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CONSTITUTIONAL TRADITIONS IN OPEN SOCIETIES: A COMPARATIVE INQUIRY

*David Hackett Fischer**

As open systems have multiplied in the world, they are increasingly diverse in their constitutional traditions. Their diversity derives from different constellations of value, and from vernacular ideas that are deeply embedded in their historical experience. We have much to learn from each of these traditions.

I INTRODUCTION

It is an honour to be here, and a pleasure to see how our disciplines of law and history have been moving toward each other. Kermit Hall observed that "almost every major problem in American history has had, in one form or another, its constitutional reflection".¹ Historians have developed a double interest in law, as a subject in its own right and also as a way of studying other subjects. At the same time, lawyers have been giving more attention to history. A practising attorney in the United States says, "Scratch a lawyer, find an historian". This conference is a happy example of those converging lines.

II OPEN SOCIETIES

My assignment is to take a comparative approach to New Zealand's constitutional traditions. I come to this task from the experience of my own work, which centres on comparative histories of open societies.

The idea of an open society emerged from the ferment of thought that followed the First World War. It appeared in major works by Henri Bergson, HG Wells, Walter Lippmann and Giovanni Amendola.² A later book with a longer reach is Karl Popper's *The Open Society and Its Enemies*.³

* David Hackett Fischer is Earl Warren Professor of History and University Professor at Brandeis University.

1 Kermit Hall *Major Problems in American Constitutional History: the Colonial Era through Reconstruction* (DC Heath, Lexington (Mass), 1992) vol 1 at v.

2 Giovanni Amendola *Una Battaglia Liberale* (P Gobetti, Turin, 1924). Amendola's writings are collected in a posthumous work *La Nuova Democrazia* (Ricciardi, Milan, 1951); HG Wells *The Open Conspiracy: Blue*

Popper was an epistemologist, and his open society was an epistemic idea. His "key point", as he called it, is that an open society enables individual people to think and judge for themselves.⁴

After World War II, others began to think of open societies not as ideal types but as functioning systems with free and fair elections, equal rights and the rule of law. Open societies in this sense have been multiplying in the modern world since the democratic revolutions of the eighteenth century. That long trend has been punctuated by strong surges, deep crises, sudden reversals and sharp declines. The leading example happened in Europe during the early twentieth century. After the First World War, open societies on that continent increased very rapidly to about twenty-five in 1932. Then came the disaster of the Great Depression. By 1942, only two open societies survived on the European mainland: Switzerland and Sweden. The rest fell victim to internal troubles and external attacks by Fascist and Communist enemies.

After the defeat of Fascism in 1945, open societies revived but closed systems also multiplied in that post-war period. Then, in the mid-1970s, open societies began to grow more rapidly throughout the world. That process has been studied by Freedom House, a centrist organisation in Washington, supported by both Democratic and Republican leaders. Each year Freedom House takes a world census of open societies, which it defines in terms of political democracy, individual rights and the rule of law. Their numbers rose from 40 nations in 1975 to 88 in 1998. At the same time, closed societies fell from a peak of 68 in 1976 to a low of 38 in 1992. By the early twenty-first century, open had become the modal form of social organisation in the world.⁵

Prints for a World Revolution (Gollancz, London, 1928); Henri Bergson *Les deux sources de la morale et de la religion* (Felix Alcan, Paris, 1932) (translated ed: Henri Bergson (translator) *Two Sources of Morality and Religion* (Henry Holt, New York, 1935)); Walter Lippmann *The Method of Freedom* (Macmillan Company, New York, 1934); and Walter Lippmann *The Good Society* (George Allen & Unwin, New York, 1937).

3 Karl R Popper *The Open Society and Its Enemies* (Routledge & Kegan Paul, London, 1962) at 7–17 and 169–201.

4 Popper's "key point" appears in Patrick Camiller (translator) *The Lesson of This Century: With Two Talks on Freedom and the Democratic State: Karl Popper interviewed by Giancarlo Bosetti* (Routledge, London, 1997) at 71–72; and Mark A Notturmo "The Open Society and Its Enemies" in Ian Jarvie and Sandra Pralong (eds) *Popper's Open Society after Fifty Years: The Continuing Relevance of Karl Popper* (Routledge, London, 1999) 41 at 45. A discussion of his work on epistemology appears in Stephen Thornton "Karl Popper" (first published 13 November 1997, revised 9 February 2009) in the online Stanford Encyclopedia of Philosophy <www.plato.stanford.edu>. For Popper himself, see his memoir Karl Popper *Unended Quest: An Intellectual Autobiography* (Fontana, London, 1976). On Popper's career in New Zealand where he taught at the University of Canterbury from 1937 to 1946, see Peter Munz "Popper, Karl Raymond" (8 January 2014) Dictionary of New Zealand Biography <www.tera.govt.nz>.

5 Freedom House *Freedom in the World, 2013* (Washington, 2013) available at <www.freedom house.org>.

But then came another crash of the world economy in 2007–2008. Once again the number of closed systems began to increase from 42 to 48 between 2007 and 2013.⁶ Open systems came under attack from reviving autocracy in Russia, expansive oligarchy in China, spreading terror in the Middle East, and a rising spirit of anarchy that opposed the rule of law. Even deep-rooted open societies in North America experienced increasing instability, internal conflict and growing alienation. A chilling indicator of alienation was the rapid growth of "hate crimes" and "hate groups" in the United States. Their numbers surged after the election of President Barack Obama in 2008, but they had been growing before that event. They increased in every American state, especially throughout the South, but their numbers were largest in California.⁷

A greater threat to open systems was the growth of wealth-inequality. This new trend emerged in the United States after 1968, slowly at first, but with growing momentum. It gave great power to small elites, retarded rates of economic growth and also increased poverty with its attendant problems. In the United States, by 2014, 100 million people were living in poverty. More than 70 percent were women and children. Many societies showed similar tendencies, which are profoundly disruptive of open systems and democratic processes.⁸

But at the same time, other and more encouraging trends have been moving in the opposite direction. Some opening impulses are more powerful in the world today than ever before. They are sustained by a revolution in free flowing knowledge, by the growth of education and literacy, by improvements in health, and by a world expansion of human rights. And even as wealth has become less equal in its distribution, middling classes continue to multiply in the world.

6 At 27. Another annual survey has been sponsored by the conservative Heritage Foundation in Washington and the Wall Street Journal in New York. It is an index of economic freedom mainly by measures of entrepreneurial freedom for business corporations, and the rule of law as evident in the strength of property rights, freedom for competition, and stable governments without corruption. Its bias appears in "the right to work", which it defines as the right of employers to hire and fire workers without interference, and also in a judgment that "reform efforts in free countries should concentrate on 'the rule of law, property rights, and free markets, rather than democracy'." That idea of economic freedom is far removed from most ideas of open societies. Fascist and Stalinist dictatorships would score higher than open societies as they are commonly understood. Compare Heritage Foundation *Index of Economic Freedom, 2013* (Washington, 2013). Executive highlights are available at <www.heritage.org>.

7 Annual data on "hate crimes" in the United States are compiled in the Federal Bureau of Investigation "Uniform Crime Reports: Hate Crimes Statistics 2012" (2012) <www.fbi.gov>. Surveys of "hate groups," racist, fascist and many other groups in the United States are published annually in the Southern Poverty Law Center's Intelligence Report. See for example Southern Poverty Law Center "For the Record" (2013) 150/1 Intelligence Report 48. For an assessment of these data, see JM Berger "The Hate List: is America really being overrun by right-wing militants?" (12 March 2013) FP National Security <www.foreignpolicy.com>.

8 For wealth inequality, see Thomas Piketty *Capital in the Twenty-First Century* (Harvard University Press, Harvard, 2014); for poverty, see Maria Shriver and others *The Shriver Report: A Woman's Nation Pushes Back from the Brink* (Rosetta Books, New York, 2014).

Taken together, this evidence suggests that imperatives for the growth of open systems remain strong, and in some ways are growing stronger. They are still the leading form of social organisation in the world. But they are very fragile – new societies especially so, and also older societies when subject to external stress and internal conflict. These are not distant problems. For those of us who value open systems, it is important to study their weaknesses and strengths. We also have an opportunity to learn from their creative differences, which is the object of this inquiry.

III THE DIVERSITY OF OPEN SOCIETIES

As open societies have multiplied in the world, they have grown more diverse in origin and condition, size and scale, wealth and poverty, in the design of their institutions, and in the content of core values. All of these patterns appear in their constitutional traditions.

By a constitutional tradition, I do not mean a written text and commentary as in American usage, but a system of institutions, established processes, fundamental documents, written laws, recorded judgments, values, customs, and beliefs that regulate the government of a society.

All of these components exist in every open society, but in different combinations. The United States, with its proud heritage of written documents, also has unwritten traditions which are vital to the meaning of its texts. New Zealanders take pride in the strength and flexibility of their unwritten constitutional traditions, but they also have had statutory constitutions in 1852, 1857 and 1986, and other documents, such as the Treaty of Waitangi, with a contested constitutional status.

A vital part of constitutional traditions are constellations of value. These values exist as vernacular ideas, and are more like folkways than ideologies. They are Tocqueville's *habitudes du coeur*, habits of the heart. In the manner of many folkways they are very durable, but also dynamic. They tend to be extraordinarily complex and creative because so many minds are continuously engaged in rethinking them. Vernacular values are deeply embedded in the daily life of a culture. They can be observed and studied by empirical research.

An important area of progress in scholarship has been the discovery of new ways of studying vernacular ideas by epistemic methods that I think Karl Popper would have approved. A leading example is Stuart Schwartz's *All Can Be Saved*, which is about the history of vernacular ideas of tolerance and salvation in Spain, Portugal and their American dominions.⁹ A wonderful irony in this study is that Stuart Schwartz found a trove of materials on vernacular traditions of tolerance in the written records of the Mexican and Spanish Inquisition. The Inquisitors were driven to distraction by the strength and persistence of habits and customs of tolerance, which proved to be much stronger and more enduring than the Inquisition itself.

⁹ Stuart B Schwartz *All Can Be Saved: Religious Tolerance and Salvation in the Iberian Atlantic World* (Yale University Press, New Haven, 2008).

I have tried to do something similar in *Albion's Seed* on vernacular ideas of order, power, liberty and freedom in four regions of what is now the United States.¹⁰ Another work, *Liberty and Freedom*, literally looks at the history and meaning of these vernacular ideas through visual evidence.¹¹ A book called *Champlain's Dream* studies vernacular values in the history of New France and Canada.¹² Yet another example is Phil Ethington's *Society in Early Modern England: The Vernacular Origins of Some Powerful Ideas*.¹³

Most recently, other scholars have linked vernacular ideas directly to the history of law and constitutional traditions. An important example is a book by Christopher Tomlins, *Freedom Bound*, on vernacular ideas of law, labour and civic identity among English-speaking settlers in North America.¹⁴ It has won major prizes in history and law. Yet another approach to the study of vernacular ideas in constitutional traditions is Akhil Reed Amar's *America's Unwritten Constitution: The Precedents and Principles We Live By*.¹⁵ It is inventive in its multitude of methods for empirical study of unwritten traditions.

IV SOUTH AFRICA: CHANGING VERNACULAR VALUES IN WRITTEN CONSTITUTIONS

Open societies tend to share many vernacular values in common, but they understand them in different ways, and choose among them with different priorities. As these ideas have become more prominent in constitutional traditions, they also have tended to change in substance and detail. A leading example is South Africa, which Sir Geoffrey Palmer regards as having "the most ambitious and interesting of modern constitutions."¹⁶ He quotes a decision of the South African Constitutional

10 David Hackett Fischer *Albion's Seed: Four British Folkways in America* (Oxford University Press, New York, 1989).

11 David Hackett Fischer *Liberty and Freedom: A Visual History of America's Founding Ideas* (Oxford University Press, Oxford, 2005).

12 David Hackett Fischer *Champlain's Dream* (Simon & Schuster, New York, 2008). See also David Hackett Fischer *Fairness and Freedom* (Oxford University Press, Oxford, 2012).

13 Phil Ethington *Society in Early Modern England: The Vernacular Origins of Some Powerful Ideas* (Polity Press, Cambridge, 2010).

14 Christopher Tomlins *Freedom Bound: Law, Labor and Civic Identity in Colonizing English America, 1580–1865* (Cambridge University Press, Cambridge, 2010).

15 Akhil Reed Amar *America's Unwritten Constitution: The Precedents and Principles We Live By* (Basic Books, New York, 2012).

16 *Shabalala v Attorney General of Transvaal* [1996] 1 All SA 64 (Provincial Division) at 77; and Geoffrey Palmer "The New Zealand Constitution and the Power of the Courts" (2006) 15 Transnational Law and Contemporary Problems 550 at 552–553.

Court in 1996, which makes explicit the vital importance of change in vernacular ideas, within this nation's dynamic constitutional traditions.¹⁷ The Court ruled that in South Africa:¹⁸

...the past was pervaded by inequity, authoritarianism, and repression. The aspiration of the future is based on what is justifiable in an open and democratic society, based on freedom and equality. It is based on a culture of accountability and transparency. The relevant provisions of the Constitution must therefore be interpreted to give effect to the purposes sought to be advanced by their enactment.

The Court listed at least six fundamental ideas in those two sentences – openness, democracy, freedom, equality, accountability and transparency – with the emphasis on freedom and equality.

V GREAT BRITAIN: ENDURING VERNACULAR VALUES IN AN UNWRITTEN CONSTITUTIONAL TRADITION

Older open societies with deeply rooted traditions give more attention to other values, and in different ways. An example is Great Britain. Two recent surveys have yielded evidence of vernacular ideas that have a special intensity in its unwritten constitutional tradition.¹⁹ Prime Minister Tony Blair liked to talk about the importance of what he called "core values" in the British "identity". He inspired the editors of *The London Times* to take a survey. They asked British readers to nominate the "core values" of their society in five words or less, and then to vote on the results. Many readers of *The Times* did not welcome that inquiry. The winning submission, which delighted the nation, was "No mottos, please. We're British."²⁰

The London Telegraph tried again, and insisted on particular core values. Their readers were more forthcoming. The two choices most frequently mentioned were "rule of law" and "sovereignty of Crown in Parliament". A third choice was a distinctively British idea of compulsory toleration: "all parties, sects, faiths and ideologies *must* tolerate the existence of their rivals." The imperatives are interesting. One reader explained that the "rule of law" is "non-negotiable". Others made the same point about compulsory toleration. These vernacular values are deeply "entrenched" within an unwritten tradition. To turn against them in Britain is not formally forbidden. It is simply "not on."²¹

17 *Shabalala v Attorney General of Transvaal*, above n 16, at 77.

18 At 77.

19 The surveys were undertaken by *The London Times* and *The London Telegraph*. The survey by *The London Times* was summarised in Sarah Lyall "Britain Seeks Its Essence, and Finds Punch Lines" *The New York Times* (online ed, New York, 26 January 2008). See, for the *Daily Telegraph* survey, Editorial "Ten Core Values of the British Identity" *The Daily Telegraph* (London, 27 July 2005).

20 Sarah Lyall, above n 19. Cartoonists weighed in by mapping the anatomy of "British on the Brain" The dominant British body-part was "BACKBONE" in caps; all others were in lower case. See the imagery at <www.stoa.org.uk>.

21 Editorial "Ten Core Values of the British Identity" *The Daily Telegraph* (London, 27 July 2005). Also mentioned in the responses were "institutions", "history", and "character".

VI CANADA: VALUES OF HUMANITY IN A DEVELOPING SOCIETY: CONSTITUTIONAL TRADITION AS A "LIVING TREE"

Canadians have gone yet another way in their constitutional traditions, with results that are instructive for us all. Through many generations and a highly complex history, the people of Canada have constructed vernacular values of humanity and human rights, which are flourishing today.

These ideas first appeared in the founding of New France. The leaders were a circle of French humanists around Henri IV who lived through a horrific era of extreme violence in France: nine civil wars of religion and two million deaths in four decades after 1560. In 1598, Henri IV and his humanists succeeded in ending the wars by greater force, and they enacted a policy of humanity and tolerance by fiat in the Edict of Nantes. In 1604, they worked together to found a new sort of empire in North America on similar principles.

A central figure in New France was Samuel Champlain, a warrior-humanist who lived for peace and tolerance. Through more than 30 years (1603–1635), he got on with the Indians, made lasting agreements with more than 50 Indian nations, worked out systems of customary law that mediated between French and Native American legal traditions, and even kept a precarious peace with the Iroquois for twenty years. At the same time, he insisted on toleration for Catholics and Protestants, Basques and Britons. All this was the work not of Champlain alone, but of a group of French and American Indian leaders who put ideas of humanity to work, and improvised ingenious ways of acting humanely, or *humainement*, a word that began to spread in their generation.²²

Subsequent leaders in New France went other ways, but the founders succeeded in embedding vernacular values of tolerance and humanity in three francophone populations and cultures: Québécois, Acadien and Métis. These cultures still exist four centuries later, and each preserves its inheritance. Memories of those vernacular traditions of humanity are also cherished today by other ethnic groups in Canada. A leading exemplar is David Johnston, a constitutional lawyer who in 2010 became Governor General of Canada. He observes that Champlain "didn't see Canada or New France as a place just to be plundered It was a place for people to come and build new communities ... on principles that you and I would hold dear today." Also in 2013, these same vernacular values won strong support from Shawn Atleo, National Chief of the Assembly of First Nations in Canada and a staunch defender of aboriginal rights. This very able leader has repeatedly urged Canadians to remember Champlain and share his spirit of humanity. Shawn Atleo asked all

22 David Hackett Fischer *Champlain's Dream*, above n 12; David Hackett Fischer "Champlain, Humanist" in Nancy Nahra (ed) *When the French Were Here... and They're Still Here: Proceedings of the Samuel de Champlain Quadricentennial Symposium 2009* (Champlain College, Burlington, 2010) 1. For the timing of "humainement" in early modern France, see the evidence of Google Ngrams at <www.books.google.com/ngrams>.

Canadians to remember that "Champlain set out to create a different society – one of mutual respect and harmony."²³

Later these large vernacular ideas interacted with other traditions of humanity in Canada. One of them was introduced by as many as 50,000 *émigrés* from the American Revolution. They dissented from liberty-centred values in the United States, called themselves United Empire Loyalists, and cherished a strong sense of belonging with others in the Atlantic world. Many settled in Canada, where they worked for reform and responsible government within the empire, and helped to lay the foundations of another humanist tradition with a Tory edge. Yet another group were thousands of African refugees who moved to Canada in the long period from the American Revolution to the Civil War. From their experience of slavery, they created another idea of humanity. Other groups in Canada included British emigrants who arrived in the nineteenth and early twentieth centuries. They brought to North America some of the vernacular values that came to New Zealand at the same time. Selective streams of immigration to Canada and the United States reinforced the vernacular traditions of both countries and deepened the differences between them.²⁴

In twentieth century Canada, three political leaders and one civil servant drew upon these many vernacular traditions to develop a constitutional system of humanity and human rights. The first was William Lyon Mackenzie King, who devoted his career to the idea of humanity, as a leader of liberal and progressive movements and author of a major work called *Industry and Humanity*.²⁵ He was Canada's longest serving Prime Minister from 1921 to 1930 and again from 1935 to 1948. Mackenzie King held Canada together in hard times, mainly through policies of humanity and forbearance. He laid the foundations for social reform and a humanitarian welfare state. The results were fundamental to the construction of Canadian identity.²⁶

23 Teresa Smith "Channelling Champlain" *Ottawa Citizen* (online ed, 15 June 2013). Also published in *Edmonton Journal*, *Calgary Herald*, *Vancouver Province*, *Saskatoon Phoenix*, and *Regina Leader Post*.

24 Maya Jasanoff *Liberty's Exiles: American Loyalists in a Revolutionary World* (Random House, New York, 2011) at 347 and 357; Ian McKay "The Liberal Order Framework: A Prospectus for a Reconnaissance of Canadian History" (2000) 81 *Canadian History* 617; Robin W Winks *The Relevance of Canadian History* (Macmillan of Canada, Toronto, 1979); Robin W Winks *The Blacks in Canada* (Macmillan of Canada, Montreal, 1997); and Harvey Whitfield *Blacks on the Border: The Black Refugees in British North America, 1815–1860* (University of Vermont Press, Vermont, 2006). Also helpful is Seymour Martin Lipset *Continental Divide: The Values and Institutions of the United States and Canada* (Routledge, New York, 1990).

25 William Lyon Mackenzie King *Industry and Humanity: A Study in the Principles Underlying Industrial Reconstruction* (Houghton Mifflin, Boston, 1918).

26 Mackenzie King *Industry and Humanity*, above n 25; JW Pickersgill and DF Forester *The Mackenzie King Record* (University of Toronto, Toronto, 1968) vol 2 at 37; Bruce Hutchinson *The Incredible Canadian: a Candid Portrait of MacKenzie King: his Works, his Time and his Nation* (Longmans, Green & Co, Toronto, 1953); and Allan Levine *King: William Lyon Mackenzie King: A Life Guided by the Hand of Destiny* (Douglas & McIntyre, Vancouver, 2011) at 344–347 and 406–407.

After the Second World War, the United Nations Declaration of Human Rights was drafted by yet another Canadian humanist and civil servant, John Peters Humphrey, who taught law at McGill University, became active in the founding of the United Nations, and served as director of its Division of Human Rights.²⁷ Humphrey's Declaration of Human Rights was strongly opposed by a small circle of conservative Canadian lawyers, but it was supported by a third great leader of the Liberal Party, Lester Pearson, who continued to develop Canada's commitment to rights of humanity in foreign relations and also among its own ethnic and linguistic groups. To that end he organised Canada's "Bi and Bi Commission". The result was a set of bilingual and bicultural policies that put relations between anglophone and francophone groups on a new foundation.²⁸

A fourth Canadian humanist, and yet another leader of its Liberal Party in the twentieth century, was Pierre Elliott Trudeau. He embedded Pearson's bilingual and bicultural program in the Canadian Constitution of 1982 and in the Canadian Charter of Rights and Freedoms. Trudeau also led Canadians from biculturalism to "multiculturalism", a word of their invention. Multiculturalism further enlarged Canada's commitment to human rights and broadened its ideas of humanity.²⁹

This process of constitutional change in Canada was distinctive not only in its substance but also in its pace and direction. In 1930, when the British Privy Council still served as Canada's highest court of appeal, Lord Sankey observed that: "[t]he British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits."³⁰ He added that a constitution should not be given a "narrow and technical construction", but rather a "large and liberal interpretation."³¹

27 AJ Hobbin "Eleanor Roosevelt, John Humphrey and Canadian Opposition to the Universal Declaration of Human Rights" (1998) 33 *International Journal* 325.

28 Peter W Hogg "Canada: From Privy Council to Supreme Court" in Jeffrey Goldsworthy (ed) *Interpreting Constitutions: A Comparative Study* (Oxford University Press, Oxford, 2007) 55 at 93–95. On Pearson, the best sources for his humanitarian values, and one of the best Canadian memoirs, is Lester B Pearson *Mike: the Memoirs of the Right Honourable Lester B Pearson* (University of Toronto Press, Toronto, 1972–1975) vols 1–3; and also a collection of short pieces, Lester B Pearson *Words and Occasions: an anthology of speeches and articles selected from his papers* (Harvard University Press, Harvard, 1970). The leading biography is John English *The Life of Lester Pearson* (AA Knopf, Toronto, 1989–1992) vols 1 and 2. *The Report of the Royal Commission on Bilingualism and Biculturalism* (1969) is available online at <www.epe.lac-bac.gc.ca>.

29 John English *Citizen of the World: The Life of Pierre Elliott Trudeau, 1919–1968* (Random House, Toronto, 2006) at 295, 302 and 324; and John English *Just Watch Me: The Life of Pierre Elliott Trudeau 1968–2000* (Random House, Toronto, 2009) at 107–109, 142–147 and 467.

30 *Edwards v Attorney General of Canada* (1930) AC 124 (PC) at 126; and Peter Hogg "Canada: Privy Council to Supreme Court" in Jeffrey Goldsworthy (ed) *Interpreting Constitutions: A Comparative Study* (Oxford University Press, Oxford, 2006) 55 at 85.

31 *Edwards v Attorney General of Canada*, above n 30, at 126.

The Canadian authority of the British Privy Council ended in 1949, but that spirit of "large and liberal interpretation" lived on. Thereafter, Stephen Gardbaum has written that the Supreme Court of Canada has "consistently affirmed the 'living tree' methodology of constitutional interpretation and a broad, 'generous approach' to the content of Charter rights."³² Many examples have appeared in decisions by the Canadian Supreme Court, especially after the Charter of Rights came into effect in 1982. In one appellate case before Canada's highest court in 1984, Chief Justice Brian Dickson declared:³³

The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of government power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must therefore be capable of growth and development over time to meet new social, political and historical realities often unimagined by the framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.

The case in question, *Hunter v Southam*, was about language rights. The Supreme Court deliberately delivered "a generous interpretation ... suitable to give individuals the full measure of the fundamental rights and freedoms referred to."³⁴ In the same spirit it sought to strengthen "existing aboriginal and treaty rights of the aboriginal peoples of Canada."³⁵ Here was a constitutional tradition that is as old as Champlain's idea of acting humanely in the world. The Supreme Court of Canada carries it forward with a vision of humanity and human rights that is explicitly designed for centuries to come. Canadians have much to teach us about humanity, about relations among different cultures, and about a constitutional tradition as "a living tree".

VII THE UNITED STATES: VALUES OF LIBERTY AND FREEDOM IN A CONTESTED CONSTITUTIONAL TRADITION

Through many generations, constitutional traditions in what is now the United States have had another centre on vernacular ideas of liberty and freedom. This heritage is complicated in several ways at once. The first complexity derives from the forgotten origins of the two operative words, liberty and freedom. Their roots had different and even opposite meanings. Liberty descends from the Latin *libertas* and Greek *eleutheria*, which literally meant a condition of autonomy, separation,

³² Stephen Gardbaum *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, Cambridge, 2013) at 104.

³³ *Hunter v Southam* [1984] 2 SCR 145 at 155. See also Hogg, above n 30, at 77.

³⁴ *Minister of Home Affairs v Fisher* [1980] AC 319 at 328 as cited in *Hunter v Southam*, above n 33, at 156.

³⁵ Canada Act 1982 (UK) c 11, sch B (Constitution Act), s 35.

and independence from another's will, and in that way unlike a slave. Freedom derives from an Indo-European root, *friya* or *priya*, which meant beloved. Freedom and friend (*freiheit* and *freund*) share that same root, an odd coupling. To study early usage is to find an explanation. Freedom meant a condition of belonging to a community of other free people, and in that way unlike a slave.

On one level, liberty and freedom share the same meaning. They both describe a status that is unlike slavery. But on another level their meanings are opposite. Liberty entails separation; freedom implies connection. Freedom means the rights of belonging – the right to vote, the right to a seat on the bus, the right to buy a home in the neighbourhood, the rights and duties of citizenship. Liberty is about the rights of autonomy – the right to go one's own way, to act as one wishes, to think as we please. Most languages in the world have only one of these words in common use: *freiheit* or *vrigheid* in Teutonic tongues; *liberté* or *libertad* in Romance languages. English-speakers have them both. Their creative tension is like a coiled spring in our culture.

In the United States, some people use liberty and freedom as synonyms. But the old meanings come through, as in the 1960s when Barry Goldwater and libertarian conservatives demanded liberty as the right of independence from their own government. At the same time, Martin Luther King and civil rights leaders spoke mostly for freedom, and sought the rights of belonging – the right to vote, to go to school, to a seat on the bus. In American usage, freedom and liberty sometimes blur together, but more often they have inspired many creative combinations.

VIII REGIONAL VARIATIONS IN VERNACULAR IDEAS OF FREEDOM AND LIBERTY

Most Americans (myself among them) share an obsessive belief in liberty and freedom. But we understand these ideas in different and even opposite ways, and have done so for sixteen generations. Some of these differences derive from British emigrants who occupied major regions in what is now the United States, four centuries ago.³⁶

New England's distinctive culture grew from a "Puritan Great Migration", which came mainly from the east of England to Massachusetts Bay from 1629 to 1640. This was the period that British Whig historians call the "eleven years tyranny", when Charles I tried to rule without Parliament, and Bishop William Laud sought to purge the Puritan movement from the Anglican Church. English Puritans had distinctive ideas of soul freedom as the right to commune with Godly souls, and ordered liberty, which John Winthrop explained as the liberty to do what is right. In America, they became very intolerant of people who did not share their beliefs. Their ideas of liberty and freedom were limited in that way, but large in other dimensions. They believed that a woman had many rights, that marriage was a contract, and that if her husband broke the contract she could divorce him. They cherished a broad array of political and economic rights, governed themselves in town

³⁶ Fischer *Albion's Seed*, above n 10; and Fischer *Liberty and Freedom*, above n 11.

meetings, and distributed land through groups of yeoman proprietors to other yeomen like themselves. They also believed in social rights, and required people of New England towns to help each other to escape the tyranny of circumstance. As early as 1642 and 1647 they agreed that every town-born child had the right to schooling, and every parent and town had a duty to provide it. They thought of liberty and freedom as both individual and collective possessions – rights of a freeborn person, the freedom of a town, and the liberty of New England. Common symbols were emblems of the towns and town meetings. These vernacular ideas of ordered liberty and soul freedom in New England had a grave weakness in their intolerance, but many enduring strengths.

Virginia, after a slow and painful start from 1607 to 1639, had another great migration in the years from 1640 to 1680. This was mostly an Anglican movement, mainly from the southern counties of England between London and Bristol. Only four percent came from East Anglia. About 80 percent were indentured servants (compared with 20 percent in New England). A leader was Sir William Berkeley, Royalist Governor for nearly 30 years. He recruited a small elite of younger sons from armigerous families and put them on his Council, where they controlled the distribution of land and took the lions' share. They shared a vision of a cavalier utopia, in which liberty and freedom were privileges of rank. People at the top had much liberty. A middling minority of yeoman farmers had some liberties. At the bottom indentured servants and convict labourers had few liberties, and later large numbers of African slaves had nearly none. This system of hierarchical and hegemonic liberty spread through the southern colonies. Edmund Burke wrote of highborn Virginians that liberty "is to them not only an enjoyment but a kind of rank and reputation."³⁷ Their leading symbol of liberty was a Roman goddess in the dress of the patrician class. A great strength in this culture were principled leaders of high character such as George Washington. A grievous weakness was that it gave some people liberty to take away the liberty of many others.³⁸

A third great migration went to William Penn's colonies in the Delaware River Valley – West Jersey, Pennsylvania and Delaware – from 1675 to about 1720. Many were Quakers like Penn himself, or Pietists from Britain and Germany. Quakers soon became a minority, but they were 75 percent of the Pennsylvania Assembly in 1755; more than 50 per cent in 1773. Many shared a radical Christian idea of liberty of conscience and soul freedom, as every man's natural right, grounded in the teachings of Christ and the Golden Rule.³⁹ Unlike New England Puritans and Virginia Cavaliers, Quakers extended to others the rights that they demanded for themselves, in a reciprocal liberty and freedom. The enduring symbol of this Quaker Utopia was a Great Bell,

37 Edmund Burke "Speech on Conciliation with the Colonies, March 2, 1775" in *Speeches and Letters on American Affairs* (JM Dent & Sons, London, 1908) 76 at 94.

38 At 94.

39 Fisher *Albion's Seed*, above n 10, at 19–205, 410–418 and 595–603.

commissioned in 1751 and inscribed with a biblical verse: "[p]roclaim liberty throughout the land unto all the inhabitants thereof."⁴⁰

A fourth great migration flowed from the borderlands of North Britain and Ireland to the American backcountry in the period from 1715 to 1775. For a thousand years, these border people had suffered much from the tyranny of two governments. In the eighteenth century, their homelands were pacified by a process as violent as the disorder that preceded it. Many people fled to America, and found a new home in the southern backcountry. They settled beyond the reach of governments and taxes, trusted to their families and clans, and shared an idea of "natural liberty" which meant the right to be left alone, and to look after their own affairs. Andrew Jackson's mother, a border immigrant, explained this idea to her son. "Andrew", she is reported to have said, "Never go to law over slander or assault. Always settle those cases yourself."⁴¹ In 1776, a symbol of this "natural liberty" was a coiled rattlesnake with the slogan "Don't Tread on Me". Another favourite motto was Patrick Henry's "Give Me Liberty". Henry was a descendant of North British Borderers. In the American Revolution, this was the only vernacular idea of liberty and freedom to be cast in the first person singular. Great strengths of this tradition were its spirit of courage, loyalty to family and friends and individual responsibility. It was (and is) also marked by violence, xenophobia, and hostility to governments and taxes.

These four hegemonic cultures of liberty and freedom were the largest in early America. There were also many smaller groups, which introduced other versions of those ideas. No two of these cultures were quite alike.

IX ELEMENTS OF UNITY IN AMERICAN CONSTITUTIONAL TRADITION

The founders of the American Republic had the hard task of framing a system of government for all of these free spirits. Jefferson got it started. Many Americans liked his idea of life and liberty, and everybody loved the pursuit of happiness. But the design of a Constitution was more difficult.

Americans agreed that it should be a written constitution. The deep diversity of unwritten values demanded an agreement in writing. The tradition of written constitutions was older than the nation itself. All English-speaking colonies in North America had fundamental written documents at an early date. In New England, the colonists themselves drafted most of them in the Great Fundamentals of Plymouth 1636, the Fundamental Orders of Connecticut 1639, the Exeter Compact in New Hampshire 1639, the Acts and Orders of Rhode Island and Providence Plantations 1647, the Massachusetts Body of Liberties 1646 and the Laws and Liberties of Massachusetts 1648. Quaker colonies in the Delaware Valley had their "Concessions and Agreements" for New Jersey 1677;

⁴⁰ Leviticus 25:10. See Fischer *Liberty and Freedom*, above n 11, at 50–60.

⁴¹ Fischer *Albion's Seed*, above n 10, at 765.

Pennsylvania's Frame of Government 1682 and Charter of Privileges 1701 and Delaware's Charter of 1701, all largely the work of William Penn himself. Southern colonies operated under colonial charters that came from the Crown or British Proprietors, as in the Virginia Charter of 1606 and the Maryland Charter of 1632. The "Fundamental Constitutions" of Carolina 1669 were drafted in England by John Locke, in a form more feudal than Lockean.⁴²

Since the early seventeenth century, 16 generations of Americans had lived with written constitutions. Some elements derived from English precedents, but these American constitutional traditions were thought to be older than England, and derived from a Higher Authority. In 1643, the first draft of "Fundamental Constitution" of New Haven Colony was called "Moses His Judicials" (1643).⁴³ The Massachusetts Laws and Liberties 1648 began:⁴⁴

So soon as God had set up Politicall Government among His people in Israel hee gave them a body of lawes of judgement both in civil and criminal causes. These were brief and fundamental principles, yet withall so full and comprehensive as out of them clear deductions were to be drawne to all particular cases in future times.

In the debates of the First Federal Congress (1789–1791), which drafted the US Bill of Rights and the enabling legislation for the new republic, I counted the written works that were cited as constitutional authorities. The most commonly cited authorities were the Bible and William Blackstone – not Locke or Harrington or Sydney or any of the English Commonwealth men of the seventeenth and eighteenth centuries. The Bible and Blackstone were the constitutional authorities that Americans knew best.⁴⁵

With remarkable unanimity, most Americans were able to agree on the idea of a republic, which they understood as a government that was not monarchical. They also agreed that the great danger was despotism, which they regarded as a mortal threat to liberty and freedom. But they thought of despotism in different ways.

Thomas Jefferson feared the despotism of the few over the many. He thought of a republic as:⁴⁶

42 George L Haskins *Law and Authority in Early Massachusetts: A Study in Tradition and Design* (Macmillan, New York, 1960).

43 John Cotton *An Abstract of the Lawes of New-England* (F Coules, London, 1641 and 1655); and WC Ford "Moses His Judicials" (1902) 16 Massachusetts Historical Society Proceedings (2nd series) 274.

44 "Epistle" in Max Farrand (ed) *The Laws and Liberties of Massachusetts* (Harvard University Press, Cambridge (Mass), 1929).

45 I *Annals of Congress* (1789). In other evidence, Calvinists cited the Old Testament, especially the great law books of Exodus and Deuteronomy. Quakers quoted the New Testament, mainly the Four Gospels of Matthew, Mark, Luke and John. Anglicans were apt to change the subject.

46 Letter from Thomas Jefferson to John Taylor (28 May 1816) available in the Jefferson papers collection, Library of Congress.

...a government by its citizens in mass, acting directly and personally, according to rules established by the majority, and that every other government is more or less republican, in proportion as it has in its composition more or less of this ingredient.

He worked out a model for a constitution in which the sovereign unit was a "ward" of about 100 families. Limited powers were delegated by those sovereign bodies to assemblies, governors and judges, who were kept on a short leash. This was Jefferson's ideal republic.

Alexander Hamilton feared the despotism of the many over the few. In the Constitutional Convention he proposed a republican government that was distant from the people, with a senate that would "hold their places for life, or at least during good behavior", and a president also chosen "for life".⁴⁷ After he sat down, there was a long silence.

John Adams thought that despotism could come from many directions. He favoured a third approach in his *Thoughts on Government* in 1776, written when colleagues in the Continental Congress had asked advice on how to frame a constitution. Adams taught himself Italian to read Machiavelli's *Discorsi*, and studied the surviving fragment of Aristotle's *Politics* with his schoolboy Greek. Aristotle's history of Greek city states found three "perfect" forms of government: monarchy, aristocracy and democracy. It also reported evidence that each perfect form, if left to itself, would degenerate into its own corruption – monarchy into tyranny, aristocracy into oligarchy, democracy into ochlocracy, or mob rule. Aristotle's remedy was a mixed constitution, which combined all three elements in a stable system.

John Adams followed this thinking and designed a mixed American constitution with a legislature in three parts: a senate to represent the few, a house of representatives for the many, and a president to maintain the balance. Then he added other checks and balances among the executive, legislative and judicial branches which are more familiar today. Nearly all American constitutions followed this model. John Adams himself wrote the Massachusetts Constitution of 1780, which is today the oldest written constitution in continuous use. It was ratified by popular vote. Americans can change their constitutions when they please. In some states they have written as many as eleven constitutions. But even when they do that, most Americans have continued to agree that a mixed or balanced system is the best way to protect liberty and freedom from the despotism of the one, or the few, or the many. They know the cost of this system. It is complex, cumbersome, inefficient, difficult and sometimes impossible to manage. But Americans continue to believe that this constitutional tradition is what keeps them free.

⁴⁷ Alexander Hamilton "Speech in the Constitutional Convention, June 18, 1787" in Max Farrand (ed) *The Records of the Federal Convention of 1787* (Yale University Press, New Haven, 1966): Madison text is in vol 1 282 at 289; and Yates text vol 1 294 at 299, 300 and 301; and Appendix F "The Hamilton Plan" vol 3 617.

In 2014, the American Republic operates under 51 constitutional systems on federal and state levels. They are remarkably similar in many respects. All have fundamental written constitutions that can be changed only by consent of the people, through referenda, ballots or conventions.⁴⁸

These written constitutions have a long reach in the lives of Americans. All 51 constitutions are legally enforceable in most regular courts, on issues between private litigants, which do not directly involve the government. Many open societies in Europe have separate constitutional courts for the adjudication of constitutional issues.⁴⁹ All 51 Constitutional systems in the United States also have written bills of rights, often included within the Constitution itself. They derive in part from the English Declaration of Rights in 1689, but also from events that led to the American Revolutions. In 1774, a Rhode Islander, Henry Marchant, designed a flag for the colony's militia. He wrote:⁵⁰

It is my idea to have a female figure representing the genius of America standing erect with a staff in her right hand and the cap of liberty upon the top of it. In her left hand either the Bible or America's Bill of Rights...

Henry Marchant was Attorney-General of Rhode Island, and later its first Federal Judge. He knew well that there was no written American Bill of Rights in 1774.⁵¹ But with most Americans, he shared personal experiences of constitutional wrongs committed by British imperial officials. For example, the second amendment on the right to keep and bear arms followed the English Declaration of Rights 1689. It was also powerfully reinforced by General Thomas Gage's attempt to disarm the people of Massachusetts in the many "powder alarms" of 1774 and 1775. The first eight amendments in the Federal Bill of Rights all derived from similar experiences of British oppression, which were a large part of Henry Marchant's unwritten American Bill of Rights as a vernacular idea and a constitutional tradition.

If we study these American Constitutional traditions in institutional terms, they also share structural similarities. Of the 51 constitutional systems that presently function in the United States, 50 have bicameral legislatures, on John Adams's suggestion. The sole exception is the state of Nebraska since 1937, thanks to its cantankerous "New Deal Republican" George Norris, which reminds us that the others could also go another way if they wished, but chose not to do so. Some states have replaced their constitution many times but they keep returning to this bicameral model.

All state legislatures are elected for fixed terms, with representatives chosen by majority or plurality vote, winner take all – no snap elections, and no proportional representation. That system

48 John J Dinan *The American State Constitutional Tradition* (Lawrence, Kansas, 2009).

49 Amar, above n 15, at 465

50 As cited in Fischer *Liberty and Freedom*, above n 11, at 107.

51 Fischer *Liberty and Freedom*, above n 11, at 107; and Edward W Richardson *Standards and Colors of the American Revolution* (University of Pennsylvania Press, Philadelphia, 1982) at 122.

helps to explain why most American states have many ethnic groups but only two major parties. The 51 American constitutional systems all have a single executive who is elected by the people for a fixed term, with a veto more or less as Adams recommended, and many strong powers. All 51 systems have an independent judiciary that exercises judicial review of legislative and executive acts. The power of judicial review does not explicitly appear in the US Constitution. State legislatures, in cases such as Rhode Island's *Trevett v Weeden* (1786),⁵² did not hesitate to remove judges who declared statutes unconstitutional. In 1790, judicial review was the name of a constitutional controversy. By 1820 it had become a constitutional doctrine in most American states, established by the assertion of judges, and ratified by the acceptance of the American people. When Presidents as popular as Thomas Jefferson in 1803 and Franklin Roosevelt in 1937, tried to curb the judiciary, they were severely defeated, with major opposition from their own parties. Judicial review is more strongly supported in unwritten constitutional traditions than in the Federal Constitution itself.

X THE PERSISTENCE OF REGIONAL DIVERSITY IN CONSTITUTIONAL SYSTEMS: MASSACHUSETTS AND TEXAS

Even as America's 50 state constitutions are extraordinarily similar in their structure, they function in profoundly different ways. We might take the measure of these differences by comparing two American states: Massachusetts and Texas. Each state thinks of itself as *sui generis*, but they also are embedded in two of the regional cultures that are drivers of diversity in America. The Massachusetts Constitution was part of the New England Way. Texas is part of a southwestern region that expanded from the southern backcountry across the Mississippi River into Missouri, Arkansas, Oklahoma and parts of Louisiana.

The state constitutions of Massachusetts and Texas are similar in their mixed and balanced institutions. The differences appear in other ways. Massachusetts called itself a commonwealth as early as 1635, and again in its constitution of 1780, and it does so today. It inherited the Puritan tradition of ordered liberty and freedom as a right of belonging in the town and the commonwealth. The Massachusetts Constitution of 1780 declared that "government is instituted for the common good ... not for the profit, honor, or private interest of any one man, family, or class of men",⁵³ an idea that would be dismissed as communism by a good many Texans. Texas operates under its State Constitution of 1875, passed to repudiate the spirit and substance of the victorious Union cause in the Civil War and Reconstruction. It calls itself the Lone Star State. The lone star began as a symbol of liberty as rights of independence, separation, and secession – as was also the case with the

52 James M Varnum, John Weeden and John Trevett *The Case, Trevett against Weeden* (John Carter, Providence (Rhode Island), 1787).

53 Article 7.

solitary Lone Star on the Bonnie Blue Flag of the Confederacy. A passage in the Texas Constitution 1875 appears to reserve the right of secession from the United States, ten years after the Civil War. In the twenty-first century, some Texas Governors still routinely threaten to secede when Washington displeases them.

The Massachusetts Constitution recognises collective rights that belong to all the people. Article 97 guarantees that all:

... the people shall have the right to clean air and water, freedom from excessive and unnecessary noise ... the natural scenic, historic, and aesthetic qualities of their environment, and protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared a public purpose.

The Texas tradition is cast in terms of individual rights.

Texas and Massachusetts have two very different ideas of the function of their state government. The New England way in general is comfortable with a more active government and energy in government. The people of Massachusetts and much of New England have imposed on themselves among the highest tax burdens in the United States. Texans believe in minimal government and maximum self-reliance. They have among the lowest tax burdens in the United States and minimal state services. Massachusetts relies heavily on a state income tax for its revenue; Texas has no state income taxes on individuals or corporations. It relies on property and sales taxes for three quarters of tax revenues, which are highly regressive.

The distribution of wealth and income in Texas and surrounding regions has been among the most highly concentrated in the United States since as early as 1859, and as recently as the Census of 2010. Income and wealth are less concentrated in Massachusetts and New England. A Census plot of income inequality by county for the United States in 2010 is a map of American regions. It shows a strong connection between income inequities and regional values.

Massachusetts abolished slavery in its Constitution of 1780 and in the court cases that followed. It was one of the first states to act; the census of 1790 found no slaves in Massachusetts. Texas was the last state to end slavery. Two months after Lee's army surrendered at Appomattox, Union troops were sent into Texas and discovered that slavery still continued there. Union General Gideon Granger issued orders that "in accordance with a proclamation of the executive of the United States", all slaves in Texas were free. Even then, Texas and its region invented new forms of forced work, tied to vagrancy laws and convict labour.⁵⁴

54 D Selim and Niani Kilkenny *Juneteenth: Celebrating Emancipation* (Smithsonian Institution Press, Washington, 1985); and Ralph Ellison *Juneteenth: a Novel* (Random House, New York, 1999). For its history, see Fischer *Liberty and Freedom*, above n 11, at 380–383.

Cultures and laws of order and violence are very different in Texas and Massachusetts. New England has among the lowest homicide rates in the United States, much like those in New Zealand (about one to two per 100,000 in Massachusetts, Rhode Island, Vermont and New Hampshire). Texas and its region have homicides rates that average five to eight. The highest rates in the United States are in the neighbouring state of Louisiana, at more than 11 per 100,000. Differences in homicide rates are greater between these American regions than among European nations. Processes of justice are very different in these states. From 1976 to 2012, Texas executed 481 people, by far the highest number of any American state or any open society. The next highest was neighbouring Oklahoma, with 98 executions (larger in proportion to population). By comparison, numbers of executions in New England have approached zero since 1976, with only one execution in Connecticut and none in the five other New England states.

Even more striking differences appear in the law of justifiable homicide. In Texas citizens can use lawfully use deadly force if they feel a threat to their lives, to their homes, to their guns, their honour or their pickup trucks. In an affluent section of Houston, a Scottish tourist lost his way in the night, knocked on a door and shouted for help. The homeowner shot him dead. A grand jury refused to indict the shooter for murder. A state senator who wrote the Texas Code commented, "I don't recall that it got any discussion at all ... It's a time honored Texas tradition to protect yourself at home at night."⁵⁵ In short, Texas and its region have preserved the culture of the old backcountry in which Andrew Jackson's mother taught her son to "settle those cases yourself." Massachusetts, even as the ethnicity of its population has changed profoundly, has kept its old tradition of ordered liberty.

In the last century, many other regions have multiplied in the United States, after New England, the Delaware Valley, the Coastal South and the Southern Highlands. The most dynamic is the Great Basin, centred on Salt Lake City. It now reaches through six states and is defined by the distribution of Mormons. Their vernacular values and material patterns are very distinctive – deeply conservative in many ways, but with a strong Mormon tradition of mutual help and the highest levels of income equality and upward mobility in the United States. Other distinctive regions are metropolitan New York, the smallest in area but with nearly ten percent of the American people. The six border states between North and South are another region from Maryland and Delaware to Kentucky and Missouri. Since 1649, a strong vernacular culture of liberty and tolerance has flourished there. The United States has many different Hispanic regions, and three diverse Francophone regions: Quebecois in New England, Cajun in southern Louisiana, Metis in Montana and others. The Pacific Slope has three large and very diverse regions with different patterns of pluralism – Pacific Northwest, northern California and southern California. In all of these areas, legal scholars have turned up interesting regional differences in constitutional traditions. A study by

55 Lianne Hart "Texas Law Steeped in Frontier Tradition Taking Some Shots" *Los Angeles Times* (Los Angeles, 14 April 1994).

Stuart Banner, for example, found major regional differences on the Pacific Slope in the rights of Native Americans.⁵⁶ In California the principle of *terra nullius* was firmly established; in parts of the Pacific Northwest it was not. Indians were given protections for property and fisheries, which are now actively enforced in the Courts in the state of Washington, but not in California.⁵⁷

XI DYNAMIC STRENGTHS IN AMERICAN CONSTITUTIONAL TRADITIONS: TEN GENERATIONS OF CREATIVE GROWTH IN LIBERTY AND FREEDOM

How have these complex constitutional traditions changed in the United States? What patterns and trends appear in many vernacular values of liberty and freedom? In the United States, one test of major trends are the amendments to the Federal Constitution. Thousands of amendments have been proposed and hundreds introduced. But so difficult is the process of amendment that only 27 have gone into effect. We might ask about trends in these amendments with regard to liberty and freedom. In a complex history, the answer is clear and simple. Only one amendment has limited liberty and freedom in a substantive way: the 18th amendment on prohibition. It passed in 1919, lasted only 14 years and, after an epic failure, it was repealed by the 21st amendment in 1933. No other amendment to the US Constitution has, on balance, diminished liberty, freedom, equal rights or democratic processes. Seven amendments tinkered with the machinery of the constitution, but made no important changes in liberty and freedom. The great majority, 18 amendments of 27 in total, expanded liberty, freedom and democracy in some ways. This is so for the first ten amendments, which comprise the Bill of Rights, and most dramatically in the 13th, 14th and 15th amendments which forbade slavery and many forms of discrimination; and in the 15th, 19th, 24th and 26th amendments, which prohibited voting restrictions on grounds of race, gender, wealth or age, and in the 17th amendment (direct election of senators), which expanded the right to vote for many millions of Americans. All of these additions to the constitution were true to the ninth amendment, which holds that the "enumeration of certain rights shall not be construed to deny or disparage others retained by the people."

Other enlargements appear in judicial interpretations of the Constitution on key issues of liberty and freedom. Examples include civil rights laws and first amendment rights of speech, press, assembly and petition. Broad new areas of rights have been added with the invention and expansions of the right of privacy during the twentieth century. We are witnessing a new constitutional invention of rights to transparency in the early twenty-first century, and new problems of constitutional conflict between rights of privacy and rights of transparency. All of this evidence supports a Whig Interpretation of liberty and freedom in American history. These vernacular ideas

⁵⁶ Stuart Banner *Possessing the Pacific: Land, Settlers and Indigenous People from Australia to Alaska* (Harvard University Press, Cambridge, 2007).

⁵⁷ At 315–320.

have continued to grow, despite many efforts to shrink them, and notwithstanding a litany of complaints that they are not growing more rapidly.

Another strength in the American constitutional tradition has been a continuing expansion of democracy, especially in state constitutions. Here, Akhil Amar finds strong evidence that democracy (that is, majority rule) has expanded in many ways in state constitutional traditions, through many generations, for instance:⁵⁸

- State constitutions are more easily amended or rewritten;
- Judicial decisions more easily overruled by popular referenda;
- Popular initiative, referendum and recall exist in many states;
- Popular election has been introduced for more officials;
- More term limits and less life tenure had been enacted;
- Electoral colleges have tended to disappear from state constitutions;
- More social rights, such as education, have been added for more people;
- Increasing encouragement for legislatures to seek advisory opinions by the judiciary; and
- Rights which originally limited Congress have been extended to limits on states.

One of the biggest changes is an expansion of the right to vote. In Mississippi during the past two election cycles, voter participation was higher for blacks than for whites – a revolution. Expansive changes have occurred in participation by race, ethnicity, gender and age. Other differences persist in participation by wealth and income.

In short, the American constitutions have achieved their primary purpose, which is to protect and promote liberty, freedom and self-government, and they have worked for more than 200 years, with the exception of one epic disaster in 1861, which was overcome with extreme difficulty. The constitutional traditions of the United States have also allowed liberty and freedom and self-government to expand. This system has grown very complex. Nobody today would want to replicate it, but everybody borrows from it. For anybody who cares about liberty, freedom and self-government, and wishes to see these values grow, America's constitutional traditions are a source of continuing frustration, irritation and astonishing creativity.

XII PERSISTENT WEAKNESS IN AMERICAN CONSTITUTIONAL TRADITIONS

Weaknesses are also apparent in these constitutional traditions of liberty and freedom. Some have existed through a very long history, and several have been growing rapidly in the twenty-first century.

A chronic problem is "gridlock", which runs at least eight levels deep in our constitutional traditions. The first and second levels are John Adams's two sets of checks and balances among the

⁵⁸ Amar, above n 15, at ch 12.

legislature, executive and judiciary, and also within the legislature among the one, the few and the many. They check and balance all too well. These two layers of gridlock have been compounded since 1789 by a third layer of conflict between state and national governments in a federal system. A fourth level of gridlock is added by deep vernacular differences among regional cultures, which frequently clash. On the fifth and sixth level, gridlock develops from a sprawling pluralism of ethnic and religious groups; and again from the collision of what Madison called factions, and later political parties. A seventh layer of gridlock emerged in the twentieth century from a growing tangle of bureaucracies. An eighth system of gridlock is caused by the collision of public and private institutions – governments and corporations, for example.

Most of these complexities were created deliberately, as ways of protecting liberty and freedom from various forms of tyranny. Some people regard them as a source of strength for the American constitutions, for an open society, and especially for liberty and freedom. Social theorists Georg Simmel and Lewis Coser have argued persuasively that a plurality of social conflicts can be a source of social cohesion. Political theorists David Hume and James Madison also believed that a multitude of factions could protect liberty and freedom by preventing any one faction from tyrannising over the rest. That may be so, but we pay a heavy price in gridlock.

Corruption grows from gridlock and is a major problem in the United States. In a gridlocked system, corruption lubricates the constitutional machinery, but it does so at a heavy cost. It is spreading in America. Some very dangerous forms of corruption have been enacted into law by members of Congress and approved as constitutional by the Supreme Court, such as in its *Citizens United* decision,⁵⁹ to name but one example. Corruption has opened a back door to tyranny in America.

Partisanship interacts with corruption and gridlock. The destructive partisanship of Republican leaders against President Obama from 2011 to 2014 was a case in point. But it is no worse than the partisanship of a Democratic Congress against Herbert Hoover after the elections of 1930, or the extreme partisanship of southern Congressmen in the late 1850s, or the reckless partisanship of Federalists in the Sixth Congress, when they blocked the presidential election of Thomas Jefferson for many weeks in 1801 and came close to starting a civil war. Armed militia had begun to muster in Pennsylvania when finally the Federalists gave way. Every major party in American history has caused serious trouble by its partisanship, but Republicans in the House of Representatives carried it to a new level of obstruction from 2011 to 2013.

Structural obstacles such as gridlock, partisanship and corruption are serious and urgent problems in open systems, but they are not insuperable. Open societies are schools of leadership. Large numbers of highly successful leaders can be found in them throughout the world. In the United States, the most familiar examples are three presidents who are widely recognised as the best

59 *Citizens United v Federal Election Commission* 558 US 310 (2010).

of our leaders in surveys of public opinion and studies by scholars. George Washington, Abraham Lincoln and Franklin Roosevelt mastered the art of governing open societies within American constitutional traditions. Something similar has happened on many other levels, not merely among small elites. That has been notably the case in the United States. Its very complex institutions and constitutional traditions give employment to an extraordinarily large number of leaders. And they learn to lead in a hard school.

XIII NEW ZEALAND: VERNACULAR TRADITIONS OF FAIRNESS AND JUSTICE

In some ways, New Zealand's constitutional traditions and vernacular values are similar to those of the United States, Canada, Great Britain and South Africa today. But they are not the same. A striking contrast came clear to us in an unexpected way on a visit to New Zealand in July 1994. We happened to be travelling through Canterbury while a Parliamentary by-election was underway for the constituency of Selwyn. Only a single seat was at stake, but the National Party held power in Parliament by a single vote and a loss in Selwyn would have brought down the Government. The media were out in force, and the parties made a maximum effort.

The sights of the campaign looked very much like an American election, but the sounds rang strangely to an American ear. Something about the rhetoric was different. Then suddenly it dawned on us that candidates from most of New Zealand's parties talked very little about values of liberty and freedom, which are much discussed in the United States. But the New Zealand candidates were passionately engaged in urgent debates about values of fairness, which are not so prominent in American politics. Also, discussions in Selwyn were striking in another way. They were not about instances of unfair acts, but about fairness as a central organising principle of an open society.

We wondered if the debate was specific to that moment of major restructuring, or if it represented a pattern that was more enduring in the public life of the nation. The following year we returned to New Zealand for a more extended visit at Otago University. For an historian, one of the delights of Dunedin is the Hocken Library, a great manuscript library with a trove of primary material from New Zealand's founding era. It was a delight to read the manuscript notebooks of Bishop Selwyn, and the writings of Wakefields, Godleys, Burnses and other founders of New Zealand's six colonies. Here again, in this material from the mid-nineteenth century, we found a broad and deep interest in ideas of fairness. Clearly this vernacular culture had deep roots.

Later, we were invited to visit Waikato University, and worked in another excellent library, which is strong on recent events in New Zealand. Its librarians gathered a collection of "ephemera", which included manifestos, position papers, faxes, xeroxes and emails from many political parties. Here, we could study fairness across a broad spectrum of opinion in the 1980s and 1990s. Most party manifestos gave prominent attention to fairness, but with many different meanings. Parties to the left tended to link fairness with equality. Those to the right connected it to liberty and individual rights. This was only one of many dimensions of difference. A commission composed of academic

scholars and civil servants issued a report in many volumes called *Toward a Fair and Just Society*.⁶⁰ They argued after John Rawls that justice consists in fairness not to groups or classes, but to individuals. Others approached fairness in collective terms. Some manifestos in the old Labour Party centred on fairness to social classes. Another and very different collective idea of fairness appeared in manifestos of the New Zealand First Party led by Winston Peters, a figure of high complexity in New Zealand politics. In 1995, he argued that fairness was a sharing of service to the nation.

Other documents came from New Zealand's National Council of Women, a coalition of 400 groups who issued a paper called *A Matter of Fairness: Employment Equity* in 1990.⁶¹ Another organisation, the New Zealand Business Roundtable, published a paper called *The Pursuit of Fairness – A Critique of the Employment Equity Bill* (also in 1990).⁶² It took the opposite side on a major question, and appealed to a different version of the same value.

Religious leaders in New Zealand also joined the debate. The heads of 12 Christian groups complained that the new reforms missed the true meaning of fairness. They argued that the primary test of fairness in a society should be the condition of its least advantaged members – an idea that came from the teaching of Jesus: "[w]hat you do for the least of my brethren you do for me."⁶³ Māori also joined the debate and offered some of the most creative ideas of fairness in several ways. They introduced their own ethical principles, in words such as *tika*, which literally means "straight". They also were quick to adopt Pākehā ideas of fairness and justice and put it to work for their own purposes, as fairness and justice to a community. Most inventive was a third approach to fairness as a meta-ethic that might promote the coexistence of different ethical systems, each on its own terms, each without taking advantage of the other. That idea of a meta-ethic has many applications.

Many unexpected ideas of fairness appeared in these materials. One surprise came from a very small party of New Zealand Fascists, the NEO Party (New Economic Order). Its manifesto used some of the conventional imagery of German fascism, such as the art deco eagle. But beneath the eagle, the Nazi swastika was gone. In its place was an open circle. A party leader explained that the open circle meant fairness and justice to Māori. In New Zealand, even Fascists had to be in favour of fairness.

⁶⁰ Royal Commission on Social Policy *The April Report* (Wellington, 1988) vols 1–4.

⁶¹ National Council of Women *A Matter of Fairness: Employment Equity* (1990).

⁶² New Zealand Business Roundtable "Submission to the Labour Select Committee: The Pursuit of Fairness – A Critique of the Employment Equity Bill" (1 February 1990).

⁶³ Matthew 25:40.

XIV THE VERNACULAR MEANING OF FAIRNESS

If fairness can mean so many different things, one might ask if it has any intrinsic meaning. We found that the answer is yes. Examples of usage in old English survive from as early as 888 AD, when the Venerable Bede was using the word. Our modern ethical idea of what's fair was evident by the fourteenth and fifteenth centuries, and probably earlier.

In early uses, fairness as an ethical term has a consistent core of customary meaning that is still evident in modern uses. As an ethical term, fairness is both a substantive and procedural idea. It is a model for relations between people who are involved in conflict, competition or rivalry in some way. In that context, fairness means not taking undue advantage of another person in ways that we would not want to be done to us. Fairness is in the eye of the beholder. It is a word that comes from an ancient Indo-European root *fagrs*, which meant "to be content". At the same time, it also implies the mutual acceptance of rules that are thought to be impartial and honest. Honesty is often part of it. In common usage, the idea of fairness has a strong association with honesty, and it tends to be the antithesis of dishonesty and corruption.

Even as this core meaning has remained the same, the uses of fairness have changed in other ways through many centuries. In early examples, fairness was a tribal idea. We can see it operating among Viking warriors who met in assemblies and voted by clashing their spears upon their shields. Assemblies, voting and ideas of fairness were ways of regulating relations among these predatory people, and kept them from preying on one another to the extinction of the tribe. In the Norse sagas, Viking warriors did not believe that fairness applied to slaves, servants, strangers and sometimes not to women in the tribe – much to their fury. Viking women in the sagas thought of themselves as free, and demanded to be treated fairly. They also were armed and dangerous, with daggers in their girdles. Norse sagas tell stories of Viking males who came home from some epic rampage and tried to treat a Viking woman as if she were a conquered province – a mortal mistake.

From those ancient tribal origins, ideas of fairness slowly grew more inclusive. Christianity made a difference by enlarging a tribal custom into a universal idea. That pattern of enlargement still goes on today. It is central to the history of fairness in New Zealand, and to the dynamics of its constitutional traditions. Among settlers, fairness in early years mostly applied to relations amongst Pākehā. Slowly, very slowly, it expanded to include Māori.

At the same time, fairness also grew in other ways. It began to spread to other cultures and languages. Early examples of fairness and its cognates have been found only in a few languages of northwest Europe – Old English, Old Norse, Frisian, Norwegian, and Danish. As an ethical term, it did not exist in Latin, Greek or Hebrew. Cognates did not appear in Spanish, French or German until the mid-twentieth century. German dictionaries did not include "fairness" until 1950, when it began to appear as *die fairness*, a borrowing from English because there was no German equivalent. In German, the simple English phrase "fair enough" requires six words – "*das ist nur recht und billig*" (literally "that is only right and proper") – and still it misses the meaning. The first appearance of

fairness cognates in French was in soccer slang during the mid to late twentieth century as "*pas le fair play*", much to the displeasure of the *académie française*. Translation of "fairness" into other modern languages is difficult. In Italian, fair play becomes "*giacomo pulito*" or "clean play". In French, fairness is translated *loyauté* or *probité*. The adjective "fair" is translated as "*permis*" (permitted). Often fairness is translated by cognates of justice or equity. But these words are not equivalents. Justice descends from the Latin for law, "*ius*". Equity is from the Latin "*aequitas*" for straight, level, equal. These ethical ideas of fairness, justice and equity overlap in English usage but they do not coincide, and each of them has a distinct centre.

In the late twentieth and twenty-first centuries, ideas of fairness have grown in yet another set of very interesting ways. They have become increasingly important in many specialised fields and learned disciplines: as "fairness in electronic commerce" on contested questions of digital access; "fiduciary fairness" among managers of other people's money; "fair negotiation" for an elaborate code of conduct among professional negotiators; "distributive fairness" for a practical ethic of public administration; "fair division" as an abstract problem in moral philosophy and mathematical logic; the "fairness doctrine" in American media law; fairness as "natural justice" in administrative law in Britain, Canada and New Zealand but not so much in the United States; and "fundamental fairness", a term of art in American law schools. These technical uses are multiplying today. As we have increasing competition of high complexity in many fields, the old ethic of fairness becomes more useful in the modern world. To study these highly technical meanings is to find that, the more fairness changes in all of these complex ways, the more its core meaning remains the same. In situations of conflict, competition, rivalry for what economists call "positional goods", fairness means not taking undue advantage of another, with "undue" often defined by custom and practice.

XV FAIRNESS IN NEW ZEALAND'S CONSTITUTIONAL TRADITIONS: EIGHT GENERATIONS OF CREATIVITY

People in most English-speaking societies make frequent use of "fairness" in daily discourse. But New Zealanders also use it in another way, as a fundamental principle for the organisation of their open society. Some Americans have used it that way too: Abraham Lincoln during the Civil War, Theodore Roosevelt and his square deal, Harry Truman and his fair deal, Barack Obama in his first inaugural address. But in general, Americans give more attention to fundamental values of liberty and freedom, as New Zealand visitors to the city of Washington are quick to notice. At meetings in Washington on the Transpacific initiatives, former National Prime Minister Jim Bolger remarked on the extraordinary prominence of freedom in the United States, by contrast with New Zealand. And it was the same again with David Clark, Labour Member of Parliament for Dunedin North. This past year, he had an extended visit in the United States as an Eisenhower Fellow, a State Department programme for gifted young leaders around the world. In his blog, he wrote very

thoughtful pieces about customary American ideas of freedom and New Zealand's traditional concern for fairness.⁶⁴

How did British colonies, which were founded by English-speaking people in the South Pacific and North America, develop these differences in vernacular values of fairness and freedom? A large part of the answer is about timing. The great migrations from Britain to the American colonies happened in the period from 1629 to 1774, when Britain was absorbed in debates about power, tyranny, liberty and freedom. At the centre of British public life in the seventeenth century were bitter conflicts over constitutional questions about the authority of the Crown, Parliament, the Courts, the Church and the liberties of the people. In the eighteenth century, as Parliament extended its authority over Scotland and Ireland, these questions were contested there in different ways.

By the early to mid-nineteenth century, the central problems had changed. Most British subjects believed that they lived in a free country. But it was not thought to be a fair or just country. The major social issues had shifted from power and liberty and freedom, to power and fairness and justice.

An empirical test can be run with the help of Google ngrams, a program which measures the frequency of any given word or phrase in many modern languages. We ran searches for frequencies of "fairness", "natural justice", "liberty" and "freedom" on a very large corpus of books published in Britain. The data showed that the usage of liberty and freedom rose to high peaks in the years from 1610 to 1775, in the period of the great colonial migrations from Britain to what is now the United States. Thereafter the frequency of liberty fell off sharply. Google ngrams for "fairness" show a different pattern – fluctuations at comparatively low frequencies until 1800, then a sharp surge to a peak circa 1840, and a continued rise from the mid-nineteenth to the twentieth century – the period of British emigration to New Zealand.

Other evidence for the prominence of fairness in early years of colonisation appears in extended writings by leaders of the "six colonies of New Zealand": Wellington, Nelson, New Plymouth, Auckland, Canterbury, and Otago. Their founders wrote at length about their own personal experiences of injustice and unfairness in Britain and America. The Godleys, the Wakefields, the Nelson Chartists and the Taranaki Mob regarded the United States as an example of organised injustice in its obsession with liberty and freedom, in its institutions of slavery. There were

64 See David Clark Dunedin North <www.davidclark.org.nz>. See also Michael J Sandel *Justice: What's The Right Thing To Do?* (Farrar, Straus and Giroux, New York, 2009); Michael J Sandel, *Justice: A Reader* (Oxford University Press, New York, 2007); Amartya Sen *The Idea of Justice* (Allen Lane, Cambridge, 2009); John Rawls *A Theory of Justice* (Harvard University Press, Cambridge (Mass), 1971; revised ed, Oxford University Press, Oxford, 1999); Erin Kelly (ed) *John Rawls: Justice as Fairness: A Restatement* (Harvard University Press, Cambridge (Mass), 2001); John Rawls *Political Liberalism* (Columbia University Press, New York, 1993; expanded ed, Columbia University Press, New York, 2005); and Samuel Freeman (ed) *John Rawls Collected Papers* (Harvard University Press, Cambridge (Mass), 1999).

exceptions in Otago, where early New England was held up as a colonial model. Many of these British founders in New Zealand also laid out large purposes of founding colonial societies that could be models of justice and fairness. This compared with similar statements by American colonial founders in the seventeenth and eighteenth centuries, who planted societies as models of liberty and freedom. Another body of evidence appears in letters and diaries of British colonists who wrote of a more personal quest for "a fair field and no favour." This material, much of it collected and published by Rollo Arnold, makes a striking contrast with major migrations to America in the period from 1629 to 1770, which were about a desire for liberty and freedom.⁶⁵

XVI CONSTITUTIONAL CREATIVITY IN THE FIRST GENERATION: SIR JAMES STEPHEN AND THE WAITANGI TREATY, 1840

Timing also made a difference in British imperial policy toward New Zealand, and the Treaty of Waitangi in 1840. Several groups were the drivers of this event. One was a circle within the Colonial Office, led by Sir James Stephen, permanent undersecretary (1836–1847), and his young assistant Edward Cardwell, future first Viscount Cardwell.⁶⁶

Stephen brought to his office the values of the Clapham Sect, named for their parish church in London. Leading members were his parents, their friends Granville Sharpe and Hannah More, and Stephen's uncle William Wilberforce. Their purpose was to apply the moral principles of evangelical Christianity to the government of the British Empire. Stephen also joined the Church Missionary Society, the Aborigines Protection Society and antislavery groups. He deeply believed that leaders of the British Empire had "a positive duty to guard the weak" and to "watch over the

65 Edward Gibbon Wakefield *England and America: A Comparison of the Social and Political State of Both Nations* (Richard Bentley, London, 1833) vols 1 and 2; Edward Gibbon Wakefield *Swing Unmasked* (E Wilson, London, 1831); Edward Gibbon Wakefield *A Letter from Sydney, the Principal Town of Australasia* (Joseph Cross, London, 1829); John R Godley *Letters from America* (John Murray, London, 1844) JR Fitzgerald (ed) "Five Letters to the Spectator" in *A Selection from the Writings and Speeches of John R Godley* (Christchurch, 1863). For New Plymouth, see Guy Scholefield (ed) *The Richmond Atkinson Papers* (Government Printer, Wellington, 1960) vol 1 at 62–64; Thomas Burns *Early Otago and the Genesis of Dunedin: Letters of Rev T Burns DD, one of the founders of the Otago Settlement, 1848–1865* (RJ Stark, Dunedin, 1916); writings in the *Otago Journal* vols 1–4, 1848–1850; and William Cargill's shipboard speech in (1848) 1 *Otago Journal*. For individual settlers see Rollo Arnold *The Farthest Promised Land: English Villagers, New Zealand Immigrants of the 1870s* (Victoria University Press, Wellington, 1981); and Alfred Simmons *Old England and New Zealand* (Stanford, London, 1879) at 13.

66 JE Egerton "Sir James Stephen (1789–1859)" *Australian Dictionary of Biography* <adb.anu.edu>. His daughter Caroline Emilia Stephen wrote a memoir of her father with extracts from his manuscripts: *The Right Honourable Sir James Stephen* (privately published, Gloucester, 1906). An eyewitness account by a close friend and colleague is Henry Taylor *Autobiography* (Longmans, London, 1885). A secondary study of high quality is Paul Knaplund *James Stephen and the British Colonial System* (Greenwood Press, Madison, 1953). For Cardwell, see Wilbur Devereux Jones and Arvel Erickson *The Peelites: 1846–1857* (Ohio State University Press, Columbus (Ohio), 1972).

welfare of the many."⁶⁷ Here was a Christian idea of fairness and justice, drawn directly from the Gospels.

To that end, one of Stephen's first major acts in the Colonial Office was to draft the Slavery Emancipation Act 1833, which abolished slavery in Crown colonies, and he also drafted the Order in Council which carried that into effect. He worked to protect freed slaves in the West Indies from apprenticeship and peonage, which were slavery by another name. Stephen was responsible for the Durham mission and a policy of self-government for Canada. He worked to end the convict transportation to New South Wales in 1840, and he acted to stop the importation of contract labour into Australia.

Stephen at first opposed adding New Zealand to the empire because he believed that it belonged to the Māori, whom he greatly admired.⁶⁸ But by 1839, he came to the conclusion that "the colonization of New Zealand is if not an expedient at least an inevitable measure. It is in fact colonized by British subjects of the worst possible character, who are doing the greatest possible amount of evil, with the least possible amount of good."⁶⁹

In 1839, instructions for the Waitangi Treaty came from the Colonial Office, over the signature of Lord Normanby, then serving as Colonial Secretary but much absorbed in Irish issues. The main lines of policy for New Zealand were designed by Stephen, and dispatches were drafted by Cardwell.

Stephen's goals for New Zealand were the "sovereign authority of the Queen" and "protection for the Maori people", along with "self-government for British settlers." He insisted that it be only with the free consent of Māori, that the treaty should be negotiated with "sincerety, justice, and good faith", and "in language that Maori could understand." Acquisition of land by settlers was prohibited, and done only by agents of the Crown. He added "nor is this all, they must not be permitted to enter into contracts in which they might be ignorant and unintentional authors of injuries to themselves." Further, all:

... acquisition of land by the Crown for future settlement of British subjects must be confined to such districts as the natives can alienate without distress or serious inconvenience to themselves.

67 James Stephen "Minute on Introduction of Contract Labourers to Australia"(12 September 1843); and Egerton, above n 66, at [6].

68 Sir James Stephen "Minute dated March 15, 1839 CO 209/4" in W David McIntyre and WJ Gardner (eds) *Speeches and Documents on New Zealand History* (Clarendon Press, Oxford, 1971) at 326–331.

69 At 326–331.

Crown officials called "Protectors of the Aborigines" were to be appointed to be sure that all of these things were done.⁷⁰

Sir James Stephen and his circle were pivotal figures in the history of New Zealand, though they never went there. In large part as a consequence of their concern for justice, New Zealand may be the only major colony in any Western empire that never experienced slavery, the slave trade, convict transportation, contract labour, the coolie trade, blackbirding, serfdom, peonage, encomienda and forced labour in any form. The fate of a few small exceptions reinforces that rule.⁷¹ The critical decisions were made in Britain and New Zealand by principled leaders.

XVII FAIRNESS IN THE SECOND GENERATION: THE ABOLITION OF THE PROVINCES (1870–1879)

Once planted in New Zealand, values of fairness and justice began to grow. Seven generations of New Zealanders put these ideas to work with extraordinary creativity. Every generation did something very interesting with ideas of fairness. A few examples might be helpful.

The second generation faced a new problem in the 1870s. They inherited George Grey's Constitution of 1852, which gave New Zealand a federal system, with strong and active provincial governments. These leaders had risen within the province system, and had a vested interest in its continuance. But they were troubled by it in several ways. One problem was its cost. Another was an issue of fairness, equity and justice. Some provinces were large and prosperous, others small and poor.

In the 1870s, several of these leaders began to think of reform. Four in particular wrote and spoke about the problem. All of them raised the issue of fairness as a major weakness in the operation of the provincial system. They did so in different ways. Julius Vogel wrote about unfairness between large rich provinces and small impoverished ones. It troubled Vogel, even though he was editor of the *Otago Times* and came from one of the largest and most wealthy provinces. Edward Stafford, a gentleman runholder in Nelson, cast the problem in different terms, of "a fair measure of justice" to individual New Zealanders, rather than justice for the provinces. Harry Atkinson of New Plymouth, one of the Taranaki Mob, had yet another goal of "good and fair

70 Claudia Orange *The Treaty of Waitangi* (Allen & Unwin, Wellington, 1987) at 6–19, 28–29, and 111–131. Paul Moon *Hobson, Governor of New Zealand, 1840–1842* (David Ling Publishing, Auckland, 1998) at 77–87 is also helpful on the colonial office.

71 Exceptions, not including Maori slavery, were small short lived programs for the apprenticeship of British children in the mid-nineteenth century; and New Zealand vessels that were involved in blackbirding from Pacific islands primarily to Australia ca 1870; and seasonal contract workers from Ni-Vanuatu in New Zealand vineyards, ca 2008: see Rochelle-Lee Bailey "Unfree Labour?: Ni-Vanuatu Workers in New Zealand's Recognised Seasonal Employer Scheme"(MA Thesis in Anthropology, University of Canterbury, 2009); and reports of trafficking of sex-workers in Auckland in 2011: *New Zealand Herald* (online ed, Auckland, 22 September 2011).

government, progressive and economical." James FitzGerald, superintendent of Canterbury agreed with Atkinson on "honesty in politics, and fairness in government", and added a special interest in fairness and justice to Māori, which might be achieved more effectively by a strong central government. With the exception of Fitzgerald, most of these leaders were thinking primarily of fairness for Pākehā, not Māori.⁷²

All of these men also had other goals than fairness. Efficiency and economy were important too. But each of them in different ways was genuinely concerned about fairness. With all of these many purposes in mind, these four men were instrumental in passing the Abolition of Provinces Act in 1875. The reformers succeeded in giving New Zealand the most centralised constitutional system in any large English-speaking open society. The old provincial system disappeared so quickly that many New Zealanders today have forgotten that it ever existed.⁷³

These reformers did something else. In pursuit of fairness, they added a new tool. It might be thought of as the constitutional equivalent of Ockham's Razor,⁷⁴ or Albert Einstein's axiom that "everything should be as simple as possible, but not simpler."⁷⁵ They removed complexity from New Zealand's constitutional system. The next generations did it again, not so suddenly, when they abolished the upper house of New Zealand's Parliament, and to the same effect. The New Zealand reformers of the 1870s discovered that fairness works best when we follow Einstein's Axiom – a powerful insight from which we all can learn.

XVIII FAIRNESS IN THE THIRD GENERATION: LIB-LABS, MATERIAL ISSUES, AND CONSTITUTIONAL INVENTION

Yet another ingenious application of fairness was made by the Liberal-Labour Coalition, which governed New Zealand for more than twenty years from 1891 to 1912. It was yet another extraordinarily gifted set of leaders, very different one from another: Jock McKenzie, William Pember Reeves, Richard "King Dick" Seddon, Joseph Ward, James Carroll, the first Māori minister, and their leader and first Prime Minister, John Ballance. These leaders tackled many reforms with remarkable success. So successful were they that many leading reformers in Europe, the British Empire and the United States came to New Zealand to meet them and to learn from their example.

72 Fischer *Fairness and Freedom*, above n 12, at 187–190.

73 For more extended discussion see Fischer *Fairness and Freedom*, above n 12, at 173–204.

74 Ockham's Razor, or *lex parsimoniae*, consisted in a proposition by William of Ockham that "plurality should never be posited without necessity": "*pluralitas non est ponenda sine necessitate*". See Anselm Blumer and others "Occam's Razor" (1987) 24 *Information Processing Letters* 377.

75 Einstein's axiom appears at greater length in Albert Einstein "On the Method of Theoretical Physics" (paper presented to the Herbert Spencer Lecture, Oxford University, 10 June 1933), as published by the Oxford University Press (Oxford, 1934). Another version appears in Carl Seelig (ed) *Albert Einstein Ideas and Opinions: based on Mein Weltbild* (Crown Publishers, New York, 1954) at 272.

Many of their projects centred on problems of substantive fairness and social justice. One of the most interesting was about material resources, and fairness and justice in access to the land. In their generation, New Zealand was running short of land. In what is now the United States, the continental dimensions of the country were so vast that the "frontier process" of land-taking continued for as many as 16 generations. It began in 1607. The peak period was in the 1920s. It still goes on in Alaska, and in pocket frontiers throughout the country. In the United States, it was reasonable to think that an open society centred on liberty and freedom could sustain an idea of social justice while the supply of land was so abundant.

In New Zealand the supply of new land was largely exhausted in two generations – a period of 50 years from 1840 to 1890. Once that happened, it was increasingly clear that fairness could not be achieved by free and open access. When distribution began to fail, redistribution was necessary. The Liberal-Labour government searched a system of redistribution that might in itself be widely regarded as fair and just. They did it with the programme for breaking up or "bursting" the large estates and selling the land in small tracts to people of modest means. A key was to do it with a willing seller and a fair price that all parties accepted as just. It was done on a large scale throughout the country. A map of big estates that were broken up from 1890 to 1940 includes holdings in many parts of the country. It was done with high success. Most buyers and sellers were happy and agreed on its fairness and justice – with one exception. Some of the land was taken from Māori, and they were not willing sellers. Their lands were confiscated, and they had little recourse under the law. The Treaty of Waitangi had been banished from New Zealand courts. In 1877, James Prendergast the third Chief Justice, declared the Treaty to be a "simple nullity", and he added the obiter dictum that Māori were unfit to be citizens and landholders.⁷⁶ Many of his fellow jurists agreed. Here again in the land policies of the Liberal-Labour coalition, we find a strong ideal of fairness, ingeniously applied, but only for Pākehā. Another century would be necessary to enlarge that circle of fairness to include Māori, and that work is still unfinished.

XIX USES OF FAIRNESS AND AS A TACTICAL INSTRUMENT OF CONSTITUTIONAL REFORM: WOMEN'S RIGHTS

An interesting pattern emerges when we compare feminist movements in open societies. American women began working together to gain the right to vote as early as the eighteenth century. In the nineteenth century, they multiplied their effort and went about it in a distinctive way. In the Seneca Falls Convention 1848, Lucretia Mott and Elizabeth Cady Stanton modelled their suffrage movement on the American Revolution and War of Independence. Their feminist Declaration of Sentiments followed the example of the Declaration of Independence. Men were compared to the tyrant King George III: "all men would be tyrants if they could."⁷⁷ Then, after having attacked all

⁷⁶ *Wi Parata v The Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC) at 78.

⁷⁷ Elizabeth Cady Stanton *A History of Woman Suffrage* (Fowler and Wells, Rochester, 1889) at 71.

men in that rounded way, American feminists asked for their support. It was not forthcoming for many years.

New Zealand women went about their suffrage campaign in a different way. Anna Stout, wife of the Premier, said that "the real power of the women's vote in New Zealand is not in opposition but in its harmony and cooperation with the men's vote." She and other New Zealand feminists cast their appeal for the vote not in terms of freedom but of fairness. They did so in a conciliatory spirit without diminishing their cause. It worked. Prime Minister Joseph Ward remembered that "the main argument... which weighed with us" was that the denial of the vote to women "appears monstrously unfair."⁷⁸ As a result, New Zealand women were the first in the world to win the right to vote in national elections. A campaign that took 130 years in the United States was won in less than 30 years by New Zealand feminists. The tactics of American feminists may have been more effective in holding their suffrage movement together, and in enlarging its active base. The tactics of New Zealand feminists were more effective in enacting the reform.

Similar patterns appeared in comparative labour movements. The American labour movement was among the most violent and confrontational in the world, and also among the least effective. The New Zealand labour movement was the least violent, and one of the most successful in obtaining results. In both of these instances, arguments to fairness and justice and the use of a rhetoric of persuasion were used by New Zealand feminists and labour leaders as tactical weapons with high success.⁷⁹

XX FAIRNESS AND JUSTICE, RIGHT AND LEFT IN THE FOURTH GENERATION: THE LONG SLUMP (1922–1939)

Another application of fairness appeared in a time of troubles for New Zealand, from the "long slump" of the 1920s through the Great Depression of the 1930s. Several groups of leaders were involved: moderate conservatives and liberals from 1925 to 1935, and the First Labour Government from 1935 to 1949. Among the leaders in the first group were two conservatives, Gordon Coates of Kaipara in Northland, and William Downie Stewart of Dunedin. They were not strongly ideological or partisan. In politics they tended to be open, flexible, pragmatic, experimental, and very fair minded. In the face of many economic troubles, they worked with others to find solutions, always open to possibilities, willing to compromise for the common good. Many (not all) New Zealand business leaders responded in similar ways.

An example was the problem of unemployment. Conservative politicians, such as Coates, made a major effort to create public projects that put men to work, not make-work, but serious jobs on needed projects – work that a man could do with pride. New Zealand conservatives tended to be

⁷⁸ Fischer *Fairness and Freedom*, above n 12, at 228 and 245.

⁷⁹ At 228 and 245.

comfortable with the idea of an active state when it was useful. Instead of resorting to lay-offs, many private employers also rationed work to keep more men on the job, and more families with pay checks. New Zealand union leaders also agreed to cuts in wage-rates so that more people could keep working. It worked, not perfectly, but better than other systems. Altogether, unemployment peaked in New Zealand at between 12 and 15 percent, compared with 20 to 25 percent in the United Kingdom, 25 to 30 percent in the United States and Australia, and 40 to 45 percent in Germany. New Zealand did better in large part because of effective leadership and a willingness of many in the country to support fair and just solutions. Here again, in a time of massive suffering and unemployment throughout the world, ideas of fairness were put to work in New Zealand as instruments of economic policy, and in creative ways. It made a difference.

XXI FAIRNESS IN THE FIFTH GENERATION: NEW ZEALAND IN WORLD WAR II

In the mid-twentieth century, a great struggle against totalitarian movements of the right and left tested open societies as never before. Most open systems in Europe totally collapsed. But open societies in English-speaking nations gained strength. One factor was a breadth and depth of leadership that extended widely through these open systems. Another was the active engagement of millions of autonomous people in a common effort. A third was the strength of vernacular values and constitutional traditions in these nations.

Here again New Zealand was a leading example. Its prime minister from 1940 to 1949 was Peter Fraser (1884–1950), a highland Scot, born to a family that had been cruelly abused in the highland clearances. He emigrated to New Zealand, worked as a day labourer in Auckland, schooled himself in the Auckland Public Library, became a leader of the Auckland Socialists and Red Feds, was imprisoned for his opposition to the first World War, became a founder of the Labour Party and made his reputation in pursuit of social justice as Minister of Health and Education in the first Labour Government.

As Prime Minister in 1940, he strongly supported the war effort, and organised a coalition cabinet, with conservative Gordon Coates as one of its strongest members and a very close friend. Together they reached out to the capitalist right, to the socialist left, and to Māori in a common cause. Fraser and his Government supported the Germany First strategy. Even as the Japanese were moving deeper into the South Pacific, he kept the strongest and most experienced New Zealand units in Africa and Europe, visited them frequently and was sometimes under fire himself. Fraser also worked closely with Admiral Chester Nimitz in the Pacific. Sometimes Fraser disagreed with Churchill and Roosevelt, but they deeply respected him. At a conference in Downing Street,

Churchill passed a note to a colleague. He wrote that, with Fraser's leadership, "New Zealand never puts a foot wrong."⁸⁰

At the end of the war, Fraser helped to found the United Nations, and took a leading part in the meetings at San Francisco, always speaking for fairness and justice. At home, he did it again in planning for the post-war economy. Fraser's explicit goal was the achievement of what he called "fair outcomes" at a Labour Party Conference on 17 June 1946. Planning for peace after the Second World War was highly successful in New Zealand. Altogether, it was an extraordinary feat of principled leadership, not only by Fraser himself, but also by leaders in both parties and civil servants such as Carl Berendsen and Alister McIntosh. Fraser's civilian leadership was highly ethical, incorrupt and true to values of justice and fairness on the home front.

Military leadership in New Zealand's army was also outstanding in World War II, and on all three major levels of command among general officers such as Bernard Freyburg, field-grade commanders such as Howard Kippenberger, and company officers such as Captain Charles Upham. All led in the same way, from the front. All were decent, fair-minded, and close to their men. They were strong leaders but never insisted on privileges of rank. Freyburg was once chastised by a high-ranking British officer because New Zealand troops failed to salute. "Quite all right", said Freyburg, "if you wave to them, they'll wave back." He made a point of insisting that officers and men on leave in Italy should have access to the same billets without regard to rank, which happened in very few armies. Kippenburger, as a battalion commander, had similar ways of working with his men. He advised others, "always think two [echelons] down", and he operated that way.⁸¹ It was similar on the company level with Captain Upham, winner of two Victoria crosses. His men remembered him not only for his courage, but also for the way he worked with them. Captain Upham treated his men as his mates. All of these officers made fairness into an instrument of leadership, and with high success. German and British officers both testified that New Zealand troops were among the best infantry in the world.

XXII THE SIXTH GENERATION: MĀORI, PĀKEHĀ AND THE WAITANGI TRIBUNAL (1975–2012)

Another application of fairness happened in relations between Māori and Pākehā. It began very much in the same way that comparable movements happened in other open and opening societies during the twentieth century. After many years of race prejudice and oppression, the victims seized the initiative. The people of India, led by Mohandas Gandhi, organised a mostly non-violent

80 Churchill's note was passed to Carl Berendsen, who recorded it in a manuscript of his memoirs. It was published by Michael Bassett and Michael King in *Tomorrow Comes the Song: A Life of Peter Fraser* (Penguin Books, Auckland, 2000) at 187, n 388.

81 Fischer *Fairness and Freedom*, above n 12, at 433; David Hapgood and David Richardson *Monte Cassino* (Congdon & Weed, Cambridge (Mass), 1984) at 149; and HK Kippenberger *Infantry Brigadier* (Oxford University Press, London, 1949) at 349–351.

campaign for national independence. In the United States, African Americans led by Martin Luther King Jr launched a non-violent movement against racial segregation and demanded civil rights of belonging in the cause of freedom. In South Africa, Nelson Mandela and the African majority demanded and won the right to govern their country in the name of democracy, equality, freedom and the rule of law.

And in New Zealand, the Māori demanded their land, their language, their culture and equality of esteem. This movement succeeded with a symbolic act of non-violent resistance, similar in spirit to sit-ins and freedom rides in the United States, but grounded in Māori culture and New Zealand traditions of fairness. In 1975, thousands of Māori organised a Hikoi, a long march of 700 miles from Te Hapua to the Parliament buildings in Wellington. The goal was justice and land. Their leader was Whina Cooper, 80 years old, walking every day. One of her critics, Eva Rickard, said, "the Maori Land March would not have come about if it hadn't been for that old lady. She had the mana ..."⁸²

Sitting in Parliament was Matiu Rata, a Māori seaman and political leader who had become Minister of Māori Affairs in the Labour government. As a direct consequence of the march, he drafted the Treaty of Waitangi Act, which created the Waitangi Tribunal.⁸³ The Tribunal was not a court of law. It only had powers of inquiry.⁸⁴ But a series of actions by successive Labour Governments expanded its jurisdiction in several dimensions, and enlarged the reach of its recommendations. Most interesting for this inquiry, the Waitangi Tribunal also refined the meaning of fairness and justice and put those vernacular ideas to work in highly creative ways. In the process, it also enlarged and refined the meaning of fairness itself.

An example was a report in 1987 by Chief Justice Edward Taihakurie Durie, for a panel of five judges, all concurring. In a very complex case, Justice Durie who was himself Māori concluded: "[i]t is out of keeping with the spirit of the Treaty that it should be seen to resolve an unfair situation for one party while creating another for another."⁸⁵ In short, the Waitangi Tribunal found ways to craft complex recommendations that did justice to several sets of claimants and other groups who

82 Michael King *Whina: A Biography of Whina Cooper* (Hodder & Stoughton, Auckland, 1983) at 228; and Fischer *Fairness and Freedom*, above n 12, at 283.

83 Treaty of Waitangi Act 1975, s 4. See also David Barber "Obituary: Matiu Rata" *The Independent* (online ed, United Kingdom, 28 July 1997) <www.independent.co.uk>.

84 Treaty of Waitangi Act 1975, s 5.

85 Waitangi Tribunal *Report of the Waitangi Tribunal on the Waiheke Island Claim* (Wai 10, June 1987) at 47 available online at <www.waitangitribunal.govt.nz>.

had an interest in the outcome. Here was a further extension and refinement of fairness and justice as a compound judgment of high complexity. Richard Hill writes:⁸⁶

New Zealand's settlement processes are widely regarded internationally as an efficient model for the reconciliation of historical grievances, and a relatively fair way of achieving historical justice for indigenous people who have suffered from colonisation and its aftermath.

Reconciliation was vital to the success of this process. And fairness was a key to the success of reconciliation.

XXIII THE SEVENTH GENERATION: FAIRNESS, JUSTICE AND THE RESTRUCTURING OF NEW ZEALAND

From 1985 to about 2007, inequality of income and wealth increased rapidly in New Zealand – as it did in most countries. A constructive step was taken by the Labour government in 2004 when it introduced a program called "Working for Families", which included a complex set of tax credits for working families with low incomes. It was inspired in part by similar programs enacted in the United Kingdom. The object was to help families with low incomes find ways to improve their condition, not by a dole, but by a program that helped them to find jobs and keep them. It also reduced their tax burden without direct transfers of wealth or income from the affluent to the impoverished.

The program was strongly opposed by the conservative National Party. Its leader and later Prime Minister John Key attacked it. In a famous phrase he called it "communism by stealth". But the program began to succeed. It helped to encourage impoverished families to find work, helped to make work pay and helped families to make ends meet. An intricate set of tax credits improved the condition of poor families without adding directly to the burdens of the middle class or affluent families. As evidence of the program's success began to increase, John Key shifted his position. Journalists reported unkindly that he "stands firmly behind both full support for Working for Families and his vehement opposition to the scheme."⁸⁷ Key received a good deal of abuse for his new position. But something interesting was happening here – something that had happened often before in New Zealand. A conservative leader who was more moderate than his rhetoric reversed his position and came to the support of a good and useful social program that actually worked. It was an old story in New Zealand, and very different from the conduct of conservatives in other societies. What made it possible was an environing frame of fairness and justice.

Even with ambitious programs such as Working for Families, the inequality of incomes and wealth has continued to increase in New Zealand, as it was doing in most national economies

⁸⁶ Richard S Hill "Nga Whakataunga Tiriti – Treaty of Waitangi Settlement Process – Problems for treaty settlements" (4 February 2013) Te Ara – The Encyclopedia of New Zealand <www.tera.govt.nz> at 6.

⁸⁷ "Key Admits Support for Communism" (29 July 2008) Scoop Independent News <www.scoop.com>.

through the world. Here is a problem as yet unsolved in open societies. It will fall to the next generation of New Zealanders like David Clark to find a way forward, as I am sure they will. That outcome seems likely when we consider the ways in which many generations of New Zealanders have engaged their vernacular ideas of fairness, justice and equity in the public life of their nation. These ideas and values were not merely proclaimed, but put to work in original and very ingenious ways. Each success reinforced a constitutional tradition, which in turn reinforced success.

XXIV THE EIGHTH GENERATION: FAIRNESS, JUSTICE AND PROBLEMS OF CORRUPTION

In the meantime a major problem throughout the twenty-first century world is corruption. Much of it is linked to growing inequality and also to the complexity of modern institutions. In most societies, open and closed, corruption is increasing rapidly today. But one country is an exception. New Zealanders have learned to control corruption more successfully than any other open society in our time. Every year efforts are made to compare magnitudes of corruption by surveys of businessmen who do business in many countries. They give high marks to New Zealand. The most recent surveys have singled out New Zealand as the least corrupt country in the world.⁸⁸ Most material motives for corruption are present in New Zealand. The control of corruption is linked in large part to values of justice and fairness, which are deeply rooted in this vernacular culture. Every open society can profit by New Zealand's example.

XXV NEW ZEALAND'S TRADITION OF FAIRNESS AND JUSTICE: A THOUGHT FOR THE FUTURE

How are New Zealand's constitutional traditions and values changing today? What are their prospects for the future? When we asked New Zealanders about this, many people answered that fairness is important to New Zealanders, but added that their country is not as fair as it used to be. In historical sources, we found evidence that New Zealanders have been saying much the same thing for seven generations. It was heard in debates over the province system in the 1870s, and in the elections that put the Liberal-Labour coalition in office and kept them there for twenty years until 1912. It was evident in the Long Slump of the 1920s and 1930s, again in the troubles of the 1970s and the painful restructuring of the 1980s, and again in the early twenty-first century.

This feeling that New Zealand is not as fair in the present as it was in the past has, for eight generations, inspired a determination to make New Zealand more fair in the future. In that spirit, New Zealanders have been continuously engaged in an effort to make their open society stronger, more fair and more just. Each of their efforts has built on those who went before. Something like this process is a fundamental part of New Zealand's history and its constitutional traditions. On the subject of fairness, New Zealand has much to teach the world. All of us can learn from its extraordinary history.

88 "New Zealand Tops 2013 Corruption Perception Index" (3 December 2013) <www.transparency.org>.

We also can learn from the constitutional traditions of other nations. South Africans can teach us about the dynamics of change in vernacular principles. The British experience is instructive on the enduring strength of vernacular ideas and their uses in adversity. Canadians have much to teach us all about values of humanity, and also about a developing constitutional tradition as a "living tree". The constitutional traditions of the United States are useful for the study of liberty and freedom – both on the vast creative power of these ideas and also their corruption and abuses.

Most nations have others things to teach the world from their traditions. Germany has a special idea of *die wurde des menschen*, "human dignity", which exists in art I of its Constitution. Poland has a collective idea of *slota wolnosc*, "golden freedom". India has a vernacular idea of *bindaas*, the right "to be". In China, when we were invited to talk in several universities about American traditions of liberty and freedom, the students said, "thank you for teaching us about Washington and Lincoln. Now let us teach you about Confucius." They became our teachers and taught us about other vernacular traditions that are very deeply rooted in the ancient and modern cultures of China.

Another sort of learning is also possible in these inquiries. It happens not by comparing traditions but by exploring them from within. It happens when we discover that our generation is not the first to walk this earth, and that our forebears can be our teachers. When we arrive at that understanding, we can learn from the creativity of our own traditions.

