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**WE THE PEOPLE? – THEORISING  
CONSTITUTIONAL DEMOCRATIC LEGITIMACY  
TO REFLECT ON AND ENRICH NEW ZEALAND’S  
CONSTITUTION**

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### ***Abstract***

*This paper explores the concept of constitutional democratic legitimacy and the democratic legitimacy of New Zealand's constitution in particular. In so doing, it considers Bruce Ackerman's constitutional theory in We the People, Volume 1: Foundations and the criticisms it has provoked to develop a theoretical framework of three constitutional models (monism, dualism and rights foundationalism) that can be used to assess constitutional democratic legitimacy. It then utilises this framework as a tool for analysing New Zealand's constitutional arrangements, observing that New Zealand has a particularly sophisticated monist constitution, noting s 268 of the Electoral Act 1993 and the adoption of MMP voting as particular institutional examples. Nevertheless, it is recognised that New Zealand's constitution may still be critiqued in terms of its claim to democratic legitimacy through the alternative perspectives of monism (focusing on remaining flaws in New Zealand's electoral system), dualism (focusing on the absence of avenues for binding public constitutional participation) and rights foundationalism (focusing on the constitutional place of the Treaty of Waitangi). Alternative suggestions for reform are offered.*

### ***Key Words***

*Constitutional arrangements; democratic legitimacy; Bruce Ackerman; electoral law*

## *Contents*

- I Introduction
- II Bruce Ackerman's Constitutional Theory and Criticisms
  - A Introduction
  - B Dualist Democracy
  - C Monistic Democracy
  - D Rights Foundationalism
  - E Conclusions: a Theoretical Framework for Assessing Constitutional Democratic Legitimacy, and the Need for Contextual Focus
- III New Zealand's Position Within the Theoretical Framework: a Sophisticated Monist Constitution
  - A Background
  - B Section 268 of the Electoral Act 1993
  - C Move to MMP voting
- IV Democratic Imperfections and Suggestions for Reform
  - A Monist Imperfections: Remaining Flaws in the Electoral System
  - B Dualist Imperfections: Absence of Avenues for Binding Public Constitutional Participation
  - C Rights Foundationalist Imperfections: the Constitutional Place of the Treaty of Waitangi
- V Conclusion
- VI Bibliography

## *I Introduction*

The underlying aim of this paper is to explore the democratic legitimacy of New Zealand's current constitutional structure and consider changes that could be made to preserve and enhance its legitimacy moving forward. The motivation for this exploration stems from the conviction that for a constitution to be meaningfully, richly democratic, it ought to be one that "We the People" can endorse, cultivate, and meaningfully participate within.

Simply, reference to a constitution is reference to the set of norms, principles or legal rules that create, structure or define the limits of government power,<sup>1</sup> or "the set of factors that determines who exercises public power and how they exercise it."<sup>2</sup> In this sense, all states have constitutions.<sup>3</sup> However, not all constitutions are necessarily democratically legitimate.

'Democracy' derives from the Greek *demokratia*, translating literally to rule by the people.<sup>4</sup> From this translation, the concept can be understood as involving values of self-determination or self-government.<sup>5</sup> The United Nations General Assembly has affirmed that: "...democracy is a universal value based on the freely expressed will of the people to determine their own political, economic, social and cultural systems..."<sup>6</sup>

Democracy expressed at this level of abstraction is generally taken for granted as a desirable constitutional principle. However, it is difficult to categorically define what makes a system democratic in practice, and different constitutional arrangements across the globe can be characterised as having varying degrees of democratic legitimacy

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<sup>1</sup> Wil Waluchow "Constitutionalism" (10 January 2001) The Stanford Encyclopedia of Philosophy (Spring 2014 ed) Edward N Zalta (ed) <plato.stanford.edu>.

<sup>2</sup> Matthew Palmer "New Zealand Constitutional Culture" (2007) 22 NZULR 565 at 565.

<sup>3</sup> Waluchow, above n 1.

<sup>4</sup> Helena Catt *Democracy in Practice* (Routledge, London, 1999) at 4.

<sup>5</sup> See Joel Colón-Ríos "New Zealand's Constitutional Crisis" (2011) 24 NZULR 448 at 451.

<sup>6</sup> *Strengthening the role of the United Nations in enhancing periodic and genuine elections and the promotion of democratization* GA Res 64/155, A/Res/64/155 (2009).

according to variable indicia. Furthermore, there may be a distinction between the concepts of democracy and of constitutional democratic legitimacy, so that although a particular constitutional regime adheres to democratic practice in its electoral system and ordinary day-to-day law making, it may nevertheless involve a democratic deficit in its constitutional arrangements generally.<sup>7</sup>

The Economist Intelligence Unit's Democracy Index ranks 165 countries based on five categories: electoral process and pluralism; civil liberties; the functioning of government; political participation; and political culture.<sup>8</sup> In 2012, New Zealand ranked 5<sup>th</sup> on this Index.<sup>9</sup> Thus, in global terms, New Zealand appears to be a world leader in its commitment to democracy. However, despite New Zealand's general commitment to democracy and its relative success in implementing it, this paper will argue that there may be aspects of our constitutional structure that are wanting in democratic terms.

To advance this argument, in Part II, Bruce Ackerman's constitutional theory from *We the People, Volume 1: Foundations*<sup>10</sup> and the criticisms it has provoked will be explored to develop a theoretical framework of constitutional models through which constitutional democratic legitimacy may be assessed. Part III considers where New Zealand fits within that framework, concluding that New Zealand has a particularly sophisticated monist constitution, referencing s 268 of the Electoral Act 1993 and the adoption of an MMP electoral system as particular examples. Part IV however notes democratic imperfections within New Zealand's constitution, and offers suggestions for reform, from the alternative perspectives of monism, dualism and rights foundationalism, focusing particularly on, respectively, remaining flaws in New Zealand's electoral system, the absence of avenues for binding public constitutional engagement, and the constitutional place of the Treaty of Waitangi. Part V concludes that while New Zealand's constitution

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<sup>7</sup> See Joel Colón-Ríos *Weak Constitutionalism: Democratic legitimacy and the question of constituent power* (Routledge, London, 2012), at 6-7 and ch 3.

<sup>8</sup> The Economist Intelligence Unit *Democracy index 2012: Democracy at a standstill* (The Economist, 14 March 2013) at 1.

<sup>9</sup> The Economist Intelligence Unit *Democracy index 2011*, above n 8 at 3.

<sup>10</sup> Bruce Ackerman *We the People, Volume 1: Foundations* (Harvard University Press, Cambridge (Mass), 1993).

has strong claims to democratic legitimacy in monist terms, improvements ought to be made to truly enrich the democratic legitimacy of New Zealand's constitution.

## *II Ackerman's Constitutional Theory and Criticisms*

### *A Introduction*

*We The People, Volume 1: Foundations* is the first volume in a three-installment series providing an extensive analysis of the constitutional history of the United States of America over the two centuries following the Founding.<sup>11</sup> This paper will primarily focus on Ackerman's constitutional theory as described in *Foundations*. In this volume, Ackerman describes the American constitution as a dualist democracy, using other constitutional models, in particular monism and rights foundationalism, to contrast and show the superiority of a dualist constitution.

Ackerman's analysis is predominantly focused on the United States context. However, this section will explain the major models Ackerman refers to, and his case in favour of dualism, in more generalised terms. In addition, it will raise some of the many criticisms Ackerman's theory has generated. This approach is taken to show the utility of Ackerman's theory for this paper, which is not to provide a single standard of constitutional democratic legitimacy, embodied in Ackerman's dualist democracy, by which the legitimacy of other regimes may be measured. Rather, both by its reference to a range of constitutional models and by the criticism it has ignited, the utility of Ackerman's theory lies in its facilitation of a conversation about how to define democratic legitimacy in constitutional terms. From this conversation, a theoretical framework of alternative constitutional models and their respective claims to democratic legitimacy begins to emerge which can be used to analyse the democratic legitimacy of alternative constitutional regimes. Part III will use this theoretical framework to assess

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<sup>11</sup> Ackerman *Foundations*, above n 10; Bruce Ackerman *We the People, Volume 2: Transformations* (Harvard University Press, Cambridge (Mass) 1998); Bruce Ackerman *We the People, Volume 3: The Civil Rights Revolution* (Harvard University Press, Cambridge (Mass) 2014).

the democratic legitimacy of New Zealand's constitution, and as a means of providing alternative suggestions for constitutional reform in New Zealand.

### *B Dualist Democracy*

Ackerman begins his case in favour of dualist democracy by describing its conceptual foundations. He states that within a dualist constitutional democracy, there is a distinction between two types of lawmaking decisions that can be legitimately made: decisions made by 'the People', and decisions made by the government.<sup>12</sup> The 'dualism' of Ackerman's dualist democracy thus comes from this idea of two-track lawmaking.<sup>13</sup>

Government decision-making, according to this framework, is the daily 'normal lawmaking' authorised by and kept in check through the electoral process.<sup>14</sup> However, even when this normal lawmaking is functioning well, "the dualist Constitution prevents elected politicians from exaggerating their authority."<sup>15</sup> This is because standing above and superior to ordinary lawmaking is 'higher law'.

'Higher lawmaking' within Ackerman's dualist framework is, in broad terms, the process whereby popular mobilisation around a particular political or constitutional issue gains such significant traction with the citizenry that, via some process or other it manifests into supreme law.<sup>16</sup> The supremacy of this law made by 'the People' prevents the electoral legitimacy of any given administration from going so far as to authorise that administration to overturn, through ordinary lawmaking procedures, decisions reached by the People through the higher lawmaking process.<sup>17</sup> This seems like a classic account of supreme law written constitutions. However, Ackerman's analysis is unique in that he characterises even informal or unlawful 'amendments' to the written constitutional regime, i.e. those that do not follow formal amendment rules, as nevertheless

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<sup>12</sup> Ackerman *Foundations*, above n 10, at 6.

<sup>13</sup> See at 9.

<sup>14</sup> At 6.

<sup>15</sup> At 6.

<sup>16</sup> At 6-7; see also ch 10.

<sup>17</sup> At 6.

democratically legitimate if they represent “the considered judgments of the mobilized People”.<sup>18</sup>

There are three moments in American constitutional history that Ackerman considers exemplify this higher lawmaking process,<sup>19</sup> a view extensively developed over the first and second installments of his series but that can only briefly be described here. Ackerman’s first constitutional moment is the Founding whereby the United States Constitution was originally enacted: despite not adhering to the amendment procedures provided by the Articles of Confederation, Ackerman considers that the Constitution thus enacted nevertheless had the support of the mobilised People and was therefore legitimate (a point Ackerman unfortunately doesn’t argue extensively for).<sup>20</sup>

Second and third are, respectively, the Reconstruction period following the Civil War and the New Deal period arising out of the Great Depression.<sup>21</sup> Although these two later constitutional moments are distinct in form and substance, it is easiest to understand Ackerman’s claim that they each represent higher lawmaking by considering their similarities.<sup>22</sup> Both periods involved an ‘inter-branch impasse’: one branch of government pushing for constitutional reform and one branch resisting.<sup>23</sup> the Reconstruction period involved conflict between a reformist Congress and a conservative Presidency on the topic of the civil and political rights of former slaves; the New Deal period between a reformist presidency and a conservative Supreme Court on the topic of government intervention in the economy.<sup>24</sup> In both instances, this deadlock “forced both sides to mobilize their supporters in the country at large”, giving “extraordinary constitutional

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<sup>18</sup> At 7; at 41-56; at ch 10.

<sup>19</sup> See at 41.

<sup>20</sup> At 41. But see Michael J Klarman “Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman’s Theory of Constitutional Moments” (1992) 44 Stanford Law Review 759 at 777-785 for a strong critique of Ackerman’s conceptualisation of the Founders as dualist democrats.

<sup>21</sup> At 41-54.

<sup>22</sup> At 48.

<sup>23</sup> See at 49.

<sup>24</sup> At 48.



meaning to the next... election.”<sup>25</sup> In the elections of both 1866 and 1936, the reformers were returned to office by the voters, thus claiming a mandate from the People for their reforms.<sup>26</sup> In the case of the Reconstruction, the 14<sup>th</sup> Amendment to the Constitution was passed despite not formally meeting Article V amendment procedures;<sup>27</sup> in the case of the New Deal, the Supreme Court ceased invalidating New Deal legislation on the basis of unconstitutionality.<sup>28</sup> In both cases, Ackerman considers that these resulting constitutional changes were legitimate because they represented the will of the People, based on the election outcomes, despite not adhering to formal amendment procedures in the United States Constitution.

Ackerman’s focus on ‘constitutional moments’ as representing higher lawmaking is innovative, however there are many critiques to be made against it. Fundamentally, Ackerman omits to define ‘the People’. A number of issues stem from this omission. For example, it is not clear that Ackerman’s constitutional moments did in fact necessarily involve the deep, broad popular mobilisation of the People, at least any more than during the process of formal constitutional amendments.<sup>29</sup> Similarly, as is the case with formal constitutional amendments, the initiative for change in Ackerman’s constitutional moments essentially came top-down from government, shattering any perception one might develop on a first reading of Ackerman’s dualism that this model is about the need for constitutional recognition of bottom up political movements initiating from the People. While such movements could be accommodated within a dualist theory, it is disappointing that this type of bottom-up politics is far from Ackerman’s focus. Rather, Ackerman’s constitutional moments appear not all too conceptually dissimilar from formal amendment processes, albeit through irregular means.<sup>30</sup>

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<sup>25</sup> At 48; see also at 53.

<sup>26</sup> At 48.

<sup>27</sup> See at 44-45 and 49-50.

<sup>28</sup> At 49.

<sup>29</sup> See Klarman, above n 20, at 764-775; see also Terrance Sandalow “Abstract Democracy: A Review of Ackerman’s *We the People*” (1992) 9 Const Comment 309 at 318-330.

<sup>30</sup> See Sandalow, above n 29, at 313.

Despite these criticisms, largely stemming from Ackerman's practical application of his theory to the United States context, there remains value in the conceptual underpinnings of dualist democracy. The idea of 'higher law' emanating from the People and acting as a legal constraint on 'normal lawmaking' to protect the constitutional achievements of the People from erosion in times where the People are less politically or constitutionally engaged is a powerful democratic alternative to traditional monist understandings of democracy.<sup>31</sup>

### *C Monistic Democracy*

'Monism' is the term used by Ackerman to describe the type of formal democracy we are familiar with in New Zealand. At its simplest, the monistic idea of democracy requires the grant of full lawmaking authority to the winners of the last general election, so long as that election was free and fair.<sup>32</sup> Thus monist democracy institutionally translates to parliamentary sovereignty.<sup>33</sup> Under the monist model, the primary democratic way to express dissatisfaction with the decisions of elected lawmakers is to turn them out of office at the next election.<sup>34</sup>

A corollary of the monist conception of democracy, according to Ackerman, is that outside of the electoral process itself, "all institutional checks upon the electoral victors are presumptively antidemocratic."<sup>35</sup> So, for example, the idea that a court, comprised of unelected office-holders, could invalidate legislation made by the elected legislature on grounds of unconstitutionality, as is the case in the United States, would be abhorrent to a monistic democrat.<sup>36</sup> However, Ackerman suggests that there may be room within a sophisticated conception of monism for *some* constitutional checks on elected lawmakers that would rebut the antidemocratic presumption by preserving the democratic legitimacy

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<sup>31</sup> See Ackerman, above n 10, at 10.

<sup>32</sup> Ackerman, above n 10, at 8.

<sup>33</sup> See at 8.

<sup>34</sup> At 8.

<sup>35</sup> At 8.

<sup>36</sup> At 8.

of the monist electoral system.<sup>37</sup> Examples include restrictions preventing the elected legislature from cancelling future elections, or checks that preserve or enhance the fairness and integrity of the electoral process itself.<sup>38</sup>

Ackerman questions the monist assertion that electoral victors are “entitled to rule with the full authority of We the People”, pointing out that it is not a given that all statutes gaining the support of a legislative majority represent the considered judgment of a mobilised majority of citizens.<sup>39</sup> Herein lies a major conceptual difference between monism and dualism: monist democracies recognise no formal distinction between ordinary and constitutional law; the sovereign legislature is authorised, by its electoral win, to make whatever law it sees fit.<sup>40</sup> In contrast, dualism seeks to reject the monist conflation of the will of the People with parliamentary sovereignty. On the dualist view, although electoral victory authorises a legislature to make ordinary legislation following ordinary legislative processes, particularly onerous ‘higher lawmaking’ procedures must be followed for the legislature to claim that its initiative represents the present constitutional judgment of the People and that it is thus authorised to alter constitutional law previously been laid down by the People.<sup>41</sup>

This distinction between ordinary and constitutional law is, according to dualist democracy, the source of the democratic legitimacy of a judicial power to invalidate legislation on grounds of unconstitutionality, and serves to dissolve the ‘countermajoritarian difficulty’ argument usually advanced to question the democratic legitimacy of such a power.<sup>42</sup> In the absence of an institution independent of the legislature with the power to preserve the higher lawmaking efforts of the People from being attacked or undermined, those higher lawmaking efforts would be in vain, as they

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<sup>37</sup> At 8.

<sup>38</sup> At 8.

<sup>39</sup> At 9.

<sup>40</sup> See at 8-9.

<sup>41</sup> At 7 and 9-10.

<sup>42</sup> At 8-9; see also Klarman, above n 20, at 759-760.

could easily be derogated from by ordinary legislative processes.<sup>43</sup> Under this view, rather than threatening democracy, “the courts serve democracy by protecting the hard-won principles of a mobilized citizenry against erosion by political elites who have failed to gain broad and deep popular support”.<sup>44</sup> This aspect of dualism, in contrast to monism, helps to distinguish “the will of We the People from the acts of We the Politicians.”<sup>45</sup>

However, this contention arguably may only be sustained if the dualist higher lawmaking system remains responsive to the People of today. Ackerman’s ‘constitutional moments’ are few and far between. Part of the reason for this is that Ackerman’s conception of higher lawmaking is a particularly onerous process, which he considers a good thing. However, these factors together raise the issue of the potential in a dualist system for previous generations to rule the present from the grave.<sup>46</sup> This raises issues from a democratic standpoint: for a constitution to be democratically legitimate as something that ‘We the People’ can endorse, it must be today’s people who rule, with their own values and problems, not long gone past generations.<sup>47</sup> If a court “invalidates today’s legislation on the basis of yesterday’s constitutional values” it is “frustrating the People’s will, and indefensibly so.”<sup>48</sup>

Ackerman does not appear troubled by this: if present generations are dissatisfied with the constitutional achievements of past generations, they can mobilise to replace previous higher law with their own.<sup>49</sup> However, given how onerous Ackerman’s idea of higher lawmaking is, and the criticisms raised above questioning whether Ackerman’s constitutional moments really stem from the People in the ways he asserts, there is a real risk under his dualist democracy of present generations being shackled by the constitutional judgments of previous generations that they have not chosen and that they cannot alter with ease. This raises the potential that for a dualist constitution to be truly

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<sup>43</sup> At 9-10.

<sup>44</sup> At 10.

<sup>45</sup> At 10.

<sup>46</sup> See Klarman, above n 20, at 765-766 and 792-793.

<sup>47</sup> See Colón-Ríos, above n 5, at 451; see also Klarman, above n 20, at 765.

<sup>48</sup> Klarman, above n 20, at 793.

<sup>49</sup> See generally Ackerman, above n 10, at 6-10; see also Klarman, above n 20, at 765.

democratically legitimate, it must be less rigid than Ackerman asserts, and offer easier routes for the People to periodically consider their constitutional arrangements.<sup>50</sup> This in turn raises the potential that ordinary and higher lawmaking are not binary poles, but rather the differences between them may be a matter of degree.

#### *D Rights Foundationalism*

Monism and dualism each share a commitment to popular sovereignty, or the idea that the People are the ultimate authority in a constitutional order; they differ primarily with regards to how popular sovereignty is best effected institutionally.<sup>51</sup> Rights foundationalism, on the other hand, has a different focus. According to it, fundamental rights (whatever these may be, an issue that can fragment adherents of this model) come before democracy, requiring constitutional protection from erosion by popular politics.<sup>52</sup> On this view, rights exist to trump decisions reached by a majoritarian democratic process; it is unjust and illegitimate for a majority to erode the fundamental rights of minority groups or individuals by sheltering behind an otherwise legitimate democratic process.<sup>53</sup>

Ackerman provides the post-War German Basic Law as his prime example of a rights foundationalist constitution, within which there are fundamental rights that cannot legally be revised, regardless of any magnitude of popular support for repeal.<sup>54</sup> Article 79(3) provides that it is inadmissible to amend certain aspects of the Basic Law, including the principles laid down in article 1. Article 1 provides, *inter alia*, that human dignity is inviolable. This “self-conscious act of entrenchment” came about in the aftermath of Nazi Germany in an effort to prevent any kind of similar regime from existing in Germany again. Now, because there is no legal route to amend those aspects of the Basic Law protected by article 79, “if the dominant political majority insisted on repeal, it would be

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<sup>50</sup> See generally Colón-Ríos, above n 5, at 451-452 and 455-456.

<sup>51</sup> Ackerman, above n 10, at 10-11.

<sup>52</sup> At 11.

<sup>53</sup> At 11.

<sup>54</sup> At 15. See Basic Law for the Federal Republic of Germany (*Grundgesetz für die Bundesrepublik Deutschland*) art 79.

obliged to replace the entire constitution with a new one in its grim determination to destroy fundamental human rights.”<sup>55</sup>

Ackerman conceptualises rights foundationalism and monism as being essentially irreconcilable: monism has inherent reservations about the elitism involved in removing fundamental questions from the democratic process, while rights foundationalism has concerns about the ease with which fundamental rights can be eroded by ordinary lawmaking procedures.<sup>56</sup> Ackerman sees the dualist two-track system of democratic lawmaking as being a compromise between these two poles.<sup>57</sup> If fundamental rights have been established in law via the higher lawmaking process of popular mobilisation, they cannot be eroded through ordinary lawmaking procedures. Nevertheless, in a dualist system, fundamental rights are not entirely out of reach of democratic process: they may be altered, but only through the onerous higher lawmaking process itself, requiring significant popular mobilisation for any alteration of higher principle. Dualism thus accommodates the need for greater protections of fundamental principles whilst preserving the right of the People to change their mind.<sup>58</sup> Under this model, “it is the People who are the source of rights; the Constitution does not spell out rights that the People must accept.”<sup>59</sup>

However, the assumptions underlying Ackerman’s position in favour of dualist democracy can be critiqued at a normative level from a rights foundationalist type of perspective. Much of the appeal of Ackerman’s argument derives from its reliance on “commonly held intuitions of popular consent or popular sovereignty, by which the ‘will of the People’ is expressed by either a majority or supermajority of the persons who make up the polity.”<sup>60</sup> The idea that ‘the People’ can mobilise around a particular issue and in doing so effect democratically legitimate constitutional change is appealing because of

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<sup>55</sup> At 15.

<sup>56</sup> At 12.

<sup>57</sup> At 12-13.

<sup>58</sup> At 14.

<sup>59</sup> At 15.

<sup>60</sup> Randy E. Barnett “We the People: Each and Every One” (2014) Yale Law Journal (forthcoming) at 15.

our deep seated assumptions about democracy, our general commitment to the idea that it is the People through whom the government obtains authority to govern and to whom the government must remain answerable and responsive. However, Randy E. Barnett “challenges this majoritarian conception of popular sovereignty as a fiction.”<sup>61</sup> He asks the oft-overlooked question of how a majority or supermajority of the People, even if they are ‘mobilised’, get to speak on behalf of the whole of ‘We the People’ in determining constitutional outcomes or change at the expense of the preferences of minority groups.<sup>62</sup>

There may well be compelling answers to this question: for example, it could be argued that, given the complexities of modern society, it would be impossible to obtain unanimous consent across the polity for any particular constitutional design, and thus the judgment of a majority or supermajority of the People is the next best thing, the closest we can get to that ideal.<sup>63</sup> However one responds to Barnett’s contention, it is one that ought to be taken fairly seriously, as it questions the underlying assumptions Ackerman relies on in asserting the democratic superiority of dualism, while raising the possibility of an alternative definition of constitutional democratic legitimacy that is not based purely on popular sovereignty or consent.

Barnett offers such an alternative. He claims that the idea that “first comes rights, then comes government” helps explain how lawmaking can be legitimate in the absence of unanimous consent.<sup>64</sup> For if rights underlie and are protected by a constitution, changes that are not unanimously endorsed by the People can nevertheless be legitimate if they are constrained by the rights of all.<sup>65</sup> To advance the democratic legitimacy of a rights foundationalist constitution along such lines, Barnett provides an alternative conception of popular sovereignty: rather than collective majority or supermajority popular

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<sup>61</sup> Barnett, above n 60, at 15; see also Randy E Barnett *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton University Press, Princeton, 2004) at ch 1.

<sup>62</sup> Barnett, above n 60, at 15.

<sup>63</sup> See Barnett *Restoring the Lost Constitution*, above n 61, at 11; see also discussion of a “good enough” constitution in Ackerman *Foundations*, above n 10 at 296-297.

<sup>64</sup> Barnett, above n 60, at 20-21.

<sup>65</sup> Barnett, above n 60, at 21.

sovereignty, Barnett puts forth the concept of the individual sovereignty of each person as the basis of constitutional legitimacy.<sup>66</sup> The course of his argument is as follows: sovereignty rests not in the government, but in the People as individuals; for the government to be legitimate, it must receive the consent of all these sovereign individuals; however, literal unanimous consent by each person is essentially impossible, and in the absence of such, the only consent that can be attributed to all individuals is consent only to those powers that do not violate the fundamental rights of the People; protecting those rights retained by the People assures that government conforms to the consent it claims as the source of its powers; “only if such protection is effective will its commands bind in conscience on the individual.”<sup>67</sup>

The need for rights to come before democracy in this way provide a serious critique of dualism: in a dualist democracy, the only way for rights to make it into higher law is through the higher lawmaking process.<sup>68</sup> But if this does not occur, they cannot act as a constraint on ordinary lawmaking in the dualist system.<sup>69</sup> This is problematic, as it is easy to see how minority rights may be overlooked by the majority in their higher lawmaking efforts: for example, the institution of slavery was shielded by the Founder’s Constitution.<sup>70</sup> But if every person within a polity is to be subjected to the powers of government (as they are), the constitution must arguably be seen to protect every person, and allow every person a place and a voice as part of the People.

### *E Conclusions: a Theoretical Framework for Assessing Constitutional Democratic Legitimacy, and the Need for Contextual Focus*

Ackerman’s preferred constitutional model is dualist democracy, and his case in favour of dualism is largely built by contrasting it to other major constitutional models: he considers that dualism avoids the democratic weaknesses of both monism and rights

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<sup>66</sup> Barnett, above n 60, at 21-26.

<sup>67</sup> Barnett, above n 60, at 21-26, in particular at 26.

<sup>68</sup> See Ackerman, above n 10, at 12-13.

<sup>69</sup> See Ackerman, above n 10, 12-13.

<sup>70</sup> See Ackerman, above n 10, at 13-14.



foundationalism. Ackerman's position, however, cannot be indiscriminately accepted at face value, as has been shown by some of the criticisms lodged against his dualist democracy. Thus the possible fallibility of Ackerman's thesis must be acknowledged, as must the difficulties involved in attempting to meaningfully and definitively theorise constitutional democratic legitimacy. The constitutional models Ackerman refers to each have valid but alternative claims to democratic legitimacy, depending on how that term is defined, and in addition highlight the democratic weaknesses of each other: there is no one model that emerges as definitively superior or more democratically legitimate than the others. Thus the utility of Ackerman's theory for this paper lies in its facilitation of a conversation about how to define democratic legitimacy in constitutional terms. Part III uses this conversation as a theoretical framework through which to assess the democratic legitimacy of New Zealand's constitution, and offer reform options, through the lenses of alternative constitutional models.

Before this, however, one final point must be acknowledged. Given that no one constitutional model emerges as democratically superior, the focus must move to the question of the superiority of any model for a particular constitutional context, and the potential that each model, or a combination of aspects of more than one model, may provide for enhancing the democratic legitimacy of that particular constitution. Thus the theoretical framework may be used to provide alternative suggestions for constitutional reform; the course that is chosen as superior must be tailored to the unique context of the constitution in question: here, New Zealand.

Given this, it is important to recognise that, in addition to legal rules and principles, cultural values are also a significant part of a constitution, and serve to inform the viability of any potential constitutional reforms.<sup>71</sup> As Matthew Palmer has argued:<sup>72</sup>

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<sup>71</sup> Palmer, above n 2; see also Constitutional Advisory Panel *New Zealand's Constitution: A Report on a Conversation* (Ministry of Justice, November 2013) at 11.

<sup>72</sup> Palmer, above n 2, at 567.

The nature of constitutional norms, and the constitutional culture from which they arise, forms a landscape that influences the likely success or failure, or at least the relative ease or difficulty of acceptance, of any constitutional reform.

This is, in itself, an idea with democratic foundations: the constitutional values of the People, how they wish to be governed and what they expect from government, must inherently inform constitutional arrangements and developments. Thus for any constitutional analysis or suggestions for reform to be useful and valuable, recognition and understanding of the constitutional values of the People in question must always sit in the background. This leaves the task of trying to determine how to enhance a constitution's democratic legitimacy while remaining faithful to the constitutional values of its populace. The following sections explore the place of New Zealand's constitution within the above theoretical framework, raise weaknesses from the perspectives of the different models of democratic legitimacy, and offer suggestions for reform. Sitting in the background remains the recognition of the need for contextual focus, and an articulation of New Zealand's constitutional values will be interwoven throughout.

### *III New Zealand's Position Within the Theoretical Framework: a Sophisticated Monist Constitution*

#### *A Background*

As mentioned earlier, in terms of Ackerman's framework, New Zealand's constitution fits most neatly within the monist conception of democracy.<sup>73</sup> New Zealand inherited the Westminster system of government from Britain upon colonisation, and since then there has been no formal break in New Zealand's constitutional commitment to parliamentary sovereignty,<sup>74</sup> by which is meant that Parliament has full legal power to make or unmake

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<sup>73</sup> See Janet McLean "The New Zealand Constitutional Review: Tradition and Change" (paper presented to New Zealand Centre for Public Law Conference: "Unearthing New Zealand's Constitutional Traditions", Wellington, August 2013) at 3-6.

<sup>74</sup> See Palmer, above n 2, at 582.

any law it sees fit, and no body or court has legal power to override legislation enacted by Parliament.<sup>75</sup>

As a result of this commitment to parliamentary sovereignty, there is no legal distinction within New Zealand's constitution between ordinary and 'constitutional' laws: all laws promulgated by Parliament have the same legal status.<sup>76</sup> Thus New Zealand has no written, supreme, entrenched constitutional document that can be used to strike down ordinary legislation as 'unconstitutional'. Instead, New Zealand's constitution can be described as 'unwritten'.<sup>77</sup> It is made up of an array of "written rules, institutional structures, procedures and norms, and understandings" that all, in conjunction, work together to determine our constitutional structure and circumscribe (either legally or extra-legally) the exercise of public power.<sup>78</sup>

Given this, New Zealand has "relatively open-textured constitutional arrangements" with the result that "New Zealand has an iterative constitution – it is in a state of constant evolution."<sup>79</sup> Thus, unlike the United States Constitution, whereby onerous amendment procedures mean that constitutional change often involves a build up of pressure for change eventually released in the form of formal entrenched amendments (or, according to Ackerman's theory of constitutional moments, informal sharp breaks from previous constitutional regimes), constitutional change in New Zealand is much more fluid and incremental, characterised more by a slow evolution of constitutional attitudes and

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<sup>75</sup> Constitution Act 1986, s 15(1); Supreme Court Act 2003, s 3(2); see also A V Dicey *Introduction to the Study of the Law of the Constitution* (3rd ed, MacMillan and Co, London, 1889) at 38; but see, for discussions on potential modern limits on parliamentary sovereignty, Geoffrey Palmer "The Bill of Rights after Twenty-One Years: the New Zealand Constitutional Caravan Moves On?" (2013) 11 NZJPIL 257; and Sian Elias "Sovereignty in the 21<sup>st</sup> Century: Another Spin on the Merry-Go-Round" (2003) 14 PLR 148.

<sup>76</sup> See generally Dicey, above n 75, at 84.

<sup>77</sup> See Matthew Palmer "What is New Zealand's constitution and who interprets it? Constitutional realism and the importance of public office-holders" (2006) 17 PLR 133 at 135.

<sup>78</sup> Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4<sup>th</sup> ed, Oxford University Press, Melbourne, 2004) at 3-4.

<sup>79</sup> Palmer and Palmer, above n 78, at 5.

conventions and ad hoc pragmatic responses to issues as they arise.<sup>80</sup> This can be viewed as the expression of the New Zealand cultural constitutional value of pragmatism, which tends to be favoured over theoretical or philosophical rhetoric in debates about our constitution.<sup>81</sup> The unfortunate dark flipside of this pragmatism and constitutional fluidity is that there is potential for the constitution to change in undesirable ways without the public being aware of it.<sup>82</sup>

Given New Zealand's persistent commitment to monism (and, arguably, pragmatism), it is unsurprising that some of New Zealand's most impressive constitutional achievements have been directed at the integrity of the electoral system itself, focusing more on improving our monist tradition rather than grand constitutional shifts.<sup>83</sup> For example, efforts to entrench the New Zealand Bill of Rights Act 1990 as supreme law were resoundingly rejected at the time of proposal, being seen, *inter alia*, as an affront to parliamentary sovereignty and vesting too much power in the judiciary.<sup>84</sup> A full discussion of constitutional developments in New Zealand is well beyond the scope of this paper, however there are two particular sophisticated monist achievements that shall be noted: the entrenchment provision in s 268 of the Electoral Act 1993, and the move to a Mixed Member Proportional (MMP) voting system.

### *B Section 268 Electoral Act 1993*

Section 268 of the Electoral Act is the only entrenchment provision of its kind on the New Zealand statute books.<sup>85</sup> It entrenches one provision of the Constitution Act 1986 and five provisions in the Electoral Act: s 17(1) of the Constitution Act, which sets the term of Parliament;<sup>86</sup> s 28 of the Electoral Act, pertaining to the Representation

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<sup>80</sup> Palmer, above n 2, at 574.

<sup>81</sup> Palmer, above n 2, at 566-567 and 590-591; See also Geoffrey Palmer "The Bill of Rights after Twenty-One Years", above n 75 at 261.

<sup>82</sup> Palmer and Palmer, above n 78, at 5-6.

<sup>83</sup> See generally McLean, above n 73 at 3.

<sup>84</sup> See *Interim Report of the Justice and Law Reform Committee on a White Paper on a Bill of Rights for New Zealand* (1986) AJHR I8A.

<sup>85</sup> McLean, above n 73, at 4.

<sup>86</sup> Electoral Act 1993, s 268(1)(a).

Commission;<sup>87</sup> ss 35 and 36 of the Electoral Act, pertaining to the division of New Zealand into electoral districts;<sup>88</sup> s 74 of the Electoral Act, pertaining to qualification of electors to vote, as well as the definition in s 3 of ‘adult’;<sup>89</sup> and s 168, pertaining to method of voting, in particular the secret ballot.<sup>90</sup>

To amend or repeal any of these provisions, a 75 percent majority in the House of Representatives or an ordinary majority in a national referendum is required,<sup>91</sup> technically placing these provisions out of reach of ordinary lawmaking processes. However, s 268 does not entrench itself, meaning that it would be perfectly legal for the legislature to repeal s 268 through ordinary legislative processes, leaving the previously entrenched provisions similarly vulnerable to change through ordinary procedures<sup>92</sup>. The reason for only single entrenchment stemmed from doubts about the legal effectiveness of entrenchment in the context of parliamentary sovereignty.<sup>93</sup> Nevertheless the provision has been complied with since its first enactment in 1956.<sup>94</sup>

Section 268, and Parliament’s continued adherence to it, may be conceptualised, in Ackerman’s terms, as a sophisticated monist achievement.<sup>95</sup> Section 268 purports to place limits on Parliament’s lawmaking authority, an arguably dualist aim in its recognition that some aspects of our constitution ought to be placed beyond the reach of ordinary lawmaking.<sup>96</sup> Yet the limits pertain to the preservation of the integrity of the electoral process itself, and are thus arguably better conceived of as part of an ever more sophisticated monist constitution.<sup>97</sup> Nevertheless, it is interesting to note that the different

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<sup>87</sup> Electoral Act 1993, s 268(1)(b).

<sup>88</sup> Electoral Act 1993, s 268(1)(c)-(d).

<sup>89</sup> Electoral Act 1993, s 268(1)(e).

<sup>90</sup> Electoral Act 1993, s 268(1)(f).

<sup>91</sup> Electoral Act 1993, s 268(2).

<sup>92</sup> Royal Commission on the Electoral System *Towards a Better Democracy* (December 1986) at 290.

<sup>93</sup> Palmer, above n 75, at 276.

<sup>94</sup> Royal Commission on the Electoral System, above n 92, at 288.

<sup>95</sup> See Ackerman *Foundations*, above n 10, at 8.

<sup>96</sup> See generally Royal Commission on the Electoral System, above n 92, at 287; see generally Colón-Ríos, above n 5, at 461-462.

<sup>97</sup> See Ackerman *Foundations*, above n 10, at 8; see also McLean, above n 73, at 4.

models are not mutually exclusive and may, in some respects, overlap. This observation may also be made with respect to the move to MMP voting in New Zealand.

### *C Move to MMP voting*

The MMP voting system and the circumstances of its adoption are of particular note from a democratic standpoint. By way of background, prior to MMP New Zealand had a First Past the Post (FPP) voting system, where votes were for electorate seats; there was no party vote.<sup>98</sup> The “winner-takes-all” nature<sup>99</sup> of FPP meant that it had a “systemic bias in favour of a single party obtaining a majority of parliamentary seats”<sup>100</sup> and consequently a “tendency to produce results that were disproportionate to voter intent.”<sup>101</sup> The distortions were so extreme that in the 1978 and 1981 elections the National Party formed the government despite the Labour Party winning a larger share of the total vote on each occasion.<sup>102</sup> Such a system, coupled with parliamentary sovereignty, raises issues from the perspective of democratic legitimacy: how can a government claim the authority of the People for even its ordinary lawmaking initiatives when voting outcomes are not reflective of voter intent?

Thus confidence in New Zealand’s democratic system began to waiver in the 1980s and 1990s, prompted in particular by the enactment of economic privatisation policies by successive National and Labour governments despite widespread popular dissatisfaction.<sup>103</sup> Prior to its election in 1984, Labour undertook to establish a commission to review the electoral system, and established a Royal Commission on the Electoral System in 1985.<sup>104</sup> The Commission undertook a comprehensive review of New

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<sup>98</sup> See Electoral Commission “FPP – First Past the Post” <[www.elections.org.nz](http://www.elections.org.nz)>.

<sup>99</sup> See Charles Chauvel “A Better Democracy, Thanks to MMP” in Caroline Morris, Jonathan Boston and Petra Butler (eds) *Reconstituting the Constitution* (Springer, New York, 2011) 199 at 202; see Electoral Commission, above n 98.

<sup>100</sup> Palmer and Palmer, above n 78, at 10.

<sup>101</sup> Chauvel, above n 99, at 202.

<sup>102</sup> Chauvel, above n 99, at 202-203.

<sup>103</sup> McLean, above n 73, at 3; Chauvel, above n 99, at 202-203; Ian Marsh and Ramond Miller *Democratic Decline and Democratic Renewal: Political Change in Britain, Australia and New Zealand* (Cambridge University Press, Cambridge, 2012) at 248-257.

<sup>104</sup> Chauvel, above n 99, at 203.

Zealand's electoral system, considering many of the questions regarding democratic legitimacy that the constitutional models articulated in Part II are directed at: "How, for instance, is the balance to be struck between majority power and minority right, or between the sovereignty of the people exercised through Parliament and the rule of law...?"<sup>105</sup> Furthermore, the Commission recognised that:<sup>106</sup>

our Governments have great powers and great responsibilities. Their exercise of those powers and fulfillment of those responsibilities is legitimate only because it arises from the consent of the people, or, to put it another way, because it is based on the political sovereignty of the people. How is that consent to be given? How is that popular sovereignty to be exercised?

After assessing the merits of a number of alternative electoral systems, the Commission recommended the adoption of MMP based on the criteria of fairness between political parties, effective representation of minority groups, effective Māori representation, political integration, effective representation of constituents, effective voter participation, effective government, effective Parliament, effective parties and legitimacy.<sup>107</sup>

Unfortunately, Labour's programme of constitutional reform ground to a halt in the late 1980s as a result of factional infighting.<sup>108</sup> National exploited this, making a promise in its 1990 election campaign to hold a referendum on New Zealand's electoral system.<sup>109</sup> After gaining office, pressure on National to honour this promise resulted in a two-part referendum.<sup>110</sup> An indicative referendum was held in 1992, asking voters if they wished to change the electoral system, and providing several options for reform.<sup>111</sup> 85% of voters were in favour of changing the electoral system, with 70% favouring MMP over the alternative options.<sup>112</sup> Thereafter, in conjunction with the 1993 election, a second, binding, referendum was held, asking voters whether they wished to retain FPP or move

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<sup>105</sup> Royal Commission on the Electoral System, above n 92, at 1.16.

<sup>106</sup> Royal Commission on the Electoral System, above n 92, at 1.18.

<sup>107</sup> Royal Commission on the Electoral System, above n 92, at 2.1; Chauvel, above n 99, at 203-204.

<sup>108</sup> Chauvel, above n 99, at 204.

<sup>109</sup> Chauvel, above n 99, at 204.

<sup>110</sup> Chauvel, above n 99, at 204.

<sup>111</sup> Chauvel, above n 99, at 204.

<sup>112</sup> Chauvel, above n 99, at 204.

to MMP.<sup>113</sup> MMP gained 54% of the vote, and took effect as New Zealand's new electoral system from the 1996 election onwards.<sup>114</sup>

This process of adoption of fundamental constitutional change was unheralded in New Zealand, and its democratic credentials are strong. Rather than slow incremental change, or change adopted through mere ordinary legislative means, change came about as a response to public dissatisfaction and through direct public participation. Again, this contains dualistic elements, as an embodiment of the idea that for constitutional change to be legitimate, it must be endorsed by the People. Further, the endorsement by the People has been continuous: in an indicative referendum held in conjunction with the 2011 election, voters were asked whether they wished to keep MMP, with 57.8% voting yes.<sup>115</sup>

Given this strong popular endorsement in favour of MMP, arguably an example of mass popular mobilisation (at least in Ackerman's terms), it could be argued that New Zealand's voting system should be viewed as higher law, that it would be democratically illegitimate, and should be illegal, for it to be overturned through ordinary lawmaking procedures. This may be an attractive argument if New Zealand's constitution was more dualist in nature. However, given our monist underpinnings, the move to MMP seems better conceptualised as an extremely sophisticated monist achievement, particularly with its focus on enhancing the democratic legitimacy of the electoral system itself and making it more responsive to the will of the People, thus strengthening the democratic legitimacy of our constitution in monist terms. In our monist context, if a government were to legislate to overturn MMP without the consent of the People, it would likely face outrage by the People, and would hopefully be turned out of office at the next election (assuming the electoral changes it made allowed this; if not, a more dire situation, e.g. constitutional crisis, may arise).

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<sup>113</sup> Chauvel, above n 99, at 204.

<sup>114</sup> Chauvel, above n 99, at 204.

<sup>115</sup> *Report of the Electoral Commission on the Review of the MMP Voting System* (29 October 2012) at 6.



The s 268 entrenchment provision and the move to MMP arguably both display slight dualistic tendencies, the former in terms of purporting to act as a constraint on ordinary lawmaking, the latter in terms of its adoption being endorsed by the People. However, both efforts were focused on the electoral system itself, on preserving and enhancing its democratic integrity, and furthermore both operate within a predominantly monist context. On Ackerman's analysis, they are thus most accurately conceptualised as achievements of a sophisticated monist constitution. Nevertheless, this may suggest that the dichotomy between the values represented by dualism and monism respectively are less delineated than Ackerman appears to acknowledge.

#### *IV Democratic Imperfections and Suggestions for Reform*

Part III has purported to show some of New Zealand's achievements in constitutional democratic legitimacy, in the form of a particularly sophisticated monist constitution. Nevertheless, there remains room for improvement. New Zealand's constitution may be critiqued from the perspectives of monism, dualism, and rights foundationalism. The following undertakes such a critique, offering suggestions for reform. Unfortunately, the scope of this paper is insufficient to provide an in depth discussion of possible reform options. Instead, it will pay deference to the work of the Electoral Commission as well as constitutional law academics whose work has been dedicated to such questions.

##### *A Monist Imperfections: Remaining Flaws in the Electoral System*

As a result of the vote in favour of MMP in the 2011 referendum on New Zealand's electoral system,<sup>116</sup> the Electoral Commission was required by law to commence a review of MMP, and make recommendations to improve MMP.<sup>117</sup> In its report, the Electoral Commission stated that in undertaking the review, it remained mindful that, inter alia, "a voting system should be as fair, equitable and simple as possible to facilitate public trust, understanding and participation."<sup>118</sup> The Electoral Commission's report noted a number

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<sup>116</sup> Electoral Referendum Act 2010, s 74.

<sup>117</sup> Electoral Referendum Act 2010, s 75; see also *Report of the Electoral Commission*, above n 115, at 7.

<sup>118</sup> *Report of the Electoral Commission*, above n 115, at 7.

of remaining flaws in the MMP system.<sup>119</sup> Of particular interest, from the perspective of accurate representative democracy and thus sophisticated monism, is its recommendation that the one electorate seat waiver to the party vote threshold should be abolished.<sup>120</sup>

The one electorate seat waiver is the rule that if a party obtains one electorate seat in an election, it gets an allocation of list seats proportionate to its share of the party vote, even if it has not crossed the party vote threshold (which is 5% of the party vote in New Zealand).<sup>121</sup> It has been viewed by the original Royal Commission on the Electoral System as their one mistake.<sup>122</sup> The one electorate seat waiver is problematic because it has been exploited to game the outcomes of elections. Rather than the electorate vote being used for its purpose, which is to elect a local representative, it has been used “to significantly influence the make-up of Parliament by helping to bring in list MPs who would not otherwise be elected.”<sup>123</sup>

The controversial ‘cup of tea’ between John Key and John Banks in Epsom in the lead up to the 2011 election is an example of such electoral manipulation. It was seen as an indication to Epsom National voters to use their electorate vote to vote, not for the National candidate in Epsom, but for the ACT candidate John Banks.<sup>124</sup> This would allow ACT to bring in list MPs in addition to Mr Banks, acting as extra support for a National government.

This type of election gaming is not consistent with the type of representative democracy that MMP is supposed to produce and protect. It gives some voters (those in controversial electorates) disproportionate influence on the makeup of Parliament, undermining the principle of equality between voters inherent in our voting system, and produces

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<sup>119</sup> *Report of the Electoral Commission*, above n 115.

<sup>120</sup> *Report of the Electoral Commission*, above n 115 at 8 and at 16-24.

<sup>121</sup> *Report of the Electoral Commission*, above n 115, at 16.

<sup>122</sup> *Report of the Electoral Commission*, above n 115, at 16.

<sup>123</sup> *Report of the Electoral Commission*, above n 115, at 18.

<sup>124</sup> See Adam Bennett “Political cups of tea shared” *The New Zealand Herald* (online ed, 11 November 2011); a similar gaming technique was also used in the 2008 election: see *Report of the Electoral Commission*, above n 115, at 18.

disingenuous results.<sup>125</sup> The Commission recommended that this rule be abolished: winners of electorate seats should keep their seats, but their party should not be entitled to a waiver of the 5% threshold for proportional representation.<sup>126</sup>

This recommendation is but one way to improve our electoral system, and thus strengthen our monist democracy. The Commission recognised others. Electoral improvements were also considered in the 2011-2013 constitutional review.<sup>127</sup> A comprehensive analysis of all the ways our electoral system could be tweaked and improved is beyond the scope of this paper. The above has purported to recognise but one issue of particular concern. At this point the question must be asked whether, even if our electoral system were perfect, even if our monist constitution was as sophisticated as possible, this would be sufficient for our constitution to claim that it was sufficiently democratically legitimate. Or, in other words, does our constitution need elements of a dualist character to supplement our monist commitments to enrich our constitution's claims to democratic legitimacy?

### *B Dualist Imperfections: Absence of Avenues for Binding Public Constitutional Participation*

Given New Zealand's monist tradition, the author does not purport to argue that New Zealand should drastically change its constitutional arrangements and move towards an entrenched, supreme, written constitution, considering that this would ride roughshod over New Zealand's constitutional values. Rather, the concern here is whether parliamentary sovereignty may be supplemented with avenues for binding public constitutional participation.

Currently, there are no such legal avenues. The People can initiate referenda, but these are non-binding.<sup>128</sup> Further, the 2011-2013 Constitutional Review, which purported to engage the People in a conversation about the constitution, had no legal avenue for its

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<sup>125</sup> See *Report of the Electoral Commission*, above n 115, at 17-19.

<sup>126</sup> *Report of the Electoral Commission*, above n 115, at 16-19

<sup>127</sup> Constitutional Advisory Panel, above n 71, at 57-66 and 72.

<sup>128</sup> See Citizens Initiated Referenda Act 1993.

recommendations to be implemented. This absence of legal avenues for binding public constitutional participation, beyond general elections, may be problematic from a democratic perspective. If Parliament is sovereign, and the only means of public control of Parliament is at the polling booths, this means that Parliament may do as it wishes in the three years between elections. Even if Parliament is as representative as possible (i.e. if the electoral system is perfected), this lack of binding public participation means that the People have very little control over their constitution. This raises issues from the perspective, generally, of constitutional democratic legitimacy stemming from the People. Furthermore, it is possible that if the People feel like they are not the authors of their constitution, they are more likely to disengage from constitutional participation.

Joel Colón-Ríos has argued that two principles are inherent in the idea of democratic legitimacy focused on the concept of self-government: democratic openness and popular participation.<sup>129</sup> Democratic openness requires that a democratic society must be an open society where “even the most fundamental rules are susceptible of being reformulated or replaced.”<sup>130</sup> Popular participation requires that “those subject to a set of rules must have the opportunity to deliberate and decide on their content through the most participatory mechanisms possible.”<sup>131</sup> He considers that the concept of ‘constituent power’ encapsulates these two principles.<sup>132</sup> Constituent power is “the faculty of creating and recreating constitutions at will, a faculty generally attributed to the people in a democracy”;<sup>133</sup> it always “remains alongside and above the constitution”.<sup>134</sup> From these ideas, Colón-Ríos extracts two criteria for democratic legitimacy, the first of which is relevant for purposes here: the criterion that “a democratically legitimate constitution must provide an opening for constituent power to manifest from time to time.”<sup>135</sup> He

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<sup>129</sup> Colón-Ríos, above n 5, at 451-452.

<sup>130</sup> Colón-Ríos, above n 5, at 451.

<sup>131</sup> Colón-Ríos, above n 5, at 452.

<sup>132</sup> Colón-Ríos, above n 5, at 452.

<sup>133</sup> Colón-Ríos, above n 5, at 452.

<sup>134</sup> Colón-Ríos, above n 5, at 453, citing Carl Schmitt *Constitutional Theory* (Duke University Press, Durham, 2008) at 125-126.

<sup>135</sup> Colón-Ríos, above n 5, at 456.

submits that currently “New Zealanders lack the proper means to exercise their constituent power.”<sup>136</sup>

Even if we wish to remain generally committed to monism, the idea that there ought to be avenues for the People to determine New Zealand’s constitutional arrangements, if they so choose, remains attractive. It may be the case that the People get fed up with our current constitutional arrangements, wanting to alter small aspects of it or change it fundamentally. That desire may not exist currently, but if it did arise, there is currently no avenue for its expression in New Zealand’s constitutional arrangements. Arguably such an avenue should be an option before it is required, to avoid fundamental constitutional change from having to occur through revolutionary means.

This does not mean that New Zealand must move towards a dualist constitution proper. There are other ways constituent power can be recognised that may supplement New Zealand’s monist constitutional structure with dualist elements. Colón-Ríos offers the solution of a Citizen Initiated Constituent Assembly.<sup>137</sup> How this would work could be that citizens could propose constitutional change, and on the basis of that proposal be required to collect signatures to trigger an initial popular referendum.<sup>138</sup> If enough signatures were obtained (with perhaps the number of required signatures being set at around 10-20% of registered voters), a referendum would be triggered in which citizens would be asked whether they wish to convene a Constituent Assembly to deliberate on the proposed changes.<sup>139</sup> If the referendum vote is positive, the assembly would be convened.<sup>140</sup> This assembly could be composed of elected delegates or delegates selected by random lot; ideally current or running politicians would be barred from sitting as delegates.<sup>141</sup> The assembly would then deliberate on the proposed changes for a determinate period of time, following which any changes it proposed being subject to a

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<sup>136</sup> Colón-Ríos, above n 5, at 467.

<sup>137</sup> Colón-Ríos, above n 5, at 467-468.

<sup>138</sup> Colón-Ríos, above n 5, at 467-468.

<sup>139</sup> Colón-Ríos, above n 5, at 468.

<sup>140</sup> Colón-Ríos, above n 5, at 468.

<sup>141</sup> Colón-Ríos, above n 5, at 468-469.

binding national referendum.<sup>142</sup> If the assembly's proposals are ratified by the public, they would then become law, and protected from ordinary lawmaking processes.<sup>143</sup>

### *C Rights Foundationalist Imperfections: The Constitutional Place of the Treaty of Waitangi*

Thus far this paper has been conspicuously silent on the Treaty of Waitangi and its place in New Zealand's unique constitution. This is not because the Treaty is constitutionally unimportant; on the contrary, it is because the Treaty is so important to New Zealand's constitution that the scope of this paper is insufficient to adequately explore the constitutional significance of it. However, the following purports to briefly canvas the Treaty's current constitutional status, and offer criticisms of that insufficient status from a rights foundationalist perspective.

The Treaty itself does not have the status of domestic law: it does not have ordinary statutory effect, nor does it act as a restraint on parliamentary sovereignty as fundamental, supreme constitutional law.<sup>144</sup> However, its significance has begun to be increasingly recognised in New Zealand's constitution.<sup>145</sup> For example, the Treaty has become an important influence on executive and legislative decision-making: the *Cabinet Manual* requires that Cabinet papers identify the Treaty implications of proposed policy recommendations and all executive proposals for legislation must report on consistency with the principles of the Treaty.<sup>146</sup>

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<sup>142</sup> Colón-Ríos, above n 5, at 469.

<sup>143</sup> Colón-Ríos, above n 5, at 469-470.

<sup>144</sup> Palmer and Palmer, above n 78, at 346.

<sup>145</sup> See Palmer and Palmer, above n 78, at 346-347; see also Parliamentary Counsel Office "LAC Guidelines Chapter 5: Principles of the Treaty of Waitangi" <[www.pco.parliament.govt.nz](http://www.pco.parliament.govt.nz)>; see also Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 244-277.

<sup>146</sup> Palmer and Palmer, above n 78, at 346; Cabinet Office *Cabinet Manual 2008* at [7.60]-[7.61].

However, the exact constitutional place of the Treaty is uncertain.<sup>147</sup> There are arguments that even the increased recognition of the Treaty in the constitution is insufficient, and that the Treaty or its principles should have constitutional protection, given that “the Treaty is a key source of the New Zealand Government’s moral and political claim to legitimacy in governing the country.”<sup>148</sup>

The cession of sovereignty by Māori as tangata whenua of Aotearoa to the British Crown was not unconditional.<sup>149</sup> David Williams conceives of the Treaty as a compact in which Māori welcomed those who wished to settle here, but with that welcome came an obligation on the Crown to “honour the collective rights of the indigenous people.”<sup>150</sup>

When the Treaty is conceived of as a foundational document of New Zealand’s constitution,<sup>151</sup> and as ceding sovereignty in return for protection of collective rights retained by Māori, this gives grounds for the rights foundationalist argument that Māori rights should be protected from abrogation by ordinary democratic means. This argument is strengthened by the fact that presently Māori are a minority of the New Zealand population, and are thus particularly vulnerable to the ‘tyranny of the majority’,<sup>152</sup> but had colonisation not taken place, they would not have this minority status. There are therefore arguments that the Treaty should have special constitutional recognition, for example as some kind of legal constraint on parliamentary sovereignty.<sup>153</sup>

## *V Conclusion*

Bruce Ackerman’s constitutional theory and the criticisms it has provoked provides a theoretical framework through which the democratic legitimacy of particular

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<sup>147</sup> Matthew Palmer *The Treaty of Waitangi in New Zealand’s Law and Constitution*, above n 145, at 277.

<sup>148</sup> Palmer and Palmer, above n 78, at 346.

<sup>149</sup> David Williams “The Treaty of Waitangi: A ‘Bridle’ on Parliamentary Sovereignty?” (2007) 22 NZULR 598 at 600.

<sup>150</sup> Williams, above n 149, at 610.

<sup>151</sup> See McLean, above n 73, at 7.

<sup>152</sup> See Williams, above n 149, at 620.

<sup>153</sup> Williams, above n 149.

constitutions may be assessed, by reference to the principles underlying monism, dualism, or rights foundationalism. These constitutional models each have unique and alternative claims to constitutional democratic legitimacy, with none emerging as definitively democratically superior to the others. In this context, the propriety of constitutional design or reform from the perspective of democratic legitimacy must be considered with reference to the constitutional values of a particular populace.

New Zealand sits most comfortably within the monist constitutional model. Although New Zealand's monism may be particularly sophisticated, there remains room for enhancing the democratic legitimacy of New Zealand's constitution. This may be in the form of perfecting the electoral system, and thus perfecting New Zealand's monism. However, arguably this is not enough to truly enrich the democratic legitimacy of New Zealand's constitution. There may be room within New Zealand's constitution to embrace dualist elements, for example by a mechanism such as a Citizen Initiated Constituent Assembly, without undermining New Zealand's general monist commitments. Furthermore, from a rights foundationalist perspective and its alternative view on democratic legitimacy, it may be necessary for greater recognition of the Treaty relationship and the role of Māori within constitutional arrangements and participation.

Ideally, all of the criticisms raised would be addressed moving forward, so that New Zealand's constitution can be said to be richly and meaningfully democratic, one that we can be proud of and meaningfully participate within. Most fundamental, however, is the need for We the People to remember that it is We who give government its legitimacy to rule, and We the People who retain the power to choose how We want our constitution to operate.



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