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**THE PLACE OF BACKLASH IN DECISIONS OF THE NEW
ZEALAND JUDICIARY**

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Abstract

Issues central to a group identity, or nomos, are very significant to those who hold them. When those issues clash in courts, judges can be faced with very difficult and controversial decisions. When they have the authority and discretion to address issues of nomos, New Zealand courts both can and should consider the backlash that their decisions could cause, as backlash in the New Zealand context tends to lead to meaningful change to a judge's decision. However, a democratic constitutionalist view of backlash realizes that it is not always a negative phenomenon. Instead, backlash is evidence of subjects within a system contesting the norms and nomos that underlie their constitutional law. This conception of backlash is well suited to New Zealand's constitutional experience, and so while judges would be prudent to consider the potential backlash against their judgments, they should not avoid full engagement with the law purely to avoid conflict.

Key Words: nomos, backlash, judiciary, constitutional law

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I Introduction

No group of people can be completely in agreement on every topic. People have inherently different values, morals, principles, and beliefs which shape their view of the world. At times these world views clash in the legal arena, and it becomes the responsibility of the judiciary to decide which world view to uphold and which to subvert. These cases are not always clear cut, and the decisions are often controversial and met with a significant amount of backlash from the subverted party. At times, judgments will not only prompt backlash from the general public but from the executive and legislative branches of government. A judge that is required to make such a decision is not in a simple position.

This paper proposes to investigate whether and to what extent public, executive, and Parliamentary backlash ought to be taken into account by New Zealand courts in their constitutional decisions. To determine this, it asks deeper questions about the nature of New Zealand's own constitutional system and about the nature of backlash itself. Should courts make their decisions in order to actively avoid backlash, or should backlash be seen as positive evidence of the New Zealand public engaging with their system and their constitution? It concludes that while backlash is significantly important in New Zealand, and Courts should take this into account, they should not avoid engaging controversial decisions purely because of the threat of backlash.

Part II of this paper begins by framing the scope of constitutional law through the lens of "nomos". Part III then reviews the constitutional role of the judiciary in New Zealand, showing that New Zealand courts have the actual authority to deal with ideas of nomos and public backlash in certain cases of true discretion. Having determined that New Zealand courts have such authority, Part IV of this paper then considers whether it is useful for courts to consider backlash. It concludes, after considering several case studies, that backlash is of significant importance in New Zealand's system and ought to be considered by courts to some extent in their judgments. The extent to which backlash should be considered in judgments is explored in Part V, which compares different theories around the purpose, importance and place of backlash in a nation, including democratic constitutionalism, and frames these in a New Zealand context. Finally, Part VI of this paper argues that democratic constitutionalism is the best theory for New Zealand's background and experiences with backlash.

II Nomos

Before embarking on a discussion of judicial interpretation of constitutional law, it is helpful to define exactly what law this study refers to. Most cases from other courts that involve backlash concern explicitly stated constitutional rights and freedoms. However, New Zealand lacks such a definite category of constitutional issues simply because it lacks a written constitution. This study requires another definition that contains the general subject matter of constitutional law, but does not require the law to be set out within a written constitution.

This paper therefore focuses on the idea of what Robert M Cover has called “nomos”. Nomos is a concept that, in its original Greek, referred to the source of all law.¹ Its meaning has developed over time to refer to commitment to a common way of life, made valid because of its acceptance by all those who live under it.² Nomos can be understood as a widely-accepted set of values or meanings, a form of group identity.³

Our legal system is not merely a set of rules but a world in which we live.⁴ As every person in the world has a different experience of life and a different set of values, there is the potential for a law to mean many things to many people.⁵ This leads to different laws having varying levels of significance.⁶ Naturally, some laws engage more with the values of the individual than others – for example, laws concerning religious beliefs or human rights are very likely to have significant importance to an individual or group of like-minded people. When courts make decisions on such laws, they are required to engage with nomos, or group identity. This can be difficult, given the fact that there will not usually be an answer to satisfy the values and meet the expectations of every invested party.

This paper therefore examines judicial decisions involving the broad idea of nomos. In doing this, there is less confusion with the subject matter that this essay proposes to deal with. Decisions around nomos tend to envelop constitutional cases in different states with

¹ Martin Loughlin “Nomos” in David Dyzenhaus and David Poole (eds) *Law, Liberty and State: Oakeshott, Hayek and Schmitt on the Rule of Law* (Cambridge University Press, Cambridge, 2015) 65 at 71.

² Loughlin, above n 1, at 72-75.

³ Robert Post and Reva Siegel “Roe Rage: Democratic Constitutionalism and Backlash” (2007) 42 *Harv.C.R.-C.L.Law Rev.* 373 at 378.

⁴ Robert M Cover “Foreword: Nomos and Narrative” (1983) 97 *Harv.L.Rev.* 4, at 5.

⁵ Cover, above n 4, at 17-18.

⁶ Cover, above n 4, at 17-18.

different constitutions, as well as cases in New Zealand that might not otherwise be considered “constitutional” purely because of the lack of a constitution. Engaging with *nomos* allows this paper to focus broadly on decisions which, by their nature, result in controversy and threaten backlash, and to analyse how such decisions should be approached in the New Zealand context.

To determine how New Zealand courts ought to respond to ideas of *nomos*, this paper will first outline the role of the courts in New Zealand’s system and the capacity of their decision-making ability. There would be no point in setting out to analyse the interaction between courts and *nomos* if courts had no authority to consider any forms of public opinion or identity.

III Constitutional role of New Zealand courts

This section will first outline the role of New Zealand courts generally, and then examine when courts may and may not have the discretion to deal with issues of *nomos*.

A Role of New Zealand Courts generally

The role of the courts is generally governed by the theory of the separation of powers. This theory states that the three governing bodies of a sovereign state – the legislature, the executive, and the judiciary – have separate functions in order to limit their powers and act as a check and balance against one another.⁷ While the Westminster democracy system present in New Zealand can be seen as a partial departure from this doctrine, it very effectively separates the judicial power from the executive and legislative bodies.⁸ The legislative role is that of passing laws, including delegating law-making authority, and the executive creates policy and carries out general administration of the country.⁹ The judicial power lies in adjudicating disputes around the application of the law, giving rulings on specific facts.¹⁰ It both interprets statute law and develops the common law, a

⁷ Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 199.

⁸ Joseph, above n 7, at 199.

⁹ Joseph, above n 7, at 200-201.

¹⁰ Joseph, above n 7, at 202.

set of rules that were created and are still shaped by court decisions, to the extent that they have not been impacted by the legislature.¹¹

Underpinning the court's adjudicative role is the importance of judicial independence. Judges, in making their decisions on statutory and common law issues, cannot appear to be partial in any way or have any form of bias, so that the public can have confidence in the judicial system.¹² In New Zealand, the Constitution Act 1986 protects judicial independence by preventing removal of a judge from office except in exceptional circumstances, so that judges will not risk removal from their position for making an unpopular decision.¹³ It also prevents reduction of judges' salaries for similar reasons.¹⁴

In short, the court's main role is to interpret and apply existing law. Traditionally, where Parliament has legislated with a clear purpose the court should not defy that intent. The justification for this rule comes from the theory of Parliamentary sovereignty, and the fact that Parliament, as a body of elected officials, best represents the intentions of the nation.¹⁵ Courts, made up of appointed judges, cannot represent the voice of the public as accurately as an elected body and therefore theoretically do not have the authority to go against Parliament's explicit legislative instructions.¹⁶ Instead, in applying the laws passed by the legislative body, the courts can legitimise the actions of Parliament as well as hold the executive responsible for any illegal actions or infringement upon the freedoms of its citizens.¹⁷ The legislature in turn can acknowledge judicial decisions, lending credibility to the courts.¹⁸

This conception of the role of the courts, of course, is not as black and white as it seems. While the courts will apply law as passed by Parliament, there are situations where the courts may have more freedom in interpreting the law than others. At times, the judiciary may consider a decision completely out of its jurisdiction. At others, the intention of Parliament may be unclear or the courts may defer to the authority of Parliament to settle

¹¹ For example, tort law: see Bill Atkin and Geoff McLay *Torts in New Zealand: Cases and Materials* (5th ed, Oxford University Press, Melbourne, 2012) at 1.

¹² Joseph, above n 7, at 797.

¹³ Constitution Act, s 23.

¹⁴ Section 24.

¹⁵ See AV Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, Macmillan & Co, London, 1959) at 39-85.

¹⁶ Joseph, above n 7, at 788.

¹⁷ Joseph, above n 7, at 788.

¹⁸ Joseph, above n 7, at 788.

a certain issue. However, some scholars have observed that there are other situations where the courts will stray entirely from the relevant legislation. These situations especially arise when the law enunciated by Parliament clashes with a common sense of justice – in other words, where *nomos* is involved. In these cases, what the courts can do depends on their authority. The next section explores the court’s jurisdiction, and the kinds of decisions a court has authority to make when cases fall within its jurisdiction.

B Jurisdiction of New Zealand courts

Generally, courts cannot hear cases that are not grounded in an existing factual dispute: There can be no theoretical cases.¹⁹ For policy reasons, courts will also not usually hear cases that are based on factual circumstances but, for various reasons, have legal issues that have become moot – for instance, death of a party or the repeal of a statute.²⁰ This paper will focus on cases that fall within the jurisdiction of the court. However, even when a case falls within the court’s jurisdiction, the court may not have the necessary authority to give the judgment that is sought by the party bringing the case. For instance, a court simply cannot make a decision that is explicitly contrary to legislation. Its role is to interpret the law, and it is not possible to interpret law in a way that is contrary to what the law actually says. Thus, when it comes to cases involving issues of *nomos*, there are two kinds of cases: those where the court has the authority to grant the requested remedy, and those where it does not.

1 Cases outside the authority of the court

If a case involving *nomos* comes before a New Zealand court and one party is asking the court to do something that is simply not possible based on the relevant legislation, then the court cannot make the decision in that party’s favour. The position of the party, or the level of public support for that position, is immaterial. If the remedy sought is outside the court’s authority, the court simply cannot give it.

However, Jeffrey Goldsworthy has observed some situations in which judges might still attempt to award a remedy that appears to be outside its authority. To do this, judges engage in “subterfuge” – in changing the law, usually through strained interpretation of legislation that is contrary to Parliament’s intentions or could not possibly have been

¹⁹ See for example *Gazley v Attorney-General* (1995) 8 PRNZ 313 (CA).

²⁰ See for example *Maddever v Umawera School Board of Trustees* [1993] 2 NZLR 471 (HC); *Turner v Pickering* [1976] 1 NZLR 128(CA).

foreseen by it.²¹ Such cases might fall outside the court's authority as one party may be asking the court to go against the intentions of Parliament in respect of a particular law. But in rare cases, the court may choose to take action that it would usually refuse to consider. Goldsworthy compares this to human rights law: sometimes, it is necessary to breach one right in order to uphold the integrity of human rights in general. In the same way, if a piece of legislation is morally reprehensible, a judge can be forced to breach the rule of law in one exercise of interpretation in order to uphold the integrity of the rule of law as a whole.²² Such breaches can be in the form of "white lies" intended to deceive, "half-truths" deliberately failing to mention some factor relevant to the judgment, or "fig-leaves", which are lies which are not likely to deceive, but cover up a truth that would disturb the public and the legal system alike if they were confronted with it.²³ Goldsworthy argues that these measures may be necessary at times but can only be justified in extreme cases, as they are simply not legally sound decisions.²⁴

Nomos could play a part in determining when judicial "subterfuge" is justified. Since Goldsworthy's argument is premised on the fact that courts may occasionally breach the rule of law specifically to uphold the rule of law generally, there would have to be some severe offence to justice for the courts to engage in the interpretational gymnastics that he has observed. Where the application of legislation offends the nomos of the public, it could indicate a general feeling of such an injustice, suggesting that there has been a breach of some moral or legal standard. This in turn could justify courts using "subterfuge" to avoid implementing the law in the way that Parliament intended. In other words, public reaction could be a measuring stick of whether a situation that Goldsworthy envisioned has occurred. Of course, there would have to be an extremely adverse response for the court to consider taking such drastic action.

There are two issues with this proposal. The first is that public disagreement with something does not necessarily make it wrong. The public could simply be misinformed on a particular topic, or not fully understand the relevant action or legislation. Alternatively, there may be very good reasons for the action being taken or legislation being passed. Either way, massive public upheaval alone should not be a catalyst for drastic court action, although it could be taken as a contributing factor. The second issue

²¹ Jeffrey Goldsworthy "The Limits of Judicial Fidelity to Law: The Coxford Lecture" (2011) 24 *Can.J.L. & Jurisprudence* 305 at 312.

²² Goldsworthy, above n 21, at 306.

²³ Goldsworthy, above n 21, at 309-310.

²⁴ Goldsworthy, above n 21, at 320.

is that if the legislative branch so confidently passed legislation that resulted in a majority disagreement, it might not be a legislature that is likely to heed the judgment of a court. In that respect, any decision made by the court will probably not be enforced and may likely be overruled by Parliament. This in turn raises the question of what happens when judges appear to be representing the interests of the public more effectively than the elected legislature, an idea that will be explored later in the paper. Such a situation seems very unlikely in New Zealand, so it brings in to question whether the courts would ever use *nomos* to justify deciding a case outside their authority. It seems safe to say that, as Goldsworthy proposes, such a situation would be exceedingly rare. For this reason, the remainder of the paper focuses on decisions that propose courses of action that are within the authority of the court.

2 *Cases within the authority of the court*

Other cases may propose remedies that are within the authority of the court, in that the decisions that the parties ask the court to make are legally viable and open on the interpretation of the relevant legislation. In these cases, the court is guided by rules of legal interpretation and precedent that will normally lead it to a sound and well-reasoned decision.

However, there are still cases where a court may have the discretion to choose between multiple outcomes. Some commentators reject the existence of judicial discretion, arguing that in every case there is only one legal solution and judges must choose that solution – there are no options.²⁵ Consequently, judges should consider only the principles underlying the law rather than any policy or moral matters.²⁶ However, this conception of judicial decision-making is decidedly unrealistic, failing to take into account the fact that judges may come to different conclusions when faced with the same legal principles. Additionally, it cannot provide a concrete direction for what judges ought to do when faced with clashing principles.²⁷ There will inevitably be cases where judges are faced with multiple outcomes that are apparently legal, and must make a decision without the clear guidance of the law.²⁸ The question then arises of when such decisions occur and how a judge should approach them.

²⁵ Aharon Barak *Judicial Discretion* (Yale University Press, New Haven & London, 1989) at 28.

²⁶ Barak, above n 25, at 30.

²⁷ Barak, above n 25, at 30-32.

²⁸ Barak, above n 25, at 8.

As already mentioned, for judicial discretion to arise, there must be a choice between two legal options. A judge cannot choose to make a decision that is illegal.²⁹ Aharon Barak has proposed that true judicial discretion arises very rarely and only in very difficult cases.³⁰ In most cases, application of the law will be fact-driven and very simple. In some cases both parties may appear to have a valid argument, and the courts may have to undertake a deeper level of analysis to determine the outcome of the case, but it will still emerge that there is only one truly legal outcome.³¹ These cases make up the majority of judicial decisions and true discretion will not arise unless there are two or more valid and legal options open to the judge.

When a court is faced with two or more legal options, it must somehow reach a conclusion without further legal guidance. Barak proposes that while there may not be any law directing the court, it is bound by several procedural and substantive limitations. He argues that, procedurally, a court must act fairly. It cannot show any impartiality or have any personal interest in the outcome of the case, and, most importantly must explain the reasons behind its decision.³² Substantive limitations are more difficult to define, but Barak suggests that a judge must act as “a reasonable judge would in the circumstances”, in order to determine whether there really is more than one legal option.³³ Barak suggests the opinion of the legal community as a whole as a standard for lawfulness. If the legal community would not consider a particular argument viable or would, in general, be shocked at a judge’s decision, it is not likely that that option is truly a lawful one.³⁴ However, once a judge is satisfied that there are multiple legal options and not much substantive legal guidance, the final conclusion is their decision and theirs alone.

In some of these situations, a judge may have the authority to make a particular decision but choose not to, instead leaving the issue to Parliament or the executive to remedy. This is known as judicial deference.³⁵ Situations where courts defer to Parliament or the executive depend on the substance of the issue at hand and how it relates to the constitutional roles of the branches of government. Courts will generally exercise discretion to defer to Parliament or the executive when the subject matter of an issue falls

²⁹ Barak, above n 25, at 9.

³⁰ Barak, above n 25, at 10.

³¹ Barak, above n 25, at 39.

³² Barak, above n 25, at 22-24.

³³ Barak, above n 25, at 25.

³⁴ Barak, above n 25, at 11-12.

³⁵ Robert H Wagstaff *Terror Detentions and the Rule of Law* (2017, Oxford Scholarship online) at 284.

to the constitutional responsibility of that other body, such as issues of national security, finance, or policy decisions.³⁶ They will also defer in areas where Parliament is considered to have more expertise or better resources, such as areas concerning moral decisions.³⁷ The Courts will be less likely to defer to Parliament in areas that typically fall within their realm of constitutional responsibility or legal expertise, such as the criminal law.³⁸ Additionally, the introduction of the New Zealand Bill of Rights Act 1990 (NZBORA) has extended the ability of the courts to make decisions relating to fundamental rights, which may allow the judiciary make judgments in some areas where the traditional approach would be to defer to Parliament or the executive.³⁹

The arguments in favour of judicial deference are several, but all revolve around the fact that there are cases which involve more than a simple application of law to facts. The courts may be required to make some kind of value judgment when the law is not sufficient to solve the issue. Proponents of judicial deference argue that the courts are simply an unsuitable decision maker for most of these issues. For instance, in areas of morality, courts will be required to make a judgment based on perceived national values when the personal backgrounds of the judges – typically from homogenous social and political backgrounds – are very limited, not representative of public opinion, and incapable of making truly informed decisions in these areas.⁴⁰ Parliament, on the other hand, is not only more representative of the population but also has far more resources to inquire into difficult social and moral decisions before coming to a conclusion.⁴¹ Allowing judges to make broad policy decisions about moral issues may require the government, and the population generally, to adhere to moral decisions that were not made by an elected body and could encourage judges to stray from their constitutional role.⁴² Requiring judges to make value judgments may lead to outcomes that are unpredictable, dependent on the individual judge who presides over the case. Some judges may become biased towards certain values, which could lead to clashes with Parliament and an overall delegitimization and distrust of the judicial system.⁴³

³⁶ Julia Adams “Breaking the Constitution: Discrimination Law, Judicial Overreach and Executive Backlash After *Ministry of Health v Atkinson*” (2016) NZ L Rev 255 at 276.

³⁷ Adams, above n 36, at 276.

³⁸ Adams, above n 36, at 276.

³⁹ John Smillie “Who Wants Juristocracy?” (2006) 11 Otago L Rev 183 at 183.

⁴⁰ Smillie, above n 39, at 184.

⁴¹ Smillie, above n 39, at 184.

⁴² Smillie, above n 39, at 185.

⁴³ Smillie, above n 39, at 187

This poses some problems for cases involving *nomos*. *Nomos* relates to public identity: it concerns issues that people feel strongly about; issues that are central to group identity. Such issues do not tend to be simple legal ones. They often concern difficult social and moral problems: matters that some commentators specifically recommend be left to Parliament or the executive because of their difficult nature. These include matters of morality and often policy decisions. The courts must decide whether to simply avoid engaging with such decisions because of the implications that their judgment may have. It could be argued that courts should not hold back from engaging. If they make a decision that Parliament and the people disagree with, it can always be overruled. However, if this were to happen frequently it could undermine the integrity of the judiciary and upset the balance of mutual respect and recognition between the courts and Parliament.⁴⁴ It follows, then, that courts should not simply make rash judgments that may or may not be accepted by Parliament and the public. However, there is certainly some room for courts to consider issues of *nomos*, and it has certainly happened in the past.⁴⁵

One of the ways in which *nomos* manifests itself is in public backlash to judicial decisions. Backlash indicates that a law has been applied or interpreted in a way that offends the identity of a particular group. This part has shown that courts have the authority to engage with issues of *nomos*. In doing so, they may risk inciting backlash. The question then arises as to whether courts should consider this potential for backlash in their decisions, and if so, what kind of importance should be attached to it. The following part will address the first of these questions by examining the characteristics of New Zealand's constitutional system through several case studies. It will argue that, based on the characteristics of and interactions between the three branches of government and the public, it is appropriate for courts in New Zealand to consider public backlash in their decisions.

IV Should New Zealand courts consider backlash?

Cass Sunstein has made an important observation about backlash: its significance relies heavily on the characteristics and institutional capacities of governmental bodies, as well as the public itself.⁴⁶ For example, if judicial decisions were always considered absolutely correct and courts were able to accurately gauge the right moral stance in a case concerning *nomos*, public backlash would be irrelevant and should not be considered

⁴⁴ Wagstaff, above n 35, at 288

⁴⁵ See for example the case studies in part IV of the paper.

⁴⁶ Cass R Sunstein "Backlash's Travels" 42 Harv CR-CLL Rev 435 at 436.

by the courts.⁴⁷ However, if judges were categorically unreliable in their constitutional decisions and interpreted decisions of *nomos* based on their own personal principles and policies, public backlash may be justified and should be taken into account by the courts.⁴⁸ It is even possible that, in such a society, judges ought to stay their hand if backlash is likely to be very intense.⁴⁹ Similarly, if the focus shifts from reliability of the judges to the reliability of the public, and the public opinion is seen as an expression of self-governance, public backlash would be important and ought to be duly noted by the judiciary.⁵⁰

Therefore the place of backlash in decisions of New Zealand courts depends heavily upon the role and nature of the courts, the executive and legislature, and the public. The following discussion involves an analysis of three constitutional cases involving judicial engagement with issues of *nomos* in New Zealand. They illustrate the interaction between the branches of government as well as with the public in general. From these case studies it is possible to draw a number of inferences about the characteristics of New Zealand's constitutional makeup, which will assist in determining whether backlash should be taken into account by the courts when engaging with decisions of *nomos*.

A Case studies

1 *Attorney-General v Ngati Apa*

*Attorney-General v Ngati Apa (Ngati Apa)*⁵¹ was a case concerning the jurisdiction of the Māori Land Court to declare the status of New Zealand's foreshore and seabed as Māori customary land, which is traditional Māori land outside the jurisdiction of New Zealand's land tenure system.⁵² The Māori Land Court alone holds the power to vest such land in its owners and change its status to Māori freehold land, which allows the land to be bought and sold as regular freehold land.⁵³ In 1997, a number of *iwi* applied to the Māori Land Court asking for recognition of customary rights in the foreshore and seabed of the

⁴⁷ Sunstein "Backlash's Travels", above n 46, at 437-438.

⁴⁸ Sunstein "Backlash's Travels", above n 46, at 442-443.

⁴⁹ Sunstein "Backlash's Travels", above n 46, at 443.

⁵⁰ Sunstein "Backlash's Travels", above n 46, at 446-447.

⁵¹ *Ngati Apa v Attorney-General*, [2003] NZCA 117, [2003] 3 NZLR 643.

⁵² The Court's power to declare land as Maori customary land comes from the Te Ture Whenua Maori Act 1993.

⁵³ *Ngati Apa v Attorney-General*, above n 51, at [2]; Native Lands Act 1865, ss 21-23.

Marlborough sounds.⁵⁴ The Māori Land Court found in favour of the iwi, and the decision was appealed to the Māori Appellate Court, which referred facts of law to the High Court.⁵⁵ Finally, the questions of law came before the Court of Appeal. They included whether the Māori Land Court had jurisdiction to declare the foreshore and seabed to be Māori customary land.⁵⁶ The Court of Appeal affirmed the decision of the High Court in recognising the jurisdiction of the Māori Land Court as extending to the foreshore and seabed.⁵⁷ In doing so, it departed from its previous decision in *Re Ninety Mile Beach*, which held the title had been extinguished.⁵⁸ That case followed the infamous and discredited authority of *Wi Parata v Bishop of Wellington*, which was rejected by the Privy Council in *Nireaha Tamaki v Baker*.⁵⁹ Since Māori title in the foreshore and seabed had not been extinguished, any executive intention to extinguish the title would have to be explicit, and none of the legislation passed since the decision had been direct enough to do so.⁶⁰

The decision of the Court of Appeal resulted in huge amounts of public backlash from non-Māori, who initially mistakenly believed that the decision meant Māori automatically owned all of the foreshore and seabed land in New Zealand.⁶¹ In later polls, over 60% of New Zealanders showed support for public ownership of the foreshore and seabed.⁶² A mere 3% of the country were satisfied with the Court of Appeal's decision and did not want the government to interfere.⁶³ The strong and immediate public outcry against the decision pressured the government into a political response.⁶⁴

This case clearly encompasses ideas of nomos. The public hysteria surrounding the possibility of extending “special rights” to Māori in regard to the foreshore and seabed demonstrates the centrality of access to the coastline to the New Zealand population's identity. It potentially also demonstrates the reluctance of New Zealanders – specifically

⁵⁴ *Ngati Apa v Attorney-General*, above n 51, at [3].

⁵⁵ *Ngati Apa v Attorney-General*, above n 51, at [4]-[7].

⁵⁶ *Ngati Apa v Attorney-General*, above n 51, at [8].

⁵⁷ Geoffrey W G Leane “Indigenous rights wronged: Extinguishing Native Title in New Zealand” Dal L J 41, at 42-43.

⁵⁸ Leane, above n 57, at 53.

⁵⁹ *Ngati Apa v Attorney-General*, above n 51, at [13]; see also *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 and *Nireaha Tamaki v Baker* (1901) NZPCC 371.

⁶⁰ Leane, above n 57, at 43.

⁶¹ Leane, above n 57, at 45.

⁶² Leane, above n 57, at 46.

⁶³ Leane, above n 57, at 46.

⁶⁴ Leane, above n 57, at 45.

European New Zealanders – to afford additional rights to Māori where those rights might interfere with the enjoyment of the nation as a whole. However, the case also engages the Māori desire to have access to land that had historically belonged to them. These two world views clashed directly in *Ngati Apa*. However, for the Court to truly engage with the nomos, there had to be true legal discretion to decide between the two points.

The Court of Appeal essentially had a choice of whether to recognise the requested jurisdiction. If it followed past case law, it would conclude that the claimed title had in fact been extinguished long ago. If it departed from the law, it could conclude that the titles were viable. It eventually went with the latter decision. Using Barak's standard of the opinion of the legal community to determine whether these two options were both valid, it appears that both options had support. Some lawyers argued that for the Court to depart from *Re Ninety Mile Beach* was an incorrect decision that held untold consequences, both legally and socially.⁶⁵ Others have applauded the decision for its recognition of native rights, approving of the legality of the decision.⁶⁶ This indicates that both options open to the Court were legal ones and it was entitled to make either. It exercised its discretion accordingly, arguably making quite a narrow decision, albeit one which introduced the possibility of significant change in the future. The Court had only allowed for the fact that there might be some recognition of title in the future, with no indication as to how easy it might be to achieve recognition of such rights.⁶⁷ In fact, the Court expressed doubt as to whether any applications would be successful, given the fact that there were not yet any guidelines set out for how the court might recognise title.⁶⁸ However, despite the Court's minimal decision, there were drastic results, as can be seen in the aforementioned backlash.

What is interesting about this case is that the public backlash was based largely on a misunderstanding of the law. While the Court of Appeal's decision was minimal, many New Zealanders interpreted it to mean that they had lost the ability to access the foreshore and seabed generally. It is questionable as to whether the strength of this response was justified, given the true nature of the Courts' decision. However, whether it was justified or not, the backlash led to a direct clash between the executive and Parliament and the Court, in a way that the Court may not have been able to foresee.

⁶⁵ See for example Bill Clayton "The Marlborough Sounds Case" (2003) 10 NZLJ 424.

⁶⁶ See for example Paul McHugh "Setting the Statutory Compass: The Foreshore & Seabed Act 2004" (2005) 3 NZJPIL 255.

⁶⁷ See for example McHugh "Setting the Statutory Compass", above n 66, at 256.

⁶⁸ McHugh "Setting the Statutory Compass", above n 66, at 256.

Within three days of the judgment, the Prime Minister of the time had indicated that the Labour government intended to undermine the decision of the Court of Appeal through legislative measures.⁶⁹

The Government drafted the Foreshore and Seabed Act 2004, which vested the ownership of all New Zealand's foreshore and seabed in the Crown.⁷⁰ This legislation essentially extinguished any rights Māori may have had to claim customary ownership of land, and replaced them with territorial customary rights⁷¹ and customary rights orders.⁷² Territorial customary rights were extremely difficult, almost impossible, to prove, and only provided iwi with a right to negotiate for a reserve to which there would be full public access.⁷³ Customary rights orders applied to the ability of Māori to continue customary behaviours and practices on the relevant land, but did not include fishing practices which were by far the most important form of customary practice.⁷⁴ Essentially, the Act completely overturned the Court of Appeal's decision and extinguished any rights to the foreshore and seabed that Māori may have been able to claim.⁷⁵

While the Act was still in its Bill stage, it received criticism on many fronts. The Waitangi Tribunal found that the policy was unnecessary, contrary to the principles of the Treaty of Waitangi, and discriminatory, as it specifically targeted Māori rights and did nothing to repel existing private title to the foreshore and seabed.⁷⁶ The United Nations Committee on the Elimination of Racial Discrimination, when petitioned by Te Runanga o Ngai Tahu, also found that the legislation was discriminatory, the first time that New Zealand had been criticised internationally for its treatment of indigenous people.⁷⁷ The Bill also provoked the largest Māori protest since the Land March of 1975.⁷⁸ Over 20,000 people participated in a hikoī to Parliament.⁷⁹ Finally, while public apprehension remained very strong, many were in favour of a less drastic "long conversation" process, which would involve Crown consultation of Māori and the allowance of claims to play

⁶⁹ Leane, above n 57, at 45.

⁷⁰ *Brookers Human Rights Law* (Online looseleaf ed, Brookers) at TW7.01.

⁷¹ Foreshore and Seabed Act 2004, s 32.

⁷² Foreshore and Seabed Act, s 48.

⁷³ Richard Boast "Foreshore and Seabed, Again" (2011) 9 NZJPIL 271 at 276.

⁷⁴ Boast, above n 73, at 277.

⁷⁵ Leane, above n 57, at 46.

⁷⁶ Boast, above n 73, at 274.

⁷⁷ Leane, above n 57, at 72; *Brookers Human Rights Law*, above n 70, at TW7.01.

⁷⁸ *Brookers Human Rights Law*, above n 70, at TW7.01.

⁷⁹ *Brookers Human Rights Law*, above n 70, at TW7.01.

out in court before any government action was taken.⁸⁰ Despite these criticisms, the Foreshore and Seabed Bill passed without amendment in 2004.

It would appear that this was the end for Māori customary rights to the foreshore and seabed, as legislation is the most supreme form of law in New Zealand. It could not be overturned or struck down by the courts. However, the actions of the executive and Parliament were not the end of the matter. They provoked their own form of “counter-backlash”, which lasted beyond the enactment of the legislation. The Act heavily offended Māori, who had traditionally partnered with the governing Labour party, to such an extent that Member of Parliament Tariana Turia left the party and re-entered Parliament as a representative of the newly formed Māori party.⁸¹ The Māori party went on to win four of the seven Māori electorate seats in the 2005 general election.⁸² The party also formed a government with National in 2008, and in 2011 succeeded in having the Foreshore and Seabed Act repealed, replacing it with the Marine and Coastal Areas (Takutai Moana) Act 2011 which reinstated the ability for Māori to make claims to the foreshore and seabed.

This is an example of how neither the courts nor the legislature can effectively close off an issue with a judgment or piece of legislation. The issue of the foreshore and seabed was so close to the identity of Māori, and the sense of injustice resulting from the actions of the executive so high, that they were further motivated to engage with the system for a longer period of time in order to repeal the offending legislation. Māori found new ways to engage with the system that they were a part of, in order to contest the national opinion that had formed against them and amend it in their favour.

2 *Ministry of Health v Atkinson*

The case of *Ministry of Health v Atkinson (Atkinson)*⁸³ concerned a discriminatory government policy around funding for the care of the disabled. Under the Ministry of Health’s policy at the time, the Ministry would pay for carers to meet the needs of disabled people in New Zealand. However if the person’s preferred carer were a family

⁸⁰ Leane, above n 57, at 47.

⁸¹ Xanthaki and O’Sullivan “Indigenous Participation in Elective Bodies: The Maori in New Zealand” (2009) IJMGR 181 at 204.

⁸² Xakanthi and O’Sullivan, above n 81, at 204.

⁸³ *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456.

member, or if the family member were the only carer available, the Ministry would not pay.⁸⁴ The policy was based on the assumption that, because of an implicit social contract, families have primary responsibility to provide support for their disabled members.⁸⁵ However, a number of families found this policy discriminatory so took a case to the Human Rights Review Tribunal in 2008, protesting that the policy breached the NZBORA.⁸⁶ The Tribunal found that the policy was discriminatory based on family status under s 21(1) of the Human Rights Act 1993.⁸⁷ The Ministry of Health appealed to both the High Court and the Court of Appeal and both courts found in favour of the respondents.⁸⁸ The Ministry of Health decided not to appeal to the Supreme Court.⁸⁹

In making its decision, the Court of Appeal was faced with the issue of how to determine whether there had been prohibited discrimination under s 19. This involved an element of judicial discretion. The parties disagreed on the definition of discrimination and the court had to decide whether “discrimination” should mean a disadvantage that was “more than trivial” or differential treatment that is “based on prejudice or stereotyping, perpetuates historical disadvantage, or has particularly severe negative effects”.⁹⁰ The latter definition had support in Canadian jurisprudence⁹¹ and from some judges in the New Zealand case *Quilter v Attorney-General*.⁹² However, after considering a number of policy issues and other parts of the Human Rights Act, the Court concluded that it “prefer[ed]” the approach of the respondents, indicating that the decision could have gone either way.⁹³

The Court’s decision was not met with a high level of public backlash. There was some criticism from the legal community, as the decision interfered to a high extent with policy and meant that the scheme would not be able to continue in its current form.⁹⁴ The general public, however, did not object to the decision and saw it as a move forward for families with disabled dependants. It was called “wonderful” and a “landmark

⁸⁴ *Ministry of Health v Atkinson*, above n 83, at [1].

⁸⁵ Cabinet Paper “Implications of the Court of Appeal’s Decision” (28 May 2012) at 9.

⁸⁶ Section 19 of the New Zealand Bill of Rights Act 1990 states that “Everyone has freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993”.

⁸⁷ *Ministry of Health v Atkinson*, above n 83, at [3].

⁸⁸ *Ministry of Health v Atkinson*, above n 83, at [3] and [185].

⁸⁹ Tony Ryall “Govt will not appeal family carers decision” (12 June 2012) The Beehive <www.beehive.govt.nz>.

⁹⁰ *Ministry of Health v Atkinson*, above n 83, at [76]-[79].

⁹¹ See discussion in *Ministry of Health v Atkinson*, above n 83, from [79]-[97].

⁹² *Quilter v Attorney-General* [1998] 1 NZLR 523 at 527.

⁹³ *Ministry of Health v Atkinson*, above n 83, at [135].

⁹⁴ *Ministry of Health v Atkinson*, above n 83, at [70]; see for example Adams, above n 36.

decision”.⁹⁵ While there was general public acceptance of the judgment, this did not prevent a negative executive and Parliamentary response.

A cabinet paper released after the decision reported that “there [was] support and understanding on both sides of the case”. It was evidently a decision that engaged ideas of *nomos* in the public, involving a clash between the desire of many to allow equal treatment and ease of care for disabled people, and the ability of the executive to make its own decisions and not be forced to change policies in such a drastic manner. Despite observing support for both sides, the executive considered the best solution was to organise individual reimbursement for the parties to the case while overruling the decision of the Court of Appeal through legislation.⁹⁶ It drafted the New Zealand Public Health and Disability Amendment Bill, which restated the ability of the Ministry of Health, as well as District Health Boards, to limit funding based on the principle that families generally have primary responsibility for the well-being of family members.⁹⁷ It also prevented any complaint to the Human Rights Review Tribunal concerning family care policies, saving the proceedings in *Atkinson* and in another case that was being litigated at the same time, *Ministry of Health v Spencer*.⁹⁸ The Bill was passed under urgency, going through its first, second, and third readings in a single day.⁹⁹

This executive and Parliamentary backlash is concerning. The decision of the Court was celebrated by the public, but opposed so greatly by the executive that it resulted not only in overriding the judgment, but in preventing any further human rights-based complaint on the issue of family care. The executive and Parliament did not only seem to be acting contrary to the Court but against the desire of the public in general. Moreover, the support from Parliament shows evidence of an elected branch of government being more opposed to the views of the majority than the courts, an unelected body. These observations raise questions of whether the Court should try and anticipate executive and Parliamentary backlash and adjust its decisions accordingly at the expense of provoking public

⁹⁵ Stacey Kirk and Danya Levy “Appeal Court’s Landmark Disability Decision” *The Dominion Post* (online ed, 14 May 2012).

⁹⁶ “Implications of the Court of Appeal’s Decision”, above n 85, at 4.

⁹⁷ New Zealand Public Health and Disability Amendment Act 2013, s 4 (now s 70A(2)(a) and (b) of the New Zealand Public Health and Disability Act 2000).

⁹⁸ *Ministry of Health v Spencer* [2015] NZCA 143, [2015] 3 NZLR 449. This case was decided along the same lines as *Atkinson*: “Caring for disabled adult family members” Human Rights Commission <www.hrc.co.nz>.

⁹⁹ Andrew Geddis “I think National just broke our constitution” (17 May 2013) Pundit <www.pundit.co.nz>.

backlash, or whether it should decide along majoritarian lines (provided those lines are legal, of course) without deferring to the executive. This is not the only case in which the executive has interfered with court proceedings,¹⁰⁰ and may well be an issue that courts will face in the future.

3 *Seales v Attorney-General*

Finally, *Seales v Attorney-General (Seales)*¹⁰¹ is an example of a case where the High Court did not have discretion to consider backlash, but one which nevertheless spurred continued discussion, norm contestation and attempts to change law. It is evidence that while consideration of backlash is not always an option for New Zealand courts, the public can still work towards desired legal outcomes outside of the judicial system.

Seales involved an application for declarations by the High Court on several aspects regarding assisted dying.¹⁰² The plaintiff had a fatal brain tumour and wished to determine when she died through administration of a fatal drug.¹⁰³ Her doctor was willing to assist her, but only if she was assured through a declaration of the court that she would be acting lawfully.¹⁰⁴ As a result, *Seales* applied to the High Court for declaratory judgments that her doctor would not commit murder, manslaughter or assisted suicide under the Crimes Act 1961 if she assisted *Seales* in dying.¹⁰⁵ Alternatively, she applied for a declaration that the relevant provisions in the Crimes Act¹⁰⁶ were inconsistent with the NZBORA rights not to be deprived of life and not to be subjected to cruel, degrading, or disproportionately severe treatment.¹⁰⁷ While the Court expressed the utmost sympathy toward *Seales*' case, it found that it could not decide in her favour, as it was bound by the

¹⁰⁰ See for example *Terranova Homes & Care Limited v Service and Food Workers Union Nga Ringa Tota Incorporated and Kristine Bartlett* [2014] NZCA 516, [2015] 2 NZLR 437, where the Court of Appeal found that the Pay Equity Act 1972 extended to occupations that paid less because they were female-dominated. The Government then entered private negotiations and settled the case outside of court: see "Care and support workers pay equity settlement" (8 September 2017) Ministry of Health <www.health.govt.nz>.

¹⁰¹ *Seales v Attorney-General* [2015] NZHC 1239, [2015] 3 NZLR 556.

¹⁰² Under the Declaratory Judgments Act 1908 and the New Zealand Bill of Rights Act: see *Seales v Attorney General*, above n 101.

¹⁰³ *Seales v Attorney General*, above n 101, at [1]-[2].

¹⁰⁴ *Seales v Attorney General*, above n 101, at [3].

¹⁰⁵ *Seales v Attorney General*, above n 101, at [5].

¹⁰⁶ Sections 160(2)(a) and (3) and s 179(b).

¹⁰⁷ New Zealand Bill of Rights Act ss 8 and 9.

statutory history of the Crimes Act, which precluded any of Seales' claims.¹⁰⁸ It could not declare inconsistencies without undermining Parliament, and departing from its constitutional role as a court.¹⁰⁹

At the time of the Court's decision in 2015, public opinion on the topic of assisted dying was fairly unified. A poll by the New Zealand Attitudes and Values Study asked 15,270 New Zealanders the question: "[s]uppose a person has a painful incurable disease. Do you think that doctors should be allowed by law to end the patient's life if the patient requests it?". Only 12.3 per cent were definitely opposed to assisted dying, and approximately 66 per cent were supportive. The remaining 21.7 per cent were undecided.¹¹⁰ On average, New Zealanders appeared either indifferent or in support of assisted dying. However, the arguments against assisted dying were very strong.¹¹¹ Professional opinion was divided, with a number of experts in Seales' case giving expert evidence both for and against the need for assisted dying.¹¹² Additionally, the Australian and New Zealand Society of Palliative Medicine, the New Zealand Medical Association, and the World Medical Association all assume an anti-euthanasia stance.¹¹³

While Seales' application was unsuccessful in the courts, it was successful in raising awareness of assisted dying and spurring public discourse on the matter. After her death, her husband continued (and, at the time of writing, continues) to publicly support the right to assisted dying.¹¹⁴ Less than three weeks after the Court's judgment was released, the Hon Maryan Street delivered a petition with 8,794 signatures to Parliament, asking:¹¹⁵

¹⁰⁸ The judge's opinion on the case is evidence at [192]:

By focusing upon the law it may appear that I am indifferent to Ms Seales' plight. Nothing could be further from the truth. I fully acknowledge that the consequences of the law against assisting suicide as it currently stands are extremely distressing for Ms Seales and that she is suffering because that law does not accommodate her right to dignity and personal autonomy.

See the Court's decision on the two applications at [148]-[150] and [209].

¹⁰⁹ *Seales v Attorney General*, above n 101, at [211].

¹¹⁰ Dutt and others *Attitudes Toward Euthanasia in New Zealand in 2015* (The New Zealand Attitudes and Values Study, NZAVS Policy Brief, 2016).

¹¹¹ *Seales v Attorney General*, above n 101, at [15]; the judge stated: "For every proponent of Ms Seales' case, there is an equally forceful opponent".

¹¹² See discussion of expert evidence in *Seales v Attorney General*, above n 101, at [35]-[48].

¹¹³ *Seales v Attorney General*, above n 101, at [57].

¹¹⁴ See for example Matt Vickers "Matt Vickers: the argument for voluntary euthanasia" *New Zealand Herald* (online ed, New Zealand, 9 June 2017).

¹¹⁵ "Petition of Hon Maryan Street and 8,894 others" (23 June 2015) New Zealand Parliament <www.parliament.nz>.

That the House of Representatives investigate fully public attitudes towards the introduction of legislation which would permit medically-assisted dying in the event of a terminal illness or an irreversible condition which makes life unbearable.

The Health Committee received over 21,000 unique written submissions on the issue, from both individuals and organisations.¹¹⁶ Around 80 per cent of submissions were opposed to any legislative change in respect of assisted dying and only 20 per cent were in favour of a law change.¹¹⁷ This is a heavy contrast to the earlier poll result, possibly suggesting that while those opposed to assisted dying were a minority, they were a very vocal minority who felt a strong conviction for their position.

This raises a further observation around backlash: its strength may not necessarily be proportionate to its representative numbers. It may be more accurate to say that it represents the centrality of the belief to the *nomos* of the particular group. If a large group of people mildly disagree with a certain issue, it is unlikely that they will retaliate as much as a small group who fiercely defend a certain fundamental belief. For instance, if the Court were to rule in favour of allowing assisted dying in Searles' case, it may have been acting according to the majority opinion. However, based on the apparent eagerness of anti-euthanasia advocates to defend their position, the Court would have been met with heavy backlash. This indicates that a court, when considering backlash in New Zealand, should not necessarily equate potential backlash with an upset of the majority.

In addition to the petition, an End of Life Choice Bill was entered into the ballot in October 2015, and drawn out in June 2017.¹¹⁸ The Bill would allow for a person who meets very strict criteria to be eligible for assisted dying.¹¹⁹ At the time of writing this paper, it has yet to pass its first reading.¹²⁰ No other End of Life bills have done so – but with the continued rising public interest in assisted dying, this could be an example of a court case being used in the long term to achieve a constitutional change.¹²¹

¹¹⁶ Health Committee *Petition 2014/18 of Hon Maryan Street and 8,974 others: Report of the Health Committee* (August 2017) at 6.

¹¹⁷ Health Committee, above n 116, at 15.

¹¹⁸ Health Committee, above n 116, at 7.

¹¹⁹ See End of Life Choice Bill 2017 (269-1).

¹²⁰ See “End of Life Choice Bill” New Zealand Parliament <www.parliament.nz> for the current status of the bill.

¹²¹ The Death With Dignity Bill 1995 (00-1) was defeated 61 to 29 in its first reading, and the Death with Dignity Bill 2003 (37-1) defeated 60 to 58 in its first reading in 2003. A further End of Life Options Bill was added to the ballot but removed in December 2014. See Health Committee, above n 118, at 5.

B The Shape of New Zealand's Constitutional System

The above cases provide an informative view as to the shape of New Zealand's constitutional system and the interactions between the judiciary, the public, and the other branches of government. As observed by Sunstein, the role that backlash plays in any decision of nomos will depend on these interactions and relationships, and the character and capacity of the respective groups.¹²² A number of observations can be drawn from these cases, and from these it can be discerned whether New Zealand courts ought to take into account backlash when engaging with decisions of nomos.

1 General capacity of courts

New Zealand courts have made decisions in the past that both support and oppose majority opinion. Whether these decisions were “right” is a difficult question to answer, particularly in cases such as *Ngati Apa* and *Atkinson* which involve judicial discretion and so do not necessarily have a correct answer. Both cases have received criticism even though they have been affirmed by both the courts and by scholars.¹²³ These cases illustrate that courts in New Zealand do not have a tendency to be “right” or “wrong”, particularly when it comes to cases of nomos, but simply do their best to make a decision based on the law and facts in front of them.

These judgments also display a loyalty to the law. When the courts have an opportunity to decide a case in favour of the majority they may do so, but when prevented by the law the courts will accept the status quo. *Seales* is an example of a court having sympathy with the plaintiff but simply not being able to abandon its constitutional role of subservience to the clear intention of Parliament. However, *Ngati Apa* shows that if a past decision of the court is shown to be mistaken, courts may depart from that decision as long as there is legal reasoning behind the departure. This could show that if ideas and nomos changed significantly in a particular area, court decisions would change as well.

¹²² Sunstein “Backlash’s Travels”, above n 46, at 436.

¹²³ Compare Clayton, above n 65, with Leane, above n 57 for *Ngati Apa v Attorney-General*, and Adams, above n 37, as a criticism of *Ministry of Health v Atkinson* even though the approach of the Court of Appeal was upheld in *Child Poverty Action Group v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729.

2 *Mistaken public understanding and expert opinions*

The *Ngati Apa* case involved an enormous amount of public backlash, but that backlash was not on informed grounds. As mentioned, many New Zealanders initially thought that Māori had gained rights to the entire foreshore and seabed of New Zealand, and there would no longer be any public access to beaches if the Court of Appeal's decision was allowed to remain. This was a fundamental misunderstanding of the Court's decision. This mistaken reaction can lead to the conclusion that the public opinion in New Zealand is not always legally correct, and so is not always legally reliable. Similarly, the *Atkinson* case is evidence of the fact that public opinion is not always practical, and following it may cause significant strains upon the state. *Seales* is evidence of a case where public opinion did not match up with expert opinion – however, it should be noted that there were (and are) experts who advocated for assisted dying, so public opinion was not completely at odds with expert advice.¹²⁴

It follows that general public opinion in New Zealand can be misinformed – which is probably not uncommon. General opinion could advocate solutions that, while possible, are not legally, economically, or by any other means advisable. However, this misinformation can lead to the formation of opinions that are very central to identity and nomos – such is in the *Ngati Apa* case.

An additional point is that it may not always be possible for the courts, in making a particular decision, to foresee any public misunderstanding of that particular judgment. However, it could be helpful to assume from *Ngati Apa* that if the issue is one of significant nomos, and the courts decide to rule against the majority on that issue, then there is more likely to be a misunderstanding. The more significant the nomos of the issue, the higher the public outrage will be if the decision even appears to go against the majority, and so the more likely the public are to mistake the judgment for being more serious than it is in reality.

3 *Disproportionate backlash*

The Health Committee Report following the judgment in the case of *Seales* is evidence of a vocal minority having the potential to drown out a clear majority. While the majority of the nation was either in favour of assisted dying or apathetic, the minority voiced the

¹²⁴ See discussion of expert evidence in *Seales v Attorney General*, above n 101, at [35]-[48].

most concern around legislating in that area, and submitted the most applications to the Health Committee.

This indicates that it is possible to have mismatched nomos – issues that are of extreme importance to one group, but not to another. This leads to one group, which may well be a minority, being far more invested in the outcome of a particular issue than another. Alternatively, it might indicate that while it appears on the surface that there is one majority battling against a vocal minority, in reality there are two small groups that have clashing identities of the same intensity, but one of the groups holds the support of the relatively apathetic majority.

Following from this, public backlash to a particular judgment may not always represent a majority of the population. Of course, this is not the situation in every case of backlash, but it is possible that a judgment may favour the majority and still receive a high level of public backlash and negativity from a vocal minority.

4 Executive and Parliamentary interference

The executive branch of government in New Zealand has, in the past, taken action to overrule decisions of the judiciary. The case studies have shown two instances in which this has happened: first, when there is a backlash against the decision from a majority of the population and second, where the decision is incompatible with government policy and is likely to cause significant disruption. When this executive action involves legislative override, it means that Parliament is also involved in the response.

Ngati Apa shows a case where the executive responded to the opinion of the majority in respect of a court decision. Parliament, too, passed legislation in support of this response. From a constitutional point of view, this response makes sense: Parliament is an elected representative of the people. In *Ngati Apa*, it was therefore acting to represent those who it was elected to represent, in line with its constitutional role.

However, a more worrying response from the executive can be seen in cases such as *Atkinson*. It could be observed from this that the executive branch in New Zealand has overruled judgments that have the potential to greatly impact policy decisions. While this response is understandable, it becomes worrying when those judgments are supported by the general public. When Parliament legislates this kind of judicial override, it acts

contrary to public opinion. In some cases in New Zealand, then, the appointed judiciary is more likely to act in line with public opinion than the elected legislature.

The nature of executive and legislative response has tended to be fairly drastic in these cases of severe outrage and policy compromise. While a less drastic response to *Ngati Apa* had some public support, Parliament passed the Foreshore and Seabed Act without amendment. Similarly, the response to *Atkinson* involved legislating against any further court action on the topic, which is a very significant move given the importance of the access to justice. However, when a court decision does not force action on a particular controversial topic and leaves any change to Parliament or the executive, the response is minimal. In *Seales* the only reason that the Health Committee considered assisted dying was as a result of public action, and the result of the report was incredibly non-committal.¹²⁵ It can be concluded from this that the other branches of government will likely not be prompted to act without either a controversial judgment or a massive public effort.

These cases also show that when there is executive backlash to a decision, this is often followed by legislative action. However, Parliament, not the executive, passes legislation. The link between executive and legislative response could be explained by the fact that in New Zealand, the executive is made up of members of Parliament.¹²⁶ While the executive may not necessarily hold a majority of seats in the House of Representatives, it has significant control over what legislation passes. This is a key factor of New Zealand's constitutional structure and indicates that executive displeasure with court judgments could quickly lead to legislative action.

5 *General ability to make change*

The length of life of a social movement in New Zealand is not dependent upon whether courts rule in its favour, but upon the resilience of its proponents. Issues of nomos are apparent in the court cases above, and because of the nature of such issues, there may be a party that feels as though it is the “loser” no matter what the outcome. However, a court decision has not precluded further action from such parties in the past. Change may be immediate – as it was for the outraged majority in *Ngati Apa* – or it may be more gradual,

¹²⁵ The Health Committee's recommendation was simply “that the House take note of its Report” – see Health Committee, above n 116, at 5.

¹²⁶ Constitution Act, s 6.

as can be seen in the ongoing struggle in *Seales*. However, a court decision in New Zealand does not signify the end of an issue.

Even legislative response can be overcome by a social movement if it is persistent, as can be seen through the formation of the Māori Party after the passing of the Foreshore and Seabed Act. This change is even more gradual, but is possible and shows that New Zealand's constitutional system is one that can be adapted to changing ideas and nomos.

Finally, court decisions play a part in changes even when the impact of the decision is overridden or makes no constitutional change. Cases such as *Seales* can spur discussion of issues central to the nomos of certain groups, and cases such as *Ngati Apa* have prompted backlash that (temporarily) quashes social movements. Either way, judgments that may be of little legal value still have social and political significance in New Zealand.

C Is consideration of backlash appropriate?

These observations show that courts in New Zealand are not necessarily infallible. However, when it comes to cases with discretion, it is hard to call a decision “right” or “wrong”. They also demonstrate that when there is severe dissatisfaction with a decision, the resulting backlash usually ends in some form of change. Backlash could be seen as a form of “self-government” through the people to impact judgments that they do not agree with. Given the fact that backlash is likely to have an impact on the future enforceability of the courts' judgments New Zealand, it seems logical, following from Sunstein's reasoning, that judges ought to consider potential backlash when making decisions on issues of nomos.

However, these observations also show that the courts need to be aware of two forms of backlash: backlash from the public, and backlash from the other branches of government (which, given the closely linked nature of the executive and legislative branches in New Zealand, will be referred to in the remainder of this paper as “executive and Parliamentary backlash”). This raises the issue of what weight the New Zealand courts should accord to these two forms of backlash. The interaction between courts, decisions of nomos, and backlash is a topic that has received extensive attention, particularly in United States jurisprudence. The next part of this paper will consist of an overview of

some of these theories, and consider how they could be adapted to a New Zealand context.

V Backlash and the constitutional role of the judiciary

Over time, academics have come to varying conclusions on how backlash ought to be treated in the context of the judiciary. These conclusions are driven by wider evaluations of the role of the courts within the democratic system, and the functioning of democracy itself: if there is distrust of the courts, backlash may be considered more reasonable and perhaps indicate wrongdoing on the part of the court, but if courts are considered correct and infallible, any backlash will consequently be incorrect and should not be taken into account.¹²⁷ Therefore, this section aims to answer three questions about each theory: first, what is the role of the court? Second, given that role, how should courts deal with ideas concerning nomos? And third, consequently, what role does backlash play in this theory? Is it positive or negative? How should the courts engage with it?

A Theories in their original contexts

It should be noted that the ideas below have all been developed within the context of the United States. The Supreme Court of the United States was created by Article III of the Constitution of the United States¹²⁸ and has the jurisdiction to strike down case law and legislation if it is deemed to be unconstitutional.¹²⁹ Consequently, the Supreme Court of the United States has the potential to make wide-reaching decisions that are, arguably, legally final. There is a high level of significance attached to these judgments, especially in areas concerning nomos that have a heavy level of personal investment from the public.

The following conceptions of the relationship between the judiciary, decisions of nomos, and backlash therefore share a common theme: they rely on the people themselves as the last possible form of backlash against judicial decisions in cases involving nomos. As already identified, New Zealand courts face other forms of backlash. This issue is addressed at a later stage in this part.

¹²⁷ See generally Sunstein “Backlash’s Travels”, above n 47.

¹²⁸ Constitution of the United States, Article III, §1.

¹²⁹ Constitution of the United States, Article III, §2; *Marbury v Madison* 5 US 137 (1803).

1 *Pluralism*

A pluralist approach holds that it is the maintenance of many different opinion groups that keeps a healthy democracy alive and functioning effectively.¹³⁰ If phrased in terms of *nomos*, pluralism recognises that there are groups within societies that have their own *nomos*, a smaller and more contained collective identity. An effective pluralist democracy must ensure all existing and potential groups are acknowledged and have full access to their constitutional rights, refusing to favour one form of *nomos* over another.

A pluralist view contends that there are consequences for failing to acknowledge all forms of *nomos* within a society. William Eskridge has observed that suppressing one group in favour of another – and particularly a minority group in favour of a majority – poses several risks for the society as a whole. Primarily, suppressing *nomos* prevents the formation and development of social and political groups, which could lead to suppression of ideas and discontent with the constitutional system.¹³¹ Related to this, suppressing *nomos* has wider social costs. Those who have their *nomos* suppressed can suffer psychological pain or dysfunction when forced to choose between being socially ostracised or hiding their identity.¹³² This in turn prevents the creation and development of new forms of *nomos* which can be damaging to society generally.¹³³ Finally, pluralism argues that suppressing one form of *nomos* in favour of another leads to anger and resentment in the suppressed group, and furthermore, adds validity to the anger of those in the opposing group of *nomos*, further dividing the groups.¹³⁴ Pluralism points out that those most likely to enforce the suppression are those who have the most hatred toward the minority group, and to recognise suppression necessarily empowers the most bigoted.¹³⁵ For these reasons, pluralism holds that if too many groups become estranged from the political process or do not feel as though they can engage with it, democracy will cease to function.¹³⁶

¹³⁰ William N Eskridge Jr “Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics” (2005) 114 Yale L.J. 1279, at 1293.

¹³¹ William N Eskridge Jr “A Jurisprudence of ‘Coming Out’: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law” (1997) 106 The Yale Law Review 2411 at 2443.

¹³² Eskridge “A Jurisprudence of ‘Coming Out’”, above n 131, at 2444.

¹³³ Eskridge “A Jurisprudence of ‘Coming Out’”, above n 131, at 2444.

¹³⁴ Eskridge “A Jurisprudence of ‘Coming Out’”, above n 131, at 2444.

¹³⁵ Eskridge “A Jurisprudence of ‘Coming Out’”, above n 131, at 2444.

¹³⁶ Eskridge “Pluralism and Distrust”, above n 130, at 1294.

As such, a pluralist approach holds that it is the role of the courts to broker peace between these multiple groups to maintain the existence of a strong democracy.¹³⁷ This can become difficult when a court is required to engage with *nomos*. Such decisions generally involve bitter disputes between groups, with a very high risk that no matter the outcome one side will become disenchanted with the constitutional system. In these cases, the court must make a special effort to “lower the stakes” of the conflict. This can be done through assuring groups that they have equal access to, and influence on, the decision making process, by attempting to avoid “culture wars” around identity politics, and by nullifying laws that are no longer relevant to the situation.¹³⁸ If a court were to make a substantively significant decision it would remove the relevant issue from the legal sphere prematurely, which could raise stakes and risk collapse.¹³⁹ Eskridge instead proposes a gradual and accommodating approach by judges, moving parties toward acceptance of one another through a good faith dialogue, and without forcing one to be put down in order to recognise the rights of the other.¹⁴⁰ Essentially, a court must be the perfect mediator.

Such an approach would necessarily consider backlash to be evidence of one social group feeling ostracised, which would signal a failure on the part of the judiciary to successfully reach an accommodating outcome. However, the function that pluralism demands of the courts is, with respect, a very difficult one. Not only must a court apply the laws or constitutional rights by which it is bound, but it must do so in a way that is pleasing, or at least acceptable, to each party in the dispute. Surely this is, in many situations involving clashes of *nomos*, practically impossible. By the time a clash in *nomos* reaches the courts, it seems likely that parties will take their various stances very seriously. Even if courts aim for compromise, it may not be something that the parties themselves are willing to consider when the issues at hand are so significant. While pluralist judges should strive to appease both parties, their judgments will only be effective if those parties are willing to embrace change.

2 *Minimalism*

¹³⁷ Eskridge, “Pluralism and Distrust”, above n 130, at 1293.

¹³⁸ Eskridge, “Pluralism and Distrust”, above n 130, at 1294.

¹³⁹ Eskridge, “Pluralism and Distrust”, above n 130, at 1310.

¹⁴⁰ Eskridge “A Jurisprudence of ‘Coming Out’”, above n 131, at 2669-2452.

Minimalism sees the legislature as the representative of the people, and legislation as the only valid way to engage in major social change, particularly around policy and moral issues.¹⁴¹ Through the legislature, people can engage with and deliberate about controversial issues in a representative manner. Change may be slow, but it is organic and flows with the opinions of the majority.¹⁴² Minimalism focuses on the classic observation that judges, being appointed rather than elected, do not represent the will of the people. Thus, courts should not engage with decisions involving *nomos* to the extent that the decision would involve major social change.¹⁴³ To do so would be to remove the issue from the public sphere and prevent it being discussed by the people through the more “natural” means of the legislature.¹⁴⁴ Instead, constitutional developments should be built incrementally.¹⁴⁵

To achieve incremental constitutional change, minimalism holds that judges should strive for decisions that are both narrow and shallow. Constitutional judgments should be narrow, in that they do not stray far from the facts at hand.¹⁴⁶ This is because judges do not have the requisite knowledge and experience to justify the creation of a broad rule.¹⁴⁷ There could be unforeseen difficulties and errors about the rule that judges simply do not have the ability or resources to consider.¹⁴⁸ This is particularly concerning in a United States context, as erroneous decisions by the Supreme Court could be very difficult to reverse.¹⁴⁹ Courts should also strive for decisions that are shallow, in that they do not delve deeply into underlying purposes or principles.¹⁵⁰ A shallow rationale is one that the greatest number of people can identify with, promoting social peace and respect between those who disagree on major points – in other words, those with different *nomos*.¹⁵¹

When faced with a question of *nomos* in which the court has the potential to advance a favourable social idea or development, a judge should first consider what would be the

¹⁴¹ Sotiros A Barber and James E Fleming *Constitutional Interpretation: The Basic Questions* (Oxford University Press, Oxford, 2007) at 140.

¹⁴² Barber and Fleming, above n 141, at 140, 148.

¹⁴³ Barber and Fleming, above n 141, at 144.

¹⁴⁴ Barber and Fleming, above n 141, at 147.

¹⁴⁵ Cass R Sunstein “Burkean Minimalism” (2006) 105 Mich L Rev 353 at 356 and Barber and Fleming, above n 141, at 140.

¹⁴⁶ Sunstein “Burkean Minimalism”, above n 145, at 362.

¹⁴⁷ Sunstein “Burkean Minimalism”, above n 145, at 362

¹⁴⁸ Sunstein “Burkean Minimalism”, above n 145, at 362.

¹⁴⁹ Sunstein “Burkean Minimalism”, above n 145, at 363.

¹⁵⁰ Sunstein “Burkean Minimalism”, above n 145, at 364.

¹⁵¹ Sunstein “Burkean Minimalism”, above n 145, at 365.

most socially desirable result – for instance, the recognition of a particular right or end of a repressive practice – and then formulate a decision moving incrementally towards that goal.¹⁵² If a court does not move incrementally, minimalism holds that it will be forcing a group to accept change that it may not yet be ready for, which could cause backlash.¹⁵³

Like pluralism, minimalism sees backlash as an indication that a judge has made the wrong decision. Instead of moving forward in a way that causes the least controversy, it has forced a social, moral, or policy change through interpretation of constitutional values that clearly does not have widespread support. While this may seem very similar to pluralism, there is a difference in the rationale behind the two ideas. While pluralism rejects backlash because it ostracises groups from society, minimalism is based on the idea that social and policy change is best made through the legislative body of a nation as that body best represents what the people in general desire. If there is a public backlash to a court's decision, it indicates that the majority of people are not happy with the result, and therefore the judgment is undemocratic. Moreover, minimalism points out an additional negative feature of backlash. If a court makes a judgment that represents a great leap toward a particular social development, it could invite very strong backlash. Such strong backlash could cripple a naturally progressing social movement that, given time and incremental development through democratic methods, all groups would have accepted naturally and without protest.¹⁵⁴

3 *Popular Constitutionalism*

Popular constitutionalism focuses on the role played by people in the interpretation and enforcement of the constitution. People shape the constitution and its values through their engagement in politics and democracy generally, creating a culture of ideas and norms that shape the interpretation of constitutional rights and laws.¹⁵⁵ If put in terms of *nomos*, then, this theory holds that *nomos* shapes the themes and opinions of society, which in turn shape the constitution. A change in constitutional values stems from a shift in *nomos*, in central identity. Popular constitutionalism argues that constitutional law is not a law that is imposed on society, but one that is developed through society.¹⁵⁶

¹⁵² Barber and Fleming, above n 141, at 144.

¹⁵³ Barber and Fleming, above n 141, at 144.

¹⁵⁴ Barber and Fleming, above n 141, at 144.

¹⁵⁵ Larry D Kramer “Popular Constitutionalism, Circa 2004” (2004) 92 California Law Review 959 at 968.

¹⁵⁶ Kramer, above n 155, at 971.

Under this theory, the court is not the only body that can develop constitutional law (which is perhaps a more bold claim in the United States than it is in New Zealand).¹⁵⁷ Some proponents of popular constitutionalism even argue that judicial decisions do not have any authority at all unless they are considered convincing, reasonable and acceptable to the public in general.¹⁵⁸ If a judicial decision is unpopular, it will likely continue to be argued in the public sphere and be eroded over time through the changing of social norms.¹⁵⁹ A judgment is not, as minimalism contends, the end of the debate – because the debate is not confined to the courts. Sometimes it may be only the beginning.

As a result, proponents of popular constitutionalism argue that the courts' rulings on constitutional law should not be absolute. Ideas developed outside the court are crucial for expanding the constitution and linking law to culture, so should not be met with opposition from conflicting court decisions.¹⁶⁰ Additionally, when one considers that the majority of constitutional interpretation happens through culture and by ordinary people, the courts do not have a better authority than any other political or constitutional body to interpret the constitution, so should not have a monopoly on that authority.¹⁶¹ If there is no perfect final answer to a constitutional question, the courts should not be able to act as though there is.¹⁶²

Popular constitutionalism views backlash to judicial decisions as a good thing: it is an example of the public engaging with constitutional norms and, to achieve change by contesting norms. Popular constitutionalism also holds that because public opinion and political culture holds such a vital part in a self-governing society, judges should consider how likely their decision is to invite public backlash.¹⁶³ If the probability of public backlash is high, and public opinion is not clearly incorrect on the matter (which it sometimes can be), the court should take this as an indication that its decision may not be constitutionally correct and should consider staying its hand.¹⁶⁴

¹⁵⁷ Kramer, above n 155, at 959.

¹⁵⁸ Kramer, above n 155, at 969.

¹⁵⁹ Kramer, above n 155, at 970.

¹⁶⁰ Kramer, above n 155, at 975, 985.

¹⁶¹ Kramer, above n 155, at 985-1001.

¹⁶² Kramer, above n 155, at 985-1001.

¹⁶³ Sunstein "Backlash's Travels", above n 46, at 443.

¹⁶⁴ Sunstein "Backlash's Travels", above n 46, at 443.

4 *Democratic Constitutionalism*

Democratic constitutionalism is a form of popular constitutionalism, so shares many common ideas with that theory. Democratic constitutionalism also conceptualises society as a group of individuals with different ideas and values that become embodied in constitutional laws and interpretations through democratic and political engagement.¹⁶⁵ Democratic constitutionalism has a particular focus on the tension between elected bodies and appointed judges: the public, having not elected judges, expect their court system to remain politically neutral, and loyal to the rule of law. However, people also desire for laws to be interpreted in a way that is responsive to democracy, and to the political opinions of the time.¹⁶⁶ This is especially so in cases of *nomos*, where groups desire to have their own interpretation of the relevant law or rule applied and political neutrality is near impossible.¹⁶⁷ A decision in these cases must, to an extent, be rooted in popular ideas and beliefs or it will not be respected and will have no legitimacy.¹⁶⁸

Democratic constitutionalism parts from popular constitutionalism in that it does not want to “take the constitution away from the court” – that is, prevent the court from making authoritative constitutional decisions.¹⁶⁹ Instead, it embraces the role of the court in enforcing constitutional rights: while the court may be no better than other bodies at doing so, it is also no worse, and still functions within the culture that it utilises to interpret constitutional laws in ways that engage with the *nomos* of citizens.¹⁷⁰

Instead of taking power away from the courts, democratic constitutionalism argues that other branches of government, as well as the people themselves, should be encouraged to engage in the process of developing and interpreting the constitution through contesting the norms and *nomos* on which the current interpretation is based.¹⁷¹ Such norm contestation, which often expresses itself in the form of backlash, does not weaken the legitimacy of the constitution, but instead strengthens it. Instead of shying away from the idea of backlash, a democratic constitutionalist approach embraces the idea of public

¹⁶⁵ Robert C Post and Reva B Siegel “Democratic Constitutionalism” in Jack M Balkin and Reva B Siegel (eds) *The Constitution in 2020* (Oxford University Press, New York, 2009) 25 at 27.

¹⁶⁶ Post and Siegel “Democratic Constitutionalism”, above n 165, at 27-28.

¹⁶⁷ Post and Siegel “*Roe Rage*”, above n 3, at 379.

¹⁶⁸ Post and Siegel “*Roe Rage*”, above n 3, at 379.

¹⁶⁹ Jamin B Raskin “The Marshall-Brennan Constitutional Literacy Project: American Legal Education’s Ambitious Experiment in Democratic Constitutionalism” (2013) 90 *Denv U L Rev* 833 at 856.

¹⁷⁰ Raskin, above n 169, at 856.

¹⁷¹ Raskin, above n 169, at 856.

debate and discussion. This is because backlash indicates that people are engaging with the system, contesting norms, and ultimately have enough hope that an issue will someday be decided in their favour. They believe that there is something worth fighting for.¹⁷² Additionally, this conception allows the law to continue to have different meanings to different people, and therefore continually remain relevant to all who live under it.¹⁷³

Democratic constitutionalism holds that courts should be aware of the possibility of backlash and take it into consideration as evidence of the cultural norms and ideas underlying the constitution. Courts should not, however, let the risk of backlash prevent them from engaging with controversial decisions in areas of nomos or constitutional importance.

B Theories in a New Zealand context

Applying these theories to the New Zealand context poses some difficulty. This is because New Zealand, contrary to many of the theories above, does not have a court of the same nature as the Supreme Court of the United States, that is, capable of striking down legislation.¹⁷⁴ Instead, New Zealand subscribes to the theory of Parliamentary sovereignty. Parliament can, at any point, overrule a decision of a New Zealand court, even the Supreme Court. This is specifically emphasised in some significant laws such as the NZBORA, where s 4 holds that courts cannot use the NZBORA to repeal or revoke any enactment purely because of its inconsistency with the rights protected within the Act.¹⁷⁵ This severely inhibits any New Zealand court's ability to carry out the functions expressed in the theories above, but also appears to undermine many of the principles on which the theories are based.

For instance, both minimalism and pluralism ground their critiques in the fact that the Supreme Court, when making a socially divisive ruling on an issue of nomos, essentially removes the issue from all further legal development through the finality of its judgment. The Supreme Court in New Zealand does not have this power and its decisions are easily legislated against by Parliament. Popular constitutionalism argues that the court should

¹⁷² Post and Siegel "*Roe Rage*", above n 3, at 383.

¹⁷³ Post and Siegel "*Roe Rage*", above n 3, at 385.

¹⁷⁴ *Marbury v Madison*, above n 129.

¹⁷⁵ New Zealand Bill of Rights Act, s 4.

not be the supreme authority on constitutional matters, and in New Zealand it is not. Democratic Constitutionalism seeks to defend the ability of the Supreme Court to make authoritative constitutional decisions and submit to cultural change. In New Zealand there is no need for such a defence, as the Supreme Court's decisions are not the highest authority in the first place.

However, New Zealand's situation does have an added factor that these theories do not consider: the aforementioned supreme law-making ability of Parliament, which extends to constitutional matters. It is possible for the above theories to be re-envisioned, based on their underlying values, to take into account the role of a supreme elected Parliament in their discussions and critiques. This involves a rephrasing not of the question that the theories seek to answer, but the purpose or consequence behind the question. While United States scholars seek to understand the extent to which courts should consider public backlash in their decisions, as it signifies discontent with a heavily binding decision, a New Zealand approach should perhaps seek to understand the extent to which courts should consider public backlash in their decisions, as it could impact the severity of any executive or parliamentary response to the constitutional idea that the court is seeking to explore.

For instance, pluralism values the inclusion of many groups and cultures within a society. The courts have a responsibility to avoid, as much as possible, alienation of one of the groups, because to do so could have a detrimental effect on society and functioning democracy in general. In a New Zealand context, if the Supreme Court were to clearly favour one group over another this decision would not be final, and that group would still have the opportunity to be recognised by Parliament through legislation. However, that group may still feel embittered by its rejection in the court system, which is supposed to be impartial and not favour one group over another. This would likely be emphasised in a case involving issues of *nomos*, where the court's outcome would have a direct link to the identity of the group in question. Therefore, while courts do not make decisions that are the final legal settlement of an issue that is central to the *nomos* of a group in society, their decisions do hold a level of social influence that could alienate the group and cause negative impacts on society. Moreover, forcing Parliamentary response could move in the direction of favouring the originally unfavoured party over the original "victor", essentially reversing the issue. This could possibly lead to further resentment and alienation of groups who may feel as though Parliament has taken away its "victory" in the court. For this reason, backlash could still be considered as a negative occurrence, and one that judges should take into account when making decisions.

Minimalism values the legislature, an elected body, as the proper body for making broad constitutional decisions involving law and policy. Therefore, a supremely authoritative court should refrain from making general laws or engaging deeply with underlying principles, because to do so would create potentially dangerous precedent that could not easily be overruled. In New Zealand, any court decision can easily be overruled, which somewhat nullifies the arguments of minimalism. However, minimalism also argues that there is a risk that broad court judgments, which the public is not yet ready for, could cause backlash. As a result, this backlash could cripple a naturally progressing social movement. In a New Zealand context, this risk could be exacerbated: social backlash towards a judicial decision could prompt a response from the executive or legislative branches of the government, which could in turn result in Parliament affirming the outrage of the retaliating parties through legislation. This could further impair the progression of a desirable social movement more severely than if it were simply retaliation from the public. Thus, courts in New Zealand should still refrain from making deep or wide judgments on constitutional issues, because public backlash could lead to executive and Parliamentary backlash which is severely inhibiting and difficult to reverse.

Popular constitutionalism values the ability of the people to determine the norms and values by which constitutional issues are decided. Because of this, judges should make decisions around constitutional issues or issues of *nomos* based on the social and cultural context. However, popular constitutionalism often argues that courts should not be the final authority on such issues as the norms and values of society are constantly changing and should be able to impact constitutional interpretations respectively. In New Zealand, this is not an issue, as the court is not the final authority for constitutional interpretation or application. The courts still ought to take public opinion and backlash into account while making its decisions, but popular constitutionalism's real issues may lie with Parliament's ability to legislate (theoretically) however it wishes. It may seek to somehow limit Parliament's ability to legislate around constitutional matters, but how that might happen is beyond the scope of this paper. Therefore, general popular constitutionalism is not applied in the rest of this discussion. However, democratic constitutionalism would hold a similar view to the role of public opinion and backlash, but would still appreciate the supremacy of Parliament in constitutional issues. Any backlash from either a court decision or resulting executive and Parliamentary response is simply evidence of norm contestation, which remains an effective way to change constitutional interpretations and national *nomos* through democracy and culture.

Having adapted these theories to the New Zealand context, the final part of this paper argues that out of these conceptions, democratic constitutionalism is the theory that is best suited to the character and nature of New Zealand's constitutional system.

VI Democratic constitutionalism as the best framework for New Zealand

Of the theories explored above, this part will argue that democratic constitutionalism is the best suited theory for New Zealand. Looking back to the previously explored case studies and characteristics of New Zealand's system, it becomes apparent that the theories of minimalism and pluralism simply do not match up with the nation's constitutional experiences. As a result, courts in New Zealand should consider public response to their decisions on a practical level, but should not consider conflict avoidance as a significant factor in their judgments, as minimalism and pluralism would suggest.

1 Democratic constitutionalism best reflects the nature of backlash in New Zealand

Backlash from the public in New Zealand has tended to result in change, not necessarily in law but also in attitudes of the general public. When the *Ngati Apa* decision was released it attracted widespread backlash from the public, resulting in the Foreshore and Seabed Act. However, by the time it was reinstated through the Marine and Coastal Areas (Takutai Moana) Act, even the Labour party was not opposed to repealing the original legislation.¹⁷⁶ While there may not have been outright backlash against the decision in *Seales*, it did prompt action from the public which may yet result in changing attitudes enough that assisted dying becomes an accepted part of New Zealand medical practice.

This is an example of backlash being a form of norm contestation, which seeks to challenge not necessarily the laws and judgments themselves but the values that underlie those laws and judgments.¹⁷⁷ Democratic constitutionalism readily accepts this role of backlash, and embraces it as a positive way for citizens to engage with constitutional law outside of the official governmental bodies.¹⁷⁸ This is evidently what has occurred in New Zealand's experience: backlash has impacted public opinion, which over time has changed the *nomos* of the people and eventually changed the law itself. The other

¹⁷⁶ Marine and Coastal Area (Takutai Moana) Bill 2010 (201-1) (select committee report) at 3. It should be noted that the Bill still did not pass without controversy: see pages 3-8 of the Report.

¹⁷⁷ Post and Siegel "Roe Rage", above n 3, at 381-383.

¹⁷⁸ Post and Siegel "Roe Rage", above n 3, at 383.

conceptions of backlash fail to recognise the positive role that backlash has played in New Zealand's legal and political history. Minimalism and pluralism both argue that backlash is a negative phenomenon. Backlash indicates that the court has made an incorrect decision, either by too readily advancing a naturally progressing social movement or by alienating a group from society. From the case studies observed earlier it appears that neither of these outcomes have resulted from backlash in New Zealand.

For instance, pluralism may heavily criticise the case of *Ngati Apa* because the initial decision of the court alienated a major group from society. The resulting backlash led to a counter-attack from the executive and legislature on indigenous rights, supposedly alienating Māori from the constitutional system. However, the harms that pluralism identifies from such alienation did not eventuate in New Zealand. The democratic system was not compromised, and in fact the supposed alienation of Māori led to a stronger engagement with politics and ultimately resulted in the repeal of the offending legislation.

Similarly, minimalism might argue that the backlash against the *Ngati Apa* judgment crippled the progression of the indigenous rights movement in New Zealand. The legislation that resulted from the backlash drew global criticism for its blatant disregard of Māori rights. Minimalism would argue that the court ought to have made a narrower decision, or perhaps no decision at all, rather than risk such oppressive backlash from the executive and Parliament. However, the legislation that was passed is now no longer in effect, and the new legislation essentially recognises the original judgment of the Court of Appeal. Arguably, while the judgment led to backlash that temporarily slowed the relevant social movement, it did not do so permanently.

2 *Democratic constitutionalism maintains the role of the courts in New Zealand*

This paper has observed that courts in New Zealand are reluctant to stray from their constitutional role, as can be seen in *Seales*. However, they are not always as reluctant to engage with policy concerns or make controversial decisions, as can be seen in *Atkinson* and *Ngati Apa*. If a controversial option is legally open to the court, it may consider taking that option. In fact, there are some cases where it appears it would be impossible to avoid making a controversial decision, because the case involves issues of nomos that are so strongly held by both sides that any outcome will hold a certain amount of controversy. Democratic constitutionalism readily recognises the reality that sometimes there may be no neutral option.¹⁷⁹

¹⁷⁹ Post and Siegel "Roe Rage", above n 3, at 426.

Minimalism argues for judgments that are narrow, shallow, and engage as little as possible with values and principles.¹⁸⁰ Pluralism argues for judgments that appease both parties as much as possible.¹⁸¹ But the fact remains that sometimes this is not desirable or even possible. *Ngati Apa* may be one such decision. If the Court did not recognise the possibility for customary title in the foreshore and seabed, it could be seen as upholding outdated judgments such as *Wi Parata* and denying indigenous rights to land. Its decision was extremely minimal – it recognised only the possibility of a right to the land.¹⁸² However, this decision still caused outrage. It is unsure as to how much narrower or shallower the judgment could have been without denying the possibility of a claim to the land altogether. Instead of requiring the courts to hold back on these decisions, democratic constitutionalism recognises that sometimes backlash can more effectively be addressed by facing controversy rather than avoiding it, which is what New Zealand courts have done, not without success.¹⁸³

Minimalism may also criticise court judgments such as *Atkinson* for probing too far into policy issues. It might argue that this was a situation in which the court ought to defer to the executive, as the controller of the national budget and creator of family assistance policies, to address the issue. However, as can be seen in *Seales*, deferring to the other branches of government will not necessarily result in action. The justification behind minimalism's insistence on executive and legislative development on these areas is based on the fact that those branches are democratically elected. However, New Zealand is an example of how courts can also, to an extent, be democratically responsible. A court's decision is arguably only valid for as long as the public accepts it to be.¹⁸⁴ This can be seen through the overruling of unfavourable court decisions by Parliament as a result of public pressure, particularly *Ngati Apa*. This indicates that the courts should be able to continue engaging with moral and policy issues in the way that they currently do, at least from the viewpoint of whether the exercise is democratic.

3 *Democratic constitutionalism allows for the unpredictability of backlash*

¹⁸⁰ Sunstein "Burkean Minimalism", above n 145, at 362-365.

¹⁸¹ Eskridge "Pluralism and Distrust", above n 130, at 1294.

¹⁸² McHugh "Setting the Statutory Compass", above n 66, at 256.

¹⁸³ Post and Siegel "*Roe* Rage", above n 3, at 430.

¹⁸⁴ Kramer, above n 155, at 969.

This paper has earlier observed that backlash is not always predictable in two ways. First, it may be based on a misunderstanding that means it is not always foreseeable by courts. Second, it might be a vocal minority speaking out which does not necessarily reflect the views of the majority. This means that in cases of *nomos* it can be difficult for the courts to predict what the backlash might be on a particular issue and act accordingly. However, democratic constitutionalism observes that while it can be prudent to attempt to avoid conflict, the avoidance of conflict should not be a major factor in a judge's decision.¹⁸⁵ Arguments about interpretation of New Zealand's constitutional law means that multiple groups of people continue to identify with the constitutional ideals of the nation, which is good and means that there may not be as much division as there seems.¹⁸⁶

In contrast, minimalism and pluralism hold that courts ought to avoid backlash, because it signifies either potential damage to a naturally progressing social movement or the alienation of a group from society. They do not explain how a court is to do this when the backlash is difficult to predict or based on misinformation. How is a court supposed to react to backlash that is simply blatantly wrong? Should it also make an incorrect legal judgment to prevent this provocation? That does not seem correct and certainly would not be accepted by courts in New Zealand. Instead, democratic constitutionalism holds that backlash is not something that ought to be avoided – indeed, as stated earlier, sometimes it cannot be avoided – and if it arises in an unpredictable situation, it is no different to any other form of backlash and will simply run its course in the political and social spheres.

This argument can also extend to executive and parliamentary backlash. Minimalism and pluralism would be very cautious of this form of backlash, as it could be seen as removing constitutional issues from all legal debate. This is particularly so in the *Atkinson* decision, which explicitly prevented any court action on the particular issue at hand at any point in the future. The court's decision in this case has been critiqued for giving such a broad definition of "discrimination" that it potentially involved every discriminatory government policy, most of which are completely valid discriminations, which in turn provoked executive and Parliamentary backlash.¹⁸⁷ The backlash placed families who were in the same situation as the plaintiffs in a position that was worse than when the litigation began.¹⁸⁸ This is a typically minimalist critique. However, as evidenced in other cases, it is possible to repeal such legislation through social

¹⁸⁵ Post and Siegel "*Roe Rage*", above n 3, at 426-427.

¹⁸⁶ Post and Siegel "*Roe Rage*", above n 3, at 427.

¹⁸⁷ Adams, above n 36, at 288.

¹⁸⁸ Adams, above n 36, at 288.

movements and political pressure. In fact, given New Zealand's unicameral state and the fact that any law requires only a simple majority to be passed,¹⁸⁹ it may be much simpler to amend or repeal constitutional laws than in other nations that have entrenched and supreme law written constitutions. If there is not sufficient backlash to result in repeal of a law, it may be that the issue is simply not one of sufficient *nomos* to the public to result in repeal.

VII Conclusion

New Zealand courts are not only capable of taking backlash into consideration when engaging with issues of *nomos*, but they should do so. This is not necessarily because court judgments are frequently imperfect and consideration of public opinion will perfect them, but because when the general public express displeasure with a judicial decision it often results in change. If courts were to make decisions without considering the potential for backlash, they would be ignoring the practical functioning of the system in which they operate. However, backlash can be unpredictable, ill-informed and not representative of the majority opinion. Courts must be careful when considering the extent to which they should incorporate the possibility of backlash into their decisions.

When considering backlash, courts should not necessarily view conflict between social groups as a negative occurrence. From a democratic constitutionalist point of view, this backlash is evidence of the general public engaging with their constitutional system. Instead of attempting to change the law, social groups can attempt to change the principles and values that underlie the law, and backlash is one method of doing so. Courts should therefore not avoid full engagement with the law on a particular issue purely because there is a potential for backlash. They should instead seek to understand and engage with issues of *nomos*, taking the potential for backlash into account but ultimately shaping judgments in a way that will allow continued engagement and identification with the constitutional system that ought to be representative of, and responsive to, the *nomos* of all New Zealanders.

¹⁸⁹ Except the Electoral Act 1993 which requires a 75 per cent majority to amend or repeal certain sections of the Act: see s 268.

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