TAX EXCEPTIONALISM: A VIEW FROM NEW ZEALAND

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Abstract

This paper provides a perspective on the phenomenon of tax exceptionalism in New Zealand administrative law. Tax exceptionalism is broadly defined as the perception that tax law is so different or special when compared to other areas of law that relevant developments in other areas of the law are not applied or applied inconsistently. However, there has not yet, to our knowledge, been any investigation into tax exceptionalism in New Zealand. This article aims to fill this gap. First, it argues that tax exceptionalism is evident in the New Zealand Supreme Court's judicial review judgment in *Tannadyce v Commissioner of Inland Revenue* (*Tannadyce*)[4] and, in particular, the Supreme Court's approach to privative clauses. It then argues that New Zealand's particular brand of tax exceptionalism represents a concerning departure from its constitutional norms and this cannot be justified by public policy. In doing so, the article not only sheds light on something that has not received attention in New Zealand, but further contributes to the broader international understanding of the phenomenon while recognising that the precise manifestation of the phenomenon is a reflection of the particular environment in which it occurs.

1. INTRODUCTION

In a pair of articles published in this journal in 2017, Kristin Hickman and Stephen Daly offered perspectives on the phenomenon of tax exceptionalism in US and UK administrative law. This paper provides a similar perspective on the phenomenon in New Zealand administrative law. Tax exceptionalism is broadly defined as the perception that tax law is so different or special when compared to other areas of law that relevant developments in other areas of the law are not applied or applied inconsistently. However, there has not yet, to our knowledge, been any investigation into tax exceptionalism in New Zealand. This article aims to fill this gap. First, it argues that tax exceptionalism is evident in the New Zealand Supreme Court's judicial review judgment in *Tannadyce Investments Ltd v Commissioner of Inland Revenue* (*Tannadyce*)[5] and, in particular, is evidence of tax exceptionalism in the Supreme Court's approach to privative clauses. It then argues that New Zealand's particular brand of tax exceptionalism represents a concerning departure from its constitutional norms and this cannot be justified by public policy. In doing so, the article not only sheds light on something that has not received attention in New Zealand but further contributes to the broader international understanding of the phenomenon.

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[4] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.
[5] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.

The general concept of tax exceptionalism—that tax is somehow different from other bodies of law—comes in many guises depending on the legal and constitutional norms of a particular jurisdiction. Hickman (2017) and Daly (2017) demonstrate that. The claim can be general: somehow tax will be treated somewhat differently from other areas of law. In New Zealand, there are many examples. For instance, uniquely, the Inland Revenue Department ("Inland Revenue") drafts tax legislation: this is usually the role of the specialist Parliamentary Counsel Office, a statutory office reporting to the Attorney General.[6] We concentrate here on a particular and specific manifestation of the phenomenon in New Zealand: the courts' treatment of privative clauses in legislation.

In section two, we outline the general characteristics of tax exceptionalism and its close relative, tax myopia, as they appear in a New Zealand context. In section three, we map the development of tax exceptionalism in the New Zealand Supreme Court's attitude to privative clauses in tax matters in comparison with the well-established orthodoxy on the courts' scepticism about such ouster clauses. In section three, we discuss the consequences of tax exceptionalism for New Zealand taxpayers and how it undermines the rule of law.

2. TAX MYOPIA AND TAX EXCEPTIONALISM: THE GENERAL AND THE SPECIFIC NEW ZEALAND ENVIRONMENTS

In his 1994 article "Tax myopia, or mamas don't let your babies grow up to be tax lawyers", Paul Caron decried the tendency of judges, academics, and practitioners to treat tax as a "self-contained body of law" (Caron, 1994, p. 518). He argued this "misperception" had "impaired the development of tax law by shielding it from other areas of law that should inform the tax debate" and that other areas of law had "been impoverished by the failure to consider how tax law can enrich their development" (Caron, 1994, p. 518). At first glance, this may appear to be more a matter of academic curiosity than of real practical significance. However, the short-sighted belief that tax is special has led courts to approach tax in a way that is inconsistent with the general body of administrative law.

With all phenomena, there are some commonalities across time and space, but many of the characteristics are reflections of the jurisdiction in which they exist. Tax exceptionalism is no exception. Here, we map the general and specific nature of it in New Zealand. In 1995, Sir Ivor Richardson, a New Zealand tax jurist and thinker, remarked that that despite being "crucial to the functioning of government and the economy" and "*raising major questions as to the application of public law values* [emphasis added], tax administration has not been a major field of study for tax professionals" (p. 197). He also emphasised that "public inquiries into tax matters and Court reviews of tax processes could benefit from reasoned policy discussion of the central role of voluntary compliance and taxpayer privacy and confidentiality" (Richardson, 1995, p. 197). What he noted, although this is not how he characterised it, was that tax was somehow seen as disconnected from law, from public law specifically, and from the "reasoned policy discussion" that public administration was generally subjected to (Richardson, 1995, p. 197). He did not use the term "tax myopia" but, in essence, that was what he was alluding to. It is important to recognise that tax myopia, while unfortunate, is at least *understandable*. Tax law has several characteristics, relating to its history, complexity, and form of administration, that give the appearance of operating outside of established legal norms.

[6] Legislation Act 2019 (New Zealand), Part 6; on the role of Inland Revenue in drafting tax legislation, see Legislation Act 2019, s. 68 and Inland Revenue Department (Drafting Order) 1995 (SR1995/286) (New Zealand); see also Griffiths (2017).

The need for common consent means that taxes may only be levied by an Act of Parliament.[7] At first glance, this constitutional element suggests that tax is "quintessentially law". However, tax's reliance on statute may, in fact, have segregated it from the common law-based private law practised and taught in the eighteenth and nineteenth centuries (Griffiths, 2017). Indeed, the need for clear parliamentary language contributed to a persistent form of tax exceptionalism: literal interpretation. The upshot, at this stage, is that while the literal approach has since been abandoned and New Zealand's legal system has become increasingly statute-based, the perception of tax as operating outside of established legal norms persists.

Furthermore, tax "must, by its very nature, be abstract and technical, and can never be easy reading."[8] Statutory language should only ever be simplified "as far as is practicable" (Law Commission Act 1985, s. 5(1)(d); see also Richardson, 2012) and sometimes that might not be very far at all. As former New Zealand Chief Justice Dame Sian Elias (2014) has said, income tax legislation deals "with a wholly artificial universe constructed by law" (p. 48).

A second source of complexity is what John Prebble KC (1995) refers to as the "ectopic nature of income tax law" (p. 111). Income tax depends on the existence of a concept of income that "ultimately can[not] be defined by law" because, unlike most things that are defined by law, income is not something that exists as a physical fact or as an abstract thought (Prebble KC, 1995, p. 114). As Prebble KC observed, income tax can only ever be applied to a legalistic "simulacrum" of transactions rather than the transactions themselves (Prebble KC, 2002, p. 307). The law must impose artificial constraints of space (such as source and residence rules) and time (such as tax years). Artificiality creates opportunities for tax avoidance, which must be countered by a further set of artificial rules which, in turn, gives rise to new issues that need to be addressed. Prebble KC (1995) argues this has made income tax more formalistic and less comprehensible than other areas of law.

Finally, in contrast to most areas of law, tax legislation is primarily interpreted and administered by the executive branch (Griffiths, 2017). In New Zealand, it is the Commissioner of Inland Revenue ("the Commissioner") who is charged with the "care and management" of taxes (Tax Administration Act 1994 [New Zealand] ["TAA 1994"], s. 6A; Griffiths, 2017) and protecting the "integrity of the tax system" (TAA 1994, s. 6; Griffiths, 2017). It is the Commissioner who has the power to review and amend taxpayers' self-assessments and, therefore, it is the Commissioner who is primarily responsible for interpreting the Inland Revenue Acts. For this reason, tax practitioners must concern themselves with a significant body of "soft law" promulgated by Inland Revenue in the form of Interpretation Statements (Griffiths, 2021). This, combined with the fact that Inland Revenue's primary practitioners are accountants rather than lawyers, understandably causes many people to perceive tax as being removed somehow from the traditional legal system (Griffiths, 2017).

This amalgam of factors does make tax law "different", special and, to some degree, disconnected from the rest of the law. It is inevitable that it will become self-referring and that a separate epistemic community will form (de Cogan, 2015). It is also understandable. We might describe this phenomenon as tax myopia: tax law and practice can and must provide the answers to problems in tax law. The tendency to ignore the rest of the law is unsurprising and

[7] Bill of Rights 1688 1 Will & Mar, Sess 2, c 2, article 4, incorporated into New Zealand law by the Imperial Laws Application Act 1988, s 3. See also Constitution Act 1986. The Bill of Rights 1688 and the importance of common consent are discussed in greater depth in section four of this article.
[8] HM Stationery Office (1936), pp. 18–19.

often necessary. But it potentially leaves tax law somewhat disconnected from the norms and values of the web of law in which it is located.

Tax exceptionalism, then, is best understood as the crystallisation of tax myopia into common law. It arises when a judge forms a myopic view of tax and allows this to cloud their judgement in the application of public law principles. This can happen because of independent error on the judge's part or (more commonly) through the exploitation of the judge's misperceptions by an opportunistic revenue authority or, on occasion, taxpayers (Walker, 2017). Consequently, there is real potential for tax exceptionalism in any country in which tax myopia can be found. This includes New Zealand.

Taken together, the history, complexity, and bureaucracy of tax law go some way to explaining its perceived difference from the rest of the law (Griffiths, 2017). However, this perceived difference is just that: perceived. To adopt a genetic analogy, tax law displays some different physical characteristics to other areas of law, but it is still of the same species. Its underlying genetics are not so different from other areas of law that they cannot interbreed. Indeed, they *should*. Tax myopia is already present in New Zealand. The question is whether it has crystallised into tax exceptionalism.

3. TAX EXCEPTIONALISM: NEW ZEALAND'S ADMINISTRATIVE LAW AS A CASE STUDY

Section 109 of the TAA 1994 is a privative clause which purports to restrict access to judicial review. We argue that the Supreme Court's interpretation of s. 109 in *Tannadyce*[9] is inconsistent with New Zealand courts' approach to privative clauses generally. This inconsistency cannot be explained by the TAA 1994's legislative scheme and, therefore, appears to be evidence of the solidification of tax myopia into tax exceptionalism in New Zealand.

This article focusses solely on evidence of tax exceptionalism in New Zealand's judiciary and does not assess the prevalence of tax exceptionalism in the attitudes of New Zealand's legislators or revenue officials. In the authors' view, it is present but that is a project for another day.

3.1. Disputes under the TAA 1994

The TAA 1994 deems certain decisions, including assessments, to be "disputable decisions" (s. 3). Its disputes process is designed to keep challenges to disputable decisions out of court. Section 109 of the TAA 1994 is intended to ensure that taxpayers cannot initiate challenge proceedings via the Taxation Review Authority ("TRA") or in the High Court until this process is complete (unless the Commissioner agrees to cut the process short; see TAA 1994, s. 89N[1][c][viii]). Section 109 operates by deeming disputable decisions to be correct except in statutory challenge proceedings:

[9] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.

> Except in objection proceedings under Part 8 or a challenge under Part 8A,—
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> (a) no disputable decision may be disputed in a court or in any proceedings on any ground whatsoever; and
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> (b) every disputable decision and, where relevant, all of its particulars are deemed to be, and are to be taken as being, correct in all respects. (TAA 1994, s. 109)

Section 109 of the TAA 1994 is supported by s.114(a), which provides that assessments made by the Commissioner will not be invalidated "through a failure to comply with a provision of" the TAA "or another Inland Revenue Act".

3.2. How New Zealand courts usually approach privative clauses

New Zealand courts (like UK courts) regard themselves as the ultimate interpreters of the law and protectors of the rule of law (Joseph, 2021; *Tannadyce*)[10]—there is no concept of interpretive or *Chevron* deference like that found in the US.[11] Consequently, New Zealand courts are generally suspicious of privative clauses and will often disregard them entirely. In *Bulk Gas Users v Attorney-General* (*Bulk Gas Users*), Cooke J held that privative clauses "will not apply if the decision results from an error on a question of law which the authority is not empowered to decide conclusively".[12] Courts will be slow to conclude that Parliament intended an authority to be so empowered (*Regina [Privacy International] v Investigatory Powers Tribunal* (*Privacy International*) at [111] per Lord Carnwath).[13]

Judicial review is fundamental to the rule of law, as reflected in Lord Bingham (2007)'s second and sixth principles of the Rule of Law: "questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion" (p. 72) and "ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers" (p. 78). If Parliament wishes to restrict such a fundamental constitutional principle then it must "squarely confront what it is doing and accept the political cost" (*Regina v Secretary of State for the Home Dept, Ex parte Simms* at p. 131 per Lord Hoffmann).[14] This common law position is reinforced by the New Zealand Bill of Rights Act 1990 ("NZBORA 1990"), which provides that courts must interpret privative clauses in a manner consistent with the right to judicial review as far as possible (*Zaoui v Attorney-General (No 2)* at [99], citing NZBORA 1990, ss. 6 and 27[2]).[15]

This does not mean that courts must always read down privative clauses. They may still exercise their discretion to decline review in the interests of justice and the rule of law. As Lord Carnwath put it, the status of adjudicative bodies "is to be respected and taken into account,

[10] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.
[11] *Chevron USA, Inc v Natural Resources Defense Council, Inc* 468 US 837 (1984).
[12] *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA) at 133.
[13] *Regina (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2020] AC 491.
[14] *Regina v Secretary of State for the Home Dept, Ex parte Simms* [2000] 2 AC 115 (HL).
[15] *Zaoui v Attorney-General (No 2)* [2005] 1 NZLR 690 (CA).

not by exclusion of review, but by careful regulation of the court's power to grant or refuse permission for judicial review (*Privacy International* at [99]).[16]

Courts will generally use their discretion to decline review (and uphold the privative clause) if they are satisfied that the grounds of review can be appropriately dealt with under a statutory dispute resolution mechanism. This prevents bespoke statutory mechanisms from being undermined by costly and time-consuming review proceedings. For example, in *Ramsay v Wellington District Court* (*Ramsay*),[17] the Court of Appeal held that the applicability of s.133(4) of the Accident Insurance Act 1998 (a privative clause)[18] was ultimately a question of fact: if the alleged ground of review could be addressed through the statutory appellate process, then s. 133(4) *would* apply. However, if it could not, s. 133(4) would not preclude judicial review (*Ramsay* at [35]–[37]). In practice, then, courts will generally give effect to privative clauses, but they do so by their own choice, not by order of Parliament. The ultimate question "is not what the clauses enact but what the rule of law requires" (Joseph, 2021).

3.3. The Evolution of s. 109 of the TAA 1994: From "Exceptional Circumstances" to Exceptionalism

Section 109 of the TAA 1994 replaced s. 27 of the Income Tax Act 1976 (New Zealand) ("ITA 1976"). The Court of Appeal considered s. 27 of the ITA 1976 on several occasions throughout the 1980s and 1990s.[19] There is no material difference between the two sections (*Tannadyce* per McGrath J at [22]).[20]

In *Commissioner of Inland Revenue v Canterbury Frozen Meat Co Ltd*, at 688, the Court of Appeal held that s. 27 of the ITA 1976 only barred judicial review of the correctness of an assessment, not procedural challenges "on traditional administrative law grounds."[21] In *Golden Bay Cement Ltd v Commissioner of Inland Revenue* (*Golden Bay Cement*), the Court of Appeal clarified that challenges on administrative law grounds could and *should* be brought under the statutory appeal process.[22] The Court endorsed the following passage from Lord Scarman:

> Where Parliament has provided by statute appeal procedures, as in the taxing statutes, it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision. (*Regina v. Inland Revenue Commissioners, Ex parte Preston* at 852)[23]

[16] *Regina (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2020] AC 491.
[17] *Ramsay v Wellington District Court* [2006] NZAR 136 (CA).
[18] Accident Insurance Act 1998, s. 134(4). Section 134(4) was succeeded by s. 133(5) of the Accident Compensation Act 2001. The Court of Appeal saw "no substantive differences" between the two provisions: *Ramsay v Wellington District Court* [2006] NZAR 136 (CA) at [27].
[19] *Commissioner of Inland Revenue v Lemmington Holdings Ltd* [1982] 1 NZLR 517 (CA); *Commissioner of Inland Revenue v Canterbury Frozen Meat Co Ltd* [1994] 2 NZLR 681 (CA); *Golden Bay Cement Ltd v Commissioner of Inland Revenue* [1996] 2 NZLR 665 (CA); and *New Zealand Wool Board v Commissioner of Inland Revenue* [1997] 2 NZLR 6 (CA).
[20] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.
[21] *Commissioner of Inland Revenue v Canterbury Frozen Meat Co Ltd* [1994] 2 NZLR 681 (CA).
[22] *Golden Bay Cement Ltd v Commissioner of Inland Revenue* [1996] 2 NZLR 665 (CA).
[23] *Regina v. Inland Revenue Commissioners, Ex parte Preston* [1985] AC 835 (HL).

The Court of Appeal would, therefore, only entertain review in "exceptional circumstances, typically an abuse of power" (*Golden Bay Cement Ltd* at 672).[24] However, the court did not exhaustively define "exceptional circumstances", leaving the question to judicial discretion. For example, exceptional circumstances arose on the facts of *Golden Bay Cement* because the Court of Appeal had already heard full argument on the relevant issues, and recourse to the objection procedure would be wasteful (at 673–674).[25] The Privy Council endorsed this approach in *Miller v Commissioner of Inland Revenue* (*Miller*), at [18] per Lord Hoffmann, summarising the position as follows:

> It will only be in exceptional cases that judicial review should be granted where the challenges can be addressed in the statutory objection procedure. Such exceptional circumstances may arise most typically where there is abuse of power…But they have also been held to arise where the error of law claimed is fatal to the exercise of statutory power and where it would be wasteful to require recourse to the objection procedure.[26]

Therefore, until the early 2000s, tax privative clauses cases were still being approached in accordance with the general position outlined in *Bulk Gas Users*.[27] However, the Court of Appeal began to treat tax somewhat differently in the case of *Westpac Banking Corp v Commissioner of Inland Revenue* (*Westpac*).[28]

Westpac Banking Corp ("Westpac") was one of several banks involved in litigation with the Commissioner over the tax consequences of a series of structured financial transactions called "repo deals". The Commissioner issued a binding ruling (see TAA 1994, s. 91E) that the general anti-avoidance rule (Income Tax Act 2007, s. BG 1) would not apply to one of Westpac's transactions. The Commissioner subsequently sought to reassess Westpac in relation to other repo deals, alleging avoidance. Westpac sought judicial review on the basis that it would be substantively unfair (or contrary to a substantive legitimate expectation) to depart from the earlier ruling.

Westpac first had to establish the existence of "exceptional circumstances" which placed its challenge outside of the scope of s. 109 of the TAA 1994 (*Westpac* at [59]).[29] The Court observed that the TAA 1994's statutory dispute provisions were akin to a dispute resolution "code" which provided "a particularly inauspicious context for judicial review" (*Westpac* at [47]).[30] Exceptional circumstances would only arise where "what purports to be an assessment is not an assessment" or where there had been "conscious maladministration" (*Westpac* at [59]).[31] This was based on the language of the High Court of Australia in *Commissioner of Taxation v Futuris Corporation Ltd* (*Futuris*)[32] in applying s. 175 of the Income Tax

[24] *Golden Bay Cement Ltd v Commissioner of Inland Revenue* [1996] 2 NZLR 665 (CA).
[25] *Golden Bay Cement Ltd v Commissioner of Inland Revenue* [1996] 2 NZLR 665 (CA).
[26] *Miller v Commissioner of Inland Revenue* [2001] 3 NZLR 316 (PC).
[27] *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA).
[28] *Westpac Banking Corp v Commissioner of Inland Revenue* [2009] NZCA 24, [2009] 2 NZLR 99.
[29] *Westpac Banking Corp v Commissioner of Inland Revenue* [2009] NZCA 24, [2009] 2 NZLR 99.
[30] *Westpac Banking Corp v Commissioner of Inland Revenue* [2009] NZCA 24, [2009] 2 NZLR 99.
[31] *Westpac Banking Corp v Commissioner of Inland Revenue* [2009] NZCA 24, [2009] 2 NZLR 99.
[32] *Commissioner of Taxation v Futuris Corporation Ltd* [2008] HCA 32, (2008) 237 CLR 146.

Assessment Act 1936 (Cth)[33] which formed part of a similar disputes regime to that found in New Zealand. The High Court of Australia held that:

> Where s 175 applies, errors in the process of assessment do not go to jurisdiction and so do not attract the remedy of a constitutional writ under s 75(v) of the Constitution or under s 39B of the Judiciary Act. (*Futuris* at [24])[34]

Judicial review was therefore only available where "what purports to be an assessment is not in fact an assessment" (*Westpac* at [59]).[35] This included "tentative or provisional assessments which for that reason do not answer the statutory description in s 175" as well as "conscious maladministration of the assessment process [which] may be said also not to produce an 'assessment' to which s 175 applies" (*Westpac* at [25]).[36]

In applying *Futuris*, the New Zealand Court of Appeal overlooked the conceptual gulf between Australian and New Zealand administrative law.[37] The organising principle of Australian judicial review is "jurisdictional error". Courts can generally only review those decisions that give rise to "jurisdictional error" as opposed to errors "within jurisdiction".[38] New Zealand judicial review is organised around the concept of "error of law" and makes no distinction between jurisdictional and non-jurisdictional errors.[39] The Court of Appeal therefore adopted an approach which, while entirely correct in Australia, was directly contrary to the organising principle of New Zealand administrative law.

The Court of Appeal appears to have reasoned that taxpayers' individual rights are secondary to those of the "hidden third party" of compliant taxpayers (*Westpac* at [61][40]; see also Griffiths, 2011). First, the Court minimised the importance of procedural propriety in tax cases by pointing out that a taxpayer's liability to tax exists independently of the Commissioner's assessment and that procedural impropriety could not erase this liability.[41] Secondly, the Court warned of the risk of taxpayers using judicial review to "game" and "delay" the statutory processes (*Westpac* at [62]–[63]).[42] Thirdly, the Court viewed these "collateral challenges" as of particular concern because of their potential to waste limited Inland Revenue resources (*Westpac* at [64])[43]: a concern that appears to evoke the Commissioner's "highest net revenue" objective under s. 6A(2) of the TAA 1994.

The Court of Appeal, therefore, appears to have reached its conclusion based on a belief that tax was "somewhat different" from other areas of administrative law. This was observed with concern by some (Griffiths, 2011).

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[33] "The validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with" (Income Tax Assessment Act 1936, s. 175).
[34] *Commissioner of Taxation v Futuris Corporation Ltd* [2008] HCA 32, (2008) 237 CLR 146.
[35] *Westpac Banking Corp v Commissioner of Inland Revenue* [2009] NZCA 24, [2009] 2 NZLR 99.
[36] *Westpac Banking Corp v Commissioner of Inland Revenue* [2009] NZCA 24, [2009] 2 NZLR 99 at [25].
[37] *Commissioner of Taxation v Futuris Corporation Ltd* [2008] HCA 32, (2008) 237 CLR 146.
[38] *Wei v Minister for Immigration and Border Protection* [2015] HCA 51, (2015) 257 CLR 22 at [28]; Lord Woolf et al. (2018), pp. 237–239; and Taggart (2008), pp. 8–9.
[39] *Peters v Davison* [1999] 2 NZLR 164 (CA) at 188.
[40] *Westpac Banking Corp v Commissioner of Inland Revenue* [2009] NZCA 24, [2009] 2 NZLR 99.
[41] See *Westpac Banking Corp v Commissioner of Inland Revenue* [2009] NZCA 24, [2009] 2 NZLR 99 at [61]. This appears to ignore the Privy Council's observation that "the making of an assessment, whether correct or not, may be an abuse of power" (*Miller v Commissioner of Inland Revenue* [2001] 3 NZLR 316 (PC) at [14]).
[42] *Westpac Banking Corp v Commissioner of Inland Revenue* [2009] NZCA 24, [2009] 2 NZLR 99.
[43] *Westpac Banking Corp v Commissioner of Inland Revenue* [2009] NZCA 24, [2009] 2 NZLR 99.

3.4. *Tannadyce*

Despite this concern, the Supreme Court fully embraced tax exceptionalism in *Tannadyce*.[44] Tannadyce Investments Ltd claimed that Inland Revenue withheld financial records necessary for it to complete its returns for the 1993–1998 income years which, in turn, caused the Commissioner to enter a prejudicial default assessment.[45] The company applied for judicial review of this assessment, arguing that the Commissioner had, by withholding the records, engaged in "conscious maladministration" involving abuse of power and breach of natural justice (*Tannadyce* at [40]).[46]

The Supreme Court majority of Tipping, Blanchard, and Gault JJ applied what could be described as an orthodox process of statutory interpretation. Parliament's intention, they held, was plainly that "disputes and challenges capable of being brought under the statutory procedures [be] brought in that way and were *not to be made subject of any other form or proceeding in court or otherwise* [emphasis added]." (*Tannadyce* at [53]). This comprehensive prohibition was indicated by the words "on any ground whatsoever" (*Tannadyce* at [54]). The majority recognised that judges "should be slow to conclude that a statutory provision ousting or limiting access to the courts was intended to preclude applications to the High Court for judicial review" (*Tannadyce* at [56], citing *Bulk Gas Users* at 133).[47] However, they concluded that there was "no need to strain to reconcile the terms of s 109 with the general availability of judicial review" (*Tannadyce* at [57])[48] because the TAA 1994's challenge procedure contains a built-in right to challenge disputable decisions in the High Court (TAA 1994, Part 8A). In their view, this outcome did "not in any way diminish the general importance and availability of judicial review" but was merely a "product of the text and purpose of s 109 in its particular statutory context" (*Tannadyce* at [60]).[49] Judicial review would, therefore, only be available in relation to disputable decisions where:

> (a) It was "not practically possible for a taxpayer to challenge the decision under Part 8A" (*Tannadyce* at [58]);[50] or
>
> (b) There was a "flaw in the statutory process" that could not be addressed within the regime itself (*Tannadyce* at [59]).[51]

In their view, an unwritten "exceptional circumstances" exception would "not be consistent with the purpose which Parliament was trying to achieve" (*Tannadyce* at [72]) [52]when it enacted s. 109 of the TAA 1994 and provided an opportunity for "gaming the system" (*Tannadyce* at [71]).[53]

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[44] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.
[45] The Commissioner may issue a default assessment under s. 106 of the TAA 1994 if the taxpayer's returns are unsatisfactory.
[46] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2010] NZCA 233, (2010) 24 NZTC 24 at [40].
[47] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153; *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA).
[48] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.
[49] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.
[50] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.
[51] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.
[52] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.
[53] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.

In summary, the majority concluded that s. 109 of the TAA 1994 precludes judicial review of disputable decisions "unless the taxpayer cannot practically invoke the relevant statutory procedure" and that such circumstances were "likely to be extremely rare" (*Tannadyce* at [61]).[54] TIL had not established the existence of such a situation (*Tannadyce*).[55]

Elias CJ and McGrath J authored what Glazebrook J (a current judge of the Supreme Court with particular expertise in taxation) later described extrajudicially as a "very strong minority opinion" (Glazebrook, 2015, p. 9).[56] The minority argued that privative clauses should not be approached from an orthodox statutory interpretation standpoint because courts of higher jurisdiction "have constitutional responsibility for upholding the values which constitute the rule of law" and ensure that "when public officials exercise the powers conferred on them by Parliament, they act within them" (*Tannadyce* at [3]).[57] They do this through the mechanism of judicial review (*Tannadyce*).[58] Statutes that purport to limit this mechanism are, therefore, viewed with suspicion and this is reflected in the interpretive presumption that "it was not Parliament's intention to allow decision makers power conclusively to determine any question of law" (*Tannadyce* at [3]).[59] In this context, judicial review should be available whenever it best serves the ends of justice, regardless of the statutory scheme. It should not be confined to cases where the taxpayer is unable to bring the grievance within the statutory process (*Tannadyce*).[60] The correct approach to s. 109 was therefore a flexible one (as outlined by the Privy Council in *Miller*.[61] The range of circumstances that might call for judicial review are too diverse to permit the framing of a definitive rule. While, generally, the statutory disputes process will be able to provide superior remedies to judicial review, it is impossible to foresee all possible circumstances in which this will not be the case (*Tannadyce*).[62]

This approach protects "the integrity of the tax system" (TAA 1994, s. 6) and ensures that taxpayers are assessed "fairly, impartially, and according to law" (TAA 1994, s. 6[2][b]). In contrast, there was a risk that the majority approach might lead to taxpayers facing "substantial prejudice" if required to proceed under the statutory procedure (*Tannadyce* at [38]).[63] It was only in circumstances where the statutory process "will in substance remedy the prejudice" that the court should "exercise its *discretion* [emphasis added] against granting relief" (*Tannadyce* at [38]).[64] Moreover, the minority argued that their approach was "consistent with the approach taken to challenges to administrative decisions *in areas other than taxation* [emphasis added]".[65] They cited, in particular, Cooke J's general approach in *Bulk Gas Users*, and the Court of Appeal's observation in *Ramsay* that this restrictive interpretation would apply *unless a challenge is amenable to the statutory process* (*Tannadyce*).[66]

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[54] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.
[55] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.
[56] Justice Glazebrook was appointed to the Supreme Court in 2012, a year after *Tannadyce Investments Ltd v Commissioner of Inland Revenue* was decided.
[57] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.
[58] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.
[59] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.
[60] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.
[61] *Miller v Commissioner of Inland Revenue* [2001] 3 NZLR 316 (PC).
[62] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.
[63] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.
[64] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.
[65] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.
[66] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153; *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA); *Ramsay v Wellington District Court* [2006] NZAR 136 (CA).

While the minority's criticism was primarily aimed at the majority approach, they also disapproved of the outcome in *Westpac*. They argued that the Court of Appeal had not addressed the *Miller* line of authority despite the lack of significant legislative change. They went on to criticise the Court's reliance on *Futuris* on the basis that an approach based on Australian judicial review principles was no substitute for New Zealand principles developed by the Court of Appeal and the Privy Council over 25 years (*Tannadyce*).[67]

The majority responded at paragraphs [69] to [73] of their judgment (*Tannadyce*). In their view, it was "not necessary" to address the *Miller* line of authority because "the essence of the earlier cases was captured in Westpac" because it perpetuated the "exceptional circumstances" exception (*Tannadyce* at [70]).[68] In any event, the majority considered that the earlier cases had overlooked the existence of an ultimate right of appeal to the High Court, which they considered would always provide an adequate remedy which, under the reasoning in *Ramsay*, meant the interpretive presumption did not apply (*Tannadyce*).[69]

This is not a convincing rebuttal. The approach in *Westpac* was plainly more restrictive than that in *Miller*, especially given the reliance on *Futuris*. It is difficult to believe that the majority overlooked this. It also seems unrealistic to suggest that Sir Ivor Richardson repeatedly overlooked the implications of an eventual right of appeal to the High Court given his role in designing the TAA 1994 and his extrajudicial wariness of judicial review in a tax context (Richardson et al., 1993). This does not mean that the majority's approach was necessarily *wrong*, but it does suggest that it involved a departure from established principles of public law.

3.5. Restricting *Tannadyce*

The question, then, is did *Tannadyce* mark a general change in New Zealand's approach to privative clauses, or the carving out of a new approach for tax law only? Subsequent cases involving privative clauses suggest the latter. The Supreme Court has consistently followed the *Bulk Gas Users* approach in all subsequent non-tax cases and has overtly restricted *Tannadyce* to its statutory context in two judgments.[70]

The first case is *H (SC 52/2018) v Refugee and Protection Officer* (*H*).[71] The appellant was an applicant for refugee status. A Refugee and Protection Officer (RPO) erroneously rejected his application after he failed to attend an interview for medical reasons, and rejected his

[67] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.
[68] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.
[69] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.
[70] The Supreme Court has mentioned *Tannadyce* on six additional occasions: *Orlov v New Zealand Law Society* [2013] NZSC 94 cites *Tannadyce* for the unremarkable proposition that "the Court would not normally permit judicial review proceedings to be heard ahead of the statutory proceedings, other than in exceptional cases" (at [6]); *Skinner v R* [2016] NZSC 101, [2017] 1 NZLR 289 cites *Tannadyce* for the proposition that Parliament never intended s. 109 of the TAA 1994 to apply to criminal proceedings (at [14]–[19]); *Austin v Roche Products (New Zealand) Ltd* [2021] NZSC 62 cites *Tannadyce* as showing the continued approval of *Ramsay* (at [20]); *FMV v TZB* [2021] NZSC 102, [2021] 1 NZLR 466 did not raise an ouster clause issue of the kind considered in *Tannadyce* (at [129]); *M (SC 82/2020) v Attorney-General* [2021] NZSC 118, [2021] 1 NZLR 770 cites *Tannadyce* for a proposition unrelated to privative clauses; *Chesterfields Preschools (in liq) v Commissioner of Inland Revenue* [2021] NZSC 133 is a recall application in which the applicant unsuccessfully argues that the Court ought to have considered *Tannadyce*.
[71] *H (SC 52/2018) v Refugee and Protection Officer* [2019] NZSC 13, [2019] 1 NZLR 433.

explanation because his supporting documents did not meet a series of non-statutory requirements. H sought judicial review of the RPO's decisions to reject his medical certificate and to reject his status application (*H*).[72]

The RPO argued that s. 249 of the Immigration Act 2009 precluded review. Section 249 of the Immigration Act 2009 is "in effect, a privative provision" (*H* at [62])[73] but the Supreme Court held (unanimously) that judicial review nonetheless provided a more appropriate remedy than the statutory dispute process (*H*).[74] In these circumstances, the Court concluded that s. 249 should be read down, expressly endorsing the approach in *Bulk Gas Users*:

> Since the decision of the Court of Appeal in *Bulk Gas Users Group v Attorney-General*, it has been settled law that a privative provision does not necessarily prevent scrutiny of a decision based on an error of law on the part of the decision-maker that is otherwise reviewable. The Court may strike out review proceedings where the Court is satisfied that the available appeal rights provide a more appropriate pathway to a remedy than might otherwise have been sought in the review proceedings. But for the reasons given, the deprivation of first instance determination as required by the statute could not be remedied by the alternative pathway of appeal in the present case. (*H* at [78])[75]

This echoed the language of the Privy Council in *Miller* and the minority in *Tannadyce*. The Court then distinguished *Tannadyce* on the basis that the TAA 1994 created a statutory disputes regime "sufficiently comprehensive to render judicial review unnecessary, except where the challenge process could not be invoked" (*H* at [87]).[76] This was because s. 109 of the TAA 1994 "did not prevent access by the taxpayer to the Court on matters of unlawfulness, but rather provided a statutory process for such access" (*H* at [87]).[77]

The second case is *Ortmann v United States of America* (*Ortmann*).[78] *Ortmann* formed part of the ongoing extradition battle between the United States and Kim Dotcom. One issue on appeal was whether Dotcom's application for judicial review was an abuse of process. The Court of Appeal treated *Tannadyce* as authority for the proposition that "if a ground of judicial review can be raised and adequately determined through the case-stated appeal process under s 68 [of the Extradition Act 1999] — as, in our assessment, it has been in this case — judicial review is not available" (*Ortmann* [2018] at [311]).[79] However, the Supreme Court held that "*Tannadyce* principles" were not "engaged on the facts of this case" (*Ortmann* [2020] at [573].[80] They pointed out that "*Tannadyce* was a very different case from the present. It was a tax case" (*Ortmann* [2020] at [573]).[81] Unlike the TAA 1994, the Extradition Act 1999 does not have a privative clause and provides only "carefully circumscribed" appeal rights (*Ortmann*

[72] *H (SC 52/2018) v Refugee and Protection Officer* [2019] NZSC 13, [2019] 1 NZLR 433.
[73] *H (SC 52/2018) v Refugee and Protection Officer* [2019] NZSC 13, [2019] 1 NZLR 433.
[74] *H (SC 52/2018) v Refugee and Protection Officer* [2019] NZSC 13, [2019] 1 NZLR 433.
[75] *H (SC 52/2018) v Refugee and Protection Officer* [2019] NZSC 13, [2019] 1 NZLR 433.
[76] *H (SC 52/2018) v Refugee and Protection Officer* [2019] NZSC 13, [2019] 1 NZLR 433.
[77] *H (SC 52/2018) v Refugee and Protection Officer* [2019] NZSC 13, [2019] 1 NZLR 433.
[78] *Ortmann v United States of America* [2020] NZSC 120, [2020] 1 NZLR 475.
[79] *Ortmann v United States of America* [2018] NZCA 233, [2018] 3 NZLR 475.
[80] *Ortmann v United States of America* [2020] NZSC 120, [2020] 1 NZLR 475.
[81] *Ortmann v United States of America* [2020] NZSC 120, [2020] 1 NZLR 475.

(2020) at [572], citing *Ortmann* [2018] at [311]).[82] The essence of *Tannadyce* was that Parliament had left "virtually no role for judicial review" (*Ortmann* [2020] at [572]).[83]

Read together, *H* and *Ortmann* suggest an effort to confine *Tannadyce* to its own statutory setting and protect the general principles established in *Bulk Gas Users* (Joseph, 2021). In both cases, the Supreme Court appears to suggest that *Tannadyce* will only apply in tax cases. Ostensibly, this is because the TAA 1994 is the only statutory regime comprehensive enough to render judicial review unnecessary, but it is difficult to escape the general trend of reinforcing *Bulk Gas Users* while limiting *Tannadyce* to tax. This trend is reinforced by Glazebrook J's concurrence in both *H* and Ortmann, and Elias CJ's concurrence in *H* (her Honour having retired prior to *Ortmann*), despite their criticism of *Tannadyce*.

3.6. *Tannadyce* as Tax Exceptionalism

While it appears that the Supreme Court *does* treat s. 109 of the TAA 1994 as somewhat different from other privative clauses, this does not necessarily reflect tax exceptionalism. It is possible that *Tannadyce* simply established a general principle that privative clauses will not, as a matter of law, be read down where an accompanying statutory regime renders judicial review practically redundant and the TAA 1994 just happens to be *exceptionally comprehensive* when compared to other statutes. It would, therefore, be Parliament, not the courts, who treated tax as being different (as Parliament, being sovereign, is permitted to do). This explanation is flawed because the TAA 1994's disputes regime is not so comprehensive as to render judicial review redundant. The cost and inefficiency of the statutory regime means that it will often be inadequate to address procedural improprieties that can (and should) be resolved by way of judicial review. *Tannadyce* is, therefore, better explained as a conscious limitation of judicial review in tax cases.

At face value, cost and inefficiency might seem incapable of giving rise to "exceptional circumstances" justifying review. This is not the case. Both *Miller* and *Golden Bay Cement* indicate that "exceptional circumstances" justifying review may arise "where it would be wasteful to require recourse to the objection procedure"(*Miller* at [17]; *Golden Bay Cement* at 673–674).[84] In any event, a theoretical right of appeal to the High Court means little if the disputes regime renders it practically inaccessible.

The inefficiency and cost of the disputes process is something of a running joke among tax commentators.[85] The disputes process alone frequently takes more than two years to complete and subsequent challenge to the High Court more than doubles this timescale (Keating, 2012). Meanwhile the cost has led the Tax Committee of the New Zealand Law Society and the New Zealand Institute of Chartered Accountants (2008) to conclude that the statutory process "simply pric[es] some taxpayers out" (p.12).

[82] *Ortmann v United States of America* [2020] NZSC 120, [2020] 1 NZLR 475; *Ortmann v United States of America* [2018] NZCA 233, [2018] 3 NZLR 475.
[83] *Ortmann v United States of America* [2020] NZSC 120, [2020] 1 NZLR 475.
[84] *Miller v Commissioner of Inland Revenue* [2001] 3 NZLR 316 (PC); *Golden Bay Cement Ltd v Commissioner of Inland Revenue* [1996] 2 NZLR 665 (CA).
[85] See, for example, Shewan (2002); Blanchard (2005); Keating (2012), pp. 15–22; Glazebrook (2015), pp. 4–10; Young (2011), p. v ; Griffiths (2011), pp. 221–225.

In order to maintain "the integrity of the tax system" (TAA 1994, s. 6), taxpayers have their liability determined "fairly impartially and according to law" (TAA 1994, s. 6[2][b]). As the *Tannadyce* minority notes, the Commissioner exercises "highly intrusive statutory powers", the improper exercise of which "can give rise to departures from the statutory purposes of such significance that resulting assessments, or other decisions affecting taxpayers, should be invalidated" (*Tannadyce* at [35]).[86] A recent example of such a departure can be found in the recent *Parore* cases, in which Inland Revenue officials compelled the defendant in a tax evasion prosecution to disclose facts and legal arguments relevant to his case through the TAA 1994's civil disputes resolution process prior to commencing the criminal prosecution. The prosecution was stayed on the basis that this breached the defendant's "right to silence" under NZBORA 1990, and the Court of Appeal subsequently made a formal declaration that Inland Revenue had breached Mr Parore's right to a fair trial under s. 25(a) of NZBORA 1990.[87] The High Court had also ordered Inland Revenue to pay damages to the defendant but this was reversed on appeal.[88] Such improprieties are of significant public and constitutional importance, and should be resolved promptly, efficiently, and without undue cost. The statutory disputes process does not always allow for this. Indeed, it may not remedy some pre-assessment improprieties at all if they do not affect the ultimate assessment (Richardson et al., 1993). Therefore, the process may provide a superior remedy to judicial review in many instances, but to suggest that judicial review no longer has a role to play is to ignore reality.

The disputes regime's limitations were well known at the time of *Tannadyce*. The suggestion that the majority's reasoning "rested on the premise that Parliament had created…an appeal process that was sufficiently comprehensive to render judicial review unnecessary, except where the challenge process could not be invoked" does not, therefore, hold water (*H* at [87]).[89] It is more intellectually honest to recognise *Tannadyce* for what it was: a conscious decision to *restrict* judicial review rights, and the ability of courts to uphold the rule of law, to ensure the efficient operation of the tax system. This is reflected in the majority's repeated emphasis on the importance of the speed and efficiency purportedly provided by the statutory regime, as well as the need to avoid "gaming" (*Tannadyce* at [49], [51], [55], [67], [71], [72]).[90] In making this trade-off, they created a rule exclusive to tax. This is textbook tax exceptionalism.

4. THE GENERAL CASE AGAINST TAX EXCEPTIONALISM AND THE SPECIFIC NEW ZEALAND CONTEXT

The case against tax exceptionalism rests on two propositions. The first is the basic tenet of the rule of law that "laws should apply equally to all, save to the extent that objective differences justify differentiation" (Lord Bingham, 2007, p. 73). Therefore, in the absence of objective differences between revenue authorities and other administrative actors, the same principles of public law should apply. This was the sentiment expressed by both the US Supreme Court in *Mayo Foundation for Medical Education and Research v United States* (*Mayo Foundation*)[91]

[86] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.
[87] *Commissioner of Inland Revenue v Parore* [2021] NZHC 3405 (stay); and *Attorney-General v Parore* [2025] NZCA 328 (declaration).
[88] *Parore v Attorney-General* [2023] NZHC 1010; and *Attorney-General v Parore* [2025] NZCA 328. For a summary of the High Court decision and Inland Revenue's response, see Handford (2023).
[89] *H (SC 52/2018) v Refugee and Protection Officer* [2019] NZSC 13, [2019] 1 NZLR 433.
[90] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.
[91] *Mayo Foundation for Medical Education and Research v United States* 562 US 44 (2011). See Hickman (2019).

and Lord Woolf in *R (Coughlan) v North and East Devon Health Authority*.[92] The second proposition is that, as Elias CJ observed during the *Tannadyce* hearing, "there's nothing special about tax except that it is a very extensive statutory regime" (*Tannadyce* (Trans) at 21).[93]

The first proposition can be taken as given. Therefore, tax exceptionalism is prima facie contrary to the rule of law unless it can be shown that there is some characteristic of tax *that merits different treatment*. Such justifications are hard to find. As Hickman (2006) has observed, normative arguments in favour of tax exceptionalism in the United States tend to criticise general administrative law principles (such as *Chevron* deference) rather than describing particular characteristics of tax which render it somehow "special" when compared to other areas of administrative law (Murphy, 2014).

Tannadyce appears to rest on the assumption that there is a particular need for efficiency in tax that justifies an exceptional limitation of judicial review. There are two flaws in this justification, which we discuss below. First, it is constitutionally inappropriate for courts to restrict their own ability to determine questions of law in the name of administrative efficiency. Secondly, even if such an outcome were constitutionally appropriate, Inland Revenue's need for judicial oversight is too great, and *Tannadyce*'s efficiency gains too minor, to justify striking the balance as the majority did.

4.1. Only Parliament Can Limit Judicial Review

The *Tannadyce* majority argued that a strict interpretation of s.109 of the TAA 1994 "leads to a much more efficient and satisfactory process overall" (*Tannadyce* at [55])[94] because "the use of the statutory procedures removes the opportunity which the availability of judicial review would present, and has presented, for gaming the system" (*Tannadyce* at [71]).[95] This is undoubtedly a meritorious aim. In this respect, taxation is "different from and more important than any other single [government] activity," or, put differently, "the *sine qua non* for all other governmental activities" (Johnson, 2012, p. 279). Indeed, it is this "revenue imperative" that justifies imbuing revenue authorities with expansive information-gathering and enforcement powers (Johnson, 2012, p. 279). However, taxation also carries inherent oppressive potential because it allows for the restriction of individual property rights without the individual having committed any "mischief" (Griffiths, 2017, p. 60). For this reason, it is a well-accepted principle in liberal democracies that "tax can be levied only if a statute lawfully enacted so provides" and that this principle will be enforced by independent courts (Vanistendael, 1996, p. 15). This is the "principle of legality". In common law countries, the principle of legality is derived from the "principle of consent". The principle of consent can be traced back to Magna Carta (1297, 25 Edw I, cl 12), which prohibited the levelling of "scutage or aid" without the "general consent" of the realm.[96] This position was restated in the Petition of Right 1627, which received Royal Assent in 1628, which demanded that "no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such charge without common consent of Parliament thereof" (3 Cha I, c 1, cl X) and, again, in the Bill of Rights of 1688, which provides that

[92] *Regina v North and East Devon Health Authority, Ex parte Coughlan* [2001] QB 213 (CA) at [61]. See Daly (2019).
[93] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC Trans 22 at [21].
[94] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.
[95] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.
[96] "General consent" was defined in Magna Carta (1297 25 Edw I, cl 14) to include the greater barons and senior clergy. While the reality fell far short of genuine representative democracy, these provisions nevertheless seeded the idea of "no taxation without representation" and, with it, the establishment of the common council, as a means of obtaining popular consent.

"levying money for or to the use of the Crown, by pretence of prerogative, without grant of Parliament, for longer time or in other manner then the same is or shall be granted, is illegal" (1 Will & Mar, Sess 2, c 2, article 4). This core principle is preserved in s. 22a of the New Zealand Constitution Act 1986. This language makes clear that Parliamentary consent is required not only for the collection of taxes, but for the manner of their collection. If the Commissioner or Inland Revenue exceed the limits of the revenue-collecting powers conferred upon them by Parliament, they act not only ultra vires the TAA 1994 but ultra vires the Bill of Rights. As a result, according to Andrew Park QC in Richardson et al. (1993), it is not "acceptable in a democracy governed by the rule of law for the Revenue's use of quite drastic…powers to be immune from challenge in the Courts" (p. 204).

Park QC notes, however, that at the same time, judicial review proceedings can "gum up the works for years" and be "intensely frustrating to Revenue authorities" (Richardson et al., 1993, p. 204). Tax administration must, therefore, strike a balance between efficiency and the judicial oversight necessary to maintain the rule of law and uphold parliamentary supremacy.

In New Zealand, the appropriate balance between efficient tax collection and judicial oversight is a question for Parliament. The role of the courts "is to determine what is lawful and what is not" (*Lab Tests Auckland Ltd v Auckland District Health Board* (*Lab Tests Auckland*) at [379]).[97] They "do not defer to anything or anybody" (*Lab Tests Auckland* at [379]).[98] What this means in practice is that they will not allow an executive body to determine the legality of their own actions without exceptionally clear parliamentary language to the contrary (*Regina (ProLife Alliance) v British Broadcasting Corp* cited with approval in New Zealand in *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council*).[99] This does not mean that the courts will not recognise the "relative institutional competence" of regulatory authorities—but they will do so at their own discretion. No amount of "institutional competence" will prevent courts from assessing the legality of executive behaviour.[100]

This is not an arbitrary position. It flows from the needs of New Zealand's particular constitutional arrangement (Elias, 2018). Westminster parliamentary systems embrace the "efficient secret" of cabinet government.[101] The legislature and the executive are, in effect, controlled by a single body and cannot be relied upon to act as meaningful checks upon each other's powers (Bagehot, 1963). Judicial review acts as a "principal constitutional check" that courts "cannot avoid without affecting the constitutional balance" (Elias, 2018, p. 25). If a court constrains its own ability to engage in judicial review, it inhibits its constitutional role. Therefore, while it may be constitutional for a court to decide not to exercise its judicial review jurisdiction on the facts of a particular case, it is not constitutional to decide that no jurisdiction exists at all (provided the matter involves questions of law appropriate for judicial resolution). Only Parliament can do that, because only Parliament's authority derives from the common consent, and only the common consent can waive the right to protection from state overreach. Any other arrangement invites tyranny.

[97] *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [379].
[98] *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [379].
[99] *Regina (ProLife Alliance) v British Broadcasting Corp* [2003] UKHL 23, [2004] 1 AC 185; *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council* [2015] NZCA 612, [2016] 2 NZLR 437.
[100] For the origins of the phrase "relative institutional competence" see *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 at [29] per Lord Bingham, as cited in *Child Poverty Action Group Incorporated v Attorney-General* [2013] 3 NZLR 729, [2013] NZCA 402 at [92].
[101] See Bagehot (1963), p.65.

As Steve Johnson observed, "the movement against tax exceptionalism does not" require perfect uniformity between tax and the rest of the law; "it requires only that differences between tax and other areas be created for good reason by [the legislature], rather than stemming from judicial decree or parochial insularity" (Johnson, 2012, p. 280).

4.2. *Tannadyce* Strikes the Wrong Balance

Judicial oversight is particularly important in a tax context because of the lack of executive or legislative checks upon Inland Revenue. Inland Revenue is responsible for assessing taxpayers, conducting investigations and audits, disputing assessments, running the disputes process itself, entering settlements with taxpayers, and releasing "soft law" guidance (which non-legally trained advisers who engage with Inland Revenue can be expected to treat as law). Outside of those rare cases that make it to the TRA or the High Court, Inland Revenue fills the role of police, prosecutor, and judge. Even members of the Adjudication Unit, which is ostensibly independent, are officers of the department and "independent in a limited sense only" (Griffiths, 2012, pp. 5–6).

Parliamentary oversight on tax matters is also limited. The Tax Working Group (2018) expressed concern at "the level of tax expertise" within the Office of the Ombudsman (p. 5). Moreover, it is Inland Revenue (rather than the Parliamentary Counsel Office) that is responsible for drafting substantive tax legislation and elected members of Parliament often lack the technical knowledge to effectively critique Inland Revenue's proposed drafting (Legislation Act 2019, s. 68).[102] Inland Revenue has also generally resisted statutory attempts to enhance taxpayers' administrative rights (Clews, 2013).

With the deepest respect to the Court of Appeal in *Parore*, non-binding Inland Revenue guidance can never "ensur[e] that there is unlikely to be" a breach of a taxpayers' rights.[103] Taxpayers need to be assured that appropriate remedies will be available *if* something does go wrong. It is not clear, for example, that there are adequate checks and balances to prevent Inland Revenue from engaging in (to use an American example) the "fiscal equivalent of racial profiling" (Clews, 2013, p. 205). Inland Revenue has considerable powers of search and seizure, including the power to enter business premises without a warrant (TAA 1994, s. 17). There is also a (still unresolved) question of the extent to which Inland Revenue can legitimately *detain* a person in the course of exercising their search function (Clews. 2013, p. 209). NZBORA 1990 rights (ss. 21 and 23) are particularly important in this context and it is not clear that Inland Revenue is doing enough to protect them (Clews, 2013; *Parore*).[104] Inland Revenue's combination of invasive powers and minimal oversight therefore create, if anything, a particularly *auspicious* context for judicial review.[105]

The United States Supreme Court expressly rejected tax exceptionalism in *Mayo Foundation*, holding that they were "not inclined to carve out an approach good for tax law only" (at [55]).[106]

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[102] Legislation Act 2019, s. 68.
[103] See *Attorney-General v Parore* [2025] NZCA 328 at [100].
[104] *Commissioner of Inland Revenue v Parore* [2021] NZHC 3405 (stay); and *Parore v Attorney-General* [2023] NZHC 1010 (damages) The Court of Appeal confirmed there was a breach of Parore's rights, but this was not substantial enough to warrant an award of damages, *Attorney-General v Parore* [2025] NZCA 328 at [99]–[100]. For a summary of the *Parore* decisions and the Inland Revenue's response see Handford (2023).
[105] Compare *Westpac Banking Corp v Commissioner of Inland Revenue* [2009] NZCA 24, [2009] 2 NZLR 9at [47].
[106] *Mayo Foundation for Medical Education and Research v United States* 562 US 44 (2011).

Tax exceptionalism persists, however, through the opportunistic arguments of tax authorities (and, on occasion, private litigants). In the United Kingdom, tax exceptionalism arises primarily from misunderstanding the scope of HM Revenue and Customs' managerial discretion rather than from treating tax as inherently special (Daly, 2017). While this is not tax exceptionalism in the American sense, it is still an abnormality of which courts should be wary.

The New Zealand Supreme Court in *Tannadyce* (and the Court of Appeal in *Westpac*) created an approach to privative clauses that is "good for tax law only" (*Mayo Foundation* at [55]).[107] Tax exceptionalism of this kind is inherently problematic because it involves courts abdicating their oversight function without Parliamentary authority. Only Parliament, empowered by the common consent, can exempt revenue authorities from judicial oversight.

Even if *Tannadyce* were justified as a matter of principle, it would still be unjustified as a matter of policy. The Commissioner's expansive powers require oversight. The statutory regime is too inefficient and Inland Revenue-dominated to provide an adequate remedy in many situations. Nor does the Ombudsman, or indeed Parliament, have the expertise to provide an adequate check. Tax exceptionalism, therefore, threatens the integrity of the New Zealand tax system.

While Tax Administration Act reform may improve oversight and accountability, it cannot fix the root of the problem. Tax exceptionalism arises because the legal community treats tax as different from the rest of the law. It can only be avoided if the legal community—judges, practitioners, and academics—recognise tax as part of the general law. The best strategy for defeating tax exceptionalism may simply be to drag it out into the open. Academic scrutiny of myopic judicial attitudes should encourage the broader reconsideration of myopic attitudes in all parts of the legal community.

5. CONCLUSION

Daly (2017) points out that Hickman (2017) wrote that "[c]ourts and commentators have read the Court's Mayo Foundation decision broadly as repudiating tax exceptionalism from general administrative law requirements, doctrines, and norms" (Hickman, 2017, p. 82, cited in Daly, 2017, p.106), while "[l]egal scholars have identified numerous ways in which tax administrative practices arguably have deviated from general administrative law requirements, doctrines, and norms" (Hickman, 2017, p. 83, cited in Daly, 2017, p.106). This article has continued the identification of deviant tax administration in the New Zealand context.

In contrast to the US Supreme Court's express repudiation of tax exceptionalism in *Mayo Foundation*, the New Zealand Supreme Court has carved out an approach to privative clauses "good for tax law only" (*Mayo Foundation* at [55]).[108] This difference is supposedly justifiable because of a bespoke, comprehensive dispute resolution regime that, ultimately, might end in access to the courts to resolve the dispute between a taxpayer and the Commissioner. However, this justification is flawed in a practical sense, as the bespoke process is complex and inefficient, and has a chilling effect on tax cases going to court. Furthermore, there remain some situations that fall outside of that process for determination.[109]

[107] *Mayo Foundation for Medical Education and Research v United States* 562 US 44 (2011).
[108] *Mayo Foundation for Medical Education and Research v United States* 562 US 44 (2011).
[109] See, for example, *Charter Holdings Ltd v Commissioner of Inland Revenue* [2016] NZCA 449.

The modern state depends on tax and, as the somewhat hackneyed phrase says, everyone "paying their fair share". But a tax system depends on trust (Freedman, 2016) and its "integrity" depends on tax liabilities determined "fairly, impartially and according to law" (TAA 1994, s 6[2][a]). As the minority in *Tannadyce* recognised, there must be a role for judicial oversight. The space for judicial review might not be large, and the use of the court's inherent jurisdiction might not be routinely invoked, but it must exist. New Zealand's courts have been understandably reluctant to see their role minimised. The decision in *Tannadyce* is an unfortunate departure from that norm. New Zealand's unwritten constitution works with a system in fine and careful balance. Sections 6 and 6A of the TAA 1994 seek to establish a balance to protect the "integrity of the tax system" (TAA 1994, s. 6). Anything that impedes that balance must be closely watched.

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