Expanding the Constitutional Protection of Property Rights to Address Regulatory Takings

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Introduction

Property and the rules of law that govern it play an integral role in the functioning and wellbeing of any society. Property as a legal concept is ultimately concerned with defining relationships between people in relation to resources. The allocation of resources in a way that benefits society as a whole is one of the primary focuses of any system of property. Under a system of private property, individuals have the lawful right to deal with their property in ways permitted by law.

To provide stability and security to property owners in relation to the rights they have, countries commonly employ constitutional clauses that protect property. Primarily, these constitutional rights to property protect property owners from having title to their land expropriated by the state without due process and without compensation. It is rare for constitutional rights to property to explicitly protect the taking or impairment of property rights by regulation. However, this distinction is not consistent with many of the theoretical justifications for the constitutional protection of property. If a constitutional right to property is to effectively protect property rights in a coherent way, it must be broad enough to apply to the taking and impairment of property by regulation.

In New Zealand, property rights in the form of title to land is constitutionally protected by the provisions constraining the state's compulsory acquisition power under the Public Works Act 1981 (PWA). However, New Zealand's constitutional framework is effectively silent as to how property rights can be *regulated* by the state. This dissertation will argue that property rights ought to be given more formal constitutional protection in the form of a single statutory "right to property". It will argue that the scope of the right should be wide enough to apply to taking or impairment of property rights by regulation. This will achieve the normative objectives of a system of private property, particularly economic efficiency and higher quality regulation. A proposal for how the right to property could be enacted is set out in the Appendix to this dissertation.[1]

To justify a more expansive constitutional protection of property rights, Chapter I will outline the background of regulatory takings, examples of such takings in New Zealand and the current constitutional protection of property rights in New Zealand. Chapter II will argue that there are strong normative theories of private property that justify the existence of the institution of private property, and its constitutional protection. Chapter III will

[1] See 54 below.

briefly analyse some of the key features of the right to property that I propose New Zealand adopts. Chapter IV will argue that despite a common view that the New Zealand Bill of Rights Act 1990 (NZBORA) is the logical statutory home for a right to property, the operative provisions of the NZBORA would undermine the right's ability to effectively protect property rights. Finally, Chapter V will argue that unlike in other jurisdictions, a weak-form judicially reviewable right to property will best serve the objective of providing a coherent constitutional protection of the institution of private property.

This dissertation does not purport to address every one of the legal issues that flow from the concept of recognising regulatory takings in law. However, it does attempt to identify and answer some of the key questions that are raised in relation to regulatory takings. It will address the normative debate about whether property should be expansively protected by constitutional law and it will explore the form that this right should take within New Zealand's current constitutional framework.

I Background

A What is a "regulatory taking"

In broad terms, a regulatory taking occurs when a legal rule restricts the ability of property owners to exercise their property rights previously recognised in law. A simple example can be imagined in a regulation imposed upon a landowner that prohibits the building above one storey, where under the law at the time they purchased the property there was no height restriction. In such a case, the regulation does not amount to the government physically taking that land, but it significantly restricts the use and likely diminishes the value of that land. The government may have good reasons in the public interest to impose such a regulation, but it is the private property owner alone that suffers the loss while the government (and the community) acquires the benefit at almost zero cost.

The term "regulatory taking" originates from United States' jurisprudence and categorizes a specific subset of "takings" jurisprudence under the Fifth Amendment to the United States' Constitution and Bill of Rights.[2] The Fifth Amendment delegates to the government the power to take private property and put it to public use – the power of "eminent domain". However, the Fifth Amendment, like most constitutional provisions that protect property, requires the government to pay "just compensation" to the property owner.[3] In *Pennsylvania Coal Co v Mahon* the Supreme Court of the United States ruled that the Fifth Amendment applied to regulatory takings (but only when regulation went "too far").[4]

While New Zealand law requires that whenever the state physically takes property it must pay compensation to the property owner, it does not recognise any restraint on the ability of regulation to take or impair *some* of the property rights that form part of the owner's bundle of rights.[5] New Zealand law does not recognise a doctrine of unlawful regulatory takings.[6]

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[2] See for example, *Lingle v Chevron USA Inc* 544 US 528 (2005) at 536.

[3] US Constitution, amend V.

[4] *Pennsylvania Coal Co v Mahon* 260 US 393 (1922).

[5] Public Works Act 1981.

[6] See *Waitakere City Council v Estate Holmes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149 at [47].

B Examples of de facto regulatory takings in New Zealand

1 Auckland International Airport Ltd and the Overseas Investment Regime

In 2007, the Canadian Pension Plan Investment Board (CPPIB) made a partial takeover offer to purchase shares in Auckland International Airport Ltd (AIAL), a publicly listed company. In 2008, the Government amended the Overseas Investment Regulations 2005 to insert an additional factor, "whether the overseas investment will, or is likely to, assist New Zealand to maintain control of strategically important infrastructure on sensitive land", into the list of factors the Minister *must* consider when assessing whether to approve an application for overseas investment.[7] When this amendment was announced, there was a sharp reduction in AIAL's share price, wiping an estimated $300 million from the market value of the company.[8]

As Lewis Evans and Neil Quigley note, this new regulation was a taking of the right to alienate land to overseas persons – a partial taking of the general right of alienation.[9] The loss suffered by the shareholders of AIAL may have been equivalent to the drop in the market value as a result of the new regulation. This taking was not achieved by an act of Parliament, but by a regulation passed by the executive. There was no legal constraint acting on the power of the executive to impair the property rights of AIAL without compensation. Given this was a taking by delegated legislation, a statutory right to property, as I propose, may have prevented the Government impairing the relevant property rights by regulation without compensation.[10]

2 Telecom unbundling

In 2006, the Government decided to enact legislation that forced Telecom Corporation of New Zealand Limited (Telecom) to unbundle its operations in relation to the copper network into three arms – retail, wholesale and network.[11] When the government

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[7] Overseas Investment Amendment Regulations 2008 (SR 2008/48), reg 5.

[8] Lewis Evans and Neil Quigley "Compensation for Takings of Private Property and the Rule of Law" in Richard Ekins (ed) *Modern Challenges to the Rule of Law* (LexisNexis, Wellington, 2011) 233 at 252.

[9] Evans and Quigley, above n 8, at 253.

[10] Appendix.

[11] Telecommunications Amendment Act (No 2) 2006, s 32; this inserted new s 69D of the Telecommunications Act 2001, the principal Act. The Act has been further amended to facilitate the full

announced this – a regulation that partially impaired Telecom's property rights in the copper network – there was a swift fall of about $3 billion in the market capitalisation of Telecom in six weeks.[12] Bryce Wilkinson notes that there was no acknowledgement by the government that this was a taking and no consideration of whether compensation ought to be paid.[13] In this case, Parliament was responsible for the taking. Under my proposal, Parliament would be entitled to regulate inconsistently with the right to property, but it would be required to do so expressly and with its eyes open to the reality of its taking of property rights.[14]

3 Nationalisation of petroleum

In 1937 the Government nationalised all petroleum in New Zealand in with the passage of the Petroleum Act 1937. Prior to this nationalisation, all minerals (other than those already owned by the Crown, for example gold) were the property of the owner of the fee simple estate under the principle, *cuius est solum, eius est usque ad coelum et ad inferos* ("whoever's is the soil, it is theirs all the way to Heaven and all the way to Hell").[15] In defiance of the common law property rights of private landowners, the Act declared all petroleum "on or below the surface of *any land* within the territorial limits of New Zealand...to be the property of the Crown".[16] The stated reason of the government was that it was in the "national interest" to increase investment by international oil companies to discover oil, increasingly critical to all forms of transportation and the strategic threat posed to New Zealand by Germany and Japan.[17] The Government argued that it was in the

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structural separation of Telecom and Chorus Limited in 2011 by the Telecommunications (TSO, Broadband, and Other Matters) Amendment Bill 2011, and s 69D of the principal Act as it appeared after the 2006 Amendment Bill no longer exists.

[12] Bryce Wilkinson *A Primer on Property Rights, Takings and Compensation* (New Zealand Business Roundtable, Wellington, 2008) at 35; see also, New Zealand Press Association "Telecom ordered to open up lines" *New Zealand Herald* (online ed, Auckland, 14 December 2006).

[13] Wilkinson *A Primer on Property Rights, Takings and Compensation*, above n 12, at 35.

[14] Appendix, at sub-cls (4) and (5).

[15] This principle still applies (with its statutory and royal prerogative exceptions) at common law in New Zealand. See Hinde, McMorland and Sim (eds) *Land Law in New Zealand* (looseleaf ed, LexisNexis) at [6.004].

[16] Petroleum Act 1937, s 3.

[17] Evans and Quigley above n 8, at 245.

national interest for these companies to be able to deal with the Crown alone.[18] Despite an earlier failed Bill in 1927 providing for a quasi-compensation mechanism of royalties being paid to the landowner, the 1937 Act provided no compensation for the taking.[19]

C Why a statutory right to property would be constitutional

New Zealand does not have a written constitution, yet New Zealand is not without a constitution. As Matthew Palmer explains, a nation's constitution is "…composed of structures, processes, principles, rules, conventions and even culture, if they significantly affect the ways in which government power is exercised."[20] Palmer identifies New Zealand's constitution in four categories: statutes and other formal instruments; international law; common law and custom; and constitutional conventions.[21]

Palmer identifies particular New Zealand statutes that he considers to be important constitutionally. He perhaps unsurprisingly identifies the New Zealand Bill of Rights Act 1990 as one of those statutes.[22] Significantly, he also identifies the State Sector Act 1988, the State-Owned Enterprises Act 1986, and the Public Finance Act 1989 (and provisions deriving from the former Fiscal Responsibility Act 1993). These statutes may not appear on their face to contain significant constitutional content. However, they constrain and define how the state can manage public services, spend and borrow, and own enterprises. These statutes constrain the way that public power can be exercised in economic affairs.

A right to property as I propose could be seen alongside these constitutional statutes. The state's regulatory power is similar to the public power to intervene economically. A right

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[18] Evans and Quigley, above n 9, At 245.

[19] Petroleum Bill 1927 (100-2), cls 25-26: the Bill provided that the Crown had the sole right to grant mining rights on private land, but it also provided that the royalties (between 9-10% of the selling-value of the petroleum) were returned to the property owner, which would have recognised the property rights of the owners, as Evans and Quigley note at 245.

[20] Matthew Palmer "Using Constitutional Realism to Identify the *Complete* Constitution: Lessons from an Unwritten Constitution" (2006) 54 Am J Comp L 587 at 595.

[21] Palmer, above n 20, at 608; See also Sian Elias, Chief Justice of New Zealand "Towards Justice: The rule of law as 'an unqualified human good'" (Sir John Graham Lecture 2018, Maxim Institute, Auckland, 10 August 2018).

[22] Palmer, above n 20, at 610.

to property would significantly affect the state's ability to exercise public power by regulating private property – subject always to the sovereignty of Parliament to legislate in defiance of it. Thus, it would have a constitutional effect and therefore it ought to be considered a constitutional right to property.

D Current legal constitutional protections of property in New Zealand

Property rights as between individuals are highly secure in New Zealand. Both the common law and statute law ensure that individuals have recourse to the courts to have their rights in property vindicated in the face of *private* interference with their property. New Zealand's land title registration system under the Land Transfer Act 1952 provides a high level of protection of title to interests in land.[23] While the security of property rights between individuals is not *prima facie* equivalent to a strictly constitutional protection of property, these protections nonetheless act to constrain *some* public interference with property. It is a cardinal feature of New Zealand constitutional law that the Crown enjoys no greater power than private subjects to contravene established property rights, unless a rule of law permits it. This was established in the leading English constitutional law case of *Entick v Carrington*.[24]

The predominant *constitutional* protection of property in New Zealand, however, is found in the Public Works Act 1981, the statute that expressly recognises the eminent domain power of the government to compulsorily acquire interests in land. The Act sets out when and how interests land may be compulsorily acquired for a "public work".[25] If the compulsory acquisition (eminent domain) power under the Act is required to be invoked, "full compensation" must be paid to the property owner and they have the right to object to the compulsory acquisition and the compensation paid.[26] Thus, while the power of eminent domain may once have been exercisable under the royal prerogative powers of the

[23] 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 131; See Land Transfer Act 1952, s 62.

[24] *Entick v Carrington* (1765) 19 St Tri 1029, 95 ER 807.

[25] "Public work" is given a very expansive definitition by s 2 of the Act, to effectively cover "every Government work or local work that the Crown or local authority is authorised to construct, operate, or maintian..."

[26] Public Works Act 1981, s 23(3) and Part 5.

Crown, it is now (almost) entirely governed by statute.[27] The sole focus of the PWA of protection from compulsory acquisition of title may mean too much of the law's focus is on title rather than the underlying rights that make the title valuable. Thus, reliance on the PWA and protection from compulsory acquisition alone may undermine the protection of the underlying rights themselves.[28]

The common law also provides a very rudimentary protection of private property from taking without compensation in the form of an interpretive presumption that "unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of the citizen without compensation."[29] However, this interpretive presumption has been held not to be even engaged by r*egulatory* erosion of property rights.[30] Thus, the common law will not even come to the aid of a property owner whose property rights have been impaired and deprived of utility by vague statutory language.

A further constitutional protection of property can be found in the Legislation Design and Advisory Committee's *Legislation Guidelines*. These guide the drafting of new legislation by setting out principles that high quality legislation should adhere to. The Guidelines recognise *inter alia* "[f]undamental constitutional principles and values of New Zealand law".[31] Among these, "respect for property" is identified as a fundamental constitutional principle:[32]

> *New legislation should respect property rights.*
>
> People are entitled to the peaceful enjoyment of their property (which includes intellectual property and other intangible property)… *The Government should not take a person's property without good justification. A rigorously fair procedure is required and compensation should generally be paid.* If compensation is not paid, there must be cogent policy justification (such as where the proceeds of crime or illegal goods are confiscated).

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[27] Phillip Joseph *Property rights and Environmental Regulation under the Resource Management Act 1991* (Ministry for the Environment, 1999) at [5.3].

[28] See Boast and Quigley, above n 23, at 143.

[29] *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508 at 576, per Lord Atkinson; Joseph, above n 27, at [7.3].

[30] *Waitakere City Council v Estate Holmes Ltd,* above n 6, at [45]-[47].

[31] Legislation Design and Advisory Committee *Legislation Guidelines* (March 2018) at 21.

[32] Legislation Design and Advisory Committee, above n 31, at [4.4] (emphasis added).

The NZBORA also provides a narrow constitutional protection of property under section 21, by affording people a right to be secure against "*unreasonable* search and seizure, whether of the person, *property*…" This has been applied narrowly by the courts however, and is seen primarily as a protection of peoples' reasonable expectations of privacy.[33] Thus section 21 has no substantive role in protecting private property from state interference generally.[34]

[33] See *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161], [223], [264], and [285]; *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [48].

[34] See *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at [58].

II Theoretical Justifications for Private Property and for Affording Constitutional Protection to Property Rights

A Outline

When examining private property as an institution and when advocating for greater constitutional protection of private property, one must confront the normative debate about the justifiability of private property as an institution, and its justifiable scope. While this dissertation cannot attempt to entertain and examine the whole debate, it logically must rely and justify its reliance on contested theoretical justifications of private property and the constitutional protection of private property from state interference. To address the most pertinent part of the debate, this Chapter will focus on the defences and critiques that are most relevant to constitutional protection of property and the protection of property from regulatory takings. I will argue that private property, and its constitutional protection, is justified by the utilitarian aim of maximising social welfare and the protection and enhancement of democracy. I will also show that the constitutional protection of property does not frustrate the ability of the state to address concerns that relate to societal wellbeing. I will then argue that the justifications for private property as well as public choice theory demands that the scope of a constitutional right to property should extend to regulatory takings.

B Why property should be constitutionally protected

The starting point for my normative justification for property rights is to acknowledge that I reject the "natural rights" conception of property as identified by Richard Epstein, deriving from John Locke's theory of property and rights generally.[35] This account is unsatisfactory whether the reasoning rests on the divine origin of rights or not.[36] Property rights relate not to the thing that that is the subject matter of the "property", but are rights that constitute, define and regulate relations between people, with reference to the thing.[37] These rights are not "natural" or "pre-political" but are creations of the state. The rights do

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[35] Richard Epstein *Takings: Private Property and the Power of Eminent Domain* (Harvard University Press, Cambridge, Massachusetts, 1985) at 5; John Locke *Second Treatise of Civil Government* (1690), Chapter V.

[36] See Epstein, above n 35, at 5, where he claims that the natural rights theory does not presuppose divine origin of rights.

[37] Morris Cohen "Property and Sovereignty" (1927) 13 CLQ 8 at 112.

not exist because the things exist, but because the law says they do. As Cass Sunstein notes, both private property and thus the "private sphere" are creations of the state.[38] However, I will argue this does not mean that private property rights cannot serve an essential and desirable function in society.

1 Utilitarian justification for private property

The question that utilitarianism seeks to answer is how resources should be allocated to maximise the welfare of society according to outcomes that society collectively values. Jeremy Bentham's conception of utilitarianism states, "the foundations of all virtue are laid in utility" and that it is public utility, "the cause of the people", which ultimately grounds all moral judgments.[39] A system of private property is utility maximizing because is ensures (on average) that property is put to its most productive use by each individual owner as the benefits and costs[40] are internal to the individual who controls the property. Thus, as Adam Smith famously said, "[i]t is not from the benevolence of the butcher, the brewer or the baker that we expect our dinner, from their regard to their own interest".[41] Economists largely agree that empirical evidence demonstrates that nations with strong institutional protection of property rights is important for economic performance by ensuring resources are efficiently allocated.[42]

The utilitarian justification does not imply that we should ignore the deleterious effects of externalities that can result from the productive use of property, for example pollution of air and water. In fact, it is desirable under utilitarianism to use the legal tools of the state to cure externalities, so that society can maximise its utility. If the mechanism employed is regulation, the question is how best to design that regulation in order to maximise utility by removing the social cost created by the harm. As part of the utility calculus, however,

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[38] Cass R Sunstein *Free Markets and Social Justice* (Oxford Univeristy Press, New York, 1997) at 209.

[39] Gerald J Postema "Interests, Universal and Particular: Bentham's Utilitarian Theory of Value" (2006) 18 *Utilitas* 109 at 109.

[40] Save for externalities, as will be discussed.

[41] Adam Smith *The Wealth of Nations* (1776) (*The Glasgow Edition of the Works and Correspondence of Adam Smith*, Metalibri) at 27.

[42] Mark Gradstein "Inequality, Democracy and the Protection of Property Rights (2007) 117 *The Economic Journal* 252 at 252; see also Acemoglu D and others "Reversal of Fortune: Geography and Institutions the in the Making of the Modern World Distribution" (2002) 117 *Quarterly Journal of Economics* 1231.

we also need to consider the incentives on regulators to ensure they will respond to externalities efficiently, so as not to harm economic production beyond what is necessary to remediate the externality. I will discuss regulatory efficiency in relation to public choice theory below.[43]

While not relying explicitly on utilitarianism for just normative justification of private property, Richard Epstein, in *Takings: Private Property and the Power of Eminent Domain* implicitly endorses this theory. [44] It is worth examining Epstein's account for takings, as he presents one of the most expansive defences of a wide scope of application of the Takings Clause of the United States Constitution. As Gregory Alexander notes, Epstein's account suffers "no ambivalence whatsoever". [45]

Epstein says there exists two pies – one representing the value of all individual rights without government, and the other representing this initial value and the additional value that the government can create to increase social welfare.[46] He argues that each and every government action must be justified on the basis that it moves society from the smaller to the larger pie.[47] In justifying the individual rights that the state is called upon to protect, Epstein relies on the political tradition of "natural rights".[48] His reliance on natural rights of course derives from John Locke's classic conception of rights – particularly rights in property – laid out in his essay, the *Second Treatise of Civil Government*.[49] Locke's natural rights theory, as explained and adopted by Epstein, states that the "end of the state is to protect liberty and property, as these conceptions are understood independent of and prior to the formation of the state".[50] Locke uses the "labour theory of value" to justify private ownership by arguing that "every man" is entitled to property in his own person; property in his labour; and thus has property in any common property he mixes his labour with.[51] As I have already noted, I do not find this natural rights-based account for property to be persuasive.

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[43] At 22.

[44] Epstein, above n 35.

[45] Gregory S Alexander "Ten Years of Takings" (1996) 46 J Legal Educ 586, at 586.

[46] Epstein, above n at 3-4.

[47] At 4.

[48] At 5.

[49] Locke, above n 35, at Chapter V.

[50] Epstein, at 5.

[51] Locke, para 27.

In relation to the justification for an eminent domain power and a correlative obligation to compensate for expropriation, Epstein says it is necessary to modify Locke's theory that government is justified by the "tacit consent" of individuals.[52] As this relates to the utilitarian justification of the constitutional protection of property from takings, Epstein says we should see interactions between the state and the individual not as consensual, but as "forced exchanges". [53] Thus to remediate this forced transaction, compensation is provided to recognise the loss that the property owner has suffered – through the measure of what a reasonable seller in their shoes would have been prepared to voluntarily sell the property to a buyer for.[54]

Cass Sunstein also provides an analysis of the utilitarian arguments in favour of private property and its constitutional protection.[55] He identifies four main aspects to the prosperity that private property creates, explaining that a system of private property: (1) harnesses the powerful human inclination to accumulate resources – for whatever purpose – and that the gains from granting use of property to individuals disincentivises sloth and waste; (2) performs a coordinating function that deals with scarcity of resources by ensuring the desires of individuals as expressed in their demand can signal to people to devote their productive activity to use property in a way that is most valued; (3) protects against a collective action problem to guard against underutilisation and overexploitation of the *specific property itself* – contrasted with the way common property (property with no one owner), such as air and water, can be easily be degraded; and (4) creates stability and protects expectations that are preconditions for investment initiative, both domestic and foreign.[56]

Therefore, utilitarian analysis demonstrates that property being in the hands of private individuals is necessary to promote the efficient allocation of resources to maximise societal welfare. In order to achieve maximum welfare, state intervention may be necessary to attain public goods that are unlikely to be achieved through voluntary means. However, in order to ensure individual property owners have the necessary security and confidence in the content of the rights they have bargained for, strong protection of property rights is

[52] At 15.

[53] At 15.

[54] At 15.

[55] Sunstein, above n 38.

[56] At 206-207.

necessary. If security and confidence in property rights is undermined by weak protection of property rights, this is likely to cause underinvestment and thus sub-optimal societal welfare.

2 *Democratic justification for private property*

If democracy is to perform the valuable function that it claims to, then the law must play a structuring role in ensuring that the integrity and efficacy of democracy is maximized. While this justification may not appear to relate specifically to the question of regulatory takings, it does provide a compelling argument for ensuring there is a strong and coherent constitutional protection of the right to property. Moreover, while on the micro level, a state deprivation of property rights by regulation might not appear to engage the question of the integrity of democracy, a general degradation of rights in property across society can undermine the independence and self-reliance aspects of private property that are important for a sound democracy.

As noted by Sunstein, private property allows the citizenry to be largely independent from and not reliant on the state, and the good will of its agents on a daily basis.[57] This independence is essential to a well-functioning, public sphere where democratic deliberations take place.[58] Moreover, the instability of a system where wealth and resources is constantly vulnerable to re-evaluation by political determination can also corrode the integrity of democracy.[59] The gains that a stable system of private property can deliver for democracy need to be placed outside (at least to some extent) the day-to-day political process. This is what *constitutional* protection of property does. While the judiciary is a branch of government, it has a unique and independent role in upholding the rule of law, particularly ensuring executive power is exercised according to law. In upholding the rule of law, the judiciary can and should restrict the state's ability to interfere with property on a day-to-day bureaucratic level.[60] This protects individuals from the arbitrary effects of constant state interference with property, strengthening the independence of citizens from the state which in turn is conducive to effective democracy.

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[57] Sunstein, above n 38, at 209.

[58] Sunstein, above n 38, at 208.

[59] Sunstein, above n 38, at 211.

[60] See Sunstein, above n 38, at 211.

Moreover, where there are regulatory mechanisms that allow for a high degree of regulation of private property and a highly public consultative process for determining how property rights may be exercised, democracy can also be undermined.[61] Under these conditions there is the likelihood that the regulatory process may be captured by special interest groups at the cost of the true interests of the wider community. This effect is likely to be observed because the interests of individuals that gain from regulation of property without being confronted with the cost are likely to be concentrated. Conversely, the interests of those individuals who are likely to be negatively affected by regulation are likely to suffer a smaller cost as the cost will be dispersed among many more people. Therefore, special interest groups have the greatest incentive to demand regulation (at effectively zero cost) and are therefore likely to exert greater influence on the political process.[62] Thus, the regulation of property is less likely to give effect to the *true* wishes of the democratic majority – the grand bargain of democracy. To protect the integrity of democracy, it is also important to recognise and protect private property rights to moderate the influence of special interest groups on the regulatory process.

3 Why critiques of constitutional protection of private property are not persuasive

It is argued that systems of private property, at least the currently dominant liberal conception of property, are responsible for unequal distribution of wealth, resources and power that exists in societies who employ systems of private property. It is argued that a system of private property has a tendency to create and perpetuate inequality.[63] Private property, and its delegation to property owners of the power to exclude others from resources, its ability to summon the coercive powers of the state to enforce property rights, impacts bargaining power and the distribution of wealth.[64] It is contended that this causally

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[61] See for example, the highly public nature of consultation processes for some resource consent applications under the Resource Mangagement Act 1991, Part 6.

[62] See George Stigler "The Theory of Economic Regulation" in *The Citizen and the State: Essays on Regulation* (Chicago University Press, Chicago, 1975) 114 at 123.

[63] Syed Bulent Sohail "Law, Property and the Rule of Law: A Theoretical Perspectives (Part II)" (2015) 20 *Pakistan Perspectives* 29 at 31.

[64] Duncan Kennedy "The Stakes of the Law, or Hale and Foucalt!" *Transformative Discources in Postmodern Social Cultural and Legal Theory* (1991) 15 Legal Stud F 327 at 332; see also Oliver Hailes "The Politics of Property in Constitutional Reform: A Critical Response to Sir Geoffrey and Dr Butler" (2017) 15 NZJPIL 229 at 250-251; Robert L Hale "Bargaining, Duress, and Economic Liberty" (1943) 43 Columbia L Rev 603 at 628.

affects the social distribution of income and wealth by forcing the ordinary worker to sell their labour in order to access the necessaries of life, such as food and housing.[65] This state of affairs is then used to argue that the constitutional protection of private property rights are used to "embed" these societal ills in law by tying the hands of government, and preventing it from addressing societal issues.[66]

An example of the critique that our liberal conception of private property is flawed and harmful, can be found in Michael Robertson's article examining the institutional conception of private property. [67] Robertson identifies what he sees as a fundamental flaw in the liberal "conceptual framework" of private property where in some contexts its justifications are applied to all forms of private property indiscriminately. He says this conceptual framework can fail to consider fundamental differences between types of property.[68] Robertson explains that the traditional justifications advanced in defence of private property cannot apply in all contexts of property ownership. Robertson relies on the work of Morris Cohen in his article "Property and Sovereignty"[69] to argue that there is a fundamental difference between property that gives the owner power over others, and property that does not.[70]

Critics of the liberal conception of property rights point to the inequalities and power imbalances that can arise where systems of private property are employed. These concerns are certainly valid, and the deleterious effects of extreme inequality and deprivation are ones that that state has a legitimate interest in addressing. Aside from the negative effect extreme inequality can have on the ability of individuals to flourish and pursue their conception of the "good life", it can also undermine social cohesion and therefore the institution of democracy itself.[71] There is no question that the state must ensure that democracy itself is protected.

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[65] Hailes at 250.

[66] See Jane Kelsey "'Regulatory Responsibility': Embedded Neoliberalism and its Contradictions" (2010) 6 *Policy Quarterly* 36.

[67] Michael Robertson "Property and Ideology" (1995) 8 Can JL & Jur 275.

[68] Robertson at 278.

[69] See Cohen, above n 37.

[70] Robertson at 279.

[71] Kenneth Scheve and David Stasavage "Wealth Inequality and Democracy" (2017) 20 Annu Rev Polit Sci 451 at 452.

As Sunstein notes, there is a problem when too many in society are without any property at all.[72] However, it does not follow that the only response to such a dissatisfactory position is to abandon or significantly reform the institution of private property itself. This is a challenge to existing *distributions* of property and not to the notion of private property as a system of recognising ownership and control of resources.[73] Furthermore, support for private property need not imply a reluctance to redistribute resources.[74] Relatedly, the social ills that are blamed on private property might in some cases be better explained by analysing the efficacy of other state intervention and government policy. For example, the decreasing rate of home ownership and increasing rate of long-term renting in New Zealand presents a problem for many of the justifications of private property. However, these trends may be better explained by our lack of a comprehensive capital gains tax, restrictive planning laws and local government capital constraints on funding vital infrastructure for residential development.[75] Therefore, private property is not necessarily the *per se* cause of negative distributional effects, and government policy needs to ensure that the productive potential of private property is not hampered and limited by constraints that lead to poor societal outcomes.

While critiques of private property identify valid societal problems related to private property, constitutional protection of property is not inconsistent with state intervention to address these concerns. A constitutional provision that provides that the state may not take or impair property without compensation does not create an impenetrable shield behind which property owners may hide behind. This principle does not see property rights as fundamental, inviolable rights.

The state has a legitimate function in regulating property to promote societal welfare, and this is well accepted in modern liberal democracies that place strong cultural value on the institution of private property. The state therefore should engage in redistribution and regulation to the extent that it can enhance welfare, without undermining the productive (and non-productive social) benefits that accrue to society as a result of placing property in private hands. The state can also intervene to cure the power imbalances that can arise as a result of the *imperium* – power over others – that is said to be inherent in certain types of

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[72] Sunstein, above n 38, at 208.

[73] Sunstein, above n 38, at 208.

[74] Sunstein, above n 38 at 210.

[75] New Zealand Productivity Commission *Housing Affordability* (New Zealand Productivity Commission, March 2012) at 1-19.

private property, where there is likely to be many people who want to access that certain resource.[76] This is seen in modern liberal democracies, such as New Zealand, with industrial relations and health and safety laws, for example.[77] Critics may maintain that these interventions do not go far enough to cure the power imbalances, however, this a political question for a democratically elected legislature to decide. Importantly, there is no reason why the legitimacy and desirability of such interventions means that private property is not also desirable and ought not to be afforded constitutional protection from uncompensated takings. A constitutional right to property would not frustrate such intervention, particularly where the right is subject to parliamentary sovereignty, as I propose.[78]

Therefore, takings law and effective regulation, for example environmental regulation, are not "mutual adversaries".[79] The inherent flexibility promoted by takings law generally is further affirmed and strengthened in my specific proposal which would allow the state to overstep its obligations by expressly avoiding them. This conforms to New Zealand's current constitutional framework where unjustified limitations of "fundamental rights and freedoms" may nonetheless be achieved by the state as a result of parliamentary sovereignty.[80]

C Why a constitutional right to property should protect against uncompensated regulatory takings

1 Utilitarian analysis

In relation to whether compensation should be provided for partial (or regulatory) takings in addition to complete takings, Epstein argues where *any* portion of property is taken from an individual, they must receive from the state some equivalent (or greater) benefit – compensation.[81] Epstein notes that where a compulsory acquisition occurs, the eminent domain clause concerns itself with what is taken not what is retained: "[i]t matters not if

[76] Robertson, above n 67, at 279.

[77] See, for example, Employment Relations Act 2000, Health and Safety at Work Act 2015.

[78] Appendix.

[79] Elliot E "How Takings Legislation Could Improve Environmental Regulation" (1997) 38 Wm & M L Rev 1117 at 1117.

[80] NZBORA, s 4.

[81] Epstein, above n 35, at 15.

the claimant owns only the two acres taken or the full four acres: the obligation to compensate is constant in either case".[82]

To illustrate why this approach to compulsory acquisition must be applied to partial takings, Epstein considers an example of air rights. In his example, A owns the air rights in a parcel of land and B owns the land itself. If the government extinguishes air rights by regulation, A is prima facie entitled to compensation because its property has been "completely" taken.[83] Epstein asks, "[d]oes it make the slightest difference if A sells his rights to B before the government acts?".[84] As a result of such a sale, the taking would be considered only a *partial* – and therefore *non-compensable* – taking of *one* of the rights owned by B as the proprietor of the land.[85] The practical effect in both cases is to destroy the property rights in air rights. Society suffers a loss, but that loss is compensated by the state *only* where a certain individual and not another happens to own the relevant right. Epstein's example here demonstrates the conceptual impossibility of drawing this distinction, as the same loss is suffered by both individuals in order to generate a public benefit.

When attempting to promote economic efficiency, there is no reason to distinguish between physical and regulatory takings.[86] Therefore, according to a utilitarian analysis, it would be erroneous to mandate that a property owner should *always* be compensated for the compulsory acquisition of a portion of their land but *never* for a regulation that restricts the rights related to ownership by an equivalent amount (unless the deprivation is of *all* beneficial use). Thus, because a constitutional right to property that protects against uncompensated compulsory acquisition is justified on a utilitarian basis, the same

[82] At 58.

[83] Note, in New Zealand, our "eminent domain clause", expressed in the compulsory acquisition provisions of the PWA would be too narrow to afford B with a right to compensation. That is because it would not be seen as a "compulsory acquisition" of an "estate or interest in land" to extinguish air rights *generally*, as the government isn't seeking to "acquire" each relevant right from the many affected property owners. However, the example stands to illustrate the equivalence between complete and partial takings of property, and thus why constitutional protections of property must be engaged by both.

[84] Epstein, above n 35, at 58.

[85] At 58.

[86] Rose-Ackerman S "Regulatory Takings: Policy Analysis and Democratic Principles" in Mercuro N (ed) *Taking Property and Just Compensation: law and economics perspectives* (Kluwer Academic Publishers, Boston, 1992) 25 at 29-30.

utilitarian analysis demands that regulatory takings fall under the jurisdiction of that same constitutional right to property.

2 *The human flourishing theory of property is not inconsistent with requiring compensation for regulatory takings*

Some theorists argue that inherent in property rights are social obligations that mean that a property owner cannot harm society. This is articulated, as an example, in a recent article written by Ben France-Hudson.[87] Here, France-Hudson suggests the law should recognise a "social obligation norm" that is inherent in property rights and argues that this approach is justified by the "human flourishing" theory of property advanced by Gregory Alexander and Eduardo Peñalver.[88] According to this view of the human flourishing theory, constitutional protection from regulatory taking without compensation would be largely unnecessary and undesirable. This is because whenever the state *explicitly* makes a regulation to address an asserted societal harm committed by property owners, this does not "take" property rights, but rather makes explicit the implicit obligations the property owner was already under. Compensation would thus represent a betterment.

In their defence of the human flourishing theory of property, Gregory Alexander and Eduardo Peñalver refer to the leading United States regulatory takings case of *Penn Central Transportation Co v New York City*[89] as an example of why in some cases the theory of human flourishing can justify placing a high (uncompensated) burden on individual property owners in pursuit of securing a benefit for the community.[90] In that case, the Supreme Court of the United States continued its restrictive approach to regulatory takings. The Court held that the financial burden placed on the owner of the terminal was not overwhelming given its ability to continue to earn a "reasonable return" from the property and did not eliminate *all* of the uses of the air rights above the terminal.[91] Alexander and Peñalver argue that the regulation's goal of preserving the heritage value of Grand Central

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[87] Ben France-Hudson "Surprisingly Social: Private Property and Environmental Management" (2017) 29 JEL 101.

[88] See for example, Gregory Alexander and Eduardo Peñalver *An Introduction to Property Theory* (Cambridge Univertsity Press, New York, 2012) at 80-101.

[89] *Penn Central Transportation Co v New York City* (1977) 438 US 104.

[90] Alexander and Peñalver, above n 88, at 181.

[91] *Penn Central,* above n 89, at 136-137.

Station by frustrating the owner's desire to develop the building was consistent with the cultural value that the community placed in heritage buildings.[92] This is not however, the only way that the human flourishing theory can apply to the question of regulatory takings.

A preferable application of the human flourishing theory of property in relation to regulatory takings is to say that the theory is consistent with a rule requiring compensation for regulatory takings. The compensation rule acknowledges the requirement of property owners, in some circumstances, to yield their rights for the "greater good" of the community, thus giving effect to the "social obligation" that is said to be an inherent feature of property rights.[93] The compensation rule however ensures they are compensated for any burden they bear which is out of proportion to the benefit they receive as part of the community.

This approach gives effect to the "social obligation" inherent in property ownership, as the community ultimately determines how property will be used in the community's interest, but recognises the specific cost that will be borne by a particular individual, who must be considered a valued member of the community. In order to demonstrate the community's valuing of its members, the community should respect the individual as a "rational, moral agent" by presumptively compensating the individual for their loss of autonomy in relation to their property.[94]

3 Public choice justification

On the specific question of whether regulatory takings causing loss should be compensated, public choice theory provides a helpful lens through which to analyse the benefits of creating a compensation rule for regulatory takings. Public choice theorists argue that such a requirement would achieve better quality and thus more efficient regulation that maximises social welfare.

This theory is utilitarian. It argues that compensating owners for regulatory takings would enhance social welfare and thus be better for society as a whole. Public choice theory argues that in order to ensure that a regulator makes an efficient decision about a proposed

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[92] Alexander and Peñalver at 182.

[93] See France-Hudson, above n 87, at 107.

[94] See Alexander and Peñalver, above n 90, at 181.

regulation within the context of the "market for regulation", the regulator must be confronted with the full costs of that regulation. Where the costs of regulation are purely political (and transactional) the regulator operates under a "fiscal illusion". A fiscal illusion, in this context, is where the true societal costs of a regulation are effectively hidden and therefore any appreciated costs that *are* considered by the regulator are often likely to be far outweighed by the societal benefit of the regulation.[95]

One of the most important normative justifications for extending the constitutional protection against takings to regulatory takings is that of it achieving more efficient and effective regulation.[96] As noted in relation to my discussion about the utilitarian justification, if society is effectively able to harness the utility-maximising power of the state through regulation to cure externalities, it must ensure regulators are faced with the correct incentives.[97] Public choice theorists argue that regulation of property rights is an activity that is near-costless to the regulator because the most of the costs are *external* to the regulator, and instead borne by the property owners alone.[98] This tends to lead to an over-consumption of regulation of property, thus the equilibrium quantity and quality of regulation can go beyond the efficient regulatory response, imposing an efficiency loss on society.[99]

Where a regulatory takings rule requires a regulator to confront the costs to property owners by being liable to pay for the loss to be suffered by the owners, the true costs will be *internalised*. This means the tendency to over-consume regulation can be counteracted, leading to more efficient outcomes in the market for regulation.[100] Not only can this approach curb inefficient regulatory behaviour, but it could lead to better and more effective regulation in certain areas because, for example, spreading the cost of regulation (in the name of social welfare) across society could reduce the political opposition to truly effective regulation.[101] Therefore, the harm as noted by public choice theorists, is not in

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[95] See Wilkinson *A Primer on Property Rights, Takings and Compensation*, above n 12, at 34; See Kevin Guerin *Protection against Government Takings: Compensation for Regulation?* (New Zealand Treasury, Working Paper 02/18, September 2002) at 5.

[96] Kathleen Ryan "Should the RMA Include a Takings Regime?" (1998) 2 NZJEL 63 at 73.

[97] Ryan, above n 96, at 73, citing Elliot, above n 79, at 1117.

[98] Ryan, above n 96, at 73.

[99] Elliot at 1183.

[100] Ryan at 73.

[101] Elliot at 1178.

regulation *per se,* but the *quality* of the regulation that is produced when regulators operate under bad incentives.[102] Under this approach, the institution of private property is seen not as the *cause* of, for example, environmental problems, but an essential part of the solution, as argued by Garrett Hardin in his seminal article, "The Tragedy of the Commons"[103].

To achieve an outcome where regulators are appropriately confronted with the true costs of a regulation of property rights, a broad constitutional right to property that addresses regulatory takings is necessary. This would ensure that a regulator looking at a proposal to regulate would be faced with a budget constraint. The regulator would need to assess compensation payable to the relevant property owners and weigh these against the measurable benefits of the regulation. Such a constraint would need to have a meaningful accountability mechanism through a form of judicial review.[104] A statutory right to property, such as I propose, would allow the courts to supervise compliance with the provision and declare conduct unlawful if it fails to comply.[105]

[102] Elliot at 1184; see also Bryce Wilkinson *Constraining Government Regulation* (New Zealand Business Roundtable, Wellington, 2001) at 194.

[103] Gregory Hardin "The Tragedy of the Commons" (1968) 162 *Science* 1243 at 1245.

[104] Sunstein, above n 38, at 211.

[105] Appendix, at sub-cl (6).

III Proposal for Expansion of Constitutional Protection of Property in New Zealand

A Right to property should be recognised within the Public Works Act 1981

The right to property that I propose would be inserted into a reworked and renamed Public Works Act 1981. Despite its outward procedural and administrative character, the Act contains the predominant constitutional protection of property rights. The Act effectively mandates that an interest in land may only be compulsorily acquired for a "public work" by due process and with payment of "full compensation".[106] As I have argued, a right to property that allows for regulatory takings is merely an extension of the physical takings principle, thus it makes sense to give legal force to the regulatory takings principle within the scheme of the PWA. However, in addition to inserting a single right to property within the PWA, it will be necessary to make some important changes to ensure alignment between the right and the general scheme of the Act. This dissertation will not canvass these necessary structural changes. Importantly, the core procedural process the state is required to follow to compulsorily acquire land will remain unchanged. Additionally, it would be likely necessary to rename the Act with a title that better encapsulates when and how the taking power of the state may be exercised in relation to property, whether by regulation or by compulsory acquisition.

As an alternative to inserting a right to property within the PWA, it is possible a new statute could be enacted to deal solely with the issue of regulatory takings, or repeal and replace the PWA and deal with all takings and impairment of property. However, this may involve either unnecessary complication that a new separate statute solely for regulatory takings would bring. or the unnecessary rewriting of the largely well-functioning PWA. Therefore, including a general right to property in the PWA makes sense in terms of simplifying the protection of property rights. It would also add greater conceptual clarity to the PWA as it exists today which, as mentioned, has the appearance of a purely procedural piece of legislation, with no real recognition of the constitutional importance that it has.[107]

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[106] Public Works Act 1981, ss 23 and 60.

[107] See Palmer "Using Constitutional Realism to Identify the *Complete* Constitution: Lessons from an Unwritten Constitution", above n 20.

B Proposal

Set out in the Appendix to this dissertation is a proposal of a right to property that could be incorporated into a reworked and renamed PWA.[108] As my right to property refers to "property", I will thus need to adequately define property to give guidance as to the general scope of the clause, while still allowing the courts to fulfil their traditional role of defining and recognising property interests at law and in equity. Thus, also set out in the Appendix is a definition that could be adopted.[109]

For the remainder of this Chapter, I will discuss two of the key provisions of this proposal and why they are significant in relation to regulatory takings.

1 Benefit sought is "essential in the public interest" (sub-clause (1)(a))

Sub-clause (1)(a) reintroduces the important concept of "essentiality" into New Zealand's primary statute that empowers expropriation of property. Introduced in 1981 as part of the original Act, the "essentiality" requirement was repealed in 1987.[110] It is important that whether expropriation be of title or by impairment by regulation, that the state is required to show that its coercive force is being employed to achieve an important objective that benefits the community. If public benefit is the justification for the state having an eminent domain power, it is consistent with that justification to ask the state to demonstrate in each and every case of taking or impairment of property, that it is acting in pursuit of a benefit that is essential in the public interest.

2 Twin compensation regime (sub-clause (1)(c)(i) and (ii))

Sub-clause (1)(c)(i) importantly preserves the largely well-functioning procedural mechanism of the PWA requiring a certain process to be followed and if land is compulsorily acquired that full compensation be paid.[111] The clause will, however, ground

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[108] Appendix.

[109] Appendix.

[110] Public Works Amendment Act 1987 (No 2), s 2(7); See Wilkinson *Constraining Government Regulation,* above n 102, at 183.

[111] Public Works Act 1981, Parts 2 and 5.

the existing PWA regime in a common protection of property provision that transcends the acquisition of interests in land.

While the important requirement of the state to proactively provide compensation for compulsory acquisition of title under the current PWA regime will not be disturbed, when it comes to *regulatory* takings, I propose under sub-clause (1)(c)(ii) only a right to *apply* for compensation should accrue to the property owner. This would mean that government actors would not have to locate every affected property owner and assess the exact liability of the Crown or other public entity to each property owner in advance of pursuing the taking or impairment. It would, however, mean that in practice it would be prudent to conduct a general survey of the likely liability of the government to property owners, assessing the probable number of affected owners and the likely quantum of compensation payable given the probability of claims being made.

This approach would ensure that government actors and regulators are more likely to be confronted with the costs, or at least consider them, before adopting a regulation. According to public choice theory, this is likely to lead to more efficient regulatory decision-making. As confirmed by sub-clause (9), however, the state can additionally ensure compliance with the protection of property clause by proactively compensating affected property owners. This ensures that the state is afforded the maximum possible flexibility in meeting its obligation to afford compensation to owners affected by a taking or impairment. Therefore, where it is more efficient for the state to take or impair, and then respond to applications for compensation it will act in that way, but where it is more efficient to assess, locate and compensate all affected property owners in advance, it can also lawfully do that.[112]

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[112] For an analysis of some of the efficiency issues that may arise under a rule requiring compensation for regulatory takings, see Wilkinson *Constraining Government Regulation,* above n 102, at 192-193.

IV Why the New Zealand Bill of Rights Act 1990 is Not the Appropriate Vehicle for a Constitutional Right to Property

A Outline

Many may see the New Zealand Bill of Rights Act 1990 (NZBORA) as the appropriate and natural home for recognising a right to property in New Zealand law. Indeed, as I will discuss, there have been explicit attempts to recognise a right to property within the NZBORA. Since those failed attempts, there have been further calls to attempt this again.[113] They often respond to legitimate concerns about instances of state taking or interference with property in a manner that leaves property owners feeling powerless. The treatment of Canterbury homeowners whose properties were red-zoned in the aftermath of the Canterbury earthquakes, leading to the Human Rights Commission calling for the NZBORA to recognise a right to property, is such an example. [114] These legitimate concerns are unlikely to be addressed until New Zealand takes steps to constitutionalise the right to property in a coherent way. However, this Chapter will argue that the NZBORA is not the appropriate vehicle for recognising a right to property if such a right is to truly protect the value of property rights.

B Discussion

1 Protecting property in the NZBORA has proven to be unsuccessful

There have been two legislative attempts to constitutionalise a right to property within the NZBORA. These two proposals came in the form of members' bills. In 1997 the New Zealand Bill of Rights (Property Rights) Amendment Bill 1997 in the name of Owen Jennings MP was defeated at second reading.[115] The second attempt was in 2005, via the New Zealand Bill of Rights (Private Property Rights) Amendment Bill 2005 in the name of Gordan Copeland MP. This Bill was also defeated at second reading.[116]

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[113] See for example, 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.

[114] MacDonald and Carlton, above n 113, at 44.

[115] (25 February 1998) 566 NZPD 6809.

[116] (21 November 2007) 643 NZPD 13352.

Many have difficulty in accepting that a right to property is so fundamental that it ought to sit alongside the rights typically seen in bills of rights and human rights instruments.[117] Moreover, much of the difficulty people have with the proposition that a right to property ought to be seen as a fundamental right comes from the view that it would frustrate the legitimate role of the state in regulating policy, particularly economic policy.[118] This perception could be mitigated somewhat if the right to property could be recognised elsewhere than the NZBORA. However, I suggest that there is a more fundamental problem with recognising a right to property in the NZBORA: section 5.

2 *Section 5 would undermine the effectiveness of any right protecting property as part of the NZBORA*

Section 5 is one of the key "instructive" provisions of Part I of the NZBORA. It provides:

> **5 Justified limitations**
> Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

While the NZBORA purports to "affirm, protect, and promote human rights and fundamental freedoms" in New Zealand, section 5 attaches a caveat to those rights and freedoms. This has led to the NZBORA being described as a "bill of reasonable rights".[119] I argue in this Chapter that section 5's effect would render a right to property largely ineffective in addressing regulatory takings. I will look at the way section 5 defines the scope of NZBORA rights and freedoms insofar as they constrain "acts done" by the branches of government, or any person or body "in the performance of any public function, power or duty..."[120] Both legislation and any public act (where it falls under the jurisdiction of section 3) are judged in accordance with section 5.

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[117] A J van der Walt "The Constitutional Property Clause: Striking a Balance Between Guarantee and Limitation" in Janet McLean (ed) *Property and the Constitution* (Hart Publishing, Portland, Oregon, 1999) 109 at 109.

[118] See Hailes, above n 64, at 261-262; Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984-1985] 1 AJHR A6 at 23.

[119] Paul Rishworth "Interpreting and Invalidating Enactments Under a Bill of Rights" in Rick Bigwood *The Statute: Making and Meaning* (LexisNexis, Wellington, 2004) 251 at 277; *cf* Elias CJ's criticism of this characterisation of s 5 in *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [6].

[120] NZBORA, s 3(a) and (b).

First, the rights-consistency of *legislation* is judged in accordance with the "unholy trinity" of sections 4-6 of the NZBORA.[121] While there was initially a state of uncertainty about how exactly sections 4-6 operated together, this has now been settled by the Supreme Court.[122] In *R v Hansen,* a majority settled the correct approach to considering whether legislation is consistent with the NZBORA.[123] Tipping J's judgment contains the clearest statement of the formula broadly adopted by a majority of the Court.[124] Tipping J summarised the correct approach to ss 4-6 as:[125]

> Step 1. Ascertain Parliament's intended meaning.
>
> Step 2. Ascertain whether that meaning is apparently inconsistent with a relevant right or freedom.
>
> Step 3. If apparent inconsistency is found at step 2, ascertain whether that inconsistency is nevertheless a justified limit in terms of s 5.
>
> Step 4. If the inconsistency is a justified limit, the apparent inconsistency at step 2 is legitimised and Parliament's intended meaning prevails.
>
> Step 5. If Parliament's intended meaning represents an unjustified limit under s 5, the Court must examine the words in question again under s 6, to see if it is reasonably possible for a meaning consistent or less inconsistent with the relevant right or freedom to be found in them. If so, that meaning must be adopted.
>
> Step 6. If it is not reasonably possible to find a consistent or less inconsistent meaning, s 4 mandates that Parliament's intended meaning be adopted.

The majority of the Court held that section 5 effectively meant that the rights *themselves* were inherently constrained by reasonable limitations. Thus*,* if legislation, and any "act" under the jurisdiction of s 3 of the NZBORA, limited a right but did so in a way that was "reasonable" and "demonstrably justified in a free and democratic society", then there is

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[121] James Allan "The Operative Provisions of the Bill of Rights: An Unholy Trinity" (1995) 5 *Bill of Rights Bulletin* 79.

[122] Paul Rishworth "Interpreting Enactments: Sections 4, 5, and 6" in Paul Rishworth and others (eds) *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) 116 at 117-118.

[123] *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1; See Andrew Geddis and M B Rodriguez Ferrere "Judicial Innovation under the New Zealand Bill of Rights Act: Lessons for Queensland?" (2016) 35 UQLJ 251 at 271.

[124] *Hansen,* above n 123, at [88]-[91], per Tipping J; See, for the remainder of the majority, *Hansen* at [57]-[60], [192], and [266] per Blanchard, McGrath and Anderson JJ.

[125] *Hansen* at [92], per Tipping J.

no inconsistency with the NZBORA. The significant conclusion from *Hansen* is that the Supreme Court has formulated an approach to the NZBORA that places section 5 at the forefront of any inquiry about the consistency of the exercising of public power with NZBORA rights and freedoms. I contend that in order to have an adequate right to property that effectively deals with regulatory takings, it cannot be subject to "reasonable limitations" as such limitations would frustrate its effect.

What then constitutes a "reasonable limitation" of rights contained in the NZBORA for the purposes of section 5? In *Hansen,* the Supreme Court adopted and applied the approach taken to a substantively similar provision by the Supreme Court of Canada in *R v Oakes.*[126] The "*Oakes* test" can be summarised:[127]

> 1. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; it must relate to concerns which are pressing and substantial in a free and democratic society where it can be characterized as sufficiently important.
> 2. Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test; that is to say they must:
>   (a) be 'rationally connected' to the objective and not be arbitrary, unfair or based on irrational considerations;
>   (b) impair the right or freedom in question as 'little as possible'; and
>   (c) be such that their effects on the limitation of rights and freedoms are proportional to the objective.

To illustrate the breadth of the *Oakes* test, we can look to the New Zealand case law and its application of the test. In *Ministry of Health v Atkinson,* the High Court found in relation to the Ministry of Health's policy of not remunerating family carers of disabled family members there were a number of "legitimate and significant concerns in a free and democratic society".[128] The social concerns identified were *inter alia* encouraging the independence of disabled people, ensure the monitoring of the delivery and quality of publicly funded support services, and for the policy to be fiscally sustainable.[129]

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[126] *R v Oakes* [1986] 1 SCR 103.

[127] *Hansen,* above n 123, at [64], per Blanchard J, citing *R v Chaulk* [1990] 3 SCR 1303 at 1335-1336.

[128] *Ministry of Health v Atkinson* (2010) 9 HRNZ 47 (HC), Asher J sitting with Ms J Grant MNZM and Ms P Davies, at [218].

[129] At [218]; This finding was not disturbed on appeal to the Court of Appeal in *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [3].

In *Child Poverty Action Group Inc v Attorney-General* the High Court held that the objective of the "off-benefit rule"[130] of the "in-work tax credit" implemented as part of the Working For Families programme of "incentivising relatively low income earners to pursue and remain in work" was a sufficiently important concern to justify curtailing the right to freedom from discrimination under section 19[131] of the NZBORA.[132] This objective, regarded as sufficiently important, relates to the purely public policy factors of maximising the economic efficacy of welfare spending and maximising the number of people in work to ensure more people received the dignity aspect of having a job.

In *Commerce Commission v Air New Zealand Ltd* the Court of Appeal held that the Commerce Commission could make suppression orders under section 100 of the Commerce Act 1986 for the purpose of protecting the integrity of an investigation under the Act.[133] These suppression orders engaged the section 14 freedom of expression right under the NZBORA. The Court held that the Commission's objectives of protecting the flow of information under its leniency policy, the aim of encouraging full and frank disclosure, and finally the protection against contamination of evidence justified the limit on freedom of expression in terms of section 5 of the NZBORA.[134] These considerations go to the ability of the Commerce Commission to conduct investigations in order to uphold the provisions and also the purpose of the Commerce Act, which is to "promote competition in markets".[135] This is a classic example of pure policy considerations being relied upon by the state to justify limiting rights and freedoms of the NZBORA.

As these cases illustrate, the concerns found to be "pressing and substantial" generally fall under the very broad umbrella of public policy. Public policy is only limited by the desires and policy appetite of the democratically elected legislature, and the duly constituted

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[130] The off-benefit rule is an exclusion to the in-work tax credit which supplements the income of low-income earners with three or fewer children. If a person recieves an income-tested benefit, they are disentitled from recieving the tax credit under s MD 8(a) of the Income Tax Act 2007.

[131] The relevant discrimination was discrimination on the basis of "employment status", a "prohibited ground of discrimination" under s 21(1)(k) of the Human Rights Act 1993.

[132] *Child Poverty Action Group Inc v Attorney-General* HC Wellington CIV-2009-404-273, 25 October 2011, Dobson J sitting with Ms J Grant and Ms S Ineson, at [191]; This finding was not disturbed on appeal to the Court of Appeal in *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [77].

[133] *Commerce Commission v Air New Zealand Ltd* [2011] NZCA 64, [2011] 2 NZLR 194 at [70].

[134] At [68] and [71]-[72].

[135] Commerce Act 1986, s 1A.

executive who is accountable to the legislature (and the law – both legislation and the common law – as applied by the judiciary).[136] This approach to section 5 is what I argue would frustrate inserting a right to property in the NZBORA. In the context of regulatory takings, the relevant regulation will, by its nature, almost always respond to a legitimate public policy concern – regardless of the objective merit of the concern. "Public policy" is judged in the eyes of the people, thus the courts generally give the legislature or decision-maker "some latitude or leeway" particularly in cases which involve the "complex interaction of a range of social, economic, and fiscal policies ... ."[137]

The Overseas Investment Act 2005, for example, places restrictions on the ability of property owners to sell their land or business to an "overseas person", which is clearly a limit on the property right of alienation.[138] The Act limits overseas investment in New Zealand assets by overseas persons and privileges ownership by New Zealand citizens and residents of these assets. While certain overseas investment may still occur in New Zealand, any proposal for an investment that triggers the Act's provisions must go through a rigorous application process.[139] The Overseas Investment Act is an example of public policy which is legitimised on the grounds of representing the democratic majority of the people, as expressed by Parliament.[140] The Overseas Investment Act undoubtedly restricts the property rights of property owners in New Zealand. However, at law these interests are swept aside in the face of a "legitimate concern" in the eyes of Parliament that it be universally observed and accepted that "it is a privilege for overseas persons to own or control sensitive New Zealand assets ... ."[141]

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[136] Andrew Butler "Limiting Rights" (2002) 33 VUWLR 113 at 142-143.

[137] *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [91].

[138] See A M Honoré "Ownership" in Anthony Guest *Oxford Essays in Jurisprudence* (Oxford University Press, Oxford, 1961) 370 at 370-371; Section 90, as well as the Act as a whole, of the Land Transfer Act 1952 places no restrictions on the citizenship or immigration status of individuals and of the owners of incorporated entities who may be a "person" and thus "transferee" of land or estate or interest in land.

[139] Under the Act, an application for consent must be made when the investment would be in certain classes of land, notably where the land is non-urban and over 5 hectares, and in relation to a business asset where the investment would see the overseas person have a 25% or greater ownership or control interest in the business asset.

[140] The Act was passed by a significant majority at third reading, with 84 ayes and 27 noes.

[141] Overseas Investment Act 2005, s 3 (purpose section).

The identification of a "pressing and substantial" societal concern is, however, not the end of the inquiry under section 5 of the NZBORA. The next stage of the *Oakes* test requires an inquiry as to the proportionality of the means chosen to achieve the objective.[142] This overall proportionality test is broken down into three parts, as noted already, whether: (a) there is a rational connection; (b) minimal impairment; and (c) the effects of means are proportional to the objective.[143] In relation to a right to property as part of the NZBORA, I contend that this proportionality inquiry would not be an adequate safeguard against section 5 being used to rubber stamp any regulatory taking on the basis of a legitimate public policy concern.

In relation to the rational connection limb, the Court of Appeal in *Child Poverty Action Group* accepted – as the parties accepted – that there is a rational connection between the off-benefit rule and the objective of incentivising being in work.[144] The rational connection test is thus not hard to meet. It merely requires that the rights-limiting means actually has the capacity to attempt to achieve the objective.

In relation to the minimal impairment test, the Court of Appeal in *Child Poverty Action Group* affirmed that the "minimal impairment" question required the Court to ask not whether the right-limiting means was the *least* right-limiting option, but rather that it was one a "*range* of *reasonable* alternatives" (emphasis added).[145] On the facts before it, the Court held that the off-benefit rule one of a range of legitimate policy choices, thus satisfying the minimal impairment test.[146] The Court appeared to be particularly influenced by the "extensive" policy process and "careful analysis of a range of options" leading to the enactment of the Working For Families legislation.[147]

Finally, in relation to the last sub-limb of the proportionality limb – whether the limitation is a "proportional response" – the courts have noted that once the other limbs of the section 5 test are met, it is hard to say the measure that results is not proportionate.[148] I will not therefore discuss this limb any further.

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[142] See *Hansen,* above n 123, at [64], per Blanchard J.

[143] *Hansen,* above n 123, at [64], per Blanchard J.

[144] *Child Poverty Action Group* above n 137, at [77].

[145] *Child Poverty Action Group v Attorney-General,* above n 137, at [102].

[146] At [129].

[147] At [109] and [120].

[148] *Child Poverty Action Group,* above n 137, at [151].

While in some senses the section 5 test places a high justificatory burden on the state (or any entity bound by section 3(b) of the NZBORA), it is one that can be satisfied relatively easily in the context of rights that are routinely subjected to limitations in the face of pressing and substantial societal concerns. In such cases, as long as the entity called upon to justify a limiting of a right under the NZBORA can satisfy a set of minimum standards as part of its regulatory response to a public policy concern, the courts are likely to find the limitation justified under section 5.

I now turn to explain why regulation that constitutes a regulatory taking of property would be routinely legitimised by section 5 of the NZBORA. First, a right to property in the NZBORA would likely be seen on the lower end of the hierarchy of rights in terms of how fundamental and inviolable they are. There are a number of rights within the NZBORA that have been identified as being incapable of being justifiably limited. As noted by Blanchard J in *Hansen,* for example, the rights not to be tortured[149] or tried unfairly[150] "can have no meaningful existence as anything less than absolute protections".[151] In *Television New Zealand Ltd v Solicitor-General,* Baragwanath J said that the right to life[152] and to not be tortured[153] were "absolute rights".[154] While these comments are *obiter,* they do a reflect a necessary distinction between rights that are more fundamental than others within Part 2 of the Act. This recognises that section 5 applies to all rights equally, but its legal force turns on whether there ever *can* be a demonstrably justified limitation of a certain right in a free and democratic society.

A right to property within the NZBORA would likely be seen as one of the least fundamental rights.[155] This could leave it exposed to many limitations in the presence of endless pressing and substantial concerns justifying interference with property rights. This can be seen for example, in the view of the Human Rights Commission, which while it supports inserting a right to property in the NZBORA, expresses the substance of the right in such opaque terms as to justify any "reasonable" regulatory impairment of property

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[149] Section 9.

[150] Section 25(a)

[151] *Hansen,* above n 123, at [65].

[152] Section 8.

[153] Section 9.

[154] *Television New Zealand Ltd v Solicitor-General* [2008] NZCA 519, [2009] NZFLR 390 at [90].

[155] See van der Walt, above n 117, at 109; Hailes, above n 64, at 261-262; Palmer, above n 118, at 23.

rights.[156] The Commission has said that “the law may subordinate...[the] use and enjoyment [of property] to the interests of society” and “Parliament can make laws that interfere with the right to property as long as it is *reasonable, proportionate and not arbitrary*”.[157] Thus any regulatory limitation on the right to property is likely to be subject to an implicitly lower “intensity of review”.[158]

A right to property within the NZBORA is likely to be seen as having a greater capacity to be “reasonably limited” given our contemporary cultural understanding of the state’s legitimate ability to tax, redistribute and regulate most aspects of property ownership. The case for subjecting regulatory takings to a general takings rule does not deny the general appreciation of the state’s ability to interfere with property to enhance societal welfare. However, if a right to property is to be effective in guarding against uncompensated regulatory takings, it needs to account for the fact that a “reasonable limitations” provision will frustrate this. Such a limitation would invite the courts to find a regulation that is *prima facie* inconsistent with a right to property is nonetheless justified because it is “reasonably justified” in pursuit of an important societal concern. This is particularly so where the regulation in question has been chosen as part of a reasonably thorough policy process, as is likely to be done by relevant government agencies in light of the Court of Appeal’s decision in *Child Poverty Action Group*.[159]

My proposed right to property has an inherent mechanism that acknowledges there are certain circumstances where there is a clear public interest in taking property rights. It does this by asking whether the taking is “essential in the public interest”.[160] This means that the clause itself already recognises that in a free and democratic society there are circumstances where the interests of society trump the individual’s right to enjoy property free from coercive interference. However, once this hurdle is overcome, the state still is required to pay compensation where a property owner can point to a taking causing demonstrable loss.[161] The two concepts of pressing societal concerns and legitimate property interests are not mutually inconsistent. It is precisely the marriage of these two concepts that is the foundation for the right to compensation for compulsory acquisition under the Public Works Act.

[156] MacDonald and Carlton, above n 113, at 44.

[157] MacDonald and Carlton, above n 113, at 44.

[158] See Butler, above n 136, at 137.

[159] *Child Poverty Action Group,* above n 137, at [109] and [120].

[160] Appendix, at sub-cl (1)(a).

[161] Appendix, at sub-cl (1)(c)(i) and (ii).

This approach to recognising legitimate concerns justifying expropriation is also seen in the many examples of such rights in the constitutions of other jurisdictions. The Fifth Amendment to the Constitution of the United States provides, "...nor shall private property be taken for *public use*".[162] The Constitution of the Commonwealth of Australia provides that the Parliament has the power to make laws with respect to "the acquisition of property on just terms from any State or person for any *purpose* in respect of which the Parliament has *power* to make laws"[163] The Basic Law of Germany provides "[e]xpropriation shall only be permissible for the *public good*" and that compensation (if applicable) be determinable by reference to the "public interest".[164] As a final example, the Constitution of South Africa provides "[p]roperty may be expropriated only...for a *public purpose* or in the *public interest*".[165]

These examples illustrate not only that my proposed right to property shares the essential characteristics of such clauses in other jurisdictions, but that built into these clauses is the irreducible acknowledgement that the state taking of property is *prima facie* permitted if it serves the public interest. It is this feature of these constitutional rights to property that makes them incompatible with section 5 of the NZBORA. Once the public interest limb is satisfied, it is difficult to see how the "pressing and substantial" concern, rational connection, minimal impairment and overall proportionality limbs of the section 5 test would not also be met in the vast majority of cases that engage the question of regulatory takings.

This is best illustrated by looking at examples that engage the question of regulatory takings that likely satisfy the section 5 test. First, as discussed already, a paradigm example of a regulatory taking by legislation in New Zealand was the nationalisation of all petroleum in New Zealand in 1937.[166] Prior to this nationalisation, all minerals (other than those already owned by the Crown, for example gold) were the property of the owner of the fee simple

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[162] US Constitution, amend V.

[163] Commonwealth of Australia Constitution Act, section 51(xxxi); See also Tom Allen *The Right to Property in Commonwealth Constitutions* (Cambridge University Press, Cambridge, 2000) at 176; *Johnson Fear and Kingham and The Offset Printing Co Pty Ltd v The Commonwealth* (1943) 67 CLR 314 at 318 and 325.

[164] German Basic Law, art 14(3).

[165] Constitution of the Republic of South Africa, 1996, section 25(2) and (2)(a).

[166] Petroleum Act 1937.

estate.[167] However, the Petroleum Act 1937 declared all petroleum "on or below the surface of *any land* within the territorial limits of New Zealand...to be the property of the Crown".[168] The reasoning of the government was that it was in the "national interest" to increase investment by international oil companies to discover oil, increasingly critical to all forms of transportation and the strategic threat posed to New Zealand by Germany and Japan.[169] The government argued that it was in the national interest for these companies to be able to deal with a single owner (the Crown).[170]

If we were to measure this regulatory taking against the section 5 test, it is not difficult to see that there was a pressing and substantial societal concern, owing in part to the unstable geopolitics at that time; that there was a rational connection; there was minimal impairment (given the uncertainty about exactly how much petroleum would have been under the common law ownership of each landowner); and overall, that this was not a disproportionate limitation on the right to property. Thus, if a right to property was subject to section 5 of the NZBORA, the courts would likely be unable to issue a declaration that the Act was inconsistent with the right to property. Under my proposed right to property, Parliament would retain the sovereign right to pass the Act regardless, but it would have to do so with its eyes open to its taking as a result of the required statement of inconsistency from the Minister of Lands.[171] Landowners would also have been able to seek declaratory relief from the courts stating that their property rights had been impaired.[172]

The central issue with section 5 constraining a right to property is that it inevitably invites the courts to head down the path that the United States has followed, recognising only a narrow concept of compensable regulatory takings. This approach, as I will argue in

[167] This principle still applies (with its statutory and royal prerogative exceptions) at common law in New Zealand. See Hinde, McMorland and Sim (eds) *Land Law in New Zealand* (looseleaf ed, LexisNexis) at [6.004].

[168] Section 3.

[169] Evans and Quigley above n 8, at 245.

[170] Evans and Quigley, above n 8, at 245; Notably though, a failed 1927 Bill, the Petroleum Bill 1927 (100-2), could have achieved this same result by affording the Crown the sole right to grant mining rights on private land, but it also provided that the royalties (between 9-10% of the selling-value of the petroleum, see cl 25-26 of the Bill) were returned to the property owner, which would have recognised the property rights of the owners, as Evans and Quigley note at 245.

[171] Appendix, at sub-cl (5).

[172] Appendix, at sub-cl (6).

Chapter V, undermines the conceptual coherence of property rights, as it draws a false distinction between complete and partial takings of property. In *Lucas v South Carolina Coastal Council*, for example, the Supreme Court of the United States held that only where the state calls upon a property owner to "sacrifice *all* economically beneficial uses [of their property]...[have they] suffered a taking".[173]

As the overarching question of the section 5 test is whether the limitation is *proportionate* to the societal concern, the question will inevitably become a quantitative exercise determining whether the property owner still has a "reasonable" use of their property and are able to use their property in an "economically viable" way. The nature of many regulations is such that they reduce the utility of *some* of the previously exercisable property rights, but that they leave many of the rights untouched. Many regulations will impose a demonstrable loss on the property owner, and this should ordinarily be compensated under a coherent conception of state taking of property rights for public use. However, under a section 5 approach, the courts are likely to be persuaded that the remaining utility in the rights left behind are sufficient to ignore the rights taken or impaired by the regulation.[174]

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[173] *Lucas v South Carolina Coastal Council* 505 US 1003 (1992) at 1019.

[174] See Boast and Quigley, above n 23, at 143.

V Why a Weak-Form Judicially Reviewable Right to Property Will Best Protect the Institution of Property Rights in a Coherent and Consistent Way

A Outline

New Zealand currently enjoys a "small c" constitution. That is, a constitutional framework that is not provided for in a supreme, written document. It remains one of the few nations in this category, alongside the United Kingdom and Israel.[175] However, it is a distinct possibility that New Zealand will yet move to adopt an entrenched, written and possibly supreme, constitution. The most recent comprehensive proposal for this can be seen in Geoffrey Palmer and Andrew Butler's *A Constitution for Aotearoa New Zealand*.[176] Palmer and Butler's proposed constitution would be written, entrenched and supreme.[177] Their proposal would include a right to property that procedurally protects property from "deprivation" but only extends a right to compensation where the state deprives "by way of expropriation".[178] Thus, it appears that Palmer and Butler have tried to exclude regulatory takings *per se* from their compensation principle.[179] However, as Oliver Hailes notes, "the distinction between mere deprivation and compensable expropriation would be ripe for litigation..."[180] In any event, this proposal does not represent the likely *substance* of a right to property as part of any written constitution that New Zealand may choose to adopt in the future; it would not be the first time Geoffrey Palmer's ambitions for constitutional reform were frustrated.[181]

This Chapter will explore the benefits of adopting a statutory interpretive/declaratory right to property, as seen in my proposed clause, as opposed to a supreme right to property as part of a written constitution. It will argue that unlike the hard-edged takings clause as seen

[175] Palmer "Using Constitutional Realism to Identify the Complete Constitution: Lessons from an Unwritten Constitution", above n 20 at 591.

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

[177] Palmer and Butler, above n 176, at 372 and 374.

[178] At 302.

[179] Hailes, above n 64, at 239.

[180] Hailes, above n 64, at 239.

[181] Paul Rishworth "The Birth and Rebirth of the Bill of Rights" in Rishworth and Huscroft (eds) *Rights and Freedoms* (Brooker's, Wellington, 1995) 1 at 23-25.

for example in the United States, a flexible right to property as exemplified by my proposed right would more effectively protect property rights in New Zealand.

B Discussion

1 Statutory right to property preserves parliamentary supremacy but ensures executive and other entities exercising public power respect property rights

New Zealand continues to adhere to the fundamental constitutional principle of parliamentary sovereignty inherited from Westminster.[182] The courts have strongly affirmed Parliament's ability to "expropriate property without compensation...step[ping] through laws and rights, obliterating remedies which would otherwise exist".[183] My proposed right to property sits firmly within the current constitutional reality in New Zealand.[184] As already noted, such a right would accord with the recognition of other rights under the NZBORA and impose a similar interpretive command as in section 6 of the NZBORA, none of which undermines Parliament's sovereign right to legislate how it wishes. Critically, the constitutional role of such a right would be very similar to that of the rights and freedoms under the NZBORA. Therefore, judicial experience and jurisprudence could guide the courts' approach to a new right to property, albeit that it would not be within the four corners of the NZBORA.

However, subject to an express statutory permission by Parliament to act inconsistently with the right to property, my proposal would place more substantive constraints on the way the executive and other entities exercising public power can interfere with property rights. Thus, its central utility could be in the realm of administrative law, in curbing the excessive interference with property rights by delegated public power. An example of what would be seen as a statutory permission allowing decision-makers acting under statutory power to ignore the right to property would be section 85 of the Resource Management Act 1991 (RMA). That section provides, "[a]n interest in land shall be *deemed* not to be taken

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[182] See A V Dicey *Introduction to the study of the law of the constitution* (8th ed, Macmillan and Co, London, 1915); Mark Tushnet *Advanced Introduction to Comparative Constitutional Law* (Edward Elgar, Cheltenham, 2014) at 41.

[183] See *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at [95].

[184] See Palmer "Using Constitutional Realism to Identify the *Complete* Constitution: Lessons from an Unwritten Constitution", above n 20; Matthew Palmer "New Zealand Constitutional Culture" (2007) 22 NZULR 565.

or injuriously affected by reason of any provision in a plan unless otherwise provided for in this Act".[185] The effect of such a provision would be to oust the compensation principle under the right to property having any legally restraining effect on the conduct of decision-makers empowered to act under the RMA. However, it is worth noting that my proposal would allow any person to seek a declaration that section 85 of the RMA is inconsistent with the right to property, and the court would be empowered to grant such a declaration.[186] Thus, the right to property I propose would be legally recognised in a similar way to rights under the NZBORA. That is, where the rights may not be enforced in substance where legislation is unambiguously inconsistent with a right or freedom, the right or freedom may nonetheless be recognised and acknowledged by a formal declaration of inconsistency.[187]

As mentioned, possibly the greatest utility of my proposed right to property would be in its ability to constrain the ability of entities acting with delegated statutory power to impair property rights. Where action purporting to rely on statutory power is inconsistent with a right to property, it will only be lawful if the empowering provision *expressly* permits secondary legislation inconsistent with the right to property. This is because sub-clause (4) of the proposed right to property clause would require a meaning consistent with the right to property be given to the empowering provision if that provision *can* be given such a meaning.[188] If secondary legislation is inconsistent with the right to property and the empowering provision does not expressly permit secondary legislation inconsistent with the right to property, it would be declared *ultra vires* by the court. This would follow the NZBORA approach to delegated legislation as set out by the Court of Appeal in *Drew v Attorney-General*.[189]

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[185] RMA, s 85(1); For a further example of a provision that would permit delegated power to be exercised in defiance of a constitutional right to property, see section 14(4) of the Heritage New Zealand Pouhere Taonga Act 2014.

[186] Appendix, at sub-cl (6).

[187] See *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24. (Note this decision has been appealed to the Supreme Court, which is yet to deliver its decision on the matter (SC 65/2017)). Regardless, the right to property in my proposal expressly creates jurisdiction to make a declaration of inconsistency.

[188] Appendix.

[189] *Drew v Attorney-General* [2002] 1 NZLR 58 (CA) at [68].

2 *Will enable a more conceptually consistent protection of property rights*

To illustrate how a supreme/hard-form judicial review approach may be harmful to a conceptually coherent takings jurisprudence in New Zealand, I will examine the unsatisfactory position that such a right to property has led to in the United States. For the purposes of my arguing that a weak-form right to property would be best for New Zealand, I have chosen to scrutinise the position in the United States, because as a jurisdiction it has had a significant body of regulatory takings jurisprudence that has generated deep controversy.[190]

As already noted, the United States constitutional protection of property rights can be found in the Fifth Amendment to the Constitution, which provides "No 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".[191] This provision first provides a due process protection for the deprivation of property, then secondly imposes a *substantive* constraint on the state taking of property. This constraint prohibits the federal government from taking private property unless it is for a public use and just compensation is paid to the property owner. In *Chicago Burlington and Quincy RR v City of Chicago*[192] the Supreme Court held that the Fourteenth Amendment to the Constitution made the Takings Clause of the Fifth Amendment applicable to the taking of private property by the States.[193] Therefore, whenever government in the United States – Federal or State – takes private property, the courts are *bound* to apply the Constitution and strike down laws or actions of the executive that are unconstitutional under the Fifth and Fourteenth Amendments. This in theory furnishes the courts with an extraordinary power over the regulatory powers of the state, whether exercised through primary or secondary legislation, or executive action.

Given the potency of the power delegated to the judicial branch by the Constitution, it is unsurprising that the United States courts have taken a conservative approach to regulatory takings, particularly with the pervasive appetite for regulation in modern market economies. This conservative approach stands in stark contrast to the common "caricature" of takings law in the United States as jurisprudence that "privileges property rights" at the

[190] Alexander "Ten Years of Takings", above n 45, at 586.

[191] US Constitution, amend V.

[192] *Chicago Burlington and Quincy RR v City of Chicago* 166 US 226 (1897).

[193] See *Lingle v Chevron USA Inc* 544 US 528 (2005) at 536.

expense of "legitimate state interests" and being a product of "property rights zealots".[194] The United States' conservative approach to regulatory takings can be illustrated by the leading cases decided by the Supreme Court of the United States.

The Supreme Court has recognised a series of narrow categories of regulatory takings that will be compensable takings, yet within these narrow categories regulatory takings has a "notoriously and frustratingly vague scope".[195] The first of these categories recently affirmed in *Lingle v Chevron USA Inc* and was described as where the regulation "deprives an owner of '*all* economically beneficial us[e]' of her property" under the approach in *Lucas v South Carolina Coastal Council*[196].[197] The second is found in the approach taken by the Court in *Penn Central Transportation Co v New York City* where it was held that a taking would occur if the magnitude of the economic impact was significant enough and if the regulation significantly interfered with the investment-backed expectations of the property owners.[198] In *Chevron,* the Court summed up these approaches to regulatory takings as all aiming to "identify regulatory actions that are *functionally equivalent* to the classic taking in which government directly appropriates private property or ousts the owner from his domain" (emphasis added).[199]

This conservative approach to regulatory takings began in the case of *Pennsylvania Coal Co v Mahon*.[200] Here the Supreme Court first recognised that the Takings Clause applied to regulation as well as direct appropriation.[201] However, Justice Holmes' formulation of the test for whether regulation has effected an unconstitutional taking was very restrictive. Holmes J said, "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes *too far* it will be recognized as a taking" (emphasis added).[202] In deciding the case, the Supreme Court held that a Pennsylvania statute that

[194] 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 147.

[195] Gregory Alexander "Constitutionalising Property: Two Experiences, Two Dilemmas" in Janet McLean (ed) *Property and the Constitution* (Hart Publishing, Portland, Oregon, 1999) 88 at 91.

[196] *Lucas v South Carolina Council* 505 US 1003 (1992) at 1019.

[197] *Lingle v Chevron,* above n 193, at 538.

[198] *Penn Central Transportation Co v New York City* 438 US 104 (1977) at 124.

[199] At 539.

[200] *Pennsylvania Coal Co v Mahon* 260 US 393 (1922).

[201] See *Lucas,* above n 196, at 1014.

[202] *Mahon,* above n 200, at 415.

prohibited the mining of coal in such a way as to cause subsidence of, *inter alia,* structures used for human habitation effected an unconstitutional taking of Pennsylvania Coal Co's property in particular mining rights. Justice Holmes, in delivering the Opinion of the Court, said; "To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it".[203] Thus, because the regulation destroyed all economic use in the property, the Court held that the regulation had gone "too far".

In establishing such a high threshold for regulation to effect a taking in *Mahon,* it is perhaps ironic that Holmes J recognised the danger of eroding property rights gradually through regulation without compensation. As Justice Scalia noted in *Lucas*:[204]

> Justice Holmes recognized in *Mahon*...[i]f...the uses of private property were subject to unbridled, uncompensated qualification under the police power, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed]."

As already discussed, this "regulation going too far" threshold was expanded upon in *Lucas,* where the Supreme Court held:[205]

> ...when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

In *Lucas,* the Supreme Court acknowledged that the state trial court found that a South Carolina statute preventing the construction of residential houses on the petitioner's property rendered the lots valueless, thus *prima facie* the facts met the "deprived of all economically beneficial use" test.[206]

These leading takings cases demonstrate that the United States courts have taken a very narrow approach to the extent of deprivation of property rights that triggers the

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[203] At 414.

[204] At 1014.

[205] At 1019.

[206] However, the Supreme Court remanded the matter to the State Court to determine whether, as a matter of with the State's law of nuisance, the prescribed use interests were not actually part of the petitioner's title to begin with.

compensation requirement of the Takings Clause. The approach taken in the United States is not conceptually coherent, because it fails give effect to the legal reality that ownership of property is not ownership of a thing but ownership of a "bundle of rights" each carrying their own value.[207] The Supreme Court itself recognises property as relating to a bundle of rights, as seen in *United States v General Motors Corp*:[208]

> It is conceivable that ["property"] was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter.

In its takings jurisprudence, however, the Supreme Court effectively has refused to recognise a regulatory taking until the state action involves the confiscation of so many of the rights in the bundle that it becomes "functionally equivalent" to a direct appropriation of property by the government.[209] This approach was implicitly rejected by New Zealand's Regulatory Responsibility Taskforce, which in its 2009 Report recommended that a right to property should protect against "impairment" to encompass regulatory actions which impair an owner's enjoyment of their bundle of rights.[210]

The narrow approach taken to regulatory takings in the United States is also inconsistent with the normative theories that underpin the arguments in favour of protecting property rights constitutionally. In terms of promoting economic efficiency, it matters not whether the taking is physical or regulatory, the same efficiency harms can result.[211] Economically, it makes no sense that a property owner should *always* be compensated for the compulsory acquisition of a portion of their land but *never* for a regulation that reduces that value of the property rights attached to the land by an equivalent amount (unless the deprivation is of *all* beneficial use). Such an aggressive distinction between physical and regulatory takings may also be inconsistent with the human flourishing theory of property. Property

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[207] See Richard A Epstein "Bundle-of-Rights Theory as a Bulwark Against Statist Conceptions of Private Property" (2011) 8 Econ J Watch 223 at 224; A M Honoré "Ownership", above n 138.

[208] *United States v General Motors Corp* 323 US 373 (1945) at 377-378.

[209] See *Chevron,* above n 193, at 539.

[210] Regulatory Responsibility Taskforce *Report of the Regulatory Responsibility Taskforce* (Regulatory Responsibility Taskforce, September 2009) at [4.63].

[211] Rose-Ackerman, above n 86, at 29-30.

owners are expected to yield some of their property rights for the public good in recognition of social interdependence and be compensated for it in the case of a public work, but are not ordinarily compensated in the case of a regulation. There is nothing in the human flourishing theory of property that would justify this distinction. Finally, this approach is also inconsistent with the public choice theory justification for limiting the impairment of property by regulation. If a regulation will only attract the attention of the compensation principle in cases where the regulation goes so far that it is equivalent to physical appropriation, there is still vast scope for regulators to make inefficient regulatory decisions when it will only have to consider compensation in a small minority of cases. Thus, such a right to property would not have a broad-based efficiency effect on the regulatory decision-making of the state.

The only way to have a coherent constitutional protection of property is to treat physical expropriation and regulatory impairment (above a baseline trigger threshold) effectively the same. As I have argued in this Chapter, this is unlikely to be achieved by an absolute right to property, as part of a supreme constitution. To avoid a narrow conception of regulatory takings, it is necessary to ensure that a constitutional right to property is flexible and resilient such that it can *recognise* but not necessarily always *vindicate* rights in property. This approach may be unsatisfactory for proponents of hard-edged protection of property rights, such as Epstein.[212] However, given New Zealand's unique political and constitutional setting, a right to property enforceable by a weak-form judicial review mechanism will likely be the best option for New Zealand.

Under my proposal, a right to property would be recognised formally in law and would initially treat physical and regulatory takings as equivalent. In both cases, the taking would need to satisfy the "essentiality" and "necessity" tests to be consistent with the state's right to take or impair property.[213] When it comes to the compensation question, however, my proposal would treat compulsory acquisition differently from regulatory takings. In the case of direct takings constituting a compulsory acquisition, the compensation requirement would be met by following the existing process set out in the PWA.[214] For regulatory takings, the state would not be required to proactively compensate affected property owners, but would rather afford property owners with a right to apply and then receive

[212] Epstein, above n 35.

[213] Appendix, at sub-cl (1)(a) and (b).

[214] Appendix, at sub-cl (1)(c)(i).

compensation.[215] This slightly less onerous requirement would take account of the fact that when it comes to regulation, the transaction costs of identifying all affected owners may make direct compensation inefficient.[216]

The enforcement of this provision will be almost identical to the way legislation is interpreted and the lawfulness of the exercising of public power is assessed under the NZBORA, apart from the section 5 analysis.[217] This means that the courts would be required to give legislation a meaning consistent with the right to property, if the legislation *can* be given such a meaning.[218] Moreover, the courts also would be able to *declare* legislation inconsistent with the right to property, but not be permitted to refuse to apply the inconsistent legislation.[219] These mechanisms will mean the courts will have decidedly less power in relation to the state interfering property than under a supreme constitution, but it would mean they could develop a more coherent approach to state actions that take or impair property. The moderating but not overriding effect of the right to property, as I propose, could additionally ensure the resilience of the provision itself, which would of course be susceptible to legislative repeal or amendment by a simple majority vote of House of Representatives. Additionally, there would be greater awareness of state interference with property at the legislative level, with the Minister of Lands being required to bring to Parliament's attention any inconsistency between proposed legislation and the right to property.[220] This would likely improve the attention paid to property rights, and state interference with them, by the courts and government generally.

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[215] Appendix, at sub-cl (1)(c)(ii).

[216] See Wilkinson *Constraining Government Regulation,* above n 102, at 192.

[217] The rationale for not subjecting a right to property to the constraint of section 5 of the NZBORA was discussed at Chapter IV above.

[218] Appendix, sub-cl (4).

[219] Appendix, sub-cls (3) and (4).

[220] Appendix, at sub-cl (5).

Conclusion

This dissertation has sought to present a proposal for a single constitutional right to property. Save for the compulsory acquisition of title to land, there is currently little constitutional protection in New Zealand of property rights that form part of the bundle of rights enjoyed by a property owner. Specifically, there is little to shield property owners from injurious regulation of their property rights without compensation.

Private property is a contentious institution. However, private property and its recognition and enforcement in law has been empirically shown to be key to economic growth and prosperity. Private property can also play an important role in ensuring the integrity of democracy and democratic institutions. Therefore, there are strong normative justifications for the institution of private property and for the constitutional protection of private property from uncompensated injurious state interference.

To implement an effective constitutional right to property that aligns with its normative justifications, it cannot apply to the taking of title to land alone. There is no justified basis for compensating partial takings of title to land and not compensating for taking or impairing property rights that form a critical and valuable component of the property itself. Therefore, a right to property must be broad enough to apply to regulatory takings. The constitutional right to property that I have proposed attempts to achieve this coherent and unified protection of property from all forms of state taking or impairment of rights in property.

Despite previous attempts and ongoing calls to do so, the NZBORA is not the best place to recognise a right to property. To be effective, the right to property cannot be subject to the "reasonable limitations" provision under section 5 of the NZBORA. Such a limitation would permit a vast array of regulatory takings on the basis of a legitimate regulatory response to a social need. Thus, the right as I propose would be better located in a reworked and renamed Public Works Act. Finally, to ensure a right to property would be likely to be applied by the courts in a consistent and coherent way and to ensure the durability of the right, it would be best implemented as a weak-form judicially reviewable right. Thus, Parliament's sovereignty would not be undermined, and thus the courts are likely to be less reluctant to give a generous reading to the scope of what the right to property *prima facie* protects.

New Zealand's system of private property is largely one that provides certainty and security to property owners. This generally ensures people have the confidence to invest in property in ways that yield productive returns and growth to support the economic needs of a modern society. However, there are very limited constitutional constraints on the state's ability to regulate property rights without compensation. This creates uncertainty that discourages necessary investment and drives poor regulatory decision-making by the state. This can be remedied by a recognising a statutory right to property as I have proposed. This approach would ensure regulatory decision-making places greater weight on property rights without undermining the key features of our current constitutional framework.

Appendix

"[xx] Right to property

(1) No enactment, or action of the Crown or any public entity, should take or impair property without the consent of the owner, unless[221]—

(a) The benefit sought by the enactment or action is essential in the public interest; and

(b) The enactment or action is necessary as voluntary mechanisms are unlikely to achieve the benefit; and

(c) in the case of—

(i) compulsory acquisition of land, the acquisition complies with the procedural requirements of Part 2 of the Act and compensation is provided in accordance with Part 5 of the Act; or

(ii) taking or impairment of property in any other form, the owner is provided with full compensation where they submit an application for compensation to the Crown or the relevant public entity.

(2) Where compensation is provided, to the extent practicable, it should be provided by or on behalf of the persons who obtain the benefit of the taking or impairment.

(3) No court shall, in relation to any enactment (whether passed or made before or after the commencement of this section),—

(a) hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or

(b) decline to apply any provision of the enactment—

by reason only that the provision is inconsistent with any provision of this section.[222]

(4) Wherever an enactment can be given a meaning that is consistent with the provisions of this section, that meaning shall be preferred to any other meaning.

(5) Where any Bill is introduced into the House of Representatives, the Minister for Land Information shall,—

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[221] The content of this subclause and of subclause (3) is largely reflective of cl 7(1)(c) of the Regulatory Standards Bill 2011.

[222] This clause mirrors s 4 of the New Zealand Bill of Rights Act 1990 (NZBORA). However, this provision might also be best formulated in relation to the whole of the PWA, such that any bill that purports to allow the state to acquire an interest to land in a manner inconsistent with the existing provisions of the PWA should also compel the Minister of Lands to table a report in the House of Representatives.

(a) in the case of a Government Bill, on the introduction of that Bill; or

(b) in any other case, as soon as practicable after the introduction of the Bill,—

bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with this section.[223]

(6) Subject to subsection (3) of this section, a court may, in any proceedings, declare a provision of any legislation to be inconsistent with this section.[224]

(7) Following a declaration made under subsection (6), the Minister for Land Information shall refer the declaration to a select committee of the House of Representatives to prepare a report to the House as to whether Parliament should amend the legislation to remedy the inconsistency.[225]

(8) This section is not subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

(9) Subsection (1)(c)(ii) is complied with if the Crown or relevant public entity prospectively compensates an owner for property taken or impaired without the owner having made an application for compensation.**”**

...

property–

(a) means everything that is capable of being owned, whether it is real or personal property, and whether it is tangible or intangible property; and

(b) includes any estate or interest in property”

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[223] This provision mirrors s 7 of BORA. See above at n 2 for possible applicability to whole Act.

[224] This type of "declaration of inconsistency" provision may yet be inserted into the NZBORA itself if the Government proceeds with Cabinet's in-principle decision to do so.

[225] Again, this sort of provision that ensures Parliament is required to reconsider NZBORA inconsistencies may be added into NZBORA under the Government's stated intention.

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