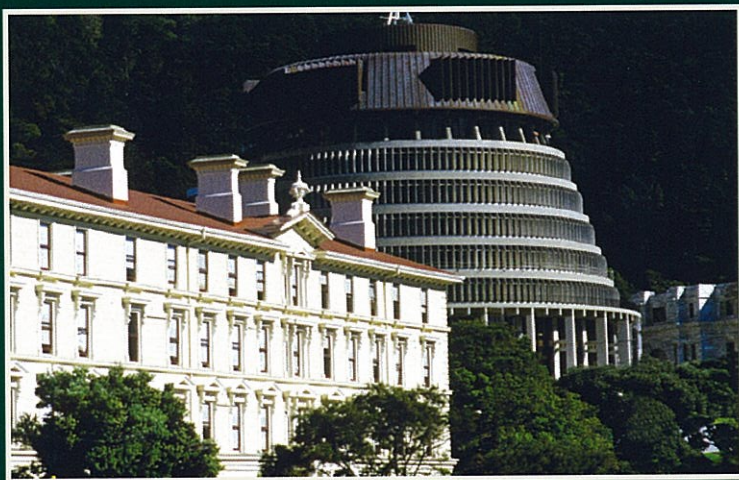


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UNIVERSITY OF WELLINGTON

*Te Whare Wānanga
o te Ūpoko o te Ika a Māui*



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LOCKE'S DEMOCRACY V HOBBS' LEVIATHAN: REFLECTING ON NEW ZEALAND CONSTITUTIONAL DEBATE FROM AN AMERICAN PERSPECTIVE

*Kerry L Hunter**

This paper considers New Zealand constitutional debate by examining American political practices resulting from an entrenched constitution. It starts by looking at Sir Geoffrey Palmer's 1992 lament that New Zealand politics was too heavily influenced by Thomas Hobbes and goes on to argue that though the United States seemingly starts with a Lockean conception of fundamental rights, natural law justice, and popular sovereignty, the attempt to preserve Locke's ideals through an entrenched written constitution has resulted in practices that come much closer to resembling Hobbes than Locke, and that if the goal of New Zealanders is to avoid Hobbes' Leviathan, they should continue to avoid the temptation of entrenching a written constitution.

I Introduction

As a political philosopher, I am fond of painting broad strokes with broad brushes. Not that I am unable to appreciate political science and its more exacting analysis, but I am more drawn to big philosophical questions and arguments linking political practice to culture and philosophical ideas – phenomena not easily measured by quantitative methodologies. I also find Alexis de Tocqueville's sweeping explanations of American politics compelling, and have been accused of putting too much emphasis on the power of ideas in making sense of American political practices.

Given these proclivities, I was delighted to discover Sir Geoffrey Palmer's reference to Thomas Hobbes in his 1992 book *New Zealand's Constitution in Crisis: Reforming our Political System*. Palmer

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starts chapter three by lamenting "[t]he Unfortunate Influence of Thomas Hobbes" arguing that "[t]he New Zealand legal system seems to be lit by ... [Hobbes'] afterglow still" and that "Hobbes' sovereign is alive and well and living in Wellington".¹ I regularly explain American political culture as essentially being lit by the afterglow of John Locke and was fascinated to discover a study which linked a different political culture to a different political philosopher.² In short, Palmer hooked me on the study of New Zealand politics. Would it be possible to draw rich comparisons between a Locke-based American political culture and a Hobbes-based New Zealand one?

I soon discovered the answer to that question is no. As probably most any scholar of New Zealand politics (including Palmer) would undoubtedly tell me, I was making too much of Palmer's connection to Hobbes. In fact for the most part, Palmer's 1992 book paints a dynamically democratic New Zealand politics which does not square with the Leviathan figure at all. It provides an account of many historically recent developments including the Constitution Act 1986, the New Zealand Bill of Rights Act 1990, and what Palmer calls the "Maori Constitutional Revolution". Moreover, Palmer revealed that New Zealand was soon to hold a referendum on the adoption of mixed-member proportional representation (MMP) something which would significantly alter the power structure in New Zealand. This did not seem at all like a place where a dictatorial Leviathan was alive and well. On the contrary, New Zealand democracy appeared to be dynamic and flourishing in a way that no longer seems possible in the United States I am familiar with.

But I was still perplexed. Throughout the book Palmer provides a rather convincing argument that National and Labour parties had a stranglehold on New Zealand politics and that through Cabinet, the party in government had virtually no checks restraining it. To quote Palmer: "The effective dictator in New Zealand is cabinet."³ And: "Limited government is what we do not have in New Zealand."⁴ Thinking of how Republicans and Democrats really do have a stranglehold on United States politics (MMP would never stand a chance of becoming policy in this country), I could not help but wonder, if Palmer was correct, what explained the dynamic changes that were occurring? Then, when I read the

1 Geoffrey Palmer *New Zealand's Constitution in Crisis: Reforming our Political System* (John McIndoe, Dunedin, 1992) at 42-43.

2 See for example Kerry L Hunter *The Reign of Fantasy: The Political Roots of Reagan's Star Wars Policy* (Peter Lang, New York, 1992); or Kerry L Hunter *The Role of the Supreme Court in American Political Culture: Preserving the Founding Myths* [Hunter *Preserving the Founding Myths*] (The Edwin Mellen Press, Lewiston, 2006).

3 Palmer, above n 1, at 106.

4 Ibid, at 108.

2004 fourth edition of *Bridled Power*, I was even more puzzled. Not only had MMP come into play (against the wishes of both Labour and National), Leviathan seemed to have disappeared altogether. In this book Sir Geoffrey and Matthew Palmer portray a picture of a government that is significantly checked by public opinion and minority parties as well as increasingly aggressive courts empowered by the New Zealand Bill of Rights Act 1990 and the 2001 amendments to the Human Rights Act 1993.⁵ Furthermore, they argue that corruption is virtually non-existent in New Zealand government and provide evidence that transparency is extremely high.⁶ From my distant perspective, this description was baffling. If indeed Leviathan was "alive and well living in Wellington" in 1992, how was he so easily toppled? Dictators are not likely to pass legislation that ensures their demise so quickly.

In short, though I thought I would have to give up my Hobbes-Locke cultural comparisons, I was still fascinated to understand how New Zealand democracy could seemingly work so well. And with the help of a grant from the Idaho Humanities Council, I went to New Zealand to study political culture. While there, my study took an interesting and ironic twist. What I discovered was a politics which on the surface seems arguably much more consistent with Locke's democratic assumptions than the American political culture I live in. I do not know if this was due entirely to the many changes Sir Geoffrey Palmer was instrumental in promoting. It may have been, but from my perspective, it seems that these changes were made possible due to a New Zealand political culture which has a long historical commitment to Locke's ideals. But I am no New Zealand scholar and will let my New Zealand peers sort that out. My strength is in American political culture and the purpose of this paper is to argue that American constitutionalism has come to reflect a more Hobbesian world view when compared to New Zealand practices. I conclude that this is due precisely to the influence of an entrenched constitution.

To be sure, what initially attracted me to the study of New Zealand politics (other than the lifetime goal to one day experience the beauty of Aotearoa first hand) was the very fact that New Zealand had thus far refused to entrench a bill of rights. Operating under the assumption that the United States Bill of Rights was a reflection of American commitment to John Locke's conception of natural rights, I problematically assumed that New Zealand was clearly rejecting Locke by such a refusal. Moreover, I had recently published a book arguing that the essential role of the United States Supreme Court was preserving the myths of American political culture,⁷ including the myth of natural rights, and I wanted to broaden my perspective by looking at a culture similar enough to the United States to make a legitimate

5 Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4th ed, Oxford University Press, New York, 2004).

6 Ibid, at 128.

7 Hunter *Preserving the Founding Myths*, above n 2.

comparison, yet which did not feel the need to grant their courts the power to rule acts of the legislature unconstitutional. In other words, many Americans tend to believe that the only way to take the concept of rights seriously is to empower the courts to stand up to a majoritarian legislative body.⁸ Yet from a distance, New Zealanders appeared to take rights seriously without a court system empowered by an entrenched bill of rights. How did they do this? Did they approach the concept of rights differently than Americans? Did they have more of a Hobbes-based world view which rejects natural rights against the government altogether?

Upon visiting New Zealand, what I began sensing was a political culture which did have a somewhat different view of rights. I was led to understand that there was actually limited political demand for the New Zealand Bill of Rights Act 1990. In fact, one seemingly well-to-do fellow I met in Auckland was unaware that the Act had actually been passed. New Zealand certainly did not need a bill of rights, he assured me, and as far as he was concerned Sir Geoffrey Palmer had spent far too long studying in the United States. I was also struck by the fact that officers within the Human Rights Commission perceive it their job to educate people with regard to what their rights are. And I was informed that New Zealanders do not think of themselves as having rights "against the state" but rather as being in a partnership with the state in order to enjoy rights. This reminded me of Edmund Burke's rejection of the conception of absolute rights as he reflected on the revolution in France. Moreover, New Zealanders seemed very interested in the question of fairness and asking whether people had a "fair go" without being as litigious as Americans. In fact, what I was perhaps most struck by was the Accident Compensation Corporation (ACC) and the New Zealand willingness to forego personal injury lawsuits in order to obtain greater public health care. This opened my eyes to what seemed to be a significant difference between the United States and New Zealand. I cannot imagine Americans willingly giving up their perceived right to sue for personal injury. Americans tend to view private lawsuits as playing a much more important role in ensuring good practice than New Zealanders. Moreover I was struck particularly by the Office of the Ombudsman and the role it plays in helping private individuals seeking redress for wrongs done by public officials. In the United States, individuals have no such avenue.

Is it possible, I began wondering, that American political culture has actually come to resemble more of a Hobbesian world view with its emphasis on legal recourse? Could it be that in the attempt to preserve Locke's inalienable rights once and for all by entrenching them in a written constitution that American political founders had actually broken faith with John Locke in a most significant way?

8 For the best scholarly argument on this approach, see Ronald Dworkin *Taking Rights Seriously* (Harvard University Press, Cambridge, 1972).

In other words, I cannot help but wonder what would happen if New Zealand were to adopt a written constitution. Having experienced New Zealand where the courts are not empowered with an entrenched constitution my eyes were opened to the possibility that Alexis de Tocqueville may have been too overly simplistic in claiming that the love of equality is the very key to understanding American political culture.⁹ A love for equality explains much, but perhaps an equally significant factor is the American deep distrust of majoritarian politics and faith in the legal process. As it turns out, Americans can be quite tolerant of inequality as long as the inequality is considered legal – that is, as long as it is considered constitutional. Surely this way of thinking is much more consistent with the thinking of Thomas Hobbes than it is of John Locke.

II *Brief Comparison of Hobbes and Locke*

Significant to this study, Hobbes and Locke differed radically on their conceptions of three deeply connected ideas: justice, sovereignty, and rights.

In a nutshell, Hobbes was the forerunner of legal positivism. For Hobbes, there is no such thing as justice which pre-exists societal norms. In fact, there is no meaningful claim to justice without an all-powerful sovereign. He saw the true state of nature as a state of perpetual war and the only law in a state of war is the law of survival. As physical creatures, Hobbes reasoned, humans have a right, so to speak, to attempt to preserve their lives and property if indeed any physical creature has a "right" to attempt survival. In such a state, he reasoned, all appeals to justice are meaningless. To cry foul play in a state of war is as silly as telling an eagle it is immoral to eat lamb. Justice is not an issue in the state of war.¹⁰

To this warre of every man against every man, this also is consequent; that nothing can be Unjust. The notions of Right and Wrong, Justice and Injustice have there no place. Where there is no common Power, there is no Law: where no Law, no Injustice. Force, and fraud, are in warre the two Cardinall virtues.

In short for Thomas Hobbes, there was no meaningful conception of justice which stood outside an all-powerful sovereign. Political power – the power to enforce the sovereign's conception of justice is what creates justice. To be certain, Hobbes rejected the argument that justice is what the strong say it is. For Hobbes, justice is what the strong are able to enforce. Justice then is what is legal and enforceable.

9 Alexis de Tocqueville understood he was being overly simplistic in his claims. As he noted toward the end of his introduction: "It must not be forgotten that an author who wishes to be understood is bound to derive all the theoretical consequences from each of his ideas and must go to the verge of the false and impracticable": JP Mayer (ed) *Democracy in America* (Anchor Books, New York, 1969) at 20.

10 Thomas Hobbes *Leviathan* (Penguin Books, New York, 1985) at 188.

Justice only takes on real life meaning in a context where a sovereign has the absolute ability to make and enforce rules. Rules are considered just simply because the sovereign has determined them to be so and is capable of enforcing them.

John Locke fundamentally rejected this notion. For Locke, the state of nature was not to be confused with a state of war. Rather the state of nature is governed by the law of nature which is universal and not subject to any human manipulation:¹¹

The state of nature has a law of nature to govern it, which obliges every one; and reason, which is that law, teaches all mankind who will but consult it that, being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions. ...

In other words, Locke fundamentally rejects Hobbes' might-makes-right argument, envisioning a universal justice that precedes government – precedes even humans for that matter. For Hobbes, absolute power is what grants the sovereign the capacity to determine justice. For Locke, justice determines the legitimacy of any sovereign's actions.

By rejecting any notions of natural justice that pre-exist human practice, Hobbes in particular intended to legitimise the rule of an all-powerful sovereign. Life without a sovereign, he reasoned, would be "solitary, poore, nasty, brutish, and short".¹² People intuitively understood this, Hobbes reasoned, which is why individuals allowed the sovereign to rule over them. So for Hobbes, reason teaches individuals that though they are certainly free to take matters into their own hands, to do so would put them back in a state of war where there really is no appeal to justice. In a state of war, one cannot really claim foul play.

Moreover, for Hobbes, not only does the sovereign make and administer all law, to truly be sovereign, the sovereign must also exercise sole authority in determining the justice and legitimacy of all law. To really be sovereign, the sovereign must exercise all powers and can have no checks.

Believing in natural justice, Locke on the other hand does not so much focus on the question of sovereignty. For Locke the question was what sort of arrangement is most likely to lead to natural justice. And for Locke the answer is when the majority rules. Reasoning that individuals will tend to be partial to their own special interests, Locke put his faith in majoritarian politics. When acting with the majority, he believed, people can think beyond individual self-interest and contemplate the good of the group.

¹¹ John Locke *The Second Treatise of Government* (The Liberal Arts Press, New York, 1956) at 5.

¹² Hobbes, above n 10, at 186.

Finally, the two philosophers differed on how they viewed rights. Rights are hardly considered by Hobbes. In a state of war, he reasoned, man has a perfect right to do anything he pleases. But since life in such a state is not worth living, people submit to being governed hoping that such submission will prove more beneficial than going it alone. In practice, Hobbes reasoned, people really only have those rights granted by the sovereign. Locke on the other hand, attempting to establish absolute limits to governmental authority, assumes natural (pre-government) rights endowed to men by their "Maker" and that all men are obligated to their "Maker" to preserve these rights. According to Locke, then, in joining society people do not give up their natural rights at all, rather they merely give up their power to police those rights – all with the intent of preserving them better. Moreover, where Hobbes assumes governments have legitimacy as long as people feel more secure, according to Locke no government which fails to preserve the natural rights of man is legitimate – this is government's sole purpose.

In short, in contrast to Hobbes, Locke conceived rights as pre-existing any political sovereign and justice to be the preservation of those rights. Consequently, he reasoned, any government could and should be critiqued from the perspective of this pre-government concept of rights and justice. Significantly for Locke, men have a right and even obligation to revolt against a sovereign who fails to abide by the natural justice requirement of preserving individual rights of life, liberty, and property.¹³

Claiming a right to "dissolve the political bands" that tied the American colonies to the British Crown, the American Declaration of Independence penned by Thomas Jefferson is steeped in Locke's assumptions. Moreover, the United States Bill of Rights codifies absolute individual rights which all are assumed to possess against the government. Consequently, it is easy to argue that the United States is built on a foundation of John Locke.¹⁴ Furthermore, given the New Zealander's unwillingness to perceive the need for an entrenched bill of rights, I initially concluded that New Zealand political culture is not a Lockean rights-based culture.

However, this view is a bit overly simplistic. It is true that American political culture is fundamentally a rights-based culture. Moreover, Americans generally do not think of sovereignty in the way Hobbes did. As Palmer noted, Hobbes did not believe in the ability to separate governmental powers. To be sovereign, the monarch had to have all legislative, executive and judicial power. Americans would seem at first blush to be closer to Locke and anti-Hobbes on this point as well. For the most part, they deeply distrust government and value ideals such as the "separation of powers" as a way

¹³ John Locke, above n 11, at ch xix.

¹⁴ See for example the seminal work by Louis Hartz *The Liberal Tradition in America* (Harcourt Brace and World Inc, New York, 1955).

of keeping government from obtaining Hobbes' Leviathan-like sovereignty. In fact, Americans do not initially envision the government as sovereign at all, certainly not in the way Hobbes would claim the government must be. According to American political culture, the people are sovereign and government is legitimate only when it abides by natural law. On this account it would seem extremely wrongheaded to argue that there is a Hobbesian Leviathan alive and well in Washington DC the way Sir Geoffrey Palmer claimed was the case in Wellington in 1992 – at least at first glance. But an emphasis on natural rights and separation of powers is only part of the equation.

Again, though my expertise is too limited to allow me a deep exploration of the degree to which New Zealand political culture connects to Hobbes, on the surface there does seem to be more of a Hobbes connection on the issue of rights and sovereignty. But on the question of justice, New Zealand practices and political culture seem, at least to this observer, more Locke-based while the United States seems to be moving further from Locke and closer towards Hobbes.

III Locke's Justice and the Majoritarian Process

In a very key way, Americans abandoned Locke when they adopted a written constitution and an entrenched bill of rights. Ultimately Locke put his trust in political processes and majority rule. Believing that all individuals tend to be partial when judging their own situation, and perhaps as a way of tempering the possibility that his theory would be used to legitimise all revolutions, Locke argued that once in society, whenever there is a dispute over what natural law requires, the majority should have the final say. Locke does not anticipate the need to temper the potential tyranny of the majority by entrenching a written constitution. Locke trusted the political process as being capable of best approaching nature's law of reason.

Many of the American founders obviously did not. In adopting an entrenched constitution, the American founders demonstrated a fear of the potential tyranny of the majority and set out to create a government of law which could keep majorities in check. Ironically, what this has often resulted in however is a more Hobbesian character to modern United States political culture. Though Americans may cling to Locke in spirit, they have to some extent abandoned him in practice.

Significantly, Locke's writings were revolutionary. He was not attempting to support the status quo. Consequently, Locke fundamentally rejected the notion that what is legal is by definition just. The big question for Locke was not what is legal, but rather, "Is what is legal just?" Yet as it has developed, this is not always the fundamental question that American constitutionalism raises. The big question for American constitutionalists is often: "What is constitutional in terms of the written document?" This question is much more consistent with Hobbes' no-sovereign-no-justice mentality than it is with Locke's notions of natural law and justice.

To put it differently, Palmer's 1992 publication itself assumes that New Zealand operates more closely to Locke's perspective on natural justice than his statements tying New Zealand to Hobbes would imply. Significantly, *New Zealand's Constitution in Crisis* is an appeal to a quasi-universal sense of justice. Note, for example, Palmer's statement regarding the possibility of MMP's being adopted:¹⁵

It would be an extraordinary and unprecedented step for a basic constitutional reform to be adopted without the support of the two main political parties in New Zealand. But it *ought* to be done. A political system which does not produce a close relationship between voting preferences and seats in Parliament *has little claim to be regarded as legitimate*.

Palmer's appeal to "legitimacy" and what "ought to be done" is not the kind of appeal made in a Hobbesian world where the sovereign alone determines what is fair and legitimate and where any other appeal to justice is meaningless. Palmer appeals to a more universal conception of justice in stating what ought to be done. He writes as an outside objective observer judging the sovereign by an external criterion of justice. In short, Palmer's concern with the "unfortunate influence of Thomas Hobbes" could be considered right out of Locke's world view and the very fact that he assumed his words would have currency with a New Zealand audience suggests Palmer did not believe that Leviathan alone was governing New Zealand.

Such a call to justice would also be appealing in American political culture. However, where both Americans and New Zealanders might both be moved by appeals to natural justice, New Zealanders seem more capable of reforming government based on such appeals. In fact, all too often appeals to the American Constitution have been used to trump appeals of natural justice. For example in the same year New Zealand passed the Homosexual Law Reform Act 1986, the United States Supreme Court ruled that the United States Constitution did not confer a "fundamental right upon homosexuals to engage in sodomy" and hence validated a Georgia state statute used to discriminate against homosexuals.¹⁶ This logic, referring to written law in a narrow legalistic way to determine justice, proves much more consistent with Thomas Hobbes' conceptions of justice than it is with Locke's.

Moreover, New Zealand scholars recognise that though Parliament might be technically supreme, in reality it operates within definite Locke-based limits. Matthew Palmer, for example, uses the theory of "constitutional realism" to portray a New Zealand Parliament checked by cultural norms as well as a host

¹⁵ Palmer, above n 1, at 199 (emphasis added).

¹⁶ *Bowers v Hardwick* 478 US 186 (1986).

of constitutional conventions.¹⁷ Philip Joseph describes how the concept of natural justice consistently influences parliamentary law,¹⁸ and is a major issue courts wrestle with on a regular basis.¹⁹ Claudia Orange sees "[a] Residue of Guilt" as having a major impact on the resurgence of the importance of the Waitangi Treaty,²⁰ Dean Knight demonstrates the contribution of Lord Cooke in developing the concept of fairness in administrative judicial review,²¹ and Matthew Palmer, Claudia Geiringer, and Nicola White argue that parliamentary sovereignty needs to be understood as operating within certain moral restraints:²²

... in practice, it is thought unlikely that Parliament would go mad enough to pass extreme legislation that (to use Dicey's example) decided that all blue-eyed babies should be murdered. Public opinion, international condemnation and democratic electoral incentives would prevent it.

For this American observer, it was initially difficult to comprehend fully the power of constitutional conventions in checking New Zealand government. Having grown up in a society where the practice of determining governmental limits has come to revolve primarily around Supreme Court decisions based on a textual examination of a written constitution, it was difficult to understand that real political power could be found in a "residue of guilt" or other non-binding institutions. It was for this reason that I was unable to understand how MMP could come about in spite of a lack of support by the two major parties. I could not comprehend how public outrage over a perceived unfair election process could connect with a report by a Royal Commission and turn into a movement with so much political power that neither National nor Labour could stop it. There really is nothing comparable to this in recent politics in the United States. In other words, because I was so accustomed to living in a society where legally entrenched political power makes significant change extremely difficult to make, it was hard for me to comprehend how a vibrant democracy actually works. In fact, there was nothing like going to New Zealand to be reminded that the United States founding fathers were after all not that keen on

17 See for example Matthew SR Palmer "Constitutional Realism about Constitutional Protection: Indigenous Rights under a Judicialized and a Politicized Constitution" (2006) 29 Dalhousie LJ 1.

18 See the discussion of House "Natural Justice Procedures" in Philip Joseph *Constitutional and Administrative Law in New Zealand* (2nd ed, Brookers Ltd, Wellington, 2001) at 356.

19 See *ibid*, at 849 ("Situations where natural justice (or fairness) applies").

20 See Claudia Orange *The Treaty of Waitangi* (Bridget Williams Books Ltd, Wellington, 1987).

21 See Dean Knight "Simple, Fair, and Discretionary Administrative Law" (2008) 39 VUWLR 99.

22 Matthew Palmer, Claudia Geiringer and Nicola White "Parliamentary Sovereignty" in *Inquiry to Review New Zealand's Existing Constitutional Arrangements: Report of the Constitutional Arrangements Committee: Appendix F* (2005) I AJHR 24A 146 at 147.

democracy. Rather, American founders put their faith in the rule of law – choosing to rely on written constitutions backed up by empowered courts.²³

Indeed the New Zealand public's ability to demand the adoption of MMP suggests a democratic element that virtually eludes contemporary American majoritarian politics. Unlike Hobbes who argued for an absolute monarch, Locke put his trust in the majority:²⁴

And thus every man, by consenting with others to make one body politic under one government, puts himself under an obligation to every one of that society to submit to the determination of the majority and to be concluded by it; or else this original compact, whereby he with others incorporates into one society, would signify nothing, and be no compact, if he be left free and under no other ties than he was in before in the state of nature. For what appearance would there be of any compact? What new engagement if he were no further tied by any decrees of the society than he himself thought fit and did actually consent to? This would be still as great a liberty as he himself had before his compact, or any one else in the state of nature has who may submit himself and consent to any acts of it if he thinks fit.

For if the consent of the majority shall not in reason be received as the act of the whole and conclude every individual, nothing but the consent of every individual can make anything to be the act of the whole; but such a consent is next to impossible ever to be had. ... [W]here the majority consent cannot conclude the rest, there they cannot act as one body, and consequently will be immediately dissolved again.

Whosoever, therefore, out of a state of nature unite into a community must be understood to give up all the power necessary to the ends for which they unite into society to the majority of the community ...

Significantly, as Jeffrey Goldsworthy has so fully documented, the British concept of parliamentary sovereignty which New Zealand has patterned itself after is consistent with John Locke. Though Goldsworthy does not directly contradict Palmer's claim that New Zealand has been overly influenced by Thomas Hobbes, he does demonstrate rather conclusively that Locke supported the idea of an all-powerful parliament limited by natural law.²⁵ To quote Locke:²⁶

23 See Bernard Bailyn *The Ideological Origins of the American Revolution* (The Belknap Press of Harvard University Press, Cambridge, 1967).

24 Locke, above n 11, at 55-56.

25 Jeffrey Goldsworthy *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press, New York, 1999).

26 Locke, above n 11, at 75.

The great end of men's entering into society being the enjoyment of their properties in peace and safety, and the great instrument and means of that being the laws established in that society, the first and fundamental positive law of all commonwealths is the establishing of the legislative power; as the first and fundamental natural law which is to govern even the legislative itself is the preservation of the society and, as far as will consist with the public good, of every person in it. This legislative is not only the supreme power of the commonwealth, but sacred and unalterable in the hands where the community have once placed it; nor can any edict of anybody else, in what form soever conceived or by what power soever backed, have the force and obligation of a law which has not its sanction from that legislative which the public has chosen and appointed; for without this the law could not have that which is absolutely necessary to its being a law: the consent of the society over whom nobody can have a power to make laws, but by their own consent and by authority received from them.

With these statements in mind, New Zealand's unwillingness to adopt a written constitution and grant unelected judges the power to trump the will of Parliament seems very Lockean indeed. As Goldsworthy notes, the ideal of parliamentary sovereignty as earlier understood envisioned a parliament whose only real check would be the people:²⁷

Those who questioned Parliament's sovereignty in the eighteenth century never suggested that its authority was subject to limits enforceable by judicial review. The relationship between Parliament and 'inferior courts' was never in question. ... It was the relationship between Parliament and the people it claimed to represent that was in question. Its duty to act in their interests was widely thought to implicitly limit its authority. But that duty was also thought to be enforceable only by the people, at parliamentary elections or, as a last resort, by resistance or rebellion.

In sum, by going to New Zealand I discovered just how much the United States has rejected Locke, and given what I experienced, I cannot help but wonder if Palmer should have been characterising what he saw as unlimited governmental powers in Wellington in 1992 as an example of Locke's notions of parliamentary sovereignty and executive prerogative rather than of Hobbes' Leviathan. Indeed Locke envisions the need for a strong executive which is both willing and capable of serving the good of the majority even if it means violating the law while being answerable to the people.²⁸

But as significant as extra-legal constitutional conventions are in checking New Zealand government, institutions such as the Office of the Ombudsman are perhaps even more significant indicators that New Zealand completely rejects Hobbes' view that justice has no meaning outside of the

27 Ibid, at 173.

28 Ibid, at ch xiv.

parameters determined by an all-powerful Leviathan. Notably, at least from what I can gather, the Ombudsman's office was created precisely to pursue justice in a more Lockean natural law sense. Rather than asking what is legal as determined by a sovereign's legislated law, I discovered that the Ombudsman is charged to determine if law actually treats people fairly. In a sense, this organization provides an institutionalised Lockean conscience for New Zealand society. This is a stark contrast to the growing United States norm of relying on private litigation in the pursuit of what is legal.²⁹

IV Hobbes and the Rule of Law

As indicated above, American founders were somewhat suspicious of democracy. In fact, many delegates who met in Philadelphia to write the new American Constitution had become wary of over-reaching state legislatures which during the revolutionary war had enacted "legislation curtailing rights, especially to property which would never have been contemplated in peace-time".³⁰ As Jeffrey Goldsworthy notes, the idea of forming a constitutional convention to create a document that would be superior to future legislatures was a novel concept. It was "an extra-ordinary invention" in the words of GS Wood.³¹

United States constitutionalism, in other words, represents a clear departure from British and subsequently New Zealand constitutionalism. United States constitutionalism is often understood as if the foundational document – the written constitution itself – establishes the first principles which are intended to limit all future governmental actions (as opposed to relying on foundational traditions and constitutional conventions). In short, United States constitutionalism has come to emphasise the literal rule of written law and rejects rule by majoritarian political processes. In fact, United States constitutionalism assumes a strong distrust of all political processes and ultimately entrusts the final say on what is just to the legal community trained to focus on what is allowed (or required) by written law. Finally, and perhaps most importantly, United States constitutionalism all too often is used to intentionally reject considerations of natural justice and extra-judicial constitutional conventions that consistently check New Zealand Parliament. Rather than ask what is just as Locke would, judges find themselves asking the Hobbesian question: What is legal?

29 See Kerry L Hunter "American Constitutionalism an Impediment to the Pursuit of Fairness? Lessons from New Zealand Political Culture" (2009) 5 Pol Q 44 [Hunter "Lessons from New Zealand Political Culture"].

30 Goldsworthy, above n 25, at 208-209.

31 Ibid, at 209.

United States scholars and practitioners actually differ significantly in how they understand the American written constitution. It is seen as a rule book for democracy,³² as a check on the potential tyranny of the majority,³³ as an aspirational document,³⁴ as a document setting out the nation's fundamental first principles,³⁵ and in a pure legalistic way – as merely the supreme law of the land.³⁶ All of these perspectives are regularly a part of the United States debate over what the United States Constitution actually stands for. Historically, the aspirational view has sometimes had its day and throughout American history the Court has occasionally used this view to promote human rights of minorities. Yet perhaps the very presence of the written document has made this view difficult to maintain as the rule of law ideal the legal community operates under is more apt to want to rely on a written constitution which includes only the formal written document as amended. This could mean that in spite of encouragement from academics such as Matthew Palmer,³⁷ United States constitutionalism seems to be moving toward the more limited legalism.³⁸ This is not to say that I perceive the New Zealand legal community as feeling unbound by written law. But it is saying the very presence of a written constitution seems to empower the legalistic way of thinking in the United States and consequently American constitutionalism continues to move more and more under the spell of a legalistic approach.

In other words, when a written constitution is viewed as the supreme law of the land by the legal community, questions of Locke's natural law justice can often have very little purchase – the ideal of courts upholding written law and not legislating from the bench to some extent demands this. Take for example the argument of Justice White in the 1986 *Bowers v Hardwick* case where he led the Court in an opinion resolving a case challenging Georgia state law banning the practice of sodomy.³⁹ While the

32 See for example William H Rehnquist "The Notion of a Living Constitution" in Walter F Murphy, James E Fleming and Sotirios A Barber *American Constitutional Interpretation* (2nd ed, Foundation Press, New York, 1995) 243.

33 See for example Dworkin, above n 8.

34 See for example William J Brennan "The Constitution of the United States: Contemporary Ratification" (1986) 27 S Tex LJ 433.

35 See *Marbury v Madison* 5 US 1 (1803) at 60 per John Marshall CJ.

36 See for example Antonin Scalia "Originalism: The Lesser Evil" (1989) 57 U Cinn L Rev 849.

37 Matthew SR Palmer "Using Constitutional Realism to Identify the Complete Constitution: Lessons From an Unwritten Constitution" (2006) 54 Am J Comp L 587.

38 This might very well help to explain the American passion for litigation.

39 *Bowers v Hardwick*, above n 16.

dissenting Justices argued that the controlling question in the case was whether the Constitution protected a right to privacy, Justice White took a narrow legalistic approach claiming: "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." Justice White then concluded that such a right was not to be found. From this legalistic perspective, courts are not meant to ask what is just outside of what is demanded by the written constitution. When contrasted with John Locke's demand that law serve natural justice to be legitimate, Justice White's jurisprudence reflects much more the thinking of Thomas Hobbes: Right equals what the sovereign (in this case the written constitution) claims. It has nothing to do with some idealistic appeal to justice outside of the law.

Significantly, this sort of Hobbesian thinking in terms of seeking answers to what is just by focusing on the text alone in the written constitution is a tactic which when used by the Supreme Court in overturning acts of the legislature makes it possible for Lockean questions of justice to be seriously downplayed. This is not to say that judges are capable of fully ignoring Lockean justice. As will be discussed below, it might be virtually impossible for any human judge to avoid such calculations. But what I am saying is that courts are most comfortable when dealing with established written law and the fact that established law is often vague enough to allow for Lockean natural law justice to enter into the equation does not change this. When a written constitution is determined to be the supreme law of land, a Hobbesian kind of legalism can easily become the default approach, if not virtually demanded. Judges come to see themselves as being expected to hold the legislature to a Hobbesian standard. At least that is how it has come to be practiced all too often in the United States.

V How Relying on a Written Constitution Effects a Lockean Conception of Rights

As indicated above, the American Bill of Rights speaks in Lockean terms, rights are viewed as absolutes and are considered to exist prior to government and not as a result of some social contract. To be sure, the American Bill of Rights has nothing equivalent to s 5 of the New Zealand Bill of Rights Act 1990, which states that New Zealand rights are subject to "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Americans, at least according to the concrete words of the United States Constitution, want to assume that natural rights need not be compromised whatsoever – there are no "reasonable limits" to absolute rights. Significantly, the First Amendment to the United States Constitution states that "Congress shall make *no* law respecting an establishment of religion".⁴⁰

⁴⁰ Emphasis added.

Furthermore, just as Locke's theory envisions people having rights against the state, the very inability of New Zealand courts to strike down Acts of Parliament that do violate the New Zealand Bill of Rights Act 1990 implies, at least at first blush, a weaker commitment to individual rights than is found in the United States. To be sure, in my experience, when Americans learn that New Zealanders have refused to grant courts power to overturn such Acts of Parliament, their first assumption is that New Zealanders do not take rights very seriously.

Nevertheless, just as the American founders' rejection of Locke by choosing the rule of written law has had a significant impact on the ability to pursue Lockean natural law justice, their anti-Lockean method of attempting to preserve Lockean rights via the entrenchment of a bill of rights has proven equally significant in practice. That is to say, that even though there remains a strong theoretical and abstract commitment to inalienable, absolute rights, in trying to preserve rights through a written constitution, Americans end up moving away from John Locke and in the direction of Thomas Hobbes. This is again due to the very fact that courts are expected to uphold the written constitution and not to engage or even tolerate Lockean natural justice speculations or arguments. For example, when a majority of Americans believe a certain affirmative practice must be adopted to ensure equal rights of historically significant racial minorities, the Supreme Court of the United States is viewed as having legitimate authority to completely disregard such considerations if the written Constitution can be shown to demand it. In the Supreme Court's 1993 *Shaw v Reno* case, Justice O'Connor ruled that a North Carolina statute creating highly irregularly shaped voting districts as an attempt to ensure two majority-black voting districts was unconstitutional even though the North Carolina legislature that created the districts is overwhelmingly white.⁴¹

Ironically, one of the United States' strongest proponents for a written constitution, Alexander Hamilton, understood and even predicted that an entrenched bill of rights could have this limiting effect on rights – significantly altering the way rights would be protected in the United States. He consequently argued against such an inclusion:⁴²

I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for

41 *Shaw v Reno* 509 US 630 (1993).

42 Alexander Hamilton *Certain General and Miscellaneous Objections to the Constitution Considered and Answered* (Federalist Papers No 84, 28 May 1788).

instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power. They might urge with a semblance of reason, that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication, that a power to prescribe proper regulations concerning it was intended to be vested in the national government. This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers, by the indulgence of an injudicious zeal for bills of rights.

Hamilton's concerns have proven prophetic. The very presence of an entrenched bill of rights seems to at least empower, if not demand, courts to not ask if a right in question is protected by natural law justice as it was understood by Locke. Rather, judges are expected to ask if the right in question is protected by the Constitution. Take for another example the statement of Justice Black with regard to the question of a right to privacy:⁴³

I do not to any extent whatever base my view that this Connecticut law is constitutional on a belief that the law is wise or that its policy is a good one. ... I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision.

In this 1965 case the law being challenged was an 1879 Connecticut law making it a crime for a physician to encourage married couples to use contraception. Rather than asking whether this law is fair, or just, or whether a married couple should have the right to resolve questions of contraception for themselves, the very presence of an entrenched constitution seemed to require justices to ask whether the law was constitutional according to the written words of the Constitution. And though Justice Black was in the dissent, the majority also perceived it necessary to provide a reading of the Constitution which made the law unconstitutional as opposed to simply unjust or out of synch with Locke's conception of natural rights.

This is not to say that conceptions of natural rights do not find themselves influencing United States judges. They inevitably do and probably have much to do with differing opinions on what is and is not included in the written constitution. In fact, it could be argued that Justices on the Supreme Court sometimes adhere to personal conceptions of absolute rights to a fault. Take for example the 2008 Supreme Court decision overturning Washington DC's ban on the possession of handguns. In spite of

43 *Griswold v Connecticut* 381 US 479 (1965).

constitutional language which might imply otherwise, the Supreme Court ruled that the Constitution protects an individual right to possess a firearm for personal protection.⁴⁴ And regardless of Justice Scalia's herculean attempt to tie the Court's decision to the language of the Constitution, it would seem naïve to assume his personal biases regarding fundamental rights were not in play.⁴⁵

Given that the United States Supreme Court has the power to overturn acts of the legislature, perhaps it is good that justices do feel somewhat required to make a good faith effort to tie their answers to the precise words of the written constitution. But the point remains: by entrusting the courts with an entrenched bill of rights, Americans have ultimately given the final say on what is and is not a legitimate right to the judiciary which tends to act in a Hobbesian fashion – only those rights exist which are afforded by the written constitution

In short, the very fact that the United States does rely on a non-majoritarian court to protect individual rights is actually quite anti-John Locke. As former Otago University Law Professor Jim Allen argues, it is extremely un-liberal (in a Lockean sense) to rely on a written entrenched bill of rights enforced by unelected and hence an un-answerable-to-the-public court to determine what laws are and are not going to be followed.⁴⁶ This trust in courts to resolve all political issues has sometimes been used to provide a chilling effect on the actual pursuit of Lockean natural law justice in the United States. As indicated by the comments of Justices White, and Black quoted above, the role of courts under United States constitutionalism is to ask what is contained in the written constitution and to avoid asking what is just. As I note in the August 2009 *Policy Quarterly*, in America, due to the fact that there is a written

44 *District of Columbia v Heller* 478 F 3d 370 (Fed Cir 2008).

45 As a side note, Locke argued that individuals actually give up their police powers when they join civil society. So had Scalia truly been approaching the Constitution from Locke's perspective, it is not at all clear that he would conclude that the right to self-defence is a constitutional right. Self defense, at least under John Locke's scheme, is a *power* and not a right. In the state of nature all individuals are basically required to exercise police powers to protect their rights of life, liberty, and property, Locke argued. But it was due to the very inconvenience of having to constantly exercise police powers that individuals join society and create government. Government is given the power to police rights. In fact, to some extent, this is the primary difference between Locke and philosophical anarchists such as Emma Goldman. Anarchists also believed in natural law. However, they disagreed with Locke on the principle that individuals should out of inconvenience give up their police powers to a government. For the anarchists, individuals should put up with the inconvenience of having to exercise the police powers and not grant them to government at all. It is certainly not at all clear that the Second Amendment to the United States Constitution rejects the Lockean vision and embraces that of the anarchists, especially given its reference to the militia. Scalia's majority may very well have been more under the influence of the National Rifle Association than either John Locke or the Constitution.

46 James Allen *Sympathy and Antipathy: Essays Legal and Philosophical* (Ashgate Publishing Limited, Burlington, Vermont, 2002).

constitution, all political questions ultimately become legal questions and consequently questions of justice in American politics have thereby become much more influenced by litigation than they are in New Zealand.⁴⁷ In the United States, the pursuit of Lockean-type justice which exists outside of what is legal often is forced to take a back seat while great efforts are expended by lawyers skilled in the manipulation of words. In this sense, then, Hobbes' Leviathan is alive and well in the United States in the form of legalism.

VI Conclusion

John Locke viewed human rights as individualistic and absolute and argued that the purpose of government was to preserve these rights. Section 5 of the New Zealand Bill of Rights Act 1990, on the other hand, indicates that New Zealanders reject this Lockean notion seeing rights as subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Nevertheless, the way New Zealanders go about protecting rights is actually more Lockean than the United States way. Rather than relying on courts, the New Zealand Bill of Rights Act 1990 requires that Parliament, the representatives of the people, be the ultimate protector of rights and the ultimate determiners of justice.

Clearly it is possible for courts in the United States to adopt a less legalistic framework and in doing so promote notions of Lockean natural law justice and civil liberties as is evidenced by the progressive civil rights decisions of the Warren Court during the 1960s and 1970s. It is also possible to view courts as acting to protect the sovereignty of the American people by standing up to overly zealous legislative bodies out of touch with the popular will of the people. Given this, it is understandable that New Zealanders interested in further promoting minority rights in the face of a seemingly narrow-minded government find entrenching a bill of rights appealing. However, if the United States experience is any indicator, using contra-Locke methods in an attempt to preserve absolute Lockean rights might do more than any other single action to give Hobbes' Leviathan a renewed grip on life in Wellington. If the goal is to keep Leviathan at bay, an entrenched constitution is not the answer.

47 Hunter "Lessons from New Zealand Political Culture", above n 29.

