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Rethinking “New Property” in the Irish Courts

Charles Reich coined the term “new property” in discussing the constitutional status of economic interests created through regulatory and welfare regimes in the U.S. In his seminal article, “The New Property” (73 Yale L.J. 733, 1964), Reich argued that constitutional protection should extend to individual interests in government-created wealth, such as licences, pensions and welfare benefits. In an age of pervasive dependency on the State, Reich argued that individual liberty depended on the existence of a level of security over such interests, enforced by the courts through judicial review. “New property” has become an equally familiar feature of Irish life as the scope of the regulatory state has grown dramatically. The Irish courts have considered the constitutional status of a variety of valuable interests created by regulatory and welfare schemes, such as licences, quota allocations and pension benefits. However, the judicial treatment of “new property” has been *ad hoc* and sometimes inconsistent. The courts have treated some individual interests in government-created wealth as property rights, whilst others have been excluded from the constitutional conception of property.

In this paper, I consider the merits of Reich’s argument in favour of constitutional protection for “new property” in the Irish context. First, I outline the major aspects of Reich’s argument. Second, I suggest that in light of Reich’s argument, the Irish courts should perhaps be more consistent in adopting a broad constitutional conception of property. When interpreting the Constitution, courts should include “new property” within the definition of property in Articles 40.3.2° and 43. Finally, I examine the scope of the State’s power to impose restrictions on “new property” interests in the Irish constitutional context. I suggest that given the extensive nature of this power, courts will not prevent the legislature from making necessary adjustments to regulatory and welfare systems by extending constitutional protection to “new property”. They will simply require the State to justify any infringements that it is shown to impose on individual rights in respect of “new property” by reference to the common good and the “principles of social justice”. This will ensure that that the right to private property can continue to perform its function of securing a sphere of individual liberty

and independence in a society where wealth comes in an ever-increasing variety of new forms.