COMMENT AND BOOK REVIEW

FROM PRIVATE PROPERTY TO PUBLIC LAW

*Simon Evans**

Janet McLean (ed), *Property and the Constitution*

INTRODUCTION

Property and the Constitution[1] brings together ten papers from a conference held in July 1998 at the Victoria University of Wellington and two subsequent contributions on related themes. It is a fascinating and diverse collection and raises issues of profound importance for Australian public and private law. In the limited space available here, I cannot do justice to all the contributions to this book. Instead, I focus on three broad themes which together encompass most of the contributions:

- the relationship between "private property" and "public law";
- the problems presented by constitutional property clauses (such as s 51(xxxi) of the Commonwealth Constitution and the Takings Clause of the Fifth Amendment to the United States Constitution); and
- the restoration of land to its indigenous original inhabitants.

One initial matter cannot go unremarked. No Australian authors are represented in *Property and the Constitution*. This is to be regretted. Clearly, there are valuable Australian perspectives on all of the themes covered here. Perhaps a further conference will explore and develop these themes. In the meantime, *Property and the Constitution* is very highly recommended for those interested in the place of property in Australian public law.

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1 J McLean (ed), *Property and the Constitution* (1999) hereafter *Property and the Constitution*.

THE FIRST THEME: "PRIVATE PROPERTY" AND "PUBLIC LAW"

The first theme emerges most strongly in the chapter by Kevin Gray and Susan Francis Gray.[2] (It is also central to chapters by Tom Allen and Geoffrey Samuel.)[3] Gray and Gray investigate the consequences for property law of the growing perception that "public" and "private" are not dichotomous domains but represent ends of a spectrum "in which adjacent connotations shade easily into one another".[4] As might be expected from earlier writings,[5] Gray and Gray focus on the power of the property owner to exclude others. They correctly observe:[6]

> For the most part, the common law engages in no subtle gradation of the exclusory powers inherent in ownership: the rule of peremptory exclusion makes no distinction between the species of property to which it may relate.

Their thesis is that the dichotomous distinction between public and private *and* the ideology of property as "raw, untrammelled, individually exercised exclusory power"[7] are now untenable:

> Both conceptual structures nowadays threaten fundamental values of community and democracy. Both imperil important freedoms of expression, association and movement. Both place in hazard those critical, but fragile, social values which are summed up in irreducible notions of fairness and respect for human dignity.[8]

Gray and Gray propose a twofold solution to the problems presented by the ideology of property as uncontrolled exclusory power. First, they offer the possibility of choosing "to fashion our property thinking to accord with more inclusive, more integrative visions of social relationships".[9] Secondly, they propose "a new form of control...an increasing form of vigilance" over certain aspects of private property.[10] This new form of control, requiring at least procedural propriety in decisions by property owners to exclude members of the public from some types of property,[11] should be drawn from public law models:

> The infiltration within traditionally private law domains of something akin to public law controls may in fact provide a key to the preservation of those intangible and fragile values which alone assure freedom from widespread exploitation, exclusion and social alienation.[12]

Gray and Gray see this new form of control operating in a "middle ground" between public and private property[13] and examine three particular contexts where

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2 K Gray and S Gray, "Private Property and Public Propriety" in ibid at 11.

3 Tom Allen, "The Human Rights Act (UK) and Property Law" in ibid at 147 and Geoffrey Samuel, "The Many Dimensions of Property" in ibid at 40. Samuel's chapter investigates the public dimensions of property from civilian and common law perspectives.

4 K Gray and S Gray, above n 2 at 11.

5 Especially K Gray, "Property in Thin Air" (1991) 50 *CLJ* 252.

6 K Gray and S Gray, above n 2 at 14. In Australia, see *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487 at 511 per Aickin J.

7 K Gray and S Gray, above n 2 at 19.

8 Ibid at 15.

9 Ibid.

10 Ibid at 39.

11 Ibid at 19.

12 Ibid at 39.

13 It is most unfortunate that they use the slippery and uninformative term "quasi-public" for this domain.

they expect it would prove useful: the shopping mall or civic commercial centre; gated residential communities; and privatised public service utilities. Each of these contexts, they argue:[14]

> concerns some ever more common mechanism of social exclusion...Each throws into opposition deep desires for exclusive control over a defined patch of territory and also for harmonised co-existence in some form of interactive, interdependent human society.

To take only one of their examples, they contend that shopping malls and civic commercial centres provide "a place of solace for the disadvantaged, the over-burdened, the elderly and the oppressed of society".[15] The open area in such a mall or centre may be a site that "not only accommodates cerebral exchanges of ideas but, at the same time, generates a supportive good that we may call civic sociability, an aspect of what others have recently been calling 'social capital'".[16] If the owner of a shopping mall or civic commercial centre can peremptorily exclude members of the public, those individuals may be permanently cut off from access to the commercial and other facilities located there and may be precluded from seeking employment in what is their home town's primary work location.[17] Accordingly, Gray and Gray argue (following the lead of American and Canadian courts) that, in the interests of "the minimum standards of democratic community", courts should recognise a right not to be unreasonably excluded from "quasi public spaces" such as shopping malls and commercial civic centres.[18]

Gray and Gray's assumption that "property is a relative phenomenon, moulded by collective visions of the social good"[19] is, of course, controversial. For some commentators and judges, property is a *pre*-political fact, merely recognised by the common law, and is not politically or socially constructed in the interests of civic sociability or other non-individualist values.[20] For them, the property owner's untrammelled exclusory power is the very foundation of the owner's liberty and is something that the constitution of the state must protect.[21]

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14 K Gray and S Gray, above n 2 at 19-20.

15 Ibid at 21.

16 Ibid, quoting from F Michelman, "The Common Law Baseline and Restitution for the Lost Commons: A Reply to Professor Epstein" (1997) 64 *U of Chicago LR* 57 at 61.

17 K Gray and S Gray, above n 2 at 23-24.

18 Ibid at 29. Their arguments for limiting owners' exclusory powers in relation to gated communities and for scrutinising privatised public service utilities follow similar lines.

19 Ibid at 19.

20 The most sophisticated exponent of this view is R A Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985). See also *Lucas v South Carolina Coastal Council* 505 US 1003 (1992). The competing views of the function of property are a theme of Gregory Alexander's chapter in *Property and the Constitution*, discussed below, text at n 26 and following.

21 For example, such a view appears to underlie *Commonwealth v Western Australia* (1999) 160 ALR 638 at 710-713 (paras 271-285) per Callinan J. Although that case concerned State property rather than property owned by a private citizen or corporation, both Gray and Gray and Janet McLean in her chapter argue that government owned property is technically subject to private ownership rather than any distinct ownership regime: K Gray and S Gray, above n 2 at 12-13, and J McLean, "Property as Power and Resistance" in *Property and the Constitution* 1 at 5-9.

Moreover, Gray and Gray's view as to which political and social theories should be used to reconstruct property institutions and to limit the owner's exclusory powers is controversial. There may be a place for public law values in the development of the common law of property but the "*collectivist* visions of the social good" advocated by Gray and Gray have not figured large in that process to date. If, then, Australian courts are to follow the lead of the North American courts and limit the owner's exclusory powers in relation to certain types of property, it will almost certainly be on the basis of a narrower set of public law values than some of Gray and Gray's language would suggest.

Although Gray and Gray do not do so, it is worth considering whether specifically constitutional values and reasoning can assist in this process in Australia. The property owner's exclusory power derives from the common law and the common law must conform to the requirements of the Constitution, including the implied freedom to discuss government and political matters.[22] Adapting the approach enunciated in *Lange v Australian Broadcasting Corporation*, a court will uphold the law that sustains the property owner's exclusory power if it satisfies two conditions:[23]

(a) that the object of the law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government; and

(b) that the law is reasonably appropriate and adapted or proportionate to achieving that legitimate object or end.

In identifying the object of the law supporting that power and in determining whether the law is or is not proportionate to that objective, the court will inevitably have to consider the controversial questions implicit in Gray and Gray's analysis: What is the proper role of property? Is it a bulwark of individual liberty that must be upheld against all challenges? Or is it something that is necessary for individual participation in civic society and self-government and which can legitimately be shaped to that end? Clearly, then, constitutionalising the common law of property involves deeply contested political questions, to which the text and structure of the Constitution provide few answers.[24]

It is possible—perhaps desirable—that despite these difficulties Australian courts will limit the property owner's "raw, untrammelled, individually exercised exclusory power" in relation to some kinds of property. If so, how should they proceed? As noted above, Gray and Gray propose (somewhat nebulously) that the courts "fashion [their] property thinking to accord with more inclusive, more integrative visions of social relationships" and (more specifically) that they model public law controls in order to

22 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566.

23 Ibid at 561-562.

24 There are some limited answers to be found in the Constitution. For example, it seems that the Constitution does not preclude government ownership of the means of production, distribution and exchange or government monopolies in (some but not necessarily all) economic activities: see for example the decision of Chief Commissioner Piddington of the Inter-State Commission in the *Seizure of Wheat Case* Parliamentary Paper No 69 of 1914-1915 at 29 (reprinted in Commonwealth Parliamentary Papers, Session 1914-1917, Volume 2, at 1113); *Hughes and Vale Pty Ltd v NSW* (1953) 87 CLR 49 at 87-88 per Webb J; *Commonwealth v Bank of New South Wales* (the Bank Nationalisation case) (1949) 79 CLR 497 (PC) at 640-641; cf *Duncan v Queensland* (1916) 22 CLR 556 at 649 per Higgins J.

limit the property owner's conduct.[25] Gray and Gray's most modest proposal, that the property owner observe procedural propriety in exercising his or her exclusory power, seems unlikely to generate the substantive outcomes they desire. They do not clearly identify what other public law controls would be more effective. For example: is an owner able to exclude whomever he or she chooses unless his or her decision is *Wednesbury*-unreasonable? Or are there irrelevant considerations which will invalidate his or her decision? If so, what are those considerations and how are they to be identified? If some types of discrimination are impermissible, what types are permissible? It must be apparent that the same substantive choices about the role of property as identified above are necessary to identify the standard and content of whatever public law controls are to be applied.

Despite these difficulties with their programme for reconstructing property, Gray and Gray's chapter is important in challenging the prevailing approach to property. Property is no more a neutral and immutable baseline than are other "private" institutions like contract and tort; the courts (to the extent that their distinctive role allows) must respond to public law values in developing the law of property as they should in developing those other institutions. Gray and Gray do not solve all the problems that will arise in this process but (it is to be hoped) their chapter will stimulate others to try.

THE SECOND THEME: CONSTITUTIONAL PROPERTY CLAUSES

Gray and Gray's concern with the differences between the individualist and the social functions of property is not explicitly constitutional. Two other important chapters in *Property and the Constitution*, by Gregory Alexander and Andre van der Walt, however, do take up this concern in the context of constitutional property clauses, such as s 51(xxxi) of the Commonwealth Constitution and the Takings Clause of the Fifth Amendment to the United States Constitution.

The function(s) of constitutional property clauses

In his chapter, Alexander argues that the existence of two conceptions of the core function of property (the individualist function of securing a zone of freedom for the individual in the realm of economic activity and the social function of serving the public good)[26] creates dilemmas for legal systems committed to protecting property through constitutional norms.

> While the two conceptions [of property] are not mutually exclusive, in some instances they will lead to different results. At a minimum they will influence the rhetoric by which courts reach decisions about the reach of the constitutional protection of property.[27]

Accordingly, in the first part of his chapter, Alexander argues that the core reason for the confusion in American takings clause jurisprudence is "the existence of uncertainty and ambivalence regarding what the primary functions or roles of property are from a constitutional perspective".[28] The constitutional text provides no clues, nor are there

25 Above, text at note 9 and following.
26 G Alexander, "Constitutionalising Property: Two Experiences, Two Dilemmas" in *Property and the Constitution* 88 at 89.
27 Ibid at 90.
28 Ibid at 91.

any super-constitutional norms which assist.[29] Moreover, most commentators assume (without significant reflection) that property serves (and always has served) precisely one constitutional purpose—securing individual liberty. That assumption, according to Alexander, is doubly problematic: first, liberty itself is an ambiguous concept and can be invoked in support of each of the functions of property;[30] and, secondly, the assumption that property has served precisely one role has meant that courts and commentators have not considered the proper relationship between property's *different* roles. The result is a muddled constitutional property jurisprudence.[31]

In the second part of his chapter, Alexander focuses on the constitutional property jurisprudence in Germany. It is, he argues, equally muddled: not because it fails to identify which functions of property it is to serve—it clearly is intended to serve both—but because the constitutional text fails to establish an unambiguous method of resolving conflicts between those functions.[32]

Guarantee or limitation?

Van der Walt's chapter[33] also explores the tension between two different approaches to property in the context of constitutional property clauses. There is of course a third way—to choose not to give property constitutional protection at all. Accordingly, van der Walt first considers in some detail Jennifer Nedelsky's argument against constitutionalising property. He summarises her objections as follows:

> (1) property will be insulated in a regulation-free private enclave; (2) the tendency of property to create and support power inequalities will be reinforced; (3) the entrenchment of property will upset and even invert constitutional hierarchies of rights; (4) constitutional litigation about property will result in a waste of resources; and (5) important issues will be removed from the public sphere and converted into technical legal debates.[34]

Nedelsky's argument and van der Walt's critique will repay careful attention if and when the possibility of an Australian Bill of Rights is next seriously debated.

Ultimately, recognising that the argument against constitutionalising property has been lost in each of the jurisdictions he considers, van der Walt adopts Nedelsky's fallback position. That position is to advocate a "limitation-oriented" constitutional property jurisprudence rather than a "guarantee-oriented" one. A limitation-oriented jurisprudence is one that regards property as entrenched in the constitution in order to protect property-holdings against arbitrary, discriminatory and unjustifiable infringements rather than in order to protect property-holdings against all state action (as would a guarantee-oriented jurisprudence).[35] Moreover:

> The question whether state interferences with property-holdings are arbitrary, discriminatory and unjustifiable should turn at least in part on whether the harm it

29 Ibid.
30 Ibid at 92.
31 Ibid at 92-93.
32 Ibid at 102.
33 A J van der Walt, "The Constitutional Property Clause: Striking a Balance Between Guarantee and Limitation" in *Property and the Constitution* at 109.
34 Ibid at 114. Van der Walt bases his analysis on J Nedelsky, "Should Property be Constitutionalized? A Relational and Comparative Approach" in G E van Maanen and A J van der Walt (eds), *Property Law on the Threshold of the 21st Century* (1996) at 417.
35 A J Van der Walt, above n 33 at 127.

causes (to first-order constitutional values like autonomy and dignity) is justifiable in a free, equal and democratic society.[36]

Van der Walt sees such a limitation-oriented jurisprudence as a way of avoiding what Nedelsky sees as an otherwise insoluble conflict between the constitutional protection of private interests and the state promotion of the public interest.

At first sight, such a jurisprudence is attractive. It does not assume that property is pre-political and inviolable. It acknowledges that it is legitimate for the state to redefine and regulate the property institutions it created in the first place and now upholds. It substantially diminishes the influence of the empty conceptualism of property-talk. It appropriately recognises that property is a second-order value that should be protected to the extent that it advances first-order constitutional values.[37]

But will such a jurisprudence work in practice? Clearly it addresses Alexander's first requirement for a satisfactory property clause jurisprudence—that the functions of the property clause must be identified. However, it does not address his second requirement—that where the property clause serves two or more functions, it must establish an unambiguous method of resolving conflicts between those functions. This is because, under his suggested limitation-oriented jurisprudence, the property clause is violated by interferences with property rights that are "arbitrary, discriminatory and unjustifiable". Those are substantive standards, not purely procedural ones, and require consideration of competing values, including the property owner's interest in not having his or her holdings redistributed or regulated. If the courts are to adopt a limitation-oriented jurisprudence, therefore, it will be necessary to flesh-out those substantive standards and to identify the relationship between the individualist and social functions of property; but it will first be necessary to demonstrate that the courts are the appropriate institution to do so.

It is somewhat surprising therefore that van der Walt argues that the High Court of Australia's current approach to s 51(xxxi) of the Constitution fits this new model of a limitation-oriented jurisprudence.[38] Section 51(xxxi) has long been recognised as operating both as a source of power to legislate for the acquisition of property and as a constitutional impediment[39] to some kinds of uncompensated acquisitions.[40] The modern extent of the impediment has been tested in a series of decisions of the High Court of Australia starting in 1994.[41] Van der Walt finds support in these cases for a

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36 Ibid at 127.

37 J W Harris develops the argument that property is such a second-order value in his chapter: "Is Property a Human Right?" in *Property and the Constitution* at 64.

38 A J van der Walt, above n 33 at 134.

39 I use this neutral term to avoid prejudging the choice between "limitation" and "guarantee" characterisations of the s 51(xxxi) jurisprudence.

40 *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 177-178 per Brennan J.

41 Including *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155; *Health Insurance Commission v Peverill* (1994) 179 CLR 226; *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270; *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297; *Nintendo Co Ltd v Centronics Systems Pty Ltd (No 2)* (1994) 181 CLR 134; *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513; *Commonwealth v Mewett* (1997) 191 CLR 471; *Commonwealth v Western Mining Corporation Resources Ltd* (1998) 194 CLR 1; *Commonwealth v Western Australia* (1999) 160 ALR 638; *Airservices Australia v Canadian Airlines International Ltd* [1999] HCA 62. See also *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480.

proportionality test that upholds uncompensated acquisitions where the acquisition "is incidental to a legitimate action in terms of a different head of power or to a process of adjusting private rights, claims and interests".[42] He argues:

> The effect of the proportionality test is that the Australian property clause is recognised as a guarantee against arbitrary and unauthorised acquisitions other than on just terms, but at the same time the property clause is not allowed to insulate property-holdings against federal intervention...All this is done with reference to the legitimate constitutional purpose for which the state action is authorised, the means selected to achieve that purpose, the effect of the state action on the individual property holder and the proportionality between the purpose served and the means selected.[43]

Do the post-1994 decisions really transform s 51(xxxi) jurisprudence from a guarantee-oriented jurisprudence to a limitation-oriented jurisprudence? Obviously, the dual character of s 51(xxxi)—as both a grant of and a restriction on legislative power—lends some initial credibility to a limitation-oriented approach. And yet the overwhelming impression to be gained from the recent cases interpreting and applying s 51(xxxi) is that the Court's property clause jurisprudence remains ambivalent about the full implications of the proportionality test. There is not space in this review to develop this argument in any detail; however it is worth noting the following:

- The Court's surface linguistic behaviour suggests that it regards s 51(xxxi) as a "guarantee", at least of "just terms" when property is acquired.[44]
- The modern Court has inherited (and developed) a highly technical approach to s 51(xxxi) that searches successively for "property" and an "acquisition" of the right kinds.[45] The proportionality approach has not displaced these formalist elements. And those elements appear to reflect guarantee-oriented thinking.
- The distinction between common law rights (statutory variation of which requires compensation)[46] and purely statutory rights (statutory variation of which generally does not require compensation)[47] seems difficult to defend on the basis of a limitation-oriented jurisprudence.
- The proportionality approach, as currently recognised by the majority of the Court, depends on a highly artificial approach to characterisation of the law in question to

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42 A J van der Walt, above n 33 at 133.

43 Ibid at 134.

44 See the cases cited in *Commonwealth v Western Australia* (1999) 160 ALR 638 at 644-645 note 10 per Gleeson CJ and Gaudron J. See also *Mutual Pools and Staff Pty Limited v Commonwealth* (1994) 179 CLR 155 at 168 per Mason CJ; at 178 per Brennan J, but cf at 180: "It would be erroneous to elevate the constitutional guarantee of just terms to a level which would so fetter other legislative powers as to reduce the capacity of the Parliament to exercise them effectively"; at 185 per Deane and Gaudron JJ. More recently, see *Airservices Australia v Canadian Airlines International Ltd* [1999] HCA 62 at paras 149-155 per Gaudron J; at para 525 per Hayne J; at paras 552, 556 and 566 per Callinan J.

45 This, of course, is an instance of Nedelsky's fifth objection to property clauses: text above at n 34.

46 *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297; *Commonwealth v Mewett* (1997) 191 CLR 471.

47 *Health Insurance Commission v Peverill* (1994) 179 CLR 226 especially per Brennan J and McHugh J; *Nintendo Co Ltd v Centronics Systems Pty Ltd (No 2)* (1994) 181 CLR 134; *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 especially per McHugh J (cf per Gummow J and Gaudron J).

decide that the law is in fact with respect to a subject matter outside s 51(xxxi). On the other hand, McHugh J's approach (asking whether the notion of fair compensation is irrelevant or incongruous to the law in question and denying compensation if it is) does not appear to enunciate a clear legal standard.[48]

- A limitation-oriented jurisprudence is essentially a substantive due process approach. It would be surprising if an such openly substantive approach to s 51(xxxi) did take root in Australia (whether or not such a development would be desirable). Australian law has never developed the categories and standards of review that would be required to flesh out such an approach.[49] And, interestingly, an express textual foundation for such an approach was rejected at the 1898 Convention.[50]

The High Court's current approach to s 51(xxxi) is unsatisfactory. It clearly contains elements of both limitation-oriented and guarantee-oriented approaches. And the limitation-oriented approach has much to commend it. However, like Gray and Gray's analysis considered in the first section of this review, van der Walt's diagnosis of the problems with property clause jurisprudence generally is more compelling than his programme for reconstructing the Australian version. Nonetheless, both Alexander's and van der Walt's insights will be extremely useful in developing such a programme.

THE THIRD THEME: DEALING WITH DISPOSSESSION

Too often public law discussion of "rights to private property" involves only discussion of rights to *retain* private property. Other dimensions of property rights—for example, the rights of those without property and more especially those who have been deprived of property—simply do not figure. As the preceding discussion demonstrates, the contributors to this volume do not neglect these other dimensions of property rights. In particular among those contributions, van der Walt demonstrates how the property clauses of the South African Constitution attempt to address that country's acute need for redistribution of land and other productive resources in order to produce "a morally, legally [and] politically legitimate and equitable system of property institutions and property rights".[51]

Three other chapters, by Axel Frame, John Dawson and Jeremy Waldron, also address these issues, principally in the New Zealand context.

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48 *Mutual Pools* (1994) 179 CLR 155 at 219-220 per McHugh J; *Airservices Australia v Canadian Airlines International Ltd* [1999] HCA 62 at paras 339-342 per McHugh J.

49 Compare Gummow J's comments in a related context: *Airservices Australia v Canadian Airlines International Ltd* [1999] HCA 62 at para 441.

50 *Official Record of the Debates of the Australasian Federal Convention: Third Session* at 668 and following (8 February 1898); and at 1780 and following (3 March 1898). It is worth noting that the debate focussed on whether language similar to that of the 14th Amendment to the United States Constitution would prevent each Australian State from discriminating on the grounds of race or would require each State to afford the same treatment as the least discriminatory State. Protection of property did not figure to any significant extent in these parts of the Debates.

51 A J van der Walt, above n 33 at 146. His account of the tortuous history of the constitutional protection of property under the Indian Constitution will also be of considerable interest to Australian constitutional property scholars.

Frame traces the historical development of the jurisprudence of Maori land rights as recognised in the Treaty of Waitangi.[52] He notes that recent privatisations of public land and natural resources in New Zealand have compelled Maoris to formulate and pursue claims to "ownership" of these assets:

> The "commodification" of the "common heritage" has provoked novel claims and awakened dormant ones in a manner destructive of New Zealand's social cohesion. Claims to water flows, electricity dams, air-waves, forests, flora and fauna, fish quota, geothermal resources, seabed, foreshore, minerals, have followed the tendency to treat these resources, previously viewed as common property, as commodities for sale to private purchasers. Not surprisingly, the Maori reaction has been: if it *is* property, then it is *our* property![53]

Maori claims to such property have been pursued in the courts and in the Waitangi Tribunal.

Dawson describes the outcome of one of the major claims, that of the Ngai Tahu, a southern iwi or tribe.[54] Over several years and in several stages, the Tribunal made findings about breaches by the Crown of its treaty obligations to Ngai Tahu. Ultimately, Ngai Tahu and the Crown entered a negotiated agreement that redresses the recent and longstanding breaches of the Crown's treaty obligations. The agreement and the legislation that gives it effect redistribute land and other resources to Ngai Tahu but, equally importantly, provide for Ngai Tahu involvement in decision-making affecting land and resources of special significance to the iwi. Dawson comments:

> Not all of these developments are easily quantifiable in monetary terms, but for a small country there is clearly a significant redistribution of property within the state. This will enhance Ngai Tahu's mana and permit the restoration of a tribal community. It will provide the resources necessary for the iwi to participate in public decisions and it will return to them cultural property of special significance, recognising their traditional economy and way of life. There is both symbolic and material property exchange.[55]

This chapter vividly illustrates how important democratic processes (especially democratic deliberation that recognises and acts on differing cultural and legal assumptions about property) are to achieving just and sustainable resolution of property issues.

Waldron is one of the most distinguished contemporary writers on property theory and his contribution to this volume is characteristically philosophical.[56] He implicitly (and justifiably) assumes that the arrival of common law property institutions in the colonies of the former British empire was not the morally neutral application of an existing legal institution to new territory. It resulted in the unjust dispossession of the colonies' prior inhabitants and provided an unjust foundation for the property holdings of the early colonists and their descendants today. Against this background Waldron's thesis is as follows:

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52 A Frame, "Property and the Treaty of Waitangi: A Tragedy of the Commodities?" in *Property and the Constitution* at 224.

53 Ibid at 234.

54 J Dawson, "A Constitutional Property Settlement Between Ngai Tahu and the New Zealand Crown" in *Property and the Constitution* at 207.

55 Ibid at 215.

56 J Waldron, "The Normative Resilience of Property" in *Property and the Constitution* at 170. This paper also appears at (1998) 9 *Otago LR* 195.

> A system of property may be unjust in the sense that it was an outrage to justice when it was set up, unjust in the sense that it ought to have been set up on a different basis. But once established, the rights and relations it generates take on a moral life of their own. Now it becomes morally wrong to interfere with them, even though it would not have been morally wrong to set up the system of property on a different basis altogether.[57]

In other words, one can be morally bound to respect the consequences of an institution even if the institution's underlying justification is weak; notwithstanding that the holdings of today's property owners rest on an unjust foundation, their claims as owners not to be disturbed in their possession of the land have their own moral significance that cannot be ignored in redressing past injustices.

Waldron creates an analytical framework for investigating this phenomenon, which he terms "the normative resilience of property". An institution is said to demonstrate normative resilience where there is a discontinuity between two types of normative judgment associated with the institution:

(1) judgments concerning the justification of the institution; and

(2) judgments concerning individual conduct in relation to an institution.

That is:

> Resilience is the phenomenon whereby judgements of type 2, although they are predicated upon the institution, nevertheless remain unaffected by judgements of type 1 that are adverse to the institution. A resilient institution continues to exert itself normatively through its type 2 judgements, notwithstanding that it is discredited at the type 1 level.[58]

Waldron argues that "ownership" is indeed a type 2 judgment or, in other words, that property does demonstrate normative resilience.[59] His argument is principally utilitarian and rests on the disruption and disappointment of settled expectations that changing existing property allocations would cause: the pain of giving something up accrues whether or not the giving-up is morally required.[60] He also sketches an argument based on personhood or constitutive theories of property such as those of Margaret Radin.[61]

What, then, are the implications of the normative resilience of property? Clearly the fact that property demonstrates this attribute does not establish the moral weight to be

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57 Ibid at 186.

58 Ibid at 174.

59 Ibid at 176. Waldron considers briefly whether property is unique or unusual in demonstrating normative resilience. In his chapter, M M Goldsmith argues that it is neither: "Normative Resilience—A Response to Waldron" in *Property and the Constitution* at 197.

60 J Waldron, above n 57 at 185. Waldron is aware of the danger that these utilitarian arguments amount to too much, that is, that not only do they justify the normative resilience of property but they also amount to a conservative (type 1) justification of property that resists all changes to existing holdings (regardless of the justice of those holdings) because any attempt to do so would be profoundly disruptive (at 186-187). Although the Benthamite-utilitarian position that Waldron develops is not truly conservative (because it would allow redistribution of existing holdings if that was possible without causing the pain of disappointment to the holders and without causing uncertainty for other holders), the practical effects of the two approaches converge.

61 M J Radin, "Property and Personhood" reprinted in *Reinterpreting Property* (1993) at 35. Waldron also finds support in Hume for this approach: J Waldron, above n 57 at 188-189.

attributed to current owners' property-holdings against the claims of the unjustly dispossessed original inhabitants and their descendants. But does it render pointless the whole endeavour of seeking to justify property institutions? Waldron argues that it does not. Rather, he argues that where an institution exhibits normative resilience the burden of justifying the institution is heavier than that of justifying an institution that does not exhibit such resilience. "[T]he more resilient an institution, the more harm it may do if it is unjust; so the heavier the burden that must be discharged in its initial justification".[62]

This is an important point for legislators and judges whose decisions affect legal institutions. However, it must always be remembered that Waldron's reasoning does not of itself justify giving conclusive weight to the claims of existing property holders: the normative resilience of their claims does not immunise them against redistribution in favour of dispossessed indigenous inhabitants.[63]

These chapters by Frame, Dawson and Waldron provide complementary perspectives on the problem of redressing injustice caused by breaches of the Treaty of Waitangi. Frame demonstrates the importance of understanding the property concepts that shape the process; Waldron explains why the current property owners' claims cannot be ignored and why care must be taken in designing any new property arrangements; and Dawson shows that dialogue and deliberation can result in an agreement that integrates two legal systems' distinctive property concepts. Their lessons should extend well beyond the New Zealand context in which they are situated.

FINAL REMARKS

The final chapter in this book, Michael Robertson's "Liberal, Democratic, and Socialist Approaches to the Public Dimensions of Private Property",[64] presents a challenge to the other contributors on two levels.

First, he argues that mainstream thinking about property, including the other contributions to *Property and the Constitution*, "exhibits characteristic limitations and blind spots resulting from the underlying structure of liberal thought".[65] His diagnosis is as follows:

> [T]he liberal public/private distinction strongly influences the way liberals think about property. Once they place property firmly within their private zone, liberals have a tendency to see property as playing a primarily private economic role that is freedom enhancing. This makes it harder for them to see the public dimensions of property that come from its political role and the power over others it gives to some owners.[66]

Secondly, he prescribes changes to property institutions that (in his view) liberals are unable to see are necessary. He proposes:

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62 J Waldron, above n 56 at 183.

63 This point is also made by Goldsmith in his chapter: M M Goldsmith, above n 59 at 206.

64 M Robertson, "Liberal, Democratic, and Socialist Approaches to the Public Dimensions of Private Property" in *Property and the Constitution* at 239.

65 Ibid.

66 Ibid.

(a) a more radical democratisation of property (and, in particular, the establishment of property structures that support community solidarity[67] and provide access to productive resources for all);[68] and

(b) "an unrelenting focus on the *power* that flows from ownership...of private property",[69] a focus that the socialist tradition can provide without the blinkers of the liberal or democratic traditions.[70]

Robertson's diagnosis is unsurprising: the structuring effect of theory is not news.[71] Moreover, he is justified in concluding that responding to some of the public dimensions of property requires liberal theorists to reconceptualise property in ways that move beyond the confines of traditional liberalism.[72] But, of course, that is just what Gray and Gray, Alexander and (less explicitly) van der Walt do in their chapters in this book.[73] Whether I or any of these authors would agree with Robertson's prescriptions is another matter. His contribution is to make liberal theorists aware of the blinkers that can prevent them from seeing both the problems that the individualist account of property can cause and the possible reconstructions of property that can address those problems. It is a salutary reminder with which to conclude this excellent book.

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67 Ibid at 251.

68 Ibid at 259.

69 Ibid at 254.

70 His more specific prescription is for the co-operative to replace the corporation as the predominant economic actor (ibid at 261): "The co-operative is an economic form for the use of productive assets in which the democratic and socialist traditions can run together and reinforce each other while seeking to avoid the disasters produced by communism. It is a form in which the public dimensions of private property which are neglected by liberal thought are openly acknowledged. Indeed, it is chosen precisely to increase democratic participation and reduce power imbalances."

71 For example: "[O]ne of the things a scientific community acquires with a paradigm is a criterion for choosing problems that, while they take the paradigm for granted, can be assumed to have solutions. To a great extent these are the only problems that the community will admit as scientific or encourage its members to undertake." T S Kuhn, *The Structure of Scientific Revolutions* (3rd ed 1996) at 37. On law's aspiration to be a science, see P Schlag, "Law and Phrenology" (1997) 110 *Harvard LR* 877.

72 My formulation here may moderate Robertson's argument somewhat: compare M Robertson, above n 64 at 242.

73 Dawson also sees issues of governance of property resources as being central to the viability of the Ngai Tahu settlement: J Dawson, above n 54.