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THE POLITICAL, THE HISTORICAL AND THE UNIVERSAL IN NEW ZEALAND'S UNWRITTEN CONSTITUTION

Janet McLean*

All modern Western style constitutions contain three elements. These represent the realm of the political, the realm of the historical and the realm of the universal. The New Zealand iterations of these realms are monism, Treaty of Waitangi foundationalism and rights cosmopolitanism. These three realms sometimes converge but are often in tension with each other. This article discusses the extent to which New Zealand's unwritten constitution currently accommodates these different realms.

I INTRODUCTION

All modern Western style constitutions contain three elements. These represent the realm of the political, the realm of the historical and the realm of the universal. These three elements sometimes converge, but they are often in tension with each other. This article discusses the extent to which New Zealand's unwritten constitution currently accommodates these different realms. It seeks to give an account of the constitutional status quo. In so doing, the objective is not to argue for retention of the status quo. Rather, it is to represent the "dynamic life" of the unwritten constitution as located in the very areas in which these different constitutional elements conflict or converge. This is important for three reasons. First, as the Constitutional Review has recently reported,[1] there is a serious lack of understanding in the general community about how the New Zealand constitution currently works; second, both the Constitutional Review's Terms of Reference and its subsequent report (quite understandably) treat these different versions of constitutionalism as discreet topics and do not consider the dynamic relationships between them; and third, if New Zealand were to adopt a written constitution, those different visions would be likely to inform

* Professor of Law, University of Auckland. Thanks to the editors and an anonymous referee. All errors are my own. This is a revised version of a paper presented at the Unearthing New Zealand's Constitutional Traditions Conference, Wellington, 29–30 August, 2013.

1 Constitutional Advisory Panel *New Zealand's Constitution: A Report on a Conversation* (November 2013) available at <www.ourconstitution.org.nz>.

constitutional discussions and to animate the resulting text. It is unrealistic, as well as undesirable, to expect that the object of the current "constitutional conversations" should be to reach a final constitutional settlement through a written constitution. Written or unwritten, constitutions are about politics and disagreement. Political disagreements, including disagreements about the proper relationship between the political, the historical and the universal, will endure.

This paper has six parts. In the next section, I briefly introduce the ways in which the three different realms are represented in the New Zealand Constitutional Review and the wider constitutional context. I then consider the dominant political element of the unwritten New Zealand constitution in more detail before illustrating the ways in which it has both been challenged by and accommodated the historical and universal elements. This account of the status quo holds lessons for how to design a written constitution. Finally, I briefly discuss the issue of the separate Māori electoral option to illustrate that the presence of a written constitution is likely to change the forum for, rather than the nature of, such arguments.

II THREE CONSTITUTIONAL ELEMENTS IN THEIR NEW ZEALAND CONTEXT

The New Zealand Constitutional Review, conducted by the Constitutional Advisory Panel, was the outcome of an arrangement for confidence and supply extracted by the Māori Party from the ruling National Party government of the centre right. Its Terms of Reference created an open-ended agenda, but the order and content is significant and reflects the different constitutional elements and aspirations:[2]

> 11. The Consideration of Constitutional Issues will include the following topics:
>
> **Electoral matters**
>
> - Size of Parliament
> - The length of the term of Parliament and whether or not the term should be fixed
> - Size and number of electorates, including changing the method for calculating size
> - Electoral integrity legislation
>
> **Crown-Māori relationship matters**
>
> - Māori representation, including Māori Electoral Option, Māori electoral participation, Māori seats in Parliament and local government
> - The role of the Treaty of Waitangi within our constitutional arrangements
>
> **Other constitutional matters**

2 Constitution Advisory Panel, above n 1, at Appendix F: Terms of Reference.

- Bill of Rights issues (for example, property rights, entrenchment)
- Written constitution.

12. Other issues are likely to arise during public engagement.

The Terms of Reference broadly reflect the political, historical and universal elements in their New Zealand guises. The realm of the political, in the New Zealand context, is represented by "monism"[3] which is the presumption that between elections legislatures have plenary law-making power; the realm of the historical is represented by Treaty of Waitangi foundationalism; and the realm of the universal is represented by a version of cosmopolitanism that appeals to Bills of Rights and international agreements – and also, as we shall see, by appeals to the rule of law.

The first four bullet points of the quoted Terms of Reference represent the political as it is understood in New Zealand's dominant monist practice. It follows from the idea that each Parliament has plenary political power that any external checks on such power are presumptively undemocratic: hence constitutional effort should be directed at making democratic institutions as fair and representative as possible. The issues about the size and numbers of electorates, the operation of the electoral system and the term of Parliament are the subject of regular review by the Electoral Commission anyway: they suggest on-going incremental democratic adjustment – or "constitutional business as usual". In this realm, politics and the constitution tend to operate in the "eternal present".

The realm of the historical in New Zealand is dominated by arguments about the foundational status of the Treaty of Waitangi and the extent to which its guarantees to Māori should continue to have legal and political effect on the institutions of government as well as on the substance of laws. Māori/non-Māori relationships are at the heart of the issues about New Zealand's constitutional identity, and indeed at the heart of disagreements between the National Party and the Māori Party which wrote the Terms of Reference. These issues are, however, buried in the middle of the Terms of Reference. The matters dealing with Māori representation and the role of the Treaty that follow represent the key political disagreements about both the past and future of the constitution. The National Party campaigned to abolish separate Māori seats in Parliament, (and famously its former leader advocated such abolition under the slogan of "one law for all")[4] while the Māori Party campaigned for the formal entrenchment of separate Māori seats.

The third realm of universalism is represented in New Zealand by a version of constitutional patriotism or cosmopolitanism. In this realm, New Zealanders tend to be outward-looking, open to international influences and aspire for New Zealand to be a good international citizen. The dominant

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3 Bruce Ackerman *We the People: Foundations* (Harvard University Press, Cambridge (Mass), 1993) vol 1 at 7 and following.

4 Don Brash "Nationhood" (speech to Orewa Rotary Club, Orewa, 27 January 2004).

question here is "where is New Zealand positioned in relation to global ideas of constitutional law?" rather than in relation to its own historic time and place. Liberal, Western, rule of law, values tend to be given priority in this sphere, in the long shadow of the United States Constitution, and of post-1945 international humanitarian agreements.

The two last issues enumerated in the Terms of Reference concern whether New Zealand should adopt a supreme law Bill of Rights and a written constitution. The concerns here are cosmopolitan – appealing as they do to the universalism of rights and to New Zealand's position in the wider world of constitutionalism. Criticisms of New Zealand by the United Nations Human Rights Committee for not having supreme law entrenched rights protection fuel this cause.[5] Constitutional cosmopolitanism seeks to achieve constitutional identity around the written constitution itself which would limit powers of government and guarantee rights to everyone.

As well as offering a challenge to monism, this constitutional vision shares monism's egalitarian premises and, as we shall see, it may also be viewed as both a counterweight and supplement to the Treaty of Waitangi.[6] The cosmopolitan vision also shares foundationalist premises with the Treaty of Waitangi tradition. Like the Treaty of Waitangi version of foundationalism, this tradition treats certain rights and freedoms as pre-political and views democracy as subject to them. But unlike Treaty of Waitangi foundationalism, constitutional cosmopolitanism seeks to transcend historical time and geographical place. Cosmopolitans want a constitution that reflects universal rights and freedoms and which does not depend on the history of a place or its peoples, on ethnicity, language or culture. On one version of cosmopolitanism, indigenous New Zealanders and recent arrivals would be treated the same.

Obviously there are rival values at stake in the three spheres. They each have a different relationship with time and with place. They represent different versions of constitutional identity. But these are not hermetically sealed realms. They also sometimes converge – and it is these moments of conflict and convergence where often the unwritten constitution is its most interesting and dynamic.

In the next part I consider in more detail the sphere of the political, which has dominated the New Zealand constitutional space. I then consider the ways in which the historical and universal realms have challenged monism or been accommodated by the unwritten constitution.

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5 Human Rights Committee *Report of the Human Rights Committee* A/50/40 (3 October 1995) reproduced in Ministry of Foreign Affairs and Trade *Human Rights in New Zealand: Report to the United Nations Human Rights Committee under the International Covenant on Civil and Political Rights* (Information Bulletin No 54, 1995).

6 Given Article III and its guarantee to Māori of the rights of British subjects, see argument below in part V.

III THE DOMINANT POLITICAL ELEMENT

Most people would define the political element in New Zealand as the idea that "parliament is sovereign". New Zealand lawyers would typically refer to the 19th century Oxford Professor, AV Dicey, for his views about parliamentary sovereignty in order to describe the political constitution.[7] The concept of "Parliamentary sovereignty", however, carries a great deal of intellectual baggage and is too much associated with absolutist claims for my purposes. I am wary too of claims that parliamentary sovereignty also inhabits the historical sphere. De jure if not de facto, New Zealand political institutions have not enjoyed full law-making power for most of their existence, unlike the mother of Parliaments at Westminster of which Dicey was writing.[8] To unselfconsciously adopt notions of parliamentary sovereignty is to deny the colonial past. Another more typical description of the political realm in New Zealand is that it is pragmatic. Pragmatism though, does not fully capture the political realm in its New Zealand iteration. I prefer to adopt Ackerman's analytical term "monism". Monism is not without principle and one can discern a particular social vision being consistently played out.

Within the realm of the political, New Zealand has a monist constitution. I use the term "monist" in the way that Bruce Ackerman defines it: the winner of an election gains plenary legislative and executive authority until the next general election.[9] All matters are capable of being decided by ordinary legislative procedures and ordinary parliamentary majorities. As Ackerman provocatively frames it – winners of the general election claim the entitlement to rule with the full authority of "We the People".[10] Constraints on such power are presumptively undemocratic.

Compared with many other constitutional systems, the New Zealand electorate is still relatively engaged. That is both a cause and a consequence of the fact that New Zealand constitutional reformers have placed most of their efforts in ensuring that the electorate is well represented.[11] The idea that the winner of an election gains plenary legislative and executive power until the next election raises the electoral stakes: it makes sense to focus on making electoral choice as reliable, representative and democratic as possible. In this New Zealand views itself as a "trail blazing

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7 AV Dicey *An Introduction to the Study of the Law of the Constitution* (10th ed, MacMillan & Co, London, 1959).

8 The Constitution Act 1986 finally removed the United Kingdom's power to enact law to have effect in New Zealand. See the discussion in Department of Justice *Reports of an Officials Committee on Constitutional Reform (Second Report)* (1986) at [2.1]–[2.14].

9 Ackerman, above n 3, at 7 and following.

10 At 7.

11 In the 2011 elections New Zealand had a 74.21 per cent voting turnout (the lowest in its history). In the same year the voting turnout in the United States was 41.59 per cent: see International Institute for Democracy and Electoral Assistance "Voter Turnout Database" <www.ideaint>.

progressive social laboratory of the South Pacific".[12] From the first colonial Parliament in 1853, eligibility to vote has been theoretically colour-blind. The initial property qualifications were liberal for their time, though Māori communal landholding meant that many Māori often did not hold enough land individually to qualify.[13] Universal Māori male suffrage came first in 1867 at the same time as the Māori seats were created (of which more later).[14] Universal suffrage for non-Māori males came in 1879.[15] It is still a matter of great national pride that New Zealand was the first country to allow women the vote in 1893. Less dramatic perhaps, but also significant, was the relatively early adoption of the secret ballot[16] and of other practical measures to ensure democratic inclusion such as scheduling Saturday polling so that workers would be able to participate.[17]

Part of a programmatic, rather than pragmatic, monist reform process was the Hon Sir Geoffrey Palmer's appointment of the Royal Commission on the Electoral System which reported in 1986.[18] It recommended that for a fairer and more representative system the country should move from a first past the post electoral system to a system of mixed member proportional representation (MMP). Electoral consideration of the Royal Commission's proposals coincided with a time in which public confidence in New Zealand's monist system was wavering and New Zealand was making a dramatic change from an executive-dominated state-controlled economy to an executive-dominated deregulated and privatised economy. There was wide-spread reaction against the idea that the winner of an election should be able to enjoy plenary legislative and executive authority until the next general election, and more particularly against the dominance of the Executive in Parliament. After an indicative, and then a binding, referendum,[19] New Zealand adopted a system of MMP to replace the first past the post system.[20]

Notably, however, the solution to the problem that governments enjoy too much legislative and executive power was itself constructed in monist terms. The solution to the problem of too great a concentration of power was not to be addressed solely or even primarily by restricting government

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12 See New Zealand Electoral Commission "the Right to Vote" (21 February 2013) <www.elections.org.nz>.

13 See Maori Representation Act 1867, preamble.

14 Maori Representation Act 1867.

15 Male Qualifications of Electors Act 1879.

16 Regulation of Elections Act 1870, s 28.

17 Electoral Amendment Act 1950, s 4. In the UK, for example, voting still takes place on a weekday.

18 Royal Commission on the Electoral System *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (Wellington, 1986).

19 19 September 1992 and 6 November 1993 respectively: see New Zealand Electoral Commission "Referenda" (26 February 2014) <www.elections.org.nz>.

20 For the full background, see Royal Commission on the Electoral System, above n 18.

power itself (although a proposal for a Bill of Rights was also mooted by Sir Geoffrey Palmer around the same time).[21] Part of the solution was framed by attempting to make the people's choice of who governs them more accurate, more reliable and more authentic. If Parliament were more representative and better able to reflect the people's views, the legitimacy of monism would be restored and even enhanced. The first election under the new system was in 1996. The effect of the adoption of MMP has been to increase diversity in Parliament and to encourage coalition politics. There are more parties, including parties representing Māori interests, more women and more ethnic minorities. The question of whether or not to retain MMP was revisited in another referendum in 2011. So far "the People" have said "yes". The referendum procedure itself is reflective of the importance and dominance of monism.

As significant to New Zealand's monist system as these measures to ensure representativeness, is the relatively short three year Parliamentary term. A government claiming the authority of "We the People" can never do so for long. In practice, though, it is typical for the party forming the government to survive at least two consecutive terms (even if it is with a new coalition partner). A proposal to extend the term to four years was rejected in a referendum in 1990 and this is a question that was posed again on the agenda of the recent Constitutional Review.[22]

The monist constitution is about electoral process rather than substantive outcomes. Hence constitutional protections have been attached to democratic procedures that protect the integrity of the periodic grant of plenary power. Section 268 of the Electoral Act 1993, for example, is the only "entrenched provision" on the New Zealand statute book that cannot be changed by a simple electoral majority. It protects core electoral matters relating to electoral districting and representation, the voting age, voting methods and the term of Parliament. A 75 per cent majority in the House of Representatives or a majority in a referendum is required for amendment of the relevant statutory provisions. These are the only matters explicitly given special protection from amendment by ordinary majority and such protections are only secured by legislation which is itself subject to ordinary processes of amendment. Enforcement is through political rather than judicial institutions. Even those protections could potentially be altered any time by an ordinary parliamentary majority.

It follows from these monist premises that constitutional change has been associated with incrementalism. Ordinary majorities should only make contingent decisions and should be able to revisit the decisions of earlier ordinary majorities. Each Parliament is equal and is able to revisit legislative judgments of the past including judgments about the constitution itself. This too is not necessarily because of some abstract idea of Parliamentary sovereignty – but because the people are

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21 Ministry of Justice "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6.

22 There have been successive referendums rejecting the option to extend the term of parliament. It would be detrimental to the constitution as a whole if that were the only thing to change as a result of the review.

differently represented in each new Parliament. This element of the constitution operates in the eternal present.[23]

There has been very little of "high theory" here. The constitution is not commonly considered in the abstract or the whole but in relation to specific issues and the day to day workings of government. Ackerman, with the United Kingdom in mind, would associate such incrementalism with Burkean elitism – "the People rule best, the Burkean says with a broad wink, when they leave the business of government to a well-trained elite immersed in the nation's concrete constitutional tradition"[24] – but this has not been how the political element has been conceived by most New Zealanders. New Zealand's version of the monist tradition is emphatically not one of elitism but of egalitarianism. Referendums have preceded important constitutional change (or retention of the status quo).

Monism in its simple, as well as its more sophisticated forms, is pervasive in the New Zealand constitutional space and is the dominant element in New Zealand's contemporary constitution. The order in which monist concerns appear in the Terms of Reference of the Constitutional Review reflects this priority. It is evident from the report of the Constitutional Review, however, that this kind of "constitutional business as usual" did not excite the general public during the consultation process.[25] It is where monism fails on its own terms, or where it is challenged by foundationalism and universalism, that the dynamic life of the constitution can be found. To put it crudely, it is at these junctures that we are forced to ask how best we should balance representative government, the Treaty of Waitangi and rights. The unwritten constitution has demonstrated a capacity to accommodate all of these different elements. These accommodations are now a part of the constitutional status quo – and that has significant consequences for the future shape of New Zealand's constitution.

IV CHALLENGES TO MONISM: TREATY OF WAITANGI FOUNDATIONALISM

The first and most important challenge to monism is, of course, from Māori as the tangata whenua of Aotearoa/New Zealand. The agreement between Māori Chiefs and Queen Victoria through which the United Kingdom claimed sovereignty over New Zealand in 1840 has served as a mirror on which to reflect the shortcomings of ordinary electoral politics in meeting Māori

23 I am not suggesting that political precedent or political morality do not play their part but rather that the constitution is capable of being made and remade within the political realm on a day to day basis.

24 Ackerman, above n 3, at 20.

25 The Review reports that there was no appetite for increasing the size of Parliament and some support for further work on the length of the Parliamentary term and the size of electorates: Constitutional Advisory Panel, above n 1, at 17.

aspirations, and as a framework through which to represent Māori interests and aspirations themselves.

The Treaty of Waitangi's legal and constitutional status has always been a major point of political division in Aotearoa/New Zealand.[26] Thirty years ago the Treaty of Waitangi scarcely received a mention in constitutional law classes at universities, let alone in the wider education system. Though its legal status remains controversial, it has been accepted by successive governments over the last decades as the founding document that constitutes the nation. A more acute point of controversy remains. If it is the case that the Treaty is both prior to and the constitutional basis of New Zealand's democratic arrangements, to what extent does it continue to speak and impose political and possibly legal limits on how the constituted nation and democratically elected government may act? Increasing numbers of New Zealanders, both Māori and Pākehā, think that it is the Treaty of Waitangi that constitutes "We the People" and, as such, it should also inform New Zealand's constitutional arrangements as well as its substantive law. This is not an abstract version of the question of whether constituent power continues to exert control over what has been constituted,[27] but a much more tangible one connected with a nascent political programme. The issue is not whether New Zealand should have a founding document that binds successive Parliaments and the courts but rather whether New Zealand already has one.

Treaty of Waitangi constitutionalism challenges traditional monism in a number of ways. Māori politics tends to take a much longer view of issues than Pākehā politics, focusing on matters that long outlast the three year electoral cycle. The Treaty's status as the foundational document is a potential constraint on the "politics of the present". It firmly locates the constitution in a historical time and place. Such an approach often sits uncomfortably alongside the monist egalitarian "ideal".

Monism has been associated with active self-government rather than with elitism. The way that the Treaty of Waitangi narrative has played out in New Zealand, however, is that, rightly or wrongly, it has come to be associated with elitism. It is Māori and Pākehā elites, particularly judges, lawyers, and academics, who are widely considered to be driving the Māori grievance and settlement processes together with the incremental constitutionalisation of the Treaty of Waitangi itself.

Issues relating to the differing levels of political and constitutional engagement with the Treaty of Waitangi run deep. The Treaty was the product of an agreement between Queen Victoria (effectively the United Kingdom colonial office) and Māori chiefs. It was never the settlers' Treaty and there has been a long history of settler antagonism towards it. (It restricted the ability of settlers to buy land directly from Māori, forcing them instead to buy land at higher prices from the

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26 See, for an extended discussion, M Hickford *Lords of the Land* (Oxford University Press, Oxford, 2011).

27 M Loughlin and N Walker "Introduction" in *The Paradox of Constitutionalism* (Oxford University Press, Oxford, 2007) 27; and J Colon-Rios "Five Conceptions of Constituent Power" (2014) 130 LQR 306.

Crown).[28] Not only has the Treaty of Waitangi been absent for long periods from non-Māori constitutional thinking generally,[29] there has traditionally been little or no grassroots engagement in big "C" constitutional discussion *of any kind* among non-Māori.

The language of the Treaty itself elevates the Crown, with all its ambiguous meanings, rather than Parliament as the apex of power on one side of the Treaty agreement. It is the Crown which plays the part of central political actor, not the people or the elected Parliament of New Zealanders. This too is significant in understanding the way in which the Treaty of Waitangi jurisprudence challenges monism. The Crown here denotes more than merely the government of the day. It refers to the New Zealand State duly constituted by the Treaty of Waitangi itself.[30]

Māori engagement with the Treaty has, by contrast, been more widely owned. For the whole of the period in which Pākehā politicians and New Zealand courts largely ignored the Treaty and its guarantees to Māori, grassroots Māori politics kept the Treaty debate alive.[31] In recent decades, for example, it was the Treaty that served as the ideological reference point for Māori land marches and protest movements. The Treaty of Waitangi has been a constant feature in the vocabulary of Māori politics though views about it have been contested and have changed over time.[32]

Another aspect of Māori grassroots engagement with the Treaty as the foundational document has been a resistance to and suspicion of alternative formulations of the Treaty itself in the statute book (references, for example, to Treaty principles rather than the text) as well as to common law sources of recognition of the substance of the Treaty guarantees (such as customary title and aboriginal title doctrines). The focus of Māori attention has tended to be what was actually agreed in 1840 both orally and in the Treaty texts – that is, understandings in which Māori participated rather than on principles of common law decided by elite judges. For Māori, it is the Treaty which is the vehicle for self-determination.

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28 For a discussion of Article II of the Treaty of Waitangi and the doctrine of pre-emption see Hickford, above n 26.

29 Legal historians would remind us that "Māori issues" without the Treaty label have always remained on the political agenda and a matter of "ordinary" politics: see for example Hickford, above n 26; and David V Williams *A Simple Nullity* (Auckland University Press, Auckland, 2011).

30 I elaborate on these matters in J McLean "Crown, Empire and Redressing the Historic Wrongs of Colonization in New Zealand" (paper presented to the Cambridge Inaugural Public Law Conference Process and Substance, Cambridge, 15–17 September 2014).

31 Petitions, for example, have been a consistent feature of Māori politics.

32 As Professor David V Williams reminds us there is no single Māori voice about or experience of the Treaty. Māori do not and did not have a uniform view of the Treaty and its interpretation – Sir Apirana Ngata, for example, taking the view that Māori had relinquished mana by the Treaty: see David V Williams "Constitutional Traditions in Māori Interaction with the Crown" (2014) 12 NZJPIL 231; and Māmari Stephens "A Loving Excavation: Uncovering the Constitutional Culture of the Māori *Demos*" (2013) 25 NZULR 820.

There is then, an important asymmetry about the Treaty debates. It appears elitist from one perspective and to reflect mobilised grassroots politics from another. Differing levels of engagement in the constitutional review and ensuing constitutional conversations may well reproduce these asymmetries.

New Zealand has not necessarily deferred the making of a foundationalist constitution. A central argument is about whether it already has one. But at least on the settler side there has been a reluctance to treat as binding agreements made at the beginning of the new nation before settlers arrived in sufficient numbers. For Māori, I suspect that even if New Zealand were formally to agree to a new, supreme law, judicially enforceable, constitution which included reference to the Treaty, the Treaty of Waitangi itself would still retain the primary, foundationalist place in the constitutional order.

V ACCOMMODATIONS OF TREATY FOUNDATIONALISM

The unwritten constitution has proven to have the capacity to accommodate some of the claims of the foundationalist constitution. The absence of a formal written constitution seems not to have undermined but rather to have served the politics of accommodation. There have been a range of attempts at power sharing – by devolution of functions and decision-making generally from the centre to localities, by experiments in Māori systems of youth justice, by co-decision procedures in the area of resource management, by alternative schooling and welfare provision, and by culturally appropriate adoption procedures (to name just a few). Some of these are of longstanding; many remain controversial.[33]

Crucially, Parliamentary accommodation came first – ordinary monist politics delivered. Some 89 statutes currently make statutory reference to the principles of the Treaty of Waitangi.[34] But what is also plain is that some initially very limited Parliamentary attempts at accommodation have acquired further constitutional significance over time. These measures and processes survive the electoral cycle and they would now be difficult politically to undo by means of ordinary politics. In Ackerman's terms they would take a "constitutional moment" to be undone. By what process have they been "constitutionalised" in the first place?

The most important institutional player has been the Waitangi Tribunal.[35] Māori and Pākehā tribunal members are represented in equal measure. The way the Waitangi Tribunal has adopted and adapted Māori protocol and oral traditions in its proceedings has been ground-breaking.[36] It has

33 The controversial separate Māori seats in Parliament are discussed in part VII.

34 As at October 2014.

35 Established by the Treaty of Waitangi Act 1975.

36 See for example IH Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989).

been given the role of interpreting the texts of the Treaty of Waitangi which controversially differs in its Māori and English language versions.[37] The Tribunal process has allowed many Māori to have their grievances fully heard for the first time. In the process, Treaty claims have become a legal and historical specialisation. Its recommendations have led to billions of dollars' worth of assets being returned to Māori and to the development of new joint governance and decision-making processes between Māori and Pākehā.

Monism is, however, formally preserved. The Waitangi Tribunal is merely the creature of ordinary statute. The Waitangi Tribunal has not been given power to decide disputes about property which is privately held. In all but one limited area it only has powers to make recommendations to the "Crown". The Tribunal's jurisdiction has been broadened and restricted by ordinary statute. It was initially empowered only to hear contemporary Māori grievances but later its jurisdiction was extended to hear historic grievances going back to 1840. No further historical claims have been able to be lodged since 1 September 2008.[38]

The Waitangi Tribunal has, however, achieved much greater constitutional status than might at first appear, or might have originally been hoped for or intended. In this the courts have played an important part. The New Zealand courts have held that recommendations of the Waitangi Tribunal have to be given good faith consideration by the Crown.[39] Taking its cue from the Waitangi Tribunal, the Court of Appeal began to develop "principles" which would inform and sustain the relationship between the Crown and the Māori Treaty parties (now conceived as a "partnership") in the 1987 Māori Council case (*The Lands Case*).[40] These principles have in turn been adopted and developed by successive governments. All of the institutions of government have "recognised"[41] and affirmed the constitutional relevance of the Treaty of Waitangi, including successive Parliaments and governments.

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37 Other controversies include how much to take account of Māori oral traditions surrounding the Treaty debates as opposed to British legal understandings, and what meaning to give Māori terms which were transliterations of English words from early translations of the Bible into Māori.

38 Treaty of Waitangi Act 1975, s 6AA.

39 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*The Lands Case*].

40 *The Lands Case*, above n 39. See, for a summary of the Treaty principles, M Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 125–129. Leading cases on the principles of the Treaty of Waitangi include: *The Lands Case*; *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) [*The Broadcasting Assets Case*]; *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) [*Sealords Case*]; and *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA) [*Whale Watching Case*]. These cases have been affirmed in numerous recent cases including *New Zealand Maori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 [*Water Case*].

41 I deliberately mean to refer to HLA Hart's rule of recognition here: see HLA Hart *The Concept of Law* (Oxford University Press, Oxford, 1961).

The contribution of the courts to constitutionalising or re-constitutionalising the Treaty, has once again taken place against a background of monism. Judges have largely avoided making final substantive determinations of Māori rights under the Treaty. Both their actions and their restraint have attracted criticism. There could, for example, be little doubt from the Treaty texts, that Māori retained their customary fishing rights at the Treaty signing – and there was clear evidence that fishing was customarily used for trade as well as for customary purposes in 1840. And yet, upon the introduction of the commercial fishing quota system, (creating "property" rights around fishing) the courts would not interfere in the substantive settlement of only 10 per cent of the quota to Māori, preferring to leave the question of proper allocation open for another day.[42] They focused instead on the relationship between the Crown and Māori parties and their duties of good faith, fair dealing and so on. It is through such doctrines that together the Waitangi Tribunal and the courts have effectively created "manner and form" or procedural restrictions on the state's privatisation programmes.

We should pause here to consider the significance of the context in which much of this law has been made. All or nearly all of this law has been made in the context of government privatisation programmes which have commoditised the commons and state assets. Privatisation of large state assets is itself a challenge to monist assumptions. Privatisation decisions outlast ordinary electoral cycles and affect the state's longer term interests. They are permanent or near permanent. Even on its own terms monism does not work well in relation to these matters.

The recent example of the partial sale of Mighty River Power is illuminating.[43] It is an example in which monism squarely confronts Treaty constitutionalism. At the general election of 2011, the incumbent National Party campaigned under a clear manifesto promise that it would partially privatise several state-owned enterprises. Polling on that particular issue showed that most New Zealanders objected to privatisation. Nevertheless the National Party won the most seats at the election and proceeded to put its partial privatisation policies into effect beginning with a power company which operated hydro-electric generators. When confronted with the argument that most New Zealanders did not support privatisation, the Government repeatedly incanted that as the elected Government it had plenary power to pursue its policies, it had a democratic mandate to do so, and no one could stop it. Māori claimants to rights to fresh water took an urgent case to the Waitangi Tribunal. The Prime Minister initially signalled that nothing the Tribunal said would detract from its commitment to privatise the company or would delay the public listing.[44] Almost certainly after legal advice, the Prime Minister corrected himself and said that he would of course consider what the Tribunal said in good faith but urged the Tribunal to report by an early date so as

42 *Sealord's Case*, above n 40.The settlement also granted to Māori quota in new species.

43 Might River Power, originally a state-owned enterprise, was partially privatised by the National Government in May 2013.

44 Mary Wilson (Checkpoint, National Radio, 23 October 2012).

not to defeat the Government's asset sales timetable and financial planning. The Tribunal delivered an interim report as a matter of urgency.[45] It found Māori to have residual proprietary rights in water (including commercial rights) and that the Crown would breach the principles of the Treaty of Waitangi if the partial share sale were to go ahead. After a brief consultation with Māori, the Government proceeded with the sale process but was delayed once more by an urgent case brought to the ordinary courts and rapidly progressed through the judicial hierarchy to the Supreme Court.[46]

The Supreme Court took the view that it was able to review the proposed sale of shares for consistency with the principles of the Treaty but concluded that the partial privatisation of Mighty River Power would not materially impair the Crown's ability to remedy any Treaty breach in respect of Māori interests in the river. It decided this without making any decision about exactly what those Māori interests in the river were and before the Waitangi Tribunal had had a chance to report fully on the matter. The Court did, however, seem to suggest that the water permits used by Mighty River could properly be regarded as interests in the Waikato River[47] and viewed commercial redress as part of a right to development.[48] Like the Waitangi Tribunal, it appeared to accept the view that to delay the matter until Māori interests in freshwater had been identified would be unreasonable.[49]

The Supreme Court, however, accepted assurances given by the Crown that the substantive questions about Māori rights would be addressed by the Waitangi Tribunal and that mechanisms would need to be put in place for the on-going use of those resources and to establish decision-making roles in relation to care, protection, use, access and allocation including charges or rentals for use.[50] The Court viewed these issues and remedies as evolving and once again stopped short of making final findings on substantive claims.[51] It found the Crown to have both the capacity and willingness to provide redress.[52] Significantly, the Court stated that "Maori can be confident that their claims will be addressed, something that was not so clear in 1987 [the year of the first *Lands* decision[53]] as it is now".[54]

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45 Waitangi Tribunal *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012) [*Freshwater Report*].

46 *Water Case*, above n 40.

47 See the suggestions at [113] and [136] (points c and e), the latter apparently accepting the contentions of the Waitangi Tribunal.

48 At [102].

49 At [113].

50 At [145] (affidavit of the Deputy Prime Minister).

51 At 113.

52 At [115], [137] and [140].

53 See *The Lands Case*, above n 39.

This shows a willingness to discipline what are essentially political processes with legally enforced procedural supervision. New Zealand's law of judicial review of administrative action more generally shares this procedural cast. It tends to shy away from reviewing substance and to focus instead on enhancing the rigour and transparency of executive decision-making processes.[55] In these Treaty cases we witness a familiar proceduralism imbued with certain foundationalist premises.

Treaty foundationalism in the New Zealand context, then, falls far short of veto or of direct opportunities for the legal enforcement of substantive rights guaranteed under the Treaty. It leaves matters of substance for incremental political settlement. But it does lend judicial supervision to these political processes. The Courts have consistently attempted to make limited decisions for today and to leave open the possibility for a future legal challenge. This strategy may have suited many of the Māori claimants as well. Notwithstanding what has actually been decided – being very far short of enforcing a Māori veto or even allowing substantial delay of privatisation itself – these cases have been viewed in certain quarters as an undemocratic elite reordering the New Zealand constitution.

Another interesting example of the accommodation of foundationalism from within the political monist constitution itself is the process by which Deeds of Settlement of historic claims by Māori against the Crown are enacted into legislation. Deeds of Settlement negotiated directly between Māori and Ministerial representatives are usually made conditional on the enactment of legislation. The Deeds of Settlement serve as "drafting instructions" to Parliamentary Counsel. Despite the orthodox view that Parliament holds full law making power, a constitutional convention has emerged that Deeds of Settlement are never altered in substance in the Parliamentary process. The Hon Douglas Graham was an important actor in establishing this practice. He argued that it followed from the Crown's obligation to deal fairly and in utmost good faith that the contract should not be reopened by Parliament.[56] The Parliamentary Select Committee confines its scrutiny to the issue of overlapping claims from different iwi and hapū rather than the fairness of the settlements themselves.[57] Only technical changes to correct problems or mistakes are undertaken in the Parliamentary process. Once again a primarily political process has accommodated foundationalist claims.

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54 At [115].

55 See for example M Taggart "Administrative Law" [2006] NZ Law Review 75 at 75–82 discussing *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597.

56 See the unsuccessful challenge to the Ngāi Tahu Deed of Settlement and Claims Settlement Act 1998 in *Ngati Apa Ki Te Waipounamu Trust v The Queen* [2000] 2 NZLR 659 (CA).

57 There is now a change to Waitangi Tribunal practice to enable it to hear regional claims involving rival hapū and iwi groups: see Waitangi Tribunal "The New Approach" <www.justice.govt.nz>.

Even given the predominant tradition of monism, it would be politically hard to undo the principles and processes enunciated by the Waitangi Tribunal and judiciary by means of ordinary legislation; they have been informally constitutionalised in the unwritten constitution and adopted by successive governments and Parliaments.[58] What Māori have won back by way of incremental constitutionalism is unlikely to be able to be undone by ordinary politics. More widespread education about the status quo makes this even more unlikely given what we know about the endowment effect. The value of something increases when it becomes a part of a person's endowment. The person demands more to give up an object than they would be willing to pay to acquire it.[59]

VI UNIVERSALISM

The other major challenge to monism is the universalist element represented by a supreme law Bill of Rights. The fact that New Zealand has not yet adopted a supreme law Bill of Rights is indicative of the dominance of monism. But as we shall see, monism does not operate to the exclusion of rights.

The New Zealand political debates about whether substantive rights should be given special constitutional protection in the courts have been coloured by monist presumptions. In this context monism has been of a particularly "sophisticated kind".[60] The 1985 White Paper proposal for a Bill of Rights would have entrenched the Bill of Rights and made its substantive protections supreme law.[61] Even so, the content of the proposed Bill and accompanying White Paper was significantly influenced by American scholars such as Alexander Bickel and John Hart Ely.[62] Bickel and Ely take the approach that "during the period between elections, all institutional checks upon the electoral victors are *presumptively* antidemocratic".[63] The authors of the White Paper appeared to share that view.[64] Although the proposed New Zealand Bill of Rights was otherwise closely modelled on the Canadian Charter of Rights and Freedoms, the more substantive liberty rights were not included. The Canadian provisions guaranteeing general liberty, right to life, property, due process guarantees, and equality were either omitted altogether or reworked. The more general guarantee of

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58 See Palmer, above n 40.

59 Daniel Kahneman, Jack L Knetsch, and Richard H Thaler "Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias" (1991) 5 Journal of Economic Perspectives 193.

60 Ackerman, above n 3, at 8.

61 Ministry of Justice, above n 21.

62 JH Ely *Democracy and Distrust* (Harvard University Press, Cambridge (Mass), 1980); and Alexander M Bickel *The Least Dangerous Branch: the Supreme Court at the Bar of Politics* (Bobbs-Merrill Educational Publishing, Indianapolis, 1962).

63 Ackerman, above n 3, at 8 (emphasis added).

64 KJ Keith "A Bill of Rights for New Zealand: Judicial Review versus Democracy" (1985) 11 NZULR 307.

equality in the Canadian Charter, for example, was replaced by an apparently narrower protection against discrimination. It had been the liberty guarantees which had attracted judicial activism and controversy early on in the life of the Canadian Charter. The pervasive idea, reflected in the New Zealand White Paper and surrounding materials,[65] is that the primary rationale for judicial enforceability of Bills of Rights is to satisfy the ideals of electoral fairness when politics fail, protecting democracy-enhancing liberties such as freedom of speech. Even Bills of Rights then, both can and should support and not undermine the monist element of the constitution.

Despite the monist rationale for the proposal – being primarily to protect democratic process – the Bill as originally proposed proved too rich a brew for Parliament. The White Paper had suggested that a supreme law Bill would be such a constitutional departure for New Zealand that a general consensus amongst the public in support of its adoption and its content would be required before the judges would be likely to uphold it.[66] That support was not forthcoming. It was widely thought to give judges too much power. Politicians and the public were concerned to maintain the unrestricted power of electoral choice. The proposal for a supreme law Bill of Rights was rejected.

By a bare majority on a partisan vote, the much weaker version, the New Zealand Bill of Rights Act 1990, was passed in the dying days of a Labour Government.[67] In its enacted form it is not supreme law and neither is it entrenched. It asks judges to interpret law consistently with protected rights but does not allow them to invalidate laws that are plainly inconsistent with protected rights.[68] It gives the Attorney-General a central role of alerting Parliament to Bills that may be inconsistent – leaving the elected representatives as the primary decision-makers of whether legislation is reasonably rights-protecting.[69] It is a version of what Stephen Gardbaum has subsequently called the "new Commonwealth model" of Bills of Rights.[70] It has been described in more withering terms by Mark Tushnet as allowing only for weak-form judicial review.[71] It is sufficient to note that the proposal for a stronger form of Bill of Rights review failed to attract a sufficient democratic mandate. Monist presumptions prevailed. The absence of a clear democratic mandate for the Bill of

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65 Ministry of Justice, above n 21.

66 At [7.18]–[7.21].

67 See Paul Rishworth's account in P Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at ch 1.

68 Sections 4 and 6.

69 New Zealand Bill of Rights Act 1990, s 7.

70 S Gardbaum "The New Commonwealth Constitutionalism" (2001) 49 Am J Comp L 707; and S Gardbaum "Reassessing the New Commonwealth Model of Constitutionalism" (2010) 8 ICON 167.

71 M Tushnet "Weak-Form judicial Review: Implications for Legislatures" (2004) 2 NZJPIL 7.

Rights at its inception, and as signalled by Parliament in assessing what is required by way of its protections, cannot but have had an inhibiting effect on judges.[72]

Nonetheless, the interpretative Bill of Rights has raised a rights-consciousness in the courts and in government's internal processes that New Zealand did not have before. In a range of cases the Bill has been able to deliver many of the same results as strong form judicial review.[73] Like strong form Bills of Rights, breaches of the rights protected by the New Zealand Bill of Rights Act 1990 can result in the exclusion of evidence at trial, legal constraints on officials including police and prison authorities, damages awards, invalidation of executive policies and decisions, and the development of Common Law causes of action.[74] Secondary legislation can be rendered ultra vires, and in certain instances legislation can be given a restricted interpretation and or effectively disapplied where it would breach rights – using techniques of constitutional interpretation familiar to those jurisdictions with supreme law or "strike down" rights guarantees.[75] In certain cases, some judges have shown a willingness to declare that legislation is inconsistent with protected rights.[76] What the New Zealand Bill does not do is allow the direct invalidation of clear and unambiguous legislation which breaches rights.[77]

While the New Zealand Bill of Rights Act 1990 sometimes disappoints, it is also true that the diluted, non-supreme law, merely interpretative Bill of Rights has not been as ineffectual as may have been predicted. Interpretative techniques and the possibilities for judicial declarations of inconsistency with rights deliver some of the constraints on governments and legislatures supplied by supreme law Bills of Rights but without their overt attack on monism. The potency of Bills of Rights can be given greater force by Common Law ideas such as the "principle of legality". These developments have undoubtedly been lawyer – and hence elite – led and are not widely known or understood by the general public.

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72 This can be compared with approaches to what is "possible" by way of interpretation taken by UK Judges applying the United Kingdom Human Rights Act 1998.

73 See for example J McLean "Legislative Invalidation, Human Rights Protection and Section 4 of the New Zealand Bill of Rights Act" [2001] NZ Law Review 421.

74 See Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (2nd ed, Brookers, Wellington, 2010); Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ, Wellington, 2005); and Rishworth and others, above n 67.

75 See *R v Pora* [2001] 2 NZLR 37 (CA).

76 See for example the dissenting judgment of Thomas J in *R v Poumako* [2000] NZCA 69, [2000] 2 NZLR 695; and "informal" such pronouncements in *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

77 See for example *R v Hansen*, above n 76, and its subsequent consideration by the Law Commission (Law Commission *Controlling and Regulating Drugs – A Review of the Misuse of Drugs Act 1975* (NZLC R122, 2011)) and non-action by Parliament.

Moreover, successive New Zealand governments have entered into international treaties, including human rights treaties, which share important content with the New Zealand Bill of Rights.[78] These international commitments long outlast the electoral cycle, and often cannot be undone. In other words, these commitments too do not easily fit within a monist constitutional framework. In the absence of a written constitution, the New Zealand legal system is particularly open to such international human rights treaties and other international influences – indeed much more so than either its United States or Australian counterparts.[79] There have been a number of judicial developments over the past decade which have enhanced the domestic law's openness to international law and demonstrate a new willingness to give such commitments domestic effect.[80] This is not just true for human rights treaties but for other areas of international law as well.[81]

It may be that this openness to external influences is another characteristic of unwritten constitutions. There is no written constitution against which to assess and possibly resist international conventions and treaties. One can see this in another context by comparing the direct effect of European Union (EU) law in Germany and the United Kingdom. The German Constitutional Court is able independently to assess the consistency of EU treaty law against its domestic constitution.[82] The United Kingdom lacks any such mechanism, or any principled or substantive barrier to the reception of EU law short of withdrawing from the Treaty altogether.[83] So

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78 The New Zealand Bill of Rights 1990 itself affirms the International Covenant on Civil and Political Rights to which New Zealand is a party.

79 See for example D Meagher "The Common law Presumption of Consistency with International Law: Some observations from Australia and Comparisons with New Zealand" [2012] NZ L Rev 465; and D Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement: a Comparative Study* (Cambridge University Press, Cambridge, 2009).

80 See the line of cases beginning with *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) (involving the United Nations Convention on the Rights of the Child); *Attorney-General v Zaoui* (No 2) [2005] NZSC 38, [2006] 1 NZLR 289 (United Nations Convention Relating to the Status of Refugees 1951); and *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA) (international customary law of the high seas). For commentary, see for example Claudia Geiringer "Tavita and all that: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law" (2004) 21 NZULR 66; and Claudia Geiringer "International Law through the Lens of *Zaoui*: Where is New Zealand Law At?" (2006) 17 PLR 300.

81 See *Sellers v Maritime Safety Inspector*, above n 80.

82 See for example cases from the German Constitutional Court such as *Internationale Handelgesellschaft mbH v Einfuhr und Vorratsstelle fr Getreide und Futtermittel* [German Constitutional Court] 2 BvL 52/71 29 May 1974, [1974] 2 CMLR 540; *Re Wunsche Handelgesellscheft* [German Constitutional Court] 2 BvR 197/83 22 October 1986, [1987] 3 CMLR 225; *Brunner v EU Treaty* [German Constitutional Court] 2 BvR 2134/92 12 October 1993, [1994] 1 CMLR 57; and *Re Ratification of the Treaty of Lisbon* [German Constitutional Court] 2 BvE 2/08 30 June 2009, [2010] 3 CMLR 13.

83 See, however, the important decision of Laws LJ in *Thoburn v Sunderland City Council* [2003] QB 151; and the interesting Supreme Court decision *R (on the application of Buckinghamshire CC) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324.

too the unwritten character of the constitution in New Zealand helps to make the legal system more open to cosmopolitan human rights influences. Leaving to one side for present purposes, how New Zealand has come to make such commitments to rights, it clearly has already done so: human rights protections are a part of its constitutional arrangements and cannot be repudiated by Parliament alone.

These developments not only challenge monism but also raise questions in relation to the Treaty of Waitangi. How do guarantees to Māori under the Treaty fit within international human rights thinking: would a supreme law Bill of Rights, for example, confirm "one law for all"[84] or, instead, protect Māori from discrimination? The relationship between "affirmative action" policies and equality guarantees in international human rights instruments are notoriously politically and legally contested around the world. And yet, perhaps surprisingly, it was the Convention for the Elimination of Racial Discrimination that forced the accommodation of Māori interests in the foreshore and seabed and not the Bill of Rights or the Treaty of Waitangi.[85] Moreover, Māori can be cosmopolitans too. Elite Māori engagement in the drafting of and subsequent New Zealand accession to the Declaration of the Rights of Indigenous Peoples adds another important dimension to the sometimes ambiguous mix of human rights commitments New Zealand's constitution currently contains.[86]

Again it is hard to imagine any government successfully directly repealing the present Bill of Rights Act or withdrawing from international human rights frameworks through ordinary political processes. That would be extremely politically and legally difficult. But equally it is difficult to see how New Zealand would be able to reach agreement about the adoption of such frameworks in the high stakes arena of written constitution-making without better and more widespread public understanding of the constitutional status quo. Though it may be seen by some as a means by which to resist or moderate some of the claims of Treaty foundationalism, there is no obvious political constituency to argue for a rights-protecting instrument. The problem is an obvious one: proponents of supreme Bills of Rights distrust democracy but depend on democracy (and probably super-majority democracy at that in the New Zealand context) for their adoption.

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84 See Brash, above n 4.

85 There was no notification to Parliament that the Attorney-General judged the Foreshore and Seabed Bill to be inconsistent with the New Zealand Bill of Rights under the s 7 procedure. It was subsequently found to be inconsistent with the Convention on the Elimination of Racial Discrimination: see Rodolfo Stavenhagen *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Addendum Mission to New Zealand* E/CN.4/2006/78/Add.3 (13 March 2006) at [43]–[55].

86 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/Res/61/295 (2007).

VII CONVERGENCE OR CONTEST?

Each of the three elements I have described – monism, foundationalism, and universalism – currently contributes to the New Zealand constitution. There are serious points of tension as well as certain similarities between them. Moving from the status quo to the higher stakes realm of formalised constitution-making brings attendant risks – including the exacerbation of existing political disagreements about which tradition should prevail. Notwithstanding the characterisation of the Constitutional Review on its website as a kind of "constitutional conversation", most written constitutions are the product of acute disagreement. Some processes for constitution-making, such as in India after independence and Ireland in 1922, did not resolve political disagreements but instead led to civil war and partition.[87] New Zealand is clearly not as divided as those societies were, but as in those countries there is an observable tendency for discrete political constituencies to talk past each other, to polarize, and to elevate their constitutional concerns at the expense of others. What New Zealanders should not try to do is to attempt to choose one or two elements of the constitution to the exclusion of the others. Constitutions, written and unwritten, reflect political tensions and not final political resolutions.

Cass Sunstein suggests that a way forward in situations such as these is to avoid the largest, most abstract issues and points of theory and to focus instead on the particular.[88] "Constitutions", he says, "are not outlines of a just society", but set out a process for getting there.[89] We can make constitutional progress by way of what he calls "incompletely theorized agreements". Hanna Lerner's more empirical work elaborates on Sunstein's theoretical starting point.[90] But for Lerner, an "incompletely theorised agreement" does not require us necessarily to avoid fundamental constitutional disputes. Rather our constitution should deliberately embrace potentially contradictory political values and ambiguity.

Actually, New Zealand politicians and lawyers already knew this. The unwritten constitution already does this in the ways I have explained here. Monism is not unchallenged. Rights and the Treaty of Waitangi sit alongside monism in a creative tension. And New Zealand already has experience in "constitution writing" in a way which embraces these ambiguities and tensions. When New Zealand eventually removed the Judicial Committee of the Privy Council in London as its final

87 See Hanna Lerner *Making Constitutions in Deeply Divided Societies* (Cambridge University Press, Cambridge, 2011).

88 C Sunstein *Designing Democracy* (Oxford University Press, New York, 2001) at 50.

89 At 10.

90 Lerner, above n 87.

Court of Appeal, these are the terms in which the new Supreme Court's statutory purpose was set out in s 3 of the Supreme Court Act 2003:[91]

> 3 Purpose
>
> (1) The purpose of this Act is—
>
> (a) to establish within New Zealand a new court of final appeal comprising New Zealand judges—
>
> (i) to recognise that New Zealand is an independent nation with its own history and traditions; and
>
> (ii) 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; and
>
> (iii) to improve access to justice; and
>
> (b) to provide for the court's jurisdiction and related matters; and
>
> (c) to end appeals to the Judicial Committee of the Privy Council from decisions of New Zealand courts; and
>
> (d) to make related amendments to certain enactments relating to courts or judicial proceedings.
>
> (2) Nothing in this Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament.

This is an example of an incompletely theorised agreement understood in Lerner's terms. The role of the Supreme Court is to resolve "legal matters" (however far they extend) relating to the Treaty of Waitangi, but without affecting Parliamentary sovereignty (whatever that may mean) and without affecting the rule of law (whatever that may mean). The Supreme Court Act deliberately places three of New Zealand's constitutional realms in creative tension with each other. We should not necessarily expect a written constitution to resolve these tensions "once and for all" but rather to provide a process by which we continue to confront them. It is to be regretted that the Judicature Modernisation Bill does not reproduce this kind of formulation.

The aim of a written constitution should not be to choose one of the political, historical and cosmopolitan elements to the exclusion of the others. Arguments about the convergence or contest

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91 I am elaborating here on a point suggested by the Chief Justice Dame Sian Elias in "Mapping the Constitutional" (address to the Legal Research Foundation Seminar Mapping the Common Law, Auckland, 29 June 2012) at [10]. The Judicature Modernisation Bill 2013 (178-2) seems to have omitted this formulation.

between the realms of the political, the historical or the universal will remain central to constitutional discourse – whether or not the constitution itself remains unwritten. In order to prevail in constitutional arguments one would seek to find convergence between the three elements or at least to marginalise the conflicts between them. I turn now briefly to consider the controversial question about the separate Māori electoral seats as a way of illustrating this point.

Perhaps the strongest argument for the separate Māori seats is from Treaty foundationalism: the separate roll and seats are a recognition of the special status of Māori as tangata whenua in Aotearoa/New Zealand. One might attempt to make an argument that the separate Māori seats also fit within a monist frame in that they contribute to representativeness and hence enhance the authenticity of monist politics. Since 1993, the number of seats has been calculated to reflect the population as a whole, the number of seats in Parliament and the number of Māori electing to enrol on the Māori Electoral roll – in order to meet objectives of proportionality.[92] The weakest argument is from universalism. Even then, proponents for the separate Māori seats would likely attempt to fit their arguments within universalist terms (affirmative action?) or at least attempt to marginalise the challenge from universalism. For an example of the latter, see the comments of the Constitutional Review Committee explaining how and why the separate seats differ from Apartheid.[93]

Arguments against the separate Māori seats too are likely to attempt to draw on all three elements. Arguments from Treaty foundationalism are likely to point to the existence of Article III of the Treaty of Waitangi, which grants Māori the status of British subjects, and leaves an open question about what the terms of Māori civic engagement should be. The background to the creation of the seats does not support either a representational or Treaty of Waitangi rationale. Four separate seats were created in 1867 when the franchise was extended to adult Māori men and as part of a deal to enfranchise South Island gold diggers.[94] At the time of their creation (initially as a temporary measure)[95] a proportionate distribution would have been somewhere in the vicinity of 14 or 15 seats.[96] Moreover, the Royal Commission on the Electoral System strongly recommended that if MMP were adopted, the Māori list seats, Māori roll and Māori option should be abandoned.[97] It

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92 This was a response to recommendations made by the Royal Commission in the event that MMP was not adopted: see Royal Commission on the Electoral System, above n 18, at [3.54], and [3.92]–[3.98].

93 Constitutional Advisory Panel, above n 1, at 40, adopting arguments of the Royal Commission on the Electoral System, above n 18.

94 For a history of the Māori seats see MPK Sorrenson "Appendix B: A History of Maori Representation in Parliament" in Royal Commission on the Electoral System *Royal Commission Report on the Electoral System: Towards a Better Democracy* (Wellington, 1986) B19.

95 Sorrenson, above n 94.

96 At B21. Frederick Whitaker proposed a Bill in 1878 which would have allocated Māori seats on a per capita basis.

97 At [3.74].

argued that MMP would provide for better Māori representation, and give stronger incentives for parties to take account of Māori concerns. It also recommended that the threshold for the party vote should be waived for parties primarily representing Māori interests.[98] The experience since MMP was introduced seems to confirm the Royal Commission's prediction that Māori would gain better representation through MMP. There may well be other (possibly better) ways to enhance Māori representation. Opposition to the creation of separate Māori seats on universalist premises has been a factor from the very beginning. Opponents of the seats in 1867 thought that special representation was an instance of class legislation and that it would be better to individualise Māori land title so that more Māori qualified under the ordinary rules.[99]

My aim here is not to resolve these issues but to demonstrate the ways in which the arguments are likely to be crafted. To some extent I am reflecting the terms of the current debate. The level of disagreement is only likely to be exacerbated if the issue were to be moved to the higher stakes arena of written constitution writing. It is unlikely, though of course not impossible, that guarantees of the separate Māori seats would be explicitly included in a written constitution. More likely the written constitution would contain some guarantees about democratic representation, something about the Treaty of Waitangi and some protection of rights. If that were the case, then constitutional challenges to the existing laws, or to attempts to repeal the existing laws which regulate the Māori seats, would be transacted in much the same terms as currently – except in that case the forum for such challenges would be a court and not the wider public domain. A written constitution would not remove the political disagreement – it would simply move the forum where the debate would take place.

VIII CONCLUSION

Notwithstanding the dominance of the monist version of the constitution, New Zealand has numerous sites of constitutional ambiguity and political agreement. These are not easy to explain even to the educated public. It is not, as some politicians and commentators have suggested, "if it ain't broke don't fix it" – or at least not in the sense that the basis of New Zealand's constitutional life is undisputed. The constitution contains numerous sites of acute political disagreement including about its very fundamental commitments. But its many areas of ambiguity, made possible in large part because it is unwritten, mitigate what are fundamental and serious political disagreements. We must learn from our experience of New Zealand's unwritten constitution, with its contradictions and mutually limiting principles, if we are to commence the high-stakes process of formal constitution-making.

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98 At [3.75].

99 Sorrenson, above n 94, at B18.