Political Culture and the Rule of Law: Comparing the United States and New Zealand

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1. Introduction.

Philosophers and lawyers often write about the rule of law as though it means the same thing in different societies.[2] This is understandable given the methodology of conceptual analysis, which seeks to analyze the concept with reference to features that are common to every possible instance of a society governed by the rule of law. It is probably the case that there is a core notion of legality that is common to all law-governed societies, but the search for the bare minimum content of the rule of law has obscured a different kind of analysis, which is to explore the ways the concept may be instantiated in actual, living legal systems. Although it is sometimes observed that Hart's jurisprudence provides an account of the English legal system, Dworkin the American, and Habermas the German, all of them purport at least to be providing an analysis of the concept of law that is general across different conceptions of a legal system.[3] An interesting possibility has received less attention, however, and that is that legal systems that appear to have a great deal in common may nevertheless differ in the way they apply or instantiate abstract ideals such as the rule of law. Differences at the level of conceptions of the more general concept may have considerably greater practical significance than the criteria that characterize the concept. The way in which an ideal is given shape through application over time can be referred to as the political culture of a society.

This paper will take as its starting point a recently published history of rival political ideals and differing political cultures in the United States and New Zealand,

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[2] See, e.g., Lord Bingham of Cornhill "The Rule of Law" (2007) 66 *Cambridge L.J.* 67; Jeremy Waldron "Is the Rule of Law an Essentially Contested Concept (in Florida)?" (2002) 21 *Law & Philosophy* 137; Joseph Raz, "The Rule of Law and its Virtue" in *The Authority of Law: Essays on Law and Morality* (Clarendon Press, Oxford, 1983) at 210; F.A. Hayek, *The Road to Serfdom* (University of Chicago Press, Chicago 1994) at 80. The locus classicus for lawyers in the common law tradition is Dicey. See A.V. Dicey, "The Rule of Law: Its Nature and General Applications," in *Introduction to the Study of the Law of the Constitution* (10th ed. 1959).

[3] Both Dworkin and Rawls have used the concept/conception distinction to refer to different levels of generality at which a value can be understood. Rawls, for example, argues that while all political theorists may agree that a society should pursue justice, they may disagree about what justice requires in practice – that is, which *conception* of the concept of justice ought to be pursued. John Rawls, *A Theory of Justice* (Harvard University Press, Cambridge (Mass.), 1971). Similarly, in Dworkin's jurisprudence the task of a judge is to identify the conception of a value (say, equality) that best fits with and justifies the past political decisions of a community. See Ronald Dworkin, *Law's Empire* (Harvard University Press, Cambridge (Mass.), 1985).

David Hackett Fischer's book, *Fairness and Freedom*.[4] Most Americans know little about New Zealand, other than thinking of it as a place of beautiful landscapes, quirky but friendly people, and rugby fanaticism. It seems an unlikely subject for a comparison with the United States. Fischer argues, however, that it makes an excellent foil for understanding American political culture because of the similarities in the histories of these two settler societies:

> At first sight, much of New Zealand's history seems familiar to an American. Both nations were founded by English-speaking people in distant lands. Both began with a heritage of the English language, law, and customs. Both entered into complex relations with native populations, Indian and Māori. Both developed what Frederick Jackson Turner called frontier societies, received large numbers of immigrants, and became more diverse in ethnicity and religion. Both industrialized and urbanized, and had reform movements in the Progressive Era and the era of the Great Depression, and in the restructuring of the late twentieth century. Both were allies in the great wars of the twentieth century, and underwent comparable processes of restructuring in the 1980's. . . . More important for this inquiry, New Zealand and the United States are both what Henri Bergson and Karl Popper called open societies. They share democratic polities, mixed-enterprise economies, pluralist cultures, individuated societies, a respect for human rights, and a firm commitment to the rule of law.[5]

Despite these significant similarities, there are profound differences between the histories of political ideals and modern political cultures of the United States and New Zealand. Fischer looks at idiomatic or vernacular language in the two countries and observes that New Zealand political discourse is pervaded by references to fairness, citing examples from Robert Muldoon's principle of "a fair go for the ordinary bloke," to Winston Peters' appeal to fairness as a call to national service, to the Green Party's linkage of fairness and sustainable development.[6] Ordinary speech contains numerous idioms for fair or unfair, many of which are not present in American speech.[7] The core of the meaning of fairness is (1) not taking undue advantage of others, (2) "finding ways to settle differences through a mutual acceptance of rules and processes that are thought to be impartial and honest"; and (3) accepting the legitimacy of results obtained through fair processes.[8] New Zealanders writing about their own political culture tend to use the term equality rather than fairness, [9] but they nonetheless do identify something distinctive about their political culture which differs from that of nations with a similar history.

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[4] See David Hackett Fischer, *Fairness and Freedom: A History of Two Open Societies, New Zealand and the United States* (Oxford University Press, Oxford, 2012).

[5] Fischer, above n __ at xxiii – xxiv.

[6] Fischer, above n __ at 6-9.

[7] Fischer, above n __ at 12-13.

[8] Fischer, above n __ at 18.

[9] Consider the descriptions by a former high-ranking government lawyer and former dean of a law school, and an award-winning historian, respectively. Matthew Palmer identifies egalitarianism, along with trust in

In the United States, by contrast, one finds ambivalence regarding the value of fairness. While there are prominent historical examples of an appeal to fairness, including Theodore Roosevelt's "square deal" (which sounds a great deal like Muldoon's fair go for the ordinary bloke), Fischer contends that modern American political culture accepts that "life is unfair."[10] In particular, the political right often equates fairness with equality of outcomes, asserting that "ideals of fairness and fair play are hostile to capitalism, destructive of national security, and dangerous to liberty."[11] Fairness is not the central organizing principle of American public life; that distinction belongs to ideals of liberty or freedom, which are endlessly invoked by politicians across the ideological spectrum. The reason is that the founders of American society were, by and large, fleeing what they perceived as English tyranny and religious persecution,[12] while emigrants to New Zealand, representing a second wave of out-migration from Britain, were motivated by the desire to create "a hierarchical society that was more just and fair than that of England . . . matching rank to merit, and wealth to virtue."[13] Thus, ideals of freedom and liberty loom much larger in the consciousness of Americans than they do of New Zealanders.

Fischer uses the fairness/freedom contrast to unify a wide range of seemingly disparate facets of the histories of the United States and New Zealand, including settlement and land acquisition by European settlers, education, women's rights, the treatment of indigenous people, foreign policy, industrial and labor relations, fiscal policy, and even the basic structure of government. For example, he argues that there was sufficient unoccupied land (because Native Americans had already been evicted from it) remaining throughout American history, even into the early twenty-first century, so that it has remained possible to believe in the so-called

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government power and pragmatism, as the three constitutive elements of New Zealand political culture. Matthew S.R. Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 278-82. James Belich summarizes what he calls the "Pakeha treaty," a set of informal myths about how life ought to be lived, i.e. the values of the "ordinary Kiwi bloke." The elements of the Pakeha treaty are: (1) egalitarianism – "not the absence of class but the absence of extreme class distinctions, class oppression, and direct gentry rule"; (2) harmony, or at least the absence of conflict, among classes; and (3) continuous progress. James Belich, *Paradise Reforged: A History of the New Zealanders from the 1880s to the Year 2000* (Allen Lane, Auckland, 2001) ["Belich II"] at 22.

[10] Fischer, above n __ at 23-25.

[11] Fischer, above n __ at 27.

[12] Fischer, above n __ at 38-47. I do not intend to pursue this point further in this paper, because I am not a historian and, in any event, it is beyond the scope of what I will be arguing here, but it is worth observing that any concept, labeled as liberty or freedom, which is broad enough to encompass the motivations and beliefs of the Puritans who settled New England (and who had been persecuted as dissenters by the Anglican church), the Royalists who fled England after the defeat of Charles I and formed the Cavalier elite of Virginia, the Quakers who founded Pennsylvania, and the Scots-Irish refugees who populated the American backcountry, must be a capacious ideal indeed. There may be family resemblances among these various conceptions of freedom, but there are probably more significant differences among them than similarities. More to the point here, some of these ideals of freedom so closely resemble conceptions of fairness as to be indistinguishable from them. Fischer cites the Quaker commitment to reciprocity: "More than any major group in modern history, they extended to others the rights they demanded for themselves." Ibid. at 44. Is that not the core commitment of the ideal of fairness?

[13] Fischer, above n __ at 50 (citing the views of Edward Gibbon Wakefield).

"American dream" that "one person can become rich and prosperous without impoverishing another."[14] Thus, there is considerable resistance to any government policy that can be characterized as wealth redistribution. In such a society, citizens perceive that government should play a limited role in their lives, mostly keeping out of the way to allow individual initiative and effort to create prosperity. In the physically smaller territory of New Zealand, by contrast, ideals of social justice cannot be realized by assuming that the pie would always be growing larger. Instead, it was necessary for the society to rely on "intervention, planning, and even the redistribution of limited resources and material possessions such as land."[15] The role of government has accordingly been larger in New Zealand, with a goal of ensuring "fairness, equity, and natural justice."[16]

If Fischer is right about his description of the foundational political value commitments of New Zealand and the United States, we would expect to see differences in the way these two societies understand the rule of law. Political scientist Robert Kagan, in his important comparative account *Adversarial Legalism*,[17] notes that the American approach to social problems emphasizes justiciable rights, formal procedures, review of government decision-making by courts, and decentralized authority. Other Western democracies have a different style of policymaking, emphasizing expert authority, bureaucratic regulation, and considerably more trust in day-to-day working relationships between citizens, regulated activities and industries, and agencies of the state. American lawyers, on the other hand, work within a legal system and a broader political culture characterized by polarization, fragmentation, mistrust of government power, and a highly individualistic, us-against-them orientation toward both adjudication and policy-making. Kagan does not discuss New Zealand in any depth, but it differs markedly from the United States in the ways he describes. In several important areas, the relationships between citizens and the state are considerably less antagonistic in New Zealand, and the rule of law is understood not in terms of individual rights but as protection of social cooperation. Constitutional and tort law, for example, are characterized by a level of trust and agreement over ends that are quite surprising to an American observer.

Much depends, of course, on having accurately characterized the political cultures of the United States and New Zealand, as well as having a clear notion of the

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[14] Fischer, above n __ at 149.

[15] Fischer, above n __ at 150.

[16] Fischer, above n __ at 204. See also ibid. at 27-28. Natural justice is a term that might be unfamiliar to American lawyers, but its meaning in New Zealand law is simply what Americans would call procedural due process, i.e. that certain procedures (such as notice and an opportunity to be heard) must be followed, and a tribunal must be suitably unbiased, in order for a decision to be legitimate. Section 27 of the 1990 New Zealand Bill of Rights Act is straightforwardly a procedural due process provision.

[17] Robert A. Kagan, *Adversarial Legalism: The American Way of Law* (Harvard University Press, Cambridge (Mass.), 2003). In a book that was talked about a great deal when it was published, Mary Ann Glendon contended that Americans tend to transform political problems into assertions of rights, which emphasizes individualism at the expense of a sense of community and social responsibility. See Mary Ann Glendon, *Right Talk: The Impoverishment of Political Discourse* (Free Press, New York, 1993).

operative terms of freedom and fairness. Fairness and freedom are protean concepts, taking on different meanings depending on the context. Moreover, they both connote ideals or virtues, so it is unsurprising to hear politicians seeking support for a policy on the ground that it increases freedom or fairness. Thus, the first claim of this paper is that a "fairness" story can be told on both sides of many of the policy debates canvassed by Fischer.[18] There may be less of a difference than Fischer claims between the political cultures of the United States and New Zealand. It may be the case that New Zealanders tend to be attracted to the label "fairness," but the substance of the policies so identified are not as different to American values as some of the stronger claims in the book would suggest. There is a danger inherent in using a term like fairness to mean, essentially, something of which the author approves. In order to do any useful analytic work, a sharper definition of fairness is required.

The second claim I wish to pursue in this paper is that Fischer has understated the importance of another dimension of difference between American and New Zealand political culture, namely how much citizens tend to trust powerful public and private institutions. Very roughly, American rhetoric and practice reflects a desire to limit the power of the state, on the right of the political spectrum, and large corporations, banks, and other economic institutions, on the left. Fischer quotes William Pember Reeves writing approvingly of state intervention to benefit the community or the less fortunate classes within it.[19] New Zealanders are comfortable, observed Reeves, with a significant state role in employment, land ownership, and control over education, the delivery of health care, and infrastructure.[20] Fischer notes that, by contrast, Americans have historically preferred a limited role for government, relied on private industry (with significant state subsidies) to build railroads and telegraph lines, and placed responsibility on private charities to take care of the less fortunate. It is hard to imagine something like the "Don't Tread on Me" rattlesnake flag, which has become a symbol of the Tea Party, catching on in New Zealand (and not only because there are no snakes here). The level of trust of government, corporations, and of elites in general is considerably higher in New Zealand and, while there are populist sentiments and political actors catering to them,[21] there is nothing that compares with the anti-government strand of the Tea Party or the Occupy movement in terms of intensity

[18] In places Fischer recognizes this difficulty in his account. Consider the economic restructuring of the 1980's, begun by the Labour Party and popularly referred to as "Rogernomics" after Finance Minister Roger Douglas. After the National Party replaced Labour in government, Finance Minister Ruth Richardson said, "The only sustainable welfare state is one that is fair and affordable." Quoted in Fischer, above n __ at 457. If the notion of fairness is broad enough to encompass the economic policies of both National and Labour, and if it identifies a value that is continuous with the foundation of previous economic policies, then it seems that a wide variety of substantively different policies can be lumped together under the label of fairness, making the analytic utility of that term somewhat less clear.

[19] Fischer, above n __ at 326-27.

[20] See also Belich II, above n __ at 313-14 (quoting L. Lipson, *The Politics of Equality: New Zealand's Adventures in Democracy* (University of Chicago Press, Chicago, 1948)).

[21] The always colorful Winston Peters and the New Zealand First party are the current embodiments of populist politics in New Zealand.

or impact on the political process. The reason is that New Zealanders simply are not as distrustful of power as Americans. The rule of law, for Americans, means that the legal rights of citizens set limits on what powers lawfully may be exercised by government institutions, leaving a substantial domain of freedom for private ordering, free of regulation. For New Zealanders, it means something closer to rule *by* law, in which citizens entrust significant decisions concerning their welfare to powerful state decision-makers.

To illustrate these claims, the paper will consider two case studies:

(1) Constitutional law and policy, as illustrated in New Zealand by the treatment by courts and Parliament of the Treaty of Waitangi and the decisions of the Waitangi Tribunal, and in the United States by aspects of the Supreme Court's constitutional jurisprudence, particularly the resort to the original understanding of the constitutional drafters.

(2) The problem of accidental injuries, which in New Zealand are handled on a social-welfare approach through the Accident Compensation Commission (ACC),[22] and which in the United States are notoriously left to the common law tort system. (I believe, by the way, that some of the notoriety of the tort process is undeserved, as discussed below).

Fischer gives considerable attention to the Treaty itself but less to subsequent implementation of it, and mentions the ACC only in passing. In both instances, he sees the difference between the United States and New Zealand as arising out of the fairness vs. freedom distinction, but I will contend that the story is a bit more complicated. The rule of law in New Zealand tends to be implemented in practice in a pragmatic, flexible standards-based way, while in the United States it generally involves the assertion of claims to rights that can be expressed as either-or rules – as Justice Scalia puts it, the rule of law as a law of rules.[23]

2. Principles-Based Treaty Policy vs. Rights-Based American Constitutionalism.

Both the United States and New Zealand have had to confront the question of how the majority of European-descended citizens should deal with indigenous people or other minority groups. The obvious comparison is between Māori-

[22] In a telling rhetorical shift, the ACC in 1981 was renamed the Accident Compensation *Corporation*. Substantive reforms made at the same time aimed to reduce the cost to employers of the ACC scheme.

[23] See Antonin Scalia, "The Rule of Law as a Law of Rules" (1989) 56 *University of Chicago L. Rev.* 1179. For the rules vs. standards distinction, see the classic article, Duncan Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89 *Harvard L. Rev.* 1685. It is a commonplace in the rules/standards literature that legal norms expressed in the form of standards tend to shift power to the decision-maker by establishing a broader sphere of discretion. Legal norms expressed as rules, on the other hand, tend to constrain the power of decision-making institutions. Thus, the somewhat trite jurisprudential distinction between rules and standards nicely suggests the theme of trust to be explored here.

Pākehā[24] relations and the Treaty of Waitangi, on the one hand, and the American law and policy with respect to Native American nations, on the other. The problem with this comparison is that Native Americans have never had prominence and influence in wider American culture equal to the impact of Māori on New Zealand society. In numerical terms, Māori and African-Americans represent roughly the same proportion of the national population, [25] and the comparison is also a better one for present purposes in light of the prominence of Māori and African-American grievances in legal and legislative policy-making. The United States had a legal low point in *Dred Scott*[26]; New Zealand had the roughly contemporaneous *Wi Parata* decision.[27] The turning point for white-black relations in the United States was a court case, *Brown v. Board of Education*, and legislation in the form of the 1964 Civil Right Act; Parliament played the leading role in New Zealand with the 1975 Treaty of Waitangi Act, but the courts proved quite receptive to the principles-based approach reflected in early Waitangi Tribunal reports arising out of the Orakei, Muriwhenua, and Manukau claims.[28] The most salient difference between the Treaty and the interpretation of the U.S. Constitution is that in New Zealand, Parliament, the courts, and the Waitangi Tribunal are willing to allow policy to develop gradually, using a pragmatic, open-ended, deliberative approach that relies on foundational values at a high level of generality and does not seek to foreclose further debate.[29] Constitutional politics is therefore an ongoing process of

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[24] "The term Pakeha is commonly used for a non-Maori New Zealander of whatever origin including those of mixed Maori-European ancestry who do not consider themselves Maori." Orange, above n __ at 272 n. 3. Controversially, Michael King has argued that "being Pakeha" means something more than simply being of European ancestry, but also involves a particular way of being attached to the land. See Michael King, *Being Pakeha Now: Reflections and Recollections of a White Native.* (Penguin Books, Auckland, 2004). Although it is generally accepted, it is a bit troublesome, because it is often used to refer to New Zealanders of European descent, no matter how deep their roots in the country, and thus renders problematic the status of non-Māori New Zealanders of other than European extraction, including Pacific Island peoples and East Asians. For an overview of some of the difficulties with this usage, see Andrew Sharp, *Justice and the Māori: The Philosophy and Practice of Māori Claims in New Zealand Since the 1970s* (Oxford University Press, Auckland, 2d ed., 1997) at 63-69.

[25] According to the 2010 Census, African-Americans make up 12.6% of the U.S. population. From Statistics New Zealand Census Snapshot (based on 2006 Census), Maori are 14.6% of the population of New Zealand.

[26] See *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

[27] See *Wi Parata v. Bishop of Wellington* [1877] 3 NZ Jur (NS) SC 72.

[28] See, e.g., *New Zealand Māori Council v. Attorney- General* [1991] 2 NZLR 129 (CA) [the *Lands* case]. For the early, highly influential Waitangi Tribunal reports, see *Report on the Muriwhenua Fishing Claim* (Wai-22) (1988) ["Muriwhenua Report"]; *Report on the Orakei Claim* (Wai-9) (1987) ["Orakei Report"]; *Report on the Manukau Claim* (Wai-8) (1985) ["Manukau Report"]. The Tribunal and New Zealand courts have an interesting reciprocal relationship regarding Treaty interpretation. The Court of Appeal in the *Lands* case relied on the Tribunal's interpretation of the Treaty, but subsequent Tribunal Reports have been indebted to, and have cited, court decisions such as the *Lands* case. For a summary of this mutually reinforcing interpretive process, see Palmer, above n __ at 112, 123-25.

[29] Matthew Palmer refers to this tendency as ad hoc pragmatism with an ironic appeal to tried-and-true Kiwi tropes: "We expect politicians to fix problems as they appear and to fashion world-leading innovations with number eight wire after tinkering in the constitutional shed." Palmer, above n __ at 279-81. Palmer also describes the value of pragmatism in a way that suggests Cass Sunstein's idea of incompletely theorized agreement: "[New Zealanders] are more comfortable with getting on with the practicalities of working out concrete problems between the Crown and Māori in a particular context than

negotiation. This style of decision-making reflects a comparatively high level of trust in the relevant institutions. In the United States, by contrast, the Supreme Court has looked for bright lines and clearly defined rights that take certain issues off the table for discussion through the political process. American constitutional practice reflects persistent mistrust of the power of government institutions and a desire to devolve power to individual citizens whenever possible. These differences are apparent in the way legal institutions make use of history.

a. Looking Back, Looking Forward.

The history and legal significance of the Treaty of Waitangi is familiar to New Zealand readers. The following summary is offered for the purpose of briefly summarizing the story for American readers and, perhaps more importantly, as a kind of check to ensure that I, an outsider, have gotten things more or less right.[30] The principal contention of this section is that the difference between the United States and New Zealand in constitutional decision-making is more a matter of style (reflecting greater trust of government institutions) than substance. The reliance on principles can be explained not by a preference for fairness, but on a widespread belief that the Crown and Māori can negotiate in good faith and act as a partnership, to use a term that recurs frequently in Waitangi Tribunal reports. The New Zealand approach is based on a particular, contested view of history in which a process of bicultural cooperation was begun with the acts of a few representatives of an embryonic British colony and a gathering of local chiefs.

The Treaty itself was signed in a formal ceremony on 6 February, 1840, by representatives of the British Crown and an assembly of 43 Māori chiefs from Northland, a fraction of the 500 or more who eventually indicated their agreement with the Treaty. The parties were not strangers to each other. Naval officer William Hobson and British Resident James Busby, who represented the Crown in the

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in developing abstract written formulations of it." Ibid. at 289. Compare Cass R. Sunstein, "Incompletely Theorized Agreements" (1995) 108 *Harvard L. Rev*. 1733. The difference between New Zealand constitutionalism (at least with respect to Treaty issues) and Sunstein's model is that Sunstein prefers to leave highly abstract concepts unspecified and work inductively from areas of agreement. The New Zealand process is precisely the reverse, with agreement (or at least settlement) at high levels of generality providing a framework within which agreement can be reached on specific issues. This is closer to a conception of genuinely pragmatic judging than Richard Posner's so-called pragmatism, which is a profoundly un-conservative invitation to judges to do what they believe to be reasonable in a given case. See Richard Posner, "Pragmatic Adjudication" (1996) 18 *Cardozo L. Rev.* 1.

[30] For historical background and the texts of the Treaty, I have relied upon Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuatahi – A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (2011) ["Wai 262 Report"]; Palmer, above n __, ch. 2; Ranginui Walker, *Ka Whawhai Tonu Matou – Struggle Without End* (Penguin, Auckland, rev'd ed., 2004); New Zealand Law Commission, *Māori Custom and Values in New Zealand Law* (2001), Ch. 5; James Belich, *Making Peoples: A History of the New Zealanders from Polynesian Settlement to the End of the Nineteenth Century* (Allen Lane, Auckland, 1996) ["Belich I"]; I.H. Kawharu, ed., *Waitangi: Māori and Pākehā Perspectives on the Treaty of Waitangi* (Oxford University Press, Auckland 1989); Claudia Orange, *The Treaty of Waitangi* (Allen & Unwin, Wellington, 1987); Ruth Ross, "Te Tiriti o Waitangi: Texts and Translations" (1972) 6 *New Zealand Journal of History* 154.

negotiations, had long-standing relationships with Māori from the Bay of Islands, Hokianga, and other northern areas. In response to perceived French designs on New Zealand, Busby had sought to establish a government among the fractious chiefs and had prepared a Declaration of Independence in 1835, pledging British protection for the ad hoc group he called the United Tribes of New Zealand. Despite his best efforts, however, wars continued to break out among rival tribes and there never was any effective confederation among the Northland chiefs. Thus, references to the Confederation of the United Tribes of New Zealand are to a fictional entity.[31] On the Crown side, there was little more in the way of an effective government. "Hobson's civil service consisted of 39 genteel officials and their assistants, and his army of eleven alcoholic New South Wales police troopers."[32] Nevertheless, the British Colonial Office instructed Hobson, who had since been appointed Lieutenant Governor, to seek to acquire sovereignty over New Zealand. Lord Normanby, the Secretary of State for the Colonies, conceded in his instructions to Hobson that an acknowledgement of Māori rights had been made in the Declaration of Independence, and that this was "binding on the faith of the British Crown." Notwithstanding the fragmentation of the Māori polity into "numerous, dispersed, and petty Tribes, who possess few political relations to each other," Normanby conceded on behalf of the Crown that "New Zealand [is] a Sovereign and independent State." Accordingly, no claim on New Zealand would be made "unless the free and intelligent consent of the Natives, expressed according to their established usages," was forthcoming.[33]

Notoriously, the Treaty documents are a linguistic dog's breakfast. Busby drafted a version in English, which was translated into the Māori language by missionary Henry Williams, and then Hobson prepared a corrected draft in English. (The only surviving English version of the first draft is a back-translation from the Māori version.) The English and Māori versions differ in crucial respects. The first article of the Treaty purported to be a cession of sovereignty by the chiefs to the Queen. The English version reads:

> The Chiefs of the Confederation of the United Tribes of New Zealand, and the separate and independent Chiefs who have not become members of the Confederation, cede to Her Majesty the Queen of England, absolutely and without reservation, all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, over their respective Territories as the sole Sovereigns thereof.

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[31] Subsequent concerted efforts at creating a pan-tribal unified political entity, including Kotahitanga and the King movement, were unsuccessful. This lack of a stable political structure among Māori would later form one of the grounds for the conclusion in the *Wi Parata* case that the Treaty was a legal nullity.

[32] Belich I, above n __ at 191.

[33] See "Instructions from Lord Normanby to Captain Hobson," in Mai Chen & Sir Geoffrey Palmer, eds., *Public Law in New Zealand* (Oxford University Press, Auckland, 1993) at 295-96. Normanby's instructions are discussed in Orange, above n __ at 30-31. Their role in interpreting the Treaty is evidenced by reliance in Waitangi Tribunal reports, e.g., Muriwhenua Report ¶ 11.3.6.

The Māori version, translated back into English, provides:

> The Chiefs of the Confederation, and all the Chiefs not in that Confederation, cede absolutely to the Queen of England forever the complete Governance [kāwanatanga] of their lands.

The second act states, in English:

> Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand, and to the respective families and individuals thereof, the full, exclusive, and undisturbed possession of their Lands and Estates, Forests, Fisheries, and other properties which they may collectively or individually possess . . . .

The Māori version states:

> The Queen of England confirms and guarantees to the Chiefs, to the Tribes, and to all the people of New Zealand, the absolute Chieftainship [te tino rangatiratanga] of their lands, of their homes, and all their treasured possessions . . . .

Other provisions of the Treaty, such as the guarantee by the Crown of taonga, are less linguistically ambiguous,[34] although they raised their own problems for subsequent interpreters.

Among numerous interpretive issues, one of the most basic is what power or capacity was transferred from the Māori signatories to the Crown, and what was retained by the Māori. The English language version contemplates cession of "all the rights and powers of Sovereignty" to the Crown, with Māori to retain possession of lands, forests, and fisheries. The Māori language version, on the other hand, provides for the assumption by the Crown of the right of kāwanatanga with reservation of te tino rangatiratanga. Considerable controversy has followed from the usage of these terms. Kāwanatanga is not a word that was in common use in the Māori language at the time the Treaty was drafted; it was an invention of bilingual missionaries who first transliterated the word "governor" into kāwana and then added the suffix –tanga to indicate something possessed by the governor.[35] Governors have limited powers – less than full sovereignty – and this fact would have been known to Māori, many of whom had traveled to New South Wales.[36]

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[34] Taonga, meaning "treasured possessions," and sometimes understood as "resources" (see, e.g., the Muriwhenua Report ¶ 10.3.2), is rendered within the English text as "lands, estates, forests, fisheries, and other properties." The difficulty is not in equating taonga with resources or valued possessions, but determining the extent of protection to be given to, e.g., the Māori language, or "taonga-derived works" such as art incorporating Māori motifs, images, elements, or designs. These matters are dealt with at length in the Wai 262 Report.

[35] See Walker, above n __ at 91-93; Orange, above n __ at 40-41.

[36] Sharp, above n __ at 17-18.

Thus, the Māori version of the document does not encompass the cession of anything equivalent to full sovereignty, as the English would have understood it. Rangatiratanga is a bit less troublesome, because rangatira, meaning chief, was a generally used Māori word. The real problem comes from the omission of the word mana, which had been used in the 1835 Declaration of Independence and thus was known to the British officials. Mana, a word still widely understood today by all New Zealanders, means the authority that comes from status, prestige and lineage, and is confirmed or enhanced through actions. In philosophical terms, it connotes legitimate authority rather than de facto power. Everyone in 1840 would have known what was implied by a cession of mana, but of course the chiefs would never have signed away their mana. Moreover, the Māori signatories would have understood rangatiratanga as inseparable from their mana.[37] The English term "possession of land" would similarly be rendered in Māori as mana whenua if one were aiming to convey the idea of ceding sovereignty over land to the Crown. Thus, historian Ranginui Walker argues that the drafters of the Treaty must have been engaged in a subterfuge when they employed the word kāwanatanga in the place of mana.[38]

Whatever the intentions of Busby, Hobson, and Williams regarding the written text, the emissaries of the Crown also made numerous statements and promises orally. James Belich suggests that it is likely that these representations were far more important to the Māori present at Waitangi and elsewhere than the precise wording of the written treaty. "[W]hy should powerful chiefs, self-confident in their oral culture, abandon the traditional practice of making solemn and binding verbal agreements on the basis of formal discussion at major meetings called for the purpose?"[39] At the ceremonial signing of the Treaty, Williams (the most proficient speaker of the Māori language among the British) stated that the Queen desired to secure certain rights and privileges to Māori, and that the purpose of the Treaty was to protect them against exploitation by any foreign power, as had happened with the

[37] In subsequent discussions of the Treaty, Māori have generally used mana and rangatiratanga interchangeably. See Muriwhenua Report ¶ 10.2.2.

[38] See R.J. Walker, "The Treaty of Waitangi as the Focus of Māori Protest" in Kawharu, above n __ at 263. Claudia Orange notes that there are other possibilities, such as accidental omission and Williams's tendency to simplify English texts when rendering them in Māori. See Orange, above n __ at 40-41. Belich implicitly endorses the view that there a hopeless muddle was created by the conflicting English and Māori versions of the Treaty: "It is not clear to everyone that a few paragraphs fudged up by a bunch of mediocre, biased and possibly deceitful British Maori-language scholars in 1840 is a suitable bible for Maori -Pakeha relations in the twenty-first century, infallible and omnipotent." Belich I, above n __ at 195. A right-wing critic of the current state of Māori-Pākehā relations, by contrast, has a much rosier view of the document itself: "[T]here can be no doubt but that the translators, honest men knowledgeable in the Māori tongue, endeavoured to translate into Māori the meaning of the English draft. The very nature of the Treaty's origins – as an English draft which purported to cede sovereignty being then translated into Māori – render differences between English and Māori improbable." DJ Round, "Two Futures: A Reverie on Constitutional Review" (2011) 12 *Otago L. Rev.* 525 at 533-34. I am not sure why the intention to transfer sovereignty, which in any event was the intent only on the British side of the table, makes it unlikely that there were two different versions, given the suggestions of Walker and Orange that the translation might have been a swindle, or a mistake.

[39] Belich I, above n __ at 195.

French takeover of Tahiti; there was no explanation of the transfer of sovereignty/kāwanatanga to the Crown.[40] Busby had also reassured the chiefs at Waitangi that the Treaty was meant to secure them in possession of whatever land they had not previously sold.[41] In response to a question from a young missionary, as to whether the assembled Māori understood the legal effect of the Treaty, Hobson said they would simply have to trust the missionaries, the most familiar representatives of British authority to many Māori, and in any event the only Europeans with any proficiency in the language.[42] Led by Hone Heke, who subsequently became famous for repeatedly cutting down the British flag over Kororaweka, many of the chiefs present, mostly from the Bay of Islands, signed the written document. Hobson signified the event by stating, in words that would later serve as a formula for contesting national identity, "He iwi tahi tatou" (we are now one people).

In negotiating the Treaty, the Crown was following a pattern it had used with indigenous people in other colonies, reflecting the then-accepted contractual theory of sovereignty.[43] How, then, does the Treaty fare as a contract or as a treaty under international law? The different languages in which Treaty documents were written should not pose that much of a challenge; well-established principles of the law of treaties give effect to the Māori version as well as the English-language document, the drafting history of the documents can be considered, and to the extent there is any ambiguity, it should be construed against the Crown under the principle of *contra proferentem*.[44] Even working within Māori understandings of Māori terms, however, there appears to be a remaining, and fatal, ambiguity. What exactly is the scope of legitimate authority assumed by the Crown as its right of kāwanatanga, in light of the retention by Māori of their rangatiratanga? The text of the documents and the drafting history do not answer that question. Nor does it help to seek to recover the intentions of the parties, as they almost certainly had conflicting intentions:

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[40] Orange, above n __ at 45-46.

[41] See Orakei Report ¶ 11.9.7. After the ceremony at Waitangi, Hobson traveled the country to obtain the signatures of other chiefs. At Hokianga he emphasized that the Treaty was the best available protection from unscrupulous European land buyers. He also had a circular issued, in the Māori language, stating that the intention of the Crown was not to acquire land. Hobson apparently heard and did not contradict the statement, subsequently to be frequently cited, by Nopera Panakareao at Kaitaia, that "the shadow of the land goes to the Queen, but the substance remains with us." Ibid. ¶ 11.9.8.

[42] Orange, above n __ at 54.

[43] P.G. McHugh, "Constitutional Theory and Māori Claims" in Kawharu, above n __ 25, 30-31.

[44] See generally Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, Cambridge, 2001) at 187-205. The Vienna Convention on the Law of Treaties (VCT), Article 33(3), provides that both the Māori and English versions of the Treaty are authentic and equally authoritative. In any event the 1975 Treaty of Waitangi Act adopted both versions as official in Schedule 1 of the legislation. Drafting history (*travaux préparatoires*) and the *contra proferentem* rule may be used as supplementary principles of interpretation to resolve any remaining ambiguity. VCT, Art. 32. Interpretation is subject to the overriding principle of good faith, often expressed as the maxim *pacta sunt servanda*. VCT, Arts. 26, 31.

> Reshaping the treat into what enlightened Maori and Pakeha today would have liked it to have been has its attractions. But it is hard to see the historical merit, because the intents of the two parties were clearly in conflict. The British wished to convert Maori into Brown Britishness and subordinacy, whereas the one thing we can be sure of about Maori motives for signing is that they did not want this.[45]

Where the subjective intent of the parties conflicts, the text of the treaty must control interpretation.[46] Where the text is ambiguous, however, an interpreter may be able to do no better than to attempt to discern some hypothetical end or purpose for which the treaty was concluded. There seems to be no way to ground an objective, stable meaning of the Treaty of Waitangi in either the text of the document or the actual, subjective intentions of the parties. In addition, the limited number of signers of the Treaty,[47] and the lack of any pan-tribal political entity with authority to act on behalf of all Māori, put considerable pressure on the international law of treaties.[48]

Therefore, an extremely interesting possibility must be considered, which is that the answer to how the Treaty fares under the law of contracts or treaties is, "It doesn't matter." Conservative critics of the modern approach of the Waitangi Tribunal have emphasized formal defects in the process, including the lack of unified political authority on the Māori side, the "amateurish and hasty" drafting of the Treaty document, and the subsequent failure of Parliament to ratify the Treaty and thus give it effect in domestic law.[49] The Treaty was, in fact, mostly ignored by the government until the 1970's, when political activism by increasingly urbanized (and therefore no longer invisible) Māori began to put pressure on the confident assumption that New Zealanders were "one people."[50] The last few decades of the twentieth century witnessed a novel, even revolutionary approach to policy-making under the Treaty. Most interesting to an American observer is that none of it was, strictly speaking, compelled by law. American history of majority-minority relations is structured to a significant extent by high-profile acts by courts or legislatures which seek to force social change by creating legally enforceable rights. Consider,

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[45] Belich I, above n __ 195.

[46] See Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, Manchester, 2d. ed., 1984) at 130-31.

[47] See Walker, above n __ at 96-97 (noting that two important chiefs, Te Wherowhero of Tainui and Te Heuheu of Tuwharetoa, as well as chiefs in the Tauranga area, the East Cape, and the Lakes district, did not sign, thus considerably undercutting British claims to sovereignty over the entire North Island). Even today the claim that no Ngai Tūhoe chief signed the Treaty has been a feature of the debate over the so-called Urewera Four. See, e.g., Catherine Masters and Patrick Gower, "Guerillas in the Mist," *New Zealand Herald* (20 Oct. 2007).

[48] For arguments that Māori signatories did have the capacity to enter into a binding treaty with the Crown, see Palmer, above n __ at ___; Benedict Kingsbury, "The Treaty of Waitangi: Some International Law Aspects," in Kawharu, above n __ at 125-26.

[49] Guy Chapman, "The Treaty of Waitangi – Fertile Ground for Judicial (and Academic) Myth-Making" (1991) NZLJ 228.

[50] The story is well told in Sharp, above n __ at ch. 5; and Walker, above n __.

for example, decisions by the U.S. Supreme Court, directing states to discontinue racially segregated public schooling and then compelling recalcitrant state governors to comply with its orders, or the voting-rights cases which slowly dismantled the legal framework of African-American disenfranchisement.[51] Congress played a role as well, most notably in the Civil Rights Act of 1964 and the Voting Rights Act of 1965, which finally created an effective mechanism to enforce the Fifteenth Amendment to the U.S. Constitution, enacted following the Civil War. School desegregation in particular was accompanied by a violent backlash, and Americans are sadly familiar with images from the era such as black high school students being escorted into Little Rock (Arkansas) Central High School by soldiers from the 101st Airborne Division.

A naïve American visitor to New Zealand would therefore expect that the contemporary landscape of Māori-Pākehā relations is the result of the assertion of legal rights under the Treaty by Māori claimants. An American lawyer may believe that the law *must* have set limits on what a Pākehā-dominated political process can do because in the American experience political majorities cannot be trusted to deal fairly with minority groups. The law has played, and continues to play a vital role in structuring the bicultural partnership of New Zealand, but it does not function as it does in the United States. The rule of law in New Zealand does not generally entail the use of legal rights to compel social change. Rather, the law provides a means through which an ongoing evolutionary process of change can be negotiated. The role of the Treaty in New Zealand law is far from the "adversary legalism" style described by Robert Kagan, although elements of adversarialism, such as assertions of rights and demands for a remedy, may be present. Instead, and to borrow another metaphor from American legal theory, the two peoples making up the nation of New Zealand bargain in the shadow of the law,[52] with the law being understood in deliberately vague, abstract terms. The rule of law must therefore be understood differently in New Zealand constitutional practice, as compared with the American case. The law does not serve as a lever to move reluctant state institutions, or as a weapon to be used against state actors; rather, it is a framework for an ongoing process of negotiating the terms of a relationship. The right theoretical model for legal rights and the rule of law is not a one-off contract whose meaning is fixed in time, but a "relational" contract whose content evolves and adapts within an ongoing relationship between the parties.[53]

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[51] For some of the early voting-rights cases, see *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

[52] Robert H. Mnookin & Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 *Yale L.J.* 950.

[53] See, e.g. Stuart Macaulay, "Non-Contractual Relations and Business: A Preliminary Study" (1963) 28 *American Sociological Rev.* 55; Ian R. Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical and Relational Contract Law" (1978) 72 *Northwestern U. L. Rev.* 854; Lisa Bernstein, "Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry" (1992) 21 *Journal of Legal Studies* 115; Lisa Bernstein, "Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions" (2001) 99 *Michigan L. Rev*. 1724. The overall objective structuring the relationship or partnership has been described as follows: "[I]n return for ceding sovereignty, Maori gained protection of their persons, properties and tribal status, and individually,

To be sure, the Treaty has ongoing vitality as positive law through legislative enactments and judicial decisions. Many statutes contain references to the Treaty and require the government to act in ways that are consistent with its obligations under it. For example, Section 9 of the State-Owned Enterprises Act, which was to become central to the *Lands* case, states that "[n]othing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi." The Environment Act of 1986 similarly makes reference to "principles of the Treaty" as one of five factors upon which decisions should be made regarding the use of natural resources.[54] Courts have given effect to these provisions as they would any other statutory language.[55] The 1975 Treaty of Waitangi Act established the Waitangi Tribunal as a permanent commission of inquiry, and the jurisdiction of the Tribunal was soon expanded to consider grievances dating back to 1840.[56] The Tribunal does not have the power to order legal changes or property settlements,[57] but its recommendations have considerable persuasive force, and the government has responded to many of these recommendations regarding matters such as fisheries regulation.[58] Early Tribunal reports, particularly those arising out of the Orakei, Manukau, and Muriwhenua claims, established the approach that characterizes decision-making under the Treaty today. They began to refer to principles of the Treaty, refusing to be bogged down by the specific textual problems referred to above. Courts often refer to Tribunal reports when interpreting statutory language requiring government decision-makers to give effect to the Treaty.[59] Finally, the Treaty serves as a self-imposed constraint on government

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the rights and privileges of British subjects." Muriwhenua Report ¶ 10.5.2 (citing the Court of Appeal's *Lands* case).

[54] See Palmer, above n __ at 92-95.

[55] Palmer, above n __ at 204-05.

[56] See generally Palmer, above n __ at 105-06, 272. The Tribunal has between two and twenty members, appointed by the Minister of Māori Affairs after consultation with the Minister of Justice. Palmer notes that the Tribunal offers a distinctive Māori voice. By tradition it is comprised of equal numbers of Māori and Pākehā members. It has its own procedures and kawa [ceremonies pertaining to meetings, often used with reference to protocol on a marae], holds hearings on marae and in the Māori language. Evidence presented ranges widely over history, customs, tradition, beliefs and practices relevant to the past and ongoing relationship between the Crown and Māori. See the description of the Tribunal's marae protocol in the Muriwhenua Report ¶ 1.8.1. Claims presented to the Tribunal are framed in the traditional manner of the English common law, in terms of an identified claimant seeking a remedy for a specified wrong, but the procedures of the Tribunal are more inquisitorial than in a New Zealand court of general jurisdiction. Palmer notes that "compared with the courts, the Waitangi Tribunal is more prepared to go beyond process, to uphold the substantive rights of Māori under the Treaty in the face of opposition by the executive." Palmer, above n __ at 275.

[57] See *Te Runanga o Muriwhenua v. Attorney-General*, [1990] 2 NZLR 641, 651-52 (CA); *Taiaroa v. Minister of Justice*, [1995] 1 NZLR 411 (CA).

[58] Palmer, above n __ at 189-90. See, e.g., the account of the Sealord deal in Walker, above n __ at 294-95.

[59] See, e.g., the *Lands* case, in which the Court of Appeal enjoined the transfer of assets to State Owned Enterprises without considering whether doing so would violate the Crown's obligations under the Treaty. *New Zealand Māori Council v. Attorney- General* [1991] 2 NZLR 129 (CA). The court was interpreting Section 9 of the State Owned Enterprises Act, but its reliance on the principle of consultation between the Crown and Māori was indebted to earlier Tribunal reports.

action, manifested in an array of forms including confidence-and-supply agreements between members of a governing coalition, statements by the Governor-General, and internal cabinet procedures manuals.[60] Nevertheless, the Treaty has constitutional and cultural significance that go well beyond the American understanding of law as essentially consisting in individual rights that can be asserted by citizens against each other, or to restrain the power of the state. The rule of law means something distinctive in New Zealand, including an essentially pragmatic, tolerant, trusting approach to the exercise of state power.

b. History and Power.

In considering the role of the Treaty in the political culture of New Zealand, Fischer conflates modern understandings of the Treaty relationship with the beliefs and expectations of British officials and Māori chiefs who negotiated and signed it in 1840.

> Hobson and the Maori chiefs succeeded not by force or by fraud, or even by persuasion, but by finding a mutuality of material interests and a harmony of ethical principles. The central principle was a creative tension between two elements. One was British 'sovereignty,' or *kawanatanga* (governance) in the Maori text. The other was the guarantee of *te tino rangatiratanga*, which meant not only 'unqualified exercise of chieftainship' but, more broadly, 'Maori control over Maori things.' At the heart of the treaty was an idea of divided powers – a concept fundamental to governance among English-speaking people. . . . Maori chiefs and British officers established a frame of law, and an idea of divided powers between *te kawanatanga katoa* for the queen and *te tino rangatiratanga* for Maori. Together they created the possibility of balance, justice, and fairness.[61]

Believing that the signatories understood rangatiratanga as "Māori control over Māori things" would require imputing an approach to Māori-Crown relations that is forward-thinking (and controversial) in the first decade of the twenty-first century to a handful of leaders on both sides who were just beginning to feel their way toward a governance structure for New Zealand. It would take the wars of the 1860's in Taranaki and the Waikato, subsequent Pākehā retrenchment and ignoring of the treaty for many decades, the Māori civil rights movement in the 1970's, the Treaty of Waitangi Act of 1975, and numerous reports of the Waitangi Tribunal, judicial decisions, and legislation referring to Treaty principles in specific contexts to give any content to the general notion of "Māori control over Māori things." As Ranginui Walker has shown, for decades after the signing of the Treaty, Māori control over Māori things was precisely what was sought by Māori and denied by the Pākehā establishment. The Kotahitanga (unification) movement tried to create a Māori parliament to deal with matters entrusted to Māori under the Treaty, such as

[60] Palmer, above n __ at 215-26.
[61] Fischer, above n __ at 121.

possession of land and control over fisheries.[62] It was simply ignored by the Parliament in Wellington. Furthermore, the scope of "Māori things" is potentially open-ended, and the current understanding of that concept was almost certainly not within the contemplation of the 1840 negotiators. The Wai 262 report encompasses a dizzying array of subjects, including environmental policy, intellectual property, biodiversity and management of native flora and fauna, Māori language, traditional medicine, and the effect of the Treaty on international agreements entered into by the Crown. So broad did the Wai 262 inquiry become that the Report describes it as "pertaining to mātauranga Māori – the unique Māori way of viewing the world, incorporating both Māori culture and Māori traditional knowledge. It is no stretch to describe this claim as being about the survival of Māori culture and its ongoing place in this country."

Whatever the signatories were thinking about on 6 February 1840, it probably was not that their actions would affect the whole of Māori culture and its unique way of understanding the world. The germ of a bicultural partnership with shared powers of governance may be discernable in the negotiations between Hobson and the Northland chiefs, but it is certainly not the only interpretation that is sustainable on the historical record.[63] The maxim "He iwi tahi tatou" could be understood as a mandate for assimilation of Māori into Pākehā ways of doing things, as it was for more than a century following the signing of the Treaty.[64] My point, however, is not to reargue this point of history. Rather, it is to identify two distinctive approaches to using history in legal reasoning and government policy-making – that is, to identify aspects of the constitutional and political cultures of the United States and New Zealand. The difference is not so much an ideological commitment to freedom or fairness, but a preference for constraining the power of the state using positive legal rights and remedies, in American political culture, and acknowledging the prerogatives of the state to negotiate the terms of relationships among citizens, and between citizens and the state, in an ongoing way, without significant legal constraint, in the case of New Zealand. There is also a relational dimension to the rule of law in New Zealand, which would be almost incomprehensible to an American lawyer. The basic terms of the agreement are left vague or unstated, and the parties are encouraged to bargain to an acceptable solution to specific, concrete problems. When Matthew Palmer argues that the Treaty should be understood as a pact of goodwill between peoples, or analogous to the unwritten norms that structure family relationships,[65] this is far from the

[62] Walker, above n __ at 165-69.

[63] Sir Ian Sinclair calls this the "emergent purpose" version of the teleological approach to interpreting treaties, which seeks to recover the end and purpose of the agreement, not as it existed at the time it was entered into, but as it evolves over time. He criticizes this approach (albeit indirectly and tactfully) as a means by which an interpreting institution can aggrandize its power. See Sinclair, *supra*, pp. 131-34.

[64] Walker, above n __ at 145, 198-99, 207, 225-28, 242-43. As civil rights activism by Māori increased in the 1970's and 1980's, some Pākehā became aware that the "one people" ideal was biased in their favor and began to speak instead of a bicultural partnership. For example, at the Waitangi Day ceremony in 1981, the Governor-General, David Beattie, said, "We are not one people, despite Hobson's oft-quoted words, nor should we try to be." Ibid. at 236.

[65] Palmer, above n __ at 302-03.

"adversarial legalism" approach of American lawyers, who are concerned to establish first the rights of individuals, and to build up relational interests only out of clearly established individual rights.

Americans tend to make a fetish of the original understanding of the meaning of the Constitution. We act as though the intentions and expectations of Madison, Jefferson, Hamilton, Adams, Jay, and a few other canonical Framers (capitalized, to convey reverence) should be controlling today on issues pertaining to federalism, separation of powers, church-state relations, capital punishment, the financing of political campaigns, privacy, police searches, marriage equality, race-based redistricting, and goodness knows what else.[66] While some Americans may believe that the Framers were uniquely wise and prescient, the more important reason for relying on the intent of the Framers is to constrain the power of judges. By tying interpretation tightly to the original meaning of the Constitution, it is thought, judges can prevent themselves and other courts from engaging in open-ended policy reasoning, substituting their own preferences for the rule of law. There has to be something objective to rein in judges, either the plain meaning of the constitutional text or the intent of the Framers. Since the text of the Constitution is open-ended, vague, and fails to address many matters, the next best source of objectivity in judging is thought to be the subjective intentions of the drafters and the then-current public meanings of crucial terms employed. History therefore assumes a central role in checking the exercise of arbitrary power by an unelected judiciary.

Consider, for example, the following case.[67] The District of Columbia has a broad prohibition on the possession of handguns. A citizen who wishes to possess and register a handgun challenges the ban on the grounds of the Second

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[66] See, e.g., Jack M. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (Knopf, New York, 1996). For the purposes of this paper it is not necessary to get into the differences between the so-called Old Originalists and New Originalists. Briefly, the Old Originalists seek to constrain the interpretative latitude of judges by restricting the meanings of terms used in the constitutional text to those meanings that were subjectively in the minds of the actual Framers of the Constitution. See, e.g., William H. Rehnquist, "The Notion of a Living Constitution" (1976) 54 *Texas L. Rev.* 693; Robert H. Bork, "Neutral Principles and Some First Amendment Problems" (1971) 47 *Indiana L.J.*1. New Originalists, who sometimes call themselves textualists, seek to ground interpretation instead in an objectified public meaning of words as they would have been understood by a reasonable person at the time the document was written. Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Amy Gutmann, ed., Princeton University Press, Princeton (N.J.), 1997); John F. Manning, "Textualism and the Role of The Federalist in Constitutional Adjudication" (1998) 66 *George Washington L. Rev.*1337. New Originalism avoids the problem of how coherently to summarize the likely-conflicting subjective intentions of authors and delegates to the constitutional convention. See Paul Brest, "The Misconceived Quest for the Original Understanding" (1980) 60 *Boston University L. Rev*. 204. It is less clear, to me at least, that it is an adequate response to Jeff Powell's argument that the Framers themselves would not have believed their intentions to be controlling of future interpretation. H. Jefferson Powell, "The Original Understanding of Original Intent" (1984) 98 *Harvard L. Rev*. 885. While one might respond that the Framers' subjective intention is beside the point, it still may be the case that Powell correctly identifies a public, objective, widely shared notion of the expectations of authors in the Eighteenth Century regarding the process of determining meaning. On the current United States Supreme Court, conservative Justices Clarence Thomas and Antonin Scalia represent the Old and New wings, respectively, of Originalism.

[67] *District of Columbia v. Heller*, 554 U.S. 570 (2008).

Amendment to the U.S. Constitution, which provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." A number of interpretive questions are presented by this provision of the Constitution. What is the scope of the "right . . . to keep and bear Arms"? Surely it does not extend to all weapons that might have military or law-enforcement applications. Even if there is such a prima facie right, the government might reasonably conclude that the public interest in safety and freedom from gun-related violence is more important than this individual right. Moreover, the text of the Second Amendment contains an interesting ambiguity created by the relationship of the first and second clauses. Is the right to keep and bear arms logically related to service in a professional or volunteer militia, so that citizens may keep and bear arms only to the extent that these weapons need to be available for military use? In the end, the Supreme Court was called upon to determine whether the D.C. handgun ban was unconstitutional.

In his opinion for the majority of the Court, Justice Scalia offered an extended ordinary-language argument based on how words such as "keep" and "bear" would have been understood in the founding era. Rather than seeking to determine how to make sensible policy decisions regarding handgun possession in a densely populated city, Justice Scalia assumed the Court's task was to recover just what the parties to the drafting of the Constitution would have meant when they used those words. Never mind that the Framers probably did not have in mind the levels of urban crime, fueled by the drug trade and ready access to firearms, that motivated the D.C. City Council to enact the ban on handgun possession. For Justice Scalia it was sufficient to prove that the words "bear arms" had a meaning in the Eighteenth Century that encompassed firearms possession outside of the context of an organized militia. In dissent, Justice Stevens acknowledged Justice Scalia's framing of the issues, offering a competing interpretation of the Second Amendment in its historical context, while Justice Breyer's opinion made a more frankly normative argument, that even if the Second Amendment was interpreted as creating an individual right not linked with militia membership, a legislature may nevertheless constitutionally restrict firearms ownership to protect citizens from urban crime. Significantly, Justice Scalia has relatively little to say in response to Justice Breyer's normative arguments. The bulk of his opinion reflects the confident assumption that historical evidence about the meaning of "bear arms" in the founding era would be decisive of the issue.

By contrast with the persnickety American originalism which treats the words and intentions of the Framers as holy writ, the approach of the Waitangi Tribunal is informed by history, but at a sufficiently high level of generality that, in a sense, the precise words spoken by Hobson, the meaning and inter-translatability of sovereignty and rangatiratanga, and the intentions of all the actors are beside the point. The genius of the New Zealand approach is what might be called ahistorical historicism. The historicism of the approach acknowledges that courts, investigatory tribunals, and Parliament do not write on a blank slate. Māori-Pākehā relations have a long history in this country, and contemporary decision-makers can

do better by taking that history into account. Nevertheless, the approach is sufficiently ahistorical to avoid getting bogged down in endless arguments over an event that took place long before the rise of the types of technology, institutions, and practices that lead to conflicts today between the two founding peoples of New Zealand. Sales of state-owned assets, large-scale commercial fishing, concerns about biodiversity, protection in international law for intellectual property, offshore gas drilling, and other matters that have been the subject of Waitangi Tribunal reports could not possibly have been within the contemplation of the signatories of the Treaty. It would be foolish to pretend that anyone in 1840 would have had a view one way or the other on any of the problems that now present themselves under the general rubric of "issues involving Māori."

Justice Scalia's opinion in the D.C. handgun case closes with a passage implying that a Court has a stark binary set of options in response to the problem of handgun violence – either ignore the Constitution or strike down the ban on handgun possession:

> Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.[68]

Imagine that the Waitangi Tribunal or the courts of New Zealand had approached questions regarding fisheries rights, possession of land, or control over cultural property with the same mindset. The options would then have been to restore Māori sovereignty, i.e. rangatiratanga, over these matters to the exact condition in which it existed in 1840, or to tell Māori that they are "one people" with Pākehā and have no recourse but to participate in the political process on the same terms as everyone else. The model of a bicultural partnership avoids these extremes by fostering, rather than shutting down, an ongoing process of debate over the more specific commitments of the partnership.[69]

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[68] *Heller*, 554 U.S. at ____.

[69] Don Brash referred in his Orewa speech to the temporary stoppage of work on the Waikato Expressway due to concerns expressed by a local iwi that the construction would disturb a taniwha. See David Slack, ed., *Bullshit, Backlash and Bleeding Hearts - A Confused Person's Guide to the Great Race Row* (Penguin, Auckland, 2004) at 149-56. The American analogue that immediately springs to mind is the halting of dam construction by a public authority in order to protect an endangered species, the snail darter. See *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978); the case may be known to non-Americans through Dworkin's use of it as an example in *Law's Empire*. The snail darter controversy was always framed in all-or-nothing terms. Either the Endangered Species Act protected the snail darter, in which case the dam could not be built, or it did not, in which case the snail darter was out of luck. In the situation with the taniwha, the problem was resolved by respectful consultation, a slight redesign and rerouting of the highway, and modest additional cost to the project. This may not be a perfect analogy because there may have been no comparable design change that could have been made to the dam, but it is nevertheless significant that two high-profile public works projects in the U.S. and New Zealand both encountered opposition on the grounds of environmental concerns (expressed in spiritual terms in the taniwha case), and yet were resolved

Conservative critics of policy since 1975 have been at pains to show that neither the text of the Treaty (with the kāwanatanga/rangatiratanga ambiguity) nor the intentions of the signers could possibly be a foundation for the modern idea of a partnership between Māori and Pākehā. The response from legal scholars, as opposed to historians, has generally been, "So what?" Constitutionalism is not the recovery of past meanings, but the ongoing process of meaning-creation, adapted to changing circumstances.[70] Critics have therefore fallen back on an argument that is familiar to Americans, but which for some reason has not gained too much traction in New Zealand, namely the fear of judicial activism. Justice Scalia's textualism and Justice Thomas's originalism are influential approaches to constitutional interpretation in the United States because conservatives fear the power of unelected judges over social policy-making. The idea of a living constitution is anathema to conservatives who believe that the "life" breathed into the document will be nothing more than left-leaning ideology. They point to numerous decisions of the Supreme Court under Chief Justice Earl Warren to illustrate their concern. The Court held, as a matter of constitutional interpretation, that prayer in public schools was impermissible, states may not ban access to contraceptives nor regulate abortion in the first trimester of pregnancy, suspects in police custody must be warned of their right to remain silent, evidence seized without authorization may not be admitted at trial against a criminal defendant, prisoners could sue over unconstitutional conditions of confinement, and students could be bused to geographically remote schools to rectify the effects of segregation. None of these legal rights and remedies had the kind of democratic legitimacy that one would associate with legislation; therefore they seem to present a "countermajoritarian difficulty" due to either the opposition or the inaction of more directly politically responsive government institutions.[71]

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in quite different ways. (Brash is still going on about taniwha – see Don Brash, "An Address to the 2011 ACT Party Congress," 12 March 2011, available at http://www.donbrash.com/an-address-to-the-2011-act-party-conference/.)

[70] Paul McHugh, "Constitutional Myths and the Treaty of Waitangi," [1991] NZLR 316. Compare the argument of Giselle Byrnes that the Waitangi Tribunal has created a "retrospective utopian history." Giselle Byrnes, *The Waitangi Tribunal and New Zealand History* (Oxford University Press, Auckland, 2004). It is not the case that McHugh and Byrnes are describing the same phenomenon, only taking approving and disapproving attitudes, respectively, toward it. Rather, McHugh is writing about *constitutionalism*, not history per se. When he says "[o]ne cannot understand the legal position of the Treaty or its place in Anglo-American constitutionalism simply by reading a few chapters of Claudia Orange's book [and] Ruth Ross' legally suspect but otherwise excellent article", he is not advocating that critics of the Tribunal read more history; he is recommending instead that they think more broadly about how political institutions should understand the relationship between history, foundational values, and policy-making, and how power should be shared among institutions in a democracy.

[71] See, e.g., Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press, New Haven (Conn.), 1961). It is not much of an exaggeration to say that American constitutional theory is obsessed with the countermajoritarian problem. See Barry Friedman, "The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship" (2001) 95 *Northwestern U. L. Rev.* 933.

The requirement that judges ground an interpretation of the constitution in the plain meaning of its language or in some aspect of its drafting history (whether the subjective intentions of the Framers or the then-current public meaning of words employed) is intended as a check on interpretive freedom. A judge cannot enact her own policy preferences as law, under the guise of interpreting the constitution, if text and history provide a meaningful constraint. The political significance of the idea of the rule of law, in American constitutional theory, is principally as a limitation on the exercise of power. Therefore, if American history is any guide – that is, if New Zealand and the United States share sufficient similarities as well as differences – then one might expect to hear criticism of the Waitangi Tribunal and court decisions pitched in terms of activism and power-grabs by undemocratic institutions. Judicial decision-making in New Zealand does not raise the countermajoritarian problem in the same way because of the Diceyan doctrine of parliamentary supremacy. Nevertheless, an institution may acquire power in different ways, and the Waitangi Tribunal may have effective power notwithstanding its inability to issue binding judgments. As a political matter it may be so difficult for Parliament to ignore a recommendation of the Tribunal that the Tribunal becomes, in effect, an unelected, unconstrained political actor. Don Brash pushed the "activism" button in his Orewa speech when he criticized the reliance on Treaty principles, noting that "it was left to unelected Court of Appeal judges to determine an interpretation of the Treaty's meaning that the politicians most certainly never intended."[72] There are also hints of this critical perspective in conservative academic commentary. David Round, for example, worries that the principles-based approach to decision-making under the Treaty "would be an open invitation to activist judges and bureaucrats to readjust and rewrite the laws of our country at their leisure and pleasure."[73]

This possibility would be less frightening in a situation characterized by a great deal of mutual trust and respect. Earlier I analogized New Zealand constitutionalism to relational contracting. Matthew Palmer similarly has argued that, fundamentally, the meaning of the Treaty of Waitangi is that Māori and Pākehā are, like it or not, in an ongoing relationship and must continue to negotiate the terms of their dealing with one another. Palmer notes that the word "relationship" has touchy-feely connotations – calling to mind "empathetic woolly-woofter liberals and naïve idealism"[74] – but he rightly emphasizes that the analogy is not with personal relationships but complex commercial negotiations. The crucial insight identified with the word "relationship" is that the negotiations are not zero-sum, and that in addition to hard bargaining, it is necessary to appreciate what is possible, communicate honestly, listen carefully, and be prepared to compromise. Thus, it may well be true that the Tribunal is engaged in a process of myth-making, but the "myth" in this case is an outcome with political significance that is the subject of respectful negotiations conducted by parties that do not see bargaining as

[72] Quoted in Slack, above n __ at 20.
[73] Round, above n __ 539.
[74] Palmer, above n __ at 311.

a one-off interaction but as an ongoing, emerging process. Viewed in that way, it is the American style of constitutionalism that is bizarre, with its insistence that the precise terms of the bargain struck in 1787 ought to control the allocation of civic rights and responsibilities in the twenty-first century.

c. Two Conceptions of Fairness.

Fischer suggests that the Treaty of Waitangi, and the settlement process begun in 1975, is fairer to Māori than comparable agreements and political processes have been to African-Americans.[75] He does not take account, however, of a strong backlash against the Treaty settlement process and a widespread perception that Māori are the beneficiaries of special treatment. That is to say, there may be a competing fairness narrative – a strong, though not universal, sense that the government has interpreted the Treaty in a way that is *unfair* to Pākehā.[76] Indeed, the National Party arguably owes its current status in government to exploitation of "Treaty fatigue" and a sense that the process of rectifying historical grievances had swung too far in the direction of special rights for Māori.[77] Fischer talks about John Key's 2010 speech on Waitangi Day, as Prime Minister,[78] but inexplicably neglects to mention the vastly more significant event of Don Brash's speech in 2004 to the Orewa Rotary Club on Treaty policy, which was almost certainly one of the causes of National's return to power.[79] "Brash tapped into public fatigue with and ignorance of the Treaty of Waitangi by asserting that his thinking as a political leader was guided by one principle: 'The Treaty of Waitangi should not be used as the basis for giving greater civil, political or democratic rights to any particular ethnic group.'"[80] Despite the "negative reaction from journalists, editorial-writers of newspapers and political commentators on radio and television,"[81] a substantial portion of the general public was supportive of Brash,[82] and the speech led to a substantial spike in support for National in public opinion polls.[83]

All of this is depressingly familiar to an American observer. The rhetoric of "equal rights, not special privileges" could have come from any episode of backlash against gains in civil rights made by women, people of color, LGBT citizens, religious minorities, or anyone else challenging the status quo. Behind the talkback radio

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[75] Fischer, above n __ at ___.

[76] I do not endorse the substance of this argument, by the way, but note its existence as evidence that there is more than one operative conception of fairness which may be used to characterize the Treaty settlement process.

[77] For the term "Treaty fatigue" and polling data showing attitudes toward the Treaty among Māori and Pākehā, see Palmer, above n __ at 299.

[78] See Fischer, above n __ at 287.

[79] See, e.g., John Armstrong, "Don Brash Tells: Why I Played the Race Card," *New Zealand Herald* (21 Feb. 2004).

[80] Walker, above n __ at 394.

[81] Ibid. at 393.

[82] See Geoff Cumming, "Non-Maori Say They've Had Enough," *New Zealand Herald* (21 Feb. 2004).

[83] See ZB Newstalk, "Poll Puts National Ahead of Labour," *New Zealand Herald* (15 Feb. 2004).

clichés, however, is a different understanding of the political value of fairness. The ideal of colorblindness, race-neutrality, formal equality, and being "one people" is an appeal to one conception of fairness, in which rights and privileges are allocated by the state in a manner that is neutral with respect to criteria irrelevant to desert. Public employment, government contracts, spots in the incoming class of a university, portions of the broadcast spectrum, and so on, should be apportioned on the basis of some notion of merit, with merit understood independently of features such as race, ethnicity, gender, sexual orientation, religion, or disability. That is an account of fairness, and one that has considerable appeal both in the United States and New Zealand.[84] It reflects the basic commitment of political liberalism, to treat all citizens equally, without regard to factors that are not relevant to the decision at hand. In the United States, it has become the dominant approach in the jurisprudence of federal courts regarding affirmative action and voting rights,[85] notwithstanding the remedial, as opposed to invidious, discrimination underlying these government programs.

Of course, race-neutrality is not the only conception of fairness that one might regard as a standard for government decision-making. Consider, as an American point of comparison, the use of diversity as a factor in university admissions, which in practice may mean a preference (or a "thumb on the scale") for women, people of color, and other members of traditionally disadvantaged groups: John Doe and Cheryl Hopwood both apply for admission to the University of State X.[86] Suppose John Doe had a slightly higher undergraduate grade-point average and scored a few points higher on the Law School Admission Test (LSAT); to make the problem simple but unrealistic, assume there is only one remaining slot in the entering class. Who *deserves* that place in the class? In other words, what does fairness require in this instance? The case for race- and gender-neutrality in admissions assumes that desert must track merit, and that merit, in turn, must be assessed using standardized measures of achievement or ranking, such as LSAT scores. But one may question whether merit or ability really is identical with easily quantifiable, purportedly objective, types of achievement.[87] Someone who overcomes discrimination and social disadvantage to score only a few points lower than an applicant who had a privileged, comfortable life may be considerably more deserving of recognition, and more meritorious on the less readily measured dimensions of hard work, tenacity, adaptability, and self-confidence. Law schools presumably are interested in graduating successful attorneys, and success depends

[84] The recurring issue of the Māori seats in Parliament is an example specific to New Zealand of the tension between race-conscious and race-neutral standards.

[85] For affirmative action cases, see *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) (government contracting); *City of Richmond v. J.A. Croson Co*., 488 U.S. 469 (1989) (government contracting); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) (public employment); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (university admissions). The leading voting rights case is *Shaw v. Reno*, 509 U.S. 630 (1993); see also *Miller v. Johnson*, 115 S. Ct. 2475 (1995); *Bush v. Vera*, 116 S. Ct. 1941 (1996); *Shaw v. Hunt*, 116 S. Ct. 1894 (1996).

[86] This example is from Susan Sturm & Lani Guinier, "The Future of Affirmative Action: Reclaiming the Innovative Ideal" (1996) 84 *California L. Rev*. 953 at 960-62.

[87] Sturm & Guinier, above n __ 964.

on more than just the ability to score highly on standardized tests.[88] A more radical critique of race-neutrality would emphasize the social role of universities in securing equal opportunity for all applicants including, where necessary, compensating for disadvantages resulting from a long history of discrimination. The John Doe vs. Cheryl Hopwood competition may have looked fair, but in fact it was deeply unfair, because John Doe had a leg up at the beginning because he enjoyed access to better schools, safer neighborhoods, more opportunities for after-school and extracurricular activities, private tutoring for the LSAT, and similar advantages. If one applicant is arbitrarily advantaged relative to another, the process is unfair; thus, fairness requires compensating for inherent disadvantages experienced by applicants.[89]

This example shows that both sides of a political issue may seek to wave the banner of fairness in support of their position. American law generally prohibits race-conscious decision-making; the Waitangi Tribunal has recently stated that government processes must be comprehensively restructured to ensure that they are *more* race-conscious.[90] Which of these approaches is fair? In political theory, fairness is often defined in terms of equality, with fairness meaning treating people as equals in relevant respects. The trouble is, egalitarianism is just as much a contestable concept as fairness. One can always ask, alluding to Amatya Sen's influential lecture, "Equality of What?"[91] Fairness as equality can refer to equal opportunity, equal access to institutions, "proportionality between contribution to society and reward, proportionality between hardness of work and reward, proportionality between need and share of social product, [or] equal (or otherwise appropriately distributed) power to act in society."[92] The observation of the essential contestability of the concepts of fairness and equality provides a nice transition into the discussion of the next point of comparison between the rule of law in the United States and New Zealand. The polar opposition between the New Zealand comprehensive no-fault accident compensation scheme and the

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[88] The Aristotelian principle that like cases must be treated alike, see Aristotle, *Nicomachean Ethics*, 1130b-1132b, depends on a prior understanding of which aspects of two cases are normatively relevant. Arguments in favor of affirmative action, against the principle of color-blindness, trade on the irrelevance, for normative purposes, of purportedly objective criteria that claim to bear on merit, such as grade-point averages and LSAT scores.

[89] Sturm & Guinier, above n __ 981-82, 990-91 (arguing that LSAT scores measure parental income more than anything else). This discussion is hypothetical and stylized, and accordingly relies on the assumption that John Doe comes from a well-off family and grew up in a comfortable neighborhood with good public schools. As critics of affirmative action never tire of pointing out, race-based criteria can be overinclusive and underinclusive with respect to the underlying considerations of social disadvantage. A substantial number of white applicants come from poor or working-class backgrounds, may have experienced significant family, social, or educational disadvantages, and did not simply coast through life before arriving at law school. While government decision-makers are generally permitted to use rough proxies in order to minimize transaction costs, it is impermissible to do so when the criteria used as proxies for the underlying factors make reference to so-called "suspect classifications," including race and national origin.

[90] Wai 262 Report.

[91] Amarya Sen, "Equality of What?" in *The Tanner Lectures on Human Values* (Cambridge University Press, Cambridge, 1980).

[92] Sharp, above n __ at 22.

enthusiastic invocation of common law tort rights by Americans can suggest a divide in the cultures between fairness and freedom, but it also may show instead that fairness is a man-faceted concept, and Americans and New Zealanders understand it in very different ways.

3. The ACC vs. the Common Law Tort System.

Non-Americans find the tort system in the United States to be utterly baffling. It seems like a gigantic roulette wheel, dispensing huge payouts to some injured people while leaving others without any recovery.[93] Liability judgments, even in highly complex, technical cases such as medical malpractice and product design defect, are based on verdicts rendered by juries comprised of ordinary members of the community without any experience in the relevant scientific or engineering disciplines. Lawyers paid on a contingent-fee basis solicit clients with dubious claims, knowing that by presenting an "inventory" of thousands of cases for settlement, a defendant would have to be crazy not to pay substantial sums to hedge against the risk of ruinous liability. For their part Americans, certainly American lawyers, are mystified that New Zealand somehow manages to be a safe place without recognizing individual legal rights to sue for negligence or unsafe product

[93] Fischer says that "[t]he American system yields large payments to a few accident claimants." Fischer, above n __ at 472. While some individual results may seem arbitrary, *in the aggregate* the tort system does not wildly over-compensate claimants. For a good recent summary of the empirical literature, see Brian H. Bornstein and Timothy R. Robicheaux, "Crisis, What Crisis? Perception and Reality in Civil Justice," in B. H. Bornstein *et al.* (eds.), *Civil Juries and Civil Justice*. (Springer, New York 2008) at 1–19. Unfortunately Fischer tries to bolster his argument by citing the caricatured description of the McDonald's coffee case which has been recycled endlessly in media accounts: "Another case in the United States was brought by tort lawyers for a woman who spilled a cup of hot coffee on herself in a fast-food restaurant." Fischer, above n __ at 472. Left out of his summary is the fact that the plaintiff, a 79 year-old woman, suffered third degree burns over six percent of her body, including her inner thighs and genital area, was hospitalized for eight days, underwent skin-grafting surgery, and incurred medical expenses of approximately $11,000. Her theory of liability against McDonald's was not "I didn't know coffee was hot," as is frequently stated, but that McDonald's, for economic reasons, had a practice of storing and serving coffee at temperatures significantly above those which are necessary for good-tasting coffee and, more to the point, are much higher than those familiar to the ordinary person who prepared and drinks coffee. Coffee at the temperature served by McDonald's (between 180 and 190 degrees Fahrenheit) will cause full-thickness skin burns in two to seven seconds. The standard warning printed on coffee cups indicating that "contents are hot" does not adequately warn of the heightened risks of coffee served at these temperatures. Nearly 700 people had filed lawsuits against McDonald's, including many claimants who also suffered third-degree burns, but the company simply settled the cases and refused to change the temperature at which it served its coffee. The jury in the New Mexico case evidently believed that a punitive damages award of $2.5 million was necessary to force McDonald's to change its policies, but the trial judge reduced the award to $680,000. See Marc Galanter, "An Oil Strike in Hell: Contemporary Legends About the Civil Justice System" (1998) 40 *Arizona L. Rev.* 717. If Fischer believes that it is unfair or unjust for the plaintiff to be compensated in these circumstances, then he owes readers an argument to that effect, with full consideration of the facts of the case. As a teacher of first-year torts, I find it incredibly frustrating to deal with urban legends about the civil justice system which are uncritically perpetuated, often by people and institutions with an ax to grind against corporate responsibility. A serious work of academic history ought to do better than to rely on inaccurate and misleading anecdotes.

design.[94] Instead, a comprehensive no-fault compensation regime, administered by a government bureaucracy that would send conservatives in the United States into apoplexy, provides payments for victims of accidental injuries, including those arising out of medical malpractice and occupational exposure to toxic substances. These two legal systems are so far apart that one wonders whether they are even pursuing the same goal.

The fact that two otherwise similar countries handle the problem of accident compensation in such radically different ways provides a nice illustration of Fischer's thesis that the systems are founded in very different political ideals. If either the ACC or the common law were manifestly better than the other in some way, it could easily be adopted elsewhere. This is particularly true in the United States with its federal structure and traditionally state-based tort system. In principle nothing would prevent a state from moving wholesale to an ACC-style no-fault compensation system. That there is no political imperative whatsoever in the United States to adopt comprehensive no-fault, despite the vocal criticism of the tort system from many quarters, suggests that there is something stubbornly attractive about the common law. Fischer's conjecture is that it is more responsive to the value of freedom, while the New Zealand ACC does better on the dimension of fairness. While I am a bit skeptical that a preference for fairness over freedom is the best explanation for the establishment and continued vitality of the ACC, it must be admitted that a preference for pragmatism does not underlie the abolition of the common law tort system. To the extent a kind of inherent Kiwi pragmatism is the best explanation of New Zealand constitutional culture, particular with respect to the Treaty of Waitangi,[95] a very different account must be proffered of the wholesale replacement of a more-or-less functional system of accident compensation with a completely different one.

Sir Geoffrey Palmer, who as a legal academic drafted the White Paper on reform of the common law system of accident compensation and subsequently served as Prime Minister, identifies differences in the political culture of the United States and New Zealand that help explain why the ACC scheme was adopted:

> [I]t is important to appreciate some of the differences in political culture between the United States and New Zealand. Historically, there has not been any assumption or evidence that New Zealanders are opposed to state action. . . . When the Woodhouse report came out in New Zealand, the Labour Party greeted it with quiet enthusiasm and said that it was democratic socialism.

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[94] The orthodox view of tort liability, strongly influenced by law and economics scholars such as Guido Calabresi and Richard Posner, is that actors and industries who are able to externalize the costs of accidents will be under-incentivised to take precautions to prevent injuries. Therefore potential tort liability serves to deter risky behavior. See Craig Brown, "Deterrence in Fault and No-Fault: The New Zealand Experience" (1985) 73 *California L. Rev.* 976.

[95] See Palmer, above n __ at 278-90.

> But the scheme was actually implemented by a conservative National government, which was dominated by farmers.[96]

Elsewhere Palmer cites the ideal of substantive fairness, as described by Fischer: "There is a strong sense of group identity among the inhabitants of isolated New Zealand – a feeling that the welfare of one's neighbor is as important to one's own peace of mind as one's own good."[97] There must have been a sense that the tort system was leading to unfair results, consistently enough, that its abolition and replacement was required. In fact, although Palmer and others have described dysfunctions within the common law tort system, the shift from tort liability to ACC cover was not intended only to correct flaws in the existing system, but to reorient it entirely. Where the tort system aimed to do justice between an injured party and the alleged injurer, the ACC was designed to provide income-replacement assistance for injured persons, regardless of whether another was blameworthy.

Americans critical of the ACC have not always noticed that Palmer's case for abolishing the common law right to sue for injuries in New Zealand makes critical assumptions about the function, role, and legal context of the respective systems. Palmer has repeatedly stated that "the provision of appropriate levels of income maintenance for the incapacitated is a core responsibility of the state of New Zealand."[98] Imagine that one were writing on a blank slate, as it were, and creating state policy with respect to accidental injuries – call it the Accident Problem. The Accident Problem could be seen as bearing a relationship with other aspects of governance, including: public health; environmental policy; workplace safety; social welfare, including superannuation, unemployment compensation, food and housing assistance, and the public provision of health care; and the regulation of product design and marketing, including medical devices and pharmaceuticals. In terms of legal categories, a solution to the Accident Problem might be found in contract law (governing the voluntary assumption of rights and duties), criminal law, public law (the administrative regulation of product and workplace safety, for example), environmental law, or the regulation of the insurance industry. Whatever the legal system did about the Accident Problem could also be understood in functional terms, as contributing to public safety by deterring careless behavior, distributing the costs of accidents (as insurance does), rectifying wrongs between two parties (corrective justice), providing a civilized alternative to self-help (civil recourse), publicly reaffirming the boundary between acceptable and unacceptable behavior (expressive theories of tort), compensating the victims of accidental injuries, promoting the efficient allocation of resources by creating the optimal mix of incentives, and respecting the autonomy of individuals and their capacity to make informed decisions about the rights and obligations they should have. Quite simply,

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[96] Sir Geoffrey Palmer, "Commentary," in Richard A. Epstein, *Accident Compensation: The Faulty Basis of No-fault and State Provision* (New Zealand Business Roundtable, Wellington, 1996) at 21.

[97] Geoffrey Palmer, *Compensation for Incapacity: A Study of Law and Social Change in New Zealand and Australia* (Oxford University Press, Wellington, 1979) at 64.

[98] Sir Geoffrey Palmer, "New Zealand's Accident Compensation Scheme: Twenty Years On" (1994) 44 *U. Toronto L.J.* 223.

the United States and New Zealand have taken categorically different approaches to the Accident Problem, with the U.S. seeing it as having something to do with deterrence, corrective justice, and efficiency, and New Zealand dealing with it as an aspect of social welfare.

Parliament passed legislation enabling the ACC scheme after consideration of a report of a royal commission, commonly known as the Woodhouse Report after the chairman Hon. Owen Woodhouse.[99] The commission recommended that any system of accident compensation be designed to reflect five foundational principles: (1) community responsibility; (2) comprehensive entitlement; (3) complete rehabilitation; (4) real compensation; and (5) administrative efficiency.[100] These principles describe the goals, functions, and form of a public-law social-welfare scheme, not a system designed to deter wrongdoing or promote the efficient allocation of resources to productive enterprises. "Few would attempt to argue that injured workers should be treated by society in different ways depending on the cause of injury," the Woodhouse Report confidently states.[101] In the U.S., at least, *many* would argue that injured people should be treated differently, depending on the cause of injury. Those who were injured by the wrongful act of another ought to have a right to recover damages from the wrongdoer; those who were injured because of their own carelessness, or by the act of a third party, ought not to be able to recover from their employer, or anyone who happens to be conveniently made a defendant in a lawsuit. The Woodhouse Commission transformed the Accident Problem from an issue arising within a bilateral relationship between injured party and injurer (with the added complication of first-party medical expense and third-party liability insurance) into a much broader social problem.[102]

Is the difference between the approaches of the U.S. and New Zealand to the Accident Problem really an instance of the fairness/freedom distinction? My answer would be, yes and no. To pick up on the themes of this paper, two observations can be made. First, one can supply a "fairness" account in support of either the ACC or the common law tort system. The American system incorporates many elements of the ACC, such as the socialization of risk and loss-spreading. Protecting individual autonomy (particularly by giving individuals a legal entitlement to bodily integrity) is certainly a goal of the tort system, but so is ensuring that injured people are compensated. Nevertheless, while it seems fair to assert that injured people should be compensated, one must also ask fairness-related questions about the source of that compensation, and how the costs of providing compensation should be allocated, e.g. among careful and careless drivers, employers with good safety records and those with shoddy ones, employers and

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[99] See *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (Wellington: New Zealand Government 1967) ["Woodhouse Report"]. An electronic version of the Woodhouse Report is available at http://www.library.auckland.ac.nz/data/woodhouse/.

[100] Woodhouse Report ¶ 5.

[101] Woodhouse Report ¶ 6.

[102] See Richard A. Epstein, *Accident Compensation: The Faulty Basis of No-Fault and State Provision* (New Zealand Business Roundtable, Wellington, 1996) at 4.

employees, and so on. Second, the continuing appeal of the American tort system, notwithstanding all of the complaints about its capriciousness, cost, and complexity, has to be understood in terms of the capacity of tort liability to serve as the sole effective constraint on some forms of power. Despite the constant bellyaching by the business community about the tort system, there is no political will to replace it with a no-fault system. This is surprising given the federal structure of the United States; surely at least one state would have a legislature and governor who are sufficiently responsive to lobbying by business interests to abolish the tort system in that state. Although Republican politicians like to blame campaign contributions by "trial lawyers," by which they mean only *plaintiffs'* trial lawyers, money alone does not explain the persistence of the tort system.[103] I will argue that a better explanation is the well deserved mistrust that people feel toward both large corporations and the government regulators who often fail to do enough to protect consumer safety.

a. The Ambiguity of Fairness in Tort and Accident Compensation.

Fairness is a foundational value in the English common law of torts, upon which the American tort system is grounded. Consider George Fletcher's classic article, *Fairness and Utility in Tort Theory*.[104] Fletcher was concerned to argue for a corrective justice foundation for tort rights and to explain the preference for either negligence or strict liability in terms of which principle of liability is most responsive to the value of fairness. For Fletcher, the crucial contrast is between instrumental and non-instrumental conceptions of fairness. His objection is to theories of tort liability that seek to rationalize doctrine with reference to essential social ends, such as loss-spreading, compensation for injuries, deterrence, and efficiency. His distinction, between instrumental and non-instrumental, can be expressed as whether the tort system is essentially a means to further some social end, or whether it is best understood as a means of doing justice between the

[103] This is concededly not a rigorous empirical analysis, but some useful data are available from the website OpenSecrets.org, which tracks campaign contributions, lobbying, and other political expenditures, and is respected for its impartiality. In 2011 the main plaintiffs' trial lawyers' lobbying group, the American Association for Justice (formerly the Association of Trial Lawyers of America), spent $3.34 million on lobbying. In the same year, the U.S. Chamber of Commerce spent $5.96 million on tort reform alone. Other lobbying groups with a substantial interest in tort reform include the National Federation of Independent Business ($2.92 million total lobbying expenses), the American Medical Association ($21.5 million total), and the American Hospital Association ($20.48 million total). Except in the case of the U.S. Chamber, which breaks out separately its tort-reform efforts, it is difficult to determine how much of the resources of a group like the AMA is dedicated to tort-reform lobbying. Moreover, some of these lobbying efforts may be relatively issue-specific, such as seeking caps on non-economic damages in medical malpractice cases. There are also other avenues of influence to consider, such as campaign contributions. In the 2012 congressional election cycle, the plaintiffs' trial lawyers organization contributed $1.34 million to Democratic Party candidates and only $55,000 to Republicans. Then there is the matter of political communications and campaign advertisements. In the 2010 election cycle, the U.S. Chamber of Commerce spent about $33 million on "electioneering communications," overwhelmingly supporting Republican candidates. While it is difficult to say anything much more precise, I do think it is reasonable to conclude that plaintiffs' personal injury lawyers are not drastically outspending business groups in the political arena.

[104] George P. Fletcher, "Fairness and Utility in Tort Theory" (1972) 85 *Harvard L. Rev.* 537.

parties.[105] Fletcher believes that tort liability is legitimate when A exposes B to a level of risk that is greater than the risk to which B exposes A; other risks are simply that which are inherent in the background of our social life, and must be borne by each of us individually.[106] This paradigm of reciprocity is what Fletcher means by fairness, but notice that it is contrasted with utility, that is, the social ends to which the torts system might be put such as loss-spreading, deterrence, and compensation of injured persons. Fairness, for Fletcher, is essentially an individual-centered ideal. His article is generally cited as representing a Kantian foundation of tort law,[107] which emphasizes that individual rights cannot be violated to serve social ends. In other words, what Fletcher explicitly refers to as a fairness-based account of tort law is what Fischer would presumably refer to as expressing an American preference for freedom.

Many of the criticisms of the ACC have invoked the idea of fairness, including a government paper published in 1991 calling for reform. The paper was entitled, *Accident Compensation: A Fairer Scheme*.[108] This title seems to support Fischer's thesis, because it invokes fairness as a value which all New Zealanders would presumably endorse. Many of the criticisms and proposals in the paper would be quite familiar and acceptable to Americans, including members of the business community who tend to oppose the existing tort system and would presumably also oppose anything that could be labeled as the "socialization" of accident compensation. For example, the paper notes that the ACC system has been faulted for moving away from the principle of individual responsibility.[109] If there is any staple of conservative American, presumably freedom-based criticism of the tort system, it is that it undermines individual responsibility.[110] This looks more like a fairness argument, the gist of which is that people who are injured through their own carelessness get more than they deserve if they recover damages from a defendant with deep pockets. The *Fairer Scheme* proposals also included a recommendation that employer levies to fund the system be adjusted to reflect differential levels of risk, along the lines of experience-rating used in workers' compensation regimes. The idea is that it would be unfair for safe employers to subsidize the compensation paid to employees at riskier firms. The proposals, from the conservative end of the political spectrum, were couched in the language of fairness, but they really trade on notions of corrective justice – i.e. the unfairness of making safe employers pay for the injuries caused either by unsafe employers or by careless employees.[111] The emphasis on corrective justice was a significant

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[105] Fletcher, above n __ 538, 540.
[106] Fletcher, above n __ 542-43.
[107] See, e.g., Gregory C. Keating, "Rawlsian Fairness and Regime Choice in the Law of Accidents" (2004) 72 *Fordham L. Rev.* 1857 (defending a different fairness-based approach to tort liability); Ernest J. Weinrib, "Toward a Moral Theory of Negligence Law" (1983) 2 *Law & Philosophy* 37.
[108] W.F. Birch, *Accident Compensation: A Fairer Scheme* (New Zealand Government, Wellington, 1991).
[109] Birch, above n __ at 8.
[110] See, e.g., Walter K. Olson, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit* (Penguin, New York, 1991).
[111] See also the use of the term fairness in one of the many reports on the ACC issued by the New Zealand Business Roundtable. *Accident Compensation: Options for Reform* (New Zealand Business Roundtable,

departure from the Woodhouse principle of community responsibility, which itself was defended on grounds of fairness.

Some of the confusion surrounding the use of the word fairness may be attributable to the influence of John Rawls, particularly in *A Theory of Justice*,[112] in academic thought outside the domain of political philosophy. Rawls, of course, defended a conception of justice as fairness, and did so on self-consciously Kantian foundations. Rawls asked what individuals would agree to in a hypothetical social contracting situation in which they are behind a veil of ignorance, not knowing various personal attributes that in real societies may influence the distribution of goods, including their race, sex, wealth, social class, disability status, level of education, and so on. (Goods, for Rawls, include liberties and opportunities.) Basic rights and freedoms should be available equally to all; other goods should be distributed in such a way that they offer the greatest possible advantage to the least well-off members of society – this is the difference principle.[113] This is obviously an egalitarian conclusion, but it is generated from individualistic premises. The parties in the original position are mutually disinterested, have no disposition to benefit others, and are motivated only by principles of reasonableness.[114] The difference principle is entailed by rationality alone. Risk-averse individuals who do not know where they are positioned in the social pecking order will reasonably choose a hedging strategy that ensures that if they ended up near the bottom, they will be as well off as possible.[115] Rawls wants to demonstrate, using the thought experiment of the original position and the veil of ignorance, that free and equal contracting parties would agree to a basic structure of the governing institutions of their society that promotes the well-being of the least advantaged. It is important to understand, however, that Rawls insists upon the priority of the right to the good, and is not a

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Wellington, 1999) § 2.3, pp. 6-7. The report states that "many may regard it as unfair" if someone injured in the commission of a crime is entitled to the same compensation as the victim, those who take precautions and act safely subsidize the costs of accidents caused by those who take unreasonable risks, "those who avoid hardship by working hard and buying insurance subsidize those who choose otherwise," and there is no right to sue for negligence.

[112] John Rawls, *A Theory of Justice* (Belknap Press, Cambridge (Mass.), 1971). Fischer has a curious Appendix on the use of the term fairness in other disciplines, including a brief note on Rawls. See Fischer, above n __ at 497-99. He acknowledges that Americans and New Zealanders understand fairness as a complex, contested concept, and also noted that in his later work Rawls made significant concessions to value pluralism. See John Rawls, *Political Liberalism* (Columbia University Press, New York, 1993). Fischer approves of the move in Rawls' scholarship from a unitary concept of justice as fairness to a political theory that relies on a much thinner account of the legitimacy of political institutions, seeking only an overlapping consensus of reasonable comprehensive doctrines. Fischer's embrace of the later Rawls threatens to undercut his neat dichotomy between fairness and freedom which structures the book. Fischer is a historian, not a political philosopher, so it is probably unfair to expect him to be as precise as a philosopher (or a lawyer) in his use of concepts, which are intended only to pick out broader categories that have explanatory significance in the comparison of two political cultures. At some point, though, categories that are too fuzzy lose their explanatory power.

[113] Rawls, above n __ § 13.

[114] Rawls, above n __ at 145, 148-49.

[115] Rawls, above n __ at 154-55.

utilitarian.[116] Basic liberties are lexically prior to distribution satisfying the difference principles; individual rights cannot be sacrificed for the sake of social welfare. His hypothetical choice procedure is highly respectful of individual freedom, but it yields a principle for the distribution of resources that is egalitarian.

The Rawlsian structure purports to show that rational individuals who autonomously choose principles for the basic structure of the government institutions of society will opt for the difference principle. What is the implication of this conception of ex ante fairness for the normative analysis of the tort system vs. the ACC? The tradeoff between the ACC and the tort system might be described as follows: "[W]orkers no longer had the right to sue, but they would enjoy full coverage for work and non-work accidents; employers would be spared the costs of litigation and high administration costs, but the levies they paid were also to cover the non-work accidents of earners."[117] The answer would surely have to do with the risk preferences of people in the original position. To put it another way, are choosers concerned only with the worst-case outcome, or do they also have preferences regarding best-case outcomes? Some people may wish to gamble a bit and opt for a system in which they have a chance at being in the most advantaged group. Experimental evidence appears to show that people in a Rawlsian original position do not, in fact, select the difference principle, and have a preference instead for a system in which the least advantaged group could do better, but the most advantaged group is significantly better off.[118]

Apart from having to account for varying risk preferences in the original position, a Rawlsian analysis of ex ante fairness with respect to the Accident Problem would have to consider the full range of costs and benefits associated with the competing rules, and to do so with respect to the various contexts in which the Accident Problem might arise: e.g. automobile accidents, medical treatment, defective products, workplace injuries, exposures to toxic substances; and the different means available of providing compensation and deterring carelessness, including first-party and third-party insurance, administrative regulation, and market mechanisms such as reputational incentives and information-sharing. One might conclude that "an average consumer of automobiles might well prefer a system of first-person automobile insurance, and either first-person or socialized health insurance, and then simply no coverage for those perhaps quite significant costs that fall in- between-no coverage at all, but cheaper automobiles and cheaper automobile insurance."[119] That is essentially the ACC system. On the other hand, one may worry about the incentive effects of a pure no-fault regime like the ACC and

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[116] Rawls, above n __ § 6.
[117] Susan St. John, "Accident Compensation in New Zealand: A Fairer Scheme?", in P. Dalziel, et al., *Redesigning the Welfare State in New Zealand* (Oxford University Press, Wellington, 1999) at 158.
[118] See, e.g., Norman Frohlich, et al., "Choices of Principles of Distributive Justice in Experimental Groups" (1987) 31 *American Journal of Political Science* 606.
[119] Benjamin C. Zipursky, "Rawls in Tort Theory: Themes and Counter-Themes, (2004) 73 *Fordham L. Rev.* 1923 at 1932.

may opt for a hybrid approach that considers the conduct of the party causing the injury in determining how the cost of the accident would be allocated.[120]

Even with the greater conceptual clarity provided by Rawls, these issues remain difficult, and not readily susceptible to explanation in terms of a preference for the values of either fairness or freedom. The Rawlsian structure builds in concern for both freedom, in the form of the lexical priority of basic liberties, and fairness, in the form of consideration of the distribution of resources from the standpoint of the original position. Any sophisticated approach to something like the Accident Problem must similarly respect both fairness and freedom.

b. Trust and Mistrust.

The law of negligence and product liability is comprised to a significant extent of cases litigated in response to failures of other types of legal regulation. To cite only one example, manufacturers of asbestos-containing products knew for many years of the dangers posed by asbestos to workers exposed to airborne fibers, yet they did nothing. One of the largest manufacturers of asbestos products, the Johns-Manville Corporation, had a practice of withholding chest x-ray reports from its own employees, reasoning that as long as they did not know they were suffering from serious lung diseases, they would continue to work for the company and not sue for damages for their injuries.[121] The president and general counsel of Johns-Manville reportedly called other companies fools for disclosing to their employees that they had asbestos-related injuries, noting that the company saved a lot of money if they simply employed workers until they dropped dead.[122] The company fought all attempts to establish legal responsibility for causing employees' injuries, and had a practice of settling cases only with the use of strict confidentiality agreements that prevented plaintiffs from sharing information about the dangers of asbestos with other workers. Government regulators and large insurance companies were also aware of the risks of asbestos but did nothing to protect the health of employees exposed to these products.

What finally made a difference to the health and safety of thousands of employees was the tort system and the plaintiffs' lawyers who doggedly pursued the companies for damages. A similar story can be told about the tobacco industry, which engaged in a massive, decades-long campaign of secrecy and disinformation. Indeed, torts casebooks include a long list of instances of regulatory failure combined with wrongdoing by powerful corporations: Agent Orange, DES, thalidomide, the Chevrolet Corvair and the Ford Pinto, the Dalkon Shield intrauterine device, the diet drug fen-phen, the painkiller Vioxx, breast implants,

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[120] That is Richard Epstein's proposal. See Epstein, above n __ at 7.

[121] See, e.g., Paul Brodeur, *Outrageous Misconduct: The Asbestos Industry on Trial* (Pantheon Books, New York, 1985).

[122] Testimony of Charles H. Roemer, Deposition taken April 25, 1984, Johns-Manville Corp. v. United States of America, U.S. Claims Court, Civ. No. 465-83C, cited in Barry I. Castleman: *Asbestos: Medical and Legal Aspects* (Aspen Publishers, 5th ed., 2005).

artificial hips – these are on the B-list of American consumer protection fiascoes, behind asbestos and cigarettes.

As far as I am aware, New Zealand has not experienced a comparable history of corporate misconduct threatening public health and safety. Air New Zealand may have engaged in an "orchestrated litany of lies" in response to the inquiry into the Erebus crash, but the accident itself was the result of a terrible series of miscommunications, not an active policy of covering up harm.[123] I have heard it suggested that, as a relatively small country, New Zealand has the luxury of free-riding on the product safety regimes of the nations in which imported goods are manufactured. There may be an element of truth to this, but it seems more plausible to believe that fiascoes like DES and the Ford Pinto are less likely to occur in a system in which there is a relatively high level of trust among industry actors and government regulators. In the discussion of the Treaty of Waitangi in the previous section, I suggested that constitutionalism in New Zealand may be analogized more closely to relational contracting than to a one-off bargain whose terms remain static. A similar dynamic may play a role in the regulation of product safety. In a smaller, more centralized society, manufacturers may see themselves as embedded in an ongoing relationship with consumers and thus less prone to under-protect their interests in safety.

4. Conclusion.

Fischer's book may be a useful corrective to the idiotic insistence on "American exceptionalism" that is such a lamentable feature of political discourse in the United States,[124] for he attempts to show how a similar society may be committed to the same set of political ideals, but nevertheless realize them in different ways. If it turns out that these different conceptions of ideals such as democracy and the rule of law lead to better results, this is something of which Americans should take notice. While I have said a great many things about the difference between American political culture and that of New Zealand, the best way to capture the distinction may be, ironically, from a political philosopher arguing that doing justice in New Zealand may be to stop worrying so much about justice and "continue to muddle and fudge along" – albeit in a principled way.[125] One of the admirable features of American "rights talk" is the hope that justice may be done. We love to quote Martin Luther King Jr.'s maxim that "the arc of the moral universe

[123] See the book by the High Court judge who presided over the commission of inquiry, Peter Mahon, *Verdict on Erebus* (Collins 1984). For a recent account, sympathetic to Mahon's conclusions, see Paul Holmes, *Daughters of Erebus* (HarperCollins 2011).

[124] President Obama is incessantly attacked by conservative commentators for not believing in American exceptionalism, so in response he seems to mention it as frequently as possible. For citations to criticism, see Andrew Sullivan, "The Big Lie," *The Daily Dish*, http://www.theatlantic.com/daily-dish/archive/2010/11/the-big-lie/180117/; for a recent statement by Obama seeking to rebut the criticism, see David Nakamura, "Obama Touts American Exceptionalism, End of Wars in Air Force Graduation Speech," *Washington Post* (24 May 2012). One refreshing feature of New Zealand politics is the absence of a perceived need for chest-thumping patriotism.

[125] Sharp, above n __ at 26.

is long, but it bends toward justice." Ironically, however, aiming at ideal notions of justice may cause Americans to overlook the importance of process and its associated virtues such as respectful engagement, flexibility, compromise, and tolerance for ambiguity. New Zealand law and history reflect a greater appreciation for these virtues, and this is something from which American lawyers could learn a great deal.