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Regulatory Capture in Product Markets and the Power of Business Interests

Abstract

This article explains pervasive regulatory failure, lagging productivity, and the corporate capture of policy and policymakers as possibly unintended, but not unpredictable, outcomes of the New Zealand Treasury's radical adoption during the 1980s of public choice and Chicago school doctrines. With deregulation and a limited role of government written into statutes and embodied in regulatory practice, the pathologies identified and described by Buchanan, Tullock, Stigler and their collaborators became more, rather than less, prevalent in the New Zealand regulatory landscape. Privatisation opened the way for looting; the Commerce Act and new regulatory guidelines enabled rather than blocked anti-competitive practices and monopolistic rent-taking; relaxed oversight meant that foreign direct investment became more extractive and less productive. From relatively inclusive politics and strong regulatory enforcement, New Zealand shifted towards more extractive institutions and weaker regulation. As a result, market power is exercised by the current business and financial elite in ways that have worsened wealth and income distributions, imposed deadweight burdens (both static and dynamic) on the economy, and now confront policymakers with roadblocks to achieving more inclusive institutions and pursuing a 'wellbeing' agenda.

Keywords regulation, market power, public choice theory, capture, looting, institutions

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> We shouldn't put people in charge of government who don't believe in government. They fail us every time.
>
> (quoted in Caputo, 2021)

In a recent article in this journal (Bertram, 2020b) I commented on the inadequacy of the Commerce Act 1986 as a check on abuses of market power – both monopolistic pricing and anti-competitive conduct. The problem of regulatory failure in New Zealand since 1984 is, however, much wider than just that one Act of Parliament. As one *Spinoff* commentary put it in relation to heavy vehicle tow bar certification and damage from forestry slash during floods, 'if I read one more story about regulatory failure my head is going to explode' (Stevenson, 2018). From Pike River to electricity prices, from the ineffective emissions trading scheme to agriculture industry-driven subversion of efforts at fresh water regulation, from fishing industry refusal to install cameras on vessels to failure to ensure workplace health and safety (while wrapping small businesses up in red tape, much of it misdirected), there is widespread public unease at the apparent inability of successive New Zealand governments to regulate effectively. Successive Parliaments have been unwilling to fix the legislative provisions that empower deep-pocketed corporate lobbies.

Many of those provisions had their origins overseas. Writing in the 1960s, Buchanan and Tullock (1962) and Olson (1965) emphasised the divergence between an idealised conception of 'the public interest' on the one hand and, on the other, the special interests of small groups within society pursuing their self-interested ends through the political processes of lobbying and capture of institutions. Subsequently, Krueger (1974) and Buchanan, Tollison and Tullock (1980) consolidated the notion of a 'rent-seeking society' as one in which the capture of special privileges and favours by particular groups created a massive waste of resources. Post-1984 in New Zealand, this rent-seeking model was enthusiastically adopted by senior public officials, and underpinned the radically transformative policies of the fourth Labour government. The neo-liberal case for those changes was spelled out in detail by the New Zealand Treasury (Treasury, 1984, 1987) in documents that not only set the course for radical policies in the short run, but continue to resonate in mainstream political discourse three decades on.

Over the decades since the neo-liberal experiment kicked off, its downsides have become apparent through a series of well-documented failures, which have had surprisingly little effect in shifting the general orientation of policy.

In the case of the state, the central changes were a rolling back of regulatory interventions of all sorts, a culture of deference to the supposedly superior qualities of the market, and a new public management model that separated 'policy advice' from operational delivery of services with the aim of reducing or eliminating the 'capture' of government resources by self-interested groups enriching themselves at the expense of the general public. Removal of 'burdensome' regulation was predicted to unleash private initiative and productivity, while the forces of competition would look after the public interest by curbing predatory exercise of market power and aligning business incentives with the interests of consumers.

In the case of the business environment, policy innovations included the elimination of direct regulation of prices and anti-competitive conduct, the privatisation of a swathe of public entities, many of which were monopolies in their respective markets, the suppression of the traditional role of the courts in providing common-law protection for the weak against the strong, a loosening of checks on foreign direct investment, a frontal assault on unions and wage awards in the name of 'labour market flexibility', and a radical shift to a less generous welfare state motivated largely by the argument that welfare benefits were a disincentive to work.

Over the decades since the neo-liberal experiment kicked off, its downsides have become apparent through a series of well-documented failures, which have had surprisingly little effect in shifting the general orientation of policy. The imperviousness of this country's policy elite both to evidence of policy failures, and to suggestions for a reorientation, is one of the issues to which the present article is addressed. Even in 2021 the neo-liberal mindset continues to hold sway over policy discourse within the state apparatus, while the corporate and financial business elite maintains a strong, and largely successful, lobbying effort in defence of its gains secured under deregulation. For old-fashioned Marxists who view the state as the committee of a predatory bourgeoisie – for whom, in other words, regulatory and policy capture is the norm – this is no surprise. For social democrats committed to a more positive vision of the nature and role of the state, it is both challenge and puzzle.

One possible answer to the puzzle is the familiar neo-liberal slogan 'there is no alternative'. A second possibility is that New Zealand now occupies the best of all possible world: that all alternatives are inferior to the status quo and that the ascendancy of neo-liberalism has been justified in retrospect by its performance in practice. A third, and I shall argue the most persuasive, is that the political and economic arenas have been 'captured' along the lines described by the (mostly right-wing) authors of public choice theory and the Chicago-school critique of regulation – precisely the doctrines on which the New Zealand Treasury built and implemented its transformational agenda.

Public choice and Chicago

Two pillars of that literature were the 'Virginia public choice' school epitomised by Olson (1965), Buchanan and Tullock (1962), Buchanan et al. (1980), Coase (1960) and Tullock (1967, 1975), and the 'Chicago school' of antitrust thinking derived from writers such as Stigler (1971), Bork (1978) and Posner (1978). (For a critique of the Chicago school by legal scholars see Hovenkamp and Morton, 2020 and Khan, 2018. For a strong economics critique see Glick and Lozada, 2021). Those writers were sceptical of collective conceptions of society, and of moral sentiments as motivators of human conduct. Their perspective was individualistic, and the human agents in their models were motivated by economic incentives. Adam Smith's bleak observation that 'people of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices' pretty much sums up the perspective.

This, too, was a central message of *Government Management* (Treasury, 1987, vol.1): since the institutions of government have the power to confer benefits upon particular groups, and those groups are comprised of self-interested individuals interested purely in self-enrichment, it follows that those groups have an incentive to 'capture' government-granted privileges for themselves, and that such 'rent-seeking behaviour' can be prevented only by closing down channels of 'capture' and forcing all parties to engage in competitive, productive activity in a free market setting.

Stigler claimed that 'as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit' (Stigler, 1971, p.3). He viewed regulation as a marketable commodity to be purchased by the highest bidder through the capture of political parties. And his conclusion offered the Treasury officials of 1984 and 1987 a clear legitimating mandate: 'economists should quickly establish the license to practice on the rational theory of political behavior' (ibid., p.18).

That suggestion – that economists (at least, ones with free market inclinations) were somehow the only people who possessed a clear vision of the public good – runs through the public choice and Chicago school literature, and provided the platform from which the New Zealand Treasury preached in 1984 and 1987. But why economists, alone among professional groupings, should somehow be immune to the self-aggrandising tactics of which all other professions stood accused, was never clear.

Regulatory capture is defined as follows:

> a corruption of authority that occurs when a political entity, policymaker, or regulatory agency is co-opted to serve the commercial, ideological, or political interests of a minor constituency, such as a particular geographic area, industry, profession, or ideological group. When regulatory capture occurs, a special interest is prioritized over the general interests of the public, leading to a net loss for society. (Wikipedia, 2021a)

It can be argued that Treasury's role in the neo-liberal policy upheaval was perhaps the clearest example in New Zealand history of precisely such a capture process. Treasury's frontal assault on the integrity of other professional groups – teachers, health professionals, engineers, lawyers, and bureaucrats in other agencies – not only coarsened the tone of political discourse but led to a stripping-out of professional expertise from key parts of the public sector, all in the name of protecting the public from predation. In addition, the separation of policy from operational responsibilities – the 'funder–provider split' – which was designed to block capture, became in practice a block to good professional practice by providers of publicly funded services, and the source of an active process of capture of state resources by opportunistic agents alert to loopholes in public–private contracting (on which cf Hart, 2017).

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Two other key elements of the public choice canon catch the eye when reviewing New Zealand's recent experience. First is the argument in Tullock (1967) that predatory transfers of wealth within society, whether achieved by rent-seekers through tariffs and regulations, or by straightforward theft, have consequences for the general welfare that go far beyond the comparative static welfare losses. Tullock focused on the dynamic welfare losses caused both by the attempts of citizens to protect themselves against predation, and by the disincentive effects of being threatened with predation (or actually predated).

The second public choice proposition, from Tullock (1975), is that once capture has occurred and the first generation of predators have taken their ill-gotten gains and moved on, their successors will be left holding assets for which they have paid the capitalised value of the rents gained by capture or predation. The result is that predation is locked in and difficult to reverse, because of losses that would have to be borne by the successor group, who bear no responsibility for the capture but have committed their wealth to the post-capture industry.

The record of neo-liberalism in action

The neo-liberal revolution staked everything on the proposition that the reforms would raise economic efficiency and that the severe social pain inflicted would be short-lived. The outcomes after three decades, measured by productivity and distribution, point in the opposite direction (StatsNZ, 2021; Nolan, Pomeroy and Zhengh, 2019; Rashbrooke, 2018; Rosenberg, 2017; Easton, 2020, ch.50). Productivity has lagged and the sharp, policy-driven increases in income inequality of the early 1990s have become entrenched rather than alleviated with passing decades. The New Zealand Productivity Commission – a body originally set up in 2012 to defend and advance the deregulatory agenda (Kelsey, 2015, pp.148–9) – for a long time attempted to portray as a 'paradox' or 'puzzle' the failure of the reforms to spark more rapid productivity growth. More recently, in trying to move beyond that position, the commission produced a list of potential explanations for poor productivity (Nolan, Fraser and Conway, 2018, p.8; Nolan, Pomeroy and Zhengh, 2019, Table 1, p.5) that conspicuously omitted the possibility that the policy revolution of the 1980s and 1990s might have been actively damaging to economic performance at the same time as it shredded large parts of the social fabric.

There is space here only for a quick review of a few of the most glaring problems that have emerged in New Zealand since 1984. There is, however, an extensive literature meticulously documenting the detail – notably Easton (1997, part VI, 2020, part V), Kelsey (1995, 1999, 2015), Jesson (1987, 1999, 2005), along with the regular listing of Overseas Investment Office decisions in the journal *CAFCA Foreign Control Watchdog*, an enormous amount of investigative journalism and commentary in the daily press (most recently, at the time of writing, the series of *Stuff* investigations into Ministry of Business, Innovation and Employment regulatory oversight of migrant worker exploitation), several reports of independent inquiries into workplace safety issues (notably Royal Commission on the Pike River Coal Mine Tragedy, 2012 and Independent Taskforce on Workplace Health and Safety, 2013), and comments from the legal fraternity in court decisions and commentary (for references to some of which see Bertram, 2020b). In relation to specific sector histories the literature includes Macfie (2013) on Pike River, Lee (2019) on finance company collapse, Dyer (2019) on leaky homes, Armstrong (2014) on workplace safety and Bertram (2006, 2013) on the electricity industry. Four issues that emerged will be summarised here in roughly chronological order.

A striking feature of the New Zealand privatisations of 1987–96 was precisely the domination of value extraction over value creation ...

Privatisation of public assets

Privatisation of public assets starting in 1987 was justified by a supposed need to pay down government debt, but was driven mainly by Treasury's generalised preference for private over public ownership (Treasury, 1984, pp.293–4; 1987, pp.37–9, 96–100, 112–17). The outcome was to enrich a small group of insiders – a mix of local business people and opportunistic overseas investors – with close connections to key players in the state apparatus.

Kelsey describes the process:

> All state operations and assets were sold as soon as commercially possible, irrespective of the economic return … [Over the decade 1987–96] some 39 assets were sold for about $19 billion. There was never any independent audit of the economic (let alone the social) costs and benefits of the privatisation programme. Privatisation saw a massive transfer of wealth from government and taxpayers to a few companies and individuals. The project was steered through by a few government officials, politicians, corporate lobbyists, and private sector advisers. Key players among the latter were a select group of merchant bankers and consultants for whom privatisation was especially lucrative … Sometimes they blurred the boundaries by advising the government and also acting as buyers. (Kelsey, 1999 pp.178–9)

The privatisation process down to 1996 provides a clear example of rent-seeking and regulatory capture in action – processes initiated and overseen by the New Zealand Treasury's self-declared disciples of the public choice and Chicago writers for whom rent-seeking and regulatory capture were supposedly anathema, a contradiction identified at the time by Bruce Jesson (1999, pp.13–16).

In the overseas literature at about the same time, Akerlof and Romer were publishing their classic analysis of the savings-and-loan scandals of the 1980s in the United States, using the term 'looting' to characterise the self-interested conduct of opportunistic private agents taking advantage of profit opportunities opened up by ill-advised and poorly designed deregulation:

> [T]he normal economics of maximizing economic value is replaced by the topsy-turvy economics of maximizing

> current extractable value, which tends to drive the firm's economic net worth deeply negative. Once owners have decided that they can extract more from a firm by maximizing their present take, any action that allows them to extract more currently will be attractive – even if it causes a large reduction in the true economic net worth of the firm. (Akerlof and Romer, 1993, p.2)

A striking feature of the New Zealand privatisations of 1987–96 was precisely the domination of value extraction over value creation (on these concepts see Lazonick and O'Sullivan, 2000). Typically, the private 'insider' purchasers used leveraged buy-out tactics to secure control, then extracted cash gains and exited, in several cases leaving the enterprises they had sold in a parlous state requiring taxpayer-funded bail-outs. Such was the case in the sale of New Zealand Steel to Equiticorp in 1987 (Wiklund, 1996), the sale of the railways to Tranz Rail (Gaynor, 1997, 2000, 2002, 2004, 2008, 2011; Hyman et al., 2003), and the privatisation of the Bank of New Zealand (Kelsey, 1999, p.180; Gaynor, 2004), the Post Office's telecommunications branch (Jesson, 1999, pp.172–3; Gaynor, 1997; Kelsey, 1999, pp.181–2), the Government Printing Office (Kelsey, 1999, p.180) and the electricity system assets formerly held by central and local government (Kelsey, 1999, pp.181–6; Rosenberg and Kelsey, 1999).

Foreign investment

The inroads of foreign investors into New Zealand markets under deregulation went far beyond participation in that early rush to buy up privatised state assets. Controls on foreign investment were loosened substantially from the late 1980s on, resulting in a switch away from the previous tendency for foreign direct investment to be directed to financing new productive ventures, towards takeovers of existing operations from which profits could be extracted by exploiting New Zealand's very lax regulatory and tax arrangements. In 2002 a report commented that

> although the nation has at times attracted significant quantities of FDI, the quality has been poor. Almost all FDI in New Zealand has involved privatisation or merger and acquisition activity with little flow-on benefit. Export-oriented greenfield investment has been sparse, and is generally concentrated in low-growth, low-return sectors. (Boston Consulting Group, 2001, quoted in Rosenberg, 2004)

In 2020 the Productivity Commission was still lamenting essentially the same problem (Productivity Commission, 2020, pp.23, 71) .

The neo-liberal regime of extraordinarily weak regulation of foreign direct investment is embedded both in the legislation and in the culture of the regulatory agency, the Overseas Investment Office (OIO). Following more than a decade of experience of overseas investors mounting looting expeditions (in the Akerlof and Romer sense) into New Zealand, the Overseas Investment Act 2005 loosened rather than tightened the controls (Rosenberg, 2004, 2010). Two tests are applied by the OIO: the investor must be 'of good character', and the investment must involve some identifiable 'benefit to New Zealand'.

The good character test is pretty much a dead letter (Ayers, 2012; Horton, 2004, 2017); it has virtually never been used by the OIO to reject an applicant. Rosenberg commented that

> The good character requirement is routinely satisfied by the individuals providing statutory declarations that they are of good character. On occasions when the regulator (formerly the Overseas Investment Commission, and since the 2005 Act the Overseas Investment Office, part of Land Information New Zealand) has been asked to investigate evidence of the bad character of an investor no action has been taken … Even for companies with established records elsewhere of large scale price fixing (such as former Canterbury Malting Company owner Archer Daniels Midland), or bad environmental behaviour (such as Waste Management's former and original owner Waste Management International or WMX) no action was taken ... (Rosenberg, 2010, p.19)

… the 'benefit to New Zealand' test, any impression from the name of the test that it involves a weighing-up of costs and benefits would be quite wrong.

Turning to the 'benefit to New Zealand' test, any impression from the name of the test that it involves a weighing-up of costs and benefits would be quite wrong. The 'test', applied to overseas purchases of 'sensitive land', requires only the counting of benefits and rules out most consideration of costs (Bertram, 2020d, 2020e). In 2018 this became apparent when the then minister of conservation, Eugenie Sage, was forced against her judgement to sign off approval for a Chinese company to buy up a mineral water resource near Whakatāne for bottling and export, against strong local opposition. The law, she was advised, did not allow her to take environmental or Treaty of Waitangi downsides into account. The following year Sage had to decide whether to approve OceanaGold's application to buy a productive Waihī dairy farm for conversion to a toxic waste dump. This time she refused, triggering what appears to have been a credible threat by the transnational mining company to litigate under the Act. The government backed down, replacing Sage with another minister, who signed the approval. The failure of a subsequent judicial review sought by a local environmental group (which not only lost the case but was hit with punitive costs for taking it) confirmed that the law does not allow cost-benefit assessment of foreign purchases of sensitive land – at least as 'cost-benefit' is understood in economics. The spectacle of a large transnational corporation first facing down government ministers, and then crushing its local citizen opponents in the High Court, could have been taken directly from Stigler's model of capture.

Assessment of public benefit

The assessment of public benefit in the regulation of mergers and takeovers has been another area in which the New Zealand regulatory system has deliberately set aside questions of the distribution of wealth, for the benefit of possessors of market power. Tullock's (1967) emphasis on the negative dynamic welfare effects of predatory wealth transfers, mentioned earlier, was set aside (or perhaps just forgotten) by Treasury officials asked to recommend how policy should deal with monopoly profits. As Pickford (1993) describes, the Commerce Commission shifted in the early 1990s from an 'income-weighted' to an 'efficiency' criterion, which meant allowing mergers even when the efficiency gains (along with any monopoly rents) were all captured by the merged firm. In 1992 an officials' committee comprising representatives of Treasury, the Department of Justice, the Department of the Prime Minister and Cabinet and the Ministry of Commerce, resolved (over the laudable objection of Justice) that in any cost–benefit evaluation of mergers and takeovers under section 3 of the Commerce Act 1986 there should be no weightings applied to the costs and benefits applying to different groups. Thus (for example), a dollar lost to consumers due to monopoly pricing was to be treated as completely offset by the dollar gained by the monopolist, provided only that both parties were New Zealanders. Monopoly per se had no welfare implications (Bertram, 2004, p.268). This proposition that bare wealth transfers are fine unless they go to foreigners remains embedded in the Commerce Commission's procedures.

Since 1990 the electricity sector ... early buyers of network and generation assets ... extracted cash as profits soared, then realised their (untaxed) capital gains by selling out to successors whose rate of return on the purchase price would be closer to normal profits ...

Regulation of monopolies

Regulation of monopolies – both 'natural' and otherwise – has been the area where the neo-liberal programme most dramatically ran aground on its own public choice rocks. Treasury's faith in markets to solve problems was qualified by token acknowledgement that monopolies could be a problem, followed quickly by rejection of well-established regulatory responses:

> The approach which traditionally has been used is to deal with symptoms of market dominance directly through price controls or rate of return regulations. However substantial costs are incurred in regulatory intervention. These are incurred directly through the operations of the regulatory authority and interest group lobbying, and indirectly through the distraction of management effort, the blunting of competition between firms and the slowing down of innovation. (Treasury, 1987, vol.1, p.106)

Even where competition in the usual sense was not feasible, contestability theory offered an alibi for non-regulation:

> If through exploitation or unfair trading an individual or firm can earn a return in a particular activity that is above that earned elsewhere then there will exist incentives for others to enter the market and compete, thereby undermining the longer term survival prospects of such practices. Thus economic rents and privileges tend to be transient in the context of competitive processes … (ibid., p.16)

The general attitude was summed up by the single sentence on regulation in the chapter on 'role and limits of government': 'Ignorance about the perverse effects of regulation may create a tendency for its overuse in the same way that smoking was widely tolerated before people knew about its costs' (ibid., p.37).

The Commerce Act 1986 reflected this philosophy. Whereas its predecessor, the Commerce Act 1975, had as its explicit purpose 'the regulation, where desirable in the public interest, of trade practices, of monopolies, mergers, and takeovers, and of the prices of goods and services', the new law promised only 'to promote competition in markets for the long-term benefit of consumers within New Zealand'. Alas, the crucial section 36 that was supposed to prevent anti-competitive practices was ineffective (Bertram, 2020b, p.84), while the provision in part 4 for regulation of monopoly profits was not activated until after 2000. In the interim, under a largely pointless (but very costly) regime of information disclosure, the newly created corporate monopolies in ports, airports, telecommunications, gas and electricity hastened to use their market power to the full, driving up prices, margins and profits and then revaluing their fixed assets up to capitalise (lock in) their licensed predatory status. Of these, the only sector whose monopoly position was eventually broken was telecommunications – significantly, the sector where powerful new deep-pocketed entrants were eager to compete 'for the market', and where the monopolistic overreach of Telecom during the 1990s was sufficient to induce Parliament finally in 2000 to pass a law breaking up the firm's vertically integrated status.

In the early 2000s, *after* the natural-monopoly firms in gas, electricity networks, ports and airports had raised prices to the profit-maximising level and banked their expected ongoing monopoly profits in the shape of massively increased book value of their assets, part 4 of the Commerce Act finally cranked into action, at precisely the moment when the monopolies needed protection against consumer hostility to their profiteering. The subsequent events in the electricity distribution sector are documented in Bertram (2006, 2013, 2014) and Bertram and Twaddle (2005). Furious and effective lobbying by the big network operators cornered the Commerce Commission into locking in, as the basis for future regulation, the companies' asset values as at 2002, bloated with capital gains secured from a decade of unrestrained monopoly conduct. An intricate, highly prescriptive set of regulatory procedures designed to preserve those was written into the Commerce Act in 2008, and the Commerce Commission from then on was merely a legitimating rubber stamp on monopoly pricing – precisely the situation described by Stigler in his seminal (1971) attack on regulation in the US. By taking an expensive and wasteful High Court case[1] against the commission in 2012 a group of monopolies in airports, gas and electricity secured also the court's imprimatur on their sky-high asset value, again a move directly out of the Stigler playbook.

Since 1990 the electricity sector has been a classic example of Tullock's (1975) model of transitional gains: early buyers of network and generation assets (in many cases foreign investors) extracted cash as profits soared, then realised their (untaxed) capital gains by selling out to successors whose rate of return on the purchase price would be closer to normal profits, and who would consequently fight any rolling back of asset values to true historic cost.

Among documented case studies of the outcome of this failed implementation of what used to be (before 1986) a serviceable regulatory model under the 1975 Commerce Act and the common law are those of Wellington Electricity (Werry and Turner, 2014; Bertram, 2018) and Aurora Energy Ltd (Bertram, 2020c). In the case of Aurora – a company which systematically milked its asset base while holding up its regulatory asset valuation – the commission has declared itself powerless under the Commerce Act to impose any write-down, with the result that urgently needed new investment must be funded from yet another price increase imposed on customers (Commerce Commission, 2020).

> ... deregulation and privatisation opened the way for a new generation of opportunistic rent-seekers and looters, and arguably shifted New Zealand down the institutionalists' development rankings.

Public choice and institutional models of development failure

To keep a sense of perspective on the discussion to this point, it is important to recall that New Zealand remains among the world's rich economies, and consistently scores highly on global indices of transparency and 'freedom from corruption' (at least the overt sort) and in global survey responses about 'ease of doing business' (however much it might be suggested that this represents executives from large transnationals celebrating the ease with which they can crush or buy out their smaller competitors in a deregulated setting).

One of the strangest features of the public choice and Chicago schools was their emergence in what was then the world's most successful economy, the United States. The apocalyptic tone ('there is no alternative') adopted by proponents of neo-liberal policy in the 1980s across much of the OECD sits oddly within the wider development discourse in institutional economics, which often attributes the success of today's rich countries to their relative freedom from rent-seeking and capture, reflecting their superior 'social infrastructure' (Hall and Jones, 1999; Landes, 1998; North, 1989, 1991, 1994; Acemoglu, 2003; Acemoglu and Robinson, 2012). These authors draw directly on public choice models; as Acemoglu and Robinson note:

> Our work follows the seminal work of Tullock (1967) who proposed the notion of 'rent seeking' to argue that the welfare costs of a distortionary economic institution like monopoly were actually much higher than the static deadweight losses would suggest … [A] key building block of our work is that inefficient economic institutions are chosen not just to create rents, but to solidify the political power of elites. It is this feature that makes it difficult to find efficient solutions to the problems of economic rents, and potentially generates much greater inefficiencies. (Acemoglu and Robinson, 2019, pp.676–7)

Concentrations of power, and/or a weak and ineffective state, they suggest, lead to regulatory capture and rent-seeking, and this explains how today's poor countries became poor. But this does not make the public good identical with the neo-liberal advocacy of deregulation and minimisation of government intervention. As Myrdal (1968) argued long ago, whether regulations and other interventions have good or bad outcomes depends more on the quality of the state – 'soft' or 'hard' – than on the content of the policies.

The officials who drove the New Zealand reforms clearly believed themselves to have a neutral, unblinkered view of where the 'public interest' lay, coupled with a firm belief that deregulation and privatisation would remove the opportunities for rent-seeking that they perceived to be rampant in pre-1984 New Zealand. In practice, deregulation and privatisation opened the way for a new generation of opportunistic rent-seekers and looters, and arguably shifted New Zealand down the institutionalists' development rankings. But the characterisation of pre-1984 New Zealand as some sort of failed state was always a weak link in the neo-liberal case.

Conclusion

In this article I have argued that the sweeping institutional changes imposed by successive New Zealand governments between 1984 and 1999, and consolidated thereafter, have left in their wake a paradoxical situation. The changes were motivated and justified by ideas drawn from the economic theories of public choice, rent-seeking and regulatory capture advanced by the Virginia and Chicago schools of economics and law, and were ostensibly designed to free New Zealand from the ills diagnosed by those schools of thought in the US. Yet the effect of the changes was not so much to eliminate pre-existing problems of capture and rent-seeking as to reinvent New Zealand as a case study of those pathologies in action, only under different management.

Rent-seeking and capture were not absent before 1984, but since that date the newly ascendant groups have had less productive orientation and more clearly extractive character (Bertram, 2003; Jesson, 1999; Kelsey, 2015). From relatively inclusive politics and strong regulatory enforcement, New Zealand shifted towards more extractive institutions and weaker regulation. As a result, market power is now exercised by the current business and financial elite in ways that have worsened wealth and income distribution, imposed substantial deadweight burdens (both static and dynamic) on the economy, and now confront policymakers with roadblocks to achieving more inclusive institutions. Among those roadblocks is the entrenchment of legislative and regulatory provisions that trap policymakers in what I have called an 'iron cage' of restraints on government (Bertram, 2020a, 2021). Hobbes' Leviathan has been tamed, shackled and demoralised, leaving a 'self-hating state' (Feffer, 2007; Monbiot, 2013; Bertram, 2014, p.51) presiding over a 'rentier capitalism' (Christophers, 2020).

In this, the neo-liberal revolutionaries of post-1984 New Zealand have run into the problem encountered by Leninist revolutionaries of the early twentieth century: having overturned the ancien regime, they have installed in its place a new order that is profoundly vulnerable to precisely the criticisms they had mounted against the old.

1 *Wellington International Airport and Ors* v *Commerce Commission* [2013] NZHC 3289.

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