TOWARDS ENVIRONMENTAL CONSTITUTIONALISM: A DIFFERENT VISION OF THE RESOURCE MANAGEMENT ACT 1991?

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'An Act to restate and reform the law relating to the use of land, air, and water' [1]

'We cannot be too often reminded that constitutions are not literary compositions but ways of ordering society'[2]

The early 1990s was a busy and exciting time for environmental lawyers across the world. [3] Catalyzed by the legal developments in other jurisdictions[4] and international debates about sustainable development,[5] this was an era of wholesale environmental law and policy reform.[6] The Resource Management Act (RMA) 1991 was one of the most ambitious and comprehensive products of this hopeful era. Twenty five years later the situation looks far less bright. These new legislative regimes never seemed to deliver what they promised and there has been a political marginalizing and rolling back of environmental commitments. We now appear to be living in an era of failed social programmes.

Or are we? The above depiction rests on a vision of environmental legislation as largely instrumental – a means to achieve particular political ends. But what if we imagined the RMA and comparative legislation in other jurisdictions differently? What if we imagined them not as tools but as 'constitutions' that set in motion ongoing debates about the role of law in contributing to environmental protection. If that was the case we would see the RMA as an evolving and 'essentially contested' [7] legal framework. We would be wary of

simple solutions to these complex problems. We would take law seriously. And we would see the fundamental importance in engaging in ongoing debates about the legal nature of those frameworks. In other words, we would commit to environmental constitutionalism.

Here I want to sketch that alternative vision and suggest it is not as fanciful and as high minded as it sounds. I draw primarily on my scholarly experience with environmental law in other jurisdictions. With that said, and duly recognizing my status as an 'outsider' to New Zealand legal culture,[8] I want to suggest that the RMA and the legal discourse around it could be pointed to as prime examples of healthy environmental constitutionalism in action.

'HOT' SITUATIONS AND 'HOT' LAW

The history of contemporary environmental law is often depicted as a history of changing social preferences – environmental law another by-product of the 1960s shift in social consciousness. It is true that environmental protection is a normative choice – if as a society we wanted to live in a garbage dump we can. But this depiction brings with it the danger that we see this choice in very 'thin' terms as a product of fashion in politics that with changing ideologies will lose its lustre and can be easily shed.

There are two problems with this. The first is that environmentalism was always more than just a one trick policy agenda. As a social movement, it is the manifestation of many different deep and long lasting strands of political and social thought. [9] Environmentalism is akin to ideas of liberal democracy in that it is a sprawling and often contradictory discourse about how we a society wish to live. What is at its core is recognition that we 'are not all simply independent spheres knocking around, occasionally intruding into another person's orb'.[10] Environmental politics is a politics borne of the fact that we live and operate within communities.[11]

The second problem with the thin vision of environmentalalism that it ignores the way in which environmental problems have emerged and have had to be reckoned with. Thus for example, Lord Carnwath of the UK Supreme Court has recently surveyed how courts over time and in different jurisdictions have 'been seeking to mould the law to respond to the environmental challenges of a developing world'.[12] This is not just judicial activism on their part but because such problems,

that are often intractable in nature, have been dealt with in judicial fora because there was no other forum in which they could be addressed.[13] As Carnwath notes that process of judicial reckoning has often taken a long time and 'showed principle and practicality as uneasy bedfellows'.[14]

I would like to suggest that much of that uneasiness is to do with the fact that environmental problems are invariably 'hot situations'.[15] Much of law is about working with what the economic sociologist Michel Callon has described as 'cold' situations - that is situations where 'actors are identified, interests are stabilised, preferences can be expressed, responsibilities are acknowledged and expressed'. [16] This means that actors can calculate the costs and benefits of various actions and negotiate and/or act on that basis.[17] Law is creating the coldness of these situations through creating frames for agreement (eg contract law), frames for consequences of actions (eg tort law and criminal law) or creating networks of responsibility (eg company law and public law). Any legal frame will be imperfect and does create what Callon calls 'overflows'as no frame controls and contains everything. But the assumption is that those overflows can be recognised and managed.[18]

In contrast, environmental problems are 'hot':

> 'everything becomes controversial: the identification of intermediaries and overflows, the distribution of source and target agents, the way effects are measured. These controversies which indicate the absence of a stabilised knowledge base, usually involve a wide variety of actors. The actual list of actors, as well as their identities will fluctuate in the course of a controversy itself and they put forward mutually incompatible descriptions of future world states'.[19]

Identifying environmental problems as 'hot' makes clear that many environmental law issues are not just 'controversial', but that the controversies are structural and foundational. There is difficulty in identifying source and target agents as there is a wide group of actors. There is a lack of a stabilised knowledge base. There are mutually incompatible understandings of the world.

Most significantly there has historically been no agreed legal frames. The environmental lawyer does not have the luxury of the contract lawyer working in well-honed grooves of legal reasoning that

have been hollowed out over centuries. Environmental problems are also often cutting across traditional legal structures – across ideas of property ownership, across jurisdictions, across ideas of public power. The 'overflows' from environmental problems cannot be simply managed. Rather, there needs to be a rethinking of legal frames.

That rethinking has resulted in the development of much of environmental law being legislative in nature because this rethinking has required the creation of new legal frames that address (although do not eradicate) polycentricity, scientific uncertainty and social conflict. These frames are often 'setting the law ablaze'[20] because of while building on pre-existing legal foundations, they also are often radical departures from such foundations, and in being so cut themselves across preexisting legal ideas.[21] Environmental impact assessment is a good example in that it creates an overarching duty for decision-makers to engage in certain administrative processes.[22]

The creation of novel legal frames is why the substance of so much environmental law is so 'technical' – it is about creating quite complex legal schemes in which law is constituting and limiting in different ways.[23] Much of the restructuring process focuses upon administrative institutions – a reason why Hudson talks of 'structural environmental constitutionalism' in regards to the subject.[24] This reflects the fact that new public institutions need to be created to address the complexity of environmental problems and regulate the collection and assessment of information, the engagement with different forms of expertise, consultation among parties, and the consideration of specific cases.[25] The need to create these frames also reflects the limits of traditional legal structures of government and the 'hot' nature of both environmental law and the problems that apply to them.

It needs to be noted that 'hot' law has a long history. Town planning legislation is an early example of this phenomenon[26] and environmental legislation built on this once the practical and normative limits of a planning focus become obvious. Thus for example as the New Zealand Supreme Court has noted 'the RMA attempted to introduce a coherent, integrated and structured scheme' in place of planning and environmental legislation that had become 'fragmented, overlapping, inconsistent and complicated'.[27] The package of

environmental law reforms in New South Wales is another such example.[28]

The nature of these legal frames will vary from legal culture to legal culture, but they share common traits. Most obvious is the administrative focus seen above. A feature of those frameworks in Anglo-Commonwealth legal cultures is the regulating of local/central relations[29] The RMA is no exception to this.[30] Many of these frames accommodate both decision-making *and* dispute resolution. Integral to environmental law reform has thus often been the creation of specialist tribunals and courts[31] or at least explicit frameworks that regulate the role of courts in the process.[32] Environmental law is thus often creating a new separation of public powers. It is also important to note that these frameworks often are utilizing policy and other forms of 'soft' law in constituting and limiting public power.[33] Again the RMA is no exception.[34] Environmental lawyers thus often have to think hard about different forms of law, legal authority, and regulation.[35]

That intellectual burden highlights the fact that the 'hot' nature of environmental problems leads to the 'hot' nature of environmental law. I mean by this that while environmental legislation is passed environmental controversies do not dissipate and underlying questions concerning scientific uncertainty, polycentricity and normative conflict remain[36] and raise difficult legal questions.

ENVIRONMENTAL LEGISLATION AS 'CONSTITUTIONAL'

All of the above might sound rather negative. But it is important to acknowledge that environmental law is a fundamentally difficult subject. It is not difficult just because it is politically controversial, but because the features of environmental problems require the adjustment of old legal frameworks and the creation of new ones. Those processes require a fine eye for legal detail, a sound understanding of conventional legal concepts, and an appreciation of how the rules, frames, principles, and ideas embedded in environmental law different from those conventions.

More significantly the type of legal engagement it requires is of a foundational nature. In this regard, it is useful to think of environmental legislation as having a constitutional quality. This is because such legislation is acting as a 'power map' – it is enabling

institutions, allocating power, framing legal discourses.[37] In this regard, environmental legislation is 'a structural endeavour and 'a device of recognition'.[38] It is not just providing a frame for what law should take into account but also who should take it into account and how.

All these different functions can be seen in the RMA. Thus it is framing discourse through the principles set out in Pt 2. Pt 3 is setting out a set of foundational ground rules for development. It is allocating powers. It is a meta law that creates an overarching structure of standards, policies, and plans.[39] It also creates its own form of separation of powers that encompasses the Environmental Court[40] and the hierarchy of New Zealand government.[41]

Talking in terms of constitutions is often an excuse to talk in high minded normative terms about rights and abstract principle, but I use the term to reflect the functional role that environmental legislation is playing. Raz has described this as a 'thin' sense of a constitution where the constitution is 'constitutive' of the legal and political structure.[42] In being so it is expected that that structure is stable, canonical (written), superior, justiciable, entrenched, and reflects the 'common ideology' of that culture.[43] Constitutional lawyers know these different features of constitutions can mean different things. Turning to the RMA we can see it embodies Raz's different features of a constitution. The RMA is a written and justiciable legal frame and while it has been subject to amendment there is an expectation that it provides a stable and entrenched model of environmental governance. The debates about it have a meta-structural nature. Such debate focuses on the interrelationship of public powers[44] and on questions of overriding purpose.[45]

The goals focused nature of the statute makes its purpose, as set out in section 5, as seemingly explicit.[46] Section 5 can be understood as its 'common ideology', but constitutional lawyers know that under the umbrella of 'common ideology' may be a range of different conflicting views on the role and nature of government. As Sunstein has noted:

> 'a central role of constitutional arrangements, and constitutional law, is to handle [widespread and even enduring disagreement], partly by turning disagreement into a creative force, partly by making it unnecessary for people to agree when agreement is not possible'.[47]

In regards to the latter, Sunstein stresses the importance of 'incompletely theorized agreements' – that is practices and outcomes in situations where people do not agree. Legal reasoning has a fundamental role to play in the formulation and execution of those agreements.[48]

In other words, environmental legislation will nearly always be accompanied by discourses over what such legislation is doing, and what it should be doing. Those discourses I would describe as discourses of 'environmental constitutionalism'. The phrase, 'constitutionalism', is in many ways a horrible piece of jargon and it also one that may suggest to some I am about to delve into a discussion about rights or democracy. I use the word in its more 'ancient' sense to connote that there are ongoing debates about the role of law in how we constitute and limit decision-making.[49] Such a debate is premised on the idea that there will different opinions on the role of law in that process and that those differences will reflect distinctive normative understandings about environmental governance. [50] Environmental constitutionalism is a particularly vibrant discourse because of the hot nature of environmental problems and environmental law.

So what, you may say? Talking in terms of constitutions and constitutionalism may make us feel warm and fuzzy in an academic way, but how does it help lawyers, judges, law reformers, or any other of the multitude of legal actors who engage with environmental legislation such as the RMA? I suggest that reimagining the RMA as a 'constitutional' document has three consequences that provide a lot to think about. I should stress that in highlighting these issues, I am not suggesting that lawyers are not already aware of them.[51] Rather, by casting them in terms of constitutionalism these features of environmental law can be seen in a more positive, or at least constructive, light.

THERE ARE NO SIMPLE AND SELF-EXECUTING SOLUTIONS

The first consequence is implicit in the analysis above – there are no simple solutions to environmental problems and there should be extreme skepticism of any legal solution that is characterized as such. This may seem obvious but I stress it because the history of

environmental law in all jurisdictions is replete with law reforms promoted as such.[52]

Win/win regulatory strategies and market mechanisms being two prime examples.[53]

In regards to both, Garrett Hardin's 'Tragedy of the Commons' is often used as a justification. His article is either understood as a reason to privatize public goods, or for strong regulatory action. The problem is that the complexity of Hardin's argument is overlooked.[54] 'Tragedy' came not from ideas of unhappiness but from the philosopher Whitehead's notion that tragedy 'resides in the solemnity of the remorseless working of things.' More importantly, Hardin was arguing against 'technical solutions' to complex problems such as overpopulation. Hardin defined a technical solution 'as one that requires a change only in. the techniques of the natural sciences, demanding little or nothing in the way of change in human values or ideas of morality'. We tend to think of technical solutions as about the application of technology, but there are many examples across environmental law where we have seen environmental law reforms as also 'demanding little or nothing in the way of change in human values or ideas of morality'. Indeed, the promotion of sustainable development is often cast in such terms as are international treaties and environmental legislation. And that tendency is understandable, who wants to engage with Gordian knots when you can seemingly use Velcro.

The tendency to grasp for simple solutions can be seen in both the promoting and the operating of the RMA. As is well known, the process of law reform that led up to the RMA was a long and deliberative one, that spanned across two governments, and which accommodated a range of different ideological views.[55] That process can be seen as akin to the founding of a national constitution and one could understand that reform process as the start of an ongoing dialogue. Yet at the time of its passing there was a tendency to see the legislation as some sort of solution that did not require normative choices to be made. Simon Upton MP, on introducing the Bill for its Third Reading stated

> 'The Bill provides us with a framework to establish objectives by a physical bottom line that must not be compromised. Provided that those objectives are met, what

> people get up to is their affair. As such, the Bill provides a more liberal regime for developers. On the other hand, activities will have to be compatible with hard environmental standards, and society will set those standards'.[56]

And he noted later that

> 'The Act makes no judgments about the well being of people or communities – it does not provide guidance on that matter, nor does it invite administrators or judges to pronounce on it'.[57]

Likewise, he cast the Act in Coasian terms – an instrument for the efficient allocation of resources.[58] I'm not arguing that Upton did not understand the complexity of the RMA. He did.[59] My point is that he was tempted to see it in self executing terms – his 'environmental bottom lines' not requiring engagement with the harder normative and foundational questions.

I would also suggest that a similar temptation is seen in regards to the Environmental Court's 'overall judgment' approach to the application of the Act.[60] That approach can be understood to have started with an acute awareness of the constitutional nature of the Act. This can be seen in Grieg J's judgment in *New Zealand Rail Ltd v Marlborough District Council*,[61] commonly recognized as the starting point for the approach, in his recognition that in Pt 2 there is 'a deliberate openness about the language, its meanings and its connotations'.[62] But as Justice Elias has noted such an approach in practice can 'mask political judgments' and needs to be subject to 'critical assessment'.[63] There is temptation to use discretion as a black box out of which it is hoped an answer will appear – an approach often cloaked in the language of deference.[64] The New Zealand courts are not the only courts to give into this tendency of course.[65]

It is also the case that such a characterization can result in a rush to judgment in any particular case. This was noted in *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited*:

> 'A danger of the "overall judgment" approach is that decision-makers may conclude too readily that there is a conflict between particular policies and prefer one over

> another, rather than making a thoroughgoing attempt to find a way to reconcile them'.[66]

Thus while the lack of simple solutions is obvious, there is a need to remind ourselves as environmental lawyers of that fact. Hot problems really do lead to hot law.

THE NEED TO TAKE LAW SERIOUSLY

The second consequence of understanding the RMA as a constitution and the discourse around it in terms of constitutionalism is that it highlights the need to take the complex and varied roles that law plays in environmental law seriously. Law is not just an instrument but a thick 'cultural phenomenon' that is ambiguous and open to interpretation.[67] It also matters as it frames our understanding of the world and how we live in it.[68] It requires us as lawyers to foster expertise as the operation of environmental law presents a series of difficult legal questions.[69] This need can also be seen in the scholarly discourse over the RMA that focuses upon a series of foundational questions about it.[70] Moreover, the ongoing discourse about reform is also often focusing on these foundational aspects.[71]

The majority judgment of the Supreme Court in *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited*[72] seems to me a prime example of taking law seriously. It is a careful analysis of the text of policies, the processes used to procedure them, and the structures created by the RMA. It points to the fact that s.5 is not the solution to everything. The whole constitutional structure of the RMA must be taken into account. The Court stated:

> 'Section 5 was not intended to be an operative provision, in the sense that it is not a section under which particular planning decisions are made; rather, it sets out the RMA's overall objective. Reflecting the open-textured nature of pt 2, Parliament has provided for a hierarchy of planning documents the purpose of which is to flesh out the principles in s 5 and the remainder of pt 2 in a manner that is increasingly detailed both as to content and location. It is these documents that provide the basis for decision-making, even though pt 2 remains relevant. It does not follow from the statutory scheme that because pt 2 is open-textured, all

> or some of the planning documents that sit under it must be interpreted as being open-textured'.[73]

Note here the court is not just engaging in legal formalism but rather paying attention to all the different types of legal ordering that the RMA is creating. As Warnock has recently shown[74] that judgment does raise further questions about the role of the Environmental Court but that is the consequence of taking law seriously.

It needs to be stressed that taking law seriously requires us to view environmental law through a different lens.[75] I was recently talking to a public law colleague about environmental law. They were commenting on how uninspired the teaching of it could be because it was often a 'trudge' through the statutory scheme. I'm not interested in getting into a debate about the correctness or virtues of this characterization. Rather what I think is interesting is that in countries with a written constitution, constitutional law is often taught in such a linear way as well. That was how Australian constitutional law was taught to me and it wasn't a trudge – it was challenging intellectual journey through a series of ongoing debates and disagreements about a document that is widely recognized as normative, as uncertain, as 'essentially contestable'. [76] That essentially contestable nature of constitutional law is recognized,[77] that of environmental law less so.

The statutory focus of environmental law does not mean the subject is legally boring. Like constitutions, RMA might include 'fundamental truths'[78] but that does not end debate but starts it. It is also the case thinking about the RMA requires us as lawyers to foster a new set of legal skills, knowledge, and expertise. To put the matter another way – over 20 years on from the passing of the RMA lawyers should see themselves as just at the beginning of the legal conversation.

CONCLUSION: THE NEED FOR ONGOING DEBATE

Recognizing the existence of that conversation is the third and final consequence of recognizing environmental constitutionalism. Ongoing debate and adjustment of any legal framework is not only inevitable but also necessary for legitimacy of any regime. A constitution without debate and disagreement would be a very alarming thing.[79] Legitimacy comes from the discourse around it. This is particularly so in relation to environmental law where the situations and the law are always 'hot'. Inherent in this discourse is a tension. On the one hand the 'hot' nature

of environmental law points to its dynamic state while talking of environmental legislation as constitutional points to a desire for stability. That tension I would suggest is a core focus of environmental constitutionalism. Environmental law is about a constant search for stable frames knowing full well the fragility of such frames.

Of course stressing the importance of environmental constitutionalism does not provide a mechanism for judging the quality of any discourse beyond being skeptical about any approach that argues for simple self-executing solutions to environmental problems. It does however provide a frame for thinking about the future and highlights that thinking is not easy and it does require expertise.

In this regard, let me end on a tentative reflective note. What is striking as an outsider to New Zealand legal culture is just how rich the legal discourse around the RMA is. As I have shown above it is occurring in scholarship, in policy, and in the courts. The debate is focused on the overall structure of the RMA. There is a recognition of its framework nature and the role it plays in constituting and limiting power. It is also a debate happening at the highest judicial levels and that contrasts significantly with other jurisdictions, where environmental and planning law matters are not always seen as worthy and capable of superior court adjudication.[80] This is not to say the work of the Environmental Court is not important but that it is not operating in isolation and that is a good thing. Identifying the vibrancy of the New Zealand environmental discourse is of course not about identifying solutions or answers to environmental problems. It will also be intensely annoying to those dealing with these problems that long for resolution of intractable conflicts. I am also acutely aware that my analysis skims across the surface of the RMA and its operation. But my overall point is that by reframing the RMA we can see it, and the debate around it, in a more constructive light.

ACKNOWLEDGMENTS

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[1] Resource Management Act 1991, Long Title.
[2] Felix Frankfurter, *The Public And Its Government* (Yale University Press 1930) 39.

[3] Geoffrey Palmer, 'New Ways to Make International Environmental Law' (1992) 86 American Journal of International Law 259
[4] For example the US and the legislative package of reforms in NSW in the late 1970s. On the former see Richard Lazarus, *The Making of Environmental Law* (University of Chicago Press 2004) and the latter see Patricia Ryan, 'Court of Hope and False Expectations: Land and Environment Court 21 Years On' (2002) 14 Journal of Environmental Law 301.
[5] World Commission on Environment and Development, *Our Common Future* (1987); Rio Declaration on Environment and Development 1992; and Agenda 21.
[6] Eg Environmental Protection Act 1990 (UK); Commonwealth of Australia, *National Strategy for Sustainable Development* (Australian Government Publishing Service 1992); Commission of the European Communities, *Towards Sustainability: A European Community Programme of Policy and Action in Relation to the Environment and Sustainable Development* (COM(92) 23 final 1992).
[7] W.B Gaillie, 'Essentially Contested Concepts' (1956) 56 Proceedings of the Aristotelian Society 167.
[8] David Nelken, 'Using the Concept of Legal Culture' (2004) 29 Australian Journal of Legal Philosophy 1.
[9] Robyn Eckersley, *Environmentalism and Political Theory: Towards an Ecocentric Approach* (UCL Press 1992).
[10] Christopher Schroeder, 'Rights Against Risk' (1986) 86 Columbia Law Review 495, 535.
[11] See this reflected in the discussion of risk distribution in Ulrich Beck, *Risk Society: Towards A New Modernity* (Sage Publications 1992).
[12] Lord Carnwath, 'Judges and the Common Laws of the Environment—At Home and Abroad' (2014) 26 Journal of Environmental Law 177, 187.
[13] A good example of this the experience of the Indian Supreme Court. See Hans Dembowski, *Taking the State to Court* (Oxford University Press 2001). See also Ben Pontin, *Nuisance Law and Environmental Protection* (Lawtext Publishing 2013).
[14] Carnwath (n 12) 179.
[15] I discuss at greater length in Elizabeth Fisher, 'Environmental Law as "Hot" Law' (2013) 25 Journal of Environmental Law 347
[16] Michel Callon, 'An Essay on Framing and Overflowing: Economic Externalities Revisited by Sociology' in Michel Callon (ed), *The Laws of the Markets* (Blackwell 1998) 261.
[17] Ibid 255, 259, 261.
[18] Ibid 248-250.
[19] Ibid 260.
[20] Harold Leventhal, 'Environmental Decision Making and the Role of the Courts' (1974) 122 University Of Pennsylvania Law Review 509, 510.
[21] Elizabeth Fisher, 'Blazing Upstream? Strategic Environmental Assessment as 'Hot' Law' in Gregory Jones and Eloise Scotford (eds), *The Strategic Environmental Assessment Directive: A Plan for Success?* (Hart in press).
[22] Eric Orts, 'Reflexive Environmental Law' (1995) 89 Northwestern University Law Review 1227
[23] D.E. Fisher, *Environmental Law: Text, Cases and Materials* (Law Book Company 1993).
[24] Blake Hudson, 'Structural Environmental Constitutionalism' (2015) 21 Widener Law Review in press.
[25] Elizabeth Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart Publishing 2007) 19-22.
[26] Patrick McAuslan, *The Ideologies of Planning Law* (Pergamon Press 1980).
[27] *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38 [9].

[28] Environmental Planning and Assessment Act 1979 and Land and Environment Court Act 1979.
[29] Elizabeth Fisher, Bettina Lange and Eloise Scotford, *Environmental Law: Text, Cases and Materials* (Oxford University Press 2013) 798-9.
[30] Pt 4, RMA 1991.
[31] Malcolm Grant, *Environmental Court Project. Final Report.* (Department of Transport, Environment and the Regions 2000)
[32] Eg in the US environmental legislation also included the grounds of judicial review which had been adapted from the general framework under the Administrative Procedure Act 1946. See Clean Air Act 42 § USC 7607(d)(9)(A)-(C).
[33] Laurence Etherington, 'Mandatory Guidance for Dealing With Contaminated Land: Paradox or Pragmatism?' (2002) 23 Statute Law Review 203 and Fisher, Lange and Scotford (n 29) Ch 11 and 12.
[34] Pt 5 RMA 1991.
[35] Fisher, Lange and Scotford (n 29) Pt 3.
[36] This is illustrated by McClean in her early analysis of the RMA. See Janet McLean, 'New Zealand's Resource Management Act 1991: Process with Purpose' (1992) 7 Otago Law Review 538
[37] Vernon Bogdanor, 'Constitutional Law and Politics' (1987) 7 Oxford Journal of Legal Studies 454, 454 citing Duchacek.
[38] Douglas Kysar, 'Global Environmental Constitutionalism: Getting There from Here' (2012) 1 Transnational Environmental Law 83, 90.
[39] Pt 5.
[40] Pt 11.
[41] Pt 4.
[42] Joseph Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries' in Larry Alexander (ed), *Constitutionalism: Philosophical Foundations* (Cambridge University Press 1998) 153.
[43] Ibid 153-4.
[44] This is beautifully illustrated by Warnock in Ceri Warnock, 'Reconceptualising the Role of the New Zealand Environment Court' (in press) 27 Journal of Environmental Law in press.
[45] RMA Principles Technical Adivsory Group, *Report of the Minister for the Environment's Resource Management Act 1991 Technical Advisory Group* (February 2012).
[46] McLean (n 36) and David Schoenbrod, 'Goals Statutes or Rules Statutes?: The Case of the Clean Air Act' (1983) 30 UCLA Law Review 740
[47] Cass Sunstein, *Designing Democracy: What Constitutions Do* (Oxford University Press 2001) 8.
[48] Cass Sunstein, *Legal Reasoning and Political Conflict* (Oxford University Press 1996).
[49] Charles McIlwain, *Constitutionalism: Ancient and Modern* (Cornell University Press 1947) 3.
[50] See also Fisher, *Risk Regulation and Administrative Constitutionalism* (n 25) Ch 1.
[51] Many of these themes can be seen running through Sian Elias, *Righting Environmental Justice* (Address to the Resource Management Law Associaiton, Samlon Lecture 25 July 2013).
[52] Elizabeth Fisher, 'Environmental Law, Technology and 'Hot Situations': Taking the Tragedy of the Commons Seriously' in Roger Brownsword, Karen Yeung and Eloise Scotford (eds), *Oxford Handbook of Law and Technology* (Oxford University Press forthcoming).
[53] Elizabeth Fisher, 'Unpacking the Toolbox: Or Why the Public/Private Divide Is Important in EC Environmental Law' in Mark Freedland and Jean-Bernard Auby (eds), *The Public Law/Private Law Divide: Une entente assez cordiale?* (Hart Publishing 2006) and Sanja Bogojevic, 'Ending the Honeymoon: Deconstructing Emissions Trading Discourses' (2009) 21 Journal of Environmental Law 443.
[54] Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 Science 143.

[55] P Memon and B Gleeson, 'Towards a New Planning Paradigm? Reflections on New Zealand's Resource Management Act' (1995) 22 Environmental and Planning A 109.
[56] (4 July 1991) 516 NZPD 3019.
[57] Simon Upton, 'Purpose and Principle in the Resource Management Act ' (1995) 3 Waikato Law Review 17, 40.
[58] Ibid, 41, 44.
[59] Ibid 21.
[60] Discussed in *Environmental Defence Society Incorporated* (n 27) [106]-[154]. See also Peter Fuller, 'The Resource Management Act 1991: "An Overall Broad Judgment"' (2003) 7 New Zealand Journal of Environmental Law 243.
[61] [1994] NZRMA 70.
[62] [86].
[63] Elias (n 51) 12, 14. See also Warnock (n 44).
[64] Edward Willis, 'The Interpretation of Environmental Legislation in New Zealand' (2010) 14 New Zealand Journal of Environmental Law 135.
[65] Kenneth Hayne, 'Deference: An Australian Perspective' (2011) Public Law 75 and Antonin Scalia, 'Judicial Deference to Administrative Interpretations of Law' (1989) Duke Law Journal 511.
[66] *Environmental Defence Society Incorporated* (n 27) 131.
[67] Fisher, *Risk Regulation and Administrative Constitutionalism* (n 25) 35-9.
[68] Elizabeth Fisher, 'Chemicals as Regulatory Objects' (2014) 23 Review of European, Comparative and International Environmental Law 163
[69] Elizabeth Fisher, 'Climate Change Litigation, Obsession and Expertise: Reflecting on the Scholarly Response to Massachusetts v EPA' (2013) 39 Law And Policy 236.
[70] Warnock (n 44); Elizabeth Toomey, ' Public Participation in Resource Management: The New Zealand Experience' (2012) 16 New Zealand Journal of Environmental Law 117; McLean (n 36).
[71] RMA Principles Technical Adivsory Group (n 45) and Toomey (n 70).
[72] *Environmental Defence Society Incorporated* (n 27).
[73] Ibid [151].
[74] Warnock (n 44).
[75] Nicole Graham, 'This is Not a Thing: Land, Sustainability and Legal Education' (2014) 26 Journal of Environmental Law in press.
[76] Gaillie (n 7).
[77] Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2004) 21 Law and Philosophy 137
[78] Upton (n 57) 22
[79] Sunstein, *Designing Democracy: What Constitutions Do* (n 47) Introduction.
[80] See the anecdote of Duggan's in Jayne Jagot and Sandra Duggan, 'Landmark cases in Planning and Environment law: North Sydney Council v Ligon 302 Pty Ltd' (2004) 10 Local Government Law Journal 17, 22. I am grateful to Jane Taylor for drawing my attention to this.