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UNWRITTEN CONSTITUTIONALISM  
A STUDY OF THE PRINCIPLES AND STRUCTURES THAT  
INFORM NEW ZEALAND'S DISTINCTIVELY  
UNWRITTEN CONSTITUTION

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# ABSTRACT

A constitution is concerned with the legitimacy of public power. Liberal theories of political morality understand the legitimacy of a constitutional order in terms of those substantive values that inform representative democracy, the rule of law and fundamental human rights. The majority of modern nations seek to achieve these normatively desirable ends through reliance on a ‘written’ constitution. Such is the popularity of the written constitutional form that its key features — an authoritative commitment to substantive values, enforceable limits on public power, and formal entrenchment of the constitution — are the standards against which claims of constitutional legitimacy are measured internationally. New Zealand’s constitution is premised on a distinctive form of constitutional settlement. It makes some use of constitutionally significant text, but does not rely on an entrenched, constitutive document in the same way as a written constitution. This distinction has important implications for theories of liberal constitutionalism. While New Zealand purports to practise constitutionally legitimate government, the usual standards used to assess such claims are closely associated with the written constitutional form.

This thesis theorises the New Zealand constitution in a manner that takes seriously its unwritten structure. It contends that the contemporary dominance of the written constitutional form risks obscuring the distinctive ways in which unwritten constitutions respond to the challenges facing modern liberal democracies. Once these distinctive characteristics are understood from the point of view of their own constitutional context it is possible to recast liberal constitutionalism in a manner that is sensitive to, and more appropriate for, an unwritten constitutional framework. Unwritten constitutions are capable of constraining without limiting, promoting stability without formal entrenchment, and allowing for governments to make meaningful commitments in the absence of an authoritative statement of constitutional principle. In short, unwritten constitutions provide for constitutionalism without text. Accordingly, an unwritten constitution may make a serious claim to constitutional legitimacy, but that claim must be judged on its own terms. Rather than relying solely on theories of constitutional legitimacy associated with the written constitutional form, New Zealand’s constitution establishes its legitimacy with reference to a distinctive but equally valid liberal model of ‘unwritten constitutionalism’.



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# INTRODUCTION

An unwritten constitution represents a distinctive form of constitutional settlement. In an unwritten constitution there is no central constitutional text that is superior to ordinary law or anterior to day-to-day politics. This type of constitutional settlement may be contrasted with that based on a written constitution, where a uniquely authoritative document both prescribes the outlines of a framework for organised government and symbolises a commitment to the realisation of fundamental values. The absence of an entrenched, constitutive document that performs these functions is the defining characteristic of an unwritten constitution.

Contemporary scholarship recognises a superficial distinction between written and unwritten constitutions but does not attribute to the distinction any substantive implications for constitutional government. This position ought to be reassessed. Without a central, authoritative constitutional text, an unwritten constitution operates in the absence of the principal institution that has influenced constitutional theory and practice in written constitutional systems.<sup>1</sup> As a result, constitutional issues that fall for resolution under an unwritten constitution will often invite a different response than if those same issues had been addressed by a written constitution. An unwritten constitution is genuinely distinctive in a manner that matters to constitutional practice.

Recognising a substantive distinction between written and unwritten constitutions invites a re-examination of key assumptions that are thought to be fundamental to all liberal democracies. Standards of constitutional propriety that have been developed with reference to a written constitutional context, for instance, may prove inappropriate for the unwritten constitutional tradition. Liberal constitutionalism, the dominant theory of constitutional legitimacy among modern democracies, exemplifies this tendency. Liberal constitutionalism seeks to secure individual freedom by institutionalising a meaningful commitment to the realisation of a liberal vision of political morality. While at a high level a commitment to liberal values is equally applicable to both written and unwritten constitutions,<sup>2</sup> orthodox models of liberal constitutionalism tend to draw heavily on the institutional arrangements, structures and principles that characterise written constitutions. A written constitution is considered to be a necessary condition for establishing constitutional legitimacy under such models because it supplies an authoritative basis for the commitment of the legal and political system to realising substantive values, in turn allowing for

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1 In this thesis, the term ‘institution’ is used to describe a constitution in the sense of an established practice or phenomenon, rather than the alternative meaning employed in KN Llewellyn “The Constitution as an Institution” (1934) 34 Colum L Rev 1.

2 The term ‘values’ is preferred to ‘principles’ at various times in this thesis to emphasise that liberal constitutionalism is a normative theory with substantive implications. Where this emphasis is not required, the two terms are used interchangeably.

the formal entrenchment of those values so that they act as enforceable limits on the legitimate exercise of public power.<sup>3</sup>

The absence of an authoritative constitutional text gives rise to uncertainty as to whether unwritten constitutions allow for substantive values to be binding on, and enforceable as against, those who exercise public power. If orthodox models of liberal constitutionalism are taken seriously as a measure of constitutional propriety, this result might challenge the legitimacy of constitutional government under an unwritten constitution. This thesis takes an alternative view. It contends that the contemporary dominance of the written constitutional form risks obscuring the distinctive ways in which unwritten constitutions respond to the challenges facing all modern liberal democracies. Any apparent inconsistency between liberal constitutionalism and unwritten constitutions stems from a lack of sensitivity towards an unwritten constitution's distinctive characteristics.

Once these distinctive characteristics are understood from the point of view of their own constitutional context it is possible to recast liberal constitutionalism in a manner that is sensitive to, and more appropriate for, an unwritten constitutional framework. Unwritten constitutions are equally capable on their own terms of securing constraints on the legitimate exercise of public power, the stability of the constitutional system against the pressures of arbitrary change, and a commitment to the realisation of substantive values that represent the goals of liberal constitutionalism. The resulting conception of the legitimacy of constitutional government in an unwritten constitutional context might conveniently be termed 'unwritten constitutionalism'.

## *A Distinctively Unwritten Constitution*

New Zealand is one of a minority of liberal democracies without a written constitution.<sup>4</sup> However, the implications of the 'unwritten' label for constitutional theory and practice are seldom examined in detail. This apparent reluctance to engage seriously with the characterisation of New Zealand's constitution as unwritten may reflect discomfort with that characterisation's descriptive accuracy. The New Zealand legal and political system manifestly draws on written sources of constitutional authority. New Zealand's constitutional arrangements include a number of carefully constructed documents dealing with constitutional matters such as the foundation of the nation,<sup>5</sup> the

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3 This thesis uses 'public power' as a generic label that does not distinguish among judicial, executive and legislative power. Many constitutions justifiably contemplate differentiated treatment as between the respective powers of each of the separate branches of government. References to 'public power' are intended to avoid presupposing, rather than to deny, such differentiated treatment.

4 Usual practice is to group Israel, New Zealand and the United Kingdom together as the only three liberal democracies without written constitutions: see, for example, Benjamin Akzin "The Place of the Constitution in the Modern State" (1967) 2 *Israel LR* 1 at 8; Adam Tompkins *Public Law* (Oxford University Press, Oxford, 2003) at 7; Hilaire Barnett *Constitutional & Administrative Law* (6 ed, Routledge Cavendish, London, 2006) at 3; Matthew SR Palmer "Using Constitutional Realism to Identify the *Complete Constitution: Lessons from an Unwritten Constitution*" (2006) 54 *Am J Comp L* 587 at 591; Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4 ed, Thomson Reuters, Wellington, 2014) at 19. Compare KC Wheare *Modern Constitutions* (Oxford University Press, Oxford, 1966) at 5-6; Rodney Brazier "Enacting a Constitution" (1992) 13 *Statute Law Rev* 104 at 104.

5 The Treaty of Waitangi/Te Tiriti o Waitangi, signed 6 February 1840.

structure and conduct of government,<sup>6</sup> and the substantive rights and freedoms that warrant special protection.<sup>7</sup> Given these written sources of the constitution, it is perhaps natural to question whether the ‘unwritten’ label properly captures the qualities that make New Zealand’s constitution distinctive.

Whether the ‘unwritten’ characterisation holds any value for New Zealand’s constitutional arrangements is one of the key matters this thesis seeks to address. It is contended that the characterisation is an apt one. The thesis defends a broad but meaningful distinction between written and unwritten constitutional systems. As foreshadowed, this distinction is partly a matter of constitutional form. Written constitutions are self-consciously founded on the basis of a text that purports to serve as the primary source of constitutional authority for government power. In contrast, the lack of a single text that serves as the focus for the authoritative determination of constitutional matters distinguishes a constitution as unwritten. Conceived in these terms, the distinction between written and unwritten constitutions leaves room for constitutional documents to play a role — possibly a significant role — in all constitutional systems. The written/unwritten distinction is not premised on the fallacy that there is a single source of (either written or unwritten) constitutional authority. Rather, the distinction turns on the existence or otherwise of a central constitutional text that purports to be both fundamental and authoritative.

When applied to New Zealand’s constitutional arrangements, the written/unwritten distinction suggests that the constitution is an unwritten one. New Zealand’s constitution does not rest on the foundation of a central constitutional text. To the contrary, an orthodox account would likely emphasise the following features as characteristic of New Zealand’s constitutional arrangements:

- A plurality of constitutional sources, without a defined hierarchy to mediate between competing constitutional requirements and principles.<sup>8</sup>
- A lack of constitutional codification, with constitutional authority being drawn from a range of fragmented and *ad hoc* sources.
- An ambivalence towards fundamental law, and consequently the absence of an authoritative interpretation of the requirements and limits imposed by the constitution.
- An unentrenched constitutional structure, which is vulnerable to sudden and unexpected constitutional change.

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6 See, for example, Constitution Act 1986; Letters Patent Constituting the Office of the Governor-General of New Zealand 1983; Standing Orders of the House of Representatives 2011.

7 See especially New Zealand Bill of Rights Act 1990.

8 The doctrine of Parliamentary sovereignty does not resolve the lack of any basis on which to order substantive principles and values within New Zealand’s constitution. Indeed, to the extent that the doctrine is fairly characterised by David Feldman “One, None or Several? Perspectives on the UK’s Constitution(s)” (2005) 64 CLJ 329 at 334 as “a value-free response to the problems posed by the absence of consensus about core values”, it primarily serves to emphasise the comparative lack of hierarchy among competing norms in contrast to most written constitutional systems.

These features mark New Zealand's constitution as distinctively unwritten. They also demonstrate that the unwritten nature of New Zealand's constitutional arrangements cannot be explained solely with reference to the comparator of a written constitution. Despite the modern dominance of the written constitutional form, it would be a mistake to emphasise the written constitutional paradigm to the exclusion of the specific traditions and structures that inform unwritten constitutions. An unwritten constitution represents a distinctive form of constitutional settlement with its own foundations, structures, principles, conventions, requirements and norms. This thesis takes the view that any understanding of an unwritten constitution that purports to be complete must account for that particular constitutional tradition in its own terms, rather than with reference to an alternative constitutional framework.

By championing the unwritten constitution as a distinctive form of constitutional settlement this thesis necessarily challenges the view that the written/unwritten distinction is void of substance. This view is exemplified in the following passage:<sup>9</sup>

There is a lot of nonsense written about the unwritten constitution. [...] The distinction between written and unwritten constitutions is one of form, not of substance. It speaks to the question of what a constitution looks like, not of what it actually tells us. No substantive consequences flow from the fact that the constitution is unwritten.

This line of argument is too quick to dismiss constitutional form as one of the means by which standards of constitutional propriety are established and promoted. One of the primary tasks of any working constitution is to legitimise the legal, political and administrative action undertaken in the name of the state.<sup>10</sup> Public power must be exercised in accordance with rules, processes, principles and values that make up the constitution if it is to be legitimised as an exercise of constitutional authority. Written constitutional systems provide a ready standard against which to judge the legitimacy of government action by requiring consistency with the text and principles of an authoritative constitutional document. In contrast, in an unwritten constitution the lack of a definitive source of constitutional authority has implications for any serious claim to constitutional legitimacy. Claims to legitimacy based solely on substantive values, for instance, are open to a higher degree of contestation because those values may be drawn from a variety of sources and cannot be validated by reference to a canonical text. At the same time, limits on the scope of authority provided by ideals such as democracy or the rule of law are not subject to definitive interpretation and remain ambiguous. Trespassing beyond these limits remains a serious matter, however, and may invite an unpredictable response from other constitutional actors. Constitutional practice in an unwritten constitution is required to take these challenges into account.

In short, a central means by which public power can be constitutionally validated (or contested) in a written constitution is not available in unwritten constitutions. Even where constitutional outcomes are similar between jurisdictions with and without written constitutions, the need to rely

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9 Tompkins *Public Law*, above n 4, at 9. See also Harry Calvert *An Introduction to British Constitutional Law* (Financial Training, London, 1985) at 10; Colin Munro "What is a Constitution?" [1983] PL 563 at 568.

10 Howard Schweber *The Language of Liberal Constitutionalism* (Cambridge University Press, New York, 2007) at 1.

on alternative structures and principles as a foundation for claims of constitutional legitimacy means that analysis proceeds on a very different basis in an unwritten constitution. By influencing standards of constitutional propriety in this way, the structural question of whether a constitution is (un)written plays a role in shaping constitutional practice. The features that distinguish New Zealand's constitution as being unwritten go beyond superficial matters of constitutional form.

## *Towards Unwritten Constitutionalism*

In modern liberal democracies, standards of constitutional legitimacy have increasingly been measured against the benchmark of liberal constitutionalism. As usually understood, liberal constitutionalism requires certain constitutional structures, principles and processes that give effect to a broadly liberal vision of political morality. That vision incorporates human rights, democracy and the rule of law. As the dominant contemporary theory of the constitutionality of public power, a commitment to liberal constitutionalism is widely considered to be a pre-requisite for constitutional government.

Orthodox accounts of liberal constitutionalism tend to emphasise certain features within a constitutional system to ensure that public power is legitimate. These features commonly include:<sup>11</sup>

- a commitment to substantive liberal values through the incorporation of those values within a uniquely authoritative constitutional text;
- supremacy of those values over all forms of the exercise of public power, so that they are binding on all branches of government;
- entrenchment of those values against change by ordinary legal or political processes; and
- enforceable limits on the legitimate exercise of public power through an appeal to an independent judiciary.

These pre-requisites are not easily reconciled with the distinctive characteristics identified above that mark New Zealand's constitution as unwritten. The unentrenched nature of the constitution counts against a stable, ongoing commitment to any set of values. The plurality of constitutional sources and lack of codification mean there is no authoritative constitutional position through which liberal values can be definitively recognised. The marked ambivalence towards fundamental law may be taken to mean that constitutional principles do not formally bind

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11 See, for example, Barak Cohen "Empowering Constitutionalism with Text from an Israeli Perspective" (2003) 18 Am U Int'l L Rev 585 at 585. See also Joseph *Constitutional and Administrative Law in New Zealand*, above n 4, at 14; Alec Stone Sweet "The Politics of Constitutional Review in France and Europe" (2007) 51 CON 69 at 74-75.

Parliament,<sup>12</sup> and ultimately the question of enforcement of constitutional principles by an independent judiciary does not arise. If standard accounts of liberal constitutionalism are taken as the benchmark for constitutionality, New Zealand's claim to constitutional government appears uncertain.

This apparent inconsistency between New Zealand's constitution and the standard requirements of liberal constitutionalism suggests one of two conclusions. The first possibility is that New Zealand's unwritten constitution is deficient. If made out, this conclusion would throw into question whether the exercise of public power in New Zealand has any valid claim to constitutional legitimacy. This thesis rejects that interpretation. In general, New Zealand's constitutional arrangements work tolerably well. New Zealand's unwritten constitution affords meaningful recognition of, and respect for, fundamental human rights, democracy and the rule of law, and there does not seem to be compelling evidence of a significant constitutional deficiency.<sup>13</sup>

On that basis, this thesis endorses the second possible conclusion: that standard accounts of liberal constitutionalism are not well attuned to the unwritten constitutional context. This conclusion is perhaps unsurprising, given the pervasive influence of the written constitutional tradition over contemporary accounts of constitutionalism. If the unwritten constitution is accepted to be genuinely distinctive, then the core tenets of liberal constitutionalism must be recast so as to account for the nuances and idiosyncrasies of an unwritten constitutional system. Rather than identifying a deficiency in the unwritten constitutional structure, the apparent tension between New Zealand's constitution and standard accounts of liberal constitutionalism demonstrates the importance of engaging with an unwritten constitution on its own terms. Substantiating New Zealand's claim to constitutional government therefore requires an investigation into the distinctive ways in which New Zealand's legal and political system seeks to give effect to fundamental (that is, constitutional) values. Demonstrating the availability of a coherent theory of constitutionalism that marries liberal political morality with New Zealand's distinctive unwritten constitution is the ultimate burden of this thesis.

## *Methodology and Thesis Structure*

The analysis in this thesis is primarily qualitative and interpretative. It examines key aspects of New Zealand's constitutional arrangements and reflects on the consequences of those arrangements in a broad way, attempting to draw insights from a range of different examples and materials. Both the doctrinal nature of the research and the specific subject matter contribute to a necessarily

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12 Lord Cooke's famous *dictum* in *Taylor v New Zealand Poultry Board* [1994] 1 NZLR 394 (CA) at 398 that "[s]ome common law rights presumably lie so deep that even Parliament could not override them" suggests one avenue for the development of a fundamental law in New Zealand. However, that approach remains embryonic.

13 See, for example, Constitutional Arrangements Committee *Inquiry to Review New Zealand's Existing Constitutional Arrangements: Report of the Constitutional Arrangements Committee I 24A* (House of Representatives, Wellington, 2005) at 8 (citing the submission of Lord Cooke of Thorndon to the Inquiry).

subjective approach. Different methodological approaches have been adopted to control for this subjectivity. Specifically, the chapters of the thesis that contribute most directly to the theoretical framework draw on a range of analytical methodologies: chapter one is primarily conceptual, chapter two involves analysis that is historical and sociological, and chapter three undertakes a specific case study. However, even with a range of methodologies the analysis in this thesis is contingent on value judgements made by the author. For that reason, the thesis seeks to identify plainly and openly the judgements on which the analysis is based. This begins in the outline of the thesis structure below.

Following this introduction, the thesis is developed through six substantive chapters. Chapter one establishes the conceptual orientation for the thesis by addressing the concepts of ‘constitution’ and ‘constitutionalism’. A complete account of a constitution must address both its descriptive and normative dimensions. If understood solely as a collection of structures, processes and rules, a constitution is little more than a description of the ways in which public power has actually been exercised. The unwritten nature of New Zealand’s constitution seems to promote an approach that is primarily descriptive, so that the constitution is understood to be “no more and no less than what happens”.<sup>14</sup> Chapter one defends an alternative conception. It understands a constitution to be a normative institution that provides a basis for the critical evaluation of the exercise of public power. This inherent normative dimension prescribes the boundaries of legitimate conduct by public officials and promotes a commitment to the realisation of substantive principles and values. The normative conception incorporates but goes beyond descriptive analysis by engaging theories of constitutionalism, which seek to explain the constitution’s claim to legitimacy in terms of political and moral theory.<sup>15</sup> The chapter observes that constitutionalism in New Zealand can be understood in terms of a commitment to political liberalism, which broadly encompasses the ideals embodied in representative democracy, fundamental human rights and the rule of law.

Chapter two explicates the written/unwritten distinction in order to demonstrate the distinctive nature of an unwritten constitution. The chapter argues that the presence or absence of an authoritative constitutional text provides the foundation for a distinction that is both real and meaningful. Historically, the distinction served to distinguish between alternative conceptions of constitutionalism by linking normative theory to constitutional form. The historical English unwritten constitution, from which the contemporary New Zealand constitution is derived, was distinctive because it was believed to have always existed, having no identifiable moment of creation. This distinctive conception promoted the stability and consistency of fundamental rules by constraining government (and royal) action because the unwritten nature of those rules effectively placed them beyond interference by human agency. While understandings of the nature of constitutionalism in an unwritten constitution have changed since the written/unwritten distinction was first observed, it is contended that a focus on constitutionalism still serves as the basis for an

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14 JAG Griffith “The Political Constitution” (1979) 42 MLR 1 at 19.

15 See Poul F Kjaer “Legitimacy through Constitutionalism” in Aldo Mascareno and Kathya Araujo (eds) *Legitimization in World Society* (Ashgate, Surrey, 2012) 99.



analytically robust distinction between written and unwritten constitutional systems. Unique textualist and constitutionalist considerations inform the ideal of constitutionalism in a written constitutional context, but are simply unavailable as a conceptual or pragmatic device under an unwritten constitution. As a result, an unwritten constitution must be different from its written analogue in a manner that is normatively significant.

Chapter three argues that this normative distinction between written and unwritten constitutions matters in practice. The chapter develops a comparative study of the judicial consideration of political communication in three jurisdictions. In New Zealand, the leading case is *Lange v Atkinson*.<sup>16</sup> While fundamental values were manifestly in play, the Court of Appeal preferred to resolve the matter through the incremental development of the common law defence of qualified privilege rather than engaging with constitutional imperatives directly. This approach stands in contrast to the decision of the United States Supreme Court in *New York Times Co v Sullivan*,<sup>17</sup> where the constitutional implications of allowing public officials to bring defamation claims were squarely confronted. It is contended that the difference of approach between the two appellate courts can be explained in part by constitutional structure. Written constitutions, such as in the United States, tend to promote a kind of “top-down” reasoning where the principle or philosophy underpinning the constitutional protection becomes the starting point for analysis.<sup>18</sup> In contrast, New Zealand’s unwritten constitution tends to promote a kind of “bottom-up”, incremental style of analysis that is not obviously constitutional in approach, and may in fact avoid engaging with constitutional principle and theory altogether. Further evidence of the relevance of constitutional structure is provided by the unsettled approach of the High Court of Australia. It is contended that an initial preference for self-consciously constitutional reasoning exhibited in *Theophanous v Herald and Weekly Times Ltd*<sup>19</sup> and the subsequent restatement of the law based on common law grounds in *Lange v Australian Broadcasting Corporation*<sup>20</sup> is best explained by that fact that while Australia has a written constitution, it has no documented bill of rights. The right to freedom of political communication therefore has only a tentative perch as an inference derived from the text of the Australian Constitution. In important respects the right to freedom of political communication is both written and unwritten. It is this ambiguous status that seems to have motivated the very different approaches by the High Court of Australia.

Given the difference between written and unwritten constitutions highlighted in chapters two and three, there is a need to develop theories of constitutionalism that are sensitive to an unwritten constitutional context. Chapter four begins this process by directly confronting an aspect of New Zealand’s constitutional arrangements that challenges the development of a workable model of liberal constitutionalism. The doctrine of Parliamentary sovereignty holds that Parliament exercises

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16 *Lange v Atkinson* [1998] 3 NZLR 424 (CA); *Lange v Atkinson* [2000] 3 NZLR 385 (CA).

17 *New York Times Co v Sullivan* 376 US 254 (1964).

18 The concepts ‘top-down reasoning’ and ‘bottom-up reasoning’ are examined in Richard A Posner ‘Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Rights’ (1992) 59 U Chic L Rev 433.

19 *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 (HCA).

20 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (HCA).

plenary legislative power that is theoretically unlimited. If accepted, this position challenges efforts to understand the New Zealand constitution in terms of a commitment to substantive liberal values. It is contended that orthodox sovereignty theory overlooks a broader range of constitutional considerations that suggest the substantive values and normative principles that influence and inform the legitimate exercise of public power are “alive in the background” of New Zealand’s constitutional practice.<sup>21</sup> These values and principles offer a strong counter-narrative to Parliamentary sovereignty’s apparent ambivalence towards fundamental constitutional considerations, although they fail to displace it. A workable theory of constitutionalism is therefore required to make sense of how the tension between Parliament’s claim to absolute authority and the influence of normative principle plays out within New Zealand’s unwritten constitutional arrangements.

The need to reconcile normative principle with the reality of New Zealand’s constitutional arrangements leads chapter five to examine the role of politics in the New Zealand constitution. Due to its focus on the normative relevance of political processes and institutions, political constitutionalism purports to offer a normative model that shows considerable sympathy to New Zealand’s actual constitutional arrangements. The initial attraction of the model is clear: an unwritten constitution premised on Westminster-style Cabinet government and the plenary authority of Parliament seems to align more naturally with a normative model based on political contestation and raw democratic accountability than notions of legal finality and enforceability. Political constitutionalism provides renewed recognition of, and normative support for, the relevance of political institutions and processes as an important site of constitutional activity. However, political constitutionalism’s focus on *ordinary* political processes as the *exclusive* site of constitutional activity implies a necessary commitment to a normatively ‘thin’ conception of constitutionalism. The weight of the fundamental principles and values that pervade the New Zealand constitution heavily count against this normatively thin conception. Accordingly, despite the valuable insight it offers, the chapter concludes that political constitutionalism does not represent a complete normative model of the New Zealand constitution.

The conclusion in chapter five, that political constitutionalism offers useful insight into constitutional theory and practice but ultimately fails as a normative model, is taken to demonstrate something significant about how theories of constitutionalism might best be approached in a New Zealand context. A coherent theory of constitutionalism ought to begin with a focus on what is genuinely *constitutional* about New Zealand’s system of government. That type of approach faces distinct challenges in an unwritten constitution. Unwritten constitutional systems tend to be characterised by the absence of a strong conceptual separation between constitutional matters and the ordinary business of government. Distinguishing clearly between the two can prove difficult. Addressing the need for a coherent theory of constitutionalism in a New Zealand context must therefore begin with an inquiry into how an unwritten constitution identifies and responds to the

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21 See BV Harris “The Law Making Power of the Judiciary” in Philip A Joseph (ed) *Essays on the Constitution* (Brooker’s, Wellington, 1995) 265 at 269.

normative gravity of those fundamental principles and values that can be properly described as ‘constitutional’. That is the task with which chapter six is concerned. It argues that an unwritten constitution functions by establishing constraints on public power without formal limits, promotes stability without entrenchment, and enables commitment between constitutional actors without reference to a dispositive source of constitutional authority. These features not only clearly distinguish New Zealand’s unwritten constitution from its written comparators, but allow New Zealand’s unwritten constitution to be understood in terms of liberal political morality. Ultimately, the theory and practice of constitutional government in New Zealand can be understood as a set of structures and principles that institutionalise a commitment to liberal constitutionalism in the absence of an authoritative constitutional text. This has important implications for how standards of constitutional propriety are established and maintained in New Zealand, and for any complete account of New Zealand’s distinctive form of constitutional settlement.

### *Assumptions and Limitations*

The scope of this thesis is subject to two important limitations. The first is that the conception of liberal constitutionalism adopted in the thesis is particularly broad. It does not seek to defend a particular vision of liberal political morality. The goal of the thesis is to reconcile a specific unwritten constitution with liberal constitutionalism in general terms. It is, in this sense, primarily a work of constitutional jurisprudence rather than a theory of political philosophy.<sup>22</sup> Despite this moral agnosticism, the thesis holds as fundamental to any meaningful account of constitutionalism a commitment to the realisation of substantive principles and values in some form. This commitment to substantive liberal values distinguishes the thesis from radical scholarship premised on an outright rejection of fundamental liberal ideals, such as challenges to the existence or utility of human rights.<sup>23</sup>

Implicit in this approach is an assumption that the nature, scope and limits of liberal values as they apply in any given democracy is to an important extent a reflection of the historical traditions, contemporary institutions and the will of the people in that democratic state. This gives rise to a second key limitation. The thesis is primarily concerned with the New Zealand constitution. It does not reach firm conclusions that are applicable to all constitutions, or even all unwritten constitutions, although the conclusions drawn with respect to the New Zealand constitution may suggest avenues for further research. The thesis does in places draw on international scholarship, especially with reference to the unwritten constitution of the United Kingdom, as this enables reference to a richer pool of research on constitutional theory and practice. However, if the conclusions arrived at have

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22 Following Martin Loughlin *Foundations of Public Law* (Oxford University Press, Oxford, 2010) at 158-164, the thesis might be described as a work of political jurisprudence rather than a theory of political right.

23 For example, Sonu Bedi *Rejecting Rights* (Cambridge University Press, Cambridge, 2009).

the potential to be developed into a broader theory of constitutionalism that can inform discourse across a range of liberal democratic jurisdictions, this must remain an avenue for further study.

# CHAPTER ONE

## CONCEPTS: CONSTITUTION AND CONSTITUTIONALISM

A constitution relates to public power and how that public power is exercised.<sup>1</sup> This chapter explores the nature of that relationship. It argues that the concept of a constitution is ambiguous, and may be understood in either descriptive or normative terms. As a descriptive institution, a constitution is a generalisation of actual legal and political activity. This conception views the exercise of public power as a matter of fact to be established through empirical investigation. Understood as a normative institution, however, a constitution supplies the basis for the critical evaluation of the legitimacy of public power by “distinguishing between valid and illegitimate political action”.<sup>2</sup> This conception holds that constitutional authority is a matter of legitimacy to be established in moral terms.<sup>3</sup> This chapter adopts a normative focus that distinguishes the thesis from the primarily descriptive analysis that characterises some prominent accounts of the New Zealand constitution. The descriptive focus of those accounts is unable to justify fully the exercise of public power it describes because it does not engage explicitly in analysis of moral principle. A normative perspective is to be preferred because no genuine constitution can be detached from the value judgements that inform the proper exercise of legal and political power.

This chapter takes the normative dimension of a constitution seriously by pairing an authoritative description of the New Zealand constitution with an account of liberal constitutionalism. In a modern context, constitutionalism is often understood in terms of a commitment to some version of liberal political morality. In this respect, the constitutional principles, structures and institutional arrangements that ultimately govern the exercise of public power can be justified with reference to their potential to promote certain substantive values: representative government, the rule of law and fundamental rights. This chapter defends an account of constitutionalism that is broadly consistent with liberal political morality, which serves as the conceptual basis for the remainder of the thesis.

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1 Matthew SR Palmer “What is New Zealand’s Constitution and Who Interprets It? Constitutional Realism and the Importance of Public Office-holders” (2006) 17 PLR 133 at 134 [“Constitutional Realism”]; Constitutional Arrangements Committee *Inquiry to Review New Zealand’s Existing Constitutional Arrangements: Report of the Constitutional Arrangements Committee I 24A* (House of Representatives, Wellington, 2005) at 7 [*New Zealand’s Existing Constitutional Arrangements*].

2 Gordon J Schochet “Introduction: Constitutionalism, Liberalism and the Study of Politics” in J Roland Pennock and John W Chapman (eds) *Nomos XX: Constitutionalism* (New York University Press, New York, 1979) 1 at 2.

3 The use of the term ‘legitimacy’ in this thesis is distinct from the concept of legality: see “The Normative Dimension”, below, at 23.

## *The Concept of a Constitution*

Constitutional law is an “elusive concept”,<sup>4</sup> and so it is important to be clear about precisely how the concept of a constitution should be understood. The key argument of this chapter is that the task of identifying a constitution cannot be “solved by an appeal to authority”,<sup>5</sup> but requires an inquiry into normative principle. While it is important to identify the source of public power and the ways in which it is actually exercised, failing to account for the principles and values that inform the exercise of public power results in a conception of a constitution that is incomplete.

The starting point for conceptual analysis of an unwritten constitution is inherently contestable. By definition, an unwritten constitution lacks the central point of focus provided by a controlling constitutional text. This thesis adopts the following statement from the New Zealand *Cabinet Manual* as its point of departure for analysis of the concept of a constitution:<sup>6</sup>

A constitution is about public power, the power of the state. It describes and establishes the major institutions of government, states their principal powers, and regulates the exercise of those powers in a broad way. While all constitutions have these general characteristics, each constitution is affected by the national character of the state it services.

This definition has a number of advantages. First, the *Cabinet Manual* comes as close to an authoritative statement of the constitutional position as is possible under New Zealand’s indistinct constitutional framework. A Parliamentary inquiry into New Zealand’s constitutional arrangements endorsed the *Cabinet Manual* as “the most authoritative current treatment of the sources of New Zealand’s constitution”,<sup>7</sup> reflecting that its content has been considered and applied by a number of executive Governments with differing priorities and ideological beliefs. Adopting this definition as a starting point limits the scope for genuine contestation in respect of the conceptual analysis undertaken in this chapter.

Second, the *Cabinet Manual* definition highlights a number of aspects that are useful for the analysis in this chapter. The definition draws an immediate link between the concept of a constitution and the state’s exercise of public power. It also goes further, neatly characterising the constitution’s relationship with public power as one entailing creation, distribution (among the institutions of government) and limitation. That a constitution is both the source and regulator of the appropriate use of public power by the separate institutions of government is core to the understanding of the New Zealand constitution adopted throughout this thesis.

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4 Nevil Johnson “Law, Convention, and Precedent in the British Constitution” in David Butler, Vernon Bogdanor and Robert Summers (eds) *The Law, Politics, and the Constitution: Essays in Honour of Geoffrey Marshall* (Oxford University Press, Oxford, 1999) 131 at 131.

5 FW Maitland *The Constitutional History of England* (Cambridge University Press, Cambridge, 1908) at 527.

6 Kenneth Keith “On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government” in Cabinet Office *Cabinet Manual* (Wellington, 2008) 1 at 1.

7 Constitutional Arrangements Committee *New Zealand’s Existing Constitutional Arrangements*, above n 1, at 19.

Third, the *Cabinet Manual* definition benefits from consistency with the definitions employed in influential academic works. Dicey defined a constitution as “all rules which directly or indirectly affect the distribution and exercise of the sovereign power in the state”.<sup>8</sup> He continued by noting that this rather broad concept is evidenced in the application of specific rules:<sup>9</sup>

Hence it includes (among other things) all rules which define the members of the sovereign power, all rules which regulate the relation of such members to each other, or which determine the mode in which the sovereign power, or the members thereof, exercise their authority.

This definition contains the core of a conceptual approach to understanding a constitution. It reflects the idea that a constitution controls the distribution and exercise of public power, which has been influential in the approach of other scholars. Jennings, for instance, adopted a similar approach, defining a constitution as the “rules determining the creation and operation of governmental institutions”.<sup>10</sup> Jennings’ definition does not directly address the matter of state power, which is central to Dicey’s definition, preferring instead the proxy of “government institutions”. However, Jennings’ definition does seem to better explain how constitutional rules affect the distribution and exercise of public power. According to Jennings, constitutional rules affect the “creation and operation” of public power, which is fundamental to the nature of a constitution. Similarly, Wheare defined a constitution as “the whole system of government of a country, the collection of rules which establish and regulate or govern the government”.<sup>11</sup> Wheare’s definition also captures the idea of rules that affect the “creation and operation” of public power, although he prefers the language of “establish and regulate”.

The similarities between the three academic definitions reveal a useful working account of a constitution for the purposes of this thesis. Dicey, Jennings and Wheare each define the term ‘constitution’ in terms of ‘rules’ that apply in respect of government or state power. This confirms the intuition that a constitution is concerned with public power, and explains the nature of this concern. By acting as a set of rules in respect of public power a constitution controls the effect of that public power by regulating how it may be exercised. Further, the nature of those rules is important. A constitution controls public power in at least two distinctive respects. The first is the “creation” (Jennings) or “establishment” (Wheare) of government power, meaning that a constitution is in a real sense the source of public power. The second is the “operation” (Jennings) or “regulation” (Wheare) of public power, meaning that once public power is established there is an ongoing role for the constitution to control the manner in which public power is exercised. Dicey’s account includes a third, “distribution” among constitutional actors, which may be implicit in the work of Jennings and Wheare. It is at this point that a coherent concept of a constitution begins to

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8 AV Dicey *Introduction to the Study of the Law of the Constitution* (10 ed, Macmillan & Co, London, 1960) at 23 (footnote omitted).

9 Dicey *Introduction to the Study of the Law of the Constitution*, *ibid*, at 23.

10 W Ivor Jennings *The Law and the Constitution* (5 ed, University of London Press, London, 1959) at 36.

11 KC Wheare *Modern Constitutions* (2 ed, Oxford University Press, Oxford, 1966) at 1. Similar definitions have been adopted in more contemporary analysis from the United Kingdom: see, for example, AW Bradley and KD Ewing *Constitutional and Administrative Law* (14 ed, Pearson Longman, Harlow, 2007) at 4.

emerge. The *Cabinet Manual* follows a similar approach, with the ideas of public power, its establishment, distribution and ongoing regulation are all present. It therefore provides a neat synthesis of the key ideas that animate the definitions supplied by Dicey, Jennings and Wheare.

Fourth, the *Cabinet Manual* definition has the advantage of brevity. While it goes on to detail the practical operation of the New Zealand constitution, the short passage quoted above captures the essence of the approach in the *Cabinet Manual* to the concept of a constitution. In doing so, it clarifies a point implicit in the definitions of Dicey, Jennings and Wheare — that constitutional rules control public power “in a broad way” and are often not addressed to the detail of government. In the United States it is recognised that the nature of a constitution means 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”.<sup>12</sup> Something quintessentially constitutional is lost as accounts of the constitution move from the general to the particular. As one commentator has described it, “[c]oncision is constitutionally constitutive”.<sup>13</sup> This feature of a constitution perhaps explains why the definitions offered by Dicey, Jennings and Wheare are so abbreviated. A constitution, by its nature, is concerned with public power at a high level, and a broadly phrased yet succinct attempt at definition reflects that nature.

While it has these advantages, the *Cabinet Manual* definition also has drawbacks. The brevity of the *Cabinet Manual* definition comes at the price of ambiguity. It shares this limitation with the definitions supplied by Dicey, Jennings and Wheare on which it implicitly draws. Although it is useful as a starting position, the *Cabinet Manual* definition needs to be supplemented so that latent ambiguities can be identified and addressed. Some academic treatments of the New Zealand constitution seek to make these ambiguities plain. Scott, for example, recognised that the term ‘constitution’ was inherently ambiguous, and sought to distinguish between three possible interpretations:<sup>14</sup>

When we ask whether New Zealand has a Constitution, there are three things we could mean. We could be inquiring whether particular kinds of law and custom exist in New Zealand. The answer would be that New Zealand, like every other civilized country, has a Constitution [...] Second, we could be asking whether some of these rules are contained in a document or a set of documents bearing a title that contains some such word as ‘Constitution’. New Zealand has such a document in the New Zealand Constitution Act, 1852 (but this Act is not generally known as ‘the Constitution’). Third, we could be asking whether there is a document or set of documents which, however it is entitled, is generally known as ‘the Constitution’. [...] The answer would be that New Zealand has no ‘Constitution’ in this sense.

Scott is partly concerned with the nature of a documentary constitution. A documentary constitution may be either a documentary record that is known and accepted as being the Constitution or simply

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12 *McCulloch v Maryland* 17 US 316 (1819) at 407.

13 Akhil Reed Amar *America’s Unwritten Constitution: The Precedents and Principles We Live By* (Basic Books, New York, 2012) at 208.

14 KJ Scott *The New Zealand Constitution* (Clarendon Press, Oxford, 1962) at 1. The Constitution Act 1986 might be substituted for Scott’s reference to the Constitution Act 1852 in a contemporary context.



a documentary record that deals with constitutional matters. New Zealand has a constitution in the latter sense. A number of documents purport to set out the basic institutions and processes of government, including the Constitution Act 1986, Letters Patent 1983, the Standing Orders of Parliament, the *Cabinet Manual* and the Treaty of Waitangi. However, none of these documents is recognised as ‘the Constitution’ in Scott’s final meaning of the term.

Scott’s primary concern is a more fundamental ambiguity around whether a constitution is in fact documentary in nature or simply a collection of legal and customary rules. In this sense, Scott’s analysis follows the Westminster tradition of distinguishing between a constitution as formally recorded in a document and the actual institutions and practice of government.<sup>15</sup> Scott goes so far as to express scepticism as to whether a documentary constitution is a genuine constitution at all. Whether a documentary constitution exists “is not a question about the nature of constitutional law but one about the linguistic habits of politicians, journalists, and scholars”.<sup>16</sup> Accordingly, analysis of the New Zealand constitution can only proceed on the basis of an understanding that the constitution is a set of rules that substantively impact on the establishment and regulation of government power. Whether or not those rules are formally recorded in writing does not determine their substantive nature.

This more fundamental ambiguity taps into broader questions within constitutional theory. Scott’s conclusion that it is the substance rather than the form of the New Zealand constitution that is relevant evokes Schmitt’s warning not to conflate the written expression of constitutional laws with the substantive constitution, properly understood. In Schmitt’s view, a written constitution is purely formal and ‘relative’ in that it confers constitutional status on a particular matter due only to its inclusion in a specific document.<sup>17</sup> There is no necessary connection between the textual rendering of a matter and its constitutional substance. The constitution in this sense is not contingent on (or relative to) formal expression, but relates directly to the nature of the state and public power it exercises. This ‘absolute’ sense of a constitution appears to be very close to what Scott means when he refers to “particular kinds of laws and customs” involving “a body of rules determining or providing procedures for determining the organization, personnel, powers, and duties of the organs of government”.

Once the idea of a constitution is separated from the expression of particular constitutional matters, Schmitt is able to identify a further ambiguity. According to Schmitt, the concept of a constitution contains two key elements. The first element is a descriptive one. The constitution acts as a description of the state to which it applies. This descriptive sense of the constitution represents the “complete condition of political unity and order”,<sup>18</sup> and as such the “concrete manner of

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15 See, for example, Jennings *The Law and the Constitution*, above n 10, at 33-36. Wheare *Modern Constitutions*, above n 11, at 1-2; Bradley and Ewing *Constitutional and Administrative Law*, above n 11, at 4.

16 Scott *The New Zealand Constitution*, above n 14, at 1.

17 Carl Schmitt *Constitutional Theory* (1928) (Jeffrey Seitzer (trans), Duke University Press, Durham, 2008) at 67.

18 Schmitt *Constitutional Theory*, *ibid*, at 60.

existence” of the state is established with reference to the constitution.<sup>19</sup> This descriptive element of a constitution may be contrasted with a normative element. In this second sense, the constitution represents “the entire normative framework of state life”.<sup>20</sup> Rather than merely describing the state, the normative constitution influences it. The constitution itself has a role in determining the substantive content of government power and process. On this view the constitution simultaneously represents the state both as it is and as it ought to be. Schmitt argues that both the “existential” and the “genuinely imperative” dimensions of a constitution are essential to its nature.<sup>21</sup>

Schmitt’s distinction between the descriptive and normative dimensions of a constitution throws light on the different traditions that have influenced the concept of a constitution in unwritten constitutional systems.<sup>22</sup> Sometimes a constitution is understood only in an existential or descriptive sense, so that it reflects the reality of actual constitutional practice but does not itself influence that practice. At other times a constitution is understood to be distinctly normative in character. A normative understanding of a constitution implies that the constitution itself has a role in determining the substantive content of public power and government process. This normative understanding does not deny an element of description, but views purely descriptive analysis of the constitution as incomplete. Whether a constitution is ultimately understood in descriptive or normative terms goes to the heart of what a constitution is and why it is important for the exercise of public power. The *Cabinet Manual* definition is open to being interpreted each way — as either a primarily descriptive account of the New Zealand constitution, or as an account that seeks to recognise the constitution’s distinctively normative dimension. Both approaches find a degree of support in scholarship in respect of unwritten constitutional systems.

## *The Descriptive Dimension*

One understanding of a constitution is as a descriptive term for the actual institutions and practice of government.<sup>23</sup> A constitution is a description of what actually happens (or has happened) in the course of governing. This first meaning is the more traditional interpretation of the term ‘constitution’, which predates the relatively modern trend of adopting written constitutions. It is an interpretation that resonates strongly with the shared New Zealand and United Kingdom tradition of an unwritten constitution:<sup>24</sup>

This [descriptive] view of public law as reflecting the ‘order of things’ is strongly reinforced by the peculiar nature of the British constitution. As a result of the absence of

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19 Schmitt *Constitutional Theory*, *ibid.*, at 59.

20 Schmitt *Constitutional Theory*, *ibid.*, at 62.

21 The term “existential” is borrowed from Martin Loughlin *Foundations of Public Law* (Oxford University Press, Oxford, 2010) at 211. The term “genuinely imperative” is taken from Schmitt *Constitutional Theory*, *ibid.*, at 63 (emphasis omitted).

22 See Colin R Munro *Studies in Constitutional Law* (2 ed, Butterworths, London, 1999) at 2; Leslie Wolf-Phillips *Comparative Constitutions* (Macmillan, London, 1972) at 7-8.

23 Charles Howard McIlwain *Constitutionalism: Ancient and Modern* (Cornell University Press, Ithaca, 1940) at 5.

24 Martin Loughlin *Public Law and Political Theory* (Clarendon Press, Oxford, 1992) at 42.

acute political crisis in recent times there has been no modern constitutional settlement. The legal forms of our constitution reflect a medieval order and, because of the lack of any permanent rupture, we have experienced an unusual degree of institutional continuity. To the extent that these forms and institutions have been adapted to reflect modern political changes the accommodation has generally been achieved through custom and practice.

Descriptive analysis of the exercise of public power appears to be the dominant approach in unwritten constitutional systems. Bogdanor has noted this tendency in respect of the United Kingdom's unwritten constitution:<sup>25</sup>

The fundamental peculiarity of the British constitution is that it seems possible to analyse it only in descriptive terms, as a summation of past experience, rather than in genuinely constitutional terms as representing the recognition of certain normative principles.

The 'descriptive' approach to constitutional analysis seeks to "systematise and tabulate existing allocations of power and practices that have arisen through historical, social, economic and political pressures".<sup>26</sup> In the passage quoted above, Bogdanor comes close to drawing a distinction between this type of descriptive analysis and "genuine" constitutional analysis, implying that the function of a constitution is broader than merely describing the exercise of public power. To Bogdanor, descriptive analysis does not acknowledge the special character of a constitution found in the recognition of normative principles that guide future government activity.

Without the ability to refer to an authoritative constitutional text, there is a tendency to conflate the unwritten constitution with "a descriptive account of a series of pragmatic working practices, ignoring the need to be concerned with organizational structures and discussion and decision mechanisms to produce legitimate outcomes".<sup>27</sup> Part of the reason for this tendency appears to be that constitutional theory in the unwritten tradition has assumed an implicit account of legitimate authority without presenting that account for criticism in explicit terms.<sup>28</sup> The roots of this approach can be traced back through the shared constitutional history of New Zealand and the United Kingdom at least as far as Dicey. In his influential text, Dicey explains his general approach to constitutional analysis in the following terms:<sup>29</sup>

At the present day students of the constitution wish neither to criticise, nor to venerate, but to understand; and a professor whose duty it is to lecture on constitutional law, must feel that he is called upon to perform the part neither of a critic nor of an apologist, nor of an eulogist, but simply an expounder; his duty is neither to attack nor to defend the constitution, but simply to explain its laws.

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25 Vernon Bogdanor *The New British Constitution* (Hart Publishing, Oxford, 2009) at 19 (emphasis added).

26 David Feldman "One, None or Several? Perspectives on the UK's Constitution(s)" (2005) 64 CLJ 329 at 334.

27 Ian Harden and Norman Lewis *The Noble Lie: The British Constitution and the Rule of Law* (Hutchinson, London, 1986) at 69 (footnote omitted) [*The Noble Lie*].

28 Harden and Lewis *The Noble Lie*, *ibid*, at 16.

29 Dicey *Introduction to the Study of the Law of the Constitution*, above n 8, at 3-4.

This passage confirms Dicey's approach to be descriptive and analytical.<sup>30</sup> Dicey expressly refrains from engaging with his subject matter in critical or evaluative terms. It is an approach that views public law "as a practical discipline involving description and analysis of the organizational rules of the political order".<sup>31</sup> The constitution is treated as a matter of fact, waiting to be discovered and presented in an empirical fashion. As a nominal or descriptive institution,<sup>32</sup> there is no role for critical reflection on underlying principles or values of the constitution once the 'fact' of the constitution has been expounded.

Dicey's empirical approach has continued to influence legal scholars up to the present day. This can be seen in particular in contemporary discussion of one of the fundamental aspects of New Zealand's constitution, the doctrine of Parliamentary sovereignty. Dicey's stated purpose in examining the doctrine was self-consciously empirical. He sought to demonstrate simply that the existence of Parliamentary sovereignty was a "legal fact".<sup>33</sup> Critical analysis is redundant on this approach: Parliamentary sovereignty simply exists and does not stand in need of justification. Nor is Parliament's legal sovereignty susceptible to challenge at the level of constitutional principle. It is simply the way that the constitution works. The influence of this empirical approach is revealed time and again in United Kingdom and New Zealand constitutional scholarship. Following Dicey, it is understood that "the fundamental *fact* of our [English] constitution is the absolutely unqualified supremacy of Parliament".<sup>34</sup> Wade famously built on to this artifice when he argued that Parliamentary sovereignty was "the ultimate political *fact*" of the constitution.<sup>35</sup> The influence of this approach is still apparent in contemporary New Zealand scholarship such that it is readily accepted that Parliamentary sovereignty remains the "the core political and legal *fact* that underlies our constitutional order".<sup>36</sup>

Both the dominance of Parliamentary sovereignty in New Zealand's constitutional arrangements and its close association with Dicey make it an obvious example of a descriptive, empirical approach to constitutional analysis. However, that approach is not limited to consideration of the legislative function. It is possible to adopt a fact-based approach to constitutional analysis while endorsing alternatives to Parliamentary sovereignty. Laws, for example, has developed a constitutional theory premised on the superiority of the common law and judicial adjudication. In expounding this theory, Laws writes:<sup>37</sup>

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30 JWF Allison *The English Historical Constitution: Continuity, Change and European Effects* (Cambridge University Press, Cambridge, 2007) at 7-11 [*The English Historical Constitution*]. See also Harden and Lewis *The Noble Lie*, above n 27, at 3-4.

31 Loughlin *Public Law and Political Theory*, above n 24, at 42.

32 Jo Erick Khushal Murkens "The Quest for Constitutionalism in UK Public Law Discourse" (2009) 29 *Oxford J Legal Stud* 427 at 434 describes this approach as "semantic".

33 Dicey *Introduction to the Study of the Law of the Constitution*, above n 8, at 39.

34 AH Birch *Representative and Responsible Government* (George Allen and Unwin, London, 1964) at 73 (emphasis added).

35 HWR Wade "The Basis of Legal Sovereignty" [1955] *CLJ* 177 at 188 (emphasis added).

36 Anita Killeen, Richard Ekins and John Ip "Undermining the Grundnorm?" [2001] *NZLJ* 299 at 299 (emphasis added).

37 John Laws "Illegality: The Problem of Jurisdiction" in Michael Supperstone and James Goudie (eds) *Judicial Review* (Butterworths, London, 1992) 51 at 69.

[F]or every body other than the courts, legal power depends upon an imprimatur from an external source; but this is not true of the High Court and its appellate hierarchy. In point of theory, there exists no higher order law for them. It follows that any analysis of their jurisdiction [...] must consist in a description of judicial review in practice.

Elliott points out that this analysis suggests there are no limits on judicial power at a theoretical level. As a result, critical or evaluative analysis of the judicial function is both unnecessary and impossible.<sup>38</sup> This leaves only empirical analysis of judicial decision making, reducing consideration of the judicial function to a bare question of fact. Again, shades of this approach can be detected in New Zealand academic writing. Joseph, for example, considers that “[t]he common law wears its own badge of legitimacy in the constitutional order and what it authorises cannot be illegitimate or perverse”.<sup>39</sup> Regardless of the preferred location of final decision-making authority in the unwritten constitution, normative analysis is readily displaced by empirical inquiry.

This descriptive account of a constitution has left an indelible influence of important strands of contemporary constitutional scholarship. That the constitution is reflective of rather than the basis for the government activity received perhaps its strongest endorsement with the delivery of Griffith’s 1978 Chorley Lecture. In that lecture, Griffith put the descriptive approach front and centre in the following terms:<sup>40</sup>

The constitution of the United Kingdom lives on, changing from day to day for the constitution is no more and no less than what happens. Everything that happens is constitutional. And if nothing happened that would be constitutional also.

The statement is sweeping and powerful, and avowedly rejects prescription or the relevance of normative values to the constitutional order. It proceeds in exactly the same manner as Dicey’s analysis. The constitution is the result of government, not a source of, or a constraint on, the legitimate exercise of public power.

There is a perspective that Griffith’s analysis contains an important normative dimension that is obscured if too much emphasis is placed on Griffith’s rhetorical flourishes.<sup>41</sup> However, the prevailing view is that Griffith’s scholarship epitomises the descriptive approach to constitutional inquiry. Tomkins notes that Griffith’s approach “was never grounded in any particular set of values — it was presented merely as description”.<sup>42</sup> Others have gone further, finding Griffith’s approach to be so completely void of normative morality that it represents a “wholly descriptive” account of the constitution.<sup>43</sup> Griffith’s style of constitutional analysis is apparently exhausted once factual description of constitutional practice is complete. This type of bare factual inquiry into

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38 Mark Elliott *The Constitutional Foundations of Judicial Review* (Hart Publishing, Oxford, 2001) at 12-13.

39 Philip A Joseph “Parliament, the Courts, and the Collaborative Enterprise” (2004) 15 KCLJ 321 at 332.

40 JAG Griffith “The Political Constitution” (1979) 42 MLR 1 at 19.

41 See Martin Loughlin “Modernism in British Public Law, 1917-1979” [2014] PL 56 at 64-66; Thomas Poole “Tilting at Windmills: Truth and Illusion in ‘The Political Constitution’” (2007) 70 MLR 250 at 253.

42 Adam Tomkins *Our Republican Constitution* (Hart Publishing, Oxford, 2005) at 52.

43 Allison *The English Historical Constitution*, above n 30, at 34.

constitutional practice is still employed in contemporary analysis of the unwritten New Zealand constitution.<sup>44</sup> As a result, there is little if any room for consideration of the constitution that provides the prescription for good and effective government in normative or moral terms.

Descriptive analysis is crucial to a complete understanding of New Zealand's constitutional arrangements. Such analysis assists with identifying constitutional change,<sup>45</sup> for example. Under New Zealand's fragmented and flexible constitution, this may be particularly important as constitutional developments may manifest in less than obvious ways.<sup>46</sup> However, descriptive analysis fails to engage with the constitution in what Bogdanor describes as "genuinely constitutional terms".<sup>47</sup> It presents the constitution as if it were largely uncontroversial, perhaps passively waiting to be discovered and recorded rather than proactively worked out as it continually influences the proper exercise of public power.<sup>48</sup> As a result, the descriptive approach can obscure important detail about the principles and values that animate constitutional practice:<sup>49</sup>

The common habit of assuming an organising theory for describing laws or the constitution without articulating it and making it available for criticism unfortunately obscures debate about constitutional fundamentals. The practice is too often accompanied by a tendency to see the jurist or constitutional lawyer as merely reporting what people say and think about what they do rather than accounting for the data through a critical interpretation.

Descriptive analysis can only offer an incomplete account of a constitution. A deeper inquiry into constitutional principle is essential for any understanding of a constitution that purports to be complete. This necessarily entails engaging with the normative constitutional dimension that Schmitt identifies, which is examined in the following section.

## *The Normative Dimension*

The normative conception of a constitution seeks to go beyond the idea of a constitution that is merely descriptive or nominal, and the associated view that empirical analysis exhausts the limits of constitutional inquiry. While a nominal conception of a constitution "describes the way in which the political power of the society is concentrated", the normative understanding of a constitution offers a more complete account of political power that "places the source of that concentration somewhere other than in the mere fact of power".<sup>50</sup> In this way, a constitution provides the

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44 See in particular Matthew Palmer's theory of "constitutional realism" that self-consciously "seeks to identify the nature of a constitution, rather than itself to be the basis for normative arguments about what a constitution should be": Palmer "Constitutional Realism", above n 1, at 135.

45 Matthew SR Palmer "Using Constitutional Realism to Identify the *Complete* Constitution: Lessons from an Unwritten Constitution" (2006) 54 Am J Comp L 587 at 634-35 ["The Complete Constitution"].

46 Palmer "Constitutional Realism", above n 1, at 141.

47 Bogdanor *The New British Constitution*, above n 25, at 19.

48 See TRS Allan *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Cambridge University Press, Cambridge, 2013) at 19 [*The Sovereignty of Law*].

49 Harden and Lewis *The Noble Lie*, above n 27, at 19.

50 Philip Allott "The Courts and Parliament: Who Whom? (1979) 38 CLJ 79 at 79.

normative framework for legitimate government.<sup>51</sup> It supplies a principled justification for the primary institutions and key power relationships within the state in a manner that demarcates the boundaries of constitutionally recognised authority. Outside of this sphere of government authority lies the unjustified use of public power that may properly be termed ‘unconstitutional’.

This normative understanding corresponds with a second, more modern meaning of ‘constitution’ that refers to the adoption of certain substantive principles as fundamental law.<sup>52</sup> This understanding of a constitution has been influenced by the proliferation of written constitutions around the world, but it has meaning for all constitutional systems. It recognises a normative dimension to a constitution that the descriptive meaning of the term obscures. That more traditional meaning provides a name for the existence of public power, but reveals little about the proper exercise of that public power. In contrast, the more modern understanding of a constitution suggests that a state’s constitution itself provides an implicit standard — consistency with fundamental principle — against which the legitimacy of public power can be critically assessed. To describe the exercise of public power as ‘constitutional’ in this second sense is to make a normative claim regarding the legitimacy of that public power. Thus, the normative conception of a constitution holds that “constitutions subject states to moral values and principles, thereby converting brute force into legitimate authority”.<sup>53</sup> The purpose of a constitution is to pair the fact of public power to a normative justification for its use.

The normative conception of a constitution holds that the protection and promotion of fundamental values justifies access to and use of public power, and the use of coercive force that public power implies. Public power may not conflict with those fundamental values, as that would result in public power losing its normative justification.<sup>54</sup> As a result, the normative conception of a constitution presents a far more complex picture than the descriptive analysis associated with Dicey and Griffith. As well as descriptive accuracy, the normative conception of a constitution is concerned with what the contours of public power should be:<sup>55</sup>

[Constitutions] are never merely descriptive. It is true that they must offer a reasonably convincing picture of the real allocation of power, yet at the same time they are expected to confer authority and legitimacy on the process of governing.

From this normative perspective, legitimacy is central to the idea of a constitution. Constitutional legitimacy establishes both the authority of a government to exercise public power and the limits of that government’s constitutional authority, providing a means for understanding why public power ought to be exercised in a particular way and, as a result, why particular constitutional arrangements are worthy of respect.<sup>56</sup> Further, by establishing a “right to rule” based on normative principle rather

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51 Beverley McLachlin “Unwritten Constitutional Principles: What is Going On?” (2006) 4 NZJPIIL 147 at 149.

52 McIlwain “*Constitutionalism: Ancient and Modern*,” above n 23, at 5.

53 Feldman “One, None or Several? Perspectives on the UK’s Constitution(s),” above n 26, at 335.

54 See Massimo La Torre *Constitutionalism and Legal Reasoning* (Springer, Dordrecht, 2007) at 34.

55 Feldman “One, None or Several? Perspectives on the UK’s Constitution(s),” above n 26, at 334.

56 Allan *The Sovereignty of Law*, above n 48, at 19.

than coercive force, constitutional authority is one of the most stable and effective forms of public power available to the state.<sup>57</sup>

The normative conception also recognises that a constitution is a dynamic institution, constantly changing to account for new challenges and circumstances, and the new ways in which the exercise of public power is contemplated. The very idea of a constitution “can exercise a powerful normative force on the future exercise of public power”.<sup>58</sup> Seeking to limit the exercise of public power to its legitimate scope does not prevent constitutional development. It does, however, channel the impetus for constitutional change in those directions that are most readily justifiable in terms of underlying principles and values. The normative conception of a constitution goes beyond description by providing an *ex ante* justification for, as well as an *ex post* explanation of, constitutional change.

As normative analysis can justify constitutional change, there is a tendency to treat such analysis as if it were a matter of law reform, appended to a descriptive account that (for whatever reason) appears to be unsatisfactory. That is not the approach taken in this thesis. Normative constitutional analysis does not merely (re)state rules of government in prescriptive form, but seeks to establish that those rules have a moral justification.<sup>59</sup> The normative character of a constitutional doctrine or decision rests on its relationship with a wider scheme of substantive principles and values. Constitutional analysis cannot be detached from moral and political theory, nor from the value judgements that inform the distinction between good and bad, just and unjust, and desirable and undesirable. The content of a constitutional doctrine or decision is, accordingly, never solely a matter of description or empirical investigation. It is “at least partly a matter of what [the constitution] *ought* to be in the light of the implicit ideals and principles that confer on the constitution whatever legitimacy we take it to have”.<sup>60</sup> This understanding confirms that constitutional legitimacy does more than simply empower government. The implicit standards of legitimacy supplied by normative analysis transform the constitution itself into an important evaluative tool. Appeals to constitutional legitimacy provide a means to critique current constitutional arrangements or premeditated constitutional change, for example, providing normative content to claims that particular acts are (un)constitutional. This conception of a constitution is at one and the same time descriptive, prescriptive, and normative in the deeper sense of being “evaluative and judgemental”.<sup>61</sup> It is the addition of this final element that properly separates the notion of a constitution as a normative institution from purely descriptive constitutional analysis.

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57 Michael J Allen and Brian Thompson *Cases and Materials on Constitutional and Administrative Law* (9 ed, Oxford University Press, Oxford, 2008) at 15.

58 Perhaps surprisingly, this statement comes from the constitutional realist analysis in Palmer “Constitutional Realism”, above n 1, at 135.

59 Feldman “One, None or Several? Perspectives on the UK’s Constitution(s)”, above n 26, at 339.

60 Allan *The Sovereignty of Law*, above n 48, at 22.

61 Hilaire Barnett *Constitutional & Administrative Law* (6 ed, Routledge Cavendish, London, 2006) at 6.



The normative perspective adopted in this thesis means that constitutional legitimacy draws much of its currency from moral and political theory.<sup>62</sup> It is moral theory that serves as the normative justification for the exercise of public power, translating the fact of public power into constitutional authority.<sup>63</sup> This reliance on normative theory distinguishes constitutional legitimacy from legitimacy as a purely sociological concept. Sociological legitimacy is concerned with whether particular arrangements are perceived to be legitimate, but may identify any number of reasons for apparent compliance from coercion through to indifference.<sup>64</sup> Constitutional legitimacy is concerned with a particular mode of sociological legitimacy: normative sanction of constitutional arrangements.<sup>65</sup> Any compelling theory of constitutional legitimacy ought to take seriously citizens' broader perceptions of legitimacy, but an inquiry into constitutional legitimacy focuses on whether those perceptions of legitimacy are likely to be stable, robust and defensible in the sense of having a coherent basis in political morality.

Constitutional legitimacy may also be distinguished from legal validity. Legal validity represents a specific form of legitimacy that provides for the binding character of legal rules and decisions. Legal validity is insufficient to establish legitimacy in the sense contemplated in this thesis, as "the rules through which power is acquired and exercised themselves stand in need of justification".<sup>66</sup> A principle or decision can therefore be legally valid while being open to genuine claims of illegitimacy in a deeper, constitutional sense, and vice versa.<sup>67</sup> This distinction has particular relevance for New Zealand's constitutional arrangements, where the unwritten constitution has developed a clear separation between constitutional and legal authority.<sup>68</sup> As a result, both constitutional legitimacy and legal validity are likely to be necessary conditions for the propriety of fundamental political and legal doctrines.<sup>69</sup> The scope of this thesis is limited to consideration of the former concept.

There are good reasons to understand the New Zealand constitution to involve a normative as well as a descriptive dimension. The demonstrable legitimacy of public power is something to which all states aspire, and if New Zealand claims constitutional government on the international stage then it is fair to assume that it is asserting something more profound than the mere existence of government institutions. To be meaningful, any such claim involves a distinctly normative contention: that the exercise of public power by the New Zealand state is legitimate. This is to

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62 See TRS Allan "The Rule of Law as the Rule of Reason: Consent and Constitutionalism" (1999) 115 LQR 221 at 236.

63 John H Schaar "Legitimacy in the Modern State" in William Connolly (ed) *Legitimacy and the State* (Basil Blackwell, Oxford, 1984) 104 at 111.

64 This sociological approach is most commonly associated with Max Weber: see Edward Shils and Max Rheinstein *Max Weber on Law in Economy and Society* (translation from Max Weber *Wirtschaft und Gesellschaft*, Harvard University Press, Cambridge, 1954).

65 David Held *Political Theory and the Modern State: Essays on State, Power and Democracy* (Polity Press, Cambridge, 1989) at 102.

66 David Beetham *The Legitimation of Power* (Humanities Press International, Atlantic Heights, 1991) at 17.

67 Randy E Barnett "Constitutional Legitimacy" (2003) 103 Colum L Rev 111 at 114.

68 See Dicey *Introduction to the Study of the Law of the Constitution*, above n 8, at 417.

69 For example, Mark Elliott's defence of the institution of judicial review seeks to establish both its constitutional (moral) legitimacy and its legal legitimacy (validity): see Elliott *The Constitutional Foundations of Judicial Review*, above n 38, at 11.

engage with the normative conception of a constitution. Accordingly, if New Zealand's governing arrangements are concerned to establish their constitutionality, those arrangements are directly concerned with an inquiry into the legitimacy of public power.

New Zealand therefore has as much need as any other nation to undertake the normative inquiry into constitutional legitimacy necessary to support any serious claim to constitutional government. It is no surprise, for instance, to see the idea of the New Zealand constitution defended through repetition of Paine's aphorism "[G]overnment without a Constitution, is power without right".<sup>70</sup> However, the unwritten constitutional tradition and the influential lines of scholarship identified above may obscure the normative dimension of New Zealand's constitution. Both the need to engage with the constitution in normative terms and the opacity of that normative dimension in the context of New Zealand's unwritten constitution were recognised to an extent by the 2005 inquiry into New Zealand's constitutional arrangements:<sup>71</sup>

A constitution can also embed some of the core values of a society in the machinery of government. In Belgium, for example, the constitution protects the right of choice of education, including moral or religious education, with public funding. And in Fiji, the laws governing the status of tribal land are given special protection in the constitution, as is the recognition of customary law and customary rights. The effect of giving constitutional protection to such matters is to put them out of reach of ordinary political debate and contest. Therefore, substantive values should not receive constitutional protection without broad and enduring social agreement.

In New Zealand, in the absence of a written and entrenched constitution, there is room for much debate whether key values or policy settings are so embedded that they have become "constitutional" in this way.

The challenge presented by the unwritten nature of the New Zealand constitution is to seek to better understand it as a genuinely normative institution. The risk is that the opacity of the fundamental principles that give rise to the constitution's institutional normativity results in analysis that is purely descriptive, failing to give a complete account of the New Zealand constitution.

## *Liberal Constitutionalism*

It is the ideal of constitutionalism that reflects a need for a moral justification for legitimate constitutional practice. In a recent text, Allan explains the importance of theories of constitutionalism to an account of the constitution that is sensitive to the requirements of political morality:<sup>72</sup>

We must interpret our constitution in light of the demands of constitutionalism, as we conceive that noble ideal. [...] To understand the constitution is therefore to grasp the

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70 See Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4 ed, Thomson Reuters, Wellington, 2014) at 1.

71 Constitutional Arrangements Committee *New Zealand's Existing Constitutional Arrangements*, above n 1, at 7.

72 Allan *The Sovereignty of Law*, above n 48, at 17

principles that underpin our practice. We must make sense of an evolving historical legal and political order, insofar as we can, by reference to the moral or political values that inform and explain our continuing adherence to it.

On this view, taking the normative dimension of a constitution seriously requires the concept of a constitution to be paired with a credible account of constitutionalism that explains the constitution's normativity, and therefore provides a basis for believing that constitutional authority is legitimate. Allan's analysis is sustained by a broad commitment to political liberalism, but his understanding of constitutionalism appears to acknowledge that the nature, scope and limits of principles and values that underpin legitimate government are to an important extent a reflection of the historical traditions, contemporary institutions and the will of the people in a particular state.<sup>73</sup> It is contended in this section that the normative dimension of the New Zealand constitution can similarly be explained in terms of liberal constitutionalism.

Constitutionalism is a complex, ambiguous term that represents a number of distinct ideas in constitutional scholarship. This thesis uses the term to refer to a theoretical 'model' of the constitution. This approach borrows from Gee and Webber,<sup>74</sup> who employ the language of models in the public law context to describe explanatory frameworks for complex or indistinct phenomena. A particular model of constitutionalism is a theoretical construct used to organise a set of values and assumptions in order to make sense of real-world constitutions. As such, any plausible theory of constitutionalism must consist of at least two components. The first is a normative dimension detailed by a commitment to a particular vision of political morality. The second is prescription for institutionalising that commitment within a constitutional system.

Consistent with the normative conception of a constitution defended in this chapter, this thesis understands constitutionalism to have a particular normative focus. Rather than simply describing the character of constitutional arrangements in a value-neutral way, constitutionalism's primary concern is with establishing the basis for the constitution's claim to legitimate authority. Constitutionalism:<sup>75</sup>

[...] is neither a rule nor a principle of law. It is a political theory. It holds that the exercise of government power must be controlled in order that it should not be destructive of the very values which it was intended to promote. It requires of the executive more than loyalty to the existing constitution. It is concerned with the merits and quality of institutional arrangements. In aid of political liberty it sets minimum standards of constitutional government.

Constitutionalism presupposes that the normative dimension of a constitution can be ordered with reference to a common set of values and principles. Models of constitutionalism engage political theory to make sense of these values and principles, and so ultimately constitutionalism turns on

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73 Allan *The Sovereignty of Law*, *ibid*, at 17.

74 See Graham Gee and Grégoire CN Webber "What is a Political Constitution?" (2010) 30 *Oxford J Legal Stud* 273 at 291.

75 Lord Steyn *The Constitutionalisation of Public Law* (Constitution Unit, University College, London, 1999) at 13.

questions of moral justification.<sup>76</sup> Theories of constitutionalism do not ask “whether a proposal or decision is constitutional, but whether it should be constitutional”.<sup>77</sup> Constitutionalism may therefore be understood as the “specific rationality” that governs a constitution,<sup>78</sup> explaining its commitment to particular principles and structures. It provides the theoretical basis for a “legitimate atmosphere for public action”,<sup>79</sup> and in doing so provides meaningful content to the normative conception of a constitution.

The second component of constitutionalism is a prescriptive account of constitutional structure that serves to institutionalise a meaningful commitment to the values that animate the normative dimension of a constitution. This second component can be seen in Barnett’s definition of constitutionalism:<sup>80</sup>

‘Constitutionalism’ is the doctrine which governs the legitimacy of government action. By constitutionalism is meant — in relation to constitutions written and unwritten — conformity with the broad philosophical values within a state. Constitutionalism implies something far more important than the idea of ‘legality’ which requires official conduct to be in accordance with pre-fixed legal rules. [...] constitutionalism suggests the limitation of power, the separation of powers and the doctrine of responsible accountable government.

Barnett’s definition captures the concept of legitimacy that is central to the normative dimension of a constitution, and distinguishes constitutional legitimacy from the concept of legality. It also suggests the idea that public power is legitimate only if it is consistent with those substantive values that are fundamental to government and society, linking the first component of constitutionalism to the ideal of constitutional propriety. However, it is a final feature of Barnett’s definition that merits particular attention. This feature is that constitutionalism seeks to secure the ideal of constitutional legitimacy through particular modes of institutional expression. Barnett associates constitutionalism with structural elements of constitutional government such as the limitation of public power, the separation of powers and the doctrine of responsible accountable government. The sheer scope of public power and its potential for abuse mean that fundamental constitutional values cannot be relied on to underwrite themselves. Specific institutional arrangements that protect and promote those values are essential. Constitutionalism must therefore be understood as more than the moral theory on which fundamental values take their meaning — it aims at actively securing and promoting fundamental constitutional principle in a real-world context.

Defined in this way, constitutionalism in the abstract does not necessarily align itself with any single vision of political morality. All that is required is a commitment to some set of fundamental

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76 See Poul F Kjaer “Legitimacy through Constitutionalism” in Aldo Mascareno and Kathya Araujo (eds) *Legitimization in World Society* (Ashgate, Surrey, 2012) 99. Compare Paul Scott “(Political) Constitutions and (Political) Constitutionalism” (2013) 14 German LJ 2157 at 2162.

77 Murkens “The Quest for Constitutionalism in UK Public Law Discourse”, above n 32, at 455.

78 Scott “(Political) Constitutions and (Political) Constitutionalism”, above n 76, at 2159.

79 Harden and Lewis *The Noble Lie*, above n 27, at 56.

80 Barnett *Constitutional & Administrative Law*, above n 61, at 5.

values, whatever their content,<sup>81</sup> and a tangible means of realising that commitment in practice. However, in a contemporary context the ideal of constitutionalism as a politically neutral concept has largely been replaced by theories of constitutional legitimacy based on a liberal vision of political morality. This reflects the reality that political liberalism is the dominant normative theory in much of the developed world.<sup>82</sup> Liberal constitutionalism underscores a particular concern to promote the freedom of the individual, and an associated focus on the restriction of the exercise of public power as a means of securing that freedom.<sup>83</sup> A distinctive set of moral imperatives based on “[f]reedom, liberty, and respect for human dignity” animate liberal constitutionalism,<sup>84</sup> and these values find institutional expression in the ideals of representative government, the rule of law and fundamental rights.

Liberal constitutionalism is so pervasive as a theory of constitutional propriety that it tends to displace consideration of other versions of constitutionalism.<sup>85</sup> This contemporary dominance cannot be ignored in any serious account of constitutional government. It is, however, important to emphasise that the account of liberal constitutionalism adopted here is particularly broad, and is not associated with any specific political ideology. As understood in this thesis, the aim of liberal constitutionalism is not to push particular values onto society, but to allow society to commit to particular values. Such matters are not dictated by the arbitrary whims of those temporarily wielding political power. This is the basis of the freedom and dignity of the individual in a modern context.

Whether the normative dimension of a constitution in fact reflects liberal principles and structures needs to be demonstrated on the evidence of constitutional practice. In line with the requirements of liberal constitutionalism, constitutional government in a modern democracy is often recognised as comprising at least four salient features:<sup>86</sup>

- a meaningful commitment to substantive liberal values through the incorporation or recognition of those values within an authoritative constitutional text;
- supremacy of those values over all forms of the exercise of public power, including the exercise of the legislative function, so that they are binding on all branches of government;
- entrenchment based on those values as against change by ordinary legal or political processes; and

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81 Although the influence of theories of political morality seek to ensure that the set of underlying principles and values is internally coherent.

82 Roberto Unger *Knowledge and Politics* (Free Press, New York, 1975) at 8.

83 Stephen Holmes *Passions and Constraint: On the Theory of Liberal Democracy* (University of Chicago Press, Chicago, 1995) at 18.

84 Joseph *Constitutional and Administrative Law in New Zealand*, above n 70, at 17.

85 See, for example, Beau Breslin *From Words to Worlds: Exploring Constitutional Functionality* (John Hopkins University Press, Baltimore, 2009) at 20-22; Murkens “The Quest for Constitutionalism in UK Public Law Discourse”, above n 32, at 437.

86 See, for example, Barak Cohen “Empowering Constitutionalism with Text from an Israeli Perspective” (2003) 18 *Am U Int’l L Rev* 585 at 586. See also Joseph *Constitutional and Administrative Law in New Zealand*, above n 70, at 17.

- enforceable limits on the legitimate exercise of public power through an appeal to an independent adjudicator in the form of the judiciary.

The first of these features — the recognition and acceptance of constitutional norms based on substantive values — is simply a restatement of the normative conception of a constitution. That understanding recognises that fundamental ideals and normative principles underpin any exercise of public power purporting to be ‘constitutional’. That the remaining three features describe the structure of constitutional government in all modern democratic contexts is a claim that is difficult to substantiate in an uncontested manner. This list of features clearly owes an intellectual debt to the pervasive modern tradition of an entrenched, fundamental written constitution; taking the second and third features together are strongly suggestive of (although do not necessarily compel) strong-form judicial review of legislation, for example. It is right to pause briefly and question whether constitutions derived from the Westminster tradition, such as the New Zealand constitution, are in fact compatible with such features.<sup>87</sup>

The above list of features is not as alien to the Westminster tradition as may first appear. The first three features listed above do an excellent job, for example, of describing judicial review of administrative decision making for consistency with fundamental common law principles and values.<sup>88</sup> Further, these principles and values can even be “entrenched” in the form of resistance to change by ordinary processes, as cases such as *Anisminic* demonstrate,<sup>89</sup> which implicates the final feature listed above. The key issue is therefore not the nature of the framework suggested by the above list, but the extension of this framework to encompass the legislative function. In that regard, if the recognition and acceptance of constitutional norms is taken seriously, then it is not difficult to see that supremacy of those constitutional norms over all forms of the exercise of public power, independent adjudication of the exercise of public power and entrenchment of those constitutional norms against change by ordinary means are necessary to ensure that those constitutional norms can be given effect within any particular constitutional framework. Anything less would risk paying lip service to fundamental principle, with the result that “[d]ay-to-day expediency becomes the only guide for action”.<sup>90</sup> The list of features set out above also has the advantage of being relatively international in character, which is the primary context in which claims of constitutional government are likely to be made. It therefore serves as a useful point of departure for analysis of how the constitutional legitimacy of the exercise of public power may be established.

The relevance of a normative and evaluative inquiry into constitutional government as described in this section is not limited to jurisdictions with written constitutions, or which may otherwise exhibit a demonstrable reliance on a concept of fundamental law. It would be wrong to assume that

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87 R Ekins “Judicial Supremacy and the Rule of Law” (2003) 119 LQR 127 at 135, for example, in a jurisprudential rather than a constitutional context, has strongly questioned the applicability of reasoning from fundamental principle with the Westminster tradition’s distinctly “Hartian” character. A similar objection might be raised in the present context.

88 Importantly, the analogy with administrative law standards holds whether one subscribes to the common law or *ultra vires* theory of judicial review.

89 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (UKHL).

90 MJC Vile *Constitutionalism and the Separation of Powers* (Clarendon Press, Oxford, 1967) at 237.

in a state with an unwritten constitution such as New Zealand limits on the legitimate, constitutional exercise of public power are irrelevant. That contention would amount to a rejection of the relevance of constitutional government in the New Zealand context, which is much further than most constitutional commentators would be willing to go. Every form of constitutional government is contingent on the existence of “legally established ways of constraining the will of the powerful, even if the constraints are not recorded in a formal constitution”.<sup>91</sup> This principle is universal; its application in practice, however, may prove to be rather more dependent on constitutional context.

## *Constitutional Analysis in New Zealand*

Despite the importance of constitutionalism and the normative concept of a constitution defended in this thesis, constitutional analysis in New Zealand tends to proceed in terms that overlook, or display a marked ambivalence towards, normative principle. This section examines two prominent perspectives that are influential in New Zealand constitutional analysis: constitutional pragmatism and constitutional realism. It is argued that both perspectives are underpinned by analysis that is primarily descriptive rather than normative. While the value of descriptive analysis is not to be underestimated, this focus on descriptive analysis means that those perspectives are limited in important ways, suggesting that they are an inappropriate starting point for the present study given the conceptual orientation of this thesis.

### *Constitutional Pragmatism*

The first prominent perspective that is underpinned by descriptive constitutional analysis in New Zealand is constitutional pragmatism. Pragmatism holds that constitutional decision-making is — and should be — both contextual and instrumental. Both of these features of pragmatism mark it out as a descriptive rather than a normative account of the New Zealand constitution.

Pragmatism entails a rejection of the idea that there is an external standard against which to measure constitutional propriety.<sup>92</sup> In this respect, pragmatism is contextual. It reflects the normative outlook of the particular decision-makers operating within a particular context. The unifying feature of pragmatism is scepticism towards the idea that law can be based on abstract principles.<sup>93</sup> Decision-makers reflect their own norms of justification. Decision making is contextual and the just outcome reflects that context. In a constitutional context, this means that the constitution is not a normative institution. It is simply the product of particular decisions.

Importantly in the context of this thesis, the contextual nature of constitutional pragmatism means that the legitimacy of constitutional decision-making is irrelevant. Pragmatism views social norms as purely human constructs, which are not contingent on reference to any kind of external

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91 Philip Pettit *Republicanism: A Theory of Freedom and Government* (Clarendon Press, Oxford, 1997) at 173.

92 See Thomas F Cotter “Legal Pragmatism and the Law and Economics Movement” (1996) 84 Geo LJ 2071 at 2079-2081.

93 Cotter “Legal Pragmatism and the Law and Economics Movement”, *ibid*, at 2074.

moral or political theory. “The distinctively pragmatic claim about justification is that there can be no *external* standard of evaluation: our norms of justification neither have nor need a ground outside themselves”.<sup>94</sup> Pragmatism is, therefore, inconsistent with critical evaluation of normative outcomes.<sup>95</sup> It is this feature that identifies pragmatism as a descriptive rather than a normative account of the constitution.

The second key feature of constitutional pragmatism is its distinctly instrumentalist outlook. This element is key to pragmatism’s appeal as a constitutional theory. At root, pragmatism emphasises a practical and empirical approach.<sup>96</sup> It advocates an instrumentalist approach to constitutional analysis, in the sense that “[r]eflective, deliberative, even contemplative thinking originates in the practical need to solve real problems”.<sup>97</sup> In this way pragmatism is sometimes interpreted as being functionalist. One prominent advocate of pragmatism has summarised the position in these terms:<sup>98</sup>

I regard pragmatism as being essentially functional. The law is viewed as a social institution in its social setting and vested with the social purpose of serving society and furthering the interests and goals of society.

Being both instrumentalist and functional, pragmatism might be considered to be ‘results-oriented’. It may be for this reason that constitutional pragmatism is sometimes employed in a New Zealand context as shorthand for a lack of theoretical perspective.<sup>99</sup> This is a misunderstanding of the theoretical underpinnings of pragmatism. Pragmatism rejects adherence to an over-arching ‘grand theory’,<sup>100</sup> but this does not amount to a complete rejection of the value of theoretical insight. In particular, constitutional pragmatism recognises the value in constitutional doctrine, stability and continuity, which necessarily requires an understanding of the theoretical considerations that inform these constitutional virtues. However, these constitutional virtues are not ends in themselves: they must promote desirable outcomes in practice.

The influence of pragmatism on the New Zealand constitution has been noted by the Constitutional Arrangements Committee of the New Zealand House of Representatives. It characterised New Zealand’s constitutional development as one of “pragmatic evolution” that has

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94 Richard Warner “Why Pragmatism? The Puzzling Place of Pragmatism in Critical Theory” [1993] U Ill L Rev 535 at 542 (footnote omitted, emphasis in the original).

95 See Warner “Why Pragmatism? The Puzzling Place of Pragmatism in Critical Theory”, *ibid*, at 542.

96 Rachael Gray *The Constitutional Jurisprudence and Judicial Method of the High Court of Australia* (Presidian Legal Publications, Adelaide, 2008) at 99.

97 Thomas C Grey “Holmes and Legal Pragmatism” (1989) 41 Stan L Rev 787 at 802.

98 EW Thomas *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge University Press, Cambridge, 2005) at 308.

99 Matthew Palmer, for example, appears to conflate constitutional pragmatism with adhocery: see Matthew SR Palmer *The Treaty of Waitangi in New Zealand’s Law and Constitution* (Victoria University Press, Wellington, 2008) at 279-282; Matthew SR Palmer “New Zealand Constitutional Culture” (2007) 22 NZULR 565 at 571.

100 Cotter “Legal Pragmatism and the Law and Economics Movement”, above n 92, at 2083.



eschewed any kind of overarching theory or design focus for constitutional development.<sup>101</sup> Elements of pragmatism also reveal themselves in a number of pieces of constitutional analysis by New Zealand academics. Harris has offered an account of New Zealand's constitution and the prospects for constitutional reform that draws on an outlook that resonates with constitutional pragmatism in important respects. He proposes a particularly pragmatic approach to constitutional development in New Zealand that is incremental, consistent with underlying constitutional principle, but primarily responsive to identified needs.<sup>102</sup> Harris understands constitutions to "operate as integrated systems that provide the foundation organisational structure for a society".<sup>103</sup> Similarly, Harris views the role of constitutional reform in instrumentalist terms:<sup>104</sup>

Essentially, the aim should be to have in place the strongest possible constitutional foundation for a prosperous future for New Zealand and all its peoples. The quality of a constitution can have a profound effect upon the quality of the country's social and commercial well-being.

Constitutional practice has an essentially pragmatic purpose, being functional, instrumental and responsive to its specific context.

Harris' analysis deliberately covers the entire spectrum of constitutional issues, which enables the pragmatic tendencies of his analysis to be exposed. Others have applied a pragmatic approach to particular issues. For example, Jackson's analysis of the New Zealand Parliament takes on a distinctively pragmatist hue when he states that "[t]here is no neat theory of Parliament. Parliaments were not based on theory, certainly not democratic theory: they evolved and continue to evolve".<sup>105</sup> Knight's proposals for republican constitutional reform are deliberately framed in incremental terms despite the fundamental nature of the proposed reform, which is considered to be in line with New Zealand's pragmatic approach to constitutional law.<sup>106</sup> Chen offers a proposal for greater use of manner and form entrenchment of legislative provisions as an alternative to more fundamental reform that would involve the adoption of a written constitution.<sup>107</sup> These are pragmatic responses to current and emerging features of the New Zealand constitution, and demonstrate the depth and breadth of pragmatism as a constitutional perspective in New Zealand.

Despite its pervasive influence, constitutional pragmatism does not give a complete account of the constitution. It is, primarily, a descriptive approach to constitutional analysis due to its

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101 Constitutional Arrangements Committee *New Zealand's Existing Constitutional Arrangements*, above n 1, at 26. Indeed, the *ad hoc* nature of the Constitutional Arrangements Committee itself seems to serve as an example of a pragmatic approach to the issue of constitutional reform.

102 BV Harris "The Constitutional Future of New Zealand" [2004] NZ Law Review 269.

103 Harris "The Constitutional Future of New Zealand", *ibid*, at 272.

104 Harris "The Constitutional Future of New Zealand", *ibid*, at 282.

105 Keith Jackson "Parliament" in Raymond Miller (ed) *New Zealand Government and Politics* (3 ed, Oxford University Press, Auckland, 2003) 77 at 79.

106 Dean Knight "Patriating our Head of State: A Simpler Path?" in Caroline Morris, Jonathon Boston and Petra Butler (eds) *Reconstituting the Constitution* (Springer, Berlin, 2011) 107.

107 Mai Chen "The Advantages and Disadvantages of a Supreme Constitution for New Zealand: The Problem with Pragmatic Constitutional Evolution" in Caroline Morris, Jonathon Boston and Petra Butler (eds) *Reconstituting the Constitution* (Springer, Berlin, 2011) 123. Despite the title of Chen's chapter, the analysis she employs is distinctly pragmatic.

scepticism of fundamental principle. This can be seen, for example, in Harris' analysis of the possible constraints on Parliament's sovereign legislative power:<sup>108</sup>

Notwithstanding the absence of judicial review of legislation, as understood in jurisdictions like that of the United States, the everyday reality is that Parliament does not have *carte blanche*. The New Zealand Bill of Rights Act 1990 obliges the Attorney-General to draw apparent inconsistencies between provisions in proposed legislation and the Bill of Rights to the attention of the House of Representatives, and there are other influential constraints from, for example, the Legislation Advisory Committee and international law obligations. However, in theory Parliament's law-making supremacy may ultimately trump these constraining forces, if this is the wish of the majority of that body.

Where the issue of constitutional restraints on the most fundamental power in the Westminster system of government is being analysed it might be expected that substantive principles and values would be engaged. However, Harris' analysis is non-normative, in line with his broader commitment to constitutional pragmatism. Pragmatism is not incompatible with prescription, and advocates for constitutional reform in New Zealand often present their case in pragmatic terms.<sup>109</sup> The evaluative analysis that stems from the normative conception of a constitution is not a feature of constitutional pragmatism. Evaluative analysis requires meaningful engagement with normative principle, and this would go against the core tenets of contextualism and instrumentalism that define pragmatism as a distinctive school of constitutional thought.

### ***Constitutional Realism***

The second key approach that is underpinned by descriptive constitutional analysis in New Zealand is constitutional realism. Constitutional realism draws on the tradition of United States realist scholars such as Llewellyn<sup>110</sup> in relying on the "rigorous use of candour in penetrating the form and fiction of a law or constitution in order to understand the reality of what is going on in the underlying human interactions".<sup>111</sup> Applying this perspective to constitutional decision-making emphasises the practical operation of a constitution in a realistic context. This perspective emphasises the "understandings and actions of those people involved in the application and interpretation" of a constitution.<sup>112</sup>

Unlike constitutional pragmatism, which finds expression in the work of a number of official and academic sources, constitutional realism is primarily associated with a single academic. Nonetheless, it appears to be an influential approach in New Zealand public law. Palmer has developed the realism perspective through a number of publications.<sup>113</sup> Most relevant for the

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108 Harris "The Constitutional Future of New Zealand", above n 102, at 277 (footnotes omitted).

109 See, for example, Harris "The Constitutional Future of New Zealand", *ibid*; Knight "Patriating our Head of State: A Simpler Path?", above n 106; Chen "The Advantages and Disadvantages of a Supreme Constitution for New Zealand: The Problem with Pragmatic Constitutional Evolution", above n 107.

110 See especially KN Llewellyn "The Constitution as an Institution" (1934) 34 Colum L Rev 1.

111 Palmer "New Zealand Constitutional Culture", above n 99, at 566.

112 Palmer "Constitutional Realism", above n 1 at 134.

113 Palmer "Constitutional Realism", above n 1; Palmer "New Zealand Constitutional Culture", above n 99; Palmer "The Complete Constitution", above n 45; Matthew SR Palmer "Constitutional Realism about Constitutional Protection: Indigenous Rights Under a Judicialized and a Politicized Constitution" 29 (2006) Dalhousie LJ 1.

purpose of conceptual analysis is Palmer's attempt to catalogue the content of the New Zealand constitution exhaustively. As it is presented within the constraints of a journal article, Palmer's account is necessarily abbreviated but it purports to be comprehensive.<sup>114</sup> Even so, Palmer's analysis remains the most complete attempt to list the individual component parts of the New Zealand constitution.

Palmer's account divides 80 elements of the New Zealand constitution into seven categories:<sup>115</sup>

- the Sovereign;
- democracy;
- the executive;
- Parliament;
- the judiciary;
- protections for citizens; and
- limits on national government.

A notable feature of Palmer's analysis is the high level of detail into which the component elements of each of these seven categories is broken down. For instance, under the "Sovereign" category Palmer identifies the provisions of the Constitution Act 1986 that provide for the Sovereign in right of New Zealand to be the head of State of New Zealand and for the Governor-General to be the Sovereign's representative,<sup>116</sup> several United Kingdom statutes concerned with the identity of the Sovereign,<sup>117</sup> the common law relating to the royal prerogative and conventions governing the exercise of prerogative power, and the Letters Patent 1983 which constitutes the office of the Governor-General as important components of New Zealand's constitution.<sup>118</sup> Reducing the content of the New Zealand constitution to this level of granularity potentially allows for a detailed analysis of New Zealand's constitution in general terms. For instance, New Zealand's constitution can be seen to be primarily a product of legislation on Palmer's account, with 45 (that is, 56%) of the 80 elements he identifies being statutory in nature.<sup>119</sup>

Palmer's realist perspective yields interesting insights into the New Zealand constitution. For example, Palmer uses his theory to identify a class of constitutional actors whom he believes are

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114 Palmer "Constitutional Realism", *ibid*, at 142. Palmer's deliberate omission of authoritative interpretations of constitutional instruments in part accounts for the abbreviated nature of his analysis.

115 Palmer "Constitutional Realism", *ibid*, at 142-145.

116 Constitution Act 1986, s 2.

117 Royal Titles Act 1974 (UK); Act of Settlement 1700 (UK); Royal Marriages Act 1772 (UK); Accession Declaration Act 1910 (UK).

118 Palmer "Constitutional Realism", *above n 1*, at 142.

119 Palmer "Constitutional Realism", *ibid*, at 145.

often overlooked in traditional accounts of the New Zealand constitution — high-ranking members of the public service — based solely on the influence members of that class can exercise over public decision-making in practice. Executive office-holders and public servants play a crucial interpretative role in New Zealand constitutional practice. According to Palmer:<sup>120</sup>

[...] the power to advise contains a significant, if not always determinative, element of authority to resolve a dispute, [and on this basis] public-office holders possess significant and under-appreciated powers to contribute to constitutional interpretation.

This insight reflects the realist emphasis on the real-life operation of the constitution, rather than abstract theory or principle that purports to describe the constitution

Despite the potential of the realist perspective to provide new insights into New Zealand's constitutional arrangements, it too has inherent limitations as a conceptual approach. Palmer recognises that the unwritten nature of the New Zealand constitution means that any account faces the inescapable challenge of being subjective rather than authoritative.<sup>121</sup> There is no external reference point from which to assess the constitutional significance of any particular legal or political practice. In light of this inescapable subjectivity, the credibility of Palmer's analysis would seem to turn on the plausibility of the concept of a constitution that he adopts. However, Palmer does not engage directly with the question of what a constitution is at the level of fundamental principle. To the extent this important matter is addressed, it is only in a rather oblique fashion. Palmer briefly outlines that the subject matter of a constitution is "public power and how it is exercised",<sup>122</sup> and that a constitution is not "just a document. It is not even a document".<sup>123</sup> Palmer then goes on to suggest that a matter is a constitutional matter "if it plays a significant role in influencing the generic exercise of public power".<sup>124</sup> These sound bites present a flavour of how Palmer might seek to answer the larger conceptual question of a constitution's nature, but at no point are these various strands brought together to present an over-arching account of how the concept of a constitution is to be best understood.

One explanation for this apparent failing in Palmer's analysis may be that the distinctive theoretical perspective he adopts remains largely unconcerned with matters of fundamental principle. To a realist, the constitution is not an institution of principle, but of messy reality. In this respect, the realist perspective shares important commonalities with constitutional pragmatism. Both approaches downplay the importance of normative inquiry into the principles, values and moral judgements that inform constitutional practice. An important difference between realism and pragmatism lies in the fact that constitutional realism does not purport to promote instrumentalist

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120 Palmer "Constitutional Realism", *ibid*, at 150.

121 Palmer "Constitutional Realism", *ibid*, at 136.

122 Palmer "Constitutional Realism", *ibid*, at 134.

123 Palmer "Constitutional Realism", *ibid*, at 134.

124 Palmer "Constitutional Realism", *ibid*, at 134.

ends the way pragmatism does. This can be seen in the way Palmer addresses the question of why it matters if something is considered to be constitutional:<sup>125</sup>

[I]t matters because people think it matters. The symbolism of the term “constitutional” seems to matter to the New Zealand public and to constitutional decision-makers in New Zealand. Whether a matter is “constitutional” can affect the behaviour and decisions of those able to make decisions in relation to that matter — politicians, officials and judges.

The circularity in the above passage is palpable — a matter is defined as being ‘constitutional’ simply because it has been defined as ‘constitutional’. There is no appeal to particular substantive outcomes that might break this circularity, and this is where pragmatism and realism diverge. In fact, whereas constitutional pragmatism is distinctively non-normative, constitutional realism is singularly non-prescriptive. Constitutional realism is a solely descriptive approach in precisely the vein as Griffith because any inquiry stops once the ‘fact’ of constitutional status is noted. There is no need to investigate further why conferral of ‘constitutional’ status might be appropriate. Indeed, dispassionately *describing* the practical operation of the New Zealand constitution, rather than engaging critically with matters of constitutional principle, appears to be Palmer’s primary motivation for developing this realist perspective.<sup>126</sup>

### *Limits of Descriptive Analysis*

To the extent that New Zealand constitutional analysis reflects pragmatism or realism, it represents descriptive analysis that cannot capture the normative dimension of New Zealand’s constitutional framework. Normativity in the sense adopted in this thesis requires a meaningful connection to a coherent moral and political theory. While constitutional pragmatism rejects the need for such overarching theory in pursuing particular constitutional outcomes, constitutional realism fails to account for the normative dimension of a constitution at all. This is not to argue that the analysis provided under either perspective is inherently flawed. Rather, the position defended here is that the analysis of the New Zealand constitution offered by pragmatist and realist accounts is simply incomplete. The failure to engage directly with the normative substance of constitutional theory and practice means that primarily descriptive analysis of the constitution is limited in important respects. Further, it is not possible to augment these existing approaches simply with a discussion of normative principle. Constitutional pragmatism gives little weight to such principle in an effort to achieve its particular instrumental goals, while constitutional realism has been deliberately crafted to offer a perspective on the New Zealand constitution that is free from the influence of constitutional theory. To tap into a normative vein of constitutional analysis in a New

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125 Palmer “Constitutional Realism”, *ibid.*, at 139.

126 See generally Palmer “Constitutional Realism”, *ibid.* Palmer does apply his theory of constitutional realism in an effort to identify the fundamental “norms” of New Zealand’s constitution, but this analysis is of limited value in the current context given the descriptive rather than normative character of Palmer’s academic project. Accordingly, Palmer’s use of the term “norm” appears to refer to usual (that is, normal) constitutional practice rather than fundamental constitution principle: see Palmer “New Zealand Constitutional Culture”, above n 99.

Zealand context, and therefore to provide a complete account of the constitution that accounts for both its descriptive and normative elements, an alternative perspective is needed.

The analysis in this chapter has signalled the departure of this thesis from the pragmatist and realist perspectives. Definitions of a constitution that merely seek to describe the content of a constitution are likely to be inadequate for the purposes of conceptual analysis.<sup>127</sup> This thesis departs from those accounts by advancing and defending a normative conception of a constitution. This conception builds on the ‘authoritative’ position of the New Zealand *Cabinet Manual* by pairing it with an account of liberal constitutionalism. As a result, the normative conception is premised on the availability of a moral justification for the legitimate exercise of public power in terms of its creation, distribution and limitation. To describe an exercise of public power as ‘constitutional’ is to make a moral judgement in respect of the legitimacy of the exercise of that power. On this conception, the normativity of a constitution is inherent in its very nature, and it is not sufficient on this conception simply to point to the fact of a constitution’s existence. The animating ideals of liberal constitutionalism that are familiar to modern democratic states — representative government, the rule of law, and fundamental rights — provide the starting point for a theory of constitutionalism that remains sensitive to the New Zealand context. The normative content supplied by these ideals underpins the conceptual tools employed in the remainder of this thesis, and provides a means for understanding New Zealand constitutional practice.

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127 See Munro “What is a Constitution?” [1983] PL 563 at 566.

## CHAPTER TWO

# THE DISTINCTIVE NATURE OF AN UNWRITTEN CONSTITUTION

An unwritten constitution represents a distinctive form of constitutional settlement. Unlike liberal democratic states that are self-consciously founded on the basis of a written constitutional document, unwritten constitutional systems operate in the absence of a central text that purports to serve as the primary source of constitutional authority. This fundamental distinction between written and unwritten constitutions can be expected to influence constitutional theory and practice. Greater understanding of the distinctive characteristics of unwritten constitutions may therefore yield important insights into aspects of constitutionalism and the practice of constitutional government in a liberal democracy such as New Zealand.

This chapter defends the distinction between written and unwritten constitutions as those terms are traditionally understood. The written/unwritten distinction is often considered to lack analytical utility in constitutional scholarship, or is dismissed as a trivial curiosity of constitutional form. These views overlook the origins of the distinction, which linked constitutional form to substantive differences in modes of constitutional thought. Historically, the written/unwritten distinction served to distinguish between alternative conceptions of constitutionalism by linking normative theory to constitutional form. While understandings of constitutionalism have changed since the distinction was first observed, the basis for drawing the distinction continues to provide the foundations for an analytically robust distinction between written and unwritten constitutional systems in a modern context.

Observing a meaningful distinction between written and unwritten constitutions requires an explanation of what it means to have either a ‘written’ or ‘unwritten’ constitutional system. The terms ‘written’ and ‘unwritten’ may either be understood as literal descriptions of constitutional form, or treated as terms of art in a constitutional context with a particular, specialised meaning.<sup>1</sup> This chapter contends that both understandings are legitimate, and indeed are related. Drawing on the normative conception of a constitution defended in chapter one, the analysis in this chapter argues that constitutional text has significance for theories of constitutionalism. Recognising the implications of constitutional text supports the use of ‘written’ and ‘unwritten’ as literal descriptions of constitutional form. However, while constitutional text is a necessary condition for a written constitution, it is not sufficient. An independent source of foundational constitutional authority is

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<sup>1</sup> Jane Pek “Things Better Left Unwritten?: Constitutional Text and the Rule of Law” (2008) 83 NYU L Rev 1979 at 1983 [“Better Left Unwritten”].

also required, so that the written constitution is accepted as normatively superior within the constitutional system. The lack of a central, authoritative constitutional text says something meaningful about the nature of an unwritten constitutional system in normative terms. The distinction between written and unwritten constitutions, if properly employed, is one that constitutional scholarship should take seriously, as unwritten constitutions are distinctive and must be analysed and understood on their own terms.

### *The Disquiet Surrounding the Written/Unwritten Distinction*

There is a tradition in constitutional analysis of dividing liberal, democratic nations into two broad categories: those with ‘written’ constitutions and those whose constitutions are ‘unwritten’. Written constitutions are characterised by the existence of a central, authoritative constitutional text. Such constitutions are ‘written’ in a very tangible, literal sense. In contrast, unwritten constitutional systems lack a central constitutional text. Many of the fundamental constitutional principles operating in unwritten systems may never have been formally committed to writing. This is, by and large, how the written/unwritten distinction is understood in constitutional scholarship.<sup>2</sup>

The distinction receives little contemporary support in constitutional scholarship. It is commonplace to dismiss the written/unwritten distinction as descriptively dissatisfying or conceptually unsound. An extreme view is that the distinction is “illusory”,<sup>3</sup> offering no coherent division on matters of constitutional form let alone the actual practice of constitutional government. This extreme view derives a measure of support from two related insights. The first is that all ‘written’ constitutions contain at least some significant unwritten elements.<sup>4</sup> The United States, for example — often considered to be the “paradigmatic example of a state built on a written constitution”<sup>5</sup> — relies on a number of unwritten doctrines and customs in order to effectively regulate the exercise of public power. A commonly cited example is the Supreme Court’s exclusive jurisdiction to provide a dispositive interpretation of the United States Constitution, and the associated ability to strike down legislation inconsistent with that interpretation.<sup>6</sup> This widely-accepted constitutional authority has no express basis in the text of the United States Constitution, but it is part of the reality in which the United States legal and political system operates. This may not be the strongest example, however, as the original rationale for the establishment of the Supreme

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2 This is, at least, the dominant perspective from those operating on the unwritten side of the dividing line. This understanding differs from the use of the terms ‘written’ and ‘unwritten’ in the work of Grey and others who employ that terminology in the debate over whether a constitution can be premised on both textual and non-textual sources of constitutional law. See, for example, Thomas C Grey “Do We Have an Unwritten Constitution?” (1975) 27 *Stan L Rev* 703.

3 CF Strong *Modern Political Constitutions* (6 ed, Sidgwick & Jackson, London, 1963) at 67.

4 See, for example, KC Wheare *Modern Constitutions* (2 ed, Oxford University Press, London, 1966) at 34; Grey “Do We Have an Unwritten Constitution?”, above n 2; Ernest Young “The Constitution Outside the Constitution” (2007) 117 *Yale LJ* 408; Laurence H Tribe *The Invisible Constitution* (Oxford University Press, New York, 2008); Akhil Reed Amar *America’s Unwritten Constitution: The Precedents and Principles We Live By* (Basic Books, New York, 2012).

5 Benjamin L Berger “White Fire: Structural Indeterminacy, Constitutional Design, and the Constitution Behind the Text” (2008) 3 *Journal of Comparative Law* 249 at 265.

6 See Matthew SR Palmer “What is New Zealand’s Constitution and Who Interprets It? Constitutional Realism and the Importance of Public Office-holders” (2006) 17 *PLR* 133 at 134 [“Constitutional Realism”].



Court's jurisdiction relied heavily on inferences drawn from the text of the Constitution.<sup>7</sup> A more compelling example might be found in the established practice that members of the United States Electoral College have a strong tendency to vote for the Presidential candidate that receives the majority of the popular vote in the state that the member represents.<sup>8</sup> There is no constitutional law requiring that this practice is observed and, while state law does seek to enforce the requirement in some cases,<sup>9</sup> in many states the practice remains completely unregulated. An even more compelling example might be the practice of passing legislation by majority vote in both the House of Representatives and the Senate, which is solely a matter of legislative convention.<sup>10</sup> Similar 'unwritten' practices and conventions appear to be a part of all major written constitutional systems.

The second, related insight is that constitutional documents are a feature of all 'unwritten' constitutions.<sup>11</sup> Obvious examples of this phenomenon include constitutional documents that are statutory in nature. Israel's Basic Laws, New Zealand's Constitution Act 1986, and the Human Rights Act 1998 in the United Kingdom are examples from each of the three liberal democracies that are considered to have unwritten constitutions. But even in unwritten constitutional systems, constitutional documents need not be statutory in nature. The Declaration of the Establishment of the State of Israel and New Zealand's founding document, the Treaty of Waitangi, are ready examples of non-statutory documents with a demonstrable degree of constitutional force.<sup>12</sup> In the United Kingdom, the symbolism associated with Magna Carta might seem to perform a similar function. Such documents are fundamental if not also foundational, and influence the entire spectrum of constitutional decision making in their respective states. If written documents are discharging these types of functions in 'unwritten' jurisdictions, any distinction between written and unwritten constitutional systems might seem to be vanishingly thin.

Together, these two insights suggest that all constitutions contain both written and unwritten elements. Accordingly, the argument runs, no meaningful line can be drawn to separate constitutions into distinctive 'written' or 'unwritten' categories. This argument is flawed. That all constitutional systems are premised on both textual and non-textual foundations is not sufficient to sustain an argument that the traditional distinction between written constitutions and unwritten constitutions ought to be collapsed completely. The distinction is not premised on the fallacy that there is a single source of (un)written constitutional authority, but on the existence (or otherwise) of a central constitutional text that purports to be fundamental and authoritative.<sup>13</sup> That this is the true basis of

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7 See *Marbury v Madison* 5 US (1 Cranch) 137 (1803) at 176-178.

8 Maine and Nebraska stand as exceptions to this general rule in line with specific state legislation governing the practice.

9 See Robert W Bennett "The Problem of the Faithless Elector: Trouble Brewing Just below the Surface in Choosing the President" (2006) 100 Nw U L Rev 121 at 121-122.

10 Young "The Constitution Outside the Constitution", above n 4, at 420.

11 See Michael Foley *The Silence of Constitutions: Gaps, 'Abeyances' and Political Temperament in the Maintenance of Government* (Routledge, London, 1989) at 81; Jan-Erik Lane *Constitutions and Political Theory* (Manchester University Press, Manchester, 1996) at 6.

12 See, respectively, *United Mizrahi Bank Ltd v Migdal Cooperative Village* [1995] 49 Isr SC 221; *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

13 See Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4 ed, Thomson Reuters, Wellington, 2014) at 19; Mark Ryan *Unlocking Constitutional and Administrative Law* (Hodder Arnold, London, 2007) at 24; Stanley de Smith and Rodney Brazier *Constitutional and Administrative Law* (8 ed, Penguin Books, London, 1998) at 14.

the distinction is effectively acknowledged in the many constitutional textbooks that, despite rejecting the distinction, consider it obligatory to resolve an apparent ambiguity in constitutional language. That ambiguity arises because colloquial understandings of a constitution as a single document stand in contrast to a broader, technical meaning of that term as extending to include the actual institutions and practice of government within the state.<sup>14</sup> However, it is not possible to dismiss this ambiguity as a mere semantic difference because it highlights an important intuition about what is important in a constitutional sense.<sup>15</sup> Unwritten constitutions are not ‘unwritten’ because there is no textual source of constitutional authority, but because there is no single constitutional text that is central to, and normatively superior within, the broader constitutional system. In other words, there is simply no text that is referred to as ‘the Constitution’.

On this basis the written/unwritten distinction can genuinely be seen to be (at least) a matter of constitutional form. However, the insight that all constitutions are in part both written and unwritten does suggest that the labels ‘written’ and (particularly) ‘unwritten’ are misleading. Alternative labels have been suggested to more accurately capture the nature of the constitutional systems that the terms ‘written’ and ‘unwritten’ are commonly used to describe. A common example is to propose replacing the written/unwritten distinction with the terms ‘codified’ and ‘non-codified’.<sup>16</sup> These terms attempt to capture the connotations of a single, authoritative constitutional document without suggesting that there is a complete absence of textual sources of constitutional authority in unwritten constitutional systems. If descriptive accuracy is the goal, this distinction is no better than the written/unwritten distinction it seeks to replace as it is difficult to accept that any constitutional system is completely codified. This reflects a pragmatic reality: constitutional issues are by their nature varied, changeable and unpredictable, and no single legal instrument is capable of addressing all such issues fully.<sup>17</sup> Rules sitting outside of the codified text must be relied on to a greater or lesser extent.

Another approach is to classify constitutions in terms of their ‘flexibility’ or ‘rigidity’.<sup>18</sup> Bryce initially proposed this classification based on whether the constitution contained a special procedure governing its own amendment.<sup>19</sup> In the absence of any such special procedure, changes to the constitution would be governed by ordinary law, and the constitution would be considered ‘flexible’.

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14 See, for example, W Ivor Jennings *The Law and the Constitution* (5 ed, University of London Press, London, 1959) at 33-36; Wheare *Modern Constitutions*, above n 4, at 1-2; Neil Parpworth *Constitutional and Administrative Law* (4 ed, Oxford University Press, Oxford, 2006) at 3-4; AW Bradley and KD Ewing *Constitutional and Administrative Law* (14 ed, Pearson Longman, Harlow, 2007) at 4. This ambiguity inherent in the term ‘constitution’ is rejected by FF Ridley “There is No British Constitution: A Dangerous Case of the Emperor’s Clothes” (1988) 41 *Parliamentary Affairs* 340, on the basis that the broader understanding of the constitution as the actual institutions and practice of government does violence to the very idea of a constitution. The broader meaning is, however, widely accepted and long established, and may even date back to Aristotle: see James Bryce *Studies in History and Jurisprudence* (Books for Libraries Press, Freeport, 1968) at 155-159.

15 Compare KJ Scott *The New Zealand Constitution* (Clarendon Press, Oxford, 1962) at 1.

16 This terminology appears to have originated with Leslie Wolf-Phillips *Constitutions of Modern States* (Pall Mall P, London, 1968) at xi-xii; *Comparative Constitutions* (Macmillan, London, 1972) at 32, but it is common in contemporary legal textbooks to advance the codified/uncodified dichotomy without attribution.

17 Adam Tomkins *Public Law* (Oxford University Press, Oxford, 2003) at 9.

18 Strong *Modern Political Constitutions*, above n 3, at 67-68; Wheare *Modern Constitutions*, above n 4, at 16-17; Bryce *Studies in History and Jurisprudence*, above n 14, at 154; Parpworth *Constitutional and Administrative Law*, above n 14, at 7.

19 Bryce *Studies in History and Jurisprudence*, *ibid*, at 154.

Constitutions subject to amendment by a special procedure only were considered to be ‘rigid’. The appeal of this alternative classification is that it attempts to replace the formal written/unwritten distinction by focussing on a matter of constitutional substance — the degree of constitutional entrenchment. However, this approach has itself been criticised as too formalistic, as the success of any constitutional amendment is likely to depend as much on the prevailing constitutional culture as any formal (usually written) constitutional requirements.<sup>20</sup> Other suggestions include replacing the term ‘unwritten constitution’ with ‘customary constitution’ or ‘common law constitution’, although the label ‘written constitution’ would be retained.<sup>21</sup> However, none of these alternatives has a common currency that has superseded the traditional written/unwritten distinction. This lack of a suitable alternative may itself be good reason to retain the terms ‘written’ and ‘unwritten’ despite their apparent limitations.

A more common and persuasive argument than collapsing the written/unwritten distinction completely is to contend that while the distinction may represent a difference of constitutional form, it does not have any substantive implications for constitutional theory and practice. Finer’s careful examination of the distinction is a good example of this line of argument, but it is not the only one.<sup>22</sup> Finer clearly places constitutions that are unwritten into a separate category based on the lack of written document that is considered to stand apart from ordinary expressions of law.<sup>23</sup> This provides a meaningful foundation for a coherent distinction between written and unwritten constitutions. However, Finer is adamant that no substantive consequences flow from the written or unwritten form of a constitution.

Finer carefully argues that the written nature of a constitution alone has no greater claim to legitimacy, nor does it better promote desirable features such as constitutional stability. The reverence which is attached to written constitutions such as that of the United States, Finer argues, is derived from the antiquity of the institution, the political struggles which informed the current constitutional settlement, and the character of the individuals who promulgated the constitution.<sup>24</sup> Finer considers that the British constitution — in his view the quintessential example of an unwritten constitution — exhibits these features in equal measure. While Finer does not carry his analysis this far, examples of each feature might include the clear historical longevity of the current British

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20 Wheare *Modern Constitutions*, above n 4, at 17.

21 See, respectively, Larry Kramer *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press, New York, 2004) at 12-13; John Alder *Constitutional and Administrative Law* (7 ed, Palgrave Macmillan, Basingstoke, 2009) at 8. This idea of a ‘common law constitution’ is distinct from Strauss’ theory of constitutional interpretation in the context of the United States constitution: see David A Strauss “Common Law Constitutional Interpretation” (1996) 63 U Chi L Rev 877.

22 See, for example, Harry Calvert *An Introduction to British Constitutional Law* (Financial Training, London, 1985) at 11; Tompkins *Public Law*, above n 17, at 7, 9; Philip A Joseph “The Higher Judiciary and the Constitution: A View From Below” in Rick Bigwood (ed) *Public Interest Litigation: New Zealand Experience in International Perspective* (LexisNexis NZ, Wellington, 2006) 213 at 214; Alder *Constitutional and Administrative Law*, *ibid*, at 9.

23 Herman Finer *The Theory and Practice of Modern Government* (Methuen, London, 1932) at 185. Finer is concerned primarily with the constitution of Great Britain as an example, and does not necessarily contend that this definition holds more widely, but does stress that the difference is a relative rather than an absolute one.

24 Finer *The Theory and Practice of Modern Government*, *ibid*, at 191.

constitutional settlement,<sup>25</sup> the historical struggles between the Crown and Parliament over the franchise on political authority, and the efforts of constitutionalists such as Coke to develop and defend a coherent version of constitutionalism that still resonates within the British constitutional tradition. As a result, the factors that give rise to the legitimacy of a constitution within a written constitutional system may be considered to apply equally to an unwritten constitutional system.

Finer also contends that a written constitution does not of itself produce a constitutional settlement that promotes stability within a political regime.<sup>26</sup> Finer observes that written constitutions tend to be expressed in terms of broad principles, which means that the details of constitutional settlement are still at large and are openly contested through the ongoing process of constitutional interpretation. Finer considers this approach to be similar in function (though perhaps reverse in operation) to the British practice of deriving broad constitutional principles by generalising from particular instruments and decisions of ordinary law. Finer's argument may have lost some of its force after the modern trend towards increasingly detailed written constitutional provisions,<sup>27</sup> but the essential point remains: "the virtue of the law resides in its details",<sup>28</sup> and no express constitutional settlement can provide all those details ahead of them being worked out in practice. Written constitutions therefore have no inherent advantage over unwritten constitutional systems in fostering political stability.

## *The Historical Development of the Written/Unwritten Distinction*

Finer's analysis is typical of that which seeks to downplay the written/unwritten distinction as an issue of constitutional form only. It seeks to demonstrate that the accepted advantages of written constitutions apply equally in an unwritten constitutional context, and that the perceived deficiencies of an unwritten constitution are not meaningfully resolved merely by a textual rendering of constitutional principles. Finer's challenge to the substantive relevance of the written/unwritten distinction is one that would have been easily met when the distinction was first conceived. The distinction originally relied on constitutional form to distinguish between starkly different — and sometimes competing — theories of constitutionalism. The perceived legitimacy of a constitutional regime proceeded on a very different basis depending on whether a constitution was written or unwritten. Changing views on the nature of the unwritten constitution have meant that the original substantive distinction has been obscured. It is suggested that if a connection between constitutional form and normative theories of constitutionalism is revived, then the written/unwritten distinction

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25 It is arguable that recent reforms in the United Kingdom, such as the passage of the Human Rights Act 1998 and the associated 'legalisation' of the United Kingdom constitution, since Finer's analysis have disturbed this constitutional settlement: see Tomkins *Public Law*, above n 17, at 21-24; Vernon Bogdanor *The New British Constitution* (Hart Publishing, Oxford, 2009).

26 Finer *The Theory and Practice of Modern Government*, above n 23, at 192-193.

27 The trend is noted by Benjamin Akzin "The Place of the Constitution in the Modern State" (1967) 2 *Israel LR* 1 at 1.

28 Finer *The Theory and Practice of Modern Government*, above n 23, at 193.

retains significant analytical value. The distinction provides a means of differentiating between different modes of constitutionalism with potentially wide-ranging implications for better understanding the theory and practice of constitutional government.

The written/unwritten distinction appears to have developed from the British tradition of distinguishing between written and unwritten sources of law more generally.<sup>29</sup> The common law notion that unwritten custom proceeding since time immemorial was a source of law distinct from written law (either statute or exercises of the royal prerogative) was well established in English legal thinking towards the end of the sixteenth century.<sup>30</sup> By the seventeenth century, this understanding of unwritten law had grown to incorporate the idea of an unwritten ‘ancient constitution’ that was without definite origin and was believed to have always existed in its current form. While this line of thought involved an element of myth-making,<sup>31</sup> it was influential in establishing the normative basis of a constitution that was quintessentially unwritten:<sup>32</sup>

[B]elief in the antiquity of the common law encouraged belief in the existence of an ancient constitution, reference to which was constantly made, precedents, maxims and principles from which were constantly alleged, and which was constantly asserted to be in some way immune from the king’s prerogative action; and discussion in these terms formed one of the century’s chief modes of political argument. [...] To the typical educated Englishman of this age, it seems certain, a vitally important characteristic of the constitution was its antiquity, and to trace it in a very remote past was essential in order to establish it securely in the present.

This ancient constitution represented law above will, including the will of the Sovereign. As such it was to become integral to the English view of constitutionalism as limited government by the end of the seventeenth century. It is unlikely that the term ‘unwritten’ was used to describe this phenomenon,<sup>33</sup> but it seems that term would have been apt for the particular constitutional settlement that was understood to exist at the time — the constitution was evoked in clear opposition to (inferior) written law.

The concept of the unwritten constitution therefore developed prior to the relatively modern trend towards the adoption of documented constitutional statements that began with the ratification of the Constitution of the United States in 1787. An unwritten constitution was not merely the lack of a written constitutional document, but a distinctive approach to constitutionalism of its own. That approach conceived of the constitution as something that was incapable of being reduced to writing without compromising its very essence. It is, however, almost certainly the case that a genuine comparative distinction between ‘written’ and ‘unwritten’ constitutions only began to carry

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29 See Bryce *Studies in History and Jurisprudence*, above n 14, at 148.

30 JGA Pocock *The Ancient Constitution and the Feudal Law* (2 ed, Cambridge University Press, Cambridge, 1987) at 36.

31 See Foley *The Silence of Constitutions: Gaps, ‘Abeyances’ and Political Temperament in the Maintenance of Government*, above n 11, at 22. Reference to myth-making is not intended to be pejorative, but is accepted as an inherent part of a vibrant and functional constitutional culture: see, for example, PG McHugh “Constitutional Myths and the Treaty of Waitangi” [1991] NZLJ 316; Todd E Pettys “The Myth of the Written Constitution” (2009) *Notre Dame L Rev* 991.

32 Pocock *The Ancient Constitution and the Feudal Law*, above n 30, at 46-47.

33 Pocock’s in-depth study simply refers to the phenomenon of “the ancient constitution”: Pocock *The Ancient Constitution and the Feudal Law*, *ibid.*

meaningful analytical value with the advent of the trend towards the adoption of written constitutions. The United States' experience, along with that immediately following the French Revolution of 1789, appears to be the foundation for the idea of a self-consciously written constitution.<sup>34</sup> At this time, the concept of committing to writing the key precepts of government was not novel. The Act of Union of the United Provinces of the Netherlands of 1579 was evidence of the practice on the European continent,<sup>35</sup> and Cromwell's Instrument of Government of 1653 provided a (relatively short-lived) English-language precedent. However, the Constitution of the United States represented the first time that a document was self-consciously labelled a 'Constitution',<sup>36</sup> and it remains the benchmark in terms of style and substance for all modern-day written constitutions.

The approach of committing constitutional principles to writing carried with it a fresh view of constitutionalism. Rather than an institution that was assumed to have always existed, having normative weight through ongoing acceptance and immutability, a written constitution was adopted as the result of the deliberate exercise of constituent power. This identifiable, constituent act placed the written constitution outside and above the realm of ordinary law and politics:<sup>37</sup>

The instrument in which such a constitution is embodied proceeds from a source different from that whence spring the other laws, is repealable in a different way, exerts a superior force. It is enacted, not by the ordinary legislative authority, but by some higher or specially empowered person or body [...] it can be changed only by that authority or by that special person or body. When any of its provisions conflict with a provision of the ordinary law, it prevails, and the ordinary law must give way.

This conscious adoption of a written constitution carried its own distinctive normativity: as Paine argued in support of the United States Constitution, "[a written] constitution is a thing antecedent to a government", and is always treated as a discrete institution.<sup>38</sup> Rather than drawing normative authority from its independence from human agency, the idea of a written constitution was based on the notion of a controlling power that vested openly in the authority of the people. Over time, it is clear that two distinctive types of constitutional form have developed, each being intrinsically linked to a particular normative theory of constitutionalism. The first relied on the uncertain and unknowable foundations of an unwritten constitution to promote forbearance among those holding positions of legal and political authority, while the second employed the device of an express articulation of the source of constitutional authority to define with certainty the limits of legitimate public power. If the normative dimension of a constitution is taken seriously, then from an historical

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34 Finer *The Theory and Practice of Modern Government*, above n 23, at 187; Alder *Constitutional and Administrative Law*, above n 21, at 7.

35 Wheare *Modern Constitutions*, above n 4, at 2-3.

36 Wheare *Modern Constitutions*, *ibid.*, at 3.

37 See Bryce *Studies in History and Jurisprudence*, above n 14, at 151.

38 Thomas Paine *The Rights of Man* (1791) (Penguin Books, New York, 1984) at 191. See also *BR Kapur v State of Tamil Nadu* (2001) 7 SCC 231 at [72], where both the substance and rhetoric of Paine's point was adopted by the Supreme Court of India.

perspective the written/unwritten distinction relates to matters of substance as much as to matters of form.

Contemporary analysis of the written/unwritten distinction does not engage at this level of normative theory. Instead, the link between constitutional form and normative theory is severed, placing the emphasis squarely on the former to the exclusion of the latter. In some respects this is surprising, because at least when written constitutions are considered on their own terms the normative value of constitutional text is expressly or impliedly accepted.<sup>39</sup> In contrast, the ideal of constitutionalism associated with unwritten constitutions has not flourished. Unwritten constitutions are no longer considered to be the product of an ancient, immutable line of authority that is immune to capture by transient holders of political and legal authority. The modern conception of an unwritten constitution is based on the opposite of these ideals: it evolves, is flexible, and is quintessentially subject to manipulation. By the start of the twentieth century the concept of an unwritten constitution was understood, for example, in the following terms:<sup>40</sup>

Unlike that of many foreign nations [...] the laws of the English Constitution are not to be found in any written document, nor were they drawn up by any particular set of man and imposed upon the nation at any particular date. Rather they are the result of continuous growth, and many of the principles which lie at the root of the Constitution have been accepted without fierce national strife, whilst others are still imperfectly defined.

The English Constitution as we find it to-day is, in fact, the product of a gradual development, and it would not be reasonable to suppose that the final stage of that development has been reached, but rather that it will go on growing and expanding with the ever-widening circles of national and imperial life.

The departure from the ideal of the ancient constitution is marked, and no theory of constitutionalism has evolved to replace it. Instead of engaging at the level of normative theory, the ever-developing nature of the unwritten constitution is defended in terms of descriptive elements:<sup>41</sup>

It is this flexibility, and, in some sense, this vagueness of our Constitution, which has excited the wonder of foreign nations, whose constitutions, being contained in written documents, are for the most part fixed and rigid; and it is this flexibility and vagueness which forms perhaps its chief excellence, for a constitution which, possibly without violent national upheaval, is capable of adapting itself to new nation exigencies, or the changes brought about by the general progress of civilization, must possess many advantages over a constitution whose rules and laws are fixed, or only changeable by means of lengthy processes, or violent upheavals.

The normative basis that informed the structure of the unwritten constitution has, therefore, become obscured behind an enthusiasm for a dynamic, flexible, evolving constitutional structure. But there is no real difference to be found in the flexibility or vagueness of unwritten constitutions. Flexibility

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39 See "Constitutional Text and Constitutionalism", below, at 46-50.

40 Edward Wavell Ridges *Constitutional Law of England* (3 ed, Stevens & Sons, London, 1922) at 1.

41 Ridges *Constitutional Law of England*, *ibid*, at 1-2. See also Bogdanor *The New British Constitution*, above n 25, at 14.

and vagueness are an inherent part of all constitutions.<sup>42</sup> The result is a commitment to a loose and ever-changing concept of a constitution that is not anchored in a commitment to any particular theory of institutional morality.

Given this erosion of the normative underpinnings of unwritten constitutionalism, it is unsurprising that the written/unwritten distinction began to appear obsolete. The substance of the distinction lay in the normative foundations of each constitutional tradition, but the understanding of the unwritten constitution tradition has developed in such a way that its normative foundations are less apparent. Unmoored from its distinctive normative foundations, the most obvious remaining feature by which to distinguish an unwritten constitution is the superficial matter of constitutional form. Finer's analysis, outlined above, is notable for the absence of an analysis of constitutionalism or normative theory when dismissing the substance of the written/unwritten distinction. But his approach is perfectly consistent with an unwritten constitution being understood primarily in terms of its apparent utility rather than legitimacy. Such 'functional' accounts call into question the value of the written/unwritten distinction, but only by excluding normative analysis of the constitution.<sup>43</sup>

### *Constitutional Text and Constitutionalism*

On the normative conception of a constitution adopted in this thesis, the considerations of constitutional legitimacy are not so easily dismissed. To the extent that these understandings of legitimacy are influenced by a commitment to constitutional text, the written/unwritten distinction represents a meaningful difference in constitutional theory and practice. There are good *prima facie* reasons to believe that the link between constitutional structure and normative theory is still strong in certain contexts, and can be revived where it is not. The written constitutional form in particular retains a strong link with the understandings of constitutionalism that motivated the original departure from the unwritten constitutional form. This section examines the relevance of constitutional text for theories of constitutionalism and the legitimacy of constitutional government. It contends that constitutional text is normatively important in its own right. This is partly because constitutional text has a distinctive functional value without an exact 'unwritten' analogue. While such functional aspects may appear trivial, it is argued that they play an important role in imbuing constitutional text with normative authority. As a result, theories of constitutionalism premised on constitutional text provide an obvious and relevant means of distinguishing written constitutions from their unwritten counterparts.

Any examination of constitutional form that centres on the written/unwritten distinction places constitutional text at the heart of the inquiry. Law tends to privilege text, and a high regard for textual sources of law has both theoretical and practical elements. In terms of theory, the dominant

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42 See Berger "White Fire: Structural Indeterminacy, Constitutional Design, and the Constitution Behind the Text", above n 5. See also Mathew SR Palmer "Using Constitutional Realism to Identify the *Complete* Constitution: Lessons from an Unwritten Constitution" (2006) 54 Am J Comp L 587.

43 See "Constitutional Analysis in New Zealand", above Chapter One, at 29-35.



jurisprudential tradition, legal positivism, places significant weight on written sources of law (particularly statutes).<sup>44</sup> In practical terms writing becomes an important tool of evidence, for example in the application of the parol evidence rule.<sup>45</sup> Accordingly, “[t]he desire to reduce legal principles to writing is significant”.<sup>46</sup> That desire becomes all the more acute when constitutional questions are involved.

Nowhere is respect for constitutional text more obvious than in the United States, where a very high regard for the written character of the Constitution operates at a number of levels. First is its popular resonance. The very written-ness of the United States Constitution is a source of popular veneration.<sup>47</sup> As such, the text of the Constitution provides a focal point for the wider phenomenon of ‘constitution worship’ in the United States.<sup>48</sup> The myths that surround the United States constitution and sustain this popular veneration are intimately tied to the constitution’s nature as a written document. This allows citizens a stake in constitutional debate, as the constitutional text represents a tangible link to the concept of the sovereignty of the people. As a result, “[t]he very definiteness with which the design for a government was set down in words on parchment was enough to command admiration and then reverence”.<sup>49</sup>

This popular veneration has parallels in United States constitutional practice, where the written character of the Constitution has been relied upon as a reason for constitutional action. In establishing the authority of the courts to strike down legislation that is inconsistent with the Constitution, the Supreme Court emphasised that the written-ness of the Constitution was crucial:<sup>50</sup>

The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, *the constitution is written*. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be re-strained? . [...]

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory *is essentially attached to a written constitution*, and is consequently to be considered, by this court, as one of the fundamental principles of our society. [...]

The very written-ness of the Constitution thus provided a basis for limiting the exercise of public power in a manner consistent with responsible and legitimate self-government.<sup>51</sup> This line of thought remains alive and well in contemporary judicial and academic approaches to questions of

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44 Thomas C Grey “The Uses of an Unwritten Constitution” (1988) 64 Chi-Kent L Rev 211 at 221.

45 Grey “The Uses of an Unwritten Constitution”, *ibid*, at 223-224.

46 Beverley McLachlin “Unwritten Constitutional Principles: What is Going On?” (2006) 4 NZJPIL 147 at 155.

47 See Micheal J Perry “The Authority of Text, Tradition and Reason: A Theory of Constitutional ‘Interpretation’” (1985) 58 S Cal L Rev 551 at 557.

48 Pek “Better Left Unwritten”, above n 1, at 1980.

49 Max Lerner “Constitution and Court as Symbols” (1937) 46 Yale LJ 1290 at 1299.

50 *Marbury v Madison* 5 US (1 Cranch) 137 (1803) at 176-178 (emphasis added).

51 See Pek “Better Left Unwritten”, above n 1, at 1987-1989.

constitutional interpretation.<sup>52</sup> Indeed, it is difficult to overstate the importance of constitutional text in the United States constitutional system.

The attraction to constitutional text is not exclusive to jurisdictions that have a written constitution. The New Zealand constitution contains a number of constitutional principles that have been deliberately committed to writing. It seems reasonable to assume that this is because there is some specific constitutional advantage in making use of the written word. For example, the Constitution Act 1986 sets out certain institutional matters concerning responsible government. Similarly, the primary instrument for the protection of human rights in New Zealand is the New Zealand Bill of Rights Act 1990 (NZBORA). While these statutes deal with fundamental constitutional issues, they are not the equivalent of a written constitution and neither expressly purports to establish or amend the constitutional structure. The Constitution Act explicitly relies on existing constitutional structures, providing that “[t]here shall *continue* to be a House of Representatives for New Zealand”,<sup>53</sup> and that “[t]he Parliament of New Zealand *continues* to have full power to make laws”.<sup>54</sup> Similarly, NZBORA recognises constitutional rights without purporting to create them. The long title indicates that the intention of the NZBORA is to “affirm, protect, and promote human rights and fundamental freedoms”, and NZBORA expressly affirms the rights it contains.<sup>55</sup> The legal position prior to the passage of NZBORA supports this analysis, as many NZBORA rights were already recognised by the common law.<sup>56</sup> If no change to the substance of New Zealand’s constitutional law was intended in either the case of the Constitution Act or NZBORA, then the primary purpose of each instrument must have been committing fundamental constitutional principles to writing. Certainly in the case of NZBORA this was contemplated to have an effect on the way fundamental rights were dealt with in practice.<sup>57</sup> The existence of constitutional text appears to have some impact on constitutionalism even in an unwritten constitutional tradition.

It is suggested that the functional value of constitutional text explains its popularity. Constitutional text plays a highly pragmatic role in identifying and symbolising constitutional principles and ideals. There is no precise analogue for this functional value of written constitutions that applies in an unwritten constitutional context. Collecting together key constitutional principles or rules and arranging them under the heading ‘Constitution’ provides an extremely effective signalling function. It readily identifies and communicates the importance of those principles and rules. This ‘identification function’ is something that written constitutions, by definition, do

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52 The two main schools of United States constitutional interpretation, ‘originalism’ and ‘living constitutionalism’, each place text at the centre of any interpretative inquiry. For a critical description of these two schools of constitutional interpretation see Pettys “The Myth of the Written Constitution”, above n 31, at 1008-1010.

53 Constitution Act 1986, s 10(1) (emphasis added).

54 Constitution Act 1986, s 15(1) (emphasis added). These provisions have been described by Robin Cooke “The Suggested Revolution Against the Crown” in Philip A Joseph (ed) *Essays on the Constitution* (Brooker’s, Wellington, 1995) 28 at 32 as “continuity provisions”.

55 New Zealand Bill of Rights Act 1990, s 2.

56 Andrew S Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) at 39-47. See also *R v Te Kira* [1993] 3 NZLR 257 (CA) at 262. Compare *R v Jefferies* [1994] 1 NZLR 290 (CA) at 299.

57 Paul Rishworth “Interpreting and Applying the Bill of Rights” in Paul Rishworth and others (eds) *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) 25 at 31-32.

extremely well, but unwritten constitutions struggle to replicate. An alternative might be to adopt special amendment procedures for constitutional change that would affect fundamental rules and principles,<sup>58</sup> but there are several disadvantages with this approach. First, this approach has never been attempted previously in a systematic fashion. Second, it is far less accessible for the general population (as compared to those with expert knowledge of constitutional matters) than the simple act of documentation. Third, the approach is unlikely to be effective or uncontroversial in the context of a common law jurisdiction that still adheres closely to the doctrine of Parliamentary sovereignty.<sup>59</sup> Identifying precisely what is and what is not constitutional is an important function,<sup>60</sup> but how this can be achieved in an unwritten constitutional system has not yet been satisfactorily explained.

The closest to arriving at a satisfactory answer so far is to observe that whether a rule or principle is in fact constitutional turns on matters of substance rather than form.<sup>61</sup> Unfortunately, this reliance on function over form necessarily involves a significant degree of subjectivity that risks undermining the very normative value that describing a matter as ‘constitutional’ is intended to promote. Only inclusion in a written constitutional document is truly dispositive, as:<sup>62</sup>

[...] that decision settles the matter — what is in the [written] constitution is “constitutional”, what is not in it is not “constitutional”. But where there is no such document it is quite impossible to make a distinction which is not purely personal and subjective.

Of course, this view is itself susceptible to a certain degree of overstatement. Any serious disagreement about whether a matter is constitutional is likely to occur at the margins, with agreement being reached more readily over the “fundamentals” of constitutional content.<sup>63</sup> However, the underlying point remains valid. A written constitution provides an unambiguous dividing line between certain matters that are constitutional from other legal and political considerations. An unwritten constitution does not.

The demarcation of constitutional and non-constitutional issues matters. Clarifying a rule or principle as constitutional automatically strengthens its normative force.<sup>64</sup> Further, if constitutional symbolism matters,<sup>65</sup> written constitutions — precisely because of their textual nature — provide

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58 See Mai Chen “The Advantages and Disadvantages of a Supreme Constitution for New Zealand: The Problem with Pragmatic Constitutional Evolution” in Caroline Morris, Jonathon Boston and Petra Butler (eds) *Reconstituting the Constitution* (Springer, Berlin, 2011) 123 at 127, 137.

59 See “Parliamentary Sovereignty”, above Chapter Four, at 87-96 .

60 See Palmer “Constitutional Realism”, above n 6, at 141.

61 See, for example, Butler and Butler *The New Zealand Bill of Rights Act: A Commentary*, above n 56, at 9.

62 Jennings *The Law and the Constitution*, above n 14, at 38.

63 The term is borrowed from Robin Cooke “Fundamentals” [1988] NZLJ 158.

64 Philip A Joseph “Parliament, the Courts, and the Collaborative Enterprise” (2004) 15 KCLJ 321 at 341.

65 For an argument that it does in a New Zealand context, see Matthew SR Palmer “The Treaty of Waitangi in Legislation” [2001] NZLJ 207 at 209. See also the more detailed account invoking the Australian experience in Jeremy Webber “Constitutional Poetry: The Tension between Symbolic and Functional Aims in Constitutional Reform” (1999) 21 Sydney L Rev 260.

an important “visual symbol of the things that men [sic] hold dear”.<sup>66</sup> They also represent a potent and enduring symbol of a common enterprise and understanding in the face of diversity.<sup>67</sup> These same signalling and symbolic features are simply not able to be replicated in the absence of the written word, and their absence distinguishes unwritten constitutions from those that are self-consciously written:<sup>68</sup>

Indeed, as a symbol of a country’s unity, a [written] constitution can do what neither flag nor anthem can accomplish; these express sentiment only, while a Constitution can also give expression to values and to an institutionalized way of life.

There is also a substantive element to the symbolism of a written constitution — constitutional symbols draw their normative value in part from their substantive content.<sup>69</sup> But this does not distract from the textual nature of a written constitution as a source of its normative authority. Written constitutions provide an accessible and accepted grammar in which to articulate and assess claims of political morality in a very literal sense. This is not to say that there is no disagreement over interpretative approaches within a written constitutional framework. What matters is that despite such disagreements the constitutional text provides a framework that limits the range of interpretative approaches available (at least to the extent that the text is respected).<sup>70</sup> In the absence of an authoritative constitutional text, the terms of the debate over fundamental issues are themselves contestable in a manner that would not make sense from the perspective of the written constitutional tradition. Issues of fundamental law in an unwritten constitutional system therefore lack a degree of interpretative formality that might otherwise be available.<sup>71</sup> The result is that written constitutions may confer normative authority on certain constitutional fundamentals in an unambiguous and accepted fashion, and this clearly distinguishes them from unwritten constitutional systems.

### *Taking the Distinction Literally*

The preceding analysis suggests that constitutional text is itself an important aspect of the normativity associated with a written constitution. There is something inherent in the idea of writtenness that is considered to be important from a constitutional perspective, and which captures the key differences in constitutional frameworks between written and unwritten constitutions. However, a focus on text does tend to emphasise the written over the unwritten. As a result, if an unwritten constitution is accepted as genuinely distinctive it may simply be defined by an absence of something important, rather than bearing a label that carries its own distinctive meaning.<sup>72</sup> An

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66 Lerner “Constitution and Court as Symbols”, above n 49, at 1299.

67 Jeremy Waldron *Law and Disagreement* (Clarendon Press, Oxford, 1999) at 145.

68 Akzin “The Place of the Constitution in the Modern State”, above n 27, at 13.

69 Compare Palmer “The Treaty of Waitangi in Legislation”, above n 65, at 209.

70 See Frederick Schauer “An Essay on Constitutional Language” (1982) 29 UCLA L Rev 797 at 828.

71 See PS Atiyah and Robert S Summers *Form and Substance in Anglo-American Law* (Clarendon Press, Oxford, 1987) at 97-98.

72 See Wheare *Modern Constitutions*, above n 4, at 14-15.

alternative view is that labelling a constitution ‘unwritten’ does say something about the particular constitutional arrangements that operate in the absence of a written constitutional document.

Research into the sociological characteristics of written and non-written language supports this alternative view. The ability to commit language to writing carries with it several implications. Ong describes text as “inherently contumacious”,<sup>73</sup> a characterisation which partly explains its sociological significance. Text has implicit authority simply because of its existence as text. For example, text enables a clear separation of language from the creator of that language.<sup>74</sup> As a result, the authority of the written word cannot be challenged directly. Ong explains that “[t]here is no way directly to refute a text. After absolutely total and devastating refutation, it says exactly the same thing as before”.<sup>75</sup> This inherent authority of text contributes to a unique normative legitimacy in a constitutional context. As a text with constitutional significance, the central, entrenched document in a written constitutional system is uniquely authoritative, exerting a certain innate priority over other constitutional sources.

Another inherent feature of text is that it can be separated from the context in which it was first created, and therefore can be divorced from external factors that might be relied on to qualify its meaning. This feature supports the perception that the authority of text is self-contained, but it also makes it possible to conceptualise the use of language as something independent of its creator. As Ong describes it, “[w]riting makes ‘words’ appear similar to things because we think of words as visible marks signalling words”.<sup>76</sup> In a written constitution, this conceptual separation allows a constitution to be understood as a ‘thing’, as an institution separate from (indeed, because of the authority of text, prior to) the exercise of public power. In an unwritten constitution, the constitution cannot be conceptually separated from the exercise of public power so easily. In fact, unwritten sources of the constitution cannot exist independently of the exercise of public power, and so an unwritten constitution can only be defined in terms of the processes and decisions it is intended to regulate. It does not directly inform those processes and decisions ‘from the outside’.

Finally, where writing can be equated with printing, a written document is strongly indicative of both self-containment and finality. Committing language to print suggests a “state of completion” that is stable and enduring, and not easily revised.<sup>77</sup> This sense of finality carries with it a sense of completeness, so that print represents all that is relevant in respect of a particular matter. Applying these insights to constitutions, the printed word itself suggests a degree of formal entrenchment and codification even before the content of constitutional text is examined. Print, and therefore text, helps create the conditions in which an authoritative constitutional text operates. In an unwritten constitution, the lack of an ability to refer to an authoritative text promotes a perception of flexibility, adaptability, and ability to expand or contract to accommodate new circumstances. The existence or

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73 Walter J Ong *Orality and Literacy: The Technologizing of the Word* (Routledge, London, 1991) at 79 [*Orality and Literacy*].

74 Ong *Orality and Literacy*, *ibid*, at 78.

75 Ong *Orality and Literacy*, *ibid*, at 79.

76 Ong *Orality and Literacy*, *ibid*, at 11.

77 Ong *Orality and Literacy*, *ibid*, at 132.

otherwise of constitutional text directly promotes the structure of the constitutional framework in each respective case.

The sociological implications of text suggest that written sources impact on constitutional analysis. The inherent stability, authority and finality of text means it is possible to see text itself as a source of normative authority within a particular legal and political system. It is, therefore, appropriate to take the ‘written’ and ‘unwritten’ labels literally. These labels capture both the essence of two divergent constitutional approaches while also suggesting the basis for that divergence. Even without a sociological investigation into the inherent properties of textual language, the label ‘unwritten constitution’ can be supported as an appropriate term for analysis. Writing in the context of New Zealand’s constitution, Palmer concludes that there is value in the term ‘unwritten’:<sup>78</sup>

Of course, “unwritten” does not properly capture the qualities of New Zealand’s constitution. But there is value in the term “unwritten”. True, most of the components of our unwritten constitution have been written, if not all in one place or at the same time. But what distinguishes it from written constitutions is that the essence of the New Zealand constitution is not comprehensively and systemically “constructed” under one framework. Its components, including its most important structural and procedural elements, have each evolved, over time, in response to their context. It is the ultimate expression of our cultural value of pragmatism. The label “unwritten” conveys that.

In an earlier work, Palmer notes that “[t]he great advantage of the term “unwritten” is that it inherently confronts you with the abstract nature of a constitution”.<sup>79</sup> This must be the essence of an unwritten constitution — an abstract and ill-defined collection of theory, principle and process that stands in contrast to the concrete, accessible outlines of a written constitution. Retaining the ‘unwritten’ label in preference to ‘flexible’, ‘uncodified’ or any of the other popular alternatives captures the most important aspects of a distinctive constitutional structure.

### *Constitutional Text, Authority and Legitimacy*

Constitutional text has normative characteristics that serve to make sense of the distinction between written constitutions and their unwritten analogues. Reliance on constitutional text alters perceptions of constitutional legitimacy because of the functional value of text as a symbol, and the sociological implications of text as an inherently authoritative form of expression. The terms ‘written’ and ‘unwritten’ are both apt as literal descriptions of constitutional structure. This section rounds out the analysis by arguing that the normative significance of a written constitution extends beyond the inherent normativity of text. As constitutional text is a feature of both written and unwritten constitutions, something more than just text is required for a constitution to be properly classified as ‘written’. The argument is that genuinely written constitutions establish a normative

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78 Matthew SR Palmer “New Zealand Constitutional Culture” (2007) 22 NZULR 565 at 590.

79 Palmer “Constitutional Realism”, above n 6, at 136.

hierarchy within the constitutional system and are accepted as superior within that hierarchy because of their association with a foundational political event. In contrast, unwritten constitutions are unwritten precisely because they have evolved in the absence of a generative event that serves to refashion the underlying principles and structures that inform the dominant constitutional narrative. Accordingly, the terms ‘written’ and ‘unwritten’ are not just accurate descriptions of constitutional form, but meaningful terms of art in a constitutional analysis.

The normative distinction between a genuinely written constitution and an unwritten constitution (that to some extent relies on constitutional text) can be explained by the relationship of each constitutional form to the concept of constituent power. Constituent power is the idea that the power to establish a constitutional order is conceptually distinct from, and hierarchically superior to, ordinary law-making activity.<sup>80</sup> In a modern context, constituent power is understood in terms that recognise that the people are “the origin of all political action, the source of all power”.<sup>81</sup> It is the reliance on this idea of a superior normative authority that is deliberately invoked to constitute the constitutional order that serves to distinguish between written constitutions and their unwritten counterparts.

Loughlin explains that constituent power is a reflexive concept with two separate components. The first is the generative authority to establish a constitutional order, while the second is constituted power, the constitutional authority that has been deliberately created by the generative act.<sup>82</sup> The creation of constituted power requires an exercise of constituent power, the most obvious manifestation of which is the promulgation of a written constitution. Accordingly, the act of promulgating a written constitution necessarily involves the establishment as well as the exercise of a normative authority that is considered to be supreme:<sup>83</sup>

[T]here can be no ‘we’ that forms a people “in the absence of an act that effects closure by seizing the political initiative to say what goal or interest joins together the multitude into a multitude, and who belongs to the people” [...] Constituent power not only involves the exercise of power by a people; it simultaneously constitutes a people.

Written constitutions are, therefore, intimately connected to both the constitutional order they purport to establish and the foundational source of all legal and political power in the nation-state, a source that is recognised as supreme at the time the written constitution is established.<sup>84</sup> By symbolising this reflexive connection between the established (that is, constituted) constitutional

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80 See Carl Schmitt *Constitutional Theory* (1928) (Jeffrey Seitzer (trans), Duke University Press, Durham, 2008) at 76.

81 Schmitt *Constitutional Theory*, *ibid*, at 128.

82 Loughlin *Foundations of Public Law* (Oxford University Press, Oxford, 2010) at 227. The relationship between these components is one often characterised by an uneasy tension that manifests as a marked ambivalence within the constitutional text as to the authority of its own written nature: see Judith Pryor *Writing Nations, Reading Difference* (Birkbeck Law Press, Abingdon, 2008) at 21.

83 Loughlin *Foundations of Public Law*, *ibid*, at 227, citing Hans Lindahl “Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood” in Martin Loughlin and Neil Walker (eds) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, Oxford, 2008) 9 at 8.

84 Pek “Better Left Unwritten”, above n 1, at 1987.

order and its normative justification (constituent authority), a written constitution becomes the dispositive source of constitutional authority within the legal and political system.

Unwritten constitutions do not rest on the foundation of an exercise of constituent power,<sup>85</sup> and as a result do not reflect the same type of institutional arrangements where a central constitutional text can be regarded as dispositive. Indeed, the distinctive constitutional form of an unwritten constitution is contingent on the constituent power not being directly engaged.<sup>86</sup> Unwritten constitutional systems can point to a reliance on constitutional text, but those documents do not represent a valid claim to superior or dispositive authority with the constitutional order. While a written constitution is premised on both constitutional text and superior normative authority, it is the absence of a constitutive, authoritative constitutional text that defines a constitution as an unwritten constitution.

Like the historical development of the written/unwritten distinction, the distinction between a written constitution and an unwritten constitution defended in this section is a normative one that is reflected in differences in constitutional form. The distinction turns on perceptions of authority and legitimacy that must be different between the two constitutional approaches. That written constitutions represent a single source of dispositive constitutional authority that is recognised as normatively superior within the constitutional order has important implications for constitutional legitimacy. The written constitution, as a symbol of the expression of constituent power, is antecedent (and therefore external) to legal and political activity. This “externality” in turn means that a constitution is separate and independent from the institutions of government that it empowers and from the exercise of public power that it legitimates.<sup>87</sup> Breslin argues that this externality is essential for the link between the written constitutional construct and liberal constitutionalism. Limits on government authority in line with the recognition of liberal political values are effective because they stem from a source of constitutional authority superior to ordinary law and day-to-day politics. This authority of a written constitution stems in part from the perceived objectivity that comes from a clear conceptual separation between the source of public power and the exercise of that power. The exercise of constituent authority to create a constitution is so rare that it is neither replicated nor approximated by the ordinary exercise of legal and political power.<sup>88</sup> The legitimacy of government authority is, therefore, manifestly not supported by its own bootstraps, but by reference to an independent standard that is equally accessible to those exercising public power and those seeking to hold them to account.

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85 Joel I Colón-Ríos *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (Routledge, London, 2012) at 89.

86 This leads to the apparent conflation of constituted and constituent power under the doctrine of Parliamentary sovereignty: see Andreas Kalyvas “Popular Sovereignty, Democracy, and the Constituent Power” (2005) 12 *Constellations* 223 at 229. For an interesting argument that the Treaty of Waitangi may represent an exercise of constituent power in New Zealand see Jessica Orsman “The Treaty of Waitangi as an Exercise of Māori Constituent Power (2012) 43 *VUWLR* 345. This view is effectively rejected by the analysis in Joseph *Constitutional and Administrative Law in New Zealand*, above n 13, at 132.

87 Beau Breslin *The Communitarian Constitution* (John Hopkins University Press, Baltimore, 2004) at 126.

88 Pek “Better Left Unwritten”, above n 1, at 1988.



In contrast, unwritten constitutions are characterised by multiple sources of relative constitutional authority, because none of those sources can stake an uncontested claim to being hierarchically superior. Whereas a written constitution posits a type of (textual) authority that is final, discrete and independent, an unwritten constitution operates in the presence of a plurality of claims to constitutional authority that resists each of these qualities.<sup>89</sup> Recognising this plurality means that any claim to constitutional authority in an unwritten constitutional context can only be relative in the sense that multiple claims to authority are “mutually constitutive and mutually constraining”.<sup>90</sup> Claims to the legitimate exercise of public power are made, validated, contested and revisited within the relationships between relative sources of constitutional authority. There simply cannot be an independent, superior source of constitutional legitimacy in an unwritten constitution because of the need to account for the existence of, and interaction between, multiple (valid but contingent) claims of legitimate authority.<sup>91</sup>

The distinctive plurality of constitutional authority that characterises unwritten constitutions suggests that those constitutions cannot be easily separated from ordinary law-making and day-to-day politics. Accordingly, unwritten constitutions cannot be characterised as external to the powers and institutions of government in the same way as written constitutions. Unwritten constitutions do not exist apart from, or antecedent to, ordinary law making and day-to-day politics.<sup>92</sup> Government institutions and powers in an unwritten constitution are better understood as “functionally equivalent” to the very source of constitutional authority that operates to legitimise those institutions and powers.<sup>93</sup> To the extent that the externality that characterises written constitutions is an essential feature of liberal constitutionalism, the distinction between written constitutions and unwritten constitutions has important consequences for perceptions of the legitimacy of public power. Authoritative commitment to constitutional values, formal entrenchment and enforceable limits all suggest a normative hierarchy that are unfamiliar to the unwritten constitutional experience. Unwritten constitutions are required to establish constitutional legitimacy without reference to an external standard. The nature of constitutionalism in an unwritten context is immanent or endogenous to the legal and political system. If liberal constitutionalism is to be preserved, it cannot simply be asserted as a measure of constitutional propriety as it can in the written constitutional context. It must find expression in the necessary interaction between competing sources of legitimate constitutional authority.

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89 See Nicole Roughan *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (Oxford University Press, Oxford, 2013) at 3.

90 Roughan *Authorities: Conflicts, Cooperation, and Transnational Legal Theory*, *ibid*, at 138.

91 Roughan *Authorities: Conflicts, Cooperation, and Transnational Legal Theory*, *ibid*, at 138.

92 Beau Breslin *From Words to Worlds: Exploring Constitutional Functionality* (John Hopkins University Press, Baltimore, 2009) at 175.

93 Breslin *The Communitarian Constitution*, above n 87, at 128.

## *A Genuine Normative Distinction*

The distinction between written and unwritten constitutions embraces a number of important elements, but the essence of the distinction can be captured in a few key concepts. Constitutional text carries with it normative characteristics that impact on the way constitutional matters are understood and resolved. In this respect, the ‘written-ness’ of a constitution can be understood as a matter of degree.<sup>94</sup> The greater the (perception of) ‘written-ness’ of a constitutional system, the more likely it will be to exhibit certain characteristics. The existence or otherwise of a central constitutional text that purports to be both fundamental and authoritative is likely to impact on the way in which constitutional theory and practice is perceived in different constitutional systems. There is, in other words, a meaningful difference between constitutions that may be properly characterised as ‘written’, and ‘unwritten’ constitutional systems. This analysis also suggests that there is particular value in retaining the descriptors ‘written’ and ‘unwritten’ in the constitutional context. It is precisely because there is perception that the constitution is represented by (or indeed just is) a single, authoritative, written instrument that separates some constitutional systems from others.

However, constitutional written-ness alone is not sufficient to mark a constitutional system as written. Written constitutions proceed on the basis of an identifiable authority that both constitutes and limits public power. In a modern liberal democracy, that authority is the people. The written constitution serves as an important symbol of that normatively superior authority, colouring the exercise of public power with constitutional legitimacy if it is consistent with the written constitution’s text and principles. An unwritten constitution, in contrast, lacks the identifiable exercise of constituent power that is characteristic of written constitutions. This makes unwritten constitutions distinctive. The distinction between written and unwritten constitutions goes to the heart of the normative conception of a constitution articulated in chapter one. It is the nature of the moral justification for the exercise of public power, as well as its formal expression, that distinguishes an unwritten constitution from a written constitution. The historical analysis at the beginning of this chapter noted that the written/unwritten distinction as it was originally conceived sought to link constitutional form to alternative theories of constitutionalism. While understandings of constitutionalism have evolved since that time, constitutional form still indicates an important distinction in the moral justification for the exercise of public power. A written constitution is able to trace that justification through an identifiable, authoritative source of constitutional principle. An unwritten constitution, regardless of the extent to which it makes use of constitutional text, does not have this same ability.

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94 See Pek “Better Left Unwritten”, above n 1, at 1986.

## CHAPTER THREE

# CONSTITUTIONAL REASONING: A COMPARATIVE ANALYSIS

Chapter two demonstrated that the written/unwritten distinction is meaningful by linking theories of constitutionalism to constitutional form. This chapter takes the argument a step further by contending that substantive consequences flow from the written/unwritten distinction. It develops a case study around the comparative treatment of the freedom of political communication with reference to New Zealand, the United States and Australia. New Zealand and the United States, the paradigmatic cases for unwritten constitutions and written constitutions respectively, each exhibit starkly different approaches to judicial reasoning in respect of constitutional issues. This chapter suggests that part of the reason for this difference in approach is that theories of liberal constitutionalism exert a more direct influence over the decision-making of the Supreme Court of the United States than the New Zealand Court of Appeal.

While there is evidence of a difference of approach between the appellate courts in the United States and New Zealand, the relationship between this difference of approach and matters of constitutional structure is more speculative. Significant support for the hypothesis that there is a correlation between constitutional structure and approaches to judicial reasoning is found in the unsettled approach of the High Court of Australia. Australia is a common law jurisdiction with a written constitution, but its written constitution does not expressly incorporate fundamental rights and freedoms. Constitutional rights have, however, been implied from the text and structure of the Australian Constitution. These rights have an ambivalent relationship with the written Constitution as they may be interpreted as being either written or unwritten. It is argued that this ambivalent status explains why the High Court of Australia has adopted two different approaches to the issue of implied constitutional rights.

### *Freedom of Expression as a Case Study: Rationale and Limitations*

The freedom of political communication has particular benefits as a case study for the purposes of this thesis. The freedom is a specific example of the right to freedom of expression, which is

fundamental to both democratic government and liberal theories of constitutionalism.<sup>1</sup> Accordingly, the nature and scope of the freedom of political communication as determined in a particular jurisdiction can be used to demonstrate a real potential to impact on constitutional outcomes.

The first respect in which free speech engages constitutional issues is by supporting the political process through increasing the effectiveness of democracy. On this understanding, freedom of expression aims to “assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people”.<sup>2</sup> Freedom of expression enables the communication of ideas about government, allowing for meaningful critique of those in office as well as promoting informed constituents and voting practices. Effective representative government in a free and open society requires “virtually unobstructed access to and diffusion of ideals”.<sup>3</sup> Protecting freedom of expression protects the workability and effectiveness of the democratic process.

In addition to this democratic rationale, freedom of expression is valuable in its own right. This idea has been expressed in terms of individual self-fulfilment,<sup>4</sup> but it goes to the heart of the ideals of freedom and human dignity that underpin modern understandings of liberal constitutionalism. Freedom of expression matters “simply because liberty matters”,<sup>5</sup> and is valued as an end in itself in addition to being a means of securing the workability of democracy.

Finally, freedom of expression may act as a safety valve for society by encouraging public order and preventing injustice.<sup>6</sup> In *R v Secretary of State for the Home Department, ex p Simms*,<sup>7</sup> a prisoner was prevented from corresponding with a reporter who was investigating the possibility that the prisoner had been wrongly convicted. The House of Lords reasoned that this refusal violated the prisoner’s right to freedom of expression, and it was in that context that the ‘safety-valve’ rationale was articulated.<sup>8</sup> Without the ability to communicate in an uncensored fashion an important means of investigating the prisoner’s innocence was removed, and there was an unacceptable risk that an injustice would be perpetuated. Freedom of expression was necessary for testing this important proposition.

Underpinning these distinctive rationales for freedom of expression is a particular philosophy concerning the way information is disseminated. This philosophy is described as the ‘marketplace of ideas’, and is captured in the sentiment that “the best test of truth is the power of the thought to

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1 See, for example, *Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington)* [2000] 3 NZLR 570 (CA) at [45].

2 *New York Times Co v Sullivan* 376 US 254 (1964) at 269.

3 *Switzman v Elbling* [1957] SCR 285 (SCC) at 306.

4 See, for example, *R v Sharpe* (2001) 194 DLR (4th) 1 (SCC) at [141].

5 Grant Huscroft “Freedom of Expression” in Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) 308 at 311.

6 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexisNZ, Wellington, 2005) at 309.

7 *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 (HL).

8 *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 (HL) at 126.

get itself accepted in the competition of the market”.<sup>9</sup> Like the freedom of expression itself, this philosophy has a number of dimensions.<sup>10</sup> The marketplace of ideas philosophy aims at competition between rival versions of the truth that are accepted or rejected on the basis of popular reception. This view is often associated with John Stuart Mill, who argued the following in respect of the “peculiar evil” of silencing opinion:<sup>11</sup>

If the opinion is right, they [the human race] are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

On this understanding, the marketplace of ideas philosophy holds that “free speech is a necessary condition to allow truth to emerge”.<sup>12</sup> Alternatively, truth need not be a component in the justification for seeking competition between ideas. It might be equally argued that an objective truth is not available. The value in competition between ideas lies in the ability to challenge the views of those in power. This approach considers that freedom of expression is “the most viable alternative to authoritative decree”.<sup>13</sup> Freedom of expression entails a suspicion of government regulation, as the operation of the marketplace is thought to occur most effectively and efficiently if it is uninhibited by external constraints.<sup>14</sup>

There are, therefore, a number of competing and intellectually distinct rationales that seek to justify the fundamental importance of the freedom of expression. However, those competing rationales are also mutually supporting. In order to be applied satisfactorily to the broad range of circumstances in which the freedom is invoked, the right to freedom of expression must draw on “several strands of theory in order to protect a rich variety of expressional modes”.<sup>15</sup> Human expression is limited only by imagination, and the circumstances in which the freedom of expression may be invoked are equally broad. For this reason it is not surprising to find a range of distinct but complementary philosophical justifications for strong protection for the freedom of expression.

The freedom of political communication is an important subset of the general freedom of expression concerning matters of politics and government. While the nature of the freedom of political communication is discussed in more detail in the analysis of judicial decisions below, it is important to note the features that make the freedom of political communication a useful case study. First, the freedom of political communication represents a fundamental consideration in a modern

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9 *Abrams v United States* 250 US 616 (1919) at 630. For an example of an apparent acceptance of the marketplace of ideas philosophy in the New Zealand courts see *Re Collier (Deceased)* [1998] 1 NZLR 81 (HC) at 90.

10 Adrienne Stone “Freedom of Political Communication, the Constitution and the Common Law” (1998) 26 Fed L Rev 219 at 234 [“Freedom of Political Communication”].

11 John Stuart Mill “On Liberty” in John Gray and GW Smith (eds) *JS Mill, On Liberty in Focus* (Routledge, London, 1991) 21 at 37.

12 Christopher McCrudden “The Impact of Free Speech” in Basil S Markesinis (ed) *The Impact of the Human Rights Bill on English Law* (Oxford University Press, Oxford, 1998) 85 at 105.

13 Vincent Blasi “Reading Holmes through the Lens of Schauer: The *Abrams* Dissent” (1997) 72 Notre Dame L Rev 1343 at 1349.

14 Butler and Butler *The New Zealand Bill of Rights Act: A Commentary*, above n 6, at 307.

15 Laurence Tribe *American Constitutional Law* (2 ed, Foundation Press, Mineola, 1988) at 789 (footnote omitted).

liberal democracy because it has relevance for the efficacy of the democratic process. Second, and reflecting its fundamental constitutional nature, the freedom of political communication is a convenient choice because it has been the subject of appellate level judicial consideration in jurisdictions with three very different constitutional structures. New Zealand and the United States are taken to represent opposite ends of the constitutional spectrum from unwritten-ness to written-ness respectively.<sup>16</sup> Due to its treatment of freedom of political communication as an implied right, the Constitution of Australia represents a clear example of a middle ground between the two extremes. This offers an opportunity to examine the impact of constitutional structure as represented by the written/unwritten distinction in a meaningful way.

The focus on the decisions of appellate level courts rather than other institutions of government also requires justification. The analysis is not intended to pre-suppose that the courts are the primary site of constitutional activity in New Zealand or in comparator jurisdictions. The recognition and protection of fundamental rights such as the freedom of political communication is rightly the concern of all branches of government. However, the judgments of appellate-level courts have been selected because the duty on the courts to supply in full the reasoning for their decisions enables a meaningful inquiry into normative dimension of constitutional decision-making. While similar considerations are likely to motivate political decision-making when constitutional fundamentals are engaged, the reasoning of political bodies tends to be more opaque. The ability to engage with clear reasoning is likely to elucidate the similarities and differences in approaches to constitutional reasoning among comparable jurisdictions.

There are, however, important limits to the case study approach. Case studies are considered to be an effective research tool where it is not possible to isolate particular factors as having dispositive influence.<sup>17</sup> For this reason it should be borne in mind that a number of competing factors are likely to have influenced the courts' analysis in each case. The (un)written nature of the constitution will necessarily represent only one such influence. Both the comparative nature of the analysis undertaken in this chapter may be seen to mitigate this disadvantage to some extent. Even so, the focus on a handful of cases and the example of a single protected freedom mean that the conclusions in this chapter are best taken as indicative rather than determinative. The aim of the case study set out in this chapter is to point to the potential of the written/unwritten distinction to influence constitutional practice through use of an exemplar. Extrapolating beyond that point must be left for another occasion.

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16 Mark Elliott "Interpretative Bills of Rights and the Mystery of the Unwritten Constitution" [2011] NZ Law Rev 591 at 592 describes New Zealand's constitutional arrangements as "the classical model of unwritten, unentrenched constitutionalism", whereas Benjamin L Berger "White Fire: Structural Indeterminacy, Constitutional Design, and the Constitution Behind the Text" (2008) 3 Journal of Comparative Law 249 at 265 characterises the United States as the "paradigmatic example of a state built on a written constitution".

17 See Robert K Yin *Applications of Case Study Research* (3 ed, Sage, Thousand Oaks, 2012) at 4.

## *Two Methods of Legal Reasoning*

A key contention in this chapter is that constitutional structure — whether a constitution is written or unwritten — promotes contrasting styles of legal reasoning. Before engaging in the substantive analysis of comparative judicial decision-making, it is convenient to set out in broad terms the two methods of legal reasoning that will be discussed. This section undertakes that task, as well as outlining the relevance for each approach to the question of constitutional structure, and the identified strengths and weaknesses of each approach to legal reasoning.

### ***‘Constitutional’ Reasoning and ‘Common Law’ Reasoning***

Methods of legal reasoning employed by appellate courts when faced with the need to resolve a dispute that touches on constitutional fundamentals may be divided into two broad categories. The first category is an approach that affords a generous interpretation to constitutional principle, affording it the most direct protection. This type of reasoning may be described as ‘top-down’ reasoning because it relies on the broad articulation of a constitutional principle or philosophy to serve as the starting point for analysis.<sup>18</sup> Resolution of the question before the court proceeds deductively from this constitutional premise, which itself requires no (or very little) justification.<sup>19</sup>

In top-down reasoning, the judge or other legal analyst invents or adopts a theory about an area of law — perhaps about all law — and uses it to organize, criticize, accept or reject, explain or explain away, distinguish or amplify the existing decisions to make them conform to the theory [...]

This type of reasoning is self-consciously ‘constitutional’ in nature.<sup>20</sup> It engages directly with the courts’ understanding of the fundamental values that inform a normative conception of a constitution and, consequently, theories of liberal constitutionalism. Characterising this style of legal reasoning as ‘constitutional’ is apt because constitutional propriety is the animating feature of the courts’ analysis.

The second method of reasoning might be characterised as a ‘common law’ style of reasoning. Common law reasoning proceeds inductively, reasoning by analogy in order to draw links between similar issues and decisions. Common law reasoning is incremental and distinctively ‘bottom-up’ in approach, proceeding in the opposite manner to constitutional reasoning. Whereas top-down, constitutional-style reasoning necessarily involves “an ambitious statement of underlying principle”,<sup>21</sup> the common law style of legal reasoning is premised on the determination of individual

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18 The phrase ‘top-down reasoning’ and its opposite ‘bottom-up reasoning’ are examined in Richard A Posner “Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights” (1992) 59 U Chic L Rev 433.

19 Posner “Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights”, *ibid*, at 433.

20 The term ‘constitutional’ is adopted in this chapter in preference to the term ‘legislative’ because the style of reasoning employed does not reflect the element of compromise that characterises legislative reasoning. On the characterisation of top-down legal reasoning as ‘legislative’ see Jeffrey J Rachlinski “Bottom-up versus Top-down Lawmaking” (2006) 73 U Chi L Rev 933.

21 Stone “Freedom of Political Communication”, above n 10, at 238.

disputes. This avoids the need to engage directly with wider constitutional considerations in the sense of the realisation of substantive constitutional values,<sup>22</sup> although such considerations may form part of the wider context in which individual disputes are determined. Common law reasoning treats any decision as provisional, always being open to further refinement and development.<sup>23</sup>

While two broadly different approaches to constitutional reasoning can be seen in the contrasting top-down, deductive and bottom-up, inductive methods, the labels ‘constitutional’ reasoning and ‘common law’ reasoning themselves require some justification in the current context. The labels might be thought to presuppose the analysis that is to come concerning the respective approaches of the Supreme Court of the United States and the New Zealand Court of Appeal. The broad distinction drawn in this section between constitutional reasoning and common law reasoning has been most directly informed by Stone’s analysis of the decision-making of the High Court of Australia.<sup>24</sup> Stone argues that in respect of the issue of freedom of political communication protected by the Australian Constitution, the High Court had a choice over whether to resolve the issue through either application of constitutional principles informed by overarching theory or the incremental development of the common law. Stone’s analysis is focused on substantive outcomes, and in particular she is critical of the High Court’s initial decision to address the matter of freedom of political communication as an issue of constitutional principle. This analysis serves to underscore the connection between the method of reasoning employed and the substantive result reached in cases touching on constitutional fundamentals. The labels ‘constitutional reasoning’ and ‘common law reasoning’ are adopted here from Stone’s analysis to signify differences in terms of matters of substance as well as questions of reasoning and process when constitutional issues are in play. They are employed to indicate two broad styles of legal reasoning, rather than as literal descriptions of particular constitutional outcomes.

### ***Strengths and Weaknesses***

Both constitutional reasoning and common law-style reasoning have their advantages and disadvantages in the judicial determination of constitutional matters. It is not the aim of this chapter to weigh the advantages and disadvantages of each approach in detail. The more modest aim is to note that a choice of different approaches is available. That choice may lead to a substantive difference in constitutional content. It is a choice that is, to a significant extent, influenced by matters of constitutional structure.

It is possible for the difference between the two types of reasoning to be overstated. Adopting a psychologically oriented framework, Bartels views top-down and bottom-up reasoning as end points on a continuum of judicial approaches to decision-making.<sup>25</sup> The place of a particular instance of

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22 Stone “Freedom of Political Communication”, *ibid.*

23 Grant Lamond “Analogical Reasoning in the Common Law” (2014) 34 *Oxford J Legal Stud* 567 at 571. See also Cass R Sunstein *Legal Reasoning and Political Conflict* (Oxford University Press, New York, 1996) at 37.

24 Stone “Freedom of Political Communication”, *above n 10.*

25 Brandon L Bartels “Top-down and Bottom-up Models of Judicial Reasoning” in David Klein and Gregory Mitchell (eds) *The Psychology of Judicial Decision Making* (Oxford University Press, Oxford, 2010) 41 at 43.



judicial decision-making on that continuum is determined by the extent to which theory-driven reasoning biases the cognitive processes involved. Top-down reasoning is highly theory and value driven. When top-down reasoning is employed, the “generic predispositions, perceptions, or theories people bring to a judgment context dictate how they process the new information in front of them”, predisposing the decision-maker to certain outcomes.<sup>26</sup> In contrast, bottom-up reasoning is characterised by “objective” scrutiny of the full range of relevant considerations.<sup>27</sup> Bartels’ point is that no decision-making process is either completely top-down or bottom-up, but will be more theory-driven or context-driven depending on a number of factors.

The argument in this chapter is that a written constitution supplies the architecture for the court to make the necessary theory and value judgements that promote a more top-down, deductive style of reasoning. The text and principles of the written constitution supply the value judgements that are perceived to be dispositive, and theories of constitutionalism explain how those values are to be translated into constitutional practice. Constitutional decision-making in an unwritten constitutional context, however, has a tendency more towards the bottom-up style of reasoning, as there is no authoritative source of constitutional values on which to found explicitly a workable theory of constitutionalism. The remainder of this chapter seeks to sustain this argument through comparative analysis of the United States and New Zealand experience with freedom of expression in a political context, and by interrogating the vacillation of the High Court of Australia in respect of the same issue.

## *The Supreme Court of the United States: Constitutional Reasoning*

The United States is a classic example of a nation governed by a central, authoritative constitutional text. The text of the United States Constitution establishes the machinery of government, and incorporates a bill of rights guaranteeing to the American people important civil liberties.

That constitutional text includes an explicit protection for the freedom of expression. The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of expression, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

This provision has been described as the “seminal” protection of freedom of expression among modern liberal democracies.<sup>28</sup> It reflects a philosophical underpinning of freedom of expression

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26 Bartels “Top-down and Bottom-up Models of Judicial Reasoning”, *ibid*, at 43.

27 Bartels “Top-down and Bottom-up Models of Judicial Reasoning”, *ibid*, at 44.

28 Butler and Butler *The New Zealand Bill of Rights Act: A Commentary*, above n 6, at 304.

jurisprudence in the United States that the freedom of expression is critical to the functioning of democratic government.<sup>29</sup> There is “practically universal agreement that a major purpose of [the First Amendment] was to protect the free discussion of government affairs”.<sup>30</sup> Freedom of expression ensures that citizens are informed about issues affecting the government and can participate more effectively in democratic processes that serve to hold the government to account. It also promotes more responsive government through better communication of the wishes of the electorate to those holding political office.

Against that philosophical background of strong theoretical support for the freedom of expression, the majority opinion in *New York Times v Sullivan* was celebrated as “an occasion for dancing in the streets”.<sup>31</sup> The case concerned a libel suit by an Alabama police official in respect of an advertisement critical of the role of the police and other public officials in resisting the efforts of civil rights activists. The Supreme Court of Alabama had upheld a jury award of \$500,000 in favour of the plaintiff, which was exceptionally high by standards at the time. On appeal, the Supreme Court of the United States overturned that decision on the grounds that “the constitution delimits a State’s power to award damages for libel actions brought by public officials against critics of their official conduct”.<sup>32</sup>

For present purposes, the decision is less important than the reasoning employed to reach and justify that decision. The rhetoric of the majority opinion is strong and sweeping. Resolving the dispute involved weighing the right of public officials to protection of their reputation against the First Amendment right to freedom of expression. The starting point was recognition of the importance of the constitutional issues involved,<sup>33</sup> and where the balance ought to be struck was expressly considered by the majority “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open”.<sup>34</sup> Ultimately, the Court viewed the constitutional commitment to the freedom of expression in such high regard that it completely outweighed competing interests.<sup>35</sup>

Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors. [...] The interest of the public [in maintaining the right to freedom of expression] outweighs the interest of appellant or any other individual. [...] Whatever is added to the field of libel is taken from the field for free debate.

The Supreme Court was also able to draw on previous statements of other courts to support its analysis. For example, the majority relied on the statement in *City of Chicago v Tribune Co* that “no

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29 See Alexander Meiklejohn *Free Speech and its Relation to Self Government* (1948) (Law Book Exchange, Union, 2000).

30 *Mills v Alabama* 384 US 214 (1966) at 218.

31 Alexander Meiklejohn, cited in Harry Kalven “The *New York Times* Case: A Note on ‘the Central Meaning of the First Amendment’” (1964) S Ct Rev 191 at 221, n 125.

32 *New York Times Co v Sullivan* 376 US 254 (1964) at 283.

33 *New York Times Co v Sullivan* 376 US 254 (1964) at 264.

34 *New York Times Co v Sullivan* 376 US 254 (1964) at 270.

35 *New York Times Co v Sullivan* 376 US 254 (1964) at 272, citing *Sweeny v Patterson* 128 F.2d 457 (1942) at 458.

court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence”.<sup>36</sup> The rationale for this position is made clear in the idea that the First Amendment “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people”.<sup>37</sup> It is a “prized American privilege to speak one’s mind”,<sup>38</sup> and the Supreme Court’s preference for this fundamental constitutional value is not easily displaced, even in the face of valid interests that might point to the opposite conclusion.

Against the strength of this rhetoric there could be little doubt that the Supreme Court would find in favour of the appellant’s constitutional right to freedom of expression. The Court’s clear approach was to identify the relevant constitutional principle and seek to give the fullest expression possible to that principle in the application of the law and the determination of the dispute. In this regard, the constitutional safeguard articulated in the First Amendment is considered to be a trump, and weighs more heavily in the Court’s analysis than the precise factual matrix of the dispute or the available precedents. Freedom of expression is identified simply as “a fundamental principle of the American form of government”,<sup>39</sup> and maintaining this fundamental principle is the Court’s primary objective. State law, be it common law or statute, must give way to constitutional requirements. These requirements themselves need no prior justification, and are assumed *a priori* as a consequence of the orthodox interpretation of an authoritative constitutional text, although their importance is reaffirmed in the Court’s liberal use of high rhetoric. As a result, the nuances of the law of libel and the interests involved in protecting one’s reputation count for little. In the words of one commentator, the Supreme Court effectively “constitutionalised” the law of defamation.<sup>40</sup>

The approach of the United States Supreme Court in *New York Times* can be seen to be engaging with manifestly constitutional issues in a manner consistent with traditional understandings of liberal constitutionalism. The articulation of a fundamental substantive value — in this case, the freedom of political communication — becomes the normative centre of the Court’s analysis. In adopting this approach, the United States Supreme Court is clearly not engaging in the sort of reasoning based on precedent and analogy, prioritising incremental development, that characterises the common law method. Precedent cases are cited almost exclusively for their rhetorical value, and are intended only to strengthen the Court’s philosophical disposition towards a deep scepticism of government regulation of speech. This is an approach that is quintessentially top-down, inductive and theory-driven. It is constitutional reasoning *par excellence*, as understood by the liberal constitutionalist tradition.

The approach of the Court is perhaps best demonstrated by its assessment of the arguments advanced by the respondent. Counsel relied on precedent indicating that constitutional protection

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36 *City of Chicago v Tribune Co* 307 Ill 595 at 601; 139 NE 86 at 88 (1923).

37 *Roth v United States* 354 US 476 (1957) at 484.

38 *Bridges v California* 314 US 252 (1941) at 270.

39 *New York Times Co v Sullivan* 376 US 254 (1964) at 275.

40 Huscroft “Freedom of Expression”, above n 5, at 316.

for the freedom of expression is not absolute and can be restricted by state laws in appropriate circumstances.<sup>41</sup> The argument sought to extend that state regulation to libellous material. The Court noted that regulation of the freedom of expression had never been extended to criticism of public officials. In this regard, the Court found that the right to protect one's reputation through an action in libel could "claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment".<sup>42</sup> Given the regard in which the Court held the commitment to freedom of expression embodied in the First Amendment, the interest of the respondent in protection of his reputation from false allegations carried comparatively little weight. The Supreme Court was equally untroubled by the argument that publication was in the nature of a paid advertisement, and for that reason the publication did not attract the same protection in terms of the freedom of expression that the press usually enjoys. The Court again grounded its decision in principle in finding that to accept this argument would "shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources'".<sup>43</sup> Once the importance of freedom of speech as a constitutional principle was accepted, the issue was effectively determined.

Further, there is a firm view that the inclusion of a specific protection for the freedom of expression in the text of the United States Constitution is essential to the protection afforded to the freedom of political communication. Not only was the text of the Constitution and the values it encapsulates the starting point for the Court's analysis, the value in constitutional text is well recognised:<sup>44</sup>

Even *with* a Bill of Rights which could hardly be more explicit about free expression — "Congress shall make no law..." — we had no free speech decisions for the first century and a third after its adoption. Even when our Supreme Court began to apply the free expression guarantees, the process was tortuous and at times grudging. There have been many times when only a constitutional shield could stay the censor's or repressor's hand. I find frightening the prospect of what would have happened had basic liberties in our system been at the mercy of judicial belief. Natural law or not, I am one who finds the First Amendment indispensable to the freedoms of expression we enjoy today. Anything less may well not have sufficed.

There appears, therefore, to be an important link between the written structure of the United States Constitution and the constitutional-style of reasoning employed by the Supreme Court. Constitutional text links theories of constitutionalism to substantive constitutional outcomes. It is not clear that this link is equally demonstrable in an unwritten constitutional context.

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41 See, for example, *Roth v United States* 354 US 476 (1957).

42 *New York Times Co v Sullivan* 376 US 254 (1964) at 270.

43 *New York Times Co v Sullivan* 376 US 254 (1964) at 266, citing *Associated Press v United States* 326 US 1 (1945) at 20.

44 Robert M O'Neil "Freedom of Expression and Public Affairs in Australia and the United States: Does a Written Bill of Rights Really Matter?" (1994) 22 Fed L Rev 1 at 3 (emphasis in the original).

## *The New Zealand Court of Appeal: Common Law Reasoning*

The highly constitutional nature of the reasoning exhibited in *New York Times* may also be demonstrated by contrasting it with the approach adopted to the issue of political communication by the New Zealand Court of Appeal. The New Zealand Court was required to determine a very similar issue to *New York Times* in *Lange v Atkinson*.<sup>45</sup> However, the approach of the Court of Appeal was starkly different. It exhibited a distinct preference for inductive reasoning and the incremental development of the common law.

As an example of an unwritten constitution, New Zealand does not have a constitutional protection for the freedom of expression in the form of an authoritative, textual decree. Effective protection for freedom of expression may, however, be secured in other ways. The principal statutory protection for the freedom of expression in New Zealand is s 14 of the New Zealand Bill of Rights Act 1990 (NZBORA), which provides “Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form”. This provision is phrased in broad terms, and no attempt was made to condition the freedom of expression to the particular New Zealand context.<sup>46</sup> Section 14 is phrased in terms reminiscent of the value-led formulations designed to afford maximum protection to individual dignity and freedom. Despite the similarities between s 14 of the NZBORA and the First Amendment of the United States Constitution, the courts in each jurisdiction have adopted very different approaches. *Lange* serves to demonstrate this point.

The plaintiff in *Lange* was a politician and former New Zealand Prime Minister. Defamation proceedings were instigated after the publication of an article that called into question the plaintiff’s capability and achievements while holding the office of Prime Minister. The issue in the case, therefore, may be characterised as one of the freedom of political communication similar in nature to that at the heart of *New York Times*. The issue was not, however, primarily contested in explicitly constitutional terms. Rather, the defendant pleaded the common law defence of qualified privilege, and the plaintiff sought to have the defence struck out. Both the High Court at first instance and the Court of Appeal on appeal found in favour of the defendant in respect of the strike out claim.

At first glance, there might appear to be important similarities in the judicial approach adopted in *New York Times* and *Lange*. The New Zealand Court of Appeal was clearly aware of the normative significance of the freedom of expression as a constitutional value. As a result, the Court was drawn into making several rhetorical statements concerning the fundamental importance of freedom of expression.<sup>47</sup> Although the Court was criticised for its use of rhetoric,<sup>48</sup> it does not

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45 *Lange v Atkinson* [1998] 3 NZLR 424 (CA); *Lange v Atkinson* [2000] 3 NZLR 385 (CA).

46 Grant Huscroft “Defamation, Racial Disharmony, and Freedom of Expression” in Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brooker’s, Wellington, 1995) 171 at 173.

47 The Court quoted from both John Milton and John Stuart Mill on the value of freedom of expression: *Lange v Atkinson* [1998] 3 NZLR 424 (CA) at 460.

48 Law Commission *Defaming Politicians: A Response to Lange v Atkinson* (NZLC PP33, 1998) at [15].

represent the heart of the Court's reasoning. In line with the nature of the pleadings in the case, the Court's approach was to seek to develop the common law incrementally and, above all, reasonably. It did not venture a far-reaching statement of constitutional principle of the type that underpinned the reasoning process in *New York Times*.<sup>49</sup>

This can be demonstrated with a close analysis of the Court's reasoning. The Court simply declined to engage with the issue of the relevance of constitutional protections for freedom of expression when resolving the matter, relying instead on a cautious and incremental development of the common law doctrine of qualified privilege. Qualified privilege is a common law defence to a claim of defamation that stands in contrast to constitutional protection. By its very nature, qualified privilege may be defeated by the plaintiff and so its fidelity to the promotion of constitutional values under an expressly adopted theory of constitutionalism is always open to question. The plaintiff may defeat the privilege either by demonstrating ill will, or that the defendant otherwise took advantage of the occasion of publication.<sup>50</sup> When addressed through the lens of the common law defence of qualified privilege, the commitment to freedom of expression takes on a "relative and contingent character".<sup>51</sup> In fact, the Court went as far as to deliberately distance itself from the constitutional approach to the issue by stating that it considered that its judgment was "not the occasion for a history of the right to freedom of expression".<sup>52</sup> As noted by one commentator, "[i]n contrast to significant debate in other jurisdictions over the proper relationship between bills of rights and the common law, the relative silence of [the New Zealand] Court is deafening".<sup>53</sup>

Part of the reason for adopting a common law-style approach to legal reasoning may have been that a common law mechanism for resolving the dispute was clearly available to the Court. The defendant argued on common law grounds for an extension to the defence of qualified privilege to cover news media publication of traditional matters. Qualified privilege traditionally arose where publishers had a duty, be it legal, moral or social, and the recipients had a corresponding duty or interest with respect to the publication.<sup>54</sup> It would be unusual for a publication to a widespread audience to attract the privilege,<sup>55</sup> such as a general media publication of matters of political interest to the public at large. If the traditional qualified privilege recognised by the common law could be extended to such matters, then the issue could be effectively resolved by a common law mechanism without resort to constitutional considerations. This is, in effect, what the decision of the Court of

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49 In this respect, the approach of the New Zealand Court of Appeal is similar to that of the House of Lords in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL). *Reynolds* is not discussed here, but it has been recognised elsewhere as employing quintessentially common law reasoning. For example, Rosemary Tobin "Political Discussion in New Zealand: Cause for Concern?" [2003] NZ Law Rev 215 at 233 finds that "*Reynolds* is firmly grounded in the traditional common law methodology. There is really nothing new in *Reynolds*, except for some relaxation of the principle of reciprocity such that it encompasses matters of legitimate public concern".

50 Defamation Act 1992, s 19(1).

51 *Lange v Atkinson* [1998] 3 NZLR 424 (CA) at 461.

52 *Lange v Atkinson* [1998] 3 NZLR 424 (CA) at 460.

53 Geoff McLay "*Lange v Atkinson*: Not a Case for Dancing in the Streets" [2000] NZ Law Rev 427 at 428.

54 *Adam v Ward* [1917] AC 309 (HL) at 334.

55 See, for example, *Braddock v Bevins* [1948] 1 KB 580 (CA).

Appeal amounted to: an incremental development of a common law doctrine rather than a fundamental statement of constitutional principle:<sup>56</sup>

[...] the Court is not engaged in any extensive development of the law. Rather it is a matter of the refinement and application of the law in yet another of the infinite variety of circumstances in which the defence of qualified privilege may be invoked. This judgment has already made it clear that the application of the defence to political debate is not new.

This common law-style approach to legal reasoning adopted by the Court seeks to balance the competing interests involved in a manner that is consistent with previous decisions. In conducting this balancing exercise, the Court did not presuppose the weight to be given to any one particular set of interests in isolation from the facts at the heart of the dispute. For instance, as part of its analysis of where the balance ought to be struck, the Court quoted the following passage from *Campbell v Spottiswoode*:<sup>57</sup>

It is said that it is for the interests of society that the public conduct of men should be criticised without any other limit than that the writer should have an honest belief that what he writes is true. But it seems to me that the public have an equal interest in the maintenance of the public character of public men; and public affairs could not be conducted by men of honour with a view to the welfare of the country, if we were to sanction attacks upon them, destructive of their honour and character, and made without any foundation.

The traditional common law test to mediate between these competing interests is the “common convenience and welfare of society”.<sup>58</sup> This standard does not presuppose a particular outcome, but seeks to balance between freedom of expression and protection of reputation must be a value judgement informed by local circumstances and guided by principle. Unlike the constitutional-style reasoning adopted by the Supreme Court in *New York Times*, this common law standard acknowledges that it may be necessary to limit the freedom of expression so that reputations may be validly protected.<sup>59</sup> In this sense, the common convenience and welfare of society is not a starting point for deductive analysis, but a means of guiding the court to consider all the relevant factors based on a preponderance of decided cases.<sup>60</sup> The ‘common convenience and welfare of society’ connects the instance case to the history and experience of the underlying case law, ensuring the development of the common law in an incremental fashion. It necessitates a common law-style of legal reasoning.

This common law approach does not exclude consideration of matters that might usually be considered constitutional in character. The constitutional context in which *Lange* was to be decided was in fact expressly addressed by the Court of Appeal. However, it did not go as far as to articulate and defend a particular theory of constitutionalism based on the realisation of substantive constitutional values. The constitutional context was treated as a single aspect of the broader context

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56 *Lange v Atkinson* [1998] 3 NZLR 424 (CA) at 462.

57 *Campbell v Spottiswoode* (1863) 3 B & S 769 at 777.

58 *Toogood v Spyring* (1834) 1 Cr M & R 181 at 193.

59 *Lange v Atkinson* [1998] 3 NZLR 424 (CA) at 442.

60 See Stone “Freedom of Political Communication”, above n 10, at 243.

in which the common law's incremental development must occur. This approach reflects the view that in the absence of a canonical authoritative text, "a common law rule hardly aspires to be more than a convenient distillation of relevant considerations, open to modification and reappraisal".<sup>61</sup> In this sense, an "underlying principle" of democracy based on universal suffrage was identified by the Court,<sup>62</sup> with a proportional representation system of elections, a legislative policy of availability of official information and the NZBORA serving as the foundation for this principle. None of these features, however, take on an authoritative or dispositive status comparable to United States First Amendment jurisprudence.

That an alternative approach emphasising the importance of constitutional principles and values might be available to the Court of Appeal was effectively acknowledged when the Court undertook a comparative assessment of freedom of political communication. While the approach of the United States Supreme Court was noted as part of this assessment, the focus of the Court's analysis was on where (rather than how) the balance between freedom of expression and protection of reputation had been struck. *New York Times* was treated as an influential precedent (alongside the precedent cases in other jurisdictions), rather than as an example of how appellate courts can recognise the importance of constitutional principle.<sup>63</sup> That differentiated treatment among different jurisdictions encouraged the Court of Appeal to strike its own balance in respect of freedom of political communication cases based on an extension of existing common law defences. If a constitutional interpretation were adopted, freedom of political communication would be treated as a value that directly informs a reinterpretation of the common law.<sup>64</sup> As a result, the type of inquiry into constitutional fundamentals that might be expected if a normative account of the constitution were invoked was effectively avoided by the Court.

The argument here is not that the Court of Appeal ought to have adopted the approach set out in *New York Times*. It remains a matter of debate whether the virtually unrestricted approach to freedom of expression applied in that case actually enhances or inhibits the workability of democratic processes.<sup>65</sup> It should be recognised also that *Lange* in fact represented a significant development in the law favouring the freedom of expression.<sup>66</sup> It is not the importance placed on freedom of expression that differentiates the approach of the appellate courts in New Zealand and the United States. Rather, it is the difference of approach to addressing issues of constitutional importance that explains the different outcomes in each jurisdiction. If the Court had elected, it could have determined the matter principally with reference to constitutional principles that are

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61 TRS Allan *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford University Press, Oxford, 2013) at 178.

62 *Lange v Atkinson* [1998] 3 NZLR 424 (CA) at 463.

63 *Lange v Atkinson* [1998] 3 NZLR 424 (CA) at 452-453.

64 This point draws on Allan's critique of *R (Prolife Alliance) v British Broadcasting Corporation* [2003] UKHL 23 in Allan *The Sovereignty of Law: Freedom, Constitution, and Common Law*, above n 61, at 27.

65 See, for example, Anthony Lewis "New York Times v Sullivan Reconsidered: Time to Return to 'The Central Meaning of the First Amendment'" (1983) 83 Colum L Rev 603.

66 Tobin "Political Discussion in New Zealand: Cause for Concern?", above n 49, at 228.



accepted as fundamental in New Zealand.<sup>67</sup> That the Court chose not to reveals something important about New Zealand's constitutional arrangements.

### *A Choice of Reasoning*

There is clearly a difference of approach to the issue of political communication between the United States Supreme Court in *New York Times* and the New Zealand Court of Appeal in *Lange*. It is also true that the United States constitutional system exhibits a high degree of written-ness, whereas the New Zealand constitution is widely regarded as unwritten. However, the propensity for either top-down or bottom-up approaches to judicial reasoning may be explained by a number of factors. It would be presumptuous to assume that constitutional structure is determinative of the issue. In order to better establish the relevance of constitutional structure to the decision-making approach employed in each jurisdiction, this section examines whether a genuine choice between interpretative approaches was in fact available given the range of institutional factors bearing on each Courts' decision.

In this respect, it may not be fair to suggest that the approach adopted by the United States Supreme Court in *New York Times* was the result of a genuine choice between alternative methods of legal reasoning. The United States Supreme Court does not have the jurisdiction to develop the common law,<sup>68</sup> which remains a matter subject to the jurisdiction of each individual state. As a result, the United States Supreme Court did not strictly have the option of a common law alternative available to it. Arguably, the Court was required to address the matter as a constitutional issue, and therefore to confront directly the constitutional values in play. However, this interpretation of the Court's reasoning may place too much weight on the literal meanings of the labels 'constitutional reasoning' and 'common law reasoning'. In this chapter, these labels are employed as analogies for the top-down and bottom-up styles of legal reasoning more generally. While the lack of a common law jurisdiction may have been a factor influencing the approach the Court ultimately adopted, this position does not exclude the application of bottom-up reasoning altogether.<sup>69</sup> The rich history of Supreme Court precedent generated by the First Amendment would have enabled an inductive, incremental development of the law of constitutional interpretation if the Court had so elected. However, the Court relied on these precedents as a source of rhetorical sentiment rather than inquiring into the reasons for the decision in those cases. The decision to start from 'first principles' and base the *New York Times* decision on a particular theory of constitutionalism that privileged the

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67 This difference of approach may not have led to a substantially different outcome in *Lange v Atkinson* itself, as the United States experience shows that recognised constitutional protection of freedom of speech has been interpreted as preventing defamation and libel claims against public office holders. However, direct constitutional recognition of rights and freedoms may have seen the law develop in quite a different direction over time.

68 *Erie Railroad Co v Tompkins* 304 US 64 (1938).

69 See, for example, Posner "Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights", above n 18, who examines both top-down reasoning and bottom-up reasoning in the context of constitutional decision-making.

freedom of expression as a fundamental constitutional value may, therefore, be reasonably characterised as a deliberate choice by the Court.

That a choice between top-down or bottom-up approaches to legal reasoning was available to the Court of Appeal in *Lange* is perhaps even more apparent. Again there is the influence of an issue of jurisdiction that may have resulted in a particular approach seeming to be the more natural choice, but again this seems to be far from determinative. *Lange* was an appeal from a strike out application, and the full merits of the contended for defence of qualified privilege for political speech was never fully argued before the Court. If matters of constitutional significance were to have a determinative role, then this might naturally have been expected to occur after full argument of the substantive issues. That the Court exhibited a more cautious, incremental approach at the strike out application stage may be understandable. A common law, bottom-up approach to legal reasoning may be an appropriate response to a strike out application even if matters of constitutional importance are clearly in play.

However, even this more cautious understanding of the role of the Court in strike out applications would not have prevented a deeper analysis of constitutional principle if the Court had been so minded. The availability of a more self-consciously constitutional jurisprudence is perhaps best demonstrated by the approach of the High Court in *Lange*. In addressing the same issues as the Court of Appeal, Elias J placed far more emphasis on the protections affirmed in the NZBORA, and used this as a basis for a more principle-driven, top-down approach to resolving the matter. The starting point for the High Court was the fundamental human right of freedom of expression. This freedom was recognised by the Court as “essential to liberty and representative government”,<sup>70</sup> and it was expressly noted that New Zealand had affirmed the freedom in a number of international covenants as well as the NZBORA. The issue of political speech was considered against that explicit constitutional backdrop. While a common law-style exercise of balancing competing interests was still contemplated as a relevant part of the assessment, Elias J found that the common law was itself subject to the rights and freedoms affirmed in NZBORA:<sup>71</sup>

The New Zealand Bill of Rights Act 1990 is important contemporary legislation which is directly relevant to the policies served by the common law of defamation. It is idle to suggest that the common law need not conform to the judgment in such legislation. They are *authoritative* as to where the convenience and welfare of society lies.

As a result, the common law standard of ‘common convenience and welfare of society’ is effectively transformed into a constitutional standard by the statutory considerations embodied in the NZBORA. Drawing on Australian case law, Elias J was influenced strongly by the underlying assumptions of democratic government contained in s 5 of the NZBORA, electorate rights in s 12

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70 *Lange v Atkinson* [1997] 2 NZLR 22 (HC) at 30.

71 *Lange v Atkinson* [1997] 2 NZLR 22 (HC) at 32 (emphasis added).

of the NZBORA, and the advent of proportional representation.<sup>72</sup> On that basis the High Court was effectively able to elevate the freedom of political communication to a constitutional value.<sup>73</sup>

In a system of representative democracy, the transcendent public interest in the development and encouragement of political discussion extends to every member of the community. A lesser protection for such communications if made to the general public than is available to sections of the community able to point to a common interest which may be of no direct public value at all, seems to me to be a result which is wrong. It is a result which is not consistent with the underlying principle of protection of communications “for the common convenience and welfare of society”.

Although it remains expressed in the idiom of the common law, the identification of a transcendent public interest engages theories of constitutionalism and liberal political morality in much the same way as the decision of the Supreme Court of the United States in *New York Times*. The normative gravity of constitutional fundamentals influences the law so that substantive values are realised and protected. The High Court judgment is further along the spectrum to constitutional-style reasoning than the approach of the Court of Appeal.

Despite citing the High Court judgment favourably, the Court of Appeal avoided this type of constitutional reasoning in its consideration of the issues. The approach of the High Court suggests strongly that a more top-down, constitutionalist style of reasoning was available to the Court of Appeal, but it elected not to pursue such an approach. The NZBORA could have been construed as an invitation to such reasoning, but ultimately the effect of New Zealand’s statutory protection for freedom of expression is left in an uncertain position:<sup>74</sup>

One of the most striking features of *Lange* is the minimal extent to which the [New Zealand] Bill of Rights [Act] features in the various judgments. Clearly, the Court has opted for incremental reform of the common law, as though the [NZBORA] does not require anything more than this, or cannot be invoked to support wider-reaching reform in any event. [...] *Lange* is best viewed as a modest reform: it expands the circumstances in which an existing common law defence may be available, but only in a limited range of cases.

This cautious approach may in part reflect the need to acclimatise to a relatively new constitutional instrument. Contemporary concerns about the horizontal effect of the NZBORA on matters between private parties may have been at the forefront of the Court’s mind. Nevertheless, it seems fair to conclude that the New Zealand Court of Appeal had the option to engage in a style of legal reasoning that was more ostensibly constitutional, but it elected otherwise. Theories of constitutionalism did not determine the nature of constitutional protection, and freedom of political communication may appear on some measures to be more vulnerable in New Zealand than in the United States. Protection for this important political right was not demonstrated as an unambiguous matter of principle under New Zealand law as it was in the context of the interpretation of the United States Constitution. For

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72 *Lange v Atkinson* [1997] 2 NZLR 22 (HC) at 45.

73 *Lange v Atkinson* [1997] 2 NZLR 22 (HC) at 46.

74 Huscroft “Freedom of Expression”, above n 5, at 319-320.

present purposes, however, this result is less important than the fact that a genuine choice faced the Court of Appeal on how to proceed. Understanding the motivation for employing a common law-style of legal reasoning may be illuminated by considering the approach of a constitutional court in a third jurisdiction, that of the High Court of Australia.

### *The High Court of Australia: Conflicting Approaches*

So far, the analysis in this chapter has discussed two different approaches to the issue of political communication in two different jurisdictions. The hypothesis is that the (un)written nature of the constitution in each case has influenced the approach of the appellate court to a significant extent. Written constitutions tend to promote more self-consciously constitutional, top-down reasoning. In contrast, unwritten constitutions tend to promote a more incremental, common law, bottom-up style of analysis. The extent to which this hypothesis can be validated is, however, a matter of speculation given that the Courts' written reasons are the only available evidence.

In this section it is argued that the experience of the High Court of Australia is instructive. The approach of the High Court is much more ambivalent than either the United States or New Zealand experience. Having developed a line of jurisprudence firmly in the United States tradition of explicitly constitutional reasoning, the High Court then retreated from that approach in subsequent cases. The unique position of the freedom of political communication under the Australian Constitution as a constitutional value that is both written and unwritten appears to offer a plausible explanation for this vacillating approach. The analysis in the remainder of this chapter also lends important support to the broader argument in this thesis that the written-ness of a constitution matters.

### *Constitutional Context*

Australia and New Zealand share many important constitutional traditions. Like New Zealand, Australia is a former British colony, and has inherited a Westminster-style government that functions in accordance with the doctrines of Parliamentary sovereignty and responsible government. Also like New Zealand, Australia is a constitutional monarchy, with the Queen in Right of Australia acting as the head of state, although usually through an appointed representative, the Australian Governor-General. Because of these constitutional features, convention continues to play an overt role in the Australian system of government. Unwritten constitutional rules and principles condition the exercise of public power by those in office.

Australia's constitutional arrangements have more in common with the United States than New Zealand. Unlike New Zealand, Australia has a written constitution. The Constitution of Australia came into force on 1 January 1901, and continues to operate as the supreme law of Australia. Importantly, however, the Constitution of Australia contains no systematic effort to protect individual liberties. The Australian constitution is primarily concerned with the structure of government and the implications stemming from federalism, although some individual rights do

receive express protection.<sup>75</sup> Protection of rights is piecemeal and limited. It is now widely understood that this was a deliberate choice on the part of the framers of the Constitution of Australia, who considered that the structure and division of public power as set out in the text of the constitution, and a faith in representative democracy, were sufficient to protect individual liberty.<sup>76</sup>

There is no equivalent of the First Amendment of the United States Constitution in the text of the Australian Constitution. However, it is now well established that the Constitution of Australia contains an implied freedom in respect of political communication. That freedom is implied in the text and structure of the Constitution of Australia, although it receives no express textual recognition. This leaves the freedom of political communication in an ambiguous position — it is both written and unwritten in important respects at the same time.

### ***Constitutional Reasoning: Theophanous and Stephens***

The implied freedom of political communication was first recognised by the High Court of Australia in a pair of cases in 1992. In *Australian Capital Television Pty Ltd v Commonwealth*,<sup>77</sup> the High Court held that the Constitution established a particular system of representative and responsible government. Implicit in that system of government was a commitment to freedom of political communication. Legislation that was found to be inconsistent with this implied freedom was prohibited under the Constitution. In the case itself, this was interpreted to mean that legislation purporting to restrict political advertising constituted an interference with the implied freedom, and was declared invalid accordingly. Similar reasoning in *Nationwide News Pty Ltd v Wills* to declare invalid legislation creating an offence for criticism of an administrative tribunal.<sup>78</sup>

*Australian Capital Television* and *Nationwide News* articulated a particular theory of constitutionalism in holding that the implied freedom of political communication was essential to representative and responsible government in Australia.<sup>79</sup> That vision of constitutionalism included a crucial role for freedom of political communication:<sup>80</sup>

[...] representatives who are members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people. And in the exercise of those powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act. Indispensable to that accountability and that responsibility is freedom of expression, at least in relation to public affairs and political discussion.

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75 For example, section 80 of the Constitution of Australia establishes a right to trial by jury for indictable offences under Commonwealth law.

76 See Anthony Mason “The Role of a Constitutional Court in a Federation” (1986) 16 Fed L Rev 1 at 8.

77 *Australian Capital Television Pty Ltd v Commonwealth* [1992] 177 CLR 106 (HCA).

78 *Nationwide News Pty Ltd v Wills* [1992] 177 CLR 1 (HCA).

79 Leighton McDonald “The Denizens of Democracy: The High Court and the ‘Free Speech’ Cases” (1994) 5 PLR 160 at 161-162.

80 *Australian Capital Television Pty Ltd v Commonwealth* [1992] 177 CLR 106 (HCA) at 138.

The Court was also clear that in discharging its role as guardian of the Australian Constitution it “should scrutinize very carefully any claim that the freedom of expression must be restricted in order to protect the integrity of the political process”.<sup>81</sup> This suggests that the High Court of Australia will approach attempts to restrict political communication with a high degree of scepticism, echoing the attitude of the Supreme Court of the United States in *New York Times*.

*Theophanous v Herald and Weekly Times Ltd* and *Stephens v West Australian Newspapers Ltd* built on this foundation to develop a distinctly constitutional jurisprudence with regard to the application of the implied freedom,<sup>82</sup> and these cases have been characterised as having extended the philosophy of representative and responsible government in Australian constitutional law.<sup>83</sup> The primary focus here is on *Theophanous*, as it is concerned with the relationship between federal laws and the Commonwealth constitution. Furthermore, most of the reasoning of the Court is contained in *Theophanous*. *Stephens* applied much of the reasoning in *Theophanous* to State governments and laws. The key issue in each case was whether the implied freedom prevented a public official from bringing a common law action in defamation. In both cases the High Court found that it did. The lead judgment for the majority in *Theophanous* was delivered by Mason CJ, with whom Toohey and Gaudron JJ joined. A 4-3 majority was established by Deane J, who delivered a separate, concurring judgment.

*Theophanous* concerned allegations published in a letter to the editor of a newspaper of bias and incompetence on the part of a member of the Commonwealth Parliament. The plaintiff commenced defamation proceedings, and the defendant newspaper countered that, in reliance on *Australian Capital Television*, it was entitled to publish the remarks because they constituted political discussion in the sense that they related to “discussion of government and political matters”.<sup>84</sup> In determining the matter, the majority of the High Court endorsed the theory of representative government espoused in the earlier *Australian Capital Television* decision. This theory of representative government was crucial in the Court’s reasoning to extend the scope of the implied freedom to the issue of the capacity and capability of Members of Parliament to discharge their duties. The lead judgment of the Court, comprising the opinion of Mason CJ, Toohey and Gaudron JJ, confirmed the finding in *Australian Capital Television* that political discussion is not limited to matters relating to the government of the Commonwealth. Their Honours held that:<sup>85</sup>

The implied freedom of expression is not limited to communication between the electors and the elected. Because the system of representative government depends for its efficacy on the free flow of information and ideas and of debate, the freedom extends to all those who participate in political discussion. By protecting the free flow of information, ideas

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81 *Australian Capital Television* (1992) 177 CLR 106 (HCA) at 145.

82 *Theophanous v Herald and Weekly Times Ltd* [1994] 182 CLR 104 (HCA) and *Stephens v West Australian Newspapers Ltd* [1994] 182 CLR 211 (HCA). The two cases were, in effect, decided together, although they are reported sequentially.

83 Stone “Freedom of Political Communication”, above n 10, at 232.

84 *Theophanous v Herald and Weekly Times Ltd* [1994] 182 CLR 104 (HCA) at 119.

85 *Theophanous v Herald and Weekly Times Ltd* [1994] 182 CLR 104 (HCA) at 122.

and debate, the Constitution better equips the elected to make decisions and the electors to make choices and thereby enhances the efficacy of representative government.

The Court had no issue finding that the publication fell comfortably within the concept of political discussion protected in *Australian Capital Television*. It emphasised that “criticism of the views, performance and capacity” of an elected official “is at the very centre of the freedom of political discussion”.<sup>86</sup>

A similar position was adopted by Deane J in a separate judgment, where his Honour described the freedom of political communication as “essential” to the operation of government as envisioned in the text of the Australian Constitution.<sup>87</sup> The majority judgments approached the issue of political communication in constitutional terms. The concept of representative government contained in the text and structure of the Australian Constitution serves as the starting point for top-down, deductive analysis that admits very little scope to limit the implied freedom of political communication.

Unlike either *New York Times* or *Lange*, *Theophanous* presented the High Court with an explicit choice between common law and constitutional grounds of appeal, both of which were filed. The relationship between the Constitution and the common law therefore became a key question for the Court to resolve, as it faced a choice concerning how to proceed as between the two approaches. The High Court resolved the choice by addressing the constitutional grounds of appeal first and adopting constitutional-style judicial reasoning. Further, by establishing a clear standard for constitutional propriety based on its theory of representative government, the Court found that the common law of Australia must give way to constitutional requirements.<sup>88</sup> The common law of defamation would need to be reformulated so that it was consistent with constitutional requirements.

Here the Court was influenced by the United States jurisprudence, including *New York Times*,<sup>89</sup> that the need for a defendant in defamation proceedings to establish truth as a defence “may well deter a critic from voicing criticism, even if it be true, because of doubt whether it can be proved or fear of the expense of having to do so”.<sup>90</sup> The existing common law defences therefore inhibited free communication “significantly”, and did not serve to provide the appropriate level of protection for political discussion.<sup>91</sup> While the principle from *New York Times* was accepted by the Court, its application in terms of a common law test introduced a distinctive element of reasonableness to the defence of qualified privilege that represented a departure from United States jurisprudence, the Court explained:<sup>92</sup>

The publisher should be required to show that, in the circumstances which prevailed, it acted reasonably, either by taking some steps to check the accuracy of the impugned

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86 *Theophanous v Herald and Weekly Times Ltd* [1994] 182 CLR 104 (HCA) at 123.

87 *Theophanous v Herald and Weekly Times Ltd* [1994] 182 CLR 104 (HCA) at 180.

88 *Theophanous v Herald and Weekly Times Ltd* [1994] 182 CLR 104 (HCA) at 126.

89 *Theophanous v Herald and Weekly Times Ltd* [1994] 182 CLR 104 (HCA) at 131-132.

90 *Theophanous v Herald and Weekly Times Ltd* [1994] 182 CLR 104 (HCA) at 132.

91 *Theophanous v Herald and Weekly Times Ltd* [1994] 182 CLR 104 (HCA) at 133.

92 *Theophanous v Herald and Weekly Times Ltd* [1994] 182 CLR 104 (HCA) at 137.

material or by establishing that it was otherwise justified in publishing without taking such steps.

The need to establish actual malice, which the United States Supreme Court adopted in *New York Times*, was rejected on the basis the interest in protecting an individual's reputation deserved greater weight than afforded under the United States test.<sup>93</sup> This does not really amount to a difference in philosophical approach between the two appellate Courts. As Stone has pointed out, the difference in approach is much more likely to reflect that the High Court had the benefit of being able to assess the practical result of three decades of United States jurisprudence following *New York Times*.<sup>94</sup>

The precise result in terms of the test the High Court formulated is, however, not strictly as important for present purposes as the broad approach adopted by the Court. The approach adopted by the Court was squarely in the vein of top-down reasoning that proceeded from constitutional fundamentals. In this sense the judgment is undoubtedly similar to, and indeed appears to have been influenced by, the United States jurisprudence. This approach has been neatly captured by one commentator:<sup>95</sup>

That the common law chilled freedom of expression in modern Australia seemed however to be accepted by the *Theophanous* plurality as a self-evident rather than empirical truth. Given the American inspiration for *Theophanous*, Mason CJ's reliance on "self-evident" truths has a certain poetic resonance, but the absence of any reference at all to the political difficulties that libel law had caused in modern Australia obviously opens the court to the accusation that it has simply been seduced by grand theory and compelling rhetoric.

Stone argues that the High Court in *Theophanous* and *Stephens* "rather quickly aligned itself with a philosophical tradition based on suspicion of government".<sup>96</sup> An alternative reading suggests the position of the majority on the Court was rather more reasoned. It aligned itself with a theory of constitutionalism that had previously been articulated by the Court, and differed in important respects from *New York Times*. Undoubtedly the United States jurisprudence exerted some influence. However, the lead judgment stressed the differences between the two jurisdictions, and recommended caution before United States jurisprudence was adopted wholesale.<sup>97</sup> Importantly, those differences relate specifically to the way in which political communication is encapsulated in the constitutional text of the respective written constitutions. In the United States, the freedom of political communication is an important part of the express protection afforded to freedom of expression generally. In Australia, the freedom of political communication is necessarily a more limited concept because its nature and scope must be implied from the text and structure of a constitutional text that does not recognise protections for freedom of expression expressly. In this sense the majority decision in *Theophanous* is perhaps better understood as an attempt to "place some doctrinal flesh on the conceptual skeleton" erected by *Australian Capital Television* and

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93 *Theophanous v Herald and Weekly Times Ltd* [1994] 182 CLR 104 (HCA) at 136.

94 Stone "Freedom of Political Communication", above n 10, at 236.

95 Ian Loveland "Sullivan v New York Times Goes Down Under" [1996] PL 126 at 130.

96 Stone "Freedom of Political Communication", above n 10, at 235.

97 *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 (HCA) at 125.



*Nationwide News*,<sup>98</sup> rather than blindly follow precedent established in a foreign jurisdiction. Any similarities are likely to be better explained by genuine similarities in constitutional structure between the two jurisdictions, with the style of reasoning adopted being influenced by the presence of an authoritative constitutional text and the particular theory of constitutionalism to which it gives rise.

### ***Common law reasoning: Lange***

The broad similarities in constitutional structure between the United States and Australia may obscure important differences in the practical application of protection for the freedom of political communication. In the United States, the Constitution includes express recognition of the freedom of expression, in respect of which the freedom of political communication is an important component. In Australia there is no similar express recognition of the freedom of political communication, which may only be implied from the text and structure of the Constitution. The judicial reasoning adopted in *Theophanous* and *Stephens* seems to have been motivated in part by a decision of the High Court of Australia to treat the implied right to freedom of political communication as forming part of Australia's written constitution. It is in the nature of an implied right, however, that such treatment cannot simply be assumed. The legitimacy of the constitutional enterprise hinges on whether the grounds for inferring the existence of the right in the constitutional text and structure are accepted as robust and appropriate.

Ultimately, the question of whether the implied freedom of political communication forms part of the written text of the Australian constitution was revisited by the High Court of Australia in *Lange v Australian Broadcasting Commission*.<sup>99</sup> In that case the High Court upheld the application of the implied freedom of expression as placing a constitutional limit on actions for defamation brought by public officials. However, the scope of the constitutional protection was narrowed significantly. Interestingly for the purposes of the present analysis, both the reasoning and the result in *Lange* moved the High Court closer to a common law methodology.

*Lange* concerned a defamation action by a politician and former New Zealand Prime Minister against an Australian broadcaster. All seven High Court Justices joined together to issue a rare unanimous judgment. The starting point for the Court was the terms of the Constitution.<sup>100</sup> This is important because *Theophanous* left open the question as to the nature and scope of the implied freedom of political communication. One reading of *Theophanous* would be that the concept of representative democracy is the touchstone of constitutional propriety under the Australian Constitution, and the implied freedom of political communication derives its normative force from that abstract concept.<sup>101</sup> However, the High Court found in *Lange* that the notion of representative democracy cannot be used to substitute for the text and structure of the Constitution. It can only be

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98 Loveland "Sullivan v New York Times Goes Down Under", above n 95, at 127.

99 *Lange v Australian Broadcasting Commission* [1997] 189 CLR 520 (HCA).

100 *Lange v Australian Broadcasting Commission* [1997] 189 CLR 520 (HCA) at 556.

101 This interpretation would align the High Court of Australia with the approach of the Supreme Court of Canada in *Reference re the Secession of Quebec* [1998] 2 SCR 217 (SCC).

relied on to elucidate that text and structure. This ‘clarification’ of constitutional methodology affirmed that it is the written constitution that gives rise to the implied freedom, and not underlying or unenumerated constitutional considerations. The Court stated that:<sup>102</sup>

[...] the Constitution gives effect to the institution of “representative government” only to the extent that the text and structure of the Constitution establish it. [...] [T]he relevant question is not, “What is required by representative and responsible government?” It is, “What do the terms of the Constitution prohibit, authorise or require?”

The focus for the Court was therefore on the relevant textual provisions of the Constitution. Particular emphasis was placed on ss 7 and 24 of the Constitution, which respectively require that members of the Senate and the House of Representative be “directly chosen by the people” of each State and of the Commonwealth.<sup>103</sup>

This ‘clarification’ of the law by the High Court provided the impetus for both a different result and a different approach than if *Theophanous* and *Stephens* had been confirmed. In terms of the result, *Lange* confirmed that the Constitution must “necessarily protect that freedom of expression between the people concerning political or government matters”.<sup>104</sup> This freedom of communication in respect of political matters is what allows the people to exercise a free and informed choice. However, the test qualified privilege under *Lange* is easier to satisfy than that established by *Theophanous*. In *Lange*, the matter is still determined with reference to a constitutional guarantee, but the nature of that guarantee is more limited due to the more narrow nature of its textual foundation.<sup>105</sup> The Court moved from “compelling justification” and “pressing social need” as a justification for regulating the political communication to the much less lofty standard that restrictions on the freedom of expression must be “reasonably appropriate and adapted to serve a legitimate end”.<sup>106</sup> The reasoning of the Court is set out as follows:<sup>107</sup>

In any particular case, the question whether a publication of a defamatory matter is protected by the Constitution or is within a common law exception yields the same answer. But the answer to the common law question has a different significance from the answer to the constitutional law question. The answer to the common law question *prime facie* defines the existence and scope of the personal rights of the person defamed against the person who published the defamatory matter; the answer to the constitutional law question defines the area of immunity which cannot be infringed by a law of the Commonwealth, a law of a State or a law of those Territories whose residents are entitled to exercise the federal franchise. That is because the requirement of freedom of expression operates as a restriction on legislative power. Statutory regimes cannot trespass upon the constitutionally required freedom.

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102 *Lange v Australian Broadcasting Commission* [1997] 189 CLR 520 (HCA) at 566-567. See also *McGinty v Western Australia* (1996) 186 CLR 140 (HCA) at 169.

103 The Court also considered ss 6, 49, 62, 63, 83 and 128.

104 *Lange v Australian Broadcasting Commission* [1997] 189 CLR 520 (HCA) at 560.

105 See Greg Taylor “Why the Common Law Should be Only Indirectly Affected by Constitutional Guarantees: A Comment on Stone (2002) 26 *Melb U L Rev* 623 at 631.

106 *Lange v Australian Broadcasting Commission* [1997] 189 CLR 520 (HCA) at 567.

107 *Lange v Australian Broadcasting Commission* [1997] 189 CLR 520 (HCA) at 566.

The test for qualified privileged was thus reformulated so that the defendant can show it was reasonable to publish in the circumstances, although the plaintiff could still succeed if he or she could prove that the publication was malicious.

The reliance on a reasonableness standard also signals an important methodological change by the High Court. Reasonableness standards necessarily entail a factual inquiry in light of the prevailing circumstances, which has the effect of mitigating the influence of overarching theories of constitutional propriety. In this sense the High Court moved away from the concept of a ‘constitutional defence’ and the need for explicitly constitutional reasoning. A key difference between *Lange* and *Theophanous* is therefore a move away from the high constitutional rhetoric that characterised the earlier judgment. In *Lange*:<sup>108</sup>

There is no ambitious or wide-ranging justification of the Court’s view that a particular extension of the common law is required by the freedom of political communication. The statement simply is that the privilege must be extended to meet the Constitution’s requirement that “‘the people’ [...] be able to communicate with each other with respect to matters that could affect their choice in federal elections or constitutional referenda or that could throw light on the performance of ministers of the State and the conduct of the executive branch of government”. Thus particular circumstances, rather than underlying or overarching theory, are the focus.

As Stone explains, bottom-up reasoning of this type emphasises the factual circumstances in which relevant interests arise, rather than the philosophical explanation for those interests.<sup>109</sup> This is a more common law-style of legal reasoning that can be expected to further develop incrementally and inductively. In *Lange* there seems to have been a deliberate change in approach by the Court in that there was no appeal to the ultimate sovereignty of the Australian people in grounding the freedom.<sup>110</sup> Absent that constitutional standard as a foundation for constitutionalist reasoning, a common law approach (albeit one influenced by constitutional context) was able to be adopted.

### *The Relevance of Constitutional Structure*

The divergent approaches adopted by the High Court of Australia in *Theophanous* and *Stephens* on the one hand and *Lange* on the other reveals an important tension within Australian constitutional jurisprudence. The High Court has a dual role as both a constitutional court and a common law court. In certain cases, this will present the High Court with a choice as to how to analyse and dispose of an issue that has arisen before it. The possibility that the common law defence for defamation of qualified privilege could be extended to cover political speech means that there was a genuine choice open to the Court as to how it should proceed.<sup>111</sup> The change in approach from

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108 Stone “Freedom of Political Communication”, above n 10, at 255, citing *Lange v Australian Broadcasting Commission* [1997] 189 CLR 520 (HCA) at 571.

109 Stone “Freedom of Political Communication”, above n 10, at 241.

110 Harley G A Wright “Sovereignty of the People — The New Constitutional Grundnorm” (1998) 26 Fed L Rev 165 at 175.

111 Stone “Freedom of Political Communication”, above n 10, at 226.

*Theophanous* and *Stephens* to *Lange* therefore represents a change in preference from constitutional-style analysis to a common law frame of reference.

The question that remains is what motivated the Court in each case to adopt the style of reasoning it did. A common answer to this question is to point to changes in judicial personal between the two decisions. The different approach of the High Court under the stewardship of Mason CJ and Brennan CJ might be thought to explain the divergent approaches of the two decisions.<sup>112</sup> The starting point for providing an answer to that question is to note that choice open to the Court did not depend solely on its dual jurisdiction. In *Lange* the ability for the Court to avoid overtly constitutional analysis is just as important. If the freedom of political communication was definitively dealt with in the text of the Australian Constitution, it is unlikely that the common law question would have arisen. Where the Australian Constitution applies, it is authoritative and would in effect displace the operation of the Australian common law.

The ability of the High Court to adopt a more common law-oriented analysis in *Lange* therefore turns on the tentative and perhaps ambiguous status of the implied freedom of political communication *vis-à-vis* the text of the Australian Constitution. The Court was, in fact, at pains to limit the scope of the implied right so that common law determination of the issue was necessary. While the interpretative ingenuity of the Court plays a role, the fact that the text of the Australian Constitution does not directly engage with the freedom of political communication provides the opportunity for the Court to substitute explicitly constitutional reasoning for an alternative form of analysis. Without a clear foundation in the written constitution, the desirability of the freedom of political communication is reduced to a contextual factor to be assessed on a case-by-case basis. This brings the Australian *Lange* closer to the approach of its New Zealand namesake. That this result was achieved by narrowing the scope of the textual basis for the implied freedom strongly suggests that constitutional structure as represented by the written/unwritten distinction proves influential in terms of the methodology employed by the courts. In making the implied freedom less 'written', less overtly constitutional analysis is more readily engaged.

Constitutional structure as reflected in the distinction explicated in chapter two between written and unwritten constitutions matters to constitutional practice. It may be argued that the results in *New York Times* and *Lange v Atkinson* were not so dissimilar as to reveal a substantive difference in constitutional reasoning. This argument overlooks that both the United States and New Zealand constitutional traditions are animated by the same underlying (largely liberal) values. Each jurisdiction would afford meaningful protection to matters of political communication, in line with the prevailing significance of representative government, human rights and the rule of law. The difference in approach between the two appellate courts is all the more striking given the similarity of the positions each Court ultimately reached. The approach of the United States Supreme Court used constitutional values as articulated in the written Constitution as an authoritative starting point

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112 See Rachael Gray *The Constitutional Jurisprudence and Judicial Methodology of the High Court of Australia: The Dixon, Mason and Gleeson Eras* (Presidian Legal Publications, Adelaide, 2008) at ch 8-9.

for the resolution of claims involving constitutional implications. In contrast, the New Zealand experience shows that unwritten constitutions have a far more ambivalent relationship with the fundamental values that underpin the constitutional system. Matters of constitutional significance are still recognised and given a place in the reasoning process, but those values are not treated as dispositive and must carry their own weight when placed alongside competing considerations. These differences matter: whether constitutional fundamentals are secured firmly or whether they are afforded only reasonable accommodation within the deliberative process leaving them open to reassessment in new contexts goes directly to the heart of what a constitution is and what it hopes to achieve.

The Australian constitutional experience invites a new perspective on the relationship between constitutional structure and legal reasoning. It suggests, for example, that the respective approaches of the Supreme Court of the United States and the New Zealand Court of Appeal can be explained at least in part with reference to the written-ness of each constitution. The textual basis of the First Amendment promotes constitutional-style reasoning and express development of theories of constitutionalism. The unwritten New Zealand constitution, in contrast, does not, and common law-style reasoning is more readily relied on. The Australian constitutional experience also suggests that constitutional structure has the ability to impact on constitutional outcomes, although it may not be dispositive. Among written constitutions theories of constitutionalism are likely to differ due to differences in constitutional text and understandings of constitutionalism. Further, unwritten constitutions are inherently contextual in their application, as the analysis of the New Zealand Court of Appeal in *Lange* demonstrates. However, the reasoning approaches adopted in written and unwritten constitutions respectively are sufficiently different that substantive consequences for constitutional practice are very likely to follow. The initial articulation of a constitutional premise may seem trivial, but “the starting point for any exercise in judicial interpretation can make a huge difference to the result”.<sup>113</sup> This conclusion is all the more true where the comparator involves the complete absence of a fundamental constitutional premise.

The importance of constitutional structure as represented by the written/unwritten distinction is, accordingly, more than a matter of form. It is not limited simply to a narrowly conceived description of what the constitution looks like.<sup>114</sup> By making theories of constitutionalism explicit, the written nature of the constitution goes directly to the issue of what the constitution tells us about the nature of legal and political power in the state. Unwritten constitutions engage with legal and political power in very different ways, which perhaps necessitates a more tentative development. This tentative approach does not count against theories of constitutionalism, but does suggest that such theories are nascent rather than explicitly formed. The unwritten constitutional tradition does not readily translate constitutional values into the idiom of positive law that can be directly enforced by the courts. While the normative expectations may be similar as between written and unwritten constitutions, unwritten constitutionalism may only be gleaned from the details of judicial

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113 Bryan Horrigan “Is the High Court Crossing the Rubicon? — A Framework for Balanced Debate” (1995) 6 PLR 284 at 301.

114 Compare Adam Tompkins *Public Law* (Oxford University Press, Oxford, 2003) at 9.

decision-making, in the tradition of the common law method, rather than being asserted as a justiciable matter as where liberal constitutionalism is given expression through the written constitutional construct. Such an incremental, inductive approach is encouraged by the very structure of the unwritten constitution.

## CHAPTER FOUR

# CONSTITUTIONALISM AND PARLIAMENTARY SOVEREIGNTY

The analysis in chapter three suggests that constitutional issues are not always resolved in explicitly constitutional terms under New Zealand's unwritten constitution. An unwritten constitutional structure tends to promote a common law-style methodology to resolve cases where constitutional considerations arise. Rather than engaging with constitutional issues in terms of an explicit liberal theory of constitutionalism, fundamental values are vindicated implicitly as part of the courts' wider reasoning into competing considerations. A key question that is addressed in the remainder of this thesis is how it might be possible to understand a commitment to liberal constitutionalism in the absence of an explicit application of liberal theory and the express vindication of constitutional legitimacy.

One valid response to this question is to deny the relevance of liberal constitutionalism altogether. The absence of a commitment among constitutional actors to a model of constitutionalism that vindicates constitutional values expressly in terms of their normative gravity may be taken as *prima facie* evidence of the constitution's departure from liberal political morality. This chapter asks whether a theory of liberal constitutionalism is appropriate at all for New Zealand's unwritten constitutional context. It must confront the challenge of a prominent feature of New Zealand's constitution: the doctrine of Parliamentary sovereignty. As traditionally understood, Parliamentary sovereignty means that Parliament enjoys "unlimited and illimitable powers of legislation".<sup>1</sup> This chapter contrasts the features of liberal constitutionalism that inform New Zealand constitutional practice with a relatively absolute interpretation of the doctrine that resists the idea of inherent limits that are binding on, and enforceable against, Parliament's legislative authority. This absolutist interpretation is defended for two reasons. First, it is contended that this position is descriptively accurate. Despite the apparent influence of the "new view" of Parliamentary sovereignty represented by the manner and form theory of legislation,<sup>2</sup> there is still no evidence that such mechanisms are effective in practice. The second reason is that an absolutist interpretation presents the strongest possible challenge to theories of liberal constitutionalism. If a model of liberal constitutionalism can successfully account for Parliament's role within New Zealand's constitutional arrangements, that model is likely to prove influential.

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1 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4 ed, Thomson Reuters, Wellington, 2014) at 515.

2 Joseph *Constitutional and Administrative Law in New Zealand*, *ibid*, at 577.

After setting out the role of Parliamentary sovereignty in New Zealand's constitution, the chapter examines a range of primary and secondary constitutional sources. This reveals an important tension that substantive constitutional limits on the exercise of public power, particularly Parliament's legislative function, do appear to be recognised as part of New Zealand's constitutional system. The tension results from the fact that these substantive limits are indeed part of New Zealand's constitutional framework despite the pervasiveness of orthodox sovereignty theory, which denies the existence of any such limits. Nonetheless, the ideals that inform liberal constitutionalism such as representative democracy, fundamental rights and the rule of law find meaningful expression within New Zealand's constitutional arrangements. While this analysis is not sufficient in itself to provide a framework of a workable model of constitutionalism that is sensitive to the New Zealand context, it does offer insights into the likely nature of any such framework. In particular, it is unlikely that liberal constitutionalism in New Zealand will be premised on an outright denial of Parliamentary sovereignty. An improved understanding of the relationship between Parliamentary sovereignty and the limits on the legitimate exercise of public power at the level of constitutional theory — that is, an account of constitutionalism that addresses directly the doctrine of Parliamentary sovereignty in a New Zealand context — holds the key to an account of constitutionalism in New Zealand's unwritten constitutional context.

## *Parliamentary Sovereignty*

Parliamentary sovereignty is a distinctive characteristic of Westminster constitutional systems, including New Zealand.<sup>3</sup> Traditionally, Parliamentary sovereignty was understood to be virtually absolute, admitting no formal limits on Parliament's legislative function. While that position may have softened with respect to modern interpretations of the doctrine, orthodox sovereignty theory does not accept substantive limits on Parliament's legislative supremacy. Standard interpretations of Parliamentary sovereignty appear *prima facie* to be in tension with the idea of constitutional limits on the exercise of public power.

## *Parliamentary Sovereignty Stated*

New Zealand's Parliament is at least as sovereign as the Parliament of the United Kingdom,<sup>4</sup> and possibly more so given recent constitutional changes in the United Kingdom.<sup>5</sup> New Zealand's

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3 The Constitution Act 1986, s 15(1) affirms that the New Zealand Parliament has "full power to make laws", while the Supreme Court Act 2003, s 3(2) records New Zealand's "continuing commitment" to "the sovereignty of Parliament".

4 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) at 472. See also Jeffrey Goldworthy *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press, Oxford, 1999) at 1 [*History and Philosophy*]; JL Robson *New Zealand: The Development of its Laws and Constitution* (2 ed, Stevens, London, 1967) at 56-57; Matthew SR Palmer "New Zealand Constitutional Culture" (2007) 22 NZULR 565 at 582.

5 See Joseph *Constitutional and Administrative Law*, above n 1, at 529.



Parliament enjoys full, unrestricted powers of legislation, which in turn is given effect to by the courts:<sup>6</sup>

The constitutional position [...] is clear and unambiguous. Parliament is supreme and the function of the courts is to interpret the law as laid down by Parliament. The courts do not have a power to consider the validity of properly enacted laws.

This position is fundamental: “The central principal [sic] of the Constitution is that there are no effective legal limitations on what Parliament may enact by the ordinary legislative process”.<sup>7</sup> It is this legally unfettered and fundamental power to make law that the doctrine of Parliamentary sovereignty describes.

Dicey provided the classical statement of the doctrine:<sup>8</sup>

The principle of parliamentary sovereignty means [...] that parliament thus defined [as the Queen in Parliament] has, under the English constitution the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of parliament.

Dicey’s Parliamentary sovereignty comprises two parts: a “positive side” that Parliament may make or unmake any law, and a “negative side” that no other institution may “override or derogate from” the law as duly expressed by Parliament.<sup>9</sup> This second part does not deny a law-making role for the courts. However, the courts are not sovereign because they cannot repeal statutes and cannot act on their own motion.<sup>10</sup> There is no effective legal limit on Parliament’s power to enact, amend or repeal law through the proper exercise of its powers of legislation.

Parliamentary sovereignty in Dicey’s terms is virtually unbounded. The sovereignty of Dicey’s Parliament is “above all laws, and therefore not susceptible to legal limitation”.<sup>11</sup> The only legal limitation on Parliament’s legislative power that Dicey was willing to admit was that Parliament could not bind itself.<sup>12</sup> This qualification is simply a logical imperative: if Parliament could bind itself, a future Parliament could not itself be sovereign. The traditional understanding of Parliamentary sovereignty is that there are no inherent limits on Parliament’s legislative function, regardless of the normative or constitutional merit of any such limitations.

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6 *Rothmans of Pall Mall (NZ) Ltd v Attorney-General* [1991] 2 NZLR 323 (HC) at 330, cited with approval in *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154 (CA) at 157. Parliament’s legislative authority also is not limited by the Crown’s residual legislative prerogative: Joseph *Constitutional and Administrative Law in New Zealand*, *ibid*, at 523.

7 KJ Scott *The New Zealand Constitution* (Clarendon Press, Oxford, 1962) at 39.

8 AV Dicey *Introduction to the Study of the Law of the Constitution* (10 ed, Macmillan & Co, London, 1960) at 39-40.

9 Dicey *Introduction to the Study of the Law of the Constitution*, *ibid*. at 40. However, as Goldsworthy has pointed out, the positive criterion is necessarily implied by the negative criterion in any case: Goldsworthy *History and Philosophy*, above n 4, at 10.

10 Goldsworthy *History and Philosophy*, *ibid*, at 13.

11 Goldsworthy *History and Philosophy*, *ibid*, at 13.

12 Dicey *Introduction to the Study of the Law of the Constitution*, above n 8, at 64-68.

### ***Modern Interpretations: Manner and Form***

The absolute, unfettered nature of Dicey's interpretation of Parliamentary sovereignty still influences contemporary understandings of the doctrine in New Zealand. For example, Dicey's classic statement of the doctrine, quoted above, was cited for its explanatory value in a 2005 Parliamentary inquiry into New Zealand's constitutional arrangements.<sup>13</sup> Further, modern definitions of the doctrine tend to emphasise the ostensibly unlimited nature of Parliament's legislative power. Palmer and Palmer suggest, for example, that "the legal power of Parliament is unlimited. It can legislate without restriction on anything. There is no higher law-making authority. It is supreme".<sup>14</sup> In a similar vein, Joseph states that: "Parliament enjoys unlimited and illimitable powers of legislation. Parliament's word can be neither judicially invalidated nor controlled by earlier enactment. Parliament's collective will, duly expressed, is law".<sup>15</sup>

Despite these strong statements of Parliament's legislative power, there is growing support for the idea that Parliament may be able to restrict itself as to the 'manner and form' of legislation. Manner and form theory holds that Parliament and its legislative process are subject to legal rules, which Parliament as the legally sovereign institution may amend.<sup>16</sup> Dicey rejected this view on the basis that no limitations on Parliament's legislative power, whether procedural or substantive, could be legally effective; if this were not the case, Parliament would not be sovereign. If manner and form restrictions are accepted as operating in New Zealand, this represents a departure from a 'pure' Diceyan view.

There are indications that the prevailing academic view is coalescing around support for the theory that Parliament can place procedural restrictions on itself.<sup>17</sup> The basis for this view is, however, not immediately obvious. Support for the manner and form theory may rely in part on the fact that the New Zealand Parliament has previously enacted manner and form restrictions. The Electoral Act 1993 purports to entrench certain 'reserved provisions', which can only be repealed or amended by a majority of 75 per cent of the members of the House of Representatives or a majority of electors polled at a referendum.<sup>18</sup> On its face, this is a classic manner and form requirement that provides for a more onerous procedure than usually required. However, the legal effectiveness of this purported entrenchment may be more apparent than real. At the time of enactment it was conceded that the 'entrenched' provisions would not be legally effective, but were

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13 Matthew Palmer, Claudia Geiringer and Nicola White "Appendix F: Parliamentary Sovereignty" in Constitutional Arrangements Committee *Inquiry to Review New Zealand's Existing Constitutional Arrangements: Report of the Constitutional Arrangements Committee I 24A* (House of Representatives, Wellington, 2005) 146 at 146.

14 GWR Palmer and Matthew SR Palmer *Bridled Power* (4 ed, Oxford University Press, Auckland, 2004) at 156.

15 Joseph *Constitutional and Administrative Law in New Zealand*, above n 1, at 515 (emphasis omitted).

16 R Ekins "Acts of Parliament and the Parliament Acts" (2007) 123 LQR 91 at 100. The phrase 'manner and form' appears to derive from the text of the Colonial Laws Validation Act 1865 (Imp), s 5.

17 Robson *New Zealand: The Development of its Laws and Constitution*, above n 4, at 66-69; Palmer and Palmer *Bridled Power*, above n 14, at 156; Palmer, Geiringer and White "Appendix F: Parliamentary Sovereignty", above n 13, at 147; Paul Rishworth "New Zealand" in Dawn Oliver and Carlo Faruso (eds) *How Constitutions Change: A Comparative Study* (Hart Publishing, Oxford, 2011) 235 at 245; Joseph *Constitutional and Administrative Law in New Zealand*, above n 1, at 576.

18 See Electoral Act 1993, s 268, carrying forward the provisions of the Electoral Act 1965, s 189.

designed only to place strong moral pressure on any subsequent government proposing amendment.<sup>19</sup> The weight that may be afforded to this example is, therefore, limited.

Support for the manner and form theory may also derive from the jurisprudence of the courts. There is limited New Zealand authority that supports the view that manner and form restrictions may be legally effective,<sup>20</sup> as well as Commonwealth authority that such restrictions are effective with respect to subordinate legislatures.<sup>21</sup> These judicial opinions need to be weighed against the fact that a sovereign legislature has never been held to be subject to such restrictions.<sup>22</sup> While not dispositive of the issue,<sup>23</sup> findings in *obiter* or conclusions relevant to subordinate legislatures do not automatically support the manner and form theorists.

The manner and form theory may be gaining ground, however, following the House of Lords decision in *R (Jackson) v Attorney-General*.<sup>24</sup> That case concerned the validity of legislation passed in accordance with an alternative enactment procedure set down in the Parliament Act 1911 (UK) and the Parliament Act 1949 (UK), which provided for enactment in the absence of the express assent of the House of Lords in certain circumstances. The appellants' challenge that legislation purportedly enacted under that alternative procedure was *ultra vires* was unanimously rejected by the House of Lords. For present purposes it is worth highlighting a particular passage from the opinion of Baroness Hale:<sup>25</sup>

[I]f Parliament is required to pass legislation on particular matters in a particular way, then Parliament is not permitted to ignore those requirements when passing legislation on those matters, nor is it permitted to remove or relax those requirements by passing legislation in the ordinary way.

This statement may suggest that the manner and form theory of legislation was front of mind in their Lordships' consideration, and that the courts will require Parliament to comply with manner and form requirements if the issue arises for determination.

However, *Jackson* involved an alternative legislative procedure rather than restrictions on Parliamentary procedure. The passage of legislation via ordinary procedures was not removed by the Parliament Acts, and so the case did not involve an assessment of the legal effectiveness of manner and form requirements. The distinction between alternative legislative procedures and

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19 (1956) 310 NZPD 2839-2840. Theoretical support for this view is provided in Scott *The New Zealand Constitution*, above n 7, at 11-16. See also Report of the Constitutional Reform Committee [1952] AJHR I.18.

20 *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154 (CA) at [13]; *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at [91]; *Carter v Police* [2003] NZAR 315 (HC) at 325.

21 See, for example, *Attorney-General for New South Wales v Trethowan* [1932] AC 526 (PC).

22 See *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590 (UKCA) at 597.

23 See W Ivor Jennings *The Law and the Constitution* (5 ed, University of London Press, London, 1959) at 163.

24 *R (Jackson) v Attorney-General* [2005] UKHL 56. Joseph appears to put particular weight on *Jackson* to provide support for the manner and form theory, for example: see *Constitutional and Administrative Law*, above n 1, at 589-590. See also Andrew Geddis "'Manner and Form' in the House of Lords" [2005] NZLJ 415.

25 *R (Jackson) v Attorney-General* [2005] UKHL 56; [2006] 1 AC 262 at [163].

manner and form restrictions is well recognised,<sup>26</sup> although statements from their Lordships such as the passage quoted above obscure this distinction. Ekins has argued on the basis of this distinction that recognition of Parliament's ability to reconstitute its law-making procedures is consistent both with a Diceyan model of continuing sovereignty and the result given in House of Lords' judgment.<sup>27</sup> There is, on this analysis, no necessary support for the manner and form theory of legislation to be drawn from *Jackson*.

From a normative perspective that emphasises constitutionalism, such as that adopted in this thesis, the issue of whether the manner and form theory should hold turns on its ability to enhance the promotion of fundamental constitutional values. In this regard, Rishworth argues that acceptance of the manner and form theory of legislation requires the resolution of a deep-seated tension.<sup>28</sup> If, on the one hand, the manner and form theory is accepted, then a simple majority could entrench legislation promoting partisan policy preferences. Normatively, this is an unacceptable position. On the other hand, if the manner and form theory is rejected, then fundamental values are left vulnerable to Parliamentary override. As a result of this tension, judgement needs to be exercised in the particular circumstances as to whether the values being entrenched are genuinely constitutional in nature (that is, whether entrenchment accords with prevailing theories of constitutionalism). This leaves the matter back with the courts to either accept or reject the attempted entrenchment based on their view of the constitutional requirements. The interplay of New Zealand's two key law-making institutions — Parliament and the courts — against the background of substantive constitutional values ultimately determines whether legislative provisions are resistant to ordinary repeal:<sup>29</sup>

[T]he invocation of manner and form provisions does not, by itself, conclude the question of entrenchment. That is ultimately a question about the nature of a country's constitution. It cannot be left to the judgment of the legislature alone, dictated by technique rather than substance.

The best available evidence is that the prevailing opinion within New Zealand society generally appears to be one of significant mistrust of entrenched legislation that cannot be unwound by Parliament.<sup>30</sup> Accordingly, the better view of the legal effectiveness of manner and form restrictions is that there can be no certainty on whether the courts would uphold any such restriction in a

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26 Jeffrey Goldsworthy *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, Cambridge, 2010) at 176-179. See also Colin R Munro *Studies in Constitutional Law* (2 ed, Butterworths, London, 1999) at 164. Compare Joseph *Constitutional and Administrative Law*, above n 1, at 605-606.

27 Ekins "Acts of Parliament and the Parliament Acts", above n 16.

28 Paul Rishworth "Affirming the Fundamental Values of the Nation: How the Bill of Rights and the Human Rights Act affect New Zealand Law" in Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brooker's, Wellington, 1995) 71 at 81 ["Affirming the Fundamental Values of the Nation"].

29 Rishworth "Affirming the Fundamental Values of the Nation", *ibid*, at 82.

30 See Justice and Law Reform Select Committee "Final Report on a White Paper on a Bill of Rights for New Zealand" [1988] AJHR I8C.

particular case. It is difficult to conclude that judicial acceptance of manner and form restriction on legislation in New Zealand is more than a possibility in the contemporary constitutional climate.<sup>31</sup>

The lack of certainty over judicial acceptance of manner and form theory suggests a Diceyan view of unfettered Parliamentary sovereignty still holds significant sway. Even if the manner and form theory is accepted it is likely that perceived reasons for the imposition of such procedural limitations will be highly influential as to the result in particular cases. Like Rishworth, Joseph draws a distinction between the procedural entrenchment for reasons of constitutional process, which is more likely to attract the protection of the courts, and the entrenchment of substantive government policy.<sup>32</sup> In the latter case, the subject matter of an enactment may mean that the courts continue to be influenced by Diceyan notions of unrestricted Parliamentary sovereignty.<sup>33</sup> This suggests that any limits on Parliament's legislative capacity that result from the acceptance of the manner and form theory are likely to be modest, and will not trespass into substantive restrictions on Parliament's exercise of the legislative function. This position maintains Parliament's legislative sovereignty in the most meaningful sense of that term.<sup>34</sup>

Consider, for example [...] a law as to form providing some existing statute can be amended or repealed only by express words, and not mere implication. If the courts were prepared to enforce those laws, by invalidating any statute enacted contrary to them, Parliament might no longer be fully sovereign in Dicey's sense. But it would still be fully sovereign in the more important sense of being free to change the substance of the law however and whenever it should choose.

On an orthodox interpretation of Parliamentary sovereignty, therefore, Parliament remains free from any meaningful substantive limitations on the exercise of its legislative function. In fact, "Parliament can by legislation override the core elements of representative government, the basic tenets of the rule of law, and fundamental human rights".<sup>35</sup>

### ***Institutional Limits: Constitutional Convention***

One of the key distinctions between written and unwritten constitutions is the demonstrable reliance on unwritten constitutional conventions in unwritten constitutional systems. Constitutional conventions are "observed norms of political behaviour that are generally acknowledged to have attained a significance and status worthy of general acknowledgment".<sup>36</sup> These norms are 'enforced'

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31 The author understands this more conservative approach to be consistent with that adopted in JF Burrows and RI Carter *Statute Law in New Zealand* (4 ed, LexisNexis, Wellington, 2009) at 21.

32 Joseph *Constitutional and Administrative Law in New Zealand*, above n 1, at 594-595.

33 See AW Bradley and KD Ewing *Constitutional and Administrative Law* (15 ed, Pearson Longman, New York, 2011) at 68.

34 Goldsworthy *History and Philosophy*, above n 4, at 15. See also *Bribery Commission v Ranasinghe* [1965] AC 172 (PC) at 200.

35 EW Thomas "The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2000) 31 VUWLR 5 at 15 ["The Relationship of Parliament and the Courts"].

36 Matthew SR Palmer "Using Constitutional Realism to Identify the *Complete* Constitution: Lessons from an Unwritten Constitution" (2006) 54 Am J Comp L 587 at 621. The circularity in this definition is patent, but presumably deliberate (Palmer himself describes the definition as "cynical") and perhaps, given the inchoate nature of constitutional conventions, inescapable.

through “the pressure of informed public opinion, politics, and history”.<sup>37</sup> Where they apply, constitutional conventions are binding on those who exercise public power.

Constitutional conventions represent one of the key ways that the exercise of public power is restricted in Westminster constitutional systems. The acceptance of a constitutional convention suggests that constitutional actors should not necessarily be able to rely on the full extent of their legal discretion when discharging their constitutional function. It has been put this way with respect to the British constitution:<sup>38</sup>

The British monarch, for example, has the legal power to prevent a bill that has passed both houses of Parliament from becoming law by withholding the royal assent. Similarly, the monarch may dismiss a ministry that still has a working majority in Parliament. Britons would describe such actions as ‘unconstitutional’, indeed as gross violations of their constitution.

Such substantive limitations on the lawful exercise of constitutional authority appear to apply equally in the New Zealand context.<sup>39</sup> Constitutional conventions act to ensure that legal power is exercised in a constitutionally legitimate manner.

There does not appear to be any consensus on whether constitutional conventions limit Parliament’s legislative power. Where limits of this nature have been suggested, they do not appear to have garnered either empirical or academic support. Marshall purported to identify a “vague but clearly accepted conventional rule” that Parliament does not enact tyrannous or oppressive legislation.<sup>40</sup> The existence of such a convention would have significant implications for the constitutionality of legislative acts. However, no firm evidence supporting the existence of this convention has been provided, and the idea has been labelled a “disputable one” in the New Zealand context.<sup>41</sup> A general constitutional limit of this kind based on convention cannot be assumed to act as an effective restraint on Parliament’s sovereign power.

An alternative for controlling Parliament’s legislative power through convention is the doctrine of mandate. The doctrine of mandate requires that the government may only pursue significant policy reforms if the issue has been put to the electorate at a general election.<sup>42</sup> There is a strong

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37 Palmer and Palmer *Bridled Power*, above n 14, at 5.

38 Thomas C Grey “Constitutionalism: An Analytic Framework” in J Ronald Pennock and John W Chapman (eds) *Constitutionalism: Nomos XX* (New York University Press, New York, 1979) 189 at 192.

39 While neither specific example is cited, both appear to be consistent with the “cardinal convention” recognised in New Zealand that the sovereign exercises its powers on and in accordance with advice from a ministry that enjoys the confidence of the House of Representatives identified in Joseph *Constitutional and Administrative Law in New Zealand*, above n 1, at 235-236.

40 Geoffrey Marshall *Constitutional Conventions: The Rules and Forms of Political Accountability* (Clarendon Press, Oxford, 1984) at 9. Something similar appears to be hinted at in RQ Quentin-Baxter “Themes of Constitutional Development: The Need for a Favourable Climate of Discussion” (1985) 15 VUWLR 12 at 15 and FM Brookfield *Waitangi and Indigenous Rights* (2 ed, Auckland University Press, Auckland, 2006) at 71.

41 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (3 ed, Thomson Brookers, Wellington, 2007) at 235. The fourth edition of Joseph’s text appears to accept the existence of the convention labelling it only “uncertain in application and scope”: see Joseph *Constitutional and Administrative Law in New Zealand*, above n 1, at 247.

42 Jennings *The Law and the Constitution*, above n 23, at 176.

democratic basis for the doctrine. However, it does not appear that the doctrine of mandate has taken hold in New Zealand. The doctrine may once have applied in respect of significant constitutional reform,<sup>43</sup> but the contemporary view is that the doctrine took on a political rather than a constitutional character.<sup>44</sup> Further, the advent of proportional representation appears to have limited the effectiveness of any mandate requirement for all but the most exceptional constitutional change.<sup>45</sup> As such, the mandate doctrine appears to do little to influence Parliament's exercise of the legislative function.

In general, it appears that Parliament is not subject to constitutional conventions which directly affect the exercise of the legislative prerogative. Even if substantive obligations founded on convention could be demonstrated, the ability of such obligations to act as substantive constitutional limits remains open to question. Conventions are not always obeyed,<sup>46</sup> and respect for convention may have eroded significantly as community standards of proper conduct have been gradually replaced by individual morality.<sup>47</sup> Discussion of constitutional conventions in New Zealand suggests that acceptance of the obligation by the actors themselves is likely to be the determinative factor.<sup>48</sup> Accordingly, convention alone is unlikely to be sufficient to meaningfully promote constitutional legitimacy:<sup>49</sup>

If conventions cannot be enforced in the courts, a convention to the effect that Parliament not exercise its legislative sovereignty so as to destroy the basis of representative government amounts to no more than a requirement that Parliament apply constitutional limits to itself. The sanction is no more than the force of public opinion.

Conventions deal not only with obligations, however, but also with rights, powers and duties.<sup>50</sup> Where the discharge of constitutional functions by other actors of government is seen to be contingent on Parliament's adherence to constitutional convention, the practical restraint on Parliament may be more real. It is not the inherent nature of convention (in the sense of a political rather than legal rule), but the distribution of power that convention secures that may serve as an effective constitutional device. In discussing the potential for abuse of convention by Parliament, Quentin-Baxter argues:<sup>51</sup>

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43 Scott *The New Zealand Constitution*, above n 7, at 52-54.

44 Joseph *Constitutional and Administrative Law in New Zealand*, above n 1, at 559. See also FF Ridley "There is No British Constitution: A Dangerous Case of the Emperor's Clothes" (1988) 41 *Parliamentary Affairs* 340 at 352.

45 See Joseph *Constitutional and Administrative Law in New Zealand*, *ibid.*, at 561.

46 Marshall *Constitutional Conventions: The Rules and Forms of Political Accountability*, above n 40, at 6.

47 Nevil Johnson "Law, Convention, and Precedent in the British Constitution" in David Butler, Vernon Bogdanor and Robert Summers (eds) *The Law, Politics, and the Constitution: Essays in Honour of Geoffrey Marshall* (Oxford University Press, Oxford, 1999) 131 at 140.

48 Joseph *Constitutional and Administrative Law in New Zealand*, above n 1, at 262-263. This interpretation appeals to the positive morality view of conventions, rather than the critical morality view: see Marshall *Constitutional Conventions: The Rules and Forms of Political Accountability*, above n 40, at 11-12. See also "The 'Critical Morality' of the New Zealand Constitution", below Chapter Five at 131-136.

49 Thomas "The Relationship of Parliament and the Courts", above n 35, at 22.

50 Marshall *Constitutional Conventions: The Rules and Forms of Political Accountability*, above n 40, at 7.

51 Quentin-Baxter "Themes of Constitutional Development: The Need for a Favourable Climate of Discussion", above n 40, at 19.

[W]e may be a little less sure that a government facing electoral defeat would not be tempted to steal a march on its successor in some unconstitutional way. Nevertheless, the Governor-General's own duty to act on the advice of ministers is also based only upon convention, and does not tie his [or her] hands if ministers persist in a manifestly unconstitutional course of action.

Thus, where adherence (or otherwise) to constitutional convention invites action from other constitutional actors, political reality is likely to strongly incentivise compliance with that constitutional convention.

Whether this is sufficient to restrain Parliament's exercise of the legislative function is a question that remains unanswered. Parliament's legislative sovereignty means that it has little need to rely on other constitutional actors to enact law, which suggests the relevance of convention may be limited. The need for the Sovereign's assent to legislative initiatives proposed by the House of Representatives may be something of an exception. Doubts over whether the Sovereign would assent to proposed legislation that did not satisfy manner and form requirements might ensure compliance with those requirements, for example, but this is unlikely to amount to a substantive restriction on Parliament. Constitutional conventions may provide a reason to give pause for thought in respect of Parliament's exercise of the legislative function by highlighting the gap between legal and constitutional authority, which appears vital to a healthy version of Westminster constitutionalism. Convention does not, however, appear to provide a compelling reason for Parliament not to act in any matter that accords with its unfettered, collective will.

### ***Absolute Parliamentary Authority?***

The interpretation of Parliamentary sovereignty set out above is a relatively absolute one that admits little room for traditional understandings of liberal constitutionalism. This absolutist interpretation may be a matter of some concern to proponents of liberal constitutionalism and the ideal of limits on the legitimate exercise of public power. The concern is that "[t]he only fundamental law is that Parliament is supreme" and "there is no constitutional law at all [...] there is only the arbitrary power of Parliament".<sup>52</sup>

It is still too early, however, to discard liberal constitutionalism altogether. From the normative perspective adopted in this thesis, further inquiry is warranted. Despite New Zealand's commitment to a relatively absolute interpretation of the doctrine of Parliamentary sovereignty representing the dominant narrative under contemporary constitutional arrangements, the idea of constitutional limits on the legitimate use of public power (including legislative power) forms a pervasive counter-narrative. The claim to absolute authority inherent in the concept of Parliamentary sovereignty potentially overlooks a more dynamic constitutional context where normative

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52 Jennings *The Law and the Constitution*, above n 23, at 65.



considerations exert some influence.<sup>53</sup> For example, the New Zealand *Cabinet Manual* expressly acknowledges that Parliament has “full power to make laws”,<sup>54</sup> but then goes on to state that:<sup>55</sup>

A balance has to be struck between majority power and minority right, between the sovereignty of the people exercised through Parliament and the rule of the law, and between the right of elected governments to have their policies enacted into law and the protection of fundamental social and constitutional values. The answer cannot always lie with simple majority decision making. Indeed, those with the authority to make majority decisions often themselves recognise that their authority is limited by understandings of what is basic in our society, by convention, by the Treaty of Waitangi, by international obligations and by ideas of fairness and justice.

There is, therefore, indicative evidence that the idea of substantive limitations on the legitimate exercise of public power is taken seriously in New Zealand, despite the prominence of orthodox Diceyan sovereignty theory.

The remainder of this chapter investigates where the balance might be struck between Parliament’s claim to unqualified legislative power and normative values that might serve to limit Parliamentary authority. The starting point for this analysis are the core substantive values that underpin traditional accounts of liberal constitutionalism — representative democracy, fundamental human rights and the rule of law. The specific New Zealand context, however, requires assessment of a fourth dimension — the foundational values of the New Zealand nation as set out in the text and principles of the Treaty of Waitangi.

## *Representative Democracy*

Representative and democratic government is “one of the fundamental generic means by which western constitutions meet the challenge of constraining the abuse of the coercive power of the state”.<sup>56</sup> Parliament’s representative nature undoubtedly places practical restrictions on what can feasibly be achieved through legislation. Factors such as “the weight of public opinion, particularly as felt by politicians through elections” are vital for constraining Parliamentary power in practice.<sup>57</sup> Representative democracy also provides a normative justification for the doctrine of Parliamentary sovereignty, locating sovereign power in a representative institution designed to give effective the

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53 See Palmer and Palmer *Bridled Power*, above n 14, at 156; BV Harris “The Constitutional Future of New Zealand” [2004] NZ Law Review 269 at 277.

54 Kenneth Keith “On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government” in Cabinet Office *Cabinet Manual* (Wellington, 2008) 1 at 1.

55 Keith “On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government”, *ibid*, at 4.

56 Palmer “New Zealand Constitutional Culture”, above n 4, at 580.

57 Palmer and Palmer *Bridled Power*, above n 14, at 156.

will of the electorate.<sup>58</sup> It is therefore possible that the nature of representative democracy itself places effective limits on the legitimate exercise of the legislative function.

Dicey considered this to be the case, despite his absolutist interpretation of the doctrine of Parliamentary sovereignty. Dicey identified two inherent limits on Parliament's exercise of the legislative function: an "external limit" in the form of the "possibility of popular resistance",<sup>59</sup> and an "internal limit" that Parliament will not pass legislation inimical to its very character.<sup>60</sup> The external limit is related to, but distinct from, the idea that Parliament is accountable to the electorate. The risk that the people might wilfully disobey an Act of Parliament places a practical limit on the subject matter in respect of which a pragmatic Parliament may be willing to legislate,<sup>61</sup> even if a justification for such legislation could be provided by political mandate. This "external" limit is not a matter of constitutional principle but of political reality. Dicey's internal limit is just as important: as a human institution, Parliament is constrained by the morality of its members. For that reason, Parliament would not pass legislation that its members would find morally abhorrent. Dicey placed great stock in this internal limit, considering it to be as powerful if not more so than the external limits on legislative power.<sup>62</sup>

The existence of these practical limits has been considered essential to the desirability of Parliamentary sovereignty in a modern context. For example, Goldsworthy has argued:<sup>63</sup>

It has always been part of the justification of sovereign power, whether monarchical or parliamentary, that the repository of the power is subject to powerful extralegal constraints, both "internal" (moral) and "external" (political), which make many conceivable abuses of the power virtually impossible. [...] this "gap" between the absence of legal constraints and the presence of moral and political ones is essential to its acceptability. We would not want an institution to possess sovereign power if there were no such gap — if there were no effective moral or political constraints on its exercise of power.

However, in arguing that Dicey's external and internal limits "make many conceivable abuses of the power virtually impossible", Goldsworthy may be overstating his case. It is not at all clear that the internal and external limits on Parliamentary sovereignty identified by Dicey are sufficient to ensure constitutional government. Indeed, Dicey himself suggested that a despot would be subject to the very same external and internal limitations on the exercise of public power.<sup>64</sup> In reality, therefore, these 'limits' reveal little about the principles underpinning Westminster constitutionalism or the nature of Parliament's legislative sovereignty. If anything, it demonstrates that these 'limits' may not be constitutional in character at all.

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58 See Palmer "New Zealand Constitutional Culture", above n 4, at 582.

59 Dicey *Introduction to the Study of the Law of the Constitution*, above n 8, at 79.

60 Dicey *Introduction to the Study of the Law of the Constitution*, *ibid*, at 80.

61 Dicey *Introduction to the Study of the Law of the Constitution*, *ibid*, at 76-77.

62 Dicey *Introduction to the Study of the Law of the Constitution*, *ibid*, at 80.

63 Jeffrey Goldsworthy "Is Parliament Sovereign? Recent Challenges to the Doctrine of Parliamentary Sovereignty" (2005) 3 NZJPL 7 at 31 ["Is Parliament Sovereign?"].

64 See Dicey *Introduction to the Study of the Law of the Constitution*, above n 8, at 78.

Dicey did, however, go further to make a specific claim about Westminster constitutionalism. It is not the internal and external limits themselves but the alignment of those limits to each other that characterises the Westminster constitution. This insight provides an important link to the idea of representative democracy. The necessary alignment between the external and the internal limit results from Parliament's nature as a representative institution. According to Dicey, representative government ensures that the internal limit and the external limit are aligned to the greatest extent possible.<sup>65</sup> The common morality between Parliament and the electorate achieved by representative democracy therefore institutionalises a kind of normative limit on Parliament's scope to act.

Dicey's reconciliation of Parliament's unfettered legal power with practical and moral constraints stemming from the reality of the politics of Westminster constitutionalism is a superficially attractive account of constitutional government in an unwritten constitutional system. However, there are at least three reasons why Dicey's account of representative democracy is not, by itself, sufficient to provide effective constitutional limitations on the exercise of public power. The first is that Dicey's account assumes that the particular mode of representative democracy applied in the constitutional system under consideration is workably effective. Whether any electoral system is workably effective in the sense that the collective will of the electorate is fairly and accurately represented by the collective will of Parliament is a matter of empirical investigation. Such an investigation is not pursued here.<sup>66</sup> It is relevant, however, that Dicey also did not entertain this question. That Parliament is held to account via effective democratic processes cannot simply be assumed, and evidence is needed before potential limits on Parliamentary sovereignty based on a workably effective system of representative democracy can be accepted.

Second, even if Parliament is held to account by the will of the people in a manner that is representative, democratic and effective, this merely shifts that issue of unrestricted political power from Parliament to the electorate. It does not suggest that substantive limits are effective in restraining the arbitrary exercise of power in breach of fundamental constitutional ideals. The good nature and common sense of the people may be sufficient in many cases, but this is a political rather than a constitutional safeguard.<sup>67</sup> If a matter is reduced to nothing more than political convenience or advantage it cannot be described as 'constitutional' without depriving that concept of at least some of its meaning.<sup>68</sup> In many cases political safeguards based on a line of accountability that traces through Parliament to the electorate may simply be too blunt to protect constitutional ideals.<sup>69</sup>

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65 Dicey *Introduction to the Study of the Law of the Constitution*, *ibid*, at 83-84.

66 In many states, voter apathy or ignorance, or even vote rigging and violence, may mitigate against the effectiveness of representative democracy. In this context it may be relevant that between 1981 and 2011, voter turnout at general elections has steadily declined from over 90% of enrolled voters to under 75%: see Statistics New Zealand <[http://www.stats.govt.nz/browse\\_for\\_stats/snapshots-of-nz/nz-social-indicators/Home/Trust%20and%20participation%20in%20government/voter-turnout.aspx](http://www.stats.govt.nz/browse_for_stats/snapshots-of-nz/nz-social-indicators/Home/Trust%20and%20participation%20in%20government/voter-turnout.aspx)> (last accessed 24 September 2014).

67 Thomas "The Relationship of Parliament and the Courts", above n 35, at 15. See also Dicey *Introduction to the Study of the Law of the Constitution*, above n 8, at 72-73; James Cornford "On Writing a Constitution" (1991) 44 *Parliamentary Affairs* 558 at 561; *R (Jackson) v Attorney-General* [2005] UKHL 56 at [159].

68 Ridley "There is No British Constitution: A Dangerous Case of the Emperor's Clothes", above n 44, at 356.

69 Quentin-Baxter "Themes of Constitutional Development: The Need for a Favourable Climate of Discussion", above n 40, at 22.

An appreciable risk remains that political considerations, whether initiated by Parliament or the people, may displace constitutional fundamentals in the absence of more effective protections.

Finally, it must be noted that ‘representative democracy’ is an abstract, and perhaps ambiguous, concept. The High Court of Australia relied on the concept to invalidate Commonwealth legislation that prohibited the broadcasting of political advertising for a period of time before an election.<sup>70</sup> The decision was justified on the basis that freedom to communicate ideas was essential to the electoral contest that forms the basis of representative democracy.<sup>71</sup> While the High Court’s enthusiasm for the concept of representative democracy is difficult to challenge, the result in the case has been criticised as undermining the “level playing field” necessary for a contest of political ideas to be meaningful and effective.<sup>72</sup> The concept may be seen to have different implications to different people, and is potentially open to abuse as a platitude that justifies all but the most egregious state action. For that reason, the idea that representative democracy is necessary to secure constitutional government appears to start from the wrong premise.<sup>73</sup> One of the key aims of constitutional government is to secure representative democracy in a tangible sense, which requires the articulation and protection of prior tangible principles and ideals within the constitutional structure. Vague appeals to representative democracy are simply unable to do this alone.

## *Fundamental Human Rights*

Fundamental human rights have been described as the international “language” of constitutionalism.<sup>74</sup> Fundamental rights resonate strongly with the Western liberal political ideals that prioritise the freedom and sanctity of the individual, and constitutional arrangements purporting to adhere to that political tradition are obliged to address the issue of rights. This is as true of New Zealand as any state with a written constitution or an entrenched, constitutional bill of rights.<sup>75</sup> In the absence of a written constitution protecting rights, substantive limits based on fundamental rights in New Zealand may have a basis in the common law, in statute or may be implied directly from New Zealand’s constitutional arrangements and principles. Each of these three sources of fundamental rights is examined in turn.

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70 *Australian Capital Television Pty Ltd v Commonwealth of Australia* (1992) 177 CLR 106 (HCA).

71 *Australian Capital Television Pty Ltd v Commonwealth of Australia* (1992) 177 CLR 106 (HCA) at 138-140.

72 Thomas “The Relationship of Parliament and the Courts”, above n 35, at 28-29. See also Stephen Sedley “Human Rights: a Twenty-First Century Agenda” [1995] PL 386 at 393-394.

73 Compare Joel I Colón-Ríos “New Zealand’s Constitutional Crisis” (2011) 24 NZULR 449.

74 Philip A Joseph “The Higher Judiciary and the Constitution: A View from Below” in Rick Bigwood (ed) *Public Interest Litigation: New Zealand Experience in International Perspective* (LexisNexis NZ, Wellington, 2006) 213 at 214 [“The Higher Judiciary and the Constitution”].

75 Indeed, New Zealand rights jurisprudence has been directly influenced by international trends in human rights recognition: see *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA). For discussion see Claudia Geiringer “*Tavita* and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law” (2004) 21 NZULR 66.

## *Common Law Rights*

There has long been a strand of jurisprudence within the common law that fundamental rights may be affirmed in the face of legislation that might abrogate those rights. This jurisprudence is founded on the enduring idea that the common law is prior to and therefore controls the exercise of the legislative function by Parliament. The starting point for such claims is *Dr Bonham's case*, where Coke CJ held that:<sup>76</sup>

[I]n many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void; for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such an Act to be void.

There is much debate over the intended effect of Coke CJ's judgment, but it has been applied or endorsed as authority for the power of the common law to control legislation on a handful of occasions in the United Kingdom.<sup>77</sup> It is therefore difficult to dismiss as a single aberration, even if the majority of judicial opinion clearly supports the proposition that Parliament is sovereign.<sup>78</sup>

There is a modern line of cases in New Zealand that at least hints at a similar result. After flirting with the idea of entrenched common law rights in a number of judgments,<sup>79</sup> Cooke J (as he then was) suggested explicitly that “[s]ome common law rights presumably lie so deep that even Parliament could not override them”.<sup>80</sup> Cooke subsequently explained extra-judicially that Parliamentary supremacy remains subject to only very broad limits, and the substantive rights and freedoms that limit Parliament's sovereign power may not be many.<sup>81</sup> However, the fundamental point underpinning Cooke's *dicta* is that democracy necessarily entails some limit on the exercise of legislative power. Cooke is firm in the view that ascertaining those limits is part of the judicial function (related to the common law).

Cooke's *dicta* have not been directly applied by any New Zealand court, and have been strongly criticised on the ground that judicial respect for Parliamentary legislation is itself fundamental to the constitutional order:<sup>82</sup>

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76 *Dr Bonham's case* (1610) 8 Co Rep 114. For discussion of *Dr Bonham's case* and modern authorities see Karen Grau “Parliamentary Sovereignty: New Zealand — New Millennium” (2002) 33 VUWLR 351.

77 See *City of London v Wood* (1701) 12 Mod 669; 88 ER 1592; *Day v Savage* (1614) Hobart 85; 80 ER 235; *Thomas v Sorrell* (1674) Vaughan 330; 124 ER 1098; *R v Inhabitants of Cumberland* (1975) 6 TR 194; 101 ER 507; *Green v Mortimer* (1861) 3 LT 642, cited in Joseph *Constitutional and Administrative Law in New Zealand*, above n 1, at 520.

78 See Thomas “The Relationship of Parliament and the Courts”, above n 35, at 18.

79 See *L v M* [1979] 2 NZLR 519 (CA) at 527; *Brader v Ministry of Transport* [1981] 1 NZLR 73 (CA) at 78; *New Zealand Drivers Association v New Zealand Road Carriers* [1982] 1 NZLR 374 (CA) at 390; *Fraser v State Services Commission* [1984] 1 NZLR 116 (CA) at 121. For discussion of this “quiet revolution” see John L Caldwell “Judicial Sovereignty — A New View” [1984] NZLJ 357.

80 *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA) at 398.

81 Robin Cooke “Fundamentals” [1988] NZLJ 158 at 164-165.

82 Michael Kirby “Lord Cooke and Fundamental Rights” in Paul Rishworth (ed) *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997) 331 at 353. See also *Builders Labourers Federation v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 406 (NSWSC).

[T]he principle of judicial respect for Parliament is to be taken as one that lies so deep that Courts will just accept it so long as Parliament has acted as a Parliament and within power [...] it is good that Lord Cooke has sparked this debate but heresy is heresy. And it may be dangerous heresy besides.

The *dicta* appear to have been accepted as an important dimension of New Zealand's unwritten constitution.<sup>83</sup> As a result, "it is possible we will come to recognise substantive limitations upon the competence of parliament to make laws in breach of [...] human rights".<sup>84</sup> The guarded nature of the language employed in Cooke's judgments has been noted as appropriate and perhaps even uncontroversial in the context of the close relationship between Parliament and the Executive characteristic of New Zealand government.<sup>85</sup> The *dicta* have even been praised for "awakening New Zealand's constitutional discourse from its complacency [in respect of received sovereignty doctrine] and instilling a more critical attitude towards parliamentary power".<sup>86</sup> It seems likely, therefore, that Cooke's *dicta* have had some influence on understandings of the legitimate exercise of legislative power in New Zealand.

While the New Zealand courts have not struck down legislation inconsistent with fundamental common law rights, the courts may still seek to give effect to fundamental rights in the face of an apparent Parliamentary intention to the contrary. Such 'creative interpretation' by the courts has long been an established part of orthodox constitutional practice.<sup>87</sup> In confronting the claim that the courts do in fact strike down legislation that is inconsistent with fundamental principles, Dicey responded:<sup>88</sup>

Language which might seem to imply this [overruling of legislation on moral grounds] amounts in reality to nothing more than the assertion that the judges, when attempting to ascertain what is the meaning to be affixed to an Act of Parliament, will presume that Parliament did not intend to violate the ordinary rule of morality, or the principles of international law, and will therefore, whenever possible, give such an interpretation to a statutory enactment as may be consistent with the doctrines of both private and international morality.

This approach is consistent with the principle of legality developed by the United Kingdom courts, where it has been held that "unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law".<sup>89</sup> The New Zealand courts appear ready to adopt a similar approach.<sup>90</sup> Consistently with Dicey's statement above, the common law provides a

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83 Harris "The Constitutional Future of New Zealand", above n 53, at 277.

84 Sian Elias "Sovereignty in the 21st Century: Another Spin on the Merry-go-round" (2003) 14 PLR 148 at 160 ["Sovereignty in the 21st Century"].

85 Grau "Parliamentary Sovereignty: New Zealand — New Millennium", above n 76, at 361.

86 Joseph *Constitutional and Administrative Law in New Zealand*, above n 1, at 552.

87 It might be more pejoratively labelled judicial "activism" by some: see DF Dugdale "Framing Statutes in an Age of Judicial Supremacism" (2000) 9 Otago LR 603 at 608.

88 Dicey *Introduction to the Study of the Law of the Constitution*, above n 8, at 62-63.

89 *R v Secretary for the Home Department, ex p Pierson* [1998] AC 539 (HL) at 575. See also *R v Secretary for the Home Department, ex p Simms* [1999] 3 All ER 400 (HL).

90 *R v Pora* [2001] 2 NZLR 37 (CA) at 40-52.

mechanism for the protection of fundamental human rights that does not contemplate a “fatal assault” on Parliamentary sovereignty as traditionally understood.<sup>91</sup> In New Zealand, it has not yet been necessary to grasp the bull by horns, and it remains a possibility that the courts would develop a principle of legality jurisprudence in preference to Cooke’s *dicta*, given the potential to reconcile the principle of legality with Parliamentary sovereignty.<sup>92</sup>

### ***Statutory Rights***

Fundamental rights also receive affirmation and recognition in New Zealand through statute. In particular, the New Zealand Bill of Rights Act 1990 (NZBORA) affirms a number of civil and political rights and freedoms that apply as against the legislative, executive and judicial branches of government, and any person discharging a public function or duty. NZBORA is a “benchmark for acceptable governmental conduct”.<sup>93</sup>

The New Zealand courts appear to treat NZBORA rights in a manner consistent with the principle of legality, often “reading down” statutory provisions that appear to conflict with NZBORA rights and freedoms. In *Zaoui v Attorney-General*,<sup>94</sup> for example, the Supreme Court found that the right to freedom from torture and the right not to be deprived of life, both fundamental human rights, should be given effect so that a refugee with security risk status would not be deported. To achieve this result, s 114K of the Immigration Act 1987, which requires the Minister of Immigration to make a decision on whether to deport based on confirmation of a security risk certificate in respect of a refugee, was effectively stripped of legal effect, contrary to a seemingly orthodox interpretation of the provision.<sup>95</sup> By this means, the courts can give an appropriately broad interpretation to NZBORA rights and freedoms.

It has been argued that the rights and freedoms affirmed in NZBORA amount to binding, substantive restrictions on Parliament’s exercise of the legislative function. The basis for this argument is that NZBORA is expressly stated to apply in respect of “acts done by the legislative [branch] ... of the Government of New Zealand”.<sup>96</sup> Accordingly, NZBORA contains a statutory requirement that “the form and content of legislation” is consistent with the rights and freedoms affirmed by NZBORA.<sup>97</sup> “The only relevant ‘act’ that can be ‘done’ by Parliament, as such, is the

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91 John Laws “Constitutional Guarantees” (2008) 29 Statute LR 1 at 6. For comment in the New Zealand context see Petra Butler “Human Rights and Parliamentary Sovereignty in New Zealand” (2004) 35 VUWLR 341 at 361-365.

92 For a list of common law principles and values that are fundamental in the sense that they have implications for the interpretation of legislation that bears on those principles see Burrows and Carter *Statute Law in New Zealand*, above n 31, at 320-326. A similar but more (and possibly over) extensive list is provided in Legislation Advisory Committee *Legislation Advisory Committee Guidelines: Guidelines on Process and Content of Legislation* (Wellington, 2001) at 49-52.

93 Paul Rishworth “Interpreting and Applying the Bill of Rights” in Paul Rishworth and others (eds) *The New Zealand Bill of Rights Act* (Oxford University Press, Melbourne, 2003) 25 at 26.

94 *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289 (SC). See further “Rights-centred Adjudication”, below Chapter Five, at 127.

95 Claudia Geiringer “Parsing Sir Kenneth Keith’s Taxonomy of Human Rights: A Commentary on Illingworth and Evans Case” in R Bigwood (ed) *Public Interest Litigation: New Zealand Experience in International Perspective* (LexisNexis, Wellington, 2006) 179 at 182.

96 New Zealand Bill of Rights Act 1990, s 3(a).

97 See Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ, Wellington, 2005) at 87-89.

passing of legislation".<sup>98</sup> This purported requirement is largely self-enforcing,<sup>99</sup> and there are institutional mechanisms such as the Attorney-General's responsibility to vet proposed legislation for potential inconsistencies with NZBORA to assist Parliament in meeting this obligation.<sup>100</sup> But these institutional checks within the Parliamentary system do not lessen the purported effect of the requirement to act consistently with NZBORA as a legal obligation, and are consistent with the position of principle that:<sup>101</sup>

It should never be appropriate to promote legislation or implement a policy that is inconsistent with the Bill of Rights. It must always be remembered that inconsistency with the Bill of Rights necessarily means that the relevant law or policy limits fundamental rights in a manner that cannot be justified in a free and democratic society. The point of the Bill of Rights is to prevent that happening, not to affirm that it can happen.

However, this approach appears to require an acceptance of the manner and form theory of legislation, which, as discussed above,<sup>102</sup> is yet to be clearly accepted in New Zealand. In the absence of support for the manner and form theory, Parliament's own view is likely to be determinative.<sup>103</sup> There is ample evidence that legislators do not consider themselves to be so bound.<sup>104</sup> In addition, it has been argued that the claim that there is a legal obligation on Parliament not to legislate inconsistently with NZBORA is incorrect as a matter of statutory interpretation. In addition to the legislative history, which included a deliberate move away from supreme law status,<sup>105</sup> the statutory restriction on judicial vindication of NZBORA in the face of an inconsistent enactment reveals a wider legislative policy "that the Bill of Rights was not to be substantively or remedially superior to other legislation".<sup>106</sup> Against that broader legislative policy, it has been argued that there is no clear legal obligation on Parliament not to legislate inconsistently with NZBORA rights and freedoms.<sup>107</sup> It therefore appears that there are reasonable grounds to conclude

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98 Paul Rishworth "When the Bill of Rights Applies" in Paul Rishworth and others (eds) *The New Zealand Bill of Rights Act* (Oxford University Press, Melbourne, 2003) 70 at 72 (footnote omitted).

99 In this respect, s 4 of NZBORA, which requires the courts not to impliedly repeal or disapply any enactment only because that enactment is inconsistent with NZBORA does not diminish the nature of the legal obligation imposed on Parliament. Section 4 is concerned only with the consequences of breach of NZBORA by Parliament, not the primary obligation not to act inconsistently: see Rishworth "When the Bill of Rights Applies", *ibid*, at 72.

100 New Zealand Bill of Rights Act 1990, s 7. The exercise of this function is non-justiciable: see *Boscawen v Attorney-General* [2009] 2 NZLR 229 (CA). There is also the possibility that the courts may declare legislation to be inconsistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990: see *Moonen v Film & Literature Board of Review* [2000] 1 NZLR 9 (CA) at 17.

101 Rishworth "Interpreting and Applying the Bill of Rights", above n 93, at 31 (footnote omitted).

102 See "Modern Interpretations: Manner and Form", above, at 88-92.

103 Claudia Geiringer "The Dead Hand of the Bill of Rights? Is the New Zealand Bill of Rights Act 1990 a Substantive Legal Constraint on Parliament's Power to Legislate?" (2007) 11 Otago LR 389 at 414 ["The Dead Hand of the Bill of the Rights"]. See also Rishworth "Interpreting and Applying the Bill of Rights", above n 93, at 36-37.

104 Geiringer "The Dead Hand of the Bill of the Rights", *ibid*, at 399.

105 Ministry of Justice *A Bill of Rights for New Zealand: A White Paper* (Government Printer, Wellington, 1985) at 22.

106 Geiringer "The Dead Hand of the Bill of the Rights", above n 103, at 410.

107 Geiringer "The Dead Hand of the Bill of the Rights", *ibid*, at 411. Compare Butler and Butler *The New Zealand Bill of Rights Act: A Commentary*, above n 97, at 87-89; Rishworth "When the Bill of Rights Applies", above n 98, at 72.



that NZBORA does not place greater restrictions on the exercise of the legislative function than fundamental rights recognised at common law.<sup>108</sup>

### ***Implied Constitutional Rights***

Finally, fundamental rights may be implied by the nature of a state's constitutional arrangements.<sup>109</sup> Such implied rights are a feature of liberal democracies with written constitutions. For example, in Australia the courts have identified an implied freedom of political communication as essential to Australia's system of representative government,<sup>110</sup> and a limited right to vote based on a universal franchise.<sup>111</sup> Further, the Supreme Court of Canada has identified four "fundamental and organizing principles" of the Canadian constitution: federalism, democracy, constitutionalism (including the rule of law) and respect for minorities.<sup>112</sup> A staunch defender of Parliamentary sovereignty has labelled implied constitutional rights as the doctrine's most serious challenge.<sup>113</sup>

Implied constitutional rights may also be a feature of unwritten constitutions. In the United Kingdom, increasing judicial willingness to give effect to fundamental rights expressly has been interpreted as a move by the courts:<sup>114</sup>

[...] to shift the boundaries of administrative law into the constitutional realm by explicitly endorsing a higher order of rights inherent in our constitutional democracy. These rights emanate not from any implied Parliamentary intent but from the framework of modern democracy within which Parliament legislates.

It has further been suggested that a similar trend has developed in New Zealand law, with human rights (as found in domestic and international sources) and the principles of the Treaty of Waitangi forming the basis for constitutional review.<sup>115</sup> This view has, however, only received limited endorsement,<sup>116</sup> and there do not appear to be any New Zealand authorities that directly support the notion of implied constitutional rights. In New Zealand, fundamental rights have been afforded recognition and protection on the basis of either the common law or orthodox statutory interpretation of Parliament's legislative intention,<sup>117</sup> which is inconsistent with the recognition of rights implied by a democratic constitution independently of legislation.

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108 This position appears to be consistent with the analysis in Claudia Geiringer "The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen* (2008) 6 NZJPIL 59.

109 For an international example, see *McGraw-Hinds (Australia) Pty Ltd v Smith* (1979) 144 CLR 633 at 670 (HCA).

110 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106 (HCA).

111 *Roach v Electoral Commissioner* [2007] HCA 43; (2007) 233 CLR 162..

112 *Reference re the Secession of Quebec* [1998] 2 SCR 217 (SCC).

113 Goldsworthy "Is Parliament Sovereign?", above n 63, at 33.

114 Jeffrey Jowell "Beyond the Rule of Law: Towards Constitutional Judicial Review" [2000] PL 671 at 675.

115 Philip A Joseph "Constitutional Review Now" [1998] NZ Law Review 85.

116 See, for example, Palmer and Palmer *Bridled Power*, above n 14, at 291.

117 See, for example, *R v Pora* [2001] 2 NZLR 37 (CA) at [52]. Founding the basis for protection of fundamental rights in Parliament's intention expressly may be in part a result of the higher esteem in which Parliamentary sovereignty is held in contemporary New Zealand compared with the United Kingdom: see Andrew Geddis and Bridget Fenton "Which is to be Master?" — Rights-friendly Statutory Interpretation in New Zealand and the United Kingdom" (2008) 25 AJICL 733 at 770-776.

Palmer has taken a different approach to the issue of implied constitutional rights in seeking to identify a collection of constitutional “norms” which may influence the exercise of public power in New Zealand.<sup>118</sup> Noting the recognition of fundamental constitutional principles in other jurisdictions,<sup>119</sup> Palmer identifies four norms that are “essential to the character of the New Zealand constitution”:<sup>120</sup>

- representative democracy;
- Parliamentary sovereignty;
- the rule of law and judicial independence; and
- the unwritten, evolving nature of the constitution.

It is, however, unlikely that these constitutional “norms” are intended to act as fundamental principles that could form the basis for implied constitutional rights jurisprudence. In fact, Palmer eschews the language of fundamental principle when discussing these ‘norms’ in a New Zealand-specific context despite the heavy use of that language elsewhere in his treatment of the broader issues of constitutional culture.<sup>121</sup> Consistent with Palmer’s over-arching theory of “constitutional realism”,<sup>122</sup> these four “norms” are perhaps better understood as denoting usual constitutional practice in New Zealand that remain open to change, refinement and reinvention. They are not “norms” in the sense of normative or substantive principles that represent a reason for exercise public power in a certain way. There is, accordingly, nothing in Palmer’s analysis to support the notion of implied constitutional rights.

## *The Rule of Law*

The rule of law is “the very spirit of the constitution we inherit” in New Zealand.<sup>123</sup> New Zealand’s current Chief Justice has argued that “[c]onstitutional legitimacy in our system of government is based upon the rule of law”.<sup>124</sup> The term is often employed as a shorthand for the principles of constitutional government, its essence perhaps being that law ought to limit and control

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118 Palmer “New Zealand Constitutional Culture”, above n 4. See also Matthew SR Palmer “Open the Doors and Where are the People? Constitutional Dialogue in the Shadow of the People” in Claire Charters and Dean R Knight (eds) *We, the People(s): Participation in Governance* (Victoria University Press, Wellington, 2011) 50. Palmer’s broader theme, that there is a meaningful relationship between national “culture” and a constitution that ought to be taken seriously, is not discussed in detail here.

119 For example, *Reference re the Secession of Quebec* [1998] 2 SCR 217 (SCC).

120 Palmer “New Zealand Constitutional Culture”, above n 4, at 580.

121 Palmer “New Zealand Constitutional Culture”, *ibid*, at 578-580.

122 See “Constitutional Realism”, above Chapter One, at 32-35.

123 Quentin-Baxter “Themes of Constitutional Development: The Need for a Favourable Climate of Discussion”, above n 40, at 13.

124 Sian Elias ““Hard Look” and the Judicial Function” (1996) 4 Waikato LR 1 at 3.

otherwise arbitrary power.<sup>125</sup> As such the term carries significant rhetorical value. This rhetorical value is widely recognised in New Zealand case law, and has received statutory acknowledgement.<sup>126</sup>

The rule of law is, however, a notoriously ambiguous concept. The contested nature of the rule of law cuts deep,<sup>127</sup> but it is customary to divide conceptions of the rule of law between those that emphasise either the formal or substantive elements of the concept.<sup>128</sup> Formal conceptions of the rule of law require only that certain procedural requirements are satisfied in order for any given law to be valid and effective. Such conceptions do not consider the rule of law to be a component of substantive political morality.<sup>129</sup> In contrast, substantive conceptions of the rule of law require, in addition to any minimum procedural requirements, that certain substantive values are recognised and protected.<sup>130</sup> The rule of law implications for the legitimate exercise of public power in New Zealand therefore depend on the particular conception of the rule of law that is adopted. In this respect, a meaningful commitment to constitutionalism and constitutional government likely requires a substantive conception of the rule of law. A purely formal interpretation of the rule of law may describe little more than the existence of organised public power, which may be taken as characteristic of virtually all constitutional systems.<sup>131</sup> A substantive conception of the rule of law is therefore the focus of this section, consistent with the normative orientation of this thesis.

In the United Kingdom, the courts have endorsed a particularly strong substantive conception of the rule of law that may even extend to allowing the courts to define enforceable limits on Parliamentary sovereignty.<sup>132</sup> While the New Zealand courts have also endorsed a substantive conception of the rule of law,<sup>133</sup> they have not gone nearly this far. There is, however, academic support for the rule of law as a substantive constraint on Parliament's legislative function, in addition to other exercises of public power. In particular, Joseph has offered a model of constitutionalism that has a substantive conception of the rule of law at its centre. Joseph argues that orthodox Westminster constitutional scholarship accepts Parliamentary sovereignty only because it eschews normative analysis of the constitution.<sup>134</sup> To rectify this perceived gap, Joseph's account relies on a substantive account of the rule of law that amounts to a rights-based theory of law and

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125 Goldsworthy *Parliamentary Sovereignty: Contemporary Debates*, above n 26, at 60; Ian Harden and Norman Lewis *The Noble Lie: The British Constitution and the Rule of Law* (Hutchinson, London, 1986) at 5.

126 Supreme Court Act 2003, s 3(2). See also Lawyers and Conveyancers Act 2006, s 4(a).

127 See Jeremy Waldron "Is the Rule of Law an Essentially Contested Concept?" (2002) 22 *Law and Philosophy* 137; Joseph *Constitutional and Administrative Law in New Zealand*, above n 41, at 155.

128 See Paul Craig "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] PL 467.

129 See, for example, Joseph Raz "The Rule of Law and its Virtue" (1977) 93 *LQR* 195.

130 Joseph *Constitutional and Administrative Law in New Zealand*, above n 41, at 177-178.

131 Joseph *Constitutional and Administrative Law in New Zealand*, *ibid*, at 149. The fourth edition of Joseph's text appears to adopt a more equivocal position: see Joseph *Constitutional and Administrative Law in New Zealand*, above n 1, at 155-157.

132 *R (Jackson) v Attorney-General* [2005] UKHL 56; [2006] 1 AC 262 at [102].

133 *Petrocorp Exploration Ltd v Minister of Energy* [1991] 1 NZLR 1 (CA) at 38.

134 Philip A Joseph "The Constitutional State" in Jeremy Finn and Stephen Todd (eds) *Law, Liberty, Legislation: Essays in Honour of John Burrows QC* (LexisNexis, Wellington, 2008) 249 at 252.

adjudication.<sup>135</sup> The common law courts rely on the rule of law as a link between moral and legal principle, and discharge their adjudicative function in a manner that best recognises and protects rule of law values. This is the case even in the face of Parliamentary legislation that might abrogate those values.

The crux of Joseph's model of constitutionalism is an emphasis on the fundamental importance of the rule of law to a legitimate constitutional order. This is complemented by a distinctive role for the courts to give effect to the principles and values the rule of law represents.<sup>136</sup> Joseph initially described this approach as based on a concept of co-ordinate authority where both the political and judicial branches of government work together in a collaborative fashion to achieve the ends of government.<sup>137</sup> However, as his theory has developed Joseph's account of constitutionalism places more and more emphasis on the existence of a "higher judiciary" that does not require endorsement (or even acquiescence) on the part of Parliament in order to promote rule of law values.<sup>138</sup> Joseph's account does not admit a necessary role for Parliament (or the political branch of government generally) in the articulation and promotion of fundamental constitutional values.

From this starting point Joseph develops an account of the New Zealand constitution that is self-consciously normative in character.<sup>139</sup> To Joseph, the constitution provides a link between moral and legal principle.<sup>140</sup> It is the rule of law and the values it represents that supplies this link within the constitutional framework, which gives rise to a form of "institutional morality" that reflects "the state's collective wisdom for the guidance of public action".<sup>141</sup> Joseph is careful to develop a sophisticated account of institutional morality that is not reducible to a single, subjective viewpoint. Joseph's institutional morality is informed by the "the higher learning, beliefs, and ideals of an age".<sup>142</sup> Institutional morality thus provides a reasonable, principled and defensible basis for the exercise of public power through the application of "higher-law values" and "pragmatic assumptions".<sup>143</sup> In this way, the morality inherent in the rule of law provides a standard against which the legitimacy of every exercise of public power can be evaluated in genuinely normative terms.

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135 In this regard Joseph's account of the rule of law is similar to the theories of Sir John Laws, Trevor Allan and Ronald Dworkin: see John Laws "Law and Democracy" [1995] PL 72; John Laws "The Constitution, Morals and Rights" [1996] PL 622; TRS Allan "Parliamentary Sovereignty: Law, Politics, Revolution" (1997) 113 LQR 443; *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, Oxford, 2001); Ronald Dworkin *Taking Rights Seriously* (Duckworth, London, 1978).

136 See Philip A Joseph "The Rule of Law: Foundational Norm" in Richard Ekins (ed) *Modern Challenges to the Rule of Law* (LexisNexis NZ, Wellington, 2011) 47 at 74.

137 Using the language of "collaborative enterprise": see Philip A Joseph "Parliament, the Courts, and the Collaborative Enterprise" (2004) 15 KCLJ 321.

138 See Philip A Joseph "The Higher Judiciary and the Constitution: A View from Below" in Rick Bigwood (ed) *Public Interest Litigation New Zealand Experience in International Perspective* (LexisNexis NZ, Wellington, 2006) 213.

139 See Joseph "The Constitutional State", above n 134, at 249.

140 Joseph "The Rule of Law: Foundational Norm", above n 136, at 53.

141 Joseph "The Constitutional State", above n 134, at 259.

142 Joseph "The Constitutional State", *ibid*, at 261.

143 Joseph "The Constitutional State", *ibid*, at 258, 260.

From this account of the rule of law, Joseph draws out two key implications: a rejection of the doctrine of Parliamentary sovereignty, and a necessary role for the judiciary in the scrutiny of legislation. Within Joseph's 'constitutional state', all government action must be held accountable in terms of the morality of the rule of law, including legislation. The rule of law therefore represents supreme law, and replaces Parliamentary sovereignty as the foundational principle of the Westminster legal system.<sup>144</sup> This approach requires a necessary role for the courts to strike down legislation that is inconsistent with the rule of law. In fact, Joseph considers that the courts already discharge this role under our current constitutional arrangements, even if it is not always understood that judges are working in this way, thereby institutionalising rule of law values in a manner consistent with common law constitutionalism:<sup>145</sup>

When judges attribute values to the common law (for example, by appealing to the principle of legality or the rule of law), they are in reality applying considerations of normative justice that are consonant with community expectations and norms.

Joseph does caveat his conclusions to an extent. He admits that only in extreme circumstances would a decision by the courts to strike down legislation for inconsistency with the rule of law be justified.<sup>146</sup> But the broad thrust of Joseph's normative argument is that the rule of law provides a defensible basis for the courts imposing and enforcing limits on the supremacy of Parliament, similar to the role of the judiciary under a written constitution.<sup>147</sup> He suggests that:<sup>148</sup>

The natural movement of political power is to innovate in accordance with the popular mandate; the natural movement of judicial power is to restrain in accordance with law and due process. [...] The political and judicial vocations are fundamentally different. Politicians exercise a democratic mandate and govern in the national interest, while Judges adjudicate disputes impartially according to law, without fear or favour.

Joseph's model of constitutionalism places significant responsibility on an autonomous judiciary to maintain and promote the values that are fundamental to the constitutional order. The denial of the sovereign authority of Parliament in particular tends to aggrandise the judicial role, and perhaps leaves Joseph's model of constitutionalism open to critique on the grounds that is inconsistent with institutional expressions of representative democracy. To level an anti-democratic charge at Joseph would, however, reveal a profound misunderstanding of his account. Representative government is one of the rule of law values that Joseph would readily admit require articulation and promotion without his account of constitutionalism.<sup>149</sup> The ideal of representative government is made to share the stage with other values such as human dignity and minority right, and although it sacrifices some of its prominence it loses none of its relevance. Joseph can therefore

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144 Joseph "The Rule of Law: Foundational Norm", above n 136, at 70-71. Joseph argues that the rule of law is "anterior to the positive laws (legislation and law), which are organised hierarchically under it and, in turn, informed by it": Joseph "The Rule of Law: Foundational Norm", above n 136, at 69.

145 Joseph "Parliament, the Courts, and the Collaborative Enterprise", above n 137, at 332.

146 Joseph "The Rule of Law: Foundational Norm", above n 136, at 74.

147 Joseph "The Higher Judiciary and the Constitution: A View from Below", above n 138, at 232.

148 Joseph "The Higher Judiciary and the Constitution: A View from Below", *ibid*, at 220.

149 See Joseph *Constitutional and Administrative Law in New Zealand*, above n 1, at 17.

be seen to bring his own distinctive perspective to the issue of how the ideal of representative democracy ought to be best institutionalised within the framework of New Zealand's contemporary constitutional arrangements.

Joseph's conception of the rule of law provides valuable normative guidance as to how public power should be exercised in New Zealand. It may not be possible, however, to reconcile a substantive account of the rule of law such as this with orthodox understandings of Parliamentary sovereignty.<sup>150</sup> Joseph's solution to this dilemma is to reject Parliamentary sovereignty. This would be the normatively desirable outcome if Joseph's interpretation of the rule of law is accepted, but it does not appear to accord with the reality of New Zealand's constitutional arrangements. Palmer, for example, while not necessarily endorsing Joseph's substantive conception of the rule of law, notes several examples where the rule of law has been overridden by legislation, apparently legitimately.<sup>151</sup> These examples include the removal of access to the courts for Māori to establish enforceable property rights by the Foreshore and Seabed Act 2004, the retrospective validation of an individual's membership of Parliament by the Electoral Amendment Act 2004, and the vitiation of a live legal challenge to the legality of Parliamentary expenditure by the Appropriation (Parliamentary Expenditure Validation) Act 2006. The reliance on an Act of Parliament in each case means that Parliamentary sovereignty is a key feature of overriding the rule of law. If this analysis is accepted, then the relationship between Parliamentary sovereignty and the rule of law is the opposite of what Joseph suggests. Palmer concludes his analysis by noting that the rule of law is not just a vulnerable norm in New Zealand.<sup>152</sup> It is Parliament's unlimited legislative power that appears to be the key source of this vulnerability.

### *The Treaty of Waitangi*

Judicial rhetoric suggests that the Treaty of Waitangi (the Treaty) is "of the greatest constitutional importance to New Zealand".<sup>153</sup> Despite its clear symbolic importance the Treaty has only limited legal and constitutional effect.<sup>154</sup> There are tensions inherent in the need to give effect to Treaty rights and Parliamentary sovereignty which may override those rights. There has been some academic speculation that the Treaty might act as a constitutional limit on Parliamentary power,<sup>155</sup> but the debate is not yet settled. In the current constitutional climate the Treaty does not appear to act as an effective constraint on Parliament's exercise of the legislative function.

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150 Martin Loughlin *Public Law and Political Theory* (Clarendon Press, Oxford, 1992) at 151.

151 Palmer "New Zealand Constitutional Culture", above n 4, at 588-589. Palmer's understanding of the rule of law is not necessarily a substantive one — and is certainly not as 'thick' as Joseph's interpretation — but the point remains that Parliament can override the rule of law through legislation.

152 Palmer "New Zealand Constitutional Culture", above n 4, at 589.

153 *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 516.

154 On the Treaty of Waitangi and constitutional symbolism see Matthew SR Palmer "The Treaty of Waitangi in Legislation" [2001] NZLJ 207 at 209.

155 See Kenneth Keith "The Roles of the Tribunal, the Courts and the Legislature" (1995) 25 VUWLR 129 at 138.

The Treaty has only limited legal effect at common law. A treaty of cession will not bind the political branches of government and is not enforceable in the ordinary courts except to the extent that it has been incorporated into domestic law.<sup>156</sup> The leading decision on the legal status of the Treaty, *Hoani Te Heuheu Tukino v Aotea District Māori Land Board*, confirmed that this general rule applies to the Treaty.<sup>157</sup>

Under [Article I of the English language version of the Treaty] there had been a complete cession of all the rights and powers of sovereignty of the chiefs. It is well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the courts, except in so far as they have been incorporated in the municipal law. [...] So far as the appellant invokes the assistance of the court, it is clear that he cannot rest his claim on the Treaty of Waitangi and must refer the court to some statutory recognition of the right claimed by him.

The practical result of the Treaty's legal status as described in *Te Heuheu* is that it is usually considered to be of legal relevance only where statutory obligations import the Treaty into particular contexts.<sup>158</sup> Further, part of the underlying rationale for the decision in *Te Heuheu* appears to be maintenance of the doctrine of Parliamentary sovereignty. On this matter, *Te Heuheu* confirmed the sovereign power of the political branch to enact legislative provisions contrary to the rights and interests guaranteed by the Treaty.<sup>159</sup> *Te Heuheu* is authority for the proposition that the Treaty is not a formal fetter on Parliament's legislative sovereignty. This position has been confirmed by subsequent case law.<sup>160</sup>

*Te Heuheu* has been reaffirmed by the courts, and the rule as to the legal effect of the Treaty at common law has been described as a "fundamental proposition".<sup>161</sup> The legal effect of the Treaty remains limited at common law despite its constitutional pedigree:<sup>162</sup>

The Māori perception, in particular, is that the Treaty is a 'basic document'. Sir Robin Cooke said that orthodox legal thought was moving in the same direction. However, the Treaty, as it currently applies, has no juridical standing for enforcement in the national courts. It has socio-political, not legal, force. It does not establish New Zealand Government and cannot be regarded as a constitution.

This statement, while accurate, does little to acknowledge the tension inherent in the relationship between the constitutional importance of the Treaty and the orthodox legal position. Legal and political developments since *Te Heuheu* have provided the Treaty with a significant, if informal, constitutional role. For instance, the *Cabinet Manual* requires Ministers to draw to the attention of Cabinet legislative proposals that affect or have implications for the principles of the Treaty of

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156 *Vajeesingji Joravarsingji v Secretary of State for India* (1924) LR 51 IA 357 (PC) at 360.

157 *Hoani Te Heuheu Tukino v Aotea District Māori Land Board* [1941] AC 308 (PC) at 324-325.

158 See BV Harris "The Treaty of Waitangi and the Constitutional Future of New Zealand" [2005] NZ Law Review 189 at 191-192.

159 See PG McHugh "Aboriginal Title in New Zealand Courts" (1984) 2 Cant LR 235 at 256.

160 *Te Runanga o Wharekauri Rekohu v Attorney-General* [1993] 2 NZLR 301 (CA) at 309.

161 *Ngati Apa ki te Waipounamu v Attorney-General* [2003] 1 NZLR 779 (HC) at 804.

162 Joseph *Constitutional and Administrative Law in New Zealand*, above n 1, at 132 (footnotes omitted).

Waitangi,<sup>163</sup> and there are now numerous statutory references to the Treaty that impact on a wide range of policy areas. This suggests an acceptance of the place of the Treaty by the political branches of government.<sup>164</sup> The courts have relied on this development to expand the legal application of the Treaty, using it as an extrinsic aid to statutory interpretation even where it is not directly referred to.<sup>165</sup> Further, the decisions of the courts on the legal application of the Treaty and its principles where those concepts do receive statutory recognition have resulted in a ‘constitutionalisation’ of the Treaty.<sup>166</sup> Finally, a local Supreme Court may be more willing to develop an indigenous jurisprudence involving the Treaty, not least because the Supreme Court’s establishing legislation expressly contemplates resolution of Treaty issues.<sup>167</sup> Taken together, these developments lend support to the observation that special protection of Māori interests represents the “status quo” in New Zealand’s prevailing legal and political culture.<sup>168</sup> The majority view appears to be that the Treaty’s significance is such that it is always speaking in a constitutional voice, even in the absence of express statutory recognition.<sup>169</sup>

Whether *Te Heuheu* should remain the law in the modern legal climate is clearly a matter of some debate.<sup>170</sup> A formal constitutional role for the Treaty that is in some sense resistant to Parliamentary sovereignty will, in time, become necessary for the continuing legitimacy of New Zealand’s cultural arrangements.<sup>171</sup> New Zealand’s current Chief Justice has stated extra-judicially that:<sup>172</sup>

[T]he sovereignty obtained by the British Crown was a sovereignty qualified by the Treaty. It has not been treated as so qualified as a matter of domestic law. But the elements of our unwritten constitution have never been fully explored to date.

It is, accordingly, not yet clear what form this role will take. One possibility is that a jurisprudence will develop that recognises that some legal and political interests based on the principles of the Treaty are analogous to fundamental human rights.<sup>173</sup> This understanding suggests that the legal

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163 Cabinet Office *Cabinet Manual* (Wellington, 2008) at [7.60].

164 See State-owned Enterprises Act 1986, ss 9 and 46Q(1); Conservation Act 1987, s 4; Education Act 1989, s 181; Crown Minerals Act 1991, s 4; Resource Management Act 1991, s 8; Crown Research Institutes Act 1992, s 10; New Zealand Public Health and Disability Act 2000, s 4; Local Government Act 2002, s 4; Land Transport Management Act 2003, s 4; Public Records Act 2005, s 7.

165 See *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210.

166 See Catherine Callaghan “‘Constitutionalisation’ of Treaties by the Courts: The Treaty of Waitangi and the Treaty of Rome Compared” (1998) 18 NZULR 334. See also Joseph “Constitutional Review Now”, above n 115.

167 The purpose of the Supreme Court Act includes “...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”: see Supreme Court Act 2003, s 3(1)(a)(ii).

168 See Harris “The Treaty of Waitangi and the Constitutional Future of New Zealand”, above n 158, at 193.

169 See *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 656.

170 See Sian Elias “The Treaty of Waitangi and the Separation of Powers in New Zealand” in BD Gray and RB McClintock (eds) *Courts and Policy: Checking the Balance* (Brookers, Wellington, 1995) 206 at 213, 219.

171 David V Williams “The Treaty of Waitangi: A ‘Bridle’ on Parliamentary Sovereignty?” (2007) 22 NZULR 598.

172 Elias “Sovereignty in the 21st Century”, above n 84, at 153 (footnote omitted).

173 This analogy has already been recognised by the Human Rights Commission: see generally Human Rights Commission *Human Rights and the Treaty of Waitangi: Te Mana i Waitangi* (Wellington, 2003). See also Ivor Richardson “Rights Jurisprudence — Justice For All?” in Philip A Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 61 at 75.



system should respond to claims based on Treaty rights in a manner consistent with the recognition of other fundamental rights, including (where appropriate) constitutional recognition.<sup>174</sup> There is Waitangi Tribunal jurisprudence that supports this analysis,<sup>175</sup> and recognition of Treaty rights is consistent with the Treaty jurisprudence of the courts.<sup>176</sup> As discussed above, recognition of such rights does not necessarily limit Parliamentary sovereignty, and it is unlikely that Treaty rights would lead other fundamental rights in this regard.

In fact, Parliament's willingness and ability to pass legislation in apparent contravention of the principles of the Treaty of Waitangi was arguably reaffirmed with the relatively recent enactment of the Foreshore and Seabed Act 2004. That legislation was passed in response to *Attorney-General v Ngati Apa*,<sup>177</sup> which dealt with the issue of Māori customary title to the foreshore and seabed. The Court of Appeal found that Māori customary title had not been extinguished on the Crown's acquisition of sovereignty, and that customary title would continue until lawfully extinguished. This had never been achieved on a general basis, and it was the proper role of the Māori Land Court to determine whether customary title had been extinguished or remained valid in each case.<sup>178</sup> The Foreshore and Seabed Act responded to that finding by vesting title of all foreshore and seabed land in the Crown,<sup>179</sup> effectively by extinguishing customary title. It also provided for a regime to allow for more limited recognition of territorial rights<sup>180</sup> and rights to carry out certain customary activities.<sup>181</sup>

While these issues primarily implicated common law customary rights, a claim that the government policy preceding the legislation was in breach of the principles of the Treaty was pursued before the Waitangi Tribunal.<sup>182</sup> The Tribunal found that the government policy was clearly in breach of Article II and Article III of the Treaty. The Tribunal considered that land comprising the foreshore and seabed was a taonga to Māori in terms of Article II, and therefore entitled to protection under the Treaty. The removal by the government of access to the Māori Land Court to determine issues of customary title therefore breached Article II.<sup>183</sup> In addition, the Article III guarantee of equal protection under the law was breached by the policy because it protected other existing private property rights to the foreshore and seabed while removing altogether the prospect of customary title.<sup>184</sup> Neither potential breach could be justified in accordance with the

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174 See Edward Willis "Legal Recognition of Rights Derived from the Treaty of Waitangi" (2010) 8 NZJPIL 217.

175 Willis "Legal Recognition of Rights Derived from the Treaty of Waitangi", *ibid.*, at 222-232.

176 Willis "Legal Recognition of Rights Derived from the Treaty of Waitangi", *ibid.*, at 233-235.

177 *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA).

178 The Māori Land Court's mandate is set out in Te Ture Whenua Māori Act 1993.

179 Foreshore and Seabed Act 2004, s 13(1).

180 Foreshore and Seabed Act 2004, ss 32-39.

181 Foreshore and Seabed Act 2004, ss 48-53.

182 For details of the political controversy and policy processes and that led to the Foreshore and Seabed Act 2003 see Harris "The Treaty of Waitangi and the Constitutional Future of New Zealand", above n 158, at 191-197; Claire Charters "Responding to Waldron's Defence of Legislatures: Why New Zealand's Parliament Does Not Protect Rights in Hard Cases" [2006] NZ Law Review 621 at 632-635.

183 Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (WAI 1071, 2004) at [5.1.1].

184 Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy*, *ibid.*, at [5.1.3].

Crown-Māori Treaty relationship, and so the Tribunal's ultimate conclusion was that the enactment of the proposed legislation would amount to a violation of Treaty rights.<sup>185</sup>

Despite these clear findings, and indeed in the face of strong domestic political pressure,<sup>186</sup> Parliament enacted the Foreshore and Seabed Act in substantially similar terms to the criticised policy. The normative force of the Treaty — which perhaps manifested in stronger and more explicit terms in respect of this issue than on any other in recent history<sup>187</sup> — and the related ability of the Tribunal to act as Parliament's conscience on Treaty matters did not appear to perturb Parliament as it abrogated Māori rights in passage of legislation.<sup>188</sup> It remains unclear whether this result represents a satisfactory constitutional outcome, and the Foreshore and Seabed Act controversy highlights that the place of the Treaty in New Zealand's constitutional arrangements continues to be an important matter of debate. The controversy does at least illustrate that Parliamentary sovereignty continues to trump any perceived need to ensure consistency with principles of the Treaty, despite the increasing indications of a move away from orthodox sovereignty theory towards increasing legal and constitutional recognition of the Treaty of Waitangi.

### *The Influence of Substantive Liberal Values*

The broad constitutional analysis set out above suggests strongly that there is recognition and acceptance of substantive limits on the legitimate exercise of public power in New Zealand. This conclusion is perhaps unsurprising. While orthodox sovereignty theory does contemplate substantively unlimited powers of legislation for Parliament, “[t]he dangers of such unlimited powers are obvious enough and not tolerated in most democratic countries”.<sup>189</sup> In this respect it appears New Zealand constitutional theory and practice does not diverge significantly from that of other democratic nations. Substantive limits on constitutional authority are a key aspect of constitutionalism, and given New Zealand's constitutional history and experience there is little reason to doubt that New Zealand is a state that “upholds the rule of law and constitutional government”.<sup>190</sup>

However, nothing in the analysis goes as far as to suggest that the four sources of values examined above — representative democracy, fundamental human rights, the rule of law and the

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185 Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy*, *ibid*, at 127-136.

186 Before the Select Committee, 94 per cent of submissions received opposed the proposed legislation: Harris “The Treaty of Waitangi and the Constitutional Future of New Zealand”, above n 158, at 195. In addition, anecdotal reports suggest that in excess of 20,000 people (both Māori and non-Māori) marched on Parliament to express concern at the proposed legislation, making it one of the largest acts of popular political protest in recent times.

187 See above n 186.

188 The legislative process that led to the enactment of the Foreshore and Seabed Act is critically examined in Charters “Responding to Waldron's Defence of Legislatures: Why New Zealand's Parliament Does Not Protect Rights in Hard Cases”, above n 182.

189 Palmer and Palmer *Bridled Power*, above n 14, at 156.

190 Philip A Joseph “The Legal History and Framework of the Constitution” in Colin James (ed) *Building the Constitution* (Victoria University of Wellington Institute of Policy Studies, 2000) 168 at 168.

Treaty of Waitangi — are effective in the face of a contrary expression of legislative will. While these values are important in a constitutional sense and therefore influential over the exercise of constitutional authority in practice, they do not appear to challenge directly Parliament’s sovereign legislative power. The strength of New Zealand’s commitment to the doctrine of Parliamentary sovereignty admits no inherent limits on the power of legislation even in the face of recognition liberal values.

There remains, however, significant value in an appeal to these ideals from a normative perspective. The values inherent in representative democracy, fundamental rights, the rule of law and the principles of the Treaty of Waitangi manifestly influence the prevailing understanding of the legitimacy of public power, and therefore represent an important dimension of constitutionalism that orthodox theories of Parliamentary supremacy fail to recognise. Such values are “alive in the background” of the New Zealand constitutional structure even if they are not always made express in constitutional analysis.<sup>191</sup> Reconciling the narrative of substantive limits on the legitimate exercise of public power more fully therefore remains a key challenge. One solution is, of course, to revisit the contemporary relevance of the notion of Parliamentary sovereignty. The issue of limits on Parliament’s legislative function was formally identified as “significant and topical” in respect of future constitutional reform,<sup>192</sup> for example. But this is a debate about future changes. While important in its own right, especially if calls for the adoption of a written constitution gather sufficient momentum, this debate risks overlooking the fact that acceptance of both Parliamentary sovereignty and the need for constitutional government currently exist within New Zealand’s constitutional framework. Further, there appears to be little indicative evidence to suggest that the *prima facie* tension between these two constitutional touchstones masks a deeper, more acute constitutional challenge.

But important questions remain. Even though there is an apparent level of comfort with the idea of Parliament as a supreme legislator, it has still not been determined exactly what that means for Parliament to legislate under the law of the constitution.<sup>193</sup> Put another way, it is not yet known what the appropriate or principled response might be to a valid claim that in discharging the legislative function Parliament has acted unconstitutionally. Every exercise of public power, including the discharge of the legislative function by Parliament, must be subject to substantive limits if it is to be considered legitimate or constitutional. Consistency with these limits is a requirement of constitutional government. Over 30 years ago Sir Owen Woodhouse suggested:<sup>194</sup>

[...] as a matter of constitutional principle there are ultimate limits upon a proper exercise of sovereign power in our democratic community. In the case of the Legislature those limits

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191 See BV Harris “The Law Making Power of the Judiciary” in Philip A Joseph (ed) *Essays on the Constitution* (Brooker’s, Wellington, 1995) 265 at 269.

192 Constitutional Arrangements Committee *Inquiry to Review New Zealand’s Existing Constitutional Arrangements: Report of the Constitutional Arrangements Committee I 24A* (House of Representatives, Wellington, 2005) at [78].

193 See Elias “Sovereignty in the 21st Century”, above n 84, at 162.

194 Owen Woodhouse *Government Under the Law* (Price Milburn, Wellington, 1979) at 11.

are nebulous to a degree and they are unenforceable by the Courts. But they are limits nonetheless because beyond them there is an absence of constitutional authority to act.

Further analysis of these nebulous and ostensibly unenforceable constitutional limits on the exercise of public power remains critical to understanding the nature of New Zealand's commitment to liberal constitutionalism.

# CHAPTER FIVE

## CONSTITUTIONALISM AND POLITICS

The challenge remaining after the analysis set out in chapter four is to reconcile satisfactorily New Zealand's constitutional arrangements with a coherent theory of constitutionalism. In light of the recent popularity of theories of political constitutionalism,<sup>1</sup> this chapter investigates whether a focus on the normative value of politics may help to achieve this reconciliation. It is contended that political constitutionalism does offer useful insight into the way the constitution functions. In particular, political constitutionalism provides renewed recognition of, and normative support for, the relevance of political institutions and processes as an important site of constitutional activity. However, political constitutionalism's focus on *ordinary* political processes as the *exclusive* site of constitutional activity implies a necessary commitment to a normatively 'thin' conception of constitutionalism. The weight of the fundamental principles and values that pervade New Zealand's constitutional tradition heavily count against this normatively thin conception. Accordingly, despite the valuable insight it offers, the chapter concludes that political constitutionalism does not represent a complete normative model of the New Zealand constitution.

### *The Core Tenets of Political Constitutionalism*

Rather than representing a single normative model of the constitution, political constitutionalism comprises a number of perspectives that coalesce around certain shared claims.<sup>2</sup> Different political constitutionalists may seek to place distinctive emphasis on particular assumptions or lines of argument, but it is a shared commitment to several core tenets that identifies a perspective as falling within the bounds of political constitutionalism. This section describes those shared commitments.

### *What is Political Constitutionalism?*

Consistent with the analysis in chapter one, this chapter's interest in political constitutionalism is as a normative model of a constitution. Political constitutionalism is therefore distinct from the concept of a political constitution. Accounts of political constitutions tend to proceed in descriptive

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1 See, for example, the collection of essays published in (2013) 14 German LJ 2103-2292.

2 A useful account of the development of political constitutionalism and its distinctive characteristics is provided in Graham Gee and Gréoire CN Webber "What is a Political Constitution?" (2010) 30 Oxford J Legal Stud 273. The analysis in this chapter draws on, and is largely consistent with, that account.

terms,<sup>3</sup> whereas theories of constitutionalism are inherently normative because they seek to establish the legitimacy of the constitution in moral terms.<sup>4</sup> The potential value in political constitutionalism as a model for the New Zealand constitution lies in its ability to supply an explanatory framework for the inherent normativity of New Zealand's constitutional arrangements.

Against that background, political constitutionalism may be understood as a collection of approaches to constitutional theory that are premised on certain shared commitments. First, if political constitutionalism has a single "core belief", it is that constitutional matters ought to be vindicated in the political arena.<sup>5</sup> Often, this leads to a focus on political institutions, and the associated view that political institutions should have dispositive authority over constitutional questions. But the idea that constitutional matters are political matters not only privileges particular institutions, it also privileges political methods. Processes such as conflict management,<sup>6</sup> public reasoning,<sup>7</sup> and accountability are quintessentially political,<sup>8</sup> providing substance to the claim that constitutional matters can and are vindicated in the political realm.

Implicit in this vision of constitutional politics is a second key premise: the rejection of the idea that legal claims are distinct from political claims. Griffith supplied the initial insight that law is an example of politics, rather than something separable from politics.<sup>9</sup> This insight distinguishes political constitutionalism not only because it inherently challenges models of constitutionalism based on legal institutions and process, but also because it identifies politics as the exclusive site of constitutional activity.

A third core tenet of political constitutionalism is an emphasis on the normative content of democracy. Democracy supplies the normative justification for reliance on the political process to sustain legitimate government. Often this claim is explained with reference to the concepts of political equality and accountability.<sup>10</sup> From this perspective, the democratic process is the only means to secure authority that is "neither arbitrary nor capricious, but which is reasoned and is

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3 The classic descriptive account of the United Kingdom's political constitution is JAG Griffith "The Political Constitution" (1979) 42 MLR 1. For an example of a descriptive (and comparative) account of the New Zealand constitution that takes politics seriously, see Matthew SR Palmer "Constitutional Realism about Constitutional Protection: Indigenous Rights under a Judicialized and a Politicized Constitution" (2006) 29 Dalhousie LJ 1.

4 See Poul F Kjaer "Legitimacy through Constitutionalism" in Aldo Mascareno and Kathya Araujo (eds) *Legitimization in World Society* (Ashgate, Surrey, 2012) 99. Compare Paul Scott "(Political) Constitutions and (Political) Constitutionalism" (2013) 14 German LJ 2157 at 2162.

5 Marco Goldoni "Constitutional Reasoning According to Political Constitutionalism: Comment on Richard Bellamy" (2013) 14 German LJ 1053 at 1053.

6 See Griffith "The Political Constitution", above n 3, at 20.

7 See Richard Bellamy *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, Cambridge, 2007) at 191.

8 See Adam Tomkins *Our Republican Constitution* (Hart, Oxford, 2005), at 1-6.

9 See Graham Gee "The Political Constitutionalism of JAG Griffith" (2008) 28 LS 20 at 31.

10 See, for example, Tomkins *Our Republican Constitution*, above n 8, at 64-65.

contestable at the instigation of those who are subject to it".<sup>11</sup> For a political constitutionalist only the political vindication of constitutional issues promotes self-government through democracy.<sup>12</sup>

Fourth, political constitutionalism admits no hierarchy of moral norms that require special recognition in the constitutional order. This is a feature of a commitment to political equality, and is most apparent in the common scepticism among political constitutionalists towards the idea that rights act as a foundation for special moral claims.<sup>13</sup> However, some perspectives have more tolerance for rights.<sup>14</sup> Tomkins, for example, understands rights to be political constructs that contribute to the public good, and therefore good government, but only to the extent that the other ends of good government are not unduly compromised. Tomkins' commitment to political constitutionalism is premised on a distinctively political understanding of rights rather than as establishing a normative hierarchy that informs constitutional government.<sup>15</sup> Even so, on either the rights scepticism or political construct model, the normative basis of political constitutionalism requires the rejection of foundational or fundamental norms as a moral imperative.

Finally, political constitutionalism necessarily contemplates that constitutional matters are addressed through *ordinary* political processes. All political issues, whether extraordinary or ordinary, fundamental or trivial, are accorded the same respect by the political process. This claim follows directly from political constitutionalism's strong emphasis on the normative content of ordinary democracy and its rejection of any hierarchy of moral or political norms. Political constitutionalism is, therefore, 'monist' in the sense used by Ackerman,<sup>16</sup> with political institutions (primarily Parliament) exercising plenary power. All theories of constitutionalism must allow for amendment and change, just as they must to some extent promote stability. Part of political constitutionalism's distinctive claim in this regard is that constitutional change — even fundamental or radical change — is and should be achieved via ordinary political processes.<sup>17</sup>

### ***What Political Constitutionalism is not***

As well as clarifying what political constitutionalism is, it is important to be clear about what it is not. Political constitutionalism represents a normative model of the constitution, and so a bare appeal to politics to explain constitutional practice is not itself sufficient to constitute a theory of political *constitutionalism*. Reliance on politics because of its historical or pragmatic value alone,

11 Tomkins *Our Republican Constitution*, *ibid.*, at 49.

12 In contrast to the direct focus on democracy as the normative component of political constitutionalism outlined here, Goldoni argues that political equality is the basic normative idea. The practical difference is unlikely to be significant, although it seems that Goldoni has been more heavily influenced by Bellamy's work than Tomkins': see Marco Goldoni "Two Internal Critiques of Political Constitutionalism" (2012) 10 I•CON 926 at 928-937. For an argument that an egalitarian premise is implicit in the normative aspect of state government see Martin Loughlin *Foundations of Public Law* (Oxford University Press, Oxford, 2010) at 198.

13 Griffith "The Political Constitution", above n 3, at 17; Bellamy *Political Constitutionalism*, above n 7, at 20-26.

14 See Adam Tomkins "The Role of the Courts in the Political Constitution" (2010) 60 U Toronto LJ 1 at 3.

15 There are, however, some signs that this commitment may be wavering: see especially Adam Tomkins "What's Left of the Political Constitution?" (2013) 14 German LJ 2275.

16 Bruce Ackerman *We the People: Foundations* (Harvard University Press, Cambridge, 1991) at 7-10. In contrast, liberal-legal constitutionalism is distinctively 'dualist' in the Ackerman sense.

17 Gee and Webber "What is a Political Constitution?", above n 2, at 296.

for example, fails to provide the normative justification for legitimate government that forms part of any serious model of constitutionalism.

The failure to understand the normative dimension of political constitutionalism in terms of the moral justification for public power characterises Hickford's analysis.<sup>18</sup> Hickford's concern is to demonstrate that historical constitutional tensions have tended to be reflected in political settlement. In pursuing this objective, Hickford invokes "the historicity of political constitutionalism", which he understands to provide "a real, but *not* absolute constraint on the main, live modes of influence, persuasion and rhetoric" that comprise political engagement.<sup>19</sup> The language of 'constraint' employs the idiom of constitutionalism, which seeks to limit the arbitrary exercise of political power by expounding a theory of what government can and cannot do legitimately. However, the idea that political choices and outcomes are "bounded by our traditions of behaviour" that "necessarily narrow what is perceived as the range of available decisions" does not constitute an account of political morality.<sup>20</sup> Such considerations partially explain political practice, but do not supply a normative justification for it.

This conceptual confusion between historical practice and constitutional principle has a long-standing pedigree in the unwritten constitutional tradition. The normative perspective adopted in this thesis requires a focus on principles and values. Historical analysis may complement, but should not supplant, this normative perspective:<sup>21</sup>

[A]lthough the search for right ordering must be rooted in historical experience and must acknowledge the variety of forms that history exhibit, unless such schemes meet certain basic conditions, they will be unable to sustain governmental ordering.

Analysis of historical political practice can be forward looking in the sense that it can help us to understand "why what happened yesterday may not happen tomorrow".<sup>22</sup> It does not, however, address questions of legitimacy or constitutional authority. Hickford's historicity of political constitutionalism represents a descriptive theory of politics rather than a normative theory of the constitution. It is for this reason that it cannot properly be understood as a theory of political *constitutionalism*.

This chapter agrees with Hickford that much of the New Zealand constitution can be explained with reference to politics — both political actors and institutions, and political processes. The difference lies in the normative significance that can properly be ascribed to New Zealand's undoubtedly political constitution, which can only be established by conducting a normative

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18 See Mark Hickford "The Historical, Political Constitution — Some Reflections on Political Constitution in New Zealand's History and its Possible Normative Value" [2013] NZ Law Review 585; *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire* (Oxford University Press, Oxford, 2011) at ch 1.

19 Hickford "The Historical, Political Constitution", *ibid*, at 622 (emphasis in the original). A similar idea is advanced in the context of the United Kingdom constitution in Gee "The Political Constitutionalism of JAG Griffith", above n 9, at 40.

20 Gee "The Political Constitutionalism of JAG Griffith", *ibid*, at 42.

21 Martin Loughlin *Foundations of Public Law*, above n 12, at 92.

22 JAG Griffith "Comment" [1963] PL 401 at 402.



assessment of political institutions and process in the contemporary operation of New Zealand's constitution. It is this task to which the remainder of this chapter is devoted.

## *The Political Dimension to New Zealand's Constitution*

There is a clear initial attraction to applying political constitutionalism in the New Zealand context, not least because the leading accounts of political constitutionalism have been developed with unwritten constitutional arrangements in mind.<sup>23</sup> Important aspects of New Zealand's system of government are manifestly political. Concepts such as Parliamentary sovereignty and Ministerial responsibility place an obvious emphasis on constitutional politics that aligns well with political constitutionalism. But taking political constitutionalism seriously invites a deeper inquiry into aspects of our constitutional arrangements that are not so readily associated with politics. In that regard, close examination of the twin drivers of liberal-legal constitutionalism — judicial consideration of constitutional matters and rights protection — shows that both take on a distinctively political character under New Zealand's constitution. Further, aspects of our constitution that are unique to New Zealand, such as the Treaty of Waitangi, appear to align with political constitutionalism at a high level.

### *Parliamentary Sovereignty*

As argued in chapter four, Parliamentary sovereignty is a defining characteristic of the New Zealand constitution. The doctrine provides that Parliament enjoys unlimited legislative authority.<sup>24</sup> The doctrine transcends legal definition, being understood as “at one and the same time a political fact, a product of the political history of [New Zealand, and] a convention of the constitution” as well as a “fundamental principle of the common law”.<sup>25</sup>

Acceptance of Parliamentary sovereignty formally places a political institution at the apex of the constitutional structure, aligning New Zealand's constitutional arrangements with political constitutionalism in at least two important ways. First, Parliamentary sovereignty institutionalises the plenary political power that is central to the model of political constitutionalism. Second, the doctrine itself is political in the sense that its parameters cannot be defined by law alone. This evidences a clear commitment to political constitutionalism in the sense that:<sup>26</sup>

[...] any constitutional system that subscribes to the principle of legislative supremacy is an ultimately political one, in the sense that, in the final analysis, respect for fundamental

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23 See Griffith “The Political Constitution”, above n 3; Tomkins *Our Republican Constitution*, above n 8.

24 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4 ed, Thomson Reuters, Wellington, 2014) at 515.

25 EW Thomas “The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium” (2000) 31 VUWLR 5 at 14.

26 Mark Elliott “Interpretative Bills of Rights and the Mystery of the Unwritten Constitution” [2011] NZ Law Review 591 at 609.

rights and basic principles of good government is contingent upon the acquiescence of politicians acting through the legislature.

Normatively, this translates into a focus on the desirability of democratic law-making, which affords an institutional justification for the doctrine of Parliamentary sovereignty.<sup>27</sup> The prominence of Parliament within the system of government is precisely how proponents of political constitutionalism envisage it working.

### ***Ministerial Responsibility***

Ministerial responsibility is an important complement to Parliamentary sovereignty. Ministerial responsibility refers to a set of constitutional conventions that ensure the government of the day is held to account by Parliament. The relevant conventions encompass both individual and collective ministerial responsibility to the House of Representatives. Individually, Ministers are required to provide explanations of policy and supporting information to the House for scrutiny. Additionally, all Ministers of the Crown are required to be Members of the House of Representatives,<sup>28</sup> promoting democratic accountability of Ministers to the electorate. Collectively, the whole of government is accountable to the House. A government defeated on an issue of confidence in the House must resign. This collective responsibility is necessary to maintain government responsibility for national policies and administration.<sup>29</sup>

Ministerial responsibility to Parliament promotes both political and democratic accountability in a manner that extends beyond strict legal liability. The prescriptive value in this distinctively political form of accountability has been neatly captured in the following passage:<sup>30</sup>

[N]o-one in authority is free to do whatever the law allows him [or her] to do. Within the ambit of statute and Common Law, everyone in authority is accountable to Parliament and the people for the way in which he [or she] exercises the powers and responsibilities of the official position he [or she] occupies. It is never an answer for him [or her] to say, "The courts are the keepers of my conscience, and the law has not found me out." This is one of the great gifts of the modern Westminster tradition, and there can be no question at all of deliberately departing from it.

Ministerial responsibility is the key constitutional doctrine in New Zealand's constitutional system that mediates the relationship between government and Parliament.<sup>31</sup> Under political models of constitutionalism this deeper accountability is essential to the proper functioning of our constitution.

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27 Bellamy *Political Constitutionalism*, above n 7, at 254.

28 Constitution Act 1986, s 6(1). See also the exception to this requirement in Constitution Act 1986, s 6(2).

29 Joseph *Constitutional and Administrative Law in New Zealand*, above n 24, at 241.

30 RQ Quentin-Baxter "Themes of Constitutional Development: The Need for a Favourable Climate of Discussion" (1985) 15 VUWLR 12 at 21.

31 Ian Harden and Norman Lewis *The Noble Lie: The British Constitution and the Rule of Law* (Hutchinson, London, 1986) at 85-86.

### *Remedial Deference*

The twin doctrines of Parliamentary sovereignty and Ministerial responsibility are obvious examples of the political nature of the New Zealand constitution. Less obvious, perhaps, is the role of the courts in promoting the political resolution of fundamental or controversial matters.<sup>32</sup> In any modern democracy that respects the principle of judicial independence,<sup>33</sup> questions touching on such issues are likely to fall before the courts for resolution. In certain cases where this occurs, the New Zealand courts have demonstrated a tendency to defer in respect of the final resolution of the matter in favour of the ‘political branch of government’.<sup>34</sup> In this way, the New Zealand courts can be seen to be promoting the ideals that underpin modern theories of political constitutionalism.

Two cases in particular seem to demonstrate this judicial deference in respect of constitutional matters. The first is *Fitzgerald v Muldoon*.<sup>35</sup> In that case, a civil servant challenged public statements of the Prime Minister that statutory obligations to make superannuation contributions would cease from the date of the Prime Minister’s press release. The High Court found in favour of the plaintiff on the basis that the Prime Minister’s statement breached article 1 of the Bill of Rights 1688 (Imp) prohibiting the suspension of the law other than by Parliamentary authority. The Prime Minister could not suspend the operation of legislation by fiat.

While mindful of the need to vindicate the plaintiff’s right to call the Prime Minister to account for his extra-legal actions, the Court was also keenly aware of political realities. The Prime Minister had recently led his party to victory in a national election, and in commanding a majority in the House of Representatives was highly likely to be successful in securing the passage of legislation by Parliament to give effect to his public statements. The Court therefore took the pragmatic step of adjourning the case for six months to allow Parliament to address the matter. Ultimately, legislation giving effect to the policy of the new Government was passed. Thus, while the question in *Fitzgerald v Muldoon* was on its face a legal one, the Court ultimately deferred to the political process — and Parliament in particular — to provide a lasting resolution to the matter.

The second case is *New Zealand Māori Council v Attorney-General* (the *Lands case*).<sup>36</sup> That case is famous for the Court of Appeal’s articulation of the principles of New Zealand’s founding document, the Treaty of Waitangi, and the finding that those principles had been breached by the Crown in the implementation of its policy to corporatise and privatise state-owned enterprises. A critical part of the implementation of the government’s policy involved the transfer of Crown assets to the ownership of those state enterprises, including millions of hectares of Crown land. However,

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32 The role of the courts in a political constitution is partly less obvious because it is not yet been subject to critical examination by political constitutionalists. An exception is Tomkins “The Role of the Courts in the Political Constitution”, above n 14.

33 Although there is a view that this principle is under threat in New Zealand: see Matthew SR Palmer “New Zealand Constitutional Culture” (2007) 22 NZULR 565 at 588-589.

34 This terminology follows Philip A Joseph “Parliament, the Courts and the Collaborative Enterprise” (2004) 15 KCLJ 321 at 321 in using the term ‘political branch of government’ to refer to the merged legislative and executive functions that are characteristic of the Westminster system of government.

35 *Fitzgerald v Muldoon* [1976] 2 NZLR 615 (HC).

36 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (HC and CA).

the Crown failed to take steps to ensure that it did not transfer land subject to indigenous rights claims, breaching a statutory obligation prohibiting the Crown from acting contrary to the principles of the Treaty of Waitangi.<sup>37</sup>

The *Lands case* is sometimes cited as an example of judicial activism.<sup>38</sup> While the articulation of Treaty principles involved a novel exercise of judicial power (albeit one made necessary by statute),<sup>39</sup> it is important not to overlook the deliberate approach of the Court in securing a political remedy for the successful plaintiffs. The orders of the Court in the *Lands case* did not dictate to the political branch the action to be taken to ensure compliance with the principles of the Treaty. Quite by contrast, the substantive detail of the principles of the Treaty and their application to the case were both left to be determined in further negotiations between the parties to the litigation. This ensured that the relationship between the Crown's Treaty obligations and the desire of the government to implement its policy was determined by a political process, not by the courts. In a case that strikes to the heart of New Zealand's constitutional arrangements, a political resolution was seen by all parties as the most appropriate.

Both *Fitzgerald* and the *Lands case* are understood to represent watershed moments in the development of constitutional law in New Zealand. And in both cases, the resolution of the issue in question was ultimately transferred to the political branch of government to be addressed. This seems to indicate that the courts see the political elements of the New Zealand constitution as contributing significantly to the legitimacy of the resolution of constitutional questions, rather than taking such matters on as a uniquely judicial task. This aligns well with orthodox understandings of political constitutionalism and the normative value it places on political institutions and processes.

### ***Statutory Rights Protection***

Legal versions of liberal constitutionalism centre on rights protection through legalisation and judicialisation of rights issues. In New Zealand, rights protection is often a distinctively political affair. This can be seen most readily in New Zealand's primary rights-protection instrument, the New Zealand Bill of Rights Act 1990 (NZBORA).

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37 State-owned Enterprises Act 1986, s 9.

38 See, for example, David Round "Judicial Activism and the Treaty: the Pendulum Returns" (2000) 9 Otago LR 653 at 654-658. Compare Janet McLean "Constitutional and Administrative Law: the Contribution of the Lord Cooke" in Paul Rishworth (ed) *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997) 221 at 223.

39 The Court was careful to emphasise the statutory basis for its judgment with the then President of the Court of Appeal stating that "[i]f the judiciary has been able to play a role to some extent creative, that is because the legislature has given the opportunity": *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (HC & CA) at 668. However, even then the novelty of the Court's approach can be overplayed. The New Zealand courts have generally adopted an approach to the Treaty that is consistent with indigenous rights jurisprudence internationally: see, for example, PG McHugh "What a Difference a Treaty Makes — the Pathway of Aboriginal Rights Jurisprudence in New Zealand Public Law" (2004) 15 PLR 87.

NZBORA affirms many of the fundamental rights that are protected in New Zealand. It includes democratic and civil rights,<sup>40</sup> non-discrimination and minority rights,<sup>41</sup> due process rights,<sup>42</sup> and rights protecting the life and security of the person.<sup>43</sup> However, it does not offer the kind of institutionalised rights protection contemplated by constitutional Bills of Rights. There are two reasons for this. First, NZBORA is a statutory bill of rights. NZBORA was enacted as an ordinary statute, and is able to be repealed or amended in the ordinary way. Further, NZBORA itself mandates that statutes inconsistent with NZBORA are to continue to have full force and effect notwithstanding that they trespass on fundamental rights and freedoms. Section 4 of NZBORA provides expressly that the courts may not hold any provision of an enactment to be impliedly repealed or invalid, or decline to apply any provision of an enactment, only because the provision is inconsistent with NZBORA.

Second, NZBORA is a Parliamentary bill of rights. Because the courts must give effect to an inconsistent enactment, Parliament is placed in the position of primary guardian of fundamental rights and freedoms. Determining whether or not fundamental rights should be respected in the legislative implementation of government policy is, therefore, a political matter. This political process of rights consideration is institutionalised through s 7, which provides for the Attorney-General to vet legislative proposals for consistency with NZBORA.<sup>44</sup> The Attorney-General is required to bring to the attention of the House of Representative any provision of a Bill that appears to be inconsistent with any of the NZBORA rights and freedoms.

Both the nature and operation of NZBORA appear to be aspects of New Zealand's constitutional arrangements in which political constitutionalists would find much to support. The courts may only enforce rights as against the actions of government to the extent that this has been endorsed by the Parliamentary legislative process. Further, the courts have on occasion endorsed a political conception of rights that fits well with political constitutionalism.<sup>45</sup>

[R]ights are never absolute. Individual freedoms are necessarily limited by membership of society. Individuals are not isolates. They flourish in their relationship with others. All rights are constrained by duties to other individuals and to the community. Individual freedom and community responsibility are opposite sides of the same coin, not the antithesis of each other.

Even sceptics of legal rights may struggle to find much to take issue with in NZBORA on its face. A residual concern internationally with Parliamentary bills of rights is a risk that “legislators come

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40 New Zealand Bill of Rights Act 1990, ss 12-18.

41 New Zealand Bill of Rights Act 1990, ss 19-20.

42 New Zealand Bill of Rights Act 1990, ss 21-27.

43 New Zealand Bill of Rights Act 1990, ss 8-11.

44 For discussion of the Attorney-General's rights vetting function see P Fitzgerald “Section 7 of the New Zealand Bill of Rights 1990: A Very Practical Power or a Well-Intentioned Nonsense” (1992) 22 VUWLR 135; Grant Huscroft “The Attorney-General, the Bill of Rights, and the Public Interest” in Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995) 133; Andrew S Butler “Strengthening the Bill of Rights” (2000) 31 VUWLR 129 at 144-146.

45 *R v Jefferies* (1993) 10 CRNZ 210 (CA) at 217. See also *R v B* [1995] 2 NZLR 172 (CA) at 182; *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 282-283.

under pressure to anticipate the court's ruling rather than to elaborate a view of their own",<sup>46</sup> so that a kind of *de facto* judicial review of legislation applies. The New Zealand example appears to mitigate this concern. While the theoretical possibility remains, the New Zealand courts have not yet confirmed that a declaration of inconsistency is an available remedy under NZBORA.<sup>47</sup> NZBORA rights therefore remain ongoing political considerations that are continuously vindicated (or not) via ordinary political processes.

### ***The Treaty of Waitangi***

The Treaty of Waitangi (the Treaty) is New Zealand's foundation document, and it continues to hold significant symbolic value as a partnership between the New Zealand government and the indigenous Māori population. However, its precise status as a constitutional instrument, and consequently its legal and political influence, remains subject to real and profound uncertainty.<sup>48</sup> Managing this uncertainty is an important function of New Zealand's constitution.

It seems to be of moment, therefore, that articulating the place of the Treaty in our legal and political system is primarily a political task. The basic common law rule is to treat the Treaty as if it is a valid treaty of cession.<sup>49</sup> Usually, a treaty of cession will not bind the political branch of government and is not enforceable in the ordinary courts except to the extent that it has been incorporated into domestic law.<sup>50</sup> One important consequence of this position is that the Treaty has no direct legal effect unless and until Parliament affords it statutory recognition. The corollary of this position is that Parliament is entitled to legislate contrary to the express terms and principles of the Treaty. Further, the extent of legal recognition afforded to the Treaty is determined by Parliament, as the words selected by Parliament to refer to the Treaty in legislation have a controlling impact on the Treaty's legal effect.<sup>51</sup> The legal and constitutional role of the Treaty is almost entirely politically determined.

### ***A Political Thread***

There is a political thread that can be traced through many of the key elements of the New Zealand constitution. The overtly political aspects, particularly Parliamentary sovereignty and Ministerial responsibility, are complemented by a judicial approach that recognises the legitimacy of political authority. Further, fundamental rights and foundational values can be reconciled with Parliamentary processes and political vindication through specific doctrines and institutions that shape such considerations as political interests. The sketch of New Zealand's constitutional

46 Bellamy *Political Constitutionalism*, above n 7, at 48.

47 The remedy was hinted at in *Moonen v Film and Literature Board of Review* [2000] 1 NZLR 9 (CA) at 17, but has never been applied by the courts. For the latest judicial developments in this area see *Taylor v Attorney-General* [2014] NZHC 1630 and *Taylor v Attorney-General* [2014] NZHC 2225. See also "Declarations of Inconsistency", below Chapter Six, at 120-124.

48 See generally, Matthew SR Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008).

49 *Hoani Te Heuheu Tukino v Aotea District Māori Land Board* [1941] AC 308 (PC) at 324. See also *Waitangi Tribunal Report of the Waitangi Tribunal on the Orakei Claim: WAI 9* (Waitangi Tribunal, Wellington, 1987) at 149.

50 *Vajesingji Joravarsingji v Secretary of State for India* (1924) LR 51 IA 357 (PC) at 360.

51 Matthew SR Palmer "The Treaty of Waitangi in Legislation" [2001] NZLJ 207 at 208.

arrangements in this part is necessarily broad brush, but themes are consistent enough with the core tenets of political constitutionalism to suggest that it offers the possibility of a workable normative model of the New Zealand constitution that ought to be taken seriously. At the very least, the political dimension to the New Zealand constitution and the associated normative imperative represented by a commitment to democracy is of such moment that any theory of constitutionalism must squarely confront it.

The analysis in this part is, in important respects, incomplete. Some of the characterisations employed and examples relied on may appear to those familiar with the New Zealand constitution to be somewhat self-serving, unduly narrow in focus, or unfairly taken in isolation from potential counter-examples and qualifications. These criticisms have some force, but accurate description of existing constitutional arrangements is not the primary goal of political constitutionalism. The analysis presented here is intended to demonstrate that key aspects of New Zealand's constitution are able to be reconciled with the general precepts of political constitutionalism in a broad way. The utility of a model of constitutionalism is that, if accepted, it identifies exceptions as outliers, and supplies a credible, normative rationale to justify that interpretation. So far, all that has been demonstrated is that political constitutionalism is a contender in this respect. Further analysis is needed to determine whether the apparent affinity with political constitutionalism is sufficiently strong that the potential outliers within our constitutional arrangements ought to heed the normative guidance offered by political constitutionalism.

### *The Supra-political Dimension to New Zealand's Constitution*

Despite the ostensibly political nature of New Zealand's constitution, certain constitutional elements challenge the application of political constitutionalism as a normative model. This part argues that the core tenets of political constitutionalism fail to capture at least two important aspects of the New Zealand constitution. The first is the rights-centred approach adopted by the New Zealand courts. The second is the tendency of constitutional actors to seek a 'constitutional space' for political activity where constitutional fundamentals are involved. This tendency may manifest as a move away from representative towards direct democracy, or through the augmentation of political deliberation with legal scrutiny. In either case, the notion central to political constitutionalism that ordinary politics is the only normatively defensible site of constitutional activity is challenged directly.

#### ***Rights-centred Adjudication***

The analysis of rights protection under NZBORA in the previous part largely passed over the interpretative role of the courts. That interpretative role is important, and signals a richer approach to the resolution of issues involving fundamental rights and values than abstract political consideration. The New Zealand courts' approach to rights issues is at least at times one that focuses on "the

positive assurance of rights”.<sup>52</sup> This “rights-centred approach” is a distinctive feature of New Zealand’s constitutional jurisprudence that stands in contrast to deterrence-centred approaches or approaches that seek to balance the overall interests of justice.<sup>53</sup> This approach ensures the moral imperative inherent in the idea of fundamental rights is given primacy of consideration when such matters fall before the courts for resolution. The approach has been described in the following terms:<sup>54</sup>

A rights-centred approach draws on the rhetoric of rights language, as a powerful factor in the argumentation and balancing of competing interests. Bills of rights language is deliberately general so as to direct the focus on the values that underpin protected rights.

This approach suggests a hierarchy of moral norms with affirmed rights taking precedence. Orthodox theories of political constitutionalism eschew any such hierarchy, denying that rights matters have any inherent value over and above other political considerations.

One obvious manifestation of this rights-centred approach is in the development of judicial remedies for breach of NZBORA rights and freedoms.<sup>55</sup> NZBORA itself does not contain provisions dealing with remedies for breaches of the fundamental rights and freedoms it affirms. Despite this lacuna, the courts will consciously develop and apply judicial remedies that seek to vindicate infringed rights.<sup>56</sup> The leading case in this regard is *Simpson v Attorney-General (Baigent’s case)*.<sup>57</sup> In that case, the police knowingly and unlawfully entered a private home under the pretence of executing a search warrant. While the search warrant was validly issued, the police arrived at an incorrect address. Although the mistake was pointed out to the lead officer at the time, a decision was taken to perform the search regardless. The victim of the unlawful search successfully brought a claim of breach by the police of the right to be free from unreasonable search and seizure under s 21 of NZBORA.

In vindicating the plaintiff’s right, the Court of Appeal went as far as to find that the Crown was primarily liable for breaches of NZBORA rights by the police. The Court awarded punitive damages against the Crown for the unlawful search. The punitive damages award in particular signals a degree of moral culpability on the part of the Crown where fundamental rights are breached. It is difficult to see how this type of moral condemnation on the part of the courts where fundamental rights are transgressed can be reconciled with political constitutionalism. The implication of the courts’ jurisprudence is that rights deserve special and specific protection, and that the judiciary will supply the necessary protection where the political branch of government has not. This aspect of the

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52 *R v Goodwin* [1993] 2 NZLR 153 (CA) at 193.

53 Joseph *Constitutional and Administrative Law in New Zealand*, above n 24, at 1282. See also Ivor Richardson “Rights Jurisprudence — Justice for All?” in Philip A Joseph (ed) *Essays on the Constitution* (Brooker’s, Wellington, 1995) 61 at 71-74.

54 Joseph *Constitutional and Administrative Law in New Zealand*, *ibid*, at 1283.

55 Joseph *Constitutional and Administrative Law in New Zealand*, *ibid*, at 1285-1287.

56 See, for example, *Dunlea v Attorney-General* [2000] 3 NZLR 136 (CA) at 161-162.

57 *Simpson v Attorney-General (Baigent’s case)* [1994] 3 NZLR 667 (CA).



courts' jurisprudence stands in contrast to political constitutionalism's suspicion of the judicialisation of rights and its specific rejection of a normative hierarchy of values.

This asymmetry between political constitutionalism and New Zealand rights jurisprudence grows starker when the courts' interpretative method is examined. There is strong evidence that the courts are willing to use the principle of legality in appropriate circumstances to protect fundamental rights even in the face of apparently contrary legislative intent. The principle of legality provides that, in the passage of legislation that may trespass on fundamental rights and freedoms:<sup>58</sup>

[...] Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

The courts now appear to hold the view that the principle of legality forms a part of New Zealand's constitutional framework.<sup>59</sup> This demonstrates a concern for the fundamental importance of recognised rights that the courts may 'read down' legislation in order to better give effect to those rights.<sup>60</sup> If the normative gravity of the right is sufficient, then the unambiguous literal meaning of a statutory provision may be completely displaced.<sup>61</sup>

This interpretive methodology is evidenced in a number of ways in the decisions of the courts. For example, in appropriate cases the courts have adopted a narrow construction of statutory offences that limits their effect.<sup>62</sup> In other cases the courts have implied reasonable limits on otherwise broad statutory powers.<sup>63</sup> One of the strongest examples of this trend is *Zaoui v Attorney-General*.<sup>64</sup> That case concerned a political refugee who risked deportation to Algeria as the subject of a security risk certificate issued pursuant to s 114D of the Immigration Act 1987. While the statute was silent on the matter, on appeal the Supreme Court determined that the risk to the appellant of torture or death in his home country was such that the fundamental rights of the appellant ought to be weighed against the alleged security risks involved. In doing so, the Court held that the right to freedom from torture and the right not to be deprived of life should be given effect so that a refugee with security risk status would not be deported.<sup>65</sup> To achieve this result, the Court had to overcome s 114K of the Immigration Act 1987, which requires the Minister of Immigration to make a decision on whether to deport based on confirmation of a security risk certificate in respect of a refugee based on security criteria. Section 114K makes no mention of

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58 *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 (HL) at 131.

59 *R v Pora* [2001] 2 NZLR 37 at [40]. See also *R v Allison* [2002] 1 NZLR 679 (CA) at [20]-[25].

60 Rodney Harrison "The New Public Law: A New Zealand Perspective" (2003) 14 PLR 41 at 48.

61 See also Joseph *Constitutional and Administrative Law in New Zealand*, above n 24, at 567.

62 See *Hopkinson v Police* [2004] 3 NZLR 704 (HC).

63 See *R v Laugalis* (1993) 10 CRNZ 350 (CA).

64 *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289 (SC). See also

65 See New Zealand Bill of Rights Act 1990, ss 8 and 9.

human rights considerations, so an orthodox exercise in statutory interpretation might conclude that such considerations are not directly relevant. The Court ‘read in’ human rights considerations despite the unambiguous text of that provision.<sup>66</sup> The effect of this approach is stark: the Minister’s statutory assessment was displaced by the Court’s insistence on the overwhelming importance of fundamental rights considerations.

### *Constitutional Politics*

Debates on constitutionalism are often centred on rights, but it is important not to overlook that constitutional matters extend to the broader nature of government and the institutional relationships between the separate branches of government.<sup>67</sup> In particular, political constitutionalism makes claims about the normative desirability of the ordinary political process that extends beyond scepticism of rights. The moral imperative of political constitutionalism lies in the apparent constitutional significance of ordinary political institutions and processes, regardless of the nature of the substantive matter on foot, as sustained by usual democratic pedigree.

New Zealand’s constitution does not always exhibit this type of agnosticism towards issues that are considered fundamental or constitutionally significant. Rather, it has a tendency to seek a ‘constitutional space’ for political activity where constitutional fundamentals are involved. One way this tendency may manifest is in a move away from ordinary representative democracy towards political processes that seek to align more directly with the mandate expressed by the electorate. Alternatively, political processes may deliberately promote legal scrutiny to augment ordinary political deliberation. In each case, in contrast to political constitutionalism where ordinary political processes are deemed sufficient, the New Zealand constitution looks to add something extra where matters are perceived to take on a constitutional significance.

One way the New Zealand constitution elevates constitutional matters beyond ordinary politics is through the ‘moral’ entrenchment of certain statutory provisions.<sup>68</sup> Section 268 of the Electoral Act 1993 purports to entrench a number of provisions relating to the conduct of elections in New Zealand against amendment by ordinary Parliamentary majority. Amendment or repeal may only be achieved with the sanction of 75 percent of all the Members of the House of Representatives or a majority of registered voters voting in a referendum. The reserved provisions relate to the establishment of electoral districts,<sup>69</sup> the qualification of electors,<sup>70</sup> the method of voting,<sup>71</sup> and the term of Parliament.<sup>72</sup> The Standing Orders of the House of Representatives support this approach to

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66 Claudia Geiringer “Parsing Sir Kenneth Keith’s Taxonomy of Human Rights: A Commentary on Illingworth and Evans Case” in Rick Bigwood (ed) *Public Interest Litigation: New Zealand Experience in International Perspective* (LexisNexis NZ, Wellington, 2006) 179 at 182.

67 James Allan “A Defence of the Status Quo” in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds) *Protecting Human Rights: Instruments and Institutions* (Oxford University Press, Oxford, 2003) 175 at 191-193.

68 It is clear that the entrenchment of certain statutory provisions in New Zealand was never intended to be legally binding: see (1956) 310 NZPD 2839.

69 Electoral Act 1993, ss 28, 35 and 36.

70 Electoral Act 1993, s 74.

71 Electoral Act 1993, s 168.

72 Constitution Act 1986, s 17(1).

entrenchment as well as contemplating its future use by providing that any proposal for entrenchment is to be carried by the requisite majority needed to repeal or amend the entrenched provision.<sup>73</sup> Thus, if a super-majority of 75% of member of the House of Representatives were to be imposed, the entrenched provisions would themselves need to be enacted by a 75% majority.

It is something of a distraction to inquire into whether s 268 operates as an effective entrenchment mechanism.<sup>74</sup> More relevant is that s 268 has conventional or moral force that makes it more resistant to amendment or repeal than ordinary legislation.<sup>75</sup> A government that sought to legislate in contravention of one of the reserved provisions would almost certainly face meaningful political consequences, including serious damage to its credibility in the eyes of the electorate. While many political constitutionalists would likely sympathise with the underlying intention of s 268 to protect the workability of fundamental democratic processes, the type of express moral ordering that the reserved provisions represent is out of step with political constitutionalism. It is a core tenet of political constitutionalism that nothing is to be considered so fundamental that it ought to inhibit the ordinary democratic process or depart from the usual lines of political accountability. The idea of single entrenchment maintains the political thread of the New Zealand constitution, but not in a way that can be easily reconciled with a political model of constitutionalism.

As an alternative to the creation of a special political process, political institutions may recognise the moral force of certain values by providing for a complementary role for the courts. A legal check may supplement the political process in order to add to the constitutional legitimacy of a particular course of government action in a way that would not be contemplated by political processes taking effect in isolation. Again, the constitution's preference for a political basis for action is manifest, as the courts look to Parliament for an endorsement of their constitutional role. But the nature of the courts' role again highlights an apparent divide between the operation of a political constitution and theories of political constitutionalism.

A recent example of this type of constitutional inquiry is the Supreme Court decision in *New Zealand Māori Council v Attorney-General*.<sup>76</sup> The background to the case concerned the development and implementation of a government policy to move a number of state-owned enterprises to a model of mixed ownership. Under the mixed-ownership model policy, the Crown would retain at least 51% of the shares in the company, and up to 49% would be sold via an initial public offering on the New Zealand stock exchange.<sup>77</sup> The case was concerned with the potential

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73 Standing Orders of the House of Representatives 2011, SO 263(1).

74 The author's view is that the purported single entrenchment of s 268 does not detract from the continuing model of Parliamentary sovereignty that is usually understood to apply in New Zealand. This position is consistent with the understanding of those responsible for the progenitor to s 268: see (1956) 310 NZPD 2839. For a full discussion of the relevant issues concerning entrenchment of statutory provisions in New Zealand see Joseph *Constitutional and Administrative Law in New Zealand*, above n 24, at 591-607.

75 Joseph *Constitutional and Administrative Law in New Zealand*, *ibid*, at 588.

76 *New Zealand Māori Council v Attorney-General* [2013] NZSC 6.

77 This policy, which is commonly referred to as the "mixed-ownership model" policy, is explained in Bill English *Budget Policy Statement 2012* (New Zealand Treasury, Wellington, 2012) available at <<http://www.treasury.govt.nz/budget/2012/bps/bps12.pdf>> (last accessed 24 September 2014).

impact that this new ownership model would have on Māori interests in natural resources affected by the operation of those previously state-owned enterprises.

From the outset, the Government recognised the potential impact of its policy on Māori interests, and it consulted specifically with iwi groups in order to develop a proposal that would recognise those interests appropriately. The result of that consultation was the inclusion in the relevant legislation of a clear statutory protection of Māori interests based on the Treaty of Waitangi in the following terms: “Nothing [...] shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi (Tiriti o Waitangi)”.<sup>78</sup> Inevitably, due to the controversial nature of the government’s policy, an iwi representative organisation challenged the implementation of the Government’s policy on the basis of inconsistency with that clear statutory obligation.

While the Court ultimately found in favour of the Crown, the result is less important than the way the Court appeared to understand its role. In particular, the Court deliberately emphasised the independence of its role and the importance of that independent assessment in promoting the values represented by the Treaty and its principles. For example, in assessing proposed Crown action for consistency with the principles of the Treaty, the Court affirmed that it:<sup>79</sup>

[...] must assess the difference between the ability of the Crown to act in a particular way if the proposed action does not occur and its likely post-action capacity. So impairment of an ability to provide a particular form of redress which is not in reasonable or substantial prospect, objectively evaluated, will not be relevantly material. To decide what is reasonable requires a contextual evaluation which may require consideration of the social and economic climate.

The need for independent, objective scrutiny of the relevant issues by the Court comes to the fore in this passage, but it is further emphasised by the Court’s concluding statement: “[t]he Court must address [these] issues directly and form its own judgment”.<sup>80</sup> The lesson seems to be that political deliberation is not sufficient to dispose of Treaty issues, and scrutiny by an independent judiciary is essential.

This understanding of the Court’s role should be taken as relatively uncontroversial. As noted above, the Treaty has no independent direct legal effect, and the courts may only determine the nature and scope of the principles of the Treaty where expressly invited to do so through statutory incorporation. The role the court was discharging in this case is, then, politically endorsed. In its judgment, the Court recognised the need for Parliamentary endorsement of their Treaty jurisprudence if it is to carry with it any legal effect. But the Court also acknowledged that the political branch of government appears to see value in independent assessment that the Court brings to this difficult and often controversial area of constitutional activity. The Court’s judgment was in

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78 Public Finance Act 1989, s 45Q(1).

79 *New Zealand Māori Council v Attorney-General* [2013] NZSC 6 at [89].

80 *New Zealand Māori Council v Attorney-General* [2013] NZSC 6 at [90(c)].

line with previous jurisprudence, which the Court noted could have been challenged by the Crown or avoided altogether through different legislative choices.<sup>81</sup> Instead, political actors choose to put the matter in issue before the courts to augment the ordinary political deliberations that had taken place.

### ***Ordinary Politics: Necessary but not Sufficient***

There are times when the New Zealand constitution looks past ordinary politics. Matters of rights, democracy and foundational values certainly take on a political dimension, but that dimension does not exhaust the scope of constitutional inquiry. Judicial augmentation of the political process plays an important role signalling the fundamental importance of certain values and principles. It would be a mistake to treat this tendency of the constitution as a judicial incursion into the political realm. As the reserve provisions of the Electoral Act demonstrate, the political process itself may be adapted in recognition of the constitutional significance of the task at hand. It would also be a mistake to look at these features of the constitution as evidence of dissatisfaction with ordinary political processes. The importance of political processes and institutions has already been demonstrated, and political endorsement underpins rights-centred adjudication (through the enactment of NZBORA), moral entrenchment of electoral issues and the role of the courts in Treaty matters. What the examples in this section show is that ordinary politics is not always considered sufficient to address constitutional matters.

### ***The ‘Critical Morality’ of the New Zealand Constitution***

If it is accepted that both rights-centred adjudication and the elevation of constitutional politics are features of the New Zealand constitution, it remains to be determined how these features are best understood in light of political theories of constitutionalism. One (valid) approach is to challenge the normative value of such features as inconsistent with a meaningful commitment to political constitutionalism. The political dimension of New Zealand’s constitution is obvious and pervasive. Political constitutionalism does well as a normative theory in explaining essential elements of the constitution, and this supports the claim that a normative commitment to political constitutionalism is consistent with New Zealand’s evolving constitutional tradition. Under this approach, rights-centred adjudication and constitutional politics ought to be treated as aberrations or outliers that need to be corrected for. Political constitutionalism sets the normative standard to which New Zealand’s constitutional practice should aspire, and activity inconsistent with that standard should be amended or discarded.

That is not the approach adopted here. It is highly relevant that neither rights-centred adjudication nor the practice of constitutional politics is understood to be unorthodox within New Zealand’s wider constitutional scheme. Both features are arguably essential components of the way in which the New Zealand constitution operates in practice. Together, these two features suggest

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81 *New Zealand Māori Council v Attorney-General* [2013] NZSC 6 at [58].

that the New Zealand constitution demonstrates a commitment to the realisation of substantive values that extends beyond the normative relevance of ordinary democratic processes. This approach challenges the ability of political constitutionalism to act as a complete normative model of New Zealand's constitutional arrangements, arguing that it fails to account for features of constitutional jurisprudence that are indispensable to the establishment of legitimate authority in a New Zealand context. The conclusion to be drawn from this argument is that the normative standard to which the New Zealand constitution aspires is much deeper than that advanced by theories of political constitutionalism.

Support for this second approach can be found in Palmer's view that there is something normatively valuable in describing a particular matter as 'constitutional' that would appear to elevate the matter above the realm of ordinary politics:<sup>82</sup>

In New Zealand political discourse use of the word "constitutional" [...] can instantly elevate the political stakes, especially if used by a respected independent commentator. [...] Almost all Ministers and Members of Parliament and all officials, with whom I advised or interacted as a senior public servant, would behave differently if clearly advised against, or in favour, of a course of action on the grounds of its constitutional propriety. Perhaps they were simply aware of the derived political effect of public value accorded to the constitution but I like to think that they also perceived some value in the constitution themselves.

Constitutional actors, and political actors in particular, tend to treat 'constitutional' matters as something different from ordinary political matters. Whereas political constitutionalism seeks to collapse any such distinction, distinguishing between constitutional and (ordinary) political matters is manifest in the way the New Zealand constitution operates in practice. If Palmer's view is accepted, and the approach of constitutional actors in rights-centred adjudication and constitutional politics provides useful supporting evidence that it should be, then any workable model of constitutionalism in the New Zealand context must observe the distinction between the constitutional and the merely political.

In order to understand how the undeniable role of politics in the New Zealand constitution may be reconciled with the thick, substantive normativity of certain constitutional doctrines, it may be helpful to draw on constitutional convention. The non-justiciable nature of convention means that it is a quintessentially political aspect of New Zealand's constitutional arrangements. However, constitutional conventions are not simply a matter of political practice or convenience, but are understood to ensure that "the constitution will be operated in accordance with the prevailing constitutional values or principles".<sup>83</sup> Constitutional conventions are normatively rich, being "permeated by values — democracy, the separation of powers, responsible government — which are generally regarded as possessing independent and permanent worth".<sup>84</sup> The establishment of a

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82 Matthew SR Palmer "What is New Zealand's Constitution and Who Interprets It? Constitutional Realism and the Importance of Public Office-holders" (2006) 17 PLR 133 at 141 ["Constitutional Realism"].

83 *Reference re Amendment of the Constitution of Canada* (1982) 125 DLR (3d) 1 at 84.

84 Joseph Jaconelli "The Nature of Constitutional Convention" (1999) 19 LS 24 at 44.

convention thus involves “distinguishing a genuinely normative rule from one which depends upon political vicissitudes”.<sup>85</sup> Constitutional convention can therefore be understood as a political mechanism that conditions the exercise of political authority with the prevailing normative standards — that is, the substantive morality — of good government.

The nature of that substantive constitutional morality is itself vitally important. Marshall argued that the source of this normative guidance could be found in the ‘critical morality’ of convention.<sup>86</sup> By this, Marshall meant that the obligation derived from the need to maintain fidelity to constitutional government. The moral imperative giving rise to the convention is an essential element in ensuring its continued observance.<sup>87</sup> This critical morality interpretation of convention may be contrasted with the idea of positive morality, which is based purely on the beliefs of political actors themselves in determining the content of their obligations. The critical morality of convention goes beyond positive morality by enabling evaluation of, and justification for, political action, despite the lack of legal sanction for non-observance. In drawing on the critical morality of convention, Marshall was able to link political practice with a constitutional commitment to substantive morality. Building on Marshall’s characterisation of the distinctive morality of convention, there appears to be a discernible strand of ‘critical morality’ that runs through and informs the practice of politics and other constitutional activity in the New Zealand constitution. Despite the ostensive flexibility offered by the political process and its usual forms of accountability, substantive moral obligations are recognised as constitutionally significant considerations that ought to be given special weight. The operation of the constitution may remain essentially political, but the normativity inherent in the idea of critical morality guides the operation of the political process so as to realise the substantive values that make our constitution genuinely constitutional. Importantly, the argument being advanced here is not that convention should be extended to account for the totality of constitutional practice in a New Zealand context.<sup>88</sup> Rather, the argument relies on the critical morality of constitutional convention as an analogy for the legitimate operation of political practice in a normatively rich but non-legal constitutional setting. Critical morality makes convention a matter of normativity rather than a matter of fact.<sup>89</sup> Similarly, the inherent normative component of New Zealand’s wider constitutional arrangements ensures that moral imperatives are recognised as ends of good government in their own right, not merely as an adjunct to a functioning but agnostic political process.

A committed political constitutionalist might respond at this point by seeking to recalibrate political constitutionalism in a manner that better reconciles with the ‘thick’ substantive morality of

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85 Vernon Bogdanor *The New British Constitution* (Hart Publishing, Oxford, 2009) at 222. See also W Ivor Jennings *The Law and the Constitution* (5 ed, University of London Press, London, 1959) at 135-136.

86 Geoffrey Marshall *Constitutional Conventions: The Rules and Forms of Political Accountability* (Clarendon Press, Oxford, 1984) at 12. See also Rodney Brazier “The Non-legal Constitution: Thoughts on Convention, Practice and Principle” (1992) 43 NILQ 262 at 268.

87 Allan *The Sovereignty of Law: Freedom, Constitution and Common Law* (Oxford University Press, Oxford, 2013) at 59-60.

88 Although there is certainly scope for a reappraisal of the role of convention within an unwritten constitution along these lines: see Mark Elliott “Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality and Convention” (2002) 22 LS 340.

89 Bogdanor *The New British Constitution*, above n 85, at 224.

the constitution that is observed in practice. Goldoni's 'internal critique' of political constitutionalism attempts to move existing theories of political constitutionalism in this direction.<sup>90</sup> Goldoni argues that political constitutionalism's focus on ordinary politics as the site of constitutional activity overlooks that constitutional matters relate not only to legal and political processes, but to the way in which a polity understands itself.<sup>91</sup> Ordinary political processes rely on accepted assumptions about the appropriateness of those processes. Where a conflict or controversy is genuinely constitutional, the continuing credibility of those assumptions is brought directly into question. A similar point can be made with respect to the (limited range of) normative values that underpin orthodox accounts of political constitutionalism. Political constitutionalism's normative foundations presuppose a shared substantive commitment to some concept of citizenship and equality. However, these concepts are not value-neutral, and are vigorously contested in New Zealand.<sup>92</sup> Ordinary political processes and institutions do not always respect the constitutional nature of the matter before them. Something more — something quintessentially *constitutional* — is required.<sup>93</sup>

Goldoni concludes that one of the functions of a constitution is to provide a prominent place in politics for certain ideals, and certain processes and procedures to revisit and reassess the relevance of those ideals.<sup>94</sup> Political constitutionalism must integrate ordinary and extraordinary political processes, values and institutions to account for the ways in which political constitutions actually can, and should, deal with constitutional matters. This variation on traditional versions of political constitutionalism aligns much more closely with the distinction between ordinary politics and constitutional (including legal) processes that have been identified in New Zealand's prevailing constitutional practice. However, Goldoni's approach is not as consistent with the core tenets of political constitutionalism as he claims.<sup>95</sup> The normative dimension of political constitutionalism is based on ordinary democratic processes, and it is implicit in political constitutionalism's veneration of democracy that there can be no hierarchy of political or moral norms that would compromise equal participation in politics. Political constitutionalism's focus on ordinary politics as the exclusive site of constitutional activity is a moral imperative that cannot be discarded without compromising the values that political constitutionalism purports to represent. The normative value of the democratic process is inherently undermined if other substantive values are given prominence within politics. By identifying the need for constitutional politics to promote fundamental ideals

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90 Goldoni "Two Internal Critiques of Political Constitutionalism", above n 12.

91 Goldoni "Two Internal Critiques of Political Constitutionalism", *ibid*, at 947.

92 See Nicole Roughan "Te Tiriti and the Constitution: Rethinking Citizenship, Justice, Equality and Democracy" (2005) 2 NZJPL 285.

93 Elsewhere, Goldoni reaches a similar conclusion by critiquing political constitutionalism's commitment to 'reasonable disagreement'. While ordinary political processes and institutions are sufficient to deal with reasonable disagreement, they are ill-equipped to deal with unreasonable or extraordinary disagreement. Constitutional matters tend to represent this 'radical disagreement', meaning ordinary political institutions and processes can be found lacking when constitutional matters arise: see Marco Goldoni and Christopher McCorkindale "Why We (Still) Need a Revolution" (2013) 14 German LJ 2197.

94 Goldoni "Two Internal Critiques of Political Constitutionalism", above n 12, at 946-948.

95 Goldoni deliberately describes his analysis as an 'internal critique' of political constitutionalism to signify his intention not to question the core tenets of that theory of constitutionalism: see Goldoni "Two Internal Critiques of Political Constitutionalism", *ibid*, at 927.



beyond ordinary democracy, Goldoni inadvertently strikes at the normative core of political constitutionalism.

This inconsistency is underscored by Gee and Webber, who identify the normatively ‘thin’ nature of political constitutionalism as one of its essential components.<sup>96</sup> They contended that it is essential to the nature of political constitutionalism that its internal workings are less visible, and therefore less obviously ‘constitutional’, than with an explicit statement of constitutional principles that will be enforced judicially. Further, political constitutionalism is always contingent, with the possibility of fundamental change always possible as a result of ordinary political processes. Ultimately, Gee and Webber conclude that “a political constitution is one that is prescriptive without really prescribing”.<sup>97</sup> It is deliberately normatively agnostic towards the recognition of fundamental values outside of the ordinary democratic process.<sup>98</sup> Supplementing this ‘thin’ normativity with recognition of other (often competing) substantive values may make political constitutionalism more constitutional, but it comes at the price of making it less political in both a descriptive and a normative sense. Goldoni’s vision of constitutionalism is, therefore, not a version of political constitutionalism as it purports to be.

Tomkins is the political constitutionalist that has been forced to confront this difficulty most directly. His preference for civil libertarian values has made it difficult for Tomkins to maintain his commitment to political constitutionalism, and ultimately he has been forced to grasp the nettle. Tomkins originally argued in favour of a supporting role of the courts in respect of fundamental rights, as long as their jurisprudence was consistent with the promotion of republican freedom on which Tomkins’ political philosophy is based.<sup>99</sup> While Tomkins guidance to the judiciary was initially presented under the rubric of political constitutionalism, the reality of the need to protect and promote fundamental principles and values within the wider constitutional system — beyond ordinary politics — has required Tomkins to reconsider his position. He now favours a variety of “mixed constitutionalism”, where both Parliament and the courts discharge their respective roles in furthering constitutional objectives.<sup>100</sup> Political constitutionalism has failed to realise Tomkins’ vision of reconciling politics with the promotion of liberal values. Tomkins ultimately concludes that he does “not want to go back to the political constitution”.<sup>101</sup>

The same considerations explain why political constitutionalism ultimately fails as a normative model of the New Zealand constitution. Its focus on ordinary politics as the exclusive site of constitutional activity is a consequence of a distinctively thin normativity. The New Zealand constitution does rely heavily on political institutions and processes, and political constitutionalism

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96 See Gee and Webber “What is a Political Constitution?”, above n 2.

97 Gee and Webber “What is a Political Constitution?”, *ibid*, at 289.

98 On some interpretations, respect for the democratic principle may be so strong that democracy itself is open to replacement: see Joel I Colón-Ríos *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (Routledge, London, 2012) at 59.

99 Tomkins “The Role of the Courts in the Political Constitution”, above n 14.

100 Tomkins “What’s Left of the Political Constitution?”, above n 15.

101 Tomkins “What’s Left of the Political Constitution?”, *ibid*, at 2292.

shows that this reliance can be normatively desirable. But New Zealand's constitutional arrangements demonstrate a commitment to substantive moral values that extends beyond the normative relevance of ordinary democratic processes. This, in turn, necessitates a role for constitutional activity outside of ordinary politics. The core tenets of political constitutionalism may sometimes influence, but they do not determine, the normative dimension of New Zealand's unwritten constitution.

### *Lessons from Politics for Theories of Constitutionalism*

By examining the constitution through the lens of political constitutionalism the deep and pervasive role of politics and the political comes into renewed focus. Political constitutionalism confirms the importance of those aspects of the constitution that are manifestly political, including the ultimate political control of the law through the doctrine of Parliamentary sovereignty and the political accountability of executive government through the principle of Ministerial responsibility. But even in areas where the political dimension might seem less than obvious, the core tenets of political constitutionalism seem to play an influential role. Judicial remediation of constitutional issues, rights protection and recognition of the foundational role of the Treaty of Waitangi to New Zealand's constitutional framework all present an inherently political dimension that forms a necessary part of the functioning of our constitution.

The use of the New Zealand constitution as a case study in political constitutionalism in turn offers insights into the limits of political constitutionalism as a normative model of a particular real-world constitution. New Zealand's constitution includes an inherent normative dimension that orthodox theories of political constitutionalism struggle to recognise and explain. Political constitutionalism's emphasis on ordinary political processes and institutions entails a commitment to a very thin version of a constitution's normativity. Such an approach can only offer an incomplete account of the rich vein of normative considerations that influence constitutional outcomes in practice. It is for this reason that political constitutionalism, despite the insights it offers, ultimately fails as a normative model of the New Zealand constitution.

Political constitutionalism's key limitation is that it fails to grapple seriously with the nature of matters that are properly considered to be constitutional, in the sense that those matters are treated as either superior to ordinary law or anterior to day-to-day politics, or both. Providing an account of the constitutional — those matters that are normatively important for legitimate government — is a crucial ingredient in any workable theory of constitutionalism, but it is an issue on which political constitutionalism has little to say. If a focus on what makes particular matters constitutional is taken as a point of departure, then a normative model of constitutionalism that exhibits greater fidelity to actual constitutional practice might be able to be developed. This approach would likely entail discarding the 'political' and 'legal' labels for particular models of constitutionalism altogether, at least initially. Given the contest of ideas represented by competing theories of political

and liberal-legal constitutionalism, each label is normatively charged in a manner that presupposes a particular framework for analysis. The more neutral starting point is to begin with evidence of what is considered to be ‘constitutional’ in the context of a particular jurisdiction. From there, the political or legal treatment of constitutional controversies each have an opportunity to assert their (possibly complementary) relevance, without bringing with them the normative baggage usually associated with each concept.

This approach aligns with first principles. Theories of constitutionalism ought to be based on what is constitutional, rather than what is legal or political. But it is also an approach that seems fit to be adapted to certain constitutional contexts more readily than others. In the written constitutional tradition, the constitution is usually considered to be an institution kept conceptually separate from ordinary law and politics. By capturing the foundational and fundamental precepts of good government in an identifiable canonical statement, a commitment to the constitution can be made separately from either support for political or legal process.<sup>102</sup> In addition, the moral superiority of the constitution within the hierarchy of political norms that ultimately guides the governing of society is in part established by this conceptual separation.

If such an approach to the development of a workable theory of constitutionalism was to be attempted in the New Zealand context, it would need to proceed on a very different basis. New Zealand’s constitution is unwritten. In the absence of a formal, canonical statement of constitutional principles and values, the conceptual separation between the constitutional on the one hand and the merely legal or political on the other can seem rather obscure. Any workable, coherent model of constitutionalism that affords due sensitivity to the New Zealand context must therefore be, in some meaningful sense, a theory of unwritten constitutionalism.

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102 Compare *Marbury v Madison* 5 US (1 Cranch) 137 (1803) at 177. Palmer observes that while the United States Supreme Court has privileged legal argument about the use of words by asserting the right of the judiciary to pronounce on the law of the constitution, in doing so that Court has “obscured the real meaning of what a constitution is in the United States”: Palmer “Constitutional Realism”, above n 82, at 134.

## CHAPTER SIX

# TOWARDS A THEORY OF UNWRITTEN CONSTITUTIONALISM

Developing a normative model of constitutionalism that reconciles reasonably well with New Zealand constitutional practice is important both for the explanatory value of that model and its ability to guide the exercise of public power in accordance with fundamental principles and values. This chapter begins the process of developing such a model. It combines the insights of chapters four and five concerning theories of constitutionalism in New Zealand with the position defended in earlier chapters that an unwritten constitution is distinctive. It sketches a theory of unwritten constitutionalism — a model of liberal constitutionalism sensitive to New Zealand’s unwritten constitutional context. The chapter offers a normative theory of New Zealand’s unwritten constitution premised on meaningful constraints on the exercise of public power even if these do not amount to enforceable limits, the promotion of stability without resorting to formal entrenchment, and a demonstrable commitment to constitutional fundamentals without relying on a source of exclusive constitutional authority. In short, unwritten constitutionalism offers a coherent theory of constitutionalism that is not contingent on the existence of an authoritative constitutional text. That is the key challenge presented by New Zealand’s unwritten constitutional structure that this thesis addresses.

In the analysis, it is clear that the unwritten constitution supplies the necessary principles and structures to secure the ends of liberal constitutionalism. These principles and structures are not novel,<sup>1</sup> although they may be nascent and their precise application may be contested. While the novelty of a constitutional position ought not count against its coherency, the individual strands of doctrine that are analysed below have the practical advantage of being tested in the context in which they are required to operate. What is original is the collection of these principles and doctrines together in an attempt to distil the outline of a complete theory of constitutionalism for New Zealand. The analysis in chapter four demonstrated that the ideals of constitutionalism pervade the New Zealand constitutional perspective. In a similar vein, this chapter provides evidence that liberal constitutionalism is often implicit in New Zealand constitutional practice. The aim of this final chapter is to identify the conceptual tools to bring this latent tendency to the fore.

Before proceeding to the substantive analysis, the modest scope of the goals of this final chapter should be noted. Any constitution is a complex institution, and the account given here of the New

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1 Although in some cases, such as with the Treaty of Waitangi, the sources of the New Zealand constitution are *sui generis*.

Zealand constitution cannot hope to be comprehensive or complete. The analysis is in the nature of a preliminary sketch, although it is hoped that the argument is carried far enough that the need for further inquiry has been demonstrated. In this sense, this chapter may be understood as laying the foundations for further research rather than providing a conclusive statement of a constitutional position.

### *The Unwritten Context*

In New Zealand, any plausible model of constitutionalism is required to take into account a distinctively unwritten constitutional context. This context means that models of constitutionalism in New Zealand are required to find practical expression in the absence of the principal institution that serves to legitimise the exercise of public power in the vast majority of liberal, democratic nations. That institution is a higher law written constitution, and its presence within a particular constitutional system has important implications for theories of constitutionalism.

Reliance on a uniquely authoritative constitutional text allows a commitment to liberal constitutionalism to be understood with reference to a particular set of features. These features commonly include:<sup>2</sup>

- a commitment to substantive liberal values through the incorporation of those values within a uniquely authoritative constitutional text;
- supremacy of those values over all forms of the exercise of public power, so that they are binding on all branches of government;
- entrenchment of those values against change by ordinary legal or political processes; and
- enforceable limits on the legitimate exercise of public power through an appeal to an independent judiciary.

These features demonstrate the functional value of a uniquely authoritative constitutional text. Liberal constitutionalism is able to be institutionalised within a constitutional framework that allows for constraint on the exercise of public power through the articulation of enforceable limits, for stability through entrenchment from change by ordinary legal or political processes, and for a tangible commitment to a particular set of fundamental values in the form of the express endorsement by a dispositive constitutional authority. It is the distinctive normativity of a written constitution that secures this functionality. A genuine written constitution is normatively superior to ordinary law and anterior to day-to-day politics in a way that distinguishes it from all other

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2 See, for example, Barak Cohen "Empowering Constitutionalism with Text from an Israeli Perspective" (2003) 18 Am U Int'l L Rev 585 at 585. See also Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4 ed, Thomson Reuters, Wellington, 2014) at 14; Alec Stone Sweet "The Politics of Constitutional Review in France and Europe" (2007) 5 I•CON 69 at 74-75.

sources of constitutional authority, allowing supremacy, entrenchment and enforcement to take effect.

The unwritten constitutional context is distinctive because it does not engage these same types of normative considerations. In contrast to a constitutional framework premised on a normatively superior constitutional text, New Zealand's unwritten constitution mediates between a plurality of authoritative sources without purporting to establish a clear normative hierarchy,<sup>3</sup> resists judicial determination of constitutional fundamentals in terms that displace competing interests,<sup>4</sup> struggles to limit the scope of Parliament's legislative authority definitively,<sup>5</sup> and seeks expression in ordinary as well as extraordinary political processes.<sup>6</sup> Accordingly, the constitutional structures and principles that support a commitment to liberal constitutionalism under a written constitution cannot be relied on to the same extent in the context of New Zealand's unwritten constitution.

This understanding of the distinctive nature of an unwritten constitution may, however, risk being superficial. Rather than conceiving of an unwritten constitution in terms of what it lacks, a workable theory of unwritten constitutionalism ought to address directly those features of a constitution that influence its normative potential. In this respect, an orthodox account that attempts to grapple seriously with the unwritten nature of the New Zealand constitution would likely emphasise the following features as characteristic of New Zealand's constitutional arrangements:

- A plurality of constitutional sources, without a defined hierarchy to mediate between competing constitutional requirements and principles.
- A lack of constitutional codification, with constitutional authority being drawn from a range of fragmented and *ad hoc* sources.
- An ambivalence towards fundamental law, and consequently the absence of an authoritative interpretation of the requirements and limits imposed by the constitution.
- An unentrenched constitutional structure, which is vulnerable to sudden and unexpected constitutional change.

These features are intimately connected with the unwritten constitutional form, and accordingly mark New Zealand's constitution as distinctively unwritten. Further, they expose the very different normative basis on which a plausible theory of unwritten constitutionalism is required to proceed. This constitutional context challenges assumptions inherent in a 'written' interpretation of liberal constitutionalism premised on authoritative, entrenched, enforceable limits on the legitimate

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3 See above, Chapter Two: The Distinctive Nature of an Unwritten Constitution.

4 See above, Chapter Three: Constitutional Reasoning: A Comparative Analysis.

5 See above, Chapter Four: Constitutionalism and Parliamentary Sovereignty.

6 See above, Chapter Five: Constitutionalism and Politics.

exercise of public power. It suggests that unwritten constitutions ought to be understood on their own terms.

### *Constraints without Limits*

A liberal vision of political morality understands that constitutional government is “one that *limits* the powers of public authorities”.<sup>7</sup> The greatest challenge to this liberal ideal of limited government under New Zealand’s unwritten constitutional arrangements is an absolutist interpretation of the doctrine of Parliamentary sovereignty. In the context of a written constitution, limits on the legitimate exercise of public power, including legislative power, are demonstrable on the face of the text and principles of the authoritative constitutional document. As argued in chapter four,<sup>8</sup> Parliament does not face these same types of limits under New Zealand’s unwritten constitution.<sup>9</sup>

This section argues that an absence of formal limits on Parliamentary power does not mean that its legislative authority is unconstrained. Meaningful, constitutional constraints arise from the way in which Parliamentary sovereignty is required to operate within New Zealand’s unwritten constitutional framework. The argument proceeds in three parts. The first is that the normative justification for Parliamentary sovereignty remains profoundly uncertain. The second is that this uncertainty serves an important constitutional purpose: it promotes forbearance on the part of Parliament (as well as other constitutional actors). Finally, this forbearance-inducing uncertainty has been deliberately cultivated by the various constitutional actors which it affects. Whereas the written constitution is premised on precisely defined and knowable limits on the legitimate exercise of public power, New Zealand’s unwritten constitution is premised on uncertain and unknowable limits that constrain through pragmatic forbearance. This is the basis of New Zealand’s distinctive form of unwritten constitutionalism.

### *The Normative Basis for Parliamentary Sovereignty*

The intellectual foundations of Parliamentary sovereignty have long been open to question. While clearly part of the constitutional tradition New Zealand has inherited, the precise justification for continued adherence to the doctrine — especially when framed in relatively absolute terms — remains highly uncertain. This uncertainty matters from a normative perspective. Disagreement over the precise normative basis of the doctrine means that the moral justification for Parliament’s claim to sovereign authority remains unarticulated, and potentially open to reappraisal. Without the confidence of an express normative justification, Parliamentary authority may be found to give way to an alternative source of authority that is better supported by an appeal to constitutional principle.

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7 Suri Ratnapala “The Idea of a Constitution and Why Constitutions Matter” (1995) 15 Policy 3 at 3 (emphasis added).

8 See “Parliamentary Sovereignty”, above Chapter Four, at 87-96.

9 This is the key difference between Westminster constitutional systems and constitutions resting on a central written text: see “Liberal Constitutionalism”, above Chapter One, at 28.

This interpretation is premised on a rejection of ‘Austinian’ positivism and the associated view that lawful authority arises from the unchallengeable command of a sovereign.<sup>10</sup> The influence of legal positivism as a jurisprudential theory in New Zealand has lent theoretical support to Parliamentary sovereignty as a constitutional doctrine, but it also means that the normative basis of Parliamentary sovereignty has remained under examined. Normative justification for constitutional authority is irrelevant under theories of legal positivism, which reduces the scope of constitutional inquiry to an empirical question of the ultimate location of sovereign power. The approach of Dicey and Wade in describing Parliamentary sovereignty as the ultimate fact of the constitution has been influential,<sup>11</sup> providing a reason to accept the doctrine in the absence of a compelling normative justification. The normative perspective adopted in this thesis cannot accept Parliamentary sovereignty so uncritically. Austinian positivism must be rejected because a normative justification for constitutional authority is necessary for any account of the constitution that purports to be complete. Excessive reliance on legal positivism to provide theoretical support for Parliamentary sovereignty in practice leaves fundamental questions of constitutional principle unanswered.

Once the limitations of legal positivism from a normative perspective are appreciated, it is perfectly reasonable to suggest that the traditional doctrine of Parliamentary sovereignty may give way to a “more modest principle of legislative primacy”.<sup>12</sup> This is the position that Elias adopts with respect to the application of Parliamentary sovereignty in New Zealand. In rejecting legal positivism and its normatively barren assessment of New Zealand’s constitutional arrangements, Elias does not reject the doctrine of Parliamentary sovereignty outright. In fact, Elias is “happy to start with the assumption that the case law, at least in [New Zealand], does not support judicial review of the substance of legislation”.<sup>13</sup> This is an important caveat, as it signals that a move away from positivist scholarship to focus on normative principle does not necessarily require condemnation of prevailing constitutional practice. Judicial deference to duly enacted legislation is a prominent feature of New Zealand’s constitutional arrangements, and orthodox interpretations of Parliamentary sovereignty explain this feature well.

Nonetheless, Elias does not accept an orthodox application of Parliamentary sovereignty uncritically. If Parliamentary sovereignty is to remain the controlling principle of New Zealand’s constitutional arrangements, then it must present itself in normatively compelling terms. It is notable, therefore, that the underlying justification for Parliamentary sovereignty is yet to be directly questioned in a forum where considerations of constitutional principle are required to determine the issue. Elias argues that New Zealand’s historical commitment to a comparatively absolute interpretation of the doctrine of Parliamentary sovereignty needs to be understood against a

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10 Sian Elias “Sovereignty in the 21st Century: Another Spin on the Merry-go-round” (2003) 14 PLR 148 at 150 [“Sovereignty in the 21st Century”].

11 See, for example, HWR Wade “The Basis of Legal Sovereignty” [1955] CLJ 177 at 188.

12 Elias “Sovereignty in the 21st Century”, above n 10, at 152. This is not an isolated view within the unwritten constitutional tradition. Writing from the United Kingdom perspective, Allan would agree with Elias that the effects and limits of Parliamentary sovereignty are required to be worked out with reference to constitutional principle, although Allan would place greater emphasis on the role of the judiciary to adjudge competing claims of constitutional principle: see TRS Allan “Questions of Legality and Legitimacy: Form and Substance in British Constitutionalism” (2011) 9 *1•CON* 155.

13 Elias “Sovereignty in the 21st Century”, *ibid*, at 149.



relatively benign constitutional context.<sup>14</sup> The types of controversies that might bring the normative justification for a sovereign Parliament into question — where adherence to Parliament’s legislative decree would unreasonably compromise the security of constitutional values that are accepted as truly fundamental — have largely been avoided as the New Zealand constitution has developed. As the need to challenge the enforceability of properly enacted legislation on constitutional grounds has not arisen in New Zealand, the issue of limits on Parliamentary authority has simply not been “authoritatively determined”.<sup>15</sup> Against that background, an absolutist interpretation of Parliamentary sovereignty remains open to challenge on the grounds that normative considerations will be found to count heavily against continuing adherence to the doctrine at some future point when an inquiry into constitutional principle becomes necessary.

Ultimately, Elias concludes that the indifference towards normative considerations exhibited by an absolute application of Parliamentary sovereignty is unlikely to satisfy any meaningful inquiry into constitutional principle.<sup>16</sup> If Elias’ conclusion is to be seriously challenged, then a positive case supporting Parliamentary sovereignty as a normative imperative must be presented. However, leading philosophical accounts of the desirability of Parliamentary sovereignty demonstrate a real difficulty of offering a positive justification for the doctrine. Goldsworthy, for example, reserves an entire chapter for discussion of the philosophical foundations of Parliamentary sovereignty, but devotes most of his analysis to a response to the claims of rival theories with a richer normative content.<sup>17</sup> No positive defence of the doctrine is offered. Ultimately, Goldsworthy acknowledges that his analysis has only taken him far enough to conclude that “the doctrine of Parliamentary sovereignty is currently part of the law of all three countries [the United Kingdom, Australia, and New Zealand]”.<sup>18</sup> The philosophical defence of the doctrine is left incomplete. Ekins’ challenge to the concept of judicial supremacy in Westminster constitutions comes close to conceding that there is no necessary principle of constitutionality that privileges Parliamentary sovereignty over alternative conceptions of ultimate constitutional authority.<sup>19</sup> It is providence, not commitment to fundamental principle, that has led to a constitutional system centred on the assumption of Parliament’s legislative authority. Perhaps Ekins has in mind that the democratic commitment to political equality, which Parliamentary government roughly approximates, represents the ‘least objectionable option’ as a system of government.<sup>20</sup> This argument is also insufficient from a genuinely normative perspective, as it fails to provide an account of how constitutional arrangements may secure the legitimacy of public power. The fact that a positive account of the moral justification for Parliament’s great legislative power has not yet been made available serves to emphasise the contingent nature of the sovereignty doctrine Elias identifies.

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14 Elias “Sovereignty in the 21st Century”, *ibid*, at 151, 156.

15 Elias “Sovereignty in the 21st Century”, *ibid*, at 156.

16 Elias “Sovereignty in the 21st Century”, *ibid*, at 163.

17 Jeffrey Goldsworthy *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press, Oxford, 1999) at ch 7 [*History and Philosophy*].

18 Goldsworthy *History and Philosophy*, *ibid*, at 279.

19 R Ekins “Judicial Supremacy and the Rule of Law” (2003) 119 LQR 127 at 135.

20 See Andrew Geddis “Representative Democracy: What’s the Law Got to Do with It?” (2006) 11 Otago LR 197 at 200.

Absolute interpretations of Parliamentary sovereignty arguably reflect historical practice,<sup>21</sup> but from a normative perspective this is insufficient. It conflates past experience, regardless of the normative justification available for that historical practice, with the resolution of deeper (and ongoing) controversies of constitutional principle. What the historical analysis demonstrates in a New Zealand context is that the constitutional limits of Parliamentary sovereignty remain untested. Parliament's claim to sovereign authority is arguably sufficient as a "general principle of the constitution" in a benign constitutional context where fundamental controversies of principle are not on foot.<sup>22</sup> When viewed from the perspective of this benign context Parliamentary authority takes on an absolute character without inherent limits. However, Parliamentary authority takes on this absolute character only when considered in a formal, abstract sense because the "nature and limits of Parliamentary sovereignty cannot be determined in abstraction from the constitutional context in which the pertinent questions arise".<sup>23</sup> Identification of limits on the legitimate exercise of Parliamentary authority requires an inquiry into constitutional principle in a specific situation where genuine constitutional controversies require resolution. In such an acute case Parliament's legislative function may be found to violate constitutional fundamentals. The constitutional position in such a case is that a successful appeal to Parliamentary sovereignty cannot simply be assumed, because the normative justification for that position remains untested.

### *The Constitutional Value of Uncertainty*

In the absence of a firm normative basis for the doctrine of Parliamentary sovereignty, there can be no guarantee that the courts will defer to Parliament's will in the event that it conflicts with adherence to fundamental constitutional principle. On the analysis provided by Elias, the likely result is that the courts would be required in such circumstances to refuse to apply legislation on the grounds of inconsistency with the constitution. However, it may not be necessary to push the argument to that extreme in order to preserve a meaningful role for constitutional principle. The key point is that, because of the indeterminacy of the moral foundations for Parliamentary authority, there is at the very least an appreciable risk that the courts will be guided by principle and values rather than rhetorical appeals to judicial deference. That uncertainty over the outcome of a case where Parliamentary sovereignty places constitutional values directly in question may itself promote a prudent degree of restraint on the part of Parliament, effectively constraining the exercise of legislative authority.

Thomas has articulated a theory of this kind. By postulating the future possibility that Parliament's legislative supremacy may be found to be less than absolute, Thomas is able to retain a high degree of fidelity to the reality of New Zealand's contemporary constitutional arrangements. Like Elias, Thomas accepts that New Zealand's Parliament is sovereign.<sup>24</sup> The orthodox

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21 Indeed, the majority of Goldsworthy *History and Philosophy*, above n 17, is devoted to an historical (empirical) analysis of Parliamentary sovereignty in the United Kingdom.

22 *R (Jackson) v Attorney-General* [2005] UKHL 56 at [102].

23 Allan "Questions of Legality and Legitimacy: Form and Substance in British Constitutionalism", above n 12, at 162.

24 EW Thomas "The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2000) 31 VUWLR 5 at 18 ["The Relationship of Parliament and the Courts"].

understanding of the doctrine that the courts may not override a validly enacted statute has been confirmed judicially on numerous occasions.<sup>25</sup> However, Thomas also recognises the dynamic context in which constitutional principles and doctrines, including Parliamentary sovereignty are required to take effect. That context means that that continued acceptance of Parliamentary sovereignty may, at some future point, come under strain.<sup>26</sup> This is especially likely to be the case if Parliament legislates in abrogation of constitutional fundamentals such as “basis of representative government, or the rule of law, or fundamental human rights”.<sup>27</sup> If that were to happen, the courts may “at a future date respond to legislation [...] with an opinion declaring the legislation to be unconstitutional”.<sup>28</sup>

The analysis goes beyond theory. Thomas considers that absolute interpretations of Parliamentary sovereignty have come under sustained pressure from four key sources in New Zealand. These are the increasing international recognition of fundamental human rights, the constitutionalisation of the Treaty of Waitangi, the advent of a proportional system of representation in which minority views may garner disproportionate influence, and the evolving basis of judicial review away from the *ultra vires* doctrine.<sup>29</sup> Notably, these factors all represent matters of constitutional principle in respect of which the doctrine of Parliamentary sovereignty has little to say. None of these points of principle has so far been relied on to displace the application of ordinary sovereignty theory, but their continued development along lines of principle that remain indifferent to bald assertions of sovereign power emphasise the tensions inherent in any practical application of the doctrine of Parliamentary sovereignty.

Against that background of constitutional tension and development, Thomas posits that:<sup>30</sup>

[...] it is unnecessary to do more than postulate the possibility that Parliament's legislative supremacy is not absolute. It is enough that the judiciary at a future date may be moved in exceptional circumstances to intervene and review the validity of legislation which is perceived to be beyond the constitutional pale.

The insight that judicial adherence to Parliamentary sovereignty is not guaranteed allows Thomas to reaffirm his commitment to New Zealand's contemporary constitutional practice while simultaneously questioning the applicability of that practice in the face of a serious constitutional challenge. Parliamentary sovereignty continues to enjoy ongoing recognition, but it remains contingent. Further, it is the judiciary that Thomas charges with the power of securing the fidelity of legislation to constitutional principle. An independent judiciary is, in Thomas' view, the “ultimate safeguard”.<sup>31</sup> While the judiciary have the task of protecting constitutional principle, Thomas'

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25 But by definition, these statements are *obiter*: Goldsworthy *History and Philosophy*, above n 17, at 239.

26 See also Elias “Sovereignty in the 21st Century”, above n 10.

27 Thomas “The Relationship of Parliament and the Courts”, above n 24, at 14.

28 Thomas “The Relationship of Parliament and the Courts”, *ibid*, at 14.

29 Thomas “The Relationship of Parliament and the Courts”, *ibid*, at 9-14.

30 Thomas “The Relationship of Parliament and the Courts”, *ibid*, at 8 (footnote omitted).

31 Thomas “The Relationship of Parliament and the Courts”, *ibid*, at 15.

justification for this role is purely pragmatic. Judicial ability to pronounce on the constitutionality of legislation is the “most immediately available and authoritative resource” available to affected individuals and minority groups.<sup>32</sup> Thus, Thomas is able to institutionalise the possibility of protection for fundamental values by aligning it with the judicial function.

The institutionalisation of the protection of fundamental values secures their respect in a way that vague appeals to ‘the constitution’ do not. Locating this potential use of power with the judiciary is significant from the perspective of constitutionalism. When legislating, Parliament faces an institutionalised, irresolvable uncertainty over the ultimate effect of its legislation. The greater the perceived trespass of any particular example of legislation on constitutional fundamentals, the greater the uncertainty over whether the courts will be sufficiently moved to invalidate that legislation on constitutional grounds. This uncertain and evolving relationship between Parliament and the courts results in a natural ‘hedge’ where considerations of prudence and institutional comity work to resist the passage of constitutionally repugnant legislation. Thomas puts the matter in the following terms:<sup>33</sup>

Uncertainty as to whether the courts will intervene to strike down legislation perceived to undermine representative government and destroy fundamental rights must act as a brake upon Parliament's conception of its omnipotence; and uncertainty as to the legitimacy of its jurisdiction to invalidate constitutionally aberrant legislation must act as a curb upon judicial usurpation of power. A balance of power between these two arms of government is more effectively achieved by the unresolved doubt attaching to the question than would be the case if the question were to be resolved affirmatively in either Parliament's or the judiciary's favour. The inconclusiveness begets a cautious forbearance, one or the other.

Thus, institutionalised uncertainty as to what is required by constitutional principle performs a role similar to the precise, defined constitutional limits that are a common feature of written constitutions. That uncertainty signals the boundaries beyond which constitutional actors concerned with the legitimacy of their action should rightly fear to tread.

Thomas' thesis is not free from criticism. In particular, it risks collapsing into a case for judicial supremacy. By conferring the constitutional responsibility for consistency with fundamental principle on the courts, Thomas risks a perception that judicial power will become unlimited in precisely the same manner as a sovereign Parliament's claim to authority. Thomas is careful to seek to resist this interpretation. In the first place, he deliberately outlines why concepts of sovereignty or supremacy — Parliamentary or judicial — are redundant under New Zealand's contemporary constitutional arrangements. On Thomas' view, sovereignty rests with the people.<sup>34</sup> Both Parliament and the courts, as institutions of constitutional government, have a role in giving effect to the wishes of those to whom they are responsible. This position may, however, prove to be a distraction from the main insight Thomas offers into the dynamic relationship between Parliament and the courts. Thomas himself claims that reliance on the “good sense of the people” is insufficient as a

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32 Thomas “The Relationship of Parliament and the Courts”, *ibid*, at 16.

33 Thomas “The Relationship of Parliament and the Courts”, *ibid*, at 8.

34 Thomas “The Relationship of Parliament and the Courts”, *ibid*, at 21.

constitutional safeguard in the face of arbitrary and possibly absolute public power.<sup>35</sup> Further, the notion of popular sovereignty is difficult to reconcile with Thomas' belief that the decision on whether to disapply legislation is ultimately one for the courts acting on their own motion.<sup>36</sup> Thomas cites the approach of the House of Lords in *Anisminic v Foreign Compensation Commission* as an example of the willingness of the courts to disapply the plain words of legislative enactment.<sup>37</sup> There seems to be little in *Anisminic* to directly support the notion of popular sovereignty, and the degree of institutional constraint necessary to constitute a genuinely constitutional protection relies on judicial competency rather than a popular mandate.

Thomas does clarify, however, that his approach is not premised on a theory of higher order law.<sup>38</sup> This element distinguishes Thomas' approach from that of natural law theorists such as Cooke. Cooke's natural law reading of the New Zealand constitution suggests that the common law is premised on "two complementary and lawfully unalterable principles: the operation of a democratic legislature and the operation of independent courts".<sup>39</sup> These two "fundamentals" required the protection of the judiciary in the face of potential legislative abrogation.<sup>40</sup> Thomas' approach does not appear to go as far. While Cooke considered that the common law inherently limits Parliament's powers of legislation at the extremes, Thomas both accepts Parliamentary sovereignty and rejects natural law theory as part of an orthodox understanding of New Zealand's current constitutional arrangements.<sup>41</sup> This position does not preclude the possibility of constitutional change led by the judiciary if such a change is necessary to protect fundamental constitutional principles. Any such change is, however, a matter for the future — at present the issue can be "left up in the constitutional air".<sup>42</sup>

This element of Thomas' approach resonates closely with common law method. The apparent reluctance of the New Zealand appellate courts to rule definitively on constitutional values aligns well with a theory of constitutional practice that deliberately leaves questions of ultimate constitutional authority unresolved. Specific controversies resolved in their immediate context rather than affirmation of an abstract commitment to a particular constitutional position is a hallmark of both approaches. As Thomas frames the matter:<sup>43</sup>

[...] rather than discuss the issue in the abstract, it is preferable to leave the question whether the courts can review the validity of extreme legislation to be decided by the judges if and when legislation is enacted which places in jeopardy the basis of representative government, the rule of law or fundamental human rights. The resulting uncertainty or inconclusiveness itself serves the constitutional function of ensuring a balance in the

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35 Thomas "The Relationship of Parliament and the Courts", *ibid*, at 15, citing *Liversidge v Anderson* [1942] AC 206 (HL) at 260-261.

36 Thomas "The Relationship of Parliament and the Courts", *ibid*, at 26.

37 *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147; [1969] 2 WLR 163 (HL).

38 Thomas "The Relationship of Parliament and the Courts", above n 24.

39 Robin Cooke "Fundamentals" [1988] NZLJ 158 at 164.

40 Cooke "Fundamentals", *ibid*, at 164.

41 Thomas "The Relationship of Parliament and the Courts", above n 24, at 24.

42 Thomas "The Relationship of Parliament and the Courts", *ibid*, at 7.

43 Thomas "The Relationship of Parliament and the Courts", *ibid*, at 36.

distribution of public power between Parliament and the courts, better than would the present resolution of the question in favour of one or the other of the two institutions. The possibility that the courts may review the validity of extreme legislation is part of the ongoing development of a dynamic constitution rather than a reassertion of the authority of cases long since gone and regularly disavowed.

This is an approach that finds a ready home in the common law style of constitutional reasoning outlined in chapter three.<sup>44</sup>

Finally, Thomas' reluctance to engage a theory of higher order law to support his position also has important consequences for the analysis in this thesis. An unwritten constitution, such as that of New Zealand, is premised on a profound ambivalence towards the concept of fundamental law. Neither Parliament nor the courts can look to a point external to the practical operation of law and politics as part of a claim to legitimate constitutional authority. The converse of this position is that there is no normatively superior claim to authority that can limit the scope of the legitimate exercise of public power. Thomas' uncertainty thesis takes this feature of New Zealand's unwritten constitution seriously.<sup>45</sup> Two points in particular warrant emphasis. First, because a key feature of the uncertainty as to Parliament's continuing claim to judicial obedience turns on normative matters of constitutional principle, Thomas is able to confer meaningful recognition on fundamental principle in the absence of fundamental law. Constitutional principle retains its relevance and indeed its influence over the actual exercise of public power that purports to be constitutional. Second, Thomas is able to supply an institutional basis for the recognition of that fundamental principle by both Parliament and the courts in the nature of the relationship between the two branches of government. The legitimate authority of each branch is relational, recognising the plurality of authority within an unwritten constitutional system. Where Parliament and the courts offer consistent interpretations as to the requirements of constitutional principle, the legitimate authority of each is strengthened. Thomas' key point is, however, that where the most fundamental of constitutional issues is in play, agreement on the correct approach is far from guaranteed. To avoid any such outcome, Parliament may need to ensure that its actions are not perceived to be unconstitutional. Thomas therefore provides a means of understanding how the sovereign power of Parliament may be constitutionally constrained without resort to the notion of enforceable limits implied by a higher order theory of law.

### ***The Creation of 'Abeyances' in Unwritten Constitutionalism***

Thomas' uncertainty thesis is compelling. It accommodates a role for normative principle and its opposition to arbitrary power within an orthodox understanding of New Zealand's contemporary constitutional arrangements. While Thomas' thesis is addressed most directly to the matter of Parliamentary sovereignty, it is argued here that it is a specific manifestation of a broader proposition of constitutionalism, namely that "the Courts and Parliament are both astute to recognise

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44 See "'Constitutional' Reasoning and 'Common Law' Reasoning", above Chapter Three, at 62-63.

45 See Thomas "The Relationship of Parliament and the Courts", above n 24, at 8.

their respective constitutional roles".<sup>46</sup> Further, the uncertainty latent within the constitutional system that Thomas identifies is critical for achieving this outcome. While the New Zealand constitution has not yet been theorised in the same way, Foley's theory of constitutional abeyances in the context of the United Kingdom constitution demonstrates the potential of the uncertainty thesis to be developed into a complete theory of unwritten constitutionalism.

The conscious deferral of constitutional questions in spite of (or perhaps because of) apparent conflict in the principles underlying and justifying constitutional practice has been identified as a key means of distributing and regulating the exercise of public power in unwritten constitutional systems.<sup>47</sup> Foley describes this feature of constitutional practice in the following terms:<sup>48</sup>

[...] those implicit understandings and tacit agreements that could never survive the journey into print without compromising their capacious meanings and ruining their effect as a functional form of genuine and valued ambiguity. It is not just that such understandings are incapable of exact definition; rather their utility depends upon them not being subject to definition, or even to the prospect of being definable.

Uncertainty should not be overplayed. Just as aspects of written constitutionalism remain highly uncertain or contestable, there is a high degree of certainty concerning the ordinary processes of Parliament and the courts, and the multitude of other constitutional actors that are required to exercise public power day-to-day. However, it is the necessity or desirability of moving to the edge of those powers where they are not so clearly defined that creates challenges. Indeed, it is this very move into an uncertain realm where the legitimacy of the exercise of public power is more easily questioned that makes the exercise of power a constitutional issue. It is "at the margins that the greatest challenge arises in the relationship between the legislative and judicial branches".<sup>49</sup> Certainly, as Thomas identifies, Parliamentary sovereignty and its corollary, judicial obedience to legislation, appear to fit within this definition because of the obscure origins of the principles underpinning those doctrines and the fact that the edges of each remain untested.<sup>50</sup>

That the creation of abeyances is a deliberate part of constitutional practice is demonstrated by New Zealand case law. Thomas notes in particular the following statement of the High Court in *Cooper v Attorney-General*,<sup>51</sup> and endorsed by the Court of Appeal in *Shaw v Commissioner of Inland Revenue*:<sup>52</sup>

[The Court is relieved] from venturing into what happily remains in New Zealand an extra-judicial debate, which the good sense of parliamentarians and Judges has kept theoretical,

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46 *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1 (PC) at 6. See also George Williams "The Constitutional Role of the Courts: A Perspective from a Nation without a Bill of Rights" (2004) 2 NZJPIL 25 at 26-27.

47 Michael Foley *The Silence of Constitutions: Gaps, "Abeyances," and Political Temperament in the Maintenance of Government* (Routledge, London, 1989) [*The Silence of Constitutions*].

48 Foley *The Silence of Constitutions*, *ibid.*, at 9.

49 Privileges Committee *Question of Privilege Concerning the Defamation Action Attorney-General and Gow v Leigh* (Wellington, June 2013) at 15.

50 See Foley *The Silence of Constitutions*, above n 47, at 94.

51 *Cooper v Attorney-General* [1996] 3 NZLR 480 (HC) at 484.

52 *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154 (CA) at [17].

as to whether in any circumstances the judiciary could or should seek to impose limits on the exercise of Parliament's legislative authority to remove more fundamental kinds of substantive rights.

The Court's refusal to offer a view on a matter of fundamental constitutional importance simply because it did not have to be decided was "precisely right" in terms of constitutional principle.<sup>53</sup> Allowing the constitutional question to remain unresolved perpetuates the uncertainty that lies at the heart of the relationship between Parliament and the courts. Even principles that are usually considered beyond controversy are often revealed to be formulated in ambiguous and inexact terms. In *Te Runanga o Wharekauri Rekohu Inc v Attorney-General*,<sup>54</sup> a group of iwi representatives challenged the ability of a Minister to introduce to the House proposed legislation that would give effect to a deed of settlement between the Crown and Māori in respect of pan-Māori claims to fisheries assets. The Court of Appeal confirmed the orthodox interpretation of Parliamentary sovereignty that amounts to non-interference by the courts in Parliamentary proceedings. While this was sufficient to dispose of the case before the Court, the exact scope of the doctrine remained undecided:<sup>55</sup>

There is an established principle of non-interference by the Court in parliamentary proceedings. Its exact scope and qualifications are open to debate, as is its exact basis. Sometimes it is put as a matter of jurisdiction, but more often it has been seen as a rule of practice [...] However it be precisely formulated and whatever its limits, we cannot doubt that it applies so as to require the Courts to refrain from prohibiting a Minister from introducing a Bill into Parliament. [...] [T]he proper time for challenging an Act of a representative legislature, if there are any relevant limitations, is after the enactment.

In line with the established tradition of common law reasoning, the immediate issue is addressed while leaving the larger constitutional questions unresolved. This approach to constitutional issues creates, or at least deliberately perpetuates, constitutional uncertainty of the kind identified by Thomas and Foley.

Perhaps ironically, effective constraints on the exercise of state power are promoted by the unwritten constitution through a dynamic constitutional settlement that leaves open the possibility of a rebalancing of constitutional relationships. Parliament's legally untrammelled sovereignty is exercised within constitutionally legitimate bounds because if it were not, it would almost inevitably invite an extra-constitutional response from other constitutional actors. This is probably understood as a constitutional constraint because it is a position that has been effectively institutionalised through New Zealand's unwritten constitutional arrangements. While not delineating firm, enforceable limits on the legitimate exercise of public power, it conditions the exercise of that public power so that it is exercised in a constitutionally legitimate manner.

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53 Thomas "The Relationship of Parliament and the Courts", above n 24, at 7.

54 *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301.

55 *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 at 307-308.



The institutionalised uncertainty embedded in the unwritten constitution and identified by Thomas and Foley ensures that this moral justification is never completely available, either to Parliament or those that would seek to challenge its authority. This creates a meaningful degree of uncertainty regarding the precise resolution of constitutional questions, forcing the constitutional system to operate without reliance on those questions being resolved. In this way, an unwritten constitution works in precisely the opposite way to a written constitution where it is assumed that there is a precise and discoverable answer to every constitutional question. Whereas certainty over the nature and extent of constitutionally legitimate authority is the organising principle of constitutionalism in a written constitution, in an unwritten constitution a persistent and irresolvable uncertainty is relied on to perform the same function. To treat Parliamentary sovereignty as a matter of empirical fact that can be assumed on the basis of historical practice is entirely appropriate if unwritten constitutionalism is taken at a superficial level only. The normative justification to either support or deny that premise has simply never been tested. It must be acknowledged, however, that to simply assume such a fact does nothing in itself to secure the legitimacy of any particular exercise of Parliament's sovereign power. Parliamentary power is only accepted as sovereign because it is simultaneously contingent on factors that Parliament cannot control. That Parliament's authority may be called into question is the very essence of the constitutional constraints that, paradoxically, bestow such awesome power on Parliament in the first place.

### *Stability without Entrenchment*

The background of institutional uncertainty that characterises an unwritten constitution provides the lens through which other aspects of liberal constitutionalism can be reinterpreted. The standard liberal requirement for entrenchment of constitutional principles and values is one example. Formal entrenchment promotes a degree of stability within the constitutional system, which is essential to constitutional government:<sup>56</sup>

[S]ome degree of stability is required for a system to warrant the name constitutional, which suggests that it should not be too easy to amend all of a constitution's provisions, or perhaps any of its basic institutional prescriptions.

The need for stability is driven partly by pragmatic reasons. Excessive debate about how to structure the basic institutions and principles of government may impede society from formulating "policy about foreign affairs, the economy, the environment, zoning, and so on".<sup>57</sup> But the drive for stability is also a normative consideration. If the commitment to the realisation of fundamental values that the constitution represents can be undone too easily, then that commitment may not be sufficiently robust to secure the legitimacy of constitutional government. Stability with respect to those values that are considered to be fundamental is important from a normative perspective.

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<sup>56</sup> Mark Tushnet "The Whole Thing" (1995) 12 Const Comment 223 at 225.

<sup>57</sup> Christopher Eisgruber *Constitutional Self Government* (Harvard University Press, Cambridge, 2007) at 13.

Formal entrenchment of the kind found in written constitutional systems is usually premised on respect for a central constitutional text which holds higher normative authority within the constitutional system.<sup>58</sup> Formal entrenchment provides for a “special process to be followed before the government can make certain constitutional changes”.<sup>59</sup> An unwritten constitution is premised on the absence of the type of commitment to fundamental law that would supply the appropriate normative authority for formal entrenchment mechanisms to be effective. In his analysis of the United Kingdom constitution, Bogdanor suggests that there are two alternatives to formal entrenchment in an unwritten constitutional system. The first is manner and form restrictions on legislative capacity, while the second is a modification to the common law doctrine of implied repeal.<sup>60</sup> This section examines these two alternatives. Neither device is firmly established within New Zealand constitutional culture, and reliance on either is likely to prove controversial, at least initially. The option of modification to the doctrine of implied repeal is more consistent with the unwritten nature of the New Zealand constitution, and so that alternative is examined first. As already argued,<sup>61</sup> if the unwritten nature of the New Zealand constitution is taken seriously, then manner and form restrictions on Parliament’s ability to legislate cannot be held effective absent a change to New Zealand’s constitutional foundations. However, the moral force of such restrictions does signal the importance of certain legislative provisions. It is this symbolic value, rather than their effectiveness in practice, that ultimately contributes to the stability of New Zealand’s unwritten constitution.

### ***Modified Implied Repeal***

The doctrine of implied repeal traditionally holds that where a later statutory provision is inconsistent with earlier enacted legislation, the later statutory provision prevails.<sup>62</sup> Genuine issues of conflict between statutory provisions are uncommon as the courts will strive to interpret apparently competing statutory provisions in a manner where each is consistent with the scope and effect of the other. Accordingly, implied repeal is a doctrine of last resort to be applied only where competing statutory provisions are irreconcilable,<sup>63</sup> and only to the extent of any inconsistency.<sup>64</sup> The doctrine of implied repeal is considered to be an application of Parliamentary sovereignty, and specifically the rule that Parliament cannot bind its successors. The doctrine “guarantees that the latest expression of Parliament’s will prevails”.<sup>65</sup>

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58 It is not uncommon for such texts to provide the means of their own amendment in terms that are clearly differentiated from ordinary legal and political processes.

59 Mai Chen “The Advantages and Disadvantages of a Supreme Constitution for New Zealand: The Problem with Pragmatic Constitutional Evolution” in Caroline Morris, Jonathon Boston and Petra Butler (eds) *Reconstituting the Constitution* (Springer, Berlin, 2011) 123 at 124.

60 Vernon Bogdanor *The New British Constitution* (Hart Publishing, Oxford, 2009) at 277.

61 See “Modern Interpretations: Manner and Form”, above Chapter Four, at 64-66.

62 *Kutner v Philips* [1891] 2 QB 267 at 272.

63 *Kutner v Philips* [1891] 2 QB 267 at 275.

64 *R v Pora* [2001] 2 NZLR 37 (CA) at [44].

65 Joseph *Constitutional and Administrative Law in New Zealand*, above n 2, at 542.

Implied repeal has traditionally applied equally to statutes dealing with constitutional matters.<sup>66</sup> However, recent developments in the application of the doctrine suggest that constitutional principles may resist implied repeal. Under this emerging approach, Parliament can only repeal legislation that affects fundamental principles and values in express and unambiguous terms. This change in application of the doctrine of implied repeal is arguably a direct alternative to formal entrenchment as it delivers many of the benefits of protecting certain legislative provisions from ordinary amendment.

The potential of the doctrine of implied repeal can be seen in the Court of Appeal decision in *R v Pora*.<sup>67</sup> That case concerned a conviction for a home invasion and murder in 1994. That initial conviction was set aside, but the accused was subsequently reconvicted of the same crime in 2000. In the intervening period, the Criminal Justice Amendment Act (No 2) 1999 was enacted, providing for a minimum non-parole term of imprisonment of 13 years for murder convictions involving home invasion.<sup>68</sup> The amendment was intended to have retrospective effect in applying to convictions where the new penalty was not available at the time of the offence. This retrospective effect placed the amendment in conflict with certain provisions of the principal Act, the Criminal Justice Act 1985, which provided that “notwithstanding any other enactment or rule of law to the contrary” a penalty could not be imposed if that penalty was not available at the time the offence was committed.<sup>69</sup> The key issue in the case was whether the purported amendment concerning the minimum term of imprisonment was effective *vis-à-vis* the principal Act. The High Court found that it was bound to apply the new minimum term of imprisonment.<sup>70</sup> The accused then appealed that sentence to the Court of Appeal.

A full bench of the Court of Appeal was split three-three on the application of the doctrine of implied repeal.<sup>71</sup> Gault, Keith and McGrath JJ invoked a traditional application of the doctrine, holding that the general non-retrospectivity provisions in the principal Act had been impliedly repealed by the later, specific statutory sentencing guidelines.<sup>72</sup> In contrast, Elias CJ and Tipping J, and Thomas J in a concurring judgment, held that the doctrine of implied repeal as traditionally understood could not be adequately applied in the case. This alternative approach relied in part on a *prima facie* presumption that each of the statutory provisions were of equal weight as they formed part of the same statute, whereas implied repeal usually concerned two different statutes enacted at different times. However, the constitutional import of the principle that criminal sanctions ought not to be imposed retrospectively also appeared to weigh heavily on the Judges’ minds. The joint judgment of Elias CJ and Tipping J noted that the principle is given effect in New Zealand

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66 *McCawley v R* [1920] AC 691 (PC) at 704.

67 *R v Pora* [2001] 2 NZLR 37 (CA).

68 Criminal Justice Amendment Act (No 2) 1999, s 2(4).

69 Criminal Justice Act 1985, s 4(2) (repealed).

70 *R v Pora* HC Wellington T992309, 23 June 2000.

71 The seventh member of the Court, Richardson P, declined to offer a view on the point: see *R v Pora*, above n 64, at [60].

72 *R v Pora* [2001] 2 NZLR 37 (CA) at [116]. The three judges did, however, allow the appeal on an alternative ground by reading down the scope of the retrospective effect of the provisions of the amending legislation: see *R v Pora* [2001] 2 NZLR 37 (CA) at [110].

legislation,<sup>73</sup> and posited that the courts would be reluctant to infer that Parliament had intended to override such a fundamental principle. In the absence of an express intention to derogate from the general non-retrospectivity provisions of the Criminal Justice Act, which were found to be “dominant”, the new provisions mandating a minimum term of imprisonment must give way.<sup>74</sup> Thomas J, relying on similar reasoning, concluded that such an approach was necessary to provide “a barrier against inadvertent legislation which would have the effect of abridging human rights”.<sup>75</sup> All three judges would have allowed the appeal on that basis.

It is likely that the joint judgment of Elias CJ and Tipping J, and the concurring judgment of Thomas J, rests in part on the view that the principle against retrospective criminal sanctions is a constitutional value.<sup>76</sup> The implied proposition is that where constitutional values receive statutory recognition the doctrine of implied repeal may be mollified. While judicial conservatism may have led to this line of reasoning not being expressly stated,<sup>77</sup> significant retrospective validation for this interpretation can be found in the United Kingdom decision *Thoburn v Sunderland City Council*.<sup>78</sup> The detail of that case is not rehearsed here.<sup>79</sup> What is relevant is that the Court in that case found that ‘constitutional statutes’ could not be impliedly repealed in the same manner as ordinary statutes:<sup>80</sup>

Ordinary statutes may be impliedly repealed. Constitutional statutes may not. For the repeal of a constitutional Act or the abrogation of a fundamental right to be effected by statute, the court would apply this test: is it shown that the legislature’s actual — not imputed, constructive or presumed — intention was to effect the repeal or abrogation? I think the test could only be met by express words in the later statute, or by words so specific that the inference of an actual determination to the effect the result contended for was irresistible. The ordinary rule of implied repeal does not satisfy this test. Accordingly, it has no application to constitutional statutes.

This passage arguably provides a conceptual justification for the approach taken in *Pora* by Elias CJ, and Tipping and Thomas JJ.<sup>81</sup> The identification of constitutional legislation that ought to be interpreted differently because of its constitutional significance explains the approach in *Pora* in terms of constitutional legitimacy. The substantive values represented by constitutional legislation have a degree of normative authority that resists arbitrary or unanticipated interference, including via the legislative process. The distinction between constitutional and ordinary statutes in *Thoburn*

73 See New Zealand Bill of Rights Act 1990, ss 25(g) and 26; Interpretation Act 1999, s 7.

74 *R v Pora* [2001] 2 NZLR 37 (CA) at [49].

75 *R v Pora* [2001] 2 NZLR 37 (CA) at [121].

76 Rebecca Prebble “Constitutional Statutes and Implied Repeal: The *Thoburn* Decision and the Consequences for New Zealand” (2005) 36 VUWLR 291 at 303.

77 Although Thomas J’s judgment comes very close to making the proposition express: see *R v Pora* [2001] 2 NZLR 37 (CA) at [121].

78 *Thoburn v Sunderland City Council* [2003] QB 151.

79 A useful analysis is given in Prebble “Constitutional Statutes and Implied Repeal: The *Thoburn* Decision and the Consequences for New Zealand”, above n 76. For discussion of some of the key constitutional issues raised by the case see Geoffrey Marshall “Metric Measures and Martyrdom by Henry VII Clause” (2002) 118 LQR 493.

80 *Thoburn v Sunderland City Council*, [2003] QB 151 at [63] (emphasis omitted).

81 Prebble “Constitutional Statutes and Implied Repeal: The *Thoburn* Decision and the Consequences for New Zealand”, above n 76, at 304.

has recently been endorsed by the United Kingdom Supreme Court in *R (HS2 Action Alliance Ltd) v Secretary of State for Transport*,<sup>82</sup> suggesting that it has the potential to evolve into a significant aspect of constitutional law in the United Kingdom. In reliance on the same principles, *Pora* can be understood as a potential modification of the doctrine of implied repeal that serves to protect constitutional principles and values.

The present interest in *Pora* is that the modification to the doctrine of implied repeal that it signals may operate as a substitute for formal entrenchment. At its most basic level, the modification represents a clear level of protection for constitutional fundamentals. Parliament cannot repeal the legislative expression of constitutional principles and values inadvertently, and the requirement to address such issues directly and expressly means that any statutory provisions touching on constitutional fundamentals are likely to receive careful scrutiny as part of the legislative process. This would seem to be the point underlying Thomas J's view that the modification to the doctrine of implied repeal is a barrier against inadvertent legislation that abridges fundamental human rights.<sup>83</sup> Accordingly, the development in the doctrine of implied repeal that *Pora* potentially represents promotes a meaningful degree of constitutional stability.

The architect of the approach set out in *Thoburn* has confirmed that greater constitutional stability with respect to fundamental values is the key rationale for the modification to the doctrine of implied repeal. Laws identifies "constitutional guarantees" as an essential component to a legitimate constitutional order. Such guarantees have two components. The first is that they protect fundamental values from state interference.<sup>84</sup> The second is that constitutional guarantees must in some sense be resistant to the types of change that applies to ordinary laws.<sup>85</sup> The second characteristic in particular is essential to the nature of constitutional government.<sup>86</sup> By identifying these features of constitutionalism, Laws' analysis effectively recognises the challenge of securing a constitutional guarantee in the context of an unwritten constitution without the ability to rely on an authoritative constitutional text.<sup>87</sup>

Laws suggests that a potential solution to this challenge presented by an unwritten constitutional structure can be found in the common law principle of legality. That principle holds that as a rule of the common law, Parliament will be presumed to legislate in a manner consistent with fundamental common law principles unless a contrary intention is made expressly and unambiguously in legislation.<sup>88</sup> While protecting from arbitrary or inadvertent amendment those values and principles that the common law views as foundational, the principle of legality is

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82 *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3 at [207]-[208].

83 *R v Pora* [2001] 2 NZLR 37 (CA) at [121].

84 John Laws "Constitutional Guarantees" (2008) 29 Stat LR 1 at 1.

85 Laws "Constitutional Guarantees", *ibid*, at 2.

86 Laws "Constitutional Guarantees", *ibid*, at 2.

87 Laws "Constitutional Guarantees", *ibid*, at 4.

88 See Joseph *Constitutional and Administrative Law in New Zealand*, above n 2, at 794.

arguably consistent with the doctrine of Parliamentary sovereignty. The principle, and its relationship with Parliamentary sovereignty, has been described in these terms:<sup>89</sup>

Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. [...] The constraints upon its exercise are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. *This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process.* In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

Laws argues that the modified application of the doctrine of implied repeal is analogous to the principle of legality. In applying the principle of legality, the courts are “contriving the public accountability of Parliament for its actions”.<sup>90</sup> The modified doctrine of implied repeal affords the same level of protection to fundamental values that have received statutory expression as those values that are of fundamental importance to the common law.<sup>91</sup> If a statute attempts to abrogate fundamental rights and interests, “the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment”.<sup>92</sup> Further, as the modified doctrine of implied repeal is a common law rule of interpretation, Parliament’s legislative sovereignty is retained.<sup>93</sup>

The legislature remains empowered to repeal any statute, including a constitutional statute, provided in the latter case that it makes clear that is what it is doing. The same rule applies to constitutional rights, recognized as such by the common law. Such rights *could* be abrogated by Parliament; but again, only if Parliament makes it clear that that is what it is doing. This is the extent of such entrenchment as is contemplated by the suggestions I made in *Thoburn’s* case. So far as statutes are concerned, all that is changed is the scope of the doctrine of implied repeal. Traditionally, this doctrine of implied repeal was thought to be a concomitant of sovereignty, because without it Parliament could seemingly dictate the terms on which a successor Parliament might legislate. However, with deference to my many illustrious predecessors who embraced such a rule, this approach can be seen to be a mistake. On the view, I take [sic] Parliament dictates no such terms. There is simply a rule of construction to the effect that constitutional statutes cannot be impliedly repealed. The rule of construction is a rule of the common law, not a command of the legislature.

By forcing Parliament to confront directly the consequences of legislation that touches on fundamental constitutional principles and values, both the principle of legality and the approach of Elias CJ and Tipping J, and Thomas J in *Pora* promote accountability to the electorate for constitutional change initiated by Parliament. Further, this accountability occurs as part of the ordinary democratic process. As such, the potential modification of the implied repeal doctrine seeks

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89 *Secretary of State for the Home Department, Ex Parte Simms* [1999] 3 All ER 400; [2000] 2 AC 115 (UKHL) at 412; 131 (emphasis added).

90 Paul Finn “Controlling the Exercise of Power” (1996) 7 PLR 86 at 89.

91 Laws “Constitutional Guarantees”, above n 84, at 8.

92 *Annetts v McCann* (1990) 170 CLR 596 at 598.

93 Laws “Constitutional Guarantees”, above n 84, at 7 (emphasis in the original).

greater alignment between the will of the electorate and Parliament's collective will. Accordingly, development of the doctrine of implied repeal as suggested in *Pora* is consistent with the dominant approach to constitutionalism that underpins New Zealand's unwritten constitutional system in a way that formal constitutional entrenchment is not.

The modification of the implied repeal doctrine suggested by *Pora* is yet to fully take hold in New Zealand, but it almost certainly points the way to the future.<sup>94</sup> It has the potential to address the key challenges and questions for constitutional reform, and so represents the natural and principled starting point for consideration and development of such issues. If the methodology in *Pora* is accepted then Parliament might even consider declaring an enactment constitutional in order to confer a degree of constitutional protection,<sup>95</sup> although at this early stage it is unclear whether such declarations would be dispositive. Perhaps the only residual concern is that any modification to the doctrine of implied repeal represents a direct challenge to the traditional Diceyan model of Parliamentary sovereignty. For that reason, it is apposite to conclude by addressing that concern and arguing that it is misplaced.

The approach of Elias CJ, and Tipping and Thomas JJ in *Pora* has been strongly criticised as inconsistent with traditional notions of Parliamentary sovereignty. Killeen, Ekins and Ip have argued that Parliament's intention was tolerably clear with respect to the statutory amendment imposing a new minimum term of imprisonment, and that an approach which does not give effect to the terms of that statutory provision undermines Parliamentary sovereignty and the "democratic legitimacy of the legal system".<sup>96</sup> That criticism has some force. However, Laws' analysis supplies a principled basis for supporting constitutional values in a manner that maintains the most important democratic features of legislative enactment.

A deeper argument of principle might be mounted that the proposed modification of the implied repeal doctrine in *Pora* does place a specific requirement of sorts on Parliament — that it must legislate in express terms before the repeal of legislation touching on constitutional fundamentals can be held effective. This might be considered a kind of manner and form requirement applicable in respect of certain statutory provisions. This point is, however, prone to over-emphasis. The *Pora* approach to implied repeal is consistent with the existing approach to fundamental common law rights, and so in reality represents nothing more than a principled extension of existing and accepted common law doctrine.<sup>97</sup> The better view is to acknowledge the context of constitutionality in which enacted statutory provisions are required to take effect.<sup>98</sup> The requirement to speak clearly and unambiguously is necessary for intelligible and effective legislation, and has nothing to do with restraints on Parliament's legislative capacity. Once this point is acknowledged, the potential

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94 Compare the somewhat more conservative view in JF Burrows and RI Carter *Statute Law in New Zealand* (4 ed, LexisNexis, Wellington, 2009) at 468.

95 Daniel Greenberg (ed) *Craies on Legislation* (8 ed, Sweet & Maxwell, London, 2004) at 516.

96 Anita Killeen, Richard Ekins and John Ip "Undermining the Grudnorm?" [2001] NZLJ 299 at 308. See also the reply in Daniel Kalderimis "*R v Pora: Debate on Parliamentary Sovereignty*" [2001] NZLJ 369.

97 This point is made cogently with respect to the *Thoburn* case in Laws "Constitutional Guarantees", above n 84, at 7-8.

98 See Joseph *Constitutional and Administrative Law in New Zealand*, above n 2, at 792-794.

modifications to the doctrine of implied repeal represented by *Pora* can be seen to be concerned with the interpretation, rather than the promulgation, of legislation. Parliament can still enact, amend or repeal any legislation it deems fit using ordinary legislative processes.

Finally, it need not be conceded that cases such as *Thoburn* and *Pora* “lay the conceptual foundations for the emergence of substantive constraints on Parliament’s competence”.<sup>99</sup> This sentiment is undoubtedly an exaggeration.<sup>100</sup> The argument relies on an inference that by reforming the implied repeal doctrine, the two decisions suggest that the basis for Parliamentary sovereignty lies in the common law, which the judicial branch may reconstruct and amend in response to changing constitutional dynamics. Implicit within this power to reconstruct and amend the common law would be the power to modify the traditional model of Parliamentary sovereignty, or even to dispense with the doctrine altogether. For present purposes, however, it is not necessary to go nearly that far. The actual decision in each case concerning the application of the doctrine of implied repeal is entirely consistent with Parliamentary sovereignty because there are no formal restrictions on the amendment or repeal of any statutes, constitutional or ordinary.<sup>101</sup> This was recognised in *Thoburn*, where both the view that Parliamentary sovereignty in the United Kingdom is limited in any way and the manner and form theory of legislation were expressly rejected.<sup>102</sup> Under each decision, then, the traditional model of Parliamentary sovereignty is preserved.<sup>103</sup> In this way, modified application of the doctrine of implied repeal has a limited but important constitutional effect in promoting stability and consistency with respect to fundamental values.

### ***Manner and Form Restrictions***

It has already been argued that the second of Bogdanor’s two categories of constitutional stability — manner and form restrictions on legislation — is ineffective as a means of formal entrenchment under New Zealand’s contemporary, unwritten constitutional arrangements. While there is some theoretical support for the manner and form theory of legislation among the academic community and in certain judgments, the theory is yet to be successfully applied in New Zealand.<sup>104</sup> This is at least in part because manner and form restrictions challenge the unwritten nature of the New Zealand constitution in a way that modification to the doctrine of implied repeal does not. However, despite the difficulty in successfully applying manner and form restrictions under current

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99 Christopher Forsyth and Mark Elliott “The Legitimacy of Judicial Review” [2003] PL 286 at 299.

100 Of course, characterising it as an exaggeration does not mean that the sentiment is misplaced. The suggestion that constitutional doctrines might plausibly harden so as to limit Parliament’s legislative capacity is a feature of ongoing uncertainty that characterises — indeed ultimately controls — questions of constitutional legitimacy within an unwritten constitutional setting.

101 Forsyth and Elliott “The Legitimacy of Judicial Review, above n 99, at 298.

102 *Thoburn v Sunderland City Council* [2003] QB 151 at [59]. Compare Amanda Perreau-Saussine “A Tale of Two Supremacies, Four Greengrocers, a Fishmonger, and the Seeds of a Constitutional Court” [2002] CLJ 527 at 528-529.

103 See respectively Prebble “Constitutional Statutes and Implied Repeal: The *Thoburn* Decision and the Consequences for New Zealand”, above n 76, at 317; Laws “Constitutional Guarantees”, above n 84, at 8.

104 See “Modern Interpretations: Manner and Form”, above Chapter Four, at 89. Compare Chen “The Advantages and Disadvantages of a Supreme Constitution for New Zealand: The Problem with Pragmatic Constitutional Evolution”, above n 59. Chen assumes without analysis that manner and form restrictions would be effective in a New Zealand context.



constitutional assumptions, the symbolic effect of such purported restrictions may serve its own constitutional function.

This more subtle, informal effect of purported manner and form restriction has two dimensions. The first is the very real but informal moral effect of manner and form restrictions. Much like the principle of legality, such restrictions signal the constitutional importance of the values that are purported to be entrenched, and give legislators reason to pause for thought before they amend or repeal such provisions. Further, the constitutional signalling in this case is from the political branch of government, not the courts, and so it promotes a degree of responsibility within ordinary political institutions and processes to identify and respect values that may properly be regarded as fundamental. It is, therefore, a mistake to assume that the value in manner and form restrictions is that they may be enforced as against a democratic majority in the same way as the provisions of a written constitutional text. Their value comes from the way they interact with the structures and principles of New Zealand's distinctive unwritten constitution. It is true that s 268 of the Electoral Act 1993 is misleading on its face and that the entrenchment it purports to effect is moral only,<sup>105</sup> but in the context of an unwritten constitution institutionally endorsed moral imperatives can prove critical.

The second dimension of purported manner and form restrictions is the potential of such provisions to signal the future direction of constitutional change. The analysis above suggested that claims to legitimate authority based on constitutional principle have the effect of constraining Parliament's legislative power without formally limiting it because of the uncertainty they create around the ongoing respect for such power. If this argument is taken seriously, then manner and form provisions based on constitutional principle should effectively signal to Parliament where the boundaries of the legitimate exercise of the legislative function might one day be found. Provided that they are not blatant attempts to secure political advantage,<sup>106</sup> manner and form provisions add another dimension to the dynamic, reflexive relationship of power and authority between Parliament and the courts. Manner and form provision represent a device through which Parliament can itself direct the courts to matters of constitutional principle that serve as a foundation to the current constitutional order. In this way, purported manner and form restrictions promote stability in respect of adherence to fundamental constitutional values, despite their inability formally to entrench those values within an unwritten constitutional context.

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105 James Allan "Why New Zealand Doesn't Need a Written Constitution" (1998) 5 *Agenda* 487 at 493.

106 See Joseph *Constitutional and Administrative Law in New Zealand*, above n 2, at 594-595; Paul Rishworth "Affirming the Fundamental Values of the Nation: How the Bill of Rights and the Human Rights Act affect New Zealand Law" in Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brooker's, Wellington, 1995) 71 at 82.

## *Commitment without Authority*

A written constitution makes plain its commitment to the realisation of substantive values.<sup>107</sup> Channelled through the constitutional device of an authoritative text, public power must be exercised with reference to values that are held to be fundamental. As the highest source of constitutional principle, the authoritative constitutional text is beyond serious challenge as to which principles and values are dispositive (though of course there may be a degree of interpretive disagreement). The exercise of legal and political power must align with this authoritative statement of values lest it risk being adjudged unconstitutional.

The unwritten nature of the New Zealand constitution means that government power is exercised in the absence of an authoritative source of constitutional principle. An unwritten constitution is premised on a plurality of constitutional sources of authority, rather than a source of constitutional authority that is dispositive in respect of the question of fundamental values. A meaningful commitment to the promotion of fundamental values is, however, still required for any credible theory of liberal constitutionalism. The question that arises is how the New Zealand constitutional system may commit to the realisation of substantive principles and values in the absence of the final authority that attaches to normative theories of written constitutionalism.

It is contended that it is the institutional arrangements between the political and judicial branches of government, and the uneasy balance of power that lies between them, that serves to secure a commitment to constitutional fundamentals under the New Zealand constitution. As neither Parliament nor the courts can provide an authoritative statement, each must promote a degree of deference towards the other in respect of constitutional fundamentals. This is a unique aspect of unwritten constitutionalism because it requires positive action on the part of constitutional actors. The institutionalisation of constraint and stability through deference and evolution of the doctrine of implied repeal respectively highlight the negative aspects of New Zealand's constitutional arrangements. Sustained commitment to these structures and principles that condition the legitimate exercise of public power requires an account of a positive commitment to the realisation of constitutional values that empower government. Explaining the nature of this empowerment is therefore essential to a complete account of constitutionalism.

The argument in this section is that the empowerment that comes from a commitment to substantive constitutional values is achieved where there is a high degree of institutional cooperation among the separate branches of government. A key example of this approach under the contemporary New Zealand constitution has been the adoption of what has been called the 'Commonwealth model' of constitutionalism.

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107 This is equally true in cases where the written constitution is more concerned with the structure and institutional arrangements of government than articulating individual rights and freedoms. The Australian experience demonstrates that a commitment to particular government arrangements may necessarily imply important rights and freedoms: see *Australian Capital Television Pty Ltd v Commonwealth* [1992] 177 CLR 106; *Leeth v Commonwealth* [1992] 174 CLR 455.

### *The ‘Commonwealth Model’ of Constitutionalism*

One approach to implementing a model of constitutionalism in an unwritten constitutional system is to seek to reconcile institutional expressions of representative democracy with a specific constitutional role for the courts to pass judgment on fundamental constitutional issues. In both New Zealand and the United Kingdom, this has been attempted through the adoption of statutory bills of rights.<sup>108</sup> Bills of rights are traditionally the instruments that give expression to important liberal values in the form of human rights. Statutory bills of rights provide a judicial mandate to examine potential breaches of human rights, including breaches committed by the legislative branch of government, without extending to a remedy of disapplying legislation. This approach has been labelled the “new Commonwealth model” of constitutionalism.<sup>109</sup>

This statutory model of rights protection comprises the following features:<sup>110</sup>

- (1) a legalized bill or charter of rights; (2) some form of enhanced judicial power to enforce these rights by assessing legislation (as well as other government acts) for consistency with them that goes beyond traditional presumptions and ordinary modes of statutory interpretation; and (3), most distinctively, notwithstanding this judicial role, a formal legislative power to have the final word on what the law of the land is by ordinary majority vote.

This approach is distinctive from the traditional entrenched, judicialised models of rights protection familiar to the written constitutional context. By employing a statutory rather than a constitutional bill of rights, the Commonwealth model decouples judicial review from the idea of judicial supremacy. While the courts may assess legislation for consistency with protected rights, Parliament may override any judicial view through the usual application of Parliamentary sovereignty. It is this feature of the model that has led to it being described as “weak-form judicial review”.<sup>111</sup>

The Commonwealth model is usually understood in terms of human rights protection, but in New Zealand it may also find expression in statutory reference to the Treaty of Waitangi. While there is no ‘constitutional’ reference to the Treaty in a statute of general application, a number of statutes of specific application make express reference to the Treaty or its principles. Where this Treaty reference is expressed in broad terms by Parliament, it affords the courts the scope to

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108 See respectively New Zealand Bill of Rights Act 1990; Human Rights Act 1998 (UK). The Canadian Charter of Rights approach, while similar in form, has been distinguished on the basis that in substance it collapses to judicial supremacy over rights issues: see Jason NE Varuhas “Courts in the Service of Democracy: Why Courts Should Have a Constitutional (But Not Supreme) Role in Westminster Legal Systems” [2009] NZ Law Review 481 at 483 [“Courts in the Service of Democracy”].

109 See Stephen Gardbaum “The New Commonwealth Model of Constitutionalism” (2001) 49 Am J Comp L 707; “Reassessing the New Commonwealth Model of Constitutionalism” (2010) 8 I•CON 167; *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, Cambridge, 2013). See also Philip A Joseph “Parliament, the Courts, and the Collaborative Enterprise” (2004) 15 KCLJ 321 at 344. For critical comment, if premised on a misreading of New Zealand’s constitutional history, see Ran Hirschl *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, Cambridge, 2004).

110 Gardbaum “Reassessing the New Commonwealth Model of Constitutionalism”, *ibid*, at 169.

111 See Mark Tushnet “Alternative Forms of Judicial Review” (2003) 101 Mich L Rev 2781 at 2784-2786. Mark Tushnet “Weak-form Judicial Review: Its Implications for Legislatures” (2004) 2 NZJPIL 7 discusses the concept in the context of New Zealand’s constitutional arrangements.

investigate the legitimacy of Crown action in terms of Treaty rights and interests.<sup>112</sup> Court scrutiny in this respect proceeds with express Parliamentary endorsement, given the statutory language Parliament has chosen.<sup>113</sup> This approach appears to be analogous to the Commonwealth model, as it contemplates a role for both Parliament and the courts in working out the ultimate meaning and effect of the Treaty in particular circumstances. Internationally, the Commonwealth model has been developed to explain statutory rights protection instruments rather than idiosyncratic features of specific constitutional regimes, and it is this feature that has received academic attention. Accordingly, it is the statutory protection of human rights that is the focus for the remainder of this section.

The Commonwealth model provides for greater weight to be given to judicial interpretations of rights requirements and stronger incentives on political branches of government to be rights respecting while maintaining formal legislative supremacy.<sup>114</sup> The Commonwealth model is therefore premised in part on the ideal of representative democracy, as the courts are afforded an institutional role to facilitate “robust democratic discourse”.<sup>115</sup> The Commonwealth model also recognises institutional weaknesses in legislative decision-making processes. These weaknesses include the dominating influence of political parties under the whip system, and the use of urgency and other procedural devices to avoid serious Parliamentary scrutiny of legislative proposals.<sup>116</sup> Continued adherence to a model of Parliamentary supremacy despite the acknowledgment of various weaknesses does not entail an inconsistency of approach. It may simply acknowledge that any theory of legitimacy that hopes to gain real-world traction must account for the defects and shortcomings that afflict all real-world institutions.<sup>117</sup>

In New Zealand, the Commonwealth model has been given effect through the enactment of the New Zealand Bill of Rights Act 1990 (NZBORA). NZBORA is an ordinary, unentrenched statute, and Parliamentary sovereignty is expressly retained.<sup>118</sup> It sets an interpretative obligation based on recognition of substantive rights rather than a normatively empty interpretative process.<sup>119</sup> In particular s 6 provides that a meaning consistent with the rights and freedoms contained in NZBORA is to be preferred to any other meaning, wherever such an interpretation is available. NZBORA affirms and protects a range of fundamental rights and freedoms dealing with life and

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112 Matthew SR Palmer “The Treaty of Waitangi in Legislation” [2001] NZLJ 207 at 208 notes that the specific words used in legislation to refer to the Treaty will have a significant impact on the Treaty’s ultimate legal effect. If that reference is not open-ended, the effect of the reference may be more symbolic than substantive, and the interpretative role of the court will be more limited.

113 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 688.

114 Jane L Hiebert “New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?” (2004) 82 Tex L Rev 1963 at 1964.

115 Varuhas “Courts in the Service of Democracy”, above n 108, at 507.

116 Varuhas “Courts in the Service of Democracy”, *ibid*, at 498-499.

117 Jeremy Waldron “The Core of the Case Against Judicial Review” (2006) 115 Yale LJ 1346 at 1389.

118 New Zealand Bill of Rights Act 1990, s 4.

119 Gardbaum “The New Commonwealth Model of Constitutionalism”, above n 109, at 728.

security of the person,<sup>120</sup> democratic and civil rights,<sup>121</sup> freedom from discrimination,<sup>122</sup> and due process rights.<sup>123</sup> Subject to the overarching commitment to Parliamentary sovereignty, these rights and freedoms may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.<sup>124</sup>

Consistent with the philosophy of a Parliamentary rather than a judicial or constitutional bill of rights, the NZBORA provides for the Attorney-General to vet proposed legislation for consistency with the rights and freedoms it contains.<sup>125</sup> However, the NZBORA is silent on the issue of judicial remedies where a breach has been established.<sup>126</sup> Despite this curiosity, the NZBORA appears to have established new and distinctive approach to the recognition of fundamental human rights. The NZBORA goes beyond traditional theoretical models of unfettered legislative supremacy without compromising a continuing commitment to Parliamentary sovereignty in practice. It may even be possible to conclude that the NZBORA has served to better protect rights and freedoms in New Zealand than would otherwise be the case.<sup>127</sup>

New Zealand adopted NZBORA despite initial proposals for a fully entrenched and judicially enforceable instrument that would function in similar terms to a written constitution.<sup>128</sup> The adoption of an ordinary statutory protection for fundamental rights was a deliberate choice, with the promoters of supreme legislation well aware that their proposals constituted a fundamental change to New Zealand's constitution. However, the traditional commitment to Parliamentary sovereignty held fast partly because accepted means of changing the doctrine were simply not available.<sup>129</sup> The lack of success of the entrenched proposal signals a commitment to the maintenance of New Zealand's unwritten constitutional structure. Accordingly, a distinctive approach to rights protection was required.

The strength of the distinctive approach adopted in NZBORA is the perception of it as a compromise between two sources of constitutional authority. Parliament and the courts each have a role to play to ensure that rights are properly respected and protected. The model is clearly premised on Parliamentary protection for fundamental rights, but contemplates a necessary role for the courts in achieving a sufficiently robust level of protection:<sup>130</sup>

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120 New Zealand Bill of Rights Act 1990, ss 8-11.

121 New Zealand Bill of Rights Act 1990, ss 12-18.

122 New Zealand Bill of Rights Act 1990, ss 19-20.

123 New Zealand Bill of Rights Act 1990, ss 21-27.

124 New Zealand Bill of Rights Act 1990, s 5.

125 New Zealand Bill of Rights Act 1990, s 7.

126 The courts have been slow to establish jurisdiction to provide declaratory relief in the form of an indication of inconsistency, as hinted at in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA). See "Declarations of Inconsistency", below, at 165-170.

127 See Gardbaum "Reassessing the New Commonwealth Model of Constitutionalism", above n 109, at 187.

128 See Ministry of Justice *A Bill of Rights for New Zealand: A White Paper* (Government Printer, Wellington, 1985).

129 See Philip A Joseph "The New Zealand Bill of Rights" (1996) 7 PLR 162 at 164.

130 Paul Rishworth "Human Rights and the Reconstruction of the Moral High Ground" in Rick Bigwood (ed) *Public Interest Litigation: New Zealand Experience in International Perspective* (LexisNexis NZ, Wellington, 2006) 115 at 121.

[NZBORA requires that the courts] articulate what proper regard for human rights would demand in the situation under review. That done, the Judge then must determine whether that proper regard can be accommodated in the statutory context. If it can be, it must be: that is the measure of s 6 of the [NZBORA]. The state's human rights provision "saves" the victim from the savagery of the protagonist, usually but not necessarily the state. If rights cannot be accommodated in the law, the very process of so deciding is itself a moral judgment about the content of the law. This is virtually explicit in s 4 of the [NZBORA]: the judicial obligation to apply even inconsistent statutory provisions arises only if the provision is first ruled inconsistent.

The role of an independent judiciary is critical because it allows individuals and minorities to invoke the fundamental values of the constitutional order in their capacity as individual citizens.<sup>131</sup> They are not required to make themselves "strategically viable" in democratic or majoritarian terms.<sup>132</sup> That these normative considerations are recognised despite an explicit commitment to Parliamentary sovereignty in respect of fundamental rights is the reason that NZBORA is understood in terms of institutional compromise and co-operation.

Crucially, both Parliament and the courts recognise the institutional authority of the other as essential to the legitimacy of this shared project. The courts rely on the democratic legitimacy conferred by Parliamentary endorsement of their interpretative role, while Parliament secures additional legitimacy by incorporating the scrutiny of an independent judiciary through which individuals and minorities can contest government action in quintessentially moral terms.<sup>133</sup> It is this concept of shared responsibility for constitutional outcomes that allows for meaningful commitment to a particular set of fundamental values. Institutional agreement both on the constitutional importance of articulated fundamental values and on the respective roles of legislature and judiciary promotes the realisation of those values. It is through institutional arrangements of shared commitment and responsibility such as NZBORA that an unwritten constitution may sustain a credible commitment to the realisation of fundamental values without reliance on an authoritative constitutional text.

To characterise the Commonwealth model as solely premised on compromise and cooperation, however, may obscure aspects of the subtle and dynamic relationship between Parliament and the courts that is central to unwritten constitutionalism. The Commonwealth model might alternatively be characterised as thriving on the ambiguity over the respective roles of Parliament and the courts. While Parliament's view is determinative, it is openly acknowledged that its view is not sufficient for effective rights protection. Equally, while the views of the courts may be overruled, those views are a necessary part of the commitment of the state to the realisation of rights and other values. Understanding the commitment engendered by shared responsibility for implementing the NZBORA might better be articulated in terms of the ambiguity and uncertainty that animates the

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131 Ronald Dworkin *A Matter of Principle* (Clarendon Press, Oxford, 1985) at 11.

132 Lawrence G Sager "Constitutional Justice" (2002) 6 NYU J Legis & Pub Pol'y 11 at 17.

133 Geoff Leane "Rights Discourse: Are We All Alone?" (2001) 8 Cant LR 187 at 203.

normative dimension of unwritten constitutionalism. The matter has been put in the following terms in respect of the United Kingdom experience:<sup>134</sup>

The Human Rights Act, although widely praised for achieving a masterly equilibrium between competing theories of constitutionalism, actually enshrines the ambivalence that such contrasting accounts engender. While on the one hand purporting to preserve Parliament's unfettered sovereignty — giving Parliament the 'last word', as it is often put — on the other, it mandates a mode of interpretation of laws that strengthens the hand of the judiciary in resisting unwarranted encroachments on fundamental rights.

This characterisation of human rights instruments such as NZBORA makes plain their relationship with a distinctively unwritten model of constitutionalism. Further, it seems to take significant support from the way the courts have approached marginal issues arising under the NZBORA framework.

### ***Declarations of Inconsistency***

The Commonwealth model of rights protection offers a number of variations to suit a nation's individual history and circumstances. The model is usually seen to be at its strongest in terms of rights protection where the courts have jurisdiction to pass formal judgment on the legislative and executive acts that breach fundamental rights.<sup>135</sup> Somewhat curiously, the NZBORA is silent on the precise role the courts are expected to play in the event an inconsistency with NZBORA rights is discovered.

In respect of breaches committed by the executive branch of government, the courts have inferred a remedial jurisdiction.<sup>136</sup> In the absence of statutory guidance, the courts will choose a remedy carefully and deliberately to ensure vindication of an abrogated right where appropriate.<sup>137</sup> Where a breach of an NZBORA-protected right is committed by Parliament, the role of the courts is less clear. NZBORA's express reservation of Parliamentary sovereignty means that the courts cannot disapply inconsistent legislation.<sup>138</sup> The natural answer might be a formal declaration by the court of legislative inconsistency with NZBORA. Such declarations are expressly permitted under comparable rights protection regimes.<sup>139</sup> Further, the interpretative exercise required to be carried out by the courts under s 5 in applying the NZBORA necessarily implies an inconsistency with fundamental rights if legislation is found not to be a reasonable limit that can be demonstrably justified in the context of a free and democratic society.<sup>140</sup> The very nature of the inquiry the courts

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134 TRS Allan *The Sovereignty of Law: Freedom, Constitution, and Common Law, The Sovereignty of Law: Freedom, Constitution, and Common Law* (Cambridge University Press, Cambridge, 2013) at 4.

135 Varuhas "Courts in the Service of Democracy", above n 108, at 508-809.

136 *Simpson v Attorney-General (Baigent's case)* [1994] 3 NZLR 667 (CA).

137 See *Dunlea v Attorney-General* [2000] 3 NZLR 136 (CA) at 161-162.

138 New Zealand Bill of Rights Act 1990, s 4.

139 See Human Rights Act 1993, s 92J; Human Rights Act 1998 (UK), s 4.

140 Paul Rishworth "The Inevitability of Judicial Review under "Interpretative" Bills of Rights: Canada's Legacy to New Zealand and Commonwealth Constitutionalism?" (2004) 23 Sup Ct L Rev 135 at 266. Compare the interesting argument that a formal process for making and considering declarations of inconsistency is needed in the New Zealand context in Varuhas "Courts in the Service of Democracy", above n 108.

are required to undertake under NZBORA will, therefore, sometimes give rise to a judicial opinion of the inconsistency of specific statutory provisions with NZBORA by necessary implication. This process of inquiry suggests that a formal declaration of inconsistency is a modest step. Despite the logical force of this position, the courts have never granted a declaration of inconsistency. It is submitted that the approach of the courts in this regard reveals much about the Commonwealth model of rights protection as applied in New Zealand, the nature of the dynamic relationship between Parliament and the courts, and ultimately the principles that underpin unwritten constitutionalism.

The possibility of a formal declaration by the courts indicating in their view the inconsistency of legislative provisions with the fundamental rights and freedom affirmed in the NZBORA was first hinted at in *Moonen v Film and Literature Board of Review*.<sup>141</sup> Drawing on the nature of the analysis it was required to conduct under s 5 of NZBORA, the Court of Appeal suggested that there was jurisdiction to issue a formal declaration:<sup>142</sup>

[Section s 5 of the NZBORA] necessarily involves the Court having the power, and on occasions the duty, to indicate that although a statutory provision must be enforced according to its proper meaning, it is inconsistent with the Bill of Rights, in that it constitutes an unreasonable limitation on the relevant right or freedom which cannot be demonstrably justified in a free and democratic society. Such judicial indication will be of value should the matter come to be examined by the Human Rights Committee. It may also be of assistance to Parliament if the subject arises in that forum. In the light of the presence of s 5 in the Bill of Rights, New Zealand society as a whole can rightly expect that on appropriate occasions the Courts will indicate whether a particular legislative provision is or is not justified thereunder.

This passage of reasoning has interesting parallels with aspects of dialogue theory that has proven influential in theorising the respective roles of Parliament and the courts under the Canadian Charter of Rights and Freedoms.<sup>143</sup> Despite retaining a formal commitment to Parliamentary sovereignty, an indication of inconsistency from the courts provides the impetus for principled reconsideration of the issue by Parliament. Parliament may elect to either confirm or amend the impugned provision, but in either case the court's view of the matter has supported principled consideration of the issue by Parliament.<sup>144</sup> The courts have framed the issue in terms of the "social value" of bringing to public notice "an enactment which is inconsistent with fundamental rights and freedoms".<sup>145</sup> From that perspective, it appears to be only a matter of time before the specific facts of a case to be decided by the courts requires the exercise of the implied jurisdiction to grant a formal declaration of inconsistency.

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141 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA).

142 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [20].

143 The seminal work is Peter W Hogg and Alison A Bushell "The *Charter* Dialogue Between Courts and Legislatures" (1997) 35 Osgoode Hall LJ 75.

144 See generally Varuhas "Courts in the Service of Democracy", above n 108.

145 *Hansen v R* [2007] NZSC 7 at [267].



There is, however, a marked reluctance on the part of the courts to exercise the jurisdiction. Where the question of jurisdiction has arisen, the courts have been reluctant to confirm the ability to issue a formal declaration.<sup>146</sup> This appears to have been a deliberate strategy on the part of the New Zealand judiciary, consistent with its understanding of the nature of its constitutional function. In *Boscawen v Attorney-General* the Court of Appeal made the most direct statement of the current legal position:<sup>147</sup>

The question as to whether a declaration of inconsistency is an available remedy under the NZBORA is still to be resolved [...] We prefer to leave the question to be decided in a case in which the outcome depends on the answer [...]

This ambivalence towards resolving the question of the courts' jurisdiction suggests a particular perspective for understanding the constitutional significance of the statutory process of rights protection in New Zealand, and the respective roles of Parliament and the court in that process. In the first place, it suggests that the courts are still discerning the nature and scope of their role under the NZBORA. In this respect the approach of the courts is consistent with the model of unwritten constitutionalism developed throughout this chapter. A predefined response to an abstract challenge to fundamental rights implies a degree of institutional rigidity that is out of place in New Zealand's unwritten constitution. Secondly, the courts' positioning on this issue may reserve to the judiciary the possibility of significant power that goes beyond declaratory relief. To accept the availability of the declaratory remedy in the abstract may stifle the development of other judicial responses. The courts have traditionally reserved the right to deal with unconstitutional legislation when the issue arises and in a manner that is appropriate in all the circumstances. A commitment to normative principle could be compromised if a particular course of action is telegraphed in advance on the basis of an abstract threat.

Thirdly, this considered judicial approach places NZBORA itself within an appropriately broad constitutional frame. While statutory recognition of fundamental rights is important to signal Parliamentary endorsement of constitutional values, the normative weight of those values attaches to their substance as much as their institutional recognition. The rights and freedoms affirmed in NZBORA are essential to New Zealand's vision of liberal democracy. Such matters of principle may, in appropriate circumstances, demand a more flexible approach than that provided by NZBORA statutory framework. In this respect, the courts' ambivalence reflects a contingent and dynamic relationship between two major constitutional institutions — Parliament and the courts — where mutual respect and forbearance are key means of securing constitutional propriety. The nature of this relationship goes beyond the notion of dialogue. Whereas dialogue theory looks primarily to institutional expression for a definitive answer on constitutional questions, unwritten constitutionalism leaves open the possibility that either Parliament or the courts may revisit their shared commitment to a mutual enterprise if there is a risk that the normative basis of that

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146 See *Taunoa v Attorney-General* [2006] NZSC 95 at [8]; *Belcher v The Chief Executive of the Department of Corrections* [2007] NZCA 174 at [16]. Compare *R v Poumako* [2000] 2 NZLR 695 (CA) at [86].

147 *Boscawen v Attorney-General* [2009] NZCA 12 at [56].

constitutional project is compromised. Parliament and the courts each take their cues from the other, but the success of the unwritten constitutional paradigm requires that the question of the institutional source of ultimate constitutional authority remain unresolved.

The tensions inherent in this more complex and dynamic relationship between Parliament and the courts appear to have come to the fore in the very recent case of *Taylor v Attorney-General*.<sup>148</sup> That case concerned the right of prisoners to vote in national elections. The Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 provided for the disqualification from voting of persons detained in prison pursuant to a sentence of imprisonment.<sup>149</sup> The named plaintiff, one of a number of prisoners serving a sentence of imprisonment, challenged the Amendment Act as being inconsistent with s 12 of NZBORA, which provides:

**12 Electoral rights**

Every New Zealand citizen who is of or over the age of 18 years—

- (a) Has the right to vote in genuine periodic elections of members of the House of Representatives, which elections shall be by equal suffrage and by secret ballot; [...]

The amendment had the effect of preventing any person serving a sentence of imprisonment on election day from voting in the national election. The plaintiff contended that the statutory amendment was not a reasonable restriction of the s 12(a) right to vote as it amounted to a blanket ban on all persons serving imprisonment sentences on election day regardless of the length of sentence or seriousness of the offence. The amendment was, therefore, disproportionate in effect and not rationally connected to any justifiable purpose.

This assessment of the inconsistency of the statutory amendment with s 12(a) received significant support from the s 7 report provided by the Attorney-General to the House at the time the legislation was enacted. The Attorney-General questioned whether every person serving a sentence of imprisonment is necessarily a serious offender.<sup>150</sup> The Attorney-General's reasoning continued:<sup>151</sup>

The blanket ban on prisoner voting is both under and over inclusive. It is under inclusive because a prisoner convicted of a serious violent offence who serves a two and a half year sentence in prison between general elections will be able to vote. It is over inclusive because someone convicted and given a one-week sentence that coincided with a general election would be unable to vote. The provision does not impair the right to vote as minimally as reasonably possible as it disenfranchises in an irrational and irregular manner.

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148 *Taylor v Attorney-General* [2014] NZHC 1630. The issue has received further judicial consideration in *Taylor v Attorney-General* [2014] NZHC 2225.

149 Now in force as Electoral Act 1993, s 80(1)(d).

150 Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill* (House of Representatives, Wellington, 2010) at [12].

151 Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill*, *ibid*, at [14]-[15].

The disenfranchising provisions of this Bill will depend entirely on the date of sentencing, which bears no relationship either to the objective of the Bill or to the conduct of the prisoners whose voting rights are taken away. The irrational effects of the Bill also cause it to be disproportionate to its objective.

The Attorney-General ultimately concluded that “the blanket disenfranchisement of prisoners appears to be inconsistent with s 12 of the [NZBORA] and that it cannot be justified under s 5 of that Act”.<sup>152</sup> Parliament enacted the proposed legislation in spite of the Attorney-General’s conclusion.

In light of this legislative context, the plaintiff sought a declaration that the statutory amendment was inconsistent with s 12 of the NZBORA. The Crown, as defendant, argued that the court lacked the jurisdiction to make any such declaration. The High Court noted that the question of jurisdiction had not previously been authoritatively determined by the courts.<sup>153</sup> The question of jurisdiction resides at the constitutional margins of the relationship between Parliament and the courts.<sup>154</sup> There is a risk that a formal declaration will amount to an assertion that Parliament has acted unlawfully, and this may disturb the delicate balance between Parliament and the courts. Deciding the question would crystallise the ‘constitutional boundary’ separating the role of the courts from the legislative function of Parliament. For that reason, the courts often deliberately refrain from intervening. It is a mistake, however, to characterise this practice as evidence of a lack of jurisdiction, as the Court in *Taylor* confirmed by refusing to strike out the case on jurisdictional grounds.<sup>155</sup> There is no impediment in principle to the courts exercising the jurisdiction in an appropriate case. However, the judicial practice of maintaining ambivalence towards the exercise of the jurisdiction until an appropriate case arises is vital to the “delicate balance of mutual respect and restraint” that underpins the relationship between Parliament and the courts.<sup>156</sup> As a result:<sup>157</sup>

[...] it may well be that the courts will diplomatically refrain from taking the step to issue formal declarations, at least until the jurisdiction (which I consider they have in the strict sense) is formalised in legislation similar to s 92J of the Human Rights Act 1993 and the Human Rights Act 1998 (UK).

Ultimately, the Court determined that *Taylor* was not an appropriate case. As a strike out application, it was not a forum where the relevant issues could be considered in their fullest context. Further, the plaintiff’s sentence of imprisonment would not have entitled him to vote under the pre-amendment legislation, so issues of standing would have to be overcome. Finally, any ‘social value’ to be derived from a formal declaration was minimal in light of the Attorney-General’s unequivocal report that the legislation was in breach of s 12 of NZBORA. This final point implicates

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152 Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill*, *ibid*, at [16].

153 In addition to the cases already cited, see *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at [59]; *Zaoui v Attorney-General* [2004] 2 NZLR 339 (HC) at [166]; *Miller v The New Zealand Parole Board* [2010] NZCA 600 at [75].

154 *Taylor v Attorney-General* [2014] NZHC 1630 at [63].

155 *Taylor v Attorney-General* [2014] NZHC 1630 at [82].

156 *Taylor v Attorney-General* [2014] NZHC 1630 at [68].

157 *Taylor v Attorney-General* [2014] NZHC 1630 at [81] (footnote omitted).

another dimension that strikes to the heart of the Court's reasoning: a declaration of inconsistency covering the same ground as an Attorney-General's vet that was clearly considered by the House may imply that judgement has been passed on the quality of the Parliamentary process. It is a basic constitutional principle that such matters are not "apt" for judicial supervision.<sup>158</sup> Such considerations led the Court to the view that while jurisdiction to grant declarations of inconsistency is likely to be available in theory, in practice the plaintiff's claim must fail. The reality is that in such circumstances, the Court is unlikely to be comfortable with the role of conscience of the legislative branch.<sup>159</sup>

The Court's approach to the issue, which implicitly acknowledges a breach of s 12 of NZBORA while refusing to issue a formal declaration to that effect, may strike some as unsatisfactory. However, a close reading of the Court's judgment suggests that the outcome is consistent with New Zealand's unwritten constitution. The judgment takes careful account of the relationship between Parliament and the courts, and the constitutional context in which that relationship exists. These are considerations that need to inform any understanding of the Commonwealth model of rights protection, as exemplified by NZBORA. The position the model enshrines is uneasy and dynamic, and preserves scope for each of New Zealand's two major law-making institutions to influence the nature and scope of rights protection. That is in the nature of an unwritten constitution.

### *Constitutionalism without a Text*

The approach of the New Zealand courts to the implementation of NZBORA demonstrates why it is inappropriate to treat that statute like a written constitutional text. It does not function as a source of fundamental values, although it does implement a process for the recognition and application of those values in particular circumstances. Nor does it tightly prescribe the scope of judicial or Parliamentary authority despite retaining a formal commitment to Parliamentary sovereignty. NZBORA is not an amalgamation of written constitutionalism and Parliamentary sovereignty.<sup>160</sup> NZBORA represents a distinctive approach to constitutionalism that necessarily operates in an unwritten constitutional context.

This chapter has argued that the New Zealand constitution operates in particular ways that demonstrate a commitment to a distinctive model of constitutionalism. The relationships between major constitutional actors are premised on mutual respect but also irresolvable uncertainty at the level of abstract normative principle. This feature is most prominently demonstrated by the relationship between Parliament and the courts, and the implications of this relationship for a complete understanding of Parliament's legislative sovereignty. Uncertainty as to how the courts

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158 *R (HS2 Alliance Action Ltd) v Secretary of State for Transport* [2014] UKSC 3 at [116].

159 Claudia Geiringer "On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act" (2009) 40 VUWLR 612 at 646.

160 Compare Gardbaum *The New Model of Commonwealth Constitutionalism: Theory and Practice*, above n 109, at 44.

will react to legislation that appears to violate the fundamental values on which the constitution is based constrains Parliament's exercise of legislative power without formally limiting it. The necessary role of the courts in the interpretation of legislation allows for stability in respect of constitutional principles through the application of a modified principle of implied repeal. This reliance on interpretative doctrine preserves Parliamentary sovereignty, forgoing the need for formal entrenchment. Finally, the constitutional values that underpin the legitimacy of public power are recognised and affirmed in legislation, allowing both Parliament and the courts a shared role in the development and protection of New Zealand's constitutional arrangements. There is no need to rely on a dispositive source of constitutional authority for these values to gain real traction. These principles and structures not only support a liberal version of constitutionalism, but do so in a way that takes into account — and even makes use of — those features that mark New Zealand's constitution as distinctively unwritten. The ambiguous, complex and contingent normative framework that results from an unwritten constitution is essential to the institutionalisation of the ideals that inform liberal constitutionalism in New Zealand. It is the foundation of a normative model of constitutionalism unmoored from constitutional text. It is a genuinely unwritten model of constitutionalism.

The concluding paragraphs of this chapter seek to demonstrate that this 'unwritten' model of constitutionalism is genuinely distinctive. Constitutionalism in New Zealand is neither a model of common law constitutionalism nor political constitutionalism under another label, although it shares features with both. Despite its affinity with the common law-style of constitution reasoning, unwritten constitutionalism is not reducible to constitutionalism based on the exclusive authority of the common law courts. In the first instance it is not a form of legal constitutionalism, despite its prescriptive, value-laden nature. Unwritten constitutionalism promotes the realisation of constitutional values through a range of legal and political processes. In each case, these are instances of a deeper commitment to constitutional principle that cannot be solely conceptualised in either legal or political terms. Those who look to the common law for evidence of constitutional practice will surely find it, but the articulation of constitutional values in that context should not be conflated with their creation. Secondly, the unwritten constitution is not organised in terms of a strict normative hierarchy as common law constitutionalists contend.<sup>161</sup> Fundamental rights and other constitutional values inhere within the unwritten constitution by virtue of the substantive nature of the requirements of constitutionally legitimate government. As such, all sources of genuinely constitutional authority reflect their nature, including the common law. However, none of those sources of constitutional authority is sufficient to sustain it.

The opaque and contingent nature of unwritten constitutionalism may also draw parallels with models of political constitutionalism. Unlike liberal constitutionalism based squarely on the construct of legally enforceable and formally entrenched limits on the exercise of public power, both political constitutionalism and unwritten constitutionalism require the boundaries and

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<sup>161</sup> Thomas Poole "Back to the Future? Unearthing the Theory of Common Law Constitutionalism" (2003) 23 *Oxford J Legal Stud* 435 at 439 describes the idea of a higher order common law as "common law exceptionalism".

conditions of constitutionally legitimate government to be worked out in practice. However, the means of addressing such matters in practice as well as the normative models of constitutionalism each implies are very different in each case. Unwritten constitutionalism recognises that New Zealand's constitutional system deliberately goes beyond ordinary political institutions and processes. Its foundations must be understood in a constitutional rather than a political frame. Political constitutionalism fails to account for the need for political institutions and processes to engage with constitutional values as constitutional values. Unwritten constitutionalism as described in this chapter sketches the beginnings of an account that marries politics with a meaningful commitment to constitutional legitimacy.

The normativity of unwritten constitutionalism is much richer than that implied by models of political constitutionalism. Gee and Webber argue that political constitutionalism is distinctive in a normative sense because “it is prescriptive without prescribing much”.<sup>162</sup> A superficial understanding of unwritten constitutionalism may cast it in similar terms. Unwritten constitutionalism may be less visible and more obscure than traditional accounts of liberal constitutionalism simply because its defining feature — its unwritten-ness — is less visible and more abstract than constitutional text. But unwritten constitutionalism maintains this ambiguous and contingent nature only in the face of abstract inquiry. Where constitutional fundamentals are brought directly into question, unwritten constitutionalism is prepared to supply a definitive answer. The fact that unwritten constitutionalism makes use of its contingent character to promote tangible constitutional outcomes where political constitutionalism seeks to remain agnostic is a meaningful difference between the two approaches. The theory of unwritten constitutionalism sketched in this chapter can, therefore, be characterised as genuinely distinctive. In making use of the distinctive features of New Zealand's unwritten constitution, a new model of constitutional propriety emerges. While it shares the broad aims of liberal constitutionalism as understood within the written constitution construct, it is necessarily distinctive in approach. It is unwritten constitutionalism, properly understood.

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162 Graham Gee and Grégoire CN Webber “What Is a Political Constitution?” (2010) 30 *Oxford J Legal Stud* 273 at 290.

# CONCLUSIONS

This thesis has argued in support of a model of liberal constitutionalism that is sensitive to New Zealand's distinctively unwritten constitutional arrangements. New Zealand's constitution makes a credible claim to legitimacy in liberal terms by constraining the exercise of public power, promoting stability in respect of constitutional fundamentals, and embodying a shared commitment to substantive values all in the absence of a foundational and authoritative constitutional text. The principles and structures that give rise to these features form the foundation for a workable theory of unwritten constitutionalism that not only describes the operation of New Zealand's constitutional arrangements, but guides the exercise of public power in a way that ensures its legitimacy.

The ability of a constitution to guide the exercise of legal and political power is a feature of its inherent normativity. Chapter one demonstrated the importance of taking this normativity seriously. While accounts of New Zealand's unwritten constitution tend to focus on descriptive analysis, an explanation of the institutional expression afforded to the constitution's underlying normative values cannot be ignored in any account that purports to be complete. These normative values are not merely prescriptive in the sense of arguments for constitutional reform. Meaningful normative standards go further by making claims on constitutional decision-makers: "they command, oblige, recommend, or guide".<sup>1</sup> It is this feature of a constitution — a feature termed 'constitutionalism' — that establishes the legitimacy of public power and the authority of government. Taking this understanding of constitutionalism seriously has been the dominant perspective informing the arguments addressed in this thesis.

Chapter two and chapter three demonstrated the distinctive nature of an unwritten constitution. Chapter two was concerned with matters of form, and specifically the link between constitutional form and constitutionalism. Historically, the written and unwritten constitutional traditions developed very differently, although they shared a concern to regulate the legitimate exercise of public power. By positing limits on state authority that were beyond amendment because they had not been committed to writing, the unwritten constitutional tradition sought to promote a set of broadly liberal values. In a contemporary context, a written constitution is based on a "uniquely prominent" written document,<sup>2</sup> and that document carries with it important normative connotations. As a nation without a central constitutional document that is accepted as foundational and authoritative, New Zealand's unwritten constitutional arrangements represent a distinctive form of constitutional settlement with distinctive ways of conceptualising claims to constitutional

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1 Christine M Korsgaard, "The Normative Question" in Onora O'Neill (ed) *The Sources of Normativity* (Cambridge University Press, Cambridge, 1996) 7 at 8 (emphasis in the original).

2 James Allan "Why New Zealand Doesn't Need a Written Constitution" (1998) 5 *Agenda* 487 at 487.

legitimacy. The terms ‘written’ and ‘unwritten’ are useful descriptions that capture an important difference in constitutional form that matters to theories of constitutionalism.

Chapter three sought to demonstrate the potential for matters of form to impact on substantive analysis. Through a comparative analysis of the judicial treatment of political communication, evidence was presented that distinctive approaches to constitutional reasoning attach to different constitutional structures. The Supreme Court of the United States has a tendency towards a top-down, deductive style of reasoning that treats constitutional interpretation as intimately tied to over-arching theories of legitimate government. Those theories are made express in the resolution of particular disputes. In contrast, the New Zealand Court of Appeal has tended towards a bottom-up, inductive style of reasoning that leaves the role of constitutional values under theorised. The influence of constitutional form on these two styles of legal reasoning was supported with reference to the experience of the High Court of Australia, which has vacillated between the two approaches. The manifest concern with the precise textual basis of the freedom of political communication in the Australian Constitution reveals the potential influence of constitutional text over constitutional reasoning.

Chapter four illuminated the tensions that underpin the study of constitutionalism in New Zealand. The dominant aspect of New Zealand’s unwritten constitutional structure is a deep commitment to a relatively absolute interpretation of Parliamentary sovereignty. It was argued that there are no inherent limits to Parliament’s plenary power. However, the liberal ideals of representative democracy, fundamental human rights and the rule of law, and the principles of the Treaty of Waitangi, represent deeper strands of normative principle within New Zealand’s constitutional structure that orthodox sovereignty theory overlooks. These normative considerations reveal the potential for theories of liberal constitutionalism to inform constitutional practice, suggesting that any workable model of constitutionalism that purports to apply to New Zealand’s unwritten constitutional arrangements must somehow reconcile the fact of Parliamentary sovereignty with a liberal vision of constitutionalism.

Chapter five contended that political constitutionalism does not achieve this reconciliation. Theories of political constitutionalism remain embryonic in New Zealand, but their focus on political institutions and processes as an important site of constitutional activity provides a superficial level of attraction for New Zealand’s constitutional system. However, political constitutionalism’s necessary commitment to a very ‘thin’ account of the substantive moral content of the New Zealand constitution is at odds with the reality of constitutional practice. Even political institutions and processes recognise the ‘critical morality’ of the New Zealand constitution as informed by substantive principles and values that are fundamental to constitutionally legitimate government. Substantive constitutional principle, rather than political expediency or raw democratic accountability, guides government action and behaviour in New Zealand. A richer normative account of New Zealand’s constitution is needed.



The framework for this normatively richer account was outlined in chapter six. The unwritten constitutional context in which the exercise of public power occurs in New Zealand requires a meaningful account of effective constraints in the absence of enforceable limits, ongoing stability in the absence of formal entrenchment, and a shared commitment to the realisation of fundamental constitutional principles and values in the absence of a unifying source of constitutional authority. These aspects of constitutional government are achieved in New Zealand through the prudential deference promoted by uncertainty at the margins of constitutional relationships, common law doctrines of interpretation that resist the amendment or repeal of constitutional fundamentals, and the apportionment of responsibility for the protection of substantive principles and values among the key institutions of government. These features of the New Zealand constitution demonstrate the availability of a coherent theory of constitutionalism that marries a liberal account of political morality with a distinctively unwritten constitutional settlement. It supplies the basis for a theory of liberal constitutionalism that serves to legitimise the exercise of public power in New Zealand in the absence of an entrenched, constitutive document that is accepted as fundamental and authoritative. A number of insights emerge from this analysis.

### *Recasting Liberal Constitutionalism*

There is a tendency to characterise a serious commitment to liberal constitutionalism in terms of a very specific set of constitutional arrangements. Those arrangements are premised on the existence of a written constitutional text that is accepted as foundational and authoritative. The device of a written constitution provides for constraint on the exercise of public power in terms of enforceable limits, stability to be secured through formal entrenchment, and commitment to constitutional fundamentals grounded explicitly in a definitive source of normative authority. In a genuinely liberal democracy, these institutional features operate to secure representative democracy, fundamental rights and the rule of law, and have become the standard against which claims to constitutional government are assessed.

The analysis in this thesis invites a reassessment of this position. While the principles and values that inform liberal constitutionalism may have some claim to universal application,<sup>3</sup> the institutional expression of those principles and values is sensitive to constitutional context. New Zealand's commitment to constitutional government proceeds on a very different basis due to the absence of a formal written constitution. New Zealand's unwritten model of constitutionalism is premised on constraints without limits, stability without entrenchment and commitment without dispositive authority. New Zealand's commitment to a liberal vision of constitutionalism is, however, no less meaningful despite its distinctive nature. The reason New Zealand has a commendable reputation internationally in terms of respect for representative democracy, fundamental rights and the rule of

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3 The "rise of constitutionalism" has been identified as an international movement, particularly with regards to human rights: see Robin Cooke "The Constitutional Renaissance" (New Zealand Law Conference, Rotorua, April 1999) at 2, cited in Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4 ed, Thomson Reuters, Wellington, 2014) at 17.

law is because a set of constitutional principles and structures operate effectively to secure those important ends. That those principles and structures are underpinned by an unwritten constitutional framework reflects New Zealand's distinctive constitutional history and culture rather than a lack of commitment to the fundamentals of constitutional government.

The principles and values that inform liberal constitutionalism are capable of much more flexible application than a narrow focus on the written constitutional tradition might suggest. Liberal principles are, first and foremost, principles, and are inherently broader and more adaptable than represented by any individual example of their institutional expression. Accordingly, claims to constitutional legitimacy cannot be assessed purely on the basis of constitutional structure. A deeper inquiry into the nature of constitutional principle and the institutional expression it receives is a necessary part of any complete account of constitutional government.

### *Reinterpreting New Zealand's Constitutional Arrangements*

Once liberal constitutionalism is recast in terms that are appropriate for an unwritten constitution, it offers the potential for renewed understanding of New Zealand's distinctive constitutional arrangements. The unwritten nature of New Zealand's constitution has led to it being characterised as complex and, at times, contradictory. The analysis in this thesis suggests that this characterisation may be apt. Some justification for it can be found in the way that the reality of legislative sovereignty is required to sit alongside pressures for principled limits on the legitimate exercise of public power.<sup>4</sup> The characterisation also finds some expression in the way political elements of the New Zealand constitution are influential — and may often take primacy — but seldom appear to be determinative in themselves.<sup>5</sup> Accounting for these tensions is key to the development of a credible model of constitutionalism for the New Zealand context.

Unwritten constitutionalism accounts for these tensions by embracing them as an integral part of the constitutional system. This approach assists with providing a constitutional account of a number of features of the New Zealand legal and political system, but most obviously with respect to the dominant feature of New Zealand's constitutional landscape — the doctrine of Parliamentary sovereignty. Dissatisfaction with the positivist interpretation of Parliamentary sovereignty as a political fact leads normative theories of New Zealand's constitution to posit an antecedent and superior source of constitutional authority. The common law, which stands as an institution of principle that evolved independently of Parliament, often appears to provide a readily available framework for 'constitutional' control of Parliamentary power. While the drive for a contemporary understanding of Parliamentary sovereignty based on normative principle is to be commended, this approach mischaracterises the unwritten nature of the New Zealand constitution. In an unwritten constitution Parliamentary sovereignty must be understood to operate within — not under — a

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4 See above, Chapter Four: Constitutionalism and Parliamentary Sovereignty.

5 See above, Chapter Five: Politics and Constitutionalism.

constitutional framework so that political authority and constitutional principle both influence each other. This framework supports a relationship between Parliamentary authority and constitutional principle that is reflexive rather than hierarchical in nature.

This reflexive relationship plays out in every exercise of the legislative function. Parliament's very claim to plenary power, for instance, consists of both legislative and constitutive components. Parliament's power of legislation is understood to involve a constitutional element, which serves to explain why Parliament may by ordinary legislative processes alter the New Zealand constitution. However, the relationship between constitutional fundamentals and political processes is not one way. That ordinary legislative processes necessarily have a constitutional dimension equally means that every exercise of the legislative function is implicitly conditioned by the same constitutional fundamentals that it may purport to repeal or amend. Parliament remains 'sovereign' in the sense that it is not subject to controlling authority, and this serves to explain the relatively absolute interpretation of the doctrine that prevails in New Zealand. But the operation of the doctrine remains contingent on the constitutional dynamics and interactions that sustain it.

Conceived in these terms, Parliamentary sovereignty is better understood as a question rather than an answer. New Zealand's unwritten constitution constantly challenges Parliament to reassert its claim to normative authority through an ongoing interaction with constitutional principle. While such analysis implies that the legitimacy of Parliament's sovereignty authority is limited, those limits are not inherent in the legislative function. Any such limits will only become apparent in the context of a particular case that brings Parliament's commitment to constitutional propriety into direct question.

This reinterpretation of a fundamental aspect of New Zealand's constitution is made available by taking seriously its unwritten nature. The unwritten constitutional context in which Parliamentary sovereignty operates is crucial to understanding its nature and effect. That context involves a set of institutional relationships characterised by dynamism and uncertainty, and this constantly challenges Parliament to reassert the basis for its claim to 'sovereign' legislative power. An unwritten constitution therefore gives rise to constitutional constraints that condition the exercise of legislative power so that it demonstrates respect for democracy, the rule of law and fundamental rights. It explains and justifies an immanent constitutionality that does not rely on external standards of constitutional propriety that purport to be precise or fixed. The structures and principles of the unwritten constitution imbue both ordinary law and day-to-day politics with the standards of propriety that ultimately secure legitimate constitutional authority in New Zealand.

### *Lessons for Constitutional Reform*

Inquiry into the structure of New Zealand's constitution invites questions regarding reform. The internationalisation of liberal constitutionalism and the dominance of the written constitutional form may signal the beginning of the end for unwritten constitutionalism as a distinctive tradition. Other

jurisdictions with unwritten constitutions have taken steps towards a more formalised, written constitutional structure. Israel is in the process of a long-standing constitutional project that envisages the ultimate adoption of a written constitution,<sup>6</sup> for instance, while appellate court jurisprudence in the United Kingdom increasingly draws on an explicitly legal (common law) model of constitutionalism that rests on a notion of judicial authority that is usually associated with the written constitutional tradition.<sup>7</sup> The New Zealand experience with a genuinely unwritten constitutional framework looks more remote in international perspective, and the adoption of a written constitution may be inevitable.

This thesis has not sought to defend the unwritten constitution *vis-à-vis* its written counterpart. Each constitutional form has its own strengths and weaknesses, and the conclusion that each form is consistent with a meaningful commitment to liberal constitutionalism leaves little to separate the two alternatives. However, the adoption of a written constitution in New Zealand would represent a fundamental change. A written constitution proceeds on a very different normative basis to that of New Zealand's unwritten constitutional arrangements,<sup>8</sup> and this in turn changes the way in which constitutional questions are approached and ultimately resolved.<sup>9</sup> An appropriate degree of caution is required before approaching any kind of constitutional change of this magnitude.

There is also reason to be cautious in respect of more modest constitutional change. Novel approaches that appear to better secure the fundamental values that underpin liberal constitutionalism may in fact represent moves towards a written constitutional premise that does not sit easily with the structures and principles that underpin New Zealand's unwritten constitution. Greater use of manner and form restrictions on legislation falls into this category. The moral weight of provisions that purport to be entrenched in the manner of s 268 of the Electoral Act 1993 serves a vital function in that it signals constitutional importance. However, to rely on such provisions to formally entrench legislation represents a fundamental shift in the nature of constitutionalism in New Zealand. Any such change may be justified if the appropriate circumstances arise, and a degree of theoretical support for such an action is certainly available, but it should not be approached lightly. In the event, it is to be anticipated that the courts are likely to show less bravado than the available *dicta* suggest.<sup>10</sup> The issue of the availability of a remedial declaration of inconsistency in respect of legislation that breaches the provisions of the New Zealand Bill of Rights Act 1990 promises a less traumatic change to the established constitutional order, but the courts tend to equivocate (quite appropriately) when the issue is put to them directly.<sup>11</sup> Even incremental

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6 See Yoram Rabin and Arnon Gutfeld "Marbury v Madison and its Impact on Israeli Constitutional Law" (2007) 15 U Miami Int'l & Comp L Rev 303.

7 See, for example, *Osborn v Parole Board* [2013] UKSC 61; *Kennedy v The Charity Commission* [2014] UKSC 20; *A v BBC* [2014] UKSC 25.

8 See above Chapter Two: The Distinctive Nature of an Unwritten Constitution.

9 See above Chapter Three: Constitutional Reasoning: A Comparative Analysis.

10 Compare, for example, *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at [91].

11 See *Taylor v Attorney-General* [2014] NZHC 1630 at [83]-[86].

constitutional change that is widely anticipated can be difficult to achieve in practice if it is inconsistent with prevailing models of constitutionalism.

### *Insights for Written Constitutions*

Finally, this thesis provides insight into the operation of written constitutions as well as unwritten constitutions. The focus of this thesis has been on the New Zealand experience, and its conclusions are based on one particular set of constitutional arrangements. There is, however, a growing appreciation of the need for written constitutions to acknowledge their wider constitutional context, including sources of authority outside of the authoritative constitutional text. The extent to which the analysis in this thesis can be extended to encompass the unwritten dimension of the constitutional arrangements of other liberal democracies remains an important avenue for future research. Some initial observations may be offered.

It is not really contested that all constitutional systems are required to operate on the basis of unwritten maxims. No constitutional text can operate effectively as a complete code, regardless of its status as a foundational document. While the distinction between written and unwritten constitutions remains one that must be observed in order to maintain analytical rigor, all constitutions require the conceptual tools for dealing with constitutional questions that cannot be resolved with reference to an authoritative constitutional text alone. Theories of unwritten constitutionalism may supply insights into the operation of written constitutions if a broad perspective is adopted that extends beyond the jurisprudence associated with the central, constitutive document.

An unwritten constitution provides inherent recognition that “[a] nation’s life is much richer than the terms we use to express it”.<sup>12</sup> Scholars operating within the written constitutional tradition ought to acknowledge that the same is true of written constitutions, albeit to a more limited extent. The primacy afforded to the constitutional text in a written constitutional system should not detract from the need to investigate the ambiguous institutional relationships, responsiveness to attempts at constitutional change, and the shared commitment among the branches of government to respect substantive values that inform constitutional government. A written constitution may be desirable, but it is neither necessary nor sufficient as a condition for constitutional legitimacy. Even in a written constitution there is a need to consider the institutional expressions of respect for democracy, fundamental rights and the rule of law that represent the true measure of a commitment to constitutionally legitimate government.

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12 Jeremy Webber “Constitutional Poetry: The Tension between Symbolic and Functional Aims in Constitutional Reform” (1999) 21 Sydney L Rev 260 at 267.

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