# *Privative Clauses: Parliamentary Intent, Legislative Limits and Other Works of Fiction*

LUKE SIZER*

*Occasionally, Parliament may seek to prevent the courts from judicially reviewing a decision of the executive. A provision that seeks to do so is called a privative clause. The courts approach such clauses with aggression to the point of rendering Parliament's intent an utter fiction. That approach risks ignoring justifiable limits on the right to judicial review. This article suggests that the courts should begin with the natural meaning of the provision and then see whether or not that meaning is justified. If it is not, then, and only then should the courts attempt an aggressive approach — always bearing in mind that Parliament, if it speaks clear enough, can completely exclude judicial review. The article concludes by examining a hypothetical based on the* Spencer *case.*

## I INTRODUCTION

Mrs Margaret Spencer has a 44-year-old son named Paul.[1] He has Down's syndrome. For the last 10 years, Mrs Spencer has sought payment from the Ministry of Health for the care that she provides to Paul.[2] Unfortunately for Mrs Spencer, government policy over the last 20 years has excluded parents, spouses, and other resident family members from receiving publicly funded payment for the care that they provide.[3]

Mrs Spencer is one of many. In 2010, nine other caregivers commenced proceedings against the Ministry of Health. They argued this: that the Government pays professional carers and that family carers do the same job, and so to pay carers, but not family, is discrimination contrary to s 19 of the New Zealand Bill of Rights Act 1990 and s 20L of the Human Rights Act 1993.[4] The Courts found unanimously in their favour.[5] It

* BA/LLB(Hons). Written in loving memory of my grandfather Laurie Darrington, who passed away in the final week of the writing of my dissertation, which formed the basis of the article. My kind thanks to Professor Bruce Harris for his guidance, and to my editors for their diligent and unenviable work.

1 Kirsty Johnston "Mum takes Ministry of Health to court" (24 June 2013) Stuff.co.nz <www.stuff.co.nz>.

2 *Spencer v Attorney-General* [2013] NZHC 2580 at [2].

3 At [2]; and Ministry of Health *Regulatory Impact Statement: Government Response to the Family Carers Case* (15 March 2013) at [2].

4 *Atkinson v Ministry of Health* [2010] NZHRRT 1, (2010) 8 HRNZ 902.

5 *Ministry of Health v Atkinson* (2010) 9 HRNZ 47 (HC); and *Ministry of Health v Atkinson* [2012] NZCA 184 [2012] 3 NZLR 456.

appeared that carers like Mrs Spencer would finally be paid to care for their disabled children.

However, the Government decided that it would only pay family carers of adult children in high to very high needs situations.[6] That, of course, remained discriminatory.[7] The obvious but expensive solution was to create a policy that was not discriminatory. The less obvious and low-cost solution was to prevent carers from going to court to challenge any future family care policy.

The Government went with the latter solution and Parliament passed the necessary legislation in a single day.[8] It seemed that, after a hard fought victory, carers like Mrs Spencer suddenly had the stool kicked from beneath them.[9]

The *Spencer* case raises a key question of constitutional importance: can Parliament exclude judicial review of executive action? This article advances the view that Parliament can. It traces the historical exclusion of judicial review to show that the current judicial approach departs from a long-held recognition that Parliament has supreme power to determine the jurisdiction of the High Court. It seeks to show that Parliament may have good reasons for doing so. This article then seeks to demonstrate how a proportionality approach, which gives effect to reasonable attempts to exclude review, can more appropriately balance Parliament's reasons against the right of access to the courts. It concludes with a hypothetical based on *Spencer*.

## II PRIVATIVE CLAUSES IN NEW ZEALAND

### A Brief History of Privative Clauses

Cases like *Spencer* involve privative clauses. A privative clause is a provision, typically in the empowering legislation, which seeks to limit or exclude judicial review in one way or another.[10] These clauses may be stated in language such as "no review", "no certiorari", or provide that the authority's decision be "final", "conclusive" or that it not be "called into

6 Ministry of Health, above n 3, at [33].

7 Ministry of Health, above n 3, "Agency Disclosure Statement"; see also Hon Tony Ryall (16 May 2013) 690 NZPD 10116.

8 New Zealand Public Health and Disability Amendment Act 2013.

9 However, s 70G of the New Zealand Public Health and Disability Act 2000 preserved some proceedings in progress.

10 *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA) at 133; *Ramsay v Wellington District Court* [2006] NZAR 136 (CA) at [29]–[30]; *Zaoui v Attorney-General (No 2)* [2005] 1 NZLR 690 (CA) [*Zaoui (No 2)*] at [16]; *O'Regan v Lousich* [1995] 2 NZLR 620 (HC) at 626; *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153 at [66]; *Phan v Minister of Immigration* [2010] NZAR 607 (HC) at [30]–[33]; and *InterPharma (NZ) Ltd v Commissioner of Patents* [2012] NZAR 222 (HC) at [63]. Note that they are sometimes referred to as ouster or preclusive clauses.

question".[11] The courts care little for the precise words used. All are greeted with short shrift.[12]

The hostility of the courts' approach is best understood through the concept of "jurisdiction". Since time immemorial, the King was considered the "head of justice" from whom all jurisdiction ultimately derived.[13] However, tens of thousands of manorial and community courts, as well as magistrates, applied all manner of local custom and law.[14] Unsurprisingly, the King relied on his common law courts of the King's Bench at Westminster as the pragmatic means to enforce his jurisdiction and the application of his law.[15] The usual means was by the prerogative writ of quo warranto, writs of error for courts of record or writs of false judgment for courts not of record.[16] Over time, justices of the peace came to supplant the local courts as political and administrative agents of the King, though the Commons supported the expansion of their powers, presumably to slow the centralising power of the Westminster courts.[17] Not that an authority's patron mattered; the King's Bench kept a tight rein on the exercise of all inferior jurisdiction.[18]

However, there was a boom of litigation during the time of the Tudors, which made reliance on local authorities desirable.[19] The King's Bench was reluctant to relinquish control and it is probably for that reason that the use of the prerogative writs of certiorari, mandamus and prohibition expanded, rather than the Council of the King simply choosing to supervise local authorities itself.[20]

---

11 For no review, see *Zaoui (No 2)*, above n 10, under s 114H(4) of the Immigration Act 1987; *Bulk Gas,* above n 10, under s 96 of the Commerce Act 1975. For no certiorari, see *Love v Porirua City Council* [1984] 2 NZLR 308 (CA) under s 166 of the Town and Country Planning Act 1977; *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL) decided under s 4(4) of the Foreign Compensation Act 1950 (UK) 14 Geo VI c 12; *The Queen v Gillyard* (1848) 12 QB 527, 116 ER 965 (QB) under (UK) 7 & 8 Geo IV c 52, s 46; and *The King v Fowler* (1834) 1 Ad & E 836, 110 ER 1427 (KB) under (UK) 13 Geo III c 78, s 81. For not called into question, see *Bulk Gas,* above n 10. For final and conclusive clauses, see *Single v District Court*, HC Auckland CP No 22/93, 23 August 1993 under s 108 of the Local Elections and Polls Act 1976; and *The King v Plowright* (1685) 3 Mod 94, 87 ER 60 (KB) under (Eng) 16 Cha II c 3. For or a "no dispute clause" in s 109 of the Tax Administration Act 1994, see *Tannadyce*, above n 10,. Similarly, for a "no other remedy" clause under s 134(4) of the Accident Insurance Act 1998, see *Ramsay*, above n 10.

12 Michael B Taggart "The Contribution of Lord Cooke to Scope of Review Doctrine in Administrative Law: A Comparative Common Law Perspective" in Paul Rishworth (ed) *The struggle for simplicity in the law: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997) 189 [Taggart "Scope of Review"] at 199. See also *Anisminic*, above n 11, at 207 per Lord Wilberforce; *Tannadyce*, above n 10, at [4] per McGrath J; *O'Regan*, above n 10, at 626; *Ramsay*, above n 10, at [29]; and William Wade and Christopher Forsyth *Administrative Law* (10th ed, Oxford University Press, Oxford, 2009) [Wade and Forsyth *Administrative Law*] at 614.

13 John Baker *The Oxford History of the Laws of England: 1483-1558* (Oxford University Press, Oxford, 2003) vol 6 [Baker *Laws of England*] at 119.

14 At 117.

15 Harry Woolf and others *De Smith's Judicial Review* (7th ed, Thomson Reuters, 2013) [*De Smith's Judicial Review*] at 202.

16 Baker *Laws of England*, above n 13, at 119. Quo warranto meaning "by what warrant", which would compel the respondent to show by what legal authority they purport to act.

17 Theodore FT Plucknett *A Concise History of the Common Law* (5th ed, The Lawbook Exchange, New Jersey, 2001) [Plucknett *Common Law*] at 169.

18 At 169.

19 Baker *Laws of England*, above n 13, at 122–124; and Plucknett *Common Law*, above n 17, at 172.

20 Plucknett *Common Law*, above n 17, at 173; and *De Smith's Judicial Review*, above n 15, at 203.

At first, the King's Bench entertained collateral attacks on decisions made by justices of the peace or community jurists in an action for trespass, which could then be quashed by writ of certiorari.[21] Over time the action in trespass, as with the writ of quo warranto, had to confront whether or not the person sued possessed authority — or more accurately, had committed an action without lawful authority and so a trespass.[22] Through the 17th century the King's Bench developed the notion of jurisdiction, both to impeach the acts complained of under such actions and to preserve its preeminent status as the fount of the King's justice.[23] As Lord Coke said in *Marshalsea's Case*:[24]

> It was resolved, that the action well lies against the defendants: and a difference was taken when a Court has jurisdiction of the cause, and proceeds *inverso ordine* or erroneously, there the party who sues, or the officer or minister of the Court who executes the precept or process of the Court, no action lies against them. But when the Court has not jurisdiction of the cause, there the whole proceeding is *coram non judice* [before one who is not a judge], and actions will lie against them without any regard of the precept or process ...

In this way, the King's Bench reserved for itself the right to ring-fence the power of the inferior courts, jurists and justices of the peace. The King's Bench also carved an exception into inferior authorities' jurisdiction, which held that if the authority had made an error that was apparent on the face of the record then it would be amenable to collateral proceedings and the writ of certiorari.[25] It was often unclear whether or not the proceedings should be quashed for want of jurisdiction or an error on the face of the record, largely because the record had to contain all the facts that the authority considered gave it jurisdiction.[26]

When confronted by the earliest privative clauses, the King's Bench responded with the concept of jurisdiction. In *Smith's Case*, the Commissioners of Sewers had rated lands outside of their jurisdiction.[27]

---

21 *De Smith's Judicial Review*, above n 15, at 203. See also *Avery v Kirton* (1649) Style 175, 82 ER 624 (KB); *Draycot v Heaton* (1619) Cro Jac 542, 79 ER 465 (KB); and *Groenvelt v Burwell* (1705) 1 Comyns 76, 92 ER 967 (KB). This may well have been an attempt to usurp the jurisdiction of the bench of Common Pleas by reinvigorating the action in trespass which the King's Bench previously did not overly bother itself with: Plucknett *A Concise History of the Common Law*, above n 17, at 172; and SFC Milsom *Studies in the History of the Common Law* (Hambledon Press, London, 1985) at 89.

22 *De Smith's Judicial Review*, above n 15, at 203.

23 *Marshalsea's Case* (1613) 10 Co Rep 68b, 77 ER 1027 (KB); *Terry v Huntington* (1679) Hardres 480, 145 ER 557 (Exch); *Commins v Massam* (1642) March New Cases 196, 82 ER 473 (KB); and *Groenvelt v Burwell*, above n 21.

24 At [76 a]. Footnotes omitted.

25 *De Smith's Judicial Review*, above n 15, at 203; Plucknett *Common Law*, above n 17, at 172; and *Anisminic*, above n 11, at 195-196. That is, an error apparent on the face of an authority's written determination; see *O'Reilly v Mackman* [1983] 2 AC 237 (HL) at 277.

26 *De Smith's Judicial Review*, above n 15, at 203; and Wade and Forsyth *Administrative Law*, above n 12, at 612.

27 *Smith's Case* (1670) 1 Ventris 66, 86 ER 46 (KB).

Certiorari was issued twice against them, which they twice refused to obey.[28] The Commissioners sought to rely on a statute that provided the Commissioners "shall not be ... compellable to make any certificate or return".[29] Kelynge CJ found the Commissioners in contempt, reasoning that if the privative clause protected matters outside of their jurisdiction, it would create "uncontroulable jurisdictions below" and that could only be achieved by "special words".[30] The ring-fencing of jurisdictional error therefore allowed the court to define the bounds within which a privative clause could operate up until the end of the 18th century.[31]

By the early 19th century, the King's Bench relinquished its control over the inferior courts by drawing firmer distinctions between errors of jurisdiction and errors on the face of the record.[32] Simultaneously, the Industrial Revolution also made its impact on the law, spawning the need for countless statutory authorities to apply the legal machinery necessary for increased urbanisation and public works.[33] Similarly, authorities with limited exposure to review flourished in New Zealand.[34] The administrative state was on the rise. Had the courts continued to draw firmer distinctions between jurisdictional and non-jurisdictional errors, the proliferation of administrative authorities could well have altered the balance of public decision making.

But that was not to be the case. By the 20th century, there had developed two long-competing lines of reasoning and authority as to the nature of jurisdiction and hence the treatment of privative clauses.[35] One line held that a privative clause would protect even a wrong decision that was

28 At 46–47.

29 An Acte for the Commission of Sewers (Eng) 13 Eliz I c 9.

30 *Smith's Case,* above n 27, at 48.

31 See also *The King v Plowright,* above n 11, where the court refused to allow the privative clause to have any application to matters of law as apart from fact (non-jurisdictional facts necessarily being within the jurisdiction of the maker); *The King v The Justices of Peace of Derbyshire* (1758) 2 Keny 299, 96 ER 1189 (KB); and *Campbell v Brown* (1829) 3 Wils & S 441 (HL).

32 See *Brittain v Kinnaird* (1819) 1 Br & B 432, 129 ER 789 (Comm Pleas); *Cave v Mountain* (1840) 1 Manning & Granger 257, 133 ER 330 (Comm Pleas); *The Queen v Bolton* (1841) 1 QB 66, 113 ER 1054 (KB); *The Queen v The Inhabitants of Rotherham* (1842) 3 QB 776, 114 ER 705 (QB); *The Queen v The Justices of Buckinghamshire* (1843) 3 QB 800, 114 ER 714 (QB) as cited in *The King (Martin) v Mahony* [1910] 2 IR 695 (KB) and *The King v Nat Bell Liquors Ltd* [1922] 2 AC 128 (PC) and *De Smith's Judicial Review*, above n 15, at 203; and Plucknett *Common Law*, above n 17, at 210. See also *The Queen v The Justices of Cheshire* (1838) 8 Ad & E 398, 112 ER 889 (KB).

33 *Re Penny v South Eastern Railway Co* (1857) 7 El & Bl 660, 119 ER 1390 (QB); *The King v Fowler*, above n 11; *The Queen v the Board of Works for the District of St Olave's, Southwark* (1857) 8 El & Bl 529, 120 ER 198 (QB); *Bunbury v Fuller* (1853) 9 Exch 111, 156 ER 47 (Exch); *The Queen v The Commissioners for Special Purposes of the Income Tax* (1888) 21 QBD 313 (CA).

34 See for instance *New Zealand Waterside Workers' Federation Industrial Assoc of Workers v Frazer* [1924] NZLR 689 (SC) interpreting the Industrial Conciliation and Arbitration Act 1908, s 96; *Re Mangaohane Block* (1891) 9 NZLR 731 (CA) interpreting the Native Land Court Act 1880; *Re Roche* (1888) 7 NZLR 206 (CA); *Quill v Isitt* (1892) 10 NZLR 663 (SC) and *Regina v Newmarket Licensing Committee* (1887) 5 NZLR 421 (SC) all interpreting the Licensing Act 1881.

35 *New Zealand Engineering, Coachbuilding, Aircraft, Motor and Related Trades Industrial Union of Workers v Court of Arbitration* [1976] 2 NZLR 283 (CA) [*New Zealand Engineering*] at 285 per McCarthy P, 295 per Richmond J and 301 per Cooke J; and Robin Cooke "Administrative Law: The Vanishing Sphinx" [1975] NZLJ 529 at 530 cited in Taggart "Scope of Review", above n 12, at 192.

within the jurisdiction of the authority.[36] The other line did not directly disagree, but suggested that the concept of an error that vitiated the jurisdiction of the authority was broader — which left less room for the privative clause to apply.[37] These divergent lines of authority, ultimately underpinned by nagging questions about the proper constitutional roles of the courts and legislature, were resolved in *Anisminic Ltd v Foreign Compensation Commission*.[38]

## The *Anisminic* Decision

In the landmark decision of *Anisminic*, the majority of the House of Lords abolished the distinction between what were known as "jurisdictional" and "non-jurisdictional" errors.[39]

Errors that were described as "jurisdictional" wrongly defined the jurisdiction of the authority's power, whereas "non-jurisdictional" errors were within the authority's jurisdiction.[40] If the authority had not made a jurisdictional error, the latter non-jurisdictional errors were immune from review unless they were an error on the face of the record.[41] Accordingly, the "esoteric distinction" between jurisdictional and non-jurisdictional errors had a significant impact on precisely what a privative clause would protect.[42]

The issue before their Lordships in *Anisminic* was the meaning of a privative clause that provided: "[t]he determination by the commission of any application made to them under this Act shall not be called into question in any court of law."[43] The appellants argued, with some ingenuity, that:[44]

> ... 'determination' means a real determination and does not include an apparent or purported determination which in the eyes of the law has no existence because it is a nullity.

---

36 *The Queen v Bolton*, above n 32; *Armah v Ghana (No 1)* [1968] AC 192 (HL) per Lord Reid; *Smith v East Elloe Rural District Council* [1956] AC 736 (HL); *Rex v Northumberland Compensation Appeal Tribunal, ex parte Shaw* [1952] 1 KB 338 (CA) at 346; *Davies v Price* [1958] 1 WLR 434 (CA); *The King v Nat Bell Liquors Ltd*, above n 32, at 156; *The Queen v the Board of Works for the District of St Olave's, Southwark*, above n 33; *The Queen v Cotham* [1898] 1 QB 802 (QB) at 808; *Rex v Cheshire Justices, ex parte Heaver Brothers Ltd* (1912) 108 LT 374, 29 TLR 23 (KB); *The King v Minister of Health* [1939] 1 KB 232 (CA) at 245; *The Queen v The Commissioners for Special Purposes of the Income Tax*, above n 33, at 313; *Bunbury v Fuller*, above n 33, at 140; *Ex parte Bradlaugh* (1878) 3 QBD 509 (QB) at 512; and *The King v The Assessment Committee of the Metropolitan Borough of Shoreditch, ex parte Morgan* [1910] 2 KB 859 (CA) at 875.

37 *The King v Board of Education* [1909] 2 KB 1045 (KB) at 1061; *Board of Education v Rice* [1911] AC 179 (HL) at 182; *Estate and Trust Agencies (1927) Ltd v Singapore Improvement Trust* [1937] AC 898 (PC) at 917; *Regina v Fulham, Hammersmith and Kensington Rent Tribunal, ex parte Hierowski* [1953] 2 QB 147 (QB) at 150; and *Board of Trustees of the Maradana Mosque v Mahmud* [1967] 1 AC 13 (PC) at 25.

38 *Anisminic*, above n 11.

39 *Anisminic*, above n 11; *Peters v Davison* [1999] 2 NZLR 164 (CA) at 201–202.

40 *O'Reilly*, above n 25, at 278. This statement was affirmed in *Bulk Gas*, above n 10, at 134 and in *Peters v Davison*, above n 39, at 201.

41 See *O'Reilly*, above n 25, at 277.

42 *O'Reilly*, above n 25, at 278 per Lord Diplock. See also *New Zealand Engineering*, above n 35, at 285 per McCarthy P, 295 per Richmond J and 301 per Cooke J.

43 Foreign Compensation Act 1950 (UK) 14 Geo VI, s 4(4).

44 *Anisminic*, above n 11, at 170 per Lord Reid.

The Commission had imposed a condition upon the appellants in making their determination that the majority found they were not entitled to impose.[45] Their Lordships considered that error fatal. As the majority variously said, an authority's decision would be outside of its jurisdiction and thus a nullity when it "'ask[s] the wrong question' or 'appl[ies] the wrong test'",[46] or when it misconstrues its powers, makes a decision it has no power to make, takes account of irrelevant considerations, or departs from the rules of natural justice — the list goes on.[47] While solemnly declaring that a "preclusive clause can have no application except to a determination made within the limits ... fixed by Parliament", their Lordships' various formulations of vitiating error form an impassable gauntlet against which no decision — or privative clause — is likely to survive.[48]

The majority in *Anisminic* thus considerably increased the scope of review and opened the way for greater judicial intervention in the presence of privative clauses.[49] The full effect of *Anisminic* was described by Lord Diplock in *O'Reilly v Mackman* as:[50]

> virtually to abolish the distinction between errors within jurisdiction that rendered voidable a decision that remained valid until quashed, and errors that went to jurisdiction and rendered a decision void ab initio.

Moreover, the distinction between errors on the face of the record and errors simpliciter also evaporated.[51] Thus, all errors of law moved the decision outside of the jurisdiction of the authority and made it a nullity, which the privative clause was powerless to protect.[52]

## The New Zealand Developments

The scene was set for the innovations that came to New Zealand in *Bulk Gas Users Group v Attorney-General*.[53] *Bulk Gas* eviscerated privative clauses by two means. First, the use of a strong presumption against the exclusion of judicial review and, second, by simplifying jurisdictional and non-jurisdictional errors into errors of law.

---

45 At 213–214.

46 At 208–211 per Lord Wilberforce.

47 At 171–172 per Lord Reid. Compare *Armah v Ghana (No 1)*, above n 36, at 234; and at 195 per Lord Pearce.

48 At 211–212. See *De Smith's Judicial Review*, above n 15, at 213.

49 *New Zealand Engineering*, above n 35, at 285 per McCarthy P. For a full history of the development of the English law, see *Re Racal Communications Ltd* [1981] AC 374 (HL); *Pearlman v Keepers and Governors of Harrow School* [1979] 1 QB 56 (CA); *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union* [1981] AC 363 (PC); *O'Reilly*, above n 25; and *Regina v Lord President of the Privy Council, ex parte Page* [1993] AC 682 (HL).

50 *O'Reilly*, above n 25, at 283.

51 *O'Regan*, above n 10, at 626. See also Lord Pearce's dictum in *Anisminic*, above n 11, at 195.

52 *Regina v Lord President of the Privy Council, ex parte Page*, above n 49, at 701 per Lord Browne-Wilkinson; *Bulk Gas*, above n 10, at 139 per Sir Thaddeus McCarthy; Wade and Forsyth *Administrative Law*, above n 12, at 616.

53 *Bulk Gas*, above n 10.

Cooke J delivered the lead judgment. He held that a privative clause "does not apply if the decision results from an error on a question of law which the authority is not empowered to decide conclusively".[54] But, as he said, there is a presumption against such empowerment.[55] His Honour maintained that the presumption could be rebutted expressly by clear language, or impliedly where the authority had the functions and status of a court, where the error was not significant or where there existed a right of appeal.[56] On the first basis, neither a generally worded privative clause nor empowerment of an authority to determine questions of law would be sufficiently express.[57] On the second, those implications almost never rebut the presumption.[58] This renders the privative clause of no effect in all but the most exceptional case.[59]

Cooke J's masterstroke, however, was to collapse both jurisdictional and non-jurisdictional error into a single "error of law" category.[60] After *Anisminic*, there was thought to remain at least some residual area upon which an authority could err.[61] In *Bulk Gas*, however, his Honour did away with jurisdiction — that fickle concept, which once ring-fenced the power of inferior authorities — and so swept away the possibility of there being anything to which the privative clause might apply.[62] Cooke J said that applying the wrong test would render the decision "invalid" with the result that "[t]he privative clause would not apply, because there would be a lack of jurisdiction in the sense recognised in *Anisminic*".[63] The jurisdiction of the High Court to supervise error thus expanded far beyond the limits adhered to for the last four centuries. Despite expansions and retractions of the area upon which an authority could err, the King's Bench always maintained that

54 At 133.

55 At 133–136.

56 At 136.

57 See JA Smillie "The Foundation and Scope of Judicial Review: A Comment on *Bulk Gas Users Group v Attorney-General*" (1984) 5 Otago LR 552 at 557. Compare *Anisminic*, above n 11, at 208.

58 *Ramsay*, above n 10.

59 See the comments of Wade and Forsyth *Administrative Law*, above n 12, at 616, which apply with equal force; also see Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 906; see Robin Cooke "Administrative Law: The Vanishing Sphinx", above n 35, at 530.

60 At 133, 138.

61 *Regina v Secretary of State for the Environment, ex parte Ostler* [1977] QB 122 (CA); JA Smillie "Judicial Review of Administrative Action – A Pragmatic Approach" (1980) 4 Otago LR 417 [Smillie "Judicial Review"] at 417–418; *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union*, above n 49.

62 *Bulk Gas*, above n 10, at 133, 138; *Phan v Minister of Immigration*, above n 10, at [32]; *Zaoui (No 2)*, above n 10, at [101]; *Cooper v Attorney-General* [1996] 3 NZLR 480 (HC) at 496; and *Peters v Davison*, above n 39, at 209.

63 *Bulk Gas*, above n 10, at 135. See also his comments at 139. This approach has been affirmed in later cases, see for instance *Cooper*, above n 62, at 496 per Baragwanath J; and *Peters v Davison*, above n 39, at 209 where it was held that "an ultra vires act has no legal effect".

the area existed.[64] *Bulk Gas* abolished that. This raises serious questions of the proper constitutional role of the courts.[65]

## Why Did the Courts React So Violently against Privative Clauses?

One of the curious features of modern administrative law is that it is not entirely clear on what basis the courts have assumed their supervisory role.[66] From the 16th to the 19th centuries, there was little conscious appreciation of why executive action ought to be subject to judicial control — it simply was.[67] It was not until early in the 20th century that A V Dicey queried whether English administrative law might be emerging.[68] Dicey perceived an early incarnation of the ultra vires theory of judicial review when he said:[69]

> ... any power conferred upon a Government department by statute must be exercised in strict conformity with the terms of the statute, and that any action by such department which is not so exercised should be treated by a court of law as invalid.

The ultra vires theory was later endorsed by Professor William Wade as the "central principle" that justified judicial review.[70] Under this principle, the "role of the courts is to ensure that Parliament's will is enforced".[71] As is fairly obvious, it cannot explain how the judicial review of non-statutory exercises of power is legitimated.[72] Consequently, it is now a modified theory of ultra vires that prevails, which is justified on the implied recognition by the legislature of the broadening basis of judicial review.[73]

In *Anisminic*, Lord Wilberforce purported to base his approach on an ultra vires theory, saying that the courts "are carrying out the intention of the legislature, and it would be misdescription to state it in terms of a struggle between the courts and the executive".[74] Judicial lip service to the ultra vires

---

64 The cases relied on by the majority in *Anisminic*, above n 11, all affirm the possibility of non-jurisdictional error: *The King v Board of Education*, above n 37, at 1061; *Board of Education v Rice*, above n 37, at 182; *Estate and Trust Agencies (1927) Ltd v Singapore Improvement Trust*, above n 37, at 917; *Regina v Fulham, Hammersmith and Kensington Rent Tribunal, ex parte Hierowski*, above n 37, at 150; and *Board of Trustees of the Maradana Mosque v Mahmud*, above n 37, at 25.

65 As intimated in the judgment of Sir Thaddeus McCarthy in *Bulk Gas*, above n 10, at 139.

66 See *De Smith's Judicial Review*, above n 15, at 12.

67 That is, the judiciary simply applied private law concepts to "public" officials: *Entick v Carrington* (1765) 2 Wils KB 275, 95 ER 807 (KB); *Avery v Kirton*, above n 21; *Draycot v Heaton*, above n 21; *Groenvelt v Burwell*, above n 21; *Cave v Mountain*, above n 32; Joseph *Constitutional and Administrative Law*, above n 62, at 853; *De Smith's Judicial Review*, above n 15, at 12; *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC) at 388; and *Regina v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513 (HL) at 567.

68 AV Dicey "Development of Administrative Law in England" (1915) 31 LQR 148 at 149.

69 At 148 discussing *Board of Education v Rice*, above n 37; and *Local Government Board v Arlidge* [1915] AC 120 (HL).

70 Wade and Forsyth *Administrative Law*, above n 12, at 30. See also See Christopher Forsyth "Of Fig Leaves and Fairy Tales: The *Ultra Vires* Doctrine, the Sovereignty of Parliament and Judicial Review" (1996) 55 CLJ 122.

71 *De Smith's Judicial Review*, above n 15, at 12.

72 Dawn Oliver "Is the *Ultra Vires* Rule the Basis of Judicial Review?" [1987] PL 543.

73 Christopher Forsyth and Mark Elliott "The Legitimacy of Judicial Review" [2003] PL 286.

74 *Anisminic*, above n 11, at 208.

theory and parliamentary intent remains pervasive.[75] Yet cases like *Anisminic* and *Bulk Gas* render privative clauses a dead letter — how can Parliament have intended that?[76]

Following the dissatisfaction with the limitations of the ultra vires theory, a number of scholars began explaining judicial review as legitimated by the common law.[77] On the one end of the spectrum, the "weak" school reconciles the common law theory with parliamentary sovereignty on the basis that Parliament retains authority at any moment to discard limitations imposed by the courts.[78] However, on the other end the "strong" school offers the view that:[79]

> [i]n so far as the common law basis for judicial review is offered as a viable and genuine alternative to legislative intent, broadly understood, it entails at least a limited qualification of legislative power.

This strong theory explains how judges, sometimes rightly, mistrusted Parliament and reconceived their role in judicial review as a constitutional one to rein in Parliament.[80]

The transition to a constitutional role was underway in *Anisminic*. Their Lordships invoked language of a constitutional nature, seeing the rule of law as the determinative principle in reaching their decisions.[81] In *Re Racal Communications Ltd*, Lord Diplock held that questions of law were for the courts "in fulfilment of their constitutional role".[82] New Zealand case law too is replete with the subordination of clearly expressed privative clauses to some broad notion of the rule of law.[83] That approach has crystallised into a near "binding rule of application", which permanently

---

75 *Boddington v British Transport Police* [1999] 2 AC 143 at 164 (HL) per Lord Brown-Wilkinson; Wade and Forsyth *Administrative Law*, above n 12, at 30–31 and 33–34.; Joseph *Constitutional and Administrative Law*, above n 59, at 897; *Peters v Davison*, above n 39, at 205–210; and *O'Regan*, above n 10, at 626.

76 *De Smith's Judicial Review*, above n 15, at 12; William Wade and Forsyth *Administrative Law*, above n 12, at 616; and Dawn Oliver "Parliament and the Courts" in Alexander Horne, Gavin Drewry and Dawn Oliver *Parliament and the Law* (Hart Publishing, Oxford, 2013) at 316.

77 For the challenges see Dawn Oliver "Is the *Ultra Vires* Rule the Basis of Judicial Review?", above n 72; Paul Craig "Competing Models of Judicial Review" [1999] PL 428; TRS Allan "The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry?" [2002] 61 CLJ 87; and Paul Craig "Constitutional Foundations, the Rule of Law and Supremacy" [2003] PL 92.

78 This view is that of Paul Craig — see Craig "Constitutional Foundations, the Rule of Law and Supremacy", above n 77, at 107–110. See also Jeffrey Goldsworthy "Is Parliament Sovereign? Recent Challenges to the Doctrine of Parliamentary Sovereignty" (2005) 3 NZJPIL 7 [Goldsworthy *Recent Challenges*] at 26.

79 TRS Allan "The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry?", above n 77, at 89–90, 94.

80 See Robin Cooke "The Road Ahead for the Common Law" (2004) 53 ICLQ 273 at 274–275.

81 *Anisminic*, above n 11, at 170, 195 and 208.

82 *Re Racal Communications Ltd,* above n 49, at 382–383, cited with approval in *Bulk Gas,* above n 10, at 133.

83 See *Tannadyce*, above n 10, at [3]–[4], [29]; *Zaoui (No 2)*, above n 10, at [16]; *L v M* [1979] 2 NZLR 519 (CA) at 527; *Singh v Prasad* [2003] NZAR 385 (SC Fiji) at 402 per Dame Sian Elias J (dissenting); *Peters v Davison,* above n 39, at 181; and Joseph *Constitutional and Administrative Law*, above n 59, at 909–910.

injuncts Parliament from excluding judicial review.[84] Such a result is only possible through the tortured interpretation that reads privative clauses as only protecting decisions made without error, which wholly preserves the jurisdiction to review.[85] In this domain, Parliamentary intent is make-believe.[86]

This judicial fiction is necessary to conceal the illegitimacy of injuncting Parliament from excluding judicial review.[87] The courts, when faced with injustice, must take the legitimate tool of interpretation and use it as a weapon. Professor Goldsworthy quite accurately states it thus: "[t]he English-speaking peoples are reluctant revolutionaries. When they do mount a revolution, they are loath to acknowledge - even to themselves - what they are doing."[88] The interpretive approach here is, to all intents and purposes, judicial review of primary legislation.

It mandates a brief recitation of why this approach is illegitimate and why giving effect to privative clauses might be a good thing.

## III CAN PARLIAMENT REALLY EXCLUDE JUDICIAL REVIEW?

The subversion of parliamentary intent stems from common law constitutionalism, which asserts, erroneously, that there is some higher constitution that binds Parliament itself.[89] It permeates the case law on privative clauses, with judicial pronouncements that completely excluding review is only possible "in theory perhaps",[90] or "within limits that need not here be explored",[91] or that there is "even room for doubt whether it is self-evident that Parliament could constitutionally do so".[92] The most stringent criticism maintains that it is "untenable" and a "bold submission" that judicial review could be excluded at all.[93] The genesis of these claims is that

---

84 In the words of Courtney J in *InterPharma (NZ) Ltd v Commissioner of Patents*, above n 10, at [68]. See also: *Zaoui (No 2)*, above n 10, at [16]; *New Zealand Rail Ltd v Employment Court* [1995] 3 NZLR 179 (CA) at 182; *Works Civil Construction Ltd v Accident Rehabilitation and Compensation Insurance Corporation* [2001] 1 NZLR 721 (HC) at [38]; *James Aviation Ltd v Air Services Licensing Appeal Authority* [1979] 1 NZLR 481 (SC) at 489; and *L v M*, above n 83, at 527.

85 Wade and Forsyth *Administrative Law*, above n 12, at 616; and Robin Cooke "Administrative Law: The Vanishing Sphinx", above n 35, at 530.

86 Joseph *Constitutional and Administrative Law*, above n 59, at 906.

87 See the scepticism in the dissent of Lord Morris in *Anisminic*, above n 11, at 181–182.

88 Goldsworthy *Recent Challenges*, above n 78, at 7–8. Footnotes omitted.

89 Joseph *Constitutional and Administrative Law*, above n 59, at 551–552. See also Lars Puvogel "AV Dicey and the New Zealand Court of Appeal – Must Theory Finally Give in to Legal Realities?" (2003) 9 Canta LR 111; Sian Elias "Sovereignty in the 21st Century: Another spin on the merry-go-round" (2003) 14 PLR 148; E W Thomas "The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2000) 31 VUWLR 5; and PG McHugh "Tales of Constitutional Origin and Crown Sovereignty in New Zealand" (2002) 52 UTLJ 69.

90 *Anisminic*, above n 11, at 207.

91 *Bulk Gas*, above n 10, at 136.

92 *L v M*, above n 83, at 527. See also Robin Cooke "The Struggle for Simplicity in Administrative Law" in Michael Taggart (ed) *Judicial Review of Administrative Action in the 1980s* (Oxford University Press, Auckland, 1986) at 10; *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374 (CA) at 390; *Brader v Ministry of Transport* [1981] 1 NZLR 73 (CA) at 78; Joseph *Constitutional and Administrative Law*, above n 59, at 552; and *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA) at 398.

93 *Zaoui (No 2)*, above n 10, at [16].

parliamentary sovereignty is either a judicial creation and so never really supreme, or that even if it was, the constitution has or is undergoing change, or if it has not yet changed, that common law constitutionalism is the best way of protecting rights and freedoms.[94]

As to historical fact, the notion of parliamentary sovereignty as a judicial creation is without basis.[95] Since the 13th century, Parliament enjoyed supremacy as both a legislative and judicial body.[96] It alone acted as the final appellate court with authority to settle jurisdictional disputes between the King's Bench, Common Pleas and Exchequer.[97] It possessed unbridled legislative powers, even when it was known as the High Court of Parliament.[98] Take, for instance, the reign of Henry VIII:[99] the statutes of Henry VIII "pressed against the very limits of legislative capability: entailing the Crown with remainders, new treasons of appalling width, fictional liveries of seisin, even boiling in oil".[100] It was clear well over a century before Lord Coke's purportedly landmark decision in *Dr Bonham's Case*[101] that "Parliament was certainly no longer thought to be legally fettered by reason or conscience."[102]

This brutal reality was confirmed when Sir Thomas More challenged the validity of legislation that condemned him to death, on the basis of its inconsistency with canon law: the quality of his argument was determined by the gallows.[103] Further, while there were judicial pronouncements of legislative limits, those declarations, never-mind their accuracy, were almost invariably pyrrhic victories, with those judges impeached, imprisoned or executed.[104] If parliamentary sovereignty was created by the judiciary, it occurred in a wholly Darwinian fashion.

---

94 *Regina (Jackson) v Attorney-General* [2005] UKHL 56, [2006] 1 AC 262; and *Ahmed v Her Majesty's Treasury* [2010] UKSC 5, [2010] 2 AC 534 at [239] and [246]–[249] as well as authorities above n 89.

95 Goldsworthy *Recent Challenges*, above n 78, at 13–14.

96 Goldsworthy *Recent Challenges*, above n 78, at 13–14, citing his own work Jeffrey Goldsworthy *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press, Oxford, 1999) at ch 9. See also his response to his critics in Jeffrey Goldsworthy "Response to the Commentators" (2002) 27 Austl J Leg Phil 193.

97 JR Madicott *The Origins of the English Parliament, 927–1327* (Oxford University Press, Oxford, 2010) at ch 3.

98 Peter C Oliver "Sovereignty in the Twenty–First Century" (2003) 14 KCLJ 137 at 145; and Baker *Laws of England*, above n 13, at 36, 38, 76.

99 Baker *Laws of England*, above n 13, at 34.

100 Baker *Laws of England*, above n 13, at 36–37 (footnotes omitted); citing (Eng) 25 Hen VIII c 22; (Eng) 22 Hen VIII c 7; (Eng) 35 Hen VIII c 1; ID Thornley, "The Treason Legislation of Henry VIII (1531-1534)" (1917) 11 TRHS 87–123; GR Elton "The Law of Treason in the Early Reformation" (1968) 11 Historical Jnl at 211–236; (Eng) 27 Hen VIII c 10; (Eng) 22 Hen VIII c 9.

101 Dr Bonham's Case (1609) Co Rep 113b, 77 ER 646 (KB).

102 Baker *Laws of England*, above n 13, at 34.

103 Baker *Laws of England*, above n 13, at 36. One is glad that the academic stakes are no longer so high.

104 Baker *Laws of England*, above n 13, at 36–38; Plucknett *Common Law*, above n 17, at 50. On Lord Coke's judgment *Dr Bonham's Case*, above n 101, see Goldsworthy *The Sovereignty of Parliament, History and Philosophy*, above n 96, at 111; John Orth "Did Sir Edward Coke Mean What He Said?" (1999) 16 Const Comment 33; for further discussion of other precedents, see Geoffrey De Q Walker "The Unwritten Constitution" (2002) 27 Austl J Leg Phil 144 at 145; and Jeffrey Goldsworthy "Response to the Commentators", above n 96, at 195. Parliament, of course, later secured judges' tenure: Act of Settlement 1700 (Eng) 12 & 13 Will III c 2.

Second, the judiciary cannot escape that history and the associated political fact that parliamentary sovereignty — not common law constitutionalism — is the unifying principle of our constitution.[105] Changing this would only be possible through a correlative change in the rule of recognition in the sense described by HLA Hart.[106] That in turn requires at least the consent of all legal officials within the system, not just the judiciary.[107] It is clear, though, that Parliament and the executive are far from acquiescing to any constitutional change.[108] This is putting aside the possibility that popular sovereignty, which requires the consent of the populace at large, is correct. If that is the case, the judiciary would face the more substantial hurdle of public mandate.[109] It is therefore untenable to suggest that since parliamentary sovereignty is a judicial creation, it can be destroyed on that same basis. The courts have bound themselves to an agreement that can only be varied by the consent of all branches of government.

Last, if some normative, Dworkinian objection is raised that what matters is the best way of organising our constitution, the response is that common law constitutionalism is simply unworkable in the Westminster system. Parliamentary sovereignty is based "in comity between institutions and workability...[in that] it represents a way of avoiding a conflict between the courts and the executive which the courts could not win."[110] As much as difficult cases might encourage the development of the now-famous *Marbury v Madison* review, that development would lack democratic mandate, which would force the courts into a humiliating defeat.[111] Even with the necessary mandate, the judiciary lacks the means of enforcement against the executive: the executive would learn a powerful lesson.[112] It runs the other way too, as the "danger of excessive judicial interference with democratic decision-making might be worse than that of parliamentary tyranny, given the relative probabilities of their actually occurring".[113]

---

105 Constitution Act 1986, s 16 and Cabinet Office *Cabinet Manual 2008* at [1]; and *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590 (PC) at 595.

106 HLA Hart *The Concept of Law* (Clarendon Press, Oxford, 1961) at 97; and Goldsworthy *Recent Challenges*, above n 78, at 10–11, 14–15.

107 Goldsworthy *Recent Challenges*, above n 78, at 15; and Tom Mullen "Reflections on *Jackson v Attorney General*: questioning sovereignty" (2007) 27 LS 1 at 16–17.

108 Supreme Court Act 2003, s 3(2); Michael Cullen "Parliamentary sovereignty and the Courts" [2004] NZLJ 243; Paul Heath "The Harkness Henry Lecture: Hard Cases and Bad Law" 16 (2008) Wai L Rev 1 at 10–12; and Cabinet Office *Cabinet Manual 2008* 'Introduction'.

109 Geoffrey Walker "The Unwritten Constitution", above n 104, at 153; *Jackson*, above n 94, at [126]; and compare Goldsworthy "Response to the Commentators", above n 96, at 197.

110 Dawn Oliver "Parliament and the Courts", above n 76, at 321. For New Zealand, see: *McCully v Whangamata Marina Society Inc* [2007] 1 NZLR 185 (CA) at [48]; and *Attorney-General v Mair* [2009] NZCA 625 at [89].

111 *Marbury v Madison* 5 US 137 (1803).

112 Dawn Oliver "Parliament and the Courts", above n 76, at 319.

113 Goldsworthy *Recent Challenges*, above n 78, at 16. See also Dawn Oliver "Parliamentary Sovereignty in Comparative Perspective" (2 April 2013) UK Constitutional Law Blog <http://ukconstitutionallaw.org>. Contrast *Regina (Countryside Alliance) v Attorney-General* [2007] UKHL 52, [2008] 1 AC 719 at [158]; Philip Joseph "Parliament, the Courts, and the Collaborative Enterprise" (2004) 15 KCLJ 321 at 329; TRS Allan "The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry?", above n 77, at 92–94; and John Laws "Law and Democracy" [1995] PL 72 at 92.

Common law constitutionalism thus threatens to turn the constitution on its head. Our courts have routinely recognised Parliament's supremacy.[114] Their wisdom should not be hastily discarded. The reasons are not just legal but practical too. Parliament may, after all, have better reasons for enacting a privative clause than a court has for ignoring it. Those reasons are explored below.

## IV SHOULD PARLIAMENT EXCLUDE JUDICIAL REVIEW?

### Privative Clauses and Institutional Limits of the Courts

The courts find difficulty in telling plaintiffs like Mrs Spencer that, regardless of their hardship, Parliament may do as it pleases.[115] As Lord Cooke asked: "why should Parliament bother protecting wrong decisions?"[116] That question demands a normative response with greater integrity than the political fact of parliamentary sovereignty. The response is hedged on the basic premise that deference to an authority is worth protecting. The reasons why this is so are essentially institutional and pragmatic.

As to the first institutional reason, Parliament frequently empowers authorities in subjective or broad terms to enable the implementation of government policy as the authority sees fit.[117] It may do so because the subject matter is highly technical and inappropriate for legislation.[118] It may also do so for political expediency, preferring an independent tribunal to administer government policy.[119] Whatever the reason, the courts should be slow to interfere with policy-making, given their institutional limitations.[120] As Professor Joseph outlines:[121]

> The courts respect the constitutional and institutional differences between the branches and defer over decisions involving: the national interest, polycentric issues, macro-economic policy, the allocation of public resources, the mediation of sectional interests and moral preferences.

This is the importance of a privative clause — it signals that Parliament intends that the authority's view on a matter should prevail.[122] This

114 *Te Heuheu Tukino v Aotea District Maori Land Board*, above n 105, at 595; *Canterbury Regional Council v Independent Fisheries Ltd* [2012] NZCA 601, [2013] 2 NZLR 57 at [140]–[149]; and *O'Regan*, above n 10, at 627.

115 *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2, (2003) 211 CLR 476 at 486; *Anisminic*, above n 11, at 208; and *Bulk Gas*, above n 10, at 136.

116 Robin Cooke "Administrative Law: The Vanishing Sphinx", above n 35, at 530.

117 Smillie "Judicial Review", above n 61, at 436.

118 At 437.

119 At 436–437.

120 *Wellington City Council v Woolworths (New Zealand) Ltd (No 2)* [1996] 2 NZLR 537 (CA) at 546–553.

121 Joseph *Constitutional and Administrative Law*, above n 59, at 873. Footnotes omitted.

122 Taggart "Scope of Review", above n 12, at 199–200.

possibility was recognised by Lord Cooke himself when he considered that an authority could be empowered in subjective terms that are incapable of creating an ascertainable test.[123]

The second institutional reason takes issue with Lord Cooke's characterisation of a "wrong" decision. Matters of interpretation are invariably open textured: "there is no bright line separating law from policy".[124] It follows that expertise in that policy may better shape the law. In *National Corn Growers Assn v Canada (Import Tribunal)* Wilson J held:[125]

> Interpreting a statute in a way that promotes effective public policy and administration may depend more upon the understanding and insights of the front line agency than the limited knowledge, detachment, and modes of reasoning typically associated with courts of law. Administration and interpretation go hand in glove.

The North American courts thus frequently defer to expert authorities and in the case of Canada, especially where Parliament has signaled that expertise through a privative clause.[126] New Zealand courts have considered the same idea, but remain haunted by the spectre of the Kings Bench, which so jealously defended its jurisdiction so many years before.[127] It is a shame: deference forces the reviewing court to think consciously of the scope of review "in terms of the appropriate allocation of interpretive authority between agencies and the Courts".[128] A privative clause may not protect a "wrong" decision but rather, a decision that the court might disagree with because it lacks the specialised competence.[129]

A judge might also respond to an aggrieved plaintiff that there are very pragmatic reasons to defer to an authority. This is especially so with

---

123 *Bulk Gas*, above n 10, at 136. See also Lord Wilberforce in *Anisminic*, above n 11, at 210; and Lord Diplock in *Re Racal Communications Ltd*, above n 49, at 383–384.

124 Taggart "Scope of Review", above n 12, at 205, citing JM Evans "'A Pragmatic or Functional Analysis': A Work in Progress" (unpublished paper presented to a Federal Court Educational Seminar, 7 September 1996) at 2.

125 *National Corn Growers Assn v Canada (Import Tribunal)* [1990] 2 SCR 1324 at 1336–1337.

126 See *Chevron USA Inc v Natural Resources Defense Council Inc* 467 US 837 (1984) at 843–844; *Chamberlain v Surrey School District No 36* [2002] 4 SCR 710 at [4], [7]; *CUPE Local 963 v New Brunswick Liquor Corp* [1979] 2 SCR 227 at 236–237; *Pezim v British Columbia (Superintendent of Brokers)* [1994] 2 SCR 557 at 590; *Canada (Director of Investigation and Research) v Southam Inc* [1997] 1 SCR 748; *Pushpanathan v Canada (Minister of Employment and Immigration)* [1998] 1 SCR 982; *Ross v New Brunswick School District No 15* [1996] 1 SCR 825 at [24]; *Trinity Western University v College of Teachers (British Columbia)* [2001] 1 SCR 772 at [17]; and *Canada (Attorney General) v Mossop* [1993] 1 SCR 554 at 584–585.

127 *The International Pilots Independent Committee of the New Zealand Airline Pilots Assoc v The Domestic Pilots Independent Committee of the New Zealand Airline Pilots Assoc* (1986) 1 NZELC 95,170 (CA) at 172 per Cooke P; and *Mobil Oil New Zealand Ltd v Motor Spirits Licensing Appeal Authority* (1985) 5 NZAR 412 (CA) at 416. See also *Miller v Commissioner for Inland Revenue* (1997) 18 NZTC 13,001 at [13039]–[13040], citing *R v Hickman, ex parte Fox* (1945) 70 CLR 598; *Commissioner of Inland Revenue v Allen* (2003) 21 NZTC 18, 137 (HC) at [27]; *E R Squibb & Sons (NZ) Ltd v Commissioner of Inland Revenue (No 1)* [1991] 3 NZLR 635 (HC); and *Miller v Commissioner of Inland Revenue* (1993) 15 NZTC 10,187, (1993) 17 TRNZ 934 (HC).

128 Taggart "Scope of Review", above n 12, at 211.

129 Smillie "Judicial Review", above n 61, at 437–439.

"partial ouster" or limited privative clauses.[130] These are clauses that do not fully exclude the supervisory jurisdiction of the courts but nonetheless restrict it in some other way.[131] Limited privative clauses are often applied in recognition of the sound legislative policy behind their design.[132]

Time limits are a strong example. The basic policy is that time limits promote expediency and finality.[133] Voiding a decision after the time period has lapsed could cause considerable hardship to third parties.[134] The courts "recognise the constitutional propriety of a measure giving reasonable time to seek judicial review and do not seek to read down its prospective effect".[135]

A second example is where there exist alternative statutory remedies. Parliament will often enact a statutory regime that limits or excludes judicial review, while providing statutory remedies in areas such as immigration, taxation, employment and claims arising under the ACC scheme.[136] The courts are generally of the view that such remedies can be sufficient alternatives to judicial review.[137] As Lord Brown so colourfully put it: "The rule of law is weakened, not strengthened, if a disproportionate part of the courts' resources is devoted to finding a very occasional grain of wheat on a threshing floor full of chaff".[138] That reasoning applies with parity to full privative clauses.

It is clear that there are reasons, both institutional and pragmatic, why Parliament might exclude judicial review. It depends on the context. Any approach which blindly ignores that context risks ignoring justifiable limits on access to justice.

---

130 Wade and Forsyth *Administrative Law*, above n 12, at 620; and Joseph *Constitutional and Administrative Law*, above n 59, at 907–908.

131 See *East Elloe*, above n 36, at 750–751; *Cooper v Attorney-General*, above n 62, at 493–494; *Ostler*, above n 61, at 122-123 per Lord Denning; *Phan v Minister of Immigration*, above n 10, at [41]; see also *Ramsay*, above n 10, at [30] to the same effect; *Love v Porirua City Council*, above n 11, at 310 but see *Tannadyce*, above n 10, at [4] and [66].

132 *De Smith's Judicial Review*, above n 15, at 202.

133 *Single v District Court*, above n 11, at 9; *Singh v Prasad*, above n 83; *Anisminic*, above n 11, at 207; *East Elloe*, above n 36, at 750–751; *Cooper*, above n 62, at 493–494; and *Ostler*, above n 61, at 95.

134 Peter Leyland and Gordon Anthony *Textbook on Administrative Law* (7th ed, Oxford University Press, Oxford, 2012) at 246.

135 *Cooper*, above n 62, at 494, citing *East Elloe*, above n 36; and *Ostler*, above n 61. See also Joseph *Constitutional and Administrative Law*, above n 59, at 907–908; and *Plaintiff S157/2002*, above n 115.

136 See Employment Relations Act 2000, s 193; Tax Administration Act 1994, s 109; Immigration Act 2009, s 249 replacing Immigration Act 1987, s 10(3)(b); and Accident Compensation Act 2001, s 133(4) replacing Accident Insurance Act 1998, s 134(4).

137 *Bulk Gas*, above n 10, at 136; *Phan v Minister of Immigration*, above n 10, at [41]; *Ramsay*, above n 10, at [30]; *Parker v Silver Fern Farms Ltd* [2011] NZCA 564, [2012] 1 NZLR 256 at [41]–[54]; *New Zealand Waterside Workers' Federation Industrial Assoc of Workers v Frazer*, above n 34, at 702–703; *Miller v Commissioner of Inland Revenue* [1995] 3 NZLR 664 (CA) at 668; and *Tannadyce*, above n 10, at [6] per Elias CJ and McGrath J.

138 *Regina (Cart) v Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663 at [100].

## V A NEW APPROACH TO PRIVATIVE CLAUSES

### The Bill of Rights Act and *R v Hansen*

The central problem — quite apart from the faulty premise of the strong common law theory, or the institutional and pragmatic reasons for excluding review — is that the *Bulk Gas* presumption begins by saying that Parliament did not mean to exclude judicial review.[139] It is then a short fiction to conclude that judicial review is not excluded. The courts are playing a stacked deck that is inconsistent with the thrust of the Supreme Court's Bill of Rights Act jurisprudence.

The first point is that the right to judicial review is protected by s 27(2) of the New Zealand Bill of Rights Act 1990. In the 1985 White Paper, it was specifically envisaged that s 27(2) would "serve as a check to privative clauses in Acts purporting to restrict the power of judicial review".[140] Thus, if the right to judicial review falls within the Bill of Rights Act, then logically it should be subject to its regime.

Second, the Supreme Court has said that the natural meaning of a rights-inhibiting provision should be the starting point.[141] To start with the presumed meaning would:[142]

> give the limitation involved in Parliament's intended meaning no chance of being justified under s 5 ... If Parliament's intended meaning is not justified under s 5 then, and only then, should the Court look for a reasonably possible alternative meaning under s 6.

The Court of Appeal has recognised that "the credibility of effective judicial supervision is dependent on a public appreciation that the competing public interests are, in fact, being judicially balanced".[143] That comment was directed at an excessively subservient judicial approach. It must apply with the same force to an excessively aggressive one.

### Reasonable Limitations and Proportionality

Assuming that the impugned provision is apparently inconsistent with the right to judicial review, the courts should then determine whether or not the limitation is justified.[144] That inquiry is essentially whether a justified end is

---

139 Joseph *Constitutional and Administrative Law*, above n 59, at 905–906.

140 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 at [10.172], as supported by case law: *Zaoui (No 2)*, above n 10, at [16]; *Spencer*, above n 2, at [164]–[167]; *Young v Police* [2007] 2 NZLR 382 (HC) at [33]; and *Keys v Flight Centre (NZ) Ltd* (2005) 2 NZELR 376 (EmpC) at [23]–[24].

141 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [60] per Blanchard J, at [92] per Tipping J, at [192] per McGrath J; and Paul Rishworth "Human Rights" [2012] NZ L Rev 321 at 329–332.

142 *R v Hansen*, above n 141, at [91].

143 *Choudry v Attorney General* [1999] 2 NZLR 582 (CA) at 597.

144 New Zealand Bill of Rights Act 1990, s 5.

achieved by proportionate means.[145] The legislative aim in each case can be weighed against the consequences of excluding review.[146] This provides a flexible result that accommodates the needs of different contexts.[147] It is a critical step that enables the court to consider whether deference is appropriate.[148]

## Section 6 — How Far Should We Go?

Once the s 5 analysis is complete, the focus then turns to s 6 of the Bill of Rights Act. That requires the court to look to other reasonably available meanings.[149] In *Zaoui (No 2)* and *Spencer* it was held that s 6 of the Bill of Rights Act simply reinforced the *Bulk Gas* presumption.[150]

In certain cases, it is perfectly reasonable to assume that a privative clause does not exclude review for errors of law. In *Bulk Gas*, s 96 of the Commerce Act 1976 prohibited judicial review "except on the ground of lack of jurisdiction." Section 19(9) of the Inspector-General of Intelligence and Security Act 1996, at issue in *Zaoui v Attorney General (No 2)*, excluded judicial review in similar terms. The courts are justified in reading "jurisdiction" as extending to all errors of law.[151] In such instances, Parliament is taken to have drafted with *Bulk Gas* in mind.[152]

In other cases, it is not reasonable to apply the *Bulk Gas* presumption. That will be so with provisions like s 193 of the Employment Relations Act 2000. Section 193 provides an exception on the "lack of jurisdiction" but goes on to define excess of jurisdiction as outside "the narrow and original sense of the term" or "the classes of decisions ... which

---

145 *R v Hansen,* above n 141, at [123] per Tipping J.

146 Such aims include efficiency: see *Ramsay,* above n 10, at [31] under the ACC scheme; *Single v District Court,* above n 14, at 9; finality: *Singh v Prasad,* above n 83, which had a finality clause to preclude appeal against decisions of the Court of Disputed returns who assessed the validity of votes; *Anisminic,* above n 11, at 207 (Such an objective is usually only taken to apply to the right of appeal as against review, though *Anisminic* shows this is not always the case. See also Wade and Forsyth *Administrative Law,* above n 12, at 610–611.); national security: *Zaoui (No 2),* above n 10, at [4]; see also the both tragic and far-fetched case of *Webster v Doe* (1988) 486 US 592 at 595, where the plaintiff was fired on the basis that his sexuality posed a threat to national security; resources: *Spencer,* above n 2, at [151]; *Regina (Cart) v Upper Tribunal,* above n 138, at [41]–[47] per Baroness Hale, at [68] per Lord Philips, at [100] per Lord Brown, [104] per Lord Clarke; at [124]–[126] and [177] per Lord Dyson and providing for expert guidance: *Love v Porirua City Council,* above n 11, at 310 where the expert opinion of the Tribunal was considered an important objective in delaying judicial review; *Chamberlain v Surrey School District No 36,* above n 126, at [7]; *Pezim v British Columbia (Superintendent of Brokers),* above n 126; and *Canada (Director of Investigation and Research) v Southam Inc,* above n 126.

147 *R v Hansen,* above n 141, at [114]–[116], citing *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 at [19].

148 *R v Hansen,* above n 141, at [106] per Tipping J.

149 *R v Hansen,* above n 141, at [252] per McGrath J. See also *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's Case*] at 674 per Cooke P; *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at 542 per Thomas J; *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 272 per Cooke P; and *Police v Smith* [1994] 2 NZLR 306 (CA) at 313 per Cooke P.

150 *Zaoui (No 2),* above n 10, at [99], [105], [126], [130] and [181]; and *Spencer,* above n 2, at [164]–[167].

151 *Zaoui (No 2),* above n 10, at 696 and 719–720, cited in Joseph *Constitutional and Administrative Law,* above n 59, at 909–910 and 911–912.

152 At 912.

the court is authorised to make" or where the court acts in bad faith.[153] The Court of Appeal in *Parker v Silver Fern Farms Ltd* applied the privative clause in refusing to review an alleged breach of natural justice as it fell outside s 193.[154]

There may be other cases where the court attempts to circumvent the privative clause altogether. The Supreme Court in *Tannadyce* was content to read in statutory exceptions to preserve judicial review variously in "exceptional circumstances", "proper grounds" or "where the statutory procedures could never be invoked".[155] That seems quite some way from the s 6 instruction of "reasonably available".[156] It leaves a gaping hole in the policy the statute is directed at. How far judicial legislation is to be taken is something on which reasonable minds can differ.[157] It may well be that especially serious contexts require it.

### Section 4 — Paying the Political Cost

Section 4 of the Bill of Rights Act represents the end of the road. If Parliament is clear enough and if the *Bulk Gas* presumption cannot save the provision, then the courts must apply the privative clause and force Parliament to accept the political cost.[158]

## VI WHAT SHOULD HAPPEN TO MRS SPENCER?

### The *Spencer* Case

We return to Mrs Spencer. Immediately after the Human Rights Tribunal upheld the claims in the *Atkinson* case, the Ministry sought an order suspending the declaration to enable it to implement a new policy and appeal the decision.[159]

Following *Atkinson*, Mrs Spencer continued to seek payment. The Ministry refused to consider her application on the basis that the Tribunal's declaration had been suspended. Mrs Spencer sought judicial review of the suspension order and to be joined to the *Atkinson* proceedings for the purposes of the remedies hearing.[160]

The Ministry argued that the Tribunal's suspension order, which purported to deem the policy retrospectively lawful, was within its jurisdiction and not void.[161] As a consequence, it also argued that it could

153 Para (a)–(c).

154 *Parker v Silver Fern Farms Ltd,* above n 137, at [31]–[33]. See also *New Zealand Rail Ltd v Employment Court* [1995] 3 NZLR 179 (CA). See also *Keys v Flight Centre (NZ) Ltd*, above n 140.

155 *Tannadyce*, above n 10, at [35] per McGrath J and Elias CJ, [70]–[72] per Tipping, Blanchard and Gault JJ.

156 Though consistent with the interpretive approach taken in the United Kingdom: Human Rights Act 1998 (UK), s 3; and *Regina v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45 at 67–68 per Lord Slynn.

157 *Frucor Beverages Ltd v Rio Beverages Ltd* [2001] 2 NZLR 604 (CA) at [39].

158 Rishworth, above n 141, at 350.

159 *Spencer*, above n 2, at [5].

160 At [1] and [14].

161 At [33].

rely on the (un)lawful policy in declining to consider Mrs Spencer's application.[162] Moreover, the Ministry argued that only declaratory relief was available for Mrs Spencer if she was successful in her judicial review claim.[163] In support of that, it relied on the newly enacted Part 4A of the New Zealand Public Health and Disability Act 2000, which it said made the old policy lawful. Finally, the Ministry argued that ss 70E and 70G precluded Mrs Spencer from being joined to the *Atkinson* proceeding.[164]

Winkelmann J dismissed the Ministry's arguments and found for Mrs Spencer.[165] For our purposes, the central question was whether Mrs Spencer could be joined to the *Atkinson* proceedings under s 70G(1), which provided:

> The proceedings between the Ministry of Health and Peter Atkinson (on behalf of the estate of Susan Atkinson) and 8 other respondents (being the proceedings that were the subject of the judgment of the Court of Appeal reported in *Ministry of Health v Atkinson* [2012] 3 NZLR 456) may be continued or settled as if this Part (other than this section) had not been enacted.

The privative clause in s 70E that the Ministry relied on provided that:[166]

> ... no complaint based in whole or in part on a specified allegation may be made to the Human Rights Commission, and no proceedings based in whole or in part on a specified allegation may be commenced or continued in any court or tribunal.

"Specified allegation" was defined as any assertion to the effect that a person's right to freedom from discrimination had been breached either by that particular Part of the Act, a family care policy, or anything done or omitted to be done in compliance, or intended compliance, with that Part or in compliance, or intended compliance, with a family care policy.[167]

The issue turned on whether the policy, which was the subject of *Atkinson* and captured under s 70G(1) was a "family care policy" with the effect that Mrs Spencer could not join those proceedings by virtue of s 70E(1). "Family care policy" was defined as:[168]

> ... any statement in writing ... that permits, or has the effect of permitting, persons to be paid, in certain cases, for providing support services to their family members; and includes any practice, whether or not reduced to writing, that has the same effect.

---

162 At [126].
163 At [126].
164 At [127].
165 At [190]–[202].
166 New Zealand Public Health and Disability Act 2000, s 70E(2).
167 Section 70E(1)(a)–(c).
168 Section 70B(1)(a).

Winkelmann J held that the unlawful policy, which was the subject of *Atkinson,* was not within that definition on its plain and ordinary meaning, since it did not permit payment to family members but forbade it.[169] Her Honour was fortified in her conclusion by the fact that s 6 of the Bill of Rights Act would have brought her to the same result.[170] The upshot was that Mrs Spencer could join the *Atkinson* proceedings and sue for damages or the Minister would be able to make payment under s 10 of the Act if appropriate.[171]

In the end, it was sloppy drafting that won the day. But how would the courts respond to s 70E if it were better worded?

## A Hypothetical

Assume that Parliament amends the definition of "family care policy" under s 70B(1)(a) to:

> ... any statement [or purported statement] in writing...that permits, [excludes, or discriminates between] or has the effect of permitting, [excluding, or discriminating between] persons to be paid, in certain cases, for providing support services to their family members; and includes any practice [or purported practice], whether or not reduced to writing, that has the same effect.

And let us assume another carer with the same standing as Mrs Spencer — Mrs X — seeks payment. How would the courts respond?

Section 70E is undoubtedly a privative clause. There is no question of what Mrs X seeking to do being a "proceeding", or of the meaning of "court or tribunal". The case would therefore turn on "specified allegation", and by implication, the meaning of "family care policy".

The definition is exhaustive in its scope. However, the courts will not lightly assume that the definition enables the authority to conclusively determine the legality of its policy.[172] At the first step, the courts should test the contended meaning.[173] In *Spencer*, the policy excluded rather than included Mrs Spencer, so she fell outside the privative clause. Here, however, the definition has been broadened to include Mrs X by the addition of "excludes". It is therefore apparently inconsistent with the right to judicial review under s 27(2) of the Bill of Rights Act.

The next step is s 5. In *Spencer,* the Ministry submitted the purpose of the limiting measure was to manage litigation risk and the limited resources available.[174] Winkelmann J rejected that for want of evidence, a statutory provision that would permit the Human Rights Review Tribunal to

169 At [156].
170 At [164]–[167].
171 That section allows for the Crown to enter into "Crown funding agreements."
172 *Bulk Gas,* above n 10, at 133; and *Anisminic*, above n 11, at 195.
173 *R v Hansen,* above n 141, at [60] and [192].
174 At [167].

take into account the limits of funding and the Ministry's "leisurely response".[175]

However, as the Attorney-General argued, this was a high-level decision about resource allocation beyond the institutional competence of the courts.[176] Section 70E might then be justified as paying all carers without discrimination would unduly interfere with the competing interests of those in the health system.[177] It represents the sort of policy-making that requires at least deference, if not non-justiciability. On that basis, the court would apply the provision.

Suppose the limit was not justified. Would another interpretation be reasonably available under s 6? One may rely on *Anisminic* and *Bulk Gas* to say that a "statement" or "practice" does not include a nullity, that is, one made in error of law.[178] As the statement breaches s 19 of the Bill of Rights Act, it has such an error. It is thus void and not truly a statement. However, the draftsman has done his homework. Section 70B(1) extends the statement to "purported" statements. That specifically recalls the language of *Anisminic* to include nullities.[179] Mrs X seems out of luck.

The result is that a court is highly unlikely to avoid such clear language and will apply s 4 of the Bill of Rights Act. It is difficult to conceive otherwise. Parliament has made itself abundantly clear. A judge who disapplied such a provision would, for the first time, explicitly and unilaterally subvert our constitution.

## VII CONCLUSION

The courts approach privative clauses with a view of their jurisdiction unmatched in our constitutional history. That "aggressive" approach mandates effective review of primary legislation, concealed within the legitimacy of interpretation.[180] But that risks overlooking Parliament's reasons for enacting the clause. And those reasons can be very compelling: institutional competence, resource allocation, expertise, policy-implementation, temporal and fiscal constraints — these are all important considerations.

---

175 At [167].

176 Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the New Zealand Public Health and Disability Amendment Bill (No 2)* (13 May 2013) at [9].

177 See *Ministry of Transport v Noort*, above n 149, at 283; and *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [18].

178 *Bulk Gas*, above n 10, at 135. See also Sir Thaddeus McCarthy's comments at 139. This approach has been affirmed in later cases, see for instance *Cooper*, above n 62, at 496 per Baragwanath J; and *Peters v Davison*, above n 39, at 209: "an ultra vires act has no legal effect".

179 *Anisminic*, above n 11, at 170.

180 See *Fulcher v Parole Board* (1997) 15 CRNZ 222 (CA) at 245; Wade and Forsyth *Administrative Law*, above n 12, at 616; and Dawn Oliver "Parliament and the Courts", above n 76, at 316–317 and 321.

How this is to be achieved is simple: the courts should start with the natural meaning of the statute.[181] That gives Parliament a fighting chance. It must justify itself if it wants to exclude judicial review. If the limitation cannot be justified, then — and only then — should the courts attempt a robust approach, always bearing in mind that where Parliament is clear enough, review can be excluded. The result should be that sensible privative clauses are applied.

But what of the hard cases? How does one respond to those?
Often the hard cases are not as hard as one might think. In *Spencer*, the most deliberately worded privative clause had gaps. Even when Parliament explicitly intends to exclude judicial review, it may not have the competence to do so. And if it did? Were Parliament to enact a truly unthinkable clause in explicit terms, no amount of judicial relief will be sufficient. Fortunately, the good sense of Parliamentarians has so far kept that situation entirely theoretical.[182]

181 *R v Hansen*, above n 141, at [60] per Blanchard J, [192] per McGrath J; and Rishworth, above n 141, at 329–332.

182 *Cooper*, above n 62, at 484.