

## THE LEGITIMACY OF REGULATION

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### *A. Introduction*

I wish to address the topic of property rights and environmental regulation, chiefly the land use regulation that takes place when a rule is made in a plan under the Resource Management Act 1991, the RMA. There has been a lot written on the topic, but mostly by advocates of property rights and critics of regulation. I wish to clear out some of the misconceptions and bring some balance to the debate.<sup>1</sup> My proposition is that it is legal, constitutional, principled, and ethical to regulate the use of land. Land use regulation cannot be dismissed if we are to make progress on amenity, natural character, ecological integrity, biodiversity, and sustainability. Policymakers should remain undeterred by the possibility that RMA regulation will affect the rights of property owners. I will not argue that all land use planning and regulation is done well, nor will I say that they are the only way to solve environmental problems; indeed it would be impossible to agree with either suggestion. I will simply argue that planning and land use regulation have a proper place in the scheme of things.

Philip Joseph has asserted that in environmental regulation too little attention is given to our property rights heritage.<sup>2</sup> He referred to Magna Carta, the political philosophy of Locke, public choice theory, and the notion of regulatory taking that comes from the United States of America. He concluded that property rights must not be discounted or undervalued as deserving of lesser protection than the environment. Likewise, Owen McShane has maintained that the threat of takings of private property is likely to be

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1 Other contributions that do provide balance have been made by P Cassin, *Compensation: An Examination of the Law* (Resource Management Law Reform Working Paper 14, Ministry for the Environment, Wellington, 1988) — a close study of the provisions of the Town and Country Planning Act 1977 and other legislation, with recommendations for reform; D W Bromley, *Property Rights and the Environment: Natural Resource Policy in Transition* (1988); D Grinlinton, "Property Rights and the Environment" (1996) 4 Aust Property L J 41; D Kirkpatrick "Property Rights — Do You Have Any?" (1997) 1 NZJEL 267. Kirkpatrick's theme was that it is impossible to separate control of the effects of the use of resources from the property rights in those resources, so that property is a key concept in planning and the RMA inevitably concerns the allocation of resources; we cannot pretend that use controls are separate from property rights.

2 P Joseph, "Property Rights and Environmental Regulation", Resource Management Law Association Annual Conference, 4-7 October 2001, Wellington.

detrimental to the environment.<sup>3</sup> He too elaborated on American law, constitutional law, and public choice theory, and went on to consider the RMA, in particular the relationship between sections 32 and 85, and provisions for heritage orders and the like.

Some of these opinions follow the line of essays contributed during visits to New Zealand by an American writer, Richard Epstein.<sup>4</sup> He identified what regulation is suspect unless accompanied by compensation, drawing naturally on his country's law. His explanation of the limited ability of government to come to correct conclusions was based on public choice theory, the impossibility of the perfect knowledge required to regulate centrally, and the inevitability of domination of government by private interests and factions. He maintained that property rights are incapable of fragmentation, so that any partial weakening of one element of ownership is a taking even if the others are left unimpaired.

Earlier, Kathleen Ryan<sup>5</sup> provided a more specific contribution by arguing that the RMA needs to be changed to include a new system to allow landowners a limited right to claim for compensation. She maintained that regulators have overindulged in restrictions that diminish land value for subjective reasons, and need some such incentive (not clearly delineated<sup>6</sup>) to ensure that the benefits of regulation are greater than the costs. Like others have, she paid considerable attention to the American experience, but also considered that of other countries, and examined the existing RMA provisions carefully. She accepted that property rights are bounded by legitimate environmental concerns, but her focus was on the possibility that unless something is done regulators will impose unfair and inefficient limitations on private uses of land.

In his "Think Piece" on the RMA in 1998,<sup>7</sup> McShane's main point on the matter was that section 85 lets regulation come free to councils, which will therefore "over-consume" regulation. In consequence councils seize large

3 O McShane, "Land Management: Public and Private Costs", Resource Management Law Association Annual Conference, 4-7 October 2001, Wellington, reprinted with some changes as "Resource Management: Public and Private Costs" [2002] NZLJ 27.

4 R A Epstein, *Natural Resource Law: Property Rights and Takings* (1999). Also see R A Epstein, *Towards a Regulatory Constitution* (2000). Epstein's main work is *Takings: Private Property and the Power of Eminent Domain* (1985).

5 K Ryan, "Should the RMA Include a Takings Regime?" (1998) 2 NZJEL 63.

6 In references by O McShane, "The Extent to Which Regulatory Control of Land Use is Justified under the Resource Management Act", in *Land Use Control under the Resource Management Act* ("A Think Piece") (Ministry for the Environment, Wellington, 1998) 38-39 to an earlier version of Ryan's work, there is a proposed amendment to ss 32 and 85 which would define it to be a taking (presumably a compensable taking) where the owner suffers an unreasonable burden and the provision does not relate to avoidance of common law nuisance, or where the control is for the purpose of the preservation of ecological sustainability, that could reasonably be addressed by other means.

7 O McShane (1998), supra n 6, 30, 37.

tracts of private land so as to incorporate them into the conservation estate; land is seized for the public benefit at no cost to the public but at significant cost to the owner, in situations which have nothing to do with internalising externalities. He drew on Ryan's work, invoking public choice theory and arguing that a compulsory takings regime would improve environmental regulation.

In 2001 the Business Roundtable published Bryce Wilkinson's *Constraining Government Regulation*.<sup>8</sup> His concern was the extent of costly and ill-conceived regulations in New Zealand, and he advocated better regulation. (He was candid in saying that New Zealand's rating for freedom from regulation is quite high;<sup>9</sup> and in saying that many of his examples of bad regulatory practice may not prove robust under closer scrutiny.<sup>10</sup>) He offered a "Regulatory Responsibility Act" which would require laws and regulations to comply with a set of regulatory principles that he offers. Like other writers in this genre, he referred often to Magna Carta, Blackstone, Epstein and other American constitutional thinking. A section on regulatory takings adopted Epstein's yardstick for determining whether regulation is a taking.<sup>11</sup>

This body of writing challenges environmental and land use regulation, and seeks to advance the position of property owners. Rights to property are asserted to be in a position superior to other rights, superior, for example, to a right to a clean environment. They are asserted to be superior to other values such as sustainability, ecological integrity, biodiversity, amenity, and landscape. Land use regulation is held only occasionally to be justifiable, and compensation is said to be payable in many cases where regulations are imposed.

#### *B. The Flaws in Arguments that Regulation is Illicit*

This criticism of land use regulation and planning has some characteristic weaknesses. Planning horror stories are cited as standard practice; there is no attempt at empirical inquiry. American law is cited as if it were New Zealand law. History and authorities from the past are used selectively. The topic sometimes slips from the defence of private property to the weakness of public property rights,<sup>12</sup> or to the special problems of amenity values,<sup>13</sup> or to policies

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8 B Wilkinson, *Constraining Government Regulation* (2001).

9 Ibid, 44, citing the Heritage Foundation/Wall Street Journal 2001 Index of Economic Freedom, in which New Zealand scored 2 for freedom from regulation on a scale with 1 as the highest level and 5 as the lowest. Eighteen other countries scored 2; only Hong Kong, Singapore and the Bahamas scored 1. Two other studies that Wilkinson documents come to similar conclusions.

10 Ibid, 5.

11 Ibid, 188.

12 McShane (2001), supra n 3, 1.

13 Ryan, supra n 5, 91.

of renationalisation. Regulation is glibly linked with Marxism or soviet communism.<sup>14</sup> (The equivalent linkage for a libertarian argument might be to a failed state like Somalia.) What regulation is acceptable is not clearly identified; a close reading indicates that some forms are acceptable, (eg regulatory non-takings, or “tit-for-tat” regulation)<sup>15</sup> but they are not well explained, and are lost amid the criticisms of planning and regulation generally. When I say that to the critics regulation is illicit, I am attempting to cope with the rather fluid movement of the argument between what the law is and what it should be.

### 1. *Arguments from the New Zealand constitution*

Joseph argues that “Where the public interest justifies the taking of land for public purposes, the law imports the right to just compensation.”<sup>16</sup> He provides no authority, and I question what New Zealand authority he could provide, beyond particular statutes and legislative practice. That my doubts are grounded seems confirmed by what another constitutional writer, Sir Geoffrey Palmer, says, in the article Joseph cites:<sup>17</sup>

it is a recognised principle that the state should not appropriate private property for a public purpose without just compensation. But in New Zealand, absent any statutory obligation such as that contained in the Public Works Act, it is a principle that has to be honoured by the executive and by Parliament. It cannot be implemented by the Courts.

Sir Geoffrey doubts that the principle is a constitutional convention. The principle or presumption cannot be advanced as strongly as it was a hundred years ago. Nor can it be maintained to deprive a clearly-worded statute of its effect. Nor does it convert a principle of narrow construction of legislation into a positive implication of a right to compensation in the absence of statutory provision.<sup>18</sup> There is plenty of authority on point.<sup>19</sup> In the Privy Council the following words have been cited with approval:<sup>20</sup>

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14 McShane (2001), *supra* n 3, 1.

15 *Ibid*, 2.

16 Joseph, *supra* n 2, 8.

17 G Palmer, “*Westco Lagan v A-G*” [2001] NZLJ 163, 168.

18 *Ibid*, 166-67.

19 H W R Wade and C F Forsyth, *Administrative Law* (8th ed, 2000) 84, 88 and 788: “This presumption does not, however, empower the court to award compensation for administrative acts authorised by Act of Parliament, unless the Act itself so provides.” McGechan J said in *Westco Lagan v Attorney-General* [2001] 1 NZLR 40, 63 “... Parliament can enact laws expropriating property without compensation.”

20 *Government of Malaysia v Selangor Pilot Association* [1978] AC 337, 350 (PC), per Viscount Dilhorne citing Wright J in *France Fenwick & Co v R* [1927] 1 KB 459, 467.

A mere negative prohibition, though it involves interference with an owner's enjoyment of property, does not, I think, merely because it is obeyed, carry with it at common law any right to compensation. A subject cannot at common law claim compensation merely because he obeys a lawful order of the State.

Writers usually make reference to Magna Carta.<sup>21</sup> No one can question the special place of the Great Charter in English legal history, as part of our own heritage, and as part of our law, as confirmed by section 3(1) of the Imperial Laws Application Act 1988. Scholars have long known that most of its clauses really had meanings different from those which were afterwards attributed to them;<sup>22</sup> yet even when misinterpreted, such as by Lord Coke in his struggle with the Stuarts, it has expressed an enormously powerful truth about the relationship of government with the governed. Yet we must be careful even in our veneration. The meaning of the promises of 1215 is obscure. Clause 39, one of the most famous provisions, can be literally translated as:<sup>23</sup>

No freeman shall be taken or/and imprisoned, or disseised, or exiled, or in any way destroyed, nor will we go upon him nor will we send upon him, except by the lawful judgment of his peers or/and the law of the land.

It was not intended to guarantee a trial by jury; it may have meant quite the opposite. Freeman, it may be noted, did not include villeins. And whether the law of the land was meant as an alternative is not clear, although it has long been understood to mean "due process of law."<sup>24</sup> Even on the most literal meaning, therefore, Magna Carta does not profess to protect a landowner from an intrusion that is authorised by law. In any event, it has no legal standing higher than a statute, and the doctrine of implied repeal means that the earlier provisions will where inconsistent be deemed to have been repealed by the later ones.<sup>25</sup> We must be clear therefore that however significant the original pact, and however potent its later history, Magna Carta's importance is as a symbol; it does not give legal grounds for striking down modern legislation such as the RMA.<sup>26</sup>

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21 Joseph, *supra* n 2; Kirkpatrick, *supra* n 1, 274; McShane (2001), *supra* n 3, 4; Wilkinson, *supra* n 8, 146-47, 162, 164, 165.

22 W Holdsworth, *A History of English Law* (1903) vol 1, pp 58-63, vol 2, pp 207-216; W J V Windeyer, *Lectures on Legal History* (2nd ed, 1957) 79.

23 *Ibid*, vol 1, p 59. The original of the key phrase is "nisi per legale iudicium parium suorum vel per legem terrae". In the 1297 reissue this was ch 29.

24 *Ibid*, vol 1, p 61.

25 The reissue of 1225 was entered on the statute roll in 1297 as 25 Edw 1: T F T Plucknett, *A Concise History of the Common Law* (1956) 23.

26 *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154, 157 (CA): Magna Carta and other English statutes identified in the Imperial Laws Application Act 1988 form part of the law of this country — "They do not, however, constitute supreme law in the sense of a limit on the New Zealand Parliament's sovereignty."

As for the New Zealand Bill of Rights Act 1990, it does not contain any protection of property rights. There are provisions against search and seizure, and in favour of natural justice; but the High Court held in *Westco Lagan v Attorney-General*<sup>27</sup> that they cannot be extended to deal in a general way with seizure of property without compensation. Nor can the general proviso of section 28 that ensures that the Bill of Rights is not read as abrogating or restricting existing rights or freedoms. Property rights were not given constitutional protection in the Canadian Charter of Rights and Freedoms 1982 on which the New Zealand Bill is largely modelled.

When McShane declares:<sup>28</sup>

Many councillors and practitioners seem to have persuaded themselves that section 85 supersedes any rights to compensation, and that, provided they claim to be acting under the RMA, the rights granted under *Magna Carta*, the *Imperial Laws Application Act 1988*, and the *New Zealand Bill of Rights Act 1990*, have somehow been withdrawn.

then I consider that the councillors and practitioners are right and he is not. Section 85, as we shall see, leaves little room for doubt as a matter of statutory interpretation; and there is nothing in these constitutional instruments to support his opinion. When Joseph argues that the text and spirit of *Magna Carta* bolster the argument for a takings regime that grants rights to compensation, the argument is not one of law or constitutional convention, but a very general one of policy and principle.

## 2. *Arguments from the American Constitution*

Most writing in this genre refers to the American law on regulatory takings, which is a fascinating point of reference, but let us clarify some preliminary points. American law is not binding in New Zealand; it is persuasive authority in that a New Zealand judge is not bound to follow it, but may properly draw on it where it is not in conflict with New Zealand law. The key difference between the two nations is that the United States has a written Constitution that prevails over legislation, and in that Constitution, in the Fifth Amendment, added in 1791, is a specific provision concerning property. Its language is not unlike *Magna Carta*: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." The Fourteenth Amendment was added in 1868: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Most state constitutions have an equivalent of

27 [2001] 1 NZLR 40 (HC). Palmer, *supra* n 17, 165, accepts the accuracy of the decision.

28 McShane (2001), *supra* n 3, 5.

the Fifth Amendment. There is no equivalent in the law of New Zealand. The American law on it has of course become enormous.<sup>29</sup>

The Fifth Amendment is easy to apply in cases where private property is deliberately taken for a public purpose.<sup>30</sup> The action involves the public power of "eminent domain," also referred to as "condemnation." The correct procedures must be followed, the purpose must be legitimate, and compensation must be paid. Land use regulation, however, is not so easy; the public neither seeks legal ownership of the land nor pays any compensation to the owner. Is a reduction in the value of the land because of regulation a taking within the scope of the Fifth Amendment? In the early days of land use zoning, the answer was no. However in 1922 the Supreme Court in *Pennsylvania Coal Co v Mahon*<sup>31</sup> gave a positive answer. A Pennsylvania statute restricted the rights of the owner of coal to undermine developed areas if surface subsidence would result. The Court held that this was a compensable taking of the coal company's rights. Holmes J, for the majority, conceded that:<sup>32</sup>

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power.

But he went on to make new law with the now-famous statement:<sup>33</sup>

The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.

The American courts have been struggling ever since to say how far is too far.

Four years after *Pennsylvania Coal*, the US Supreme Court came to consider land use zoning in *Village of Euclid v Ambler Realty Co.*<sup>34</sup> Land was zoned residential, reducing its value per acre from \$10,000 for industrial to \$2,500. The Court upheld the constitutional validity of the particular zoning and the theory of land use zoning in general. It left open the possibility that individual applications of zoning might be rejected as arbitrary or unreasonable, along the lines of the "too far" test of *Pennsylvania Coal*. But land use regulation without compensation could develop as a constitutionally valid activity of government, even where it affected land use. So too, under

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29 R C Platt, *Land Use and Society: Geography, Law and Public Policy* (1996); R Meltz, D H Merriam and R M Frank, *The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation* (1999).

30 Much of this account is based on Platt, *supra* n 29, 258.

31 260 US 393 (1922).

32 *Ibid*, 413.

33 *Ibid*, 415.

34 272 US 365 (1926). By the way, Holmes J voted with the majority. *Nectow v City of Cambridge* 277 US 183 (1928) showed that zoning could infringe the Fourteenth Amendment.

earlier authority, could regulation that protected the community from injurious use of property, in an analogy with the common law of nuisance, but not restricted to a historical understanding of nuisance.<sup>35</sup> Aesthetics are widely accepted as a basis for land use control, especially in relation to billboards.<sup>36</sup> Historical and architectural controls are equally often found to be valid.<sup>37</sup> Even the most casual visitor to Vermont notices that land use in heritage areas is controlled with great firmness. New Zealand references to American law are therefore deficient if they refer to *Pennsylvania Coal* without also referring to *Euclid* and the rest of the law that upholds land use regulation.

The "takings" issue was dormant for many years, without much new understanding of the issues, but it awoke in a series of Supreme Court cases between 1978 and 1994. The first of them, *Penn Central Transportation Co v New York City*<sup>38</sup> is still the most important, in enunciating a balancing test that recognises the significance of three factors, (i) the economic impact of the regulation on the landowner, (ii) the extent to which the regulation interferes with distinct investment-backed expectations, and (iii) the character of the government action. Subsequent Supreme Court decisions have clarified procedural readiness or ripeness to challenge,<sup>39</sup> the relevant parcel on which to calculate economic impact,<sup>40</sup> damages as the remedy available,<sup>41</sup> the need for nexus and proportionality,<sup>42</sup> and a per se rule on total regulatory takings, although with two exceptions of nuisance and underlying concepts of property law.<sup>43</sup> The cases hailed by property rights advocates as paradigm-shifting victories do indeed confer greater protection on private property, but on any objective examination, they are also doctrinally cautious and are often limited in application.<sup>44</sup> If one looks at the overall picture, in the large majority of

35 *Mugler v Kansas* 123 US 623 (1887); *Goldblatt v Town of Hempstead* 369 US 590 (1962); and *Village of Euclid*, supra n 34, 386.

36 Platt, supra n 29, 286.

37 Platt, supra n 29, 289; *Penn Central Transportation Co v New York City* 438 US 104 (1978).

38 438 US 104 (1978). Generally, see Meltz et al, supra n 29.

39 *Williamson County Regional Planning Commission v Hamilton Bank of Johnson City* 473 US 172 (1985).

40 *Keystone Bituminous Coal Association v DeBenedictis* 480 US 470 (1987).

41 *First English Evangelical Lutheran Church of Glendale v County of Los Angeles* 482 US 304 (1987).

42 *Nollan v California Coastal Commission* 483 US 825 (1987); *Dolan v City of Tigard* 512 US 374 (1994).

43 *Lucas v South Carolina Coastal Council* 505 US 1003 (1992).

44 Meltz et al, supra n 29, 9, referring to *First English*, *Lucas*, *Nollan*, and *Dolan*. Platt, supra n 29, 264, refers to those cases and *Keystone* to conclude that since 1987 several Supreme Court decisions have shown a greater willingness to find that regulatory action has harmed a landowner in a way that amounts to a taking, and that the state has an obligation to compensate.



cases using the *Penn Central* approach of weighing and balancing factors of particular significance, the landowner loses.<sup>45</sup> State appellate courts show an increased tendency to uphold land use and environmental regulatory programs.<sup>46</sup> Where some lower court decisions have pushed the boundaries of regulatory taking into new territory, their importance may lie not so much in their narrow legal significance but in a politically self-fulfilling perception of a broadening of the rights of property owners in the face of land use regulations.<sup>47</sup> The most recent Supreme Court cases have revived and reaffirmed the *Penn Central* analysis, especially investment-backed expectations, and have largely disappointed property rights advocates.<sup>48</sup> Takings law is the locus of deep ideological divisions, and Supreme Court decisions have been finely divided between liberal and conservative camps. The law is often criticised for incoherence, but this is not entirely fair.<sup>49</sup> In fact takings law is an effort to balance private and public rights, both of which are necessary, and which often evolve together over time, in a sequence where a particular land use initially does not present a problem, then becomes the subject of private action in nuisance, and then the subject of public legislation.<sup>50</sup> For over a century legislators have taken over the task of refining and specifying the range of acceptable landowner practices.

The takings litigation of the last twenty years has been strongly pressed by conservative interests determined to restrain government and to advance the interests of developers. The legal team of the Reagan White House launched a vigorous attack on government regulation through the takings clause. Charles Fried, Solicitor General for a key period, recalls:<sup>51</sup>

But Attorney General Meese and his young advisers — many drawn from the ranks of the then fledgling Federalist Societies and often devotees of the extreme libertarian views of Chicago law professor Richard Epstein — had a specific, aggressive, and, it seemed to me, quite radical project in mind: to use the Takings Clause of the Fifth Amendment as a severe brake upon federal and state regulation of business and property.

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45 Meltz et al, supra n 29, 9.

46 Meltz et al, supra n 29, 555.

47 Platt, supra n 29, p 269.

48 *Palazzolo v Rhode Island* 533 US 606 (2001) and *Tahoe-Sierra Preservation Council v Tahoe Regional Planning Agency* 535 US 302 (2002). See G M Stein, "Takings in the 21st Century: Reasonable Investment-Backed Expectations after Palazzolo and Tahoe-Sierra" (2002) 69 Tenn L Rev 891.

49 Meltz et al, supra n 29, 8.

50 C M Rose, "A Dozen Propositions on Private Property, Public Rights and the New Takings Legislation" (1996) 53 Washington & Lee L Rev 265; C M Rose, "Property and Expropriation: Themes and Variations in American Law" (2000) Utah L Rev 1.

51 C Fried, *Order and Law: Arguing the Reagan Revolution — A Firsthand Account* (1991) 183.

Inside government, the project involved conservative appointments to the federal judiciary, alterations to the federal court system and to procedure to ease takings claims, and advocacy against regulation. Outside, well-funded conservative forces trained lawyers, litigated takings cases on behalf of developers, and brought judges to attend all-expenses-paid resort seminars to discuss libertarian views on secure property rights.<sup>52</sup>

The chief theorist of the project has been Richard Epstein.<sup>53</sup> Epstein maintains that citizens have a natural right to property, and that government rights to interfere are limited. Any interference at all must be compensated; if property can be understood as a bundle of rights, then an effect on any one stick in the bundle is a taking. Virtually any regulation that diminishes the value of property must be compensated, as a constitutional requirement. Partial takings therefore have to be compensated as well as complete ones. The nuisance exception must be restricted to a narrower and static interpretation of traditional common law nuisance.<sup>54</sup> Regulation must have a more direct relation, as a means to an end, and the end itself must be examined.<sup>55</sup> Epstein's ideas fit in well with libertarian politics, but there was much criticism of the accuracy of his constitutional scholarship; his reshaping of Locke's political theory, his dismissal of a century of constitutional development, his dismissal of the historical record of regulation at the time the Constitution was written. I will not try to review it all. No doubt the criticism from left-wing, environmentalist, or even centrist sources will be dismissed as mere partisanship. But perhaps I can indicate the seriousness of the flaws in Epstein's work by referring to two right-wing American constitutionalists: Robert Bork, who pronounced the book a powerful work of political theory, but not convincingly located in the Constitution and not plausibly related to the original understanding of the takings clause;<sup>56</sup> and Charles Fried, who wrote that Epstein was moved to complete not only the text of the Constitution by reference to the Lockean spirit, but Locke's text itself.<sup>57</sup>

We must be careful how we use the American law on regulatory takings. To understand the body of law as a whole, we must consider the authority — a preponderance — that supports land use regulation without compensation, as well as the authority that requires compensation for regulation that goes too far. Regulatory takings law has been vigorously "talked up" and advanced by political action. That is not in itself a problem; it happens all the time. But

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52 D T Kendall and C P Lord, "The Takings Project: A Critical Analysis and Assessment of the Progress So Far" (1998) 25 Boston College Environmental Affairs L Rev 509.

53 *Takings: Private Property and the Power of Eminent Domain* (1985.)

54 *Ibid*, 112.

55 *Ibid*, 128.

56 R H Bork, *The Tempting of America: The Political Seduction of the Law* (1990) 230.

57 C Fried, "Protecting Property — Law and Politics" (1990) 13 Harv J L & Public Policy 44, 49.

knowing about it should help us come down to earth in our comparative legal analysis. American lawmaking on the subject is much like that in other jurisdictions, with political action, strategic litigation, judicial activism, split decisions, inconsistent decisions and unprincipled decisions. There is nothing inherently superior about this American law. It does not deserve the breathless admiration that it gets in some of the New Zealand writing on property and regulation.

### 3. Arguments from other constitutions

Many other countries have constitutions that contain a clause to protect property rights. How far they apply to regulatory limitations on property is a very common question.<sup>58</sup> Normally it is said that the state can legitimately impose restrictions on the use of private property to protect the rights and interests of others and the public interest, usually without provision for compensation. Planning, zoning and conservation legislation are common examples. The distinction between compensated “eminent domain” takings and “police power” regulation is perhaps the most difficult issue in the whole field.<sup>59</sup> But constitutions do not generally give the degree of protection against land use regulation that property rights advocates call for.

In Australia, section 51(xxxi) of the Constitution gives the Commonwealth power to make laws with respect to the acquisition of property on just terms. It limits Commonwealth power, and protects property, but it does not provide a right to compensation. It does not have equivalents in the states. It is different from the American equivalent in guaranteeing freedom from acquisition, not freedom from taking. Acquisition requires an obtaining of at least some identifiable benefit or advantage relating to the ownership or use of property, and ordinarily not merely an extinguishment of rights without the acquisition of a countervailing benefit.<sup>60</sup> The fact that a minister exercises a veto over a development or activity does not amount to acquisition or vesting of possession in the Commonwealth.<sup>61</sup> Land use regulation does not confer such a benefit.<sup>62</sup> Nor does the achievement of government policy objectives, such as those for environmental protection.<sup>63</sup> In contrast, the removal of the burden of

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58 A J van der Walt, *Constitutional Property Clauses: A Comparative Analysis* (1999).

59 *Ibid*, 15-19.

60 *Mutual Pools and Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155; G Griffith and G Kennett, “Constitutional Protection Against Uncompensated Expropriations of Property” [1998] AMPLA Yearbook 49; D F Jackson and S Lloyd, “Compulsory Acquisition of Property” [1998] AMPLA Yearbook 75.

61 *Commonwealth v Tasmania (Tasmanian Dams Case)* (1983) 158 CLR 1.

62 *R v Land Use Planning Review Board (by its delegates Davis and Laughlin) ex p M F Cas Pty Ltd* (1998) Tas Lexis 52, [1998] TASSC 131.

63 *Tasmanian Dams Case*, *supra* n 61; *Commonwealth of Australia v WMC Resources Ltd* (1998) 194 CLR 1.

a mining tenement over land in a Commonwealth national park has been held to be the acquisition of a benefit.<sup>64</sup>

Although Great Britain is like New Zealand in having no written constitution, a Northern Irish case, *Belfast Corporation v O.D. Cars Ltd*<sup>65</sup> is noteworthy for its consideration of constitutional protection of property in the Government of Ireland Act 1920. The House of Lords held that the right to use property was not itself property, and town planning restrictions did not amount to a taking of property. In the ordinary use of language, an authority which imposes some restriction has not taken that property. "It is clear that such a diminution of rights can be affected without a cry being raised that Magna Carta is dethroned or a sacred principle of liberty infringed."<sup>66</sup>

In Canada, as we have noted, the Canadian Charter of Rights and Freedoms does not contain a protection of property rights. However, most of the country shares the original common law heritage that we do. The presumption against taking without compensation has altered there into a presumption of compensation when a taking occurs — a significant shift.<sup>67</sup> In *British Columbia v Tener*,<sup>68</sup> the owner of property rights in minerals was affected by park status given to the lands in which his mineral rights lay, after the rights had been obtained. A park use permit was denied him. He was held to have been denied the right of access which was central to his rights. The rights had been transferred to the regulator-expropriator. But even here, this transfer of rights had to be distinguished from land use zoning:<sup>69</sup>

This process I have already distinguished from zoning, the b[r]oad legislative assignment of land use to land in the community. It is also to be distinguished from regulation of specific activity on certain land, as for example, the prohibition of specified manufacturing processes. This type of regulation is akin to zoning except that it may extend to the entire community . . . Here, the action taken by the government was to enhance the value of the public park. The imposition of zoning regulation and the regulation of activities on lands, fire regulation limits and so on, add nothing to the value of public property.

Even if New Zealand did have a constitutional guarantee of property rights like that of Australia, Northern Ireland or Canada, environmental regulation of land use would be common and perfectly legal.

64 *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513.

65 [1960] AC 490, 519.

66 *Ibid*, per Lord Simonds, 519.

67 *Manitoba Fisheries Ltd v The Queen* [1979] 1 SCR 721, 88 DLR (3rd) 462.

68 [1985] 1 SCR 533, 17 DLR (4th) 1. The facts in *Newcrest Mining*, supra n 64, were similar.

69 17 DLR (4th) 1, 12, per Estey J. The requirement that a taking be a transfer of rights to the government authority, and not simply a prohibition, derived from older cases: *France Fenwick & Co v The King* [1927] 1 KB 458; *Ulster Transport Authority v James Brown & Sons Ltd* [1953] NI 79 (NICA); *Government of Malaysia v Selangor Pilot Association* [1978] AC 337 (PC); *Manitoba Fisheries Ltd v The Queen* [1979] 1 SCR 101, 88 DLR (3d) 462.

#### 4. Arguments from political theory

Arguments in defence of private property invoke Locke and Blackstone.<sup>70</sup> Locke contested the claims of the monarch to absolute power, and his writing is the mainspring of classical liberalism, and the predecessor of the democratic liberalism that still dominates Western political thought.<sup>71</sup> Humans are created free and equal, and co-operate by virtue of reason. They consent to the establishment of civil society and of government, entrusting power to its governors for the benefit of society, on pain, in an extreme situation, of being replaced by the people. The protection of private property is a key reason for the development of civil society out of the state of nature: “The great and *chief end* of Mens uniting into Commonwealths, and putting themselves under Government, is the Preservation of their Property. To which in the state of Nature there are many things wanting.”<sup>72</sup> It is common also to quote the sentence — “Thirdly, The *Supream Power cannot take* from any Man any part of his Property without his own consent.”<sup>73</sup> Thus, property rights advocates argue, Locke shows that in a liberal democracy property rights are prior to society, are special, and are immune from state interference. But this is not what Locke said.<sup>74</sup> For one thing, he often uses the term property in a wider sense than usual: directly before the first of these sentences, he explains that he includes life, liberty and estates under the general name property.<sup>75</sup> Rights to land are only part of his concept. As for the limitations on the supreme power of the legislature, a wider reading makes it clear that Locke’s concern is with arbitrary power, especially in taxation, and not with any power whatsoever. And when he insists on consent, it may be the consent of the individual owner, or it may be consent through representative politics:<sup>76</sup>

But still it must be with his own Consent, *i.e.* the Consent of the Majority, giving it either by themselves, or their Representatives chosen by them.

Although Locke does not explore questions of the representativeness of a parliamentary majority, his writings do not support an absolute property right

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70 Joseph, *supra* n 2, 3-4, 9-10; Wilkinson, *supra* n 8, on Blackstone 145-46, 155, 160; on Locke 138.

71 J Locke, *Two Treatises of Government* (P Laslett ed, 1988)(1690).

72 *Ibid*, II §124, 350. (Individuals in the state of nature acquire as property the goods given to humanity in common by mixing their labour with them; this aspect of Locke’s thought is considered below.)

73 *Ibid*, II §138, 360.

74 On the misinterpretation of Locke, see M L Duncan, “Reconceiving the Bundle of Sticks: Land as a Community-Based Resource” (2002) 32 *Environmental Law* 773, n 43 and n 46.

75 Locke, *supra* n 71, II §123, 350.

76 *Ibid*, II §140, 362.

immune from legislative action. We can go further in this vein. He opened his Second Treatise by clarifying his language:<sup>77</sup>

*Political Power* then I take to be a *Right* of making Laws with Penalties of Death, and consequently all less Penalties, for the Regulating and Preserving of Property, and of employing the force of the Community, in the Execution of such Laws, and in the defence of the Common-wealth from Foreign Injury, and all this only for the Publick Good.

Similarly, "For in Governments the Laws regulate the right of property, and the possession of land is determined by positive constitutions."<sup>78</sup> These words are not easy to interpret,<sup>79</sup> but are a forbidding obstacle to extreme readings of Locke on property rights. Finally, relevant to resource management, are Locke's words against waste: "Nothing was made by God for Man to spoil or destroy"<sup>80</sup> and in the state of nature to waste the fruit of the land "offended against the common Law of Nature".<sup>81</sup>

Locke's explanation of property met his need to expound a new theory of government, and did not state in any detail the conditions under which civil society could limit individual property rights. But there is enough in what he wrote to put to rest any suggestion that may be attributed to him that property rights are free of regulation.

Blackstone is often quoted for his description of property as ". . . that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe" and his statement that "So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community."<sup>82</sup> These sentences please the property rights advocates, and it suits them to portray Blackstone as a legal eminence who explained property rights to be absolute and invulnerable rights vested in the individual by the laws of nature and of God, as followed by the wisdom of the common law. Blackstone's detractors have denounced him as a reactionary defender of antiquated law. Neither point of view is entirely right. Certainly he was an enthusiast for English law as well as an expert,<sup>83</sup> but he

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77 Ibid, II §3, 268.

78 Ibid, II §50, 302.

79 Ibid, introduction by Laslett, 104.

80 Ibid, II §31, 290.

81 Ibid, II §37, 294.

82 W Blackstone, *Commentaries on the Laws of England* (John Murray, London, 1857) (1765) Book 1, p 125, Book 2, p 2.

83 Blackstone introduced the teaching of common law in the universities alongside Roman and canon law. His synopsis of law was more influential in the United States than it was in England, largely because it provided a compact overview at a time when legal materials were scarce.

was not blind to its defects or the benefits of law reform.<sup>84</sup> Nor was he a rights zealot. He spoke of absolute rights to personal security (life, health and reputation), liberty and private property, but he called them absolute in an odd, attenuated sense of being available only in a purely hypothetical state of nature prior to the formation of civil society.<sup>85</sup> In civil society, rights are not really absolute at all. "Political, therefore, or civil liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public."<sup>86</sup> So too with property rights. Private property as we know it is a civil institution or human invention, and not a natural right at all: "all property is derived from society."<sup>87</sup> On something as basic as the right of inheritance, he says "It is certainly a wise and effectual, but clearly a political, establishment; since the permanent right of property, vested in the ancestor himself, was no natural, but merely a civil, right."<sup>88</sup> Property rights are therefore not insulated from government action, and can be changed without doing injustice to the individual.<sup>89</sup> He esteemed community values as well as individual ones, speaking often of the general good of the nation or the public, and of duties as well as rights. Government should leave each individual "master of his own conduct, except in those points wherein the public good requires some direction or restraint."<sup>90</sup> This is hardly a libertarian manifesto. Blackstone followed his ringing words on sole and despotic dominion by pondering on the fragility of entitlements to property rights. He sought to assuage those doubts with a tale of initial occupancy in a state of nature that developed into permanent rights that encouraged occupiers to invest their industry, justifying property on a utilitarian basis, only indirectly from natural law. But it was not meant as a full theoretical justification, and the author preferred to drop tricky matters like whether occupancy was by universal consent and plunge into the thickets of doctrine. And indeed his exposition of doctrine shows how unlikely it is that he intended his remarks about sole and despotic dominion and exclusive right to be taken literally.<sup>91</sup> A singular unitary concept of property was not a good description of English property law of his time; most land was

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84 A W Alschuler, "Rediscovering Blackstone" (1996) 145 U Pa L Rev 1.

85 Ibid, 28. On the shortcomings of Blackstone's religious explanation of absolute rights, see M Raff, "Environmental Obligations and the Western *Liberal* Property Concept" (1998) 22 Meib ULR 657.

86 Blackstone, *supra* n 82, Book 1, ch 1, p 113.

87 Ibid, Book 1, ch 8, p 294; also Book 1, ch 1, p 125.

88 Ibid, Book 2, ch 1, p 10.

89 Alschuler, *supra* n 84, 30; R P Burns, "Blackstone's Theory of 'Absolute' Rights of Property" (1985) 54 U Cin L Rev 67, 73-74.

90 Blackstone, *supra* n 82, Book 1, ch 1, p 114. See Alschuler, *supra* n 84, 48. Nor does he show any particular disapproval of statute law: Burns, *supra* n 89, 83.

91 C M Rose, "Canons of Property Talk, or, Blackstone's Anxiety" (1998) 108 Yale LJ 601.

either in settled trusts or subject to pre-enclosure manorial rights, both of which imposed a web of checks and balances on the holders of interests in land.<sup>92</sup> Read properly, Blackstone does not give property rights a special place against legislative reformulation.

From more modern political theory, property rights advocates often invoke public choice theory.<sup>93</sup> Public choice theory uses economic assumptions and methods to study political institutions and the pursuit of self-interest in politics.<sup>94</sup> It sees the political process as a “marketplace” where the different actors — voters, politicians, bureaucrats and agencies, lobbyists, industries, etc — are seeking only to advance their own private interests. The public interest is nothing more than the outcome of their interactions — their trading. Everyone is in it for what they can get. It is therefore hostile to the idea of regulation in the public interest. The state, the legal system, and regulatory agencies are simply furthering individual private interests when they profess to act in the public interest; government is merely a means for individual needs and aspirations to be pursued.

As a theory of public life, it has its shortcomings. The individual is not always the appropriate unit of analysis; sometimes it is the group or society. It is also necessary to inquire into how different private interests or preferences are formed; shaping the agenda is vital in politics. Nor can politics be understood without inquiring into how power and influence are distributed unequally in society. Public choice is therefore subject to limitations in its ability to explain reality, just as other theories are. It faces competition from other modern theories of democratic politics, such as developmental democracy, civic republicanism, and participatory democracy.<sup>95</sup> Assertions that the RMA is not in accordance with public choice theory are not in themselves persuasive, except to a person wholeheartedly convinced of its strength.

Even if one were to accept public choice as a theory of political activity, it does not seem to be able to bear the weight of the argument that it is asked in relation to the RMA. When McShane uses it to say that RMA regulators have

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92 Ibid. As to strict settlements, see A W B Simpson, *An Introduction to the History of the Land Law* (1961) 222 on restrictions on use by life tenant (“He was liable for waste; thus he was unable to cut timber, or open new mines, or plough up ancient meadow land”) and 224: “Modern textbooks as well as historical works tend to portray the law of real property as a body of law which has zealously protected the power of free alienation of land, and the rule against perpetuities (and associated doctrines) as an effective curb against attempts to destroy this power in landowners. It is important to realize that the strict settlement ingeniously removed the power of free alienation from a large number of the landowners of the country; it required statutory intervention to restore it to them.” As to manorial rights, see E C K Gonner, *Common Land and Inclosure*, (2nd ed, 1966).

93 Ryan, *supra* n 5, 73; Joseph, *supra* n 2, 13; McShane (2001), *supra* n 3, 8.

94 Farber and Frickey, *Law and Public Choice: A Critical Introduction* (1991); McAuslan, “Public Law and Public Choice” (1988) 51 *Mod L Rev* 681.

95 D Held, *Models of Democracy* (2nd ed, 1996).



incentives to over-consume regulation,<sup>96</sup> he argues a proposition deriving from theory that needs to be verified by empirical inquiry. While it is true that councils do not have to “buy” the effects they have on landowners, it is arguable that their use of regulation is strongly constrained by the scrutiny of the plan-making process, including section 32, by the cost of the plan-making process, by the possibility of reversal in the Environment Court, and ultimately by the adverse political reaction of affected voters.

##### 5. *Arguments from history*

It is sometimes said, or implied, that there is no precedent for environmental regulation in its intrusion on the rights of property owners, and it is for that reason unjustifiable. The first answer is one that we will come back to, and that is to concede that indeed there is more environmental regulation than in days gone by, but for the very good reason that we are more aware of environmental problems than our forebears were, and have created worse problems. So our concerns in society have had to change. The second point is that regulation is not a recent phenomenon. Our forebears regulated to the best of their ability. The form of regulation has changed over the years. In pre-industrial rural England, for example, the law of the manor was an elaborate system of regulation and management of resources. In its form it was largely a matter of property law. But we must be wary of thinking that it was some “state of nature” Eden before the fall; feudalism, where the manorial system developed, was anything but a free consensual relationship.<sup>97</sup> Most of the population, especially in the country, was unfree. There was no room for individualism. The use of land in and near the royal forests was closely and sometimes brutally regulated. Mining in the stannaries of Cornwall and Devon, the Peak District and on Alston Moor was closely regulated by local courts — local administrative agencies.<sup>98</sup> The face of England was transformed over a period of several centuries by enclosure of the manorial commons, and then by canal and railway companies, in procedures that we might call land use planning and regulation, and that were compulsorily imposed as far as most of the smaller landowners were concerned.<sup>99</sup> American scholars have found that the regulation of non-injurious uses of land was very common at the time of the nation’s founding, and that the taking of private property was not understood to include land use regulation, but only actual expropriations of private property.<sup>100</sup> A similar inquiry in New Zealand about the continuity of

96 McShane (2001) *supra* n 3, 8; McShane (1998, *Think Piece*), *supra* n 6, 37.

97 A W B Simpson, *supra* n 92; J N Claster, *The Medieval Experience 300-1400* (1982) 141.

98 See G R Lewis, *The Stannaries: A Study of the English Tin Miner* (1908); A Raistrick and B Jennings, *A History of Lead Mining in the Pennines* (1965); R R Pennington, *Stannary Law: A History of the Mining Law of Cornwall and Devon* (1973).

99 Gonner, *supra* n 92; R W Kostal, *Law and English Railway Capitalism 1825-1875* (1994).

100 W M Treanor, “The Original Understanding of the Takings Clause and the Political Process” (1995) 95 *Columbia L Rev* 782; J F Hart, “Colonial Land Use Law and its Significance for

land use regulation in different forms and for different purposes would be instructive.

#### 6. *Simplified view of what constitutes property rights*

Rarely does property rights advocacy go beyond the virtue of property law, the estate in fee simple, and the assumption that the owner has full rights to land in consequence. Property rights are more complicated than that. The property rights spoken of in Magna Carta, for example, are different from those we enjoy today. They involved a web of relationships with superiors, inferiors and fellow users, with little room for absolute independence. Wilkinson speaks of the desirability of the common law of property, contract and tort and their ability to secure individuals a high measure of freedom. He offers a series of tests for a proposed law or regulation that includes "Does it preserve venerable common law causes of action against harm or remove novel or expanded definitions of legal harms?"<sup>101</sup> This question is nonsense. When does a law become venerable? And how do we separate out common law from statute? The fee simple, for example, only became a transferable estate because of a statute, *Quia Emptores*, in 1290. (In fact it was passed for what we would call revenue purposes.) Are restrictive covenants, much esteemed by the advocates of non-statutory land use control, venerable? They did not exist before 1848,<sup>102</sup> and before 1953 they could not be notified on the Land Transfer register, which meant that they were ineffective. It is insufficient to describe law as divided into property-common law-venerable-efficient-individualist and regulation-statutory-new-inefficient-collectivist. Property rights need more sophisticated treatment than that.

#### C. *A Better View*

Having discussed the flaws in the arguments of the property rights advocates, I will now offer what I believe is a more rounded and more supportable view of the issues. The relationship between regulation and property raises some fundamental questions about society and the individual, so I will not be able to explore all the issues in detail. I hope I can do enough, however, to show that regulation has a useful and legitimate place.

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Modern Takings Doctrine" (1996) 109 Harvard L Rev 1252; J F Hart, "Land Use Law in the Early Republic and the Original Meaning of the Takings Clause" (2000) Northwestern Univ L Rev 1099.

101 Wilkinson, *supra* n 8, 212. For a vigorous criticism see J Allan, "Going to hell in a handbasket" [2002] NZLJ 335.

102 *Tulk v Moxhay* (1848) 2 Ph 774, [1843-60] All ER Rep 9 (LC). It took statute (the Property Law Amendment Act 1986) to allow positive covenants to be made so as to run with the land; are they any the less property rights for having a statutory parentage?

1. *The sovereignty of the legislature and the safeguards of the law*

My starting point is parliamentary sovereignty, as a basic and uncontroversial principle of New Zealand constitutional law.<sup>103</sup> As a matter of law there are no constraints that prevent Parliament from passing a law like the RMA, or one a good deal more draconian for that matter. Whether it should pass a law with an effect on property rights is primarily a matter of politics and policy. Our political arrangements reflect a desire to ensure that this parliamentary sovereignty is exercised carefully. The mixed-member proportional method of voting was introduced to promote deliberation in law-making, to reduce the domination of the legislature by the executive, and to reduce the likelihood that a government will make law in an arbitrary manner. The same purpose appears in Parliament's select committee processes, and in the duty of the Attorney-General to report on consistency of bills with the New Zealand Bill of Rights Act 1990, imposed by section 7 of that Act.

The exercise of parliamentary sovereignty is also constrained by international forces. International law is engaged when a state fails to pay compensation for the taking of the assets of the national of another state.<sup>104</sup> International investment conventions impose similar obligations. Also important is the perception of the international investment community of New Zealand as a place to invest and do business. The effect on governments of this perception has increased as the forces of globalisation have gathered strength.<sup>105</sup> The legislature's concern to reassure international investors of their security of title appears in the Crown Minerals Act 1991, where elaborate provisions ensure that rights acquired by oil companies and mineral companies will be grandparented even at the expense of considerable delay in applying changed rules and policies to them.

In the law of statutory interpretation we find another form of the desire to ensure that the sovereignty of Parliament is exercised carefully in respect of property. The courts do not contradict the intentions of the legislature as expressed in a statute, but through the process of interpreting statutes and giving effect to them they can make it more difficult to interfere with fundamental rights and freedoms. Thus the long-standing presumption against taking property without compensation, for which *Attorney-General v De Keyser's Royal Hotel Ltd*<sup>106</sup> is a leading authority, ensures that property will not be taken as a collateral effect or by subterfuge. Parliament may give powers to take property, but it must do it openly, and those who promote the measure must be willing to take the political consequences. A degree of

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103 P A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 3.

104 M N Shaw, *International Law* (4th ed, 1997) 573.

105 T Friedman, *The Lexus and Olive Tree* (1999).

106 [1920] AC 508 (HL) 542 per Lord Atkinson: "The recognized rule for the construction of statutes is that, unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation."

transparency is ensured. Parliament and the courts are not in opposition, but working in their different spheres to protect private property.

However the presumption against taking is not as strong as it was. As John Burrows puts it: "Once the Courts were most protective of private property both real and personal. This protection has, understandably, diminished in the area of planning and land use legislation: here the public interest in the control of land use prevails."<sup>107</sup> We will look at the planning and land use cases soon, and will see there that the presumption does not deprive a clearly-worded statute of its effect.<sup>108</sup> (We have already noted that the presumption does not extend to the implication of a compensation requirement in the absence of statutory provision.) The point that Burrows makes is an important one, and it is a broad one. In the United States, the courts in the late nineteenth century and the early twentieth century narrowly construed statutes that derogated from the common law, in order to limit the reach of statutes protecting workers and consumers; but this period of aggressive judicial resistance to social and economic regulation ended in the 1930s.<sup>109</sup>

The statutory interpretation issue is part of a wider theme in the evolution of public law. While law in the nineteenth century kept pace with the growth of the modern administrative state, in the early part of the twentieth century it fell behind, and failed to come to grips with the mass of new regulatory legislation.<sup>110</sup> Voices like Lord Hewart railed against the new despotism of the bureaucracy, suggesting that regulation and delegated legislation subverted the role of the legislature and were contrary to the rule of the law.<sup>111</sup> The role of the courts, it was thought, was to curb bureaucratic interference with the common law. In fact the courts were missing opportunities to deal with ministerial powers and new regulation. In English and New Zealand administrative law this "great depression" lasted until the early nineteen-sixties.<sup>112</sup> However, it lifted, and administrative law began to grow again. The courts devised effective principles and remedies to impose controls where necessary on modern administration. They also came to realise that they have a role in facilitating regulation as well as containing it. Harlow and Rawlings described the matter as involving a "red light" and a "green light" approach to administrative law.<sup>113</sup> The red light approach — Diceyan and liberal — views administrative law as confined to the judicial control and containment of

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107 J F Burrows, *Statute Law in New Zealand* (3rd ed, 2003) 221.

108 See discussion of *Falkner v Gisborne District Council* [1995] 3 NZLR 622 and *Attorney-General ex rel Mundy v Cunningham* [1974] 1 NZLR 737, below n 154 and accompanying text.

109 C Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (1990) 6.

110 H W R Wade and C F Forsyth, *Administrative Law* (8th ed, 2000) 15.

111 Hewart, *The New Despotism* (1929).

112 Wade and Forsyth, *supra* n 110, 16.

113 C Harlow and R Rawlings, *Law and Administration* (1984) 35.

agency action in order to safeguard individual rights. The green light approach sees administrative law as public law in a broad sense that recognises the need for agency action and regulation, and takes heed of the broader political, social, group and non-legal factors that influence administrators. It therefore rejects the view that the courts are there simply to contain the executive. It is now commonplace that the courts in judicial review and statutory interpretation should seek outcomes that facilitate the just operation of administration and not obstruct it.

The same shift has occurred in the United States; the traditional model of administrative law concerned itself with confining regulators to their statutory jurisdiction and ensuring that they exercised their discretion in the ways that the legislature had intended. It controlled the intrusion of government into private affairs; a classically liberal, rule-of-law objective.<sup>114</sup> But it had to change in order to accommodate the broad discretionary authority vested in agencies by the New Deal legislation of the 1930s. The courts did not attack that legislation with the traditional kind of judicial review, but, reacting in part to the Administrative Procedure Act of 1946, made new requirements for agency fact base, procedures, and reasoning; and made new use of statements of legislative purpose.

McAuslan<sup>115</sup> distinguished three different ideologies or purposes in action in British planning law: to protect private property; to advance the public interest, for example in slum clearance and sanitation, relying on expert administrators acting for the common good; and to advance the cause of public participation for its own sake as a radical or populist cause in participatory democracy, if necessary against both of the first two ideologies. The point at which the courts came to accept the second ideology, of advancing the public interest, if necessary against private property, was *Board of Education v Rice*<sup>116</sup> and *Local Government Board v Arlidge*<sup>117</sup> — an early point in this process of evolution.

Regulation, including land use regulation, therefore has a long and honourable place in our legal system. Public law has long recognised the necessity and desirability of regulation and delegated legislation.<sup>118</sup>

### 2. *The justification of regulation*

There is another side to the debate other than the legal one, and that is whether, as a matter of policy, a sphere of activity should be subject to regulation, or whether the matter should be left free of regulation and subject to the

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114 R Stewart, "The Reformation of American Administrative Law" (1975) 88 Harv L Rev 1669.

115 P McAuslan, *The Ideologies of Planning Law* (1980).

116 [1911] AC 179 (HL).

117 [1915] AC 120 (HL).

118 Wade and Forsyth, *supra* n 110, 839.

economic forces of the marketplace.<sup>119</sup> New Zealand is like many other countries in having seen enormous debate in the last twenty years on the proper extent of regulation. Many areas have seen deregulation, but many have seen more new regulation or re-regulation — utilities, energy, health, and education for example. Safety is one area where regulation is common — for food and drugs, vehicles, vehicle and equipment operators, structures, and the workplace. Monopoly is another area, whether under the Commerce Act 1986 or specialist legislation like the Electricity Act 1992. Professions are regulated, and so, to some extent, are trades like taxi driving. The stock exchange and other financial institutions are also regulated to some extent. In some such cases we notice that regulation can take the form of self-regulation, whether sanctioned by legislation or not. The Advertising Standards Complaints Board, for example, does not operate under legislation.

It is possible to say that regulation is unnecessary in such fields if market forces can operate freely. Properly informed, people are said to be able to make choices about the level of safety and risk that they are willing to incur. Monopolies can be said rarely to last long where there are no legal barriers to entry. However in some cases economic analysis can show that there is a case for regulation; there may be externalities, monopolies, or information deficiencies which prevent the normal operation of market forces and lead to market failure. Ogus puts it: "If, then, 'market failure' is accompanied by 'private law failure' . . . , there is on public interest grounds a prima facie case for regulatory intervention."<sup>120</sup> Unless the matter is dealt with in private law, then regulatory activity is justifiable if it will lead to greater efficiency. Environmental regulation can be justified because of commons issues, that is public goods outside the market system (eg clean air and water, stable climate, and amenity); valuation issues, due to the impossibility of putting a monetary value on environmental amenities; and intergenerational issues, due to the difficulty of allocating goods (and bads) over time to different generations.<sup>121</sup> However the observation that an economic justification can be found for regulation tends to shift into a policy requirement that one must be found; an assertion that regulation can only be justified by an economic rationale.

There is no reason to make such a radical shift. Environmental problems are not always susceptible to economic analysis; the issues often lie in the field of preference formation. Where we are considering what means to adopt in order to reach an end, economic forces may well be useful tools. But our judgment about how to reach that end should not be clouded by an excessively

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119 Or "presumably" subject to the economic forces of the marketplace. The lack of regulation does not imply that there is a market of any kind, and, if there is none, advocacy against regulation will simply be for a laissez-faire position without any pressure being brought to bear to change the existing state of affairs.

120 A Ogus, *Regulation: Legal Form and Economic Theory* (1994) 28.

121 R V Percival and D C Alevizatos (eds), *Law and the Environment: A Multidisciplinary Reader* (1997) 33-35.

high presumption that economic forces are to be preferred. If regulation has a better chance of producing the results that we as a community need, then we should be willing to use it even if no economic rationale can be produced. Government action is not contingent on proof that market forces are unusable. We must be alert to the possibility that leaving it to the market is really a policy to do nothing, because there is no likelihood that market forces will influence behaviour, because there is no market in operation, or because the incentives are too low to produce the necessary changes. Daniel Bromley pointed out that “leave it to the market” prescriptions imply that bargaining over land use externalities must occur against the backdrop of prevailing institutional arrangements, but policy prescriptions that involve planning involve alterations in the prevailing institutional arrangements.<sup>122</sup>

In *After the Rights Revolution: Reconceiving the Regulatory State*,<sup>123</sup> Cass Sunstein lays down a detailed defence of government regulation against the attack on it from neo-liberal ideas that became influential in government in the 1980s and 1990s, in the USA and elsewhere. He points out that the critics of collective action are seeking fundamental change. He argues that regulatory initiatives in fields such as the environment, occupational safety and health or broadcasting are far superior to an approach that relies solely on private markets and private ordering. One of his most basic criticisms of reliance on market outcomes is that they are affected by a range of factors that are morally arbitrary — supply and demand at any particular place and time, unequally distributed opportunities before people became traders at all, existing tastes, the sheer number of purchasers and sellers, and even the unequal distribution of skills.<sup>124</sup> There is no good reason for government or society to take these factors as natural or fixed, or to allow them to be turned into social and legal advantages, when it is deciding on the appropriate scope of regulation.

As for the argument from individual liberty or autonomy, that if there is no harm to others, government ought to respect divergent conceptions of the good life, he observes that difficulties in coordinating the behaviour of many people, and problems of collective action, may make private ordering coercive or unworkable.<sup>125</sup> Government regulation prevents coercion or chaos, and thus promotes liberty by making it easier for people to do what they want. Moreover there is more to liberty than the satisfaction of private preferences; true liberty calls for decisions made in a full awareness of all available opportunities, with all relevant information and without illegitimate constraints. Preferences are not exogenous, and legal rules affect preferences. Law and regulation may protect collective goals and aspirations, rejecting the choices of private consumers in favour of public values or considered

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122 D W Bromley, *supra* n 1, 37.

123 C Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (1990).

124 *Ibid*, 39.

125 *Ibid*, 36.

judgments. The protection of such aspirations is a vindication of democracy and is not an objectionable interference with freedom. As for the argument from welfare, that people know what is in their own best interests, regulation often provides the solution to coordination and collective action problems. The model of two-party contracting is unrealistic where there are many people involved. Market pressures and sheer numbers may prevent players from obtaining their preferred solution: for instance littering a park or street, or polluting the air, may be in everyone's self interest if individual benefits outweigh individual costs, but if everyone does it then aggregate costs may be higher. Legal coercion is necessary to ensure the satisfaction of individual preferences.<sup>126</sup> In the environmental field, regulation is a response to the problem of irreversibility, where effects on a species, a place, or an artefact, may be permanent. The effect on future generations is a kind of externality. Thus Sunstein finds that the modern system of governmental controls — allowing freedom of contract and private property in general, but rejecting them in targeted areas — has far more coherence and integrity than is generally supposed. Regulatory failure, where regulation benefits interest groups and rent seekers, does occur, but it is not the usual result; much regulation has been successful.

In *Free Markets and Social Justice*<sup>127</sup> Sunstein expands on his analysis of the relationship between markets and law. He is strongly in favour of market instruments and argues that environmental protection in the United States should take more advantage of market thinking than it now does.<sup>128</sup> But his main objective is to question the assertion of the normative primacy of market ordering. "Free markets can produce economic inefficiency and (worse) a great deal of injustice. Even well-functioning economic markets should not be identified with freedom itself."<sup>129</sup> Market ordering is not the be-all and end-all of our social arrangements. The achievement of social justice is a higher value than the protection of free markets; markets are mere instruments to be evaluated by their effects. "[F]ree markets are a tool, to be used when they promote human purposes, and to be abandoned when they fail to do so."<sup>130</sup>

Another key insight of Sunstein is that markets are inextricably dependent on law and regulation. Free markets depend for their existence on law; on the law of property that tells people who owns what, and what that ownership

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126 Ibid, 37, 43.

127 (1997). Sunstein will smile if he sees what Palmer, *supra* n 17, 167, and Joseph, *supra* n 2, 14, have quoted from p 203 of *Free Markets and Social Justice*. He would not deny for a moment what he said about the importance of the protection of property rights in encouraging investment in a nation. But he is likely to say that the quotation does not represent the point that his book as a whole has to make.

128 Sunstein (1997), *supra* n 127, 384 and chapters 10, 13-14. Also see p 7.

129 Ibid, 4.

130 Ibid, 7.



entails, and on the law of contract.<sup>131</sup> A New Zealand example of the dependence of free markets on law and regulation is the electricity industry. Mere abolition of statutory monopolies in 1987 and 1992 was insufficient to bring a competitive market in electricity into being until further legal and regulatory reforms occurred in 1996 and 1998.<sup>132</sup> The New Zealand Stock Exchange, after years of denial, is waking up to the fact that higher levels of regulation will produce a better market and bring back investors.

### 3. *Property theory*

How far can the institution of property be supported on a sound conceptual basis in relation to other interests? We have noted the claims from the thought of Locke and Blackstone. Property is much debated by political theorists and students of jurisprudence. Property is a particularly public part of a legal system because the assertion of a property owner is not against one party bound by a *lis inter partes*, but against the whole world, endorsed by the state. There are two general kinds of argument to justify the institution of private property, rights-based arguments and utilitarian arguments.

Jeremy Waldron, who has given the most thorough and influential modern analysis of the rights-based arguments, describes them as arguments that show that an individual interest considered in itself is sufficiently important from a moral point of view to justify holding people to be under a duty to promote it.<sup>133</sup> Are the individual interests served by the existence of private property so important from a moral point of view that they justify holding governments to be under a duty to promote, uphold, and protect property-owning? If they do not have the level of importance that justifies treating them on the basis of rights, should they be dealt with in the aggregate in the form of utilitarian arguments about property institutions?

Waldron examines the differences between the two rights-based arguments.<sup>134</sup> The theory of Locke, developed in some respects by Robert Nozick, he describes as a special right; private property is a right that someone may hold in the same way as he or she may have certain promissory or contractual rights. A person holds property because of what he or she has done or what has happened to him or her. To Locke, this was the labour that a person has mixed with land or a thing. The creator gave the goods of the world to humanity in common, and in a state of nature there could be no property. But God intended men and women to survive, and to labour for their subsistence. Private appropriation is the only way to meet human needs. And

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131 *Ibid*, 5.

132 B J Barton, "Governance in the Electricity Industry" [2000] NZLJ 300; B J Barton, "Responsive Regulation in the Electricity Industry" [2000] NZLJ 347.

133 J Waldron, *The Right to Private Property* (1988) 1.

134 Waldron concludes that the general right argument is fundamentally different from the special right argument, and that the two cannot be brought together in a single case.

when a person mixes labour with the land, he or she acquires the right to it. In his view, as we have noted, the state exists to protect the right so acquired, and its action is constrained by that right to property, but that right is itself constrained by a general right which each person has to the material necessities for survival. Waldron finds the details of this approach to be unconvincing. It is simply not true that private appropriation is necessary, particularly where land is concerned; it may be the most efficient way, but it is not the only way, so the argument can hardly support a conclusion of right, as opposed to utility.<sup>135</sup> The argument about mixing one's labour is incoherent; it cannot be rescued by "desert" or entitlement to reward, by creation *ex nihilo*, or by psychological identification. As for Nozick's version of the special right theory, the lack of a background general right to subsistence is a fatal flaw.

In contrast, Hegel developed a general right: private property is a right that all persons have rather in the way that they are supposed to have the right to free speech or to an elementary education. Its recognition is part and parcel of respect for them as free moral agents. Waldron finds that although there are obscurities in the Hegelian approach, it is convincing in developing a general right out of the connection between respect for property and respect for persons, in individual self-assertion, mutual recognition, the stability of the will, and the establishment of a proper sense of prudence and responsibility. But private property can be so justified only if it can be made available to every person on whose behalf that argument can be made out.<sup>136</sup> This is a central problem. It has a radical distributive implication, and suggests a contradiction: if property must be available to all, then the rights of property owners must be limited in order to prevent inequality. But this need not undermine the very idea of private property; legal systems recognise all sorts of constraints on the rights of owners. In either case (the Lockean theory or the Hegelian) it will always be necessary to constrain property rights by a general background right of subsistence. While this background right is egalitarian, there is considerable leeway for variations in social policy and economic distribution. From all this Waldron draws out his chief point:<sup>137</sup>

The important conclusion, then, is this. Under serious scrutiny, there is no right-based argument to be found which provides an adequate justification for a society in which some people have lots of property and many have next to none. The slogan that property is a human right can be deployed only disingenuously to legitimize the massive inequality that we find in modern capitalist countries.

This analysis of rights-based justifications of private property can be directed at environmental issues as much as distribution issues. The institution of property can make out a very modest moral claim to require governments to

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135 Waldron, *supra* n 133, 137-252.

136 *Ibid*, 389.

137 *Ibid*, 5. The rest of this paragraph draws from there also.

promote it, which leaves it mainly requiring justification from its utility. The other needs of society such as environmental needs are not subordinated, and justify constraints on property. In addition, the right to subsistence will often imply rights of access to resources and rights of protection from environmental harm.

There has been a resurgence of interest in natural law and rights arguments for law in the last two or three decades.<sup>138</sup> The jurisprudence of America warms to natural law more than that of Britain or New Zealand, so does much of the property advocacy.<sup>139</sup> The reason is the emphasis on fundamental rights coming from outside the legal system, directly from natural rights or through an entrenched constitution. Rights talk is often volatile: to assert something as a right is inevitably competitive and assertive.<sup>140</sup> Rights, however, are always subject to limitations and overrides, such as where they clash with other rights. Your right to use your hands freely does not extend to punching me in the nose. Your right to property does not extend to keeping me as a slave. Some of the limitations and overrides of rights to property are inherent in property law itself.

The utilitarian argument for the institution of private property declares that property and its laws are a human construct built to suit human needs. Its sole justification is utility, that is, that human experience shows that it is useful for the promotion of human happiness. Jeremy Bentham, drawing on David Hume's work, and arguing against the natural law views he attributed to Blackstone, held that laws were made by human beings, and should be made, and reformed, with a view to their consequences. An argument for private property is a utilitarian one if it shows that property will improve prosperity, the human condition, or overall welfare. Law and economics theory derives from utilitarian and positivist thought, in asserting that the common law is best explained as a system for maximizing the wealth of society.<sup>141</sup>

Legal positivism is a close ally of the utilitarian approach in law. It has been the leading line of legal philosophy for most of the twentieth century. The writings of H L A Hart epitomise legal positivism, and have greatly influenced modern mainstream thinking in law.<sup>142</sup> They give the best explanation of how a legal system works in practice as a system of rules, including primary rules, secondary rules which determine how those basic primary rules are made, and a rule of recognition that defines the system constitutionally. Law is confined to the law enforced by the courts, and moral issues are distinguished from it,

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138 A leading example is R Dworkin, *Taking Rights Seriously* (1977).

139 Wilkinson, *supra* n 8, 61-62, 165, 168. At 126 he condemns the subversive influence on the rule of law in the last century of the doctrine of legal positivism or legal realism, preferring law to include some ill-defined meta-law.

140 M A Glendon, *Rights Talk: The Impoverishment of Political Discourse* (1991).

141 R A Posner, *Economic Analysis of Law* (5th ed, 1998) 27.

142 H L A Hart, *The Concept of Law* (1961).

although that is not to say that they are not relevant. A legal positivist considers that property is the result of positive legal systems, and that property could not exist without the law's coercive power. Property and property rights are dependent on the law, and the law must be analyzed as a human construct or artifice. Property rights must be evaluated against a utilitarian understanding of what will promote human happiness. No system of property rights is free from this scrutiny. No form of property rights is immune from being reshaped in consequence.

The utilitarian and positivist justification for private property therefore finds that property rights are justified and entitled to respect for their ability to contribute to overall welfare, but not on the basis of some exterior natural law. Property rights are part of the legal system and a human construct. Property rights must demonstrate a contribution to overall welfare, and are subject to alteration until they do. There is no reason for property rights to claim a specially-protected position as against other elements of the legal system, such as environmental regulation. We should employ whatever combination of property rights and environmental constraints will advance the overall good.

In consequence, neither of the two main theoretical perspectives, rights and utility, support the claim that property rights are superior to other interests and deserving of protection against state action. They do not support the more sweeping assertions of the sanctity of property rights. There has been an upsurge of theoretical interest in property in the last twenty years.<sup>143</sup> Some of the scholarship concurs that property rights cannot be asserted as fundamental human rights to the exclusion of regulations aimed at preserving public health, amenities or the environment,<sup>144</sup> or suggests serious weaknesses in the conceptual underpinnings of private property.<sup>145</sup> Other writers point out the complexities in private property; for example, are people's rights of movement and expression in an airport concourse, a shopping mall, or a residential estate, to be controlled purely by the owner's right to exclude trespassers?<sup>146</sup> An environmental re-appraisal of the institution of property has emerged.<sup>147</sup> The New Zealand debate about property and regulation will be improved by

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143 J R Pennock and J W Chapman (eds), *Property: Nomos XXII* (1980); E F Paul, F D Miller and J Paul (eds), *Property Rights* (1994); J McLean (ed), *Property and the Constitution* (1999).

144 J Harris, "Is Property a Human Right?" in J McLean (ed), *supra* n 143, 64, 87. Also J Harris *Property and Justice* (1996).

145 K Gray, "Property in Thin Air" (1991) 50 CLJ 252; W N R Lucy and C Mitchell, "Replacing Private Property: The Case for Stewardship" [1996] CLJ 566.

146 K Gray and S F Gray, "Private Property and Public Property" in McLean (ed), *supra* n 143, 11.

147 R J Goldstein, "Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property" (1998) 25 Boston College Env Affairs L Rev 347; M L Duncan, "Reconceiving the Bundle of Sticks: Land as a Community-Based Resource" (2002) 32 Environmental Law 773.

drawing on such a wider and more modern range of thinking, rather than on misreadings of Locke and Blackstone.

#### 4. *The nature of property, regulation and other kinds of law*

Property, regulation and other kinds of law are not always readily distinguished from each other, and common law and statute are more closely intertwined than some writers notice. Much property law, for example, is embodied in legislation. *Quia Emptores* was mentioned earlier, and notice can be taken of the Land Transfer Act 1952, which lays down the doctrine of indefeasibility of registered title, surely the bedrock of the modern New Zealand law of real property. Common law principles determine whether an agreement concerning land is an option or a right of first refusal and whether it is an interest in land — a right to property, in fact. But statutory rules determine whether the holder can sustain the caveat which may be essential to protecting the right. Other statutory rules determine whether a person can hold a right to property in the nature of an easement in gross without owning a dominant tenement nearby. Conversely, the common law provides long-standing principles of statutory interpretation and statute law that are indispensable to any functioning system of regulation. The common law can regulate monopolies if statute does not.<sup>148</sup> A rounded view of the relation between regulation and property requires us to accept that they are mutually-supportive, co-evolving parts of the same legal system.<sup>149</sup> The rights of the landowner cannot be determined from one part in disregard of the other.

Equally, it is necessary to inquire into the nature of property and the particular property right that is subject to regulation. Property rights are not simple, and their content may vary from one place to another. They vary through time, as we have noted. *Lucas v South Carolina Coastal Council* is useful in holding that a decision on regulatory taking requires a “logically antecedent inquiry into the nature of the owner’s estate”.<sup>150</sup> What is in the bundle of rights that makes up the property of the owner? Landowners are constrained in their use of land by the law of nuisance. Property rights advocates have sometimes argued that nuisance analogies are the only legitimate kind of land use regulation; but in truth common law on a matter like nuisance can and does evolve with a view to changing circumstances, and can be influenced by legislation,<sup>151</sup> which would make the argument rather circular. However there are other limitations than nuisance. For example, the

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148 M Taggart, “Public Utilities and Public Law” in P Joseph (ed), *Essays on the Constitution* (1995) 214; P P Craig, “Constitutions, Property and Regulation” [1991] Public Law 538. *Vector Ltd v Transpower NZ Ltd* [1999] 3 NZLR 646 (CA) held that the Commerce Act 1986 was such a statute.

149 C M Rose (1996) supra n 50.

150 505 US 1003 (1992), 1027.

151 Burrows, supra n 107, 369.

common law limits the rights of the holder of an estate in fee simple by requiring him or her to allow the uphill neighbour a right of support. Some of the limitations on property rights are inherent in those rights themselves. Sometimes it is not easy to tell those inherent limitations apart from externally-imposed ones.

##### *5. The environmental problem*

Serious debate about the environment has been under way only for the last forty years. Before then, concerns were more particular; urban sanitation and public health in the mid-nineteenth century, wildlife and wilderness protection in the late nineteenth century, and so forth. The reason is that environmental problems were not so serious then. There is much more degradation now because of the exponential growth of world population since 1650, because of our use of resources, especially energy resources, and because of the concomitant technology that allows us to have more impact per person. In addition, our concern is greater because we have better knowledge about the health and ecological damage that is caused by the degradation of the environment. The environmental problem therefore does not figure in the work of early thinkers on property rights. The world population at the time that Locke wrote was about three-quarters of a billion, and at the time of Blackstone and Bentham, still less than a billion.<sup>152</sup> Now it is six billion. No wonder that they do not address the environmental problem, it had scarcely emerged. They were more preoccupied with the relation between property and the state as a constitutional matter and as a distributional matter. Modern writers like Waldron have been taken up with like issues rather than the environment. But what they say about the relationship between property and other public questions is readily applicable to the environmental problem. The underlying issue is the place of the institution of property in our social, political and legal arrangements.

Just as we can understand why early writers did not address the environmental problem, we can see why we do need to do so now. There are more of us than ever jostling for place and for peace. There is general agreement that action is needed to put right damage to the environment and avoid future damage as best we can. The problems are serious and require substantial action.

##### *6. The response of the RMA*

Let us turn to the Resource Management Act 1991 and consider its response to environmental problems in relation to property rights. We find that it encourages a wide variety of activities, such as education, information, and financial incentives, but we are not concerned with them in this inquiry. Our

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<sup>152</sup> Population Division, Department of Economic and Social Affairs, United Nations Secretariat, *The World at Six Billion*, ESA/P/WP.154, 1999, Table 1.

concern is regulation, primarily rules in district and regional plans on the use of land. The power of district councils to make such rules is contained in section 76(1):

A territorial authority may, . . . include rules in a district plan.

The effect of rules is chiefly stated in section 9(1):

No person may use any land in a manner that contravenes a rule in a district plan or proposed district plan unless the activity is—

- (a) Expressly allowed by a resource consent granted by the territorial authority responsible for the plan; or
- (b) An existing use allowed by section 10 or section 10A.

This restriction is backed up by the criminal sanctions of section 338 as well as other enforcement procedures.<sup>153</sup> Finally, section 85(1) avoids the possibility that these regulatory restrictions are compensable takings of land:

An interest in land shall be deemed not to be taken or injuriously affected by reason of any provision in a plan unless otherwise provided for in this Act.

The effect of these provisions on property rights is shown in *Falkner v Gisborne District Council*, decided by the High Court in 1995.<sup>154</sup> The property right in question was an unusual one, the right of the owner of a property on the sea coast to protect it from the inroads of the sea. The owner may erect groynes or other coastal defences to protect his or her land from erosion. This right is undeniably one of longstanding in English common law, and it is also clearly part of New Zealand common law. However the Court observed that there is nothing in principle to prevent a duty sourced in the Crown's prerogative power, or an established common law right, from being overridden or restricted by statute: *Attorney-General v De Keyser's Royal Hotel Ltd.*<sup>155</sup> A provision in a statute purporting to restrict or abolish existing rights ought to be construed strictly; a court should look for express language or necessary implication in a clear and unambiguous manner. Against this background the Court turned to the RMA and considered its comprehensive, interrelated system. Barker J held:<sup>156</sup>

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153 It is not necessary here to go into detail about subdivision (s 11), nor the constraints of purpose, function and matters to be taken into account before a council makes rules in a plan, nor the making of a rule which requires a resource consent to be obtained for any activity causing adverse effects not covered by the plan, s 76(4). The regional equivalent of s 76 is s 68. The equivalents of s 9 for the restriction of activities that concern regional councils are ss 9(3) and 12-15C.

154 [1995] 3 NZLR 622.

155 [1920] AC 508.

156 *Falkner*, supra n 154, 632. Section 23 was no assistance to protect a right or rule of law which, upon proper construction of the statute as a whole, would otherwise impliedly be restricted or abolished.

The whole thrust of the regime is the regulation and control of the use of land, sea, and air. There is nothing ambiguous or equivocal about this. It is a necessary implication of such a regime that common law property rights pertaining to the use of land or sea are to be subject to it. . . .

The effect of all this is simply that, where pre-existing common law rights are inconsistent with the Act's scheme, those rights will no longer be applicable. Clearly, a unilateral right to protect one's property from the sea is inconsistent with the resource consent procedure envisaged by the Act; accordingly, any protection work proposed by the residents must be subject to that procedure. . . .

[T]here is nothing in the scheme of the Act to suggest that the common law right cannot be infringed — quite the reverse. The Act is simply not about the vindication of personal property rights, but about the sustainable management of resources.

The consequence was that the landowners were obliged to obtain resource consents before coastal protection works could be built. They faced steady erosion of the coastal foredunes on which their residences were built, and they faced a district council which had adopted a policy of "managed retreat." Their plight was plainly on Barker J's mind. The possibility of compensation was discussed, not that there was any entitlement under the existing state of the law, but that the legislature could well pass a law like that of the United Kingdom. Another interesting possibility was that the common law duty and right could properly be considered by the consent authority under section 104(1)(i) — "[a]ny other matters the consent authority considers relevant and reasonably necessary to determine the application."

The Court observed that it should approach its interpretative task in a manner mindful of the legislative background:<sup>157</sup>

As has been acknowledged both academically and judicially, the statutory implementation of integrated planning and environmental regimes represents a clear policy shift towards a more public model of regulation, based on concepts of social utility and public interest. Private law notions such as contract, property rights and personal rights of action have consequently decreased in importance (see D A R Williams, *Environmental Law* (1980), para 109; *Attorney-General, ex rel Munday v Cunningham* [1974] 1 NZLR 737, 741; *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment* [1985] AC 132, 140-141).

The utilitarian assumption is clear. Earlier, Barker J had observed, on an old case that a landowner has the right to protect himself or herself against the inroads of the sea,<sup>158</sup>

It might be said that such an approach manifests a narrow nineteenth century preoccupation with proprietary rights, out-of-keeping with the more holistic policy

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<sup>157</sup> *Ibid*, 631.

<sup>158</sup> *Ibid*, 630. The case was *R v Commissioners of Sewers for the Levels of Pagham, Sussex* (1828) 8 B&C 355, 108 ER 175.



concerns of sustainability and environmentalism popular today. The policy underlying the common law perhaps has less force today.

Modern law, then, does not give property priority over environmental regulation.

*Gebbie v Banks Peninsula District Council*<sup>159</sup> is similar. The landowner sought to reopen a quarry on his land for greywacke and rhyolite, and argued that he could do so without a resource consent. It was agreed that he owned those minerals and could mine them as a common law incident of ownership. But mining and quarrying are a use of land in terms of section 9, both on an ordinary reading of the words and in light of the express definition of use in section 9(4)(c) as including "excavation, drilling, tunnelling, or other disturbance of the land". The Act applied to the landowner regardless of his ownership of the minerals and his common law right to mine them. Although there is a principle against construing an Act so as to interfere with property, the intent and meaning of the Act is the final and decisive factor. Likewise *Hall v McDrury*<sup>160</sup> held that the common law and statutory right to use a public road did not override the RMA's provisions for controlling activities which have adverse effects on the environment, so that an enforcement order could be pursued against a farmer driving a dairy herd along a road. And *New Zealand Suncern Construction Ltd v Auckland City Council*,<sup>161</sup> following *Falkner*, pointed out that the RMA sets in place a scheme in which the concept of sustainable management takes priority over private property rights. The cases are therefore quite clear that the RMA is intended to constrain property rights.

There was nothing unorthodox about these RMA cases in their approach to the intention of the legislature; they are part of a line of consistent New Zealand land use planning cases. *Ideal Laundry Ltd v Petone Borough Council*<sup>162</sup> held that the Town and Country Planning Act 1953 authorised prohibitions on land uses, and that words like "make provision" had to be given such fair, large and liberal construction as would best ensure the attainment of the objects of town planning. *Attorney-General ex rel Mundy v Cunningham* rejected an argument to give the Town and Country Planning Act 1953 a narrow interpretation on the ground that it severely affects common law rights and imposes criminal liability. This consideration could not justify attributing an artificially narrow meaning to the words of the Act.<sup>163</sup>

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159 [2000] NZRMA 553 (HC).

160 [1996] NZRMA 1 (EC).

161 [1996] NZRMA 411, 425 (EC), affirmed by the High Court [1997] NZRMA 419, without referring to this matter.

162 [1957] NZLR 1038, 1061 (CA).

163 [1974] 1 NZLR 737, 741. Cf dicta of McCarthy J in *Clifford v Ashburton Borough Council* [1969] NZLR 927, 943 (CA).

Moreover, in the context of planning legislation, which is necessarily concerned with limiting individual rights in the interests of the community generally or local sectors of the community, I cannot think that it would be right to adopt the "strict and cautious" approach for which counsel contends. Interference with private rights and imposition of criminal liability are certainly points to be weighed in the process of interpretation, but they cannot be allowed to override the discernible policy of the legislature or the ordinary meaning of the words.

The interpretation of the RMA and previous legislation is therefore in line with the trends in public law and statutory interpretation that were described earlier. A philosophy of interpretation that struggles against constraints of the liberty of the property owner opposes the clear intention of the RMA. There would not be much point in the RMA if it did not encompass the possibility of constraining the use of property. Economic instruments and non-regulatory means came to the forefront too late in the reform and drafting process to appear in any significant way in the RMA.<sup>164</sup>

#### *7. Safeguards of property rights in the RMA*

Let us bear in mind the safeguards that are built into the RMA to constrain the way that the rule-making powers of section 76 and its like are used. The first is the process for plan-making that is set out in the First Schedule. Consultation, notification, openness, submissions, hearings, and appeals to the Environment Court figure very prominently. They are significant constraints on the power of councils to make rules and other provisions in plans. Citizens, communities and landowners can participate and express their views about the fairness or unfairness of proposed plans. Landowner groups like Federated Farmers are capable users of these procedures. A second safeguard is that final decisions on plans are made by elected councillors, who are receptive to the views of their ratepayers, and who generally prefer to be seen to be acting fairly and reasonably as they go about their work. Many of them wish to get re-elected. This sensitivity to public opinion supplements the statutory procedures and can save landowners the time and expense of pursuing the formal options such as appeals to delete proposals for restrictive rules.

The other two safeguards are sections 32 and 85, which call to be considered together.<sup>165</sup> Section 32 requires a council to consider a set of matters as it proposes provisions for its plan. Provisions containing rules will be particularly relevant. Are the provisions necessary in achieving the purpose of the Act? Are other means possible? What are the reasons for and against the provisions? How do they look if we evaluate the likely benefits and costs of the plan? Is the council satisfied that the provisions are necessary and the most

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164 G Palmer, "Sustainability — New Zealand's Resource Management Legislation" in M Ross and J O Saunders (eds), *Growing Demands on a Shrinking Heritage: Managing Resource-Use Conflicts* (Canadian Institute of Resources Law, Calgary, 1992) 408, 425; S Upton, "Purpose and Principle in the Resource Management Act" (1995) 3 *Waikato L Rev* 17.

165 I agree with McShane's (2001) approach to this, *supra* n 3, 5.

appropriate means? The council must document its work on these matters, and its success in justifying the provisions of its proposed plan will inevitably figure in debate in the plan hearings and any reference.<sup>166</sup> Section 32 is a significant control on the regulatory powers of the council. Section 85(2) allows a landowner to challenge a provision in a plan if it renders that land incapable of reasonable use. He or she may do so in a submission during the regular plan-making process, or by applying for a private plan change under clause 21 of the First Schedule. An alternative exists under section 85(3) for the Environment Court to act where a rule both renders land incapable of reasonable use and places an unfair and unreasonable burden on any person having an interest in the land. The test is not an easy one to meet, but it can be met.<sup>167</sup>

These safeguards mean that the Fable of the Awakening Landowner does not have a lot to do with reality: ("Then the landowner wakes up one day to find that a proposed plan has been declared that over a third of the farm is a Significant Natural Area because it is kiwi habitat or similar"<sup>168</sup>). The reality is that such a proposal would not last long. If the SNA is a mistake it will never stand scrutiny. If it is not, and one third of the farm is indeed significant, then probably it will have attracted environmental attention and restrictions already, perhaps under the Forests Act as well as the RMA. If not, few knowledgeable landowners or valuers would overlook the possibility in appraising the potential of the land for development.

Property rights advocacy makes it sound as if councils are in the habit of stopping landowners from using their land as they have been accustomed. That is uncommon, because the real issue is usually change in use — the development potential of land. Future development raises difficult questions especially where the future development is distant or speculative. Regulation is only one of the factors that determine whether land can be developed in a particular way, and when. Market forces are a major factor, often reflecting underlying physical changes such as neighbouring development, transport options, new crops, and new building techniques. Potential use will change, and both market forces and regulation may play a part in that potential.

The assumption that the RMA reduces land value also needs checking. Land use regulation often enhances the value of your land because of the restrictions on what your neighbours can do. It reduces the risk that you will

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166 The Environment Court examines the council's work on s 32 matters as part of its adjudication on the substantive merits of the proposed plan, and not by giving relief against non-compliance with s 32: *Kirkland v Dunedin City Council* [2002] 1 NZLR 184 (CA).

167 *Application by P A Steven* (1997) 4 ELRNZ 64 (EC) and *Steven v Christchurch City Council* [1998] NZRMA 289 (EC); K Palmer, "Zoning 'Wipeout' and the No Compensation Principle" (1997) 1 NZJEL 316.

168 McShane (2001) *supra* n 5, 7.

suffer loss of value from what your neighbour might do.<sup>169</sup> Arguments about compensation for loss of value must take into account that value may also have been enhanced by regulation.<sup>170</sup> The RMA does not always reduce rights; in the case of water, for example, a landowner can obtain much greater rights, for irrigation or some such purpose, than he or she could have under common law. (And, one might add, without paying for the water.) Criticism of the RMA as intruding on property rights must not be selective.

#### *D. Conclusions*

First, let me make clear what I am not saying. I am not saying that all regulation is good. Some of it is badly done. Practice under the RMA is sorely in need of improvement.<sup>171</sup> I agree that silly things can happen under regulation; but silly things happen under market forces too.<sup>172</sup> I am not saying that non-regulatory instruments are ineffective. Many are effective. The information strategies of reflexive law offer much promise, and so do self-regulation, voluntarism and education and information instruments.<sup>173</sup> They are not a panacea, but nor is regulation. Nor is a panacea to be found in economic incentive systems such as environmental taxes, tradeable quotas, risk bubbles, and natural resource development and use trading systems. They are not always realistic, because, for example, of difficulties in defining workable new individual property rights, and in initiating trading in a genuine market, but

169 McShane (2001) *supra* n 5, 2, notes this as “fit for tat” regulation, imposing mutual restraints for mutual advantage, eg not building within 3 m of the boundary. This regulation he sees as belonging in the private realm and different from other regulations in a more public realm eg protection of wetlands and riparian edges. It is not clear whether this distinction can be sustained; it assumes that regulation of relations between neighbours is somehow by contract, when it is clearly publicly imposed, and it assumes that other regulation involves no such consensual advantage, when arguably it does, the only difference being the number of people involved.

170 The Town-planning Act 1926 provided compensation for land taken or injuriously affected by a planning scheme, other than by bulk and location requirements: s 29. It also provided that landowners were liable to pay betterment, “such increase in the value of that property as is attributable to the approval of a town or regional planning scheme” — s 30(1). The landowner could be liable to pay one half of the betterment into a Betterment Fund — ss 30 and 31. In Britain there was a similar procedure for betterment and “worsenment” payments under the Town and Country Planning Act 1932, but it was dropped in 1947: Ryan, *supra* n 5, 75. There is probably no case to introduce it in New Zealand, but there is a case for taking the beneficial effects of land use regulation into account when the owner argues that he or she has suffered loss because of it.

171 N Ericksen, J Crawford, P Berke, J Dixon, “Plans: The Next Generation. Extracts from a Report to Government on Resource Management, Plan Quality and Governance” unpublished seminar paper, New Zealand Planning Institute Conference, March 2001.

172 D W Bromley, *supra* n 1, 39: “Problems arise when over-zealous commentators claim that ubiquitous markets will solve all land-use problems, or when self-righteous planners claim to know best about what should be done.”

173 N Gunningham and P Grabosky, *Smart Regulation: Designing Environmental Policy* (1998); R B Stewart, “A New Generation of Environmental Law?” (2001) 29 *Capital Univ L Rev* 21.

they show unfulfilled promise in areas such as allocation of water and allocation of marine space. Nor am I saying that individual landowners must shoulder unreasonable burdens. Where land has special importance, public money should be used more to pursue public aims. (I am confident that landowners will not object to the rates or taxes required to pay the most affected of them for that public benefit.) Compensation or relief from a rule should be available in some cases. I have not reached as far as to identify which cases; Ryan's work on the point is useful and further work would be even more helpful.<sup>174</sup> In a case like *Steven v Christchurch City Council*<sup>175</sup> where no public agency was willing to put large sums into an old house to make it habitable, then I agree that the landowner should not be prevented from demolishing it. Nor do I think the RMA is perfect as is; it has many deficiencies, and not least in its approach to ownership.

I have argued that it is legal, constitutional, principled, and ethical to regulate the use of land. This has taken me initially through the arguments of property rights advocates; I have found serious flaws in their arguments from New Zealand constitutional law and American constitutional law. The same goes for their arguments from history and from political theory. Their arguments that land use regulation is illegal, unconstitutional or objectionable are a very selective representation of the true picture. I have sought to round out the picture, by investigating the constitutional position, the theoretical justification of regulation, the theoretical justifications of property rights, and their limits. I will have accomplished something if I have shown that Locke, Blackstone and Epstein are not irrefutable and are not the only sources of useful ideas. I have also considered the response of the RMA, both the degree to which it grants regulatory power and the checks and balances that it imposes on that power. My coverage is by no means complete, and there is a lot of room for exploration in further research. Empirical work would be particularly welcome to inquire into the horror stories, how they got resolved, and how representative they are. Legal history could help ascertain the extent of land use regulation at different times in New Zealand's history, and ascertain the intentions of the legislators and policymakers in drafting the RMA.

Regulation has a leading place in a functional system of environmental management. It is a valid and democratic expression of community aspirations and decisions. It is effective even though it is often imperfect. The main alternatives have promise but also serious deficiencies. Regulation will affect market allocations and property rights; indeed, that is its whole point. There is no need for surprise when landowners report that there has been an effect. Nor should the existence of an effect automatically trigger a guilty sense of obligation to pay compensation. There are cases where compensation, or voluntary sale or removal of the regulatory burden, appears to be desirable, but

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174 Ryan (1998), *supra* n 5.

175 [1998] NZRMA 289 (EC).

not in every case where a landowner can find a valuer to say that his or her land value has dropped. I need go no further; there is plenty of room for a healthy debate about how regulation should work and how it should relate to property rights. We have to make our own way here, mindful of history, mindful of the theoretical insights of all kinds of thinkers, in order to work out how to address the environmental difficulties that we face.