The Demise of Parliamentary Supremacy? Canadian and American Influences upon the New Zealand Judiciary's Interpretations of the Bill of Rights Act of 1990

Michael Principe

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The Demise of Parliamentary Supremacy? Canadian and American Influences upon the New Zealand Judiciary's Interpretations of the Bill of Rights Act of 1990

DR. MICHAEL PRINCIPE*

I. INTRODUCTION

The Governor-General of New Zealand signed the New Zealand Bill of Rights Act¹ ("Act") in August 1990. The Governor-General's assent to the Act ended a five-year debate over whether New Zealand should continue to observe the principles of parliamentary supremacy or incorporate into its constitutional system an entrenched document placing certain individual rights beyond the reach of Parliament.² At the heart of this debate was the issue of judicial review: should an undemocratic institution, such as the judiciary, have the power to declare void the laws of a democratically-elected body, such as Parliament, if it finds that the laws are inconsistent with its interpretation of this proposed constitutional document?

When the New Zealand House of Representatives adopted the Labour Government's long-promised Bill of Rights, critics

* Ph.D. (Political Science), University of California, Santa Barbara, 1992; J.D., University of Washington, 1983; B.A., Whitman College, 1978; Fulbright Scholar, Victoria University, Wellington, New Zealand, 1990-91; Lecturer in Constitutional Law, University of Waikato Law School, Hamilton, New Zealand, 1990; Assistant Professor of Law, Gonzaga University School of Law, 1992-93; Visiting Scholar, Cambridge University, 1993-94.

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claimed that it lacked the bite of an entrenched constitutional document and that the supporters of parliamentary supremacy had prevailed.3 This response may have been premature. Although parliamentary supremacy remains the prevalent form of government in New Zealand, the Bill of Rights Act provides the New Zealand judiciary with an opportunity to move closer to the Canadian and American practices of judicial review.

This Article will begin with a brief review of the New Zealand, Canadian, and American constitutional histories. Next, this Article will examine the New Zealand judiciary’s initial interpretations of the Bill of Rights Act of 1990 in light of the New Zealand, Canadian, and American experiences. Finally, this Article will explore the potential effect of these interpretations on New Zealand’s governmental system.

II. THE CONSTITUTIONAL HISTORIES OF NEW ZEALAND, CANADA, AND THE UNITED STATES

A. The New Zealand Constitutional History

Parliamentary supremacy is the basis of New Zealand’s political system.4 Parliamentary supremacy means that the House of Representatives is absolutely sovereign.5 Thus, in this system, there are no formal checks on the powers of Parliament, except for triennial elections. Since the National Government abolished the second chamber of Parliament in 1950, some have argued that this form of government can be called an “elected dictatorship,” because the majority party in Parliament governs without any constitutional checks.6

In examining the origins of parliamentary supremacy, it is helpful to compare the focus of powers of New Zealand’s system of government with that of the United States. As maintained by the


eminent British scholar and Fellow of The Queen's College at Oxford, Geoffrey Marshall:

In Britain and the United States the professed aims of government are in principle similar, whilst the organization of the three branches of government designed to further them are characteristically different. As it happens, much of the world's constitution-making has reflected the competing claims of the English concentration of powers and the American separation of powers—one featuring a theory of legislative sovereignty with its ideological roots in Hobbes; the other a doctrine of equal and semi-autonomous authorities, in part derived from the Lockian philosophy of restricted governmental power and natural law.7

Another eminent British scholar and Fellow of Pembroke College at Oxford, R.F.V. Heuston, argued that the doctrine of parliamentary supremacy originated in the political philosophy of Thomas Hobbes and was developed by William Blackstone and Albert Venn Dicey.8

In describing the unlimited legislative authority of Parliament, Blackstone wrote:

It can change and create afresh even the constitution of the kingdom and of parliaments themselves; as was done by the act of union, and the several statutes for triennial and septennial elections. It can, in short, do everything that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of Parliament. True it is, that what the Parliament doth, no authority upon earth can undo.9

Thus, Blackstone maintained that Parliament has the power to do whatever it pleases. The writings of A.V. Dicey continued to reflect this notion.10

Dicey aimed to explain the nature of parliamentary supremacy, show that its existence is legal fact, discount any alleged legal limitations upon the sovereignty of Parliament, and show that Parliament is an absolutely sovereign legislature.11 Dicey's definition of Parliament included the King, the House of

10. See generally id.
11. Id. at 39.
Lords, and the House of Commons, which, when acting together, can be described as the King in Parliament. Under the principle of parliamentary supremacy, Parliament has "the right to make or unmake any law whatever; and further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament." Yet, according to Dicey, neither the King, the Houses of Commons or Lords, nor the Law Courts can claim independent legislative power. First, the King must assent to bills proposed by the Houses. Second, the Houses of Parliament, although possessing complete control over their own proceedings, must accept that a declaration or a resolution by either House is not in any sense a law. Third, the parliamentary electors have the sole legal right to elect the members of Parliament. Finally, although judges do make a large portion of the English law, English judges cannot claim any power to repeal statutes. On the other hand, acts of Parliament can and often do override the laws created by judges, making judicial legislation subject to the supervision of Parliament and, therefore, subordinate.

In addition to discounting these various claims of independent power by the individual branches, Dicey maintained that three of the most prominent alleged limitations upon the legislative sovereignty of Parliament are invalid. First, Dicey discounted the invalidity of an act of Parliament which opposes the principles of morality or the doctrines of international law, on the grounds that "[t]here is no legal basis for the theory that judges, as exponents of morality, may overrule Acts of Parliament." Judges will presume Parliament did not intend to violate rules of morality or principles of international law and, therefore, will attempt to interpret statutes as being consistent with those doctrines.

Dicey also discounted the idea that Parliament does not have the right to touch the Prerogative. Dicey argued that, although

12. Id.
13. Id. at 40 (defining law as being "any rule which will be enforced by the courts").
14. Id. at 50-54.
15. Id. at 54-59.
16. Id. at 59-60.
17. Id. at 60-61.
18. Id. at 62.
19. Id.
20. Prerogative is the right of the Crown to govern.
certain powers are left by law in the hands of the Crown and are exercised by the executive government, Parliament could regulate or abolish these powers or, for that matter, any other branch of royal authority at any time.\textsuperscript{21}

Finally, Dicey contested the alleged limitation on Parliament's legislative authority to limit the enactments of its successors, arguing that any attempt by Parliament to bind its successors limits the discretion of the future Parliament and disables it from all available options in legislating for the public welfare. Because the cornerstone of the law of the Constitution is the doctrine of the legislative supremacy of Parliament and because no power under the English Constitution rivals parliamentary supremacy, none of these alleged limitations can be considered legitimate, either by statute or by common law.\textsuperscript{22}

Yet, conversely, Dicey did maintain that there are two actual limitations on Parliament's sovereignty, one being external while the other is internal. The external limit "consists in the possibility or certainty that his subjects, or a large number of them, will disobey or resist his laws."\textsuperscript{23} Thus, it is possible that a law or set of laws could be so unpopular that a large majority of the people would decide to ignore them, challenging the sovereign's authority. Dicey argued that this is true in even the most despotic monarchies.\textsuperscript{24} As for the internal limitation on Parliament's sovereignty, Dicey argued: "Even a despot exercises his powers in accordance with his character, which is itself molded by the circumstances under which he lives, including under that head the moral feelings of the time and the society to which he belongs."\textsuperscript{25} Therefore, the surrounding social condition effectively restricts the legislature, forcing Parliament to remain within those guidelines or face the threat of being ignored.\textsuperscript{26}

This same notion of limitation upon sovereign power is found in New Zealand. Although it appears that the power of Parliament

\begin{itemize}
\item \textsuperscript{21} Dicey, supra note 9, at 63-64.
\item \textsuperscript{22} Id. at 64-70.
\item \textsuperscript{23} Id. at 76-77.
\item \textsuperscript{24} Id. at 77.
\item \textsuperscript{25} Id. at 80.
\item \textsuperscript{26} Id. at 82-85. Interestingly, Dicey maintained that, in the context of the representative government, the divergence between the external and internal limits to the exercise of sovereign power diminishes. The electors choose who occupies the House of Commons, thereby assuring that their wishes will be observed by the government. Id.
\end{itemize}
is absolute, in reality, this omnipotence is somewhat theoretical. A "vast array of social forces" constantly pressures Parliament when it exercises its lawmaking function. These apparent forces controlling parliamentary powers include: (1) the Cabinet's collective and Ministers' individual responsibility to the House; (2) constitutional conventions—those unwritten rules sustained by recognition and acceptance; (3) the role of the courts in protecting certain fundamental common law rights; (4) the fact that the Governor-General must give Royal Assent to any bill of Parliament; (5) the opposition party, who must track and publicize any improper actions of the Executive; and (6) the ballot, which ultimately decides who shall govern. Even with these controls, however, critics have argued that "many members of the public are concerned at the lack of constitutional safeguards in New Zealand—safeguards that other countries take for granted."

In New Zealand, no written constitutional document exists. Instead, the New Zealand Constitution is a combination of various statutes, conventions, and principles of the rule of law. In defining the principles of the rule of law, Dicey stated:

[I]t means in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. ... It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts ... [and], lastly, ... that, in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land.

Thus, in theory, these principles govern the government's actions throughout the legislative process.

Of the various constitutional documents included within the New Zealand Constitution, the Constitution Act of 1986 is the

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28. O'Connor, supra note 6, at 4-6.
30. Mulholland, supra note 27, at 17.
31. Dicey, supra note 9, at 202-03.
most significant because it provides the central framework for governmental action. The Magna Carta of 1215, the Petition of Right of 1628, and the Bill of Rights of 1689 are also significant aspects of the New Zealand Constitution.

The Treaty of Waitangi is of increasing constitutional importance. This controversial agreement between many of the Maori Chiefs and Captain William Hobson, as representative of the Crown, arguably gave Great Britain sovereignty over New Zealand. Today, many of New Zealand's legal scholars see the Treaty as an important constitutional document. For instance, Sir Robin Cooke, President of the New Zealand Court of Appeal, has stated:

[N]o matter precisely how it should be categorised in law, it has taken on in fact a vitality and potency of its own. For Maori its mana has always been high. Now there can be few Pakeha who in their hearts scoff at it or underrate its practical significance. Some see it as a threat, and political capital is made out of that point of view; but in truth theirs is a tacit tribute to the Treaty, a reluctant recognition that it has become part of the essence of the national life. Even its critics have to accept that it is a foundation document. It is simply the most important document in New Zealand's history.

Even though the Treaty has gained the attention of several prominent New Zealanders, however, it has done little to help the plight of the Maori in New Zealand. For example, as a result of the Maori land dispossession and the industrial revolution, "Maori rights appear always to be relegated to second place." In addition, although the Maori comprise ten percent of the population of

32. Mulholland, supra note 27, at 18.
34. 9 Hen. 3, ch. 39 (1215) (Eng.).
35. 3 Cor. 1, ch. 1 (1627) (Eng.).
36. 1 W. & M., ch. 2 (1688) (Eng.).
37. Mulholland, supra note 27, at 23.
38. The Treaty of Waitangi, Feb. 6, 1840, Eng.-Maori, 6 Hertslet's Commercial Treaties.
42. Tamihere, supra note 2, at 153.
New Zealand, they own less than five percent of the nation's lands and make up nearly fifty percent of New Zealand's prison population. As a result, there is a deep Maori distrust of the Government and its administration. As discussions of the Treaty of Waitangi in governmental circles increase, perhaps it will eventually be interpreted as being what the Maori have claimed it to be for so long—an entrenched document guaranteeing rights to an indigenous people.

Conventions are another important aspect of New Zealand's constitutional foundation. Like the British Constitution, the New Zealand Constitution has developed largely by way of a series of rules called conventions. Rather than set out in statutes, these conventions have evolved and have become established through frequent usage and custom over a period of years. "Conventions are adhered to and observed for political expediency and respect for tradition and not because some specified sanction will follow on breach."

As the New Zealand Constitution has evolved through the years, so too have the roles of the various governmental institutions. Today, these institutions include the Office of the Governor-General, Parliament, the Executive, and the Judiciary. Together they administer New Zealand's Government. Parliament, however, is clearly the most powerful branch of the government. Within Parliament, the Cabinet is the decision-making body and the central figure in New Zealand's executive branch. The executive branch also includes the Executive Council and the departments of State.

The New Zealand judiciary and its interpretation of the doctrine of stare decisis were the major source of law in New Zealand until the twentieth century. Increased Parliamentary legislation during this century, however, has shifted New Zealand's legal system from an adversarial system into a system where the legislature

44. Id.
45. Tamihere, supra note 2, at 153.
46. Mulholland, supra note 27, at 28-29.
47. Id. at 29.
50. Id. at 103.
has the untrammeled power to make laws.\textsuperscript{51} Into this system, the
New Zealand Bill of Rights Act\textsuperscript{52} was proposed, debated, and
enacted.

\textbf{B. The Canadian Experience}

The Canadian Parliament enacted the Canadian Bill of
Rights\textsuperscript{53} as an ordinary statute in 1960, forcing the Canadian judici-
ary to consider whether to take a more activist role in disputes in-
volving the government or to maintain its non-interventionist role
within the legislative realm. With few exceptions, the Supreme
Court of Canada chose to adhere to the principle of parliamentary
supremacy. One of the earliest cases involving the Bill of Rights
was \textit{Robertson v. The Queen.}\textsuperscript{54} In that case, Justice Ritchie, speak-
ing generally about the Bill of Rights, laid the foundation for the
Canadian judiciary's eventual interpretation of its enactment:\textsuperscript{55}
"The Canadian Bill of Rights is not concerned with 'human rights
and fundamental freedoms' in the abstract sense but rather with
such 'rights and freedoms' as they existed in Canada immediately
before the Statute was enacted."\textsuperscript{56} This view drastically limited the
development of constitutional protection in the area of human
rights and civil liberties. Instead, the Court continued to act as an
umpire of disputes, carefully avoiding what it considered to be the
domain of the legislative body.\textsuperscript{57} "This, so-called 'frozen rights'
theory of interpretation clearly limited the potential development
of the Canadian Bill of Rights."\textsuperscript{58} Thus, it was not until the Cana-
dian Constitution went into effect in April 1982\textsuperscript{59} that the judiciary
changed its approach toward judicial activism.\textsuperscript{60}

The Canadian Constitution Act is located in schedule B to the
Canada Act,\textsuperscript{61} an enactment of the British Parliament. Canada re-

\begin{itemize}
\item \textsuperscript{51} Id. at 71.
\item \textsuperscript{52} New Zealand Bill of Rights Act, \textit{supra} note 1.
\item \textsuperscript{53} Canadian Bill of Rights, R.S.C., app. III (1985) (Can.).
\item \textsuperscript{54} 1963 S.C.R. 651 (Can.).
\item \textsuperscript{56} \textit{Robertson}, 1963 S.C.R. at 654.
\item \textsuperscript{57} \textit{See} Elman, \textit{supra} note 55, at 524.
\item \textsuperscript{58} \textit{Id.}
\item \textsuperscript{59} Canada Act, 1982, ch. 11 (Eng.).
\item \textsuperscript{60} Carl Baar \& Ellen Baar, \textit{Diagnostic Adjudication in Appellate Courts: The Supreme Court of Canada and the Charter of Rights}, 27 \textit{Osgoode Hall L.J.} 1, 2, 10 (1989).
\item \textsuperscript{61} Canada Act, \textit{supra} note 59.
\end{itemize}
quested the passage of the Act in order to transfer the source of Canada's legislative authority from Great Britain to the Canadian Parliament. The passage of the Canada Act in 1982 ended the United Kingdom's involvement in the constitutional development of Canada. This development began with the British North America Act, establishing the Dominion of Canada as a federation of most of the then existing colonies. This Act made clear Great Britain's control over all substantive matters relating to the Canadian Constitution. For instance, any attempt by Canada's Government to amend the basic structure of its own Constitution would violate the Colonial Laws Validity Act, which voided any provision in a colonial enactment that conflicted with a British Parliament statute extending to that colony.

Over the years, the British Parliament amended Canada's Constitution by amending the British North America Act. It became evident, however, that the British Parliament would only amend Canada's Constitution at the request of the Canadian Parliament, creating a constitutional convention. The Canadian Parliament would unilaterally use this forum if a proposed constitutional change was of a purely Federal nature. Otherwise, if the proposed amendment would affect provincial powers, the Canadian Parliament would seek the consent of the provincial legislatures.

In 1931, the Statute of Westminster recognized the de facto independence of such British dominions as Canada and New Zealand. It provided that any further enactments by the British Parliament would only apply to the dominions if they were expressly requested and assented to by that dominion. Because the Canadian provinces had failed to reach an agreement with the Parliament regarding the formula for amending the Constitution, a

63. British North America Act, 1867, 30 & 31 Vict., ch. 3 (Eng.).
65. Colonial Laws Validity Act, 1865, 28 & 29 Vict., ch. 63 (Eng.).
68. The Statute of Westminster, 1931, 22 & 23 Geo. 5, ch. 4 (Eng.).
69. McWhinney, supra note 67, at 248.
70. Id.
specific provision, Section 7.1, was inserted into the statute. Section 7.1 provided that Canadian consent was not required for enactments altering, amending, or repealing the British North America Act, 1867-1930. Thus, unlike the other dominions affected by the Statute of Westminster, the British Parliament retained the power to amend the Canadian Constitution.

The inability of the provinces and the Federal Government to reach an agreement regarding the amendment process for an entrenched constitution frustrated the efforts of "patriation" for over fifty years. Although the Federal Government had enacted the Canadian Bill of Rights Act and various provinces had enacted bills of rights, these were ordinary enactments, not entrenched constitutional provisions. Thus, it was not until the era of Pierre Trudeau that an entrenched document became a possibility.

As early as 1955, Prime Minister Pierre Trudeau, then a legal academic, recommended that the Canadian Constitution "should include a statement of fundamental rights." In 1965, he proposed an entrenched Bill of Rights as part of a general Canadian constitutional reform. An entrenched Bill of Rights, he argued, would address the discontent manifested by the rise of the separatist movement in Quebec and would establish a unified Canada.

The threat to Canada's national unity became even more dramatic a decade later when the Parti Quebeçois, led by Premier Rene Levesque, was elected in Quebec. The primary policy of the Parti Quebeçois was the secession of Quebec from the Canadian Federation. In response to this threat to Canada's national unity, the Federal Government proposed a new Constitution with a Char-
ter of Rights and Freedoms as its featured component. The intent of the proposal was to unite the country on the basis of its affirmation of a common set of values, thus negating any influence the separatists might have in Quebec. On May 20, 1980, the Quebec referendum on Sovereignty-Association was held. With Prime Minister Trudeau and several other provincial premiers lobbying for a “no” vote by promising to initiate constitutional reform, the Quebecers voted against Sovereignty-Association.

Although the Quebecers’ vote inspired the Parliament to proceed with constitutional reform immediately, Ontario and New Brunswick were the only provinces in agreement with the proposed constitutional changes. A stalemate between the Federal Government and the provincial premiers concerning the amending formula continued through the first series of conferences. As a result, Prime Minister Trudeau declared in October 1980 that his Government would act unilaterally to request passage of the Constitution Act by the British Parliament. Because the remaining eight provinces maintained that either unanimous or substantial provincial support was necessary for the Federal Government to initiate the process to amend the Constitution, the matter was referred to the Courts of Appeal of Manitoba, Quebec, and Newfoundland.

The Courts of Appeal reached conflicting results. The Manitoba Court of Appeal ruled for the Federal Government by a majority of three to two. The Quebec Court of Appeal also ruled for the Federal Government by a majority of four to one. On the other hand, the Newfoundland Court of Appeal unanimously

82. Id.
83. Id.
85. Id. at 222-23.
86. Id.
87. Id.
88. Id.
89. Id.
90. Mary Elizabeth Williford, Canadian Constitutional Law, 19 TEX. INT’L L.J. 233, 233-34. See also Hogg, supra note 64, at 223; Albert, supra note 62, at 397-98.
found for the provinces. These decisions were appealed thereafter to the Supreme Court of Canada, which delivered its judgment on September 28, 1981. The Canadian Supreme Court held that, although the Federal Government was not required by law to have the provinces’ consent before initiating constitutional change, a “substantial degree” of provincial consent was required as a matter of constitutional convention.

In reaction to the politically unattractive ramifications of this decision, the Prime Minister called for another conference among the leaders of the Federal and provincial governments. This conference led to a negotiated compromise among all of the provinces except Quebec. The consenting parties agreed to certain amendments, as well as to prevent from being argued and decided by the British Parliament the issue of whether to pass a constitutional amendment requested by the Canadian Federal Government yet opposed by a majority of the provinces. As a result of these compromises, the proposed Constitution Act was transmitted to the United Kingdom, where it was duly enacted by the House of Commons and the House of Lords and given Royal Assent on March 29, 1982.

Upon the passage of the Constitution Act, the Canadian Constitution became the supreme law of the land. The Constitution authorized the judiciary to invalidate any laws inconsistent with this enactment. In addition, Part I of the Constitution—the Canadian Charter of Rights and Freedoms— guaranteed to all Canadian citizens legal, political, and linguistic rights, in addition to rights of equality. As a result, the Constitution is now superior to Parliament. The Supreme Court is the Constitution’s guardian and is responsible for the zealous protection of individual rights and freedoms against legislative intrusion.

Some argue, however, that the Supreme Court’s zealous protection of individual rights partially stemmed from the composition

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95. Id.
97. Id.
98. Canada Act, supra note 59.
99. Id. pt. I.
of the Court's personalities. If a number of the recently-retired conservative Justices had been replaced by other conservatives, the Court likely would have proceeded at a slower pace. With the appointment of more liberal Justices, however, the Supreme Court effectuated a monumental break from Canada's constitutional past.

C. The American Experience

The original U.S. Constitution did not include a bill of rights. The framers, "deep believers in natural rights," omitted a bill of rights at the Philadelphia Convention because they felt that one would not be needed. They believed that, because the Federal Government was to be limited, the expansive resources and breadth of the country would prevent a tyrannical majority. The framers argued that to include a bill of rights "would be an even greater threat to liberty." In Federalist 84, Alexander Hamilton expressed this same rationale in his argument as to why it would be unwise to adopt a bill of rights.

As the ratification process unfolded, however, it became abundantly clear that a large number of people were dissatisfied with the omission of individual protection against governmental oppression. As a result, some states, notably Massachusetts, ratified the Constitution on the condition that the protection of civil liberties would be quickly incorporated into the document.

As a staunch supporter of a bill of rights, Thomas Jefferson proposed that ratification be delayed until the Constitution included provisions protecting individual rights. Eventually, he backed off from such demands, and instead, focused his energies on convincing James Madison, through a series of letters, that a bill of rights was necessary: "Let me add that a bill of rights is what the people are entitled to against every government on earth, general

101. Elman, supra note 55, at 527.
102. Id. at 530.
105. COX, supra note 103, at 38.
106. THE FEDERALIST No. 84 (Alexander Hamilton).
107. PRITCHETT, supra note 104, at 2.
108. Id.
110. Id.
or particular, and what no just government should refuse, or rest on inference." In addressing the positive and negative aspects of a bill of rights, Jefferson stated:

There is a remarkable difference between the characters of the inconveniences which attend a Declaration of rights, and those which attend the want of it. The inconvenience of the Declaration are [sic] that it may cramp government in it's [sic] useful exertions. But the evil of this is shortlived, moderate, and reparable. The inconveniences of the want of a Declaration are permanent, afflicting and irreparable: they are in constant progression from bad to worse. The execution in our governments is not the sole, it is scarcely the principal object of my jealousy. The tyranny of the legislatures is the most formidable dread at present, and will be for long years.

Madison, although not necessarily opposed to a bill of rights, had never believed that the omission of one was "a material defect." Madison had observed numerous violations of such documents in the past and was concerned that by enumerating such rights on paper, the public could limit their definitions further than would a government. Jefferson nevertheless convinced him that a bill of rights was necessary. Madison's conversion was evident when he adopted Jefferson's notion of the judiciary as the guardian of these rights:

If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.

Yet, there was opposition to the proposed adoption of a bill of rights from a number of sides on a number of issues. The extreme anti-federalists believed that the convention had already gone too

114. Id. at 287.
115. James Madison, Speech to the House of Representatives (June 8, 1789), quoted in MAISON & BAKER, supra note 109, at 293.
far in centralizing Federal powers, thus lessening state powers to protect individual rights. Their argument was based on a belief that a bill of rights would be unnecessary in a system observing state sovereignty.\(^{116}\) James Madison, whose main concern was to avoid the wrong kind of bill of rights, decided to propose the amendments to the House of Representatives himself, ensuring that his notions of a proper bill of rights would be adopted.\(^{117}\) Because of Madison’s efforts, the states finally ratified the Bill of Rights\(^{118}\) on December 15, 1791.\(^{119}\) The application of the Bill of Rights to actions by the Federal Government led many to assume that individual states would provide protection against oppressive state action.\(^{120}\)

Subsequently, and without express Constitutional support,\(^{121}\) the Supreme Court assumed responsibility as the final authority on the interpretation of the Constitution.\(^{122}\) The Court’s interpretation that the Fourteenth Amendment incorporates the Bill of Rights as against state actions is the clearest example of this assumption of power. Although the Court initially interpreted the Due Process Clause of the Fourteenth Amendment to protect only economic freedoms and property rights against state actions,\(^{123}\) it ultimately took the position that additional rights are also enforceable as against the states:

In the course of upholding the conviction of a prominent Communist under the New York criminal anarchy statute, Justice Sanford for the conservative Court made this astounding concession: “We may and do assume that freedom of speech and of the press . . . are among the fundamental rights and ‘liberties’ protected . . . from impairment by the States.” This issue had not been argued before the Court, and the holding was unneces-

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117. Interestingly, Madison would have liked certain rights extended to the states; however, because a consensus could not be reached during this Congress, the matter of incorporating the Bill of Rights to the states remained dormant until a century and a half later. Id. See also Pritchett, supra note 104, at 3; Mason & Baker, supra note 109, at 282.
118. U.S. Const. amends. I-X.
119. Pritchett, supra note 104, at 3.
120. Cox, supra note 103, at 38.
121. Id. at 41-42.
122. Id. at 44-45.
sary to the decision of the Gitlow case. It was in this offhand manner that the historic decision was made enormously enlarging the coverage of the First Amendment and the jurisdiction of the Supreme Court to guarantee the freedom of speech and press against state or local action as well as against Congress.124

Beginning with the Gitlow case,125 which incorporated the Bill of Rights to apply as against the states, the Supreme Court, during the Warren era, vastly expanded the constitutional protection afforded to speech, press, and criminal procedure.126

Thus, from the Court's ground-breaking decision permitting judicial review in Marbury v. Madison127 to its gradual incorporation of most of the Bill of Rights provisions to the states, the U.S. Supreme Court has exercised powers of judicial independence previously unheard of in judicial history. As a result, individual civil liberties have expanded so that there are now far greater protection than were ever imagined by the framers of the Constitution.

D. History of New Zealand Bill of Rights Proposals

New Zealand's proposal for a bill of rights dates back to discussions by the National Government in the early 1960s.128 In August 1963, the National Government introduced a bill of rights that was based upon the Canadian Bill of Rights.129 After months of debate, however, Parliament allowed the proposed bill of rights to lapse.130

The subject of a possible bill of rights remained in the public background until 1981, when the Labour Party included a bill of rights as part of its Election Manifesto. In 1984, it received even greater prominence when the Labour Government featured a bill of rights component in its Open Government Policy.131 Finally, in 1985, the Labour Government introduced into the New Zealand Parliament a White Paper supporting a bill of rights.132

124. PRITCHETT, supra note 104, at 20.
125. 268 U.S. 652 (1925).
126. COX, supra note 103, at 182.
127. 5 U.S. (1 Cranch) 137 (1803). See also PRITCHETT, supra note 104, at 312.
128. 509 PARL. DEB. (HANSARD) 2799 (statement of Bill Dillon).
129. Id.
130. Id.
This White Paper included a Draft Bill of Rights as well as explanations of the following: (1) what a bill of rights would do; (2) why New Zealand needs a bill of rights; (3) how the proposed Bill of Rights would deal with the Treaty of Waitangi; (4) how it would operate in practice; and (5) how it would be adopted. The proposed Bill of Rights primarily served to protect the fundamental rights of New Zealanders against the potentially tyrannical power of the state, accomplishing this purpose by giving the judiciary power to interpret and enforce the Bill of Rights. In order to accomplish this goal, the Labour Government outlined its intentions to adopt a bill of rights that would: (1) constitute the supreme law of the land; (2) recognize the rights of the Maori under the Treaty of Waitangi; (3) insure the right to freedom from discrimination; and (4) establish in the courts the power of judicial review.

E. Responses to the Bill of Rights

Over the subsequent five years, various groups continued to debate the proposed Bill of Rights. These debates addressed whether the Bill of Rights would bestow too much power on the undemocratic judiciary, potentially making it the most powerful branch of government or, conversely, whether legislative oppression could be prevented without a bill of rights. These debates continued until August 1990, when, in response to the Labour Government’s loss of political ground to the National Party shortly before the October elections, Parliament passed a Bill of Rights Act. The Bill of Rights Act, however, is far more limited than the White Paper proposal. Rather than become the supreme law of the land, the Bill of Rights Act is on the same level as any other legislative enactment of Parliament. Thus, Parliament can alter or even eliminate the Act at any time. Additionally, the Bill of Rights Act fails to recognize the rights of the Maori under the Treaty of Waitangi.

133. Id.
134. Id. at 68.
135. Id. at 74-75.
136. Id. at 85.
137. Id. at 109-16.
139. New Zealand Bill of Rights Act, supra note 1; 510 PARL. DEB. (HANSARD) 3773 (result of the vote was Ayes 36, Noes 28).
Waitangi.140 Most importantly, the Bill of Rights Act specifically prohibits the judiciary from striking down laws of Parliament, whether passed before or after the enactment of this Act.141 Understandably, supporters of an entrenched constitutional document were generally disappointed.

Although the Bill of Rights Act prohibits striking down an enactment in violation of the Bill of Rights, the judiciary nonetheless may be able to control the interpretation of an enactment. For instance, unlike the U.S. Constitution, the New Zealand Bill of Rights Act specifically mentions the power to implement good faith affirmative action measures142 and the right to observe the principles of natural justice,143 as well as the notion of judicial review.144 When these sections are combined with Section 6 of the Act,145 which specifies that the preferred interpretation of any enactment is the one that is consistent with the Bill of Rights,146 it would appear that the New Zealand judiciary is provided with an opportunity to examine the interpretations of a variety of laws.

Although the impetus for the Labour Government's interest in a bill of rights may have arisen from its criticisms of the previous Administration's alleged excessive involvement in economic matters, it is unlikely that the Bill of Rights Act will address any issues of that nature. Instead, as with Canada, the greatest amount of litigation between the state and its citizens under the Bill of Rights Act will likely occur in the area of criminal law. In fact, most litigation have arisen under those provisions within Part II of the Act dealing with search, arrest, and detention.147 One provision in this area that may have particular importance in the future is Section 27(2), which provides: "Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that

140. New Zealand Bill of Rights Act, supra note 1.
141. Id. § 4.
142. Id. § 19(2).
143. Id. § 27.
144. Id. § 6.
145. Id.
146. Id. Section 6 states: "Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning." Id.
147. Id. §§ 21-27.
determination." 148 Under this provision, a court, in examining the actions of a public authority, could decide that the public authority ignored Parliament's clearly-expressed intentions that its enactments be interpreted consistently with the Bill of Rights. Courts could maintain that, as Parliament has expressly stated a desire to have issues of natural justice, human rights, freedom from discrimination, and other fundamental freedoms affirmed, protected, and promoted in New Zealand, public authorities as well as tribunals must consider these rights and freedoms in interpreting Parliament's enactments. Thus, even though courts cannot strike down an enactment in violation of the Bill of Rights, the Bill of Rights could nonetheless give the judiciary a great deal of influence over the administration of Parliamentary enactments.

New Zealand's Bill of Rights, therefore, has at least opened the door to some judicial review of laws passed by Parliament. Yet, as the Canadian and American experiences have shown, whether the New Zealand courts will choose to take advantage of this opportunity depends in part upon the judges themselves.

III. THE NEW ZEALAND COURTS' FIRST IMPRESSIONS OF THE NEW ZEALAND BILL OF RIGHTS ACT

An examination of the New Zealand courts' initial interpretations of the Bill of Rights Act reveals an attempt to use the Bill of Rights to prevent administrative oppression by interpreting this enactment so as to protect fundamental rights and freedoms. Although the New Zealand judiciary has, in a number of cases, found that the Bill of Rights Act did not apply, 149 there has also been a significant number of instances where the courts have applied and interpreted the Act. 150

In those cases where the courts ruled that the Act does apply, perhaps the two most cited sections of the Bill of Rights are Section 6, which requires that the preferred interpretation of an enactment is one consistent with the Bill of Rights, 151 and Section 23,

148. Id. § 27(2).
150. See, e.g., cases cited infra notes 153, 160.
151. New Zealand Bill of Rights Act, supra note 1, § 6.
which concerns the rights of persons arrested or detained.\textsuperscript{152} Both the New Zealand Court of Appeal and the High Court have stated the importance of Section 6 in a variety of cases.\textsuperscript{153} In \textit{R. v. Rangi},\textsuperscript{154} the Court of Appeal relied on Section 6\textsuperscript{155} and Section 25(c) of the Act\textsuperscript{156} to quash a lower court’s conviction and sentence on the grounds that the district court judge’s instructions to the jury were improper.\textsuperscript{157} The Court ordered a new trial, stating that Section 202(4)(a) of the Crimes Act 1961 must be interpreted in light of the Bill of Rights Act and that, as a result, the Crown, rather than the defendant, carries the burden of proof as to defendant’s possession of a knife in a public place without lawful authority or reasonable excuse.\textsuperscript{158} Thus, under the Bill of Rights Act, a criminal defendant charged with an offense (at least under this Section of the Crimes Act) will have certain procedural protection concerning the burden of proof that were not available before the Act came into force. Whether these procedural protection will apply to other criminal enactments will have to be addressed, especially considering the Court of Appeal’s statement that even though Section 6 of the New Zealand Bill of Rights Act “is an important section . . . it has no application unless the enactment in question can be given a meaning consistent with the rights and freedoms contained in the Bill of Rights.”\textsuperscript{159}

A number of Court of Appeal and High Court cases also have dealt with Section 23 of the New Zealand Bill of Rights Act.\textsuperscript{160} In

\textsuperscript{152} \textit{Id.} \textsuperscript{23(1)}. Section 23(1) states:

Everyone who is arrested or who is detained under any enactment—(a) Shall be informed at the time of the arrest or detention of the reason for it; and (b) Shall have the right to consult and instruct a lawyer without delay and to be informed of the right; and (c) Shall have the right to have the validity of the arrest or detention determined without delay by way of \textit{habeaus corpus} and to be released if the arrest or detention is not lawful.

\textit{Id.}


\textsuperscript{155} \textit{New Zealand Bill of Rights Act}, \textit{supra} note 1, § 6.

\textsuperscript{156} \textit{Id.} \textsuperscript{25(c)}. Section 25(c) stipulates that everyone charged with an offence has, at a minimum, the right to be presumed innocent until proven guilty according to law. \textit{Id.}


\textsuperscript{158} \textit{Id.}


R. v. Kirifi, the Court of Appeal upheld a district court’s exclusion of a videotape of the defendant’s oral admissions during an interview because the police had not advised the defendant of his right to consult and instruct a lawyer without delay even though he had been in custody for over three hours. The Court of Appeal stated: "It seems to us that, once a breach of § 23(1)(b) has been established, the trial judge acts rightly in ruling out a consequent admission unless there are circumstances in the particular case satisfying him or her that it is fair and right to allow the admission into evidence." Similarly, in R. v. Crime Appeals, the Court of Appeal found that the rights of the accused under Section 23(1)(b) had been plainly violated without excuse. In Crime Appeals, one of the accused apparently admitted that he committed aggravated robbery, but had not been told that he was being arrested or otherwise advised of his rights. The other accused was coerced into making admissions despite his previous requests to see a lawyer. President Cooke found:

[T]he Acts must not be construed narrowly or technically, but applied in a realistic way. It is an affirmation of the basic rights of the people in New Zealand, and these rights cannot be hard and fast in their operation. The Act must normally be given primacy, subject only to the clear provisions of other legislation.

Thus, President Cooke held that "prima facie a violation of rights renders any evidence obtained inadmissible. The Act is not merely a relevant factor in exercising the Court’s discretionary jurisdiction." Although Justices Gault and Holland questioned some of
the implications of the Act's provisions, the decision ordering a rehearing in this appeal was unanimously allowed.

Perhaps the most important case dealing with Section 23 of the Act is Ministry of Transport v. Noort. In Noort, the Court of Appeal reversed the lower court decision, which had disposed of the Bill of Rights argument by holding that the Transportation Act could not be given an interpretation consistent with the application of Section 23(1)(b) of the Bill of Rights Act. The Court of Appeal, relying on Sections 4, 5, and 6 of the Bill of Rights Act, held that it would not substantially impair the administration of the Transportation Act to allow motorists suspected of driving under the influence of alcohol a limited opportunity to contact a lawyer by telephone and take advice before assenting to undergo breath and blood tests. In so ruling, the Court noted the importance of Section 6 and declared that it applies in instances where enact-

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167. *Id.*

Gault J stated that while a denial of rights will usually result in the exclusion of evidence, the Courts must be cautious to ensure that this does not lead to effective automatic exclusion. . . . Holland J, in particular, expressed reservations about the possible implications of the Act's provisions, without the introduction of other measures to balance between the rights of the individual, and the need to bring law breakers to justice.

168. *Id.*


170. *Id.* at 266-67.

171. Section 4 of the Act states:

No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights)—(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or (b) Decline to apply any provision of the enactment—by reason only that the provision is inconsistent with any provision of this Bill of Rights.


Section 5 of the Act states:

Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.


173. *Id.* at 272-73.

Turning to § 6, it is to be noted that this is one of the key features of the New Zealand Bill of Rights. It lays down a rule of interpretation comparable in impor-
ments are ambiguous rather than clearly inconsistent.\textsuperscript{174} Here, the Acts were only ambiguous, as “the two Acts can reasonably stand together.”\textsuperscript{175}

Additionally, the Court of Appeal has interpreted the Section 23 right to legal advice as a fundamental right:

Internationally there is now general recognition that some human rights are fundamental and anterior to any municipal law, although municipal law may fall short of giving effect to them . . . . The right to legal advice on arrest or detention under an enactment may not be quite in that class, but in any event it has become a widely-recognised right . . . and one of those affirmed in New Zealand. It has great ‘strategic’ value as a safeguard against violations of undoubtedly fundamental rights such as the right not to be arbitrarily arrested or detained . . . . Subject to contrary requirements in any legislation, the New Zealand Courts must now, in my opinion, give it practical effect irrespective of the state of our law before the Bill of Rights.\textsuperscript{176}

Thus, in reflecting upon the cases applying Section 23(1)(b) of the Bill of Rights Act, the New Zealand courts have determined that the Bill of Rights provides enforceable protection of individual rights in the area of criminal procedure, including the right of those accused of a crime to consult a lawyer without delay.

The New Zealand courts have also addressed other rights enumerated in the Bill of Rights Act. For example, in \textit{Knight v. Commissioner of Inland Revenue},\textsuperscript{177} the Court of Appeal reversed a lower court decision permitting the Inland Revenue Department to invoke statutory privilege against the disclosure of documents. President Cooke, in a separate opinion, relied upon Section 27(3) of the New Zealand Bill of Rights Act to strengthen his conclusion.\textsuperscript{178} He argued that because of Section 27(3),

\textit{Id.} at 272.
\textsuperscript{174} \textit{Id.} at 273.
\textsuperscript{175} \textit{Noort}, [1992] 3 N.Z.L.R. at 274 (limiting expressly the Court’s conclusion to the context of evidential breath tests and blood tests).
\textsuperscript{176} \textit{Id.} at 270.
\textsuperscript{178} New Zealand Bill of Rights Act, \textit{supra} note 1, § 27(3). Section 27(3) provides: “Every person has the right to bring civil proceedings against, and to defend civil proceed-
The Crown as a defendant in litigation should be in the same position as an individual. That cannot exclude public interest immunity, which applies wherever the public interest demands, no matter whether or not the Crown is a defendant. But, as previously explained, public interest immunity is no longer claimed in this case.\textsuperscript{179}

The role of the Bill of Rights in this decision remains unclear, as the other Justices agreed with President Cooke's decision without citing the Act.\textsuperscript{180} Still, future cases that involve the Crown as a defendant will likely rely upon President Cooke's citation to the Bill of Rights.

In \textit{R. v. Chignell},\textsuperscript{181} the High Court relied on Section 14 of the Bill of Rights Act\textsuperscript{182} to dismiss an application by the Crown to prohibit the broadcast of an interview of a former witness to a trial who had since recanted his testimony. In preparing for the retrial granted to the defendants by the Court of Appeal, the Crown was concerned that this interview would be prejudicial to the conduct of a fair trial even though they did not plan to call upon this former witness in the new trial. The High Court stated:

Section 14 of the New Zealand Bill of Rights Act 1990 reiterates the value of freedom of expression and freedom of information within our society. Although there is a need for responsibility and restraint to ensure that there be a fair and proper retrial, it would be an unwarranted over-reaction by the Court to respond as is here suggested. However, there should be no doubt as to the willingness of the Court to act firmly and decisively if there is comment or activity which is in fact destructive of a fair trial.\textsuperscript{183}

Thus, the Bill of Rights Act also supports an enforceable right to freedom of expression in some situations.

One final case of interest concerning the New Zealand Bill of Rights Act is the district court decision in \textit{Police v. P.C.F.}\textsuperscript{184} In this
case, four young ladies claimed that the defendant sexually abused them some ten to twelve years earlier. The issue in the preliminary hearing was whether the long period between the alleged offense and the complaint was too long to prosecute without constituting an abuse of process. The district court dismissed each of the charges against the defendant on the grounds of abuse of process, despite recent High Court cases siding with complainants where delays lasted several years.\(^1\)

In challenging the binding character of the High Court's judgments, the district court relied in part on the Preamble of the Bill of Rights Act,\(^2\) which affirms and protects fundamental freedoms in New Zealand, and Section 25(b),\(^3\) which conveys a right to be tried without undue delay.\(^4\) The court went on to find that the Act "cannot be put to one side as legislating something again which has always been part of the law. Rather it seems to me to revive the constitutional notion of ensuring a trial without delay."\(^5\) Although a decision of the district court has less influence than decisions of the High Court or the Court of Appeal, this case, decided in the first weeks after the Bill of Rights came into force, nonetheless exemplifies the New Zealand judiciary's eagerness to apply and interpret the New Zealand Bill of Rights Act so as to protect the rights and freedoms of New Zealanders.

It would appear that the New Zealand courts have indeed addressed some of the concerns of the critics of the New Zealand Bill of Rights Act. As stated by New Zealand legal scholars Antony Shaw and Andrew S. Butler: "In a series of important judgments, the Court of Appeals has recognized the New Zealand Bill of Rights Act as a significant constitutional document with important practical implications in a number of diverse areas."\(^6\) The judiciary has interpreted the Bill of Rights as protecting certain civil

\(^1\) Id. at 4-7.
\(^2\) New Zealand Bill of Rights Act, supra note 1, pmbl. The Preamble states: "An Act (a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand . . . ." Id.
\(^3\) Id. § 25(b). Section 25(b) states: "Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights: . . . (b) The right to be tried without undue delay . . . ." Id.
\(^5\) Id. at 9-10.
rights in criminal proceedings;\(^{191}\) protecting freedom of expression;\(^{192}\) and supporting the argument that the Crown, as a defendant in civil litigation, must be, absent public interest immunity, in the same legal position as an individual.\(^ {193}\) Thus, as some of the New Zealand and Canadian legal scholars have predicted, the Bill of Rights does have some value in protecting fundamental rights and freedoms, depending upon the willingness of the judiciary to apply the statute.\(^ {194}\) Based on the New Zealand courts' initial impressions of the Bill of Rights Act, the New Zealand judiciary clearly will not limit its protection of fundamental rights and freedoms to only those in existence immediately before the legislation was enacted, as the Canadian judiciary did with its Bill of Rights Act.\(^ {195}\)

Yet, as for Professor Paciocco's argument that the New Zealand judiciary "can effect a curial cure for the debilitated Bill,"\(^ {196}\) these remarks must be tempered with the realization that Parliament can, at any moment, decide to alter or even eliminate this enactment.\(^ {197}\)

**IV. Conclusion**

With the adoption of the Bill of Rights Act of 1990, New Zealand has taken its first steps away from what Great Britain's Lord Birkenhead described as an uncontrolled constitution to a controlled constitution.\(^ {198}\) New Zealand is a country where the Gov-

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195. See supra notes 53-60 and accompanying text.

196. Paciocco, supra note 194, at 353.


In McCawley v. R., Lord Birkenhead L.C. said that there is a distinction between (i) "uncontrolled" constitutions, that is to say, constitutions "the terms of which may be modified and repealed with no other formality than is necessary in the
Government itself has admitted that: (1) the powers of Government are just too great in a system strictly observing parliamentary supremacy; (2) the abuse by the executive branch can too easily go unchecked, except at the ballot box; and (3) New Zealand is one country that lacks the safeguards for fundamental rights and freedoms that many other nations enjoy and that, consequently, this move towards the notion that "government ought to be carried on within a publicly known and enforceable set of constraints" is a positive one.

Although it is clear that both the Westminster and American systems of government are founded upon the principles of democratic law, it is no less obvious that a system possessing unrestrained law-making powers can narrow or eliminate precious rights and freedoms with little or no opposition. Living under even the threat of such potential oppression should be unacceptable. Yet, even when the Labour Government itself argued that, with an entrenched bill of rights, fundamental rights and freedoms would be protected, the constitutional principle that government is under the law would be affirmed, and tyrannical majorities would be prevented from abusing minorities, the Nation as a whole was not yet ready for such a major change in its system of government. Thus, the Government enacted the more limited New Zealand Bill of Rights Act in the hope that it would provide some of the necessary checks and balances upon the powers of the legislature and administration, as well as perform an educative function for the citizens of New Zealand.

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199. Palmer, supra note 132, at 5.
200. Griffiths, supra note 198, at 29. "As the American political scientist Glenn Tinder has said, 'No political idea in the West has greater authority than constitutionalism.' There has been a remarkably wide and stable consensus that government ought to be carried on 'within a publicly known and enforceable set of constraints.'" Id.
201. Id. at 39.
203. Id. at 21.
204. Id. at 23.
In light of the initial responses to the Bill of Rights Act by the New Zealand judiciary, this Act may achieve some of its intended goals. In the area of criminal procedure, the courts have stated that the Government cannot take shortcuts by trampling upon the fundamental rights and freedoms of New Zealanders. This is true whether it concerns the right to consult and instruct a lawyer without delay, the right of an individual to be presumed innocent until proven guilty, or the right to be tried without undue delay.\textsuperscript{206} In addition, the educative function is fulfilled as people learn of their rights through public commentary on recent court decisions. In time, as the public comes to rely on these rights and freedoms and consider them fundamental, it will be increasingly difficult for the Government to amend, narrow, or override this enactment.

Still, it must be remembered that, with the governmental machinery presently in place in New Zealand, Parliament can decide to alter or eliminate this enactment at any time. Therefore, the courts must move cautiously in their efforts to protect the fundamental rights and freedoms provided in the New Zealand Bill of Rights Act. If the courts are not cautious, the National Government may decide to do away with this enactment before the Nation's citizens begin to rely on its protection. On the other hand, if a prudent approach is taken by the New Zealand courts, eventually the country will be ready for an entrenched constitutional document as proposed by the Bill of Rights White Paper.\textsuperscript{207}

When that day comes, a number of the arguments expressed during the Parliamentary debates will be again at the forefront of legal discussion, including the following: (1) which rights are most important;\textsuperscript{208} (2) whether legislation is necessary for liberty;\textsuperscript{209} (3) whether social and economic rights should be included in a bill of

\textsuperscript{206} See supra notes 154-76 and accompanying text.

\textsuperscript{207} See supra notes 132-37 and accompanying text.

\textsuperscript{208} 509 PARL. DEB. (HANSARD) 2801 (statement of Paul East).

They said that the Treaty of Waitangi was so important that it could not be included in ordinary law and, because the new Bill of Rights was ordinary law, not supreme law, the treaty could not be included in it. However, it has included the right to life, the right to vote, and the right to liberty in this nicely phrased unenforceable Bill—and those are some of the most fundamental rights that New Zealanders enjoy.

\textit{Id.}

\textsuperscript{209} 510 PARL. DEB. (HANSARD) 3452 (statement of Warren Kyd). "It is well known that liberty lies in the hearts of the people and in the willpower of politicians, not in legislation." \textit{Id.}
rights;\(^{210}\) (4) whether a system observing parliamentary supremacy has sufficient checks;\(^{211}\) and (5) whether the judiciary is the proper branch to perform such vital functions.\(^{212}\) As a result, various experiences shared by the Canadian and United States’ judiciaries should provide valuable lessons for the New Zealand courts.

Although both Canada and the United States have enjoyed the additional protection against legislative oppression offered by federalism, there are a number of factors that make their comparisons to New Zealand significant, as well as pertinent, to a judiciary just embarking upon the institution of judicial review. For instance, all three countries were originally under the powers of the Crown of Great Britain; all three have democratically-elected legislatures; all three have had long and emotional debates as to how far these protection should extend; and all three have included in their Bill of Rights such concepts as freedom of association, assembly and religion, as well as freedom from unreasonable search and seizure.

In addition, Canada shares with New Zealand the following: (1) a common political heritage (a democratically-elected Parliament in the Westminster tradition); (2) a common legal tradition (the protection of rights and freedoms by the common law’s provision of remedies); and (3) the fact that both Bills of Rights were introduced into long-established political systems, promoting fundamental shifts of power in government. Thus, it would appear that the experiences of Canada and, to a lesser degree, the United States in establishing and interpreting their Bills of Rights are valuable comparisons for New Zealand.

\(^{210}\) 502 Parl. Deb. (Hansard) 13,040 (statement of the Right Honorable Geoffrey Palmer).

Such rights would not have been enforceable and it was decided not to include any of them in the Bill. Bills of Rights are traditionally about putting restraints on the powers of the State. Hence, they tend to focus on procedural rather than substantive rights. Social and economic rights are in a different category.

\(^{211}\) Id at 13,044 (statement of the Honorable W.P. Jeffries). “All sovereign power resides in the House of Representatives, between elections it is without any other external constitutional check on the exercise of its sovereign powers.” Id.

\(^{212}\) Id. at 13,046 (statement of the Honorable J.B. Bolger).

Members of the judiciary have tenure for life, or until they are retired at some venerable age: The Bill transfers the rights to a body that is unrepresentative of New Zealand—made up of middle-aged to ageing gentlemen who are well paid and remote, and who of late have increasingly taken to emulating their American cousins and writing the law.

Id.
If and when New Zealand does adopt an entrenched constitutional document, it will be interesting to see how the New Zealand courts will deal with some of the more important issues dealt with by the United States' judiciary. These issues include: (1) whether possible violations of certain rights should be scrutinized to a higher degree than others; (2) whether the so-called “preferred position” argument in the United States would be a possible guide in light of New Zealand's Parliamentary discussions as to where the Treaty of Waitangi stands in relation to the Bill of Rights; (3) whether there is a hierarchy of values in the constitutional document; and (4) whether judges should find it natural to use “constitutional adjudication as an instrument of reform” in society.

In addressing the United States' experiences with the “preferred position” argument, Professors Murphy and Pritchett stated:

In the Carolene Products case of 1938 . . . Stone laid the basis for a new jurisprudence. He distinguished between economic rights on the one hand and, on the other, rights pertaining to freedom of speech, press, and assembly, to equal protection of the laws, and those others encompassed in the Bill of Rights. The last three sets of rights, he thought, were entitled to greater judicial protection than were economic rights. More particularly, he would later claim, the rights touching on political communication deserved a “preferred position” that would overcome the usual presumption by judges that a challenged statute was constitutional.

Although the “preferred position” was controversial in the United States, even jurists such as Felix Frankfurter and Benjamin Cardozo felt that there was a hierarchy of essential rights that could be enforced against state action. Frankfurter and Cardozo were opposed to the incorporation of the entire Bill of Rights so as to apply to the states by way of the Fourteenth Amendment. For example, in Palko v. Connecticut, Justice Cardozo “spoke of the guarantees of the First Amendment as 'the matrix, the indispensable condition, of nearly every other form of freedom.’”

Finally, in examining the constitutional options a judge has to effect reform in a society, it is imperative to reflect upon the War-

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213. Cox, supra note 103, at 182.
216. Murphy & Pritchett, supra note 214, at 604.
ren Court era and the Supreme Court's assumption of responsibility for protecting values and the rights of minorities. As stated by the eminent Harvard law professor and former United States Solicitor General during the Warren Court era, Archibald Cox:

[W]here the old activist decisions prior to 1937 merely blocked legislative initiatives in order to maintain the status quo, the decisions of the 1950s and 1960s... were to force major changes in the established legal and social order. The constitutional protection for speech and press were vastly expanded. So were procedural safeguards for those accused of crime. . . . The use of constitutional adjudication as an instrument of reform made ours a freer, more equal, and more humane society.217

Yet, in order to maintain legitimacy, a system observing the institution of judicial review must always recognize the following:

It is important to keep in mind that to accept judicial power as a legitimate counterweight to popular political sentiment does not imply that judges are free to ignore the limits on and traditions of the judicial process. Those traditions impose loose reins rather than iron fetters, but they do indicate restriction on discretion. Without a doubt judges sometimes make law and policy, but they do so in ways different from and more limited than those of other public officials.218

Until the day when New Zealand adopts a constitutionally-entrenched bill of rights, the New Zealand courts must decide whether or not to continue carving out civil liberties from the existing New Zealand Bill of Rights Act. As this enactment is merely a statute within a system observing parliamentary supremacy, the Bill of Rights Act is clearly still on tenuous grounds. Therefore, should the judiciary choose to continue, they must be careful not to move too quickly for the public or the legislative branch.219

In conclusion, when examining the opportunities now available to the New Zealand judiciary by way of the recently-adopted New Zealand Bill of Rights Act, it is worthwhile to consider the experiences of the Canadian and United States' judiciaries. Although, unlike their counterparts under the American Constitution, the New Zealand courts are expressly prohibited from invali-

217. Id. at 182-83.
218. Id. at 599-600. See also Cox, supra note 103, at 123.
219. See supra notes 196-97 and accompanying text.
dating laws as inconsistent with the Bill of Rights Act,\textsuperscript{220} the Act does propose a dualism by also specifying that the preferred interpretation of any enactment is one consistent with the Bill of Rights.\textsuperscript{221} In addition, the Act expressly specifies the concepts of judicial review, natural justice, human rights, and fundamental freedoms\textsuperscript{222}—concepts not expressly included in the U.S. Constitution. Thus, controlling the interpretation of an enactment would seem to be a logical avenue for the courts.

Although Canada, New Zealand, and the United States all have shown an interest in protecting individual rights, their methods of providing protection of these rights differ considerably. While Canada and the United States enjoy the protection afforded by added checks and balances based on their federalism precepts, New Zealand strictly observes Great Britain’s Westminster system of parliamentary supremacy, which does not provide for such protection. Thus, New Zealand faces a more difficult battle in instituting entrenched individual rights protection.

In order to adopt a constitutionally-entrenched bill of rights, New Zealand must establish limitations upon the powers of the legislative branch that are inconsistent with the theory of parliamentary supremacy underlying New Zealand’s Government. In addition, such limitations could have a major effect upon New Zealand’s notions of majoritarian democracy and justice, as well as upon the efficiency of the executive and legislative branches to make laws in response to the will of their electorate.

Yet, what the Labour Government proposed, first in presenting its Bill of Rights White Paper to Parliament and then in enacting this Statute, was what Canada and the United States discovered in their constitutional developments—that is, that a majority can be no less tyrannical than an aristocracy in considering the needs of the minority. Therefore, although on some levels the legislative and executive branches’ efficiency in enacting and administering laws may suffer as a result of implementing individual rights pro-

\textsuperscript{220} New Zealand Bill of Rights Act, \textit{supra} note 1, § 4.

No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights)—(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or (b) Decline to apply any provision of the enactment—by reason only that the provision is inconsistent with any provision of this Bill of Rights.

\textit{Id.}

\textsuperscript{221} See \textit{id.} § 6.

\textsuperscript{222} See \textit{supra} notes 142-44 and accompanying text.
tection against state action, the countervailing advantage is that all members in a democratic society such as this will be cared for, regardless of political beliefs or representation in the political processes.

As the New Zealand judiciary has shown in its brief history interpreting the New Zealand Bill of Rights Act, it is willing to protect human rights and civil liberties by examining the actions of public authorities and tribunals in connection with their interpretations of New Zealand laws. This is very different from what the Canadian judiciary did when confronted with its 1960 Bill of Rights Act. Yet, even though it was largely ignored, the Canadian enactment was a stepping-stone for Canada's eventual adoption of their Constitution Act and Charter of Rights and Freedoms. Therefore, it would appear that, as suggested in the Final Report of the Justice and Law Reform Committee on the Bill of Rights White Paper, the option of eventually adopting an entrenched constitutional document is also available to New Zealand should the populace become sufficiently schooled on the subject and choose to adopt such a monumental constitutional change. If the initial responses of the New Zealand judiciary to this enactment are any indication, this schooling has begun.