(Diceyan) Paradise Reforged? Mapping the Growing Acceptance of Constitutional Entrenchment in New Zealand

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INTRODUCTION

My initial interest in this topic stems from studying Public Law.[1] Entrenchment was mentioned in passing,[2] with seemingly the clearest exposition of the current legal position found in a footnote in a High Court decision.[3] This proposition seemed to be at once new and inarguable. This interested me then and continues to interest me now.

There has been no comprehensive account of the evolving orthodoxy about entrenchment in New Zealand. Further, no attempt has been made to try to understand this shift in the broader context of constitutional change in New Zealand. In this paper, I attempt to do just that. To that end, both a legal historical and a normative constitutional approach will be taken.

This year, 2018, has in some ways marked the new high water-mark of this new orthodox. In arguments in the Supreme Court, the Solicitor-General conceded the efficacy of entrenchment without a hint of reluctance.[4] However, profound uncertainties remain. In debate about entrenching the Māori seats, Parliamentarians showed a profound confusion and perhaps an unawareness of the new 'orthodoxy'.[5] Further, the debate showed no clear consensus on matters that could properly be entrenched. A new orthodoxy has taken the place of the old. However, uncertainty abounds.

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1 The title of this dissertation is drawn from: James Belich *Paradise Reforged: A History of the New Zealanders* (Penguin, Auckland, 2001).

2 In this dissertation, "entrenchment" (and similar phrases) has been used to describe "any mechanism which requires legislation to be supported formally in the process of enactment by some body or bodies other than parliament acting by a majority of one" (BV Harris "The Law-Making Powers of the New Zealand General Assembly: Time to Think about Change" (1984) 5 OLR 565, 580).

3 *Taylor v Attorney-General* [2014] NZHC 2225 at [68].

4 *Ngaronoa v Attorney-General* Transcript SC 102/2017, 26 March 2018.

5 (5 September 2018) 732 NZPD 6306-6321, especially 6308 and 6320-6321.

Chapter I sets out the foundations of New Zealand's constitutional system, before noting how the existence of entrenchment poses an existential and legal challenge to those foundations. In the second Chapter, I chart the shifting orthodoxy about the legal efficacy of entrenchment noting that there is a sharp disjunction between the 1956 and 2018 orthodoxies. The third Chapter attempts to account for such change in a theoretically acceptable way, noting that although adequate theoretical justification may exist the change has not been articulated in these terms. Chapter IV begins by noting some areas of uncertainty around the new orthodoxy. It then considers this constitutional change in broader terms as illustrative of, what I term, 'new whig constitutionalism' and notes the inherent risks in constitutional change occurring on these terms.

CHAPTER I: The Conundrum

1.1 Introduction

It is necessary to place the path to acceptance of entrenchment as legally efficacious in its broader constitutional context. This Chapter has four parts.

Its first part will establish what it means for a Parliament to be sovereign in a Diceyan sense and account for sovereignty's basis and origins. The second will establish that the primary (or orthodox) description of New Zealand's constitution accords with the model described in the first part. It will note that this persists despite heterodox views. The third will outline the problems that entrenchment poses to this structure, both in an existential and legal sense. The fourth part will outline why, nonetheless, entrenchment is frequently seen as desirable.

1.2 What does it mean for Parliament to be sovereign?

1.2.1 Parliamentary Supremacy

At its most simple, Dicey describes his conception as follows:[6]

> The principle of Parliamentary sovereignty means … this, namely, the Parliament thus defined has … 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 the right to override or set aside the legislation of Parliament.

Traditionally, a corollary of this conception has been the doctrine of implied repeal. Lord Langdale described the doctrine as meaning that:[7]

> If two inconsistent Acts be passed at different times, the last must be obeyed and if obedience cannot be observed without derogating from the first, it is the first which must give way.

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[6] A V Dicey *The Law of the Constitution* (8th ed, MacMillan, London, 1927) at 37-38.
[7] *Dean of Ely v Bliss* (1842) 5 Beav 574, 49 ER 700 at 582, 704.

Thus, in general, the latest word from Parliament is to prevail over any earlier word. This general rule prevails even if the earlier Act states it is to prevail over subsequent Acts.[8] The general conception of parliamentary supremacy can be described as follows: Parliament is able to change any law on any substance matter without any judicially enforceable constraints.[9]

1.2.2 Jurisprudential Basis

There is no clear consensus regarding how the New Zealand Parliament acquired sovereign powers. There are essentially two steps to answering this. The first is to find the origin (and therefore legal nature) of the conception in Britain. The second step is to determine how (and perhaps when) such a rule was 'imported' into New Zealand's constitutional matrix. Present circumstances only justify brief comment on each. Adam Tomkins suggests there are only two possible answers to the origin of parliamentary supremacy:[10]

> … there are two alternatives: authority might be found either in statute or in common law. The first of these options may relatively quickly be dismissed. Parliament has never legislated so as to confer legislative supremacy on itself ... The doctrine of legislative supremacy is a doctrine of the common law.

Others agree that the source of parliamentary supremacy is the common law.[11] But as Goldsworthy argues, such a claim must be false.[12] Tomkins is correct in asserting that (at least in Britain) Parliament has never (and presumably could never have) legislated to give itself legislative

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[8] *Vauxhall Estates Ltd v Liverpool Corp* [1932] 1 KB 733 at 746.

[9] See, e.g. Jeffrey Goldsworthy *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press, Oxford, 1999) at 16.

[10] Adam Tomkins *Public Law* (Oxford University Press, Oxford, 2003) at 103.

[11] See, e.g., Owen Dixon "The Law and the Constitution" (1935) 51 LQR 590 at 592; *R (Jackson) v Attorney-General* [2005] UKHL 56, [2006] 1 AC 262 at [102] per Lord Steyn; Sian Elias "Transition Stability and the New Zealand Legal System" (2004) 10 OLR 475 at 485; Sian Elias "Fundamentals: A Constitutional Conversation" (2011) 19 Waikato L R 1 at 6; Sian Elias "Mapping the Constitutional" [2014] NZ L Rev 1 at 14; Sian Elias, Chief Justice of New Zealand "Another Spin on the Merry-Go-Round" (Speech to the Institute for Comparative and International Law, University of Melbourne, Australia, 19 March 2003) at 14.

[12] Jeffrey Goldsworthy *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, Cambridge, 2010) at 47, 49-51.

supremacy. But descriptions of parliamentary supremacy finding its legal footing in the common law also seem remarkably inapt.[13] As the Court of Appeal notes, to assert that the Courts created parliamentary supremacy is to "beg the question of where the Judges in turn got their authority".[14] As Goldsworthy states, "if it is true … that Parliament's authority 'must come from somewhere', it must be equally true of the judges' authority".[15] Put simply, if the Courts created Parliament's authority, Parliament cannot possibly have created the Courts' authority. There is thus a need to "break the cycle"[16] and find a source of authority independent of the two sources Tomkins suggests above.

There are several approaches that seek to account for parliamentary supremacy in terms other than Tomkins' crude dichotomy. The sovereignty of the Westminster Parliament, it has been said, is a political fact established following the Civil War and the Glorious Revolution.[17] As Wade wrote, the rule is "the ultimate *political* fact".[18] This conclusion must inevitably flow from Goldsworthy's "cycle" above. Elsewhere, the rule has been described as a Kelsenian "grundnorm".[19] Sir John Salmond referred to the rule as "legally ultimate; its source is historical only, not legal".[20] In Hartian terms, it is the "ultimate rule of recognition".[21]

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[13] BV Harris "The Law-Making Powers of the New Zealand General Assembly: Time to Think about Change" (1984) 5 OLR 565 at 572.
[14] *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [50].
[15] Jeffrey Goldsworthy *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, Cambridge, 2010) at 51.
[16] Jeffrey Goldsworthy *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, Cambridge, 2010) at 51.
[17] Jeffrey Goldsworthy "Is Parliament Sovereign? Recent Challenges to the Doctrine of Parliamentary Sovereignty" (2005) 3 NZJPIL 7 at 11; HWR Wade "The Basis of Legal Sovereignty" (1955) 13 (2) CLJ 172 at 188.
[18] HWR Wade "The Basis of Legal Sovereignty" (1955) 13 (2) CLJ 172 at 188. (Original emphasis)
[19] Dennis Lloyd *The Idea of Law* (Penguin, London, 1977) at 193-195.
[20] John Salmond *Jurisprudence* (10th ed, Sweet & Maxwell, London, 1947) at 155; referred to in *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [45].
[21] HLA Hart *The Concept of Law* (3rd ed, Oxford University Press, Oxford, 2012) at 106.

The best view of both the origin and nature of parliamentary supremacy is one that relies on Hart. Understanding this helps to place New Zealand's growing acceptance of entrenchment as legally effective into its proper context. Goldsworthy suggests that "the doctrine of parliamentary sovereignty can easily be understood as being constituted by rules of recognition".[22] Hart explains his ultimate rule of recognition in the following way:[23]

> Finally, when the validity of a statute has been queried and assessed by reference to the rule that what the Queen in Parliament enacts is law, we are brought to a stop in inquiries concerning validity: for… there is no rule providing criteria for the assessment of its own legal validity.

In simpler terms, Goldsworthy says: "the most fundamental laws of any legal system simply are whatever laws are accepted as binding, and routinely applied in administering the system, by its most senior officials".[24] There is significant support for the doctrine of parliamentary supremacy being conceived in terms of the ultimate rule of recognition.[25] However, this explanation is not universally accepted.[26]

To accept this is not to relegate judges to mere observers. The opinions and actions of judges (at least when acting in their judicial capacity) are a necessary (but not sufficient) indicator of the

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[22] Jeffrey Goldsworthy "Is Parliament Sovereign? Recent Challenges to the Doctrine of Parliamentary Sovereignty" (2005) 3 NZJPIL 7 at 10.

[23] HLA Hart *The Concept of Law* (3rd ed, Oxford University Press, Oxford, 2012) at 107.

[24] Jeffrey Goldsworthy *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press, Oxford, 1999) 237.

[25] See, e.g., James Allan "The Paradox of Sovereignty: *Jackson* and the Hunt for a New Rule of Recognition" (2007) 18 KJL 1; James Allan "The Glorious Revolution and the Rule of Recognition"(2015) 30 Constitutional Commentary 509 at 517-518, 520; Richard Ekins "The Authority of Parliament: A Reply to Professor Joseph" (2005) 16 KCLJ 51 at 56; Richard Ekins "The Relevance of the Rule of Recognition" (2006) 31 Australian Journal of Legal Philosophy 95; A J Harding "Parliament and the Grundnorm in Singapore" (1983) 25 Malaya L Rev 351 at 357, 359, 361; Jeffrey Goldsworthy *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press, Oxford, 1999) 236-239; Peter C Oliver *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford University Press, Oxford, 2005) at 291-294; Adam Tucker "Uncertainty in the Rule of Recognition and in the Doctrine of Parliamentary Sovereignty" (2011) 31(1) OJLS 61.

[26] See, e.g, TRS Allan *The Sovereignty of Law: Freedom, Constitution and Common Law* (Oxford University Press, Oxford, 2013) at 12, 137-140.

ultimate rule of recognition. For Hart, his ultimate rule of recognition was "an empirical, though complex, question of fact… established by appeal to… the actual practice of the courts and officials of the system".[27] Further, there must be "a form of social practice comprising both patterns of conduct regularly followed by most members of the group and a distinctive normative attitude".[28]

For now, three points suffice. The first is that Hart's essential argument is that at some point the law 'runs out'. At this point, no clear 'legal rule' that dictates conduct. Reference to *legal* authority, therefore, may not be the silver bullet in isolating rules of obligation. This leads to the second and third points. The judiciary is only one of the constitutional actors with a part to play in determining the ultimate rule of recognition.[29] Finally, only formal judicial action will be of interest. Extra-judicial writing and obiter comments do not of themselves constitute the sufficient normative position. As Tucker reminds us, we must consider the "actual behaviour, not hypothetical beliefs" of the various constitutional actors.[30] For the most part, judges acting officially continue to feel obliged to recognise parliamentary supremacy. It is this normative attitude in their formal constitutional capacity that is our primary concern. Extra-judicial writing and hypothetical obiter musings can, however, seep into official practice.[31] But it is only then that the rule of recognition can begin to evolve.

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[27] HLA Hart *The Concept of Law* (3rd ed, Oxford University Press, Oxford, 2012) at 293.
[28] HLA Hart *The Concept of Law* (3rd ed, Oxford University Press, Oxford, 2012) at 255; on this see: Adam Tucker "Uncertainty in the Rule of Recognition and in the Doctrine of Parliamentary Sovereignty" (2011) 31(1) OJLS 61 at 65, 68.
[29] Jeffrey Goldsworthy "Abdicating and Limiting Parliament's Sovereignty" (2006) 17 KCLJ 255 at 261.
[30] Adam Tucker "Uncertainty in the Rule of Recognition and in the Doctrine of Parliamentary Sovereignty" (2011) 31(1) OJLS 61 at 69; see also HLA Hart *The Concept of Law* (3rd ed, Oxford University Press, Oxford, 2012) at 55, 109, 293, 255.
[31] James Allan "The Paradox of Sovereignty: *Jackson* and the Hunt for a New Rule of Recognition" (2007) 18 KJL 1 at 2.

1.2.3 Constitutional Inheritance

The creation story of New Zealand's parliamentary supremacy is enough to justify significantly more writing than space permits. A brief sketch is necessary. The indigenous people of New Zealand had no conception of an organised national political structure that could possibly have full plenary law-making powers.[32] Like much of our politico-legal infrastructure, the conception of a sovereign law-making body was transplanted from the United Kingdom. Despite denotative similarities, the acquisition of British sovereignty in New Zealand did not automatically create a supreme law-making body.[33] The New Zealand Constitution Act 1852 (UK) stated that the General Assembly (as Parliament was known until 1986)[34] could "make laws for the peace, order and good government of New Zealand, provided that no such laws be repugnant to the law of England".[35] In 1914, it was stated that: "[i]t is evident that [the powers of the General Assembly]… are not unlimited like those of the Imperial Parliament".[36]

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[32] See, e.g, Jacinta Ruru "The Maori Encounter with Aotearoa: New Zealand's Legal System" in Benjamin J. Richardson and others (eds) *Indigenous peoples and the law: comparative and critical perspectives* (Hart, Portland, 2009) at 112-113.

[33] Sian Elias, Chief Justice of New Zealand "Another Spin on the Merry-Go-Round" (Speech to the Institute for Comparative and International Law, University of Melbourne, Australia, 19 March 2003) at 10; note the method or even fact of acquisition itself has been questioned extensively, on this see, e.g., FM Brookfield "The Treaty, the 1840 Revolution and Responsible Government" (1992) 5 Canterbury L R 59 at 60-64; Peter C. Oliver *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford University Press, Oxford, 2005) at 28-32; Phillip Joseph *Constitutional and Administrative Law in New Zealand* (1st ed, Law Book Company, Sydney, 1993) at 32-35.

[34] Constitution Act 1986 (NZ), s 14(2).

[35] New Zealand Constitution Act 1852 (UK) 15 & 16 Vict c 63, s 53.

[36] J Hight and HD Bamford *The Constitutional History and Law of New Zealand* (Whitcombe and Tombs, Christchurch, 1914) at 344. Although the term 'peace, order and good government' encompassed extensive legislative competence, there were indeed limits: *R v Riel* (1885) 10 App Cas 889 (PC) at 678. These included the ability to legislate extra-territorially as well as certain limits on altering the constitution (on this, see, e.g., Peter C. Oliver *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford University Press, Oxford, 2005) at 187; New Zealand Constitution Amendment Act 1857 (UK) 20 & 21 Vict c 53, s 2).

There is a divergence of views about when New Zealand's Parliament did acquire full legislative powers.[37] A broad consensus recognises that by 1987 (at the latest) New Zealand was sovereign in a Diceyan sense.[38] This may have been effected by a "disguised revolution".[39] As Joseph analogises:[40]

> … the axeman who, perched on the bough of a tree, severs the limb at the trunk. … Like the axeman who loses his only means of support, do parliament's powers likewise fall to the ground? Can there exist, in law, a power without a source?

1.3 The Orthodox View

1.3.1 Diceyan Paradise

In establishing the claim that New Zealand has been a "Diceyan Paradise", I will articulate the orthodoxy before suggesting that constitutional change is normally articulated as occurring within supremacy. Even heterodox views give rhetorical credence to the Diceyan view.

Professor Joseph describes New Zealand as the "acme of legislative supremacy".[41] He is not alone in making this claim. The centrality of parliamentary supremacy is pervasive in descriptions of New Zealand's constitutional arrangements. Harris proclaims it "is the dominant feature of the structure and functioning of the present New Zealand constitution".[42] So much so that it also has

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[37] See Phillip Joseph *Constitutional and Administrative Law in New Zealand* (1st ed, Law Book Company, Sydney, 1993) at 121, 307; Peter C. Oliver *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford University Press, Oxford, 2005) at 262-263, 192-193, 323, 328; and BV Harris "The Law-Making Powers of the New Zealand General Assembly: Time to Think about Change" (1984) 5 OLR 565 at 569.

[38] Effected (at the latest) by Constitution Act 1986 (NZ), s 15(2), s 26(1).

[39] Peter C. Oliver *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford University Press, Oxford, 2005) at 260.

[40] Phillip Joseph *Constitutional and Administrative Law in New Zealand* (1st ed, Law Book Company, Sydney, 1993) at 416.

[41] Phillip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 15.4.1.

[42] B V Harris "The Law-Making Powers of the New Zealand General Assembly: Time to Think about Change" (1984) 5 OLR 565 at 565.

been described as "the one legal doctrine…New Zealand lawyers are never taught to question (or perhaps taught never to question)".[43] The doctrine is acknowledged in both legislation and case law. For example, the Senior Courts Act 2016 refers to "the sovereignty of Parliament" alongside the "rule of law" and states that nothing in that Act affects "New Zealand's continuing commitment" to those principles.[44]

Perhaps the clearest exposition of the principle is in *Rothmans of Pall Mall*, where the High Court stated simply: "[t]he constitutional position in New Zealand... is clear and unambiguous. Parliament is supreme".[45] Recently, the Court of Appeal has consistently reaffirmed this principle. The context for such comments is often appeals by Māori appellants on the grounds that the acquisition of sovereignty over New Zealand was not legally valid, or that compliance with the Treaty of Waitangi and/or Māori customary law is a condition of valid law making.[46] Perhaps unsurprisingly, the Court of Appeal often does not give these appeals thorough consideration. These two grounds of appeal present their own (separate) legal issues, but they offer Courts the rare opportunity to make general statements about New Zealand's basic constitutional structure.

In *Phillips* it was noted that:[47]

> The leading decisions affirm that Parliament is sovereign and its legislation applies to all New Zealanders … . Thus New Zealand Courts are bound to accept the validity of all statutory enactments … .

Brooker stated that the matter was one of "well-settled law" and further:[48]

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[43] Geoffrey Walker "Some Democratic Principles for Constitutional Reform in the 1990s" (paper presented to a conference held by the Legal Research Foundation, Auckland, August 1993) 183 at 190.
[44] Senior Courts Act 2016, s 3(2); see also Constitution Act 1986, s 15(2). For discussion of this inclusion in the previous Supreme Court Act 2003 see: Matthew Palmer "New Zealand Constitutional Culture" (2007) 22 NZULR 565, 585.
[45] *Rothmans of Pall Mall (NZ) Ltd v Attorney-General* [1991] 2 NZLR 323 (HC) at 330.
[46] See, e.g., *R v Brown* [2007] NZCA 5, *R v Knowles* CA146/98, 12 October 1998; *R v Mitchell* CA68/04, 23 August 2004; *R v Harawira* CA180/05, 1 August 2005.
[47] *Phillips v R* [2013] NZCA 580 at [3].
[48] *Brooker v R* [2014] NZCA 436 at [4].

> The courts have consistently held that challenges to the sovereignty of Parliament, and validity of Acts of Parliament (whether in the context of Maori sovereignty arguments, or any other challenge to the sovereignty of the New Zealand Parliament) cannot succeed.

Underhill held that challenges "to the sovereignty of the New Zealand Parliament… cannot possibly succeed".[49]

Judicial reference to the principle is longstanding and pervasive.[50] Parliament has been described as "the supreme law making body";[51] and the principle of parliamentary supremacy as a "constitutional principle … [that] gives effect to the primacy of Parliament in the whole field of legislation".[52] The principle mandates that "every citizen of this country is… subject to Parliament's sovereign will".[53] In 2018, the Court of Appeal stated that it was "well settled that arguments challenging the general law-making authority of the New Zealand Parliament cannot succeed".[54]

Further, there has been recognition of constitutional change occurring *within* a conception of parliamentary supremacy rather than in conflict with it. In *R v Poumako*, Thomas J (dissenting) advocated for declarations of inconsistency when a statute is inconsistent with the New Zealand Bill of Rights Act 1990 (NZBORA).[55] He was very particular in noting that "the Courts clearly acknowledge the principle of Parliament's legislative supremacy", and stated the conventional position that:[56]

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[49] *Underhill v R* [2015] NZCA 156 at [5].
[50] See, e.g, *The Land Board for the District of Otago v Higgins* (1884) 3 NZLR 66 (CA) at 75*; Worth v Worth* [1931] NZLR 1109 (CA) at 1129-1130 per Herdman J.
[51] *Fisheries Inspector v Turner* [1978] 2 NZLR 233 (CA) at 237 per Richardson J.
[52] *Combined State Unions v State Services Co-ordinating Committee* [1982] 1 NZLR 742 (CA) at 745 per Woodhouse P.
[53] *Wallace v Ministry of Justice and Chief Executive of the Department of Corrections* [2011] NZCA 678 at [9].
[54] *Ferri v Police* [2018] NZCA 181 at [8]; see also: *Ruka v R* [2011] NZCA 404, (2011) 25 CRNZ 768 at [86].
[55] *R v Poumako* [2000] 2 NZLR 695 (CA).
[56] *R v Poumako* [2000] 2 NZLR 695 (CA) at [103] per Thomas J.

> … the Courts must not trespass on Parliament's legislative function. If they do so they aggrandise their own judicial role and prejudice the delicate balance between the two organs of government

A declaration, he thought, would still allow Parliament's "legislative sovereignty [to remain] intact".[57] It is notable that in dissenting and advocating for a significant change in NZBORA jurisprudence at that time, Thomas J was very careful to cloak his arguments in the language of a traditional Diceyan conception of supremacy. He was 'progressive' in advocating for this change to NZBORA jurisprudence but he was somewhat 'conservative' in using such strong Diceyan language to describe New Zealand's constitutional position. Even if those comments were more conservative than his extra-judicial position on the matter,[58] and he perhaps adopted that language in order to provide legitimacy for his argument, it is still notable that he felt it was necessary to do so. In Hartian terms, one is unable to find a clear heterodox view in Thomas' formal normative position.

When accepting the availability of declarations of inconsistency, the Court of Appeal in 2017 used similar language.[59] The Court's discussion of "the common law jurisdiction of the higher courts" began with a conventional exposition of parliamentary supremacy:[60]

> The supremacy of the Crown in Parliament is … the "bedrock" of the constitution. Parliament may make or unmake any law it wishes, unconstrained by any entrenched or codified constitution. This principle is … fundamental in New Zealand … .

Even more interesting is the Court's explicit reference to Dicey in articulating the contours of the inherent jurisdiction. In declaring that "Courts will declare void any act… that exceeds the limits of the power that organ derives from the law", the Court immediately states that "[t]his principle too is not radical; again, Dicey recognised it".[61] These examples illustrate that even when courts

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[57] *R v Poumako* [2000] 2 NZLR 695 (CA) at [103] per Thomas J.
[58] See, e.g., E. W. Thomas "Centennial Lecture - The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2000) 31 VUWLR 5 at 8, 15, 26.
[59] *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24.
[60] *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [44].
[61] *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [54]. Footnotes omitted.

shift the position they do so within a particular conception of parliamentary supremacy, reaffirming a commitment to supremacy in their choice of language. The courts, as a key constitutional institutional actor, are prudent in their choice of language and cognisant of a need to constantly reaffirm a commitment to parliamentary supremacy. Although this may be mere lip service in order to make significant changes seem less significant, it contributes towards the requisite normative position. Further, choosing language in order to obtain legitimacy for change speaks to an underlying consensus recognising parliamentary supremacy.

1.3.2 Challenges to the Orthodoxy

There is a heterodox narrative in existence. What is particularly interesting about those who advocate against supremacy is they often use explicitly Diceyan language. For example, Dame Sian Elias suggests Parliament is subject to "fundamental constitutional preconditions of valid law-making".[62] Such preconditions, she suggests may include "rules fundamental to the democratic process",[63] "substantive limits inherent in the very distribution of authority among the state actors"[64] and "substantive constraints which might be implied from democratic principle or fundamental rights".[65] She describes this as a "more modest constitutional principle of the Sovereignty of Parliament" and a "more modest doctrine of legislative supremacy in law-making".[66]

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[62] Sian Elias, Chief Justice of New Zealand "Another Spin on the Merry-Go-Round" (Speech to the Institute for Comparative and International Law, University of Melbourne, Australia, 19 March 2003) at 34, see also at 6, 7; and Sian Elias "Something Old, Something New: Constitutional Stirrings and the Supreme Court" (2004) 2 NZJPIL 121 at 136.

[63] Sian Elias "Something Old, Something New: Constitutional Stirrings and the Supreme Court" (2004) 2 NZJPIL 121 at 136.

[64] Sian Elias "Mapping the Constitutional" [2014] NZ L Rev 1 at 16

[65] Sian Elias, Chief Justice of New Zealand "Another Spin on the Merry-Go-Round" (Speech to the Institute for Comparative and International Law, University of Melbourne, Australia, 19 March 2003) at 6.

[66] Sian Elias "Mapping the Constitutional" [2014] NZ L Rev 1 at 13, 14; see also: Sian Elias, Chief Justice of New Zealand "Another Spin on the Merry-Go-Round" (Speech to the Institute for Comparative and International Law, University of Melbourne, Australia, 19 March 2003) at 7.

Sir Geoffrey Palmer's view has evolved over his 40 years of public life.[67] He now states, in similar terms to Elias, that "I argue for softening the doctrine of parliamentary sovereignty".[68] Remarking especially on his view as a former parliamentarian, he states that he prefers "power to be shared rather than for one body to enjoy absolute power".[69] Lord Cooke's dicta outlining possible limits to supremacy are famous.[70] In his seminal 1988 article "Fundamentals", he states simply "[b]efore any serious discussion of the subject it is necessary to get Dicey out of the way".[71] The crux of the argument is expressed as follows:[72]

> Suppose that an Act of the legislature purported to strip Jewish people of their citizenship and their property; … Can any lawyer in all honesty accept [this]…?
>
> It would seem that hypocrisy on that scale must be the ultimate result of taking Dicey undiluted… if honesty compels one to admit that the concept of a free democracy must carry with it some limitation on legislative power… . Then it becomes a matter of identifying the rights and freedoms that are implicit in the concept…

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[67] For his previous views see, e.g, Geoffrey Palmer "New Zealand and the Glorious Revolution" (1976) 12 NZLJ 265 at 267-268; Geoffrey Palmer "The Separation of Powers in 1984" (1984) NZLJ 178 at 179 cf. Geoffrey Palmer "The New Public Law: Its Province and Function" (1992) 22 VUWLR 1 at 6-7; Geoffrey Palmer "Muldoon and the Constitution" in Margaret Clark (ed) *Muldoon Revisited* (Dunmore Press, Palmerston North, 2004) 167 at 168.

[68] Geoffrey Palmer "What the New Zealand Bill of Rights Act Aimed to Do, Why it Did Not Succeed and How it Can be Repaired" (2016) 14 NZJPIL 169 at 170.

[69] Geoffrey Palmer "What the New Zealand Bill of Rights Act Aimed to Do, Why it Did Not Succeed and How it Can be Repaired" (2016) 14 NZJPIL 169 at 186.

[70] *L v M* [1979] 2 NZLR 519 (CA), 527; *Brader v Ministry of Transport* [1981] 1 NZLR 73 (CA), 78; *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374 (CA), 390; *Fraser v State Services Commission* [1984] 1 NZLR 116 (CA), 121; *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA), 398. They have been analysed thoroughly elsewhere: see, e.g., John Caldwell "Judicial sovereignty – A new view" [1984] NZLJ 357 at 358; Aaron Lloyd "Lord Cooke's Fundamental Rights and the Substantive Judicial Review" (1999) 8 Auckland U L Rev 1173; Lars Puvogel "AV Dicey and the New Zealand Court of Appeal – Must Theory Finally Give in to Legal Realities?" (2003) Canterbury L Rev 111 at 191; MD Kirby "The Struggle for Simplicity: Lord Cooke and Fundamental Rights" (1998) 24 CLB 496 at 498-503; B V Harris "The Law-Making Powers of the New Zealand General Assembly: Time to Think about Change" (1984) 5 OLR 565 at 574.

[71] Robin Cooke "Fundamentals" [1988] NZLJ 158, 160.

[72] Robin Cooke "Fundamentals" [1988] NZLJ 158, 164-165.

His argument is undoubtedly powerful. The example chosen is provocative. Although forceful in his criticism, here and elsewhere,[73] he still refers to the risk of 'taking Dicey undiluted'. For Cooke, like Elias and Palmer, Diceyan supremacy is clearly accepted as the starting point. Deference is given to Dicey and his theory. This is as likely a rhetorical device as a genuine belief in the doctrine. However, that rhetorical deference both acknowledges the existence of the orthodoxy and seeks to effect change within it.

There is also a consistent reference to constitutional change in whiggish or nationalistic terms. This will become especially important in Chapter IV. Elias, for example considers that the doctrine "collides uncomfortably with modern movements for internationalism, federalism, devolution…".[74] Further, she suggests that "Dicey's elegant doctrine"[75] has had an inhibiting effect on the development of what she terms an "evolutionary constitution".[76] Variously, she has suggested that this view "has blunted our capacity for constitutional thought and inhibited development of a coherent theory of the constitution",[77] "defined away much of the proper subject of constitutional law",[78] "impoverished our constitutional thinking… [leading] us to trade slogans"[79] and that the doctrine creates "conceptual shackles" causing us to think "barrenly".[80] She advances this inhibiting view by reference to Allen Curnow's *Landfall in Unknown Seas* who wrote, "Simply by sailing in a new direction/You could enlarge the world".[81]

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73 See, e.g., Lord Cooke of Thorndon "The Myth of Sovereignty" (2005) 3 NZJPIL 39 at 42, 44.
74 Sian Elias "Something Old, Something New: Constitutional Stirrings and the Supreme Court" (2004) 2 NZJPIL 121 at 131.
75 Sian Elias "Mapping the Constitutional" [2014] NZ L Rev 1 at 11.
76 Sian Elias, Chief Justice of New Zealand "Towards Justice: Reflections on the System and Society" (Sir John Graham Lecture 2018, Maxim Institute, Auckland, 10 August 2018) at 24.
77 Sian Elias "Mapping the Constitutional" [2014] NZ L Rev 1 at 11.
78 Sian Elias "Mapping the Constitutional" [2014] NZ L Rev 1 at 19.
79 Sian Elias "Transition Stability and the New Zealand Legal System" (2004) 10 OLR 475 at 478.
80 Sian Elias "Mapping the Constitutional" [2014] NZ L Rev 1 at 12.
81 Sian Elias "Transition Stability and the New Zealand Legal System" (2004) 10 OLR 475 at 490; Sian Elias, Chief Justice of New Zealand "Towards Justice: Reflections on the System and Society" (Sir John Graham Lecture 2018, Maxim Institute, Auckland, 10 August 2018) at 22.

Joseph also refers to a developing constitution.[82] He sees the Human Rights Act 1998 (UK) and NZBORA as marking an emergence of a "new constitutionalism" negotiating "a middle path between parliamentary sovereignty and 'higher law' jurisprudence".[83] However, although Joseph advocates a new model, he still accepts that the conception of supremacy continues to be the orthodoxy (he restates in his most recent text that "New Zealand is the acme of legislative supremacy"[84]) even if it is "increasingly" under attack and heading to a "rupture".[85] Palmer considers NZBORA to be "a way point on a journey to a more balanced constitutional destination".[86]

In 2018, the Attorney-General drew upon the comments of Elias and Cooke in asserting his own view that "there are limits to the sovereignty of Parliament".[87] This is just the latest in a history of forceful critiques of supremacy. For these purposes, three things are notable. First, although sometimes bold in their language, that criticism is often expressed in terms of a "more modest

[82] See his early writings: Phillip Joseph "Beyond Parliamentary Supremacy" (1989) 18 Anglo-Am L R 91 at 106, 108, 122-123; cf. his more recent writings: Phillip Joseph "Parliament, the Courts, and the Collaborative Enterprise" (2004) 15 KCLJ 32, Phillip Joseph *Constitutional and Administrative Law in New Zealand* (1st ed, Law Book Company, Sydney, 1993), 454; on Joseph's shifting view see Jeffrey Goldsworthy "Is Parliament Sovereign? Recent Challenges to the Doctrine of Parliamentary Sovereignty" (2005) 3 NZJPIL 7 at 20.

[83] Phillip Joseph "Parliament, the Courts, and the Collaborative Enterprise" (2004) 15 KCLJ 321 at 343, 344.

[84] Phillip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, 2014) at 15.4.1.

[85] Phillip Joseph "Parliament, the Courts, and the Collaborative Enterprise" (2004) 15 KCLJ 321 at 322, 323.

[86] Geoffrey Palmer "What the New Zealand Bill of Rights Act Aimed to Do, Why it Did Not Succeed and How it Can be Repaired" (2016) 14 NZJPIL 169 at 188.

[87] Hon David Parker, Attorney-General, "Protection of human rights under the New Zealand Bill of Rights Act 1990 and other constitutional issues" (Address to Auckland District Law Society, 11 May 2018). In his view these limits include: the inability to legislate away the inherent jurisdiction, habeas corpus or to end elections.

doctrine"[88], "softening the doctrine"[89] or 'diluting Dicey'[90]. This reinforces, rather than detracts from, the orthodox status of the doctrine. Secondly, a sense of constitutional change as inherent 'progress' is often articulated. Understanding this can help us to better understand constitutional change in New Zealand. Finally, one should recall Hart's requisite normative attitude that relies on actual behaviour, not hypothetical beliefs. With the exception of Cooke's dicta,[91] these comments have largely been made in unofficial channels and do not (of their own) constitute the requisite shift in normative position to illustrate a changing rule of recognition.

1.4 Parliamentary Sovereignty and Entrenchment: The Conundrum

Entrenchment sits uncomfortably within a conception of parliamentary supremacy. There are potential paths to accepting the efficacy of entrenchment within this conception. However, difficulties arise. Writing about religious philosophy, Mackie set out the 'paradox of sovereignty' in the following terms:[92]

> … I would point out that there is a parallel Paradox of Sovereignty. Can a legal sovereign make a law restricting its own future legislative power? … neither the affirmative nor the negative answer is really satisfactory. If we were to answer 'Yes', we should be admitting the validity of a law which, if it were actually made, would mean that parliament was no longer sovereign. If we were to answer 'No', we should be admitting that there is a law… which parliament cannot validly make, that is, that parliament is not now a legal sovereign.

Gray makes a very similar point:[93]

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88 Sian Elias "Mapping the Constitutional" [2014] NZ L Rev 1 at 14.
89 Geoffrey Palmer "What the New Zealand Bill of Rights Act Aimed to Do, Why it Did Not Succeed and How it Can be Repaired" (2016) 14 NZJPIL 169 at 170.
90 Robin Cooke "Fundamentals" [1988] NZLJ 158 at 164.
91 His comments were obiter and therefore not truly contributing to a requisite normative position. They are also now 30 years old.
92 JL Mackie, "Evil and Omnipotence" (1955) 64 Mind 200 at 211; see also James Allan "The Paradox of Sovereignty: *Jackson* and the Hunt for a New Rule of Recognition" (2007) 18 KJL 1 at 1.
93 HR Gray "The Sovereignty of Parliament Today" (1953) 10 UTLJ 54 at 54; Michael Gordon *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing, Oxford, 2015) at 57.

> … if Parliament is sovereign, there is nothing it cannot do by legislation; if there is nothing Parliament cannot do by legislation it may bind itself hand and foot by legislation; if Parliament so binds itself by legislation there are things which it cannot do by legislation; and if there are such things Parliament is not sovereign.

This same 'paradox' exists for procedural entrenchment.[94] Expressed more simply, could the 1993 Parliament make it more difficult for the 2018 Parliament to change certain legislation? If the answer is yes, the 2018 Parliament's supremacy is arguably limited. However, if the answer is no, the 1993 Parliament's power is curtailed.[95] Recall, too, the conventional position on implied repeal, supposedly a natural consequence of Dicey's theory.[96] If entrenchment is to be considered legally effective, Parliament is unable to impliedly repeal the entrenching provision. There is no easy answer. It is, truly, a paradox. Entrenchment, therefore, brings into sharp relief the existence and nature of parliamentary supremacy in New Zealand. Depending on how we conceive it, this paradox can potentially be solved within a conception of parliamentary supremacy or it can be seen as a more direct challenge to the conventional exposition of New Zealand's constitutional arrangements. Understanding the basis and shape of parliamentary supremacy in New Zealand will therefore shape the potential answer and help to understand the wider consequences.

For Dicey, the answer was simple. "[A] sovereign power cannot," he wrote "while retaining its sovereign character, restrict its own powers by any particular enactment".[97] Goldsworthy takes the opposite view: "a legislature able to change its own composition, procedure and form of legislation, is surely more rather than less sovereign".[98] Similarly, Michael Gordon suggests that Dicey's answer

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94 B V Harris "The Law-Making Powers of the New Zealand General Assembly: Time to Think about Change" (1984) 5 OLR 565 at 575.

95 Jeffrey Goldsworthy "Abdicating and Limiting Parliament's Sovereignty" (2006) 17 KCLJ 255, 255.

96 See, e.g., *Vauxhall Estates Ltd v Liverpool Corp* [1932] 1 KB 733.

97 A V Dicey *The Law of the Constitution* (8th ed, MacMillan, London, 1927) at 66; FM Brookfield "Parliamentary Supremacy and Constitutional Entrenchment: A Jurisprudential Approach" (1984) 5 OLR 603 at 624.

98 Jeffrey Goldsworthy *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press, Oxford, 1999) at 15.

to the conundrum is "straightforward and superficially attractive" but "distort[s] the debate about the proper extent of sovereign law-making authority".[99] Possible answers to the conundrum, both within and outside, a conception of parliamentary supremacy will be considered in Chapter III. For present purposes it suffices to understand that a conundrum exists that needs to be addressed.

Entrenchment also poses an existential threat to parliamentary supremacy. Allan, for example, outlines this position:[100]

> … a Parliament representing one generation (loosely speaking) is purporting to lock in future generations…. [it] involves a strong sense of self-assuredness, of moral self-righteousness, of one particular generation being so confident of the rightness of what it is doing that it seeks to make any future changes harder than what is required to pass an ordinary statute.

Goldsworthy agrees. He considers that "one of the reasons for entrusting Parliament with ordinary legislative sovereignty is that mistakes and injustices can be corrected by future Parliaments".[101] For example, a Nineteenth Century parliament might have entrenched provisions limiting the franchise to men. No one now disputes that the expansion of franchise to women was an advancement, however the vote to do so was tight.[102] If the normative position underlying parliamentary supremacy is a belief in the desirability of legally unconstrained majoritarian decision making, accepting the desirability of entrenchment may undermine this normative foundation. Without analytical clarity, acceptance of entrenchment might be seen as an existential threat to supremacy. To accept this is not to reject the possibility of change, but to expect intellectual honesty if there is a change.

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[99] Michael Gordon *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing, Oxford, 2015) at 58.

[100] James Allan "The Paradox of Sovereignty: *Jackson* and the Hunt for a New Rule of Recognition" (2007) 18 KJL 1 at 14.

[101] Jeffrey Goldsworthy *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, Cambridge, 2010) at 138.

[102] In the Legislative Council, the vote was 20-18. See: Neill Atkinson "Voting Rights –Votes for women" (17 February 2015) Te Ara – The Encyclopedia of New Zealand <teara.govt.nz/en/voting-rights/page-4>

1.5 'Why entrench?'[103]

What justifies some topics being removed from the majoritarian decision making process (where a broadly representative decision making body can make decisions on a 'half plus one' majority vote)?[104] What issues should be resolved in a way other than the conventional method?

There are multiple ways to articulate the utility of entrenchment. Entrenchment brings with it stability and thus "can raise confidence in the legal system".[105] On this account, entrenchment is a tool to balance flexibility and stability (not unlike sunset clauses).[106] Another potential advantage is the ability for entrenchment to "act[] as a signal of importance" in the form of:[107]

> a public declaration that the state regards a rule as being of especial value or significance… entrenchment can be used as a device to pick out certain features of the constitution as having special significance. It can have an educative function…

Slightly less loftily, as Gordon suggests, "[i]f there is a compelling democratic reason to permit legislation on any substantive matter, this should also be understood to extend to legislation altering the legislative process".[108]

Perhaps one might legitimately think the rules of the 'electoral game' ought to be placed outside the domain of normal party political decision making. The clearest exposition of such an argument can be found in the debates on the passing of the Electoral Act 1956. The Attorney-General described the utility of such measures in the following terms: "… this Bill is a genuine, and I believe

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103 NW Barber "Why Entrench?" (2016) 14(2) ICON 325.
104 Michael Gordon *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing, Oxford, 2015) at 289.
105 NW Barber "Why Entrench?" (2016) 14(2) ICON 325 at 336.
106 Eric A. Posner and Adrian Vermeule "Legislative Entrenchment: A Reappraisal" 2002 111(7) Yale L J 1665; NW Barber "Why Entrench?" (2016) 14(2) ICON 325 at 336
107 NW Barber "Why Entrench?" (2016) 14(2) ICON 325 at 336.
108 Michael Gordon *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing, Oxford, 2015) at 302.

successful, attempt to place the structure of [electoral] law above and beyond the influence of Government and party…".[109]

For many, entrenchment appears instinctively attractive. However, there is no one clear theoretical justification adopted. This uncertainty contributes to a lack of consensus about entrenchment in certain topic areas.[110]

1.6 Conclusion

As outlined, parliamentary supremacy is the key descriptor of New Zealand's constitutional matrix. It is comprehensively referred to by the Courts, and, importantly, guides their conduct. No doubt there are strong criticisms of supremacy, however, these criticisms normally accept the orthodox nature of parliamentary supremacy and rhetorical deference is paid to it. Entrenchment sits uncomfortably within supremacy, both normatively and legally. Mapping the shifting opinion about the legal efficacy of entrenchment, therefore, will illustrate broader trends.

[109] (26 October 1956) 310 NZPD 2839 (Hon Jack Marshall, Attorney-General)
[110] See, e.g., Geoffrey Palmer and Andrew Butler *A Constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2016); Electoral (Entrenchment of Māori Seats) Amendment Bill 2018 (56-1).

CHAPTER II: The Evolving Orthodoxy

2.1 Introduction

There is yet to be a comprehensive account of the evolving consensus about the legal efficacy of entrenchment since the enactment of the Electoral Act 1956. This chapter provides this account and aims to provide some coherence to the shift. Broadly, the shift can be illustrated by reference to two statements. In 1956, the Attorney-General stated that "[w]hat we are doing has a moral sanction rather than a legal one".[111] Sixty-two years later, in argument before the Supreme Court, the Solicitor-General stated:[112]

> … there might have been some surprise at the proposition that if the manner and form provisions haven't been met then the Court can declare the legislation invalid. That is not a controversial proposition…

It is difficult to provide coherence to a process that, as will be seen, has largely been incoherent. Retrospectively finding clear stages of progression in orthodoxy is a difficult task. Further, presenting change in such a way may itself imply support for the evolution. In this respect, it is difficult (but necessary) to separate the normative and descriptive.

By examining Parliamentary debate, judicial decisions, and commentary across 62 years, some trends emerge. There have broadly been three differing (roughly chronological) conceptions of the efficacy of entrenchment (roughly chronologically): the provisions have only moral force; the provisions provide a legal constraint on the House; and the provisions create a precondition for valid law-making. The implications of this change and of differing views of constitutional actors will be considered in Chapter IV.

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111 (26 October 1956) 310 NZPD 2839 (Hon Jack Marshall, Attorney-General)
112 *Ngaronoa v Attorney-General* Transcript SC 102/2017, 26 March 2018 at 58.

2.2 Entrenchment as a compact: "… a moral sanction rather than a legal one"[113]

The original orthodoxy was that entrenchment represented a moral or political compact rather than a legally efficacious constraint. The 1952 Report of the Constitutional Law Reform Committee suggested that Parliament "could bind itself in statute and hope its successors would feel equally constrained" but that "it could not easily bind them" by a "legally effective" process.[114] This view was also dominant in the parliamentary debate on the Electoral Act 1956. The Attorney-General sought to "make it perfectly clear" that the provisions had a "moral force as representing [Parliament's] unanimous view" rather than a "legal force".[115] Other members noted that Parliament "cannot be bound by the actions of any of its predecessors"[116] and referred instead to "a strong moral obligation".[117]

This view was also apparent when the voting age was lowered to 20 in 1969 and then 18 in 1974.[118] As Collins points out, because the votes were carried 'on the voices' there is no record of whether the entrenching provision's requirement for "75 percent of all members" was met.[119] Although it may have been, the fact that it was not recorded was "a poor reflection on our legislative procedures".[120] Here, the moral imperative was satisfied as the Bill was unanimously supported, but if the entrenching provision was a precondition, it is possible that the votes of 18 to 21 year olds for many years were invalid. Interestingly, Collins' view was that "of course" any challenge to

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113 (26 October 1956) 310 NZPD 2852.
114 Elizabeth McLeay *In Search of Consensus: New Zealand's Electoral Act 1956 and its Constitutional Legacy* (Victoria University Press, Wellington, 2018) at 123.
115 (26 October 1956) 310 NZPD 2839 (Hon Jack Marshall, Attorney-General)
116 (26 October 1956) 310 NZPD 2847.
117 (26 October 1956) 310 NZPD 2850.
118 (20 August 1969) 362 NZPD 2107 and Electoral Amendment Act 1969; (19 September 1974) 394 NZPD 4368-4369 and Electoral Amendment Act 1974.
119 Electoral Act 1956, s 189(2)(a).
120 DB Collins "A Constitutional Conundrum" [1975] NZLJ 195 at 196.

the validity of the Act would not succeed as "[a]t the time the Governor-General gave his assent to the Bill… Parliament impliedly repealed [the entrenching provision]".[121]

Early texts referring to the 1956 Act further show that the consensus then recognised only a moral constraint. In 1962, Scott's view was that the entrenched provisions have "no superior legal sanctity of an effective matter, they have a superior moral sanctity" as a form of statutory recognition of an agreement reached between the two parties.[122] Further, he considered that "the weight of evidence" indicated that the domestic New Zealand Courts and the Privy Council would consider "that entrenching provisions are not legally effective to achieve their purpose".[123] CC Aikman and JL Robson in 1967 considered the provisions to be "no more than a noble gesture".[124] Interestingly, however, CC Aikman stated his view that "it does not follow [from the inefficacy of the current entrenchment] that a properly entrenched section could not be effective".[125]

As recently as 1984, Harris stated that "doubts surround" the legal effectiveness of entrenchment and that the "predominant approach amongst English commentators" is that it is not effective.[126] Further he stated his view that "it is unlikely that New Zealand courts would uphold such

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121 DB Collins "A Constitutional Conundrum" [1975] NZLJ 195 at 196.
122 KJ Scott *The New Zealand Constitution* (Oxford University Press, Oxford, 1962) at 8.
123 KJ Scott *The New Zealand Constitution* (Oxford University Press, Oxford, 1962) at 41.
124 JL Robson (ed) *New Zealand: The Development of its Laws and Constitution* (2nd ed, Stevens and Sons, London, 1967) at 36; a similar view was expressed in an article of a similar time period, A C Brassington "The Constitution of New Zealand – Aspects of Change and Development" [1963] NZLJ 213 at 217-218. See also: JL Robson (ed) *New Zealand: The Development of its Laws and Constitution* (1st ed, Stevens and Sons, London, 1954) at 50-51.
125 CC Aikman "Parliament" in JL Robson (ed) *New Zealand: The Development of its Laws and Constitution* (2nd ed, Stevens and Sons, London, 1967) at 66-67. Of note, Aikman was writing with the assistance of one K Keith, later Sir Kenneth Keith.
126 BV Harris "The Law-Making Powers of the New Zealand General Assembly: Time to Think about Change" (1984) 5 OLR 565 at 579, 580.

restrictions" until the "General Assembly acting by a majority of one no longer has supreme law-making powers."[127]

There has been a more recent tendency to mischaracterise these earlier arguments as suggesting that the only barrier to legal efficacy was the ability for the entrenching clause to be amended or repealed before amending or repealing the entrenched clause (the two-step solution).[128] However, earlier comments were not made in these terms. Parliament and the commentators focussed on the moral constraint provided as a compact between the two parliamentary parties. Reference is rarely made to this two-step solution. In the 1956 debate, for example, one member stated that a "determined enough" Government could "say it has the right to make laws and not be bound by anything that had been passed previously".[129] A wide range of evidence establishes that initially the provisions were seen as only providing a moral constraint.

This view is apparent in some form in the debate about the Electoral Reform Bill in 1993.[130] Interestingly, there is very little direct comment about the legal effect of entrenchment, although the impending arrival of MMP provided a distraction. The Attorney-General discussed the entrenchment provision of the then Act:[131]

> … it has been argued that in theory it is possible … to repeal section 189 by a simple majority, then to proceed to amend or repeal the provisions that were entrenched … But the reality is that it is not an option … [s 189] registers an agreement between the parties in Parliament … . To proceed otherwise than in accordance with the requirements of section 189… would be to expose this House to allegations of political abuse and to allegations of having breached constitutional conventions.

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127 BV Harris "The Law-Making Powers of the New Zealand General Assembly: Time to Think about Change" (1984) 5 OLR 565 at 590.

128 See, especially: "A Bill of Rights for New Zealand: A White Paper" (Government Printer, Wellington, 1985) at 7.9.

129 (26 October 1956) 310 NZPD 2848.

130 On this, see: PA Joseph "Constitutional Entrenchment and the MMP Referendum" (1994) 16 NZULR 67.

131 (3 August 1993) 537 NZPD 17140-17141.

Here, direct reference was made to the two-step solution, unlike earlier debates. However, his language about "an agreement between the parties" and "constitutional conventions" continues to place the enforcement of the entrenchment in the realm of the political. It was his view, however, that "this forthcoming referendum should proceed in terms of [the entrenching provision]".[132]

In *Hunua*, an evolving position can be found. The full (then) Supreme Court stated its view that:[133]

> In the absence of a constitution it is difficult to appreciate that s 106 is entrenched within the true meaning of that term but suffice it to say that this Court must take notice of the fact that the legislature has indicated that the section is of special significance in that it is provided that it shall not be repealed or amended unless [the requirements are met]

These comments are not particularly clear, and Harris and Brookfield both caution against reading too much into them.[134] Reference to "special significance" potentially refers to the moral compact view outlined above. However, the Court also states the specific constraining effect. Here, we can see the beginning of a transition from the political (or moral) realm to the legal.

2.3 Entrenchment as a legal constraint on the House: "Imping[ing] on our procedures"[135]

Over time, the House began to consider itself bound by the entrenching provision. However, that does not necessarily imply a view that the courts could examine whether the requirements were met as preconditions for valid law-making. This distinction partly turns on the House's right to

132 (3 August 1993) 537 NZPD 17141.
133 *Re Hunua Election Petition* [1979] 1 NZLR 251 (SC) at 298.
134 B V Harris "The Law-Making Powers of the New Zealand General Assembly: Time to Think about Change" (1984) 5 OLR 565 at 581; FM Brookfield "Parliamentary Supremacy and Constitutional Entrenchment: A Jurisprudential Approach" (1984) 5 OLR 603 at 631.
135 (15 July 1975) 399 NZPD 3055.

exclusive cognisance, an aspect of parliamentary privilege.[136] Although "Parliament is subject to law just like every other person and body in New Zealand; it is bound by statutory requirements",[137] the conventional position is "that it is exclusively for the House itself to administer that part of statute law which relates to its internal proceedings."[138] The New Zealand courts have traditionally affirmed this principle.[139] This provides the context for some of the evolving position.

The comments of Walter Nash, Leader of the Opposition in 1956, perhaps were an early sign of what was to come when he stated that:[140]

> I do not know how this Parliament can write a law which all other subsequent Parliaments must abide by … . In the House itself none of those provisions may be amended or repealed without the approval of 75 per cent of the Members.

Nash, unlike most of his colleagues in that debate, made explicit reference to the constraint as more than moral. However, his reference to "[i]n the House itself" may illustrate the view that it was only for the House to enforce. The Speaker expressed similar views in 1975 stating that the entrenching provisions provision "impinges on our procedures" and that the Committee of the Whole had agreed it "would be strictly applied to questions affecting the reserved provisions".[141] Immediately following this ruling, although an amendment passed by a simple majority, "[t]he requisite majority not having been obtained the chairman declared the motion lost".[142]

In 1980, the Speaker made two specific rulings about the effect of entrenchment on the House's procedures, indicating that he considered himself to be the arbiter of compliance. He ruled that "the 75 percent vote is required at the point at which the relevant clause is being considered in the

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136 Phillip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 13.6.1.
137 *Shaw v Commissioner of Inland Revnue* [1999] 3 NZLR 154 (CA) at [13].
138 *Awatere Huata v Prebble* [2004] 3 NZLR 359 (CA) at [44].
139 See, e.g., *Mangawaro Enterprises Ltd v Attorney-General* [1994] 2 NZLR 451 (HC) at 454-455.
140 (26 October 1956) 310 NZPD 2844.
141 (15 July 1975) 399 NZPD 3055.
142 (15 July 1975) 399 NZPD 3057.

Committee of the whole"[143] and that "if it is carried on the voices it is deemed to be carried unanimously, and no question arises as to the number present".[144] Both rulings appear to strain the actual statutory language.[145] Brookfield considers this as a significant turning point in recognising the legal nature of the rules.[146] Both rulings display a pragmatism that may indicate that moral imperatives continued to be the primary concern, although the House was beginning to speak in terms of being constrained in this period

Thomas also accords with this view.[147] In *Thomas*, an unintentional gap in transitional provisions meant that Members of Parliament were not technically defined as such for the purposes of the entrenching provision.[148] Justice Gallen focussed on the House ensuring compliance when he stated "the legislators will debate the matter in the knowledge of the legal situation which they have themselves created in the legislation already passed."[149] His Honour expressed reluctance to intervene because of "the undesirability of the Courts becoming involved in the legislative process" and the "greater undesirability" of an "open and obvious conflict between Parliament and the Courts".[150] Interestingly, he stated that challenge after enactment would pose "difficult questions of law and [a] conflict between the appropriate authorities… and… questions as to whether or not Parliament is able to pass legislation of this kind".[151] As it transpired, Parliament cured the potential loophole by adding members elected in accordance with the 1956 Act to the definition.[152]

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143 (18 September 1980) 4333 NZPD 3513.
144 (18 September 1980) 4333 NZPD 3513.
145 Electoral Act 1956, s 189(2)(a); Electoral Act 1993, s 268(2)(a).
146 FM Brookfield "Parliamentary Supremacy and Constitutional Entrenchment: A Jurisprudential Approach" (1984) 5 OLR 603 at 623.
147 *Thomas v Bolger (No 2)* [2002] NZAR 948 (HC) (NB: the decision was made in 1995, although not reported until 2002). The case concerned the Electoral Reform Bill (subsequently the Electoral Amendment Act (No 2) 1995).
148 Electoral Act 1993, s 27.
149 *Thomas v Bolger (No 2)* [2002] NZAR 948 (HC) at 952.
150 *Thomas v Bolger (No 2)* [2002] NZAR 948 (HC) at 951.
151 *Thomas v Bolger (No 2)* [2002] NZAR 948 (HC) at 951.
152 Electoral Amendment Act 1995, s 2.

Brookfield's 1984 article illustrates the change underway by then. He stated both that the provisions provide "very modest but nevertheless real legal protection"[153] and that they constitute a form of "moral entrenchment".[154] He considered that his argument in favour of 'real legal protection' "has admittedly no support in New Zealand judicial authority."[155] His view was that if compliance was to be enforced it was best to be enforced before formal enactment and the Governor-General refusing to assent to a non-compliant Bill provided "some safeguard".[156] Openly acknowledging the shifting consensus he stated that:[157]

> changes in the facts of constitutional life may be such that they ultimately become part of the law, whether those changes have taken place with revolutionary abruptness or through the slow evolutionary force of custom.

The view that entrenchment posed a constraint on the House, but one that is unable to be enforced by the Courts still appeared in the September 2018 debate on the Electoral (Entrenchment of Māori Seats) Amendment Bill.[158] Nick Smith, the lead speaker for the Opposition said:[159]

> The second point the member makes is somehow if we pass this bill Parliament could not by simple majority remove the Māori seats. That's not true. Standing Order 268 of this Parliament says that any Standing Order at any time can be suspended by a simple

153 FM Brookfield "Parliamentary Supremacy and Constitutional Entrenchment: A Jurisprudential Approach" (1984) 5 OLR 603 at 620. See also at 605.
154 FM Brookfield "Parliamentary Supremacy and Constitutional Entrenchment: A Jurisprudential Approach" (1984) 5 OLR 603 at 621.
155 FM Brookfield "Parliamentary Supremacy and Constitutional Entrenchment: A Jurisprudential Approach" (1984) 5 OLR 603 at 622.
156 FM Brookfield "Parliamentary Supremacy and Constitutional Entrenchment: A Jurisprudential Approach" (1984) 5 OLR 603 at 605. On this, see also, David J Slight "Refusal of assent – a suicidal safeguard?" [1987] NZLJ 146 at 147; FM Brookfield "No Nodding Automaton: A Study of the Governor-General's Powers and Functions" [1978] NZLJ 491 at 499-500.
157 FM Brookfield "Parliamentary Supremacy and Constitutional Entrenchment: A Jurisprudential Approach" (1984) 5 OLR 603 at 621.
158 (5 September 2018) 732 NZPD 6306-6321.
159 (5 September 2018) 732 NZPD 6308. Dr Smith's reference to SO 268 is incorrect, SO 4 provides for the suspension of Standing Orders.

> majority. … [H]e's representing this bill as meaning that by simple majority the Māori seats could not be removed, if that was the will of the majority of this Parliament, is factually incorrect.

It is enormously difficult to understand what this comment means. The requirement to follow the entrenching provision is found in statute, rather than Standing Orders. However, Dr Smith's focus remains on what "the will of the majority of this Parliament" could achieve, and does not refer to an ability for Courts to invalidate a purported Act of Parliament for non-compliance. Replying to Dr Smith's comments, the member in charge of the Bill described Smith as a "snake oil salesman".[160] Further, the following exchange occurred:[161]

> Rino Tirakatene: … We can move around the Standing Orders as well, Mr Smith.
>
> Hon Dr Nick Smith: You can't. You can't entrench without our support.
>
> Rino Tirakatene: Yes we can.

There is, here, clearly deep confusion. It is difficult to blame MPs for that. They are far from the only confused ones. However, the comments indicate a view that entrenchment remains a matter for the House alone. Further, a lack of consensus about subject matters properly available to be entrenched endures. As we shall see, this is now the minority view.

2.4 Entrenchment as creating preconditions for valid law-making: "It is trite…"[162]

More recently, the orthodoxy has transitioned once more. It now appears to be accepted that compliance with the entrenching provision is a precondition for valid law-making. Now, not only is the House bound to follow the provisions, if it does not the Courts may declare the Act to be

[160] (5 September 2018) 732 NZPD 6320.
[161] (5 September 2018) 732 NZPD 6321.
[162] *Taylor v Attorney-General* [2014] NZHC 2225 at [68].

invalid even after Assent.[163] It is worth noting that non-compliance with the entrenching provision can take multiple forms. A bull-headed government could be determined to alter 'the rules of the game' in its favour. Further, an amendment passed on the voices without 75 per cent of Parliament present may be a technical breach of the entrenching provision or it is possible that the courts will hold implied or indirect repeal of an entrenched provision to be ineffective if the manner and form requirements have not been met.[164] In the latter case, Parliament and a court may have different legitimate views about whether legislation would indirectly affect an entrenched provision. Thus, the effect of entrenchment may change as well as the form of determination.

The 1985 Bill of Rights White Paper is an early example of this shift in thinking. It considered that in enacting manner and form requirements, "Parliament is not binding its successors, but only redefining 'Parliament'".[165] Reference is made to supposed substantive limits on Parliament's powers (such as those in Cooke's dicta) as contributing to "the growing legal opinion that it is possible to restrain future Parliaments in the ways indicated".[166] Although the White Paper illustrates an evolving consensus, the attempt at theoretical justification for that evolution is disappointingly barren.

The evolving consensus is perhaps clearest in the courts. In a series of cases challenging the substantive law-making power of Parliament, the courts took the opportunity to make passing comment on procedural restrictions on Parliament. In *Shaw*, the Court of Appeal stated that under the Declaratory Judgments Act 1908 the Court had the power:[167]

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163 To see this shift put in wider context see, e.g., B V Harris "The Law-Making Powers of the New Zealand General Assembly: Time to Think about Change" (1984) 5 OLR 565 at 591-592; David McGee "Parliament and the Law – Some Recent Developments" (1996) 6 Canterbury L Rev 195 at 198.

164 *Taylor v Attorney-General* [2014] NZHC 225 at [70].

165 "A Bill of Rights for New Zealand: A White Paper" (Government Printer, Wellington, 1985) at 7.12.

166 "A Bill of Rights for New Zealand: A White Paper" (Government Printer, Wellington, 1985) at 7.15-7.18.

167 *Shaw v Commissioner of Inland Revnue* [1999] 3 NZLR 154 (CA) at [13].

> to consider the validity of legislation… [in] ensuring that a statute was properly enacted; in other words the Court may determine whether Parliament itself has followed the laws that govern the manner in which legislation is created.

Direct reference is not made to the 'manner and form' requirements, and it is possible that reference was intended to the normal requirements of validly passing legislation. The power in the Declaratory Judgments Act may have originally been intended to enable consideration of compliance with the (then) substantive constraints on Parliament imposed by the New Zealand Constitution Act 1856 (UK).[168] However, in *Westco Lagan* (another challenge to the substantive law-making powers of Parliament), McGechan J made direct reference to manner and form requirements with reference to *Shaw*.[169] His Honour noted that he was "pressed for time" but thought fit to consider the legal efficacy of manner and form requirements.[170] His view was simple and unequivocal:[171]

> I have no doubt that this Court has jurisdiction to determine whether there has been compliance with any mandatory "manner and form" requirements imposed by statute law for the enactment of legislation by Parliament.

His Honour considered that jurisdiction "must exist as a matter of principle", and that "from a constitutional point of view it is quite simply necessary".[172] In His Honour's view, the best time for the Court to intervene would be "between third reading and assent, if only because by that stage fullest and last opportunities for the House to observe mandatory procedures would have ended".[173]

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168 See, e.g., *R v Lander* [1919] NZLR 305 (CA).
169 *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at [92]
170 *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at [90].
171 *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at [91].
172 *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at [92].
173 *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at [93]. Note that this position differs from Gallen J's in *Thomas* some 5 years earlier (*Thomas v Bolger (No 2*) [2002] NZAR 948 (HC) at 952.) *Thomas* is not referred to for this point. There seems to be some support for this proposition in *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84 at [109] and fn 101 per Elias CJ dissenting.

Similar cases have followed.[174] In *Taylor v Attorney-General*, it was "not disputed that non-compliance [with the entrenching provision] would invalidate the amendment", and this position was referred to as "trite", relying on *Westco Lagan*.[175] Further, Ellis J stated she had "some reservations about the correctness of the proposition that an entrenched provision is only protected from direct, rather than implied, amendment or repeal".[176] Although efficacy of entrenchment was not determinative in these recent cases, the courts clearly considered that they were competent to consider whether Parliament had complied with the provisions. In his most recent text, Joseph states a "shift in judicial attitude is discernible over the past 60 years", commenting that the position has changed and it is now "clear" that entrenchment is legally effective.[177] Joseph commends the fact that the "dicta in New Zealand cases are uncluttered and free of … theoretical sparring".[178]

Most recently, the oral arguments in the Supreme Court in *Ngaronoa* illustrate the new consensus.[179] The Solicitor-General, relevantly, stated:[180]

> ... there might have been some surprise at the proposition that if the manner and form provisions haven't been met then the Court can declare the legislation invalid. That is not a controversial proposition … if Parliament breaches a manner and form provision, its subsequent enactments isn't validly passed law…

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174 *Carter v Police* [2003] NZAR 315 (HC) at 325; *Walker v All New Zealand Labour Party Elected Members of Parliament* HC Wellington CIV-2008-485-1724, 6 October 2008 at [6]; *Easton v Governor-General* [2012] NZHC 206 at [16]-[17].

175 *Taylor v Attorney-General* [2014] NZHC 2225 at [68].

176 *Taylor v Attorney-General* [2014] NZHC 2225 at [70]; see also *Taylor v Attorney-General* [2016] NZHC 355; [2016] 3 NZLR 111 from [70] and *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643 at [105].

177 Phillip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 16.8.11.

178 Phillip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 16.8.11.

179 *Ngaronoa v Attorney-General* [2017] NZSC 183; *Ngaronoa v Attorney-General* Transcript SC 102/2017, 26 March 2018.

180 *Ngaronoa v Attorney-General* Transcript SC 102/2017, 26 March 2018 at 58.

Although not in the Solicitor-General's mind 'controversial', as this Chapter has shown this position is new. Further, she suggests that "[the 1956 Parliament] thought that the entrenchment provisions … were going to have moral suasion only, but in my submission we've moved well past that as a proposition".[181] The Solicitor-General suggests that her approach follows from "a maturation of how we understand our constitutional framework".[182] Here, her arguments are on the same whiggish terms as Elias' extrajudicial views in Chapter I.

Such provisions have 'progressed' from possessing 'moral suasion only' to a position where the House felt legally bound to comply. Over time, this position has further cascaded into a new orthodoxy. Now, the courts have asserted an ability to enforce compliance as a pre-condition of valid law-making. This has occurred with remarkably little resort to the niceties of constitutional theory.

[181] *Ngaronoa v Attorney-General* Transcript SC 102/2017, 26 March 2018 at 59.
[182] *Ngaronoa v Attorney-General* Transcript SC 102/2017, 26 March 2018 at 59.

CHAPTER III: The Theory

3.1 Introduction

Much of the shift in orthodoxy regarding the legal efficacy of entrenchment has occurred without overt reference to theory. Joseph considers such absence of theoretical analysis commendable, stating that "dicta in New Zealand cases are uncluttered and free of… theoretical sparring".[183] In this Chapter, I re-clutter the shift in orthodoxy by providing possible theoretical explanations. In Chapter IV, I will go on to argue that abandoning theoretical justification in evolutionary constitutional change is an unfortunate symptom of pervasive new whig constitutionalism.

3.2 Within Sovereignty

3.2.1 Continuing and Self-Embracing Sovereignty

An explanation of the legal efficacy of entrenchment can perhaps be found within sovereignty theory itself. Recall Mackie's parallel to an omnipotent power: "[c]an a legal sovereign make a law restricting its own future legislative power?", he asked, "neither the affirmative nor the negative answer is really satisfactory."[184] This paradox is not without resolution, but none is inherent in a general conception of sovereignty. Hart sought to further classify sovereignty in order to help answer the question:[185]

> The requirement that at every moment of its existence Parliament should be free from legal limitations including even those imposed by itself is… only one interpretation of the ambiguous idea of legal omnipotence. It in effect makes a choice between a *continuing* omnipotence in all matters not affecting the legislative competence of successive parliaments, and an unrestricted *self-embracing* omnipotence the exercise of which can only be enjoyed once.

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183 Phillip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 16.8.11.
184 JL Mackie "Evil and Omnipotence" (1955) 64 Mind 200 at 211
185 HLA Hart *The Concept of Law* (3rd ed, Oxford University Press, Oxford, 2012) at 149.

Winterton elaborates further. A Parliament possessing continuing supremacy "will have the same power as its predecessor: it will be able to legislate on every subject bar one" (being the ability to restrict the legislative competence of its successors).[186] For Jennings, the notion of self-embracing sovereignty rests upon the ability of Parliament to change the common law, including the rules about the recognition of an Act of Parliament.[187] For Hart, which form of omnipotence in existence was "an empirical question concerning the form of the rule which is accepted as the ultimate criterion in identifying the law".[188] The ultimate rule of recognition mentioned in Chapter I is therefore more complicated than just establishing the existence of parliamentary supremacy in New Zealand. The source of New Zealand Parliament's supreme powers may now be more important than in the initial analysis.

If the New Zealand Parliament possesses 'self-embracing' sovereignty rather than 'continuing' supremacy, an easier solution to our initial conundrum can be found.

3.2.2 New Zealand's position

Harris and Brookfield both rely on the continuing/self-embracing distinction in their 1984 articles.[189] Harris accepts that "it is a logical impossibility for the Westminster Parliament to have created itself as a supreme law-making body" and that a form of "common law" establishes British parliamentary supremacy.[190] However, as this rule "does not have the characteristics of a common law rule, namely the capacity to be changed by Parliament acting by a majority of one", it must be

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186 George Winterton "The British Grundnorm: Parliamentary Sovereignty Reexamined" (1976) 92 LQR 591 at 592.

187 Ivor Jennings, *The Law and the Constitution* (5th ed, 1959) 138-140; Jerome Elkind "A New Look at Entrenchment" (1987) 50(2) MLR 158 at 163.

188 HLA Hart *The Concept of Law* (3rd ed, Oxford University Press, Oxford, 2012) at 150.

189 BV Harris "The Law-Making Powers of the New Zealand General Assembly: Time to Think about Change" (1984) 5 OLR 565; FM Brookfield "Parliamentary Supremacy and Constitutional Entrenchment: A Jurisprudential Approach" (1984) 5 OLR 603.

190 BV Harris "The Law-Making Powers of the New Zealand General Assembly: Time to Think about Change" (1984) 5 OLR 565 at 572.

"something different from that traditionally thought to be common law".[191] Harris suggests this to be a form of "higher law" common law.[192] Harris does allude to the Kelsen and Hartian explanations, but does not explain why his explanation is superior. In rejecting the ability of (the Westminster) Parliament to change its foundation by a simple majority, Harris seemingly accepts that the courts have the sole ability to change foundational aspects of the constitutional matrix. This may be so; however, further explanation is required in order to establish as much. On this account, Goldsworthy's "cycle" is again in play. If the courts created Parliament's status; Parliament cannot have created the courts'. Accepting this leads to a need to find a political settlement after the final step in legal analysis. It may be that the political settlement was to give the courts this power, but as Goldsworthy contends, this is a poor account of history.[193] A Hartian analysis better accords with the true nature of our constitution. As noted in Chapter I, on this analysis, judges are not mere bystanders, they are a necessary but not sufficient element in determining the ultimate rule of recognition.

Brookfield is bolder. He considers that because the Westminster Parliament was able to abdicate its powers territorially (i.e. surrender control of former colonies), its powers must be self-embracing in all senses.[194] Brookfield further rejects the notion that the New Zealand

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191 BV Harris "The Law-Making Powers of the New Zealand General Assembly: Time to Think about Change" (1984) 5 OLR 565 at 572.

192 BV Harris "The Law-Making Powers of the New Zealand General Assembly: Time to Think about Change" (1984) 5 OLR 565 at 572.

193 Jeffrey Goldsworthy "Abdicating and Limiting Parliament's Sovereignty" (2006) 17 KCLJ 255 at 261.

194 FM Brookfield "Parliamentary Supremacy and Constitutional Entrenchment: A Jurisprudential Approach" (1984) 5 OLR 603 at 608, 610-611. Others have considered such abdication to be essentially revolutionary. See, e.g., Peter C Oliver *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford University Press, Oxford, 2005) at 260-265; HWR Wade "The Basis of Legal Sovereignty" (1955) 13 (2) CLJ 172 at 191-192. Elias has expressed doubts about this approach: "The revolutionary explanation allows theoretical consistency, if a rather jerky progression of constitutional history. I was once attracted to it, but I have come to believe that, in truth, it is the theory that does not fit." (Sian Elias "Something Old, Something New: Constitutional Stirrings and the Supreme Court" (2004) 2 NZJPIL 121 at 135).

Parliament possesses continuing sovereignty, stating that it "has to be understood as a legally constituted body".[195] He considers both the Westminster and Wellington Parliaments to be "procedurally self-embracing".[196]

It is not completely clear what type of supremacy Harris considered the New Zealand Parliament to possess. Although he sees parliamentary supremacy in New Zealand as "provided by statute",[197] he later predicted that the Courts "are likely to decide that the New Zealand General Assembly enjoys a supremacy which is continuing".[198] Harris suggests that the New Zealand Constitution Act 1852, the Statute of Westminster 1931 and the New Zealand Constitution (Amendment) Act 1947 are the source legislative supremacy in New Zealand.[199]

This argument requires further explanation. As Oliver notes, although the New Zealand Parliament acquired the ability to alter any law whatsoever in 1947, the United Kingdom Parliament did not even purport to give up its right at this time. In fact as his evidence shows, the Wellington Parliament envisaged a continuing role for the Westminster Parliament.[200] At this point (or on the passing of the New Zealand Constitution Amendment Act 1973), the New Zealand Parliament acquired full law-making powers. Harris arguably errs in considering this to be an acquisition of full sovereignty. In order for the New Zealand Parliament to be 'sovereign', it is

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195 FM Brookfield "Parliamentary Supremacy and Constitutional Entrenchment: A Jurisprudential Approach" (1984) 5 OLR 603 at 614.
196 FM Brookfield "Parliamentary Supremacy and Constitutional Entrenchment: A Jurisprudential Approach" (1984) 5 OLR 603 at 608, 617.
197 BV Harris "The Law-Making Powers of the New Zealand General Assembly: Time to Think about Change" (1984) 5 OLR 565 at 573.
198 BV Harris "The Law-Making Powers of the New Zealand General Assembly: Time to Think about Change" (1984) 5 OLR 565 at 590.
199 BV Harris "The Law-Making Powers of the New Zealand General Assembly: Time to Think about Change" (1984) 5 OLR 565 at 573-574.
200 Peter C. Oliver *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford University Press, Oxford, 2005) at 323, 192-193; Statute of Westminster Adoption Act 1947 (NZ), s 3.

necessary for Acts of the Westminster Parliament to no longer apply to New Zealand. The Westminster Parliament continues to have authority to legislate over New Zealand in the same sense it has always had authority to legislate over Paris through its extraterritorial jurisdiction.[201] The more precise (and helpful) question is whether such legislation would be accepted as New Zealand law.[202] Oliver suggests two possible paths that may have been followed to legislative sovereignty. One acknowledges a "historical connection" to Westminster but suggests "an evolution in the attitudes of New Zealand… judges and officials" occurred.[203] The second is a "disguised revolution",[204] where the Constitution Act 1986 (NZ) was a "technical breach of continuity".[205] Neither option is truly 'legal'. Simply put, if the Constitution Act 1986 was legally possible, it was legally unnecessary. Accepting this, I argue, results in understanding New Zealand Parliament's supremacy as continuing.[206] It relies on the fact of acceptance rather than a legal link to the past. On this analysis, the basis for New Zealand parliamentary supremacy is similar to the basis for Westminster's.

3.2.3 (Re)Defining Parliament

The benefit of conceiving New Zealand's parliament as possessing self-embracing sovereignty is the ability to use RTE Latham's analysis. Latham has had a disproportionate influence on constitutional law scholarship given his short life.[207] In his article, "What is an Act of

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[201] *Manuel v Attorney-General* [1983] Ch 77 (EWCA) at 87.
[202] Jeffrey Goldsworthy "Abdicating and Limiting Parliament's Sovereignty" (2006) 17 KCLJ 255 at 257.
[203] Peter C. Oliver *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford University Press, Oxford, 2005) at 262.
[204] Peter C. Oliver *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford University Press, Oxford, 2005) at 262.
[205] Phillip Joseph *Constitutional and Administrative Law in New Zealand* (1st ed, Law Book Company, Sydney, 1993) at 121.
[206] The Court of Appeal (in passing) stated as much, see: *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [53].
[207] He died (aged 34 years) serving in World War II, see: Peter Oliver "Law, Politics, the Commonwealth and the Constitution: Remembering R.T.E. Latham, 1909-43" (2000) 11 KCLJ 153.

Parliament?",[208] Latham rejected that parliamentary sovereignty was a theoretical dead end providing a total theoretical response. Hart, writing after Latham, considered the ultimate rule of recognition in Britain to be "what the Queen in Parliament enacts is law". Latham suggests more is required:[209]

> where the purported sovereign is not an individual but a collective… the extraction of a precise expression of will from a multiplicity of human beings is… an artificial process and one that cannot be accomplished without arbitrary rules… . It can only be sovereign when acting in a certain way prescribed by law. At last some rudimentary "manner and form" is demanded of it: the simultaneous incoherent cry of a rabble, small or large, cannot be law, for it is unintelligible.

Latham's reasoning certainly appeals – not least his reference to a "simultaneous incoherent cry of a rabble"! He states that there:[210]

> must be principles in the constitution prescribing what form of the sovereign's acts will be recognises as valid… and… rules for procedure in the sovereign assembly… there must be a rule laying down how [or if] these rules may be changed… all these rules… are logically prior to the power of the sovereign…

Latham considered that "there is quite an astonishing lack of certainty on this central point of our law".[211] So much remains true. Latham was mindful to outline the "exact length to which this argument goes", considering that it "only pushes to its logical conclusion the recognised competence of Parliament to regulate validly and in a manner binding for the future its own composition".[212] In a similar vein, it has been accepted that "Parliament" can mean different things for different purposes.[213] Latham's clear exposition of the problem has been influential.[214] As

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208 RTE Latham "What is an Act of Parliament?" [1939] King's Counsel 152.
209 RTE Latham "What is an Act of Parliament?" [1939] King's Counsel 152 at 153.
210 RTE Latham "What is an Act of Parliament?" [1939] King's Counsel 152 at 153-154.
211 RTE Latham "What is an Act of Parliament?" [1939] King's Counsel 152 at 154.
212 RTE Latham "What is an Act of Parliament?" [1939] King's Counsel 152 at 161.
213 *Harris v Minister of the Interior* (1952) (2) SA 428 (AD) at 464, 465; *Bribery Commissioner v Ranasinghe* [1965] AC 172 (PC) at 200.
214 See, e.g., *R (Jackson) v Attorney-General* [2005] UKHL 56; [2006] 1 AC 262 at [81] (per Lord Steyn); at [160] (per Baroness Hale).

Oliver notes, however, it relies upon an acceptance of self-embracing sovereignty (although Hart's taxonomy was yet to come). On Latham's exposition, this does follow. However, it is not a necessary consequence of the rules being 'logically prior' that Parliament itself has the ability to set or change them. Arguably, the reverse is true.

3.2.4 A path through?

Goldsworthy provides an extra layer of nuance to the taxonomy by splitting "continuing" supremacy into 'strong' and 'weak' continuing supremacy.[215] Goldsworthy makes the distinction between "there [being] no method at all by which authority can be lawfully limited or abdicated" ("strong" continuing supremacy) and the position if "Parliament cannot limit or abdicate its own authority" ("weak" continuing supremacy). On the weak version, Parliament's authority can be limited "by a change in the official consensus that constitutes the rule of recognition".[216] The benefit of Goldsworthy's analytical approach is that it accounts for evolving constitutional change, while rejecting the notion that Parliament has the power of change solely in its own hands.[217] In my view, this must follow from a Hartian ultimate rule of recognition. Weak continuing supremacy recognises the existence of constitutional change and gives it analytical force. On this account, the courts are again necessary but not sufficient actors in determining the nature of New Zealand's constitution.

Oliver's analysis furthers this point and may bring us closer to theoretical resolution of the paradox in New Zealand. Although the ultimate rule of recognition can be changed by senior officials, as a matter of fact some actions of senior officials will have more effect than others. He suggests that

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[215] Jeffrey Goldsworthy "Abdicating and Limiting Parliament's Sovereignty" (2006) 17 KCLJ 255 at 259.
[216] Jeffrey Goldsworthy "Abdicating and Limiting Parliament's Sovereignty" (2006) 17 KCLJ 255 at 259.
[217] For criticism of the apparent effect of continuing supremacy as precluding change see: P A Joseph "The Apparent Futility of Constitutional Entrenchment in New Zealand" (1982) 10 NZULR 27 at 31; Jeffrey Goldsworthy "Abdicating and Limiting Parliament's Sovereignty" (2006) 17 KCLJ 255 at 260.

"special priority [is] usually accorded to those with better democratic credentials" when determining a change in the ultimate rule of recognition.[218] Matthew Palmer's conception of constitutional dialogue may also be of assistance.[219] He suggests that each branch of government can speak "more or less strongly than the others" and that the New Zealand Parliament is "reasonably loud".[220]

By enacting entrenching provisions in 1956 and 1993, Parliament has spoken loudly. On this analysis, building on both constitutional realism and (at least in the case of Oliver, Hartian theory), we might be able to conceive the rule of recognition in New Zealand evolving so as to recognise an ability for Parliament to be bound by procedural constraints. We must, I argue, accept that New Zealand's Parliament possesses continuing supremacy. However, if we conceive of it in Goldsworthy's terms as 'weak continuing supremacy', whereby the ultimate rule of recognition can evolve, this may be able to explain in a theoretically acceptable way the growing acceptance of entrenchment as legally effective in New Zealand.

On this account, Parliament took the bold step of enacting an entrenching provision in 1956 but this was seen to not be legally effective (as I have established in Chapter II). Over time, Parliament and the courts took the entrenching provision more seriously. Now, we have reached a point where the ultimate rule of recognition has evolved so that New Zealand's Parliament can bind its successors in a procedural sense. Neither Parliament nor the courts alone can change this position. The courts' formal position is necessary but not sufficient in reaching this point. Such analysis certainly appears convincing on its face. Our constitutional actors rarely think of themselves as

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218 Peter C Oliver "Abdicating and Limiting Parliament's Sovereignty – Reply to Goldsworthy" (2006) 17 KCLJ 281 at 283.

219 Matthew Palmer "Lecture: Constitutional dialogue and the rule of law" (2017) 47 HKLJ 505. See also: Matthew 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 155, 157.

220 Matthew Palmer "Lecture: Constitutional dialogue and the rule of law" (2017) 47 HKLJ 505 at 515, 517.

acting in those terms. In cases such as *Westco Lagan*, the Court did not think of itself as acting in concert with Parliament to change the rule of recognition. It is unclear that this change has been conceived by constitutional actors in these terms, perhaps limiting the utility of this theoretical clarity. Determining what theory can explain this shift will help to determine the potential wider significance of this specific change to New Zealand's constitution more generally.

Gordon posits a 'manner and form' theory that is in some ways similar to Goldsworthy's notion of 'weak continuing supremacy'. He rejects Hart's continuing/self-embracing dichotomy. Instead, he suggests an ability for Parliament to alter the process for future Parliaments (unlike continuing) but not an ability to limit legislative competence (unlike self-embracing).[221] The difference between Gordon's and Goldsworthy's conceptions is primarily about the source of restrictions. Goldsworthy conceives the restrictions inside a rule of recognition rubric, whereas Gordon suggests that "the rule of recognition should not be used as a jurisprudential 'get out of jail free card'".[222] Gordon's primary criticism of using the rule of recognition analysis is that it "affords a prominent, and more active, role to the judiciary in establishing the scope of legislative power".[223] In his view, this analysis goes beyond the courts "recognising", to one where they are "determining" although not as far as the "definitive role" under common law constitutionalism.[224] Such a position, he argues, is "normatively objectionable".[225]

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221 Michael Gordon *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing, Oxford, 2015) at 81-82.
222 Michael Gordon *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing, Oxford, 2015) at 83.
223 Michael Gordon *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing, Oxford, 2015) at 181.
224 Michael Gordon *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing, Oxford, 2015) at 181.
225 Michael Gordon *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing, Oxford, 2015) at 182.

Gordon is right to note that to challenge Goldsworthy's reasoning. Although Goldsworthy remains a fierce defender of parliamentary supremacy, he accords the courts a significant role in determining its scope. However, in my view Gordon's analysis is misplaced for two reasons. The first is that the role Goldsworthy would here ascribe to the courts differs significantly from common law constitutionalism. If change is conceived of in these terms, the courts cannot act other than in concert with Parliament. This must appease Gordon's normative concerns somewhat. Secondly, to accept Gordon's view may counterintuitively create more uncertainty and exacerbate his democratic concerns. On his view, the General Assembly in 1956 would have be wrong as a matter of law, and over time this has been realised. Rather than an evolving consensus, Gordon seeks the enlightened 'true theory' as articulated by constitutional scholars at any point of time. As we have seen, this too can change. Constitutional scholars have a lot of virtues but surrendering ultimate determination of constitutional structure to them is undesirable.

Goldsworthy's account, therefore, better accords with what has happened in countries such as New Zealand, and is normatively preferable. New Zealand's method of constitutional change is not perfect; far from it. However, if conceptual clarity can be brought to change, in terms of a rules of recognition analysis, that is infinitely preferable to the position being that as expressed by the theorists at any given moment. This concern will be further discussed in Chapter IV.

3.3 Leaving Sovereignty Behind?

In some ways, entrenchment does pose an existential threat to parliamentary supremacy. If the general normative justification of supremacy is the desirability of decisions being made by a broadly majoritarian process, a consensus in favour of the desirability of legally efficacious entrenchment undermines this. Recall that I argued that constitutional change in New Zealand is normally conceived as occurring within parliamentary supremacy; and that even some of the

fiercest normative critiques of the doctrine cloak their arguments in Diceyan rhetoric. However, some of the language used in accepting the legal efficacy of entrenchment suggests a shift away from sovereignty.

The nature of a paradox is that no single answer can claim inherent superiority. The paradox of sovereignty can be solved in a theoretically sound manner within sovereignty. Allowing a current Parliament to limit a future Parliament procedurally is one possible option. However, 'senior officials' in the United Kingdom and New Zealand frequently do not to follow this approach. In discussing entrenchment, reference is often made to other (substantive) limits on parliamentary supremacy. This is how McGechan J raised the issue in *Westco Lagan*;[226] how some of the Judges in *Jackson* spoke,[227] and how the Solicitor-General in *Ngaronoa* presented the Crown's position.[228] As should be clear, in my view, this is unnecessary. As the courts rarely discuss macro-constitutional issues, there is a heightened focus on what is said when they do. The contrasting normative justifications for supremacy and entrenchment may spark this theoretical disjuncture.

Although substantive and procedural limits are both restrictions, their nature varies significantly. Possible substantive limits on parliament's supremacy, as posited by Lord Cooke and furthered by others (such as Lord Steyn in *Jackson*)[229] have very little to do with entrenchment. Considering them together may appear coherent but risks a theoretical conflation that undermines detailed consideration of either.

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226 *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at [90].
227 *R (Jackson) v Attorney-General* [2005] UKHL 56; [2006] 1 AC 262 at [102] (per Lord Steyn); at [107] and [113] (per Lord Hope).
228 *Ngaronoa v Attorney-General* Transcript SC 102/2017, 26 March 2018 at 58-59: "Parliament is sovereign within its boundaries, and the Courts are sovereign within theirs" and 88: "even Parliament's sovereignty has its boundaries and we're not there on this case, but those protections exist".
229 *R (Jackson) v Attorney-General* [2005] UKHL 56; [2006] 1 AC 262 at [102] (per Lord Steyn).

3.4 Conclusion

This Chapter has outlined the 'manner and form' and 'weak continuing supremacy' approaches as possible explanations of entrenchment within supremacy. Generally, however, the change has not been seen through this lens. As noted in Chapter II, the views of the institutional actors have rapidly changed without much resort to theory. Where theory has been employed, it has typically been without rigorous analysis. Further, perhaps because of contrasting normative justifications, discussion of entrenchment often occurs alongside discussion of broader potential limits on Parliament's law-making authority. Any inherent substantive and self-imposed procedural limits differ in both origin and nature. Discussion of entrenchment demands conceptual clarity, and reference to substantive constraints (in Cooke's sense) muddies any clarity. In some ways it is difficult to blame either Parliament or the courts for their reluctance to engage in theory. Joseph for example commends the fact that the "dicta in New Zealand cases are uncluttered and free of… theoretical sparring".[230] This is, I argue, the incorrect approach. A more detailed analysis of theory along the way would assist understanding our current position. Chapter IV will attempt to outline the new orthodoxy before considering more generally the existence of new whig constitutionalism in New Zealand.

[230] Phillip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 16.8.11.

CHAPTER IV: Reforging Paradise

4.1 Introduction

This Chapter has two aims. The first is to outline the new orthodoxy in favour of legally efficacious entrenchment, noting areas that are yet to be explored. The second builds upon the first, what lessons about constitutional change can we draw from the shift in orthodoxy about entrenchment? In the second part of the Chapter, I argue that the path to acceptance of entrenchment as legally efficacious is an example of pervading new whig constitutionalism in New Zealand and illustrates broader problems with constitutional change in New Zealand. The New Zealand public is notoriously constitutionally apathetic. However, more should be expected from our key constitutional actors.

4.2 The New Entrenchment Orthodoxy

4.2.1 The Orthodoxy

At one level, the new orthodoxy is easy to articulate. Compliance with manner and form procedures is a mandatory precondition for valid law-making; and the courts may not apply any non-compliant provision. As we have seen, this is a relatively new position. Further, to use the words of a Member debating the 1993 re-enactment, this has occurred without a "thoroughgoing debate".[231] In this first part of the final Chapter, I will briefly identify some areas that would have benefitted from further "thoroughgoing debate".

[231] (3 August 1993) 537 NZPD 17146.

4.2.2 Available Subject Matters

Perhaps the most significant issue left open is whether only some topics may be entrenched. While the Electoral Act 1993 is the only current example of entrenchment, courts do not limit themselves to reference to the Electoral Act. For example, McGechan J in *Westco Lagan* was clear:[232]

> I have no doubt that this Court has jurisdiction to determine whether there has been compliance with any mandatory "manner and form" requirements imposed by statute law for the enactment of legislation by Parliament.

The Electoral Act was listed as an "example" of such requirements.[233] Other cases have chosen not to confine the principle to the Electoral Act.[234] Joseph states his view that "[t]he legitimate sphere of constitutional entrenchment ought to be protected against political opportunism".[235] Few would dispute that. But from this, lines need to be drawn. In my view, the drawing of lines creates two issues.

First, the line drawing itself creates its own problems. In the past, when entrenchment was not seen as legally efficacious, the courts could mechanically follow the later expression of Parliament's will (the non-compliant Act). Now, the courts would be engaging openly in deciding which words of Parliament to follow and which to ignore. This choice would now be much more subjective, requiring them to engage in the inappropriate task of making substantive political judgements. Again, the absence of real theoretical discussion has exacerbated this problem. As Goldsworthy notes, if the position is that Parliament's supremacy is self-embracing (at least in a procedural sense), there are no limits to the subject matters that Parliament may be able to entrench.[236] Grappling with the theory will at least help us work out an answer.

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232 *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at [91].
233 *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at [91].
234 E.g. *Taylor v Attorney-General* [2014] NZHC 2225 at [68].
235 Phillip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 16.8.4.
236 Jeffrey Goldsworthy "Abdicating and Limiting Parliament's Sovereignty" (2006) 17 KCLJ 255 at 278.

Secondly, where should a line be drawn? Barber, for example, suggests that "entrenchment is at its most attractive when the reason for departing from the default rule informs the type of entrenchment adopted and the area of laws entrenched".[237] On this view, perhaps entrenchment should only be effective when it serves to protect 'the rules of the game'. However, this does not account for a subject matter that many suggest would benefit from entrenchment; a bill of rights.[238] Further, even using a test of 'the rules of the game' leaves room for a dispute. The appointment process for the Representation Commission is currently entrenched on terms that benefit the two main parties and disadvantage the minor parties. The 75 per cent supermajority could not be met without the buy-in of both major parties. Perhaps, then, entrenchment is acting in an anti-democratic way here.

Writing in 1984, Harris outlined two contentious issues that could broadly be considered under 'the rules of the game' that create their own difficulties: prisoner voting and Māori seats.[239] Harris' choice of examples proves that some things do not change.[240] Both issues clearly fall within the ambit of electoral law, but there is no strong consensus on what approach to take. Should they be entrenched? Harris argues that they "should not be altered freely at the whim of the incumbent government" and that "the importance of the provisions transcends individual governments".[241] There exists a paradox. In general, we should only entrench areas when there is a consensus that they should be; however, it is the areas without consensus that could usefully benefit from

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237 NW Barber "Why Entrench?" (2016) 14(2) ICON 325 at 350.

238 See, e.g., "A Bill of Rights for New Zealand: A White Paper" (Government Printer, Wellington, 1985); Geoffrey Palmer and Andrew Butler *A Constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2016).

239 BV Harris "The Law-Making Powers of the New Zealand General Assembly: Time to Think about Change" (1984) 5 OLR 565 at 597-599.

240 See: Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 and subsequent litigation, *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 and *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643; Electoral (Entrenchment of Māori Seats) Amendment Bill 2018 (56-1).

241 BV Harris "The Law-Making Powers of the New Zealand General Assembly: Time to Think about Change" (1984) 5 OLR 565 at 597-598.

entrenchment so as to avoid an otherwise "cavalier attitude"[242] towards fundamental rights. This is a vexed issue. As Joseph notes, the 2001 review of MMP received advice that Māori seats were not a legitimate provision to be entrenched because they "raised issues of substantive policy over which different parties held different views".[243] Parliament recently voted at First Reading (by a simple majority) in favour of entrenching Māori seats, however it is unlikely this will progress to enactment.[244] Resolution of this question is outside the scope of this dissertation; it is largely a political issue.[245]

These examples do show the perils of line drawing. The line between constitutional fundamentals and substantive policy is not clear cut. In accepting entrenchment without resort to theory, the courts have created a position where they might be forced to determine the validity of entrenchment in certain subject areas. Without theory, and in areas around the margins, the Courts have little to rely upon other than their own views. In my view, this is problematic.

4.2.3 The Procedural/Substantive Distinction

If we accept that Parliament can limit itself procedurally but not substantively, this too entails line drawing. If a procedural requirement is too onerous to ever be met, Parliament is attempting to limit itself substantively while purporting to limit itself procedurally. Joseph suggests that at some

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242 Andrew Geddis "Prisoner voting and rights deliberation: how New Zealand's Parliament failed" [2011] NZ L Rev 443 at 444.

243 Phillip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 16.8.4; P A Joseph "The Future of Electoral Law" in Caroline Morris, Jonathan Boston and Petra Butler (eds) *Reconstituting the Constitution* (Springer, Heidelberg, 2011) at 226-228.

244 The Bill cannot pass without the support of New Zealand First or National. National did not support the Bill at First Reading. New Zealand First supported the Bill at First Reading but the member speaking on their behalf stated: "I must make it clear on behalf of the party that New Zealand First does not support the outright entrenchment of the Māori seats, especially when it's being voted on in this House." See: (5 September 2018) 732 NZPD 6312.

245 For discussion of entrenching Māori seats see: Jeremy Sparrow "The Truth About Maori Seats" (LLB(Hons) Dissertation, University of Otago, 2010) especially at 6.1.

point a "metamorphosis" occurs between a procedural constraint and a "nugatory attempt to impose a legislative vacuum".[246] Where is this line? De Smith suggests a "common-sense line" could be drawn.[247] Perhaps so, but once more the court would have to pick what word of Parliament to follow without the benefit of a black-and-white rule. Is there any magic in the 75 per cent figure? Would an 'Act' passed inconsistently with an entrenching provision that stipulated a 95 per cent supermajority be valid? On present understanding, one cannot even predict what reasoning a court might use to answer this. This is problematic.

As Goldsworthy notes, a requirement that amendment is only effective after a referendum must be a substantive constraint on Parliament; as the decision would be made outside 'Parliament' whatever definition is used.[248] Goldsworthy suggests that a Parliament might entrench a matter so that it could not be amended without approval of an external body, such as corporation, in order to protect its long term investment interests against change in government policy.[249] This intuitively seems inconsistent with democratic values. However, the door to this possibility is perhaps left ajar by the courts not clearly stating whether the 'redefinition of Parliament' analysis explains the efficacy of entrenchment. In slightly more plausible terms, would an entrenching provision in Treaty of Waitangi settlement legislation that required that the Act could not be changed without consent of the relevant iwi be permissible? One could easily imagine an iwi asking for such a provision if it was available, and in the interests of reaching an agreement, the Crown might agree. Perhaps such a provision would assist the Crown in meeting its Treaty obligations. Would the court hold this to be a precondition of valid law-making? The answer is again unclear. Uncertainty

246 Phillip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 16.8.3.
247 Stanley de Smith and Rodney Brazier *Constitutional and Administrative Law* (6th ed, Penguin, London, 1989) at 92.
248 Jeffrey Goldsworthy "Abdicating and Limiting Parliament's Sovereignty" (2006) 17 KCLJ 255 at 279.
249 Jeffrey Goldsworthy "Abdicating and Limiting Parliament's Sovereignty" (2006) 17 KCLJ 255 at 278.

is common in the law. However, the lack of exposition of a considered theoretical justification makes predictions undesirably difficult and the law undesirably uncertain.

4.2.4 Entrenching Process

The Standing Orders of the House of Representatives require that:[250]

> A proposal for entrenchment must itself be carried in a committee of the whole House by the majority that it would require for the amendment or repeal of the provision to be entrenched.

The House has the ability to suspend Standing Orders by a majority vote. Does an entrenching provision only create a precondition for valid law-making if it is itself enacted by the special majority? Could a government use its temporal simple majority to make it significantly harder for a future government to change something? Goldsworthy considers that his weak continuing supremacy approach answers this concern.[251] If there was not even a consensus amongst legislators and "one political party [was] attempting constitutional change without broader support", the rule of recognition would not have changed, and the entrenching provision would not create a precondition.[252]

This may at first glance seem an intrusion on parliamentary supremacy. However, the nature of entrenchment is that the courts are required to pick one word of Parliament over another. If entrenchment is to be legally effective, the courts should ensure that entrenchment represented the consensus of Parliament. The absence of theoretical rigour on the path to acceptance of entrenchment has created this problem without a clear answer. Closer reliance on a theoretical justification would allow this question to be answered more easily.

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[250] Standing Orders of the House of Representatives 2017, SO 266.
[251] Jeffrey Goldsworthy "Abdicating and Limiting Parliament's Sovereignty" (2006) 17 KCLJ 255 at 279.
[252] Jeffrey Goldsworthy "Abdicating and Limiting Parliament's Sovereignty" (2006) 17 KCLJ 255 at 279.

4.2.5 Implied/Indirect Amendment or Repeal

As Harris notes, a bull-headed government could use the two-step solution to avoid the entrenching provision.[253] This would likely be effective.[254] Where the entrenching provision may have more effect is in curtailing the ability of Parliament to indirectly or impliedly amend or repeal an entrenched provision. This could be a way of avoiding the political consequences of the two-step approach, out of mindlessness, or Parliament and the courts could take different (but reasonable) views about the indirect impact on the entrenched provisions. Recall Ellis J stating that she had "some reservations about the correctness of the proposition that an entrenched provision is only protected from direct, rather than implied, amendment or repeal".[255]

There are two competing concerns here. First, Parliament has set out a limited number of provisions it wants to entrench. These are obviously the exception and not the rule and a court should be careful to be not too liberal in extending what is entrenched. To do so would be to significantly upset the current roles of our two main constitutional actors, and without a broad national settlement could amount to common law constitutionalism by stealth. Secondly, the entrenching provision could lose all effect if it only guarded against direct attack on entrenched provisions. Here, Parliament could easily circumvent what is now accepted as a precondition for valid law-making. Once more, the absence of theoretical analysis leaves us ill-equipped to answer this question. Courts have recently attempted to tackle this question.[256] This will likely continue to

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253 B V Harris "The Law-Making Powers of the New Zealand General Assembly: Time to Think about Change" (1984) 5 OLR 565 at 581-582.

254 Although this is the likely answer, there is a possibility that the Courts would limit Parliament from using the 'two-step' solution. See, e.g., *R (Jackson) v Attorney-General* [2005] UKHL 56; [2006] 1 AC 262 at [59] (per Lord Nicholls): "That express exclusion carries with it, by necessary implication, a like exclusion in respect of legislation aimed at achieving the same result by two steps rather than one. If this were not so the express legislative intention could readily be defeated." and at [164] (per Baroness Hale) cf. at [79] (per Lord Steyn); see: Andrew Geddis "'Manner and Form' in the House of Lords" [2005] NZLJ 415.

255 *Taylor v Attorney-General* [2014] NZHC 2225 at [70]; see also *Taylor v Attorney-General* [2016] 3 NZLR 111 from [70].

256 *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643; *Ngaronoa v Attorney-General* [2017] NZSC 183. The Supreme Court has granted leave to appeal, and heard the appeal in March 2018 but at

be the main source of entrenchment litigation. An overly liberal approach would unnecessarily undermine Parliament's law-making ability. A distinction might legitimately be drawn between direct 'implied repeal' and an indirect incursion on the provision, the former being invalid if non-compliant. This is a finely balanced distinction and one that the courts are currently ill-prepared to define.

4.3 New Whig Constitutionalism

In the remainder of the final Chapter, I will suggest a new lens through which to view constitutional change in New Zealand. By arguing that constitutional change in New Zealand is largely conceived of in whiggish terms, I suggest that the potential flaws in the story of the growing acceptance of the legal efficacy of entrenchment can be more clearly understood. Understanding this will allow us to better understand the inherent fragility in New Zealand's constitutional position and to better mitigate the current risks.

4.3.1 New Zealand's Constitutional 'Progress'

Constitutional change does not exist in a vacuum. Thid much is trite. However, there are multiple levels of context that one can insert into constitutional analysis. To truly understand constitutional change in New Zealand it is necessary to go to a deep level.

McHugh considers that New Zealand's constitutional history is "located squarely in the Whig paradigm".[257] In this sense, constitutional history is seen as a "triumph of constitutional liberty"[258]

time of writing was yet to issue a judgment: see *Ngaronoa v Attorney-General* Transcript SC 102/2017, 26 March 2018.

[257] PG McHugh "The Historiography of New Zealand's Constitutional History" in Philip A Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 344 at 344.

[258] PG McHugh "The Historiography of New Zealand's Constitutional History" in Philip A Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 344 at 345.

and the "growth of democratic institutions".[259] On this account, much emphasis is placed on the triumph of a benevolent supreme Parliament. His view in 2000 was that New Zealand may be "losing that awe [of Whig constitutionalism] which gripped the constitutional imagination of earlier generations".[260] The sustained and forceful critiques of Parliamentary supremacy, at least from constitutional scholars, reinforce this view. Although still the orthodoxy, it is certainly no longer infallible.

However, in the changing orthodoxy about entrenchment, the rise of a new whig constitutionalism is apparent. This new intellectual tradition abandons the substantive end goal of the old (a benevolent supreme Parliament) but largely inherits the same intellectual constructs. Arguably, this view is inherent in the 'New Zealand story'. The historian Belich considers "progress" to be one of the "formal myths of settlement" in New Zealand.[261]

A new myth of New Zealand has replaced the old. Constitutional 'progress' continues to guide constitutional thought. Take, for example, Elias' extra-judicial writing. She states that the doctrine of parliamentary supremacy "collides uncomfortably with modern movements"[262] and it has "inhibited development".[263] Similar views were expressed by the Solicitor-General in oral argument in *Ngaronoa* where she stated that accepting the efficacy of entrenchment is "a maturation of how

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259 PG McHugh "The Historiography of New Zealand's Constitutional History" in Philip A Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 344 at 345.

260 Paul McHugh "Sovereignty this Century – Maori and the Common Law Constitution" (2000) 31 VUWLR 1 at 27.

261 James Belich *Paradise Reforged: A History of the New Zealanders* (Penguin, Auckland, 2001) at 21. Such thinking is pervasive in New Zealand's 'nation-building'. For example, Keith Sinclair refers to *The New Zealand Herald* remarking in 1925: "All is yet molten, mercurial. There are more departures to make than precedents to follow. To have a history may be an old land's glory and safeguard: to make history is a new land's perilous enjoyment" (Keith Sinclair *A History of New Zealand* (Penguin, Harmondsworth, UK, 1959) at 301).

262 Sian Elias "Something Old, Something New: Constitutional Stirrings and the Supreme Court" (2004) 2 NZJPIL 121 at 131.

263 Sian Elias "Mapping the Constitutional" [2014] NZ L Rev 1 at 11.

we understand our constitutional framework".[264] Palmer considered NZBORA to be "a way point on a journey to a more balanced constitutional destination".[265] For many, entrenchment's blunting effect on the perceived excesses of parliamentary supremacy can be considered 'progress' towards a more enlightened position. Further, New Zealand's longstanding desire to remain "the exemplary paradise among the nations"[266] often leads to a "unique form of cultural cringe", "constitution envy".[267] This only furthers the drive 'forward'.

4.3.2 'always been at war with Eastasia': Whiggism and Denial of History

Whiggism has a particular view of history. Although the "past is depicted as a harmonious progression to the present",[268] it is also "dissociated from any context apart from this relevance to the present".[269] As McHugh notes, "[d]isruptive moments, unhelpful precedents, aberrant cases or texts… are explained away".[270] On this view, current principles have always existed "even if in some then unrecognised embryonic form".[271]

New Zealand's constitutional actors have often not even done us the service of 'explaining away' the past consensus. One could easily be forgiven for thinking that the new consensus is not new. *Shaw* and *Westco Lagan*, arguably the cases that contributed most to this new position, did not

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264 *Ngaronoa v Attorney-General* Transcript SC 102/2017, 26 March 2018 at 59.
265 Geoffrey Palmer "What the New Zealand Bill of Rights Act Aimed to Do, Why it Did Not Succeed and How it Can be Repaired" (2016) 14 NZJPIL 169 at 188.
266 James Belich *Paradise Reforged: A History of the New Zealanders* (Penguin, Auckland, 2001) at 45.
267 Stephen M Hunter "Constitutional Entrenchment of the Bill of Rights" (2013) 9 Auckland U L Rev 27 at 28.
268 PG McHugh "The Historiography of New Zealand's Constitutional History" in Philip A Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 344 at 347.
269 PG McHugh "The Historiography of New Zealand's Constitutional History" in Philip A Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 344 at 356.
270 PG McHugh "The Historiography of New Zealand's Constitutional History" in Philip A Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 344 at 356.
271 PG McHugh "The Historiography of New Zealand's Constitutional History" in Philip A Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 344 at 356.

describe the position as new or even acknowledge competing viewpoints. The Court in *Shaw* stated that "the Court may determine whether Parliament itself has followed the laws that govern the manner in which legislation is created."[272] In *Westco Lagan*, McGechan J had "no doubt" about the position.[273] It must, he thought, "exist as a matter of principle" and was "quite simply necessary".[274] In *Taylor*, Ellis J considered efficacy to be "trite".[275] In argument in the Supreme Court, the Solicitor-General stated it to be "not a controversial proposition" that entrenchment was efficacious.[276]

On this account, the body of earlier views regarding the inefficacy of entrenchment do not even garner a mention. Some thirty to fifty years of constitutional history is brushed aside with a firm statement of a new position. Justice McGechan view that the position must "exist as a matter of principle" has all the hallmarks of the history-denying qualities of whig constitutionalism. Further, even when slightly more theoretical expositions of the shift have been attempted, it has been on historically unsound terms. The Bill of Rights White Paper, for example, considers the early perception that entrenchment was inefficacious solely in terms of the two-step solution.[277] As has been illustrated in Chapter II, perceived inefficacy was not solely based on these terms.

Denying even the existence of change is concerning. One need not resort to Orwellian hyperbole in order to illustrate this point. To some extent, this is inherent in the new whig constitutionalism emerging in New Zealand.

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[272] *Shaw v Commissioner of Inland Revnue* [1999] 3 NZLR 154 at [13].
[273] *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at [91].
[274] *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at [92].
[275] *Taylor v Attorney-General* [2014] NZHC 2225 at [68].
[276] *Ngaronoa v Attorney-General* Transcript SC 102/2017, 26 March 2018 at 58.
[277] "A Bill of Rights for New Zealand: A White Paper" (Government Printer, Wellington, 1985) at 7.9.

4.3.3 'uncluttered and free of theoretical sparring'[278]: Constitutional Complacency

Whig thought also produces complacency. If change is conceived as inherent progress towards an enlightened end-goal, it is easy to neglect the perceived "conceptual shackles"[279] of theory. Joseph celebrates the transition outlined in Chapter II as "uncluttered and free of… theoretical sparring".[280] This is a disappointing position to take as it leaves the development of our constitutional law vulnerable.

The absence of theoretical analysis has had both specific and general effects. Specifically, there remains uncertainty around the edges of entrenchment. I do not seek to suggest that a penumbra of doubt or hard cases are confined to this issue. The law is full of them. However, the lack of a theoretical understanding for change makes it difficult to predict the future. With no adequate theoretical basis for entrenchment adopted it is impossible to come to principled decisions around the periphery. Put simply, not only is it difficult to predict what courts may do but they are fundamentally ill-prepared to make the decisions. This is especially problematic in the area of constitutional law because the areas at the edges will often involve political calls. For example, suppose Parliament entrenches Māori seats by a simple majority[281] and in five years' time a different government attempts to abolish them without meeting the requisite majority. This is signed into law by the Governor-General. What is the Court to do? Here, the absence of theoretical grappling along the journey to the new orthodoxy leaves the Court totally ill-prepared to decide which 'Act' of Parliament to follow. Not only that, any decision made will at the very least be seen as political. Without a coherent theory, the courts are open to significant attack. By this point, any attempt to introduce theory may be seen as a superficial attempt to justify a political outcome.

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278 Phillip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 16.8.11.
279 Sian Elias "Mapping the Constitutional" [2014] NZ L Rev 1 at 12.
280 Phillip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 16.8.11.
281 By suspending (by simple majority) the application of SO 266.

More generally, the absence of confined theory has meant that the effect of accepting entrenchment on the broader constitutional matrix is unclear. Put simply, has the former Diceyan paradise been reforged? No doubt, entrenchment appears attractive. There are strong arguments in favour of adopting entrenchment, especially as a tool to protect the 'rules of the game' from partisan attack. However, there are significant flow-on effects from the courts not taking theory seriously. As the Chief Justice has recently noted, "it is easy to move a strand here, and not realise damage there".[282] As noted in Chapter I, there have been attacks on the doctrine of parliamentary supremacy on the basis that there are in fact substantive limits on Parliament's powers. Frequently, the existence of potential substantive constraints has been used to bolster arguments in favour of the legal efficacy of procedural constraints. In the Bill of Rights White Paper, for example, reference is made to "Britain's connections with Europe" and to Cooke's dicta.[283] Then, noting that these are not "directly on point", it states that they nevertheless "contribute to the growing legal opinion that it is possible to restrain future Parliaments in the ways indicated".[284] Such reasoning is illusory although not uncommon. This also works both ways. Dame Sian Elias has suggested that:[285]

> If law is indeed to rule, then Parliament must at least observe the prior rules of formal validity for lawmaking. Whether those rules go further than formal requirements has not been authoritatively decided.

If, as Cooke suggested, it does go further, she suggests that this may include "rules fundamental to the democratic process".[286] In a speech she has suggested that Parliament is "constrained by

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282 Sian Elias, Chief Justice of New Zealand "Towards Justice: Reflections on the System and Society" (Sir John Graham Lecture 2018, Maxim Institute, Auckland, 10 August 2018) at 12.
283 "A Bill of Rights for New Zealand: A White Paper" (Government Printer, Wellington, 1985) at 7.15-7.16.
284 "A Bill of Rights for New Zealand: A White Paper" (Government Printer, Wellington, 1985) at 7.17.
285 Sian Elias "Something Old, Something New: Constitutional Stirrings and the Supreme Court" (2004) 2 NZJPIL 121 at 136.
286 Sian Elias "Something Old, Something New: Constitutional Stirrings and the Supreme Court" (2004) 2 NZJPIL 121 at 136.

law only in the fundamental constitutional preconditions of valid law-making. What those constitutional restrictions are is not settled and can be expected to shift over time".[287]

I do not wish to express a view on the desirability of such an approach, although my view is likely clear. However, if such a shift in constitutional thinking is to occur (and as has been established in Chapter I, it would be a shift) we should be upfront that it is happening. The lack of theoretical underlay and sloppy rhetoric that conflates procedural and substantive constraints on Parliament under the umbrella term of "preconditions" makes our constitution more uncertain than it needs to be. The new whig constitutionalism downplays the existence of change and by conceiving of the entire constitution in a linear path, fails to account for the more complex web of the constitutional realm.

4.4 Rejecting New Whig Constitutionalism

Constitutional intellectuals have largely rejected whig constitutionalism mainly because of disagreement about the substantive end goal. They must also reject the intellectual tradition more generally, or at the very least recognise its existence and mitigate its effect in order to better protect New Zealand's fragile constitution.

4.4.1 Anglo-centricity

One strong reason for rejecting old whig constitutionalism was that it silenced the indigenous voice. The end goal of old whig constitutionalism (a benevolent supreme Parliament) was certainly Anglo-centric. Further, any questions of constitutional illegitimacy based on an ineffectual or

[287] Sian Elias, Chief Justice of New Zealand "Another Spin on the Merry-Go-Round" (Speech to the Institute for Comparative and International Law, University of Melbourne, Australia, 19 March 2003) at 24.

limited acquisition of British sovereignty were roadblocks to the broad arc of progress and were thus 'explained away'. However, new whig constitutionalism is also out of place in New Zealand society. The whig linear relationship between the past and present sits at odds with Te Ao Māori, and the importance of what is described by Dame Anne Salmond as the "spiral of space-time".[288] This might perhaps be another example of what she calls "an ontological impasse… at the heart of the New Zealand state".[289] Exploring ways to harmonise European and Māori conceptions in this space would be a welcome development.

4.4.3 Constitutional Challenges

New Zealanders are a profoundly constitutionally apathetic people. This is not new.[290] Despite gallant efforts from those such as Palmer and Butler to ignite constitutional debate, shows no sign of changing.[291] However, we can and must expect more from our constitutional actors. The story of the growing acceptance of entrenchment as legally efficacious should be a chance for them to commit themselves anew to their respective constitutional tasks.

Whig thought can have particular effects in the constitutional sphere. First, these matters are seldom litigated. Further, those who might challenge non-compliant Acts are often likely to be impecunious. Contrast litigants in contractual dispute cases with the series of public law cases brought by Arthur Taylor. His tenacity (and perhaps boredom) may support endless appeals, but this is very much the exception not the rule. The macro-constitutional is not litigated as often as

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288 Anne Salmond *Tears of Rangi: Experiments Across Worlds* (Auckland University Press, Auckland, 2017) at 408.

289 Anne Salmond *Tears of Rangi: Experiments Across Worlds* (Auckland University Press, Auckland, 2017) at 287.

290 See, e.g., "The Singular Apathy of New Zealand" *Auckland Star* (Auckland, 12 March 1891): "The first impression made upon the New Zealander who takes any interest in public affairs… is the fact that we have been strangely indifferent…"; André Siegrid *Democracy in New Zealand* (G Bell & Sons, London, 1914) at 53: "[New Zealanders] have, like almost all men of action, a contempt for theories…".

291 Geoffrey Palmer and Andrew Butler *A Constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2016).

conventional private law disputes so courts should take extra care to bring intellectual rigour and theoretical clarity to the macro-constitutional cases that are.

Secondly, the need for this effort is supported by the respective roles of our constitutional actors. Courts seldom see themselves as acting in concert with Parliament to determine the ultimate rule of recognition. Obviously, such a view depends on a positivist approach. However, notions of "collaborative enterprise"[292] and "dialogue"[293] illustrate non-positivist support for an ongoing consensus. The democratic justification for the courts not getting too far away from Parliament (and the people) in determining the ultimate structure of the constitution is strong.

Recall that for Hart, the ultimate rule of recognition is an "an empirical, though complex, question of fact… established by appeal to… the actual practice of the courts and officials of the system"[294] and relies on "a distinctive normative attitude".[295] Tucker reminds us to consider "actual behaviour, not hypothetical beliefs"[296] of the various constitutional actors. When judges act in macro-constitutional cases, they are contributing to the formation of the rule of recognition. The import of ideas from extra-judicial writing or foreign law has a more unsettling effect in the constitutional sphere than in common law reasoning. By not thinking clearly about the nature of their task, courts are potentially changing the rule of recognition further, or in a different way from Parliament. This is inherently problematic for our constitution.

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[292] Phillip Joseph "Parliament, the Courts, and the Collaborative Enterprise" (2004) 15 KCLJ 32.
[293] Alexander Bickel *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd ed, Yale University Press, New Haven, 1986) at 261.
[294] HLA Hart *The Concept of Law* (3rd ed, Oxford University Press, Oxford, 2012) at 292.
[295] HLA Hart *The Concept of Law* (3rd ed, Oxford University Press, Oxford, 2012) at 255.
[296] Adam Tucker "Uncertainty in the Rule of Recognition and in the Doctrine of Parliamentary Sovereignty" (2011) 31(1) OJLS 61 at 69.

The strain between our constitutional actors is heightened by the pervading new whig constitutionalism amongst the courts and among constitutional intellectuals. Respective Parliaments and Executives do not really consider themselves on these terms. Although politicians may seek to make 'progress' on certain issues, the cut and thrust of modern politics limits their ability to see change in one intellectual progression. Put simply, courts are often more high-minded and historically contextual than Parliament. I do not seek to suggest this is necessarily a bad thing. However, for the system to work, the actors need to be more aware of their different ontological viewpoints.

In 2018, the courts and Parliament were speaking on different wave lengths about our constitution. Recall that the legal efficacy of entrenchment was conceded by the Crown in *Ngaronoa* without much fanfare.[297] Recall too the debate in Parliament about the entrenchment of Māori seats that portrayed a fundamental misunderstanding of the current orthodoxy about entrenchment.[298] Whigs may not be concerned by this discrepancy. For them, the courts may be right and Parliament may be wrong. In other words, perhaps the courts are further along the path to the enlightened goal than Parliament. However, we must be concerned by this. New Zealand's constitution is inherently fragile. Intellectual honesty and theoretical clarity are important. When the courts and Parliament are talking past each other, we all lose.

[297] *Ngaronoa v Attorney-General* Transcript SC 102/2017, 26 March 2018 at 58.
[298] (5 September 2018) 732 NZPD 6306-6321, especially 6308 and 6320-6321.

CONCLUSION

The 2005 Constitutional Arrangements Committee coined the term "pragmatic evolution" to explain New Zealand's constitutional history. They suggested this described "New Zealanders' instinct to fix things… without necessarily relating them to any grand philosophical scheme".[299] Matthew Palmer suggests that "pragmatism" is one of New Zealand's "cultural attitudes to the exercise of public power".[300] He notes Dame Sylvia Cartwright's view of New Zealand constitutional change as "incremental and gradual, and frequently the result of emerging consensus on an issue". [301] I have posited the 'new whig constitutionalism' term as a possible organising paradigm.

It is beyond the scope of this paper (and my competence) to fully account for the New Zealand psyche and as will have been apparent throughout this paper, I am largely supportive of New Zealand's current constitutional position. For the most part, New Zealand's constitutional pragmatism is a virtue. However, that is not to say that the entrenchment's path to acceptance does not illustrate a fundamental fragility in New Zealand's constitution. It does. The re-emergence (or continuance) of sub-conscious whig constitutional thought makes our constitutional structure unnecessarily vulnerable. Our primary constitutional actors should recommit themselves to their collective task as *kaitiaki* of our constitution. Only then will our constitutional pragmatism become a virtue and our constitutional fragility be mitigated.

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[299] Constitutional Arrangements Committee "Inquiry to Review New Zealand's Existing Constitutional Arrangements" [2005] AJHR I24A at [26].
[300] Matthew Palmer "New Zealand Constitutional Culture" (2007) 22 NZULR 565 at 565.
[301] Dame Sylvia Cartwright *The Role of the Governor-General* (NZCPL Occasional Paper, 2001) at 15.

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