Constitutional Nonsense? The 'Unenforceable' Fiscal Responsibility Act 1994, the Financial Management Reform, and New Zealand's Developing Constitution

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> *'Once again, in promoting this legislation New Zealand leads the world. This is pioneering legislation. It is distinctly New Zealand – style.'*
>
> (22 June 1994) 541 NZPD 2010 (Ruth Richardson)

> *'[It] is constitutional nonsense. The notion that this Parliament will somehow bind future Governments on fiscal policy…is constitutional stupidity.'*
>
> (26 May 1994) 540 NZPD 1143 (Michael Cullen)

The Fiscal Responsibility Act 1994 (the 'FRA') was part of New Zealand's Financial Management Reform, a reform said to have introduced new values – efficiency, economy, effectiveness and choice – into the law.[1] The FRA is peculiar because the courts may not be able to enforce it. Despite this, the authors of the FRA expected it to impact profoundly on the thinking and behaviour of the executive, Parliament, and the electorate.[2]

The debate about how the FRA has affected the executive, Parliament, and the electorate continues.[3] Yet no one has analyzed thoroughly how the FRA has affected – or might affect – judicial reasoning.[4] This article attempts that analysis, and concludes that the FRA may have profound legal and even constitutional effects, despite being 'unenforceable'.

The finding that the FRA may have legal and constitutional effects could be useful for two reasons. First, the FRA's constitutional effects suggest that judicial reform of the constitution may tend to privilege the neo-liberal values that the Financial Management Reform wrote into law. Parliamentary sovereignty could be said to encourage a free and contestable market place of ideas, but this supposed strength may be paradoxically used to legally entrench values.

Secondly, the FRA's legal and constitutional effects may explain why proposals for 'responsibility' legislation have proliferated. By 1995, the Labour Party had promised to reframe the prin-

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1 Geoffrey Beresford, 'The Processes of Constitutionalism in New Zealand and the United Kingdom' (2005) 1 *New Zealand Postgraduate law e-Journal* 2.

2 Ruth Richardson, 'Opening and Balancing the Books: The New Zealand Experience' (1994) 75 *Parliamentarian* 244, 246.

3 Roger Kerr, 'The Fiscal Responsibility Act: A Stocktake' (Paper presented at CONFERENZ 8th Annual Public Sector Finance Forum, Wellington, 23 September 2004).

4 The author is aware of only one legal academic work published since 1995 that has the FRA as its primary subject: Mark Robinson, 'Can fiscal responsibility legislation be made to work?' (1996) 3 (4) *Agenda* 419.

ciples of the FRA to meet 'sound economic and constitutional principles'.[5] In 1998 the Charter of Budget Honesty Act (Cth), a statute modeled on the FRA,[6] was enacted in Australia. In 2001, the New Zealand Business Roundtable[7] published a draft 'Regulatory Responsibility Act'.[8] In January 2005, the Labour-led Government made front page news by announcing that it intends to propose a 'social reporting law' that will be the 'equivalent of the Fiscal Responsibility Act'.[9] Less than two months later the ACT party released its policy of introducing a Regulatory Responsibility Act.[10] There have also been calls for a 'Social Responsibility Act',[11] a 'Treaty Responsibility Act'[12] and an 'Infrastructure Responsibility Act'.[13] Some promoters of 'responsibility Acts' may see the potential for such statutes to influence the development of New Zealand's constitution.

The FRA was repealed on 25 January 2005, but its substance was simultaneously re-enacted as part of the Public Finance Act (the 'PFA').[14] This move was characterised as a merely technical and administrative consolidation of the law governing the use of public financial resources.[15] This article refers to the stand-alone FRA rather than to the PFA. Commentary and case law to date generally refers to the FRA. This also follows what appears to be an emerging common practice: even after the FRA was subsumed by the PFA, commentators have continued to refer to the FRA when speaking about the fiscal responsibility provisions of the PFA.[16] The footnotes refer to equivalent sections of the PFA.

Part One of this article describes the FRA, and Part Two tries to establish that the FRA is unenforceable. Part Three suggests that the FRA nevertheless has legal and constitutional effects, and Part Four connects these findings to broader constitutional developments.

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5 Jane Kelsey, The New Zealand Experiment - A World Model for Structural Adjustment? (1995) 310.

6 *Charter of Budget Honesty Act* 1998 (Cth); Robinson, above n 4, 427-428.

7 '[A]n organisation comprising primarily chief executives of major business firms committed to contributing to the development of sound policies that reflect overall national interests. It is founded on the belief that a healthy, dynamic business sector and open and competitive markets are fundamental to the achievement of a prosperous economy and fair society.' New Zealand Business Roundtable, <http://www.nzbr.org.nz/statement_of_purpose.asp> (at 18 March 2006).

8 Bryce Wilkinson, Constraining Government Regulation (2001).

9 Ainsle Thomson, 'Govt plan for annual 'social report'', *The New Zealand Herald,* Auckland, New Zealand, 25 January 2005, A1.

10 Rodney Hide, 'ACT's Plan to Cut Red Tape' (Speech delivered at New Zealand Large Herds Association Conference, Christchurch Convention Centre, Christchurch, 19 April 2005).

11 Jonathon Boston, 'The Idea of a Social Responsibility Act for Aotearoa/New Zealand', in Michael O'Brien (ed), *Social Responsibility: Whose Agenda?* Proceedings of Conference (1998) 13.

12 Thomas Bennion and Geoffrey Malvin, 'Assessing Performance', [1994] *The Māori Law Review* 1, <http://bennion.co.nz/mlr/1994/jul.html> (at 27 April 2006).

13 Interview by Paul Henry with Chris Olsen, Auckland's Transport Infrastructure', (TVNZ, Breakfast Programme, Auckland, 27 April 2005) <http://tvnz.co.nz/view/video_popup_windows_skin/707148>, (at 27 April 2006): 'I have heard some of the Auckland mayors talk about the possibility of having an Infrastructure Responsibility Act, which would be would be very similar to the Fiscal Responsibility Act'.

14 *Public Finance Amendment Act* 2004 s 37(2).

15 *Public Finance Act* 1989, s 1A, inserted by *Public Finance Amendment Act* 2004, s 4. For an examination of this characterisation, see Chye-Ching Huang, 'The Repeal and Resurrection of Responsibility' (2005) 11 *Auckland University Law Review* 230.

16 Olsen, above n 13.

I. Features of the FRA 1994

During New Zealand's Financial Management Reform the reformers put selected neo-liberal economic theories[17] into practice in a relatively undiluted form.[18] Also known as the New Zealand Experiment,[19] or 'Rogernomics' and 'Ruthanasia'[20] the Financial Management Reform was a radical structural adjustment.[21] It transformed New Zealand from 'the first welfare state to the first post-welfare state',[22] from 'fortress New Zealand to free market',[23] and from a 'politically interventionist economic management to a more market-led type of economic management'.[24] The Fourth Labour Government began the transformation, and the succeeding National Government continued it.[25]

The National Government passed the FRA by majority on 22 June 1994, arguably in order to address the concerns of 'public choice theory'.[26] Public choice theory predicts that self-interested government actors tend to pursue fiscal policies that are not in the best interests of the wider community.[27] In line with public choice theory, Treasury considered that before the FRA, 'short-term fiscal thinking, driven by influential groups and electoral politics, was biased against sound economic principles'.[28] A 2004 Business Roundtable review of the FRA took a similar view:[29]

> The quality of fiscal policy deteriorated during the 1970s and '80s. Government spending mushroomed; the tax system became distorted and inefficient …. The incoming Labour government did much to improve fiscal policy, especially through sound tax reforms, but it struggled to achieve fiscal discipline…. In response to this haphazard record, the architects of the FRA, notably finance Minister Ruth Richardson, sought to bring a greater focus in annual budgets to issues of fiscal prudence and longer-term strategy.

17 Kelsey, above n 5, 1.

18 Beresford, above n 1, 11. Public choice theory, agency theory and transaction-cost economics, and the new public management were particularly influential: Boston, Public Management: the New Zealand Model (1996) 16.

19 Marcia Russell, Revolution: New Zealand From Fortress to Free Market (1996) 9.

20 After successive Ministers of Finance Roger Douglas and Ruth Richardson.

21 Kelsey, above n 5.

22 Russell, above n 19.

23 Ibid.

24 (26 May 1994) 540 NZPD 1146 (John Robertson).

25 Commonwealth Secretariat, Current Good Practices and New Zealand Developments in Public Service Management: A Profile of the Public Service of New Zealand (1995) 2.

26 For a brief overview of the development of public choice theory, see James Buchanan, 'Public Finance and Public Choice', *National Tax Journal 28* (December 1975), 383.

27 Boston, above n 18.

28 Kelsey, above n 5, 233. Scott explains how such analysis draws on public choice theory; Graham Scott 'New Zealand's Fiscal Responsibility Act' (1995) 2 (1) *Agenda* 3.

29 Kerr, above n 3.

Ruth Richardson, the architect of the FRA, intended it to also boost the public's confidence in government.[30] Graham Scott[31] saw the FRA as '[offering] some comfort to those concerned that one of the effects of MMP[32] might be a return to deficits and increasing debt'.[33]

Critics of the FRA have alleged that its unstated purpose was 'to bind future Governments to National Party policy'.[34] Professor Jane Kelsey, University of Auckland, also considered that the FRA was motivated by political purposes:[35]

> In reality, the [FRA] was designed to embed the current fiscal strategy of budget surpluses, repayment of debt, privatization and low taxation in law.
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> ....
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> An element of party politicking lay behind the Bill. National was determined to present itself as the natural party of government, especially as the electoral rules were about to change. It had built its credibility on reduced deficits and debt. With this established as the norm, National's opponents would have to endorse its strategy or justify their deviation. According to finance Minister Bill Birch: 'Either way we gain'.

Whatever the FRA's true purpose, it had the following features.

A. 'Principles'

The FRA 1994 requires the executive government of New Zealand[36] to 'pursue its policy objectives' in accordance with the 'principles of responsible fiscal management':[37]

> (a) Reducing total Crown debt to prudent levels so as to provide a buffer against factors that may impact adversely on the level of total Crown debt in the future, by ensuring that, until such levels have been achieved, the total operating expenses of the Crown in each financial year are less than its total operating revenues in the same financial year; and
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> (b) Once prudent levels of total Crown debt have been achieved, maintaining these levels by ensuring that, on average, over a reasonable period of time, the total operating expenses of the Crown do not exceed its total operating revenues; and
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> (c) Achieving and maintaining levels of Crown net worth that provide a buffer against factors that may impact adversely on the Crown's net worth in the future; and
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> (d) Managing prudently the fiscal risks facing the Crown; and
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> (e) Pursuing policies that are consistent with a reasonable degree of predictability about the level and stability of tax rates for future years.

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30 Richardson, above n 2, 244 and New Zealand Treasury, *The Fiscal Responsibility Act 1994: An Explanation* (1995) <http://www.treasury.govt.nz/legislation/fra/explanation/intro.asp> (at 27 January 2005).

31 Secretary to the New Zealand Treasury from 1986-1993, Principal of Graham Scott NZ Ltd.

32 The Mixed Member Proportional voting system that replaced the First Past the Post voting system.

33 Scott, above n 28, 10. For a general analysis of the influence of public choice theory and other economic perspectives on the Financial Management Reform, see J Boston, Public Management: the New Zealand Model (1996) 16. At page 27 Boston argues that the Fiscal Responsibility Act 1994 was prompted at least partly by public choice considerations.

34 (22 June 1994) 541 NZPD 2016 (Jim Anderton).

35 Kelsey, above n 5, 237.

36 *Fiscal Responsibility Act* 1994, s 2 and *Public Finance Act* 1989, s 2.

37 *Fiscal Responsibility Act* 1994, s 4 and *Public Finance Act* 1989, s 5.

Because they do not set quantitative targets, the policy outcome that any given principle requires is somewhat indeterminate, some have said to the extent of being 'totally vague and meaningless'.[38]

B. Justified Departure

The FRA allows the executive to depart temporarily from the principles, but the executive must give reasons for any departure. The executive must also state how it intends to return to compliance, and how long it expects the return to compliance to take.[39]

C. No Explicit 'Manner and Form' Restrictions

The FRA does not explicitly require Parliament to follow special procedures to amend or repeal it.

D. Reporting Requirements

The FRA legislates for reporting and accountability requirements:

- A responsible minister must publish a 'policy statement' setting out the executive's objectives and intentions with regard to principles in the Acts;[40]
- A 'strategy report' must be laid before the House of Representatives on the day on which the first Appropriation Bill relating to the financial year is introduced, which assesses the consistency of the Budget with the policy statements;[41]
- 'Statements of Responsibility' or 'Certificates' must be signed by specified members of the executive, attesting to the accuracy and professionalism of reports prepared under the Acts;[42]
- 'Economic and fiscal updates' and forecasts must be published;[43] and
- Crown financial statements must follow 'Generally Accepted Accounting Practice'.[44]

The net effect of these requirements is that a responsible Minster must report regularly to the House of Representatives on the extent to which government fiscal policy is consistent with the principles of responsible fiscal management, and justify and report any departures from those principles that the government makes.[45]

E. Unique in the international context

In 1994, no other country had enacted legislation with the same features as the FRA. Consequently overseas experiences did not clearly indicate what the impacts of the FRA would be.

The Australian Charter of Budget Honesty Act 1998 (Cth) mimicked the FRA, and Australian scholars look to New Zealand commentary on the FRA for indications on how the Charter of Budget Honesty Act 1998 will work.[46]

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38 (22 June 1994) 541 NZPD 2012 (Peter Dunne).

39 *Fiscal Responsibility Act* 1994, s 4(3) and *Public Finance Act* 1989, s 5(2).

40 *Fiscal Responsibility Act* 1994, s 6 and *Public Finance Act* 1989, s 11.

41 *Fiscal Responsibility Act* 1994, s 7 and *Public Finance Act* 1989, s 7.

42 *Fiscal Responsibility Act* 1994, s 12 and *Public Finance Act* 1989 ss 21-22.

43 *Fiscal Responsibility Act* 1994, ss (8)-(10), (13)-(15) and *Public Finance Act* 1989, ss 13-20.

44 *Fiscal Responsibility Act* 1994, s 5 and *Public Finance Act* 1989, s 6.

45 *Fiscal Responsibility Act* 1994, long title cl (a) and *Public Finance Act* 1989, s1A(2)(a).

46 Robinson, above n 4.

The Stability and Growth Pact was adopted by European Union states in 1997, and like the FRA it contains fiscal monitoring provisions. However although it deals with broadly the same subject matter as the FRA – government debt and financial reporting – the Stabilty and Growth Pact is significantly different from FRA. Unlike the FRA, the Stability and Growth Pact imposes numerical government debt targets on each signatory state, and provides explicitly for (financial) sanctions upon breach. Furthermore, the international law and institutional aspects of the European Union make it difficult to draw parallels with the FRA.

In the United States, 'balanced budget' requirements are a traditional mainstay of state public finance.[47] By 1998, Vermont was the only state that did not have a balanced budget requirement.[48] Balanced budget requirements at the state level are designed to address the same problems as the Fiscal Responsibility Act: to 'prevent fiscal irresponsibility on the part of state officials'[49] and to address predictions by public choice theorists that the political incentives of elected executives will lead government to debt-fund excessive spending on public goods and services, leaving later generations to pay the debt.[50]

However balanced budget requirements differ from the FRA in important ways. Most states entrench these requirements in their constitutions as higher law.[51] Furthermore, balanced budget requirements encapsulate quantitative targets (state expenses must equal receipts in a budget year), but the principles in the FRA do not. United States literature is therefore used cautiously in the following analysis of a unique Act operating in New Zealand's unique[52] constitutional arrangements.

II. The Enforceability of the FRA

A hypothetical litigant claims the executive has pursued policy in violation of the principles of fiscal responsibility, or that the executive has breached the FRA's reporting and accountability requirements.[53] The litigant might seek a declaration of inconsistency against the executive. Can the courts decide whether or not the FRA has been breached, and give appropriate remedies?

Marc Robinson, (in the only detailed legal analysis since 1994 of the FRA's effects), seemed to assume that the FRA is unenforceable.[54] In his view the FRA does not *compel* future executives to be fiscally responsible, even though its mandatory wording makes it appear 'on the surface' to do so.[55] Instead, Robinson characterized the FRA as a 'fiscal responsibility declaration': a discretionary commitment undertaken by an executive government to fiscal responsibility rules and

47 David Lubecky, 'The Proposed Federal Balanced Budget Amendment: the Lesson From State Experience', (1986) 55 *University of Cincinetti Law Review* 563, 568. See also; Nancy Staudt, 'Constitutional Politics and Balanced Budgets', [1998] *University of Illinois Law Review* 1105.

48 Lior Strahilevitz, 'The Balanced Budget Amendment and Social Security: an Alternative Means of Judicial Enforcement', [1998] 22 *Seton Hall Legislative Journal*. 513.

49 Lubecky, above n 47, 576.

50 Staudt, above n 47.

51 Strahilevitz, above n 48, 568.

52 Philip Joseph, Constitutional and Administrative Law in New Zealand (2nd ed, 2001) 3-7.

53 For examples of the fact scenarios that might lead to such an action, see Strahilevitz; above n 48 and James Bowen, 'Enforcing the Balanced Budget', (1994) 4 *Seton Hall Constitutional Law Journal* 565.

54 Robinson, above n 4.

55 Ibid.

targets.[56] Robinson's conclusion seems to be based on the assumption that 'no legal sanctions are provided for a failure to comply with [the principles of fiscal responsibility]'.[57]

The FRA does not state explicitly whether or not the courts can enforce it. Although people have suggested that the FRA has been breached,[58] no one has tried to bring an allegation of breach to the courts, so no precedents settle the issue.[59] Legal scholarship has largely neglected the enforceability question. This section tests Robinson's assumption. It argues that there are three reasons for thinking that the FRA is not enforceable: (1) justiciability principles; (2) lack of individual standing; and (3) Parliament's intent.

A. Justiciabilty Principles

Justiciability (in its broadest sense) is the 'constitutional concept which recognizes the capabilities of the courts are limited'.[60] It may be that justiciability principles are not legitimate;[61] nevertheless the courts use them to limit their review powers. Applying justiciability jurisprudence, courts could conclude that the principles of responsible fiscal management are high policy, and that the courts cannot properly enforce them. This is the view that the Crown Law Office took before the FRA was enacted.[62] 'High policy' involves two ideas.[63]

The first is the 'institutional competence of the courts to adjudicate upon [a matter]'.[64] Judges may not have the expertise needed to determine whether policy complies with the FRA principles.[65] Even if judges have the necessary expertise, they are constrained by the adversarial system and rules of evidence[66] and counsel may not present judges the information they need to make a good decision.[67]

For example, the first principle of fiscal responsibility uses the modifier 'prudent', which was 'expected to take account of numerous factors: the structure of the economy, its degree of vulnerability, the strength of the Crown's balance sheet, the credit rating of sovereign debt, the financial strength of the country's competitors and demographic factors'.[68] Judges would need evidence on all these factors, and to be able to evaluate the economic implications of the evidence, in order to decide whether the first principle of fiscal responsibility had been satisfied. If United States fiscal

56 Ibid.

57 Ibid.

58 Rodney Hide, *Economics and Freedom: Why New Zealand is on the Wrong Path* <http://www.scoop.co.nz/stories/PA0505/S00656> 25 May 2005 and *Labour is Irresponsible and out of Touch* Scoop; <http://www.act.org.nz/news-article.aspx?id=233373> at 24 March 2006.

59 Matthew Palmer 'What is New Zealand's Constitution and Who Interprets It? Constitutional Realism and the Importance of Public Office Holders' (2006) 17 *Public Law Review* 133. The author states that the FRA 'is never litigated', but does not consider whether or not this is possible.

60 B V Harris, 'Judicial Review, Justiciability and the Prerogative of Mercy' (2003) 62 *Cambridge Law Journal* 631.

61 Trevor Allan, Law, Liberty and Justice: the legal foundations of British constitutionalism (1993) 162-199. Compare Chris Finn, 'The Justiciability of Administrative Decisions: A Redundant Concept?' (2002) 30 *Federal Law Review* 239.

62 Kelsey, above n 5, 236.

63 Finn, above n 61, 240-241.

64 Ibid.

65 For an exposition of what is involved in this idea, see Harris, Judicial Review, above n 60, 640-642.

66 Finn, above n 61, 240.

67 Harris, Judicial Review, above n 60, 641.

68 Kelsey, above n 5, 236.

legislation – setting out quantifiable balanced budget targets – would require judges to 'become accountants' when comparing state revenue and expenditure,[69] then the FRA – setting out general economic principles instead of targets – might virtually require New Zealand judges to become economists before they could enforce it.

The second element of 'high policy' is the idea that Judges should not encroach on functions properly left to Parliament in the constitutional structure.[70] To decide whether or not a function is properly left to Parliament, the courts should consider what the best accountability mechanism in the situation is:[71]

> [when deciding justiciability questions] an effect on the wider community would need to be assessed… including ascertaining whether the accountability would be better provided by one of the politically accountable branches of government, the processes of which may allow wider participation in the review of executive action.

The principles of fiscal responsibility were expected to be applied and interpreted by Parliament not the courts, and therefore to be enforced by political rather than legal accountabilities.[72] Treasury stated:[73]

> The definitions of a 'prudent' level of debt, or risk management, a level of Crown net worth that provides a 'buffer against future events', or a 'reasonable' degree of predictability are not specified in the legislation. *It is left to the Government of the day to interpret the relevant fiscal terms in its Budget Policy Statement and Fiscal Strategy Report, and to justify those interpretations to Parliament and the public*.

The Court of Appeal also considers that judges should not generally be involved in making 'value judgments'.[74] Statutory terms such as 'excessive' (and presumably its antonym 'prudent') are not objective and therefore may be value laden:[75]

> If one asks…even in the circumstances of an individual case, whether a local authority's budgeted expenditure for a year is excessive, it is plain that there can be no objective criterion by which to determine the answer. What is the appropriate level of public expenditure and public taxation is, and has always been, a matter of political opinion.

The sway of 'high policy' considerations varies with the subject matter before the court. In New Zealand, courts have readily found the 'principles of the Treaty of Waitangi' – protected in statutes such as the State Owned Enterprises Act 1986 – to be justiciable, even though the principles might be considered subjective and value-laden, and even though the principles are not set out in those statutes.[76] However, common law courts have traditionally been more readily convinced by justiciability principles to defer to executive decision making in areas such as security and defence. Decisions by US courts show that government decisions about fiscal policy are also likely to attract a high degree of deference from the courts. In a system with an entrenched, supreme law Constitution, US courts are used to making decisions that might be considered 'high policy'

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69 Donald Tobin, 'The Balanced Budget Amendment: Will Judges Become Accountants?' (1996) 12 *Journal of Law & Politics*. 153.

70 Harris, Judicial Review, above n 60, 637-640.

71 Ibid 636.

72 Robinson, above n 4. New Zealand Treasury, 'above n 30.

73 Ibid.

74 *Lange v Atkinson* [1998] 3 NZLR 242 (CA), 462 in a section of the judgment entitled 'Court or legislature?'

75 *R v Secretary of State for the Environment, ex parte Hammersmith and Fulham London Borough Council* [1991] 1 AC 521 per Bridge LJ.

76 *New Zealand Māori Council v Attorney General* [1987] 1 NZLR 641 (HC and CA).

in Commonwealth courts. However, even US courts appear to take pains to stay out of explicitly dictating fiscal policy.

In the US, the courts may consider it constitutionally inappropriate to adjudicate on a matter, *even if* they consider themselves institutionally competent to do so, and *even if* they are provided with objective criteria to assess action against. The 'political question doctrine' allows United States courts to refuse to adjudicate on a matter if the issue is (inter alia) constitutionally committed to a coordinate political department, *or* impossible to decide without an initial policy determination of a kind clearly for non-judicial discretion, *or* cannot be resolved without the courts expressing disrespect for a coordinate political branch, *or* if potential embarrassment may arise from multifarious pronouncements by various departments on one question. Applying the political question doctrine, the Connecticut Supreme Court refused to require the state legislature to adhere to a balanced budget requirement, because to do so would create a conflict with a coequal branch of government.[77]

In line with decisions of some United States courts, New Zealand judges might also consider that the decisions they would have to make in 'macro-enforcing the [FRA] would be of the type best settled by a body designed to facilitate a consensus, rather than by an institution that aspires to administer impartial justice'[78] and that that budget issues are 'political questions to be decided by [Parliament and the executive] and therefore defer decisions regarding budgetary matters to their judgment'.[79]

The same justiciability principles would also apply to any attempt to enforce – through the courts – the reporting and accountability requirements in the FRA. Unlike the principles of fiscal responsibility, the reporting and accountability requirements seem at first glance to give objective criteria that judges could use to decide whether or not the executive is in compliance. It could be said that 'policy statements' and 'strategy reports' are tabled and published, or they are not, and that certificates are signed by executive, or they are not. Nevertheless, deciding whether these requirements have been met may involve high policy.

For example, the minister responsible for the administration of the FRA must publish fiscal strategy reports stating the executive's long-term objectives for fiscal policy.[80] The purpose of this duty is to provide information that will help improve fiscal policy.[81] If judges were to attempt to enforce the requirement at all, they should construe the text of the FRA in light of its purpose,[82] and therefore would need to decide what constitutes an adequately detailed statement.[83] This would involve examining the substance of any fiscal strategy report, rather than merely asking whether or not the minister had published something that he claimed to be a fiscal strategy report. The courts might not think themselves institutionally competent to decide what financial information is sufficient for Parliament, or to determine what information is sufficient to improve fiscal policy.

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77 Strahilevitz, above n 48, 524.

78 Ibid.

79 Lubecky, above n 47, 582.

80 And must do so on the day that the first Appropriations Bill to which the report relates is introduced to the House; FRA, s 7 and PFA s 8.

81 See text accompanying above n 28.

82 *Interpretation Act* 1999, s 5(1).

83 Assuming that judges would reject as unprincipled the approach of deciding only 'easy' cases (such as where no report had been published at all) and refusing to decide 'hard' cases.

B. Standing

Some commentators argue that the principles of justiciability are illegitimate, and that a violation of a public law right is all that must be established to render something subject to judicial review.[84] Even if this were the case, there may be no one who has legal standing to bring an action against a government for breaching the principles of fiscal responsibility or the FRA reporting and accountability requirements.[85]

The FRA imposes duties on the executive to pursue policy in accordance with certain principles, and duties to report to Parliament. However, duties do not imply corresponding individual rights in every statutory context:[86]

> Every public authority has the duty of observing the law in the conduct of its activities…but it hardly follows that every official action or decision is appropriately subject to judicial review. Nor will it necessarily involve a question of right. No one has a general *right* that public bodies observe the law, because such an assertion of right is meaningless.

Public welfare rationales drawn from public choice theory featured in the promotion of the FRA.[87] Perhaps this indicates that the FRA confers a collective right, owed in abstract to the public at large, but which in any event does not give individuals standing. Strahilevitz concluded that standing is a daunting barrier to judicial enforcement of United States balanced budget provisions,[88] and many of those provisions were, like the FRA, based on public choice theory rationales and designed to protect the public welfare.[89]

C. Parliament's intent

Sufficient evidence of legislative intent may override common law considerations of justiciability.[90] The long title of the FRA set out its purpose '[a]n Act to improve the conduct of fiscal policy by specifying principles of responsible fiscal management and by strengthening the reporting requirements of the Crown…'.

The courts are not mentioned, and the omission may show that Parliament did not intend judges to enforce the FRA. The FRA's long title instead highlights its comprehensive reporting and accountability provisions.[91] These requirements are meant to facilitate political oversight of the principles of fiscal responsibility, by providing Parliament and the public access to 'information on which they can judge the government's performance'[92] as against the principles of fiscal responsibility. The Opposition can be expected to use perceived non-compliance with the principles

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84 Finn, above n 61, 261-263.

85 Assuming that the FRA leaves traditional notions of standing intact.

86 Allan, above n 61, 223-224.

87 For example Treasury said of the FRA that it 'should encourage fiscal policy to make a strong positive contribution to the well-being of New Zealanders'; New Zealand Treasury, above n 30.

88 Ibid.

89 Lack of standing would also mean that individuals could not suffer any loss from a breach of public welfare legislation; See Strahilevitz, above n 48, 519.

90 Harris, Judicial Review, above n 60, 634.

91 Richardson, above n 2.

92 (26 May 1994) 540 NZPD 1149 (Rob Storey).

to embarrass politically the executive.[93] Parliament has empowered a means of political accountability, indicating that it intended the principles to be enforced politically rather than judicially.[94]

Parliament's intent also shows that the appropriate oversight for the reporting and accountability requirements is political rather than legal. There are viable alternatives to judicial enforcement of the FRA: public and parliamentary pressure,[95] impeachment[96] and the accountability regime under the State Sector Act 1988.[97] Judges might find that Parliament intended to rely on those mechanisms to enforce the reporting and accountability requirements rather than judicial oversight.

Most tellingly, Parliament has explicitly empowered the Finance and Expenditure Committee to fulfil the enforcement role. Evidence of this sort that fiscal issues have been committed to a 'coordinate political department' has been a 'particularly forbidding barrier' to judicial enforcement of balanced budget requirements in the United States.[98]

Section 16 of the FRA requires 'referral of every report required under the Act to the Parliamentary select committee responsible for the review of financial management (currently the Finance and Expenditure Committee)'.[99] The Finance and Expenditure Committee then reports its findings to Parliament,[100] so section 16 ensures that the content and adequacy of reports tendered under the FRA will be examined in a forum other than the courts:[101]

> The Committee has the opportunity to examine the Minister of Finance as part of its review, and is free to call in witnesses and expert opinion. The committee may obtain an independent assessment of the reports if it so desires.
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> This type of review is an important element in determining the credibility of any government's fiscal strategy. In addition, the review and Parliamentary debate of the Budget Policy Statement allow more

93 (22 June 1994) 541 NZPD 2011 (Ruth Richardson).

94 Parliamentary history also shows that Parliament did not intend judicial review to result For example, Tony Ryall, at the Second Reading of the Fiscal Responsibility Bill explains the principles as a 'guide to the Government', that will 'put real pressure on a Government', and that 'do not bind any successive Government' (7 June 1994) 540 NZPD 1486 (Tony Ryall). In New Zealand, parliamentary history can be used as an aid to statutory interpretation; *Marac Life Assurance Ltd v Commissioner of Inland Revenue* [1986] 1 NZLR 694, 701 (CA).

95 New Zealand Treasury, above n 30. NZPD 2010 (Ruth Richardson).

96 Parliament might constitute itself as a 'court' to impeach executive members who did not comply with reporting and accountability requirements. Impeachment was last used in the United Kingdom in 1906. Recently, also in the United Kingdom, some Members of the House of Commons commissioned a report that concluded that an action of impeachment against Prime Minister Tony Blair was viable. For a general overview of impeachment in the current United Kingdom political context, see House of Commons *What is Impeachment?* <http://www.w4mp.org/html/eni/2004q123/040827_impeachment.asp> (at 27 January 2005). For the report on whether Prime Minister Blair might have been susceptible to impeachment, see Report prepared for Adam Price MP (unknown author) *A Case to Answer: a first report on the potential impeachment of the Prime Minister for High Crimes and Misdemeanors in relation to the invasion of Iraq* (2004) <http://www.impeachblair.org/> (at 27 January 2005).

97 The State Sector Act 1988 gives the State Services Commissioner the power to create a regime of accountability in the state sector. The FRA reporting and accountability requirements might be incorporated into that regime. Accountability for non-compliance would ultimately be to the State Services Commissioner, through various provisions in the State Sector Act 1988.

98 Strahilevitz, above n 48, 524.

99 New Zealand Treasury, above n 30.

100 See, for example, Finance and Expenditure Committee, *Report of the Finance and Expenditure Committee: Budget Policy Statement 2006*, (February 2006). <http://www.clerk.parliament.govt.nz/Content/Select CommitteeReports/BPS%202006.pdf> (at 15 April 2006).

101 Ibid.

> open and transparent budget processes and increase the accountability to Parliament of the Government's fiscal management.

Judges might consider that because the Finance and Expenditure Committee can call expert witnesses and engage in explicitly political arguments as it wishes, it gives superior oversight to that which the courts might provide.[102]

D. Other possible barriers to enforcement

United States literature on balanced budget legislation suggests three further reasons that judges might not be able to enforce the FRA. These reasons either do not apply in New Zealand, or are beyond the scope of this article to assess.

United States literature suggests that it may be virtually impossible for a potential plaintiff to make out factual causation of loss.[103] For example it may be difficult to attribute 'pursuit of policy' to the executive rather than Parliament, given the complex way policy can evolve.[104] However, this is a practical barrier to a plaintiff mounting a successful action for breach of the FRA, rather than a legal barrier to the Courts hearing that action.

Crosthwait has also argued that United States balanced budget requirements are unenforceable because there are no appropriate remedies.[105] She argues that a mere declaratory judgment should not be available where no other remedies are available, and that no remedies (such as injunction or compensation) can be given against an executive or legislature for breaching balanced budget requirements.[106] However, *Moonen v Film & Literature Board of Review (No 2)*[107] makes it clear that even if no other remedies are available, New Zealand courts can declare that the executive has acted inconsistently with statute.[108]

Finally, Strahilevitz suggests that '[c]ourts reluctant to delve into the realm of budgetary policy could concoct a number of convincing rationales for refusing to decide such cases on the merits'[109]. It is beyond the scope of this article to consider whether New Zealand judges would prefer not to enforce the FRA, and if so, whether they would take the unsavoury approach of deliberately reasoning towards their preferred outcome.

E. Conclusions on Enforceability

The FRA appears to be 'unenforceable' in the sense that a breach of it will not attract legal sanction. Although the FRA imposes legal duties, duties at public law might not confer judicially enforceable rights. Instead, justiciability principles and the purpose and scheme of the FRA indicate that the political arena is the appropriate forum for accountability. Parliament and the public are

102 For an example of the questioning of the Minister Finance on matters of fiscal responsibility and the Treasury and Government Financial Statements, see Collier (ed), *Select Committee News* 3 March 2006 8-10.

103 Ibid.

104 Court interference in legislative processes is limited: see McGee, 'The Legislative Process and the Courts' in P Joseph (ed), *Essays on the Constitution* (1995) 84, 93 citing *Comalco Power (New Zealand) Ltd v Attorney-General* (19 December 1986) unreported, High Court per Heron J.

105 Bowen, above n 53, 608-610.

106 Ibid.

107 [2002] 2 NZLR 754 (CA).

108 It is beyond the scope of this article to consider the possible remedies in detail, given its conclusion that the courts will not attempt to enforce the FRA.

109 Strahilevitz, above n 48.

therefore expected to 'enforce' the FRA through political pressure. This may make the FRA peculiar. Part Three considers whether it also makes the FRA legal and constitutional 'nonsense'.

III. Despite Being 'Unenforceable' the FRA has Legal and Constitutional Effects

It may be tempting to think that because the FRA is unenforceable it has no legal or constitutional significance. Winston Peters said of the Fiscal Responsibility Bill 'legislation of this type in this country is meaningless unless this Parliament means to keep the faith',[110] and claimed that it signified 'absolutely totally nothing'.[111]

This section argues that despite being unenforceable the FRA has legal and constitutional impacts because: (1) statutes may have legal functions other than providing recourse to the courts on breach; and (2) the proposition that the FRA cannot affect New Zealand's constitution supposes a Diceyan parliamentary sovereignty. Taking into account recent constitutional developments, a Diceyan view of New Zealand's constitution may no longer be accurate.

A. The Legal Effects of the FRA

Providing for judicial sanction is not the only function or effect of a statute. The FRA might give signals to citizens and help judges to interpret other laws.

Law not only tells judges what to do after someone breaks it, law also tells citizens what not to do in advance.[112] As law the FRA may give the executive two reasons for not breaching it, even to those who see the FRA as 'nonsense'. Ministers and officials who have an 'internal point of view'[113] to law may try to avoid breaching the FRA.[114] Furthermore, a perceived breach of the FRA, although not attracting judicial sanction, may prompt the Opposition to accuse the executive of 'fiscal irresponsibility'.[115] The label 'fiscally irresponsible' might provoke negative reaction from the electorate (lost votes at the next election) and deter breach or repeal of the FRA. The promoters of the FRA intended this to be the case.[116]

Presumably an Opposition could accuse a government of being fiscally irresponsible, even if the FRA had not been enacted:[117]

> If future Government wants to be fiscally irresponsible, the punishment might come from the operation of the financial markets not from the fact that they have been a bit naughty in the terms of the wording of Parliament. The notion that an Act of Parliament itself will have more weight in the world economy than a reaction of those who actually look at what a Government does, is itself a piece of economic and constitutional nonsense.

110 (7 June 1994) 540 NZPD 1490 (Winston Peters).

111 (26 May 1994) 540 NZPD 1143 (Michael Cullen).

112 Jim Evans, Statutory Interpretation: Problems of Communication (1988) 51; in the context of criminal law, see A P Simester and W J Brookbanks, Principles of Criminal Law (2nd ed, 2002) 28.

113 In the sense of a mutual acceptance of the law as a standard for assessing conduct, for reasons other than fear of sanction.

114 See generally HLA Hart, The Concept of Law (1994).

115 Indeed this label was used during the legislative process: 'Would the member agree that a vote against the Bill is a vote for fiscal irresponsibility?' (22 June 1994) 541 NZPD 2024 (Max Bradford).

116 See (26 May 1994) 540 NZPD 1151 (Clem Simich). See also (22 June 1994) 541 NZPD 2029 (Jim Bolger).

117 (26 May 1994) 540 NZPD 1143 (Michael Cullen).

However, with the FRA in force, accusations of fiscal irresponsibility might have extra bite because the Opposition can also say that 'fiscal irresponsibility' is *illegal*. A voter might disapprove of a 'fiscally irresponsible' executive that also *breaks the law* more than she would disapprove of a 'fiscally irresponsible' executive whose actions were lawful. A voter may disapprove of an illegal act even if she thought the law being broken had no merit (or had not formed a view about the merit of the law).[118] A voter may also be more likely to think that an idea has merit if it is enshrined in law. The economic concept of signaling explains why.[119] Signals communicate information that might otherwise be costly or difficult to access. For a signal to be credible it must be costly to fake. A classic example of signaling is:[120]

> One wears a threadbare polyester suit…the other wears an impeccably tailored sharkskin suit and drives a new BMW…. Our simple signalling principles suggest that the latter attorney is a better bet. The reason is that a lawyer's ability level in a competitive market is likely to be mirrored closely by his income, which in turn will be positively related to his consumption.

That the principles in the FRA are 'law' might signal to voters that there is a broad social consensus that behaviour that the statute requires has merit, even though voters might not be able to observe directly the existence of such norms. Many voters may not have the expertise or time to evaluate the economic desirability of the principles in the FRA,[121] and the mere fact that the principles are law may signal to voters that they have been rigorously tested and are sound. Voters may therefore conclude that any breach of the FRA is a breach of principles that society approves of and that are economically sound. Assuming that voters think that economically sound, widely endorsed ideas have merit, they may therefore react negatively to a breach (or repeal) of the FRA.

By employing the signaling function of law, the FRA may indeed be, as Elizabeth Tennant suggested, 'a public relations exercise'.[122] Indeed its expression indicates that its drafters intended to invoke the signaling function of law. Margaret Clark observed that any Act repealing the FRA 'would immediately be dubbed the 'Fiscal Irresponsibility Act'.[123] David Caygill made a similar observation,[124] 'This Bill should have been…a public finance amendment bill. How it came to be called something so grandiose as the Fiscal Responsibility Bill is a story in itself.'

Characterizing the FRA as a signal may also help explain why political parties other than National have proposed responsibility legislation of their own. If a signal (such as passing principles into law) effectively communicates a desirable quality (such as the merit of those principles) then this will force others to signal whether or not they have that same quality.[125] Other governments have an incentive to embed their preferred principles of responsibility in law, because otherwise voters might assume that their ideologies are not widely accepted or meritorious.

As well as performing a signaling function, the FRA may also affect judicial thinking and the outcomes of cases, even if judges cannot directly enforce it.

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118 See generally Hart, above n 114.

119 Robert Frank, Microeconomics and Behaviour (4th ed, 2000) 196.

120 Ibid.

121 See (26 May 1994) 540 NZPD 1146 (Peter Dunne).

122 (22 June 1994) 541 NZPD 2022 (Elizabeth Tennet).

123 Margaret Clark, 'Central Government in the Future' in Futures Trust, *Our Country: Our Choices* (1997) <http://www.futurestrust.org.nz/publications/book/centralgovernment.html> (at 27 January 2005).

124 (22 June 1994) 541 NZPD 2025 (David Caygill).

125 Frank, above n 119, 191.

'All Acts of Parliament must fit into the body of the law as a whole'[126] so when interpreting statutes, judges can consider the FRA. If provisions in two different Acts appear to be inconsistent, courts must strive for an interpretation that best reconciles the inconsistency.[127] Therefore statutory provisions can be construed so as to reconcile them with the principles in FRA.[128]

Choudry v Attorney-General[129] shows that the FRA can also influence the interpretation of common law terms. In *Choudry v Attorney-General*, the Court surveyed Acts that used the word 'security' (including the FRA 1994) in order to decide how to define 'security' in the context of public interest immunity.[130]

The lawmaking role of judges might also allow the FRA to have legal effects. Grau observed, 'as a matter of reality in New Zealand judges are more and more frequently called upon to make political decisions'.[131] Judges legitimately make law when developing the common law.[132] Parliament can also delegate judges the task of lawmaking, by passing deliberately indeterminate legislation;[133] Franks accuses 'cowardly and cunning politicians' of passing 'obscure and ambiguous' law 'capable of application only using broad discretion and judicial ingenuity', and thereby deliberately 'sending intractable political issues to the Courts for decision'.[134]

When judges make law, they must identify the relevant social and moral principles and public policy.[135] Perhaps because the lawmaking task requires judges to canvass wide-ranging policy considerations, Sir Ivor Richardson extra-judicially criticized counsel as being:[136]

> …somewhat reluctant to explore wide social and economic concerns; to delve into social and legal history; to canvas law reform committee materials; to undertake a review of the general legislative approach in New Zealand to particular questions…and so on.

Judges could use the FRA to explore wide social and economic concerns. The FRA articulates principles that Parliament considers to be 'sound'.[137] Courts could strive to develop the law consistently with the principles. Using the FRA in this way could enhance the legitimacy of judicial lawmaking. The courts would be relying on Parliament's statements to guide their policy choices, and Parliament is arguably the institution in New Zealand's constitution best suited to formulating policy aims.[138]

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126 J S Burrows, Statute Law in New Zealand (3rd ed, 2003), 168.

127 Ibid.

128 This should be distinguished from section 6 New Zealand Bill of Rights Act (NZBORA) interpretation. The NZBORA arguably allows 'possible' interpretations of other Acts to be preferred if they are consistent with the NZBORA, even though such interpretations might not realistically reflect the intent of Parliament.

129 [1999] 2 NZLR 582 (CA).

130 Ibid 594.

131 Karen Grau, 'Parliamentary sovereignty: New Zealand - New Millennium' (2002) 33 *Victoria University Wellington Law Review* 351, 375.

132 *Lange v Atkinson,* above n 74 441-442.

133 BV Harris, 'The Law-Making Power of the Judiciary' in P Joseph (ed), *Essays on the Constitution* (1995) 266, 270-273.

134 Franks, 'On Tanner's 'Confronting the Process of Statute Making' in R Bigwood (ed), *The Statute: Making and Meaning* (2004).

135 Sir Ivor Richardson, 'The Role of Judges as Policy Makers' (1985) 15 *Victoria University Wellington Law Review* 46.

136 Ibid 50.

137 *Fiscal Responsibility Act* 1994, s 4 and *Public Finance Act* 1989, s 5.

138 See generally Harris, Judicial Review, above n 60, 640-643.

Although judges cannot enforce the FRA, it makes sense to describe the FRA as 'law'; it is a statute and therefore can influence judges' decisions, and it performs the signalling function of law. It might not be a stretch to think that the FRA could also have constitutional effects.

B. The 'Constitutional' Effects of the FRA

Over the past two decades, interest in New Zealand's constitution and constitutional change has intensified. Goldsworthy recently argued that 'today, a number of judges and legal academics in Britain and New Zealand are attempting a peaceful revolution, aimed at toppling the doctrine of parliamentary sovereignty and replacing it with a new constitutional framework in which Parliament shares ultimate [lawmaking] authority with the courts'.[139] This section argues that the FRA, despite being in a sense 'unenforceable' may be playing a role in any such revolution.

C. Diceyan presumptions

Michael Cullen said of the Fiscal Responsibility Bill '[I]t is a constitutional nonsense…the notion that this Parliament will somehow bind future Governments on fiscal policy…is constitutional stupidity'.[140] This would be an accurate assessment of the FRA, if Diceyan theory were an accurate description of New Zealand's constitution.

Two central tenets of Dicey's theory are that Parliament can make or unmake any law and that all statutes have equal force.[141] In a Diceyan parliamentary sovereignty, higher, entrenched law is impossible. Therefore in a Diceyan parliamentary sovereignty the phrase 'constitutional law' can take on a highly restricted and specific meaning: law that creates rights that are enforceable in the courts by the conferment of remedies. This is the interpretation of Dicey that Patmore and Thwaites took. They wrote that in a Diceyan parliamentary sovereignty, 'the law of the constitution is not the source, but the consequence, of the rights of individuals, as defined and enforced by the courts'.[142] Rights are 'based on private law actions',[143] and so rights are 'the result of the ordinary law of the land'.[144] Under this reading of Dicey, the 'constitution' is changeable because rights can be changed by ordinary statute. Also, 'Dicey emphasized… an 'inseparable connection' between rights and remedies …. [remedies] give practical effects to rights rather than simply declaring them'.[145]

If Patmore and Thwaites are correct, then in a Diceyan parliamentary sovereignty an unenforceable statute does not create rights and cannot be 'constitutional'. Consequently if New Zealand were a Diceyan parliamentary sovereignty, the FRA could be accurately described as 'constitutional nonsense'. Indeed, it is likely that Cullen assumed New Zealand has a Diceyan legal

139 Jeffrey Goldsworthy, 'Is Parliament Sovereign? Recent Challenges to the Doctrine of Parliamentary Sovereignty' (2005) 3 *New Zealand Journal of Public and International Law* 7.

140 (26 May 1994) 540 NZPD 1143 (Michael Cullen).

141 A V Dicey, Introduction to the Study of the Law of the Constitution (10th ed, 1964) 40; Burrows, above n 126, 15.

142 G Patmore and A Thwaites, 'Fundamental Doctrines for the Protection of Civil Liberties in the United Kingdom: A V Dicey and the Human Rights Act 1998 (UK)' (2002) *Public Law Review* 52, 55.

143 Ibid.

144 Ibid.

145 Ibid 56.

system when he said as much: Cullen champions Diceyan theory as both an accurate description of New Zealand's constitution and a desirable constitutional structure.[146]

D. Recent constitutional developments

If Diceyan theory does not describe New Zealand's legal system well then it might not be ludicrous to claim that the FRA has constitutional importance. Goldsworthy claimed that judges are undermining the Diceyan parliamentary sovereignty:[147]

> if Diceyan parliamentary sovereignty is faced with a challenge in the near future, it is most likely to arise from further development of the tendency to describe important common law principles – and now statutes – as having 'constitutional status, which entitles them to special protection….

Four special protections that judges might give 'constitutional' statutes are outlined below. Some of these protections might already exist in New Zealand and other Commonwealth jurisdictions.

First, the courts might consider that 'constitutional' statutes can affect the development of law more than 'ordinary' statutes. *Lange v Atkinson* may be evidence that the Court of Appeal has already taken this view.[148]

Secondly, courts refer to parliamentary history, and where there are indications that Parliament enacted a statute under mistake or ignorance they may be unwilling to apply it.[149] Judges may scrutinize more intensely the legislative history of statutes that appear to be inconsistent with 'constitutional statutes'. Judges may also be more ready to apprehend legislative mistake where Parliament has seemingly ignored statutory principles of a constitutional character. This is one interpretation of the judgments of Elias CJ and Tipping and Thomas JJ in the Court of Appeal case *Pora*. In *Pora,* these judges decided that a non-restrospectivity provision of the Criminal Justice Act 1985 was not impliedly repealed by a seemingly inconsistent amending provision. They seemed to have been influenced by the perception that Parliament made a 'mistake' in enacting the amending provision,[150] and that the amending provision seemed to override constitutional rights.[151]

Thirdly, the Court in *Thoburn v Sunderland City Council*[152] (*Thoburn*) ruled that in the United Kingdom, 'constitutional' statutes are not subject to implied repeal:[153]

> In the present state of its maturity the common law has come to recognise that there exist rights which should properly be classified as constitutional or fundamental […] from this a further insight follows. We should recognise a hierarchy of Acts of Parliament: as it were 'ordinary' statutes and 'constitutional' statutes. […] The special status of constitutional statutes follows the special status of constitutional rights.

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146 Michael Cullen 'Parliament: Supremacy Over Fundamental Norms?' (2005) 3 *New Zealand Journal of Public and International Law* 1.

147 Goldsworthy, above n 139, 8.

148 See text accompanying below n 180.

149 The Laws of New Zealand vol 7, Constitutional Law, para 1, 1-3.

150 Anita Killeen, Richard Ekins and John Ip, 'Undermining the Grundnorm?' [2001] 5 *New Zealand Law Journal* 299, 308.

151 Rebecca Prebble 'Constitutional Statutes and Implied Repeal: the *Thoburn* Decision and the Consequences for New Zealand' (2005) 36 *Victoria University Wellington Law Review* 291, 303.

152 [2003] QB 151.

153 Ibid, para 62, Laws J.

The Court found that the European Communities Act was a Constitutional Statute and could not be impliedly repealed by the Weights and Measures Act 1985. Prebble has argued that *Pora* was a precursor to *Thoburn*:[154]

> [I]t is tempting to conclude that the real reason why [Elias CJ and Tipping J] judges rejected implied repeal is that the provision that would have been repealed was one that guaranteed a constitutional right. Elias CJ and Tipping J may have felt that the proposition that constitutional statutes cannot be impliedly repealed was better hedged around than baldly stated.

On this basis, Prebble concluded that it is highly likely that New Zealand courts will soon unequivocally adopt the position that constitutional provisions cannot be impliedly repealed.[155]

Finally, judges might eventually declare that Parliament cannot ever override constitutional rules.[156] For example, Elias CJ extra-judicially notes that 'constitutional fundamentals' may give judges a reason to strike down statutes:[157]

> [T]he possibility that legislation may be struck down by the courts for reasons other than inconsistency only with the Bill of Rights Act is left open. That itself may be of some significance in any case involving constitutional fundamentals and raising questions of the competence of Parliament….
>
> Such a result would cause some reassessment of traditional notions of Parliamentary sovereignty, although the decencies would be preserved if the courts do not purport to disallow legislation directly. Although some will view this development with alarm, increasingly it has come to be recognised that the notion of arbitrary Parliamentary sovereignty within its area of formal competence represents an obsolete and inadequate idea of the constitutions of both Australia and New Zealand.

Elias CJ suggests that 'constitutional fundamentals' can be found in statute law:[158]

> Arguably, the Constitution Act 1986 in New Zealand now recognises a separation of function between the legislative, executive and judicial branches which operates as a fetter upon encroachment by Parliament. Although we lack a basic constitutional text, the principles of democratic representation from which our laws gain legitimacy, may be seen as constitutional principles of law.

Assuming Goldsworthy is correct, and New Zealand judges consider (or will consider in the near future) that 'constitutional' statutes are entitled to special protection, what criteria will judges use to decide whether or not the FRA is constitutional?

One possibility is that judges will take a realist approach to the question. According to Palmer, a 'constitutional realist approach' requires that 'a rule should be regarded as constitutional if it plays a significant role in influencing the generic exercise of public power – whether through structures, processes, principles, rules, conventions or even culture'[159]. This method of isolating 'constitutional' rules from the rest clearly considers more than the subject matter of a statute. It also requires a study of a statute's actual impacts, an analysis that might draw on disciplines such as economics, political science, and sociology to identify and describe how the statute has influenced the de facto exercise of public power. This could involve examining, inter alia, how the expression of the statute's substance came about, how much consensus there was around its enact-

154 Prebble, above n 151.

155 Prebble, above n 151, 316.

156 Goldsworthy, above n 139; see generally Robin Cooke 'Fundamentals' [1988] 41 *New Zealand Law Journal* 158,164; Sian Elias 'Constitutions and Courts' (Speech delivered at the AIJA Oration, Sydney, 16 June 2000).

157 Sian Elias 'Constitutions and Courts' (Speech delivered at the AIJA Oration, Sydney, 16 June 2000) 8-9.

158 Ibid, 11.

159 Palmer, above n 59.

ment,[160] its impact on the 'everyday lives' of citizens[161] and whether or not it has been complied with.

The possibility of judges adopting a realist approach to identifying constitutional law has been criticized for lacking firm criteria, leading to arbitrary outcomes, and effectively entrusting the matter to judicial discretion.[162] This article does not normatively assess the realist approach; it merely notes that New Zealand judges might use it and outlines some possible consequences of them doing so. Judges in other Commonwealth jurisdictions seem to have already taken a realist approach to identifying constitutional rules.

In *Australian Capital Television*[163] Brennan J stated that when identifying implied constitutional principles from an entrenched constitution, 'political conditions' should be taken into account.[164] By analogy, the social and political history of a statute may therefore influence whether or not it is 'constitutional'.

Thoburn, as well as being an example of a 'constitutional' statute being given special protection, is also an example of a statue being labelled 'constitutional' because of its practical impact. In *Thoburn*, Laws LJ said a 'constitutional statute' was one that 'conditioned the legal relationship between citizen and state in some general, overarching manner or enlarged or diminished the scope of what were regarded as fundamental constitutional rights'.[165] When applying his test Laws LJ took into account practical impacts of the European Communities Act stating 'it may be there has never been a statute having such profound effects on so many dimensions of our daily lives. The 1972 Act is, by force of the common law, a constitutional statute'.[166]

New Zealand courts may already be heading in the direction of constitutional realism, if (as Prebble argues) *Thoburn* is a natural progression from *Pora*.[167] If New Zealand judges were to adopt explicitly a *Thoburn*-like approach, any practical and historical importance that the FRA has could translate into legal protections. The FRA has been called 'one of the most important pieces of economic and fiscal legislation in New Zealand since 1840'.[168] On the basis of such observations, the FRA could be considered 'constitutional' despite being in a sense 'unenforceable'.

Commentary on New Zealand's constitution routinely states that the FRA is a constitutional statute. Harris stated 'currently operative constitutional statutes enacted by the New Zealand Parliament include the…Fiscal Responsibility Act 1994'.[169] Allan argued that the FRA is one of the statutes that 'lie at the heart of the constitution understood in a broad sense'.[170] Joseph identified the FRA as being one of the Acts that have effected a transition in New Zealand's constitution

160 Constitutional Arrangements Committee, 'Inquiry to review New Zealand's existing constitutional arrangements: Report of the Constitutional Arrangements Committee I 24A' (House of Representatives, Wellington, 2005) 26.

161 *Thoburn*, above n 152.

162 Prebble, above n 151, 237.

163 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) CLR 177.

164 Ibid, para 16, Brennan J.

165 *Thoburn*, above n 152, [62] Laws LJ.

166 Ibid.

167 Prebble, above n 151.

168 Richardson, above n 2, 244.

169 Harris, 'The Constitutional Future of New Zealand' [2004] *New Zealand Law Review* 269, 279-280.

170 Allan, 'Why New Zealand Doesn't Need a Written Constitution' (1998) 5 *Agenda* 487, 492.

over the past 20 years.[171] *The Laws of New Zealand* used the FRA to support its claim that New Zealand's constitution is changeable.[172]

Some claims that the FRA is constitutional are based (at least in part) on the FRA's practical effects. For example, the Constitutional Arrangements Committee's Inquiry to Review New Zealand's Existing Constitutional Arrangements identified significant constitutional developments by examining the practical significance of events from a historical perspective:[173]

> the demarcation between significant constitutional, as opposed to historical events is itself contentious.… Constitutional significance, according to a recently published text on the New Zealand Bill of Rights, 'arises from an amalgam of considerations, including the importance of the enactment to transcending constitutional questions, the consensus of commentators, and public opinion'.

Under this methodology, the FRA made the Committee's list of events that represent significant developments in New Zealand's constitution, under the heading '1986: reform of the public sector to promote efficiency and accountability'.[174] Palmer's realist approach of examining 'structures, processes, culture and conventions that constitute the way that government power is exercised'[175] led him to find that the Fiscal Responsibility Act 1994 is a key constitutional statute.[176]

When these commentators say that the FRA is 'constitutional', they do not necessarily suggest that New Zealand is not a Diceyan Parliamentary Sovereignty. They may merely be using the term 'constitutional' in a different way to Patmore and Thwaites: to make an observation about the political impacts and substance of a law rather than to make an observation about whether or not that law creates enforceable rights. Furthermore, Diceyan theory accommodates the idea that laws or customs may in reality constrain Parliament:[177]

> [I]f a legislature decided that all blue-eyed babies should be murdered, the preservation of all blue-eyed babies would be illegal; but legislators must go mad before they could pass such a law and subjects must be idiotic before they could submit to it.

Therefore, commentators who observe that the FRA is in some socio-political, practical, or realist sense 'constitutional', are not necessarily suggesting that judges should give it *legally* recognised special protection.[178] However judges may decide to take that further step, and formalise the observed de facto effects of legislation with de jure legal protections. Any widespread view that the FRA is 'constitutional' as a matter of practice may encourage them to do so.[179]

Lange v Atkinson arguably shows that some New Zealand judges already consider:

- the FRA has constitutional effects in that it evidences or helped to make basic changes in the constitution;
- whether or not a statute evidences or makes changes to the constitution is determined by the statute's practical effects; and

171 Joseph, above n 52, 4-5.

172 *The Laws of New Zealand* vol 7, Constitutional Law, para 1, 1-3.

173 Constitutional Arrangements Committee, above n 160 30.

174 Ibid, 69-70.

175 Palmer, above n 59.

176 Ibid 17.

177 L Stephen, Science of Ethics (1882) 143.

178 For example Allan explicitly rejects this idea; above n 170, 487.

179 Harris, 'Sovereignty and Interim Injunctions' (1992) 15 *New Zealand Universities Law Review* 15 (1992) 55, 64 quoting Cooke, 'Practicalities of a Bill of Rights' (1984) 112 *Council Brief* 4 (F.S. Dethridge Memorial Address).

- statutes that have constitutional effects may have greater influence on judicial decisions than others.

In *Lange v Atkinson*, the Court expanded the defamation defence of qualified privilege in relation to political statements. The Court reached that decision by building a history of New Zealand's constitution, devoting an entire section of its judgment to 'Political Statements in the New Zealand Constitutional Context'. The Court agreed with Stephen that:[180]

> Two different views may be taken of the relation between rulers and their subjects. If the ruler is regarded as the superior of the subject … it must necessarily follow that it is wrong to censure him openly…. If on the other hand the ruler is regarded as the agent and servant … it is obvious that this sentiment must be reversed.

The Court also agreed with Stephen that a constitution can move between these two states, and considered that such a constitutional change had occurred in New Zealand:[181]

> [Stephen's] comment may suggest the relative and contingent character of areas of law like the present. It may better be seen as indicating a movement over the centuries as part and parcel of basic changes in the constitution, including the electoral system, which had led by the late nineteenth century to much greater freedom of political speech….

Stephen's change nevertheless has occurred in substantial measure. We are citizens of New Zealand rather than subjects of the sovereign.

These 'basic changes in the constitution' were evidenced by statutes that had enshrined in law principles such as 'the right of New Zealanders to participate in the process of policy and decision making and to call the government to account' and the corollary principle of the free flow of information (particularly official information).[182] The FRA was a statute that evidenced basic changes in the constitution in this way:[183]

> The emphasis on transparency is to be seen as well in legislation regulating the structure of the state sector and the government's spending and fiscal responsibilities, especially the State Sector Act 1988, the Public Finance Act 1989 and the Fiscal Responsibility Act 1994.[184]

The 'unenforceability' of the FRA did not prevent the Court from seeing it as evidence of constitutional change. The Court concluded that qualified privilege should be developed in a manner consistent with the principles it had derived from its survey of legislation, and its resulting understanding of New Zealand's constitution.[185]

Therefore in *Lange v Atkinson*, the FRA was seen as constitutional in the sense that the Court thought it evidenced constitutional change. The Court may have thought that the FRA was practically important in introducing the principle of transparency into de facto public practice, given the state of the law and of the political relationship between citizens and the government before and after the FRA.

Perhaps any Act with subject matter relevant to defamation would have influenced the Court's decision. However, the Court went to lengths to establish that the relevant statutes considered related to *constitutional* ideas. The importance of a principle being constitutional (reflecting or effecting a 'basic change' in the constitution) could be twofold. Constitutional principles might have

180 *Lange v Atkinson*, above n 74, 461.

181 Ibid 462-465.

182 Ibid 462-465.

183 Ibid 445.

184 Ibid, 464.

185 Ibid, 464-478.

greater weight than other legal principles when a court is making any legal decision. It could also be that the Court thought that it was developing a constitutionally important area of the common law. When judges develop the constitution at common law, perhaps they will be highly persuaded only by statutory principles that are 'constitutional'.

If this interpretation is correct, it is evidence that the FRA has already been given more legal weight than other statutes because of its constitutional character. Although the Court in *Lange v Atkinson* does not explicitly reject the doctrine that all statutes are equal, it may have been acting on Elias CJ's suggestion of seeking to preserve the 'decencies' by couching its judgment in reassuring terms.

If judges were to examine the social and political impacts of statutes to determine whether or not they are constitutional, then the practical and constitutional effects of the FRA might form a feedback loop. If judges found that the FRA had profound practical impacts on the executive they might consider it constitutional.[186] The label 'constitutional' could act as a signal to voters; just as voters might think that the law enshrines widely accepted and rigorously tested principles, they might think that this is even more likely to be true of 'constitutional' law. Voters might therefore react more adversely to fiscal irresponsibility that breaches 'constitutional' law rather than 'ordinary' law. Knowing this, the executive may be less likely to breach the FRA if the courts were to consider the FRA 'constitutional', so if the courts were to suggest that the FRA is constitutional, this could make its practical effects more profound. This in turn might give the courts more reason to think that the FRA is 'constitutional', and so on.[187]

Through this iterative process, a statute like the FRA that was given little academic attention at the time of its enactment could work its way to the centre of New Zealand's constitutional developments.[188] In a legal system where all statutes are not equal and some statutes can limit Parliament's lawmaking power, it is not nonsense to describe the FRA as constitutional or to think that it might be constitutional one day.

IV. The FRA and New Zealand's Constitutional Development

The above analysis of the FRA suggests four possible insights into New Zealand's constitutional developments that all deserve further dedicated testing.

A. Constitutionally Privileging Neo-liberalism?

The FRA has been considered 'constitutional', based on a historical examination of its social and political impacts. This suggests that other statutes in the Financial Management Reform 'package' – enacted around the same time as the FRA, in order to effect the same economic and political ideology, and in response to the same historical context and motivations – might also be thought of as constitutional.

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186 *Thoburn*, above n 152.

187 Judicial views of the constitution may already be influencing the de facto exercise of power. The Cabinet Office, Department of the Prime Minister and Cabinet, Cabinet Manual, (2001) mirrors the judgment in *Lange* by stating that the 'emphasis on greater transparency in decision making and policy development is also to be seen in the legislation governing the government's spending and fiscal policies (especially the Public Finance Act 1989 and the Fiscal Responsibility Act 1994)'.

188 See generally Palmer's account of constitutional convention as 'iterative and endogenous': Palmer, above n 59, 24.

Even in 1994 it was evident that the FRA and other Financial Management Reform statutes were closely related and historically significant:[189]

> That is what is so momentous about [the Fiscal Responsibility Bill] today. It is one of the more important moments in modern political economy. This legislation will fit well with the progressive legislation of the members opposite – the Reserve Bank of New Zealand Act and the Public Finance Act.
>
> Lots of legislation passes through this House, but this is one of those key pieces of legislation….In the past few years a number of key pieces of economic legislation have been passed, and I go right back to 1986 and the State-Owned Enterprises Act. I refer…to the Public Finance Act and the Reserve Bank of New Zealand Act, and I add the Employment Contracts Act….This Fiscal Responsibility Bill will add a fifth dimension to those major pieces of economic legislation and, to me, it will complete the jigsaw puzzle and add the last piece that is so critical.

The commentators and judges cited in Part III who have labelled the FRA constitutional have generally said the same thing about other Financial Management Reform statutes, perhaps because the Financial Management Reform statutes have shared practical significance. The Constitutional Arrangements Committee identified the 'reform of the public sector to promote accountability and efficiency' as one of New Zealand's 'constitutional milestones',[190] focusing on the historical and political significance of the statutes passed during that reform:[191]

> In 1986 New Zealand initiated reform of the public service in order to promote greater efficiency and greater public accountability. The reforms downsized the core public service. The role of the state was redefined, limiting its involvement to the exercise of constitutional and coercive powers and to where it had a comparative advantage.

Three key statutes led the reforms; the State-Owned Enterprises Act 1986, the State Sector Act 1988, and the Public Finance Act 1989. The reforms continued under the Fiscal Responsibility Act 1994.

> The Reforms began with the State-Owned Enterprises Act 1986, which transformed five state-owned corporations into nine new State enterprises…. The State Sector Act 1988 reconfigured the relationship between Ministers and Departments…. The Public Finance Act 1989 transformed the framework for the financial management of the public sector and its reporting to Parliament…. The Fiscal Responsibility Act 1994 imposed a medium and long-term focus on government expenditure and strengthened the reporting requirements of the Crown.

Applying his constitutional realist approach, Palmer found that the State Sector Act 1988, the State Owned Enterprises Act 1986, the Public Finance Act 1989, and the Fiscal Responsibility Act 1994 were all key constitutional statutes. Alongside the FRA, Allan considered the Reserve Bank of New Zealand Act to be one of the most important statutes that lie at the heart of the constitution in a broad sense.[192] The State Services Commission stated that the 'reform of the state sector, including the enactment of the State Owned Enterprises Act 1986', and the 'enactment of the State Sector Act 1988, the Public Finance Act 1989, and the Fiscal Responsibility Act 1994' were '[r]ecent significant changes to the New Zealand Constitution'.[193] In *Lange v Atkinson*, the

189 (22 June 1994) 541 NZPD 2019 (Tony Ryall).

190 Constitutional Arrangements Committee, above n 160, 69-70.

191 Ibid.

192 Allan, above n 170, 492.

193 State Services Commission, The Constitutional Setting (1995) 8.

State Sector Act 1988, the Public Finance Act 1989 and the Official Information Act 1982 were all mentioned in the Court's account of constitutional change.[194]

It is unsurprising that Financial Management Reform statutes such as the FRA catch the attention of judges and commentators who use a realist approach to identify constitutional statutes. The FMR was a 'breathtaking change in New Zealand and one which would ultimately transform the social, economic and cultural landscape of the nation', and a 'remarkable convulsion' by which the architecture of the public sector was 'reorganised on a scale and at a pace that in earlier times would have been thought impossible'.[195] It instigated 'dramatic changes in the style of public administration as the public sector [was] put through the wringer of efficiency, economy, and effectiveness'.[196] Not before the Financial Management Reform had New Zealand law so explicitly dealt with the structure and functions of government, or reflected one set of norms so clearly and consistently.[197]

The Financial Management Reform had 'profound', 'massive', 'revolutionary' and 'dramatic'[198] impacts on the way that law is made, on the way government operates, and therefore on the everyday lives of New Zealanders. Because of this, under a judicial approach that translates historical importance into constitutional protection, the neo-liberal values of the Financial Management Reform statutes might be expected to be 'constitutionalised'. Just as Beresford argues that the neo-liberal economic values of the financial management reform have been assimilated into the administrative law of New Zealand, neo-liberal ideas might form the basis of any new, non-Diceyan constitutional law that will be declared by judges.

Evaluating the merits of judge-led constitutional reform may require evaluating whether or not neo-liberal values form an adequate basis for New Zealand's constitution.[199]

B. Democratic Credentials for Judge-Led Constitutional Change?

Part IIIs analysis of the FRA might also suggest something about the desirability of judge-led constitutional reform. Goldsworthy and Cullen (among others) have argued that any judge-led constitutional reform is undesirable because it is undemocratic.[200] It has been said that 'the effect of giving constitutional protection to some core values is to put them out of the reach of ordinary political debate and contest', and that therefore 'substantive values should not receive constitutional protection without broad and enduring social agreement'.[201] The approach to identifying 'constitutional' law described in Part Three arguably has democratic credentials; judges would be using statutes as the basis of constitutional reform, and statutes reflect the democratic will of the electorate as expressed by Parliament. Financial Management Reform statutes could be taken as evidence of a broad and enduring social agreement, as they consistently reflect one set of values.

194 *Lange v Atkinson*, above n 74, 464.

195 Boston, above n 33, 58.

196 Beresford, above n 1, 38.

197 See Commonwealth Secretariat, above n 25, 1.

198 See for example, Russell, above n 19; Beresford, above n 1.

199 More specifically, evaluating the desirability of a judicially constitutionalised FRA would require evaluating of the merits of 'fiscal constitutionalism': see Buchanan, 'Constitutional Restrictions on the Power of Government', in Buchanan and Tollison (eds), *The Theory of Public Choice II* (1984); Buchanan and Wagner, 'Democracy in Deficit: the Political Legacy of Lord Keynes' in *The Political Biases of Keynsian Economics*, (1977). Staudt, above n 47.

200 Goldsworthy, above n 139, 35.

201 Constitutional Arrangements Committee, above n 160, 7.

However the statutes of the Financial Management Reform may not be able to give a democratic gloss to any judicial 'development of the constitution' or 'revolution'. The neo-liberal reforms of the 1980s may have undermined confidence in democratic processes, and led to voter disillusionment,[202] as 'both the Labour government of 1984-90 and the National Governments of 1990-96 were seen by the electorate as implementing policies antithetical to their election manifestos'.[203]

For example, there has been concern that the promoters of the FRA rendered ineffective a process designed to ensure that proposed legislation is rigorously scrutinised. Promoters of the Bill were said to have represented a narrow set of ideologies and interests, and to have captured the legislative process.[204] Treasury contributed to the development of the FRA, but was thought to have 'adopted an ideological and highly politicized stance in financial and economic matters',[205] and to be incapable of giving independent advice.[206] Ruth Richardson introduced the Bill, and soon after that was made chair of the select committee that examined it. The Labour Opposition contended that the Bill was 'hijacked in the select committee'[207] by groups such as the Business Roundtable. The enacted principles of fiscal responsibility were introduced by Supplementary Order Paper, and replaced the broader legislative guidelines that had been originally introduced to Parliament.

C. Inherently Unstable Constitutional Arrangements?

Goldsworthy maintains that recent constitutional developments are not just a reform but a revolutionary break with the Dicey's doctrine of parliamentary sovereignty that was once an accurate description of New Zealand's constitution. Any such revolution may have been instigated in part by the Financial Management Reform; '[i]t is no secret that recent constitutional reform in New Zealand coincided with a period of political controversy inspired by the neo-liberal revolution',[208] and possibly the link is causal.

Any judicial reform of the constitution that privileges certain values might involve 'a value judgment by the Courts, based on their view of the will of the people',[209] and other factors that Rishworth sees as constituting a 'judicial assessment of the political reality'.[210] Judges have generally not tried to observe these things directly. Instead they might use statute law as a signal of the will of the people and political reality.[211] Perhaps the explosion of statute law this century, particularly during the Financial Management Reform when statutes began to explicitly and in detail define the role of the State, has made tools with which to assess the 'will of the people' more accessible to any judges inclined to use them.

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202 Kelsey, above n 5, 397-322.

203 Palmer, above n 59, 10.

204 (7 June 1994) 540 NZPD 1481-1483 (Paul Swain).

205 (16 September 1993) 538 NZPD 18065 (Jim Anderton).

206 Ibid.

207 (7 June 1994) 540 NZPD 1482 (Paul Swain).

208 Beresford, above n 1, 38.

209 Harris quoting Cooke, above n 179.

210 Rishworth 'Lord Cooke and the Bill of Rights' in Paul Rishworth (ed) *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (1997) 298, 300.

211 *Lange v Atkinson*, above n 74.

If Financial Management Reform statutes such as the FRA are found to have prompted or sustained a constitutional revolution in New Zealand, this will reveal something about Diceyan parliamentary sovereignty. It could be said that Diceyan parliamentary sovereignty provides a relatively value-neutral framework in which ideas can contest for the privilege of becoming law. However if all that is required to motivate a revolutionary move away from a Diceyan parliamentary sovereignty is to enact a package of statutes that consistently reflect one set of values (in this case neo-liberalism) then Diceyan parliamentary sovereignty may be an inherently unstable constitutional arrangement. There may therefore be more at stake in a contest to enact law within a Diceyan parliamentary sovereignty than the mere ability to enact law. If Diceyan parliamentary sovereignty is so easily toppled, the contest to enact law may in reality be a contest to influence the shape of a new constitution.

New Zealanders may soon be asked to explicitly choose a constitutional structure, so this possible characteristic of Diceyan parliamentary sovereignty should be further examined in order to give a clearer picture of the Diceyan option.

D. Hastening judicial constitutional change?

This article's analysis on the enforceability of the FRA assumed that the enactment of the FRA left traditional notions of justiciability, standing, and Parliamentary intent intact. There is another possibility: that the enactment of legislation like the FRA might encourage judges to undertake a 'constitutional revolution' of the type that Goldsworthy has described. Indeed, as this article has noted, judges in *Lange v Atkinson* case saw the FRA as evidencing at least one type of 'constitutional change'.

Under a 'constitutional revolution', traditional notions of justiciabilty, standing, and the primacy of Parliament's intent may no longer hold, and the conclusion that the FRA is unenforceable may have to be revisited under the revised approaches to such questions.

The possibility that 'responsibility legislation' might accelerate constitutional change is likely to alarm some promoters of responsibility legislation. The proposed Regulatory Responsibility Act is seen by some of its proponents as a way to fetter the lawmaking of government, while stopping short of giving the courts the power to review legislation.[212] Indeed, the initial drafter of the proposed Regulatory Responsibility Act considered written constitutions as vulnerable to subversion by a 'despotic populist government' or 'activist court of appeal'.[213]

However, the very enactment of a regulatory responsibility statute requiring Parliament to follow principles such as 'laws and regulations should … preserve or enhance the rule of law' might be interpreted by judges as evidence of a fundamental constitutional change, a change that invites judges to adjudicate on such duties. In the dynamic environment of possible 'constitutional revolution', proponents of responsibility legislation should not ignore the impact that such Acts might have on the development of judicial thinking in this area.

212 Wilkinson, above n 8.

213 Wilkinson, above n 8, 180.

V. Conclusion

Proposals for 'responsibility' Acts – social, regulatory or otherwise – have proliferated. The authors of these proposals may hope that such Acts will signal to voters that certain values have merit, and influence the shape of New Zealand's constitution. This article concludes that any such hopes may not be in vain. Given recent constitutional developments, the FRA does not 'signify absolutely totally nothing', and it is not nonsense to think that the FRA can have legal and constitutional effects. Of course, if these constitutional developments are undesirable or unjustifiable, then normatively speaking the FRA may nevertheless be 'constitutional stupidity'.