

Does New Zealand Have a “Pragmatic” Constitution?

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This article is about New Zealand’s constitution and how people’s attitudes towards it shape the community’s political imagination. For example, it is sometimes claimed that New Zealand’s constitutional life is “pragmatic”; that it is more concerned with “getting on with things” than with abstract principles of justice. In this article, I argue that New Zealand does not and should not have a pragmatic constitution. There is nothing distinctively pragmatic about New Zealand’s constitution, in practice or in theory. Moreover, constitutional pragmatism is incompatible with the rule of law.

I INTRODUCTION

The claim that New Zealand’s constitutional life is “pragmatic” is so frequently recited in public law scholarship and cloisters of government that it has become dogma. The incantation usually lacks authority and is rarely subject to serious criticism. It serves as both a descriptive and a normative basis for reform and, more commonly, inaction. In this article, I challenge both the claim that New Zealand’s constitution is pragmatic and the claim that it should be. I question the neutrality and merits of pragmatism as a constitutional perspective and as a general approach to constitutional change.

I begin by asking what “pragmatism” actually means in a constitutional setting, concluding that no single definition is possible. I then consider pragmatism as it appears in three informatively different constitutional perspectives. My analysis of constitutional pragmatism is as much a critique of these pragmatic theories as it is of pragmatism itself. In later parts, I consider whether New Zealand’s constitutional practice and orthodox constitutional theory actually reflect these perspectives. Finally, I discuss when, if ever, a constitution should be pragmatic.

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II WHAT DOES IT MEAN TO BE PRAGMATIC?

Sometimes it is good to be pragmatic. Avoiding a technical view of the world in favour of a practical approach often produces more realistic and intelligible solutions. People may be willing to sacrifice mechanical compliance in the interests of “getting on with things”. But what does pragmatism mean in a constitutional setting?

No exhaustive definition is possible. The ordinary meaning of “pragmatic” is “dealing with matters with regard to their practical requirements and consequences”.¹ “Practical” is defined as “of or concerned with practice or use rather than theory”.² This is the gist of the concept. Pragmatism as a mode of action does not exist in the abstract; what is pragmatic in a given instance depends on the nature of the problem calling for a practical solution. When we think about a constitution, though, in what sense do practical, as opposed to theoretical, issues arise? We often think of a constitution as a set of abstract principles constituting a society’s fundamental priorities. Is any constitutional question a practical question, or must every issue be decided by principle due to a broader understanding of the rule of law?

One source of confusion is the blurred line between the constitution and the administration of what is already constituted. Practical issues arise constantly in administering the state; there is an entire branch of law dedicated to them. Special rules exist in that area, including the principles of natural justice. Although constitution and administration support each other, they are not the same thing: the act of constituting is not the same as the act of administering. Theory arises when practice leads us astray. The need to define society’s priorities — the necessity of law — comes from human experience at the terrors of both anarchy and totalitarianism.

What about constitutional change? Do practical questions arise there? After all, even if the subject matter of a constitution is mostly theoretical, pragmatism as a mode of action relates to how problems are identified, as well as to how they are solved. This is where arguments from pragmatism are at their strongest and where the theories I critique in this article are most compelling. I will focus on three major perspectives on New Zealand’s constitution. No uniform account of pragmatism is possible as each of these perspectives identifies pragmatism in an instructively different way. I will use these viewpoints to assess how relevant pragmatism is to the constitution.

1 Tony Deverson and Graeme Kennedy (eds) *The New Zealand Oxford Dictionary* (Oxford University Press, Oxford, 2005) at 885.

2 At 885.

Ad Hoc Pragmatism

The first perspective is drawn from Matthew Palmer’s theory of “constitutional realism”. In his words:³

A constitutional realist seeks to identify and analyse all those factors which significantly influence the generic exercise of public power. In my view, a complete view of a “constitution” includes all the structures, processes, principles and even cultural norms that significantly affect, in reality, the generic exercise of public power.

Palmer envisions the constitution as comprising not only those key norms “that lawyers express as principles, expound as ‘doctrines’, or even crystallise as constitutional ‘conventions’”, but also the cultural attitudes towards the exercise of public power that underlie those norms.⁴ The two are intimately linked because “[t]hese norms form and dissolve through the iterative interaction of the beliefs and behaviour of all those who participate in a constitution over time.”⁵

Relevantly, Palmer identifies ad hoc pragmatism as a salient feature of New Zealand’s constitutional culture, along with authoritarianism and egalitarianism.⁶ Palmer uses pragmatism in the ordinary sense of the word, which is true to the spirit of the concept.⁷ In calling New Zealand’s constitutional culture pragmatic, Palmer is writing descriptively. As he explains:⁸

We expect politicians to fix problems as they appear and expect them to fashion world-leading innovations with number eight wire after tinkering in the constitutional shed. ... New Zealand culture tends to be uncomfortable with high-flown rhetoric in case it seems pretentious. We don’t do the vision thing, let alone have a dream.

This “aggressive modesty” is said to be in tension with the fact that New Zealanders value innovation.⁹ In Palmer’s view, most New Zealanders seem comfortable with constitutional development being something of a “random walk”.¹⁰ I will explore these views in greater depth shortly.

3 Matthew SR Palmer “New Zealand Constitutional Culture” (2007) 22 NZULR 565 at 566.

4 At 570.

5 At 570 (footnotes omitted).

6 At 576–578.

7 At 571.

8 At 576.

9 At 577.

10 At 577.

Authoritarian Pragmatism

The second perspective is the political constitutionalism of JAG Griffith.¹¹ In Griffith's view, society is by nature authoritarian,¹² and "laws are merely statements of a power relationship and nothing more".¹³ Gee and Webber usefully delineate four claims central to Griffith's view of a political constitution:¹⁴

First, there is no sharp distinction between law and politics. Second, law and politics each respond to and are conditioned by 'the conflict [which] is at the heart of modern society'. ... Third, because of the circumstances of politics, reasoning under the rubric of 'rights' should be employed with caution, since there will likely be disagreement about which so-called 'rights' to recognize, how 'rights' apply to concrete cases, how best to realize such 'rights' and so forth. More pointedly put: arguments about what are contestable, political claims should be recognized and labelled as such rather than paraded about as 'rights'. Fourth, ... 'the best [that] we can do is enlarge the areas for argument and discussion' in the political process, including about the nature and content of the constitution itself.

Griffith appears to deny normative content to the political constitution with his provocative statement that "the constitution is no more and no less than what happens".¹⁵ But Gee and Webber regard Griffith's statement as merely downplaying the normativity within a political constitution.¹⁶ As the authors say, Griffith uses the language of "ought" in relation to political accountability and the possibility of enlarging areas of argument about constitutional matters.¹⁷ A recent article by Mark Hickford draws on Griffith's view of the political constitution and explicitly acknowledges its normative value.¹⁸

In what way is Griffith's view of a political constitution "pragmatic"? In Hickford's view, it is analytically simplistic to characterise New Zealand's constitutional culture as pragmatic or ad hoc without accounting for the richer values of ordinary politics.¹⁹ Nonetheless, a version of pragmatism is implicit in Griffith's version of the political constitution. When one envisions the law as the product of conflict between competing interest groups, the extent to which any particular group can assert

11 See JAG Griffith "The Political Constitution" (1979) 42 MLR 1.

12 At 2.

13 At 19.

14 Graham Gee and Grégoire CN Webber "What is a Political Constitution?" (2010) 30 OJLS 273 at 278–279 (footnotes omitted).

15 Griffith, above n 11, at 19.

16 Gee and Webber, above n 14, at 280–281.

17 At 279. See also Griffith, above n 11, at 16.

18 Mark Hickford "The Historical, Political Constitution — Some Reflections on Political Constitutionalism in New Zealand's History and its Possible Normative Value" [2013] NZ L Rev 585 at 587.

19 At 623.

dominance over others will depend on its practical leverage. This is certainly a pragmatic outlook, yet one of a different kind to Palmer’s.

Democratic Pragmatism

The third perspective, a branch of political constitutionalism advocated by Richard Bellamy, locates pragmatism within a wider normative framework. It is, I suggest, a perspective sufficiently distinct from Griffith’s as to justify separate treatment.²⁰

Bellamy grounds the political constitution in democratic principle:²¹

... the commitment to equality of concern and respect that animates most contemporary theories of rights and the rule of law can only be met via a form of self-rule that satisfies the condition of non-domination.

Gee and Webber note that the “very aspects” of political life that legal constitutionalists denigrate are those that Bellamy praises, including competitiveness, compromise, majority rule and the role of political parties.²² The compromise point is especially relevant as compromise generally involves parties reaching a pragmatic middle-ground solution wherein no party gets exactly what it wants. Bellamy sees compromise as “a natural part of a process that ‘hears the other side’ and seeks to avoid dominating citizens by failing to treat the reasons they offer equally”.²³ Pragmatism is therefore justified for democratic reasons.

III PRAGMATISM IN CONSTITUTIONAL PRACTICE

I have outlined three distinct but overlapping perspectives of pragmatism based on different constitutional standpoints. First, there is what may be called “ad hoc pragmatism”, which refers to pragmatic attitudes (in the ordinary sense) towards the exercise of public power. Secondly, there is what I call “authoritarian pragmatism”, which refers to how much individuals and groups can assert power over one another. Thirdly, there is what one might label “democratic pragmatism”, which seeks to justify the politics of compromise.

In this part I consider whether pragmatism has a descriptively important role in New Zealand’s constitutional practice. By “constitutional practice” I mean the actual exercise of public power as opposed to how constitutional theory says it is or should be exercised. I ask the same question of constitutional theory later in this article. To foreshadow, I find

20 See Richard Bellamy *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, Cambridge, 2007).

21 At 259.

22 Gee and Webber, above n 14, at 281–282.

23 Bellamy, above n 20, at 193.

that New Zealand's constitutional practice evinces an uneasy tension between apathy and principle, rather than any genuinely distinctive pragmatism. This conclusion is general; there may be isolated matters in respect of which our constitutional practice is pragmatic. However, the question is whether a general claim as to its pragmatism is correct. To that end, we should consider specific episodes of New Zealand's constitutional practice in order to determine whether there is a pattern of behaviour.

The focus for this discussion is the relationship between the Crown and Māori. I focus on this because if New Zealand's constitutional practice is not pragmatic in this significant area, it is unlikely to be pragmatic elsewhere. In writing about the Crown's relationship with Māori, it is easy to slip into the familiar language of high constitutional theory and neglect the practical consequences of the exercise of public power. I endeavour to avoid that here, although theory inevitably bears upon practice. I wish to specifically discuss the Crown's approach to the settlement of claims made under the Treaty of Waitangi or customary law. It is no coincidence that the watershed moment in modern Treaty constitutionalism arose from the transfer of assets from the Crown to state-owned enterprises. The litigation in *New Zealand Maori Council v Attorney-General (Lands)* was prompted by fear that Crown land, once transferred, would no longer be available to return to Māori in accordance with any recommendation of the Waitangi Tribunal.²⁴ Although the Treaty of Waitangi conveys no legally enforceable rights save to the extent they are incorporated into statute,²⁵ s 9 of the State-Owned Enterprises Act 1986 provided: "[n]othing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi."

The Court of Appeal seized its chance to give meaning to those principles. Notably, however, it did not impose an ultimate solution for the parties, nor did it forbid the Crown from transferring the land indefinitely. As Cooke P stated:²⁶

If the Crown acting reasonably and in good faith satisfies itself that known or foreseeable Maori claims do not require retention of certain land, no principle of the Treaty will prevent a transfer.

In practical terms, the Court left the resolution of the dispute to the parties so long as the Crown acted in accordance with the minimum legal standard explained above. In the *Lands* case, it was at least necessary that the Crown establish a system to consider whether transfers would breach the principles of the Treaty.²⁷ The Supreme Court, 26 years later, confronted a strikingly similar claim in respect of the partial privatisation of Mighty River Power Ltd.²⁸ The claimants were concerned as to how the sale of shares would

24 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (HC and CA) at 653 [*Lands*].

25 *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590 (PC) at 597.

26 *Lands*, above n 24, at 664.

27 At 666.

28 *New Zealand Maori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 [*Mighty River*].

affect potential redress relating to Māori customary rights in water. In this later case, the Court held that the test for whether there was a “material impairment” in the Crown’s ability to provide redress was not met.²⁹ The Court considered that legal and social circumstances had changed since the *Lands* case and that Māori could be confident their claims would be addressed.³⁰ In both cases we see the Courts’ reluctance to become involved in the political relationship between the Crown and the Māori claimants. As Hickford states, “it is well known that Treaty settlements addressing historical claims have been regarded largely as political compacts or arrangements, with the courts largely sustaining that view”.³¹

It may be argued that this political solution to the settlement of Treaty claims is a pragmatic approach to resolving longstanding tensions arising from raupatu,³² and the suppression of Māori culture and norms. The Courts’ relatively hands-off approach may support this view. I think it requires closer scrutiny. Let us consider how such an approach may be “pragmatic”.

First, to what extent does it reveal a preference for a practical as opposed to a theoretical approach to the exercise of public power? Palmer suggests that the preference for practicality is an aspect of New Zealand culture. It is true that any form of bilateral settlement involves the practical constraints of negotiation. But where, as here, the parties have a Treaty obligation to act in good faith, it is reasonable to expect that the outcome reached will accord in some way with the principle of redress. Further, the view that a solution must be practical misses the point that constitutional issues raise questions of justice; no solution that ignores this will be truly durable.³³ To characterise the Treaty settlement process as pragmatic undermines its significance to both Māori and Pākehā. Moreover, in many cases the pragmatic solution is simply to maintain the status quo (although this is not possible where there is a definitive need or legal duty to act).

I think the careful approach of the Courts is explicable on other bases than ad hoc pragmatism. First, there is an obvious wish to limit any parliamentary backlash against the development of indigenous rights. The scars of the foreshore and seabed controversy are still quite visible, however much the Marine and Coastal Area (Takutai Moana) Act 2011 is hailed as a triumph of pragmatism.³⁴ Certainly that Act came about through political compromise but it was motivated by deep resentment towards the Foreshore and Seabed Act 2004.³⁵ This political power play showed that New Zealand’s constitutional practice involves the second kind of pragmatism —

29 At [150].

30 At [115].

31 Hickford, above n 18, at 621 (footnotes omitted).

32 Raupatu means the seizure and confiscation of (Māori) land: Deverson and Kennedy, above n 1, at 934. “Raupatu(-tia)” is defined as “seize land, conquest, confiscate land” in PM Ryan *The Raupō Dictionary of Modern Māori* (4th ed, Penguin, North Shore (NZ), 2012) at 268.

33 Compare *Mighty River*, above n 28, at [148].

34 If only by the Government that passed it: see, for example, (24 March 2011) 671 NZPD 17631; and compare Nin Tomas “Maori Land Law: The Coastal Marine (Takutai Moana) Act 2011” [2011] NZ L Rev 381 for a more reserved analysis of the Act.

35 See Tomas, above n 34, at 383–384.

what I have called “authoritarian pragmatism”. But does this add any descriptive value to our understanding of New Zealand’s constitution? I suggest it does not. Griffith’s central point is that *every* society is authoritarian.

Secondly, there is much to be said for the argument that the incrementalism of New Zealand’s constitutional development arises from the nature of its unwritten constitution. Matthew Palmer agrees but argues that its informality is underpinned by a pragmatic desire for flexibility.³⁶ I think there is a convincing argument otherwise. Consider this passage from Palmer:³⁷

New Zealanders do value innovation, and take quiet pride in leading the world in climbing Mt Everest or (I was going to say) rugby or sailing. Our pragmatism is so determined as to be undeterred by the untried. This can lead, almost by accident, to innovative world-leading changes – for example, women’s right to vote, the welfare state, accident compensation, the Waitangi Tribunal, or economic deregulation. New Zealand’s innovative brand of pragmatism is not necessarily conservative as to radical change. But it does favour flexibility over coherence.

Aside from the difficulty of classifying any of these accomplishments as the result of pragmatism, there is a deeper problem with expecting the attitudes of New Zealanders in respect of their ordinary private lives to translate into their attitudes to public power. Many, if not most, New Zealanders are disinterested in constitutional matters. As Sir Geoffrey Palmer has put it: “[a]pathy and indifference too often characterize the attitudes of New Zealanders to their Constitution.”³⁸ In addition, those who are not disinterested usually have strong feelings about the constitution as a matter of principle. Matthew Palmer notes that New Zealand’s size “still allows determined individuals to make a difference”.³⁹ Moreover, conflating simple apathy with pragmatism is dangerous. It is a similar kind of logic to that employed by those who assume that a decision not to vote is a vote of confidence in an incumbent government. In reality, one can only speculate reasons for indifference.

I am uneasy about the extent to which apathy may be misconstrued and seized upon as a reason to deny a principled approach to political disagreement. There is an inescapable feeling of utopianism about the idea that we can simply “muddle along” and everything will work out for the best. But I do not believe that this is the prevailing culture. In fairness, Matthew Palmer is descriptive rather than normative in his analysis. However, it is hard to resist the instinct that his analysis is too simplistic a

³⁶ Palmer, above n 3, at 596.

³⁷ At 577.

³⁸ Geoffrey Palmer *Unbridled Power: An Interpretation of New Zealand’s Constitution & Government* (2nd ed, Oxford University Press, Oxford, 1987) at 1.

³⁹ Palmer, above n 3, at 577.

characterisation of New Zealanders’ constitutional attitudes.⁴⁰ He acknowledges this to some degree:⁴¹

In looking for “New Zealand” constitutional culture and norms, I do not ignore the existence of a variety of cultural attitudes to the use of public power among different groups of New Zealanders. In particular, the attitudes of Māori about the constitution are likely to be different from, though probably overlapping with, those of non-Māori New Zealanders. ... And I am sure that the formation of the nebulous notion of “public opinion” can be found to be led or influenced by some groups of New Zealanders – presumably those with greater access to power, money and/or media exposure – much more easily than others.

I am not sure that there is such a thing as a New Zealand constitutional culture. Certainly there are attitudes towards the exercise of public power. But those views are far too diverse to be generalised. Even if we were to make some general statements about them, I would seriously doubt Palmer’s allegation that dedication to the rule of law is not to be found among them.⁴²

What about the political constitutionalism of Richard Bellamy? The Treaty settlement process may find a role for democratic pragmatism, which sees compromise as a hallmark of political equality, in the legislative deliberation of settlement Acts. Yet I do not think the practice of political compromise is especially strong in New Zealand compared to other democracies. If anything, observation suggests that we are not as divided along political lines as, for example, the United States, leading to more common ground across the political spectrum. In any case, Bellamy’s pragmatism is presented within a normative framework of the constitution that warrants a more complete analysis. I therefore defer that discussion to the next part, where I consider the extent to which pragmatism is embodied in orthodox constitutional theory.

In summary, New Zealand’s constitutional practice reveals an uneasy tension between apathy and principle, rather any genuinely distinctive pragmatism.

IV PRAGMATISM AND CONSTITUTIONAL THEORY

“It is striking how little New Zealand constitutional scholarship focuses on fundamental principles.”⁴³ I think the truth of this observation by Matthew

40 Compare Hickford, above n 18, at 623.

41 Palmer, above n 3, at 570.

42 Contrast Palmer, above n 3, at 589.

43 At 578.

Palmer goes some way to explaining why New Zealand, “apparently through osmosis”, has adopted AV Dicey’s views as definitive of its constitution.⁴⁴

As is well known, Dicey described English constitutional law as comprising two elements: the law of the constitution and the conventions of the constitution.⁴⁵ Only the former is law in the “strictest sense”; that is, enforceable by the courts.⁴⁶ Dicey regarded parliamentary sovereignty as the “dominant characteristic” of the constitution.⁴⁷ The combination of parliamentary sovereignty with this intensely positivist definition of law resulted in the following rule:⁴⁸

A law may, for our present purpose, be defined as ‘any rule which will be enforced by the Courts’. The principle then of Parliamentary sovereignty may, looked at from its positive side, be thus described; any Act of Parliament, or any part of an Act of Parliament, which makes a new law, or repeals or modifies an existing law, will be obeyed by the Courts.

Dicey carefully noted that the lack of legal limitations on Parliament is not the same as Parliament being omnipotent in a practical sense.⁴⁹

The external limit to the real power of a sovereign consists in the possibility or certainty that his subjects or a large number of them will disobey or resist his laws.

Similarly:⁵⁰

The internal limit to the exercise of sovereignty arises from the nature of the sovereign power itself. Even a despot exercises his powers in accordance with his character, which is itself moulded by the circumstances under which he lives, including under that head the moral feelings of the time and the society to which he belongs.

Real as these limits are, they are also pragmatic. Moreover, they are pragmatic in the second, “authoritarian” sense I have mentioned; the group that controls Parliament, controls the law absolutely. Dicey’s descriptivism led Sir Stephen Sedley to deny that English constitutional law, historically at least, had normative content.⁵¹

44 At 571–573 Matthew Palmer also considers the pragmatism of New Zealand’s constitutional theory. Here I embark on a similar analysis and reach a somewhat different answer.

45 AV Dicey *Lectures Introductory to the Study of the Law of the Constitution: The Oxford Edition of Dicey – Volume I* (Oxford University Press, Oxford, 2013) at 20.

46 At 20.

47 At 27.

48 At 27.

49 At 44–46.

50 At 46.

51 Stephen Sedley “The Sound of Silence: Constitutional Law without a Constitution” (1994) 110 LQR 270 at 270.

... it offers an account of how the country has come to be governed; and, importantly, in doing so it confers legitimacy on the arrangements it describes. But if we ask what the governing principles are from which these arrangements and this legitimacy derive, we find ourselves listening to the sound of silence.

Dicey's view of the relationship between the rule of law and parliamentary sovereignty was also pragmatic. He considered that parliamentary sovereignty favours the rule of law and that the rule of law necessitates parliamentary sovereignty.⁵² Parliamentary sovereignty favours the rule of law because "[t]he will of Parliament can be expressed only through an Act of Parliament", which is "formal and deliberate".⁵³ Further, Parliament rarely exercises direct executive power.⁵⁴ The rule of law necessitates parliamentary sovereignty because the rigidity of the law may otherwise prevent the executive from exercising the discretionary powers it must in extreme circumstances.⁵⁵ Dicey writes:⁵⁶

Under the complex conditions of modern life no government can in times of disorder or of war keep the peace at home or perform its duties towards foreign powers without occasional use of arbitrary authority.

The pragmatism of Dicey's account is reinforced by a preference for monistic democracy. Monism, as Bruce Ackerman describes, is an idealised version of British parliamentary practice.⁵⁷

Democracy requires the grant of plenary lawmaking authority to the winners of the last general election—so long, at least, as the election was conducted under free and fair ground rules and the winners don't try to prevent the next scheduled round of electoral challenges. ... [D]uring the period between elections, all institutional checks upon the electoral victors are presumptively antidemocratic.

Monistic democracy has arguably been eroded in New Zealand over the last 35 years. As Sir Geoffrey Palmer wrote in 1987:⁵⁸

There has been a tendency in New Zealand to reserve judgement upon a Government until the end of its three-year term. That means public opinion, expressed in voting, works in response to the total rather than individual decisions of a Government. ... In the last few years this has started to change. The parliamentary

52 Dicey, above n 45, at 180.

53 At 180.

54 At 181.

55 At 182.

56 At 182.

57 Bruce Ackerman *We The People: 1 — Foundations* (Belknap Press, Cambridge (Mass), 1991) at 8.

58 Palmer, above n 38, at 15.

process now encourages public participation through the select committees.

The Official Information Act 1982 and the Office of the Ombudsman, for example, provide similar non-electoral checks on government power.⁵⁹ These are signs of evolution in New Zealand's constitutional orthodoxy and I suggest they should be considered alongside the rise of legal or "common law" constitutionalism as indicating a departure from Diceyan orthodoxy. The lucid writing of Sir John Laws best explains the central tenets of this view (from a British perspective). Crucial to it is a rejection of pragmatism:⁶⁰

It is characteristic of the intellectual insouciance which marks our unwritten constitution that though higher-order law is an imperative required for the establishment of institutions to govern a free people, not only is it nowhere to be found, but its emphatic denial, in the shape of the absolute sovereignty of Parliament, is actually represented by our traditional writers such as Dicey as a constitutional cornerstone.

Sir John Laws expresses the theoretical basis of legal constitutionalism in two different ways:⁶¹

... the rules which establish and vindicate a government's power are in a different category from laws which assume the existence of the framework, and are made under it, because they prescribe the framework itself.

...

Ultimate sovereignty rests, in every civilised constitution, not with those who wield governmental power, but in the conditions under which they are permitted to do so. The constitution, not the Parliament, is in this sense sovereign.

So even if Parliament is fulfilling its constitutional role of checking executive power, higher law is still needed to protect democracy and fundamental rights (which by implication the courts must enforce):⁶²

It is a condition of democracy's preservation that the power of a democratically elected government—or Parliament—be not absolute. The institution of free and regular elections, like fundamental individual rights, has to be vindicated by a higher-order law: very obviously, no government can tamper with it, if it is to avoid the mantle of tyranny; no government, therefore, must be allowed to do so.

59 At 15 and 17–18.

60 John Laws "Law and Democracy" [1995] PL 72 at 90.

61 At 87 and 92.

62 At 85.

But to what extent has New Zealand’s constitutional theory embraced legal constitutionalism? Parliamentary sovereignty has not been usurped despite occasional judicial comment that it could be.⁶³ Indeed, the New Zealand Bill of Rights Act 1990 (NZBORA) expressly preserves it.⁶⁴ This is not to deny the effect of the NZBORA and the common law principle of legality on statutory interpretation where rights issues are raised.⁶⁵ However, more recent NZBORA jurisprudence emphasises the relevance of demonstrably justified limitations on rights.⁶⁶ The cases showing more assertive use of presumptions of consistency increasingly appear to be outliers.⁶⁷ Further, NZBORA does not legally affirm the Treaty of Waitangi, despite an earlier draft to the contrary.⁶⁸

Despite this diffidence, it seems unlikely that there will be an absolute return to Diceyanism. In part, this is because New Zealand, with its Treaty jurisprudence, is beginning to develop a distinctive constitutional law. It is also because criticisms of common law constitutionalism are largely not about the values it seeks to protect, but rather about who is to protect them. Bellamy, for instance, defends democracy against judicial review:⁶⁹

... not on the grounds that democracy is more important than constitutionalism, rights or the rule of law, but because democracy embodies and upholds these values. The judicial constraint of democracy weakens its constitutional attributes, putting inferior mechanisms in their place. ... Judicial review undermines the equality of concern and respect between citizens that lies at the heart of the constitutional project

The similarities between political and legal constitutionalism are important:⁷⁰

... both a political constitution and a legal constitution are prescriptive, but not only do they make different demands of different political and judicial actors, they do so in more and less exacting ways. The prescriptions of a legal constitution are the more extensive and exacting, and thereby also the easier to detect. ... In contrast, a political constitution offers no comparable, definitive prescriptions: no formalized legal instruments, no immutable statement of rights or architectural arrangements The normative content of a political constitution is, in other words, difficult to discern.

63 See, for example, *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA) at 398 per Cooke J.

64 New Zealand Bill of Rights Act 1990, s 4.

65 See, for example, *Drew v Attorney-General* [2002] 1 NZLR 58 (CA); and *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 328 (HL).

66 See, for example, *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.

67 See, for example, *R v Pora* [2001] 2 NZLR 37 (CA). Contrast *Taylor v Attorney-General* [2015] NZHC 1706, where the Court made a formal declaration of inconsistency with NZBORA.

68 See Palmer, above n 38, at 291.

69 Bellamy, above n 20, at 260.

70 Gee and Webber, above n 14, at 286.

In a sense, political constitutionalism simply takes a different view of the institutional framework that best satisfies our democratic principles. Jeremy Waldron has observed the strangeness of advocating theories of rights, including rights to political participation, while giving courts, not the legislature, the final word.⁷¹ However, Waldron concedes that the strength of the argument for legislative supremacy depends (among other things) on whether democratic institutions are in “reasonably good working order”.⁷² That courts should not decide matters of pure policy is constitutional orthodoxy in New Zealand. It is also an organising principle of judicial review:⁷³

Policy decisions are for Ministers entrusted with the exercise of statutory powers. They are not for the Courts. The legitimate role of the Court is to satisfy itself that the process of decision making accords with the administrative law standards. It is not to review or question a substantive policy decision.

There is no need to regard political and legal constitutionalism as mutually exclusive.⁷⁴ Current orthodoxy reflects an uneasy institutional tension between the courts and Parliament, but the values that each institution advances are similar. As I return to the original question — “to what extent is all this pragmatic?” — this analysis suggests that the infusion of normative values into constitutional theory has seriously undermined both the ad hoc and authoritarian varieties of pragmatism. Ad hoc pragmatism is inconsistent with the legal constitution, while authoritarian pragmatism is substituted for a view that political compromise is an expression of democratic values. Additionally, as I have discussed above, the growth of Treaty of Waitangi jurisprudence reflects a distinctive constitutional morality that stands at odds with a pragmatic approach to reform.

For completeness I discuss one important exception to this trend: the doctrine of the “third source” of government authority.⁷⁵ The theory has received some judicial acceptance, though it remains controversial.⁷⁶ The “third source” is the notion that the government has residual freedom to act where such action will not violate positive law.⁷⁷ The government may not act if positive law prohibits or limits the proposed action.⁷⁸ The third source is an openly pragmatic doctrine. As Bruce Harris states:⁷⁹

71 Jeremy Waldron “A Right-Based Critique of Constitutional Rights” (1993) 13 OJLS 18 at 36–37.

72 Jeremy Waldron “The Core of the Case Against Judicial Review” (2006) 115 Yale LJ 1346 at 1360.

73 *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 129 (CA) at 141 [*Radio Frequencies*].

74 Gee and Webber, above n 14, at 294. See also Tom Hickman “In Defence of the Legal Constitution” (2005) 55 UTLJ 981 at 987.

75 See generally BV Harris “Government ‘Third Source’ Action and Common Law Constitutionalism” (2010) 126 LQR 373.

76 See BV Harris “Recent Judicial Recognition of the Third Source of Authority for Government Action” (2014) 26 NZULR 60.

77 At 60.

78 At 61.

79 At 80.

In an ideal world the Chief Justice’s point of view in expecting democratic pre-action approval for all executive action should prevail. However, in the real world there are good practical reasons for recognising that the government should be free to do that which is not prohibited by positive law. It is not possible for Parliament to anticipate all needed government authority, or for it to provide for all needed government authority with appropriate prescription.

The third source is pragmatic in the sense that it has no principle supporting it other than the values inherent in ad hoc pragmatism (a matter I consider below) and a strict reading of the limits of positive law. Yet defining the scope of government authority by reference to fairly contestable policy concerns seems ill advised. Our constitutional history is one where the legislature and courts have carefully circumscribed executive power.⁸⁰ The danger is that an outlook which is too pragmatic risks creating de facto prerogatives. The default position that the government cannot act without positive law authority is an important constitutional safeguard. In New Zealand, the courts have a duty to ensure government action is legitimate. The position is more subtle than strict positivism suggests because there will always be uncertainty in hard cases. Nevertheless, the “third source” is not yet constitutional orthodoxy.

To summarise, I contend that New Zealand’s constitution does not meaningfully involve either ad hoc pragmatism or authoritarian pragmatism. Our constitution is somewhat pragmatic in the democratic sense, although any such pragmatism is limited by principle. In the next part, I discuss whether New Zealand’s constitution should be in any sense pragmatic.

V WHEN SHOULD THE CONSTITUTION BE PRAGMATIC?

At the outset of this article I noted that it is sometimes good to be pragmatic. This is true for both people and constitutions. Yet it is much less typical of constitutions, for reasons that I will now consider.

Ad Hoc Pragmatism

Pragmatism in the ordinary sense is underpinned by certain values. The arguments in favour of pragmatism take four basic forms. I will make these explicit and critique their relevance to constitutional questions.

First, what of the charge that a “practical approach” is better in some circumstances at solving problems? It may be argued that practical solutions are, by definition, those found to be workable despite their imperfections. When there are efficiency concerns, a pragmatic solution may help us to “get on with things”. These points are valid. However, they beg a further

80 See, for example, *Fitzgerald v Muldoon* [1976] 2 NZLR 615 (SC).

question: in what circumstances do they apply? In this respect, the arguments suffer from the same problem I raised earlier: they do not transfer from the private to the constitutional sphere. Moreover, the perception that pragmatic solutions are more self-evident than rights-based solutions is flawed. People may disagree on whether a response is in fact pragmatic. In the face of disagreement, it is no solution to choose the most pragmatic answer as this reproduces exactly the disagreement that called for the solution in the first place.⁸¹ Additionally, democracy does not claim perfection. I have said that it contains its own peculiar form of pragmatism in the form of political compromise. It does so based on the importance of people's voices being heard rather than the value of pragmatism itself.⁸²

The second argument is that pragmatism exhibits a desirable intellectual humility — that there is something valuable in our “aggressive modesty” that we should strive to replicate in constitutional life.⁸³ It avoids extremism and constrains the power of ideologues. Moreover, practical solutions may be less convoluted and so easier for people to understand. Again, I agree that these are valuable ends. But I counter: there is nothing inherently modest about pragmatism. To be humble is to fully confront the realities of life. There is nothing humble about closing one's mind to other solutions. Democracy does not invent ideology; an object of democracy is to channel disagreement so that social tension is shifted from among people, to among ideas. Elections are said to be a contest of ideas and there is nothing wrong with a politically engaged constituency. Democracy is difficult but apathy may equally lead to tyranny. Real humility is engaging with democratic values even when doing so is difficult. I echo Sir John Laws.⁸⁴

Though our constitution is unwritten, it can and must be articulated. Though it changes, the principles by which it goes can and must be elaborated. They are not silent; they represent the aspirations of a free people.

The third allegation is that pragmatism prioritises “substance over form”. Pragmatism apparently deals in substance because it suggests that if an underlying problem is solved, there is no need to change surface-level theory. This is a claim we must take seriously. Nevertheless, I think two objections can be raised. First, we must remember the importance of theory in guiding action. The fact that an underlying concern has been rectified does not mean that it will not return or that a deficiency in theory was not an originating cause of the problem. Both possibilities suggest that changes in theory are required to comprehensively address substantive issues. After all, the purpose of norms is to regulate conduct. Secondly, I am doubtful that pragmatism deals only in substance; one can also take a practical approach to questions of form. The “third source” doctrine is one such example.

81 Compare Waldron, above n 71, at 32.

82 Compare Waldron, above n 71, at 39–40.

83 See Palmer, above n 3, at 577.

84 Laws, above n 60, at 93.

The fourth claim, which I think is the weakest, is that pragmatism is somehow inherently democratic. This is because a practical approach must apparently respond to the pressing needs of the people. Further, it may produce a more stable political environment. The answer to the first point is that what is practical in the circumstances depends upon those circumstances. An antidemocratic government may not care about the pressing needs of the people and may find it "practical" to ignore them. The stability theme is an argument for incrementalism rather than pragmatism.

The inherent values of ad hoc pragmatism provide no independent justification for its presence in constitutional life. Before moving on, I add two further criticisms. First, the habit of responding only to practical exigencies and not theoretical concerns may foster a culture of political disengagement affecting not only legislators and the public service, but also the general public. It is not only the big issues that matter; legal systems require small, measured adjustments to keep abreast of social change. Secondly, the victims of constitutional silence tend to be those advocating rights inconvenient to the establishment. This underscores the need for a receptive democracy.

Authoritarian Pragmatism

Even if we accept Griffith's descriptive thesis that "law is politics carried on by other means",⁸⁵ the force of his normative argument suffers from incompleteness. Griffith vigorously argues for political accountability, open government and the enlarging of ordinary politics.⁸⁶

It is not by attempting to restrict the legal powers of government that we shall defeat authoritarianism. It is by insisting on open government.

...

For the best we can do is to enlarge the areas for argument and discussion, to liberate the processes of government, to do nothing to restrict them, to seek to deal with the conflicts which govern our society as they arise.

There is no need to engage in a rigorous defence of the rule of law to see how unlikely it is that doing nothing to restrict the processes of government will defeat authoritarianism. Even if we accept that the rule of law is a political claim, it is one most people agree with. Its uncertainty reflects the complexity of human nature. We embrace vague fundamental principles even though we may disagree about what they mean because an uncertain principle is often more attractive than no principle at all.

85 JAG Griffith "The Common Law and the Political Constitution" (2001) 117 LQR 42 at 59.

86 Griffith, above n 11, at 16 and 20.

Democratic Pragmatism

There is a certain amount of pragmatism inherent in New Zealand's system of majoritarian democracy. Open debate and party politics introduce adversarial elements that, while constrained by convention and electoral law, give individuals and groups wide discretion to persuade others of the correctness of their views. This is not the article for a critique of such arrangements. However, it is important to recognise that democratic pragmatism does present certain dangers and can be taken too far. I raise two particular threats: first, that such pragmatism tends to distract from the importance of the legal constitution; and secondly, that it tends to ignore deeper questions as to its own legitimacy.

As to the threat that legal principle is lost among the cajolery of "ordinary politics", the lingering questions are: "to what extent should ordinary politics be the ultimate determiner of rights issues?" and "how do we improve the institutional processes of ordinary politics?" I have little to say about the latter, except that comity and judicial respect for parliamentary privilege makes it imperative that Parliament's institutional procedures reflect the democratic nature of its authority.

The former question is an extremely difficult one. Constitutional orthodoxy currently reflects an uneasy institutional tension between Parliament and the courts. Although New Zealand adheres to parliamentary sovereignty, it is not outrageous to suggest that a court might strike down a clearly despotic statute.⁸⁷ However, one imagines such a statute would be passed in political circumstances radically different to those currently prevailing. And the fact that only a tyrannical law would prompt intervention by the courts, rather than one that is merely wrong or with which the court simply disagrees,⁸⁸ suggests that parliamentary sovereignty has life in it yet.

Gee and Webber argue that the normative content of a political constitution is indistinct and ill-defined because the workings of the political constitution — democratic processes themselves — are less visible than those of the legal constitution with its "grand judicial pronouncements".⁸⁹ This is probably correct. But in considering the important question of which institution is to have ultimate authority in rights cases, it is unacceptable not to at least try to articulate the basis of Parliament's authority. It is only by asking questions that we get answers and only by trying to agree that we discover the extent of our disagreement.

Jeff King has explained that there are several benefits to resolving constitutional disputes in the courts.⁹⁰ I think there are three main reasons why courts may be better positioned to decide rights questions. First, Parliament may deliberately or unwittingly undermine the legitimacy of its authority by, for example, arbitrarily limiting free and fair elections or by stripping a disadvantaged group of its voting rights. In such a case, the

87 See *Taylor*, above n 63, at 398 per Cooke J.

88 See, for example, *R v Poumako* [2000] 2 NZLR 695 (CA) at [42].

89 Gee and Webber, above n 14, at 286.

90 Jeff King *Judging Social Rights* (Cambridge University Press, Cambridge, 2012) at 60–62.

courts may rightly be seen as guardians of legislative authority rather than assailants.⁹¹ Secondly, courts are already vested with constitutional authority to uphold fundamental rights and have developed experience at dealing with such claims.⁹² Thirdly, conferring on the courts genuine power to defend rights is likely to increase institutional dialogue, which makes for a more coherent constitution.⁹³ These points suggest that there are limits to what political compromise, within the framework of ordinary politics, can and should try to achieve.

The second risk that democratic pragmatism raises is the tendency of the political process to ignore questions concerning its own legitimacy. This is an issue it shares with most political institutions but is exacerbated by the adversarial nature of Parliament. In New Zealand, there is a significant question as to whether — and to what degree — ideas such as political equality embrace aspects of *tikanga Māori*. There are continuing arguments about the place of *tino rangatiratanga* in the overall scheme of governmental authority.⁹⁴ These fundamental questions cannot be resolved by the pragmatism of ordinary politics because it is the very nature of ordinary politics that we disagree about.⁹⁵

VI CONCLUSION

In this article, I have argued that there is nothing distinctively pragmatic about New Zealand’s constitution. I began by asking what “pragmatism” really means in a constitutional setting, identifying pragmatism within three alternative constitutional perspectives. I then found that New Zealand’s constitutional practice and theory are not meaningfully pragmatic in either an ad hoc or authoritarian sense. Finally, I argued that New Zealand’s constitution should not be pragmatic. The values of ad hoc and authoritarian pragmatism are incompatible with democracy and the rule of law. In New Zealand, where fundamental constitutional questions still linger, the rule of law may even require us to challenge some of the more entrenched and avowedly pragmatic aspects of liberal democracy.

91 Compare Ackerman, above n 57, at 6.

92 King, above n 90, at 60–62.

93 At 62.

94 *Tino rangatiratanga* is defined as “full (Maori) sovereignty” by Deverson and Kennedy, above n 1, at 1179. “*Tino*” is translated as “very, absolute, main, real” and “*rangatiratanga*” is translated as “kingdom, principality, sovereignty, realm, ... ownership” by Ryan, above n 32, at 326 and 262.

95 See Waldron, above n 71, at 32.