The Legitimacy of Regulation

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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. There has been a lot written on the subject in New Zealand as elsewhere, but my justification for bringing it up again is that most of what we have heard is from the side of advocates of property rights and critics of regulation. I wish to clear out some of the misconceptions and bring some balance to the debate.[1] 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. What I am saying is that planning and land-use regulation have a proper place in the scheme of things.

Last year at the Association's Conference in Wellington, Philip Joseph addressed us with an argument that too little attention is given to our property rights heritage, a heritage that began with Magna Carta.[2] He took us through 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. At that Conference, Owen McShane spoke as well, maintaining that the threat of takings of private property is likely to be detrimental to the environment.[3] 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.

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[1] Other contributions that do provide balance have been made by P. Cassin, *Compensation: An Examination of the Law* (Ministry for the Environment, Wellington, 1988, Resource Management Law Reform Working Paper 14); 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* (Ministry for the Environment, Wellington, 1988); D. Kirkpatrick "Property Rights – Do You Have Any?" Resource Management Law Assn Annual Conference, October 1996, Auckland, reprinted in (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 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 Assn Annual Conference, 4-7 October 2001, Wellington.

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

Some of these opinions follow the line of essays contributed during visits to New Zealand by an American academic, Richard Epstein,[4] whose views we will consider in more detail shortly. He described 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 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.

Kathleen Ryan[5] provided a more focussed contribution by arguing that the RMA needs to be changed to include a new system to allow land owners 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[6]) 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" in 1998,[7] McShane's main point on the matter was that section 85 lets regulation comes free to councils, which will therefore 'over-consume' regulation. In consequence councils seize large tracts of public 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 internalizing 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*.[8] His concern was the extent of costly and ill-conceived regulations in New Zealand, and advocated better regulation. (He was candid in saying that New Zealand's rating for freedom from regulation is quite high;[9] and in saying that many of his examples of bad

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[4] R A Epstein, *Natural Resource Law: Property Rights and Takings* (Wellington: NZ Business Roundtable, 1999). Also see R A Epstein, *Towards a Regulatory Constitution* (Wellington: NZ Business Roundtable, 2000).

[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") Wellington: Ministry for the Environment: 1998, pp 38-39 to an earlier version of Ryan's work, there is a proposed amendment to ss 32 & 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, pp 30, 37.

[8] B Wilkinson, *Constraining Government Regulation* (Wellington: NZ Business Roundtable, 2001).

[9] Wilkinson, supra, p. 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. 18 other countries scored 2; only Hong Kong, Singapore and the Bahamas scored 1. Two other studies that Wilkinson documents come to similar conclusions.

regulatory practice may not prove robust under closer scrutiny.[10]) 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.[11]

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 should be paid in many cases where regulations are imposed.

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,[12] or to the special problems of amenity values,[13] or to policies of renationalization. Regulation is glibly linked with Marxism or soviet communism.[14] (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 (eg regulatory non-takings, or "tit-for-tat" regulation) are acceptable,[15] but they are not well explained, and 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.

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."[16] 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 expert, Geoffrey Palmer, says in the article Joseph cites:[17]

> 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

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[10] Wilkinson, supra, p. 5.
[11] Wilkinson, supra, p. 188.
[12] McShane (2001), supra, p 1.
[13] Ryan, supra, p 91.
[14] McShane (2001), supra, p 1.
[15] McShane (2001), supra, p 2.
[16] Joseph, supra, p 8.
[17] G Palmer, "Westco Lagan v A-G" [2001] NZLJ 163 at 168.

> principle that has to be honoured by the executive and by Parliament. It cannot be implemented by the Courts.

Palmer 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.[18]

Writers usually make reference to Magna Carta.[19] 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 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;[20] yet even when misinterpreted, such as by Lord Coke in his struggle with the Stuarts, it has expressed an enormously powerful truth about the relation of the government to the governed. 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:

> 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.[21]

It was not intended to guarantee a trial by jury; it may have meant quite the opposite. Freemen, 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."[22] Even on the most literal meaning, therefore, Magna Carta does not profess to protect a land owner from an intrusion that is authorized 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.[23] 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.[24]

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

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[18] Palmer, supra, p. 166-67; H W R Wade and C F Forsyth, *Administrative Law* (8 ed, Oxford: Oxford Univ. Press, 2000) p. 788. I discuss these matters in more detail in relation to *AG v DeKeyser's Royal Hotel Ltd* [1920] AC 508 (HL) and *Falkner v Gisborne District Council* [1995] 3 NZLR 622 (HC).

[19] Joseph, supra; Kirkpatrick, supra, p 274, McShane (2001), supra, p 4, Wilkinson, supra, pp 8, 146-47, 162, 164, 165

[20] W Holdsworth, *A History of English Law* (London: Methuen, 1903) vol 1 pp 58-63, vol 2 pp 207-216; W J V Windeyer, *Lectures on Legal History* (2nd ed, Sydney: Law Book Co, 1957) p 79.

[21] Holdsworth, supra, 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 chap 29.

[22] Holdsworth, supra, vol 1 p 61.

[23] 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* (London: Butterworth, 1956) p 23.

[24] *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154 (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." at 157.

justice; but the High Court held in *Westco Lagan v Attorney General*[25] 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:

> 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.[26]

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.

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.

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[25] [2001] 1 NZLR 40 (HC). G Palmer in "Westco Lagan v A-G" [2001] NZLJ 163 accepts the accuracy of the decision.

[26] McShane (2001), supra, p 5 ([2002] NZLJ at 29).

Most state constitutions have an equivalent of the Fifth Amendment. There is no equivalent in the law of New Zealand. The American law on it has of course become enormous.[27]

The Fifth Amendment is easy to apply in cases where private property is deliberately taken for a public purpose.[28] 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*[29] 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 company's rights. Holmes J, for the majority, conceded that:[30]

> Government could hardly 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:[31]

> 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 taking.

The American courts have been struggling ever since to say how far is 'too far,' but *Pennsylvania Coal* has kept is place.

Four years after *Pennsylvania Coal*, the US Supreme Court came to consider land use zoning in *Village of Euclid v Ambler Realty Co*[32] Land was zoned residential, reducing its value per acre from $10,000 for industrial to $3,500. The Court upheld the constitutional validity of the particular zoning and the theory of land use zoning in general. It left open the possibility of that individual applications of zoning might be rejected as arbitrary or unreasonable, using 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 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.[33] Aesthetics are widely accepted as a basis for land use control, especially in relation to billboards.[34] Historical and architectural controls are equally often

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[27] R C Platt, *Land Use and Society: Geography, Law and Public Policy* (Washington DC: Island Press, 1996); R Meltz, D H Merriam & R M Frank, *The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation* (Washington DC: Island Press, 1999).

[28] Much of this account is based on Platt, supra, p 258.

[29] 260 US 393 (1922).

[30] *Pennsylvania Coal*, supra at 413.

[31] *Pennsylvania Coal, supra at 415.*

[32] 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.

[33] *Mugler v Kansas* 123 US 623, *Goldblatt v Town of Hempstead* 369 US 590 (1962); and *Village of Euclid* at 386.

[34] Platt, supra, p 286.

found to be valid.[35] 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*[36] is probably still the most important, in enunciating a balancing test that recognizes 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,[37] the relevant parcel on which to calculate economic impact,[38] damages as the remedy available,[39] unconstitutional conditions of nexus and proportionality,[40] and a categorical or per se rule on total regulatory takings, although with two exceptions of nuisance and underlying concepts of property law.[41] 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.[42] If one looks at the overall picture, in the large majority of cases using the *Penn Central* approach of weighing and balancing factors of particular significance, the landowner loses.[43] State appellate courts show an increased tendency to uphold land-use and environmental regulatory programs.[44] Some lower court decision have pushed the boundaries of regulatory taking into new territory. Their importance may lie not so much in their narrow legal significance but in what they are thought to represent; a broadening of the rights of property owners in the face of land use regulations. The perception may become politically self-fulfilling.[45] Takings law is often criticized for incoherence, but it is not as bad as many say.[46] However no one is happy with it, for it is the locus of deep ideological divisions, and Supreme Court decisions have been finely divided between liberal and conservative camps.

The takings litigation of the last fifteen years has been strongly pressed by conservative interests determined to restrain government and to advance the interests of developers. It is now well documented that the legal team of the Reagan White House launched a vigorous attack on government regulation through the takings clause. Charles Fried, the Solicitor General (and a prominent conservative himself), recalls:

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35 Platt supra, p 289, *Penn Central Transportation Co v City of New York* 98 SCt. 2646 (1978).

36 438 US 104 (1978). Generally, see Meltz et al, supra.

37 *Williamson County Regional Planning Comsn v Hamilton Bank*, 473 US 172 (1985).

38 *Keystone Bituminous Coal Assn v DeBenedictis*, 480 US 470 (1987).

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

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

41 *Lucas v Sth Carolina Coastal Comsn*, 505 US 1003 (1992).

42 Meltz et al, supra, p 9, referring to *First English*, *Lucas*, *Nollan*, *Dolan*. Platt, supra, p 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 land owner in a way that amounts to a taking, and that the state has an obligation to compensate.

43 Meltz et al, supra, p 9.

44 Meltz et al, supra, p 555.

45 Platt, supra, p 269.

46 Meltz et al, supra, p. 8.

> Attorney General Meese and his young advisors – 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.[47]

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 litigated takings cases on behalf of developers, trained lawyers, and brought judges to attend all-expenses-paid resort seminars to discuss libertarian views on secure property rights.[48]

The chief theorist of the project has been Richard Epstein, in *Takings: Private Property and the Power of Eminent Domain*.[49] 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 had to be restricted to a narrower and static interpretation of traditional common law nuisance.[50] Regulation must have a more direct relation, as a means to an end, and the end itself must be examined.[51] 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 very 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;[52] 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.[53]

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 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 others, with political action, strategic

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47 Charles Fried, *Order and Law: Arguing the Reagan Revolution – A Firsthand Account* (1991) p. 183, cited in Kendall and Lord, p 529.

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

49 (Cambridge, Mass: Harvard Univ Press, 1985.)

50 Epstein, supra, p 112.

51 Epstein, supra, p 128.

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

53 C Fried, "Protecting Property – Law and Politics" (1990 13 Harv J L & Public Policy 44 at 49.

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.

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.[54] 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.[55] There is an opportunity for careful comparative analysis here, with countries like Australia, where a number of cases have been decided on the issue in recent years, notably *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 147 ALR 42 (HCA).

Although Great Britain is like New Zealand in having no written constitution, a Northern Irish case, *Belfast Corporation v O.D. Cars Ltd* [1960] AC 490 at 519 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."[56]

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.[57] In *British Columbia v Tener*,[58] the owner of property rights in mineral 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. (The events were similar to those in *Newcrest Mining*.) 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. This transfer of rights distinguished the case from land use zoning.

> 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.

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54 A J van der Walt, *Constitutional Property Clauses: A Comparative Analysis* (Cape Town: Juta, 1999).
55 van der Walt, supra pp 15-19.
56 at 519 per Lord Simonds.
57 *Manitoba Fisheries Ltd v The Queen* [1979] 1 SCR 721, 88 DLR (3rd) 462.
58 [1985] 1 SCR 533, 17 DLR (4th) 1.

> 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.[59]

Arguments from Political Theory

Arguments in defence of private property invoke Locke and Blackstone.[60] Locke's thought is a mainspring of classical liberalism, which took was intially concerned to contest the absolute powers of the monarch and the church. It asserted that the political system should protect the rights or civil liberties of the individual, including property rights, and should maximize individual freedom of choice. Political power should be limited to the public sphere; it had no business in the private aspects of an individual's life, including much of economic and social life. This limitation of political power could be obtained through democracy, but democracy was not its purpose. The theory of liberal democracy, enshrining democracy as a fundamental value, was developed by John Stuart Mill in the mid-nineteenth century. It is the central political tradition of western thought.[61] Liberal democracy is often utilitarian in its orientation, and is open to vigorous government action in order to redress inequities and social problems. Thus the references to Locke make one ask about the things that his thought did not address. What about democracy? What about inequity? How much power can be safely accumulated in the private sphere without public consequences? When does individualism become divisive? Lockean liberalism's preoccupation with limiting public power can cause it to overlook the necessary limits on private power.

The passages from Blackstone that property advocates usually quote say that the right of property is "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 "So great moreover is the regard for 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."[62] Blackstone's explanation for these statements was a religious one; according to Genesis, God gave to man dominion over all the earth, and this is the only true and solid foundation of his dominion over external things. However his biblical theology was selective and out of step with his contemporaries Locke and Hale.[63] His singular unitary concept of property was not a good description of English property law of his time; most land was 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.[64] Blackstone's synopsis of law

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[59] DLR at 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), *Govt of Malaysia v Selangor Pilot Assn* [1978] AC 337 (PC); *Manitoba Fisheries Ltd v The Queen* [1979] 1 SCR 101, 88 DLR (3d) 462.

[60] Joseph, supra, pp 3-4, 9-10; Wilkinson, supra on Blackstone at 145-46, 155, 160; on Locke p. 138.

[61] See D. Held, *Models of Democracy* (2nd ed., Stanford, Calif: Stanford University Press, 1996) p. 70.

[62] W Blackstone, *Commentaries on the Laws of England* (first published 1765, 1982 ed vol 2, 2, and vol 1 p. 138-39.

[63] M. Raff, "Environmental Obligations and the Western *Liberal* Property Concept" (1998) 22 Melb ULR 657. Even in *Genesis* 1:28 God's direction was to be fruitful, and multiply, and replenish the earth, as well as to subdue it. Modern theology finds ample biblical support for a more environmentally responsible ownership of land, especially to a reader who ventures beyond the first page or two; and so do thinkers in other religions: see Raff p 668. Locke could say "Nothing was made by God for man to spoil or destroy": see Raff p 664.

[64] As to strict settlements, see A W B Simpson, *An Introduction to the History of the Land Law* (Oxford: Oxford Univ Press, 1961) p. 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 p. 224: "Modern textbooks as well as historical works tend to portray the law of real property as a body of law which has zealously portected the power of free alienation of land, and the rule against perpetuities (and associated doctrines) as an effective curb

became much more influential in the United States than it ever was in England, largely because it was compact and portable. A modern view of Blackstone recognizes the difficulties imposed by his enthusiasm for a natural law justification for eighteenth-century English law, notwithstanding its centuries of unreformed complexity, obscurantism and barbarity.[65] When it comes to specifics of legal rules, Blackstone does not follow through with his assertion that positive law must be a nullity where it conflicts with natural law.[66]

From more modern political theory, property rights advocates often invoke public choice theory.[67] Public choice theory uses economic assumptions and methods to study political institutions and the pursuit of self-interest in politics.[68] 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. Public choice has a good deal in common with pluralist political theory.

Arguments from public choice theory have their shortcomings. Public choice theory is limited in relying on the assumptions that economics makes. The individual is not always the appropriate unit of analysis; sometimes groups or societies are. Equally, how preferences are made and changed can often be vital in politics, but economics takes them as a given and focuses on their effect. Political power cannot be understood without considering the shaping of values and understandings of what are the proper issues for debate; 'shaping the agenda.' Nor can it be understood without inquiring into how power may be distributed unequally in society, or why one person or group may have more influence than another. Public choice theory 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.[69] Even if one were to accept public choice theory wholeheartedly as an explanation 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 incentives to over-consume regulation,[70] 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 land owners, 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 by the adverse reaction of affected voters.

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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."

[65] D. Kennedy, "The Structure of Blackstone's *Commentaries*" (1979) 28 Buffalo L Rev 205.

[66] M Taggart, "Expropriation and Public Purpose" in C Forsyth and I Hare (eds) *The Golden Metwand and the Crooked Cord* (Oxford: Oxford Univ Press, 1998) p 91 at 96 observes that Blackstone had no objection to expropriation of property for public purposes.

[67] Ryan, supra, p. 73, Joseph, supra, p 13, McShane (2001), supra, p 8.

[68] Farber and Frickey, *Law and Public Choice: A Critical Introduction* (Chicago: University of Chicago Press, 1991); McAuslan, "Public Law and Public Choice" (1988) 51 Mod L Rev 681.

[69] Held, supra.

[70] McShane (2001) supra, p 8; McShane (1998, *Think Piece*) p 37.

Public choice theory, libertarianism, the critique of government regulation, and the elevation of property rights all form part of neo-liberal or new-right political philosophy. Individualism and inalienable individual rights are at the core of its vision, and so is freedom of market forces for those individuals to bargain with each other. The role of the state is a minimal one, to protect those rights, and to allow those market forces to prevail for the common good. It is backed up with concepts and methods from economics, a discipline which has persuasive analytical capability. The philosophy has been influential in the last twenty years. It has an intellectual coherence that has a powerful allure, and can give a sense of mission and purpose, even among people who do not intend to make use of its ability to shore up the position of vested interests. Much of the argumentation amounts to an assertion that the RMA is not in accordance with the principles of some of the more radical kinds of this neo-liberal philosophy. However those who do not adhere to that philosophy are quite happy that the RMA does not accord with it.

Arguments from History

It is sometimes said, or implied, that environmental regulation is an unprecedented intrusion on the rights of property owners, and is for that reason unjustifiable. The first point to make in response is that indeed there is more environmental regulation than in days gone by. The reasons are that we are more aware of the environmental problem than our forebears were. We have clearer knowledge about the health and ecological damage that can be done by degradation of the environment. In addition, there is much more degradation because we are so much more numerous on the planet, and because our technology enables us to have a much greater effect. Anthropogenic greenhouse gas emissions are a product of the Industrial Revolution. 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 control of the use, conservation 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.[71] 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.[72] 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 many of the smaller landowners were concerned.[73] 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 contemplated as including land use

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[71] A W B Simpson, supra; J N Claster, *The Medieval Experience 300-1400* (New York: New York Univ Press, 1982) p 141.

[72] See G R Lewis, *The Stannaries: A Study of the English Tin Miner* (Cambridge, Mass: Harvard Univ Press, 1908); A Raistrick and B Jennings, *A History of Lead Mining in the Pennines* (London: Longmans, 1965); R R Pennington, *Stannary Law: A History of the Mining Law of Cornwall and Devon* (Newton Abbott: David & Charles, 1973).

[73] R W Kostal, *Law and English Railway Capitalism 1825-1875* (Oxford: Oxford Univ Press, 1994).

regulation, but only actual expropriations of private property.[74] Similar inquiry in New Zealand about the continuity of land use regulation in different forms and for different purposes would be profitable.

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, were 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?"[75] What laws are sufficiently venerable? And how do we separate out common law from statute? The estate in fee simple, for example, was brought into being by 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.[76] And before 1953 they could not be notified on the Land Transfer register, which meant that they were ineffective. And while we are on the subject, is the Land Transfer Act 1952 property law or regulatory? My point is that there are some serious issues to consider here if we are to go beyond advocacy.

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.

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.[77] 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

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[74] 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 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.

[75] Wilkinson, supra, pp 79-82, 210, 212.

[76] *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?

[77] P A Joseph, *Constitutional and Administrative Law in New Zealand* 2nd ed (Wellington: Brookers, 2001).

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 would 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.

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.[78] International investment conventions impose similar obligations. Also important is the perception of the international community, especially 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 globalization have gathered strength.[79] 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 the rights of oil companies and mineral companies will be grandparented even at the expense of considerable delay in applying changed rules and policies to them.

Our law also reflects a 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 DeKeyser's Royal Hotel*[80] 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 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:[81]

> Once the Courts were most protective of private property. 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.

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.[82] (We have already noted that the presumption does not extend to the implication of compensation requirements in the absence of statutory provision.) The point that Burrows makes is an important one, and is broader than New Zealand planning and land use legislation. In the United States, the courts in the late nineteenth century and the early twentieth century narrowly construed statutes in derogation of the common law, in order to limit the reach of statutes protecting workers, consumers and

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78 M N Shaw, *International Law* (4th ed, Cambridge: Cambridge Univ Press 1997) p. 573.

79 T Friedman, *The Lexus and Olive Tree* (London: HarperCollins, 1999).

80 [1920] AC 508 (HL) at 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."

81 J F Burrows, *Statute Law in New Zealand* (Wellington: Butterworths, 1992) p. 161.

82 See discussion of *Falkner v Gisborne District Council* [1995] 3 NZLR 622 and *AG ex rel Mundy v Cunningham* [1974] 1 NZLR 737, below.

other intended beneficiaries; but this period of aggressive judicial resistance to social and economic regulation ended in the 1930s.[83]

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.[84] 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. 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. 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. However they also came to realize 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.[85] The red light approach - Diceyan and liberal - views administrative law as confined to the judicial control and containment of agency action in order to safeguard individual rights. The green light approach sees administrative law as public law in a broad sense that recognizes 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.[86] 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[87] 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 thirdly, 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* [1911] AC 179 (HL) and

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83 C. Sunstein, *After the Rights Regulation: Reconceiving the Regulatory State* (Cambridge: Harvard Univ Press, 1990) p 6.
84 H W R Wade and C F Forsyth, *Administrative Law*, 8th ed, (Oxford: Oxford Univ Press, 2000) p. 15.
85 C Harlow & R Rawlings, *Law and Administration* (London: Weidenfeld & Nicholson, 1984) p. 35.
86 R Stewart, 'The Reformation of American Administrative Law' (1975) 88 Harv L Rev 1669.
87 P McAuslan, *The Ideologies of Planning Law* (London: Pergamon, 1980).

Local Government Board v Arlidge [1915] AC 120 (HL) – an early point in this process of evolution.

Regulation, including land use regulation, therefore has a long an honourable place in our legal system. Public law has long recognized the necessity and desirability of regulation and delegated legislation.[88]

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 economic forces of the marketplace.[89] 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 will be argued to be able to make choices about the level of safety 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."[90] 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; 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.[91] 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.

I do not accept that view. Environmental problems are not always susceptible to economic analysis; the issues often fall into 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

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88 Wade and Forsyth, supra, p. 839.

89 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 not 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.

90 A Ogus, *Regulation: Legal Form and Economic Theory* (Oxford: Clarendon Press, 1994) p. 28.

91 R V Percival and D C Alevizatos (eds) *Law and the Environment: A Multidisciplinary Reader* (Philadelphia: Temple Univ. Press, 1997) pp 33-35.

our judgment about how to reach that end should not be clouded by an excessively 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.[92]

These matters have received careful study by Cass Sunstein. In *After the Rights Revolution: Reconceiving the Regulatory State*[93] 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.[94] 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,[95] he observes that difficulties in coordinating the behaviour of many people, and problems of collective action, make private ordering coercive or unworkable. 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 on the process of preference formation. Preferences are not exogenous. The legal system should promote autonomy in the process of preference formation, and regulation should respond to the fact that private preferences and beliefs are not fixed, but instead adapt to limitations in available opportunities and information, and to existing circumstances. Legal rules may shape preferences, for example in making the initial allocation of entitlements.[96] Law and regulation may protect collective

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[92] D W Bromley, *Property Rights and the Environment: Natural Resource Policy in Transition* (Ministry for the Environment, Wellington, 1988) p 37.

[93] C Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Cambridge: Harvard Univ Press, 1990).

[94] Sunstein (1990), supra, p. 39.

[95] Sunstein (1990), supra, p. 36.

[96] In *Free Markets and Social Justice* (New York: Oxford Univ Press, 1997) Sunstein expands this analysis of preference, the way that preferences are formed and their connection with real human well-being, the contextual character of choice, and the ability of disciplines other than economics to explore the puzzles of human rationality.

goals and aspirations, rejecting the choices of private consumers in favour of public values or considered 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, as expressed in market transactions, 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. And 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.[97]

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. He proceeds to appraise the functions of regulatory statutes. Many respond to market failures, such as monopoly, collective action problems (including co-ordination questions and transaction costs), inadequate information, and externalities. Others redistribute resources, embody collective desires and aspirations, redress social subordination, or to affect the development of preferences. 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. Finally, there is regulatory failure where regulation benefits interest groups and rent seekers. Although it has become fashionable to argue that this is the usual fate of regulation, Sunstein shows that it is a gross misstatement, and that much regulation has been successful.

In *Free Markets and Social Justice* [98] Sunstein expands on his analysis of the relationship between markets and law. He is strongly in favour of market forces and market instruments; he considers, for example, that environmental protection in the United States has abandoned markets too readily, and should take far more advantage of market thinking than it now does.[99] But his main objective is to raise questions about economic analysis of law in its conventional form, and especially its 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."[100] He is quite clear that 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."[101]

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

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[97] Sunstein, *After the Rights Revolution*, supra, pp 37, 43.

[98] New York: Oxford Univ Press, 1997. Sunstein will smile if he sees what Palmer, supra p 167, and Joseph, supra p. 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.

[99] Sunstein. *Free Markets*, p 384 and chaps 10, 13-14. Also see p. 7.

[100] Sunstein, *Free Markets*, p. 4.

[101] Sunstein, *Free Markets*, p. 7.

people who owns what, and what that ownership entails, and on the law of contract. Sunstein goes as far as to say that the notion of "laissez-faire" is a myth, a grotesque misdescription of what free markets actually require and entail: "markets should be understood as a legal construct, to be evaluated on the basis of whether they promote human interests, rather than as a part of nature and the natural order, or as a simple way of promoting voluntary interactions."[102] 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.[103] 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.

Property Theory

What conceptual basis is there to advance the position of property owners and assert that rights to property are superior to other rights and superior to other values? 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.[104] 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 a right-based argument is an argument showing 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.[105] 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.[106] The Lockean theory, 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 hold 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 world was given to humanity by the creator, and in a state of nature there could be no property. But God intended men and women to survive, and to labour for

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[102] Sunstein, *Free Markets*, p 5.

[103] The NZ Electricity Market was established in 1996; the Electricity Industry Reform Act was enacted in 1998. The Ministerial Inquiry of 2000 found that by then competition was emerging but was far from perfect, and substantial new regulatory action was initiated. See B J Barton, "From Public Service to Market Commodity: Electricity and Gas Law in New Zealand" (1998) 16 JERL 351; B J Barton, "Governance in the Electricity Industry" [2000] NZLJ 300; B.J. Barton, "Responsive Regulation in the Electricity Industry" [2000] NZLJ 347.

[104] F. Cohen, "Dialogue on Private Property" (1954) 9 Rutgers L Rev 374.

[105] J. Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988), p 1.

[106] Waldron concludes that the general right argument is fundamentally different from the special right argument, and the two cannot be brought together in a single case, since they pull in different directions.

their subsistence. Private appropriation is the only way to meet human needs. And when a person mixes labour with the land, he or she acquires the right to it. 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 the Locke / Nozick 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.[107] The argument about mixing one's labour is incoherent; it cannot be rescued by 'desert' or entitlement to reward, by creation *ex nihilo*, or 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 what can be described as 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; not because they have contingently acquired it, but because its recognition is part and parcel of respect for them as free moral agents. The institution of private property can be related to individual self-assertion, mutual recognition, the stability of the will, and the establishment of a proper sense of prudence and responsibility. Waldron finds that although there are obscurities in the Hegelian approach, it is convincing in developing a general right to property out of the connection between respect for property and respect for persons. But private property can be justified as a right of personality only if it can be made available to every person on whose behalf that argument can be made out.[108] 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 will have to be limited in order to prevent inequality. But this need not undermine the very idea of private property. It is understood in many different ways, and legal systems recognize all sorts of constraints on the rights of owners; and the constraints that are needed may not defeat the original aims of a right-based argument to property. In any case (either 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, it need not call for absolute equality; there is considerable leeway for variations in social policy and economic distribution. From all this Waldron draws out his chief point:

> 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 legitimitize the massive inequality that we find in modern capitalist countries.[109]

This analysis of the strengths and weaknesses of the rights-based justification of private property can be directed at environmental issues as much as distribution issues.

There has been a resurgence of interest in natural law and rights arguments for law in the last two or three decades.[110] The jurisprudence of America warms to natural law more than that of

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107 Waldron pp. 137-252.

108 Waldron p. 389.

109 Waldron p. 5. The rest of this paragraph is from there also.

110 A leading example is R. Dworkin, *Taking Rights Seriously* (Cambridge, Mass: Harvard Univ Press, 1977).

Britain or New Zealand, so does much of the regulatory takings advocacy.[111] The reason is the constitution and its emphasis on fundamental rights coming from outside the legal system. Rights talk is often volatile; to assert something as a right is inevitably competitive and assertive.[112] 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. The utilitarian tradition traces its origins to David Hume and Jeremy Bentham. Bentham did more than any one to set in motion the great English law reform of the nineteenth century. He was profoundly convinced that Blackstone was wrong in attempting to justify the law of England in its eighteenth-century form from divinely-inspired natural law. Bentham held that laws were made, and not discovered, by human beings, and should be made chosen with a view to their consequences. Any argument for private property that shows that it will improve prosperity, the human condition, or overall welfare, is a utilitarian argument. Law and economics theory derives from utilitarian and positivist thought, by way of economics. The common law is best explained as a system for maximizing the wealth of society.[113] A rationale of economic efficiency can be discerned behind many longstanding common law rules, including the law of property.

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 epitomize legal positivism, and have greatly influenced modern mainstream thinking in law.[114] 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, 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-

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[111] Wilkinson, supra, p. 61-62, 165, 168. At p. 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.

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

[113] R A Posner, *Economic Analysis of Law* (4th ed, Boston: Little Brown, 1986) p 21.

[114] H L A Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961).

protected position as against other elements of the legal system, such as environmental regulation.

This theoretical discussion may have become tiresome, although anyone with expertise in jurisprudence will fault it for being superficial. I hope I have said enough, however, to explain the two mainstream justifications of property in modern law and political theory. I have brought the debate up to date from Locke and Blackstone, and have discussed the weaknesses in their thinking. As Waldron has shown, their rights-based justifications for property are only able to make a moderate claim against the other social imperative of equity and against constraints on property generally. The utilitarian and legal positivist justifications find no logical merit at all any such a claim, and deny that property rights as part of the legal system are in any special position. The utilitarian position asks that laws advance human welfare and happiness, and in our particular context would ask that we employ whatever combination of property rights and environmental constraints on them that will advance the overall good. In consequence, neither of the two main theoretical perspectives 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.[115] Some of the scholarship adds weight to the view that property rights cannot be asserted as fundamental human rights to the exclusion of regulations aimed at preserving public health, amenities or the environment.[116] Other writers point out the complexities; 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 property right to exclude trespassers?[117] Other views suggest that serious weaknesses in the conceptual underpinnings of private property.[118] There is an environmental critique, and there is an emerging New Zealand body of writing.[119] Unfortunately, such modern thought is not informing our debate about property and regulation in New Zealand. For too long we have been asked to consume an unbalanced diet. An awareness of the wide range of systematic thinking on the subject of property rights will be an improvement.

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 again of the Land Transfer Act 1952, which lays down the doctrine of indefeasibility of registered title, surely the bedrock of 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

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115 J R Pennock and J W Chapman (eds) *Property: Nomos XXII* (New York: New York Univ Press, 1980); E F Paul, F D Miller and J Paul (eds) *Property Rights* (Cambridge: Cambridge Univ Press, 1994); J McLean (ed) *Property and the Constitution* (Oxford: Hart Publishing, 1999).

116 J Harris, "Is Property a Human Right?" in J McLean (ed), supra, p 64 at 87. Also J Harris *Property and Justice* (Oxford: Oxford Univ Press, 1996).

117 K Gray and S F Gray, "Private Property and Public Property" in McLean (ed), supra, p 11.

118 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.

119 A Frame, *Property and the Treaty of Waitangi: A Tragedy of the Commodities?* (Hamilton: Te Matahauariki Institute, Univ of Waikato, 2001) also published in J McLean (ed) supra.

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.[120] It is a fragile understanding to rely on a division between property-common law-venerable-efficient-individualist, on the one hand, and regulation-statutory-new-inefficient-collectivist on 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 Commission* is useful in holding that a decision on regulatory taking requires a "logically antecedent inquiry into the nature of the owner's estate".[121] 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; unfortunately for their argument, common law on nuisance can evolve with a view to changing circumstances and can be influenced by legislation,[122] which would make the argument rather circular. However there are other limitations than nuisance. For example, the 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.

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. There is a reason for this, of course, and that is that environmental problems were not so serious then. The exponential growth of world population since 1650 is one reason; the other is our use resources per capita, especially energy resources. The recognition of the environmental problem as an integrated whole, and the recognition of its seriousness, is a recent phenomenon. It therefore does not figure in the work of early thinkers on property rights. The world population at the time that Locke wrote was about half a billion, and at the time of Blackstone and Bentham, still less than a billion.[123] 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.

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120 M Taggart, "Public Utilities and Public Law" in P Joseph (ed) *Essays on the Constitution*, (Brookers Wellington, 1995), p. 214; P P Craig, "Constitutions, Property and Regulation" [1991] Public Law 538.

121 505 US 1003 at 1027.

122 Burrows, supra, p. 259.

123 J. S. Dryzek and D. Schlosberg, *Debating the Earth: The Environmental Politics Reader* (Oxford: Oxford Univ Press, 1998, p. 15.)

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 peace. I do not to expatiate on this theme here, for I believe that 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; the status quo is not sustainable.

The Response of the RMA

Let us turn to the Resource Management Act 1991 and consider its response to the environmental problem 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. Our 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 in its district plan rules which prohibit, regulate or allow activities.

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.[124] 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.[125] 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, being overridden or restricted by statute: *Attorney-General v De Keyser's Royal Hotel Ltd*.[126] A provision in a statute purporting to restrict or abolish existing rights

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124 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 a rule in a plan, nor the making a rule which requires a resource consent to be obtained for any activity not specifically referred to in a plan, s. 76(4). The regional council equivalent of s. 76 is s. 68. The equivalents of s. 9 for the restriction of activities that concern regional councils are ss. 12-15C.

125 [1995] 3 NZLR 622.

126 [1920] AC 508.

would be construed strictly; a Court would look for express language or necessary implication in a clear an unambiguous manner. Against this background the Court turned to the RMA and considered its comprehensive, interrelated system. Barker J held:[127]

> 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. …
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> 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. …
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> [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 land owners 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 a district council which had moved to a property 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 such a law as that of the United Kingdom had. Another interesting possibility that the common law duty and right could properly be considered by the consent authority under s. 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.[128]

> As has been acknowledged both academically and judicially, the statutory interpretation 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 perfectly clear. Earlier, Barker J had observed, on an old case that a land owner has the right to protect himself or herself against the inroads of the sea,[129]

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127 *Falkner* at 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.

128 *Falkner* at 631.

129 *Falkner*, supra, at 630. The case was *R v Comsrs of Sewers for the Levels of Pagham, Sussex* (1828) 8 B&C 355, 108 ER 175.

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

Gebbie v Banks Peninsula District Council [2000] NZRMA 553 (HC) 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 as including "excavation, drilling, tunnelling, or other disturbance of the land". The Act applied to the land owner 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* [1996] NZRMA 1 (PT) 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 be pursued against a farmer driving a dairy herd along a road. And *New Zealand Suncern Construction Ltd v Auckland City Council* [1996] NZRMA 411 at 425 (PT), 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*[130] held that the Town and Country Planning Act 1953 authorized 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.[131]

> 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-

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[130] [1957] NZLR 1038 at 1061.

[131] [1974] 1 NZLR 737 at 741. Cf dicta per McCarthy J in *Clifford v Ashburton Borough Council* [1969] NZLR 927 (CA).

regulatory means came to the forefront too late in the reform and drafting process to appear in any significant way in the RMA.[132]

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 by way of reference 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 land owners can participate and express their views about the fairness or unfairness of proposed plans. Land owner 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 land owners the time and expense of pursuing the formal options such as references to delete proposals for restrictive rules.

The other two safeguards are sections 32 and 85, which call to be considered together.[133] 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 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. Section 32 is a significant control on the regulatory powers of the council. Section 85(2) allows a land owner 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.[134]

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."[135]) 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

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[132] 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* (Calgary: Canadian Institute of Resources Law, 1992) 408 at 425; S Upton, "Purpose and Principle in the Resource Management Act" (1995) 3 Waikato L Rev 17.

[133] I agree with McShane's (2001) approach to this, supra.

[134] *Steven v Christchurch City Council* [1998] NZRMA 289 (EnvC); K. Palmer, "Zoning 'Wipeout' and the No Compensation Principle" (1997) 1 NZJEL 316.

[135] McShane (2001) supra, p 7.

the Forests Act as well as the RMA, If not, few knowledgeable land owners 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 land owners from using their land as they have been accustomed. That is uncommon, because the real issues 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 one's land because of the restrictions on what your neighbours can do. It reduces the risk that you will suffer loss of value from what your neighbour might do.[136] Arguments about compensation for loss of value need to take into account that there has also be enhancement of value at one time or another, or in the present, because of regulation.[137] 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.

Conclusions

First, let me make clear what I am not saying. I am not saying that all regulation is good. Much of it is badly done. Practice under the RMA is sorely in need of improvement.[138] I agree that silly things can happen under regulation; but silly things happen under market forces too.[139] 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.[140] They are not a panacea, but nor is

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136 McShane (2001) supra, p 2, notes this as "tit 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 regualtions in a more public realm eg protection of wetlands, riparian edges, etc. 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 regulatio invovles no such consensual advantage, when arguable it does, the only difference being the number of people involved.

137 The British Town and Country Planning Act 1932 permitted councils to recover 'betterment' payments where the value of land had been increased by planning changes, and required them to pay compensation for 'worsenment'. But the scheme was unworkable and was dropped in 1947. See Ryan p 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 and environmental management into account when arguing that an owner has suffered loss because of it.

138 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, NZPI Conference March 2001.

139 D W Bromley, *Property Rights and the Environment: Natural Resource Policy in Transition* (Ministry for the Environment, Wellington, 1988) p. 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."

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

regulation. Nor is a panacea to be found in economic incentive systems such as environmental taxes, tradeable quota, 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 they show unfulfilled promise in areas such as allocation of water and allocation of marine space.

Nor am I saying – forgive the length of this list – that individual land owners must shoulder unreasonable burdens. Where land has special importance, public money should be used more to pursue public aims. (I am confident that land owners 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.[141] In a case like *Steven v Christchurch City Council*[142] where no public agency was willing to put large sums into an old house to make it habitable, then I agree that the land owner 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 land owners 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 not in every case where a land owner 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

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[141] Ryan (1998), supra.
[142] [1998] NZRMA 289 (EnvC).

theoretical insights of all kinds of thinkers, in order to work out how to address the environmental difficulties that New Zealand faces.