

CONNECTING THE COMMON-LAW MIND AND SOVEREIGNTY-TALK, WITH SHAKESPEARE'S *KING RICHARD II* AS AN ANALOGICAL SOURCE

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I. INTRODUCTION

The phrase 'the common-law mind' began its life in John Pocock's *The Ancient Constitution and the Feudal Law* (1957), which examines the character of seventeenth-century English historical, legal, and political thought.¹ Pocock gives particular attention to the great common-law lawyers of that period, including Sir Edward Coke, Sir John Davies, and Sir Matthew Hale. For them, knowledge of the law cannot be reduced to a set of rules; it was a disciplined form of historical knowledge, the main objective of which was competency in the art of reconstituting a cultural inheritance. In summarising the bent of 'the common-law mind', Pocock turns to Edmund Burke:²

Burke's essential ideas are that institutions are the products of history; that history consists in an unceasing and undying process, in which the generations are partners and in which men perpetually adapt themselves to new needs and new situations; that existing institutions are the fruits of this process and, whether because they represent the latest adjustment or because they have been retained through many adaptations, embody the wisdom of more men, in a higher state of refinement, than the individual intellect can hope to equal or exceed; and that political wisdom lies in participating in this process ... not in attempting to reconstruct institutions on *a priori* lines.

Burke and those before him who make up the common-law tradition are conservatives in the original sense that they believe in the conservation of the past, not the least as an educational resource for intelligently contributing to further 'adaptations'.

The authority of the past that was revered by the seventeenth century common-law mind lived in tension with another authority, a 'sovereign'. As Pocock states, one value of 'the ancient constitution' resided in 'a purely negative argument':³

[f]or a truly immemorial constitution could not be subject to a sovereign: since a king could not be known to have founded it originally, the king now reigning could not claim to revoke rights rooted in some ancestor's will.

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1 J G A Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (1957).

2 Ibid 242-3. Immediately after the passage quoted, Pocock writes: 'In all this we cannot be mistaken in recognizing the voice of the great tradition of common-law thought, and in particular of those men who had conceived the law of England as custom and custom as perpetual adaptation'.

3 Ibid 51.

This argument, for some, deserves little or no respect. With the aim of making a constructive contribution to sovereignty-talk, the principal aim of this article is to identify some fundamental differences between the common-law mind and that which is opposed to it.

Part II tunes in to some key moments in William Shakespeare's history play *King Richard II*. Here we have a Sovereign who refuses to acknowledge the existence of any authority other than himself, and we also have a subject who seeks to defend his 'customary rights'. Shakespeare's play, I suggest, offers a fruitful analogical source for critically engaging with sovereignty-talk in a variety of contexts.⁴ Part III turns to Shakespeare's near contemporary Thomas Hobbes, who is one of the most influential theoretically-oriented defenders of 'absolute' sovereignty. Part IV reads Burke's anti-theoretical efforts to enrich sovereignty-talk, efforts made in the face of conflict over the status of the American colonies. Part V discusses some sovereignty-talk during the infancy of the United States of America. Part VI makes a leap in time and comments on some relatively recent sovereignty-talk in New Zealand. The final section concludes.

Before we begin our reading of Shakespeare's play, some further introductory remarks may be helpful. What, we might do well to ask, can a lawyer learn from reading Shakespeare? Ian Ward, in *Shakespeare, the Narrative Community and the Legal Imagination* (1999), suggests that Shakespeare's 'constitutional' plays can serve as a touchstone for judging present and future constitutional configurations. In particular:⁵

[T]hrough the study of Shakespeare we will better appreciate the historically imaginative nature of a constitution. This is not merely to emphasize the literary quality of any constitution, either early modern or contemporary. It is also to emphasize the potentially empowering facility of language. As we search today for a revived theory of constitutional morality, an understanding of the historical and literary nature of constitutions, as products of interpretation, as active modes of imagining, can both liberate and inspire. Most importantly of all, by demanding our active participation as interpretive actors, such a theory of constitutionalism can reinvest the idea of democracy upon which any revived ideal of constitutional morality must be founded.

Ward appreciates that one aim of what we call 'imaginative literature' is the estrangement of the familiar, the distancing of habitual modes of thought. That which is familiar and the habitual may seem to be natural and fixed rather than an artifact that is vulnerable to change.⁶ A disposition against

4 This paper, following various contributions to the 'law and literature' movement, seeks to set different genres in dialogue. A founding text for this movement is J B White, *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* (1973). White's book defines law 'as' a literary activity, rendering problematic the word 'and' in the movement's name. The direction of the present article resembles my law-as-literature article 'Distinguishing Elias CJ from "Radical Maori", with Sophocles' *Antigone* as an Analogical Source' (2007) 15 *Waikato Law Review* 190.

5 I Ward, 'Shakespeare, the Narrative Community and the Legal Imagination', in M Freeman and A Lewis (eds), *Law and Literature* (Vol II) (1999) 117, 118.

6 The art of estranging the familiar would seem to be a force behind Lon Fuller's hypothetical case of the Speluncean Explorers. See L L Fuller, 'The Case of the Speluncean Explorers' (1949) 62 *Harvard Law Review* 616. The case concerns five cave explorers trapped after a landslide. One of them is killed and eaten, and the survivors are convicted of violating a law making it a crime that one 'willfully take the life of another' (618). Voting to reverse, Foster J

change may be a source of disagreement between parties with 'different modes of imagining'. Identifying the source may facilitate a move from talking past each other to talking together.⁷

Ward's talk of being positioned to 'better appreciate the historically imaginative nature of a constitution' would be widely accepted today by South African lawyers caught up in 'transformative constitutionalism', a phrase for the formal efforts since the early 1990s to move away from the apartheid order.⁸ Etienne Mureinik, in *A Bridge to Where? Introducing the Interim Bill of Rights* (1994), describes the move as being away from 'a culture of ... apartheid ... coercion' to 'a culture of justification ... built on persuasion'.⁹ He elaborates with sovereignty-talk:¹⁰

Legally, the apartheid order rested on the doctrine of Parliamentary sovereignty. Universally, that doctrine teaches that what Parliament says is law, without the need to offer justification to the courts. In South Africa, since Parliament was elected only by a minority, the doctrine taught also that what Parliament said was law, without a need to justify even to those governed by the law. The effect of these teachings, at the apogee of apartheid, was to foster an ethic of obedience. ... If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification – a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion.

Mureinik here suggestively gives life to the fundamental 'persuasion/coercion' distinction, which would seem to be an important resource for distinguishing between governments that are and are not worthy of respect.¹¹

argues that the conviction goes against the purpose of the statute, read in the context of the law being a purposive activity of 'facilitating and improving men's coexistence' (621). The extraordinary character of the case, for Foster J, draws attention to this activity:

The proposition that all positive law is based on the possibility of men's coexistence has a strange sound, not because the truth it contains is strange, but simply because it is a truth so obvious and pervasive that we seldom have occasion to give words to it. Like the air we breathe, it so pervades our environment that we forget it exists until we are suddenly deprived of it. (620-21)

We can be confident that Foster J here speaks for Fuller himself. See F J Mootz III, 'Natural Law and the Cultivation of Legal Rhetoric' in W J Witteveen and W van der Burg (eds), *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (1999) 425, 449.

- 7 My language echoes that of the cultural anthropologist Dame Joan Metge. See, for example, her booklet *Korero Tabi: Talking Together* (2001).
- 8 An early usage of the phrase resides in K E Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146. 'By *transformative constitutionalism* I mean a long-term project of constitutional enactment, interpretation, and enforcement committed ... to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction' (150).
- 9 E Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal of Human Rights* 31, 32.
- 10 Ibid 32.
- 11 Mureinik's phrase 'a culture of justification' has been kept alive in various contexts. See, for example, S Choudhry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (1999) 74 *Indiana Law Journal* 819, 843; A S Butler, 'Limiting Rights' (2002) 33 *Victoria University of Wellington Law Review* 537, 554; D Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (2006) 224; M Liston, "'Alert, alive and sensitive": Baker, the Duty to Give Reasons, and the Ethos of Justification in Canadian Public Law' in D Dyzenhaus (ed), *The Unity of Public Law* (2004) 113, 114; E Fox-Decent, 'Fashioning Legal Authority from Power: The Crown-Native

This distinction might be thought of as overlapping that of the authoritative versus the authoritarian, with the former being legitimate and the latter being illegitimate.

Integral to the apartheid order was a particular mode of imagining language. The movement towards a 'culture of justification' calls for a different mode. Henk Botha, in *Metaphoric Reasoning and Transformative Constitutionalism* (2002-03), has made this argument.¹² Botha accepts recent work in cognitive theory claiming that all our reasoning is metaphoric in structure – that it is not possible to avoid metaphors. His central claim is this: 'that the reflective use of metaphors can help South African lawyers to break with the essentialism and reductionism of apartheid legal thought, transform legal theory and practice, and imagine more humane futures'.¹³ What he calls 'essentialism and reductionism' flows from a tradition that he traces through leading philosophers of modern Western civilization, including Hobbes and Locke. Central to this tradition is the 'conduit' metaphor. Locke described language as 'the common conduit whereby the improvements of knowledge are conveyed from one man and one generation to another'.¹⁴ 'The conduit metaphor', writes Botha, 'structures our understanding of ideas, language and communication'.¹⁵ Specifically:¹⁶

It presents ideas as objects, linguistic expressions as containers, and communication as sending. On this understanding, a writer or speaker puts ideas (objects) into words or expressions (containers), and sends them (along a conduit) to a reader or listener who extracts the ideas from the words. This metaphor is pervasive. For instance, we attempt to *capture* our *ideas* in *words*, and tell students to try to *pack* more *thoughts* into fewer *words*. We sometimes find it difficult to *get* our *thoughts* across, or complain that a speaker has not *given* us any *idea* of what she means.

The fundamental image here is that of the machine: language is a tool for pointing to 'objects' in the world, and writers and readers mechanistically connect objects with words, which can move from one person to another like articles on a conveyer belt.

The mechanistic imagery has significant ethical and political consequences. 'The conduit metaphor', Botha stresses, 'trivialises the role of the reader or listener in the construction of meaning'.¹⁷ The reader or listener is defined as a passive receiver of information: '[a]ll the reader/listener has to do is to receive and unwrap the package containing the message'.¹⁸ The meaning of a message, however, is not an object that is external to us, but an experiential

Fiduciary Relationship' (2006) 4 *New Zealand Journal of Public and International Law* 91; Rt Hon Lord Wolf, J Jowell, A Le Sueur, *De Smith's Judicial Review* (2007, 6th ed) 544; and S Elias, 'Righting Administrative Law' in D Dyzenhaus, M Hunt and G Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (2009) 55, 70.

12 H Botha, 'Metaphoric Reasoning and Transformative Constitutionalism (part 1)' (2002) *Journal of South African Law* 612; 'Metaphoric Reasoning and Transformative Constitutionalism (part 2)' (2003) *Journal of South African Law* 20.

13 *Ibid* (part 1) 613.

14 J Locke, *An Essay Concerning Human Understanding* (1671; 1962) 106, quoted in Botha, *ibid* 618, n 33.

15 Botha, above n 12, 618.

16 *Ibid* 618-19.

17 *Ibid* 621.

18 *Ibid*.

process. Meaningful talk about 'meaning' thus needs to consider 'the feelings or presuppositions' of the interpreter, not the least in her or his efforts 'to reconstruct the context in which the words were uttered'.¹⁹ For Botha, we will do well to attend to the ways in which 'the conduit metaphor ... tricks us into believing that communication is relatively easy' – it downplays 'that constant hard work that is required to make shared meaning possible'.²⁰ This 'hard work' involves both the writer trying to step in the shoes of the reader and the reader trying to step in the shoes of the writer. That which Botha calls 'shared meaning' is the product of what has been aptly called a 'collaborative enterprise' between reader and writer.²¹

For Botha, it is false to imagine that language can be cleansed of metaphor in the service of perfect communication about an 'objective reality'. A shared reality, for him, is the product of the metaphorical imagination, which is central to the process of familiarizing the strange and of estranging the familiar. 'The challenge', he argues, 'is to use metaphors reflectively and imaginatively'.²²

In the first place, we need to be conscious of the metaphoric nature of our reasoning. We need to think of legal categories as imaginative constructs that are rooted in particular (physical, social and historical) experiences, and abandon the objectivist myth that they correspond to an objective reality. Secondly, we should scrutinise our metaphors in order to develop a critical understanding of the realities enabled by them. We should be aware of the politics of representation; of the ways in which metaphors can be used to legitimate the *status quo*, normalise violence, or contest power. Thirdly, we need to remind ourselves that the realities enabled by our metaphors do not exhaust the possibilities that are open to us. Other metaphors are likely to enable other realities. The supposed inevitability of our current social arrangements does not reflect objective necessity, but a failure of imagination. We must strive to enable different realities through the self-conscious use of multiple metaphors; we must challenge orthodox beliefs through the creative use of existing metaphors and the invention of new ones.

For Botha 'a failure of the imagination' can be intimately associated with injustice. The architects of the apartheid order would have us believe that there is only one way to conceive of 'reality'. They would resist that which has become the heart of 'transformative constitutionalism' in South Africa, namely, 'dialogue',²³ which begins with the affirmation of otherness and with the understanding that our being in the world is in relationships with others. The negotiation and renegotiation of these relationships is at the heart of the topic of justice. Shakespeare has much to hint about this matter.

II. WILLIAM SHAKESPEARE'S *KING RICHARD II*

At the end of Act I, King Richard expresses the extremely unbecoming hope that his uncle, the Duke of Lancaster, will die, so that he might seize his estate for use in putting down a rebellion in Ireland. The Duke of York

19 Ibid.

20 Ibid.

21 J R Lindgren, 'The Pervasiveness of Metaphor: Privacy and the Supposed Independence of Legislation and Adjudication' in R Kevelson (ed), *Law and Semiotics* (Vol III) (1989) 221, 232. '[B]oth writing and reading involve receptiveness to the expected response of one's counterpart in the collaborative enterprise of communication.'

22 Botha, above n 12, 623.

23 Ibid (part 2) 21-30.

is disturbed by this intention, not the least because Lancaster's son, Henry Bullingbrook, will be deprived of his inheritance. When Lancaster dies, York offers King Richard a distinctive way of imagining the king and the foundations of his authority. Seemingly with Magna Carta between the lines, York claims that the sovereign's powers and rights are limited.²⁴

Seek you to seize and gripe into your hands
 The royalties and rights of banished Herford?
 Is not Gaunt dead? And doth not Herford live?
 Was not Gaunt just? And is not Harry true?
 Did not the one deserve to have an heir?
 Is not his heir a well-deserving son?
 Take Herford's rights away, and take from time
 His charters and his customary rights.
 Let not to-morrow then ensue today.
 Be not thyself. For how art thou a king
 But by fair sequence and succession?
 Now, afore God – God forbid I say true! –
 If you do wrongfully seize Herford's rights,
 Call in the letters patents that he hath
 By his attorneys-general to sue
 His livery, and deny his offered homage,
 You pluck a thousand dangers on your head,
 You lose a thousand well-disposed hearts,
 And prick my tender patience to those thoughts
 Which honour and allegiance cannot think.

The King, York suggests, cannot impair the 'customary rights' of others without undermining the foundations of his own inherited position.²⁵ In mentioning that he may 'lose a thousand well-disposed hearts', York is suggesting that the King ought to be concerned about the way his actions will be perceived by the larger community. Rebellion could be justified against a monarch who violated his own side of the fealty arrangement.

It seems fair to say that in all this frankness and in the multitude of questions that invite a rich and complex conversation on the nature of a just community, York has made an attempt to genuinely persuade King Richard to reconsider his proposed course of action. York, however, having earlier remarked that 'all in vain comes counsel to his ear',²⁶ would not have much hope of persuading him. '[D]eaf'²⁷ King Richard, who apparently is completely unmoved by York's speech, ignores his uncle's warning. He shows no interest in a conversation on the nature of a just community. He offers York no explanation for his decision to appropriate the Lancastrian estates.

24 W Shakespeare, *King Richard II* (ed A Gurr, 1990) II.i.189-208.

25 This reciprocal relationship suggested in this scene has been the subject of much comment. See, for example: J H Hexter, 'Property, Monopoly, and Shakespeare's *Richard II*', in P Zagorin (ed), *Culture and Politics: From Puritanism to the Enlightenment* (1980) 1, 20-1; J B Gohn, 'Richard II: Shakespeare's Legal Brief on the Royal Prerogative and the Succession to the Throne' (1982) 70 *Georgetown Law Journal* 943, 948; J B White, 'Shakespeare's *Richard II*: Imagining the Modern World', in his *Acts of Hope: Creating Authority in Literature, Law, and Politics* (1994) Chapter 2, 59-60; R Dutton, 'Shakespeare and Lancaster' (1998) 49 *Shakespeare Quarterly* 1, 2-4.

26 Shakespeare, above n 24, II.i.4.

27 *Ibid* II.i.16.

In his silence, King Richard refuses to acknowledge the existence of any authority other than himself, and he establishes an authoritarian community with York and with every other person in England.

Three prominent noblemen from the north, namely the Earl of Northumberland and Lords Willoughby and Ross, who have witnessed King Richard's capriciousness, have an exchange that sows the seeds of an opposition:²⁸

- North.* Well, lords, the Duke of Lancaster is dead.
Ross. And living too, for now his son is duke.
Will. Barely in title, not in revenues.
North. Richly in both if justice had her right.
Ross. My heart is great, but it must break with silence
Ere't be disturbed with a liberal tongue.
North. Nay, speak thy mind, and let him ne'er speak more
That speaks thy words again to do thee harm.

Shakespeare at this point may well have done all that he could to pull his audience into accepting this 'justice' talk and the will to depose King Richard that motivates it. But this talk is talk of a very simple sort ('justice' is not a 'her', nor a thing, but rather a *doing*), and careful readers of Shakespeare know he insinuates that oversimplification is dangerous. Here we see no conversation at all about what Northumberland, Ross and Willoughby think it might mean to act *justly*, in light of the events that have gone before them and in view of what kind of England they want and of who they themselves are becoming. What kind of characters are these people? We can only answer this by listening to what they say, and they say almost nothing.

When King Richard arrives on the Welsh coast after a rough crossing of the Irish Sea, he expresses joy, despite being aware of a movement toward rebellion led by Henry Bullingbrook. He says:²⁹

- Dear earth, I do salute thee with my hand,
Though rebels wound thee with their horses' hooves.
...
Feed not thy sovereign's foe, my gentle earth,
Nor with thy sweets comfort his ravenous sense
But let thy spiders that suck up thy venom
And heavy-gaited toads lie in their way,
Doing annoyance to the treacherous feet
Which with usurping steps do trample thee.

King Richard's courtiers seem to believe that the 'sovereign' needs to do more than talk with the earth. They sense that Bullingbrook is becoming 'strong and great in substance and in power'.³⁰ For King Richard, however, being deposed is seemingly unimaginable: 'Not all the water in the rough rude sea / Can wash the balm off from an anointed king'.³¹ But King Richard's imagination, which can only sense differences between the King and others, is put to the test, for soon he is coerced into handing the crown

28 Ibid II.i.224-231.

29 Ibid III.ii.6-17.

30 Ibid III.ii.35.

31 Ibid III.ii.54-5.

over to Bullingbrook. He senses that he will have to re-imagine himself: 'if I turn mine eyes upon myself / I find myself a traitor with the rest, / For I have ... / Made glory base, a sovereignty a slave, / Proud majesty a subject, state a peasant'.³² In prison he pursues the task of re-imagining. He talks alone.³³

I have been studying how I may compare
This prison where I live unto the world,
And for because the world is populous
And here is not a creature but myself
I cannot do it. Yet I'll hammer't out.

Richard (dare we drop 'King?') is talking to himself about his own thought process. One of the common consequences of a traumatic experience is a disrupted relationship with language, ultimately with the terms with which one's past experiences have been negotiated and worked out. Richard begins to pick his way through a shattered language that he can use only in fragments. He shows an impulse to create metaphors with the aim of forming order out of chaos. He has to work hard at recomposing, or reconstituting, himself. Who is 'I' (he uses this pronoun five times in the five lines)? There is a 'self' here searching for identity. We are witnessing an activity, an impulse for making a resemblance. He goes on to say:³⁴

... play I in one person many people,
And none contented. Sometimes am I King,
Then treasons make me wish myself a beggar,
And so I am. Then crushing penury
Persuades me I was better when a king,
Then am I kinged again, and by and by
Think that I am unkinged by Bullingbrook,
And straight am nothing. But what'er I be
Nor I nor any man that but man is
With nothing shall be pleased till he be eased
With being nothing.

This talk, the activity of an internal conversation between several voices, is about Richard's experience of turning from one role to another and about his effort to make sense of this experience. He is 'King', until a self within him says otherwise.³⁵ To say otherwise is to become a traitor, at least temporarily, until a self within him reclaims his kingship. He can only hope for a transitory pause against incoherence. In such a place we have the comfort of custom, which Richard destroyed in breaking his oath with the barons.

Immediately after the ominous words 'till he be eased / With being nothing', music sounds. To this, Richard responds by exercising further his analogical imagination.³⁶

32 Ibid IV.i.246-251.

33 Ibid V.v.1-5.

34 Ibid V.v.31-41.

35 For a comprehensive contribution to 'law and literature' talk about the self as a site of multiple selves, see K M Crotty, *Law's Interior: Legal and Literary Constructions of the Self* (2001).

36 Shakespeare, above n 24, V.v.42-66.

Ha, ha, keep time! How sour sweet music is
When time is broke and no proportion kept.
So it is in the music of men's lives.
And here have I the daintiness of ear
To check time broke in a disordered string,
But for the concord of my state and time
Had not an ear to hear my true time broke.

...
This music mads me. Let it sound no more,
For though it have help madmen to their wits
In me it seems it will make wise men mad.
Yet blessing on his heart that gives it me,
For 'tis a sign of love, and love to Richard
Is a strange brooch in this all-hating world.

The 'disordered string' is himself, who has been playing his part 'out of time', resulting in him 'breaking the concord', or the harmony of the various parts which compose the state.³⁷ Richard here, as one commentator has remarked, 'confesses to himself his gravest political fault':³⁸

[he] had no ear for the change in the rhythm and tune of Time. He had no ear for the murmuring of the change of the age. Time was out of joint, and he did not notice it before he himself became its victim, before his fate became irreversible.

Richard is in a process of transformation, becoming a good critic of himself. In sensing 'a sign of love', we can take it that Richard is making progress in ordering the 'string'. We readers who supported the deposition may well now feel deeply uncomfortable with his impending death.³⁹

The play ends chaotically, with Sir Pierce of Exton murdering Richard. The murder was a response to a seemingly plain command by King Henry (dare we use 'King?'). But we readers, who accept that 'in one person' there are 'many people', may well sense now that no utterance has a plain meaning. Which self, with what intention, speaks? And which self, with what intention, hears? Like Henry and other characters in the play, we have no language with which we can adequately describe the world and our place in it. Henry declares his intent to 'make a voyage to the Holy Land / To wash this blood off from my guilty hand.' How will he address the real Sovereign, namely, God?

Our earthly 'sovereign'-talk is left in an awkward place. How could a 'self'-identified 'sovereign' now adequately justify his position as 'sovereign'? King Richard II, the grandson of King Edward III and the son of Edward the Black Prince, had inherited a social order in which he did not have to justify his position as 'sovereign'. To have to justify his position, as he imagined it, would be to dissolve it – to try to justify it would be to expose one's justification to the judgment of others. This move would create a process in which the word of the 'sovereign' is not final. We might call such a process 'due process', which makes a place for justice-talk.

37 E W Naylor, *Shakespeare and Music* (1896; 1931) 32.

38 A Heller, *The Time Is Out of Joint: Shakespeare as Philosopher of History* (2001) 188.

39 In addition to the works referred to above, my reading of *King Richard II* has benefited from E H Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (1957), I Ward, *Law and Literature: Possibilities and Perspectives* (1995), and D J Kornstein, *Kill All the Lawyers: Shakespeare's Legal Appeal* (1994).

III. A THEORETICAL TURN: THOMAS HOBBS

Thomas Hobbes was very much concerned with preventing the kind of chaos that existed at the end of Shakespeare's *King Richard II*. He sought to establish a 'science' of politics consciously modelled on that of geometry. In *Leviathan* (1651), he set out an argument on how to prevent 'Civill Warre' and attain 'PEACE'.⁴⁰ In Hobbes' theoretical system, certain supposed self-evident 'truths' about 'mankind' play a role analogous to Euclid's elementary axioms. From these truths, he thought it possible to derive a set of propositions that lead us to the conclusion that 'Sovereign Power ought in all Commonwealths to be absolute'.⁴¹ A fundamental part of Hobbes' system is a precise language:⁴²

The Light of humane minds is Perspicuous Words, but by exact definitions first snuffed, and purged from ambiguity; Reason is the *pace*; Encrease of *Science*, the *way*; and the Benefit of man-kind, the *end*. And on the contrary, Metaphors, and senselesse and ambiguous words, are like *ignes fatui*; and reasoning upon them, is wandering amongst innumerable absurdities; and their end, contention, and sedition, or contempt.

The root image at work in Hobbes' project for an 'absolute Sovereign Power' is that of the machine: language is a machine, with 'Perspicuous Words' serving as a neutral tool for conveying 'Light' into our 'minds'. With language functioning as a code for transferring information, Hobbes images 'men' as machines, for discourse is reduced to the joining together of names, and 'Reason' amounts to a purely logical process of adding and subtracting. After reading Shakespeare's *Richard II* we may be well-equipped for sensing how metaphorical Hobbes' language is. With his metaphors against metaphors, I suggest that Hobbes' 'science' is built on flimsy, non-reflexive foundations – hardly a science worthy of the name.

In the introduction to *Leviathan*, Hobbes prepares the way for persuading his reader to attend to his (or her) own experience as an authority for accepting the supposed self-evident truths about 'mankind':⁴³

[T]here is a saying much usurped of late, That *Wisedome* is acquired, not by reading of *Books*, but of *Men*. Consequently where-unto, those persons, that for the most part can give no other proof of being wise, take great delight to shew what they think they have read in men, by uncharitable censures of one another behind their backs. But there is another saying not of late understood, by which they might learn truly to read one another, if they would take the pains; and that is, *Nosce teipsum, Read thy self*: which [is] ... meant ... to teach us, that for the similitude of the thoughts, and Passions of one man, to the thoughts, and Passions of another, whosoever looketh into himself, and considereth what he doth, when he does *think, opine, reason, hope, feare, &c.*, and upon what grounds; he shall thereby read and know, what are the thoughts, and Passions of all other men, upon the like occasions.

Let us put aside Hobbes' failure to talk about the importance of the 'reading of books' for acquiring '*Wisedome*'. The saying 'Read thy self', as a reader of *King Richard II* will appreciate well, points not to a simple and passive act but

40 T Hobbes, *Leviathan* (1651; 1968) (ed C B Macpherson) 186.

41 *Ibid* 260.

42 *Ibid* 116-7.

43 *Ibid* 82-3.

to a complex activity. Imagine asking Richard in prison about his experience of handing over the Crown: could he simply 'looketh' into himself? 'What', his questioning self might ask, 'is the "self"?"

Hobbes went on to build a theoretical system on 'feare'. Against a background of what modern economists call 'scarce resources', Hobbes puts 'for a generall inclination of all mankind, a perpetuall and restlesse desire of Power after power, that ceaseth onely in Death'.⁴⁴ With this 'inclination', it is but a series of steps for his conclusion about the power of the 'Soveraign':⁴⁵

So that it appeareth plainly ... that the Soveraign Power ... is as great, as possibly men can be imagined to make it. And though of so unlimited a Power, men may fancy many evill consequences, yet the consequences of the want of it, which is perpetuall warre of every man against his neighbour, are much worse. ...

The greatest objection is, that of the Practise; when men ask, where, and when, such Power has by Subjects been acknowledged. But one may ask them again, when, or where has there been a Kingdome long free from Sedition and Civill Warre. In those Nations, whose Common-wealths have been long-lived, and not been destroyed, but by forraign warre, the Subjects never did dispute of the Soveraign Power. ... The skill of making, and maintaining Common-wealths, consisteth in certain Rules, as doth Arithmetique and Geometry; not (as Tennis-play) on Practise onely: which Rules, neither poor men have the leisure, nor men that have had the leisure, have hitherto had the curiosity, or the method to find out.

With that conclusion about 'Practise' Hobbes was casting aside a tradition of thought going back to Aristotle, who considered that to make sound judgments regarding political matters, a person must possess not only theoretical understanding but also a 'virtue' of 'character' he called 'prudence' or 'practical wisdom'.⁴⁶

For the common-law mind, I suggest, one of the most defective aspects of Hobbes' theoretical turn is his treatment of time (a central theme in *King Richard II*). The common-law mind, to reiterate, has a distinctive respect for the past. From the standpoint of philosophers such as Hobbes, as Anthony Kronman has claimed in *Precedent and Tradition* (1990), it is 'deference to the past, to precedent, that gives the law its foreign look'.⁴⁷ Hobbes was not alone among theoreticians to insist that the rule of precedent is 'an absurdity'.⁴⁸ A science of politics consciously modelled on that of geometry, perhaps needless to say, has no place for precedent. In writing *Leviathan*, Hobbes offers his readers 'not really a philosophy of law at all, but rather a philosophical replacement for it'.⁴⁹ In this regard, Hobbes was an imperialist.

44 Ibid 161.

45 Ibid 260-1.

46 Readers of *King Richard II* may have grounds for placing Shakespeare's play adjacent to the Aristotelian tradition. The play brings to our attention with striking force the importance of practical wisdom, which King Richard lacked in electing to confiscate the Lancastrian estates against the reasoning of his uncle.

47 A T Kronman, 'Precedent and Tradition' (1990) 99 *Yale Law Journal* 1029, 1034.

48 Ibid.

49 Ibid 1035.

IV. AN ANTITHEORETICAL TURN: EDMUND BURKE

In 1769, speaking in the House of Commons, Edmund Burke raised grave concerns about a growing mutual distrust between the Americans and the British. The former ‘have made a discovery ... that we mean to oppress them’; the latter ‘have made a discovery ... that they intend to rise in rebellion’.⁵⁰ Burke sensed a vicious spiral: ‘Our severity has increased their ill behaviour. We know not how to advance; they know not how to retreat’.⁵¹ With the aim of creating a workable mutuality, Burke resisted what he called ‘theoretic’ talk.⁵² A fragment from his ‘Speech on American Taxation’ (1774) is suggestive of the nature of this talk:⁵³

[L]eave America, if she has taxable matter in her, to tax herself. I am not here going into the distinctions of rights, nor attempting to mark their boundaries. I do not enter into these metaphysical distinctions; I hate the very sound of them. Leave the Americans as they anciently stood, and these distinctions, born of our unhappy contest, will die along with it. ... [I]f, intemperately, unwisely, fatally, you sophisticate and poison the very source of government, by urging subtle deductions and consequences odious to those you govern, from the unlimited and illimitable nature of supreme sovereignty, you will teach them by these means to call that sovereignty itself in question. ... If that sovereignty and their freedom cannot be reconciled, which will they take? They will cast your sovereignty in your face. Nobody will be argued into slavery.

Burke’s deliberate avoidance of ‘going into the distinctions of rights’ relating to ‘sovereignty’ is a move that could be said to differentiate him from ‘theoretic’ writers in the tradition of Hobbes. The pursuit of ‘distinctions’ with a view to ‘theoretic’ clarity may be a path not to resolving a conflict but rather to contributing to it. When we start dissecting a human relationship in the pursuit of objectivity the parties to the relationship can readily become objects to one another – a ‘thou’ becomes an ‘it’.

Seeking to avoid the situation where the Americans ‘cast your sovereignty in your face’, Burke endeavoured to give new life to the word ‘sovereignty’. He did so in part by differentiating what he called ‘the constitution of the British empire’ from ‘the constitution of Britain’, a distinction that would enable ‘subordination and liberty’ to be ‘reconciled’.⁵⁴

The parliament of Great Britain sits at the head of her extensive empire in two capacities: one as the local legislature of this island, providing for all things at home The other, and I think her nobler capacity, is what I call her imperial character; in which, as from the throne of heaven, she superintends all the several inferior legislatures, and guides and controls them all, without annihilating any. As all these provincial legislatures are only co-ordinate to each other, they all ought to be subordinate to her; else they can neither preserve mutual peace, nor hope for mutual justice, nor effectively afford mutual assistance. It is necessary to coerce the negligent, to restrain the violent, and to aid the weak and deficient, by the overruling plenitude of her power. She is never to intrude into

50 E Burke, in *Sir Henry Cavendish’s Debates of the House of Commons* (ed J Wright) (1841-3) (1) 398-9.

51 Ibid 399.

52 E Burke, ‘An Address to the King’ (1777) in *The Works of The Right Honourable Edmund Burke* (1877) (vol 5) 460, 464.

53 E Burke, ‘Speech on American Taxation’ (1774) in *The Works of the Right Honourable Edmund Burke* (1883) (Vol 1) 382, 432-3.

54 Ibid 434.

the place of the others, whilst they are equal to the common ends of their institution. But in order to enable parliament to answer all these ends of provident and beneficent superintendence, her powers must be boundless.

Burke's 'two capacities' help create a language of greater complexity than the language others were using to talk about 'powers'. Whilst at a general level the 'powers' of Great Britain's parliament could be imagined as 'boundless', there is a 'place' in which it 'is never to intrude'.

In his *Bill for Composing the Present Troubles in America* (1775) Burke stressed to the House of Commons that talk about sovereignty should be carried out with considerable care. On the matter of 'the parliament of Great Britain' being 'the sovereign of America', he said:⁵⁵

That the sovereignty was not in its nature an abstract idea of unity, but was capable of great complexity and infinite modifications, according to the temper of those who are to be governed, and to the circumstances of things; which being infinitely diversified, government ought to be adapted to them, and to conform to the nature of things, and not to endeavour to force them. That although taxation was inherent in the supreme power of society, taken as an aggregate, it did not follow that it must reside in any particular power in that society.

Burke here suggests that productive talk about sovereignty must go beyond an 'abstract' manner of talk. In doing so, he implicitly invites his audience to resist defining 'sovereignty' in the form of a simple proposition ('by sovereignty I mean ...'). For Burke, the meaning of 'sovereignty' at any particular moment will be intimately associated with 'circumstances'. This puts custom at the base of our sovereignty-talk, for our efforts to make sense of circumstances must be done in the light of previous circumstances. This is the material of reasoning by analogy, which is the heart of the common-law mind.

Like some of the American liberty-talk that he sympathized with, Burke's sovereignty-talk fell on deaf royal ears. (Deafness is talked about in the *Declaration of Independence*: '[T]he present King of Great Britain [has been] ... deaf to the voice of justice'.) The King's non-response to Burke was not only an injustice but a momentous 'lost moment' in the history of sovereignty-talk.⁵⁶

Perhaps inspired by Shakespeare's York in *Richard II*, a central metaphor of Burke's political philosophy is that of inheritance.⁵⁷ Consider, for example, these famous passages in *Reflections on the French Revolution* (1790):⁵⁸

You will observe that from Magna Charta to the Declaration of Right it has been the uniform policy of our constitution to claim and assert our liberties as an *entailed inheritance* derived to us from our forefathers, and to be transmitted to our posterity – an

55 E Burke, in *The Parliamentary History of England* (1813) (XVIII) 973-4.

56 I used the term 'lost moment' in my 'Treaty of Waitangi Sovereignty-Talk: Lost Moments' (2008) 11 *Otago Law Review* 683, 685. As I say there, 'lost moments in history' is a phrase that was introduced by historians to mean great turning points, long-term changes in one direction rather than in another, changes that might not have materialized if circumstances had been different.

57 For a connection between Burke and Shakespeare, see White, above n 25, 60.

58 E Burke, *Reflections on the French Revolution* (first published 1790, E J Payne ed 1898) 38.

estate specially belonging to the people of this kingdom, without any reference whatever to any other more general or prior right. By this means our constitution preserves a unity in so great a diversity of its parts.

A spirit of innovation is generally the result of a selfish temper and confined views. People will not look forward to posterity, who never look backward to their ancestors. Besides, the people of England well know that the idea of inheritance furnishes a sure principle of conservation and a sure principle of transmission, without at all excluding a principle of improvement. It leaves acquisition free, but it secures what it acquires.⁵⁹

Burke's organic image of inheritance is as far away from the mechanistic 'theoretic' tradition as one can imagine. Burke's image enables one to reconcile 'unity' and 'diversity'. For Hobbes, on the other hand, diversity leads to disunity, which can only be kept at bay by a unitary sovereign.⁶⁰ Hobbes' reductive theorizing, for Burke, offers 'excellence in simplicity', with a 'whole' merely being the sum of its parts. Burke's integrative, organic 'whole' offers 'excellence in composition',⁶¹ which offers interdependent parts a dynamic interconnection between the parts and the whole.

V. THE CONSTITUTION OF THE UNITED STATES: 'WE THE PEOPLE'

When thirteen colonies wanted to 'unite' into one nation, yet each retain the status of 'state', the word 'sovereignty' was destined for a stimulating life. From the outset of their efforts, sovereignty-talk became something of a repetitive to-and-fro between the Federalists and the Anti-Federalists. Historian Gordon Wood, in his *The Creation of the American Republic* (1969), tells us that 'none of [the] arguments about ... "coequal sovereignties" convincingly refuted the Antifederalist doctrine of a supreme and indivisible sovereignty'.⁶² The Federalists 'sought to refine, to evade, even to deny the doctrine, but it remained, as it had earlier, an imposing, scientific conception that could not be put down'.⁶³ The 'scientific' imaginings of theorists such as Hobbes, we might say, were more powerful than the analogical imaginings of the common-law mind.

What, then, became of the word 'sovereignty' in the early stages of American constitutionalism? James Wilson, who had a particularly high regard for the common law,⁶⁴ had the most significant impact on sovereignty-talk. At the Pennsylvania Ratifying Convention, Wood tells us, Wilson 'was left ... to deal most effectively with the Antifederalist conception of sovereignty'.⁶⁵ In short, '[h]e challenged the Antifederalists' use of the concept of sovereignty not by attempting to divide it or to deny it, but by doing what the Americans had done to the English in 1774, by turning it against its proponents'.⁶⁶ For Wilson, in all governments 'there must be a power established from which

59 Ibid 39.

60 For a criticism of the Hobbesian tradition in this regard, see J Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (1995) 196.

61 Burke, above n 58, 200.

62 G S Wood, *The Creation of the American Republic, 1776-1787* (1969) 530.

63 Ibid.

64 S A Conrad, 'James Wilson's "Assimilation of the Common-Law Mind"' (1989) 84 *Northwestern University Law Review* 186, 187.

65 Wood, above n 62, 530.

66 Ibid.

there is no appeal, and which is therefore called absolute, supreme, and uncontrollable.⁶⁷ 'The only question', said Wilson, 'is where that power is lodged?'⁶⁸ For Wilson, this power 'remains and flourishes with the people ... It resides in the PEOPLE, as the fountain of government'.⁶⁹

In his 1791 *Lectures on Law*, Wilson, the first Professor of Law at what is now the University of Pennsylvania (a position he held whilst serving as a Justice of the first United States Supreme Court), exercised his analogical imagination and compared past searches for 'the source of sovereignty' to stories about the source of the Nile.⁷⁰ The source of this 'magnificent' phenomenon had long been a mystery. Many people had come to believe that the river had a 'divine' origin and 'worshipped' it 'as a divinity'.⁷¹ But the source was 'discovered' to be 'a collection of springs small, indeed, but pure'.⁷² Learning of such humble beginnings might well have disappointed worshippers, and Wilson made a connection: locating sovereignty in 'the people' might well be disappointing to those who imagined sovereignty to be 'something more than human'.⁷³ The problem with this Nile analogy, however, is that it reflects and perpetuates the image of sovereignty as an independently existing (physical or metaphysical) object. We can surmise that Burke would have suggested to Wilson to re-direct his analogical imagination.

Wilson, one of the six who signed both the Declaration of Independence and the Constitution, wrote an opinion in *Chisholm v Georgia* (1793). The plaintiff, a citizen of South Carolina and the executor of a South Carolina merchant, sued the state of Georgia for the value of clothing supplied by the merchant during the Revolutionary War. Georgia refused to appear, claiming immunity from the suit as a 'sovereign state'. Wilson J showed some caution with the word 'sovereign'. He remarked that 'in an instrument well drawn, as in a poem well composed, silence is sometimes most expressive', and he went on to say:⁷⁴

To the Constitution of the United States the term sovereign, is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those, who ordained and established that constitution. They might have announced themselves 'sovereign' people of the United States: But serenely conscious of the fact, they avoided the ostentatious declaration.

Had Wilson J earlier re-directed his analogical imagination along Burkean lines, he might have construed the use of the word 'sovereign' to be far from an 'ostentatious declaration'.

Wilson J asserted that if a dishonest merchant could be sued for breaking a contract, and states, just like persons, could make and break contracts, the same 'general principles of right' that permitted suit against the merchant

67 Ibid.

68 Ibid.

69 Ibid.

70 J Wilson, *Lectures on Law* (1791), reprinted in R G McCloskey (ed), *The Works of James Wilson* (1967) 80-1.

71 Ibid 81.

72 Ibid.

73 Ibid.

74 *Chisholm v Georgia*, 2 Dall. (2 US) 419 (1793), 454.

required holding the state accountable for its breach as well. It would be problematic to say that Georgia could escape accountability for its misdeeds simply by being 'permitted, proteus-like, to assume a new appearance, and to insult him and justice, by declaring, I am a sovereign state'.⁷⁵

After *Chisholm* went against it, Georgia successfully participated in promoting the Eleventh Amendment, which restricted the power of federal courts to hear suits against states brought by citizens of other states. *Chisholm* was thereby overruled. 'State sovereignty' was thus 'protected', at least for the moment.

Wilson had little opportunity to recompose his position on sovereignty after this event of overruling by constitutional amendment. In the 1790s he was jailed twice for debt, and he then went into hiding in North Carolina, where he died.⁷⁶ How might he have talked of 'sovereignty' in the context of the Eleventh Amendment? He might well have said something like this: 'It is wrong to say that state sovereignty was protected, for did not the sovereign American "people" delegate to the states a portion of their sovereignty?'⁷⁷

But to say as much is to remain committed to the image that sovereignty is a 'thing' that can be delegated and split, or retained in full, and so on. Here we will do well to join Shakespeare's Richard in prison and become highly conscious of how language can mislead and frustrate and delude. We will do well to imagine language not as a neutral tool (as Hobbes would have us do) but as a powerful form of life that structures the way we imagine the world and ourselves in it. The word 'sovereignty' is not an innocent label that can point to something or someone out there in the world. The meaning of 'sovereignty' is not independent of who says it and how.

Sovereignty-talk continued in the United States ('united States?') in connection with the activity of banking. This question led to a stir: Did Congress have the constitutional power to establish a national bank? Seeking cabinet advice, President Washington put the question to Thomas Jefferson and Alexander Hamilton in the early 1790s, when Congress chartered the Bank of the United States. For Jefferson, the creation of such a bank was not within the powers of Congress enumerated in Article 1 nor within the General Welfare Clause (Article I Section 8: 'To lay ... Taxes ..., to provide for ... the general Welfare of the United States') nor the Necessary and Proper Clause (later in Section 8: 'To make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States ...'). For Hamilton, Congress had certain implied powers, and the creation of a national bank could be reasonably claimed to be among them. The differences between Jefferson and Hamilton were connected with different ways of imagining the identity of the parties to the Constitution. For Jefferson, the Constitution

75 Ibid 456. This reading of Wilson draws from J M Sher, 'A Question of Dignity: The Renewed Significance of James Wilson's Writings on Popular Sovereignty in the Wake of *Alden v Maine*' (2005) 61 *NYU Annual Survey of American Law* 592, 602.

76 For further discussion of Wilson's life and work, especially his metaphorical imagination, see S A Conrad, 'Metaphor and Imagination in James Wilson's Theory of Federal Union' 13 *Law & Social Inquiry* (1988) 1.

77 Here I draw from Sher, above n 75, 604.

was a compact among thirteen sovereign Peoples, and Article I should be narrowly construed in accordance with the traditional rule that treaties generally be interpreted narrowly.⁷⁸ For Hamilton, the Constitution was a grant of power by one People to a special set of national agents:⁷⁹

This restrictive interpretation of [Article I] is also contrary to this sound maxim of construction; namely, that the powers contained in a constitution of government, especially those which concern the general administration of the affairs of a country, its finances, trade, defense, etc., ought to be construed liberally in advancement of the public good.

The Bank of the United States was established, and it had a planned life of twenty years. After it expired, Congress established the Second Bank of the United States for the purpose of trying to put an end to economic disorder. Southern and western states expressed their belief that the Bank inhibited the growth of capital in their regions and that it engaged in some problematic fiscal practices. In response, some states taxed it significantly. The state of Maryland claimed that the Bank owed it \$15 000 in state taxes. James McCulloch, the cashier of the Baltimore branch, refused to pay the tax. A legal case began.

This is the opening of Marshall CJ's opinion for the Court in *McCulloch v Maryland* (1819):⁸⁰

In the case now to be determined, the defendant, a sovereign state, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that state. The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the constitution of our country devolved this important duty

The Court, Marshall CJ suggests, is obliged to make an authentic, creative 'decision', an obligation that comes with dread, or 'awful responsibility'. We have, after all, nothing less than 'sovereign' against 'sovereign'.

The identity of 'the people' is one of Marshall CJ's concerns. What is he to make of the claim, by counsel for the state of Maryland, to consider the Constitution 'not as emanating from the people, but as the act of sovereign and independent states'.⁸¹ By this claim, 'The powers of the general government ... are delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the states, who alone possess supreme dominion'.⁸² To this, Marshall CJ offers a lengthy response, part of which concerns the Preamble to the Constitution:⁸³

78 A R Amar, 'Of Sovereignty and Federalism' (1987) 96 *Yale Law Journal* 1425, 1453.

79 Quoted in Amar, *ibid.*

80 *McCulloch v Maryland* 17 US (4 Wheat) 316, 400-1 (1819).

81 *Ibid* 402.

82 *Ibid.*

83 *Ibid* 402-5.

It would be difficult to sustain this proposition. The convention which framed the constitution was indeed elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligations, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might 'be submitted to a convention of delegates, chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification.' This mode of proceeding was adopted From these conventions the constitution derives its whole authority. The government proceeds directly from the people; is 'ordained and established' in the name of the people The constitution ... bound the state sovereignties. ... The government of the Union, then (whatever may be the influence of this fact on the case), is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

What will be striking to some of his readers is the qualification '(whatever may be the influence of this fact on the case)'. Marshall CJ seems to be suggesting that it may not make any significant difference to the result of the case whether it starts out from the position that the Constitution was a compact between sovereign Peoples or a grant by one People.

What apparently really mattered for Marshall CJ was the nature of language in general and the significance of this nature for the present case. He stressed that the Constitution was, out of necessity, drafted broadly and that it was not to be regarded as a 'legal code'.⁸⁴

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the proximity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the ninth section of the 1st article, introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is *a constitution* we are expounding.

How are we to read that oft-quoted passage? What does the phrase 'it is *a constitution* we are expounding' mean? In considering that question, we must never forget that words do not speak for themselves.⁸⁵

We can be sure that by the time Marshall CJ disposed of the question concerning the identity of 'We the People', some of his readers resisted identification with his 'we' (in his remark 'it is *a constitution* we are expounding'). These resisting readers are our present concern. Perhaps the most influential critique of Marshall CJ's attempt to 'consolidate' the state governments under one central power was John Taylor's *Constitutions*

84 Ibid 407.

85 Words always come from someone, who is directing them to someone else, even when they are part of a soliloquy. Claims about 'the meaning' of the 'plain' or 'literal' words generally erase this relational and contextual dimension of language. Lon Fuller had much to say and suggest about this, as a number of recent interpreters have claimed. See the volume edited by Witteveen and Van der Burg, above n 6. See also W E Conklin, 'Lon Fuller's Phenomenology of Language' (2006) 19 *International Journal for the Semiotics of Law* 93.

Construed and Constitutions Vindicated (1820). Taylor sought to put an end to the use of the word 'sovereignty' in American constitutional discourse. In a section titled 'Sovereignty', he wrote:⁸⁶

I do not know how it has happened, that this word has crept into our political dialect, unless it be that mankind prefer mystery to knowledge; and that governments love obscurity better than specification. ... Sovereignty implies superiority and subordination. It was therefore inapplicable to a case of equality ... The word being rejected by our constitutions, cannot be correctly adopted for their construction; because, if this unanimous rejection arose from its unfitness for their design of refining and limiting powers, its interpolation by construction for extending these same powers, would be an evident inconsistency. It would produce several very obvious contradictions in our political principles. It would transfer sovereignty from the people ... to their own servants. It would invest governments and departments, invested with limited powers only, with unspecified powers. ... Our constitutions, therefore, wisely rejected this indefinite word as a traitor of civil rights, and endeavoured to kill it dead by specifications and restrictions of power, that it might never again be used in political disquisitions.

In fact, the term 'sovereignty,' was sacrilegiously stolen from the attributes of God, and impiously assumed by kings. Though they committed the theft, aristocracies and republics have claimed the spoil. Imitation and ignorance even seduced the English puritans and the long parliament to adopt the despotism they resisted; and caused them to fail in accomplishing a reformation for which they suffered the evils of a long war.

Why, we might ask, is the word 'sovereignty' still in circulation outside of religion? Perhaps there is not a bright line between 'religion' and the 'political'? Perhaps there is not a bright line between 'mystery' and 'knowledge'? Perhaps it is impossible to eliminate 'obscurity' and in 'inconsistency'? In the spirit of the common-law mind, which seeks to reconcile unity and diversity, perhaps 'obscurity' and 'inconsistency' can at times be virtues. (It is indeed ambiguity that makes a place for the movement and transformation that is central to the common law.) They might well be vices solely for the Hobbesian theorist who wants a tidy world, in which the whole is equal to the sum of the parts.

In offering a response to Taylor, we can perhaps do no better than turning to Marshall CJ's *McCulloch* opinion. What he said about the word 'necessary' arguably can be said about the word 'sovereignty'. Reading the Necessary and Proper Clause, Marshall CJ wrote:⁸⁷

Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense – in that sense which common usage justifies. The word 'necessary' is one of this description. It has no fixed character peculiar to itself. It admits of all degrees of comparison; and it is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases.

86 J Taylor, *Construction Construed, and Constitutions Vindicated* (1820; 1970) 25-6.

87 *McCulloch*, above n 80, 414.

In making this claim about ‘the character of human language’, Marshall CJ does to ‘necessary’ what Burke did to ‘sovereignty’, namely, insisting that its actual meaning is not independent of the circumstances of its use. The task of giving meaning to ‘sovereignty’ is not a simple one-line definition but a ‘composition’.

VI. NEW ZEALAND

In 2000, the originator of the phrase ‘the common-law mind’ directed his attention to sovereignty-talk in New Zealand. In *Waitangi as Mystery of State*, Pocock offered some innovative materials for talking about the *Treaty of Waitangi*. Here are two fragments:⁸⁸

The Treaty of Waitangi is now considered fundamental, in that it precedes and establishes the national sovereignty; it therefore furnishes a basis on which Maori make claims against that sovereignty, reminding it that it is conditional upon fulfillment of a treaty that made promises to Maori which have not always been honoured (this is to put it mildly). The Treaty is not used to delegitimise sovereignty, but as a reminder of its conditionality.

The Treaty of Waitangi renders New Zealand sovereignty perpetually debatable, but recasts sovereignty as a perpetual debate between the Crown, Maori and *Pakeha* qualified to engage in it. Sovereignty rests on the Treaty, but the Treaty remains unfulfilled, and the lack of fulfillment sets up a process and a debate that extend to the indefinite future. Like a written or an unwritten constitution, the Treaty is open to perpetual interpretation by a body identical to neither courts of law nor parliament (though in procedure it resembles the former), not exercising sovereignty so much as advising it of its perpetually disputable character ...⁸⁹

Pocock here imagines the *Treaty of Waitangi* as the seed of a potentially endless conversation. He gives new life to the word ‘sovereignty’ not in the language of theory (with a set of propositions) but in living speech. ‘Sovereignty rests on the Treaty’, he says in a somewhat reifying breath, which is followed by a qualifying breath (‘but ...’) that renders ‘it’ less solid. (His vital noun is ‘process’, a word that is typically missing from the language of timeless theory.) In doing so, he suggests that the word ‘sovereignty’, like the common law and the common-law mind, can never rest.

In 2001, Pocock followed up *Waitangi as Mystery of State* with *The Treaty Between Histories*. Here Pocock offers some remarks on the S-word that touch both the particular and the general:⁹⁰

Maori as participants in this debate need to articulate – to one another and to other participants – their understanding of sovereignty, or of whatever term in either language they wish to employ in its stead; and *Pakeha* need to understand their employment of the term, or rather the limits within which *Pakeha* may expect to understand it. It is an essential feature of all communication that it takes place between actors who do not fully understand one another, and of all communication between communities that each is addressing its own members as much as members of the other.

88 J G A Pocock, ‘Waitangi as Mystery of State: Consequences of the Ascription of Federative Capacity to the Maori’, in D Iverson et alia (eds), *Political Theory and the Rights of Indigenous Peoples* (2000) 25, 26.

89 Ibid 34 (macrons omitted).

90 J G A Pocock, ‘The Treaty Between Histories’ in A Sharp and P McHugh (eds), *Histories, Power and Loss* (2001) 75, 86.

If we communicate with one another accepting the fluid nature of language (communication without the conduit metaphor), and thus accepting that we 'do not fully understand one another', we would make a place for an educative friendship, ultimately for a community worthy of the name. We would have, Pocock suggests, common-law minds meeting and co-evolving with one another.⁹¹

Pocock's talk of 'perpetual debate' is a challenge to many *Treaty* commentators who speak in a declarative tone, which implies a reality of fixity and closure. Consider, for example, David Round's *Truth or Treaty* (1998), which is offered as 'a book of common sense; a book of simple and obvious home truths that somehow few people seem inclined to want to put into print'.⁹² Concerning the meaning of Article I:⁹³

We know what sovereignty is. As the dictionaries tell us, it is 'supremacy in respect of power, domination or rank; supreme dominion, authority or rule'. We all know, too, as a simple matter of fact, that for a very long time the Crown has been recognised, by both New Zealand and international law, as possessing that sovereignty.

What 'authority' should 'we' grant to dictionaries and to Round's use of them in the context of reading the *Treaty*? Authors of dictionaries are the only people whom when they write words do not *say* them to someone in a particular context. In entering into the *Treaty*, one party, who was located in one context, spoke to another party, who was located in another context. Speaking generally, to the extent that any act of expression derives its meaning from its relation to its context, the expression will not have exactly the same meaning for the parties involved. When there is a difference in meaning that is significant to the communicators, a question that arises is this: How is the difference to be managed? What many of us (I am avoiding Round's kingly 'we') call 'the law' offers a valuable resource (especially the institution of the hearing), to say the least, for managing differences. The hope here is to *create* through dialogue a common sense out of conflicting common senses, rather than have a selectively imagined common sense given privileged status as Truth.⁹⁴

Round seeks to do battle with 'Treatyists', a term he invented for 'the small but vocal collection of my opponents'.⁹⁵ He uses his new word when he goes on to talk about the activity of understanding the *Treaty*, an activity involving part-whole relations:⁹⁶

91 By 2001, Pocock intimated some distance between himself and the phrase 'the common-law mind': 'The common-law mind (as the present writer once perhaps rashly called it) ...' (ibid 82).

92 D Round, *Truth or Treaty?: Commonsense questions about the Treaty of Waitangi* (1998) 9.

93 Ibid 98.

94 Lon Fuller's work suggested much about the necessity to create common sense through dialogue. Fuller compared the common-law system with 'a discussion of two friends sharing a problem together' – L L Fuller, 'Human Purpose and Natural Law' (1956) 53 *Journal of Philosophy* 697, 705. In his hypothetical case of the Speluncean Explorers, differing judges make conflicting appeals to 'common sense', and Fuller's reader is left to make sense of the differences. Fuller, above n 6, 620 and 642.

95 Round, above n 92, 12.

96 Ibid 101.

In order to understand the Treaty, one must read it as a whole. This is, after all, what the signatory chiefs did in 1840. One gets the impression from some Treatyists that the chiefs in the 1840s assented only to Article II, but this is hardly so. The Treaty has a preamble and three articles. Anything it might, or might not, say about chieftainship in Article II has to be read in light of Article I, which, even in the Maori version, has the chiefs give the Queen 'complete government', and Article III, whereby the Queen gives Maoris 'the rights and duties of citizenship'.

Round apparently could not stop to invite his reader to read Article I 'in light' of Article II and of other parts of the *Treaty*. For Round (and for many other commentators, including so-called 'radical Maori' such as Ani Mikaere⁹⁷), such a suggestion might well sound strange. With Article I, we are dealing with the word 'sovereignty', which seems to have a magical force, with its meaning supposedly fixed and stable and independent, knowable to all. The dialogical common-law mind, however, would dissent.

The S-word is used in the Parliamentary Sovereignty clause of the *Supreme Court Act 2003*. Section 3(2) states: 'Nothing in this Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament.' How are we to read this clause? One's reading of a text is not separate from what one brings to one's reading. Or so the common-law mind would claim, against the force of those who live by the conduit metaphor, expressing the view that the meaning of the text is there in black and white. The anti-dialogue conduit metaphor is central to the tradition of legal positivism and to the self-image of the 'plain-fact judge', who, as David Dyzenhaus has discussed in the context of apartheid, would have us all separate 'legality' and 'justice'.⁹⁸ The metaphor is problematic to the 'common-law judge', who would insist that legality and justice are fused in a manner that negates any sense of their separateness. The common-law judge, we might say, imagines communication as a collaborative enterprise, a metaphor that challenges the positivist image of law as 'a one-way projection of authority'.⁹⁹

In 2004, Philip Joseph expressed his dissatisfaction with our inherited talk about the supposed absence of legal limitations on the legislative powers of Parliament. Promoting the metaphor of a 'collaborative enterprise' for imagining Parliament-Courts relations, he wrote:¹⁰⁰

Parliamentary sovereignty is a latter-day myth perpetrated by our habits of lazy thinking. Parliament has never been *sovereign*. In the dominant tradition, sovereignty implies autocracy. It imports the language of *Leviathan*. It conjures an instant association with the all-powerful Kings and Queens of our ... historical past. But domestic legislative power has never been of this nature. Throughout English constitutional history, Parliament and the Courts have exercised co-ordinate, constitutive authority – Parliament through legislation, the Courts through statutory construction and principles of common law. While each has been, operationally and functionally, independent of the other, each has been constitutionally interdependent on the other. ... Each is engaged in a collaborative enterprise – the business of government.

97 See Dawson, above n 4.

98 D Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (1998), especially 77-90.

99 This quoted language is from L L Fuller, *The Morality of Law* (1969 – revised ed) 221.

100 P A Joseph, 'Parliament, The Courts, and the Collaborative Enterprise' (2004) 15 *The King's College Law Journal* 321, 321-2 (a quotation and footnotes omitted).

The common-law mind, perhaps needless to say, will welcome an attempt to resist 'the language of *Leviathan*.' To speak of a 'collaborative enterprise' is to take a fruitful step away from a rule-centered image of law to an activity-centered image,¹⁰¹ an activity that is at heart a literary one.

A word of constructive criticism: whatever one thinks of the metaphor of a 'collaborative enterprise' for Parliament-Courts relations, the label 'lazy thinking' seems to me to be unnecessarily adversarial. If we want to stimulate a collaborative conversation about a 'collaborative enterprise' we might do well to explore various possible *uses* of the word 'sovereignty'. A non-'dominant tradition', which runs through Burke, could readily retain the word 'sovereignty' whilst adopting the metaphor of a 'collaborative enterprise'. In doing so, we would put to good use the master-word of the common-law mind, namely 'circumstances'. Meaning, to reiterate, is not independent of circumstances.

More recently, in 2007, Joseph went as far as suggesting that we eliminate the word 'sovereignty' from our constitutional language.¹⁰²

It is misconceived doctrine, derived from Hobbes and Austin, to view law as the command of an all-powerful 'Sovereign'. ... It is Alice-in-Wonderland theory, defining an imaginary world that does not exist. ... Absolute untrammelled power cannot co-exist with the rule of law and the ideal of limited government. Dicey espoused schizophrenic doctrine. ... [T]he continued use of the term 'sovereignty' is a distraction that is better avoided. Multiple or twin sovereignties is an oxymoron. ... It is preferable to purge the term from the discourse and develop language and concepts that can build a more inclusive theoretical explanation.

A move to eliminate the word 'sovereignty' from our law talk could well be helpful in some *circumstances*. But as there are some occasions in which the word could have a fitting use, such as in the process of negotiating the limits of relative 'sovereign' powers, a push 'to purge' completely seems to me unnecessary and possibly undesirable. What are we to do with our inherited legal materials that contain the word 'sovereignty', materials such as the *Treaty of Waitangi*?¹⁰³ Joseph's will 'to purge' seems to me to resemble Hobbes' 'scientific' will to erase figurative language from all serious discourse in the service of a search for precision. Is 'a more inclusive theoretical explanation' either possible or desirable? Burke, whose common-law mind was concerned not so much with general theory as with the particulars of circumstances, might have answered in the negative.

The common-law mind might well question the fittingness of Joseph's reference to 'Alice-in-Wonderland theory, defining an imaginary world that does not exist.' Such 'theory', like all theory, is the product of an imagination

101 Lon Fuller's integrative jurisprudence explicitly invited a move away from a rule-centered image of law to an activity-centered image. We can be sure that in his hypothetical case of the Speluncean Explorers Keen J's deference to 'a clear-cut principle, which is the supremacy of the legislative branch of our government' (above n 6 at 633) does not speak for Fuller.

102 P A Joseph, *Constitutional and Administrative Law in New Zealand* (1993; 2007, 3rd ed) 543, 545.

103 The word 'sovereignty' arguably still has an important place in international relations, not the least in managing inequality. See B Kingsbury, 'Sovereignty and Inequality' (1998) 9 *European Journal of International Law* 599.

(perhaps a delusive one), and it contributes to the social construction of reality, experiences of which will differ from one person to another. (One person's reality is another's fiction.) What we call 'the law' indeed offers a place (the institution of the hearing) to negotiate the meaning of differing experiences. It is here that we might give the word 'justice' new life, including the occasion of addressing a self-identified 'sovereign'.

Let us now turn to the latest edition of Morag McDowell and Duncan Webb's textbook *The New Zealand Legal System* (2006). Concerning relations between Parliament and the Courts:¹⁰⁴

The judiciary's subordinate function is clear: Parliament may enact any law that it pleases, and the Courts must apply the law and not question it.

Parliament has unequalled, and indisputable lawmaking power. ... Albert Venn Dicey, a nineteenth century legal scholar, was one of the main proponents and formulators of this doctrine. He defined Parliament as having the right to make or unmake any law whatsoever, and that such law was unable to be set aside or invalidated by any person or body.¹⁰⁵

Dare their reader, who might be inclined to take their cue from Shakespeare's York, 'question' what they declare about the doctrine of Parliamentary Sovereignty? How do the authors define themselves and their reader and the relationship between them? What autonomy do they grant to their reader to make their own sense of the vitally important relationship between the different branches of government? ('Autonomy'? That word could serve as a substitute for the word 'sovereignty' in various circumstances.) For those seeking to promote a culture of justification in the law, law teachers will do well to encourage the asking of 'justification' questions at all levels of governance. What, according to McDowell and Webb, justifies the doctrine of Parliamentary Sovereignty?

McDowell and Webb's reference to Dicey brings to mind Brian Simpson's *The Common Law and Legal Theory* (1973), in which he claims that what members of the 'caste of lawyers' count as law shapes what counts as law.¹⁰⁶ 'Settled doctrines, principles, and rules of the common law', Simpson says, 'are settled because, for complex reasons, they happen to matters upon which agreement exists, not, I suspect, because they satisfy tests'.¹⁰⁷ Simpson here draws attention to the significance of custom as a non-deliberative source of stability in law.¹⁰⁸

Dicey may have known what Shakespeare's Richard II seemed to know so well: that justification can be destruction of that which one seeks to justify. Whatever the case about Dicey, Simpson's words seem to me to invite contemplation of the price we might pay for the unreflective acceptance of the doctrine of Parliamentary Sovereignty. Might not the price include the failure to take the word 'justice' seriously? McDowell and Webb fail to invite the question. This failure, I suggest, is nothing less than a failure of the legal imagination.

104 M McDowell and D Webb, *The New Zealand Legal System: Structures and Processes* (1995; 2006, 4th ed) 104.

105 *Ibid* 108.

106 A W B Simpson, 'The Common Law and Legal Theory' in (ch 4) A W B Simpson (ed), *Oxford Essays in Jurisprudence* (1973) 94.

107 *Ibid* 97.

108 *Ibid* 96.

VII. CONCLUDING REMARKS

'Sovereignty', Konrad Schiemann has aptly claimed, 'is one of those words that go straight to your gut'.¹⁰⁹ The theorist Hobbes was a significant player in giving the S-word the punch that it has. If Burke's anti-theoretical common-law mind and voice had had more weight in the flow of history, 'sovereignty' would not be among the 'totemic words' that 'produce powerful, and sometimes unreasoned and unreasonable reactions in our hearts and thus shape our actions and decisions'.¹¹⁰ This essay is written out of the hope that we can do better with our management and use of the S-word.

In *Our Uncommon Common Law* (1975), Harry Jones remarked that it has long seemed to him 'to be a paradox that the common-law tradition, with its spotlight on judges and what they do, originated in England, which is the birthplace of the political doctrine of legislative supremacy'.¹¹¹ At issue, I suggest, are two ways of imagining language, two ways of imagining social and legal life. A defining feature of the common-law mind is an appreciation that language is a fluid cultural artifact, and that acts of language are not reducible to a clear and simple proposition, which is 'objective' in the sense of being outside of context. The desire to reach out of the world of contingent and unstable contexts is, I suggest, a desire to reach for the Sovereign, for an unchanging entity. The desire seems readily understandable, but incongruent with the conditions of our existence.

Talk about the desire to reach for the Sovereign goes all the way back to the Babel story (*Genesis* 11: 1-9), which raises fundamental questions about the relationship people have with language. The Babel story, as Walter Brueggemann has suggested, 'raises important questions about how we speak and how we listen and answer'.¹¹² He continues:¹¹³

In a positivistic society, language is conventionally understood simply as descriptive of what is. When language only describes what is, it inevitably becomes conservative. It tends to become ideological, giving permanence to the way things presently are. But language ... can be evocative and creative, calling into being things that do not exist. Such language is the way of promise and of hope.

Sovereignty-talk in the spirit of Hobbes is expressed as being 'descriptive of what is', but the expression, as Burke suggested, is problematic. The expression offers a sense of 'permanence', but this masks a world of change, a world in which 'is' and 'ought' defy neat separation.¹¹⁴ Hobbes was thus 'conservative' in an awkward sense, trying to conserve what was not 'there'. (In the words of Lord Cooke of Thorndon, 'The myth of sovereignty is a

109 K Schiemann, 'Europe and the Loss of Sovereignty' (2007) 56 *International and Comparative Law Quarterly* 475, 476.

110 Ibid.

111 H W Jones, 'Our Uncommon Common Law' (1975) 42 *Tennessee Law Review* 443, 459.

112 W Brueggemann, *Genesis: A Bible Commentary for Teaching and Preaching* (1982) 102.

113 Ibid.

114 Lon Fuller had difficulty with the is/ought language, and in his later work he tended to side-step it in favour of a distinction between 'order' and 'good order', a distinction that better lent itself to talking about law with an internal morality. For a comprehensive treatment, see K I Winston, 'Is/Ought Redux: The Pragmatist Context of Lon Fuller's Conception of Law' (1988) 8 *Oxford Journal of Legal Studies* 329.

common illusion, tidy but superficial.¹¹⁵) Burke was the true conservative, seeking to maintain and improve for future generations the worthy parts of an inherited culture.

Speaking of worthy parts of an inherited culture, the inclusion of a Shakespeare play in an article on the common-law mind may have surprised the reader at the start. To the extent that the play directs attention to the reciprocity between language and custom, a reciprocity the common-law mind is acutely conscious of, the reader may now sense a 'natural' place for the play here. We can gain much from reading Shakespeare, not the least reminders about the artificial and fluid character of language. In an article on legal education, Thomas Eisele suggested that teachers will do well to remind students about the contingency of language.¹¹⁶

In law school ... students hunger for 'black letter' law. They actually think that the law exists in this form, or that this is the standard or normal or ordinary form in which the law exists. The common law tradition teaches otherwise; it suggests that legal rules are formulable quite variously, and that the propriety of any particular formulation of a rule is a function of the individual case in which the rule arises and the string of cases out of which it grows. Unless our students understand how black-letter rules are generated and elicited and abstracted from the cases and the contexts, they understand little or nothing of what they need to know – as professionals – about the law and its uses. And because the 'black letter' view of law is a view of which our students must be disabused again and again, we teach the lesson again and again by asking them (among other things) to read and state the cases for themselves, to puzzle over their inclinations with respect to horrible hypotheticals and imagined cases, and to put together fields of law on their own.

Teachers will do well to remind themselves, too, for they were once students. The 'hunger' that students may have may well also be in them. The 'hunger' may be particularly acute when using the word 'sovereignty'. To speak from my own experience, it seems very difficult to talk like a common-law lawyer when it comes to talking about Parliamentary Sovereignty. When we put the S-word into our mouths, it may carry us further than we might imagine. Perhaps there is a King Richard II in us all. If so, we will do well to try to put him in his place, under the sovereignty of custom.

115 'The Myth of Sovereignty' (2007) 11 *Otago Law Review* 377, 379. According to Elias CJ, Lord Cooke was a serious reader of Shakespeare. S Elias, 'Euology for the Lord Cooke of Thorndon' (2008) 39 *Victoria University of Wellington Law Review* 1, 2. 'Lord Cooke never stopped reading Shakespeare. He kept paperwork copies of the plays to tuck into his pockets to keep with him'.

116 T Eisele, 'Wittgenstein's Instructive Narratives: Leaving the Lessons Latent' (1990) 40 *Journal of Legal Education* 86, 91.