Judicial Supremacy: An Alternative Constitutional Theory

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I: INTRODUCTION

> It is a fundamental principle with English lawyers, that Parliament can do everything but make a woman a man, and a man a woman.[1]

This may have been so in 1885 when Dicey first published *The Law of the Constitution*,[2] but with modern scientific technology such gender transformation is now possible. An enactment of the New Zealand Parliament compelling citizens to undergo gender-changing operations would now be recognised as legally binding under orthodox (Diceyan) constitutional theory. It is the purpose of this article to reconsider Diceyan theory, and discuss an alternative theory which may be an improvement. Support for, and application of, this alternative theory in the case law will be demonstrated, and tentative solutions to some of the objections critics have raised will be suggested.

Two concepts central to this article require explanation. "Political morality" refers to the fundamental values and aspirations of the New Zealand polity. "Political reality" refers to political facts. Political reality generally derives from political morality. For example, New Zealand is a democratic nation (a political reality) because democracy is considered the most desirable form of government (the underlying political morality).

Dicey's theory of constitutional law rested on a belief that legal constitutional

1 Quoted in Dicey, *An Introduction to the Study of the Law of the Constitution*, ed Wade (10th ed 1959) 43, attributed to de Lolme.

2 Ibid.

doctrine need not comply with political reality. He was prepared to accept that, due to political considerations, certain laws could not be passed by Parliament, but maintained that if such laws were passed they would be legally valid.

This dichotomised conception of constitutional law has recently been subject to challenge.[3] The position taken in this article is that the constitution provides a legal conceptualisation of the State. It is a necessary element in the existence of the State, furnishing the legal order by which it is governed and controlled.

> [The] Constitution [is] ... that assemblage of laws, institutions and customs, derived from certain principles of reason ... that compose the general system, according to which the community hath agreed to be governed.[4]

The constitution governs the government, defining and controlling the relationship between the governed and the government. It inevitably involves political matters and ideally should conform to the political realities and moralities of the people.

Admittedly such ideals are often unattainable. There are limits to the ability of legal principle and institutions to accommodate practical and political matters.[5] Although these limits hinder the search for an ideal constitutional model,[6] they cannot justify abandoning the pursuit of the ideal altogether. This article contends that a constitution which reflects political realities and moralities must be preferable to one which ignores them. It argues that the proposed alternative constitutional theory more closely approximates the political moralities and realities of New Zealand than does Diceyan theory.

II: DICEYAN THEORY

1. The Absolute Power of Parliament

According to Dicey's theory of sovereignty, Parliament's power is absolute:[7]

> Parliament thus defined has, under the English Constitution, ... the right to make or unmake any law whatever; and, further ... no person or body is recognised as having a right to override or set aside the legislation of Parliament.

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3 See, for example, Allan, "The Limits of Parliamentary Sovereignty" [1985] PL 614, 615, 619-620.

4 Quoted in Wade & Bradley, *Constitutional and Administrative Law* (10th ed 1959) 4, attributed to Bolingbroke, *A Dissertation Upon Parties* (1733).

5 See Evans, "Some Reflections on the Development of the Doctrine of Negligence (or Murphy's Law Reaffirmed)" in *Legal Reasoning and Judicial Activism: Two Views* (Legal Research Foundation 1992) 5, 20-23.

6 See Perry, *Morality, Politics, and Law* (1988) 169.

7 Supra at note 1, at 39.

2. The Source of the Constitution in the Common Law

The Diceyan theory of parliamentary supremacy proposes a rule of the constitution. This is a secondary rule, being a rule as to who can make primary laws for the nation.[8] Logically, this rule must be prior to any laws made pursuant to it. In order to understand its nature, one must consider the source of this rule.

It is arguable that the secondary rule is part of a constitution which exists in symbiosis with the nature of the society it governs, and which is discovered rather than created. This theory is attractive in its simplicity, but ignores the practical problem that it is the courts which would discover such a constitution. The power is therefore effectively put in the hands of the courts to create the constitution. One is forced to conclude that constitutional law is a set of common law rules:[9]

> [T]he principle [of the absolute authority of Parliament] is one of constitutional law. It is part of the constitutional law of the United Kingdom and is to be ascribed to the common law .... The plenitude of [Parliament's] authority was measured by the doctrine of the common law.

Although the rules of the constitution are common law rules, they are not subject to the legislative power of Parliament. Instead, they must be considered *sui generis* rules - that is to say, they are rules that exist in a class of their own.[10] This is because parliamentary enactments are primary laws. It would be illogical if a primary law could alter the empowering secondary rule. To accept this as legally valid would be akin to allowing a regulation to alter the empowering statute.

The Constitution Act 1986 could be advanced to dispute the argument that constitutional law is a common law matter in New Zealand. To argue this cogently it must be posited that the Act is a secondary rule. However, this effectively suggests that the Act amounted to a legal revolution in New Zealand. This is not the way in which the Act has been interpreted:[11]

> [T]he Act is declaratory rather than ... the wellspring of the state's authority and the source of its legitimacy .... None of these expressions contains the fundamental language or rhetoric for establishing the foundations of a state. Secondly the Constitution Act 1986 lacks the character of superior law.

Like Diceyan theory, the alternative theory presented in this article proposes a constitution sourced in the common law. The secondary rule of the alternative

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8 See Hart, *The Concept of Law* (1961): the "ultimate rule of recognition"; Kelsen, *General Theory of Law and State*, trans Wedberg (1945): the "grundnorm".

9 Dixon, "The Common Law as an Ultimate Constitutional Foundation" (1957) 31 ALJ 240, 242-243; cf *Brader v Ministry of Transport* [1981] 1 NZLR 73, 78 (CA).

10 Winterton, "The British Grundnorm: Parliamentary Supremacy Re-examined" (1976) 92 LQR 591, 592.

11 Joseph, *Constitutional and Administrative Law in New Zealand* (1993) 99.

theory is a common law understanding, reflecting the political realities and moralities of the nation, of what laws Parliament is competent to pass. The judiciary applies this secondary rule and refuses to recognise parliamentary enactments outside legislative competence.

III: CRITICISM OF DICEY AND THE PROPOSED ALTERNATIVE THEORY

1. Incorporation of Political Reality and Morality

Dicey argued that, in legal theory, the legislature has unlimited legislative power. However, he did recognise that the power of Parliament is limited by political realities:

> [T]he external limit to the real power of a sovereign consists in the possibility or certainty that his subjects, or a large number of them, will disobey or resist his laws.[12]

> The internal limit ... arises from the nature of the sovereign power itself. Even a despot exercises his powers in accordance with his character, which is itself moulded by the circumstances under which he lives.[13]

When Diceyan theory is challenged, particularly when a theory is sought which will give greater protection to democracy, these limits are generally cited in order to dismiss any debate as irrelevant. The contention is that no Parliament would ever enact a law so extreme as to be arguably constitutionally invalid.[14]

Two criticisms can be made of this position. First, such enactments are not beyond the realms of possibility. Sir Robin Cooke has intimated that an Act such as the now repealed Economic Stabilisation Act 1948 might have been susceptible to judicial invalidation had it been worded in a "self-denying" manner.[15] Consequently, it is "advisable to have one's ideas in order against the day of unexpected test".[16]

Second, the statement that Parliament will never enact such legislation is an expression of a political reality. It is submitted that the constitution should be formulated to take account of this matter. Furthermore, the political morality

12 Supra at note 1, at 76-77.

13 Ibid, 80.

14 See, for example, Lee, "Comment II" [1985] PL 632.

15 Cooke, "Fundamentals" [1988] NZLJ 158, 163-164. By "self- denying", his Honour referred to the character of legislation which completely abrogates Parliament's power with regard to the subject matter of that legislation.

16 Ibid, 160.

which underlies the reality must be that matters such as human rights and democracy are fundamental values in New Zealand society.[17] As such, these values warrant constitutional protection from legislative abrogation. A constitutional theory must address these matters, rather than ignore them. The orthodox position that the debate is irrelevant simply evades the issue.[18]

2. Recognition of Political Morality

Under orthodox theory, the judicial role is an interpretive one.[19]

> [A] judge may exploit every ambiguity in the legislation and, presuming that Parliament could not intend anything so morally outrageous, strain to avoid the conclusion that the legislation is indeed intended to authorise ... [infringement of human rights]. But if the conclusion is unavoidable, the judge must proceed to it however reluctantly or resign office.[20]

Thus, in applying orthodox principles of statutory interpretation, judges are permitted to consider the potential abrogation of human rights and interpret the statute to avoid this. To justify the interpretation, political reality is invoked in the form of a presumption that Parliament would not have intended to infringe fundamental human rights unless it made such an intention clear.[21] This political reality must be supported at a fundamental level by a recognition that human rights comprise part of the political morality of the nation.

However, this recognition of the political morality by orthodox theory is limited: the morality can be overridden by Parliament so long as the intention to do so is made clear. Under orthodox theory, political morality merely imposes de facto manner and form restriction on Parliament.[22] The theory fails to recognise the fundamental importance of political morality to a society. Such morality underlies the society and should be incorporated into any definition of the way in which the society is to be governed.

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17 See infra at notes 19-21 and accompanying text.

18 Mann, "Britain's Bill of Rights" (1978) 94 LQR 512, 513.

19 See Perry, "Noninterpretive Review in Human Rights Cases: A functional justification" (1981) 56 NYULR 278; and infra at note 26, at 11.

20 Brookfield, "The Bill of Rights as Fundamental Law in the Light of the Canadian Experience" in A *Bill of Rights for New Zealand* (Legal Research Foundation 1985) 147, 150.

21 See generally Browne-Wilkinson, "The Infiltration of a Bill of Rights" [1992] PL 397, 404-408; Brookfield, supra at note 20; O'Neill, "The Australian Bill of Rights Bill 1985 and the Supremacy of Parliament" (1986) 60 ALJ 139, 144-146; Allan, "Legislative Supremacy and the Rule of Law" (1985) 44 CLJ 111; *Raymond v Honey* [1983] 1 AC 1 (HL); *R v Sparrow* [1990] 1 SCR 1075.

22 See generally *Vauxhall Estates Ltd v Liverpool Corporation* [1932] 1 KB 733; *Ellen Street Estates Limited v Minister of Health* [1934] 1 KB 590; the *Factortame* saga, infra at note 38; *R v Sparrow*, ibid; *R v Drybones* [1970] SCR 282.

3. Protection of Democratic and Other Rights

(a) Democratic rights

Dicey proposed that Parliament be recognised as having plenary power. Applied to New Zealand, the justification for this theory is that New Zealand is a democracy, and that Parliament is the nation's democratically elected representative. Parliament, therefore, should be recognised as having absolute power to rule over the nation.

New Zealand's democratic system is a political reality, and is based in the political morality of democracy. However, Diceyan theory does not remain true to these democratic principles, because the plenary power accorded to Parliament includes the power to destroy democracy. Dicey would dismiss such a use of Parliament's power as a political impossibility. If this is the case, it is submitted that it should also be a legal impossibility. Furthermore, the practical likelihood of such a situation cannot sustain the orthodox theory as preferable to another which does not contain a theoretical flaw of this nature.

The flaw in Diceyan theory is avoided by an alternative theory which recognises both the political reality that Parliament is the democratic representative of New Zealand, and the political morality of democracy. The alternative theory recognises Parliament as the bearer of enormous power to create primary laws, thus acknowledging its democratic nature. However, the alternative theory refuses to recognise Parliament as having the power to destroy democracy, thereby according protection to the political morality which underpins the theory.

> A parliamentary enactment whose effect would be the destruction of any recognisable form of democracy (for example, a measure purporting to deprive a substantial section of the population of the vote on the grounds of their hostility to Government policies) could not consistently be applied by the courts as law.[23]

Thus, under the alternative theory Parliament does not have the power to remove rights which are fundamental to a democracy, such as freedom of political debate, thought and conscience, freedom of association and assembly, and universal suffrage. The principles underlying this alternative theory have been recognised and applied by the courts of various democratic nations.[24]

23 Supra at note 3, at 620-621.

24 See text infra at Part V.

(b) Other rights

The argument presented above relies on the necessity of certain rights to a democracy. However, it is not so clear that other rights which are less obviously required in a democracy are constitutionally protected by the same argument. Examples might include the right to religion, the right to be free from cruel and inhumane punishment, and a general right to free speech. Yet it is difficult to imagine a democracy which would countenance the infringement of such rights by imposing, for example, a single State religion. It is arguable that this is because such rights comprise an inherent part of a true democracy, and are therefore protected in a democratic society. If this is the case, they will fall within the democratic rights argument presented above.[25]

This argument, while forceful, is open to criticism on the basis that one should not take a definitional approach to democracy.[26] By definition, democracy does not involve substantive ideals but merely a process. Thus democracy consists of machinery by which human rights can be protected, but does not incorporate the rights themselves. Therefore, constraints such as human rights cannot be validly incorporated into a proper definition of democracy. Ely has taken a similar position to this, arguing for "process-perfection".[27] He contends that democracy involves participation, but not substantive rights.[28] In a similar way, Dworkin has reasoned that democracy requires that all receive treatment as equals.[29] These arguments afford protection of substantive rights, so long as this protection is offered equally to all. However, as Ely recognises, they do not prevent infringement of such rights where a democratic process is employed.[30]

If these other rights (for example, the right to religion, or a general right to free speech) are to be fully protected, another justification may be required to achieve this under the alternative constitutional theory. Perry has pointed out that democracy is not the sole aspiration of our political tradition.[31] One can argue that a basic tenet of New Zealand society is that it is a *free* democracy. On this basis it can be contended, in addition to the democratic rights argument, that all other fundamental human rights should also be legally inviolable under the constitution. Such protection is required if the constitution is to be consistent with the free nature of New Zealand society.

25 See, for example, Tribe, *Constitutional Choices* (1985).

26 Perry, *The Constitution, The Courts, and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary* (1982).

27 Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980).

28 Ibid, 77.

29 Dworkin, *Taking Rights Seriously* (1978) 272-273.

30 Supra at note 27, at 181.

31 Supra at note 6, at 165-169.

IV: JUDICIAL SUPREMACY: THE MECHANICS OF THE ALTERNATIVE THEORY

1. Judicial Supremacy

The alternative theory requires that all legislation be subject to review in the courts to ensure its compliance with the constitution. It is a theory of judicial supremacy rather than the orthodox parliamentary supremacy. An analogy can be drawn with administrative law: under the alternative theory, the courts review legislation not on the merits of the policy being implemented, but to ensure that the legislature has not committed an error of law by purporting to infringe human rights.[32] Because human rights are inherently political matters, the theory is criticised as requiring a role of judges which is too political. But the prospect of judicial review in a political field is less worrying when it is remembered that statutory interpretation on the basis of human rights is equally political, yet tolerated within orthodox theory.[33]

The term "judicial supremacy" might appear contrary to the democratic morality which the alternative theory purports to protect. However, the alternative theory recognises that as the democratically elected representative of the nation, Parliament has immense power to make primary laws. The caveat is simply that there is a small cluster of rights which Parliament cannot abrogate. Furthermore, the courts are likely to accord Parliament a wide "margin of appreciation",[34] only exercising their supremacy where infringement is blatant. Pragmatically speaking, Parliament remains supreme. The alternative theory is based at a fundamental level on a concern to protect the political morality which has given rise to this political reality. It is submitted that this theory is preferable to orthodox Diceyan theory.

2. Statutory Interpretation

Even under traditional Diceyan theory, statutes are not always applied to the full extent of their literal meaning. Statutes are interpreted in accordance with presumptions as to Parliament's intentions, and these presumptions reduce the applicability of the statute to varying extents. In *Commissioner of Inland Revenue v West-Walker*,[35] a statute was read in such a way that solicitors were not required

32 See *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA).

33 Supra at note 21 and accompanying text; see also Richardson, "The Role of Judges as Policy Makers" (1985) 15 VUWLR 46, 52; Dworkin, "The Forum of Principle" (1981) 56 NYULR 469.

34 See *The Observer and the Guardian v United Kingdom* (1991) 14 EHRR 153, 178(ECHR) on the "margin of appreciation"; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 159 per Brennan J.

35 [1954] 1 NZLR 191 (CA).

to comply with its provisions. This exception was considered to be what Parliament must have intended, because to hold otherwise would destroy the confidentiality of the solicitor-client relationship. The result was that the statute was not applied in all of the situations within its literal meaning. Such a result can be reached using a number of interpretation methods.[36] On a conceptual level:[37]

> [T]he interpretation and application (or non application) of a statutory provision is essentially a matter of degree. An interpretation which limits the scope of statutory words in deference to an important principle of political morality necessarily excludes their application in those situations governed by the principle.

At the end of this continuum of applicability statutes are effectively not applied at all, as the *Factortame* saga illustrates.[38] The alternative theory occupies the end of the continuum.

V: CASE LAW SUPPORT FOR THE ALTERNATIVE THEORY

Similar principles to those on which the alternative theory is based have been discussed and applied in the case law of several common law jurisdictions, most notably Canada, Australia, and New Zealand. This writer does not uphold the decisions discussed below as irrefutable precedents which must be followed - if this were attempted, a plethora of cases could easily be amassed to counter them. The reason for discussing the cases is to show that the theoretical principles already advanced can be translated into practical application in the courts, and that several judges, at various times, have done so. The cases also provide useful examples of situations in which the alternative theory has been applied in the past. From these examples it is possible to gain a conception of the rights which may be important enough to warrant constitutional protection.

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36 See, for example, *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 (HL); *Re Bhinder and Canadian National Railway Co* [1985] 2 SCR 561; *R v Sparrow*, supra at note 21; *Re Winnipeg School Division No 1 and Craton* [1985] 2 SCR 150; *Raymond v Honey*, supra at note 21; the *Factortame* saga, infra at note 38; *R v Drybones*, supra at note 22.

37 Allan, supra at note 3, at 617.

38 The *Factortame* saga involved the House of Lords restraining the Secretary of State from obeying a statute of the English Parliament because the statute violated European Community Law: *Factortame Ltd v Secretary of State for Transport* [1990] 2 AC 85 (HL) and *R v Secretary of State for Transport, ex parte Factortame Ltd (No 2)* [1991] 1 AC 603 (ECJ & HL). See also Wade, "What has Happened to the Sovereignty of Parliament?" (1991) 107 LQR 1; Zuckerman,"Interlocutory Injunctions on the Merits" (1991) 107 LQR 196.

1. United Kingdom

The orthodox constitutional theory of parliamentary supremacy was established and developed in England. It is therefore not surprising to find little support for the alternative theory in English case law. Lord Morris of Borthy-Gest put the matter very clearly in *British Railways Board v Pickin*:[39]

> [W]hen an enactment is passed there is finality unless and until it is amended or repealed by Parliament. In the courts there may be argument as to the correct interpretation of the enactment: there must be none as to whether it should be on the Statute Book at all.

However, the alternative theory did have support in England in the 17th century, most notably in *Dr Bonham's Case*.[40] Coke CJ stated:[41]

> [I]t appears in our books, that in many cases, the common law will ... controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right or reason, or repugnant, or impossible to be performed, the court will controul it, and adjudge such an Act to be void.

Although the critics debate the meaning of this passage,[42] it is clear that Coke CJ was discussing some form of higher law, to be defined by the courts. It is in this regard that Sir Henry Hobart CJ approved of *Dr Bonham's Case* in *Day v Savadge*[43] and *Lord Sheffield v Ratcliffe*.[44] Coke CJ's view of the powers of the judiciary also had the support of Vaughan CJ[45] in the 17th century and Lord Holt CJ[46] in the early 18th century.

However, the *Bonham* decision has not been influential in English jurisprudence since then. In 1871 Willes J stated:[47]

> That dictum, however, stands as a warning, rather than an authority to be followed. We sit here as servants of the Queen and the legislature. Are we to act as regents over what is done by parliament with the consent of the Queen, lords, and commons? I deny that any such authority exists.

Certainly, Willes J did not intend this statement to encourage proponents of the alternative theory, but his reference to a warning provides an excellent insight into

39 [1974] AC 765, 789 (HL); see also *Hinds v R* [1977] AC 195, 212 (PC).

40 (1610) 8 Co Rep 107a; 77 ER 638.

41 Ibid, 118a; 652.

42 Corwin, "The "Higher Law" Background of American Constitutional Law" (1928) 42 Harv LR 149; cf Thorne, "Dr Bonham's Case" (1938) 54 LQR 543.

43 (1615) Hob 85; 80 ER 235.

44 (1615) Hob 334; 80 ER 475.

45 *Thomas v Sorrell* (1674) Vaughan 330; 124 ER 1098.

46 *City of London v Wood* (1701) 12 Mod 669; 88 ER 1592; see also per Keble J in *R v Love* (1651) 5 St Tr 43 and *Streater's Case* (1653) 5 St Tr 366.

47 *Lee v Bude and Torrington Junction Railway Co* (1871) LR 6 CP 576, 582.

one of the alternative theory's valuable attributes. A warning is cautionary advice against a certain course of action. Merely propounding the alternative theory may warn Parliament away from attempting to infringe human rights, thereby ensuring them at least a modicum of protection. If the alternative theory is accepted this protection will be even greater.

2. New Zealand

Sir Robin Cooke, President of the New Zealand Court of Appeal, has been the major proponent of the alternative theory in New Zealand. His Honour has suggested in several cases, albeit obiter dicta, that there are limits on the legislative competence of Parliament. These statements began tentatively in 1979 when he stated:[48]

> [I]t would be a strong and strange step for Parliament to attempt to confer on a body other than the Courts power to determine conclusively whether or not actions in the Courts are barred. There is even room for doubt whether it is self-evident that Parliament could constitutionally do so.

In 1982 this "doubt" became a "reservation",[49] and in 1983 his Honour stated that "it *is arguable* that some common law rights may go so deep that even Parliament cannot be accepted by the Courts to have destroyed them".[50] In 1984, in *Taylor v New Zealand Poultry Board,*[51] Cooke P collected previous dicta on the subject and stated his opinion rather more forcefully than before:[52]

> I do not think that literal compulsion, by torture for instance, would be within the lawful powers of Parliament. *Some common law rights presumably lie so deep that even Parliament could not override them.*

References to the fundamental rights doctrine did not end there. In 1986, Cooke P cited *Taylor,*[53] and stated:[54]

> A duty to answer questions by a police or other officer is usually only imposed by express enactment *and is never in this country enforceable by literal physical compulsion.*

In addition to this, in *R v Cann*[55] a statute was impugned on the grounds, *inter alia,* that it was *ad hominem* and therefore interfered with the judicial process in an

48 *L v M* [1979] 2 NZLR 519, 527 (CA).
49 *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374, 390 (CA).
50 *Fraser v State Services Commission* [1984] 1 NZLR 116, 121 (CA). Emphasis added.
51 [1984] 1 NZLR 394 (CA).
52 Ibid, 398. Emphasis added.
53 Ibid.
54 *Keenan v Attorney-General* [1986] 1 NZLR 241, 244 (CA). Emphasis added.
55 [1989] 1 NZLR 210 (CA).

unconstitutional manner. The argument failed on the evidence, but was not rejected outright. In 1992, in *Te Runanga o Wharekauri Rekohu Inc v Attorney-General,* Cooke P again referred to the alternative constitutional theory, stating for the Court of Appeal:[56]

> There is an established principle of non-interference by the Courts in Parliamentary proceedings. Its exact scope and qualifications are open to debate, as is its exact basis .... As held in *Eastgate*,[57] the proper time for challenging an Act of a representative legislature, if there are any relevant limitations, is after the enactment.

This again appears to provide confirmation that the Court would be prepared to consider a submission regarding the invalidity of an Act of Parliament.[58]

Cooke P has also discussed the alternative constitutional theory extra-judicially.[59] In 1988 he argued that the constitution is built on two unalterable pillars: a democratically elected legislature which enacts the laws, and an independent judiciary which interprets them. He then discussed the concept that a free democracy has implicit in it certain rights. Because these rights are fundamental to the constitution, they are inviolable. This inviolability is to be protected by the courts.

While the remarks of Cooke P are at best obiter, they provide important support for the alternative theory because they lay the groundwork for a later court to hold an Act invalid. These remarks act as a warning to Parliament not to interfere with fundamental human rights.

3. Canada

(a) Relevance of Canadian jurisprudence

Canada is a federal state. In such a governmental construct, certain spheres of activity are subject solely to the legislation of the federal Parliament, and others solely to the legislation of the relevant provincial Parliament. The courts are given the power to invalidate any statute passed by a legislature acting outside its allotted jurisdiction.[60] Thus, both levels of the Canadian legislature have inherently

56 [1993] 2 NZLR 301, 308.

57 *Eastgate v Rozzoli* (1990) 20 NSWLR 188.

58 In *Te Runanga o Wharekauri Rekohu Inc v Attorney-General*, supra at note 56, at 308 Cooke P referred to the status of the Treaty of Waitangi in New Zealand constitutional theory. An argument can be made that the Treaty forms part of the fabric of New Zealand society. As such it can be argued, along similar lines to the theory of fundamental human rights presented above, that the Treaty is enshrined in the common law rules of New Zealand's constitution, and cannot be breached by Parliament.

59 Cooke, supra at note 15.

60 For an example of the courts recognising this distinction, see *Union Colliery Company of British Columbia Ltd v Bryden* [1899] AC 580 (PC).

limited legislative competence. This contrasts with the orthodox position in New Zealand of unlimited parliamentary power.

On this basis it could be argued that the Canadian jurisprudence is irrelevant in New Zealand. However, in Canada in the 1950s a theory was developed which placed fundamental human rights issues beyond provincial competence. This was done partly on the basis of the British North America Act 1867, the constitutional document of the time. However, the reasoning behind this implied Bill of Rights also considered the importance of such rights to the polity. This development bolsters the argument presented for the legal inviolability of these rights in New Zealand.

In Canada, matters of fundamental human rights ultimately remained within the jurisdiction of the federal Parliament. It is arguable that if these rights were important enough to warrant protection from the provincial legislatures, they constituted part of the national political morality, and as such should have been protected from *all* legislative incursion. This proposal was tentatively made by some Canadian judges. However, regardless of whether this argument was ultimately accepted, the importance of human rights, demonstrated by placing them beyond the provincial legislatures, provides a sound basis on which to argue that similar rights in New Zealand are constitutionally inviolable.

(b) The Canadian development of the implied Bill of Rights

In *Re Alberta Statutes*,[61] the Supreme Court of Canada held invalid an Alberta Bill which would have compelled newspapers to publish, on demand, a government reply to any criticisms of the government appearing in the newspaper. The judges gave varying reasons for their decision, mainly relying on the Bill being ancillary to, and dependent on, other invalid legislation. That aside, the judgment of Sir Lyman Duff CJC is most relevant to this discussion. He recognised that the British North America Act 1867 prescribes a British-style representative democracy and "a parliament working under the influence of public opinion and public discussion".[62] He argued that this necessarily gives rise to a "right of free public discussion of public affairs [because the practice of this right] ... is the breath of life for parliamentary institutions".[63] Therefore "[a]ny attempt to abrogate this right ... or to suppress the traditional forms of the exercise of the right ... would, in our opinion, be incompetent to the legislatures of the provinces".[64] Logically, such an argument leads to the conclusion that the federal legislature cannot infringe this right either, although Duff CJC did not discuss this.

The argument of Duff CJC is based on the prescription of a democracy in the British North America Act 1867. New Zealand has no such statute,[65] but that does

61 [1938] SCR 100 (affirmed [1938] 4 DLR 433 (PC)).

62 Ibid, 133.

63 Ibid.

64 Ibid, 134.

65 See supra at note 11 and accompanying text.

not render a similar argument inapplicable here. New Zealand is unquestionably a democracy and it can therefore be contended that rights essential to a democracy should be legally protected under the New Zealand constitution, rather than leaving their protection merely to politics.

In *Saumur v Quebec*, [66] a challenge was made to a by-law which made it illegal to distribute pamphlets without prior authorisation. Five of the nine judges upheld the by-law because it dealt with the regulation of streets and was therefore within the power of the Quebec legislature. The judgments of the four members of the Court who held the by-law invalid are of more interest here because of their development of the implied Bill of Rights doctrine. The minority held that the by-law involved "original freedoms"[67] and was therefore solely a matter for the federal Parliament. These original freedoms consist of matters such as freedom of speech, religion, and inviolability of the person, and are accorded protection because they are the "necessary attributes and modes of self-expression of human beings and *the primary conditions of their community life within a legal order*".[68]

Although the case was decided on the basis of the federal-provincial dichotomy, the minority held the original freedoms to be inviolable at the provincial level not because this was implied in the British North America Act 1867 (as was the case in *Re Alberta Statutes)*[69] but rather on the basis of their fundamental importance. The case illustrates concern for non-democratic fundamental rights such as the right to religion, and provides a sound basis for arguing that these matters are indeed part of the political morality of a free nation. Consequently, the decision provides support for an argument that similar rights and freedoms should be legally inviolable in New Zealand.

In *Henry Birks & Sons (Montreal) Ltd v Montreal*,[70] a statute requiring stores to close on religious and feast days was invalidated by the Supreme Court. The majority simply relied on the fact that the statute made opening a store on the designated days a criminal offence, and was therefore solely within federal competence.[71] Rand, Kellock, and Locke JJ agreed, but added that the statute was also invalid because, for the reasons given in *Saumur*,[72] the provincial legislature of Montreal was not competent to prescribe religious obligations.[73]

The democratic rights argument was again employed in *Switzman v Elbling*.[74] In this case an Act made it an offence to propagate communism or bolshevism. The majority decided that this was beyond the power of the Quebec legislature because its "pith and substance"[75] was criminal.[76] Abbott, Rand, and Kellock JJ

66 [1953] 2 SCR 299.
67 Ibid, 329 per Rand J.
68 Ibid. Emphasis added.
69 Supra at note 61.
70 [1955] SCR 799.
71 Ibid, 800-811 (Kerwin CJ, Fauteux J, Cartwright, Estey, Abbott and Taschereau JJ concurring).
72 Supra at note 66.
73 Supra at note 70, at 813-814 per Rand J, 823 per Kellock J, Locke J concurring.
74 *Switzman v Elbling and Attorney-General of Quebec* [1957] SCR 285.
75 Ibid, 316.
76 Ibid. See also ibid, 324 per Fauteux J.

reached the same conclusion, but on the basis that the aim of the Act was "to protect ... [the individual] from his own thinking propensities".[77] It therefore infringed rights to free political belief and public discussion. "The right of free expression of opinion and of criticism, upon matters of public policy and public administration ... are essential to the working of a parliamentary democracy such as ours."[78] Infringement of such rights at the provincial level was declared not possible.

Abbott J elaborated on the point outlined above, stating that "[a]lthough it is not necessary ... for the purposes of the present appeal ... I am also of [the] opinion that as our constitutional Act now stands, [the federal] Parliament itself could not abrogate this right of discussion and debate".[79] Rand J appears to have agreed.[80] This supports a doctrine of constitutional inviolability for fundamental democratic rights at both legislative levels in Canada which can be applied in New Zealand under the alternative theory.

(c) The decline of the implied Bill of Rights

The implied Bill of Rights was thus developed in Canada in a series of minority judgments in the 1950s. By the 1970s its most forceful proponents, Rand, Kellock, and Abbott JJ, no longer occupied the Supreme Court bench and the theory lost its judicial support. The Supreme Court of Canada's decision in *McNeil v Nova Scotia (Board of Censors)*[81] demonstrates this. The case concerned part of an Act which provided for the creation of a Board to censor films and performances. In the provincial Court of Appeal, the provision was invalidated on the grounds that censorship is a criminal matter, and therefore outside the provincial jurisdiction. MacDonald JA also gave consideration to the history and development of the implied Bill of Rights, and decided that censorship was a matter solely within federal competence because it "amounts to a restraint on the fundamental freedoms [of assembly, association, speech, conscience and religion and the dissemination of news and opinion] that are the inherent right of every citizen of this country".[82]

On appeal to the Supreme Court of Canada,[83] this decision was reversed by a majority of five of the nine judges. The minority agreed with the Court below that censorship is a criminal matter, and thus beyond the provincial legislature. They therefore found no need to consider the rights-based argument. The majority decided that the pith and substance of the Act was regulation and prevention, not

77 Ibid, 305.
78 Ibid, 326 per Abbott J.
79 Ibid, 328.
80 Ibid, 308.
81 (1976) 78 DLR (3d) 46 (reversed [1978] 2 SCR 662).
82 Ibid, 56. See also the discussion of those freedoms, ibid, 58.
83 *Nova Scotia Board of Censors v McNeil* [1978] 2 SCR 662.

punishment, of crime. It was thus within the provincial jurisdiction. The majority then considered the rights-based argument and it was held that the argument did not justify the conclusion that the purpose of the Act was to infringe rights. MacDonald JA's decision was dismissed as mere speculation as to the intention of the legislature. While the majority decision did not reject outright the implied Bill of Rights theory, the cursory attention given to MacDonald JA's judgment was indicative of waning judicial support for the theory.

This sentiment was further and more clearly reinforced in *Attorney-General of Canada v Dupond.*[84] Here a city ordinance banning public assemblies in the Montreal Public Domain, and its empowering by-law, were impugned. In the Supreme Court the minority held the by-law invalid as it was a "mini-Criminal Code"[85] and therefore beyond provincial competence. In their view, this encroachment on the federal jurisdiction was further aggravated by the by-law and ordinance's intrusion upon rights to freedom of assembly and association. However, the majority held the by-law and ordinance to be preventive, not punitive, and therefore within the provincial jurisdiction. They held:[86]

> None of the freedoms referred to [religion, press and speech] is so enshrined in the Constitution as to be above the reach of competent legislation.
>
> None of those freedoms is a single matter coming within the exclusive federal or provincial competence. Each of them is an aggregate of several matters which, depending on the aspect, come within federal or provincial competence.

The implied Bill of Rights theory involved jurisprudential reasoning about democracy and the constitution which gave rise to conclusions on legislative competence. *Dupond* turns this reasoning on its head, making legislative competence fundamental, even where this is incongruous with Parliament's democratic and jurisprudential basis.

While *Dupond* is troubling in the context of the theory advanced in this article, the result need not be accepted in the absence of sound reasons. The majority's main reason for rejecting the implied Bill of Rights theory appears to have been that it is difficult to draw a distinction between fundamental rights or freedoms and other lesser rights and freedoms.[87] This is true; the political morality underpinning any constitution is a complex matter. However, many legal concepts are incapable of being clearly and absolutely expressed. The nature of the constitution is not certain, yet the courts still progress with it, refining as they go. It is suggested that the difficulty in dealing with constitutional rights is a poor reason to deny their existence. The aim of the alternative theory is to approximate these matters more closely than Diceyan theory, rather than ignoring them.

84 [1978] 2 SCR 770.
85 Ibid, 796.
86 Ibid, 774.
87 Ibid, 796.

4. Australia

(a) Interpretative limitations of the Australian Constitution

Like Canada, Australia has a federal system of government. The Constitution empowers the Commonwealth Parliament to legislate for "the peace, order, and good government of the Commonwealth"[88] and State legislatures are similarly empowered. Previously, the courts read this wording as conferring equivalent power to that enjoyed by the British Parliament.[89] However, recently some judges have declined to give to the words such a liberal interpretation. Street CJ has held that:[90]

> Laws inimical to, or which do not serve, the peace, welfare, and good government of our parliamentary democracy ... will be struck down by the courts as unconstitutional.

(b) Murphy J's doctrine of silent constitutional principles

In addition to such an interpretive limitation, in the High Court of Australia in the early 1980s, Murphy J developed a doctrine of fundamental human rights. This doctrine limited the Commonwealth Parliament's power. Murphy J held that "the Constitution [is] superimposed on a fabric in which "silent constitutional principles" operate"[91] and that these constitutional principles must therefore be recognised as constraints on Parliament's power, in addition to those constraints expressed in the Constitution.[92] In *McGraw-Hinds (Australia) Pty Ltd v Smith*, his Honour stated:[93]

> The Australian Constitution does not express all that is intended by it: much of the greatest importance is implied. Some implications arise from consideration of the text; others arise from the nature of the society which operates the constitution.

Following this doctrine, Murphy J stated that because Australia is a "union of free people" in which prohibitions on slavery and serfdom exist, these prohibitions

88 Sections 51-52 Commonwealth of Australia Constitution Act 1900.

89 *Ibralebbe v R* [1964] AC 900, 922-923 (PC).

90 *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, 384.

91 *Sillery v R* (1981) 35 ALR 227, 234 (HCA).

92 Although these theories constituted the basis of Murphy J's decisions on two occasions, (*McGraw-Hinds (Australia) Pty Ltd v Smith*, infra at note 93; *Miller v TCN Channel Nine Pty Ltd*, infra at note 95) the cases were not controversial as his colleagues invalidated the Acts in a more orthodox manner.

93 *McGraw-Hinds (Australia) Pty Ltd v Smith* (1979) 144 CLR 633, 668.

are implied into the Australian Constitution.[94] His Honour also accepted that the Constitution impliedly protects democratic rights:[95]

> The Constitution also contains implied guarantees of freedom of speech and other communications and freedom of movement .... Such freedoms are fundamental to a democratic society. They are necessary for the proper operation of the system of representative government at the federal level.

Although New Zealand lacks a constitutional document equivalent to Australia's, New Zealand does not lack a constitution. Fundamental human and democratic rights, such as those recognised by Murphy J, modify the New Zealand constitution. Rather than having a document superimposed on a fabric of silent constitutional principles, in New Zealand these principles *are* the constitution. In this light, Murphy J's concern to protect human rights supports the thesis of this article that such matters should be legally inviolable in New Zealand.

(c) Recent Australian developments

Recently the High Court of Australia accepted the argument that democratic rights limit the Commonwealth Parliament's legislative competence. In *Australian Capital Television Pty Ltd v Commonwealth*,[96] challenge was made to Part IIID of the Broadcasting Act 1942 (C'th), which required broadcasters to provide free time units for election broadcasts.[97] Five of the seven judges held this Part of the statute wholly invalid, as being in breach of the Constitution. All of the judges, apart from Dawson J, held that the Constitution prescribes a representative democracy and thereby also gives constitutional protection to the rights essential to such a system of government. Mason CJ stated:[98]

> Freedom of communication in the sense just discussed [in relation to public and political affairs] is so indispensable to the efficacy of the system of representative government for which the Constitution makes provision that it is necessarily implied in the making of that provision.

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94 Ibid, 670.

95 *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 581-582. For further examples of Murphy J's implied rights, see *R v Director-General of Social Welfare for Victoria, ex parte Henry* (1975) 133 CLR 369 (slavery, serfdom, and self-determination); *Buck v Bavone* (1976) 135 CLR 110 (travel); *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54 (travel, speech, and communication); *Seamen's Union of Australia v Utah Development Co* (1978) 144 CLR 120 (serfdom); *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237 (sexual discrimination); *Uebergang v Australian Wheat Board* (1980) 145 CLR 266 (speech, assembly, travel, and communication).

96 Supra at note 34.

97 Cf supra at note 61 and accompanying text.

98 Supra at note 34, at 140 per Mason CJ.

Dawson J dissented, deciding that the Australian Constitution: [99]

> [D]oes little to confer upon individuals by way of positive rights those basic freedoms which exist in a free and democratic society. They exist, not because they are provided for, but in the absence of any curtailment of them.

His Honour then dismissed the theory that rights can be accorded constitutional protection where they are found in the nature of society. He held that when Murphy J drew such implications from the nature of Australian society, he did so without recognising the true nature of the Australian Constitution, which limits relevant implications solely to those which can be drawn from within its text.[100] The other judges did not need to consider this question because they had decided that a right to free public speech could be implied from the Constitution itself.

On the same day the High Court decided *Nationwide News Pty Ltd v Wills.*[101] In this case s 299(1)(d)(ii) of the Industrial Relations Act 1988 (C'th), which made it illegal for anybody to bring the Industrial Relations Commission into disrepute, was challenged. The Court unanimously held the section invalid because it was not within or incidental to the power vested in Parliament by s 5l(xxxv) of the Constitution. In addition, some members of the Court discussed constitutional protection of fundamental human rights.

Brennan J took an interpretivist approach.[102] His Honour held that implications may be made from the text of the Constitution itself, but that limitations on legislative competence cannot be derived otherwise.[103] Any rights derived from outside the Constitution are merely recognised by the common law, and are liable to impairment or abrogation by legislation.[104] It bears repeating here that in the context of the alternative theory under discussion, the posited fundamental rights which are recognised in the common law are considered to form part of the constitution. Hence, despite their common law origins, they are *sui generis* constitutional rules, and as such are not susceptible to legislative abrogation. Brennan J then considered the correct interpretation of the Constitution, and concluded that a prescription of representative democracy in the Constitution necessarily involved a right to freedom of political discussion. He decided that s 299(1)(d)(ii) unreasonably infringed this right.[105]

In contrast, the approach of Deane and Toohey JJ favoured Murphy J's "background of silent constitutional principles". They state that the power granted in the Constitution:[106]

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99 Ibid, 182.
100 Ibid, 186.
101 (1992) 177 CLR 1.
102 See supra at note 19 and accompanying text.
103 Supra at note 101, at 43.
104 Ibid, 48.
105 Ibid, 48-53.
106 Ibid, 69.

> [M]ust also be read and construed in the context of other more particular implications which either are to be discerned in particular provisions of the Constitution or which flow from the fundamental rights and principles recognised by the common law at the time the Constitution was adopted.

They held that the doctrine of representative government underlies the Constitution[107] and is implemented by its provisions. Such a doctrine necessitates the right of public debate and this right was unreasonably infringed by the impugned provision.[108]

As in the Canadian context, New Zealand's lack of a written Constitution does not make the reasoning of the High Court of Australia inapplicable. Rights which are essential to the proper functioning of a democracy logically require protection in the constitution of a State which purports to base its constitutional theory on the political morality of democracy. That New Zealand's Constitution is an unwritten set of *sui generis* rules cannot exempt it from the same logical requirement. Such rights have to be considered as forming part of the Constitution of New Zealand, rather than being implications from or into that legal order.

5. Conclusions From the Cases

The cases above illustrate an acceptance in four common law jurisdictions, at varying times and to varying degrees, of constitutional restraints on legislative competence in order to protect democratic and human rights. They show support for the thesis that a constitutional theory based on democracy cannot logically allow abrogation of rights essential to democracy. The cases also provide support for the argument that certain other fundamental human rights are so important in a free and democratic society that they too warrant constitutional protection. The practical application of these arguments in the cases can be mustered in support of the alternative theory presented in this article. The theoretical debate should not be dismissed as mere academic musing.

VI: THE NECESSARY LIMITS OF THE ALTERNATIVE THEORY

The alternative theory does not maintain that the rights involved are absolute. Although the rights are described as fundamental, they are subject to reasonable limits. The theoretical position is that fundamental rights exist and are recognised, but infringements of them are tolerated in so far as those infringements are

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107 Ibid, 70.

108 McHugh J, while giving a separate judgment, appears essentially to agree with the sentiments of Deane and Toohey JJ, see ibid, 101; Gaudron J made only brief reference to the argument, ibid, 94; Mason CJ and Dawson J did not discuss it.

reasonable. In the words of Murphy J, "[t]he freedoms are not absolute, but nearly so".[109]

The general concept of rights as subject to reasonable limits is well established in the law: consider the interaction of freedom of speech with defamation, the right to life with self-defence, and the right to liberty with criminal punishment by imprisonment.[110] The tests for determining where the limit is reached are numerous.[111] For present purposes it is enough to recognise that the rights which the alternative theory protects are not to be treated as sacrosanct.

VII: OBJECTIONS TO THE ALTERNATIVE THEORY

Critics of the alternative theory raise several objections to it. Many of these criticisms involve fundamental issues in constitutional theory, and the brief consideration granted to them simply reflects the confines of this article rather than their importance.

1. The Potential for Constitutional Crisis

Consider, for the sake of argument, a statute which the Court of Appeal has held unconstitutional. An appeal could be taken to the Privy Council where the decision would in all likelihood be overturned and parliamentary supremacy reapplied, as in *Pickin.*[112] Alternatively, the government could accept the ruling and not enforce the statute. A further option would be to ignore the judiciary and enforce the statute regardless, using the police and the armed forces. Choosing this final option would force the nation into a state of constitutional crisis. In the worst scenario, the Governor-General might dismiss the Prime Minister, which would force an election. If the incumbent Prime Minister and his or her government were re-elected, there would be a popular mandate in support of the statute, and perhaps even in support of eliminating the judiciary. This disposal would be blatantly contrary to the principle of an independent judiciary and therefore would effectively constitute a legal revolution.[113]

Given that the situation described above would not occur under orthodox Diceyan theory, can one sensibly advocate the alternative theory as preferable? Several points can be made in response to this question. First, it must be remembered that this is a worst case scenario. If the government were instead to acquiesce in the Court's ruling of invalidity, then the relevant human rights would

109 *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, 88.

110 See Gewirth, "Are there any Absolute Rights?" in Waldron (ed), *Theories of Rights* (1984) 91, 91.

111 See *Nationwide News Pty Ltd v Wills*, supra at note 101, at 28 (reasonable connection),94 (proportionality). See also *Australian Capital Television Pty Ltd v Commomwealth*, supra at note 34, at 76 (public interest), 142-144.

112 *British Railways Board v Pickin*, supra at note 39.

113 See Cooke, supra at note 15. On dismissal of judges, consider s 23 of the Constitution Act 1986 — surely misbehaviour does not include simply deciding a case contrary to Parliament's interests.

have been protected. Most would consider this a valuable achievement. Admittedly this does not answer the criticism that the alternative theory has the potential to cause a breakdown of the State for the sake of upholding the rights of what may only be an individual or a minority. Should the individual's rights weigh so heavily against the State's right to subsist? This is a complicated debate. However, it is submitted that if the individual's rights do not carry such weight, then they cannot be termed *fundamental* human rights. It is the thesis of this article that some individual rights *must* be treated as fundamental. This issue is discussed in section four, below.

2. Democracy is Self-Regulating

Another common criticism of the alternative theory is that democracy itself will protect the rights involved. Ideally this would be true, but it is questionable in practice, as the most vulnerable rights are those of minorities who have no true power in Parliament. "[I]n times of excited political feeling, elected persons are not the proper custodians of the liberties of minorities."[114] If Parliament is truly omnipotent then in theory there is nothing to prevent it from destroying democracy.[115] The alternative theory addresses these concerns.

3. Uncertainty

The alternative theory is rejected by some as causing uncertainty in the law. However, the statutes which are subject to invalidation on the alternative theory are likely to be obvious (not to mention very infrequent), and the courts are likely to exercise a wide margin of appreciation in unclear cases.

4. The Weaknesses of the Concept of Human Rights

One major problem which the alternative theory faces is the question of the source of human rights.[116] Significant issues surround whether human rights exist,[117] and why they should be inviolable. These are complex questions which cannot be answered fully here. A tentative response is that human rights stem from citizenship. Rand J held that human rights are inherent in the status of citizenship

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114 HL Deb, Vol 318 Col 1717 (7 December 1936) per Aneurin Bevan.

115 See Walker, "Dicey's Dubious Dogma of Parliamentary Sovereignty: A Recent Fray with Freedom of Religion" (1985) 59 ALJ 276, 277.

116 See *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations*, supra at note 90, at 406.

117 See Hart, "Are there any Natural Rights?" in Waldron, supra at note 110, at 77-78.

in a free and democratic Canada.[118] Likewise, Murphy J discovered rights in the nature of Australian society.[119]

Some fundamental rights must be accepted in the political morality of the nation. However, the diversity of beliefs within a nation such as New Zealand make it very difficult to show that certain values are believed to be fundamental by all. The determination whether any particular value or aspiration is truly part of the political morality of the nation is problematic, and this is an objection to the alternative theory.[120]

Proper analysis of New Zealand's political morality is beyond the scope of this article, and it has therefore been assumed that human rights and democracy are values within that morality. Support for making this assumption can be drawn from the case law of the analogous democracies of Canada and Australia. It has been shown that in those countries the courts have been willing to recognise basic human rights as values which are fundamentally important to the nation. It is submitted that it is reasonable to treat New Zealand's political morality as one of a free democracy, which imports a recognition of the fundamental importance of human and democratic rights.

Alternatively, it can be argued that human rights have a more fundamental basis. That is, they are rights "to which human beings are entitled independently of their varying social relationships".[121] In sourcing these rights, one can make an appeal to natural law:[122]

> Every man is human by 'nature'; no human being is 'by nature' a slave of another human being. There must then be an essential human nature which determines this status and a law governing the relations of human beings as such, independently of the laws of all particular societies concerning their artificial relationships.

There are a variety of sources of human rights available, upon which it is reasonable to collectively rely for the purposes of the alternative theory.

5. Inconsistency with Legislation

The alternative theory appears to be inconsistent with at least two statutes. Section 4 of the New Zealand Bill of Rights Act 1990[123] impliedly recognises Parliament as the holder of unlimited legislative power, and s 15 of the Constitu-

118 See *Saumur v Quebec*, supra at note 66, at 329.

119 See the discussion of Murphy J's constitutional theories, supra at note 91 and accompanying text.

120 See, for example, Ross, "Diluting Dicey"(1989) 6 AULR 176, 197.

121 Macdonald, "Natural Rights" in Waldron, supra at note 110, at 21, 31.

122 Ibid, 23-24, 27: "the nature of man determines his 'natural' rights" (presumably Macdonald intends these statements to apply equally to women).

123 Section 4 prevents the courts holding any provision impliedly repealed or revoked, or declining to apply statutes, by reason only of their inconsistency with the Bill of Rights.

tion Act 1986 states that Parliament "continues to have full power to make laws". These Acts do not by themselves infringe rights, but they arguably allow Parliament to do so.

However, the Acts need not be considered an impediment to the alternative theory. This is because they are merely primary laws,[124] and therefore cannot logically alter the secondary rule of the constitution under which they were created. The statutes can be understood consistently with the alternative theory: s 15 of the Constitution Act supports the continuance of Parliament's power, which is limited by fundamental human rights. The Bill of Rights can be regarded as simply a group of rights which Parliament has chosen to recognise as important. Section 4 allows Parliament to retreat from that recognition should it so wish, but it does not confer on Parliament the power to override fundamental human rights.

6. The Potential of the Judiciary to Destroy Democracy

A problem with Diceyan theory is that Parliament's omnipotence, which is sourced in its role as democratic representative, enables it to destroy democracy. The alternative theory also has the capacity for destruction of democracy because the judiciary could ignore the political morality of New Zealand and refuse to recognise Parliament as competent to pass *any* laws.

There are two ways of responding to this flaw in the alternative theory. The first, which is jurisprudentially unsatisfactory, is to accept the flaw and recognise that the alternative theory does not accord full protection to the political morality of democracy. The debate then turns to which of the two theories better approximates the political morality. At this pragmatic level the political realities are equal because it is unlikely that either Parliament or the judiciary would abolish democracy. Thus, to differentiate the two theories one must consider what practical constitutional arrangements would best serve the political morality of New Zealand. On this basis one can argue that the alternative theory is preferable because it vests power to destroy democracy in the branch of government least able to enforce such a decision. Whereas Parliament is effectively under the control of the executive branch of government,[125] which has the force of the police and armed forces to compel an abolition of democracy, the courts lack any coercive power to enforce their judgments.[126] Thus, if practical realities must be resorted to, the alternative theory is arguably preferable.

However, the flaw in the alternative theory identified above can be avoided altogether if the political realities and moralities underpinning the alternative constitution are, as Sir Robin Cooke has termed them, *"unalterable* fundamental pillars" of that constitution.[127] This means that the political realities and morali-

124 Supra at note 10 and accompanying text.

125 See Crossman, "Introduction" to Bagehot, *The English Constitution* (1963) 40-57.

126 See Brennan, "The Purpose and Scope of Judicial Review" in Taggart (ed), *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (1986) 18, 18.

127 Supra at notes 15 and 59 and accompanying text.

ties of New Zealand society will always be held inviolable by the courts under the alternative constitution.

7. The Undemocratic Nature of the Judiciary

The final objection is that the alternative theory contradicts democratic morality by empowering unelected judges to decide on the validity of enactments of the democratically elected legislature. This again is a complex objection.[128] Although the judiciary is electorally unaccountable,[129] it must be remembered that Parliament is not necessarily a diligent protector of minority rights.[130] Furthermore, democracy is not the sole component of New Zealand's political morality - we also strive to achieve justice.[131] Under the alternative theory, the judiciary is not asserting the right to govern the nation, but merely the power to limit, in the interests of justice, the enormous power of the democratic government, and to ensure that it complies with its democratic basis.

VI: CONCLUSION

This article has attempted to show that the orthodox Diceyan theory of parliamentary supremacy can be improved upon by an alternative theory which provides a closer legal approximation of the political realities and moralities of New Zealand. This alternative theory is not as unsupported as it may first appear. It has received judicial support in some of the highest courts in the Commonwealth: the Supreme Court of Canada, the High Court of Australia, and the New Zealand Court of Appeal. There is opposition to the theory, but it is submitted that it is an improvement on Diceyan theory, and therefore warrants greater consideration.

It must be accepted that Diceyan theory does not fully serve the function for which it was intended. It fails to justify the legal position of power which Parliament enjoys. If the constitutional law of New Zealand is to retain legitimacy in the eyes of the citizens of New Zealand, it must accommodate those fundamental rights which are considered to be basic tenets of citizenship. Diceyan theory fails to do this and hence must be considered inferior to the proposed alternative theory.

In several areas it is becoming clear that New Zealand is developing an

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128 For the analogous debate over the legitimacy of judicial review in the United States, see generally Perry, supra at notes 6, 19, and 26; Tribe, supra at note 25; Bobbitt, *Constitutional Fate: Theory of the Constitution* (1982).

129 Cf Perry, supra at note 6, at 168: "Constitutional decisionmaking by the Court is responsive to the polity - not immediately, but it is responsive."

130 See supra at note 114 and accompanying text.

131 Cf Perry, supra at note 6, at 166.

indigenous law.[132] The United Kingdom is being drawn into the European Union, while New Zealand is developing its own jurisprudential identity. A chasm is growing between the two legal systems and it is appropriate for New Zealand theorists to consider possible advances on what are currently imperfect and inherited constitutional theories.

132 See, for example, in the field of negligence the change documented by Todd, "The Law of Negligence in New Zealand after *Murphy*" in *Negligence after Murphy v Brentwood DC* (Legal Research Foundation 1991) 1; *South Pacific Manufacturing Co Ltd v New Zealand Security & Investigating Ltd* [1992] 2 NZLR 282, especially 293 per Cooke P (CA).

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