

CAN ENVIRONMENTAL REGULATION CONSTITUTE A TAKING OF PROPERTY AT COMMON LAW?

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We live, profoundly, in an age of regulation. Much of this regulatory activity is aimed at the promotion of environmental welfare, a term which I understand as referring not merely to the conservation of natural landscape and protection of the ecosphere, but also to the safeguarding of our cultural, archaeological and architectural heritage. Can environmental regulation amount to a taking of property at common law? That is a straight question; and it deserves a straight answer. The trouble is that, in this area, straight answers are in very short supply.

One thing is sure. Our inquiry into this matter will certainly take us well 'beyond environmental law' into complex areas of political and philosophical concern. We will be forced to look deep into the inner meaning of the ancient and extraordinary institution that we rather loosely call 'property'. We will have to define the social limits of ownership. We will have to debate the correct political balance between individual and community interests. We will be required to examine the interaction of human rights and civic duties. Our inquiry will ultimately comprise an exploration of the implicit content of *citizenship*. For, in discussing the subject of 'regulatory taking', we are doing neither more nor less than working out a modern civic morality of property. In the process, we may have to recognise that we are moving into an area where conventional understandings of property have steadily decreasing coherence or utility.

The origins of takings law

An important part of the history of 'regulatory taking' began in Sydney – and, as so often in Sydney's past, the Irish were at the centre of things. In 1863 a Roman Catholic Cemetery was opened up at Petersham. In 1879 a man called Slattery purchased a burial plot in the cemetery, intending it to be the final resting place for himself and his wife. Some five years later the municipal council of the borough of Petersham, motivated by environmental health considerations, passed a bye-law which prohibited any further interments closer than 100 yards to any public building, place of worship, schoolroom, dwelling-house or public street within the borough. This amounted, in effect, to a total ban on any further burials in the cemetery at Petersham. When Slattery's wife died six months later, Slattery nevertheless buried her in his plot. The Celt, Slattery, was promptly prosecuted by the borough inspector of nuisances, a man with the irremediably Anglo-Saxon name

of Naylor, and once again there emerged the timeless confrontation between authority and Irishry. Slattery was convicted by a justice at Newtown of an offence under the Petersham bye-law. The correctness of his conviction fell to be determined three years later by the judicial dinosaurs of the late Victorian era sitting 10,000 miles away in London. In all of this there is, of course, a large human and geographical incongruity. It is unlikely that any members of the Judicial Committee of the Privy Council had ever visited Sydney. For them the far-flung colony of New South Wales was truly *terra incognita*. The only information they had about Petersham was, in the words of counsel, that ‘the district in which the cemetery was situated was not populous.’

It was argued before the Privy Council in *Slattery v Naylor*¹ that the Petersham bye-law was ultra vires in that it ‘destroyed private rights’, namely the rights of those who owned burial places in the cemetery. The Privy Council acknowledged the ‘sacred’ nature of human preferences as to the disposal of the dead and the importance of ‘the desire of resting in the same spot with them.’ The Privy Council agreed it was ‘true that, in regulating the interment of the dead, the bye-law makes the cemetery useless for its former purpose.’² It nonetheless upheld Slattery’s conviction, although the law reports do not disclose what penalty was actually imposed on the elderly man. For many years I felt a deep curiosity to seek out the Slattery grave at Petersham in order to discover whether Slattery’s wish to rest forever beside his wife was fulfilled. Alas! Instead of the cemetery encroaching upon the growing town, the town eventually encroached upon, and ate up, the cemetery. The Roman Catholic Cemetery at Petersham was finally dismantled in the 1930s in order to make room for a school, a hospital and the extension of the railway. The dead of Petersham were moved to the Necropolis at Rookwood, where, I strongly suspect, the two Slatterys rest to this day, reunited in connubial proximity.

Slattery’s case has much to tell us about the courts’ response to claims of ‘regulatory taking’. But, first, let me transport you forward most of a century and across half the planet to consider the plight of another Irishman. In the 1970s O’Callaghan was a farmer on the coast of County Dublin in Ireland. Part of his farm contained a promontory fort of early neolithic origin – a primitive stone-built defensive structure – which, as O’Callaghan well knew, had been listed as a national monument some years before he purchased the land. When O’Callaghan proceeded to plough up the area around the 5,000 year-old site, scattering archaeological remains far and wide, the Irish Commissioners of Public Works issued a preservation order which prohibited, without compensation, any further interference with the soil surrounding what was left of the monument. O’Callaghan later alleged that the preservation order, by preventing further cultivation, had sterilised his land in a manner invalidated by the property guarantees of the Irish Constitution. In *O’Callaghan v Commissioners of Public Works in Ireland and the Attorney General*³ the Irish High Court and, on appeal, the Supreme Court nevertheless held that the facts did not disclose, in constitutional terms,⁴ any ‘unjust attack’ on the landowner’s property rights.

¹ (1888) 13 App Cas 446.

² (1888) 13 App Cas 446 at 450.

³ [1983] IRLM 391 (High Court); [1985] ILRM 364 (Supreme Court).

⁴ See Article 40.3.2° of the Constitution of Ireland.

The central question raised by regulatory intervention

The cases of *Slattery* and *O'Callaghan* exemplify the essential dilemma posed by modern regulatory intervention. Such intervention involves no outright acquisition by the state of the landowner's formal title, an act which would generally require the payment of publicly funded compensation. Instead, whilst leaving title intact in the landowner's hands, regulatory controls merely curtail or redefine the uses that may be made of the land, for which interference no money compensation is normally payable. It is as well to be clear about the precise question at stake in all this. Nobody is asking whether environmental welfare (in the broadest sense) is a good thing. As in the case of motherhood and apple pie, we all agree that it is. Nobody is asking whether regulatory mechanisms are a necessary and proper means to achieve environmentally desirable objectives. By and large we all agree, at least at the level of abstract principle, that they are.

The vital question relates, instead, to the allocation of the *economic cost* of environmental protection. It remains a contingent fact of life that environmental welfare comes at a price which must be paid either by the general community or by some subset of it. The critical resource is almost always land. Should the individual landowner be left alone to bear the cost of a regulatory intervention which enures to the wider benefit of the whole community? Is uncompensated regulation a form of environmental fascism, dumping on isolated landowners the economic burden of certain cherished public goods? In what circumstances (if any) should landowners receive reimbursement from public funds for their uncovenanted contribution to the general weal? Such questions are sharpened by a dark suspicion that extensive state intervention may allow government to 'do by regulation what it cannot do through eminent domain – ie, take private property without paying for it.'⁵ Or, as Callinan J indicated in *Commonwealth of Australia v Western Australia*,⁶ the 'real point' about regulation is that governments 'can effectively achieve the benefit of many aspects of proprietorship without actually becoming proprietors.' Just *how minutely* may government 'control land without buying it'?⁷

A general denial of compensation for regulatory impositions

Across the common law world the standard response is that mere regulatory interference with land use or land management does *not* constitute a deprivation of property for which compensation need be paid.⁸ The words which ring in the common lawyer's ear are those of the English law lord, Viscount Simonds, who acidly

⁵ *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency*, 228 F3d 998 at 999 (2000) per Kozinski J.

⁶ (1999) 196 CLR 392 at [280].

⁷ *Mariner Real Estate Ltd v Nova Scotia (Attorney General)* (1999) 177 DLR (4th) 696 at 699 per Cromwell JA (Nova Scotia Court of Appeal).

⁸ See *Belfast Corporation v O D Cars Ltd* [1960] AC 490 at 519 per Viscount Simonds, 523-524 per Lord Radcliffe (House of Lords); *The Queen v Tener* (1985) 17 DLR (4th) 1 at 7, 23 (Supreme Court of Canada); *Steer Holdings Ltd v Manitoba* [1993] 2 WWR 146 at [9], [13] (Manitoba Court of Appeal); *Mariner Real Estate Ltd v Nova Scotia (Attorney General)* (1999) 177 DLR (4th) 696 at 713 (Nova Scotia Court of Appeal); *Grape Bay Ltd v Attorney-General of Bermuda* [2000] 1 WLR 574 at 583B-F (Privy Council).

observed almost 50 years ago that regulatory diminutions of an owner's rights 'can be effected without a cry being raised that Magna Carta is dethroned or a sacred principle of liberty infringed.'⁹

The rationales underpinning this stern view are indeed compelling. It is entirely arguable that environmental regulation involves no *net* loss for the affected landholder. In so far as the diffused local or public benefit of regulation secures an 'average reciprocity of advantage'¹⁰ for everyone concerned, a dimension of compensation is already inherent in the regulatory mechanism. The general distribution of the regulatory dividend – as evidenced by an enhanced quality of life for all – undermines any claim of proprietary derogation.¹¹ Individual proprietary rights are simply exchanged for improved civic rights to environmental welfare.¹² A closely allied contention is that privileges of ownership have always been intrinsically curtailed by community-oriented obligation.¹³ The purchase of a bundle of rights 'necessarily includes the acquisition of a bundle of limitations.'¹⁴ Deep at the heart of the property concept lies a fusion of individual right and social responsibility.¹⁵ When viewed from this perspective, as Justice Frankfurter once said,¹⁶ regulatory control of

⁹ *Belfast Corporation v O D Cars Ltd* [1960] AC 490 at 519. See, more recently, the reluctance of New Zealand courts to view Magna Carta 'as some early Public Works Act compensation statute' (*Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 at [42] per McGechan J).

¹⁰ The origins of this idea (classically demonstrated by zoning law) lie in the judgment delivered by Justice Holmes in *Pennsylvania Coal Co v Mahon*, 260 US 393 at 415, 67 L Ed 322 at 326 (1922). See also *Re Ellis and Ruislip-Northwood UDC* [1920] 1 KB 343 at 362 per Bankes LJ, 370 per Scrutton LJ; *Agins v City of Tiburon*, 447 US 255 at 262, 65 L Ed 2d 106 at 113 (1980) per Justice Powell; *Commonwealth of Australia v State of Tasmania* (1983) 158 CLR 1 at 283 per Deane J; *Keystone Bituminous Coal Association v DeBenedictis*, 480 US 470 at 491, 94 L Ed 2d 472 at 492 (1987) per Justice Stevens; *Lucas v South Carolina Coastal Council*, 505 US 1003 at 1017-8, 120 L Ed 2d 798 at 814 (1992) per Justice Scalia.

¹¹ The affected landowner 'has in a sense been compensated by the public program "adjusting the benefits and burdens of economic life to promote the common good"' (see *Florida Rock Industries, Inc v United States*, 18 F3d 1560 at 1570 (Fed Cir 1994), quoting *Penn Central Transportation Co v New York City*, 438 US 104 at 124, 57 L Ed 2d 631 at 648 (1978)).

¹² The point is widely acknowledged in the United States case law. See eg *Keystone Bituminous Coal Association v DeBenedictis*, 480 US 470 at 491, 94 L Ed 2d 472 at 492 (1987) per Justice Stevens; *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency*, 535 US 302 at 324, 152 L Ed 2d 517 at 552 (2002) per Justice Stevens. See also *Chapman v Luminis Pty Ltd (No 5)* [2001] FCA 1106 at [738].

¹³ As Scrutton LJ observed in *In re Ellis and Ruislip-Northwood UDC* [1920] 1 KB 343 at 372, 'Parliament may have taken a view that a landowner in a community has duties as well as rights, and cannot claim compensation for refraining from using his land where they think that it is his duty so to refrain.'

¹⁴ *Gazza v New York State Department of Environmental Conservation*, 679 NE2d 1035 at 1039 (NY 1997).

¹⁵ See Kevin Gray, 'Equitable Property' (1994) 47(2) *Current Legal Problems* 157 at 188-189. For a powerful elaboration of the same theme, see Joseph W Singer, *The Edges of the Field: Lessons on the Obligations of Ownership* (Beacon Press, Boston 2000). See also Gregory S Alexander, *Commodity and Propriety* (Univ of Chicago Press, Chicago and London 1997); Singer, *Entitlement: The Paradoxes of Property* (Yale Univ Press 2000).

¹⁶ *Kimball Laundry Co v United States*, 338 US 1 at 5, 93 L Ed 1765 at 1772 (1949). See also *Kim v City of New York*, 659 NYS2d 145 at 152 (Ct App 1997).

land use simply represents 'part of the burden of common citizenship.'¹⁷ The community is already entitled – has *always* been entitled – to the benefit of a public-interest forbearance on the part of the landowner.¹⁸ The landowner has *never* had any entitlement to degrade his or her land or to utilise it in an environmentally detrimental manner.¹⁹ But does the landowner owe any *positive duty* to promote environmental welfare? In *O'Callaghan v Commissioners of Public Works in Ireland and the Attorney General*²⁰ the farmer failed precisely because, according to the Irish Supreme Court, 'the common good requires that national monuments which are the prized relics of the past should be preserved as part of the history of our people.' In the words of O'Higgins CJ,²¹ the preservation of the neolithic fort was therefore 'a requirement of what should be regarded as the common duty of all citizens.'²²

Overarching all such arguments is the judicial mantra that '[t]he give and take of civil society frequently requires that the exercise of private rights should be restricted in the general public interest.'²³ It was exactly this sentiment that caused the Privy Council in *Slattery v Naylor*²⁴ to pronounce that

'The object of the present [enabling] statute is to establish regulations for the common advantage of persons who have come to live in the same community, in a great number of matters affecting their daily life, and that cannot be done except by interference with many actions and many modes of enjoying property, which, but for such regulations, would be lawful and innocent. It is difficult to see how the Council can make efficient bye-laws for such objects as preventing fires, preventing and regulating places of amusement, regulating the killing of cattle and sale of butcher's meat, preventing bathing, providing for the general health, not to mention others, unless

¹⁷ The citizen may also be expected to shoulder his or her share of the burden of the state's compliance with international obligations (see eg *Keane and Naughton v An Bord Pleanála* [1998] 2 ILRM 241 at 260-262 (construction of radio mast as navigational aid for international shipping)).

¹⁸ See Kevin Gray, 'Land Law and Human Rights', in L Tee (ed), *Land Law: Issues, Debates, Policy* (Willan Publishing 2002), pp 239-243.

¹⁹ There is, for example, an extensive body of American case law, reaching back into the 19th century, which denies that any compensable 'taking' can be effected by land regulations which merely suppress 'noxious' or anti-social users which are 'injurious to the community' or threaten 'public health, safety, or morals' (see *Mugler v Kansas*, 123 US 623 at 665, 31 L Ed 205 at 211 (1887) per Justice Harlan; *Pennsylvania Coal Co v Mahon*, 260 US 393 at 417, 67 L Ed 322 at 327 (1922) per Justice Brandeis). For a willingness to apply similar logic in Australia, see *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 415 per Stephen J.

²⁰ [1985] ILRM 364.

²¹ [1985] ILRM 364 at 367-368.

²² Likewise, in the United States, heritage preservation has generally been declared non-compensable as 'fostering ends the community deems worthy' (*Maher v City of New Orleans*, 516 F2d 1051 at 1060 (1975)). See David L Callies, 'Historic Preservation Law in the United States' 32 ELR 10348 (2002). See also *Harvard Investments Ltd v City of Winnipeg* (1995) 129 DLR (4th) 557 at 561-565 per Philp JA; *Lumber Specialties Ltd v Hodgson* [2000] 2 NZLR 347 at [148] per Hammond J.

²³ *Grape Bay Ltd v Attorney-General of Bermuda* [2000] 1 WLR 574 at 583C per Lord Hoffmann.

²⁴ (1888) 13 App Cas 446 at 449-450.

they have substantial powers of restraining people, both in their freedom of action and in their enjoyment of property.'

The common law instinct in respect of regulatory interventions is strongly reinforced by several pragmatic considerations. The progress of civilised society would effectively grind to a halt if every minor regulatory act of the state provoked an immediate entitlement to some carefully calculated cash indemnity for the affected landowner.²⁵ On any other analysis, as Lord MacDermott LCJ opined in the Northern Ireland Court of Appeal in *O D Cars Ltd v Belfast Corporation*,²⁶ the power to legislate for peace, order and good government 'would be abridged to an unthinkable degree.' There is another reason why the regulatory activity of the state cannot give rise to general rights of compensation from public funds. This is simply the deadweight of cost. Even American courts – traditionally the most sympathetic towards takings claims – have realised that to regard all regulatory impositions as compensable would 'transform government regulation into a luxury few governments could afford.'²⁷ The costs of social and economic organisation would become prohibitive. In the United States Supreme Court in *Palazzolo v Rhode Island*²⁸ Justice Stevens pointed to the spectre of a 'tremendous – and tremendously capricious – one-time transfer of wealth from society at large to those individuals who happen to hold title to large tracts of land' in environmentally sensitive locations.

A matter of statutory construction

The purist will, of course, point out – quite rightly – that the compensability of statutory interferences with land use and management is ultimately a matter of construction of the enabling legislation. Courts across the common law world have devised certain well known 'assumptions'²⁹ or presumptions in relation to the interpretation of legislation (whether primary or delegated). These interpretive canons – which are themselves rules of common law³⁰ – can be summarised in two propositions which support the analysis disclosed above.

²⁵ As Justice Holmes once indicated in the United States Supreme Court, '[g]overnment 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' (*Pennsylvania Coal Co v Mahon*, 260 US 393 at 413, 67 L Ed 322 at 325 (1922)). See likewise *Belfast Corporation v O D Cars Ltd* [1960] AC 490 at 518 per Viscount Simonds; *A & L Investments Ltd v Ontario (Minister of Housing)* (1997) 152 DLR (4th) 692 at [29] (Ontario Court of Appeal).

²⁶ [1959] NI 62 at 87 ('In a community ordered by law some regulation of private rights for the public benefit is inevitable').

²⁷ *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency*, 535 US 302, 152 L Ed 2d 517 at 541 (2002) per Justice Stevens. See likewise *Belfast Corporation v O D Cars Ltd* [1960] AC 490 at 518 per Viscount Simonds; *The Queen v Tener* (1985) 17 DLR (4th) 1 at 22 per Wilson J.

²⁸ 533 US 606 at 645, 150 L Ed 2d 592 at 624-625 (2001).

²⁹ 'Courts approach the interpretation of legislation with a number of basic assumptions in mind' (D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (3rd edn Sydney 1988), p 97).

³⁰ *Belfast Corporation v O D Cars Ltd* [1960] AC 490 at 523 per Lord Radcliffe; *Gladstone v Canada (Attorney General)* (2003) 233 DLR (4th) 629 at [40].

First, expropriatory legislation is presumed (in the absence of an unequivocally expressed contrary intent³¹) to require the payment of compensation.³² This presumption gives expression to what McTiernan J once called an important 'rule of political ethics'.³³ Any compulsory deprivation of title for the benefit of the wider community represents a sacrifice which should be shared by that community collectively. No individual citizen should be 'singled out to bear a burden which ought to be paid for by society as a whole'.³⁴ This prejudice against arbitrary or uncompensated taking is, in the words of Kirby J, 'basic and virtually uniform in civilised legal systems'.³⁵

Second, merely regulatory legislation is presumed (in the absence of a clear contrary intent³⁶) to require no payment of compensation.³⁷ The prime demonstration of this rule of interpretation appears in the widespread refusal to accept that the restrictions imposed by zoning laws give rise to any compensation claim for the

³¹ See *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at [12]-[14] per Gaudron, McHugh, Gummow and Hayne JJ, [31], [56] per Kirby J; *Authorson v Canada (Attorney General)* (2003) 227 DLR (4th) 385 at [14], [52]-[54]; *Canadian Pacific Railway Co v Vancouver (City)* (2006) 262 DLR (4th) 454 at [19], [37] (Supreme Court of Canada).

³² Supporting authority is legion: see *Western Counties Railway Co v Windsor and Annapolis Railway Co* (1882) 7 App Cas 178 at 188 per Lord Watson; *Greville v Williams* (1906) 4 CLR 694 at 703 per Griffith CJ; *Commonwealth of Australia v Hazeldell Ltd* (1918) 25 CLR 552 at 563 per Griffith CJ and Rich J; *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508 at 542 per Lord Atkinson; *Inglewood Pulp and Paper Co Ltd v New Brunswick Electric Power Commission* [1928] AC 492 at 498-499 per Lord Warrington of Clyffe; *Belfast Corporation v O D Cars Ltd* [1960] AC 490 at 517-518 per Viscount Simonds, 523 per Lord Radcliffe; *Manitoba Fisheries Ltd v The Queen* (1978) 88 DLR (3d) 462 at 473 (Supreme Court of Canada); *The Queen v Tener* (1985) 17 DLR (4th) 1 at 8 per Estey J (Supreme Court of Canada); *Newcrest Mining (WA) Ltd v Commonwealth of Australia* (1997) 190 CLR 513 at 657-661 per Kirby J (High Court of Australia); *Rock Resources Inc v British Columbia* (2003) 229 DLR (4th) 115 at [132]; *R (Lord Chancellor) v Chief Land Registrar* [2006] QB 795 at [36]-[37].

³³ *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 294-295. See likewise *Mabo v Queensland* (1988) 166 CLR 186 at 226, where Deane J spoke of the 'strong presumption against a legislative intent to confiscate or extinguish proprietary rights and interests without compensation.' 'The common law has always frowned on deprivation without compensation' (F A R Bennion, *Statutory Interpretation* (4th edn London 2002), p 707. See also Pearce and Geddes, *Statutory Interpretation in Australia*, p 102.

³⁴ *Florida Rock Industries, Inc v United States* (1999) 45 Fed Cl 21 at 23 per Smith CJ. The proposition commands universal support: see *Armstrong v United States*, 364 US 40 at 49, 4 L Ed 2d 1554 at 1561 (1960) per Justice Black; *Penn Central Transportation Co v New York City*, 438 US 104 at 124, 57 L Ed 2d 631 at 648 (1978) per Justice Brennan (US Supreme Court); *Grape Bay Ltd v Attorney-General of Bermuda* [2000] 1 WLR 574 at 583D (Privy Council); *Estate Homes Ltd v Waitakere City Council* [2006] 2 NZLR 619 at [128] per Baragwanath and Goddard JJ (New Zealand Court of Appeal).

³⁵ *Newcrest Mining (WA) Ltd v Commonwealth of Australia* (1997) 190 CLR 513 at 659. See also *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at [17], [28], [30] per Kirby J ('Australian society ordinarily attaches importance to protecting ownership rights in property').

³⁶ See eg Water Management Act 2000 (NSW), s 87 (statutorily authorised compensation for reductions in water allocations following amendment of management plan).

³⁷ *Commonwealth of Australia v State of Tasmania* (1983) 158 CLR 1 at 283 per Deane J; *The Queen v Tener* (1985) 17 DLR (4th) 1 at 22 per Wilson J (Supreme Court of Canada); *Mariner Real Estate Ltd v Nova Scotia (Attorney General)* (1999) 177 DLR (4th) 696 at 713 (Nova Scotia Court of Appeal); *Grape Bay Ltd v Attorney-General of Bermuda* [2000] 1 WLR 574 at 583B-F (Privy Council); *Kaisilk Development Ltd v Urban Renewal Authority* [2002] 291 HKCU 1 at [19] (High Court of Hong Kong SAR).

affected landowner.³⁸ Such 'adjustment of competing claims between citizens'³⁹ imposes (or reinforces)⁴⁰ burdens which must simply be 'endured in the public interest.'⁴¹

These common law presumptions regarding property are supplemented by a more general interpretive convention which constrains the 'taking away of what is given at common law.'⁴² The High Court has long recognised 'the general principle that a statute will not be construed to take away a common law right unless the legislative right to do so clearly emerges, whether by express words or by necessary implication.'⁴³

A common law doctrine of takings

Together the interpretive aids outlined above comprise the core of an historic and freestanding common law doctrine relating to takings.⁴⁴ The source of this doctrine is what Deane J once described as 'long-established notions of justice that can be traced back at least to the guarantee of Magna Carta (25 Edw 1 c 29) against the arbitrary disseisin of freehold.'⁴⁵ In *London & North Western Railway Co v Evans*,⁴⁶ an early English takings

³⁸ See eg *Village of Euclid v Ambler Realty Co*, 272 US 365 at 395-397, 71 L Ed 303 at 314 (1926) per Justice Sutherland (United States Supreme Court); *Westminster Bank Ltd v Beverley BC* [1971] AC 508 at 529D-F per Lord Reid, 535C per Viscount Dilhorne (House of Lords); *The Queen v Tener* (1985) 17 DLR (4th) 1 at 7 per Estey J, 23 per Wilson J (Supreme Court of Canada); *Grape Bay Ltd v Attorney-General of Bermuda* [2000] 1 WLR 574 at 583B-C per Lord Hoffmann (Privy Council appeal from Bermuda); *Fine Tower Associates Ltd v Town Planning Board* [2005] 504 HKCU 1 at [51] (High Court of Hong Kong SAR); *Estate Homes Ltd v Waitakere City Council* [2006] 2 NZLR 619 at [140]-[142] per Baragwanath and Goddard JJ (New Zealand Court of Appeal).

³⁹ *Commonwealth of Australia v State of Tasmania* (1983) 158 CLR 1 at 283 per Deane J.

⁴⁰ One American court has gone so far as to say that 'the question is simply one of basic property ownership rights: within the bundle of rights which property lawyers understand to constitute property, is the right or interest at issue, as a matter of law, owned by the property owner or reserved to the state?' (*Loveladies Harbor, Inc v United States*, 28 F3d 1171 at 1179 (Fed Cir 1994)).

⁴¹ *Rodriguez Holding Corp v City of Vaughan* (Ontario Superior Court of Justice, 21 August 2006) at [37]. See generally F A R Bennion, *Statutory Interpretation* (4th edn London 2002), p 708 (pointing out that the 'presumption against doubtful penalisation' is applied less rigorously in cases where 'Parliament finds it necessary to lay down a detailed system of regulation in some area of the national life', the courts recognising that 'it may then be impossible to avoid inflicting detriments which, taken in isolation, are unjustified').

⁴² F A R Bennion, *Statutory Interpretation* (4th edn London 2002), p 707.

⁴³ *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 45 ALR 609 at 617 per Mason ACJ, Wilson and Dawson JJ. See also *South Australian River Fishery Assn and Warrick v South Australia* (2003) 84 SASR 507 at [192] per Williams J. '[P]lain words are necessary to establish an intention to interfere with common-law ... rights' (*Deeble v Robinson* [1954] 1 QB 77 at 81 per Somervell LJ).

⁴⁴ See, for example, Wright J's reference in *France Fenwick & Co Ltd v The King* [1927] 1 KB 458 at 467 to the existence of 'a common law right to compensation for interference with a subject's property.'

⁴⁵ *Mabo v Queensland* (1988) 166 CLR 186 at 226. A similar attribution to Magna Carta is found in *Newcrest Mining (WA) Ltd v Commonwealth of Australia* (1997) 190 CLR 513 at 658-659 per Kirby J; *Estate Homes Ltd v Waitakere City Council* [2006] 2 NZLR 619 at [130]-[134] per Baragwanath and Goddard JJ. See also D Clark, 'The Icon of Liberty: The Status and Role of Magna Carta in Australian and New Zealand Law', (2000) 24 Melb U L Rev 34.

⁴⁶ [1893] 1 Ch 16 at 28 (English Court of Appeal).

case, Bowen LJ similarly regarded it as part and parcel of 'natural justice' that the 'canons of construction' should, in this way, lean against uncompensated confiscations of property. And it was upon this ancient reservoir of common law jurisprudence that the House of Lords drew in *Belfast Corporation v O D Cars Ltd*.⁴⁷ Here the courts were required to examine the scope of the provision, contained in the Government of Ireland Act 1920, which forbade the enactment in Northern Ireland of any law which would 'either directly or indirectly ... take any property without compensation.'⁴⁸ This statutory formula generated a now largely forgotten cache of case law which, quite explicitly, found its conceptual and philosophical origins in a pre-existing common law tradition in respect of unjust takings. In the *O D Cars* case, with the concurrence of two of the three other members of the House of Lords, Lord Radcliffe declared himself unable to give a meaning to the phrase 'taking without compensation' except by reference to 'the general treatment of the subject in the law of England and Ireland before 1920.' He indicated that such an inquiry disclosed a 'general principle, accepted by the legislature and scrupulously defended by the courts, that the title to property or the enjoyment of its possession was not to be compulsorily acquired from a subject unless full compensation was afforded in its place.'⁴⁹

In much more recent times the existence of a doctrine of '*de facto* taking at common law' has been powerfully reaffirmed by the Supreme Court of Canada. In delivering the Court's judgment in *Canadian Pacific Railway Co v Vancouver (City)*,⁵⁰ McLachlin CJC indicated that the doctrine, at least in its Canadian version, is again anchored in the interpretive presumption that the legislature does not intend to authorise uncompensated expropriation.⁵¹ Although no explicit reference was made to the Northern Ireland experience, the Supreme Court recognised that state-sanctioned regulatory intervention may amount to a '*de facto* taking requiring compensation at common law' where such intervention results in the 'removal of all reasonable uses' of the affected asset or resource. In the Court's view, interference of this standard of severity gives rise to a head of compensability at common law quite distinct from that provided under the British Columbia version of the Expropriation Acts which are a common feature of Canadian provincial legislation.⁵²

It is, of course, quite true that the historic distaste for uncompensated expropriation has never attained the status of an *entrenched* or *indefeasible* rule of the common law.⁵³ Despite some fleeting support emanating

⁴⁷ [1960] AC 490.

⁴⁸ Government of Ireland Act 1920, s 5(1).

⁴⁹ [1960] AC 490 at 523.

⁵⁰ (2006) 262 DLR (4th) 454 at [30]-[37].

⁵¹ (2006) 262 DLR (4th) 454 at [27]. See similarly *Alberta (Minister of Public Works, Supply and Services) v Nilsson* (2002) 220 DLR (4th) 474 at [47] (Alberta Court of Appeal).

⁵² In the *Canadian Pacific Railway* case a 'common law *de facto* taking remedy' was ultimately withheld by the Supreme Court, partly because the Court (almost certainly in error) postulated that a common law taking requires 'an acquisition [by someone] of a beneficial interest in the property or flowing from it' and partly because the Province of British Columbia had 'the power to alter the common law' by an explicit statutory denial of compensation in specified cases and had exercised precisely such a power.

⁵³ See *London & North Western Railway Co v Evans* [1893] 1 Ch 16 at 28 per Bowen LJ.

from the New Zealand Court of Appeal,⁵⁴ the idea has been discountenanced by the High Court of Australia that there exists some fundamental common law protection against uncompensated deprivation of property which lies so deep that no state parliament can override it.⁵⁵ The common law's solicitude towards property owners is *not* so complete that the state legislator cannot explicitly enact that expropriation should occur without compensation. But it is hugely questionable whether, save in extraordinary circumstances, state-authorised confiscation accompanied by blatant denials of compensation therefor could long remain a politically tenable stance.⁵⁶ As Lord Radcliffe explained in *O D Cars*,⁵⁷ the strong impulse of the common law is that, unless the words of the relevant legislation clearly so demand, any statute which authorises such expropriation must provide for 'full compensation' or import 'an intention to give compensation and machinery for assessing it.'⁵⁸

The Northern Ireland experience

The language of the old Government of Ireland Act 1920 – with its reference to the *taking of property* – is peculiarly indicative. It finds its semantic origins in a swathe of 19th century and early 20th century case law in which the terminology of 'taking' was seen as central to the legal discourse surrounding expropriation. The 1920 statute was enacted against the backdrop of a flurry of litigation in which the rhetoric of 'taking' was widely regarded as encapsulating a rich common law jurisprudence leading right back to Magna Carta. Seven months before the parliamentary passage of the Government of Ireland Act, the House of Lords had decided *Attorney-General v De Keyser's Royal Hotel*.⁵⁹ Here, in ordering that compensation be paid for a war-time requisitioning of possession, the law lords spoke consistently of 'takings' of 'property'. The crown, declared Lord Atkinson, could not be relieved of a 'legal liability to pay for the property it takes from one of its citizens.'⁶⁰ The property of a subject, said Lord Parmoor, 'shall not be taken without compensation for the benefit to others or to the public.'⁶¹ This was an era in which English and Irish courts spoke frequently of the

⁵⁴ See eg *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 at 398 per Cooke J.

⁵⁵ *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at [12]-[14] per Gaudron, McHugh, Gummow and Hayne JJ, [52]-[62] per Kirby J.

⁵⁶ See *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at [61] per Kirby J.

⁵⁷ [1960] AC 490 at 523.

⁵⁸ It makes no difference whether the underlying principle is analysed as a common law or a statutory rule – the principle represented no 'conflict between the legislature and the courts ... [but was] common to both' ([1960] AC 490 at 523).

⁵⁹ [1920] AC 508.

⁶⁰ [1920] AC 508 at 542.

⁶¹ [1920] AC 508 at 579. Barely a year earlier, Lord Atkinson had insisted in another case that an intention to 'take away the property of a subject without giving him a legal right to compensation for the loss of it' is not lightly to be attributed to the legislature (*Central Control Board (Liquor Traffic) v Cannon Brewery Co Ltd* [1919] AC 744 at 752).

presumptive impropriety of any statutory attempt to ‘take away private rights of property’.⁶² The idea of ‘taking away’ lay at the heart of the autonomous common law principle against expropriation – a principle which had long found its pre-eminent expression in certain important presumptive rules of statutory construction. ‘Taking of property’ was the key concept by reference to which was measured the legitimacy of governmental interference with the resources of the citizenry. Small wonder, then, that the notion of ‘taking of property’ was at the forefront of the parliamentary mind in 1920 – still less that it found its way into, and became a focus of attention under, the Government of Ireland Act enacted in December of that year. The precise meaning of the phrase was to spark a laboratory experiment in the courts of Northern Ireland during which, over a period of more than 40 years, the lawfulness of regulatory intervention was effectively tested against a venerable common law doctrine of unjust takings.

The relationship between regulation and expropriation

It will have been observed that the language of proprietary ‘taking’ reaches beyond mere deprivations of formal title and is capable of embracing at least some kinds of interference with the use or management of property. Again in 1920 – a fateful year indeed – Bankes LJ in the English Court of Appeal spoke of the interpretive presumption against depriving a person ‘either of his property or of the beneficial enjoyment of his property without compensation’.⁶³ Forty years later, in summing up the common law doctrine of takings, Lord Radcliffe was equally clear that, for all relevant purposes, a ‘taking’ comprises the ‘[a]cquisition of title or possession’.⁶⁴

The exact scope of ‘takings of property’ requires further analysis, but takings jurisprudence has always accepted the ultimate impossibility of any categorical distinction between compensable acquisitions of title and non-compensable impositions or restrictions on the use of land. It is notorious that every jurisdiction which has ever grappled with the problem of regulatory control has eventually been forced to concede that certain interferences with a landowner’s user rights may become so intensive or extreme that they comprise a taking of land and therefore call imperatively for the payment of compensation.⁶⁵ Excessive limitation of user rights inevitably shades into expropriation; a regulatory measure may well conceal a confiscatory act even though it leaves the formal title perfectly intact. In the famous words of Justice Oliver Wendell Holmes, ‘while property may be regulated to a certain extent, if regulation goes too far it will be recognised as a taking’.⁶⁶ Likewise, in

⁶² *Colonial Sugar Refining Co Ltd v Melbourne Harbour Trust Commissioners* [1927] AC 343 at 359 per Lord Warrington of Clyffe. See also *Westminster Bank Ltd v Minister of Housing and Local Government* [1971] AC 508 at 529B per Lord Reid.

⁶³ *In re Ellis and Ruislip-Northwood UDC* [1920] 1 KB 343 at 361 per Bankes LJ.

⁶⁴ *Belfast Corporation v O D Cars Ltd* [1960] AC 490 at 523. See similarly *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 295 per McTiernan J.

⁶⁵ See *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 415 per Stephen J (referring to the ‘universality of the problem sooner or later encountered’).

⁶⁶ *Pennsylvania Coal Co v Mahon*, 260 US 393 at 415, 67 L Ed 322 at 326 (1922). A similar formula appears in *United States v General Motors Corp*, 323 US 373 at 378, 89 L Ed 311 at 318 (1944) per Justice Roberts. See more recently *Mariner Real Estate Ltd v Nova Scotia (Attorney General)* (1999) 177 DLR (4th)

Belfast Corporation v O D Cars Ltd,⁶⁷ Viscount Simonds acknowledged that ‘a measure which is ex facie regulatory may in substance be confiscatory ... the question is one of degree and the dividing line is difficult to draw.’⁶⁸ Lord Radcliffe thought it not ‘out of the question that on a particular occasion there might not be a restriction of user so extreme that in substance, though not in form, it amounted to a “taking” of land effected for the benefit of the public.’⁶⁹ More recent is Lord Woolf’s reference in the Privy Council⁷⁰ to ‘the cumulative effect of a number of different restrictions on the normal incidents of property, none of which in themselves would amount to a taking but which cumulatively [do amount] to a taking.’

When state intervention in the management of a privately owned resource reaches this stage of intensity, the courts of the common law world categorise the result, in essentially similar terminology, as a form of ‘constructive expropriation’⁷¹ or ‘constructive deprivation’⁷² or ‘de facto expropriation’.⁷³ It is at this point that intrusive regulatory legislation becomes ‘merely a disguise for an attempted confiscation of the land without compensation.’⁷⁴ In such cases the relevant enabling legislation falls to be governed, not by the interpretive presumption that mere use restrictions are non-compensable, but by the alternative presumption that proprietary deprivation must normally be accompanied by compensation.⁷⁵

696 at 725 per Cromwell JA (‘The cases have long recognised that at a certain point, regulation is, in effect, confiscation’).

⁶⁷ [1960] AC 490 at 520. In the Northern Ireland Court of Appeal Lord MacDermott LCJ had been even more obviously prepared to regard the concept of compensable taking as inclusive of ‘the imposition of some restriction or prohibition or other interference with proprietary rights’ (*O D Cars Ltd v Belfast Corporation* [1959] NI 62 at 87).

⁶⁸ See also *McCann v Attorney-General for Northern Ireland* [1961] NI 102 at 126 per Viscount Simonds (‘the elusive or often illusory distinction between regulatory and confiscatory measures’).

⁶⁹ [1960] AC 490 at 525. See similarly *Grape Bay Ltd v Attorney-General of Bermuda* [2000] 1 WLR 574 at 583G (Privy Council); *Fine Tower Associates Ltd v Town Planning Board* [2005] 504 HKCU 1 at [54] (High Court of Hong Kong SAR).

⁷⁰ *La Compagnie Sucrière de Bel Ombre Ltee v Government of Mauritius* (Unreported, Privy Council, 13 December 1995).

⁷¹ *TFL Forest Ltd v British Columbia* (2002) BCD Civ J LEXIS 1929 at [34].

⁷² *La Compagnie Sucrière de Bel Ombre Ltee v Government of Mauritius* (Unreported, Privy Council, 13 December 1995) per Lord Woolf.

⁷³ *Alberta (Minister of Public Works, Supply and Services) v Nilsson* (2002) 220 DLR (4th) 474 at [48] (Alberta Court of Appeal). This understanding is not confined to the common law world. The European Court of Human Rights has long acknowledged that, in some circumstances, state regulation of land use may constitute ‘de facto expropriation’ if it sufficiently ‘affects the substance of the property ... [that] the measure “can be assimilated to a deprivation of possessions”’ (*Banér v Sweden No 11763/85* (1989) 60 DR 128 at 139-140, citing *Sporrong and Lönnroth v Sweden*, Series A No 52 (1982) at [63]).

⁷⁴ *Steer Holdings Ltd v Manitoba* [1993] 2 WWR 146 at [10] (Manitoba Court of Appeal). In the words of Scalia J in *Lucas v South Carolina Coastal Council*, 505 US 1003 at 1018, 120 L Ed 2d 798 at 814 (1992), the regulatory process runs a ‘heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.’

⁷⁵ See the pragmatic solution adopted in Sydney, where the impact of heritage preservation law (in precluding upward expansion of an historic building) is cushioned under a planning code which allows the disentitled owner to sell the unutilised notional ‘transferable floor space’ (ie development potential) to some

But this is only to begin a process of analysis. Once it is conceded that statutorily authorised regulation is sometimes classifiable as a virtual expropriation requiring compensation, a vital focus is inevitably thrown upon the common law understanding of the key terms, 'property' and 'taking'. It is here that formidable problems emerge, rendering it unlikely that common law takings doctrine can catch anything other than fairly rare and exceptional instances of regulatory intervention. But it is significant, nonetheless, that there remains *some* scope for the operation of common law doctrine – particularly in cases which fall outside the reach of constitutional protections against compulsory and uncompensated acquisition.

What is 'property'?

The seemingly innocuous word 'property' is always rife with difficulty. It was recognised by Viscount Simonds in *Belfast Corporation v O D Cars Ltd*⁷⁶ that 'anyone using the English language in its ordinary signification ... would agree that "property" is a word of very wide import, including intangible and tangible property.' It is highly unlikely that the notion of 'property' can be 'confined pedantically to the taking of title ... to some specific estate or interest in land recognised at law or in equity.' For present purposes, as Dixon J once said, the term must extend to 'innominate and anomalous interests' and must also include 'the assumption and indefinite continuance of exclusive possession and control ...'⁷⁷ In more recent years the High Court has referred in this context to the deprivation of an 'identifiable and measurable advantage ... relating to the ownership or use of property.'⁷⁸ But, even on the premise that 'property' in the relevant sense can exhibit a certain loose or amorphous quality, it is far from clear that many regulatory restrictions involve any taking of, or impact on, 'property' per se. In most cases it is difficult to identify with any precision the 'property' which is alleged to have been taken by regulatory intervention. The common law jurisprudence in this area is ill-formed and incomplete. Various ranges of problem present themselves, most stemming from the remarkably incoherent and unanalytical way in which the term 'property' is generally bandied about by common lawyers.⁷⁹

A central difficulty lies in the question whether the deep structure of 'property' is, so to speak, *atomic* or *molecular*. If 'ownership' of land is acknowledged to comprise a 'bundle of rights',⁸⁰ can it truly be said that,

other owner not so disintitled (*Uniting Church in Australia Property Trust (NSW) v Immer (No 145) Pty Ltd* (1991) 24 NSWLR 510 at 511B–F (reversed on unconnected grounds: (1993) 182 CLR 26)).

⁷⁶ [1960] AC 490 at 517.

⁷⁷ See *Bank of New South Wales v Commonwealth of Australia* (1948) 76 CLR 1 at 349 for the High Court's expansive approach to the 'property' reference contained in section 51(xxxi) of the Constitution of Australia.

⁷⁸ *Newcrest Mining (WA) Ltd v Commonwealth of Australia* (1997) 190 CLR 513 at 634 per Gummow J.

⁷⁹ The term 'property' is, in its more accurate sense, a reference not to a resource, but rather to the element of *control* which one has over a resource. 'Property' is what we have in things, not the things that we think we have (Gray and Gray, *Elements of Land Law* (4th edn Oxford UP, 2005), para 2.11).

⁸⁰ This much was conceded by Lord MacDermott LCJ in *Ulster Transport Authority v James Brown & Sons Ltd* [1953] NI 79 at 111 (Northern Ireland Court of Appeal).

by virtue of some process of 'conceptual severance',⁸¹ every interference with any individual right within the bundle constitutes a deprivation of 'property'? Even if this 'atomic' analysis is tempered by some version of a de minimis rule, every non-trivial derogation from the overall bundle of a landowner's user rights would necessarily constitute a compensable taking of 'property'. Or does the term 'property' refer instead only to certain 'molecular' combinations of rights, with the result that the regulatory subtraction of a single user right from the bundle triggers *no* claim to compensation?

It must be said that, for present purposes, the common law tradition has always inclined towards a 'molecular' (rather than 'atomic') analysis of the phenomenon of 'property'. The perception of 'property' as denoting only 'molecular' combinations of rights can be traced deep into the jurisprudence generated by the Government of Ireland Act 1920. In *Belfast Corporation v O D Cars Ltd*,⁸² Viscount Simonds, in withholding compensation for a refusal of planning permission, asserted that the ordinary exponent of the English language 'would surely deny that any one of those rights which in the aggregate constituted ownership of property could itself and by itself aptly be called "property" and ... would deny ... that the restriction or denial of that right ... was a "taking", "taking away" or "taking over" of "property".' This narrowly circumscribed understanding of 'property' is reiterated throughout the common law jurisprudence of takings.⁸³ For example, in *Grape Bay Ltd v Attorney-General of Bermuda*,⁸⁴ the Privy Council regarded it as 'highly artificial' to treat individuated rights attendant upon ownership as representing, in themselves, 'separate items of property'.⁸⁵ It was entirely consistent with this line of authority that, in *La Compagnie Sucrière de Bel Ombre Ltee v Government of Mauritius*,⁸⁶ Lord Woolf pointed out that '[t]he ownership of land has a multiplicity of incidents and every regulation of those incidents in the public interest does not attract a prima facie right to compensation.' He added, significantly, that this is 'especially true where ... the regulation is part of the general control of an industry which is already subject to substantial regulation in the interests of all those involved in the industry.'

It certainly follows that the regulation or restriction of only one isolated incident of ownership does not necessarily rank as a deprivation of 'property', a conclusion which has at least the merit that the economic cost of regulating for environmental welfare does not spiral out of control. Other doubts multiply. It is by no means

⁸¹ The phrase originates in M J Radin, 'The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings', 88 Col L Rev 1667 (1988).

⁸² [1960] AC 490 at 517.

⁸³ See eg *Mariner Real Estate Ltd v Nova Scotia (Attorney General)* (1999) 177 DLR (4th) 696 at 717, 722 per Cromwell JA (Nova Scotia Court of Appeal); *Panton v Minister of Finance* [2001] UKPC 33 at [22] (Privy Council); *Alberta (Minister of Public Works, Supply and Services) v Nilsson* (2002) 220 DLR (4th) 474 at [51] (Alberta Court of Appeal).

⁸⁴ [2000] 1 WLR 574 at 584D-H.

⁸⁵ Likewise, in *Government of Mauritius v Union Flacq Sugar Estates Co Ltd* [1992] 1 WLR 903 at 911D, the Privy Council considered that the voting power attached to a particular class of share in a company 'is incidental to the ownership of specified property but is not in itself property and confers no interest in or right over property.' Thus interference with the balance of voting power did not constitute any 'deprivation of property' without compensation which could be said to be contrary to the Constitution of Mauritius.

⁸⁶ Unreported, Privy Council, 13 December 1995.

clear that the landowner's prima facie privilege to manage his land as he wills is a 'proprietary right' at all⁸⁷ or, even assuming that it is, that it constitutes 'property' for purpose of takings jurisprudence. Even Lord MacDermott, a notable though cautious proponent of a more expansive view of takings, balked at the idea that the term 'property' is 'necessarily synonymous' with every individual component within the 'bundle' of ownership rights, however 'fundamental and valuable that right may be.'⁸⁸ For him, the taking of a 'proprietary right' was not necessarily a taking of 'property'.⁸⁹ Lord MacDermott even expressed some reservation as to whether the right to exercise a lawful trade 'comes within the common meaning of property.'⁹⁰ More recently, and in similar vein, the Privy Council has forthrightly denied that the 'liberty' to open a McDonald's restaurant on privately owned premises constitutes a form of 'private property' which can ground a complaint of 'deprivation of property' when the state legislature forecloses the possibility of such an enterprise on those premises.⁹¹

Against the background of this common law experience, probably the most that can be said is that, whilst a regulatory interference with single incidents of land ownership does not normally or intrinsically merit classification as a deprivation or taking of 'property', it remains feasible that the abstraction or destruction of a *strategic combination* of a landowner's user rights and privileges may bring about precisely this kind of impact. The possibility was left unquestionably open by the House of Lords in *Belfast Corporation v O D Cars Ltd*⁹² – although it was indicated that the triggering circumstances would be extreme and unusual – and was reinforced by the weighty words of Northern Ireland's Chief Justice in the court below. Here Lord MacDermott LCJ, whilst finding it unnecessary to formulate a test of general applicability, had been entirely willing to accept that there may be a taking of 'property' even though 'the proprietary rights which are taken away do not exhaust all the attributes of ownership.'⁹³ We must therefore reserve for discussion the quantum or assemblage of user privileges which must be withdrawn or curtailed by force of statutory regulation before there can be said to have been, in any relevant sense, a 'taking' of 'property'.

⁸⁷ See eg *Auckland Acclimatisation Society Inc v Sutton Holdings Ltd* [1985] 2 NZLR 94 at 99 per Cooke J. Compare, however, the view of Sir Robert Lowry LCJ, who thought that 'the right to use one's own premises ... in the manner permitted by the ordinary common or statute law is a private right of property' (*R (Secretary of State for Northern Ireland) v Recorder of Belfast* [1973] NI 112 at 128).

⁸⁸ *Ulster Transport Authority v James Brown & Sons Ltd* [1953] NI 79 at 111.

⁸⁹ *O D Cars Ltd v Belfast Corporation* [1959] NI 62 at 86-87.

⁹⁰ *Ulster Transport Authority v James Brown & Sons Ltd* [1953] NI 79 at 111. (A strong contrary view was voiced by Sheil J (at 93) and Curran J (at 99-100)).

⁹¹ *Grape Bay Ltd v Attorney-General of Bermuda* [2000] 1 WLR 574 at 582H-583A.

⁹² [1960] AC 490 at 519-520 per Viscount Simonds, 525 per Lord Radcliffe.

⁹³ *O D Cars Ltd v Belfast Corporation* [1959] NI 62 at 87.

What is a 'taking'?

The terminology of 'taking' is equally fraught with difficulties of semantic imprecision. Yet there are at least two respects in which the common law understanding of 'taking' may make it easier to advance the claim that a particular statutory regulation has effected a 'taking' which requires compensation.

First, there is universal agreement that, in verifying whether a 'taking' has occurred, the determining factor is the substantive effect of the measure in question rather than its outer or superficial form.⁹⁴

Second, the term 'taking' carries no necessary implication that, in relation to what is 'taken', there must be some transfer to, or acquisition by, another party. The overriding emphasis in this context is on the 'takee'⁹⁵ (rather than the taker) and there is no requirement that a common law 'taking' should involve the conferment of some entitlement or benefit on anyone else.⁹⁶ In *Northern Ireland Road Transport Board v Benson*,⁹⁷ Babington LJ considered that the common law background of the prohibition on 'taking' imported merely a general concern 'to protect the subject from possible spoliation ... [from] expropriation or confiscation or destruction of any property without compensation.'⁹⁸ This view gained a wide acceptance in the Northern Ireland case law, Lord MacDermott observing in the *O D Cars* case⁹⁹ that the word 'take' signifies 'not only a taking over but a taking away such as may be achieved without any transfer or change of ownership or possession.' The terminology of 'taking' addresses itself to the perspective of 'the person deprived of his property.'¹⁰⁰ In this highly significant respect the common law presumption against 'taking' is rendered free of the requirement of demonstrable 'acquisition' which has bedevilled other protections against confiscation such as that contained in section 51(xxxi) of the Australian Constitution.

⁹⁴ See eg *Mariner Real Estate Ltd v Nova Scotia (Attorney General)* (1999) 177 DLR (4th) 696 at 722-723 per Cromwell JA; *Grape Bay Ltd v Attorney-General of Bermuda* [2000] 1 WLR 574 at 583G per Lord Hoffmann; *Fine Tower Associates Ltd v Town Planning Board* [2005] 504 HKCU 1 at [52] (High Court of Hong Kong SAR).

⁹⁵ See *Belfast Corporation v O D Cars Ltd* [1960] AC 490 at 508 (argument of counsel).

⁹⁶ In just the same way, the Privy Council indicated in *Government of Malaysia v Selangor Pilot Association* [1978] AC 337 at 347G that a person may be 'deprived of his property' without any other person actually 'acquiring it or using it.' The Canadian Supreme Court's recent statement to the contrary in *Canadian Pacific Railway Co v Vancouver (City)* (2006) 262 DLR (4th) 454 at [30]-[33] seems wholly contrary to the tenor of the historic doctrine of common law takings. Contrast, for example, *Ulster Transport Authority v James Brown & Sons Ltd* [1953] NI 79 at 111-112 per Lord MacDermott LCJ, 128 per Black LJ.

⁹⁷ [1940] NI 133 at 157-158 (Northern Ireland Court of Appeal).

⁹⁸ In the light of 'the common law which Parliament must be presumed to have been aware of', Babington LJ considered that the reference to taking in Government of Ireland Act 1920, s 5, should be 'liberally construed so as to give the utmost protection which the language used will allow.' Babington LJ was in the minority in *Benson's* case, but his views won the respectful approbation of later courts (see eg *O D Cars Ltd v Belfast Corporation* [1959] NI 62 at 82-84 per Lord MacDermott LCJ).

⁹⁹ *O D Cars Ltd v Belfast Corporation* [1959] NI 62 at 84.

¹⁰⁰ *Northern Ireland Road Transport Board v Benson* [1940] NI 133 at 157 per Babington LJ.

A link with possessory control

For present purposes the notion of ‘taking’ may be analysed across a spectrum of potential statutory impacts. At one edge of the spectrum the term ‘taking’ can be applied, uncontroversially, in respect of any statute which authorises the compulsory acquisition of title to land (or other property) for public purposes. Equally clearly, the term ‘taking’ embraces the statutory extinguishment of an owner’s estate in his land (or other property)¹⁰¹ or the physical dissipation or destruction of such resources.¹⁰² Further applications of the terminology of ‘taking’ are less obvious, but there is high authority for the proposition that the common law concept of ‘taking’ extends to an acquisition or assumption of ‘possession’ of land or of some other enterprise or undertaking.¹⁰³ Indeed, one context in which an interference with an owner’s user rights has always been regarded as compensable occurs where relevant regulatory activity takes the form of a continuous physical invasion or occupation of the land concerned (eg through the installation of electricity transmission lines or pylons¹⁰⁴ or through the compulsory placement of facilities for cable television reception¹⁰⁵).

This understanding of ‘taking’ widens into a more general sensitivity to the notion of ‘dispossession’ as an important indicator of the kinds of circumstance in which compensation becomes payable.¹⁰⁶ It is useful, in this context, to recall that the historic focus of Magna Carta fell on the arbitrary ‘disseisin of freehold.’¹⁰⁷ If the term ‘possession’ is used in its original (and most accurate) sense of overall control over some identified terrain or resource, the compulsory removal of such control – even in the name of the public interest – is tantamount to expropriation. It was for this reason that, in *Belfast Corporation v O D Cars Ltd*,¹⁰⁸ Lord Radcliffe referred to the interpretive presumption as encompassing an uncompensated acquisition of ‘the enjoyment of ... possession.’ Again, in *France Fenwick & Co Ltd v The King*,¹⁰⁹ Wright J considered the rule against arbitrary taking of a subject’s property to be applicable ‘where property is actually taken possession of, or used

¹⁰¹ *The Queen v Tener* (1985) 17 DLR (4th) 1 at 9 per Estey J (Supreme Court of Canada).

¹⁰² *Northern Ireland Road Transport Board v Benson* [1940] NI 133 at 158 per Babington LJ; *Ulster Transport Authority v James Brown & Sons Ltd* [1953] NI 79 at 111-116 per Lord MacDermott LCJ.

¹⁰³ *Belfast Corporation v O D Cars Ltd* [1960] AC 490 at 523 per Lord Radcliffe.

¹⁰⁴ *West Midlands Joint Electricity Authority v Pitt* [1932] 2 KB 1 at 30 per Macnaghten J, 54 per Romer LJ; *Robb v Electricity Board for Northern Ireland* [1937] NI 103 at 117 per Megaw J, 123-126 per Andrews LJ; *Electricity Supply Board v Gormley* [1985] IR 129 at 149-151 per Finlay CJ.

¹⁰⁵ See *Loretto v Teleprompter Manhattan CATV Corp*, 458 US 419 at 426, 73 L Ed 2d 868 at 876 (1982) per Justice Marshall (‘we have long considered a physical intrusion by government to be a property restriction of an unusually serious character’). See likewise *Penn Central Transportation Co v New York City*, 438 US 104 at 124, 57 L Ed 2d 631 at 648 (1978); *Ehrlich v City of Culver City*, 911 P2d 429 at 443 (Cal 1996).

¹⁰⁶ See eg *Northern Ireland Road Transport Board v Benson* [1940] NI 133 at 157 per Babington LJ. The iconic instance of compensable dispossession must forever remain the requisition order issued in respect of Arthur Dalziel’s car park at the corner of Wynyard Street and York Street in Sydney (see *Minister of State for the Army v Dalziel* (1944) 68 CLR 261).

¹⁰⁷ Magna Carta 1215, Arts 39, 52 (see J C Holt, *Magna Carta* (2nd edn, Cambridge UP 1992), pp 461, 465-466).

¹⁰⁸ [1960] AC 490 at 523.

¹⁰⁹ [1927] 1 KB 458 at 467.

by, the Government, or where, by order of a competent authority, it is placed at the disposal of the Government.’ It is also significant that, in the case law on the Government of Ireland Act 1920, the Northern Ireland courts moved slowly but surely towards reliance on the terminology of ‘dispossession’ (ie dispossession of the landowner or of his enterprise or undertaking) as marking the threshold of compensable intervention.¹¹⁰

Nor need ‘dispossession’ entail any physical ouster: it may simply comprise the total removal or extinguishment of an owner’s right to exploit a relevant resource in whatever manner he pleases. In *London & North Western Railway Co v Evans*¹¹¹ the defendant owned extensive coal reserves (worth some £144,000 even in late 19th century values) that were situated under a canal. Navigation rights in respect of the canal came to be vested in the plaintiff company, which successfully sued for an injunction to restrain further working of the coal beneath the canal. The enabling legislation from which the plaintiff’s rights stemmed was held by the English Court of Appeal to have vested in the plaintiff an implied right to support for the canal, even though the upholding of this right effectively rendered the defendant’s coal mine unworkable. However, Bowen LJ accepted that – had it not been for the express mechanism for compensation contained in the enabling statute – the imposition of this obligation of support would have constituted an illicit confiscation of the defendant’s property. In the absence of compensation (or a clear indication of a parliamentary intent to exclude compensation), the burdening of the defendant’s land with an onerous support liability would plainly have ranked as a ‘taking’ of ‘property’ – even though no physical possession of the subjacent coal reserves passed to the canal operator. In *Northern Ireland Road Transport Board v Benson*¹¹² Babington LJ later pointed to the *Evans* case as a prime example of ‘property being taken away and rendered useless.’¹¹³

Debatable instances of taking

We have just seen some circumstances where the terminology of ‘taking’ (and a concomitant duty to compensate) may well be appropriate. However, the case law discloses other kinds of circumstance where there is a wide consensus that *no* relevant ‘taking’ can be alleged. It is agreed, for instance, that no compensable ‘taking’ of property can be said to have occurred merely because regulatory intervention has caused land (or some other asset) to decline in value.¹¹⁴ The true index of a ‘taking’ of property consists in

¹¹⁰ See *Northern Ireland Road Transport Board v Benson* [1940] NI 133 at 157 per Babington LJ; *Ulster Transport Authority v James Brown & Sons Ltd* [1953] NI 79 at 111, 116 per Lord MacDermott LCJ; *O D Cars Ltd v Belfast Corporation* [1959] NI 62 at 82-84 per Lord MacDermott LCJ.

¹¹¹ [1893] 1 Ch 16.

¹¹² [1940] NI 133 at 162.

¹¹³ The defendant suffered only ‘a liability not to let down the support ... [but] I think his property was taken away or confiscated or destroyed, as you please, and he most certainly lost it as a result of the Act of Parliament.’

¹¹⁴ See eg *O D Cars Ltd v Belfast Corporation* [1959] NI 62 at 79 per Lord MacDermott LCJ; *Gazza v New York State Department of Environmental Conservation*, 679 NE2d 1035 at 1042 (NY 1997); *Mariner Real Estate Ltd v Nova Scotia (Attorney General)* (1999) 177 DLR (4th) 696 at 713 per Cromwell JA (Nova Scotia Court of Appeal).

some substantial 'interference with the incidents of ownership rather than loss of economic value', although it is fair to add that a decline in market value may often reflect the 'taking away of the incidents of ownership'.¹¹⁵ However, a mere diminution in value does not, in itself, signify a 'taking' of 'property'.

Another circumstance which, at least in the past, has been held to fall short of a compensable 'taking' occurs where legislation imposes or empowers a merely *passive* restriction on the permissible use of an owner's assets. The classic demonstration of this interpretive guideline respecting the construction of statutory powers occurred in *France Fenwick & Co Ltd v The King*,¹¹⁶ where the English High Court was required to deal with a compensation claim arising from the implementation of an emergency war-time regulation. The regulation in question had authorised customs officials, without any formal act of requisition, to prohibit on pain of criminal liability the discharge of cargo from specified ships in harbour. Wright J (later Lord Wright) dismissed the suppliant ship owner's compensation claim with words which were destined to exert an extensive hold over takings law thereafter:

'A mere negative prohibition, though it involves interference with an owner's enjoyment of property, does not ... merely because it is obeyed, carry with it at common law any right to compensation. A subject cannot at common law claim compensation merely because he obeys a lawful order of the State.'¹¹⁷

This dictum has been widely applied in common law jurisdictions to justify the denial of public compensation for limitations imposed by many statutory measures ranging from zoning regulations to heritage preservation orders, from environmental protection designations to fire prevention controls. In effect, the merely passive regulation of land use generates, in the vast plurality of cases, no presumptive right to compensation. Yet the severity of the *France Fenwick* approach may have owed something both to the specificity of the prohibition involved in that case and also to the judge's firm premise that 'it cannot have been intended that compensation would be paid to subjects for abstaining from illegal acts.'¹¹⁸ Much more recently the Privy Council has indicated a broader view that 'a person may be deprived of his property by a mere negative or restrictive provision.'¹¹⁹ It is clear that there remains a residue of cases – even involving passive or negative regulation – in which intensive restrictions on land use may slip over some elusive borderline and become *confiscatory*.

¹¹⁵ *Mariner Real Estate Ltd v Nova Scotia (Attorney General)* (1999) 177 DLR (4th) 696 at 724, 727 per Cromwell JA.

¹¹⁶ [1927] 1 KB 458.

¹¹⁷ [1927] 1 KB 458 at 467.

¹¹⁸ [1927] 1 KB 458 at 465.

¹¹⁹ *Government of Malaysia v Selangor Pilot Association* [1978] AC 337 at 347H per Viscount Dilhorne. See similarly *Alberta (Minister of Public Works, Supply and Services) v Nilsson* (2002) 220 DLR (4th) 474 at [62] (Alberta Court of Appeal).

The threshold of compensable takings of property

The precise location of the threshold where regulation shades into confiscation (ie effects a 'regulatory taking') is one of the most difficult questions of modern law. Most regulatory restrictions and controls are properly classified as non-compensable interferences with land use. However, there remains the possibility that, particularly when viewed in combination, some regulatory interventions may cross the threshold and trigger the common law presumption against uncompensated 'takings' of 'property'. But the gradations between regulation and taking are 'almost imperceptible'.¹²⁰ The search for the crucial borderline has rightly been called the 'lawyer's equivalent of the physicist's hunt for the quark'.¹²¹

The threshold criteria of compensable taking are not enshrined in any definitive formula,¹²² but it is clear that they set an exacting standard. Courts across the common law world have tried, in varying ways, to articulate the point at which regulatory intervention becomes confiscatory or expropriatory.¹²³ Amongst the leading attempts to pinpoint this step are the following.¹²⁴

Regulatory legislation has been said to bring about a compensable taking where its nature, extent or severity is such as to:

- deprive the owner of 'the reality of proprietorship',¹²⁵
- eliminate 'virtually all of the aggregated incidents of ownership',¹²⁶
- 'remove virtually all of the rights associated with the property holder's interest',¹²⁷

¹²⁰ *Stevens v City of Salisbury*, 214 A2d 775 at 779 (1965); *City of Annapolis v Waterman*, 745 A2d 1000 at 1015 (Md 2000).

¹²¹ *Williamson County Regional Planning Commn v Hamilton Bank of Johnson City*, 473 US 172 at 199, 87 L Ed 2d 126 at 147 (1985) per Justice Blackmun, quoting Charles M Haar, *Land-Use Planning* (3rd edn, Little, Brown & Co, Boston 1976), p 766.

¹²² See *Mariner Real Estate Ltd v Nova Scotia (Attorney General)* (1999) 177 DLR (4th) 696 at 716 per Cromwell JA ('there is no magic formula for determining (or describing) the point at which regulation ends and taking begins').

¹²³ It is striking that, by frequent cross-reference to the experience of other jurisdictions in this area, the courts of the common law have built up a largely shared jurisprudence. See, for instance, the citation of Australian case law in *Mariner Real Estate Ltd v Nova Scotia (Attorney General)* (1999) 177 DLR (4th) 696 at 717 (Nova Scotia Court of Appeal).

¹²⁴ It is, for present purposes, irrelevant that some of these attempts have emerged in the context of constitutional provisions which require not merely that property be 'taken' from an affected owner, but also that that property should be 'acquired' by someone else.

¹²⁵ *Bank of New South Wales v Commonwealth of Australia* (1948) 76 CLR 1 at 349 per Dixon J; *Newcrest Mining (WA) Ltd v Commonwealth of Australia* (1997) 190 CLR 513 at 633 per Gummow J; *Mariner Real Estate Ltd v Nova Scotia (Attorney General)* (1999) 177 DLR (4th) 696 at 717 per Cromwell JA.

¹²⁶ *Mariner Real Estate Ltd v Nova Scotia (Attorney General)* (1999) 177 DLR (4th) 696 at 717 per Cromwell JA.

¹²⁷ *Alberta (Minister of Public Works, Supply and Services) v Nilsson* (1999) 246 AR (2d) 201 at [97] per Marceau J; *Mariner Real Estate Ltd v Nova Scotia (Attorney General)* (1999) 177 DLR (4th) 696 at 716-717 per Cromwell JA.

- take away ‘everything that made [the property] worth having’¹²⁸
- produce ‘an effective sterilisation of the rights constituting the property in question’¹²⁹
- render the owner’s physical assets ‘virtually useless’¹³⁰ or his private rights ‘meaningless’¹³¹
- ensure that the owner’s proprietary rights are ‘not merely limited by the imposition of a restriction ... but ... wholly nullified’¹³²
- operate a ‘confiscation of all reasonable private uses’ of the owner’s property¹³³
- defeat the owner’s ‘entire interest’ in the land¹³⁴
- bring about the ‘dispossession’ of the owner¹³⁵
- ‘rob the land ... of its only profitable user’¹³⁶
- ‘sacrifice *all* economically beneficial uses’ of the owner’s land¹³⁷
- place the asset ‘effectively beyond reach [and]... worthless’¹³⁸ or
- cause the ‘complete extinguishment of the asset’s value to the owner.’¹³⁹

¹²⁸ *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 286 per Rich J.

¹²⁹ *Newcrest Mining (WA) Ltd v Commonwealth of Australia* (1997) 190 CLR 513 at 635 per Gummow J.

¹³⁰ *Manitoba Fisheries Ltd v The Queen* (1978) 88 DLR (3d) 462 at 473 (Supreme Court of Canada); *The Queen v Tener* (1985) 17 DLR (4th) 1 at 12 per Estey J (Supreme Court of Canada); *Harvard Investments Ltd v City of Winnipeg* (1995) 129 DLR (4th) 557 at 568 per Twaddle JA (Manitoba Court of Appeal). See *South Australian River Fishery Association and Warrick v South Australia* (2003) 84 SASR 507 at [189], where Williams J offered the analogy of a situation where, under a mining tenement, ‘the use of picks and shovels [is] banned and the taking of precious stones later prohibited. In such a case the tenement would be left intact but rendered useless’ (infra, footnote 170).

¹³¹ *Casamiro Resource Corp v British Columbia* (1991) 80 DLR (4th) 1 at 10-11.

¹³² *Rashleigh v Environment Protection Authority* [2005] ACTSC 18 at [37]-[38] (reversed on other grounds: see *Environment Protection Agency v Rashleigh* [2005] ACTCA 42).

¹³³ *Mariner Real Estate Ltd v Nova Scotia (Attorney General)* (1999) 177 DLR (4th) 696 at 735-736 per Hallett JA. See likewise *Canadian Pacific Railway Co v Vancouver (City)* (2006) 262 DLR (4th) 454 at [30], where the Supreme Court of Canada referred to a ‘*de facto* taking at common law’ as requiring the ‘removal of all reasonable uses of the property’.

¹³⁴ *The Queen v Tener* (1985) 17 DLR (4th) 1 at 24 per Wilson J (Supreme Court of Canada).

¹³⁵ See the case law on the Government of Ireland Act 1920 (supra, footnote 110).

¹³⁶ *O D Cars Ltd v Belfast Corporation* [1959] NI 62 at 93 per Lord MacDermott LCJ.

¹³⁷ *Lucas v South Carolina Coastal Council*, 505 US 1003 at 1019, 120 L Ed 2d 798 at 815 (1992) per Scalia J (a ‘categorical’ taking). See also *Trailer and Marina (Leven) Ltd v Secretary of State for the Environment, Food and Rural Affairs* [2005] 1 WLR 1267 at [68].

¹³⁸ *The Queen v Tener* (1985) 17 DLR (4th) 1 at 24 per Wilson J (Supreme Court of Canada).

¹³⁹ *Harvard Investments Ltd v City of Winnipeg* (1995) 129 DLR (4th) 557 at 566-567 per Twaddle JA (Manitoba Court of Appeal).

A test of substance

The relevant test may be said to be one of 'pith and substance'.¹⁴⁰ It is even possible that some of the stern criteria detailed above may nowadays overstate the preconditions of a recognisable regulatory taking. In *La Compagnie Sucrière de Bel Ombre Ltee v Government of Mauritius*¹⁴¹ the Privy Council indicated that the threshold of 'constructive deprivation' is reached long before regulatory intervention converts an asset into a 'valueless shell'. The suggestion that 'taking' necessarily means 'a complete taking' was always answered in the Northern Irish jurisprudence by the realisation that, if this were so, 'if you take off a man's limbs, one by one, his only claim, if he had any at all, would be in respect of the last limb removed, for until then he would not be a limbless man.'¹⁴² The substantive nature of the relevant test was also explained,¹⁴³ perhaps less helpfully, by reference to Shylock's lines in *The Merchant of Venice*:

'You take my house when you do take the prop that doth sustain my house.
You take my life when you do take the means whereby I live.'

Equally, it must be said that no 'taking' of 'property' necessarily occurs merely because regulatory legislation prohibits the 'highest and best use' which can be made of land (or of some other asset in issue).¹⁴⁴ A statutory limitation which merely negatives a 'right to add further value' to a resource (as distinct from altogether destroying the existing value of the resource) presents no strong case for compensation.¹⁴⁵ But, as a court in British Columbia recently emphasised, 'expropriation can be accomplished ... by creation of a regulatory regime such as to completely frustrate a person's opportunity to enjoy his property.'¹⁴⁶

¹⁴⁰ See *Ulster Transport Authority v James Brown & Sons Ltd* [1953] NI 79 at 116 per Lord MacDermott LCJ.

¹⁴¹ Unreported, Privy Council, 13 December 1995 (Lord Woolf).

¹⁴² *Ulster Transport Authority v James Brown & Sons Ltd* [1953] NI 79 at 92 per Sheil J.

¹⁴³ *Northern Ireland Road Transport Board v Benson* [1940] NI 133 at 157 per Babington LJ; *O D Cars Ltd v Belfast Corporation* [1959] NI 62 at 83 per Lord MacDermott LCJ.

¹⁴⁴ *Canadian Pacific Railway Co v Vancouver (City)* (2006) 262 DLR (4th) 454 at [34] (Supreme Court of Canada). See likewise *Alberta (Minister of Public Works, Supply and Services) v Nilsson* (1999) 246 AR (2d) 201 at [136].

¹⁴⁵ *Harvard Investments Ltd v City of Winnipeg* (1995) 129 DLR (4th) 557 at 568 per Twaddle JA (Manitoba Court of Appeal). See likewise *State ex rel BSW Development Group v City of Dayton*, 699 NE2d 1271 at 1276 (Ohio 1998); *64933 Manitoba Ltd v Manitoba* (2002) 214 DLR (4th) 37 at [8], [13].

¹⁴⁶ *Bingo City Games Inc v British Columbia Lottery Corp* (2005) BCD Civ J LEXIS 61 at [185], citing *Casamiro Resource Corp v British Columbia* (1991) 80 DLR (4th) 1.

A residue of reasonable alternative user?

For this reason there has emerged a wide-ranging body of case law which establishes that claims of compensable taking can be rebutted by showing that the owner is still left with a residue of reasonable alternative forms of user. In *O'Callaghan v Commissioners of Public Works in Ireland and the Attorney General*,¹⁴⁷ for example, it was deemed important that the Irish farmer, although precluded from arable farming of his land, could still graze his cattle around the protected neolithic fort.¹⁴⁸ In some circumstances, however, it may not be easy to determine whether regulatory intervention has extinguished all or most reasonable private uses of land. In perhaps the most controversial of the American takings cases, *Lucas v South Carolina Coastal Council*,¹⁴⁹ state legislation intervened to frustrate a private developer's intention of building luxury beachfront homes on a notoriously unstable, ecologically fragile coastal area which he had earlier purchased for almost US \$1 million. A majority of the United States Supreme Court pointed to the likelihood that the developer, Lucas, was entitled to compensation for this regulatory imposition on the ground that, although not stripped of title, he had been deprived of all 'economically beneficial uses' of his land.¹⁵⁰ However, in spearheading the minority's opposition to publicly funded compensation, Justice Blackmun attached significance to the fact that the landowner, whilst enjoined from building developments, could still enjoy 'other attributes of property' in respect of his coastal strip. For example, Lucas remained perfectly entitled to exclude strangers and to alienate his land to third parties.¹⁵¹ Other residual rights retained by Lucas included his entitlement to 'picnic, swim, camp in a tent, or live on the property in a movable trailer.'¹⁵²

In this context much depends on whether the private uses of which the landowner must be deprived are restrictively construed as comprising only economically valuable (or 'developmental') uses or are instead more

¹⁴⁷ [1983] ILRM 391 at 397.

¹⁴⁸ See likewise *Pine Valley Developments Ltd v Ireland*, Series A No 222 (1991) at [56] (disappointed developer could still farm or lease the land); *Canadian Pacific Railway Co v Vancouver (City)* (2006) 262 DLR (4th) 454 at [34] (railway authority could still operate a railway). The availability of a reasonable alternative use of premises would preclude, for instance, any claim for compensation arising from the exercise of a statutory power to close a brothel on the ground of its detrimental community impact. See *City of Sydney Council v De Cue Pty Ltd* [2006] NSWLEC 763 (order pursuant to Restricted Premises Act 1943 (NSW), s 17(1) for cessation of brothel activities at 'Mistys' in Potts Point).

¹⁴⁹ 505 US 1003, 120 L Ed 2d 798 (1992).

¹⁵⁰ 505 US 1003 at 1044 at 1019, 120 L Ed 2d 798 at 815. See also *Lucas v South Carolina Coastal Council*, 424 SE2d 484 at 486 (1992).

¹⁵¹ For European parallels, see *Tre Traktörer Aktiebolag v Sweden*, Series A No 159 (1989) at [55] (1989); *Matos e Silva, LDA and others v Portugal* (1997) 24 EHRR 573 at [103].

¹⁵² 505 US 1003 at 1044, 120 L Ed 2d 798 at 831. See likewise *Mariner Real Estate Ltd v Nova Scotia (Attorney General)* (1999) 177 DLR (4th) 696 at 706, 728-729 ('traditional recreational uses' still available); *Steer Holdings Ltd v Manitoba* [1993] 2 WWR 146 at 153; *Gazza v New York State Department of Environmental Conservation*, 679 NE2d 1035 at 1041 (NY 1997); *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency*, 34 F Supp 2d 1226 at 1241, 1243 (1999).

broadly related to non-commodity values inherent in the land.¹⁵³ As the majority judgment in *Lucas* demonstrates, the American tendency is, all too predictably, to confine the ‘takings’ question to monetisable aspects of land use as distinct from less tangible (and somewhat more subtle) features of human enjoyment of the resource concerned.¹⁵⁴ And there is, of course, the sad footnote that, although the State of South Carolina eventually bought out the frustrated developer, Lucas, for US \$1.5 million, the State then – unbelievably – sold the disputed beachfront strip to a housing construction corporation in order to recover the enormous costs which the State had incurred throughout the lengthy litigation.¹⁵⁵

Examples of common law ‘takings’

The foregoing account makes it clear that common law ‘taking’ in the regulatory sphere is, inevitably, a rare phenomenon, occurring only in the margins of the state’s many interventions in matters of land use and land management.¹⁵⁶ The state must commandeer at least a very substantial part of the utility of privately held land before confiscatory terminology begins to seem appropriate. Identification of the precise quantum of property which must be requisitioned has proved problematical, not least in the context of environmental conservation. Significant guidance may be derived from *Newcrest Mining (WA) Ltd v Commonwealth of Australia*.¹⁵⁷ Here commercial excavation in land owned by a mining company was suddenly restricted by a regulatory initiative which incorporated that land within Kakadu National Park. A majority of the High Court took the view that there had been ‘an effective sterilisation of the rights constituting the property in question’,¹⁵⁸ a conclusion which, although reached with reference to the Australian constitutional requirement of just compensation,¹⁵⁹ could as readily have been adjudged a taking of property in the sense of the old Government of Ireland Act of 1920. Kirby J, for example, thought it improper to expand a national park for public benefit ‘at an economic cost to the owners of valuable property interests in sections of the Park whose rights are effectively confiscated to achieve that end.’¹⁶⁰

¹⁵³ See eg *Lucas v South Carolina Coastal Council*, 505 US 1003 at 1065, 120 L Ed 2d 798 at 844 per Justice Stevens (who proffered the example of a ‘regulation arbitrarily prohibiting an owner from continuing to use her property for bird-watching or sunbathing’).

¹⁵⁴ See P Manus, ‘The Blackbird Whistling – The Silence Just After: Evaluating the Environmental Legacy of Justice Blackmun’ 85 Iowa L Rev 429 (2000).

¹⁵⁵ Gideon Kanner, ‘Not with a Bang, but a Giggle: The Settlement of the *Lucas* Case’ in David L Callies (ed), *Takings: Land-Development Conditions and Regulatory Takings after Dolan and Lucas* (American Bar Association 1996), pp 310-311.

¹⁵⁶ See generally Kevin Gray and Susan Francis Gray, ‘The rhetoric of realty’ in J Getzler (ed), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (LexisNexis 2003), pp 268-278.

¹⁵⁷ (1997) 190 CLR 513.

¹⁵⁸ (1997) 190 CLR 513 at 635 per Gummow J.

¹⁵⁹ Constitution of Australia, s 51(xxxi).

¹⁶⁰ (1997) 190 CLR 513 at 639.

When a similar issue had arisen some years earlier in *The Queen v Tener*,¹⁶¹ the Supreme Court of Canada ruled that a conservation-driven denial of access to provincial park land over which the respondents held mineral claims plainly disclosed an occasion of compensable expropriation. For Estey J the question was whether the effect of the regulatory intervention was such as to render the respondents' rights 'virtually useless'¹⁶² – albeit that the government action was clearly intended to enhance public amenity in the park land. Wilson J agreed that state interference 'cannot be viewed as mere regulation when it has the effect of defeating the respondents' entire interest in the land.'¹⁶³ In *Tener* regulatory control had destroyed the respondents' ability to 'enjoy the mineral claims granted to them in the only way they can be enjoyed, namely, by the exploitation of the minerals.' Wilson J accordingly recognised that

'The reality is that the respondents now have no access to their claims, no ability to develop and realize on them and no ability to sell them to anyone else. They are effectively beyond their reach. They are worthless.'

Obliteration of commercial enterprise

Statements of this kind reinforce one peculiarly recognisable instance of compensable derogation from an owner's complement of rights. This occurs where statutory intervention has the consequence, not of depriving the owner of any formal title in land, but rather of closing down a business or undertaking which the owner has carried on in the premises affected by the new control.¹⁶⁴ In *Manitoba Fisheries Ltd v The Queen*¹⁶⁵ the Supreme Court of Canada thought that a regulatory measure which caused 'the obliteration of the [claimant's] entire business' constituted a self-evident case of compensable expropriation. The *Manitoba Fisheries* litigation centred around legislation which conferred on a statutory corporation a monopoly of exporting fish from Manitoba, a regulatory control which obviously affected all private traders who had previously exported fish out of the province. As the Privy Council later recognised in *Grape Bay Ltd v Attorney-General of Bermuda*,¹⁶⁶ 'the effect of the Act was to destroy their business.' The traders had been 'deprived of their property, namely the goodwill of the business', with the result that there had been a 'taking of property' for which it had to be presumed, in the absence of clear statutory language, that compensation was payable. This

¹⁶¹ (1985) 17 DLR (4th) 1.

¹⁶² (1985) 17 DLR (4th) 1 at 12.

¹⁶³ See *The Queen v Tener* (1985) 17 DLR (4th) 1 at 24.

¹⁶⁴ Of course, no true regulatory taking would occur, even in these circumstances, unless the commercial operation in question were the only feasible or reasonable use of the premises affected by the regulation. Contrast, in precisely this regard, *City of Sydney Council v De Cue Pty Ltd* [2006] NSWLEC 763 at [111] (closure of brothel pursuant to Restricted Premises Act 1943 (NSW), s 17(1) did not foreclose a different form of business user).

¹⁶⁵ (1978) 88 DLR (3d) 462 at 471.

¹⁶⁶ [2000] 1 WLR 574 at 583H. See also *Gladstone v Canada (Attorney General)* (2003) 233 DLR (4th) 629 at [41]-[42].

conclusion finds an echo in other decisions in Canada¹⁶⁷ and also accords with the stance taken in the Northern Irish cases of the 1940s and 1950s, where the courts refused to overlook ‘the reality of the transaction’ in circumstances in which an owner had been ‘dispossessed of his undertaking.’¹⁶⁸ In *Ulster Transport Authority v James Brown & Sons Ltd*,¹⁶⁹ for example, the Northern Ireland Court of Appeal had no doubt that a statutory regulation of the road transport industry, by ‘diverting a definite part of the business of furniture removers and storers’ away from the complainant, had effected an illicit taking of property without compensation.¹⁷⁰

Evasive intent and equivalent effect

One further, and again particularly distinctive, instance of compensable taking is linked with the awareness that government may be tempted to use the process of regulation as a circuitous device aimed at obtaining the benefit of proprietorship without having to pay for it. The fear that regulatory processes may ultimately comprise a disguised form of expropriation is most pronounced where an environmental or conservationist objective could just as easily be achieved through an outright acquisition of title by the state as by the imposition of intrusive regulatory prohibitions. Such circumstances occur where the effect of regulation is so total as to confer on the state the same plenary power or control over land as would have resulted from a compulsory purchase, the owner of the regulated land being left with a residue of rights which is either useless or valueless. There emerges here a powerful argument that the consequence of the regulatory intervention is the equivalent of acquisition by the state and should therefore be viewed as a similarly compensable event.¹⁷¹ For all practical purposes, there has been a de facto expropriation: private land has been made the subject of

¹⁶⁷ See eg *Harvard Investments Ltd v City of Winnipeg* (1995) 129 DLR (4th) 557 at 565-569, where – although no compensable taking was found on the facts – the Manitoba Court of Appeal was prepared to envisage that the limitations imposed by the heritage listing of an historic building could render that building ‘commercially impracticable’, thereby generating a ‘taking’ which entitled the owner to compensation.

¹⁶⁸ See eg *Northern Ireland Road Transport Board v Benson* [1940] NI 133 at 157 per Babington LJ.

¹⁶⁹ [1953] NI 79 at 116-117 per Lord MacDermott LCJ, 122 per Porter LJ, 126-130 per Black LJ.

¹⁷⁰ See also *South Australian River Fishery Association and Warrick v South Australia* (2003) 84 SASR 507. Here South Australia proposed to restructure existing regulatory controls over licensed commercial fisheries by prohibiting gill net fishing and the targeting of principal fish species. Williams J thought (at [181]) that this was ‘tantamount to the dismantling of the fishery or steps to this end.’ In his view, ‘[t]he question at issue strikes at the heart of government in South Australia and the nature and extent of a government’s liability when the citizen is put out of business as a result of a deliberate change in government policy ... without proper provision for compensation ... In my opinion it is incompatible with the fair operation of this system ... that the Governor in Council should be at liberty ... to disturb accrued rights by reducing the licences to a mere worthless shell ...’ ([142], [190]). Williams J’s ruling to this effect was reversed by the Full Court of the Supreme Court of South Australia on the ground that the licences in question were inherently limited and variable or, in the alternative, that they did not give rise to ‘an inalienable right in property’ ((2003) 85 SASR 373 at [73]-[76], [191]).

¹⁷¹ Even more so is this the case where there is reason to suspect that an imposition of regulatory control (eg through zoning) was intended to depress land values prior to the initiation of a compulsory purchase (see *Alberta (Minister of Public Works, Supply and Services) v Nilsson* (1999) 246 AR (2d) 201 at [86], [110]; *Rodriguez Holding Corp v City of Vaughan* (Ontario Superior Court of Justice, 21 August 2006) at [34]).

a 'specific dedication ... to public use.'¹⁷² It follows that, if the state positively elects, whether cynically or disingenuously or otherwise, to accomplish exactly the same purpose by means of intensive regulation as could have been achieved through purchase, the enabling legislation is likely (in the absence of a clear contrary statutory intent) to be read subject to an implied requirement of publicly funded indemnity.¹⁷³

The point was made perhaps most eloquently in the Northern Ireland Court of Appeal in *O D Cars v Belfast Corporation*.¹⁷⁴ Here Lord MacDermott CJ postulated circumstances in which a building in a city centre, just in front of a public monument of great architectural merit, had been destroyed by enemy action in war-time. Parliament then decided that the open prospect thereby revealed should be preserved in the interests of the community. Lord MacDermott continued:

'Two courses of action are open when it comes to implementing this decision by statute. Provision may be made whereby the site will be acquired from the owner by some body obliged to hold it as an open space; or the owner may be prohibited from building thereon or making any use of the site except to lay it out in grass and flowers. If the site is acquired by purchase it is taken directly. If the other alternative is adopted it is surely also taken, though indirectly. From the point of view of the owner the effect is very much the same whichever of the methods is employed for, either way, he has lost his building site.'

To Lord MacDermott it seemed inconceivable that, absent unequivocal statutory authority, compensation should be paid to the owner in the one case but not in the other. Any contrary assertion, said the Chief Justice, 'would lead to so irrational and unjust a result that such an intention ought not to be imputed to the Legislature.' Lord MacDermott's expression of view was, of course, couched in terms of the prohibition in the Government of Ireland Act 1920 of uncompensated takings of property, but, as indicated earlier, it is well known that this statutory turn of phrase was devised against the background of, and was deeply embedded in, the antecedent common law.¹⁷⁵

¹⁷² *Trelenberg v Alberta* (1980) 31 Alta LR (3d) 353 at [55] per Sinclair J.

¹⁷³ '[W]here a statutory procedure exists for taking away rights with compensation, the Court will resist the argument that some other procedure is available for doing the same thing without compensation' (*Estate Homes Ltd v Waitakere City Council* [2006] 2 NZLR 619 at [188] per Baragwanath and Goddard JJ). See also, in this context, *Hall & Co Ltd v Shoreham-By-Sea UDC* [1964] 1 WLR 240 at 247-251 per Willmer LJ; *Hartnell v Minister of Housing and Local Government* [1965] AC 1134 at 1173 per Lord Wilberforce.

¹⁷⁴ [1959] NI 62 at 84-85.

¹⁷⁵ *Northern Ireland Road Transport Board v Benson* [1940] NI 133 at 157-158 (Northern Ireland Court of Appeal).

Conclusion

It is in the field of environmental law that humankind and reality are most closely allied in a joint battle for survival. Both are under threat today, and regulatory controls of land use and management are an essential weapon in the fight. Yet the improbable has occurred: an essay on environmental law has become, at once, an examination of the inner meaning of property and an exploration of the communally defined parameters of citizenship. Rarely before has it been so evident that proprietary rights and proprietary duties are ultimately also social rights and social duties.

The critical question throughout the present inquiry has been the proper allocation of the cost of the environmental welfare which we all profess to desire. It is simply impossible for the general community to sustain the entire cost of providing and promoting this welfare. As was indicated by the Irish Supreme Court in *O'Callaghan's case*,¹⁷⁶ some part – even a large part – of this cost must inevitably be borne by the individual as his or her share of the burden of common citizenship. Nevertheless, it can also be said that, in certain extreme and necessarily rare instances, regulatory intervention may have an effect that is so overwhelming as to constitute a taking of property which triggers the common law presumption that compensation was intended by Parliament. This common law presumption significantly reinforces the contention that the phenomenon of property, even though it may perform no compellingly positive function, still finds a minimal, but meaningful, role in protecting the citizen from the more extreme assertions of the invasive power of the state.¹⁷⁷

The reference to Ireland a moment ago causes us to return to the Irishman with whom we began this paper. It may well be that hard cases make bad law and, if so, *Slattery v Naylor* (the Petersham Cemetery litigation) seems to me to be an impossibly hard case. In *Slattery v Naylor*¹⁷⁸ the Privy Council upheld a criminal conviction for unlawful interment of the remains of a departed spouse in an already purchased burial plot. But if one regulatory act – no doubt prompted by strong public health considerations – ever deprived an owner of 'the reality of proprietorship' or took away 'everything that made the property worth having', it must be the state-sanctioned and uncompensated prohibition of interment in Slattery's grave at Petersham. There is, of course, one further irony. If Slattery had not been an Irish émigré in Sydney in the 1880s, but rather an Irishman living in Northern Ireland in the years following 1920, he would surely have succeeded in claiming, in equivalent circumstances, that he had suffered a common law taking which required compensation. Such, of course, is the lottery of time and place.

¹⁷⁶ *O'Callaghan v Commissioners of Public Works in Ireland and the Attorney General* [1985] ILRM 391.

¹⁷⁷ See generally Kevin Gray, 'Property in Thin Air' [1991] Cambridge LJ 252; 'Human Property Rights: The Politics of Expropriation' (2005) 16(3) Stellenbosch L Rev 398.

¹⁷⁸ (1888) 13 App Cas 446.