# Judicial Abeyances in New Zealand's Unwritten Constitution

By Edward Willis*

## I. Introduction

The New Zealand courts regularly decline to address issues of constitutional law that come before them. In *Ngaronoa v Attorney-General*,[1] for instance, it was anticipated that the Supreme Court would offer a view on the legal enforceability of the manner and form restrictions in s 268 of the Electoral Act 1993. Section 268 purports to restrict Parliament's ability to enact amending or repealing legislation in respect of certain provisions relating to the holding of democratic elections unless certain procedural requirements (which are more cumbersome than for the ordinary passage of legislation) are met. Legal enforceability of the manner and form restrictions was essential to the appellants' case, and the Crown conceded in argument that such restrictions are effective as a matter of law.[2] However, the Court declined to express any general view on the issue. As a result, the legal effectiveness of the manner and form restrictions in s 268, with its important implications for the nature and effect of parliamentary sovereignty and constitutional protection of the electoral process, remains unresolved.

This judicial approach seems odd. We expect courts to decide questions of law fearlessly, independently and definitively. This expectation reflects the courts' authoritative role with respect to legal questions, including questions that relate to constitutional matters. This article is motivated by an instinct that judicial refusals to engage with constitutional questions reveal something important about New Zealand's constitutional practice. It has two key aims. The first aim is to identify deliberate non-engagement with constitutional issues as a particular phenomenon of New Zealand's constitutional jurisprudence. This analysis begins in Part II, which explains the expectation that the courts will provide definitive answers to questions of constitutional law. Part III then identifies specific examples of the courts failing to determine questions of constitutional law fully and with certainty. It is suggested that these "judicial abeyances" may involve the court refusing to determine an issue of obvious constitutional importance, but may equally involve the resolution of the substantive issue before the court without engaging in explicitly constitutional reasoning.[3] While I do not survey New Zealand case law exhaustively, I identify a number of examples of this phenomenon suggesting that judicial abeyances are an aspect of constitutional practice worthy of scholarly attention.

The article's second aim is to offer an explanation for this phenomenon, which is presented in Part IV. My analysis here is more speculative, and I offer two broad frameworks for consideration.

---

* Faculty of Law, University of Auckland.

1 *Ngaronoa v Attorney-General* [2018] NZSC 123, [2019] 1 NZLR 289.

2 *Ngaronoa v Attorney-General* (NZSC 102/2017; [2018] NZSC Trans 6) at 55.

3 The term is adapted from Michael Foley *The Silence of Constitutions: Gaps, "Abeyances" and Political Temperament in the Maintenance of Government* (Routledge, Abingdon (UK), 2011).

The first is judicial deference to political actors on constitutional questions. While there are doctrinal and theoretical arguments in support of this view, it is not obvious on the face of the examples identified that the courts wish to empower other actors to take determinative positions on these issues. Further, given the risks long identified in the liberal constitutionalist tradition associated with political actors determining their own limitations, I argue that we should be slow to attribute this view to the courts.

The second possible explanation is styled as a "last resort" principle, where questions of constitutional law are left open until they must be resolved. On this approach, constitutional determination of legal questions remains a matter for the courts but the jurisdiction is exercised sparingly. There is doctrinal support for this approach in United States constitutional law,[4] but in that context the principle is motivated by concern with the potential overuse of the judicial striked-own power. I suggest instead that a similar judicial practice in New Zealand might well be motivated by our own constitutional idiosyncrasies. I argue that equivocating on the answers to questions of constitutional law preserves New Zealand's unwritten constitutional structure while leaving the option of legal resolution available if required in future circumstances. The possibility that a more definitive legal position will be enforced in the future also conditions the exercise of political power in a way reminiscent of the written constitutional tradition, albeit without the same reliance on a conceptual of fundamental law. These considerations potentially explain why the courts can be more circumspect with respect to deciding live constitutional issues than they otherwise might be.

One caveat is in order before the substantive analysis begins. While I seek to describe and explain the phenomenon of judicial abeyances in the New Zealand constitution, I do not attempt to justify or defend that practice. If my argument is accepted, judicial abeyances may well be desirable in some circumstances. However, there are always trade-offs to be made when eschewing definitive, enforceable constitutional limits. Normatively assessing these trade-offs is complex, and lies beyond the scope of the present analysis. The initial task is simply to identify the relevant practice and supply a possible explanation for it.

## II. Expecting Certainty from Constitutional Law

Why do we expect certainty from the courts with respect to the resolution of issues of constitutional law? There are two broad answers to that question. The first answer is that legal certainty is desirable. The rule of law requires that law is prospective, coherent and clear in its expression, and relatively predictable in its application. Courts need to actually decide cases for these objectives to be achieved. The second answer is that constitutional certainty is desirable. Liberal theories of constitutionalism in particular place considerable value on the limitation of government power through law. The implicit assumption here is that constitutional law is sufficient certainty and clear to supply enforceable standards. These two answers are distinct but mutually reinforcing.

4 See *Ashwander v Tennessee Valley Authority* 297 US 288 (1936).

### *A. Legal Certainty*

The rule of law stands against both absolute power and arbitrary government decision-making.[5] In doing so it implicitly endorses and supports a preference for certainty and predictability. Different accounts of the rule of law render this implicit support more or less explicit.

We can see this emphasis on certainty and predictability with some clarity in liberal formulations of the rule of law in particular. Hayek, for example, placed "fair certainty" at the very centre of his vision of the rule of law:[6]

> Stripped of all technicalities, [the rule of law] means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.

A concern with the arbitrary or otherwise unconstrained exercise of government power is evident here. Hayek seeks to employ rule of law certainty as ballast to offset the risk that the unpredictable use of government authority will amount to abuse. But Hayek's version of the rule of law also specifically highlights the benefits of certainty and predictability for those who are subject to the law. When taking a particular action or arranging one's affairs, "[t]he law tells [the individual] what facts he [or she] may count on and thereby extends the range within which he [or she] can predict the consequences of his [or her] actions".[7] Controlling and focusing the power of the state through law helps to maximise the liberty of the individual. On this view of the rule of law, certainty and predictability are vital touchstones for freedom.

On other interpretations of the rule of law, certainty and predictability emerge as a consequence of more fundamental requirements. Fuller's influential account of the "internal morality of law" identifies a number of requirements necessary for both the efficacy of law and to secure law's normative value.[8] These requirements include standards of accessibility, prospectivity, intelligibility, consistency and stability, which each contributing to a certain and predictable legal framework. On this account, certainty and predictability are not always mentioned explicitly as primary rule of law requirements. However, these properties do emerge from the essential requirements of a just and functioning legal system. A legal system founded on laws that are accessible, prospective, intelligible, consistent and stable will be a system where laws are reasonably predictable and certain.

Fuller's account is a useful touchstone because his version of the rule of law is one of the few to directly acknowledge the important role of the courts in determining legal issues. Nestled in his discussion of the problems with retrospective law and the need for a legal system to promote prospectivity, Fuller confirms that judicial determination of legal questions is a necessary requirement for satisfying his version of the rule of law:[9]

---

5 See, for example, TRS Allan "The Rule of Law" in David Dyzenhaus and Malcolm Thorburn (eds) *Philosophical Foundations of Constitutional Law* (Oxford University Press, Oxford, 2016) 201.

6 FA Hayek *The Road to Serfdom* (Routledge, London, 1944) at 72.

7 FA Hayek *The Constitution of Liberty* (Routledge, London, 1960) at 156–157.

8 Lon L Fuller *The Morality of Law* (Yale University Press, New Haven (CT), 1964).

9 At 56.

> When a dispute arises concerning the meaning of a particular rule, some provision for the resolution of the dispute is necessary. […] Obviously the judge must decide the case. If every time doubt arose as to the meaning of a rule, the judge were to declare the existence of a legal vacuum, the efficacy of the whole system of prospective rules would be seriously impaired.

This gives expression to what is often only an instinct.[10] A mechanism for clearly resolving disputes about what the law requires is a feature of any functioning legal system that takes seriously the control of government power and the liberty of the individual. Where the courts fail to determine a question of law that comes before them for decision, they are failing in some aspect of their basic function in a system of law that ought to trend towards certainty and predictability. This makes securing the benefits of the rule of law more difficult.

For example, a clear risk flowing from the judicial failure to determine a question of law is that other parties with no legitimate authority will push their preferred interpretation with impunity. Susan Koniak has neatly demonstrated this risk in her analysis of two contrasting decisions dealing with the obligations on lawyers to report the fraudulent activities of their securities clients.[11] In *SEC v National Student Marketing Corp*,[12] the Court ruled that lawyers are subject to obligations make to official reports where they become aware of fraudulent activities. While this finding technically constituted a win for the regulator, the Court expressly refused to specify the actual reporting obligations on lawyers with any precision.[13] As a result, the ruling in the case failed to displace the view held by the advising lawyers that the duty of client confidentiality was the controlling factor in such cases. This absolutist view of confidentiality requirements continued in the face of strong protests from the securities regulator, who interpreted the relevant legal requirements very differently in light of its concerns to identify and address fraudulent conduct. Without clear endorsement from the courts, however, the regulator lacked any legitimate authority beyond its own assertions of state power to seriously challenge the legal profession's view with its own interpretation.[14] In absence of a definitive ruling, "the court abdicated its responsibility, leaving the state and the bar to battle over the shape of law".[15] An issue that should have been determined in accordance with the rule of law was left to the arbitrary outcome of a battle of wills.

Later, in *Ackerman v Swartz*,[16] a contrasting approach was adopted when the Court addressed substantially similar issues in more definitive terms. In this second case, the Court:[17]

> […] asserted that courts have the power to control the dispute. Moreover, the court articulated the law. It asserted that confidentiality must yield when a lawyer discovers, after issuing an opinion letter that the lawyer knows will be included with other offering documents disseminated to third parties, that statements made in that opinion are materially misleading.

---

10 The idea is perhaps under-emphasised in modern scholarship because it is simply accepted, along with Locke, that a "known and indifferent Judge, with Authority to determine all differences according to the established Law" is a feature of any constitutional state: John Locke *Two Treatises of Government* (Peter Laslett (ed), Cambridge University Press, Cambridge, 1963) at 396.

11 Susan P Koniak "When Courts Refuse to Frame the Law and Others Frame it to Their Will" (1992–1993) 66 Southern California Law Review 1075.

12 *Securities and Exchange Commission v National Student Marketing Corporation* 457 F Supp 682 (DDC 1978).

13 At 713.

14 See Koniak, above n 11, at 1082.

15 At 1083.

16 *Ackerman v Swartz* 947 F 2d 841 (7th Cir 1991).

17 Koniak, above n 11, at 1088.

As the Court had determined a clear rule that despite obligations of confidence there was a duty to report fraudulent statements, and legal advisors were forced to change their practice as a result. In Koniak's assessment, "[t]he court took responsibility for articulating the law […] It stepped into the fray. It acted like a court".[18] It is not hard to see that underlying Koniak's assessment is a view that it is dereliction of the courts' basic duty to the legal system to fail to fully resolve the question of law before it in definitive terms. The *Ackerman* Court discharged this basic duty, whereas the *National Student Marketing Corp* Court did not.

### *B. Liberal Constitutionalism*

The rule of law requirement that courts determine legal questions takes on special prominence in a constitutional context. Liberal theories of constitutionalism in particular turn on a concept of fundamental law,[19] which provides a shared framework for politics and seeks to limit state action. This fundamental law must be applied clearly and robustly in order to maintain the constitutional legitimacy of the government. Under orthodox separation of powers principles, it is the role of the courts to determine whether government has acted lawfully and therefore constitutionally.

The most celebrated moment in this constitutional tradition is still the decision of the United States' Supreme Court in *Marbury v Madison*.[20] When confirming the Supreme Court's jurisdiction to strike down legislation inconsistent with the Constitution, Marshall CJ famously held that it is "emphatically the province and duty of the Judicial Department to say what the law is".[21] This finding melded "constitution" and "law", so that constitutional prescriptions could be enforced as legal imperatives. It becomes a necessary function of the judiciary to determine constitutional and unconstitutional conduct on this approach.

While *Marbury* can sometimes be seen an example of United States exceptionalism, its influence is broad. Time and again the courts in different jurisdictions take on the role of providing definitive legal rulings on constitutional questions. The High Court of Australia, for example, has accepted this position as "axiomatic" in its own constitutional context,[22] suggesting that there is nothing inherent to the Westminster constitutional tradition preventing the courts from taking on an active and definitive constitutional role. The *Marbury* precedent has also been influential in unwritten constitutional jurisdictions, with the Israeli Supreme Court drawing directly on *Marbury* when asserting its own constitutional authority.[23] The judgment in *Marbury* is a standard in the liberal constitutionalist tradition of fundamental law that reaches above and beyond its place in the cannon of United States Supreme Court decisions.

It is the particular framing of the courts' constitutional role as a *duty* on which I place some emphasis. This embeds into the jurisdiction to determine the application of constitutional law a commensurate responsibility to do so on appropriate occasions. In *Marbury* itself, Chief Justice Marshall makes this abundantly clear:[24]

---

18 At 1089.

19 See, for example, Dieter Grimm *Constitutionalism: Past, Present and Future* (Oxford University Press, Oxford, 2016).

20 *Marbury v Madison* 5 US 1 Cranch 137 (1803).

21 At [141].

22 *Attorney-General (WA) v Marquet* [2003] HCA 67 at [66], (2003) 217 CLR 545 at 570.

23 *United Mizrahi Bank v Migdal Cooperative Village* [1995] IsrSC 49(4) 221 at 416.

24 *Marbury v Madison*, above n 20, at [142].

> […] if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

The judicial function with respect to constitutional law is not just an exclusive jurisdiction, but a necessary function for ensuring the constitutionality of government actions. *Marbury* is not a licence for the courts to overstep their acknowledged boundaries. Some matters – even some constitutional matters – may properly be considered political questions in respect of which political remedies are the most appropriate.[25] But questions of constitutional *law* do require answers – and judicial answers at that.

This idea is pervasive, and although its origins lie in liberal constitutional theory its influence is much wider. Arch-political constitutionalist Adam Tomkins rests his own constitutional theory on an overtly republican vision that empowers government institutions, rather than liberal account of constitutional morality that might seek to constrain government action.[26] When addressing the role of the courts in his constitutional theory, Tomkins is clear that clear judicial determination of the law still matters:[27]

> A core function of the courts in constitutional law is to declare what legal powers the government has. It is a fundamental rule of constitutional law that the government has only such powers as are clearly conferred upon it by the law. Where the government has acted without legal authority, the courts should be robust in declaring such action unlawful.

Government does not include Parliament on this account, which is why Tomkins' argument does not amount to a liberal justification of judicial power in the constitution. Parliament remains supreme, determining the law that the courts must then apply. But the value of a judicially robust application of constitutional law is still very much apparent, as this is required to ensure that the government is in fact acting in accordance with Parliament's intent.

Given these different constitutional threads in favour of judicial determination of constitutional law, it is unsurprising that this same idea that the courts should definitively speak on matter of constitutional law has received recognition from the New Zealand courts. In *Attorney-General v Taylor* the Court of Appeal went as far as to suggest that questions of constitutional law relating to Parliament's legal authority "recourse must be had to the courts … for an authoritative answer".[28] While not mentioned explicitly, the parallels here with *Marbury* have been noted by commentators.[29] There are also connections to be found with the Westminster constitutional tradition. Geiringer argues that the decision reveals a preference for "Diceyan notions of the supremacy and objectivity of law" and "the independent role of judges in finding, declaring and enforcing it".[30] The judicial

25 At [75]–[77].

26 See especially Adam Tomkins *Our Republican Constitution* (Hart, Oxford, 2005).

27 Adam Tomkins "The Role of the Courts in the Political Constitution" (2010) 60 UTLJ 1 at 1.

28 *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [56].

29 Claudia Geiringer "The Constitutional Role of the Courts under the NZ Bill of Rights: Three Narratives from *Attorney-General v Taylor*" (2017) 48 Victoria University of Wellington Law Review 547 at 555–556.

30 At 556.

function is understood here as being directly concerned with answering questions of law in constitutionally significant cases.[31]

I conclude this section with a final New Zealand example. In *Ngāti Whātua Ōrakei Trust v Attorney-General*,[32] the appellant sought recognition of its rights to challenge a Ministerial decision to transfer land to other iwi interests as part of the settlement of historical Treaty grievances. Legal recognition of those rights potentially sit at odds with the political nature of settlement negotiations, and risked offending the principle of non-interference in parliamentary proceedings given the practice of finalising settlements through legislation. The conventional legal position is that such matter are not amenable to review by the courts.[33] The High Court and the Court of Appeal struck out Ngāti Whātua's claim on precisely these grounds.[34] However, the Supreme Court found much more weight could be given to the rights possibly impugned. The majority stated in its judgment that it could not ignore "the function of the courts to make declarations as to rights".[35] Elias CJ, writing in the minority, put the point more forcefully: "[w]here claims of right or legal interest are made in our constitutional order, it is the function of the courts to determine them".[36] I think this is precisely how we imagine the courts discharging their function in our constitution. Legal questions should be addressed directly and fully, providing resolution of the dispute before the court and clarifying the constitutional position. We do not need a theory of judicial supremacy to recognise the important role played by principled inquiry into, and resolution of, constitutional disputes in accordance with the law.

## III. Identifying Judicial Abeyances

Despite these rule of law values and constitutional expectations, the New Zealand courts do not always resolve issues of constitutional law that fall before them for resolution. This may occur because the court explicitly refuses to offer any view on the constitutional matters at all, in which case the deliberate act of placing engagement with such matters into abeyance is apparent. In other cases a lack of constitutional engagement may occur because the court resolves the dispute before it with reference to non-constitutional doctrines and principles – that is, with an exclusive reliance on ordinary law. We might term this under-determination of constitutional matters a "constructive abeyance". This Part III sets out examples of each type of judicial abeyance in New Zealand constitutional decision-making.

31 *Attorney-General v Taylor* (CA), above n 28, at [62].

32 *Ngāti Whātua Ōrakei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116.

33 *Milroy v Attorney-General* [2005] NZAR 562 (CA) at [18]; *New Zealand Maori Council v Attorney-General* [2007] NZCA 269, [2008] 1 NZLR 318.

34 *Ngāti Whātua Ōrakei Trust v Attorney-General* [2017] NZHC 389, [2017] 3 NZLR 516; *Ngāti Whatua Ōrakei Trust v Attorney-General* [2017] NZCA 554, [2018] 2 NZLR 648.

35 *Ngāti Whātua Ōrakei Trust v Attorney-General*, above n 32, at [46].

36 At [78].

## *A. Why Judicial "Abeyances"?*

But first, a note on terminology. I have labelled the lack of judicial engagement on constitutional matters an "abeyance" following Michael Foley's analysis of deliberate ambiguities and gaps in constitutional practice.[37] Foley's thesis is that all constitutional practice relies on the conscious deferral of answers to legal and political questions. Foley describes this constitutional practice in the following terms:[38]

> […] those implicit understandings and tacit agreements that could never survive the journey into print without compromising their capacious meanings and ruining their effect as a functional form of genuine and valued ambiguity. It is not just that such understandings are incapable of exact definition; rather their utility depends upon them not being subject to definition, or even to the prospect of being definable.

Foley identifies constitutional abeyances as part of a larger argument that institutional accommodation within any political system requires a degree of mutual deference and respect, and that in many circumstances abeyances fulfil that role more completely and effectively than definitive resolution of constitutional questions. My purpose is not to defend Foley's account of constitutional practice specifically. Instead I take up the more general notion that the gaps in our constitutional understanding left by the courts are perhaps deliberate, and as such may serve a constitutional function. The language of "abeyances" seems to capture the essence of this notion of deliberate gaps serving a genuine constitutional purpose.

I also adopt the term to conceptually separate deliberate refusals to engage in constitutional issues, leaving them un- or under-determined, from a determination of the court that, properly understood, there is no legal or constitutional question falling for resolution. The function of the courts is resolve genuine disputes that give rise to questions of law. If resolution of the legal questions before the court is moot,[39] or the dispute has not crystalised as between the parties,[40] the court will not consider the issues. The New Zealand courts also do not offer advisory opinions, and so must be seized of a genuine dispute.[41] Judicial abeyances are qualitatively different from these scenarios in that it is clearly open to the court to provide some constitutional guidance if it is minded to do so.

## *B. Direct Abeyances*

I have already foreshadowed an important recent example of the Supreme Court refusing to engage with a constitutional issue. *Ngaronoa v Attorney-General* concerned the issue of prisoner voting rights. The appellants contended that a legislative amendment imposing a blanket disqualification on voting affecting all prisoners was enacted unlawfully.[42] The qualifications for electors are set

37 Foley, above n 3.

38 At 9.

39 *Folwer & Roderique Ltd v Attorney-General* [1987] 2 NZLR 56 (CA) at 78.

40 See Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 841.

41 *Gazley v Attorney-General* (1995) 8 PRNZ 313 (CA) at 315.

42 Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010.

out in s 74 of the Electoral Act 1993, which is subject to manner and form protections against amendment or repeal by virtue of s 268 of the Electoral Act. Section 268(1) identifies a number of "reserved provisions", including:[43]

> […] section 74, and the definition of the term adult in section 3(1), and section 60(f), so far as those provisions prescribe 18 years as the minimum age for persons qualified to be registered as electors or to vote:

Section 268(2) then provides that the identified reserved provisions may only be amended or repealed if passed by a 75 per cent super-majority of the members of the House of Representatives or if supported by a majority of electors in a national referendum. The appellants argued that the legislative amendment imposing the blanket disqualification engaged s 268 and, because it was enacted by a bare majority of the members of the House, it was invalid and of no effect.

Because the appellants' argument implicated the legal effectiveness of s 268's purported manner and form entrenchment, it carried important implications for the doctrine of parliamentary sovereignty in New Zealand. It is currently unclear whether Parliament's legislative sovereignty is best understood as "continuing", which would render any attempt at manner and form restrictions ineffective, or "self-embracing", which would allow manner and form restrictions to take effect.[44] However, the Supreme Court determined that properly construed, s 268(1) only protected the minimum voting age. There was, therefore, no legislative disability to disqualify prisoners from voting. While the case ultimately turned on this relatively discrete point of statutory interpretation, *Ngaronoa* is also the first time the courts have been called upon to consider directly the manner and form protection of the reserved provisions in New Zealand's constitutional framework. There are some statements in obiter that suggest the courts take such requirements seriously.[45] A firm decision one way or another would have significant implications for the competing theories of the nature of parliamentary sovereignty in the New Zealand constitution as well as the relationship of comity between the political and judicial institutional branches of government. It would also clearly signal the strength of the protection afforded by s 268 to the reserved provisions more generally, which are considered essential to a fair electoral process. While the Court resolved the issue before it without finding it necessary to directly consider the larger constitutional issues, the Crown conceded in its argument that such restrictions were likely to be legally effective.[46] This concession served as an invitation to the Court to make a formal finding on this crucial constitutional point. However, after noting that the issue was a live one, the majority refused to engage with the substantive issue stating simply that "we would prefer that issue to be resolved after argument on the point".[47] In other words, the Court made a deliberate decision to leave this important constitutional issue unresolved.

Perhaps some will question the significance of the decision to avoiding addressing the constitutional issues raised by the case on the basis that the immediate dispute raised before the court was successfully resolved. Following McIntyre, I prefer the view that this narrow focus on mechanical dispute resolution overlooks the "inherent duality" of the judicial function,

---

43 Electoral Act 1993, s 268(1)(e).

44 The classic account of the distinction is HWR Wade "The Basis of Legal Sovereignty" (1955) 13 CLJ 172.

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

46 *Ngaronoa v Attorney-General*, above n 2, at 55.

47 *Ngaronoa v Attorney-General*, above n 1, at [70].

which distinguishes courts from other bodies that might settle disputes.[48] Courts necessarily resolve disputes in the context of constitutional government, and so are intimately engaged in norm creation and application when discharging their dispute resolution role. Non-decisions on constitutional matters can frustrate this norm creation and application process, which in part may explain the rule of law and constitutionalist imperative to engage more definitively with such issues. In *Nagornoa*, however, the Court recognised that there is live constitutional issue to be determined, and that it could offer an authoritative view on that issue, effectively resolving it and providing significant clarity to New Zealand constitutional practice, but ultimately refused to do so. Indeed, it is arguable that the Court would not be making a controversial decision by engaging with this issue. The balance of academic opinion is now firmly in favour of the view that manner and form entrenchment is valid an effective under New Zealand's constitutional arrangements.[49] At the crucial moment however, the Court has elected not to seize the opportunity available to it. Giving only the briefest of justificatory reasons, it has preferred to perpetuate the uncertainty of the current legal position. The limited academic commentary available since the decision expresses some scepticism over whether avoiding the matter in this way was a meritorious approach.[50] It is unlikely that the Court would have been unaware of these potential criticisms. What that seems to suggest is that the Court saw some value in deliberately perpetuating the uncertainty that continues to shroud the application of manner and from provisions in the New Zealand constitution. When provided with an opportunity to choose between the continuing or self-embracing theories of parliamentary sovereignty, the Court has elected to sit on the fence.

*Ngaronoa* is not an isolated example. In *Shaw v Commissioner of Inland Revenue* the Court of Appeal faced a challenge in respect of an individual's tax assessment.[51] While the appellant accepted that the relevant provisions had been duly enacted by Parliament and that there was no issue of interpretation on the face of those provisions, he rather boldly argued that the provisions themselves were invalid by virtue of Magna Carta's prohibition on extraordinary taxation. The Court determined there was no merit in the claim, but the matter of potential limits on Parliament's legislative sovereignty was clearly put in issue by the case. The Court was, however, happy to leave the matter unresolved:[52]

> [The Court is relieved] from venturing into what happily remains in New Zealand an extra-judicial debate, which the good sense of parliamentarians and Judges has kept theoretical, as to whether in any circumstances the judiciary could or should seek to impose limits on the exercise of Parliament's legislative authority to remove more fundamental kinds of substantive rights.

---

48 Joe McIntyre *The Judicial Function: Fundamental Principles in Contemporary Judging* (Springer, Singapore, 2019) at 71.

49 JL Robson *New Zealand: The Development of its Laws and Constitution* (Stevens, London, 1967) at 66–69; GWR Palmer and Matthew SR Palmer *Bridled Power* (4th ed, Oxford University Press, Melbourne, 2004) at 156; Matthew Palmer, Claudia Geiringer and Nicola White "Appendix F: Parliamentary Sovereignty" in Constitutional Arrangements Committee *Inquiry to Review New Zealand's Existing Constitutional Arrangements: Report of the Constitutional Arrangements Committee I 24A* (House of Representatives, Wellington, 2005) 146 at 147; Paul Rishworth "New Zealand" in Dawn Oliver and Carlo Faruso (eds) *How Constitutions Change: A Comparative Study* (Hart Publishing, Oxford, 2011) 235 at 245; Joseph, above n 40, at 576.

50 Andrew Geddis and Marcelo Rodriguez Ferrere "New Zealand" in Richard Albert and others (eds) *2018 Global Review of Constitutional Law* (I·CONnect-Clough Center, 2019) 209 at 211–212; Leonid Sirota "Breaking the Silence: New Zealand's Courts and Parliament after *Attorney-General v Taylor*" (2019) 30 PLR 13 at 14.

51 *Shaw v Commissioner of Inland Revenue*, above n 45.

52 At 158, citing *Cooper v Attorney-General* [1996] 3 NZLR 480 (HC) at 484.

This reasoning seems to suggest even more directly that the basic constitutional issues involved should deliberately remain undetermined. The opportunity to provide some principled guidance on the matter is left to pass by.

One final example will serve to illustrate my point. In *Te Rūnanga o Wharekauri Rekohu Inc v Attorney-General*,[53] iwi challenged the ability of a Minister to introduce to the House proposed legislation that would give effect to a deed of settlement between the Crown and Māori in respect of pan-Māori claims to fisheries assets. The Court of Appeal confirmed the orthodox interpretation that parliamentary sovereignty admits a principle of non-interference by the courts in parliamentary proceedings. However, the Court went out of its way to point out that the "exact scope and qualifications" of this principle "are open to debate, as is its exact basis".[54] The Court, it seems, was content to acknowledge this uncertainty within the constitutional framework (indeed, has deliberately drawn attention to it) and simply left it to continue. While the immediate issue was squarely addressed, the larger constitutional questions that inform that issue and imbue it with greater significance were left unresolved.

### *C. Constructive Abeyances*

Sometimes judicial abeyances do not result from a direct refusal to engage with constitutional questions. Instead, the courts treat constitutional issues as ordinary matters of legal analysis. Rather than openly acknowledging the constitutional significance of the principles in play or the implications of any decision for the wider constitutional order, judicial decisions are presented as simple matters of ordinary statutory interpretation or incremental development of the common law. I argue that these "constructive abeyances" have much the same effect as more expressly and outrightly declining to address legal questions of constitutional significance.

An interesting feature of these constructive abeyances is that alternative approaches that engage more explicitly with constitutional principles are usually available to provide a counterpoint for more straightforward analysis. In *Attorney-General v Taylor*,[55] another recent case concerning prisoner voting rights, the Supreme Court was asked to consider whether the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2012 was inconsistent with the right to vote as protected by the New Zealand Bill of Rights Act 1990.[56] The High Court and Court of Appeal in the same case had recognised the inconsistency, and for the first time had granted a formal declaration to that effect. Jurisdiction to grant a formal declaration in this way is controversial, however, in part because the New Zealand Bill of Rights Act does not address the issue of judicial remedies. Other examples of such declarations tend to be underpinned by express statutory authorisation,[57] or else such remedies may be excluded.[58] It fell to the Supreme Court to provide clarity on this important issue.

While the court by majority did confirm jurisdiction to provide a declaration remedy for legislative breaches of protected rights, my primary is not the result but the reasoning the plurality

53 *Te Rūnanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA).

54 At 307–308.

55 *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213.

56 New Zealand Bill of Rights Act 1990, s [12].

57 Human Rights Act 1998 (UK), s 4; Human Rights Act 1993, s 92J.

58 *Momcilovic v R* [2011] HCA 34, (2011) 245 CLR 1.

adopted to justify its decision. For such a dramatic constitutional moment, the plurality's reasoning was expressed in quite straightforward terms. The issue was framed as one of implied statutory jurisdiction, and so largely turned on ordinary questions of statutory interpretation. The fact that the New Zealand Bill of Rights Act expressly applies to acts of the legislative branch of government is therefore of particular moment.[59] The plurality was assisted in this approach by the fact that an implied remedial jurisdiction with respect to executive breaches of protected rights has been a longstanding feature of the New Zealand Bill of Rights Act jurisprudence.[60] The plurality's reasoning was defended both as an ordinary application of legislative intention and an incremental development of the existing case law concerning remedies for rights simply a "logical step" from a "settled position" in the law.[61]

Here the Court of Appeal judgment in the same case supplies a fascinating counterfactual in terms of the approach to judicial reasoning. The unanimous beach preferred to rest their justification on "the common law jurisdiction of the higher courts to answer questions of law".[62] This required extensive engagement with first principles concerning the balance of authority between the legislature and judiciary in New Zealand's constitution and an unambiguous assertion of the judicial function to determine the law. While acknowledging the Parliament's legislative supremacy renders it sovereign,[63] the Court defended judicial obedience to Parliament is an independent principle of the common law.[64] On this theory of the constitution, Parliament cannot exercise arbitrary power free from judicial scrutiny.[65] Instead:[66]

> When issues arise affecting the legislature's legal authority, recourse must be had to the courts, both for an authoritative answer and as a practical necessity.

The stark difference in styles of reasoning between the Court of Appeal and Supreme Court has also been noted by others. Bookman notes that the Supreme Court decision "eschews questions of constitutional first principle, which had been central to the Court of Appeal's reasoning".[67] Ip similarly compares finds that the Supreme Court manages to "steer clear of any claims of constitutional grandiosity".[68] I would only add that the Supreme Court's approach to its task, in the face of an obvious alternative, is clearly a deliberate choice. Making that specific choice not to justify its decision with reference to grand constitutional conclusions must say something about the judicial function in our constitution.

Again, I am less concerned with the substantive argument than I am with the decision to analyse the extent of the Court's remedial jurisdiction in such expansive constitutional terms. Explicitly engaging in constitutionally driven reasoning has clear implications for the balance of authority

---

59 *Attorney-General v Taylor* (SC), above n 55, at [43]. See New Zealand Bill of Rights Act 1990, s 3(a).

60 *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA). See also *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462; *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429.

61 *Attorney-General v Taylor* (SC), above n 55, at [38].

62 *Attorney-General v Taylor* (CA), above n 28, at [109].

63 At [44].

64 At [47].

65 At [53].

66 At [56].

67 Sam Bookman "Decoding Declarations in *Taylor*: Constitutional Ambiguity and Reform" [2019] NZ L Rev 257.

68 John Ip "*Attorney-General v Taylor*: A Constitutional Milestone?" [2020] NZ L Rev 35 at 56.

between Parliament and the courts in the New Zealand constitutional order. In the face of the Court of Appeal's eloquent account of the courts' inherent constitutional function, however, the Supreme Court judges were largely unmoved. The lead judgment specifically noted that:[69]

> … in its reasoning towards the conclusion that there was power for the higher courts to make a declaration of inconsistency, the Court of Appeal canvassed the relationship between the political and judicial branches of government and the role of the higher courts under the New Zealand constitution. As is apparent, we have not found it necessary to undertake a similar exercise. We are accordingly not to be taken as endorsing the Court of Appeal's approach towards these matters.

The experience of the Court of Appeal and Supreme Court in the *Taylor* litigation is not unprecedented. In the *Lange v Atkinson* litigation,[70] the Court of Appeal (then New Zealand's final domestic appellate court) considered a defamation suit by a former Prime Minister against the author of a piece of news media critical of the Prime Minister's political performance. The nature of the claim squarely raised constitutional issues – in particular the scope of the freedom of expression in the context of political communication. The Court simply declined to engage with the issue of the relevance of constitutional protections for freedom of expression when resolving the matter, relying instead on a cautious and incremental development of the common law doctrine of qualified privilege. In fact, the Court went as far as to deliberately distance itself from the constitutional approach to the issue by stating that it considered that its judgment was "not the occasion for a history of the right to freedom of expression".[71]

As noted by one commentator, "[i]n contrast to significant debate in other jurisdictions over the proper relationship between bills of rights and the common law, the relative silence of our Court is deafening".[72] Another lamented the lack of serious engagement with rights instruments:[73]

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

A primary point of comparison here is the celebrated decision of the United States Supreme Court in *New York Times v Sullivan*.[74] The case concerned a libel suit by an Alabama police official in respect of an advertisement critical of the role of the police and other public officials in resisting the efforts of civil rights activists. On appeal, the Supreme Court expressly emphasised the importance of the constitutional issues involved,[75] and where the balance ought to be struck was expressly considered by the majority "against the background of a profound national commitment to the

69 *Attorney-General v Taylor* (SC), above n 55, at [66].

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

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

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

73 Grant Huscroft "Freedom of Expression" in Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) 308 at 319–320.

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

75 At 264.

principle that debate on public issues should be uninhibited, robust, and wide open".[76] Ultimately, the Court viewed the constitutional commitment to the freedom of expression in such high regard that it virtually outweighed all competing interests:[77]

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

The approach of the United States Supreme Court in *New York Times* can be seen to be engaging with manifestly constitutional issues. In contrast, the New Zealand Court of Appeal saw no need to engage in this kind of explicit constitutional reasoning. Instead it placed emphasis on the balance of competing factors and a preference to develop the common law incrementally. When given the option to address constitutional questions as constitutional questions, a senior court has elected to follow an alternative path.

Both direct abeyances such as *Ngaronoa*, *Shaw* and *Te Rūnanga o Wharekauri Rekohu*, and constructive abeyances such as *Taylor* and *Lange* seem to have a similar effect. They avoid resolving questions of constitutional law, and so perpetuate a degree of uncertainty with respect to the precise constitutional position. This strategy of constitutional avoidance appears deliberate and occurs sufficiently regularly that it is a feature of judicial decision-making that warrants scholarly attention. As yet, however, the rationale for such avoidance is not immediately obvious. In Part IV below I turn to consider some possible explanations for these constitutional abeyances.

## IV. Explaining Judicial Abeyances

Part III demonstrated that judicial abeyances are a feature of New Zealand's constitutional practice. This Part seeks to explain that practice particularly in light of the expectation, outlined in Part II above, that courts should determine questions of constitutional law. It suggests that there are two broad types of explanation that may be offered. The first is an explanation based on judicial deference to political processes and actors, while the second type of explanation is a kind of "last resort" principle where non-constitutional analysis is preferred for prudential reasons. It is suggested that this second explanation is the more compelling.

### *A. Deference to Politics*

One possible explanation for judicial abeyances on constitutional matters is that the courts prefer that such matters are resolved by political rather than judicial mechanisms. As such, when constitutional questions come before them for resolution the courts demure, leaving space for the executive and legislative branches of government to address the issue.

We can see this type of thinking in the political questions doctrine as applied in the United States. Despite the celebrated assertion of the judicial role in constitutional law articulated in *Marbury*, it has long been recognised that there are some constitutional matters that are best left for political resolution. Early application of this principle concerned the proper manifestation of political

76 At 270.

77 At 272, citing *Sweeny v Patterson* 128 F 2d 457 (1942) at 458.

authority as required by the constitutional guarantee of republican government.[78] The quintessential case is *Luther v Borden* where the Supreme Court held:[79]

> Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantees to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government and could not be questioned in a judicial tribunal.

This was the starting point for fashioning a more general principle of avoidance based on institutional capacity and the limits of the judicial function. Later decisions extending the application of the doctrine concerned the validity of formal constitutional amendment procedures,[80] and selection of electoral candidates.[81] But framing the issue in terms of the nature and limits of state authority has particular resonance with some of the New Zealand examples of judicial abeyances discussed above. *Shaw v Commissioner of Inland Revenue* in particular represents a very similar kind of challenge, in that the applicant contested that there are limits (in this case imposed by Magna Carta) on government inherent to the constitutional nature of the New Zealand state. While not explained in these terms, the reluctance of the Court of Appeal to engage with the constitutional argument presented in the case is understandable when approached from the perspective that non-judicial institutions and processes have the core responsibility for determining the state's basic political nature.

Modern applications of the political questions doctrine have, however, departed significantly from this original understanding. The willingness of the United States Supreme Court to intervene in ostensibly political matters is now much greater.[82] There are even indications that the early cases on the Constitution's Guarantee Clause might be revisited at an appropriate opportunity.[83] This perhaps reflects the gradual accretion of the Court's authority under a constitutional system accepting of judicial supremacy, suggesting that the political questions doctrine is a poor fit for New Zealand.

In our own constitutional context deference to political actors and processes is more likely to be justified with reference to theories of political constitutionalism. Political constitutionalism posits, broadly, that representative institutions making use of deliberative and participatory processes can and should be sites of constitutional contestation and resolution.[84] Modest versions

78 United States Constitution, art IV, section 4.

79 *Luther v Borden* 48 US (7 How) 1 (1849) at 42. See also *Pacific States Telephone & Telegraph Co v Oregon* 223 US 118 (1912).

80 *Coleman v Miller* 307 US 433 (1939).

81 *O'Brien v Brown* 409 US 1 (1972).

82 See, for example, *Bush v Gore* 531 US 98 (2000); *Citizens United v Federal Election Commission* 558 US 310 (2010); *Shelby County v Holder* 133 S Ct 2612 (2013).

83 *New York v United States* 505 US 144 at 184–86 (1992).

84 See Graham Gee and Grégoire CN Webber "What is a Political Constitution?" (2010) 30 Oxford Journal of Legal Studies 273; Richard Bellamy *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, Cambridge, 2007); Tomkins, above n 26; JAG Griffith "The Political Constitution" (1979) 42 MLR 1.

of political constitutionalism mirror aspects of the political questions doctrine by claiming that some constitutional matters are political in their orientation and so are not suitable for judicial resolution. We see this idea take on particular prominence in Commonwealth systems with respect to the question of judicial enforcement of constitutional convention.[85] Stronger versions of political constitutionalism content that, in the final analysis, political mechanisms are superior to judicial forums for resolving almost all constitutional questions including personal liberties and human rights.[86]

If theories of political constitutionalism provide some explanation for judicial abeyances, this requires accepting a normative preference for the electoral accountability of politicians to the independent judgement exercised by the courts. In my view, however, this would be a somewhat strained reading of the examples of judicial non-engagement discussed in Part III. Those examples seem to take the form of questions about the legal limitations on political actors and institutions, whether based in claims to recognition of protected legal rights such as in *Taylor*, or competing theories of parliamentary sovereignty as in *Ngaronoa*. As explained in Part II, there are attendant risks from both a rule of law and constitutionalist perspective where political actors and institutions can determine the scope and limits or their own authority. But perhaps more simply, there is no real indication from the courts that declining to engage with these issues because they fall outside the ambit of the judicial function as the courts themselves understand it. Indeed, as a descriptive position it is a difficult one to reconcile with those other occasions when the courts do find it appropriate to assert their judicial authority.[87]

Rather than an invitation to other constitutional actors, the examples of judicial abeyances that we have discussed seem to leave constitutional questions open and unresolved in *legal* terms. It would be odd, for example, for Parliament to determine the legal effect of the enacted manner and form provisions put in issue in *Ngaronoa*, for example. Of course, the appropriateness of enacting those provisions may be brought into question by theories of political constitutionalism but once enacted the matter of the provision's precise legal effect is squarely one for the courts to resolve. If a constitutional role for politics was intended by the courts in cases of judicial nonengagement, it is fair to expect that a substantive explanation would be provided from the court as to why deference to political actors and mechanisms is appropriate. It is revealing, in my view, that no such substantive explanation has yet been supplied.

### *B. Last Resort Principle*

An alternative explanation for judicial abeyances is an approach that might conveniently be label a "last resort" principle. At its broadest, this approach simply counsels that where there is an opportunity to dispose of a case other than on constitutional grounds, the deciding court should adopt that alternative approach.

85 See *R (Miller) v Secretary of State for Exiting the European Union* (2017) UKSC 5; *Reference re: Resolution to Amend the Constitution* (1981) 1 SCR 753 at 880; Colin R Munro "Laws and Conventions Distinguished" (1975) 91 LQR 218.

86 Jeremy Waldron *Law and Disagreement* (Oxford University Press, Oxford, 1999).

87 See, for example, *Fitzgerald v Muldoon* [1976] 2 NZLR 615 (SC); *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

Once again the key doctrinal influences for this approach are American. In *Ashwander v Tennessee Valley Authority*,[88] the United States Supreme Court set out a number of overlapping reasons for "constitutional avoidance". These reasons included matters such as leave and standing, but it also articulated the rule the Supreme Court must determine a case before it on non-constitutional rather than constitutional grounds if it is possible to do so.[89] This was not a new idea, and can even be traced back to *Marbury*.[90] But the principle has taken on special prominence since *Ashwander*.

The motivating concern in *Ashwander* is an abiding respect for the separation of powers. The Supreme Court was acutely aware that its power to invalidate congressional and executive acts has the potential to interfere with the proper operation of government. That power should be used sparingly to avoid any unnecessary interference. As Justice Brandies put the matter in the lead judgment: "One branch of the government cannot encroach upon the domain of another, without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule".[91] On the basis of this reasoning, if other grounds present themselves to dispose of the issues in the case, then those other non-constitutional grounds should be relied on to determine the issue.

Of the New Zealand examples discussed in Part III, the last resort doctrine does appear to reveal certain parallels with the New Zealand Supreme Court's *Taylor* decision. Recall that in *Taylor*, the lead judgment in the Supreme Court preferred to resolve the question of jurisdiction to provide declarations of inconsistency with reference to an implied statutory jurisdiction. This contrasted with the Court of Appeal's judgment, which rested on the constitutional role of the courts to determine the law. While there are obvious constitutional implications with issuing declarations of inconsistency, relying on an implied statutory jurisdiction is the more constitutionally conservative approach. The Supreme Court's approach suggests greater respect for legislative authority (at least superficially), which remains a key feature of New Zealand's constitutional arrangements. There is no need to test the boundaries of the relationship between the courts and Parliament on this approach, as the primary justification for the court's declaratory jurisdiction is rooted firmly in a plausible conception of parliamentary intent.

However, there are also differences between *Ashwander* and *Taylor* given the distinctive constitutional context in which each was decided. *Ashwander* was motivated by a concern with the inappropriate overuse of the constitutional strike down power. This judicial power is significant in the United States' constitutional order, with the potential to cause dramatic interference with the conduct of the other branches of government. That same concern is not evident in *Taylor*, which addressed the question of the availability of only a declaratory remedy. Under New Zealand's constitutional framework there is no question of directly invalidating properly enacted legislation. Indeed, one of the arguments against jurisdiction to issue declarations of inconsistency is that they may not serve any legal purpose.[92] There is no need to show substantive deference to Parliament on this approach – respect for Parliament's legislative sovereignty is already an embedded feature of the New Zealand constitution.

88 *Ashwander v Tennessee Valley Authority*, above n 4.

89 At 347.

90 *Marbury v Madison*, above n 20, at [75]–[77].

91 Quoting *Sinking-Fund Cases v US Central Pacific Railroad Co* 99 US 700 (1871) at 718.

92 *Attorney-General v Taylor* (SC), above n 55, at [52]–[65].

If we view the *Ashwander* doctrine more broadly as directed at maintaining the proper institutional balance within the United States' distinctive constitutional arrangements, then I think some kind of last resort principle can be defended with reference to New Zealand's own idiosyncratic constitutional context. In New Zealand, ultimate constitutional authority lies with Parliament. This precipitates the opposite concern from the United States position that it is the legislative body, rather than the courts, that may exercise its constitutional power in a manner that upsets the traditional balance of constitutional functions between the political and judicial branches of government. Here I draw in particular on Ted Thomas' insight that placing constitutional questions into abeyance may, somewhat counter-intuitively, condition the exercise of political power. Thomas relies in particular on the deliberate avoidance of the question of limits on Parliament's sovereignty raised in *Shaw v Commissioner of Inland Revenue*. In Thomas's view:[93]

> … the Court's answer [of leaving the constitutional question unresolved] was precisely right. … Uncertainty as to whether the courts will intervene to strike down legislation perceived to undermine representative government and destroy fundamental rights must act as a brake upon Parliament's conception of its omnipotence; and uncertainty as to the legitimacy of its jurisdiction to invalidate constitutionally aberrant legislation must act as a curb upon judicial usurpation of power. A balance of power between these two arms of government is more effectively achieved by the unresolved doubt attaching to the question than would be the case if the question were to be resolved affirmatively in either Parliament's or the judiciary's favour. The inconclusiveness begets a cautious forbearance, one or the other.

Thomas is describing here the kind of distribution and curtailment of power that might usually be achieved in a written constitution with hard legal rules. But here the same result is achieved in a uniquely unwritten way – the creation of "negative space" in the form of a constitutional abeyance that leaves the precise limits of government authority open for the time being. The option for the courts to determine more precise legal limits is left open for the future, but for now the matter can be "left up in the constitutional air".[94] It is this absence of a definitive answer on the constitutional question that preserves a modest role for the courts appropriate to New Zealand's unwritten constitutional framework, while at the same time counselling restraint in the exercise of political power. The judicial abeyance at the heart of the case seems to preserve New Zealand's basic constitutional arrangements, both in respect of its unwritten structure and the balance between judicial and political institutions.

The target of Thomas' analysis is the doctrine of parliamentary sovereignty. By postulating only the future possibility that Parliament's legislative supremacy may be found to be less than absolute, Thomas is able to retain a high degree of fidelity to the reality of New Zealand's contemporary constitutional arrangements where parliamentary supremacy is still widely accepted while suggesting that there remains an effective constitutional constraint on the exercise of legislative authority. I consider that is basic idea that unanswered questions of constitutional law condition constitutional practice is a powerful one, because it seems to help reconcile the rule of law and constitutionalist values explored in Part II with the practice of judicial abeyances. If uncertainty over the constitutional position can condition political power in the way Thomas claims, then the

93 EW Thomas "The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2000) 31 VUWLR 5 at 7–8.

94 At 7.

risk of arbitrary or abusive government power is greatly mitigated. A legally-based by at times undefined constitutional structure addresses these basic principles and values more neatly than an appeal to political authority over constitutional matters.

I also think this Thomas's thinking has broader resonance within New Zealand's constitutional system. Let me illustrate this by returning the constitutional question at the heart of *Ngaronoa* – should the Court confirm the legal effectiveness of manner and form entrenchment? A decision on this point either way comes certain trade-offs. Rishworth argues that acceptance or rejection of the manner and form theory of legislation requires the resolution of a deep-seated tension.[95] If, on the one hand, the manner and form theory is accepted, then a government could entrench legislation promoting partisan policy preferences. This is clearly an unacceptable position. On the other hand, if the manner and form theory is rejected, then fundamental values are more vulnerable to parliamentary override. The tension between these contrasting approaches currently remains because it cannot be resolved in the abstract. Accepting or rejecting manner and form provisions turns on a value judgement about the constitutional importance of any entrenched provisions in the context of any particular legal challenge.[96] Judicially confirming either the continuing or self-embracing theories of parliamentary sovereignty ahead of a particular challenge that calls for a definitive choice to finally be made risks an uncomfortable constitutional outcome that can, for now at least, be avoided. While the option of enforcing manner and form restrictions remains a future possibility, the most prudent course for the moment is to perpetuate the uncertainty on whether the courts would uphold any such restrictions.[97] A definitive finding either way remains a constitutional last resort.

What, then, to make of the preponderance of academic opinion and smattering of obiter that manner and form entrenchment is legally effective? The consensus view here now appears to be tolerably clear and unambiguous in favour of accepting manner and form theory.[98] I would argue that it is perhaps it is better to view this settled discourse as contributing to the uncertainty over competing theories of parliamentary sovereignty rather than as an effort to resolve it. At the time the precursor to s 268 was enacted, Diceyan notions of continuing sovereignty still held firm. That the debate has shifted to the point where the possible enforcement of manner and form is even a genuine constitutional question is itself a remarkable achievement based on changes in the normative basis of our collective constitutional thinking. Until the courts rule definitively, however, the latent potential in that shifting normative discourse remains unfulfilled. This could also explain the anecdotal frustration with the Supreme Court's decision not to engage with the underlying constitutional issues in *Ngaronoa*. Judicial views are authoritative in a way the normative discourse over our constitutional arrangements is not. My argument here is than an

95 Paul Rishworth "Affirming the Fundamental Values of the Nation: How the Bill of Rights and the Human Rights Act affect New Zealand Law" in Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995) 71.

96 See Joseph, above n 40, at 594–595.

97 See JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 21.

98 For discussion of the evolution of the views on the effectiveness of manner and form provisions see Timothy Shiels and Andrew Geddis "Tracking the Pendulum Swing on Legislative Entrenchment in New Zealand" (2020) 41 Stat LR 207.

absence of a final judicial view also carries with it some constitutional authority. It reserves to the courts the future power to articulate New Zealand's constitutional law more definitively, ensuring it is fit for those future circumstances. In the meantime, our fundamental constitutional law remains distinctively, and unmistakably, unwritten.

## V. Conclusion

This article has advanced two arguments. The first is that judicial abeyances with respect to questions of constitutional law are a feature of New Zealand constitutional practice that is worth paying attention to. Judicial abeyances seem to frustrate our expectations, derived from the rule of law and theories of liberal constitutionalism, that the courts should determine questions of constitutional law clearly and definitively. The second argument seeks to provide a suitable explanation for this phenomenon: that uncertainty with respect to fundamental constitutional questions performs a constitutional function. This uncertainty maintains a balance between legal authority and judicial modesty, potentially conditioning the exercise of political power in a way that preserves the basic structure of our unwritten constitution. Undoubtedly, understanding New Zealand's constitutional law in terms of ambiguity and uncertainty presents certain conceptually challenges. Confronting those conceptual challenges may be necessary to better understand the role of the judiciary and its articulation of constitutional law within our distinctive constitutional arrangements.