution for Aotearoa New Zealand (8 November 2016) <constitutionaotearoa.org.nz>.

allows the state to nationalise resources in which rights of ownership would have been recognised under the common law; and thirdly, it fails to provide an adequate framework for recognising and enforcing Māori rights arising under the Treaty of Waitangi.[42]

Proponents of a broad takings doctrine – a generic requirement that the state must compensate when divesting an owner of the utility of their property – emphasise it would underpin the importance of private ownership in New Zealand's liberal democracy and market economy.[43] The requirement for compensation favoured by Lewis Evans and Quigley would include any event "where [the] government uses its regulatory powers to constrain or remove [a] firm's ability to generate income from its regulated activity".[44] They defend this position on the principled ground that the rule of law requires such compensation to protect individual freedom from the coercive state.[45] Moreover, they anticipate the benefits of sustainable resource allocation and dynamic efficiency through the inspiration of long-term investor confidence.[46] Chye-Ching Huang, on the other hand, questions these general assertions.[47] She argues that Evans and Quigley's examples of alleged abuse of property rights are neither economically inefficient nor unfair breaches of the rule of law.[48] Huang also highlights conflicting evidence as to the asserted link between a right to property and economic growth.[49]

Opponents of greater protection worry a takings doctrine would allow those with property to discipline the state against precautionary regulation and prevent the adoption of certain progressive policies. Any rigid requirement for compensating takings – whether through outright expropriation

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42 Richard Boast and Neil Quigley "Regulatory Reform and Property Rights in New Zealand" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 127 at 143.

43 See generally Lewis Evans and Neil Quigley "Compensation for Takings of Private Property Rights and the Rule of Law" in Richard Ekins (ed) *Modern Challenges to the Rule of Law* (LexisNexis, Wellington, 2011) 233.

44 At 238.

45 At 236.

46 At 236 and 238.

47 Chye-Ching Huang "The Constitution and Takings of Private Property" (2011) 24 NZULR 621.

48 At 624–633. The examples offered by Evans and Quigley of what they say are unjustified takings of property in New Zealand that should have been compensated include: changes to the valuation policy on Crown pastoral leases; acquisition of Māori land; nationalisation of petroleum; elimination of claims to customary title in the foreshore and seabed; treatment of pre-1990 forests under the Kyoto Protocol; changes to the Overseas Investment Regulations 2005 to block a Canadian takeover offer for a 40-per-cent shareholding in Auckland International Airport Ltd; and statutes that devolve the ability to take, such as the Telecommunications Act 2001, the Commerce Act 1986 and the Resource Management Act 1991: Evans and Quigley, above n 43, at 239–257.

49 Huang, above n 47, 646–648.

or regulatory impairment – is bound to clash with legislative autonomy over matters such as regulating for health and safety concerns, placing controls on foreign acquisition and control of land, environmental protection and the historical preference for nationalising important resources.[50] Aside from undermining democratic decision-making, constitutional takings clauses in other jurisdictions leave open a wide zone of judicial discretion that threatens the rule of law by unsettling reliance on statutory and common-law rights, thereby creating uncertainty about the scope of interests that attract compensation.[51] Jennifer Nedelsky formulates five arguments against a constitutional right to property: first, property will be insulated in a regulation-free enclave; secondly, the tendency of property to create power inequalities will be reinforced; thirdly, the entrenchment of property will upset existing hierarchies of rights; fourthly, constitutional litigation will result in a waste of resources; and fifthly, issues will be removed from the public sphere and converted into technical debates.[52]

III A MODEST PROPOSAL?

Defining the ambit of takings, let alone deciding whether to entrench a constitutional clause, raises difficult questions. These have been the subject of careful analysis by New Zealand scholars in recent years.[53] However, no such complexity is mentioned by Sir Geoffrey and Dr Butler. They present their right to property through a brief and apparently modest proposal:[54]

> Property
>
> The right not to be arbitrarily deprived of property is included in the Universal Declaration of Human Rights (1948). Most Bills of Rights overseas protect that right in some form or other. Property is an important means by which individuals look after themselves and their families and communities and shield themselves from the power of the State. On a number of occasions there have been proposals to amend [NZBORA] to add property rights to it; on each occasion the proposal was rejected, but it would appear that concern about wording was the primary driver.

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50 Richard P Boast and Susy Frankel "Defining the Ambit of Regulatory Takings" in Susy Frankel and Deborah Ryder (eds) *Recalibrating Behaviour: Smarter Regulation in a Global World* (LexisNexis, Wellington, 2013) 329 at 349–362.

51 Huang, above n 47, at 638–646.

52 Jennifer Nedelsky "Should Property Be Constitutionalized? A Relational and Comparative Approach" in GE Van Maanen and AJ Van Der Walt (eds) *Property Law on the Threshold of the 21st Century* (Gaunt, Holmes Beach, 1997) 417, as usefully summarised by AJ Van Der Walt "The Constitutional Property Clause: Striking a Balance Between Guarantee and Limitation" in Janet McLean (ed) *Property and the Constitution* (Hart Publishing, Oxford, 1999) 109 at 114.

53 The protection of property rights was considered throughout the Law Foundation's three-year Regulatory Reform Project led by Susy Frankel, which produced three volumes of insightful essays and an online Regulatory Reform Toolkit.

54 Palmer and Butler, above n 1, at 168 (footnotes in original).

> Interestingly, the Constitutional Advisory Panel noted that adding property rights to [NZBORA] had been discussed; and it recommended exploring options to add property rights to [NZBORA],[55] although noted that there was concern about getting the wording right.[56]
>
> Our proposed wording builds in a modest, targeted protection for property rights. It draws on the long established principle of no compulsory acquisition without compensation and prohibits arbitrary deprivation of property, while at the same time affirming the ability for Parliament to enact laws that affect property rights in pursuit of the common good.

This passage advances four main claims: first, the right to property is settled as a universal human right codified in foreign constitutions; secondly, property is important as a private interest held by individuals to protect their wealth and welfare from state interference; thirdly, past proposals to bolster the status of property have been rejected due to disagreement over wording; and fourthly, the right is a modest extension of the status quo that will not affect the role of Parliament. Combined, they paint a picture of normative consensus that has awaited the right technical eye to craft a clever clause. But the authors' failure to flesh out the significance of a right to property is misleading. The rest of this article is structured around the claims identified above, which I address in reverse order. In so doing I adhere to what Sir Geoffrey and Dr Butler hoped to achieve in drafting their Constitution: "remove the mystery", "provide an accurate map about how we govern ourselves", "dispel the disenchantment with politics" and "[p]rovide for development in the future".[57]

IV THE WORDING

Tucked toward the end of pt 12 of the draft Constitution – what would become an extended and entrenched version of NZBORA – is Sir Geoffrey and Dr Butler's proposed right to property:[58]

> 104 Right to property
>
> (1) Everyone has the right not to be deprived of his or her property except in accordance with the following principles:
>
> (a) deprivation shall not occur except pursuant to an Act of Parliament:
>
> (b) deprivation shall only be pursuant to a law of general application and in pursuit of a public purpose or public interest:
>
> (c) deprivation shall not be arbitrary:

---

55 Constitutional Advisory Panel, above n 2, at 48.

56 At 51.

57 Palmer and Butler, above n 1, at 25–26.

58 At 69 (footnotes added).

(d) deprivation by way of expropriation shall be subject to the prompt payment of just and equitable compensation.

(2) For the avoidance of doubt, deprivation in pursuit of a public purpose or public interest shall include, but not be limited to—

(a) the carrying out of public works (whether or not the works are undertaken by a person or body referred to in Article 76):[59]

(b) taxation, and the levying of rates or charges:

(c) the benefit of public health, resource management, the environment, public transport, the integrity of the financial sector, law enforcement, family relationship purposes, or any other aspect of the common good.

(3) Nothing in this Article applies to any sanctions that the State is required to impose pursuant to a resolution of the Security Council of the United Nations.[60]

At first blush this clause addresses the concerns raised in scholarly and political debates. Article 104(2) outlines a non-exhaustive range of public purposes and interests that may be pursued by Parliament despite incidental deprivation of property. These permissible purposes reflect the approach of comparable Commonwealth jurisdictions that have adopted a takings clause: the state does not owe a duty to compensate when it encroaches on property rights through taxation or for the sake of common concerns such as public health and safety.[61] But the type of legislative activity listed, and the discrete term "expropriation" under art 104(1)(d), suggests the operative word "deprivation" must include regulatory takings. The right is in fact a significant step beyond present protections, which place no legal limit on the deprivation of use and enjoyment through regulatory enactments.

The entitlement to compensation would be triggered only in the event of takings where the state formally acquires title, if that is the distinct meaning intended by "expropriation". Sir Geoffrey and Dr Butler have steered clear of the position that every regulation that lessens the utility of ownership requires full compensation. But the distinction between mere deprivation and compensable expropriation would be ripe for litigation in order to exploit the latter category. Foreign courts have

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59 Article 76 largely replicates s 3 of the New Zealand Bill of Rights Act 1990, which limits its application to the three branches of government or any person or body performing a public function: see Palmer and Butler, above n 1, at 63.

60 This third limb would, for example, preserve New Zealand's ability to deprive foreign owners if their home state is subjected to economic sanctions. I address it no further.

61 Tom Allen *The Right to Property in Commonwealth Constitutions* (Cambridge University Press, Cambridge (UK), 2000) at 163.

held that regulations reach a point where they might be considered an expropriation.[62] The red-zoned properties after the Canterbury earthquakes might, for example, meet this threshold. The proposed clause would invite claims based on the position preferred by Russell Brown that compensation should be available where one is able to demonstrate that the effect of regulation is equivalent to expropriation through "a *complete* deprivation of all economically beneficial uses",[63] which approximates the approach to takings in the United States.[64]

The clause transfers the fixing of compensation to the judiciary. Two approaches have been adopted by courts under foreign constitutions:

(1) full indemnification at market value; or

(2) lesser compensation arrived at through judicial balancing of the public and private interests at stake.[65]

As Huang argues, this discretionary task is unlikely to lead to more certainty or stability in the prevention of arbitrary changes to property than the present practice of enacting specific statutory regimes to provide compensation for takings.[66] The qualification that compensation must be "just and equitable" does not assist in predicting the interpretation likely to be favoured. This formula does not feature in any existing New Zealand statute. It is likely a truncated adaptation from the Constitution of South Africa, which goes on to specify that this amount must reflect a balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including: the current use of the property; the history of the acquisition and use of the property; the market value of the property; the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and the purpose of the expropriation.[67] No such guidance is offered by the clause proposed for New Zealand's adoption. Having compared the approaches to compensation for takings in several jurisdictions, Allen observes that "departures from the indemnification principle must be clearly spelled out in the

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62 *Lucas v South Carolina Coastal Council*, above n 10; and *La Compagnie Sucrière de Bel Ombre Ltée v The Government of Mauritius* [1995] 3 LRC 494 (PC).

63 Russell Brown "Possibilities and Pitfalls of Comparative Analysis of Property Rights Protections, and the Canadian Regime of Legal Protection Against Takings" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 145 at 168–169 (emphasis in original).

64 See *Lingle v Chevron USA Inc* 544 US 528 (2005) affirming *Lucas v South Carolina Coastal Council*, above n 10.

65 Allen, above n 3, at 512.

66 Huang, above n 47, at 539.

67 Constitution of the Republic of South Africa, art 25(3).

property clause".[68] In the absence of criteria like those in South Africa, it is likely that the proposed right would be interpreted to require prompt payment of full economic loss at market value. That could create a palpable chill on public policy.

Further ambiguities are worth noting. By art 104(1)(b) and (c), deprivation shall only be pursuant to a law of "general application" and must not be "arbitrary". It is unclear whether an Act of Parliament regulating a particular sector would violate these requirements. While such a statute would no doubt be drafted in general terms, one can imagine creative lawyers structuring a claim that this regulation constitutes discrimination against the targeted industry and is therefore contrary to the constitutional right. There is a latent appetite for such litigation. In 2008 New Zealand's largest telecommunications company had to demerge from its network infrastructure division – a process known as "local loop unbundling" – as a precondition to its participation in the Government's ultra-fast broadband initiative.[69] This structural separation was mandated to secure public benefits through a competitive market for the provision of broadband services. A constitutional scholar advised the Commerce Commission that this unbundling "encroache[d] on economic and property interests" and in some jurisdictions the company would have a right to "offset its losses through compensation".[70]

Would the company have been able to sustain a claim if the proposed clause was then in force? While the promotion of competition surely qualifies as a "public purpose",[71] it is arguable that legislation targeting the major player in a particular industry falls foul of the principles under art 104(1)(b) and (c). Certainly the claim would survive a strike-out application in the absence of case law. But what remedy would follow an established breach? It is unclear to what extent a deprivation that failed to comply with the principles listed under art 104(1) could ground an application for judicial review and remedies. The proposed Constitution sets out a broad jurisdiction to declare whether any law or conduct is inconsistent and "make any order that is just and equitable in order to remedy the consequences or effects of that inconsistency".[72] The NZBORA experience demonstrates judicial willingness to infer remedies despite the total absence of remedial provisions.[73] Could a mandatory demerger that is inconsistent with one of the art 104 requirements trigger a right to compensation on the basis that an unconstitutional deprivation is expropriatory?

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68 Allen, above n 3, at 513.

69 Boast and Frankel, above n 50, at 331–333.

70 Philip Joseph "Local Loop Unbundling Review: The Legal and Interpretive Issues Governing the Commerce Commission Review under Section 64 of the Telecommunications Act 2001" (letter submitted to Commerce Commission by Telecom, 2003) at [36] quoted in Boast and Frankel, above n 50, at 333.

71 See Commerce Act 1986, s 1A.

72 Palmer and Butler, above n 1, at 59.

73 See for example *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's Case*]; and *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791; aff'd [2017] NZCA 215, [2017] 3 NZLR 24.

Any attempt to answer these questions would be wholly speculative. The example hints at the sort of well-heeled litigant who would endeavour to define the ambit of an uncharted takings doctrine when the abstract principles and supposed safeguards remain exposed to interpretative violence.

In observing that proposals have failed due to worries about wording, Sir Geoffrey and Dr Butler cite the report of the Constitutional Advisory Panel, which records concerns as to how remedies would be determined and whether affirming property rights might worsen inequalities or negatively affect the environment.[74] I do not think they have addressed these concerns. Moreover, the primary concern reported by the Panel is ignored altogether by Sir Geoffrey and Dr Butler, and here we arrive at a fundamental problem with their proposal: what do we even mean by "property"? Written constitutions vary in the range of interests protected. Unlike other constitutional rights, the scope of a takings clause is determined at least partly by rights arising from private law.[75] The 1950 Constitution of India, for instance, protected "property, moveable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking".[76] Several problems flow from leaving the concept undefined. Does the clause protect all interests recognised as property under private law? Intellectual property rights? Including tobacco trademarks? What about debts and financial instruments? And does it protect interests that are not recognised as property under private law? Are social welfare benefits protected? What about licences granted by the state? Including water permits? Are contractual rights a species of constitutional property?

I return to the enigma of property in part VI when examining the conception of property assumed by Sir Geoffrey and Dr Butler, which obscures its true legal nature as an evolving plurality of social relations underwritten by an active state, and again in part VII to show how the constitutional protection of their conception is characteristic of liberal constitutions and serves as a kind of political insurance for unimpeded capital accumulation (possibly with deleterious consequences). For now, however, I simply note it would hardly be modest or targeted to expose Parliament, the courts and the government of the day – and therefore the voter and the taxpayer – to the aforementioned string of questions without a lot more legal and policy analysis. At the very least one would expect some detailed reflection as to why New Zealand has rejected a right to property in the past.

V PAST PROPOSALS

Proponents of a takings doctrine are alive to McGechan J's observation that "[i]f the content of legislation offends, the remedies are political and ultimately electoral".[77] Parliament is an

74 Constitutional Advisory Panel, above n 2, at 51 cited in Palmer and Butler, above n 1, at 168.

75 Allen, above n 3, at 506.

76 Constitution of India, art 31(2) as originally enacted.

77 *Westco Lagan Ltd*, above n 34, at [95].

appropriate reference point for figuring out why proposals have failed, including amendments to NZBORA and attempts to install a regulatory responsibility regime. New Zealand's entry into investment treaties has also raised questions in parliamentary politics about the protection of property. The debates went well beyond definitional quibbles: they touched on deep disagreement as to the limits of democratic policymaking and the role of the state in matters of political economy and the environment.

A Amendments to NZBORA

During the drafting of NZBORA the inclusion of a right to property was rejected by Sir Geoffrey and company – along with other economic, social and cultural rights – on the basis that the instrument "should not … attempt to capture (or more accurately to impose) a temporarily popular view of policy … especially in the economic area".[78] Since then, Parliament has twice considered members' bills proposing its amended inclusion.

Owen Jennings MP for the ACT Party sponsored the New Zealand Bill of Rights (Property Rights) Amendment Bill 1997 in order to recognise the "primacy of property rights" in "a property-owning democracy like New Zealand".[79] He considered this "glaring omission" to be a symptom of the "politics of envy" and "lack of wit and commercial nous" that he associated with the collectivist menace of socialism.[80] This ideological division was embraced somewhat by Matt Robson MP for the Alliance Party, who suggested state assets were in greater need of protection due to harmful privatisation policies.[81] In explaining the National Government's lukewarm stance the Hon Doug Graham MP, Attorney-General and Minister of Justice, said it was "constitutionally inappropriate" to encroach on substantive policy through a right to property; and that the safeguards sought could not be achieved because Parliament can always legislate in defiance of NZBORA.[82] The Hon Tony Ryall MP, Minister for State Owned Enterprises, added that NZBORA should be amended rarely and only then on the basis of national consensus in order to ensure long-lasting support from all sectors of the community.[83] In the absence of such consensus it would be dangerous to invite the courts to get involved in economic policy.[84] The Bill was accordingly negatived at the second reading by 110 noes to the nine ayes.[85]

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78 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 at 23.

79 Owen Jennings (25 February 1998) 566 NZPD 6794.

80 At 6794.

81 Matt Robson (25 February 1998) 566 NZPD 6807–6808.

82 Douglas Graham (25 February 1998) 566 NZPD 6796–6798.

83 Tony Ryall (25 February 1998) 566 NZPD 6801.

84 At 6801.

85 (25 February 1998) 566 NZPD 6809.

The more recent proposal was sponsored by Gordon Copeland MP.[86] The Bill would have secured, first, the right to own property, whether alone or in association with others; and secondly, the right not to be deprived of the use or enjoyment of property without just compensation.[87] While it enjoyed broad support at its first reading, the debate focused on rights in real estate and the lack of compensation under the Resource Management Act 1991. When introducing the Bill, Mr Copeland said his proposed rights would shore up the old adage that "[a]n Englishman's home is his castle";[88] arguing that property rights are a precondition to economic prosperity and social well-being, which creates stability for families and order in communities.[89] Dr Wayne Mapp MP for the National Party echoed these views, suggesting the mood had shifted in support of a right to property since the synthesis of "the old left-right battle" between socialism and capitalism into the "third wayism" du jour.[90] But the Hon Dr Michael Cullen MP, Deputy Prime Minister, challenged the nexus drawn by the Opposition between property and democracy, noting that property is strongly protected in many non-democratic states, and he recorded the Labour Government's serious reservations about the wide language in the Bill.[91] Undefined terms left entitlement to compensation at the whim of the judiciary, which Russell Fairbrother MP considered "a litigator's dream and a legislator's nightmare".[92] The Government nonetheless supported the Bill progressing to select committee.

The Green Party was the sole voice of opposition on the basis that property is a contingent privilege undeserving of protection alongside human rights. Mike Ward MP believed the amendment would be antithetical to its core policies since "property owners commonly have access to lawyers and expert witnesses that are unaffordable to those who act on behalf of the environment and people".[93] This disquiet perhaps reflects the support from prominent bodies in New Zealand's business community, albeit with definitional reservations,[94] such as the Property Council, Federated Farmers, Business New Zealand and Business Roundtable.[95]

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86 Mr Copeland was an MP for United Future when the Bill was introduced but was an independent by the second reading.

87 New Zealand Bill of Rights (Private Property Rights) Amendment Bill 2005 (255-1), cls 11A and 11B.

88 Gordon Copeland (11 May 2005) 625 NZPD 20496.

89 At 20497.

90 Wayne Mapp (11 May 2005) 625 NZPD 20497–20499.

91 Michael Cullen (11 May 2005) 625 NZPD 20499–20500.

92 Russell Fairbrother (11 May 2005) 625 NZPD 20508.

93 Mike Ward (11 May 2005) 625 NZPD 20504.

94 See Business New Zealand "Submission to the Justice and Electoral Committee on the New Zealand Bill of Rights (Private Property Rights) Amendment Bill 2005" at [3.0]–[3.9].

95 Gordon Copeland (7 November 2007) 643 NZPD 12914.

In any event the Justice and Electoral Committee was unconvinced that the costs of compensation and the uncertainty surrounding undefined terms were risks worth assuming when there had not been exhaustive research into the existing framework for protection.[96] The National Party changed its tune, recording a minority view that compensation issues should be dealt with by statute rather than through the courts due to the potential for a flood of litigation; and that the Bill illustrated the dangers in proposing amendments that could have wide-ranging consequences without proper analysis or full advice.[97] The Committee realised the fallacy in sliding from the view that property rights are important to the conclusion that there ought to be a justiciable right requiring compensation in every event of deprivation.

Further concerns were raised in the second reading debate. Te Ururoa Flavell MP for the Māori Party alleged a cultural bias to the Bill despite its support from the Treaty Tribes Coalition.[98] The amendment may secure individual property rights but, based on experiences like the enactment of the Foreshore and Seabed Act 2004 (which foreclosed claims by pre-emptively vesting title in the Crown), Mr Flavell doubted its effective protection of customary rights.[99] Russell Fairbrother for the Labour Party brought to the fore the core problem that "property" was without definition; he believed the courts and Parliament would be clogged for the next decade "as everyone tries to set right the cat that would be let among the legal pigeons".[100] And in the last remarks before the Bill was put to bed by 107 noes to 12 ayes, he addressed the asymmetric benefits of the proposal with polemical clarity:[101]

> [T]o claim that property is a fundamental human right is disingenuous and reflects a view of the capitalist State that does not aid those who do not enjoy the fruits of extreme capitalism.

B Regulatory Responsibility

Controversy concerning the inclusion of property under the grand banner of NZBORA has led to more subtle attempts to introduce a takings doctrine. Several incarnations of a regime designed to restrain the economic role of government have been advanced by those who arguably do enjoy the fruits of extreme capitalism. Rodney Hide MP for the ACT Party introduced a private member's Bill that passed its first reading and led to the Commerce Committee's recommendation that an expert

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96 New Zealand Bill of Rights (Private Property Rights) Amendment Bill 2005 (255-2) (select committee report) at 3.

97 At 3–4.

98 Te Ururoa Flavell (21 November 2007) 643 NZPD 13346.

99 At 13345–13347.

100 Russell Fairbrother (21 November 2007) 643 NZPD 13350.

101 At 13352.

taskforce be appointed.[102] Following the 2008 general election, the National–ACT Confidence and Supply Agreement included a commitment to establish the Regulatory Responsibility Taskforce. The Taskforce issued a report, including a draft Bill, on measures to improve the quality of legislation and reduce the regulatory burden on economic activity.[103] Although the Regulatory Responsibility Bill was voted down, it resurfaced in 2011 as the diluted Regulatory Standards Bill.[104] In May 2015 the Commerce Committee recommended it not be passed because "the main effect … would be to add an extra layer to existing legislative processes and practice".[105]

As introduced, the Regulatory Standards Bill set out 11 principles to be enforced through a certification regime, judicial declarations of incompatibility, and a direction for the courts to prefer compatible meanings when interpreting other enactments.[106] The third principle – "taking of property" – provided that legislation should not authorise the taking or impairment of property unless it is necessary in the public interest and the owner receives full compensation.[107] This principle was premised on the Taskforce's finding that regulatory constraints are tantamount to outright takings.[108] Richard Ekins and Huang doubt the cogency of this equation, pointing to the muddled state of takings law abroad.[109] Moreover, they argue the principle "plainly brings in a very strong doctrine of regulatory takings that is foreign to our constitution".[110]

The proposal to transfer power from the democratically accountable branches to the judiciary prompted Paul Rishworth to describe the proposed regime as a "second bill of rights".[111] Sir Geoffrey weighed in on the debate at the time, rejecting Rishworth's suggestion that a right to property in NZBORA would be preferable to the regime:[112]

> The difficulty with including property in [NZBORA] is that it would be necessary to go through the whole statute book and look at 1,100 existing statutes to work out which of those involved interference

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102 Regulatory Responsibility Bill 2006 (71-2) (select committee report) at 2.

103 Regulatory Responsibility Taskforce *Report of the Regulatory Responsibility Taskforce* (September 2009).

104 Regulatory Standards Bill 2011 (277-1).

105 Regulatory Standards Bill 2011 (277-2) (select committee report) at 2.

106 Regulatory Standards Bill (277-1), cls 7–12.

107 Clause 7(1)(c).

108 Regulatory Responsibility Taskforce, above n 103, at [4.63].

109 Richard Ekins and Chye-Ching Huang "Reckless Lawmaking and Regulatory Responsibility" [2011] NZ L Rev 407 at 422–423.

110 At 424.

111 Paul Rishworth "A Second Bill of Rights for New Zealand?" (2010) 6(2) Policy Quarterly 3.

112 Geoffrey Palmer "A View of the Legal Debate" (2010) 6(2) Policy Quarterly 33 at 34.

> with property rights now and how that matter should be handled. Otherwise, the costs and consequences of such a change would be drastic and uncertain. Such work would take some years.

Sir Geoffrey accepted the regulatory responsibility regime "amounts to a substantial constitutional change" and queried the "legitimate source for this shift of power" due to the lack of "any widespread public consensus on the issues".[113] These reservations are absent in respect of his current proposal for a justiciable takings clause in a codified constitution.

C Investment Treaties

The question of proprietary limits on legislative power reached a flashpoint during debates around entry into the Trans-Pacific Partnership Agreement (TPP), which includes comprehensive protections for investors from expropriation.[114] Investment treaties provide a complement to constitutional rights by requiring contracting states to pay compensation at full market value in the event of the nationalisation, expropriation or deprivation of assets.[115] Through international arbitration, which relies on the notorious Investor-State Dispute Settlement (ISDS) clause, foreign investors have access to a "backdoor takings doctrine that precludes proactive regulation in public health and environmental protection,"[116] as well as reform in other politically salient sectors such as labour relations and state ownership.[117] Fletcher Tabuteau MP for New Zealand First introduced a Bill that would have prevented entry into future treaties containing an ISDS clause,[118] which he defended on the basis that "global investment rules … allow foreign corporations to sue Governments if they introduce policies that interfere with corporate profits".[119] This concern was repeated when the (premature) implementation legislation for the TPP passed through the House.[120] Eugenie Sage MP for the Green Party, for instance, opposed the legislation on the basis that the TPP would restrict the ability to regulate foreign ownership and the oil, gas and mining industries; and might prevent the enactment of biodiversity standards or controls on land use to protect water quality.[121]

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113 At 33.

114 Trans-Pacific Partnership (opened for signature 4 February 2016), art 9.8.

115 Gus Van Harten *Investment Treaty Arbitration and Public Law* (Oxford University Press, Oxford, 2007) at 82.

116 At 91–92.

117 Oliver Hailes and Andrew Geddis "The Trans-Pacific Partnership in New Zealand's Constitution" (2016) 27 NZULR 226 at 255.

118 Fighting Foreign Corporate Control Bill 2015 (14-1), cl 5.

119 (22 July 2015) 707 NZPD 5252.

120 Trans-Pacific Partnership Agreement Amendment Act 2016.

121 (8 November 2016) 718 NZPD 14859–14861.

If we erase the xenophobic overtones, the basic concern of these minor-party MPs is for the regulatory autonomy of Parliament not to be subordinated to concentrations of wealth that are willing and able to chill or challenge policies that advance a broader public goal. This is the perennial argument against the installation of a takings doctrine, echoing opposition to the protection of property under NZBORA and the ACT Party's "Holy Grail" of a regulatory responsibility regime.[122] One would therefore expect a proposal for an entrenched right to property to be defended carefully in the light of deep political disagreement in New Zealand. Again I borrow freely from Sir Geoffrey: "The ideological and cultural controversies are considerable: there was, and is, without doubt, *no community consensus* in relation to such a right."[123]

VI THE CONCEPT OF PROPERTY

Arguments in favour of past proposals suggest the taking of property clashes with certain ideas about the function of government. In the liberal tradition, the state is understood as a putative social contract to protect individual rights; it cannot extinguish interests in property when the protection of those notionally pre-political rights is its primary purpose.[124] Constitutional economists likewise recommend that property rights should be insulated from the ebb and flow of electoral politics in order to reduce inefficient conflicts over the ground rules of the market economy.[125] These accounts share a conception of property that is intuitively (and therefore politically and legally) powerful: protection of individual control over valued resources.[126] In my view, it is the conception adopted by Sir Geoffrey and Dr Butler in their proposal.

This intuitive conception focuses on things over which individuals maintain exclusive possession and decisional authority: toothbrushes and houses and sheep and factories. It assumes a form and a function. The form was best expressed by Blackstone when he praised 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."[127] It is reflected in the very structure of a right to property, which situates the individual in opposition to the state. In terms

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122 See Nicholas Jones "Act's search for Holy Grail goes on" *New Zealand Herald* (online ed, Auckland, 12 May 2015) <www.nzherald.co.nz>.

123 Palmer, above n 23, at 167 (emphasis added).

124 RA Epstein *Design for Liberty: Private Property, Public Administration and the Rule of Law* (Harvard University Press, Cambridge (Mass), 2011) at 99.

125 See James M Buchanan "The Domain of Constitutional Economics" (1990) 1(1) Constitutional Political Economy 1.

126 Gregory S Alexander and others "A Statement of Progressive Property" (2009) 94 Cornell L Rev 743 at 743.

127 William Blackstone *Commentaries on the Laws of England* (University of Chicago Press, Chicago, 1979) vol 2 at 2 (originally published in 1765).

of function Sir Geoffrey and Dr Butler describe property as "an important means by which individuals look after themselves and their families and communities and shield themselves from the power of the State".[128] This implies a purely private justification for property law as a regime through which control over resources allows individuals to accumulate wealth to share with their intimates. Mirroring the formal opposition between the individual and the state, the intuitive conception assumes a functional divergence between private interests protected by property and the pursuit of a public purpose.

Sir Geoffrey once expressed concern that "the bold inclusion of an indeterminate right to property, however defined, may ignore *the highly complex character of the institution of property* itself".[129] Indeed, internal tensions within the intuitive conception of property make it inadequate as the sole basis for resolving conflicts or designing property arrangements.[130] I now move beyond that conception to explain why property rights must be understood properly as coercive social relations whereby private economic power is underwritten by an active state apparatus. I then turn to the range of functions performed by property law beyond wealth maximisation.

A Property Rights as Social Relations

Industrial revolution and the rise of the corporation brought about a boom in commercial intangible rights, such as shares and debt instruments, which threatened physicalist conceptions of property based on land ownership.[131] Judges confronting strange claims were forced to shift their focus from the concrete *object* of ownership to the abstract *rights* of the owner, placing emphasis on the exchange value of transferable rights as the defining measure. This posed a conceptual dilemma: if property is defined by its expected earning power, how does one avoid the conclusion that any governmental activity that changes social expectations, and hence alters its exchange value, constitutes an interference with property rights? Lawyers soon learned that "a property right is a relation not between an owner and a thing, but between the owner and other individuals in reference to things".[132]

This relational conception was given clarity by Hohfeld, who highlighted four forms of legal entitlement – rights, privileges, powers and immunities – that cannot be conferred on individuals in a social vacuum.[133] These constructs create correlative constraint: *rights* are claims, enforceable by

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128 Palmer and Butler, above n 1, at 168.

129 Palmer, above n 23, at 167 (emphasis added).

130 Alexander and others, above n 126, at 743.

131 Morton J Horwitz *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy* (Oxford University Press, New York, 1992) at 146–147.

132 Morris R Cohen "Property and Sovereignty" (1927) 13 CLQ 8 at 12.

133 Wesley Newcomb Hohfeld "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1917) 26 Yale LJ 710.

state power, that impose a duty on others to act in a certain manner in relation to the holder; *privileges* are permissions to act in a certain manner without being liable for damages to others and without others being able to summon state power to prevent those acts; *powers* are state-enforced abilities to change legal entitlements held by oneself or others; and *immunities* are security from having one's own entitlements changed by others.[134] Hohfeld demonstrated that property consists of an aggregate of entitlements each entailing its correlative in respect of other persons.[135] The registered proprietor of a fee simple has a general privilege to use the land as she pleases (without being liable to others so long as she abides the law of tort and local bylaws), which could exist independently of her right to stop others trespassing (and their duty to act only as she sees fit) or her power to alienate a part of her interest through the creation of an easement or lease (whereby her decision to yield exclusive possession creates enforceable entitlements in favour of another). Her "ownership" of the "property" can exist only by reference to the conduct of others and in the shadow of state power.

Indeed, Morris Cohen characterises property as a delegation of sovereign power by the state to private individuals, which permits them to do as they please with a particular resource and to compel obedience from others.[136] The creation of transferable rights to invoke these coercive powers (while permitting unlimited accumulation and the possibility of destitution) has serious consequences for bargaining strength and wealth distribution; particularly in a system where the means of production are privately controlled, necessities such as food and housing are rationed by markets, and most people are forced to sell their labour to survive.[137] Normal transactions between formally equal parties do not necessarily reflect fair relations.[138] The market value of a loaf of bread is the measure of the seller's rights over productive assets versus the correlative constraints the law places on the aspiring purchaser. The purchaser must surrender her liberty to toil in the fields or the factory – these days, the customer-service call centre or the Burger King kitchen – until she obtains the means to consume that loaf lawfully by paying the cost of its production plus whatever profit the seller can attach to the price tag. The bargain for the bread (and the purchaser's labour) is not so much the neutral result of supply and demand but rather an outcome structured by existing property arrangements underpinned by the force of law. The systemic asymmetry permits no bright line between beneficial profit-seeking and detrimental rent-seeking. Wealth can be unilaterally extracted

134 Joseph William Singer "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld" (1982) Wis L Rev 975 at 986–987.

135 Hohfeld, above n 1334, at 746–747.

136 See generally Cohen, above n 132.

137 Duncan Kennedy "The Stakes of Law, or Hale and Foucault!" in *Sexy Dressing Etc.* (Harvard University Press, Cambridge (MA), 1993) 83.

138 Robert L Hale "Bargaining, Duress, and Economic Liberty" (1943) 43 Columbia L Rev 603 at 625–626.

by the propertied party at point of sale and in the labour market. Property begets power begets property.

This relational understanding of property begins to blur the standard division of society into public and private zones wherein the former is viewed as the coercive realm of state power and the latter is a space for individual liberty. The distinction is wielded as a rhetorical device in debates about the role of the state in the economy;[139] and it serves to obscure public dimensions of private property such as the use of wealth to influence democratic processes, the environmental degradation caused by economic externalities, and the authoritarian structures of the workplace.[140] Unaccountable concentrations of private power are often overlooked due to the liberal preoccupation with arbitrary state power. But Paddy Ireland believes we can dispel "the widespread view of markets as naturally arising, potentially unregulated, private phenomena" and thereby expose the radical potential of property law: "[P]roperty rights are, at root, *social relations*, a myriad of legally constituted, personal rights between individuals underwritten by the state" which are therefore "eminently changeable".[141] Put another way, property rights are legal constructs produced by policy decisions that are ripe for debate and revision. Not only must lawyers, judges and legislators be alive to the relations that constitute property but they should also shape the law to promote the ability of each person to obtain the resources necessary for social participation: "Property law can render relationships within communities either exploitative and humiliating or liberating and ennobling."[142]

In sum, economic power does not arise as a private force to which the state is radically opposed. Reductionist accounts in support of a takings doctrine rest on liberal assumptions that neglect how individual private property is both social and public in important respects: it tends to be measured by its expected exchange value; it entails correlative constraint on other people; it depends on state institutions for its very existence; and it affects the distribution of wealth and power throughout society. At a minimum, property relies on recourse to the state's monopoly over the legitimate use of violence and the maintenance of confidence in fiat currency as a stable medium of exchange.[143] Property is actively constituted by the state. Yet we pay very little attention to the obvious corollary to the study of takings: government action can often cause an increase in property values;[144] and the

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139 Paddy Ireland "Property, Private Government and the Myth of Deregulation" in Sarah Worthington (ed) *Commercial Law and Commercial Practice* (Hart Publishing, Oxford, 2003) 85 at 86.

140 See Michael Robertson "Liberal, Democratic, and Socialist Approaches to the Public Dimensions of Private Property" in Janet McLean (ed) *Property and the Constitution* (Hart Publishing, Oxford, 1999) 237.

141 Ireland, above n 139, at 112 and 96 (emphasis in original).

142 Alexander and others, above n 126, at 744.

143 David Harvey *Seventeen Contradictions and the End of Capitalism* (Profile Books, London, 2014) at 38–52.

144 Abraham Bell and Gideon Parchomovsky "Givings" (2001) 111 Yale LJ 547.

"law-making function of legislatures and common law courts is a major engine for creation, definition, and protection of property rights".[145] A rigid dichotomy between the rugged individual and the rogue Leviathan does not reflect the reality of property as coercive social relations underwritten by state power. It becomes unclear on what principled basis we should allow unelected judges to quarantine existing property arrangements from democratic decision-making through the formal organs of government.

B Pluralism in Property Law

The enigmatic character of property is not due to any definitional failing, but rather because the concept itself must reflect and embrace the complexities of lived experience. It serves many functions beyond wealth maximisation, which are baked into the array of institutions that populate the law at large.[146] Property institutions vary according to the type of *resource* (land, chattels, copyright, patent, water) as well as according to *relationships* in different social settings (family, neighbourhood, co-ownership, commerce).[147] These institutions also reflect the plurality of competing *values* at stake in liberal societies, as affirmed by the Supreme Court in *Clayton v Clayton*: property is a "fluid concept" and its meaning and scope is affected by the statutory and wider context in which it is used, including "changing social values, economic interests and technological developments".[148]

In *State Insurance Ltd v Ruapehu Alpine Lifts Ltd*, for example, the Court of Appeal held that snow, whether natural or artificial, could be considered property in the context of a ski field and was therefore covered by the operator's insurance policy following a series of volcanic eruptions.[149] And in *Coltart v Lepionka & Co Investments Ltd* the Court of Appeal held that a mortgagee exercising its power of sale owed a duty to act in good faith by using that power for the predominant purpose of repaying the debt through sale at the best price reasonably obtainable.[150] The mortgagee could not act in a manner that unfairly prejudiced or recklessly sacrificed other parties that had an equitable interest in the value of the land beyond the secured sum.[151] The infamy of foreclosures in the wake of the 2008 financial crisis might have created a popular perception that the rights of mortgagees are inviolable. Yet this case shows that the powers conferred by an ordinary mortgage take their ultimate shape in the context of competing social values: the interests of the secured creditor are

145 Joseph William Singer "Justifying Regulatory Takings" (2015) 41 Ohio NUL Rev 601 at 658.

146 Gregory S Alexander "Pluralism and Property" (2011) 80 Fordham L Rev 1017.

147 Hanoch Dagan *Property: Values and Institutions* (Oxford University Press, Oxford, 2011) at xii.

148 *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 at [30] approving *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 279.

149 *State Insurance Ltd v Ruapehu Alpine Lifts Ltd* (1999) 10 ANZ Insurance Cases 61-435 (CA) at [27].

150 *Coltart v Lepionka & Co Investments Ltd* [2016] NZCA 102, [2016] 3 NZLR 36 at [65]–[66].

151 At [54] applying *Kennedy v De Trafford* [1897] AC 180 (HL) at 185.

tempered by communal concern for vulnerable persons affected collaterally by the disposition of land.

It would be a mistake to suggest these decisions involve exceptional extension or erosion of an otherwise determinate mode of ownership. While the everyday certainty of property depends on the assumption that the judiciary and executive apparatus will recognise and enforce a particular claim, this does not mean that property rights rest on nothing more than a series of impulsive adjustments based on the merits of a case. The values advanced by property are mediated by a grab bag of tools – statute, equity and contract – derived from precedent and deployed to define a legal entitlement. Certain configurations crystallise over time into stable forms because they serve as useful institutions for structuring relations in respect of resources.

New modes of owning are constantly emerging through public and private initiatives. Parliament has endowed forests and rivers with personhood to preserve their ecological, cultural and historical values through co-management between iwi and the Crown.[152] At the same time, Michael Robertson notes the revival of common property in private legal theory, which exists when each individual has a right not to be excluded from the use or benefit of a resource. These forms of common property include intellectual property in the public domain, state-owned land subject to a public trust, and formerly private property that has been transformed by instruments such as conservation easements or Creative Commons licences.[153] Existing property laws can be "hacked" (to use David Bollier's preferred term) to promote new kinds of collective and common ownership: subsistence commons in the Global South; digital commons such as open-source software; knowledge and design commons for material production; urban commons for the management of public spaces and water resources; provision of credit and social services through cooperatives; and stakeholder trusts for the management of large common-pool resources such as oil, minerals, water and the atmosphere.[154] The extent to which these forms can invoke the force of law depends on their finding a foothold in the evolving range of functions advanced within the concept of property.

Property operates through coercive social relations underwritten by the state that inevitably affect a plurality of persons beyond the nominal owner. Likewise, a number of social functions are performed by property law beyond protecting individual wealth. Why then is there such a gap between the intuitive conception of property and its operative reality? Alexander suggests many North Americans are apt to view "property" as synonymous with "commodity" since property is normally valued in terms of its ability to satisfy preferences through exchange.[155] Indeed, the

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152 Te Urewera Act 2014; Te Awa Tupua (Whanganui River Claims Settlement) Act 2017.

153 Michael Robertson "Common Property *Redux*" (2016) 49 UBC L Rev 563 at 603–615.

154 See David Bollier "Reinventing Law for the Commons" (strategy memo for the Heinrich Böll Foundation, 16 September 2015).

155 Gregory S Alexander "Property as Propriety" (1998) 77(4) Nebraska L Rev 667 at 667–668.

commodity form of property – anything bought or sold in a market – is the predominant institution throughout the global economy. This is the particular form we assume when we think of property exclusively as the protection of individual control over valued resources.

VII THE COMMODITY FORM OF CONSTITUTIONAL PROPERTY

Under the assumption that the concrete content of an abstract concept is bound to be dominated by whatever conception prevails at a given time and place, I now show how the intuitive conception of property-as-commodity adopted by Sir Geoffrey and Dr Butler in their proposal can be understood better by reference to New Zealand's economic substructure and the class interests at play. This helps to explain the proliferation of rights to property abroad, which is the opening justification for Sir Geoffrey and Dr Butler's proposal, and how constitutional property can pose an untimely hurdle to serious political problems.

A Commodities, Individuals and Constitutions

A commodity (such as a loaf of bread) has a use value insofar as it satisfies a human need or want (hunger) but it also has an exchange value represented by its monetary price (say $2.49) which allows it to be traded for other commodities. In this way the commodity serves as a vehicle for the accumulation of capital – defined by Marx as "value in motion" – through an expanding cycle of production, exchange, distribution and investment: money is used to buy certain commodities (labour power and means of production, including raw materials and energy) through which a fresh commodity emerges from the productive process, pregnant with surplus value to be realised when it is thrown upon the market in exchange for the initial outlay plus a profit, which is then reinvested in the productive sphere to seek further profits and maintain growth at a compound rate.[156] The commodity is thus the proprietary basis for capitalism. Indeed, Marx describes it as the "economic unitary cell" that sustains the "complete organism".[157] Against that backdrop, constitutional property takes the presumptive form of a commodity owned by a socially isolated individual wielded against the state and capable of being quantified in terms of its market value.

Alongside its essential economic function, the commodity carries a certain normative weight. When mediated by money, the circulation of commodities "bursts through all the temporal, spatial and personal barriers imposed by the direct exchange of products".[158] The commodity assumes an independent quality – a "fetishistic character" – such that it seems to break free from social processes of production and exchange; relations between humans are transformed into relations

156 In what follows I draw heavily on David Harvey's exposition of Marx. See generally David Harvey *Marx, Capital and the Madness of Economic Reason* (Profile Books, London, 2017).

157 Karl Marx *Capital, Volume I: The Process of Production of Capital* (Dent, London, 1972, originally published in 1867) at xlviii.

158 David Harvey *The Ways of the World* (Oxford University Press, New York, 2016) at 40 quoting Marx.

between things.[159] This is inescapable in a global context: we cannot comprehend the hidden labour that contributes to the value of an iPhone – from the coltan mines of the Congo to the Foxconn factory in Shenzhen – when we encounter the pure commodity in a sealed box at an Apple Store.

A lot of ink has been spilt on Marx's concept of commodity fetishism but we can work with the essential lesson identified by Duncan Kennedy: the consciousness of actors in capitalist society (producers, owners, workers, merchants, consumers, and so on) is structured such that they act as if "value is an attribute of the commodities themselves, rather than grasping that the values placed on commodities are a coded version of social decisions about what to produce and how to distribute it".[160] Despite alternatives to the existing system, popular sentiments of honesty and belonging become embedded in the established property regime such that interference with these arrangements is presumed to be morally illegitimate.[161] We see this conservatism at play in a plurality opinion of Justice Scalia of the Supreme Court of the United States: a compensable taking should be found whenever a lawmaker "declares that what was once an *established* right of private property no longer exists".[162] The normative resilience of property, as Jeremy Waldron calls it, insulates property rights from criticism regarding their underlying justification, which explains the difficulty in correcting historic and enduring injustices such as colonial expropriation.[163] Waldron suggests this resilience might be the ideological product of capitalist institutions.[164] Indeed, Kennedy believes the fetishism of commodities serves as a cognitive block: "people don't think of, or reject as unnatural or unworkable, alternative ways of organizing the economy that would be more humanly satisfying and more just".[165]

The dominance of the commodity increases as more goods and services become governed by market mechanisms. In order to maintain compounding growth it is necessary to create investment opportunities through the commodification of resources, information and culture that were hitherto unimagined as things ripe for private appropriation. Indeed, state power has been deployed to advance the commodity through processes of "accumulation by dispossession" even against the popular will: the geographical expansion of neoliberal capitalism has heralded the enclosure of

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159 Marx, above n 157, at 43–58.

160 Duncan Kennedy "The Role of Law in Economic Thought: Essays on the Fetishism of Commodities" (1985) 34 Am UL Rev 939 at 991.

161 Jeremy Waldron "The Normative Resilience of Property" in Janet McLean (ed) *Property and the Constitution* (Hart Publishing, Oxford, 1999) 170 at 171–172.

162 *Stop the Beach Renourishment Inc v Florida Department of Environmental Protection* 560 US 702 (2010) at 715 (emphasis added).

163 Waldron, above n 161, at 173–179.

164 At 193–194.

165 Kennedy, above n 160, at 991.

global commons – including genetic material, water, seed plasmas, peasant farmland and indigenous knowledge – and the transformation of public property and social services into tradable assets through privatisation.[166] Legal institutions, especially large firms, play an active role in this "creative destruction" as handmaidens to capitalist "revolutionaries".[167]

The commodification of Aotearoa is as old as New Zealand. In the 19th century the determination of title by the Native Land Court was intended to "destroy tribal ownership, and to individualise Māori land" by "remov[ing] community land-management rights and disrupt[ing] community decision-making processes at a crucial period when pressures to alienate would come from both the Crown and settlers".[168] Despite the collective desire of Māori to retain control of ancestral lands, the Court allocated fractional interests to individuals and effectively "assimilated [the land] into English law concepts of ownership rather than recognising the notion of collective tenure by an iwi, hapū or whānau as a matter of tikanga or customary law".[169] Alex Frame observes that, since the 1980s, the privatisation of public land and other state assets has forced Māori to formulate claims to water, forests and fisheries in the language of the commodity, which reinforces the Pākehā assumption that these taonga remain ripe for opportunistic alienation from Māori control.[170] While some believe a right to property would have provided a weapon against the Foreshore and Seabed Act 2004, the clause proposed by Sir Geoffrey and Dr Butler assumes that constitutional property can be liquidated as compensation in favour of an individual claimant. Without a more nuanced articulation of property, constitutional protection could distort the intrinsic values of collective rights through the singular logic of the commodity.

Indeed, commodity fetishism is complemented by liberal fetishism of the individual. Just as Marx describes the commodity as the basic economic cell, Evgeny Pashukanis believes the perfection of capitalism requires a corresponding subject – "the atom of legal theory" – in the form of a commodity-owning individual with rights to contract freely in the market.[171] Paradoxically it is

166 Harvey, above n 158, at 260.

167 Jack Hodder "Capitalism, Revolutions and Our Rule of Law" (2012) 12 Otago LR 627 at 631–632.

168 Waitangi Tribunal *He Maunga Rongo – Report on Central North Island Claims* (Wai 1200, 2008) vol 2 at 456–457.

169 *Ngāti Hurungaterangi v Ngāti Wahiao* [2016] NZHC 1486, [2016] 3 NZLR 378 at [21]. See also *Ngāti Hurungaterangi v Ngāti Wahiao* [2017] NZCA 429, [2017] 3 NZLR 770 at [10]–[26].

170 Alex Frame "Property and the Treaty of Waitangi: A Tragedy of the Commodities?" in Janet McLean (ed) *Property and the Constitution* (Hart Publishing, Oxford, 1999) 224 at 234–236.

171 Evgeny Pashukanis "Commodity and the Subject" in *The General Theory of Law and Marxism* (2nd ed, Ink Links, London, 2007, originally published in 1924) 109. See also A Claire Cutler "New constitutionalism and the commodity form of global capitalism" in Stephen Gill and A Claire Cutler (eds) *New Constitutionalism and World Order* (Cambridge University Press, Cambridge, 2014) 45; Isaac Balbus "Commodity Form and the Legal Form: An Essay on the 'Relative Autonomy' of the Law" (1977) 11 Law &

the disembodied corporation – which enjoys the benefit of human rights – that best fits the ideal subject demanded by the capitalist mode of production.[172] The emphasis on protection from state power creates a mythology, reflected in political rhetoric and popular culture, that constitutional rights are free-standing entities defined from the individual's perspective alone and therefore absolute in nature.[173] This bias is manifest in Sir Geoffrey and Dr Butler's proposal, which places the private owner in opposition to the public interests advanced by the state.

There is a tremendous irony, says Laura Underkuffler, that the right to property is bound up with ideas of separation, isolation, autonomy and control when it is impossible to conceive of property in wholly private terms; she calls the intuitive conception of property a "constitutional myth".[174] Indeed, Max Lerner once wrote of the United States: "Every tribe needs its totem and its fetish, and the Constitution is ours".[175] The fetishism surrounding written constitutions in other jurisdictions creates conceptual blind spots for scholars and laypeople alike, obscuring the breadth of constitutional realities and stunting debate.[176] The very act of entrenching a right to property in a written constitution would add another layer of resilience to the commodity: "To designate property as a constitutional right conveys the idea of property as essentially a private right requiring insulation from public interference and control."[177]

What I call "the commodity form of constitutional property" captures the real effect of a right to property: the protection of a particular form of property as a kind of political insurance for capital accumulation. The protection is *direct and material* – owners enjoy compensation at market value in the event of a taking, which lessens the risk of investment and chills the implementation of policies that threaten profitability – as well as *structural and ideological* – constitutions assist in the process of commodification and thereby discipline the collective imagination against experimenting with property forms. By stacking the factors of fetishism – not only of commodities but also of the individual and written constitutions – we appreciate how capitalism and liberal constitutionalism work together to foreclose on the potential of property as a field of legal innovation and social change.

Society 571; and China Miéville *Between Equal Rights: A Marxist Theory of International Law* (Brill, Leiden, 2005).

172 New Zealand Bill of Rights Act 1990, s 29.

173 Laura S Underkuffler "Property as Constitutional Myth: Utilities and Dangers" (2007) 92 Cornell L Rev 1239 at 1244.

174 At 1247.

175 Max Lerner "Constitution and Court as Symbols" (1937) 46 Yale LJ 1290 at 1294.

176 Brian Christopher Jones "Preliminary Warnings on 'Constitutional' Idolatry" [2015] PL 74.

177 Nedelsky, above n 52, at 422.

Through this lens we should review past debates: opposition to amending NZBORA, installing a regulatory responsibility regime and protecting foreign investors from indirect expropriation can be read as a defence of rival forms of property that pursue ends beyond the capitalist value regime such as environmental protection, wealth redistribution and mana whenua. The battle is fought not against property per se but between alternative definitions of property rights.[178]

B Rights to Property Abroad

The commodity form of constitutional property sheds light on the recent proliferation of rights to property abroad. Sir Geoffrey and Dr Butler begin their proposal by referring to art 17 of the Universal Declaration of Human Rights (UDHR).[179] Yet the status of the right to property on the international plane is far from settled. The UDHR is not the multilateral instrument many imagine it to be: it is a mere resolution of the United Nations General Assembly.[180] And the treaties that followed the UDHR – the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights – do not include any obligation in respect of property. This omission reflects the disagreement among negotiators representing rival regimes that placed varying emphases on markets and state ownership.[181] Since the fall of the Berlin Wall, however, the expansion of the commodity form of property has provided the impetus for many constitutions such as the 1993 Constitution of the Russian Federation.[182] Ten years later the Coalition Provisional Authority swiftly privatised Iraq's centrally planned economy, opening it up to foreign investment and imposing new protections for private property and free movement of capital.[183] The changes locked in through commitments under liberal constitutions and economic treaties form a governance structure for the global economy that privileges and protects transnational capital accumulation by limiting the policy space available to governments and progressive social forces.[184] So not only does the state advance the process of commodification;

178 EP Thompson *Whigs and Hunters: The Origin of the Black Act* (Allen Lane, London, 1975) at 261.

179 *Universal Declaration of Human Rights* GA Res 217A, III, A/Res/3/217A (1948).

180 See Hurst Hannum "The Status of the Universal Declaration of Human Rights in National and International Law" (1996) 25 GJICL 287.

181 Zehra F Kabasakal Arat "Human Rights Ideology and Dimensions of Power: A Radical Approach to the State, Property, and Discrimination" (2008) 30 HRQ 906 at 921–923.

182 See Stephen Gill "Market civilization, new constitutionalism and world order" in Stephen Gill and A Claire Cutler (eds) *New Constitutionalism and World Order* (Cambridge University Press, Cambridge, 2014) 29 at 33.

183 See Nicole Marie Crum "Liberalization or Economic Colonization: The Legality of the Coalition Provisional Authority's Structural Investment Law Reforms in Post-Conflict Iraq" (2006) 2 SCJ Int'l L & B 49.

184 See Hailes and Geddis, above n 117, at 236–239.

capitalist influence over lawmakers has yielded constitutional and international instruments designed to prevent the reversal of commodification.[185]

The right to property should be viewed not as a universal human right, but rather as a political achievement to secure a particular mode of owning and governing. There is nothing new under the sun: the Framers of the United States Constitution were inspired not so much by the hope of constraining arbitrary public power from above but by the fear of grassroots democratic efforts from below that would harm private owners through redistributive reform.[186] The vision behind that Constitution, which has served as the archetype for many more, is evident in the unabashed view of chief drafter James Madison: that the "primary responsibility of government" is "to protect the minority of the opulent against the majority" who "secretly sigh for a more equal distribution of [life's] blessings".[187] The assumption that mature democracies must entrench protection for individual rights largely ignores the genealogy of liberal constitutions as elite instruments geared toward hegemonic preservation.[188] It is contestable whether entrenchment is the best means of protecting individual rights, and legal scholars with greater faith in majoritarian or social democracy warn New Zealand against the false promise of a written, codified constitution.[189] Given the global and polycentric nature of regulatory puzzles in the 21st century, constitutional protection of the commodity should attract the apogee of such scepticism.

C The Crises of Commodity Capitalism

The commodity form of constitutional property is a useful theoretical device precisely because the abstract and neutral concepts of "property" and "the economy" are given analytical clarity by naming the concrete and political conceptions advanced by liberal constitutionalism: commodities under capitalism. Yet these institutions are confronting mounting crises. First, the price mechanism that underpins commodity production and exchange is vulnerable to disruptive digital technologies: as marginal costs of production decline toward zero, firms are forced to contrive profits by securing extensions to patents and copyright, which leads to inefficient monopolies and frustrates efforts to

185 See Cutler, above n 171.

186 Tim Di Muzio "Toward a genealogy of the new constitutionalism: the empire of liberty and domination" in Stephen Gill and A Claire Cutler (eds) *New Constitutionalism and World Order* (Cambridge University Press, Cambridge, 2014) 81 at 90–93.

187 Quoted in Noam Chomsky *Profit over People: Neoliberalism and Global Order* (Seven Stories Press, New York, 1999) at 47–48.

188 Ran Hirschl *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, Cambridge (MA), 2004) at 50–99.

189 Jeremy Waldron "A Right-Based Critique of Constitutional Rights" (1993) 13 OJLS 18; James Allan "Against Written Constitutionalism" (2015) 14 Otago LR 191; and John Smillie "Who Wants Juristocracy?" (2006) 11 Otago LR 183.

promote peer-to-peer collaboration through open-source access.[190] But a more urgent crisis challenges the dominance of commodity capitalism – due mainly to energy advantages across space and time, the production and consumption of commodities has become welded to the combustion of fossil fuels and the emission of greenhouse gases.[191]

Efficient allocation of finite resources through strong protection of commodities does not account for barriers to infinite growth. Faced with climate change, there is overwhelming scientific evidence and diplomatic consensus that this death drive cannot continue if organised human life is to survive in any recognisable form: "Best projections paint a picture of Earth characterised by social chaos, environmental refugees, resource wars, system collapse and mass loss of life."[192] The Paris Agreement attempts to wrestle these threats by reducing carbon-intensive industry while leaving capitalist property relations intact: unenforceable national contributions are superimposed on the binding commitments of international economic law, which continue to globalise unsustainable patterns of production.[193] Likewise, the environmental rights Sir Geoffrey and Dr Butler admirably include in their proposed constitution are bound to be undermined if introduced alongside a right to property that props up the commodity.[194] Although the marriage of emissions and commodity capitalism is largely an historical accident, it continues to pose major hurdles to mitigation and adaptation by chilling strong regulation and even structuring our legal imagination. It is instructive to note that the intuitive policy response to climate change in New Zealand has been the commodification of emissions to create carbon markets.[195] Worldwide, emissions trading schemes have done little to force a break from fossil-fuel dependence or to encourage the large-scale investments necessary for transition to a low-carbon economy.[196]

The need to adapt rapidly to abrupt change demonstrates the dangers of the commodity form when elevated to the constitutional plane. In *Lucas v South Carolina Coastal Council*, for example, the Supreme Court of the United States held that a compensable taking occurred when a ban was

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190 See generally Jeremy Rifkin *The Zero Marginal Cost Society: The Internet of Things, the Collaborative Commons and the Eclipse of Capitalism* (Palgrave Macmillan, New York, 2014).

191 See Andreas Malm "Fossil Capital: The Energy Basis of Bourgeois Property Relations" in *Fossil Capital: The Rise of Steam Power and the Roots of Global Warming* (Verso Books, London, 2016) 279.

192 Peter D Burdon "Wild Law: A Proposal for Radical Social Change" (2015) 13 NZJPIL 157 at 160.

193 Paris Agreement under the United Nations Framework Convention on Climate Change (opened for signature 22 April 2016, entered into force 4 November 2016).

194 Palmer and Butler, above n 1, at 69–70.

195 Climate Change Response Act 2002, pt 4.

196 "Everybody's Favourite Law: Cap and Trade programs have proliferated, but global emissions continue to climb" *Jacobin* (Summer 2017). Some argue, however, that these "political and operational difficulties … do not necessarily stem from the articulation of the private property rights themselves": Ben France-Hudson "Surprisingly Social: Private Property and Environmental Management" (2017) 29 JEL 101 at 125.

imposed on certain forms of coastal construction.[197] The purpose of the regulation was to limit erosion by preserving the buffering function of barrier beaches.[198] Writing for the majority Scalia J said the building ban, which would "eliminate all economically valuable use", was "inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture".[199] The Court has thus interpreted the Fifth Amendment as effectively entrenching the commodity form of property, which shields the supposed autonomy of private ownership from the growing recognition that human societies are interdependent with natural systems.[200] However, a functioning property system should adjust to changing socioeconomic, cultural, political, and biophysical conditions.[201] This capacity is undermined by the "economic vision of property" in takings jurisprudence, which provides a "psychological lift" to owners and frames the way "government regulations of property are viewed even when those regulations deal with public goods or serious problems with commons, like our global climate system".[202]

To take a tangible example for how the proposed right to property could impede progressive lawmaking, a serious political problem right now is the question of how to regulate New Zealand's dairy industry due to its contribution to the national emissions profile and dwindling water quality. Proposals have been floated to include agriculture in the emissions trading scheme and to place a levy on the use of fresh water. Already the Lake Rotorua Incentives Scheme has been established, through which local government "buys" nitrogen off landowners to promote voluntary changes to land use.[203] But escalating environmental crises suggest New Zealand will need to implement non-voluntary regulation to curb atmospheric and freshwater pollution, which would likely reduce the output of dairy farms, lower the profitability of rural landownership and perhaps trigger financial instability due to high levels of indebtedness.[204] The ultimate policy response must accommodate a range of voices and interests. If regulatory interventions had to overcome the commodity logic of Sir Geoffrey and Dr Butler's right to property, it would indeed be a litigator's dream and a legislator's nightmare.

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197 *Lucas v South Carolina Coastal Council*, above n 10.

198 At 1008–1009.

199 At 1028.

200 Jedidiah Purdy "Book Review: Coming into the Anthropocene" (2016) 129 Harv L Rev 1619 at 1627–1632.

201 Lynda L Butler "The Resilience of Property" (2013) 55 Ariz L Rev 847 at 891.

202 At 888.

203 Bay of Plenty Regional Council "$40 million fund now open to all Lake Rotorua catchment land owners" <www.boprc.govt.nz>.

204 For details on farm-sector debt in New Zealand, see Jane Kelsey *The FIRE Economy: New Zealand's Reckoning* (Bridget Williams Books, Wellington, 2015) at 57.

The same could be said of the resistance to be expected if a future government began a regulatory crackdown on speculative investment in the residential housing market, or if it sought to close coal mines and roll back permits granted under the Crown Minerals Act 1991 to prospect, explore or mine petroleum onshore and offshore. Policy options of that nature are conceivable if the Sixth Labour Government, formed on 26 October 2017 with New Zealand First and the support of the Green Party, pursues an agenda of economic and environmental change in line with its anti-capitalist rhetoric.[205]

The binary and adversarial approach of constitutional litigation through the courts does not adequately reflect the complexities of modern government and the place of property therein. This is not to say that property rights should not continue to enjoy presumptive protection in the context of statutory interpretation and administrative law. However, just as Kate Raworth proposes a new economic agenda to promote inclusive and sustainable development within planetary boundaries,[206] we need flexible constitutional arrangements that permit novel property experiments from below (which might prefigure a post-commodity paradigm) as well as muscular regulation of commodity production and exchange from above (which is essential to tackle the urgencies of the climate crisis).

New Zealand's present protections for property do just that. Constitutional constraints on takings are widely respected, yet Parliament has the final say as to how the rights of private owners should be harmonised with our regulatory response to collective struggles and whether compensation is appropriate. Sir Geoffrey and Dr Butler's proposal for an entrenched right to property would create more problems than it would solve.

VIII CONCLUSION

The right to property proposed by Sir Geoffrey and Dr Butler contains legal uncertainties and ignores political disagreement about the place of property in constitutional reform. Past lawmakers have been mindful there is no consensus in relation to such a right due to the enigma of property as a legal concept and its wide-ranging consequences. Moreover, the intuitive conception adopted by Sir Geoffrey and Dr Butler – protection of individual control over valued resources – obscures the nature of property as the product of coercive social relations underwritten by state power. The evolving values and forms of property law complement New Zealand's constitutional arrangements, which provide presumptive protection while recognising the importance of democratic decision-making in the light of the range of stakeholders affected by the creation and regulation of

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205 Bryce Edwards "NZ's radical new government of change" *National Business Review* (online ed, Auckland, 21 October 2017) <www.nbr.co.nz>. But see Bryce Edwards "The new government may not be so radical after all" *National Business Review* (online ed, Auckland, 27 October 2017) <www.nbr.co.nz>.

206 Kate Raworth *Doughnut Economics: Seven Ways to Think Like a 21st-Century Economist* (Random House, London, 2017).

property. But an entrenched right tends to privilege the intuitive and dominant form of property: the commodity.

Earlier I noted legal experiments with common and collective property. At the same time, the global resurgence of a socialist Left, through the figures of Bernie Sanders and Jeremy Corbyn, has lifted somewhat the taboo on alternative models of ownership.[207] None of these developments threaten the dominance of the commodity and their scalability (let alone desirability) remains an open question. But if the commodity is the existing "cell" of the global economy then this is the sort of legal "bioengineering" required to explore the potential of property in the context of an organic crisis in fossil-fuelled capitalism. Moreover, escalating environmental degradation and other salient political problems warrant an active state to manage resource use without the technical hurdles of a takings doctrine and the threat of litigation. At this juncture I recommend the rejection of the proposal to entrench a right to property. The dynamic principles of property law and the principled dynamism of an unwritten constitution offer the best way forward for owning and governing an uncertain future.

207 See for example Labour Party (UK) "Alternative Models of Ownership: Report to the Shadow Chancellor of the Exchequer and Shadow Secretary of State for Business, Energy and Industrial Strategy" (2017) <labour.org.uk>.