

# DOING JUSTICE IN PROPERTY 'TAKINGS' CASES: FROM COAL TO SAND

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In the year 2000, American lawyer Milner Ball remarked that the word 'justice' resides in the law reports almost exclusively in the title of judges.[1] Ball suggested that there might well be a widespread feeling of discomfort among lawyers and judges with the word 'justice'. A year earlier, Ball's colleague Robin West outlined various institutions which inhibit the talk of 'justice' among lawyers. In one passage she mentioned the significance of the influential American judge, Oliver Wendell Holmes J:

Since Holmes' dismissive allegation that a lawyer who resorts to arguments based on 'justice' is merely revealing either that he has no credible legal argument, or worse his legal ignorance, we have all been seemingly loathe to address the topic. Holmes chided us out of it. As a consequence, as a profession, lawyers not only lack a coherent or credible idea of what legal justice might require of advocates, of judges, and of the law itself, we do not even have a family of competing ideas.[2]

Inviting her readers to resist the authority of Holmes, West calls to the legal profession to take 'justice' seriously. This article, centering on the topic of property 'takings', is a tentative response to West's call. By way of a preparatory signpost, the article begins with some words on property talk in general. In property talk, like justice talk, we will do well to avoid reification. In the process of offering the same advice 70 years ago, Felix Cohen coined the word 'thingification'. [3] Cohen urged lawyers to stop talking about property as a physically complete, independent substance - a thing. For him, property is a fluid, evolving institution. Echoing this claim, Carol Rose, in her 1994 book *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership*, offered these reflections:

[S]eeing property is an act of the imagination - and seeing property also reflects some of the cultural limitations on imagination. Different peoples see the signals of the surroundings through very different imaginative lenses, and they put those signals

together in different property stories; they persuade themselves that the things they see can yield the security of entitlement, whatever that may entail, and then they act on the visible signals as if the signified entitlements were permanent, solid, objective. And to some degree they are - so long as everyone, or most everyone, is persuaded.[4]

If one is persuaded, as the writer is, that seeing property, and thus the taking of property, is an act of the imagination, then situations in which different people and different peoples see property differently present an opportunity to jointly explore, through conversation, imaginative lenses. To explore these lenses is to explore the culture(s) that shape our minds.

The writer suggests that such an exploration is the material of the activity of self-understanding and mutual understanding. This article will directly associate this activity with the topic of justice.

The first section of this article introduces the topic of property takings, along with American legal theorist cum conversationalist John R Commons. My attraction to Commons is the way he adopted what may be called the 'Socratic method' in education. In this he sought to offer not a 'true understanding' of the law but, rather, insights into the generative process that construct a particular reading of a case or series of cases. (In this process, the student appreciates that her or his own answer is a creation and is not an answer that can be matched against some external standard and graded as true or false.)[5] The second section of this article offers a discussion of the landmark United States Supreme Court takings case *Pennsylvania Coal Co v Mahon*,[6] in which Holmes J wrote the opinion for the Court, and in which Brandies J wrote a dissenting opinion. The juxtaposition of the opinions offers material for illuminating the kind of conversation Commons invited. In the third section this article turns to New Zealand, revisiting some colonial property talk. Finally this article turns to the recent dispute about the 'ownership' of the foreshore, giving particular attention to the possibilities of what the Waitangi Tribunal called the 'longer conversation'.

## I. TAKINGS: AN INHERITANCE

The Takings Clause of the Fifth Amendment to the American Constitution states that 'nor shall private property be taken for public use, without just compensation.' Similar clauses reside in the state constitutions. Takings talk commonly involves differences over the terms 'private property', 'taken', 'public use', and 'just compensation'. Takings talk also commonly involves the term 'police power': if the judiciary sustains an injurious statute without requiring compensation, then the 'police power' to regulate for some sufficient public purpose is a reference point. When does a government regulation amount to a 'taking' of 'property' requiring compensation to the party regulated? And when does a regulation amount to a legitimate exercise of the police power, requiring no compensation to the party regulated? These two

questions may be said to constitute the takings issue.[7] The 'general rule', said Holmes J in *Pennsylvania Coal Co v Mahon*, 'is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'[8] This general rule raises the question: What is 'too far'? This directly concerns the topic of justice. We can expect reasonable people to differ here. John R Commons, as suggested in his 1924 book *Legal Foundation of Capitalism*, was much of this mind.[9] Drawing on Wesley Hohfeld's Yale Law Journal paper of 1917 on fundamental legal relationships, Commons explicitly described rights and duties as a pattern of mutually defining relations. He urged the view that property rights are sets of relative capacities and constraints among people arising out of their relations to scarce resources that they value in some way or another. These capacities and constraints, in his view, are not and cannot be precisely defined at any given moment: the law may be thought of as a fluid set of 'working rules', loose expectations concerning what governmental officials will do if there is a conflict.[10] When a conflict does take place over relative rights, a court decides what the working rule is, a decision that may become a precedent and thereby re-shape expectations about what judicial officials will do if there is a similar conflict. A working rule 'lays down four [ 'auxiliary' ] verbs for the guidance and restraint of individuals in their transactions.'[11] These concern what parties must do, may do, can do, and cannot do. Connecting these up with inherited legal terms: he distinguished four capacities, namely right, liberty, power, immunity, and four constraints, namely duty, exposure, liability and disability. These he arranged into two sets, which together form what he called a 'compass', one he drew up as follows:[12]

<i>Jural Correlatives</i>			
<b>Right</b>	Liberty	Power	Immunity
	Duty	Liability	Disability
<i>Jural Limits</i>			
<b>Right</b>	Liberty	Power	Immunity
<b>Exposure</b>	Duty	Liability	Disability

The assignment of certain capacities in one party creates 'correlative' constraints on another party. In brief, a right is a legally endorsed demand of A against B; viewed from B's angle, this right is a duty to A. (The correlative of right is duty.) Such a right in A is marked off from A's legal liberty to do something without legally endorsed objection by B; from the angle of the possible objector, B, it is an exposure. (The correlative of liberty is exposure.) When A can by her action change B's legal relations (his rights, duties, and so on) she has the legal power to do so; B is then under a liability. (The correlative of power is liability.) When A's legal relations cannot be changed by B she has an immunity, which is a disability for B. (The correlative of immunity is disability.) Rights, duties, liberties, exposures, powers, liabilities, immunities, and disabilities are subject to limits. The limit of a right defines where a party stands exposed. The limit of a duty defines where a party is at liberty to act. The limit of power is disability, the condition wherein one lacks the power to determine another's legal relations. The limit of liability is immunity, the exemption of power.

For Commons, who drew from Holmes J's terminology, key issues in legal disputes typically concern matters of 'degree',[13] and these in turn concern what Commons called

'reasonableness'.[14] The 'compass' in itself does not guide one in reaching actual solutions but, rather, offers assistance for thinking about decisions to be made in specific situations. The choice involves determining relative capacities and constraints. Commons's terminology encourages the habitual acknowledgement of limits on rights. As such it may serve to check absolutist rights talk, a vital capacity in itself for those who seek to promote conversation in situations of difference over rights. It seems to me that justice, as John Dewey said of democracy, 'begins in conversation'.[15]

Commons invited conversation through his rights talk. He thought that his 'compass' imposed (rather than discovered) a sense of order on a kaleidoscopic world. Any such tool, he suggested, illuminates one or several facets of the world, but ignores others. A sense of the limits of each tool was required. After presenting his compass Commons directed attention to its limits. The compass is, he said, 'simply a scheme of words and definitions, a set of mere symbols or "universals" tied together logically, it is believed, yet serving merely as a [means] by which we may hope to navigate the actual flux of behaviour in the world of reality'.[16] As a human artifact the compass 'is open to the criticism of Justice Holmes as to the "illusion of certainty"', an illusion that 'gives rise to metaphysical "entities" and "substances" conceived as existing apart from and independent of the behaviour of officials and citizens'.[17] Rights thus may be thought of as ephemeral artifacts, along with the language we use to talk about them. Rights lack a certain substance, but they do have a certain reality about them:

For as an actual, living reality, the right exists only in the expected behaviour of officials and there is where the prudent lobbyist, businessman or workingman locates it and finds its real substance. Idealism gives to these airy nothings a local habitation and a name, but sagacity inquires what will the judge on the bench, the jury in the box, the executive on the highway, do?[18]

Seeing 'rights', for Commons, is an imaginative act. Different people will see rights differently. An engagement with these differences will enable an exploration of factors and forces that shape the imagination, an exploration that is an imaginative activity.

Commons stressed that we imaginatively learn words in certain contexts and that we project them into new contexts. With reference to the Fifth and Fourteenth Amendments, Commons described the law as a rhetorical process, a way in which an inherited language is used to talk to one another and is transformed in the process:

The hearing and decision are... listening to pleadings and arguments and giving meaning to words ... For the court proceeds ... by the judicial process of weighing practices, customs, precedents, statutes, and constitutions in the light of changing conditions ... This process has required changing the definitions of all the words of the Fifth and

Fourteenth Amendments to fit the economic and ethical changes of the past sixty years. The process is still going on.[19]

For this flow philosopher language is an organic artifact; it is a product and a producer of social activities. Law, for Commons, is an arena in which meaning, an experiential process, is negotiated and institutionalised. We do not start with a blank sheet of paper, ready to construct abstract definitions:

[W]hen conflicts arise ... the court itself must change the meanings of the terms as found in precedents, statutes, and constitutions in order to arrive at their application to the new disputes arising out of the change in conditions and assumptions. The court does so, not by trying to formulate academic or scientific definitions that shall be good for all time, but by the experimental process of 'exclusion and inclusion', which is the universal process of the human mind by which language itself changes. By 'exclusion' a former meaning of these terms is deemed not to be applicable to the present dispute. By 'inclusion' the issue within a present dispute is brought within a former meaning which had not hitherto been deemed to include it. Thus constitutions, statutes, and even precedents change in process of time through the gradual but universal process of human speech which excludes old meanings and includes new meanings in order to fit the language to the changing practices and customs which require language to reach agreements.[20]

Commons steered away from the image of law as a system of rules, an impersonal entity with the name the Rule of Law. Law, for him, consists not only of the rules of law but also a language by which and in which such rules are made, applied, repealed, and denied. By a language he meant not a system of names but habits of mind and expectations - what may be called a culture.[21] For Commons, the takings issue, like all legal issues, could not be separated from the flux of culture.

## II. THE PENNSYLVANIA COAL CASE

Pennsylvania Coal Co v Mahon[22] concerns the constitutionality of the Kohler Act 1921, a statute responding to a problem of soil subsidence in a mining region. The statute prohibited the mining of coal that would cause subsidence of adjacent surface uses, including streets, railroad lines, churches, hospitals, schools, and dwellings. A dwelling was at issue in Pennsylvania Coal. Pennsylvania Coal had notified Henry Mahon that the company's mining operations beneath his dwelling would soon reach a point that would cause subsidence to the surface. Mahon sought to prevent the company from removing any coal that would cause subsidence. Mahon accepted that he owned only 'the surface or right of soil', and that the Coal Company had reserved the right to remove the coal without any liability to the owner of the

surface estate. Nonetheless, Mahon asserted that the Kohler Act entitled him to an injunction. Mining practices were at the time in a state of change, and this may well have contributed to a significant change in the meaning of the deed (as to the level of the expected consequences of mining), which was signed by Mrs Mahon's father in 1878. In the 1870s the ordinary practice was to leave supporting pillars intact, in large part to keep the mines from caving in on the miners. Thus the parties to the deed may well have expected subsidence only when accidental cave-ins occurred. It was only later, as the coal from the initial mining was depleted, that the company began mining the support pillars (or sold the rights to others who would take the risk of collapse). As a result of this 'second mining' the first major surface ruptures occurred shortly after the turn of the century.[23]

In the language of the 'compass', the issue was whether the Pennsylvania legislature should have the constitutional power to place restraints on the liberty of Pennsylvania Coal to mine coal, which would thereby reduce or eliminate Mahon's corresponding exposure to subsidence. If without the constitutional power, the legislature may be said to be under a disability in that particular exercise of its will, and Pennsylvania Coal enjoyed therefore immunity from damages if it should mine and cause subsidence. In terms of the commonly used categories of 'private' and 'public', the private purposes of Pennsylvania Coal would thereby become public purposes to the extent that the court sanctioned the mining. The private purposes of Pennsylvania Coal would be contrary to public purposes to the extent that the court holds it liable to the will of others. For Commons, who resisted the claim of a sharp private versus public distinction, '[t]he question always is ... [i]s the private purpose also a public purpose, or merely a private purpose?'[24] Holmes J, speaking for the majority of the Court, outlined the approach that was adopted:

Government hardly could go on if to some extent values incident to property could not be diminished without paying for such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain, and compensation to sustain the act. So the question depends on the particular facts ... The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.[25]

Here Holmes J, in his habitual manner of distancing himself from the illusion of absoluteness, framed the issue at hand as one of 'limits'. In doing so he begins a conversation that is more complex than a clash of rights assertions.

In the present case the majority thought that the regulation did indeed go 'too far', and ruled in preference of Pennsylvania Coal. Holmes J wrote:

This is the case of a single private house. No doubt there is a public interest even in this, as there is in every purchase and sale and in all that happens within the commonwealth ... But usually, in ordinary private affairs the public interest does not warrant much of this kind of interference ... The extent of the public interest is shown by the statute to be limited, since the statute ordinarily does not apply to land when the surface is owned by the owner of the coal. Furthermore, it is not justified as a protection of personal safety. That could be provided for by notice. Indeed, the very foundation of this bill is that the defendant gave timely notice of its intent to mine under the house. On the other hand, the extent of the taking is great. It purports to abolish what is recognized in Pennsylvania as an estate in land, - a very valuable estate, - and what is declared by the court below to be a contract hitherto binding the plaintiffs. If we were called upon to deal with the plaintiff's position alone we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive destruction of the defendant's constitutionally protected rights ...

It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved. As said in a Pennsylvania case: 'For practical purposes, the right to coal consists in the right to mine it.'... What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This we think that we are warranted in assuming that the statute does ...

The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so shortsighted as to acquire only surface rights, without the right of support, we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place, and refusing to pay for it because the public wanted it very much ... When this seemingly absolute [constitutional] protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears ...

We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we have already said, this is a question of degree -and therefore cannot be disposed of by general propositions. But we regard this as going beyond any of the cases decided by this court.[26]

It seems to the writer that Holmes J had something of the slippery slope in mind whilst engaging with this case. He sees something distinct about 'this kind of interference', one that alerts him to 'danger' and to 'the natural tendency of human nature ... to extend the qualification more and

more'. All this is said in a non-authoritarian manner, unlike, for example, that of Rufus Peckham J's impersonal opinion in the famous *Lochner* case,[27] in which Holmes J dissented.[28]

Brandeis J dissented in *Pennsylvania Coal*. Of immediate significance, his view on property rights in relation to government was seemingly similar to that of Holmes J. 'Every restriction', he said, 'upon the use of property imposed in the exercise of police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the State of rights of property without making compensation.' [29] For Brandeis J then, as for the majority, rights have limits and they are liable to modification by law in a manner that amounts to an uncompensated taking. Like Holmes J, there is a distancing from the illusion of absoluteness. Where, then, did Brandeis J differ from the majority? Let us turn to other parts of his opinion:

But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use. The property so restricted remains in the possession of its owner. The state does not appropriate it or make any use of it. The state merely prevents the owner from making a use which interferes with paramount rights of the public. Whenever the use prohibited ceases to be noxious - as it may because of further change in local or social conditions, - the restriction will have to be removed, and the owner will again be free to enjoy his property as heretofore.

The restriction upon the use of this property cannot, of course, be lawfully imposed, unless its purpose is to protect the public. But the purpose of a restriction does not cease to be public because incidentally some private persons may thereby receive gratuitously valuable special benefits.[30]

Brandeis J was primarily concerned not with Holmes J's 'extent of diminution' but with protecting 'the public' from 'noxious use'. As such, like *Pennsylvania Coal* and *Mahon*, the two opinions differ in their naming and framing.[31] Unlike Holmes J, Brandeis J at the time evidently was not living by the slippery slope metaphor.

Brandeis J went on to claim that the application of Holmes J's test for a 'taking', namely the 'extent of diminution', is problematical:

It is said that one fact for consideration in determining whether the limits of the police power have been exceeded is the extent of the resulting diminution in value ... But values are relative. If we are to consider the value of the coal kept in place by the restriction, we should compare it with the value of all other parts of the land. That is, with the value not of the coal alone, but with the value of the whole property.[32]



The 'extent of diminution' depends on the definition of what constitutes the relevant unit of property. Thus the 'extent of diminution' test is operationally awkward: since exchange value depends on rights, an antecedent specification of rights is required to determine the diminution of value. The pattern of rights is really the question to be answered. The juxtaposition of the majority and minority opinions in *Pennsylvania Coal* facilitates consideration of several aspects of selective perception. We arguably have, for a start, two different readings of nature and significance of the Kohler Act: in the writer's view one focuses on economic redistribution, and the other focuses on the prohibition of noxious use. We also have different perceptions on the size of the losses relating to the legislation. These perceptions were built upon selective perception of rights. Whilst the language of both the majority and minority opinions is cast in terms of affirmation of rights, the decision actually determined rights: Holmes talks about the 'extensive destruction' and the 'interference' of *Pennsylvania Coal's* 'constitutionally protected rights', and Brandeis J talks about the state preventing *Pennsylvania Coal* 'from making a use which interferes with paramount rights of the public.' [33] The term 'interference', in the writer's view is a clumsy one, for there was a basic interdependence between the two rights claimants, and there was an inescapable necessity of value-laden choice by government concerning the structure of the interdependence. Relative rights had to be worked out in the new conditions. It seems that there was room for the majority and the minority to converse further on the problematic term 'interference'. This, however, would be a door not for a simple tidying up of mere words but for deep philosophical issues, including the nature of property, the nature of government, and the relation of property to government. In a 1984 article on *Pennsylvania Coal* Carol Rose took a linguistic cum philosophical turn and offered this commentary on the differences between the two opinions:

Takings jurisprudence uses two quite divergent vocabularies, reflecting one of ... two divergent concepts of property. The takings dilemma is thus not simply a confusion over legal terms, to be solved by adopting scientific policy ...

The impasse is particularly unfortunate because both views of property have considerable commonsensible appeal. The argument for protecting acquisitiveness rests on the intuitive propositions that human beings act to further their own material well-being ... and that the ability of individuals to act in their own best interest may have substantial social benefits. The civic argument rests on the equally intuitive propositions that any community - including one that protects private property - must rely on some moral qualities of public spiritedness and mutual forbearance in its individual members to bond the community together, and that a democracy may be particularly dependent on these qualities because it relies not on force, but on voluntary compliance with the norms of the community.

Our inability to reconcile these positions in any principled way suggests the inadequacy of our existing political vocabulary ... [P]erhaps Mahon's larger lesson is that it is necessary to move on to some other way of talking about property and takings.[34]

The 'two quite divergent vocabularies' argument and the suggested 'lesson' carries force with the writer. The writer considers that the interchange in *Pennsylvania Coal v Mahon* involving

Holmes and Brandeis JJ could have been richer if both had talked differently. They could have been even less assertive and even more open and tentative than they were. In each opinion there was room for acknowledging further and engaging with the claims of the other, and for expressing self-doubts about certain claims made, perhaps especially in regard to the slippery slope metaphor, if that is what it was. This would make the interchange an integrative conversation, one that more deeply entwines the plaintiff's story with the defendant's story. 'Integrative' here means putting the two stories together to make a third, which is dissimilar from both yet deferential of them.[35] The conversation would be distinguished not by the position that the Judges took, but by how they expressed the position taken. Here 'the personal' and 'the professional' blend in a manner that negates any possibility of their separateness. It is in the voice, in the relationship constituted through it, that justice is done or not done. Justice may be defined as an integrative conversation, which may be facilitated by a multi-vocal judiciary.[36] For Holmes J and for Brandies J, both in their interchange with each other and with Pennsylvania Coal and Mahon, there was, in the writer's view, some considerable room for an improvement in vocal range. In saying this it is hoped that the writer is doing, as the writer considers Rose did, Holmes and Brandeis JJ justice.[37]

### III. EARLY WAITANGI TAKINGS TALK

An early landmark in Waitangi takings talk took place in 1862, when Attorney-General Henry Sewell wrote to the Secretary of State for the Colonies questioning the right of 'the Crown as Sovereign, by virtue of what is termed its Eminent Domain', to make roads through 'Native Lands.'[38] In response, the Secretary of State urged that 'policy, not less than justice, requires that the course of the Government should be regulated with a view to the expectations which the Maoris have been allowed to base on the Treaty of Waitangi.'[39] Here the Secretary of State, perhaps unknowingly, was suggesting a rule of interpretation that had been established by Marshall CJ of the United States Supreme Court in an 1832 case involving the Cherokee Nation. In reference to the Treaty of Hopewell 1785 between the Cherokees and the United States, he stated:

This treaty contains a few terms capable of being used in a sense which could not have been intended at the time ... The language used in Treaties with the Indians should never be construed to their prejudice ... How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.[40]

Sewell brought Marshall's voice explicitly into Treaty discourse in 1863, when he wrote to the Secretary of State for the Colonies identifying 'a pretty exact parallel' with 'the American Indians and their relations with the United States.' Sewell quoted at length Marshall CJ's opinion in *Cherokee Nation v State of Georgia*, in which he declared American Indian tribes to be 'domestic dependant nations'. 'Did the New-Zealanders,' Sewell asked the Secretary after quoting the opinion, 'any more than the American Indians, imagine that by placing themselves under the

guardianship of the British Empire they forfeited their inherent rights to govern themselves according to their own usages, and to retain the ownership of their land?'[41] Sewell immediately went on to make reference to the Treaty:

As to the latter, the Treaty of Waitangi expressly reserves to them their territorial rights. As to the former, it is true they surrendered to the Queen the 'Kawanatanga' - the governorship - or sovereignty; but they did not understand that they thereby surrendered the right of self-government over their internal affairs, a right which we never have claimed or exercised, and could not in fact exercise. The acknowledgment of sovereignty by the New-Zealander was the same in effect as in the case of the American Indians. It carried with it the exclusive right of pre-emption over their lands, and the exclusion of interference of foreign nations ... [B]ut it could not authorise us to inflict on them, as ordinary citizens the penalties of laws which they never heard of, expressed in language of which they are ignorant.[42]

Sewell here tries to make sense of the Sovereignty clause. He makes meaning by contemplating a similarity with a different situation. Sewell thus begins a conversation, one about limits, that has an element of complexity in it. 'Sovereignty', Sewell invites his reader to recognise, does not have a plain meaning; it does not point to something out there in the world for all to see. Governor George Grey, who did not have a habit of acknowledging limits to the rights he asserted, would in his pursuit of war and subjugation render Sewell's pleading weightless. The authoritarian community put into place by Grey was cemented by the creation of the Maori Land Court and the Maori Representation Act 1867. These two institutions, both contrived by 'the Crown' (the label 'the Queen' disappearing from the scene), sought to further reduce the already pale shadows of tribal chiefs.

The Supreme Court contributed to the dissolution of the tribes in the 1877 case *Wi Parata v Bishop of Wellington*.<sup>[43]</sup> This case involved Ngati Toa, who had gifted land in the 1848 to the Bishop of Wellington for the purpose of building a school. The proposed school was not built. In 1850 Governor Grey had issued a grant that included the gifted land to the Church without the knowledge or consent of the chiefs and the members of the tribe. After a dispute with Church officials, Ngati Toa leader Wi Parata challenged the legitimacy of that grant. Prendergast CJ disposed of the issue with these words:

On the foundation of this colony, the aborigines were found without any kind of civil government, or any settled system of law. There is no doubt that during a series of years the British Government desired and endeavoured to recognise the independent nationality of New Zealand. But the thing neither existed nor at the time could be established. The Maori tribes were incapable of performing the duties, and therefore assuming the rights, of a civilised community ... [T]he Crown was compelled to assume in relation to the Maori tribes, and in relation to native land titles, these rights and

duties which, *jure gentium*, vest in and devolve upon the first civilised occupier of a territory thinly peopled by barbarians without any form of law or civil government... On the cessation of territory by one civilised power to another, the rights of private property are invariably respected, and the old law of the country is administered ... by the Courts of the new sovereign ... But in the case of primitive barbarians, the supreme executive Government must acquit itself, as best it may, of its obligation to respect native proprietary rights, and of necessity must be the sole arbiter of its own justice. Its acts in this particular cannot be examined or called in question by any tribunal, because there exist no known principles whereon a regular adjudication can be based. Here, then, is one sufficient reason why this Court must disclaim the jurisdiction which the plaintiff is seeking to assume ...

The existence of the pact known as the 'Treaty of Waitangi' ... is perfectly consistent with what has been stated. So far as that instrument purported to cede the sovereignty - a matter with which we are not directly concerned - it must be regarded as a simple nullity. No body politic existed capable of making cessation of sovereignty, nor could the thing itself exist. So far as the proprietary rights of the natives are concerned, the so-called treaty merely affirms the rights and obligations which, *jure gentium*, vested in and devolved upon the Crown under the circumstances of the case ...[44]

Contrary to Prendergast CJ's framing of the identity of the plaintiff, it was not 'the aborigines' of 'New Zealand' who were making claims to certain rights in this case but, rather, Ngati Toa, the tribe involved in the transaction in question. Similarities and differences between the 'tribes' and between them and Western nations were open to complex discussion, and Marshall CJ's Cherokee Nation opinion was a seemingly obvious departure point.[45]

Having made the apparently obvious distinction between a 'civilised power' and 'primitive barbarians', we see Prendergast CJ go on to claim an apparently obvious necessity for different treatment with regard to 'rights of private property' and 'native proprietary rights'. He asserts that the latter and their relation to the will of 'the supreme executive Government' cannot be a topic of justice talk, for he claims there are 'no known principles whereon a regular adjudication can be based.' The putative non-existence of any such principles did not prevent him from innovating and explicitly creating one or more of them. But to do so would run counter to what Prendergast CJ seems to want to do, namely, maintain the pretence that the law is a system of known rules applied by a judge. Prendergast CJ's opinion echoed the Enlightenment's sharp separation of fact from value, a separation associated with a sharp distinction between 'what the law is' and 'what the law ought to be'. The issue of 'what the law is' was an 'objective' one, and it could be discerned through 'rational' argument. The issue of 'what the law ought to be' was a 'subjective' issue, and it was beyond the realm of the rational.

Prendergast CJ presents himself as mechanistically reading texts, including the Treaty. He tells us that statements he has made earlier in the opinion are 'perfectly consistent' with the Treaty. That text is inferred to have a plain meaning: no interpretation is necessary. Prendergast CJ

talks about the 'cessation of sovereignty' as if the term 'sovereignty' corresponds with some objective, independent thing out there in the world. (Sewell's pleading to the Secretary of State for the Colonies, a pleading drawing attention to the significance of context, attests to the actuality of a different way of thinking about 'sovereignty'.) Prendergast CJ, in the writer's view, offers no invitation for his readers to make their own meanings from the texts he refers to. By asserting a conclusion and by implying that one answer was obviously correct, he brought into being an authoritarian community. This is a community in which the only voice Prendergast CJ seemed to value was his own, a voice that asserted its own unquestioned validity and that rendered the core of the Treaty a 'nullity' under the pretence of registering a pre-existent given. Wi Parata's voice was given no genuine place to stand. With this act of silencing, law and justice were deemed to be two different concerns. The writer submits that Prendergast CJ's judgment offered not the rule of law but the rule of unreasoned and undisciplined prejudice.

#### IV. THE FORESHORE DISPUTE

In the mid 1990s, Ngati Apa and seven other tribes collectively expressed frustration and concern about the impact of marine farming on what they considered to be their customary rights. The tribes took a case to the Maori Land Court, claiming that areas of the foreshore and seabed in the Marlborough Sounds were 'Maori customary land'. In an interim decision, the Maori Land Court, in 1997, held that these areas may be such land. The Crown, the New Zealand Marine Farming Association Inc, Port Marlborough New Zealand Ltd, and the Marlborough District Council made a preliminary challenge to the claim, arguing that the Court had no jurisdiction to determine the claim. The foreshore and seabed, they claimed, were not 'land' for the purposes of the Maori Land Act 1993. In 2001 the High Court decided in their favour.[46] The Court applied lines of reasoning used in the Ninety Mile Beach case and ruled that Maori customary property in the foreshore was extinguished once the adjoining land above high water mark had lost the status of Maori customary land. [47]

The tribes took the matter to the Court of Appeal. The hearing took place over five days in July 2002. On 19 June 2003, almost a year after the hearing, the Court overruled the ethnocentric Ninety Mile Beach judgment and unanimously held that the Maori Land Court did have jurisdiction to hear the claims, and to investigate the status of 'land' in the foreshore and seabed. The Court unanimously held that the judgment in the Ninety Mile Beach case kept a problematic aspect of Wi Parata alive, in particular the notion that 'through the acquisition of sovereignty, all land in New Zealand became owned by [the Crown].'[48] That, in the Court's view, was incorrect. Elias CJ stated: 'The error of this approach was ... its equation of sovereignty with ownership (conflating imperium and dominium).'[49] Giving direct critical comment on Ninety Mile Beach, Elias CJ stated, 'it is clear that the premise upon which the Court based its conclusions ... was an assumption that the English common law of tenure displaced customary property in land upon the assumption of sovereignty.'[50] Contrary to Ninety Mile Beach, 'the investigation through the Maori Land Court of the title to customary land ... cannot extinguish any property held under Maori custom in lands below high water mark.'[51] Concerning law then and now, '[w]hether there are such properties is a matter for the Maori Land Court to

investigate in the first instance as a question of tikanga.'[52] Elias CJ wrote her opinion in what seems to me to be an impersonal, formal tone. She talked about, for example, the 'error' of the Ninety Mile Beach judgment. In this she presented herself as something of a logician, one who is merely pointing out that the authority of a precedent is flawed because its sums had been done incorrectly. Thus the topic of rules dominated, reflecting something of the cultural inheritance at work. Consider, for example, her engagement with a passage from Sir John Salmond's book Jurisprudence[53] - Salmond being 'Solicitor-General in the critical years at the beginning of the 20th century, when questions of customary title to lands and fisheries were before the courts.'[54] The passage is as follows:

When we say that certain lands belong to or have been acquired by the Crown, we may mean either that they are the territory of the Crown or that they are the property of the Crown. The first conception pertains to the domain of public law, the second to that of private law. Territory is the subject-matter of the right of sovereignty or imperium, while property is the subject-matter of the right of ownership or dominium. These two rights may or may not co-exist in the Crown in respect of the same area. Land may be held by the Crown as territory but not as property, or as property but not as territory, or in both rights at the same time. As property, though not as territory, land may be held by one state within the dominions of another. The distinction between territorial sovereignty and ownership is to some extent obscured by the feudal characteristics of the British constitution. In accordance with the principles of feudal law all England was originally not merely the territory but also the property of the Crown; and even when granted to subjects, those grantees are in legal theory merely tenants in perpetuity of the Crown, the legal ownership of the land remaining vested in the Crown. So, in accordance with this principle, when a new colonial possession is acquired by the Crown and is governed by English law, the title so acquired is not merely territorial, but also proprietary. When New Zealand became a British possession, it became not merely the Crown's territory, but also the Crown's property, imperium and dominium being acquired and held concurrently.[55]

After quoting this passage the Chief Justice commented that 'Salmond himself may have taken the view that the Crown's proprietary interest was burdened by native title ... But he viewed such burden not as a legal one but as a political obligation for Parliament to address.'[56] That view, Elias CJ judged, was problematic, and she quoted with approval Sir Kenneth Roberts-Wray's view that Salmond's reasoning 'does not take into account the vital rule that, when English law is in force in a Colony ... it is to be applied subject to the local circumstances.'[57] Elias CJ stopped here with her engagement with Salmond, but more could have been done by way of critical commentary. The writer considers that there is a more serious problem with the above quoted passage by Salmond. He presents the law as a kind of machine comprised of sharply distinct parts, including 'the domain of public law' and 'of private law', which fit together and work in ways that can be rendered wholly explicit in an impersonal language. (In doing this, Salmond presents himself as an expert telling the reader indisputable facts - in the present case about the substance of colonial law.) For Salmond, the terms 'the Crown', 'property', 'public', 'private', 'sovereignty', 'imperium', 'ownership', 'dominium', 'rights', 'the

British Constitution' and 'possession' all mean what they say. He presents a conceptual discourse laden with nouns, each of which carries a bit of meaning about an objective world. Each term, however, lacks a given meaning; their definitions must be worked out in the process of integrating them in a world of flux, that is, of ever changing 'circumstances'. Accepting for a moment the beginning of the last sentence in the passage from Salmond, namely, '[w]hen New Zealand became a British possession', what it became and what it should become will depend on what one means by 'possession'. And the meaning of this term will depend on the context one imagines the process by which New Zealand became a 'British possession'. Furthermore, what New Zealand's constitution becomes will depend in part upon how different meanings (read: imaginings) regarding New Zealand's status as a 'British possession' are worked out. All that Salmond obscured by perpetuating a faith that there is a sharp line between law and politics, a faith that 'law' has a formal, autonomous existence. In doing so Salmond accepted the imagined separation between law and justice that the Wi Parata 'judgment' presented as being real, as opposed to non-imagined, a justice concerned with evaluating at all levels the propriety of human relationships.

Such a separation, in the writer's view, is deeply unfortunate. For it privileges the 'law is a system of rules' metaphor, shutting out the view that law is a medium for reconstituting community, a view that would give the indigenes a place to stand as rhetorical equals with non-indigenes. Privileging the 'law is a system of rules' metaphor is part of the process whereby lawyers, then and now, talk about conflicts over 'rights' as a 'problem' requiring a 'solution'. But such matters, the writer submits, are different. If lawyers (and non-lawyers) could write and talk in ways that reflect greater tolerance for ambiguity and openness, a place may be established for the parties to the Treaty to have a genuine conversation on matters of justice.

Whilst the NgatiApa judgment undermined the authority of the Wi Parata judgment, it did so largely at the level of abstract rules. In the writer's view the Wi Parata judgment degraded not just the person Wi Parata but also the indigenes and the law. The writer submits that there was an important place in the NgatiApa judgment to make this move away from degradation explicit. This 'foreshore case' then would have been imaged as reconstituting the rule of law, a rule of law in which indigenes are not deemed to be savages and inferiors but have a place to stand in the courts as equals with non-indigenes. This is not the fictitious rule of law that consists of a rigid set of rules but rather one in which judges are understood to be using their discretion in their engagement with rules in a manner that is respectful to all parties concerned.[58] The topic of justice would then be taken seriously, and this would seriously undermine Wi Parata. On 20 June 2003, a day after the Court's decision in Ngati Apa, Prime Minister Helen Clark announced that steps would be taken to confirm absolute Crown title over the foreshore because it was 'important to establish what has long been assumed', namely, 'that the beaches [are] there for all New Zealanders.'<sup>[59]</sup> The following day, Attorney-General Margaret Wilson announced that legislation would be introduced to 'clarify in fact that the seabed and the foreshore is owned by all New Zealanders in the form of the Crown.'<sup>[60]</sup> These responses, perhaps especially since the topic of compensation was not addressed, marked the beginning of much adversarial communication, reflected in part by claims and counter-claims of 'rights'. A governing metaphor in this adversarial communication would be 'battle': claims were said to be

'indefensible'; counter-claims 'attack' claims; parties are 'fighting' for their rights; and so on. In August 2003, the Department of Prime Minister and Cabinet produced a discussion document *The Foreshore and Seabed of New Zealand: Government Proposals for Consultation* (hereafter 'Proposals'). The Proposals stated that the document was a direct response to the Court of Appeal decision, one that 'raised the possibility of new private titles being created over parts of the foreshore and the seabed.' Such titles 'would give the owners the power to sell those spaces and to exclude other people from them.' Such a scenario was 'not acceptable.'<sup>[61]</sup> The proposed legislation, which 'recognises that the government has a responsibility to protect the customary interests of whanau, hapu and iwi', would be 'based on four principles', namely:

#### **Principle of Access**

The foreshore and seabed should be public domain, with open access and use for all New Zealanders.

#### **Principle of Regulation**

The Crown is responsible for regulating the use of the foreshore and the seabed, on behalf of all present and future generations of New Zealanders.

#### **Principle of Protection**

Processes should exist to enable the customary interests of whanau, hapu and iwi in the foreshore to be acknowledged, and specific rights to be identified and protected.

#### **Principle of Certainty**

There should be certainty for those who use and administer the foreshore and seabed about the range of rights that are relevant to their actions.<sup>[62]</sup>

The term 'public domain' was given privileged status over the term 'ownership'. In a section discussing the principle of access, the Proposals indicated a desire to discontinue using the term 'ownership': 'The government's preference is to remove the language of ownership and title altogether from the foreshore and seabed. It is not meaningful, in anybody's culture, to say that a person owns part of the ocean, in the same way as people own a car or a house.'<sup>[63]</sup> The meaning of this preference would become the centre of much controversy. The proposed legislation giving the Crown the power for 'regulating the use of the foreshore' and for defining 'specific rights' of indigenes in regard to it could readily be seen as a statute conferring 'ownership' in the Crown. An unfortunate aspect of the Proposals, in the writer's view, is the repeated suggestion that it is 'the Maori' who were claiming rights in relation to the foreshore, as opposed to numerous tribes, and by no means all of them, especially those without a beach. This use of 'Maori' inappropriately framed the issue in racial terms. Examples of what I consider to be out of place use of Maori in the Proposals include: 'Maori customary rights';<sup>[64]</sup> 'Maori customary interests';<sup>[65]</sup> 'The Treaty of Waitangi was an agreement between Maori and the Crown';<sup>[66]</sup> 'Maori customary land';<sup>[67]</sup> 'the courts [could] grant private titles in the foreshore and seabed to Maori'.<sup>[68]</sup> There is an element of awkwardness in the common use of 'Maori' that comes from certain inherited institutions, including the 'Maori Land Court', which sought to undermine iwi and hapu as political concerns. The Proposals do not explicitly talk about the topic of justice. Nor do the Proposals contend with the actuality of the fluidity of the labels that



are commonly assigned to certain parties central to Treaty discourse. The writer considers that the silence on both is connected: justice is about who parties are in relation to each other. Like 'Maori', 'the government', identified as the author of the Proposals,[69] is a term used awkwardly. The Proposals talk about 'the government' and 'Maori' as separate, different parties. The juxtaposition of 'Maori' and 'the government' in the Proposals, however, is infelicitous: among other things, 'the government' includes 'Maori' at various levels and in various forms. The Proposals make occasional reference to 'the Crown', and there is no accompanying indication as to the relation between 'the Crown' and 'the government'. The lack of clarity about this relation has long been a source of talking past each other. It can lead to confusion about who is speaking to whom. In September 2003, eleven consultation hui were held to discuss the Proposals. Each one was scheduled to last for three hours, a period of time considered by many of the participants to be too short to permit any substantive discussion. The issues raised were complex, including, for example, the relationship between 'ownership' and 'kaitiakitanga' and between these two terms and several Treaty terms such as 'sovereignty' and 'rangatiratanga' and 'property'. With such complexity, three hours offered little time for the interlocutors to even begin to do justice to each other, if 'justice' is defined as understanding the other's point of view (imaginings) as fully as reasonably possible. It seems to the writer to be a fair comment, one made by Richard Boast, that the Proposals 'was not so much a set of "proposals" as a statement of the policy decisions that had already been taken.'[70]

By the time the hui had got under way, the proverbial goal posts had inchoately shifted, for Deputy Prime Minister Michael Cullen appeared to open the door to compensation talk. He said the Government would engage in talks with groups whose 'collection of customary rights was such that they would have amounted in total to something like a freehold title' if not for the legislation the Government would introduce.[71] This raised all sorts of questions, such as: How would the compensation be determined? And, who would rule on what Cullen called 'something like'? Vague gestures such as this one by Cullen made the phenomenon of 'talking past each other' almost inevitable.

A comprehensive critique of the Proposals was given at Ngati Kahungunu's Omaha Marae. First speaker Moana Jackson echoed the following critical comment he had given in a paper written several weeks earlier:

Because of the context in which common law (and hence the Crown) notions of 'customary use and title' are developed and perceived any attempt to resolve the foreshore debate in those terms distorts the values base of the 'custom law' which should regulate the relationships between Iwi and Hapu and their lands ... It also traps Maori in terminology that restricts kaitiakitanga to a Crown management role instead of situating it as a component of rangatiratanga which necessarily involves much more than management.[72]

At the hui Jackson argued that the principle of regulation was a measure granting the Crown 'effectively a supreme freehold title to define and regulate the use of the foreshore and seabed.' The principle of protection, in his view, was a misnomer, for it required tribes to go to the Maori Land Court 'to prove the survival of something the Crown has no right to take away in the first place.' The principle of certainty thus was just as problematic, for there were 'grave uncertainties for Iwi and Hapu because it is yet another diminution of our rangatiratanga.' Kahungunu, he said, proposed a redefinition of the principles. Among other matters, the principle of access would recognise the foreshore and seabed as 'the domain of Iwi and Hapu' prior to 'negotiation of covenants for access based on precedents in tikanga.' The principle of regulation would recognise the tino rangatiratanga of iwi and hapu to 'regulate and nurture the foreshore and seabed for the benefit of all ... and with due regard to tikanga and the interests of those who have a stake in the respectful use of the foreshore and seabed.' [73]

At the end of the hui, Cullen used his second speaking opportunity to correct what he saw as inaccuracies in the statements by Jackson and by others. Cullen claimed that they had 'not understood' the Proposals. Some observers, reading his claim as an affront on their capacity to grasp a plain, objective meaning, discerned much anger arising from Cullen's claim. [74] At many of the hui there were a number of people who wished to speak but were denied the opportunity due to time constraints. [75] Cullen seemed to lack the capacity to participate in the hui in what a professor of law at Yale calls 'civil listening', [76] which involves, among other things, listening to others with the knowledge of the possibility that his interlocutors may be right. However, it is conceded that the writer may be quite wrong in this judgment of Cullen.

A number of tribes turned to the Waitangi Tribunal, and claims were heard over six days during January 2004. The Tribunal's Report on the Crown's Foreshore and Seabed Policy was completed six weeks later, in March 2004. The Tribunal gave significant emphasis to the topic of understanding. For example, in an opening section on 'the context' in which the Report was written, the Tribunal wrote:

The government's resolve to step in as soon as the Court of Appeal's decision was released to implement another regime very quickly, combined with the apparently widespread fear that Maori will control access to the beach, has led to an emotional response across the whole country. It is necessary to have an understanding of complex legal concepts to discuss foreshore and seabed in an informed way. Perhaps this is why the public discourse has generally been so unsatisfying, oversimplifying the issues and thereby distorting them. It appears to us that polarised positions ... have quickly been adopted, and real understanding and communication have been largely absent. We have heard a lot of criticism about the Government's consultation, but we decided early on that we would not inquire into the alleged deficiencies of that process. We felt that to do so would confirm what everybody already knew: the consultation process was too short; and it was fairly clear that the Government had already made up its mind. [77]

The issue of mutual understanding and the matter of proper consultation were central concerns of the claimants and of the Report. All claimant counsel urged on the Tribunal what it called the 'longer conversation'. In particular:

Maori really want the process to begin again. They want the opportunity to sit down with government and properly explore the options that are genuinely available. As we have said, they consider that they have not had the opportunity ... It may be that the

conversations would be long ones, and would take place over an extended period. We think it is appropriate. The issues are complex. The rights being interfered with are important ones. Although Maori clearly prefer the path through the courts to the one proposed by the Government, the subtleties of each are almost certainly imperfectly understood. It is also very doubtful that the Government really understands where Maori are coming from. The adversarial way in which the issue has developed has led to people taking positions rather than really communicating. In our hearing, we heard from some outstanding people about their perspectives of where the Maori interests lie in terms of tikanga and identity. We think that the government needs to hear those korero. They make it clear that the issues here are not simply legal or political. They are about people, and their conception of themselves as beings connected to the environment through whakapapa, tikanga and emotion.[78]

Justice, the Tribunal suggests here, has less to do with particular outcomes or results than with the character of communicative action, particularly the type of relationship or community constituted through the process of communicating.

A considerable amount of foreshore rights talk was expressed in absolutist terms, with little reference to any limits to rights claimed. Silence in regard to limits is unfortunate, for interlocutors typically recognise some limits, and to talk about these limits may serve as an entry point for talk on matters that could be agreed upon. Such talk could form the beginning of conversation that is more complex than a simple clash of assertions. Through conversation, openings may emerge for differences to be bridgeable.[79] The Tribunal expressed something of this view:

It seems to us that the claimants and the Crown agree on some fundamental points. Although the cultural imperatives are different, they agree that the public should generally have access to the foreshore and seabed (except where this would cause harm), and they agree that the foreshore and seabed should not be sold. Claimants and the Crown also agree that customary rights exist in the foreshore and seabed, are fundamentally important, and need to be recognised and protected. Further, kawanatanga carries with it a power to regulate the coastal marine area for the benefit of everyone. Claimants and the Crown agree that current tools for regulation (such as

the Resource Management Act and the regime for customary fisheries) are not working well for Maori, and this needs to be improved.

These are important bases for agreement. We think that they serve as starting points for the dialogue that we say needs to happen next. We do not attempt to prescribe the nature or outcomes of that dialogue. That is for Maori and the Crown, if they agree to negotiate. Whatever happens, we hope for an outcome that is faithful to the vision of the Treaty: two peoples living together in one nation, sharing authority and resources, with fundamental respect for each other.[80]

If the Tribunal had directed attention to dangers and complexities associated with using the labels 'Maori' and 'the Crown' it may have done better as an advocate for and exemplar of the integrative conversation it urged. In fairness to the Tribunal, however, those writing the Report were placed under some considerable time pressure, which perhaps prevented them from doing justice to the intricacies of the issues concerning the ownership of the foreshore and seabed. Crown officials, however, would not acknowledge the intricacies and the need for the time to adequately address them. Deputy Prime Minister Cullen was of the view, only days after the publication of the Report, that the Tribunal had misjudged basic issues. On the 'central conclusions' of the Tribunal's Report, he stated:

Those conclusions - particularly surrounding supposed breaches of the Treaty of Waitangi and the rule of law - depend upon dubious or incorrect assumptions by the Tribunal. The most important of these is an implicit rejection of the principle of parliamentary sovereignty ... The power of Parliament to change the law is central to the exercise of sovereignty and therefore the contemporary exercise of Article One of the Treaty.[81]

Here Cullen engages in rights talk of an absolutist kind, with no reference to the issue of limits, an important issue for the Tribunal. In the writer's view the Tribunal had suggested that the meaning of Article One is not independent of Article Two: there had not been an 'implicit rejection of the principle of parliamentary sovereignty', only the principle of absolute and arbitrary parliamentary sovereignty. This distinction may be taken to be core material behind the expression 'due process of law', an expression frequently used in foreshore talk, though one rarely if at all given due treatment.

Cullen's hasty and brief and sharp response to the Tribunal's Report suggested to the writer that he read it only for the flaws that he could find. It appeared to the writer that he began his reading with the certainty that his 'adversaries' are wrong. However, again, the writer concedes that he may be wrong, and he may not be doing Cullen justice here. The enactment of the Foreshore and Seabed Act in November 2004 closed off the option of the 'longer conversation'. The voices that the Tribunal thought that the government 'needs to hear' remained unheard.

Voices that could be heard, such as Tariana Turia, were thought to be really unheard: a new political party, the Maori Party, led by her emerged from the jostling.

A Bill giving effect to the Proposals was introduced just before Easter 2004. The Bill identified two potential types of right: the territorial customary right (TCR) and the customary rights order (CRO). Different processes apply to each. The TCR approximates 'exclusive ownership' and its acquisition required approaching the High Court; CROs are non-exclusive use-rights processed through the Maori Land Court. Paul McHugh, an authority on the application of common law Aboriginal title to the New Zealand setting, has this to say about the difference between the two:

This distinction matches the common law's differentiation between an exclusive ('territorial') aboriginal title and non-exclusive ('non-territorial') aboriginal title use-rights. Non-territorial rights are non-exclusive in the sense that they are held over land in respect of which the aboriginal rights-holders have lost the right to exclude other people. Non-exclusive ownership is sometimes said to resemble a 'bundle of rights', each of which is specifically identified. The issue that aboriginal people have had with the 'bundle of rights' approach is that it is inherently reductive and reduces their spiritual and holistic connection to land to a shopping list of discrete and specific use rights and activities. In that sense, the retention of the right to exclude becomes crucial because it is through assertion of the right to control access that aboriginal peoples can ensure the integrity of their relationship with land.[82]

McHugh here talks about 'the common law' when he might do better to talk about a common law, as perceived by himself. McHugh fails to point out that the distinction he is talking about is a product of a discourse that seems to offer little or no place for aboriginal peoples to participate as conversational partners concerning what distinctions and categories might be infelicitous and what one might be apt. McHugh seems to the writer too preoccupied with 'legal' rules and too little concerned with political ethics. The separation of law and political ethics serves in the writer's view to divide the world up in a way that directs attention away from a common humanity and from the possibility of a conversation between equals.

Such preoccupation with legal rules may be discerned in the Deputy Prime Minister's speeches moving that the Foreshore and Seabed Bill be read. After claiming that the Bill provided 'a clear unified system for recognising and protecting rights in the foreshore and seabed', he spoke about tests:

The territorial customary rights test in the legislation is high - as it should be under the law. What is in the legislation is ... a codification in statute of the best expert advice we have had as to what those tests should be. In other words, they are the very tests that

the High Court should have had to apply if somebody had applied to that Court under its inherent jurisdiction, and the very tests, in combination with the tikanga test, that the Maori Land Court should have had to apply if there had been an application for customary land status. We have not imported anything new in that respect; we have tried, as far as possible, to reflect what the state of the law actually is.[83]

Between his lines one may hear the proposition, 'what is, is and ought to be.' Cullen treats what 'actually is' as natural, in some ontologically absolute sense, and thus obfuscates any possible distinction between natural and artifact, and, thereby, the possible element of choice.[84] Such treatment is one way to stop conversation.

The legislation does, Cullen stressed, 'remove the avenue of customary title', for which 'there must be redress available.' The Foreshore and Seabed Act states that in the event that the High Court determines that a group 'would, but for the vesting of the full legal and beneficial ownership of the public foreshore and seabed in the Crown ... have held territorial customary rights to a particular area of the public foreshore and seabed at common law', the Crown 'must enter into discussions with the applicant group for the purpose of negotiating an agreement as to the nature and extent of the redress to be given by the Crown.'[85] No shape or form is given to the word 'discussions'. And the uncertain outcome of these 'discussions' cannot be reviewed by a court, for the statute declares that 'No Court has jurisdiction to consider the nature or the extent of any matter that the Crown proposes, offers, or gives for the purpose of any redress' .[86] The indigenes may think such a negotiating arrangement does not deserve the term 'negotiating arrangement'. The writer does not think it deserves the term. The statute in my mind constitutes the indigenes as supplicants.

Which direction or directions might criticism of the Foreshore and Seabed Act go? Could Ngati Apa or some other tribe or collection of tribes challenge the statute as 'unconstitutional', for want of 'due process' or of something else? What, if anything, could be said before the Supreme Court of New Zealand?

The 'purpose' of the Supreme Court, according to s 3(1)(a)(ii) of the Supreme Court Act 2003, is 'to enable important legal matters, including legal matters relating to the Treaty of Waitangi, to be resolved with an understanding of New Zealand conditions, history, and traditions.' However, s 3(2) states: 'Nothing in this Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament.' Does this section rule out the Supreme Court from hearing a challenge to the constitutionality of the Foreshore and Seabed Act? In October 2003, when the Government's Proposals on the foreshore and seabed were being discussed, Labour MP David Parker talked about foreshore law and the sovereignty of Parliament during the third reading of the Supreme Court Bill:

The importance of parliamentary sovereignty is hard to overstate, and in practice at the heart of parliamentary sovereignty is the relationship between Parliament and the courts ... I am concerned when judicial activism goes too far and amounts to lawmaking, which should be left to Parliament... A recent court decision, which may be an example, is the foreshore and seabed decision. The five judgments in that case are all intelligent, well-reasoned decisions given after serious deliberation. But for the court to arrive at its decision, it was required to overrule a longstanding part of our common law. It had to overrule the 40-year-old Court of Appeal decision in the Ninety Mile Beach case and a line of prior cases. In doing so it unleashed the highly charged and intrinsically political furore that has since ensued. I reinforce that I do not suggest any bias on the parts of the members of the Court of Appeal, as another member has, but I for one am not sure that the Court of Appeal did itself, our courts system, or our nation any favours in that decision.[87]

Parker's words here appear quite fragmented to the writer. In particular, after having described the five judgments in the Ngati Apa case as 'intelligent, well-reasoned decisions given after serious deliberation', he expressed doubt as to whether the Court of Appeal 'did itself, our courts system, or our nation any favours in that decision.' How does that negative expression of doubt about 'favours' fit with his positive description of the judgments? What kind of decision could the Court of Appeal have given to do itself, our courts system, or our nation what he calls 'favours'? Parker offered no reasoning why he thought the Ninety Mile Beach case should have been upheld, rather than overruled. As such, he gives no insight into what forms of thought and argument he thinks should be given respect. Had he done so, he may have begun a conversation in which he could have given meaningful use of the label 'judicial activism'. [88] Parker claims that he has 'respect' for 'legal processes, our courts, and our judges', but what does he mean by this?

Judging from the remainder of his speech, Parker, like Deputy Prime Minister Cullen, seems to want us to respect no authority other than what the Government of the day says:

The consequences of the [Ngati Apa] foreshore and seabed decision are being responsibly dealt with by this Government... I say to our courts, and in particular to our future Supreme Court, that they should not try to fetter the sovereignty of Parliament by overturning the decision in the Te Heuheu Tukino case. To do so would be usurp Parliament's sovereignty in respect of Treaty issues. The present constitutional status of the Treaty has not evolved significantly beyond the principle laid down by the Privy Council in 1941 in the Te Heuheu Tukino case. The Treaty has the force that Parliament gives to it by statute. Parliament has given it more force in the last decade, but the important underlying principle remains unchanged ...

So the Supreme Court will inherit the Privy Council's right to overrule or uphold the Privy Council decision. If the Supreme Court were so unwise as to try to usurp

Parliament vis-à-vis the treaty, then the sovereignty of New Zealand's Parliament would be fettered. This would be outrageous, and I do not think it will happen.[89]

Parker here offers no reasoning why the Te Heuheu Tukino[90] case is worthy of respect. Linked with this silence, he gives no reasoning for his claim that the Supreme Court would be 'unwise' and 'outrageous' to 'fetter the sovereignty of Parliament by overturning the decision in the Te Heuheu Tukino case.' Parker fails to mention the arbitrary process through which Parliament assumed the position of final authority on matters relating to the meaning of the Treaty. And he fails to mention that the texts of the Treaty are silent on who should interpret them. He simply assumes the legitimacy of the status quo constitutional arrangements, which is really a status quo that is selectively perceived by him. Different images of the existing constitutional arrangements have been painted, including by the present Chief Justice,[91] who Parker fails to mention. In regard to the then proposed foreshore legislation Parker referred to, what if a group or a collection of groups within 'the nation believes we have it wrong'? Parker fails to ask this question, for he speaks abstractly about 'the nation' as a whole. In speaking abstractly, Parker sidesteps the question of justice, which in the present case is about relations between parties within a nation. Not once does Parker talk about justice. In this he perpetuates the dominant view that law is a self-contained system of rules. In doing so, possibilities for a genuine conversation about what could become of the law, and of us in making it, are lost. It seems to the writer that there is a strong case for a tribe or a collection of tribes to make a case to the Supreme Court that justice has not been done in this foreshore takings case. Our legal institutions provide an arena in which inaudible stories can be told and listened to, really listened to, and then 'integrated', not assimilated, with the louder stories; it seems to the writer to be a worthy task for lawyers to actualise this possibility. This means confronting the past and seeing lost opportunities for such integration. Prendergast CJ's Wi Parata ethnocentric judgment, which granted the Crown almost unlimited powers, and corresponding unlimited disabilities on the tribes, is one such lost opportunity. The time has come, in the writer's view, to challenge this inheritance.

## V. CONCLUDING REMARKS

The writer hopes that this article has provided a resource to facilitate participation in a conversation on property takings that might lead to justice, in the form of an integrative conversation. When two like-minded members of the American Supreme Court - Holmes and Brandeis JJ - can have basic unresolved differences on what constitutes a 'taking', it will be no surprise to witness an impasse when two or more peoples are involved. It seems to the writer that we should be seeking not to eliminate differences but, rather, to explore ways in which we might better manage our differences. Rose has discussed the 'impasse' associated with 'divergent vocabularies' in takings talk. Her suggestion about looking for 'some other way of talking about property and takings' sounds germane to the writer. Whatever way it is, surely we need to take interdependence seriously. No person, no people, can be an island. Each has scarcity relationships with others, at least in the sense of being a generator and recipient of various kinds of impacts. Absolute autonomy is impossible. In her 1990 book *Private Property*



and the Limits of American Constitutionalism Jennifer Nedelsky explores the dominant metaphor of the 'boundary' in property cum autonomy talk. She claims that treating property rights as boundaries gives them a reified quality, rather than the evolving patterns of relationships that she suggests they are. This reified quality conceals a conversational process that determines particular patterns of relationships. Nedelsky invites us to come up with a better metaphor, one that focuses not on separation but on connection. This metaphoric change will be associated with a change in the way we imagine autonomy:

A proper conception of autonomy must begin with the recognition that relationship, not separation, makes autonomy possible. This recognition shifts the focus from protection against others to structuring relationships so that they foster autonomy. Some of the most basic presuppositions about autonomy shift: dependence is no longer the antithesis of autonomy, but a precondition in the relationships - between parent and child, student and teacher, state and citizen - which provide the security, education, nurturing, and support that make the development of autonomy possible. Interdependence becomes the central fact of political life, not an issue to be shunted to the periphery in the basic question of how to ensure individual autonomy in the face of collective power. The human interactions to be governed are seen not primarily in terms of the clashing of rights and interests, but in terms of the way patterns of relationship can develop and sustain both an enriching collective life and the scope for genuine individual autonomy. The whole conception of the relation between the individual and the collective shifts: the collective is a source of autonomy as well as a threat to it.[92]

What Nedelsky says here about relational autonomy in the context of American property discourse seems readily and worthily transferable to Waitangi relations. Waitangi talk often stumbles into difficulty when the 'S' word is used. Judging from the writer's observations - in the classroom, in the street, and at seminars and conferences - when one party starts talking about 'Crown Sovereignty' another party stops listening. And when one party starts talking about 'Maori Sovereignty' another party stops listening. If the communicators were to talk about the limits of the powers of their Sovereign, we might have the start of a conversation, one in which there could be plural sovereigns. Here the juristic terminology of powers-immunities-rights-liberties could be helpful, as long as the companion word limits is commonly used. The use of this terminology might even eventually render the 'S' word obsolete.

The 'S' word, we have seen, is used in the Parliamentary Sovereignty clause in the Supreme Court Act. This usage no doubt has its roots from a certain concern about the relationship between Parliament and the courts - so-called activist judges. The composers of the clause presumably had previously asked themselves the question, Who is sovereign, Parliament or the courts? Rejecting the 'either/or' question, Philip Joseph, in a 2004 King's College Law Journal article on the relationship between Parliament and the courts, activated his metaphorical imagination in claiming that both branches are engaged in a 'collaborative enterprise' .[93] Joseph believes we will do well to eliminate 'traditional sovereignty language': 'To persist with

sovereignty language and its supremacist connotations forces constitutional scholarship into a Procrustean bed.'[94] This change requires a deliberate steering away from military metaphors:

The collaboration of the branches transcends the language of Leviathan - of sovereignty, supremacy and subordination. The constitution is not a power-play between two great forces, locked in battle to assert will and dominance. The contest of extremes depicts a world that does not really exist.[95]

It could be added that in living by military metaphors an actual war, with little difficulty, can come to exist. Changing the metaphor, and thus the way people experience the world, can change what exists. The metaphor of justice as integrative conversation seem apt to the writer. The Crown's refusal to accede to the Waitangi Tribunal's recommendation of the 'longer conversation', in the writer's view, was to act unjustly toward the indigenes. The Supreme Court surely is a worthy place to turn in order to pursue this conversation.

The communicative action in an integrative conversation worthy of the name will be quite different to that in the genesis of the Foreshore and Seabed Act 2004. In the context of Treaty talk, the ideal would be to reach the highest degree of mutual understanding reasonably possible about the meaning of the Treaty in the context of the 'ownership' of the foreshore and seabed. The result of the conversation, as suggested by the Waitangi Tribunal, by nature must be unpredictable. This is something not to be feared but to be welcomed, for it will be a sign of a genuine partnership, or a collaborative enterprise.

1. M Ball, 'Just Stories' (2000) 12 *Cardozo Studies in Law & Literature* 37, 42.
2. R West, 'The Zealous Advocacy of Justice in a Less than Ideal Legal World' (1999) 51 *Stanford Law Review* 973, 988. (A footnote has been omitted.)
3. F S Cohen 'Transcendental Nonsense and the Functional Approach' (1935) 35 *Columbia Law Review* 809. Reprinted in F S Cohen, *The Legal Conscience* (1960) 40.
4. C Rose, *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (1994) 296-297.
5. For a fuller discussion of the socratic method see J O Cole, 'The Socratic Method in Legal Education: Moral Discourse and Accommodation' (1984) *Mercer Law Review* 867. Commons made one explicit reference to Socrates in his autobiography - see J R Commons, *Myself* (1934) 47-48.
6. *Pennsylvania Coal Co v Mahon*, [1922] USSC 193; 260 US 393 (1922).
7. R Pilon, 'Property Rights, Takings, and a Free Society' in J D Gwartney & R E Wagner (eds) *Public Choice and Constitutional Economics* (1988) 151, 153.
8. *Pennsylvania Coal Co v Mahon*, [1922] USSC 193; 260 US 393 413, 415 (1922).
9. J R Commons, *Legal Foundations of Capitalism* (1924).
10. Karl Llewellyn praised Commons's 'working rules': See K N Llewellyn, 'The Effect of Legal Institutions Upon Economics' (1925) *American Economic Review* 665.
11. Commons, above n 9, 6.
12. *Ibid* 124.
13. O W Holmes, 'Privilege, Malice, and Intent' (1894) *Harvard Law Review* 1, 7.
14. J R Commons, 'Law and Economics' (1925) *Yale Law Journal* 371, 377.
15. Quoted in J B White, *Justice as Translation* (1990) 91.
16. Commons, above n 9, 122.
17. *Ibid* 124-125.
18. *Ibid* 112 (emphasis in original quote).
19. J R Commons, *Institutional Economics* (1934) 690-691.
20. *Ibid* 691.
21. J B White, *The Legal Imagination* (1973); Abridged (1985) Preface.
22. *Pennsylvania Coal Co v Mahon*, [1922] USSC 193; 260 US 393 (1922).
23. My discussion of changing practices draws heavily from C M Rose, 'Mahon Reconstructed: Why the Takings Issue is Still a Muddle' (1984) 57 *Southern California Law Review* 561, 578-579.
24. Commons, above n 9, 327.
25. *Pennsylvania Coal Co v Mahon*, [1922] USSC 193; 260 US 393, 413, 415 (1922).
26. *Ibid* 413, 414, 416.
27. *Lochner v New York*, [1905] USSC 100; 198 US 45 (1905).
28. For a critical discussion of Peckham J's opinion see F Schauer, 'Formalism' (1988) 97 *Yale Law Journal* 509.
29. *Pennsylvania Coal Co v Mahon*, [1922] USSC 193; 260 US 393, 417 (1922).
30. *Ibid*.
31. D Schön, 'Generative Metaphor: A Perspective on Problem-Setting in Social Policy', in A Ortony (ed) *Metaphor and Thought* (1979) 254.
32. *Pennsylvania Coal Co v Mahon*, [1922] USSC 193; 260 US 393, 419 (1922).
33. W J Samuels, *Essays on the Economic Role of Government* (1992) 261.
34. Rose, above n 23, 596-597.

35. White, above n 15, ch 1. Here the writer is building on earlier work, which also draws from White: see R Dawson, *Justice as Integrative Conversation: A Literary Turn with Waitangi Law* (LLM Thesis, University of Waikato, 2005). The thesis is due to be published in October 2006 by the Treaty of Waitangi Research Unit, Victoria University of Wellington. Its new title is *Waitangi, Law, and Justice: A Literary and Conversational Turn*. Material in it on the genesis of the Foreshore and Seabed Act 2004 is reproduced in this paper.
36. Various lawyers are now praising multi-vocalism in law. See, for example, S Berns, *To Speak as a Judge: Difference, Voice and Power* (1999); EP Hodges, 'Writing in a Different Voice' (1988) *Texas Law Review* 66, 629.
37. My analysis of the Pennsylvania Coal case has been heavily influenced by W J Samuels, 'An Economic Perspective on the Compensation Problem' (1974) 21 *Wayne Law Review* 113 and S G Medema, 'Making Choices and Making Law: An Institutional Perspective on the Takings Issue' in N Mercurio (ed), *Taking Property and Just Compensation* (1992) ch 3.
38. Quoted in H Sewell, *The New Zealand Native Rebellion* (1864) 39.
39. *Ibid* 42.
40. *Worcester v Georgia*, 30 US [1831] USSC 6; (5 Pet) 1, 582 (1831).
41. Sewell, above n 38, 9.
42. *Ibid*.
43. *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72.
44. *Ibid* 77-78.
45. *Cherokee Nation v Georgia*, 5 Pet [1831] USSC 6; (30 US) 1 (1831).
46. *Attorney-General v Ngati Apa* [2002] 2 NZLR 661 (HC).
47. The case *In re the Ninety Mile Beach* [1963] NZLR 461 had its origins in 1955, when Waata Tepania of Ahipara lodged an application in the Maori Land Court seeking an investigation of title into Wharo Oneroa a Tohe, also known as The Ninety Mile Beach. The Crown eventually questioned whether the Maori Land Court had jurisdiction to inquire into the foreshore and issue titles to it. Citing *Wi Parata*, among other cases, the Solicitor-General submitted that the common law of England had applied to New Zealand as from the date of the assumption of sovereignty; that it was part of the common law that the title to the foreshore was, and remained, in the Crown; and that no one else could, except by Act of Parliament, acquire any right of interest therein. North and Gresson JJ gave judgments. North J considered it 'pertinent to observe that at this late period in the development of New Zealand,' the claim, 'if well founded, would have startling and inconvenient results' (at 467). In particular, 'the owner of property the title to which showed the ocean as a boundary might be faced with the contention that although his title ran to the line of high-water mark at ordinary tides, he had no legal right of access to the sea.' No similar valuation was expressed in regard to how 'inconvenient' it might be for the tribe to maintain its traditions and thus its identity. It is thus hardly surprising, then, that the case was decided in favour of the Crown. North and Gresson JJ, however, were not persuaded by what North J called (at 468) 'an attractive simplicity' in the argument about the Crown being the owner of the foreshore by 'prerogative right' following its 'assumption of sovereignty.' North and Gresson JJ gave particular significance to the Maori Land Court, especially the assimilative intent expressed in the statute creating it. They asserted that the process of investigation of title by the Native Land Court was sufficient to extinguish native title to the foreshore. It

was ruled that 'once the Court investigated the title to customary Maori land bounded by the sea, and issued a certificate of title or made a freehold order in respect thereof the customary title was extinguished.' As 'a consequence, the Crown was freed from any obligations it had undertaken in the Treaty of Waitangi.' From that moment on (at 474), 'pakeha and Maori alike were entitled to enjoy the beaches of the country.'

48. Attorney-General v Ngati Apa (2003) 3 NZLR 643, [25] (CA).
49. Ibid [26].
50. Ibid [79].
51. Ibid [88].
52. Ibid.
53. Sir John Salmond, *Jurisprudence* (6th ed, 1920) 495.
54. Attorney-General v Ngati Apa (2003) 3 NZLR 643, [27].
55. Quoted in Attorney-General v Ngati Apa (2003) 3 NZLR 643, [27].
56. Attorney-General v Ngati Apa (2003) 3 NZLR 643, [27].
57. Ibid.
58. See M J Radin, 'Reconsidering the Rule of Law' (1989) 69 *UCLA Law Review* 781.
59. Quoted in M Jackson, 'Like a Beached Whale: A Consideration of Proposed Crown Actions Over Maori Foreshore', in L Pihama (ed), *Te Takutai Moana* (2003) 13.
60. Quoted in 'Clark may act on Foreshore', *New Zealand Herald*, 21 June 2003, A1.
61. Department of the Prime Minister and Cabinet, *The Foreshore and Seabed: Government Proposals for Consultation* (2003) 6.
62. Ibid 4.
63. Ibid 16.
64. Ibid 7.
65. Ibid 8.
66. Ibid.
67. Ibid 10.
68. Ibid 11.
69. Ibid 5.
70. R Boast, 'Maori Proprietary Claims to the Foreshore and Seabed After Ngati Apa', (2004) 21 *New Zealand Universities Law Review* 1,5.
71. 'Maori in bid for compensation', *New Zealand Herald*, 27 August 2003, A6.
72. Jackson, above n 59, 30.
73. Here I draw from the web-site of Te Ope Mana a Tai, a coalition of the original parties in the Court of Appeal. The site address is <http://www.teope.co.nz/hui/Omahu.htm> (last accessed 19 November 2003).
74. Ibid.
75. Ibid.
76. S Carter, *Civility: Manner, Morals, and the Etiquette of Democracy* (1998) 136-47.
77. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (2004) xii.
78. Ibid 139-140.
79. J B White, 'Looking at Our Language: Glendon on Rights' (1992) 90 *Michigan Law Review* 1267, 1267.
80. Waitangi Tribunal, above n 77, 144.
81. The Hon Dr Michael Cullen, *Waitangi Tribunal Report Disappointing* (2004), available at [www.beehive.govt.nz/ViewDocument.aspx?DocumentID=19091](http://www.beehive.govt.nz/ViewDocument.aspx?DocumentID=19091).

82. P McHugh, 'From Common Law to Codification' in B Arthur et al (eds), *Foreshore and Seabed Act* (2005) 11.
83. New Zealand, *Parliamentary Debates*, 16 November 2004, 16930-1, 17184-6 (Deputy Prime Minister, Hon M Cullen).
84. On the obfuscation of choice through this strategy see W J Samuels, *Essays on the Methodology and Discourse of Economics* (1992) ch 20.
85. *Foreshore and Seabed Act 2004*, s 37.
86. *Foreshore and Seabed Act 2004*, s 38.
87. New Zealand, *Parliamentary Debates*, 14 October 2003, 9118 (David Parker).
88. For a recent attempt to augment the level of debate about 'judicial activism', see E W Thomas, 'So-Called "Judicial Activism" and the ascendancy of Judicial Constraints' (2005) 21 *New Zealand Universities Law Review* 685.
89. New Zealand, *Parliamentary Debates*, 14 October 2003, 9119 (David Parker).
90. *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308.
91. S Elias, 'Sovereignty in the 21st century: Another spin on the merry-go-round' (2003) 14 *Public Law Review* 149.
92. J Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madison Framework and Its Legacy* (1990) 273.
93. PA Joseph, 'Parliament, the Courts, and the Collaborative Enterprise' (2004) 15 *The King's College Law Journal* 321.
94. *Ibid* 333.
95. *Ibid* 345.