

OF PROTEST, THE COMMONS, AND CUSTOMARY PUBLIC RIGHTS: AN ANCIENT TALE OF THE LAWFUL FOREST

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*This article explores an ancient tale of customary public rights that starts and ends with the landmark decision of *Brown v Tasmania*. In *Brown*, Australia's highest court recognised a public right to protest in forests. Harking back 800 years to the limits of legal memory, and the Forest Charter of 1217, this right is viewed through the metaphor of the lawful forest, a relational notion of property at the margins of legal orthodoxy. Inherent to this tale is the tension that pits private enclosure against the commons, a contest that endures across time and place – from 13th century struggles against the Norman legal forest, through to modern claims of rights to the city.*

I INTRODUCTION

Australian constitutional law contains very few rights, and a paucity of related case law. In this context, the October 2017 High Court decision of *Brown*¹ is a rare addition to the jurisprudence. Its invalidation of the *Workplaces (Protection from Protesters) Act 2014* (Tas) ('*Protesters Act*') as an impermissible burdening of the implied freedom of political communication² represents a powerful vindication of the right of peaceful protest.³ However, beyond its headlines,⁴ the judgment hints of other less likely narratives; background contexts of ancient legal pasts, and the implications that forgotten public rights may pose for modern rights to enter, gather and protest in forests. In *Brown*, public rights of access to public forests are said to have been long recognised in Tasmanian law, initially under the *Forestry Act 1920* (Tas), and then its successor, the *Forest Management Act 2013* (Tas). What the High Court recognises in these statements is a body of law that dates

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1 *Brown v Tasmania* (2017) 261 CLR 328 ('*Brown*').

2 Ibid 374 [152] (Kiefel CJ, Bell and Keane JJ), 297 [232] (Gageler J), 425 [295] (Nettle J).

3 As 'essential to the maintenance of the system of representative and responsible government': ibid 359 [88] (Kiefel CJ, Bell and Keane JJ).

4 Bob Brown, former federal Greens leader, was a plaintiff to the action, thus ensuring the case's national prominence.

back at least 800 years;⁵ a remarkably under-regarded public jurisprudence of rights to the ‘public forest estate’. What is equally remarkable is how these ancient laws find resonance and traction in their 21st century companions, the ‘right to the city’ and similar collective claims that seek to assert and protect public place and space.⁶

These *other* narratives, the concealed backdrop of *Brown*, are the focus of this article; a tale of forest rights, invocations of the commons, and an ongoing, centuries-old resistance to enclosure in all its legal, rhetorical and political forms. These *other* narratives support what we call the *right to the forest*. This right is rarely articulated – a communal or public right to sociable and relational performances of property, one premised on a universal assumption of ‘forest’ access ‘granted to all’.⁷ Meanwhile, the *forest*, the object of this right, is both physical and metaphysical. It is, of course, the stands of old-growth eucalyptus trees at Lapoinya in northwest Tasmania, the material forest of ecosystems and habitats that protesters in *Brown* fought to save. Importantly, the forest is also an ontological *idea*, a legal memory of forest ‘liberties and customs’, dating from the early 13th century woods of England, whose diaspora has endured from historic rural commons to today’s urban ‘forests’.

Inspired by the forests in *Brown*, this article also introduces two distinct and competing metaphors, that of the *legal forest* and the *lawful forest*. The legal forest is an abstract positivist construct, a domineering paradigm where rights are technical, the ‘lawscape’⁸ detached, and private rights prevail. By contrast, the lawful forest aspires for the many not the few, a relational context where public or common rights resist private enclosure through occupation or performance. Public claims to this lawful forest draw on the authority of customary law to resist the totalising edicts of the legal forest. Both forests inform an ongoing dialectic tension, a contest between two opposing narratives whose ceaseless interactions shape and underlie the kind of valorised ‘forest’ at the heart of how society is, how it can be imagined, or indeed, imagined otherwise.

The legal forest is the product of the dominant narrative of property, the sole domain of private rights and their relentless urge to enclose. Legal geographer Nicholas Blomley calls this narrative the ‘ownership model ... of property’ – a legal perspective that views property rights through an exclusively private prism.⁹ In 2004, he argued that this hegemonic worldview has reduced our capacity to imagine other kinds of property or to accord them equivalent legitimacy, with the result that non-private forms of property do not look like property at all to us and

5 ‘Henry III: *Charter of the Forest (1217)*’ in Carl Stephenson and Frederick George Marcham (eds), *Sources of English Constitutional History: A Selection of Documents from AD 600 to the Present* (Harper & Row, 1937) 129, 129–32 (‘*Forest Charter of 1217*’ or ‘*Charter*’).

6 See, eg, Chris Butler, *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (Routledge, 2012); Mark Purcell, ‘Possible Worlds: Henri Lefebvre and the Right to the City’ (2014) 36 *Journal of Urban Affairs* 141; David Harvey, *Rebel Cities: From the Right to the City to the Urban Revolution* (Verso, 2012); Antonia Layard, ‘Public Space: Property, Lines, Interruptions’ (2016) 2 *Journal of Law, Property, and Society* 1.

7 *Forest Charter of 1217*, above n 5, ch 17.

8 Nicole Graham, *Lawscape: Property, Environment, Law* (Routledge, 2011).

9 Nicholas Blomley, *Unsettling the City: Urban Land and the Politics of Property* (Routledge, 2004) 3.

tend to be ignored.¹⁰ This invisibility of other forms of property rights is no accident – ‘considerable scholarly investment has gone into marginalizing or ignoring [their] presence’.¹¹ The motivation for this can be inferred from those who stand to gain from this marginalisation and from the acts of enclosure it justifies. In Australia, for example, the absence of private property rights was used to justify dispossession via the fiction of *terra nullius*.¹²

This article is, conversely, our scholarly investment in foregrounding these less visible *other narratives*, and the alternative forms of property they perform and embody – the *lawful forest*. Part II begins with the judgment in *Brown*, a contemporary exemplar of the dialectic tension referred to above. In *Brown*, protesters resisted the state’s compulsive urge to close (and effectively enclose) the forest by performing their relational claim to it.¹³ By digging into the granular of the majority and minority opinions, this part discerns traces of an ancient forest law, the legal foundation for these relational claims. This judgment, and its matter-of-fact recognition of the public right to the forest, is but one episode of an ancient struggle between the legal forest (and its underlying ownership model of property), and the lawful forest (and its underlying communal rights) – one that has played throughout history.

Part III celebrates this antiquity by stepping back 800 years, to the *Forest Charter of 1217*, a moment almost beyond legal memory.¹⁴ This enduring yet little regarded statute is this article’s chronological point of departure, illustrating that the tension between competing ‘forest values’ extends to the very doorstep of time immemorial. Part IV then examines how the Charter’s ‘liberties of the forest’ evolved into the contested idea and concrete practice of *the commons* – an ongoing theory and reality that undermines the dominant private property paradigm. As Blomley argues, ‘[t]he tragedy of the commons, perhaps, is less its supposed internal failures as its external invisibility’.¹⁵ This part picks up on recent scholarship that unearths the commons and seeks to make it visible again.¹⁶

Part V walks the chronological and turbulent path from ancient forest rights, through the commons, to the modern city, describing the many historic performances of protest that resist the totalising tendencies of enclosure, and protect the public square. Part VI explores the way the commons were reimagined in the urban forest, and the claims to the right to the city that developed in this

10 Ibid 8 (citations omitted).

11 Ibid.

12 Stuart Banner, *Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska* (Harvard University Press, 2007) 13–46.

13 See, eg, Bob Brown Foundation, *High Court Victory for Bob Brown’s Challenge to Tasmania’s Anti-protest Laws* (18 October 2017) <https://www.bobbrown.org.au/hcc_181017_wewon>.

14 Legal memory is limited to 6 July 1189, the accession of Richard I: LexisNexis Australia, *Encyclopaedic Australian Legal Dictionary* (at 10 December 2018) (definition of ‘Legal Memory’).

15 Blomley, *Unsettling the City*, above n 9, 8.

16 See, eg, Frank van Laerhoven and Elinor Ostrom, ‘Traditions and Trends in the Study of the Commons’ (2007) 1 *International Journal of the Commons* 3; Ashwini Chhatre and Arun Agrawal, ‘Forest Commons and Local Enforcement’ (2008) 105 *Proceedings of the National Academy of Sciences of the United States of America* 13286; Peter Linebaugh, *The Magna Carta Manifesto: Liberties and Commons for All* (University of California Press, 2009); Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press, 2015).

context. While the right to the city has captured the imagination of both scholars and activists, particularly in the wake of the global Occupy movement, and the iconic urban protest camps in Tahrir Square, Puerta de Sol and Taksim Square, the right to the forest is its necessary prerequisite. Not only do forests (and rural commons) have deeper historical roots, but their preservation is essential to the health of the city and its inhabitants.

Following this, Part VII considers the way claims to the lawful forest have migrated to the New World and examines the fraught implications of these claims to place in the colonial context. Already existing insider-outsider tensions around who is inside the commons take on new meanings on stolen land. We ask, does this invocation of historical alter-narratives risk erasing existing Indigenous histories and relations to place,¹⁷ and what are the possibilities if we try to acknowledge both? Part VII closes by observing the largely unremarked resilience of customary public rights in the transplanted colonial forest.

In Part VIII, we move from the New World to explore a theory of forests – their cultural, social and legal symbolisms, and related re-imaginings in property theory. This part starts with a single eucalypt, and interpolates the symbolic power of trees to people, particularly in the urban environment. As Australian property theorist Margaret Davies articulates, ‘[t]rees ... are entangled with human communities, whether in particular localities or ... as the lungs of the planet’.¹⁸ By transitioning from the single tree to theorise the forest as a whole, this part also acknowledges that beyond a romantic attachment to trees and forests, we are reliant on them for our survival. In this context, resistance to enclosure, and capitalism’s process of accumulation by dispossession,¹⁹ take on a new level of urgency. These occupations in defence of the forested environment are about more than rights of access to protest, like those in *Brown* – they are fundamentally focused on our mutual survival. As Davies pithily observes, ‘[w]ithout the Earth, our human rights, much less our artificial legal rights, are clearly worthless’.²⁰

Part IX concludes with final observations of the lawful forest and its instinctive urge to resist enclosure’s overreach. Whether defending old growth forests or the urban public square, the exercise of the right to the forest, or its latter-day right to the city, are infinitely variable performances of actors engaged in a relational reconceptualisation of people, property and place. Theirs is a glimpsed ‘thought of utopia’,²¹ a sociable, at times festive reordering of society imagined otherwise, the variously diverse enactments of an ancient tale of the lawful forest.

17 Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015) 12.

18 Margaret Davies, ‘The Consciousness of Trees’ (2015) 27 *Law & Literature* 217, 229.

19 David Harvey, *The New Imperialism* (Oxford University Press, 2003) 116–51.

20 Margaret Davies, ‘Material Subjects and Vital Objects – Prefiguring Property and Rights for an Entangled World’ (2016) 22(2) *Australian Journal of Human Rights* 37, 38.

21 *Ibid* 39.

II THE HIGH COURT FOREST: THE *BROWN* JUDGMENT

The tension between the lawful and legal forest is intrinsic to *Brown*. The two plaintiffs, Dr Bob Brown and Ms Jessica Hoyt, challenged the validity of the *Protesters Act* on the grounds that it ‘impermissibly burden[ed] the implied freedom of political communication contrary to the *Commonwealth Constitution*’.²² The *Protesters Act* contained a range of provisions that excluded persons engaging in protest activities from entering ‘business premises’ – which included forestry land and land on which forestry operations are being carried out – and ‘business access areas’ – which included the areas around and outside those premises.²³ Both plaintiffs had been arrested, at different times, when they entered ‘the Lapoinya Forest for the purpose of raising public and political awareness about the logging of the forest and voicing protest to it’.²⁴

The subtext to this case was to pit the plaintiffs’ claim to a right to protest inside the forest against the state’s claim to close the forest for the purposes of private logging. Each of the judgments canvass, to a greater or lesser degree, the narratives behind this tension, the history of public protest in Tasmanian forests, and the concomitant expectations of public rights to enter and protest.

The joint majority judgment of Kiefel CJ, Bell and Keane JJ, part of the overall majority, struck down the *Protesters Act* as a significant burden on the implied freedom of political communication,²⁵ citing the vagueness of the Act’s terms ‘business premises’ and ‘business access area[s]’²⁶ as pivotal. However, while this judgment emphasised the ill-defined forestry operation areas within which protester actions were prohibited,²⁷ and used this ambiguous reach to invalidate the Act, it did so in an explicitly spatio-temporal *context*, the placed-ness and history of Tasmanian forests. Early on, the judgment noted how setting was formative, to both the impugned Act, and the question before the Court, a contested history dating back to the nationally significant Franklin Dam protests in the early 1980s.²⁸ The Franklin protests themselves built on an earlier unsuccessful campaign in the 1970s to save Lake Pedder.²⁹

There is ... a particular historical, social and legislative background to forest operations and public access to forests in Tasmania, and demonstrations in forests appear to have been the catalyst for the *Protesters Act*.³⁰

Moreover, as the judgment emphasised, this *public* setting was important, noting the ‘long history of political protests ... in spaces accessible to the public and on Crown land’.³¹ This judicial attention to the potency of the specific location

22 *Brown* (2017) 261 CLR 328, 340–1 [5] (Kiefel CJ, Bell and Keane JJ).

23 *Ibid* 349 [45]–[46] (Kiefel CJ, Bell and Keane JJ).

24 *Ibid* 340 [4], 342–3 [14]–[15] (Kiefel CJ, Bell and Keane JJ).

25 *Ibid* 367 [118].

26 *Ibid* 366–7 [115], [118]. See *Protesters Act* ss 6(1)–(3);

27 *Brown* (2017) 261 CLR 328, 354 [66]–[67] (Kiefel CJ, Bell and Keane JJ).

28 *Ibid* 344 [23] (Kiefel CJ, Bell and Keane JJ).

29 Clive Hamilton, *What Do We Want? The Story of Protest in Australia* (2016, National Library of Australia Publishing) 168.

30 *Brown* (2017) 261 CLR 328, 341 [6] (Kiefel CJ, Bell and Keane JJ).

31 *Ibid* 346 [32] (Kiefel CJ, Bell and Keane JJ).

of these protests is significant – both for the *lawful forest* and for the development of the jurisprudence around the implied freedom of political communication. In 1998, constitutional scholar Adrienne Stone noted that Kirby J’s judgment in *Levy v Victoria*³² appeared to be influenced by the public forum doctrine: ‘United States authority which is especially hostile to regulation that occurs in traditionally public fora and, to some extent, other public property’.³³ In this case, the doctrine worked against Levy, with Kirby J noting that the duck hunting area that Levy sought to access for his protest was ‘no “Hyde Park”’³⁴ and, thus, not a traditionally public forum.

In the 20 years since *Levy*, this issue of *forum* has rarely arisen in the jurisprudence around the implied freedom – and it has never been a determinative factor in any successful case (until *Brown*). In *Coleman v Sellars*,³⁵ only the dissenting Muir J agreed with the appellant’s submission that the nature of pedestrian malls, such as the one Coleman had used for his protest (without the requisite Council permit), ‘made them inherently useful as venues for the effective exercise of free speech’.³⁶

The issue of forum also arose in *O’Flaherty v City of Sydney Council*.³⁷ Occupy Sydney protester Eamonn O’Flaherty argued that the Council’s prohibition on staying overnight in Martin Place was incompatible with the implied freedom, because it unreasonably restricted his capacity to communicate his political opinions and support for the worldwide Occupy movement.³⁸ Although O’Flaherty’s claims were ultimately rejected, the Federal Court spent some time acknowledging the potency of both place and non-verbal protest, including the act of occupation.³⁹ Katzmann J contextualised this case within a global jurisprudence of occupation, including *Tabernacle v Secretary of State for Defence*,⁴⁰ which characterised a long standing women’s peace camp on public land as protected political communication;⁴¹ *City of London Corporation v Samede*,⁴² which acknowledged the political potency of the Occupy London protest camp in the

32 (1997) 189 CLR 579 (*Levy*).

33 Adrienne Stone, ‘Case Note: *Lange, Levy* and the Direction of the Freedom of Political Communication Under the *Australian Constitution*’ (1998) 21 *University of New South Wales Law Journal* 117, 133.

34 *Levy* (1997) 189 CLR 579, 642.

35 (2000) 181 ALR 120.

36 *Ibid* 125 [22], 130 [47] (Muir J). Gelber notes that the majority justices’ acceptance of the prioritisation of business interests over political speech appears to recast some areas of public space as commercial. She argues that this ‘raises challenges for the retention of democratic public spaces which are particularly well-suited to the exercise of political communication’: Katharine Gelber, ‘Pedestrian Malls and Local Government Powers: Political Speech at Risk’ (2003) 5 *University of Technology Sydney Law Review* 48, 62.

37 (2013) 210 FCR 484 (*O’Flaherty*).

38 *Ibid* 486–7 [5], [9] (Katzmann J).

39 *Ibid* 491–2 [33] (Katzmann J).

40 [2009] EWCA Civ 23 (5 February 2009).

41 *O’Flaherty* (2013) 210 FCR 484, 492 [36] (Katzmann J); *ibid* [37]–[38] (Laws LJ), [50] (Wall LJ).

42 [2012] 2 All ER 1039.

churchyard of St Paul's Cathedral;⁴³ *Batty v Toronto*,⁴⁴ which found that the Occupy Toronto protest camp constituted political expression that engaged section 2(b) of the *Canadian Charter of Rights and Freedoms*,⁴⁵ and *Occupy Minneapolis v County of Hennepin*,⁴⁶ which accepted that sleeping in a public park was protected speech.⁴⁷ Katzmann J also noted affidavit evidence from Occupy Sydney protester Wenny Theresia, who 'detailed a number of services that she and others provided to both protesters and members of the general public at the site, such as musical performances, film nights, and free yoga and meditation classes'.⁴⁸

In contrast to *O'Flaherty*, the significance of *forum* succeeded in tipping the balance in *Brown*, by inviting a higher level of judicial scrutiny over the regulation of access to the forest. Ultimately, the majority found that the law was not appropriate and adapted to achieve a legitimate end, the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of government.⁴⁹

But why did the Court classify the forest as a public forum to begin with, despite it being 'no Hyde Park'? While this classification was not the ratio, it nevertheless forms an important backdrop to the judgment. Some insight is provided in the discussion of the relevance of an amendment to the *Forestry Act 1920* (Tas) ('*Forestry Act*') in 1984,⁵⁰ a state government reaction to the momentous Franklin Dam protests of 1983.⁵¹ The amendment inserted into the *Forestry Act* 'a situation of trespass' that was otherwise absent, and this empowered police to remove protesters causing 'obstruction in the forests'.⁵² According to the Court, this amendment revealed a propertied truth about the public right, much like thunder informs us of unseen lightning:

The inference presently to be drawn ... is that the Tasmanian Parliament considered it to be necessary to make express provision for notifying the public when they might *not* access forest areas. That provision ... recognises that there is an expectation on the part of the public in Tasmania, residents and visitors alike, that they may access forest areas and that that expectation should, so far as reasonably practicable, be met.⁵³

43 *O'Flaherty* (2013) 210 FCR 484, 492–3 [38] (Katzmann J); *ibid* 1048 [28], 1049–50 [35] (Burnton MR for the Court). However, it should be noted that the Court ultimately declined to protect the camp: at 1056 [60] (Burnton MR for the Court).

44 (2011) 108 OR (3d) 571.

45 *Canada Act 1982* (UK) c 11, sch B pt 1; *O'Flaherty* (2013) 210 FCR 484, 494 [42]; *ibid* [70]–[72] (Brown J).

46 866 F Supp 2d 1062 (D Minn, 2011) (Kyle DJ).

47 *O'Flaherty* (2013) 210 FCR 484, 494 [42] (Katzmann J); *ibid* 1069 (Kyle DJ).

48 *O'Flaherty* (2013) 210 FCR 484, 488 [15] (Katzmann J).

49 *Brown* (2017) 261 CLR 328, 374 [152] (Kiefel CJ, Bell and Keane JJ).

50 *Forestry Amendment Act (No 2) 1984* (Tas). The *Forestry Act* was the predecessor to the *Forest Management Act 2013* (Tas) ('*FMA*').

51 See *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*').

52 *Brown* (2017) 261 CLR 328, 344 [23] (Kiefel CJ, Bell and Keane JJ), citing the Second Reading Speech to the *Forestry Amendment Act (No 2) 1984* (Tas): Tasmania, *Parliamentary Debates*, Legislative Council, 6 December 1984, 2782 (Hodgman).

53 *Brown* (2017) 261 CLR 328, 345 [24] (Kiefel CJ, Bell and Keane JJ).

To meet this ‘expectation’ as ‘far as reasonably practicable’, the joint judgment observed that public forest access could only be qualified where safety or other operational factors prevailed:

It is sufficient to appreciate that the scheme of the *FMA* is that persons will not be impeded in their access to forestry land or in their use of such land for any purpose so long as their presence or the activity which they undertake is not incompatible with the management of the forestry land, which would include forest operations ... on that land.⁵⁴

The extent of this public expectation was also explicit in the second reading speeches that preceded the passage of the 1984 *Forestry Act* amendment, which talked of the public’s ‘enjoy[ment] [of the] ... public forest estate’ as a right of access qualified only by the reasonable operational requirements of forestry authorities.⁵⁵ Later obiter in the joint judgment reiterated the breadth of the public forest estate. The ‘ability of people to access forest areas and undertake protest activities on them’⁵⁶ is ‘the *premise* of the *FMA*’,⁵⁷ reduced only in circumstances where ‘the Forest Manager [could justify] its powers to exclude’, namely, where it was ‘in order to perform [the Forest Manager’s] functions effectively or efficiently, or in the interests of [public] safety’.⁵⁸ The public forest right was also described in *universal* terms, said to ‘appl[y] to all persons’ or ‘residents and visitors alike’, unlike the *Protesters Act* which purported to apply only to the actions of protesters’.⁵⁹

The joint judgment felt no compulsion to determine the *nature* of the public forest estate. Importantly, it was described as being ‘recognised by the *FMA*’,⁶⁰ inferring its general or common law origins that predated state forestry statutes, whose scheme was and is regulatory, and not creative of rights. However, the *incidents* of this public forest right were the subject of brief judicial foray. Citing management plans prepared by Forestry Tasmania, the joint judgment listed a mixed bag of incidents: ‘recreation sites, organised events, recreational vehicle use, hunting and firearm use, fossicking and prospecting, firewood collection, indigenous rights use ... mineral exploration and mining and tourism’.⁶¹

Gageler J (who concurred with the majority) was equally explicit in his references to context, and the importance of history’s intersection with public place:

More significant to an assessment of the relevant burden imposed by the impugned provisions is the long history of political protest on Crown land in Australia. Most significant is the history of on-site political protests on Crown land in Tasmania,

54 Ibid 365 [110] (Kiefel CJ, Bell and Keane JJ).

55 Ibid 345 [25] (Kiefel CJ, Bell and Keane JJ), quoting Tasmania, *Parliamentary Debates*, House of Assembly, 24 September 2013, 40 (Bryan Green). This provision was similar to the *Forestry Act 1920* (Tas).

56 Ibid 365 [109] (Kiefel CJ, Bell and Keane JJ).

57 Ibid 365 [110] (Kiefel CJ, Bell and Keane JJ) (emphasis added).

58 Ibid.

59 Ibid 345 [24], 353 [62] (Kiefel CJ, Bell and Keane JJ).

60 Ibid 365 [110] (Kiefel CJ, Bell and Keane JJ).

61 Ibid 345 [26] (Kiefel CJ, Bell and Keane JJ), 445–6 [364] (Gordon J).

directed to bringing about legislative or regulatory change on environmental issues, beginning with the protest activity between 1981 and 1983 ...⁶²

Gageler J employed a hypothetical to explain why the *Protesters Act* was a burden on the implied freedom of political communication. This scenario was insightful, albeit unintentionally, premised as it was on the inviolability of access to the public forest estate. His Honour described two groups of persons walking along a forest road, one a school group on excursion, or recreational walkers on an organised hike; the other, a group of protesters as defined in the Act.⁶³ The discriminatory implications that ‘one group is subject to the strictures imposed by the impugned provisions [while] [t]he other is not’,⁶⁴ had constitutional consequence. But, of course, neither group could walk down the forestry road in the absence of any public forest right of access, such that the constitutional lesson of Gageler J’s anecdote would fall away.

Of the remaining justices, Nettle J (who also concurred with the majority), and Gordon and Edelman JJ (who were in the minority) made passing references to public property freedoms, or the significance of context. Thus, Nettle J talked of the critical history of protest against forest operations in Tasmania.⁶⁵ He also described the public forest right in similar terms to the majority justices, as a ‘freedom so to access *and protest* on permanent timber production zone land’.⁶⁶ This freedom was of course not unqualified, precluded in circumstances ‘incompatible with the Forest Manager performing its functions’.⁶⁷ Edelman J was prepared to categorise the public forest right as a ‘statutory licence’ under section 13(1) of the *FMA*, diverging from the joint judgment’s recognition approach.⁶⁸ Yet, even he was tempted to expand on the right’s incidents of tenure, suggesting that the so-classified statutory licence could embrace ‘peaceful protest activities such as ... filming and investigation’ within its non-exhaustive range of incidents.⁶⁹ Gordon J was the most brief, judicially noting that the situs of the case ‘was and remains Crown land’, permanently reserved forest lands.⁷⁰

In *Brown*, discussion of the public forest right was subliminal to the higher order constitutional issues. One was ratio, the other obiter; one determinative, and the other its context. Yet despite its subsidiarity, certain conclusions can be drawn from the judgments as to the nature and extent of the Tasmanian public forest estate. First, the public expectation is contextual, nestled in the massive old-growth forests of the island state. Second, the right to access this estate is constrained only by statutory caveats of public safety and reasonable operational needs. Third, its enjoyment is universal, an expectation of access open to ‘residents and visitors alike’.⁷¹ Fourth, it exists only on Crown lands, or forest lands accessible to the

62 Ibid 387 [191].

63 Ibid 394–5 [221].

64 Ibid 395 [221] (Gageler J).

65 Ibid 400 [240].

66 Ibid 401 [243] (emphasis added).

67 Ibid 401 [242], 406 [256] (Nettle J).

68 Ibid 490 [516].

69 Ibid 490 [515].

70 Ibid 451 [381].

71 Ibid 365 [110] (Kiefel CJ, Bell and Keane JJ).

public, what the High Court terms in almost quaint property language as the ‘public forest estate’.

The majority’s ‘recognition’ of this forest estate did not arise in a vacuum. Part III next explores the rich legal history of the laws of forests, the reformist *Forest Charter of 1217*, and what modern public forest rights may mean for other diverse lawful forests in our midst.

III FROM THE LEGAL TO THE LAWFUL FOREST

Seventeenth century jurist Edward Coke, famed for his *Reports* and *Institutes* that systemised the common law,⁷² described forests as comprising of ‘8 things, viz. of foil [soil], covert, laws, courts, judges, officers, game, and certain bounds’.⁷³ As Coke’s list enumerates, rather than being a geographic place, the forest was predominantly a positivist legal construct, a juridical space through which kings, wild game, poachers, enforcers, and commoners passed. It was a legal artifice, one where trees were peripheral, indeed superfluous – a bounded jurisdiction carved from, and distinct from, the customary realm outside it.

The Norman Conquest of 1066 imported the idea of the legal forest, as defined by Coke, into the common law. The pre-Norman legal landscape had been a polyglot of ‘variegated and diverse system of localized practices’, a juridical geography that was ‘profoundly decentralised and pluralistic’.⁷⁴ The Norman legal forest, by contrast, was a unitary space, one of royal privilege and homogeneity, large ‘afforested’⁷⁵ tracts estimated at their zenith to comprise one-third of the English landmass.⁷⁶ Inside this legal forest, the hunting rights of the political elite were paramount, ownership of wild game was vested in the Crown, and transgressors were punished severely – by death or blindness.⁷⁷ Harsh conditions were imposed on forest residents, the discharge of onerous obligations or the payment of fines, while common rights were relegated to the imperatives of the hunt.⁷⁸ Forest laws in effect *enclosed* common lands and other tenures within forested boundaries, turning open countryside into private royal game parks, a jurisdiction where pre-existing law and practice was overridden by a discrete law drafted for the few.

Unsurprisingly, legal forests were deeply unpopular in 12th century England, a ‘toxic political issue’ that generated dissent and unrest in ways unparalleled in

72 Nicholas K Blomley, *Law, Space and the Geographies of Power* (Guildford Press, 1994) 69–82.

73 Edward Coke, *The Fourth Part of the Institutes of the Laws of England; Concerning the Jurisdiction of Courts* (W Clarke and Sons, first published 1644, 1817 ed) 288. Covert is a thicket in which game can hide.

74 Blomley, *Law, Space and the Geographies of Power*, above n 72, 76–7.

75 This term does not mean covered by trees, but brought within the jurisdiction of the forest law.

76 Judith A Green, ‘Forest Laws in England and Normandy in the Twelfth Century’ (2013) 86 *Historical Research* 416, 417.

77 *Ibid* 426.

78 Thus for example, ‘owners of woods ... in forests must provide common herbage and leave cover and browse for deer’: John Langton, ‘Royal and Non-Royal Forests and Chases in England and Wales’ (2015) 88 *Historical Research* 381, 388.

William the Conqueror's native Normandy.⁷⁹ 'Forest laws were objectionable because they extended over land belonging to men other than the king; they were restrictive; and they were arbitrary'.⁸⁰ The Magna Carta made direct reference to the 'evil customs relating to forests' in 1215.⁸¹ Two years later, the *Forest Charter of 1217* was a direct response to these 'evil customs' and legislated against some of them.⁸² Sealed on 6 November 1217, the *Charter* was a landmark legal instrument that remained in force for over 750 years.⁸³ Only in 1971 was the *Charter* superseded by the *Wild Creatures and Forest Laws Act 1971* (UK). That Act abolished remaining Crown forest franchises but preserved all 'existing right[s] of common or pannage originating in the forest law'.⁸⁴

Like the Australian High Court in *Brown*, the *Forest Charter of 1217* pushed back against the excesses of the executive, balancing the rule of law against regulatory overreach. Comprising 17 'chapters',⁸⁵ the *Charter* partially restored and 'recognised' pre-existing common rights of access and agriculture. Chapter 1 began with a guarantee of public forest access, 'all the forests which Henry ... afforested shall be visited by good and lawful men'. It also restored agrarian rights, the 'common of herbage and other things ... to those who were accustomed to have them before',⁸⁶ plus rights of 'agistment [for each free man's] woodland in the forest and [to] have his pannage'.⁸⁷ Chapter 13 restored a right to 'have honey found in his woods'. Chapter 17 ends with the universalising proclamation that 'these liberties with regard to the forest we have granted to all ... the liberties and free customs ... that they had earlier had'. Such liberties were explicitly extended to 'all persons of our kingdom, both clergy and laity'.⁸⁸ Excluded were the lay and ecclesiastically powerful, 'the archbishops, bishops, abbots, priors, earls, barons, [and] knights'.⁸⁹

In practical terms, the *Charter* sharply reduced the geographic footprint of the legal forest, 'disafforesting' large swathes of countryside afforested since the accession of Henry II,⁹⁰ and returning them to the heterogeneous and localised jurisdictions of the ever-evolving common law.⁹¹ The narrative of disafforestation, which culminated at this point in time in the *Charter*, had been one of struggle and resistance. Petit-Dutaillis argues, 'if a precise date is to be assigned to the end of the *long struggle* for disafforestation, it is ... the beginning of the reign of Edward

79 Green, above n 76, 416–17.

80 Ibid 417.

81 Magna Carta of 1215, art 48, as reproduced in GRC Davis, *Magna Carta*, (British Library, 1989).

82 Mark Hill, 'The Charter of the Forest 1217: A Medieval Solution for a Post-Modern Problem?' (Paper presented at the G20 Interfaith Summit, Istanbul, 16–18 November 2015) <<https://www.iclrs.org/content/events/116/2377.pdf>>.

83 Ibid.

84 *Wild Creatures and Forest Laws Act 1971* (UK) c 47, s 1(5).

85 These 'chapters' of the *Forest Charter of 1217* are not lengthy and could also be described as 'clauses' or 'articles'.

86 *Forest Charter of 1217*, above n 5, ch 1.

87 Ibid ch 9. Pannage is the right for pigs to forage.

88 Ibid ch 17.

89 Ibid.

90 Ibid ch 3. *Disafforesting* refers to the removal of lands from the forest jurisdiction.

91 Blomley, *Law, Space and the Geographies of Power*, above n 72, 79.

III that must be chosen'.⁹² However, we argue, this struggle never ended, nor did it disappear, as the facts in *Brown* evidence. It is all too easy to (metaphorically) lose sight of the forest for its trees, where the forest is not (and never was) just about the trees, and the tension between its legal and lawful impulses remains deeply subliminal and amorphous.

The *Forest Charter of 1217* is said to be more significant than its far better known contemporary, the Magna Carta. Its significance is multifaceted: it dealt 'with [the] rights enjoyed by the common man rather than privileges of barons',⁹³ it 'irrevocably altered English land law',⁹⁴ and challenged the hegemony of the Norman legal forest. Moreover, the *Charter* endured, remaining good law until 1971. However, in ways that mirror our 'archiving of the memory of enclosure over that of the commons', Lucy Finchett-Maddock claims the Magna Carta for the most part successfully ridded itself of its 'communal twin'.⁹⁵ Recent commentary on the eve of its 800th anniversary describes the *Charter* in expansive, at times hyperbolic, terms: 'one of the world's first pieces of environmental and natural resources legislation',⁹⁶ or 'the foundation for the modern concept of common stewardship of resources'.⁹⁷ In substance, the following summary seems the most apt:

The *Charter of the Forest* re-established rights of access for free men which had been eroded by William the Conqueror and his heirs. The royal forests – which included heathland, farms and villages as well as heavily wooded areas – were a source of fuel for cooking, heating, and small industries such as charcoal burning. The *Charter* provided protection for ordinary citizens who used the forest to forage for food and to graze their animals. The King was required to give up possession of large tracts of land and make it available for use by the commoners living in [the] community.⁹⁸

In effect, the *Forest Charter of 1217* created cracks in the edifice of the legal forest, transforming it from a private hunting ground to a diverse jurisdiction where many common rights, including rights of access, were restored or preserved. The exclusivist legal forest shifted back towards a relational lawful one. Even with its ultimate demise in the UK in 1971, the *Charter* lives on through section 1(5) of the *Wild Creatures and Forest Laws Act 1971* (UK), which retains common rights 'originating in the [lawful] forest law'.

The *Charter* did not settle the dialectic tension between these two forests but merely reset the stage for the next contest, which played out in the subsequent struggle of the commons. Parts IV and V explore what happened next, how the *Charter*'s proclaimed 'liberties of the forest' found alternate voice in the struggle

92 Charles Petit-Dutaillis, *Studies and Notes Supplementary to Stubbs' Constitutional History* (Manchester University Press, 1908–14) vol 2, 232 (emphasis added).

93 Mark Hill, above n 82.

94 Ibid.

95 Lucy Finchett-Maddock, *Protest, Property and the Commons: Performances of Law and Resistance* (Routledge, 2016) 130.

96 Daniel Magraw and Natalie Thomure, 'Carta de Foresta: The Charter of the Forest Turns 800' (2017) 47 *Environmental Law Reporter* 10934, 10934.

97 Carolyn Harris, *The Charter of the Forest* (17 December 2013) Magna Carta Canada <<http://www.magnacartacanada.ca/the-charter-of-the-forest/>>.

98 Mark Hill, above n 82.

for the rural commons, a turbulent tussle over not only a discrete propertied place, but also its contested idea. As this article argues, these forest liberties became the core of the modern lawful forest, a diverse enclave of custom and the commons, a place characterised by expectations of reasonable public access, and protected by lawful protest, much like the contested Tasmanian forest coupe in *Brown*.

Although it appears that the terminology of the ‘forest’ disappears from succeeding discussions, it remains, as in *Brown*, latent – the customary underpinnings of a modern-day incantation pitting private enclosure against the commons. The shift in this article from forests to the rural commons to the city, traversed in Parts IV, V and VI, reflects what happened on the ground – a clear felling of great expanses of forest that accompanied the rise of an agrarian economy, in turn to be displaced by an urban, (post) industrial ‘forest’. This ‘evolution’, and its intensifying momentum, has resulted in a massive loss of forests on a global scale, yielding an environmental crisis of existential dimension. However, while the historical record evidences a widespread *material* loss of forests, their destruction does not correspond with a commensurate loss of the *idea* of the forest. Indeed, the idea of the lawful forest endures; an ideal performed as stridently and defiantly today as the protests of the *good and lawful men* of 13th century England, and their resistance to the legal forest’s perennial *evil customs*.

IV THE ‘LIBERTIES OF THE FOREST’: THE IDEA OF THE COMMONS

In recent decades, the concept of the commons has played a significant role in the global justice movement, representing an ‘alternative model of social organization against the onslaught of “there is no alternative” neoliberal thinking’.⁹⁹ Peter Linebaugh argues that the commons can perhaps better be described as a verb or activity, in that ‘it expresses relationships in society that are inseparable from relations to nature’.¹⁰⁰ He emphasises that it was through a process of ‘commoning’ that many historical rights were obtained.¹⁰¹ Reflecting on the history of the *Forest Charter of 1217* itself, Massimo De Angelis argues, ‘rights were not “granted” by the sovereign, but ... already-existing common customs were rather acknowledged as de facto rights’.¹⁰²

Despite the resonance of this commons-based narrative, it does not offer a simple antidote to enclosure. Careful analysis of the history of the commons reveals that it is a contested concept, one that has been used as much to restrict and exclude access as to emancipate the poor.¹⁰³ As Ben Maddison emphasises, ‘[f]ar

99 George Caffentzis, ‘A Tale of Two Conferences: Globalization, the Crisis of Neoliberalism and Question of the Commons’ (Paper presented at the Alter-Globalization Conference, Mexico, 9 August 2004).

100 Linebaugh, *The Magna Carta Manifesto*, above n 16, 279.

101 Ibid.

102 Massimo De Angelis, ‘On the Commons: A Public Interview with Massimo De Angelis and Stavros Stavrides’ (2010) 17 *e-flux journal* 2.

103 See, eg, Ben Maddison, ‘Radical Commons Discourse and the Challenges of Colonialism’ [2010] (108) *Radical History Review* 29, 31; Briony McDonagh and Carl J Griffin, ‘Occupy! Historical Geographies of Property, Protest and the Commons, 1500–1850’ (2016) 53 *Journal of Historical Geography* 1, 6.

from having a unitary and ahistorical meaning, the term commons has its own complex and contradictory history, one that evolved during struggles over commons as physical spaces'.¹⁰⁴ Nonetheless, from out of this dialectical process and protracted periods of class struggle, it is possible to trace a radical commons discourse – one that is imbued with universal rights to communal property.¹⁰⁵

Mobilisation around the idea of the commons in England can be traced all the way back to the Norman invasion, as demonstrated by the unrest leading to the *Charter*. Maddison argues that within the *Charter* (and the Magna Carta) '[w]e can observe the articulation of a self-conscious connection between commons and freedom and rights'.¹⁰⁶ Together these documents were known as the Charter of Liberties and represented the settlement of a rebellion against executive overreach. Linebaugh argues this rebellion represented a 'multifaceted popular defense of the commons'¹⁰⁷ – one that is explicitly connected to rights and freedom.¹⁰⁸ As the *Charter* concludes: '[t]hese liberties with regard to the forests we have granted to all'.¹⁰⁹

In less conceptual terms, the physical historic 'commons' of England was land that was 'used in common facilitated by the granting of common rights' for farming, grazing livestock, collecting 'fuel, fodder, food, building materials and minerals', and as a gathering place for community festivals.¹¹⁰ Even as the concept of the commons has been adapted to emerging struggles and contexts, at its core the commons has continued to represent a resistance to the idea of commodified private property rights, the appropriation of common rights by enclosure, and the callous detachment of people from their place.

Linebaugh describes enclosure as 'an important interpretative idea for understanding neoliberalism', but he also emphasises that enclosure is 'an important empirical fact' both in our time and historically.¹¹¹ As noted, there has been a documented process of enclosure in England going back at least to the 13th century.¹¹² This process has also accelerated over time. For example, in 1688 at least 'a quarter of the total area of England and Wales was common land'.¹¹³ Just under 200 years later, 26 million of these estimated 28.5 million acres of common lands had been enclosed.¹¹⁴

Like enclosure, the commons is both an important interpretative idea and a concrete reality. When we consider the verb 'commoning' in concrete terms, this process of resisting enclosure encompasses physical acts such as hedge-breaking

104 Maddison, above n 103, 31 (citations altered).

105 See, eg, Maddison, above n 103, 31–2; McDonagh and Griffin, above n 103, 6.

106 Maddison, above n 103, 32.

107 Linebaugh, *The Magna Carta Manifesto*, above n 16, 24.

108 Maddison, above n 103, 32.

109 *Forest Charter of 1217*, above n 5, ch 17.

110 David J Bederman, 'The Curious Resurrection of Custom: Beach Access and Judicial Takings' (1996) *Columbia Law Review* 1375, 1381.

111 Peter Linebaugh, 'Enclosures from the Bottom Up' (2010) 108 *Radical History Review* 11, 11 (emphasis altered).

112 See, eg, *ibid* 13.

113 *Ibid*.

114 'The Common Lands Census of 1873–74 showed that only 2.5 million acres of common land remained in England': *ibid* 14.

and occupation. In contrast, a more conceptual understanding of commoning might include changing the narrative around public space or actively performing and forging relationships between communities and place.

As we will explore in more detail below, this connection to place is particularly relevant to the idea of the commons. Linebaugh argues that commoners share ‘an epistemology and an orientation dependent on the unenclosed’.¹¹⁵ This connection was so strong that 19th century commoners described being lost as *losing their world* and the act of leaving their common lands as *wandering ‘out of [their] knowledge’*.¹¹⁶ Jeanette Neeson likewise describes the solitude of the wastes, and of commoners deriving a sense of belonging, of being ‘one of a tribe’.¹¹⁷ As the process of enclosure accelerated, and commoners were evicted from their land, their relational attachment to place was lost and they became available for exploitation via wage labour. In political theory, Marx described the separation of people from the land through enclosure as ‘primitive accumulation’,¹¹⁸ and geographer David Harvey argues this is foundational to capitalism’s process of accumulation by dispossession.¹¹⁹ As the protesters in *Brown* remind us, we are now faced with the logical conclusion of this accelerating process – our dispossession of a liveable planet via environmental destruction and a looming climate catastrophe. This existential threat brings our ongoing dependence on the commons into sharp focus.

The contested concept of the commons, canvassed in Part IV, speaks to a tension underlying this paper, the duality of the *material* and the *abstract*. Indeed, it is a tension central to property, a contest between an orthodoxy that deems property as juridical rights between persons about things, and an alternate understanding premised on the physicalised thing itself. In *Brown*, protesters protected the material Lapoinya forest, yet relied on abstract constitutional freedoms to achieve their ends. Likewise, the *Charter*’s universal ‘liberties’ meant ordinary subjects could again visit places like Ankerwycke Yew near Runnymede, feed their livestock, and forage for food in surrounding woods.¹²⁰ To reconcile the coexisting material and the abstract defies easy answer. Wesley Hohfeld observed it in 1913, when he wrote of the paradox of incorporeal rights assuming corporeal form.¹²¹ Likewise, it is the paradox that reduces abstract in rem rights to specific in personam actions, the largely unremarked curiosity where rights (conceivably) enforceable against the world are enforced against particular defendants. The methodologies of the abstract and the material appear contradictory, yet in practice, they work in creative tandem. It is in these paradoxical ways that the

115 Linebaugh, ‘Enclosures’, above n 111, 19.

116 *Ibid* (emphasis altered).

117 J M Neeson, *Commoners: Common Right, Enclosure and Social Change in England, 1700–1820* (Cambridge University Press, 1993) 180.

118 Karl Marx, *Capital: A Critique of Political Economy* (Samuel Moore and Edward Aveling trans, Charles H Kerr & Co, 1909) [first published 1867] vol 1, 786.

119 Harvey, *The New Imperialism*, above n 19, 142–3.

120 Peter Fiennes, *Oak and Ash and Thorn: The Ancient Woods and New Forests of Britain* (Oneworld Publications, 2017) 123–4.

121 Wesley Newcomb Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 23 *Yale Law Journal* 16, 24.

lawful forest manifests as both physical and metaphysical, an ancient simultaneity of material practice and utopian ideal.

The history of enclosure and occupation, as exemplified by early 16th century resistance in England, the Diggers movement in the mid-17th century, and the actions of squatters and small-scale encroachments in the late 18th and early 19th centuries, ‘serve to detail some of the foundational ways in which the securitisation of space, and the attendant legal framework used to discipline protest, emerged’.¹²² Although these historic acts of occupation and commoning did vary in a number of significant ways, they ‘were united by offering a critique of the idea of exclusive property in land’.¹²³ In the following Part V we will explore this historic dialectic between occupation and commoning and what it tells us about both about the nature of the commons and the remarkable tenacity of those who fought to perform their claims to it.

V THE TURBULENT FOREST

The early historical record of local acts of resistance to enclosure is patchy, but it does note the Peasants’ Revolt of 1381, in which ‘commoners in Winchester and Cambridge pulled down enclosures’, and Ket’s Rebellion of 1549.¹²⁴ It wasn’t really until the early 16th century that resistance to enclosure became the core issue of these rebellions. This particular resistance movement was a response to a wave of rural enclosures that were designed to protect the growing profits landholders were making from an increased demand for wool and cloth.¹²⁵ Commoners were forced off the land, denying them access to their traditional sources of livelihood and to their communal places of sociability. In response, they resisted through both litigation and more direct action such as occupation, culminating in the Midlands Rising of 1607 in which rioters dug up hedges surrounding recently enclosed fields, before setting up camp to occupy them until they were violently evicted by the local justices of the peace.¹²⁶

Another response to this wave of enclosures was of a more theoretical nature. Thomas More reacted by writing *Utopia* – a seminal work of fiction published in Latin in 1516 that both critiqued early 16th century England and portrayed a place (or rather ‘no place’) where enclosure was unthinkable and communal ownership of property the norm.¹²⁷ Stephanie Elsky argues that, in *Utopia*, More sought to imagine a ‘political commons rooted in custom’, and that this discursive commons

122 McDonagh and Griffin, above n 103, 1.

123 Ibid 9.

124 Maddison, above n 103, 33.

125 See, eg, Bruce Mazlish, ‘A Tale of Two Enclosures: Self and Society as a Setting for Utopias’ (2003) 20(1) *Theory, Culture & Society* 43, 45; Shin Lee and Chris Webster, ‘Enclosure of the Urban Commons’ (2006) 66 *GeoJournal* 27, 30.

126 McDonagh and Griffin, above n 103, 3–4; Maddison, above n 103, 33.

127 Mazlish, above n 125, 45, citing S J Edward Surtz and J H Hexter (eds), *The Complete Works of St Thomas More* (Yale University Press, 1965) vol 4 (‘*Utopia*’); B R Goodey, ‘Mapping “Utopia”’: A Comment on the Geography of Sir Thomas More’ (1970) 60 *Geographical Review* 15.

shares ‘the same contours – and same contradictions – as English common law’.¹²⁸ Indeed custom was viewed as a key source or foundation of law in England by many legal theorists of the time.¹²⁹ According to John Fortescue, it was this foundation in custom that had enabled the common law to continue unaltered through a series of invasions – including the Normans in the 11th century.¹³⁰

The idea of *Utopia* and the communal property ownership it envisaged was a powerful source of inspiration, and in 1649 it motivated a new radical interpretation of the commons by a movement that came to be called the Diggers.¹³¹ During the period of 1649–50, the Diggers established several communities on common land and wastes in places such as Walton-on-Thames near Weybridge in Surrey, Wellingborough in Northamptonshire and Iver, Buckinghamshire.¹³² In this unsettled period after the English Civil War and the execution of Charles I, the Diggers sought to establish a new community – a Utopia – in which the commons would be claimed ‘for and in behalf of all the poor oppressed people of England and the whole world’ and communal farming would create a society free from exploitation.¹³³

Thomas describes the Diggers movement as ‘the culmination of a century of unauthorized encroachment upon the forests and wastes’.¹³⁴ The Diggers believed the land they occupied was commons, wastes and Crown land,¹³⁵ and the occupiers argued that this land had ‘returned again to the Common people of England’ upon the King’s death – a renewed attempt to transfigure the legal forest back into a lawful forest.¹³⁶ Echoing claims made in the lead up to the *Forest Charter of 1217*, the intellectual leader of the Diggers, Gerrard Winstanley, argued that this common ‘land had been stolen from the people and “hedged into Inclosures” by the rich while the poor lived in “miserable poverty”’.¹³⁷

McDonagh and Griffin argue that by not focusing on specific parcels of land, ‘the Diggers offered a much more radical critique of existing concepts of property

128 Stephanie Elsky, ‘Common Law and the Commonplace in Thomas More’s *Utopia*’ (2013) 43 *English Literary Renaissance* 181, 184.

129 See, eg, T F T Plucknett and J L Barton (eds), *St. German’s Doctor and Student* (Selden Society, 1974) 45–7, cited in *ibid* 185.

130 John Fortescue, *On the Laws and Governance of England*, in S Lockwood (ed), *Cambridge Texts in the History of Political Thought* (Cambridge University Press, 2002) 25–7, cited in Elsky, above n 128, 186.

131 See, eg, McDonagh and Griffin, above n 103; Maddison, above n 103.

132 McDonagh and Griffin, above n 103, 5; Ariel Hessayon, ‘Review: Brave Community: The Digger Movement in the English Revolution by John Gurney’ (2008) 59 *Journal of Ecclesiastical History* 778, 778.

133 Maddison, above n 103, 35, quoting Christopher Hill (ed), *Winstanley: The Law of Freedom and Other Writings* (Cambridge University Press, 1983) 109.

134 Keith Thomas, ‘Another Digger Broadside’ (1969) 42 *Past and Present* 57, 58, cited in Maddison, above n 103, 34.

135 Gerald Aylmer, ‘The Diggers in Their Own Time’ in Andrew Bradstock (ed), *Winstanley and the Diggers, 1649–1999* (Routledge, 2013) 8, 16–17; McDonagh and Griffin, above n 103, 5.

136 *The Speeches of the Lord General Fairfax and the Other Officers of the Armie, to the Diggers at St George’s Hill in Surrey and the Diggers Several Answers and Replies Thereunto* (London Printed for RW, 1649), quoted in McDonagh and Griffin, above n 103, 5.

137 McDonagh and Griffin, above n 103, 5 citing Gerrard Winstanley, ‘A Declaration to the Powers of England’ in Thomas N Corns, Ann Hughes and David Loewenstein (eds), *The Complete Works of Gerrard Winstanley* (Oxford University Press, 2009) vol 2, 5.

and property rights as they were practiced [sic] in mid seventeenth century England than had the participants in anti-enclosure riots a century earlier'.¹³⁸ Maddison explains that by engaging in such a critique, the Diggers and Winstanley reconceptualised the commons in three important ways.¹³⁹ First, they universalised the claim to the commons, shifting it from a locally bounded, exclusionary approach to one that was open to all. Second, they conceptualised this universal approach as a human right. And, finally, they reframed the idea of freedom as one that was both 'collective and defined by the ability to maintain independence from wage labor and commodity relations more generally'.¹⁴⁰

By universalising the claim to the commons, 'Winstanley liberated commons conceptually from their everyday, practical enmeshments in the real property and power relations of seventeenth-century England'.¹⁴¹ This universalisation of the lawful forest – beyond the boundaries of the local inhabitants – was disputed by many at the time. The implication that 'the wastes were not privately owned was [considered by many to be] a wilful misunderstanding of the legal basis of common land which went against centuries of established legal and customary practice'.¹⁴² Indeed, Winstanley's vision – especially in his essentially communist understanding of collective freedom and the need to resist the alienation of labour from the workers – challenged both the established social order, with its feudal traditions and customs, and the emerging capitalist society that was rapidly taking its place.¹⁴³

The language of rights, used by the Diggers when they referred to the commons as their 'creation birthright' also represented a radical conceptual shift and a challenge to the legitimacy of local custom that sought to exclude the landless from access to the commons.¹⁴⁴ The radicalism of the Diggers' manifesto is underscored by the fact that many of its core tenets remain controversial today. In asserting a right to land based on human need, we can see some foundational concepts for the recognition of socio-economic rights. Furthermore, the assertion of a right to maintain control over the means of food production is reflected in today's calls for food sovereignty, led by radical civil society groups such as *Via Campesina*.¹⁴⁵

Ultimately, all of the Digger communities were evicted through a combination of legal action and physical intervention – including the reoccupation of their lands by local commoners.¹⁴⁶ While ruling class interests certainly orchestrated these

138 McDonagh and Griffin, above n 103, 5.

139 Maddison, above n 103, 34.

140 Ibid.

141 Ibid 35.

142 McDonagh and Griffin, above n 103, 5.

143 Maddison, above n 103, 36–8; McDonagh and Griffin, above n 103, 6.

144 Maddison, above n 103, 36.

145 See, eg, Sam Grey and Raj Patel, 'Food Sovereignty as Decolonization: Some Contributions from Indigenous Movements to Food System and Development Politics' (2015) 32 *Agriculture and Human Values* 431. The definition of 'food sovereignty' is hard to pin down: see, eg, Raj Patel, 'Food Sovereignty' (2009) 36 *The Journal of Peasant Studies* 663, but suffice to say it is a radical interpretation of the human right to food that focuses on cultural context and community control over the production of food, and can be contrasted with the more limited notion of 'food security' (which can be achieved through both the market and the provision of food aid).

146 McDonagh and Griffin, above n 103, 6; Maddison, above n 103, 37.

interventions, the involvement of local commoners highlights the clash between the Diggers' ideals of universal rights to the commons and a bounded approach based on local custom. Nonetheless, the Diggers' vision for a new society, a Utopia, lived on, partly due to Winstanley's writing, and continues to resonate.¹⁴⁷

In the early 1800s, occupation of the commons took the form of squatting.¹⁴⁸ This practice was not especially political in nature – 'squatting when undertaken by the landless was almost without exception low level, opportunistic and individual'.¹⁴⁹ However, there was a spike of encroachments from the lower classes in the 1740s and 1750s, and again in the 1830s, after waves of enclosures reduced access to the lawful forest.¹⁵⁰ The commons and wastes were also extensively used for working class political gatherings in the 1800s, partly because they offered sufficient space and 'were often beyond the direct surveillance of urban authorities'.¹⁵¹ McDonagh and Griffin note that 'it was also a political statement, gathering and occupying that land which was of the people'.¹⁵² They argue, 'this discourse of making claims to, symbolically using and defending access to land for food, fuel and recreation was a constant theme of rural protest in the first half of the nineteenth century'.¹⁵³

Enclosure unleashed massive social upheaval and demographic change, as propertied resources were shifted from the landless poor to the landed rich, from the many to the few. In 18th and 19th century England, the loss of the commoner's world, their *moving out of their knowledge*, left millions placeless and rootless, a numbing uniformity that seems to persist (geographically at least) in the dispersed 'geographies of nowhere' that characterise 21st century cities, especially on their suburban and ex-urban peripheries.¹⁵⁴ Enclosure yielded two profound changes in the common law world: the shift to the city explored in Part VI, and colonial emigration canvassed in Part VII. In both the city and the colony, the idea of the lawful forest and its deep-rooted practices of the commons find new contexts and diverging exigencies.

VI THE URBAN FOREST

A significant context to these late 18th and early 19th century occupations was the industrial revolution, which required the excess labour created by rural enclosure. As commoners were forced off their land, they had little choice but to relocate to the growing urban centres and to exchange their labour power for the

147 Maddison, above n 103, 29–30.

148 McDonagh and Griffin, above n 103, 7.

149 Ibid.

150 Ibid 8–9.

151 Ibid 9.

152 Ibid.

153 Ibid, citing Roger Wells, 'Historical Trajectories: English Social Welfare Systems, Rural Riots, Popular Politics, Agrarian Trade Unions, and Allotment Provision, 1793–1896' (2003) 25 *Southern History* 85.

154 James Howard Kunstler, *The Geography of Nowhere: The Rise and Decline of America's Man-Made Landscape* (Simon & Schuster, 1993).

means of survival. As towns grew into cities, the urban environment began to take centre stage in the ongoing struggle between enclosure and resistance.

The most dramatic of these urban struggles resulted in the 1871 Paris Commune – a ‘dramatic seizure of the government by Parisian workers [as] ... a response to smouldering class antagonisms’.¹⁵⁵ Significantly, this 73-day socialist occupation of Paris took place at the beginning of what is known as ‘the gilded age’, a period that followed a 70-year increase in income inequality that was about to kick into overdrive. Alexander Vasudevan characterises the Paris Commune as an ‘attempt to produce an autonomous social space’,¹⁵⁶ while Marx called it ‘a revolution ... by the people for the people of its own social life’.¹⁵⁷

According to Henri Lefebvre, the Paris Commune was a ‘festive revolution’ that created a ‘concrete utopia’, despite its ultimate demise.¹⁵⁸ In reflecting on the relevance of this festive revolution to the (ultimately unsuccessful) 1968 uprising in Paris, Lefebvre coined the concept of ‘the right to the city’.¹⁵⁹ He described the act of claiming this right as ‘autogestion’ – a process of seizing control from below in order to collectively manage decisions and common resources.¹⁶⁰ Purcell argues this kind of self-management ‘is a radical attack on the foundations of capitalist social relations in which the bourgeoisie controls, through private ownership, the means of production’.¹⁶¹

The right to the city has been described as the ultimate expression of the need ‘to maximize use value for residents rather than to maximise exchange value for capital’.¹⁶² Thus, the act of claiming the right is an act of resistance to the process of accumulation by dispossession. As such, the right to the city is not a claim to an individualistic right, but rather to what Antonio Negri describes as a ‘right to resistance ... built upon common demands and social cooperation’.¹⁶³ In his early theoretical work, Lefebvre highlighted ‘the role of festivals in the lives of the rural peasantry in France’.¹⁶⁴ He was particularly concerned with the way traditional festive practices operated to strengthen social bonds; arguing that ‘[t]he festival suggests a connection between community members, and between human bodies and the rhythms of nature’.¹⁶⁵ Lefebvre also highlighted the link between festivals and everyday moments. He contended that ‘the material and spiritual grounds for

155 Alexander Vasudevan, ‘The Autonomous City: Towards a Critical Geography of Occupation’ (2015) 39 *Progress in Human Geography* 316, 321.

156 Ibid.

157 Karl Marx, *The Civil War in France* (First published 1871, 2009) Marxists Internet Archive <<https://www.marxists.org/archive/marx/works/1871/civil-war-france/index.htm>>, quoted in ibid 321.

158 Butler, above n 6, 136, citing Henri Lefebvre, *The Explosion: Marxism and the French Revolution* (Monthly Review Press, 1969) 118.

159 Ibid 133.

160 Purcell, above n 6, 147.

161 Ibid.

162 Mark Purcell, ‘Citizenship and the Right to the Global City: Reimagining the Capitalist World Order’ (2003) 27 *International Journal of Urban and Regional Research* 564, 578, quoted in Vasudevan, above n 155, 320.

163 Antonio Negri, *The Porcelain Workshop: For a New Grammar of Politics* (Semiotext(e), 2008) 110, cited in Vasudevan above n 155, 320.

164 Butler, above n 6, 34 (citations omitted).

165 Ibid 35.

the festival lie within everyday life and spring forth in an intense and magnified form through particular moments'.¹⁶⁶ Festivals create transformative potential by materialising a model of a 'possible future free from alienation' and, thus, an opportunity for the 'rupture of the ordinary'.¹⁶⁷ But the historic role of festivals in everyday life, of passing on customary knowledge and practising relationality, has been undermined by increasing 'social stratification, the displacement of collective systems by private property' and urbanisation.¹⁶⁸

Chris Butler argues that the political potential of everyday moments and collective expressions of festivity lies in the possibility of creating *concrete utopias* – even if they are fleeting in nature.¹⁶⁹ These concrete utopias serve to both anticipate and effect an alternative future.¹⁷⁰ Political struggles are motivated by concrete visions of alternative social relations and this requires a genuine belief that 'another world is possible'.¹⁷¹ As Lefebvre contended, 'social change is driven by the play of a dialectic between the possible and the impossible'.¹⁷²

Reflecting on this dialectical process of social change, Harvey argues, 'the right to the city is an empty signifier. Everything depends on who gets to fill it with meaning'.¹⁷³ As a result, '[t]he definition of the right is itself an object of struggle, and that struggle has to proceed concomitantly with the struggle to materialise it'.¹⁷⁴ Harvey also asks whether 'pursuit of the right to the city [is] the pursuit of a chimera'.¹⁷⁵ The same could be asked of the commons and the lawful forest. In conclusion, Harvey argues that 'political struggles are animated by visions as much as practicalities'.¹⁷⁶ It is here that the creation of concrete utopias becomes so important to motivating and guiding those engaged in the struggle for social change.

Within the discourse and activism around the right to the city, the practice of occupation and its role in resisting enclosure looms large. Blomley sees this practice in distinctly *propertied* terms, portraying inner city activists resisting the enclosure of the 'urban commons' as defending the collective property claims of the poor in the face of creeping gentrification.¹⁷⁷ Raj Patel describes the neoliberal era as a period of accelerated enclosure that has 'brought our planet to the edge of

166 Ibid 34.

167 Ibid 35.

168 Ibid 35–6.

169 Ibid 133–7.

170 Ibid 135–6, citing Ruth Levitas, 'Educated Hope: Ernst Bloch on Abstract and Concrete Utopia' (1990) 1(2) *Utopian Studies* 13, 15.

171 Bernard Cassen, 'Inventing ATTAC' in Tom Mertes (ed) *A Movement of Movements: Is Another World Really Possible?* (Verso, 2004) 152, 170.

172 Butler, above n 163, 136, citing Henri Lefebvre, *Introduction to Modernity: Twelve Preludes September 1959–May 1961* (John Moore trans, Verso, 1995) 348 [trans of: *Introduction à la modernité* (first published 1962)].

173 Harvey, *Rebel Cities*, above n 6, xv.

174 Ibid.

175 Ibid xvi.

176 Ibid.

177 Nicholas Blomley, 'Enclosure, Common Right and the Property of the Poor' (2008) 17 *Social & Legal Studies* 311, 324.

destruction'.¹⁷⁸ Set against this accelerated process of enclosure have been significant waves of resistance, some of which have managed to pierce the consciousness of people in the Global North. These have included the 1994 Zapatista uprising in Chiapas 'in opposition to the repeal of article 27 of the *Mexican Constitution* that provided for *ejido*, or common lands, attached to each village'.¹⁷⁹ Another prominent wave culminated in the 1999 'battle of Seattle', which challenged the World Trade Organisation's enclosure-based agenda being negotiated at the time.¹⁸⁰ And, finally, just as the alter-globalisation movement, with its world social fora and message that 'another world is possible', seemed to be petering out, the Occupy movement of 2011 rose to prominence.

In 2011, the urban protest camp took centre stage in a series of prominent activist campaigns that both occupied public space and sought to construct an alternative social order from below. These urban protest camps, such as Tahrir Square in Cairo, Puerta de Sol in Madrid, Zuccotti Park in New York, St Paul's Cathedral in London, Martin Place in Sydney and, later, Taksim Square in Istanbul, had their roots in existing practices of urban occupation, including urban squatters, labour activists and student protest movements.¹⁸¹ According to Vasudevan, the link between these disparate protest movements is 'a shared understanding of "occupation" as a political process that *materializes* the social order which it seeks to enact'.¹⁸²

Judith Butler describes the act of occupation as exercising 'the right to have rights, not as natural law or metaphysical stipulation, but as the persistence of the body against those forces that seek to monopolize legitimacy'.¹⁸³ These pre-figurative actions can be characterised as an attempt to enact 'other ways of thinking about and inhabiting the city'.¹⁸⁴ In this way, the daily moments of occupation – the camp kitchens, yoga classes, and libraries, the consensus-based social organisation – sought to establish utopian 'laboratories of the politics of the commons'.¹⁸⁵ Mitchell likens this political act of occupation to the rhetorical device of *occupatio* – 'an insistence on being heard ... a demand that the public be allowed to gather and remain in a public space'.¹⁸⁶

But, reflecting the dialectical process discussed above, the history of occupation is also a history of legal response. As Mitchell acknowledges, this demand to gather and remain on public space is shaped by, and made with, the

178 Raj Patel, *The Value of Nothing: How to Reshape Market Society and Redefine Democracy* (Picador, 2009) 172.

179 Linebaugh, 'Enclosures', above n 111, 12.

180 Paul Reynolds, 'Eyewitness: The Battle of Seattle', *BBC News* (online), 2 December 1999 <<http://news.bbc.co.uk/2/hi/547581.stm>>.

181 Vasudevan, above n 155, 331.

182 *Ibid* (emphasis in original).

183 Judith Butler, *Bodies in Alliance and the Politics of the Street* (September 2011) European Institute for Progressive Cultural Policies <<http://eipc.net/transversal/1011/butler/en>>, quoted in Vasudevan, above n 155, 323.

184 Vasudevan, above n 155, 330.

185 Anna Feigenbaum, Fabian Frenzel and Patrick McCurdy, *Protest Camps* (Zed Books, 2013) 233, quoted in Vasudevan, above n 155, 332.

186 W J T Mitchell, 'Image, Space, Revolution: The Arts of Occupation' (2012) 39 *Critical Inquiry* 8, 10, quoted in Vasudevan, above n 155, 322.

knowledge of the risk of state eviction.¹⁸⁷ Similarly, Butler argues that this right to have rights ‘is being actively contested and destroyed by the force of the state’¹⁸⁸ – as it was under the *Protesters Act* challenged in *Brown*. Set against this risk, occupation is a daily act of resistance, of co-producing autonomous social spaces and of bringing into being simultaneously concrete and abstract utopias. Even when these occupations are successfully evicted, they serve as a model for alternative social orders and help to animate the ongoing struggle that brings them to life.

VII THE COLONIAL FOREST

Other commoners *wandering out of their knowledge* found themselves not in the city, but flung to the far corners of the British globe. As the imperial state expanded, the same tactics of enclosure were applied throughout the Empire.¹⁸⁹ However, outside the metropolis, these tactics were employed not against the landless rural poor, but against so-called ‘landless’ indigene.¹⁹⁰ In the Australian colonial context, Andrew Buck acknowledges the cruel paradox that saw ‘entire peoples, both Aboriginal in Australia and peasant in England, dispossessed at law’.¹⁹¹ Overlapping in time, but not place, these waves of dispossession saw hegemonic conceptions of property supplant pre-existing pluralities, such that ‘market-oriented notions of property ... displaced alternative notions that supported customary and communal property rights’.¹⁹²

These new ‘settlers’, some being displaced commoners themselves, occupied what Maddison calls ‘a highly contradictory position – eradicating one commoning system while establishing another.’¹⁹³ More significantly, participants in the wider colonial dispossession project sought to erase Indigenous ownerships via private freehold grant. Blomley identifies one such latter participant, the fictitious ex-convict William Thornhill, from Kate Grenville’s novel *The Secret River*, who ‘took possession of a piece of land through an almost alchemical act’.¹⁹⁴

In the centre of the clearing he dragged his heel across the dirt four times, line to line. The straight lines and the square they made were like nothing else there and changed everything. Now there was a place where a man had laid his mark over the face of the land. It was astonishing how little it took to own a piece of the earth.¹⁹⁵

187 Ibid.

188 Vasudevan, above n 155, 323, citing Judith Butler, *Bodies in Alliance and the Politics of the Street* (September 2011) Transversal <<https://transversal.at/transversal/1011/butler/en>>.

189 McDonagh and Griffin, above n 103, 2.

190 A R Buck, *The Making of Australian Property Law* (Federation Press, 2006) 24.

191 Ibid 14.

192 Ibid.

193 Maddison, above n 103, 44.

194 Nicholas Blomley, ‘Cuts, Flows, and the Geographies of Property’ (2010) 7 *Law, Culture and the Humanities* 203.

195 Kate Grenville, *The Secret River* (Canongate, 2005) 138, quoted in *ibid* 204.

Thornhill's alchemical act piles yet another contradiction on other colonial contradictions – the early settler's almost universal preference for private over communal forms of land title.¹⁹⁶

Why was it ... that settlers with experience of communal ideas of property in their country of origin shed those ideas ... Why was it that settlers with recent experience of customary based land systems, as had existed in the Scottish highlands before and during the clearances, or in the English countryside before and during the parliamentary enclosures of the late 18th and early 19th centuries ... so readily embraced a commodity concept of property in new lands?¹⁹⁷

The answer to this question is both prosaic, and not. Legal historian John McLaren attributes the embrace of freehold to an 'historical amnesia' scorched into collective memory, a numbness inflicted by the pain of loss of common lands that was relieved by the secure private title on offer.¹⁹⁸ And, of course, freehold tenure was promoted by colonial authorities to efficiently 'settle' a colony's vast 'wastelands'.¹⁹⁹ All this coincided with the perfect storm of global capitalism, and its attendant liberal notions that 'hardened and concretised the notion of property in land and the reification of usages into properties which could be rented, sold or willed'.²⁰⁰ The law was reinforced by enclosure's pervasive rhetoric, language that talked of improvement versus waste, and transformed common rights such as gleaning into mere 'practices' condemned for their 'universal promiscuity' and perceptions of 'vagrancy'.²⁰¹

Such contradictions emphasise that the creation of new property rights atop pre-existing ones, is never without consequence in the colonial forest. In the case of common rights, the dynamics of the insider/outsider dilemma (inherent to the commons model) fundamentally shift and re-align. For example, although the egalitarian and universalist language of the Diggers was used by working class settlers in late 19th century Australia to resist private enclosure and protect access to local 'commons', especially in rural areas, Indigenous people were overwhelmingly excluded from this Utopian vision.²⁰² In the case of private rights, William Thornhill's rough-hewn act of dominion, the dragging of his heel four times across cleared dirt, enclosed and evicted Indigenous ownerships, and ended in violence. As Maddison submits, the colonial challenge is not to dismiss the ongoing relevance of the commons, but to underline the importance of continuing

196 Enid Campbell, 'Rights of Common in New South Wales: A History' (2007) 11 *Legal History* 243, 246.

197 Buck, above n 190, 17.

198 John McLaren, 'The Canadian Doukhobors and the Land Question: Religious Communalists in a Fee-Simple World' in A R Buck, John McLaren and Nancy E Wright (eds), *Land and Freedom: Law, Property Rights and the British Diaspora* (Routledge, 2001) 135.

199 John Page, *Property Diversity and its Implications* (Routledge, 2017) 15–16. This policy was legislated by rewarding 'productive' settlers with grants of land: see the *Crown Lands Alienation Act 1861* (NSW) ('Robertson Land Act'), or the *Homestead Act*, ch 75, 12 Stat 392 (1862) in the US, discussed in John Page, *Property Diversity and its Implications*, above n 199, 16–17; or sanctioned (reactively) by legitimising the 'land grabs' of squatters who had forged new Lockean-like property relations to suit their context and their theft: see Graham, above n 8, 114–23; Eduardo M Peñalver and Sonia Katyal, *Property Outlaws: How Squatters, Pirates and Protesters Improve the Law of Ownership* (Yale University Press, 2010), 55–6.

200 Buck, above n 190, 24, citing English legal historian E P Thompson.

201 *Steel v Houghton* (1788) 126 ER 32, 33 (Lord Loughborough), 38 (Wilson J).

202 Maddison, above n 103, 38–43.

to expand the idea, and appropriately adapting it to the local context.²⁰³ In so doing, this insider/outsider dilemma must acknowledge the brutal reality that on stolen lands, ancient insiders became outsiders on their Country. As Irene Watson observes in relation to the possibilities of remedying colonial breaches of Indigenous laws, such an expansive readaptation of the colonial commons might ‘open a space for us to begin again to consider [new] possibilities ... inclusive of all peoples, where the will and power of peoples can override the current exclusionary powers of states’.²⁰⁴

Not only is the colonial forest awash with contradictions, but also it is remarkable (albeit mostly unremarked) for the tenacity of its customary public rights. Like its English parent, the pan-colonial forest is not homogenous, carrying in its transplanted crevices and margins the eclectic seeds of its customary past. As observed in Part V, the durability of custom recognised it as a key source or foundation of law in England. In the United States, Eric Freyfogle writes of the legal polyglot imported into the New England states, ‘the legal ideas, and land-use ... practices that people brought with them across the Atlantic’.²⁰⁵ Thus, ‘as a form of customary practice, local residents ... used unenclosed rural lands for open grazing, hunting, fishing, and collecting firewood and berries, in ways understood as common practice in their “home country”’.²⁰⁶ David Bederman likewise observes of custom in US law, and its almost festive relationship with property:

Custom’s bright and cheery demeanor has been forcefully espoused by many legal writers. And one would have to be a ... boor to not feel some favor for a doctrine that allows the rustic villagers to dance around the Maypole on the manor lawn, that permits hardy fishermen to dry their nets on the shore ... [or] the right to take a midnight stroll on a windswept beach.²⁰⁷

Bederman refers to Carol Rose in the first instance; the prodigious jurist who argues that custom is as feasible a justification for public rights in land as so-called ‘strong’ orthodox bases such as the public trust doctrine or prescription.²⁰⁸ In the last instance, Bederman writes of the customary right of public access along the entire length of Oregon’s dry sand beaches,²⁰⁹ a right likewise recognised by the state’s Supreme Court in *State ex rel Thornton v Hay*.²¹⁰ *Hay* invoked custom to justify a statewide public right, described as a ‘public recreational customary easement’.²¹¹ The Court’s evidence included the use of dry-sands by ‘aboriginal inhabitants ... for clam-digging and ... cooking fires’, a custom continued by newcomers after statehood.²¹² This custom carried with it a public expectation where:

203 Ibid 43–4.

204 Watson, above n 17, 145.

205 Eric Freyfogle, *On Private Property: Finding Common Ground on the Ownership of Land* (Beacon Press, 2007) 53.

206 Page, above n 199, 74.

207 Bederman, above n 110, 1381–2 (citations omitted).

208 Carol Rose, ‘The Comedy of the Commons: Custom, Commerce, and Inherently Public Property’ (1986) 53 *University of Chicago Law Review* 711, 714, 722.

209 Bederman, above n 110, 1380.

210 462 P 2d 671 (Or, 1969) (*‘Hay’*).

211 Bederman, above n 110, 1419.

212 *Hay*, 462 P 2d 671, 673 (Or, 1969) (Goodwin J).

the dry-sand area was a part of the public beach, and the public has used the dry-sand area for picnics, gathering wood, building warming fires, and generally as a headquarters from which to supervise children or to range over the foreshore as the tides advance and recede.²¹³

Beyond the geographic limitations of the Oregon Pacific coastline, public rights of access to the US federal forest estate bear striking similarities to the Australian High Court's 'public forest estate' in *Brown*. In *United States v Curtis-Nevada Mines Inc*,²¹⁴ the Ninth Circuit held that all citizens automatically qualify as recreational licensees on federal lands despite having no actual permission for access. Of course, different colonial contexts yield diversely different colonial forests, such that the American forest is not the Australian. Yet the customary origins of the parent 'seed' highlight shared commonalities.

Whether in the parent metropolis or post-colonial setting, the right to the forest resonates to a background thunder of custom. Why this is so is not easily explained, and not always rationally. There is a mystique about the forest and its constituent trees. As this article nears its journey's end, Part VIII seeks to articulate a theory of the forest to explain the relationship between the material and the abstract, and how attachment to place and acts of belonging bridge the two. In particular, it considers the implications of this relationship for the re-imagining of property theory.

VIII THEORY OF THE FOREST

There is a well-known aphorism that decries our inability to see the forest for the trees, a rebuke for the failure to see the big picture amidst the minutiae. Part VIII explores ways of *seeing* the forest anew, briefly observing its 'big picture' cultural, social and legal symbolisms. In particular, Part VIII examines how such reconceptualisations may inform property theory, reflecting a shift from an orthodox view of property as a series of abstract, 'dephysicalised' relations between persons about things,²¹⁵ to an institution reflective of its context. Seeing property anew is to see the forest anew, indeed as it subsists ecologically – as a relational, inter-connected whole, rather than an atomistic collection of its parts.

Davies writes of the death of an iconic river red gum in suburban Adelaide in *The Consciousness of Trees*.²¹⁶ Underlining that all law is local, Davies uses the doomed struggle to save the tree (transformed into a shopping mall's centrepiece) as a device to interpret the cultural, social and legal symbolism of this 'phenomenal tree', and by implication, the forest.²¹⁷

[T]rees are symbolically overloaded. Trees have many sacred meanings, they represent life and regeneration, they can have national and ethno-cultural meanings, they are the focal point for rituals, and of nostalgia. ... In the Australian context the eucalyptus and in particular the red gum are central to both Aboriginal and colonial

213 Ibid.

214 611 F 2d 1277 (9th Cir, 1980).

215 See, eg, the 'paradigm of placelessness': Graham, above n 8, 5–8.

216 Davies, 'The Consciousness of Trees', above n 18, 217–18.

217 Ibid.

tree lore. For non-Indigenous culture, a wide spectrum of ideas about trees and forests as dangerous, magical, nurturing, or as economic resources, have been developed ...²¹⁸

Davies likewise observes the cultural dualities that trees and forests provoke, ‘familiar Western distinctions between urban and rural, culture and nature, the human and the non-human’.²¹⁹ The latter in particular, has legal consequence, recasting the fluid roles of subject and object that predetermine propertied relations between things and their owners. Traditional Hohfeldian analysis would see the tree as an object of propertied relations between persons, a thing (or an ‘it’) peripheral to the property equation.²²⁰ Classified as a fixture attached to an abstract feudal estate, the tree is lost to the forest, and the forest to the tree.

However, such artifice does not neatly correspond to lived experience, an acknowledgment of the rise of what Davies calls ‘the highly dynamic and contingent view of property held by many contemporary property theorists’.²²¹ Rather than external objects, trees (and forests) are capable of being seen as inalienable components of the social landscape, objects with a social identity ‘interpreted and juridified by human intervention’.²²² As ‘an integral part of both our survivability and our sociality’,²²³ this change in perspective enables trees to ‘[achieve] a kind of subjectivity’ as things ‘entangled’ in human communities, a complex entanglement that shifts our understanding of the forest and its trees from an ‘it’ to an increasingly subjectified ‘you’.²²⁴

[The tree] has participated in human history. ... It has become an actor in human space and human society. Its tree qualities are therefore not only biological and ecological – the tree also assumes the symbolisms and stories, including the legal stories, of human society. ... It is a phenomenon constituted by human intentionality, and is even potentially a ‘you’ if drawn into a reciprocal relationship with a person.²²⁵

The Norman legal forest, a juridical enclave excised from customary law, was clearly a detached ‘it’, an object of royal privilege. By contrast, the *Forest Charter of 1217* restored the forest to its relational surroundings, such that the forest became an ‘actor’ amidst ‘human space’, a shared resource for food, shelter and sociable sustenance. While not a ‘you’, the lawful forest shifted somewhat along the spectrum, as a ‘phenomenon constituted by human intentionality’.²²⁶

The paradigm shift that propels socialised objects towards greater property consequence logically ends at Christopher Stone’s famous prediction of the legal standing of trees, in effect as subjects in a propertied relationship.²²⁷ In New Zealand (Aotearoa), the former Urewera National Park was de-gazetted in 2014 in

218 Ibid 219.

219 Ibid 220.

220 Hohfeld, above n 121, 21–2.

221 Davies, ‘The Consciousness of Trees’, above n 18, 222.

222 Ibid.

223 Ibid 229.

224 Ibid 228–30.

225 Ibid 229–30.

226 Ibid 230.

227 Christopher Stone, ‘Should Trees have Standing? – Towards Legal Rights for Natural Objects’ (1972) 45 *Southern California Law Review* 450.

an apparent affirmation of Stone's prophecy, with title to the forest vested in the forest.²²⁸ As section 3 of the organic Act explains, 'Te Urewera is ancient and enduring, a fortress of nature, alive with history; its scenery ... abundant with mystery, adventure, and remote beauty ... treasured by all for the distinctive natural values of its vast and rugged primeval forest'.²²⁹ The ontological shift exemplified by Te Urewera again demonstrates the possibilities of both expanding and appropriately adapting the lawful forest (or commons) to specific colonial contexts.

From the ponderings around a dying eucalypt in Adelaide, to the vesting of Te Urewera's title in itself, property's abstract, detached simplicities belie the powerful symbolism of the forest. Symbols speak to identity and relation to place, they interpellate. Property scholars such as Davina Cooper and Sarah Keenan,²³⁰ amongst others, appeal similarly to symbolic attachment to place through the 'property as belonging' lens. This school of thought describes *belonging* as a 'relationship of proximity, attachment, or connection ... [a] notion of proper or rightful place', which is 'central to the formation and assumption of property relationships'.²³¹

Belonging intersects with this tale of the lawful forest in several key respects. First, it is an attachment-based understanding of property, a relational doctrine that derives content and legitimacy from context, like the Tasmanian forests in *Brown*. Hence, grounded norms of inclusion better explain the legal landscape than arbitrary black-letter rules of exclusion. Cooper uses the example of Summerhill School in Suffolk, described on its website as '[t]he original alternative "free" school' or 'the oldest children's democracy in the world',²³² as a propertied place that only makes sense to outsiders if 'the black box of unofficial property' is opened up.²³³ While exclusionary rules may 'depict things and spaces', it is inclusion that 'represents the space as property, in the sense of being constitutive of community life'.²³⁴ Indeed, '[a]pproaching property at Summerhill in conventional terms would give us ... a disappointingly thin picture of school life, missing much that is innovative and effective about the school's practice'.²³⁵ Likewise, approaching the forest in *Brown* from conventional legal artifice, the legal nonsense of 'business access areas' absent its protest-laden history, correspondingly delivered a disappointingly thin picture of the forest, one the High Court rejected.

228 *Te Urewera Act 2014* (NZ) s 4.

229 *Te Urewera Act 2014* (NZ) ss 3(1), (8); see also Jacinta Ruru, 'Tūhoe-Crown Settlement – *Te Urewera Act 2014*' [2014] (9) *Maori Law Review* 16.

230 See Cooper, *Everyday Utopias*, below n 231; Keenan, below n 247.

231 Davina Cooper, *Everyday Utopias: The Conceptual Life of Promising Spaces* (Duke University Press, 2014) 161, 163.

232 Summerhill School, *A S Neill's Summerhill School* <www.summerhillschool.co.uk>.

233 Davina Cooper, 'Opening up Ownership: Community Belonging, Belongings, and the Productive Life of Property' (2007) 32 *Law & Social Inquiry* 625, 659.

234 *Ibid* 642.

235 Cooper, *Everyday Utopias*, above n 231, 161.

Second, *belonging* underscores the richness of the *other* in law, particularly property, and the concomitant need to ‘leave room for otherness, for difference’.²³⁶ Cooper’s ‘black box of unofficial property’ proved instrumental as a treasure trove of the marginal and eclectic, part of the vast storehouse of diverse property.²³⁷ The right to the forest is no doubt beyond property’s central logic,²³⁸ existing in property’s margins. Yet central logic can be limiting and unimaginative, a mindset that is conformist, unreflective and narrow.²³⁹ Conversely, an eclectic perspective has a doctrinal counter-logic, one redolent of the nature of forest rights.

[I]t will tend to look for the paradox and the contradiction rather than for broad theory and grand narrative, for diversity rather than uniformity, for dissent rather than consensus, for conflict and chaos rather than consent and order.²⁴⁰

Third, *belonging* is Utopian in its ethos; a rich intellectual vein already explored, a common thread joining the struggle for the lawful forest to the very beginnings of Utopian thought. Cooper says any interpretation of property outside its private, land as commodity orthodoxy, is utopian in its premise.²⁴¹ Using several ‘everyday utopias’ as case studies, Cooper argues that utopias ‘emphasize the importance of “society imagined otherwise, rather than merely society imagined”’.²⁴² Utopian property models encourage us to ‘think differently’, such that the re-imagination of property as a way of belonging ‘contribute[s] productively to a transformative politics’.²⁴³

Of course, belonging implies that others may *not* belong, notwithstanding its best intentions. Cooper cautions that ‘property as belonging seems preferable to property as exclusion ... [y]et property as belonging is still premised on relations of nonbelonging as well as on the capacity of recognized relationships ... to express the interests of some (rather than others)’.²⁴⁴ In the 17th century, local commoners seized on the Diggers’ perceived non-belonging to eject them from their ‘birthright’ lands,²⁴⁵ one darker episode in an ongoing tension between bounded versus universalised notions of *who belongs*. A similar eviction occurred in colonial Australia, as newly arrived commoners asserted claims to property based on the fiction of terra nullius, seeking to erase existing Indigenous systems of belonging.²⁴⁶ Non-belonging illustrates that the dichotomy between the

236 A J van der Walt, ‘Property and Marginality’ in Gregory S Alexander and Eduardo M Peñalver (eds), *Property and Community* (Oxford University Press, 2010) 81, 104.

237 Cooper, ‘Opening up Ownership’, above n 233, 659; Hanoch Dagan, *Property: Values and Institutions* (Oxford University Press, 2011); Amnon Lehavi, *The Construction of Property: Norms, Institutions, Challenges* (Cambridge University Press, 2013) 50–1.

238 Van der Walt, above n 236.

239 Ibid 81–5.

240 Ibid 100.

241 ‘[U]nderstanding property not through private ownership but through squatting, common or public lands’ is utopian: Cooper, *Everyday Utopias*, above n 231, 32.

242 Ibid 33, quoting Ruth Levitas, ‘The Imaginary Reconstitution of Society, Or, Why Sociologists and Others Should Take Utopia More Seriously’ (Speech delivered at the Inaugural Lecture, University of Bristol, 24 October 2005) 14.

243 Ibid 159–60.

244 Ibid 221 (emphasis altered).

245 McDonagh and Griffin, above n 103, 5–6.

246 Watson, above n 17, 13, 35.

exclusionary legal forest and its lawful other is not clear-cut, that drawing the inevitable line between those who belong, and those who do not, is imprecise and sometimes fraught.

Keenan similarly conceptualises property through this relational prism, as ‘a spatially contingent relation of *belonging*’.²⁴⁷ Her theories are likewise intimately contextual: ‘property can be usefully understood as a relationship ... held up by space. So property is not a permanent relationship, but rather something that occurs when a subject becomes embedded in particular spaces’.²⁴⁸ Such a contextualised view stands in stark contrast to the a-contextual orthodoxy, where ‘legal discourse and procedure focus on subjects as if they live lives free from context’.²⁴⁹ Belonging’s strength, compared to ‘exclusion-focused theorisations’, is to bring into focus ‘spatial factors that tend otherwise to be overlooked’.²⁵⁰ Thus, the embedding of protesters in *Brown’s* Tasmanian forests, indeed the embedding of the forest itself, disrupted the law’s erstwhile blank canvas, such that the forested legal space was shaped by the human and non-human bodies embedded in it. As a variant of what Keenan categorises ‘subversive property’, forest rights instilled context and history into the High Court’s thinking, such that stories of protest in public forests were not overlooked in its final decision-making.

To belong in the lawful forest is to be attached to material place, the loci where ‘nearly every aspect of law is located, takes shape, is in motion, or has some spatial frame of reference’.²⁵¹ It is to be enmeshed in Lapoinya’s forests, or Summerhill School, or the ‘camp of tents, outdoor kitchens, free universities and meeting spaces’²⁵² at Occupy St Paul’s. Importantly, it is to be attached to any of the countless other, everyday ‘worlded’²⁵³ places in which we have a sense of rightful or proper place. In so belonging, we must overcome the material *geographies of nowhere* that renders us *lost to our world*. We must equally confront an understanding of property antithetical to anywhere.

In writing of place, Tim Dee remarks that ‘[o]bjects, as it says on North American car mirrors, are closer than they appear. We fail to notice this when mediation is all’.²⁵⁴ Orthodox property mediates between people and place, such that abstraction is all-consuming. Theory ignores that property’s objects *are* closer than they appear. However, to ignore is not to forget. As Dee also observes:

the spirit of a place, the sum of the meeting of people and land, remains of vital importance. ... [P]lace pertains and operates most and best at a local level, and on a scale we still might call human. ... [L]ooking at and growing a feeling for those less dramatic times in our lives when we cross the path of our own community; moments when old ways seem still operative; times when dormant traditions wait

247 Sarah Keenan, *Subversive Property: Law and the Production of Spaces of Belonging* (Routledge, 2015) 6 (emphasis added).

248 Ibid 14. And as they move through, ‘subjects take space with them’: at 16.

249 Ibid 22.

250 Ibid 71.

251 Irus Braverman et al, ‘Introduction: Expanding the Spaces of Law’ in Irus Braverman et al (eds), *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford University Press, 2014) 1, 1.

252 Finchett-Maddock, above n 95, 204.

253 Braverman et al, above n 251, 1.

254 Tim Dee, ‘Introduction’ in Tim Dee (ed) *Ground Work: Writings on Places and People* (Jonathan Cape, 2018) 1, 2.

to be woken; times when our lives mesh with those of others who share the same weather; moments of intense and personal response to familiar corners.²⁵⁵

This yearning for a relational understanding of property and place informs the creative tension at the lawful forest's core, an abstract 'memory of the commons' that periodically awakens dormant traditions,²⁵⁶ that fleetingly *materialises* the idea that property may bind us as much as it excludes. This memory does not fade, since '[p]laces ... remain stubbornly *there*, itchy, palpable, determining'.²⁵⁷ Abstract property's failure to account for our grounded truths also takes shape in alternative ways of seeing property; the embrace of interconnected webs of interests,²⁵⁸ or diverse mosaics of property types.²⁵⁹ More radically, place is seen as outside property, the institution too arcane and narrow to accommodate its worlded-ness. As Lucy and Mitchell argue, to care for place, the notion of instrumentalist stewardship, is antithetical to private property's rights-structure, and is a ground for its replacement.²⁶⁰

Keenan's 'subversive property' also highlights a paradox at the heart of rights embedded in lawful forests: a jurisprudence settled in its antiquity, yet disruptive when stirred.²⁶¹ Disruption takes material form as protest on public lands, a telltale indicator of forest rights that the High Court observed repeatedly in *Brown*. Finchett-Maddock draws the link between what she calls these '*proprietary* right[s] of resistance',²⁶² and the landed inequity that enclosure caused (and causes).

Enclosure ... speaks of the force, representation and hierarchy of individual property rights, and the way law is linked specifically to the land through the imposition and encroachment of the enclosure system from the fifteenth century onwards.²⁶³

This propertied right of resistance is in effect a 'taking back', reclaiming 'previously shared resources ... divided up by private property rights',²⁶⁴ a pattern that runs through 'the common fields of the fifteenth century ... to the abandoned spaces of the twenty-first'.²⁶⁵ There is nothing new in enclosing, and therefore nothing new in protest. Finchett-Maddock's focus is on the inner-urban social centre, an informal group collective that keeps alive the 'memory of the commons'

255 Ibid 12. The discipline of geography has much to say about place. On the one hand it is an '[e]nclosed and humanized space': Yi-Fu Tuan, *Space and Place: The Perspective of Experience* (University of Minnesota Press, 1977) 54. On the other, place is space made distinctive through its connections, the 'constantly evolving networks which are social, cultural and natural ... Places need to be understood through the paths that lead in and out': Tim Cresswell, *Place: A Short Introduction* (Blackwell Publishing, 2004) 43.

256 Finchett-Maddock, above n 95, 160.

257 Dee, above n 254, 7 (emphasis in original).

258 Craig Anthony (Tony) Arnold, 'The Reconstitution of Property: Property as a Web of Interests' (2002) 26 *Harvard Environmental Law Review* 281.

259 Page, above n 199, 96.

260 William N R Lucy and Catherine Mitchell, 'Replacing Private Property: The Case for Stewardship' (1996) 55 *Cambridge Law Journal* 566, 567.

261 Keenan, above n 247.

262 Finchett-Maddock, above n 95, 121 (emphasis altered).

263 Ibid 120.

264 Ibid 121.

265 Ibid 137.

through its ‘archive’ of performances of resistance against the violence of private property.²⁶⁶

The grossest act of private violence is the damage wrought to our earthly commons. Acts of protest, like those in *Brown*, do archive in their performance a ‘memory of a commons’, one characterised by ‘great bodies of law’ premised on values of ‘moderation, proportionality, prudence, and responsibility to the others who are entitled to share in the common resource’.²⁶⁷ The lawful forest is therefore critical for the implications it poses for property’s ‘quest for environmental ethics’.²⁶⁸ Rose argues that such values should influence modern property rhetoric, such that our rights and relationships with land are seen through the prism of a gift rather than a given.²⁶⁹ Sustainability is a natural consequence of the commons values of restraint, not Hardin’s inevitable (evidentially flawed) tragedy. As Nicole Graham observes of the historical record:

The death of the laws and customs of the commoners and the peasant economy was not brought about by any intrinsic failure or inevitable collapse. Contrary to the claims of the improvers (those who stood to benefit from enclosure), the laws and customs of the commoners were neither unproductive nor non-viable.²⁷⁰

The existential threat posed by climate change suggests that we ought to take heed of Linebaugh’s counsel – that ‘we might pay those commoners more mind’.²⁷¹

Part VIII has delved into forested symbols and relational property theory, beginning with a tragic river red gum and ending at existential tragedy, the fragile relationality of the endangered environment we share. As a brief theoretical excursus, Part VIII aspires to belong to what Davies calls ‘prefigurative theory’, thinking that ‘reimagin[es] the world and prefigur[es] the future’.²⁷² The forest is a powerful reminder of the past, carrying within its wooded glades and copses a ‘memory of the commons’. But it is also a symbol of a different future, if one strives to see this relational, utopian-tinged, re-imagined forest for its trees.

IX CONCLUSION

Brown seems an unlikely place to begin and end this tale of the lawful forest and the right to the forest. After all, *Brown* is first and foremost a judgment of constitutional import, an affirmation of the implied freedom of political communication in Australian law – and the significance of *forum*. Counterintuitively, what makes it a *likely* starting place are the subtler counter-narratives it yields. *Brown* casts a thin torchlight into a dialectic tension, an ongoing struggle between a dominant paradigm and its marginalised, insurgent

266 Ibid 160.

267 Carol M Rose, ‘Given-ness and Gift: Property and the Quest for Environmental Ethics’ (1994) 24 *Environmental Law* 1, 27.

268 Ibid.

269 Ibid.

270 Graham, above n 8, 54.

271 Linebaugh, ‘Enclosures’, above n 111, 19.

272 Davies, ‘Material Subjects and Vital Objects’, above n 20, 38–9.

other. The counter-narrative in *Brown* is told through the prism of ancient rights to the public forest estate, entitlements of visitation enjoyed by *all good and lawful men*. In *Brown*, its chief actors performed a story of rich historical provenance, of protest and resistance to the modern-day *evil customs of the forest*.

Brown is also significant because of its context, its setting amongst the wild and magnificent trees of Tasmania. In *Brown*, the contested forest was physicalised and its survival was threatened. However, as the Norman legal forest showed, forests have never been just about the trees. The forest is deeply symbolic and metaphoric, a representation of a yearned-for relational understanding of people, place and the law. As this article argues, the original struggle against the *evil customs of the forest* is in truth an ongoing historical continuum, from the early 11th century enclosures of rural commons to the Occupy movement. These struggles are ceaseless performances of *taking back*, of resistance to a dominant narrative which is totalising and universalising in its private appropriation, and unidirectional in its enclosing.

And lastly, *Brown* is significant for its apparent insignificance, the subsidiarity of the ancient narratives that fly beneath the legal radar. This is the lesson of lawful forest rights – the subliminal, easy to overlook context of a High Court judgment, the near-forgotten yet incredibly resilient *Forest Charter of 1217*, the marginalised yet not forgotten struggles of the Diggers and their fellow commons travellers, the ‘a-legalness’ of rights to the city, Cooper’s ‘unofficial black box’ of everyday utopias, and so on. This ‘insignificance’ takes shape as an endless contest between *legal* and *lawful forests*, between the dominant narrative, and its subversive other. Here, although the concrete utopias that were brought into being by the Diggers, the Paris Commune, the Occupy movement and others may have been fleeting and seemingly insignificant, they all served to challenge the hegemonic power of the legal forest. As in *Brown*, these movements sought to resist the forces of enclosure and to assert the public’s common rights of access. In *Brown*, the purported *legal* sought to close the forest to the public. The *lawful* succeeded in resisting its too-vague propensities to enclose, upholding customary public rights through which protesters protected the forest.

The right to the forest embodies ancient laws that enact, re-create, and remember what Finchett-Maddock calls the ‘memory of the commons’.²⁷³ Like the commons, the idea of the lawful forest is a rich, at times, overloaded idea. The lawful forest may be an endangered old-growth coupe of eucalypts, or the grounds of London’s St Paul’s Cathedral. In the former, the right to the forest lies dormant yet ready to spring to life. In the latter, the right to the city is its modern-day manifestation – a right not just to place but to collective power – seized from below. The right’s adaptation from the forest to the city is measured in this article across time and place, from the disafforestation of the Norman legal forest to the Occupy camps at St Paul’s, and elsewhere. Indeed, the lawful forest, and the rights that enact it, subsist in both physical and metaphysical form. The former is a grounded place, the latter, a compelling, truly Utopian idea that has endured across centuries and resiliently adapts to context. Its common thread is an urge to resist

273 Finchett-Maddock, above n 95, 160.

enclosure's overreaches, an instinct that perseveres in its striving for spatial and environmental justice for the many, not the few. This is the ancient tale of the lawful forest.