Lord Cooke's Fundamental Rights and the Institution of Substantive Judicial Review

Aaron Lloyd*

I: INTRODUCTION

Over a decade ago Sir Robin Cooke (now Lord Cooke of Thorndon) made obiter dicta in a number of cases about possible grounds for the judiciary to overturn legislation passed by Parliament.[1] President Cooke reiterated these comments in a conference paper and subsequent article published in the New Zealand Law Journal.[2] New Zealand's legal and political system has developed very much in the British tradition. The adoption of the Westminster style of government and the development of a court system that to this day retains the Privy Council as its highest appellate court are indications of this. The doctrine of parliamentary supremacy, so eloquently illustrated by Dicey,[3] is an integral part of this tradition. The comments made by Cooke P indicated a belief that Dicey's assessment of parliamentary power was mistaken. It is no surprise then that his Honour's comments created something of a stir in legal and political circles both in New Zealand and overseas.

In this paper I will look at the comments made by Cooke P over ten years ago, using them as a springboard from which to discuss the broader issue of substantial judicial review. My intention is to show the reader that rather than dismissing Cooke P's comments as scandalous, the sentiments expressed in them should be given serious consideration. In addition to the introduction and conclusion, the paper will consist of four main parts.

The first part will examine the comments made by Cooke P and the nexus between them and the institution of substantive judicial review.

The second part considers the principles underlying liberal democratic theory.

---

* BA. Thank you to Tim Dare of the Philosophy Department at the University of Auckland for his help with my work on this paper.

1 *L v M* [1979] 2 NZLR 519, 527; *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374, 390; *Fraser v State Services Commission* [1984] 1 NZLR 116, 121; *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398; *Keenan v Attorney-General* [1986] 1 NZLR 241, 244.

2 "Fundamentals" [1988] NZLJ 158.

3 See generally Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1959).

One of the main objections to an institution of substantive judicial review is that it is anti-democratic. The purpose of this section is to allay the reader of that concern.

Just as substantive judicial review is considered by many to be anti-democratic, it is also considered to be in conflict with the principles of legal positivism – the dominant legal theory in the Western tradition. The third section of the paper addresses the concern that for a theory of law to adopt an institution of substantive judicial review it must sway from the essential requirements of positivism. I will approach this section from the perspective of looking at how one may reason cases decided under the institution of substantive judicial review within a coherent theory of law.

The fourth section of this paper will attempt to answer the question: why judges? The first three parts establish only that substantive judicial review is *acceptable* to the liberal legal positivist. The fourth part seeks to establish that an institution should be preferred over some informal check, and that the courts are the institution most suited to exercising substantive judicial review.

I am far from convinced that the adoption of substantive judicial review is the way that New Zealand should move. To make this step a much broader range of issues than will be covered here needs to be considered. However, I am convinced that Dicey's idea of parliamentary supremacy is a burden on the promotion of liberal egalitarianism. As a liberal egalitarian, the thought that our Parliament is technically supreme is a frightening one.

II: LORD COOKE'S CONTROVERSIAL COMMENTS

In *Taylor v New Zealand Poultry Board*,[4] Cooke J gave us a hint of his feelings about the role of the judiciary with regards to the Legislature. In discussing the question of whether a citizen can be forced to answer certain questions from an official, his Honour wrote:[5]

> 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.

Taylor was not the first instance that Cooke J had suggested there was a restriction on Parliament's law-making powers and nor was it to be the last. In the decade from 1979 and the case of *L v M*,[6] through to the publication of *Fundamentals* in 1988, Cooke P indicated clearly his views on the matter. In *Fundamentals* he asks the question:[7]

---

4 Supra note 1.
5 Ibid 398.
6 Supra note 1.
7 Supra note 2 at 164.

> Can any lawyer in all honesty accept as a viable principle that some infringements of human rights are so grave that if enacted in other countries they will not be recognised as law at all by us, but that this would not matter if they were enacted by our own legislature?

From here his Honour goes on to state, "[w]ithin very broad limits Parliament has the constitutional role of laying down policy".[8]

But what are those broad limits? Unlike the United States, Australia or Canada, New Zealand has no written constitution. However, the New Zealand Bill of Rights Act 1990 now provides us with some indication of these limits, although the rights are themselves limited in their effect by ss 4-6 of the Act.

President Cooke acknowledges this issue when he notes, "[o]ne may have to accept that working out truly fundamental rights and duties is ultimately an inescapable judicial responsibility".[9] It appears that Cooke P is suggesting not only that there is a set of fundamental rights that lie so deep that Parliament cannot legislate over them, but that in the absence of any clear indication as to what those rights are, it is the responsibility of the courts to define and protect them.

His Honour's comments may be seen to parallel the institution of substantive judicial review in the United States. Loosely defined, judicial review is an application to the court to check the legality of a decision that has been made. In the British tradition judicial review exists for review of administrative decisions only, but in the United States the ambit of review is much wider. Substantive judicial review is the phrase coined to refer to the actions of the court when reviewing the substance of legislation passed by a Legislature. Under the Westminster tradition and the doctrine of parliamentary sovereignty in particular, this power does not exist. By way of contrast, substantive judicial review is a fundamental institution within the American judicial (and political) system.

The United States Supreme Court first struck down an act of Congress in 1803 in the case of *Marbury v Madison*[10] when Marshall CJ interpreted the Judiciary Act of 1789, along with Article III of the Constitution, to give the Court the power of substantive judicial review. This institution is fundamental to the tripartite separation of powers between Congress (the Legislature), the President (the Executive) and the Supreme Court (the Judiciary).

I do not intend to suggest that what Cooke P was actually advocating in his comments is that we should adopt a form of substantive judicial review akin to the United States. All that I wish to establish here is Cooke P's belief in fundamental rights, and his belief that the courts should protect those rights from legislative abuse. The reference to the operation of the United States Supreme Court is an attempt to give a tangible grasp on the concept of judicial protection against inappropriate legislative action. This is to provide the reader with a concept of rights protection that may be carried through the remainder of this paper.

---

8 Ibid 164-165.

9 Ibid 165.

10 5 US 137 (1803).

III: DEMOCRACY AND SUBSTANTIVE JUDICIAL REVIEW

A legal system and the law within it do not exist in isolation, rather they are a part of a wider political system encompassing all of the institutions and arrangements that organise and facilitate a civil society. While the law may be readily identified and separated from the wider system, its significance lies in the ability of the citizens to use the law to help order and maintain the society of which it is a part. If the legal system that exists within a society is incompatible with the wider political system that it is intended to support, protect and promote, then it is an inadequate system of law.

It follows from this observation that if an institution of substantive judicial review is to exist within a legal system, then that institution must be compatible with the wider political system of the society. One of the primary objections to substantive judicial review is that it is anti-democratic. Implicit in this is two important points. The first is that a system of democracy should be the preferred system. The second point is that substantive judicial review is incompatible with such a system.

In this section of the paper I will address the latter of these two points. While the term "democracy" in no way identifies one clearly defined theory, I submit that the best political system that we could adopt will nevertheless be "democratic". Therefore my focus will be on what the best conception of democracy may be, and how substantive judicial review may be seen to be not only compatible with such a system, but also desirable.

By its nature substantive judicial review is contrary to the majoritarian nature of democracy. When a court overturns legislation passed by a democratic Legislature, it does so despite the majoritarian forces at work in the passing of that law. It is this affront to the majoritarian nature of democracy that many see as a justification for criticising substantive judicial review.

Alexander Bickel focuses on this anti-majoritarian concern when he writes:[11]

> [J]udicial review is a counter-majoritarian force .... [and this] is the reason the charge can be made that judicial review is undemocratic .... [A]lthough democracy does not mean constant reconsideration of decisions once made, it does mean that a representative majority has the power to accomplish a reversal.

The "representative majority" that Bickel refers to are the elected representatives that constitute the Legislature. The objection is that in accepting that the representative majority has the right to review laws passed, there is an implicit denunciation of any other form of review. Fellow American John Ely makes this point more clearly when he argues that the central problem of judicial review is that "a body that is not elected or otherwise politically responsible in any significant way is telling the people's elected representatives that they cannot govern as they'd like". [12]

---

[11] Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962) 16-17.

[12] Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980) 4-5.

Jesse Choper is another American author who highlights this concern eloquently:[13]

> [W]hen [courts] exercise the power of judicial review to declare [laws] unconstitutional ... they reject the product of the popular will by denying policies formulated by the majority's elected representatives.

Despite the absence of substantive judicial review in New Zealand, similar concerns have been expressed in relation to the power of judges in their role as decision-makers. Roger Kerr highlighted the concerns of the New Zealand Business Roundtable when he made the comment that:[14]

> Judicial independence is not supposed to give judges a licence to pursue their own enthusiasms and social goals untrammelled by the need to account to any democratic electorate.

Judges should uphold the law as declared by Parliament and nothing more. That is Kerr's view.

What is it exactly that Bickel, Ely, and Choper are objecting to when they say that substantive judicial review is anti-democratic?[15] Is it really that judges are not accountable to the populace or is it something more?

Samuel Freeman suggests that it is something more. He suggests that the basic problem with substantive judicial review is not that judges are not electorally accountable to the majority's will, but rather that the exercise of this power works as a constraint upon the equal rights of citizens to take part in and influence the government decision-making process.[16] What Freeman is tapping into here is John Rawls' principle of equal political participation.[17] The idea is that all citizens have an equal right to a say in the process which establishes the laws they are to obey. Substantive judicial review infringes this right by second-guessing the results of the process of equal political participation. Freeman presents this formulation of the anti-majoritarian objection when he writes:[18]

> By exercising their equal political rights through legislative procedures designed to accommodate them, citizens have already made as democratic a determination as can be made. So even if presiding judges are elected and can be recalled, the damage [of overturning these determinations] has already been done.

---

13 Choper, *Judicial Review and the National Political Process* (1980) 6.

14 Quoted by Sir Geoffrey Palmer, "Judicial Activism", Nine to Noon Show (sound recording), Radio New Zealand, 27 October 1998.

15 It should be noted that Bickel and Choper are pro-judicial review on grounds other than the democratic principles discussed so far. Bickel argues that judicial review is needed to promote moral values, while Choper argues that it protects minority interests.

16 Freeman, "Constitutional Democracy and the Legitimacy of Judicial Review" (1990-1991) 9 Law and Philosophy 327, 333.

17 Rawls, *A Theory of Justice* (1971) 221.

18 Supra note 16 at 334.

The validity of this objection relies on the assumption that equal political rights are concerned only with individual liberty and the necessarily majoritarian outcome that this focus will produce. I will attempt to establish in the remainder of this section that such a narrow focus is a mistake. I have already indicated the differences in approach between the American political system, which allows substantive judicial review, and the British Westminster tradition, which does not. It is my belief that an examination of the philosophy behind each of these systems will show that while the Westminster tradition is based solely upon the principle of liberty in determining equal political rights, the American system is based on both liberty and on the principle of equality. Further to this, it is my contention that we ought to prefer a political system which is based upon both principles, and accordingly if our conception of democracy is framed in this manner the objection to substantive judicial review as anti-majoritarian, and therefore anti-democratic, will fail.

To see the importance of the distinction between the two approaches it is helpful to look to the seventeenth century and the beginnings of modern democratic theory. Thomas Hobbes and John Locke are the starting points for two separate approaches to democratic theory and are also indicative of the aforementioned division between the Westminster and the American approaches.

Hobbes and Locke present models of the social contract justification for the role of the state.[19] In these models they describe the conceptual contract as an agreement by individuals opting to contract out of their natural freedom of action in order to remove themselves from a state of nature. By contracting with each other to appoint a sovereign, citizens are able to escape an unpleasant world where all people are in conflict with one another for a more orderly rule-governed society. For both theorists neither the state of nature nor the social contract is meant to be historical. Both entities are constructs, which if considered provide a rational understanding of what the role of society may be. This is often cited as an inadequacy in social contract theory. Ronald Dworkin highlights this when he writes, "[a] hypothetical contract is not simply a pale form of an actual contract; it is no contract at all".[20] However, if one takes social contract theory as Dworkin later suggests, not as an agreement but rather as a device for teasing out the implications of certain moral premises, then its value is restored.

While Hobbes and Locke both present an argument for society based upon the social contract, their theories differ in one important aspect. For Hobbes the creation of the sovereign equates to the full relinquishment of one's political power. Hobbesian sovereignty is absolute and undivided. The tensions of the state of nature create this situation by forcing individuals to:[21]

> [C]onferre all of their power and strength upon one Man, or upon one Assembly of men, that may reduce all their Wills, by plurality of voices, unto one Will ... and

---

19 Hobbes, *Leviathan* (1973) 63-64; Locke, *Two Treatises of Government* (1988) 328.

20 Dworkin, *Taking Rights Seriously* (1977) 151.

21 Supra note 19 at 89.

> therein to submit their Wills, every one to [the sovereigns'] Will, and their Judgements, to his Judgement.

Locke on the other hand believed that this was unlikely. He writes of Hobbes' argument for the full relinquishment of political power:[22]

> This is to think that Men are so foolish that they take care to avoid what Mischiefs may be done them by *Pole-Cats*, or *Foxes*, but are content, nay think it Safety, to be devoured by *Lions*.

Locke's criticism of Hobbes' thesis is clear: if one's intention in entering into the contract is to escape a state of perpetual distrust, then it is unlikely one would do so by submitting one's trust to an omnipotent ruler. David Held eloquently summarises Locke's position when he writes that:[23]

> The rights of law-making and enforcement (legislative and executive rights) are transferred, but the whole process is conditional upon the state adhering to its essential purpose: the preservation of "life, liberty and estate".

This distinction enables us to tease out some of the moral premises that Dworkin was talking about with regards to the political arrangements creating society. For Hobbes, the main moral premise that underlies entry into the social contract is liberty. For Locke however, liberty is coupled with equality; everyone has an equal right to protection of life, liberty and property. Hobbes' system establishes an all-powerful ruler, an effective despot. Locke's system establishes the same despot but with restricted powers. What we see in Hobbes and Locke are two competing conceptions of democracy.

By a combination of timing and politics these two conceptions of democracy were adopted by two different nations on opposite sides of the world. Hobbes' theory of undivided and all-powerful sovereignty was eagerly received by the English at a time of despair with the revolution and the execution of Charles I. With the development of a political system in the Hobbesian tradition came the substitution of Parliament for the King, but the idea of absolutism remained. In the United States this absolutist approach was rejected and in line with the Lockean emphasis on liberty and equality came the Constitution and the eventual adoption of an institution of substantive judicial review.[24]

New Zealand has followed the Westminster tradition and thus adopted the Hobbesian conception of democracy. Geoffrey Palmer highlights this when he writes that "[t]here is an absolutist twinge to our government which Hobbes would well recognise .... Hobbes' sovereign is alive and well and living in Wellington".[25]

---

22 Supra note 19 at 328.

23 Held, *Models of Democracy* (1987) 52-53.

24 This connection between Locke and the framers of the Constitution is perhaps not as direct as I suggest. While it is clear that Jefferson was a Lockean, there is some question over his contemporaries. See the introduction to Locke, supra note 19 at 14-15.

25 Palmer, *New Zealand's Constitution in Crisis: Reforming our Political System* (1992) 43-44.

Therefore any adoption of substantive judicial review in New Zealand which is based on the assumption of Lockean observations of democracy would require a major change to the nation's underlying political ideology.

Previously, I noted that the traditional criticism of substantive judicial review as being anti-democratic is reliant on an assumption that equal political rights are concerned only with individual liberty. On the basis of the Lockean conception of sovereignty, this assumption does not hold; equal political rights are concerned not only with individual liberty, but with equality also. Freeman picks up on this suggestion when he writes:[26]

> My basic claim is that the set of moral principles and ideals that best justify democratic decision-making processes provide a justification for the institution of judicial review under appropriate circumstances.

Freeman goes on to highlight the crux of the issue: "[u]ltimately, the case for or against judicial review comes down to the question of what is the most appropriate conception of a constitutional democracy".[27] What that conception is will be debatable. However, I suggest that a Lockean conception of democracy with its emphasis on liberty and equality is superior to the alternative Hobbesian despotism.

To take a Hobbesian conception of sovereignty, placing liberty as the sole foundation for democratic decision-making provides each citizen with an equal say in the initial decision, but damns the consequences of such an action to systemic fate. The problem of systemic fate caused by a focus on individual participation is illustrated by considering the moral theory of utilitarianism. Like the Hobbesian social contract, utilitarianism places the participatory focus on the individual but then focuses on the collective outcome rather than the individuals who initially participate in the process.

The simplistic catch-cry of utilitarianism is that of the greatest good to the greatest number. Utilitarianism necessarily involves a calculation whereby everyone is entered into the formula on an equal footing, but the outcome of the calculation condemns or rewards individuals with impunity. It is the collective good, not the individual, which is rewarded by utilitarianism. Thus, as Rawls points out,[28] it is possible to sacrifice a few for the good of the many, as with the establishment of a slave class, if doing so provides the highest overall utility.

This sort of "ends justifies the means" theory is unacceptable in a world where we place a great deal of importance on human rights. The various international instruments such as the United Nations Declaration on Human Rights and the International Covenant on Civil and Political Rights, along with local legislation such as the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993, are indicative of the importance society places on individual rights.

Will Kymlicka suggests that intuitions such as the intuition against slavery may

---

26 Supra note 16 at 328.
27 Ibid 331.
28 Supra note 17 at 167.

be, in themselves, valid objections to a theory of justice. Kymlicka writes:[29]

> I believe that the ultimate test of a theory of justice is that it cohere with, and help illuminate, our considered convictions of justice. If on reflection we share the intuition that slavery is unjust, then it is a powerful objection to a proposed theory of justice that it supports slavery.

I agree, and it is with this faith in my intuition against a conception of democratic decision-making based solely upon a foundation of liberty that I reject the Hobbesian social contract tradition in favour of Locke.

The question of the compatibility of substantive judicial review with a Lockean conception of democracy is now a small step away from being answered. If we are to place importance not only on liberty but also equality, what does this entail?

We have already seen that the principle of liberty provides for a decision-making scheme where all citizens have an equal initial say. The equality principle acts as a check on any abuse that may be generated by the application of the liberty principle. The equality principle tells a story of some standard of minimum rights that all citizens have, rights that cannot be overridden by an abuse of the inherent majoritarian nature of the liberty principle. The principle of equality is Locke's check of adherence mentioned earlier.[30]

It is easy to see how a court exercising substantive judicial review could be protecting the equal rights of citizens from abuse through the majoritarianism of the liberty principle. A court overturning legislation is entitled to do so under a liberal egalitarian system of democracy so long as it is protecting the minimum standards that the equality principle prescribes for the citizens concerned.[31] Held summarised this position succinctly when he wrote that liberalism was "the attempt to uphold the values of freedom of choice, reason and toleration in the face of tyranny and the absolutist system".[32]

Therefore, Ely was only half right when he wrote that judicial review was anti-majoritarian and therefore anti-democratic. It clearly is anti-majoritarian, but with a conception of democracy based upon liberty *and* equality, substantive judicial review can just as clearly be seen as promoting democratic ideals rather than detracting from them.

---

29 Kymlicka, *Contemporary Political Philosophy: An Introduction* (1990) 7.

30 Note that Locke's application of the equality principle is based upon a belief in natural rights. Such a belief is not required in a theory of democracy based on liberty and equality. One alternative is for the citizens to decide upon a set of rules in the absence of agreement on natural rights. This raises its own problems, one of which is how to do this in a non-majoritarian fashion. See the discussion infra note 43 and accompanying text.

31 Note the link here to Rawls and the idea of Rawlsian Paretianism. This is the idea that Rawls' difference principle links with the idea of Pareto-optimality in economics. Rawlsian Paretianism is therefore a modification of the pure economic doctrine. See Alexander & Wang, "Natural Advantages and Contractual Justice" (1984) 3 Law and Philosophy 281, 284.

32 Supra note 23 at 41.

IV: SUBSTANTIVE JUDICIAL REVIEW WITHIN A POSITIVIST THEORY OF LAW

It is important that when judges make decisions others can understand why and how those decisions are made. How judges make decisions and that they do so appropriately is important to each and every one of us. Dworkin notes that it "matters how judges decide cases. It matters most to people unlucky or litigious or wicked or saintly enough to find themselves in court".[33] But it also matters to those of us who are not in court. It is in the best interests of all society if the law and the way that it is applied is clear and without ambiguity or arbitrariness. For the law to act as the social contractarians suggest, to resolve conflict and debate over what is right, then the law must be clear.[34]

In this section I will look at how the practice of substantive judicial review may be seen to be consistent with a satisfactory theory of law free from ambiguity and arbitrariness. I will use the mechanism of case law reasoning to look at legal theory and substantive judicial review. Although I take legal positivism to be the appropriate theory of law to work with, I will begin this section by looking at the competing natural law philosophy and, in particular, the theory of Dworkin. In doing this I will illustrate the main objections to substantive judicial review that the positivist may hold. I will then examine how these objections may be overcome from within the paradigm of legal positivism itself.

A simple analysis of the differences between natural law and legal positivism might be that the former is a content dependent theory of law with an external test of validity, while the latter is content independent with an internal test of validity. Thus, for the natural lawyer, *lex unjusta non est lex*: an unjust law is no law at all.[35] Augustine, and later Aquinas, hailed this catch-cry of natural law.[36] For Aquinas the test for a law's validity was that it measured up to the law of God, thus the content of the law had to measure up to an external divine standard. Dworkin provides us with a more contemporary theory of law in the natural law tradition, a theory of law that is ripe for the institution of substantive judicial review.

In the Dworkinian system, a judge is empowered to review every decision before him or her in light of the jurisdiction's overarching political morality. Wilfred

---

33 Dworkin, *Law's Empire* (1986) 1.

34 See, for example, Hobbes, supra note 19 at 19: "the parties must ... set up for right Reason, the Reason of some Arbitrator ... for want of a right Reason constituted by Nature".

35 I do not intend to suggest that this maxim is all there is to natural law. As Wilfrid Waluchow notes, "natural lawyers ... reject the ludicrous proposition that any law, wrongly or rightly condemned as unjust, may be disobeyed with impunity, something Bentham ascribed to advocates of natural law and which he labelled 'terrorist doctrine'": Waluchow, "The Weak Social Thesis" (1989) 9 Oxford J of Legal Stud 23, 24. What is clear is that the natural law theorists all posit a moral law external to the positive human law. For the purposes of this paper, that is enough.

36 See, for example, "Summa Theologica", Part II, Question XCVI, 4th Article, in Pegis A (ed), *Basic Writings of Saint Thomas Aquinas: Volume II* (1945) 795.

Waluchow summarises this approach well when he writes:[37]

> Dworkin, like most of his contemporaries, rejects the notion of a universal, natural law emanating from God and discoverable by natural reason in the very nature of the universe. Nevertheless, he does seem to accept the idea of a morality – political morality – whose role, in relation to positive law, is similar to that of the natural law in the theories of Aquinas and Augustine. It, like the law of nature, is necessarily instrumental in determining the existing legal rights of citizens. Political morality, according to Dworkin, serves to establish such rights when the settled (i.e. positive) law for some reason fails to do so. Indeed, as is now clear from *Law's Empire*, Dworkin wishes to ascribe a key role to political morality even in 'easy cases' where it might seem that the law, unaided by anything even vaguely moral or political, is itself sufficient to determine the state of the existing law on some matter or other.

The political morality that Waluchow refers to is determined by an analysis of all the legal and political decision making that occurs within the jurisdiction. This produces a consistent set of overarching principles that make up the jurisdiction's political morality. Dworkin assigns this task to the fictitious judge, Hercules.[38]

When Hercules decides a case he applies the law as passed by the Legislature in a fashion consistent with the political morality of the jurisdiction. If the law as passed by the Legislature is so inconsistent with this morality that the judge cannot apply it, then he or she is justified in declaring the law an anomaly and ignoring it. It must be noted that Dworkin does not think that Hercules will in any way be creating law in these circumstances, rather he will be finding it. According to Dworkin, every legal problem will have a right answer, and thus any decision that a judge comes to is by necessity the uncovering of existing law rather than the creation of new law. In any instance where a judge rejects the direct intention of the Legislature because of inconsistencies with the jurisdiction's political morality (such as in the case of substantive judicial review), the judge will in effect be correcting the Legislature's mistake in finding the existing law. Hercules, just like Cooke P,[39] is fulfilling the role of establishing exactly what the fundamental rights and duties of the jurisdiction are. Hercules and Cooke P are relying on the existence on an objective truth.

This reliance on an objective truth is the cornerstone of the positivist rejection of the natural law tradition. The objection may exist in one of two forms. The stronger version rejects the idea of objectivity completely, while the weaker suggests that regardless of whether or not objective truths exist, our inability to agree on what those truths are makes reference to them futile. The distinction between these two formulations of the objection is not important. What is important is that the positivists reject the claim to an objective "right answer" that the natural lawyers, including Dworkin, present.

---

37 Waluchow, supra note 35 at 23.

38 Supra note 33 at 337, and generally chs 6, 7 and 9.

39 See supra note 9 and accompanying text.

Joseph Raz picks up on this problem when he discusses the essential character of law as an authoritative command. Raz believes that the inherent force of law means that laws act as reasons for action of a logically different type to all other reasons for action. Law is vested with this special character because of the absence of any predetermined objective standard of behaviour. It is a response to the problem of "no right answer".

Raz asks us to imagine a situation where two individuals take a dispute to an arbitrator:[40]

> [The arbitrator] has authority to settle the dispute, for [the parties] agreed to abide by his decision. Two features stand out. First, the arbitrator's decision is for the disputants a reason for action. They ought to do as he says because he says so .... The arbitrator's decision is also meant to replace the reasons on which it depends. In agreeing to obey his decision, the disputants agreed to follow his judgment of the balance of reasons rather than their own. Henceforth his decision will settle for them what to do.

The first point Raz makes is that the arbitrator is used as an instrument to settle argument in the face of there being no right answer. The second point is that once that decision has been made, once all the arguments for and against are heard, the arbitrator's decision replaces all of those prior arguments. One cannot defeat the arbitrator by saying "but I said...". Raz speaks of the reasons the arbitrator takes into account as being dependant reasons for action, because the arbitrator's decision is dependant upon their consideration.

Raz develops his objection to the Dworkinian approach by highlighting two important features that an authoritative directive, such as that of the arbitrator, must possess. The first is that it must be some person's or some institution's view on how those who will be subject to it must act. The second is that it must be possible to identify the command without recourse to the reasons that the command purports to adjudicate over.[41] This second feature, Raz claims, is a consequence of the earlier claim that the decision is designed to replace all of the dependent reasons under debate between the parties.

This constraint is often phrased in terms of the relationship between morality and the identification of law, where morality represents the arguments for and against the law in question. Because morality will necessarily be a part of the group of dependent reasons, reference to it in identifying the law is inappropriate. Raz therefore insists on a theory of law totally free from morality. Tim Dare summarises Raz's position eloquently when he writes:[42]

> Law, the claim goes, must be capable of being authoritative, and it can be authoritative only if our tests for status as law wholly exclude moral or evaluative considerations. The

---

40 Raz, "Authority, Law and Morality" in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1994) 196-197.

41 Ibid 202-204.

42 Dare, "Wilfrid Waluchow and the Argument from Authority" (1997) 17 Oxford J of Legal Stud 347, 350 (emphasis added).

> pivotal premise in the argument from authority is one which proposes a *conceptual constraint* upon authoritative directives, to the effect that the identification and interpretation of such directives cannot involve reference to the very matters those directives were intended to resolve.

It is the conceptual constraint that provides the cornerstone of Raz's objection to Dworkin's theory. Under a Dworkinian system of law, the identification of the law is determined by reference to the jurisdiction's political morality. In effect this is an appeal to the dependent reasons the positive law purports to adjudicate over. Such an appeal is prohibited by Raz's conceptual constraint.

For Dworkin, a judge exercises effective powers of substantive judicial review every time he or she makes a decision. They are empowered to find the law as it is in itself, even if it is different from the positive law presented. It is clear that if the process by which this occurs breaches Raz's conceptual constraint, as it is suggested, then substantive judicial review under a Dworkinian system of law is not appropriate in the way indicated at the beginning of this section.

It is not clear on Raz's account that all questions of morality are necessarily excluded from consideration in determining the identification of a law. It is certainly clear that all dependent reasons that are moral are excluded, but it is possible that some moral reasons are not dependent reasons. Thus, if there are issues not taken into consideration by those who posited the law, then reference to them may be allowed without a breach of the conceptual constraint. This possibility is raised by Waluchow:[43]

> Consider ... a charter system with ... moral rights serving as criteria for valid law. These moral rights need have no relation whatsoever to the disputed dependent reasons which a law attempts ... to settle. The validity of a piece of legislation ... might be challenged on the moral grounds which are unrelated to the dependant [sic] reasons the statute sets out to settle.

This is similar to Jim Evans' suggestion for using Aristotle's theory of equity to allow exceptions to rules in circumstances where the rule was never intended to apply. Evans' thesis is intended to provide for exceptions to rules where the meaning of the language is clear, but an exception is nevertheless appropriate, as the circumstances of the exception were never considered when the law was passed.[44]

Whether Raz succeeds in excluding all morality or only dependent morality turns out to be unimportant in this instance. Neither the modified conception of Raz's theory nor Evans' theory are able to accommodate substantive judicial review in the way alluded to by Cooke's comments. Because the exceptions are only allowed in cases where circumstances exist outside of the Legislature's original intention, no breach of legislative supremacy will occur in granting the exception. Accordingly, neither Raz's nor Evans' approach allow for substantive judicial review, because that

---

[43] Waluchow, *Inclusive Legal Positivism* (1994) 139.

[44] Evans, "Aristotle's Theory of Equity" in Krawietz, MacCormick and von Wright (eds), *Prescriptive Formality and Normative Rationality in Modern Legal Systems* (1994).

would require exceptions in cases where it is clear that the law is acting in the way the legislator intended. Under this conception of Raz, and under Evans, the theories do not go far enough in allowing for substantive judicial review.

This is not to say that Raz's theory cannot be made to accommodate an institution of substantive judicial review. In the remainder of this section I will attempt to show how substantive judicial review can be retained, while at the same time adhering to the theory of law proposed by Raz. It hinges on being able to construct a theory of review that allows for the rejection of the express intimations of the Legislature, while at the same time protecting the essential elements of authoritative directives.

A restraint on the supremacy of a Legislature does not inherently affect the way its directives work as authoritative commands. If such a restraint can be achieved without falling into the trap of reliance on objectivity, then it would appear a system of review compatible with Raz's theory may be found.

Dare addresses this issue with reference to the case of *Andrews v Law Society of British Columbia*.[45] In *Andrews* the Supreme Court of Canada was asked to strike out a regulation of the Canadian Law Society requiring Canadian citizenship for the practice of law. The Court did so on the grounds that it was inconsistent with the equality provisions of the Canadian Charter of Rights. A number of points need to be raised here.

The first point is that the provision of equality in a written constitution gives guidance to the courts as to what criteria a law must measure up against. It should be noted that there is no claim to objectivity involved here, unlike that which occurs with the "political morality" criteria of Dworkin. By establishing a set of agreed rights, such as may be drawn up in a constitution or charter, the courts can exercise substantive judicial review without making claims to the objective nature of their benchmark.

There are two main problems with this compromise. First, the institution of substantive judicial review is supposed to be a protection for minorities, yet by allowing for the rights to be established by agreement it is likely that they will be influenced by majoritarian concerns. Second, even if rights are drawn up in a constitution for the courts to use as a guide in their work, the wording of the document is likely to be so vague that the courts are required to act in a manner akin to legislating. The solution to the first problem lies in the way in which a constitution is drafted. If the constitution is drafted in a majoritarian fashion then it will by necessity reflect majoritarian concerns. If, on the other hand, a more representative body is established to draft the constitution then the interested parties will see to it that the document reflects the concerns of a wider society. This of course may have the opposite effect and oppress the majority interests unfairly; the balance will be difficult to achieve. The solution to the second problem is less clear. The problem of the vagueness of language will be addressed briefly in the following section of this paper.[46]

The second point is that when the Court overturns the law, this is in no way a

---

45 [1986] 4 WWR 242 (BCCA). See Dare, supra note 42 at 360.

46 See infra note 56 and accompanying text.

restriction on the ability of the law to have acted as an authoritative directive up until the point that it is overturned. The decision of the Court to overturn the law may be seen as a separate authoritative directive. This can be seen when a timeline of the events in our example is considered.

Regulation made.	Authoritative Directive = Only citizens can practice law.
Court overturns law.	Authoritative Directive = Regulation made in contravention of the constitution, therefore the regulation is repealed. & Authoritative Directive = Right to practice law not restricted to citizens.

Linked to this idea is the third point, namely that as a separate authoritative directive, the court's directive relies on different dependent reasons than that of the law in question. Dare notes that:[47]

> [T]he dispute is not properly described as a dispute over the dependent reasons contained in the [regulation]. It is not the same dispute, involving the same set of dependent reasons, as that which motivated the enactment of the statute.

Instead Dare suggests that the dispute is over "whether or not [the regulation] is consistent with the equality provisions of the Charter".[48]

Therefore, provided that the deliberation of the court, in identifying the answer to this question, does not rely on the set of dependent reasons pertinent to it, namely those which relate to the provision of equality, then this model of the exercise of substantive judicial review can be seen as consistent with Raz's theory of law.[49]

---

47 Dare, supra note 42 at 361.

48 Ibid.

49 Dare has some good arguments for how this might be possible to a degree. The claim is based on Gallie's doctrine of essentially contested concepts, and asserts that this doctrine provides reasons for establishing artificial reason for those concepts. I say "to a degree" because Dare still has the problems of vagueness of language and the artificial concepts being somewhat contestable because of it. See Dare, "Kronman on Contract: A Study in the Relation Between Substance and Procedure in Normative and Legal Theory" (1994) 7 Can J of Law and Juris 331, 339-342; Gallie, "Essentially Contested Concepts" 56 Proc Arist Soc 167.

V: WHY JUDGES? EFFICIENCY, LANGUAGE AND POLITICS

In the previous two sections of this paper, I have attempted to show that the institution of substantive judicial review can be seen as compatible with liberal democracy and legal positivism. In this section of the paper I will argue that such an institution is more desirable than an alternative which may achieve the same end.[50] In support of this assertion, I will briefly comment on four issues. First, I will consider the issue of why an institution is preferred over a non-institutional mechanism for review. Second, I will examine issues of efficiency as an argument for an institution of substantive judicial review. Third, I will consider the objection that substantive judicial review creates discretion for judges where none currently exists. Finally, I will consider the accountability objection to substantive judicial review, namely that it places the ultimate discretion in a body which is neither elected nor directly accountable to the electorate.

The first hurdle that must be passed in arguing for an institution of substantive judicial review is to establish the need for a formal institution. As we are dealing with a democracy, where the people decide who governs, why not simply rely on the democratic process of election and re-election to settle any public dissatisfaction with the laws as created? There are two problems with this approach. Dworkin highlights the first when he writes:[51]

> He knows, of course, that the voters can throw a legislator out of office at the end of his term if the voters disagree with what he has done. But that is no argument: a wrong is not justified by an opportunity for revenge.

The second problem is that most democratic electoral systems do not account for the protection of minority interests. The accountability of elected legislators is a majoritarian accountability. Thus, the informal approach provides no protection against the tyranny of the majority, the very danger that we are wishing to get away from.

This is not to say that, in the absence of institutional accountability, there is no way that action cannot be taken against a Legislature during its sitting term. Waldron highlights the possibility of seeing revolution as the people's protection from a tyrannous Parliament when he writes:[52]

> Locke does not consider it necessary for a society to have institutional mechanisms for resolving disputes about whether the legislature has overstepped the limits ... It is of course possible that the legislature may abuse its trust, but on Locke's account that is a proper occasion for revolution or resistance, not for the routine subordination of this institution to some other department of government.

---

50 I am indebted to Professor Andrew Sharp of the Political Studies Department at the University of Auckland who posited to me the question: why should judges be the required conduit for the check on legislative supremacy?

51 Supra note 33 at 340.

52 Waldron, "Freeman's Defence of Judicial Review" (1994) 13 Law and Philosophy 27, 33 n 13.

However, a revolution is not only an extremely inefficient way to cure social ills (a political application of the old adage that prevention is better than cure), but it is also itself a majoritarian instrument which can be abused. The threat of revolution is unlikely to protect a small minority from oppression by the Legislature. Given these points, an institutional form of protection is more desirable than a non-institutional one.

The argument from efficiency continues where the argument against non-institutional protection leaves off by suggesting that not only is an institutional protection more efficient, but that the use of the Judiciary is the most efficient institution.

The courts are conceptually the best vehicle to deal with major disputes in society. The role of the courts in New Zealand may be stated as follows:[53]

> In simple terms, the role of the courts is to administer justice by resolving disputes and enforcing the law to maintain public order .... While remaining subject to Parliament and its will, 'there is nevertheless wide scope for the [c]ourts to apply and interpret the law in accordance with the needs of society'.

In many cases the courts are already Raz's arbitrator.[54] Judges already decide many of the major debates and arguments of our society. Those that are not in the realm of the courts are normally in the realm of the Legislature. Given that what we are trying to check is an abuse of power by the Legislature, it seems odd to suggest that we would go to an institution other than the courts to resolve these concerns, especially when these concerns are about questions of law. One would not call a plumber to fix faulty electrical outlets. Indeed, to do so may have quite dangerous consequences. So it is with the law. While it may be true that the operation of a legal system is not purely scientific, the basis of a legal system is still the law and judges remain the appropriately trained and resourced people to adjudicate over disputes regarding the law. To some degree this belief that the courts are the appropriate institution is related to concerns of economic efficiency. It would be irrational to double up on institutions for no good reason and that is exactly what we would be doing if we established an institution separate from the courts to resolve the type of disputes envisaged here.

One criticism that may be levelled at substantive judicial review is that the introduction of such a system would mandate judges to act in a discretionary manner that is incompatible with our objective view of the judicial system. Two points should be made about this objection. First, it begs the very question that is central to the debate over a check on legislative power, namely whether the courts should simply apply the law, or whether they are entitled to review and question the law. Second, the absence of discretion, as trumpeted by the objectivist, is in fact a legal fiction. Judges have discretion in two areas: linguistically, and through their interpretation of social and political constructs necessary to apply the law to the facts of any given

---

[53] Report of the New Zealand Judiciary (1995) 4, citing McDowell & Webb, *The New Zealand Legal System: Structures, Processes and Legal Theory* (1995) 227.

[54] See supra note 40 and accompanying text.

case. It is important to recognize the fact that this discretion currently exists. Moreover, the existence of discretion actually strengthens the efficiency argument against doubling up on institutions because it establishes the capability of the current judicial system to perform the substantive review role. I will now say a little more about each area of discretion.

Wittgenstein, writing early this century, discussed the idea of the anti-essentialist nature of language.[55] This idea of language lacking any essential meaning is picked up on by HLA Hart when he discusses the core and penumbral meanings of words:[56]

> In all fields of experience, not only that of rules, there is a limit, inherent in the nature of language, to the guidance which general language can provide. There will indeed be plain cases constantly recurring in similar contexts ... but there will also be cases where it is not clear whether they apply or not.

The existence of a penumbra, where it is unclear whether or not a term fits within the meaning of a word, gives judges discretion. Hart highlights the example of the word "vehicle", and how a motorcar clearly falls within the meaning of the word but aeroplanes and roller skates do not. Motorcar is a core concept with regard to the word vehicle, but roller skates and aeroplanes are merely penumbral. They may or may not be a vehicle for the purposes of a rule in different circumstances.

Part of Wittgenstein's method involved talking of language with an analogy to a "game". To understand and assess any given use of language we have to know what game is being played and what its rules and objectives are. Thus, if I talk of someone as having "scored", what that entails is dependant upon the game that I am referring to. It is possible to look at the law and society in much the same way as Wittgenstein suggests we look at language. To understand a law it may be necessary to understand where the law fits in society, what the rules and objectives of the society are. It is here that the political and social discretion of judges arises.

If it is necessary to have an understanding of what society's rules and obligations are about, then the judge must form an opinion as to the sociological and political nature of society. Thus, in interpreting and applying the law a judge will always be influenced by his or her political and social viewpoint.[57]

The final issue I wish to touch on here is the contention that substantive judicial review places the ultimate discretion in a legal system with a body that is not elected and therefore not accountable. In part three it was argued that the unaccountable nature of judicial review does not make it anti-democratic. A further response that might be made to the above contention is to say that judges are in fact accountable to

---

55 See generally Wittgenstein, *Tractatus Logico-Philosophicus* (1955); *Philosophical Investigation* (1953).

56 Hart, *The Concept of Law* (1961) 123.

57 This claim, that judges do not look at the facts of the case through objective eyes, is the core contention of the school of jurisprudence commonly referred to as Critical Legal Studies. While the CLS writers come from a variety of different viewpoints, this strand throughout their writings is what links them together. See, for example, Unger, *The Critical Legal Studies Movement* (1983) ch 1.

the public. Judges can be removed from office for misbehaviour or incapacity.[58] This is in addition to the less tangible accountability to the public generally through criticism of their decisions. It is true that this accountability is far weaker than that of elected politicians, but for good reason; it protects judicial independence, thereby allowing the judiciary to protect minority interests without the pressures from the tyranny of the majority.

VI: CONCLUSION

In part two of the paper I examined the prior comments of Lord Cooke of Thorndon which created such a stir over a decade ago. Cooke's call to recognise fundamental rights smacks of the Dworkinian system of law as elucidated in part four.

In part three I examined the principles of liberal democracy. Here I established that liberty and equality are both fundamental to a proper conception of democracy. From this comes the conclusion that substantive judicial review has a place in a democracy to protect the interest of equality against the inherent majoritarian tyranny of the liberty interest. This conclusion is at odds with the traditional conception of parliamentary sovereignty in the Westminster system, and any change to incorporate substantive judicial review in our system would require a major rethink of these foundations.

Part four of the paper was an attempt to reconcile substantive judicial review with legal positivism. The intention was to show that substantive judicial review could be part of a coherent legal theory. This was achieved through reconciling substantive judicial review with Joseph Raz's theory of law based upon authoritative directives. However, in doing this, a concession to the idea of substantive judicial review had to be made. The objective nature of substantive judicial review had to go, replaced by a liberal agreement on the terms of the review process.

In the penultimate section a number of issues were examined to address the question of why substantive judicial review is the appropriate form of the desired constitutional check on legislative supremacy. The conclusion reached was that an institutional check is required and that substantive judicial review is the most efficient form of that check. It was found that the discretion and accountability features of current judicial practice actually enhance the efficiency argument for judicial review. These conclusions led to the assertion that substantive judicial review was not only compatible with the institutions of democracy and legal positivism but was to be the preferred mechanism in protecting society from abuse of the principles therein contained.

I noted in my introduction that I am far from convinced that the adoption of an institution of substantive judicial review is desirable in New Zealand. I wish to clarify this comment further. I think that some form of a check on parliamentary sovereignty

---

[58] Constitution Act 1986, s 23.

is desirable, but like all major issues there must be universal and full debate before the decision is made, especially given that the decision would be such a dramatic change to the fabric of our Westminster political system.

It is clear to me that the unfortunate influence of Hobbes is a burden on the protection of minority rights in New Zealand. The New Zealand Bill of Rights Act 1990 goes some way to alleviate this burden, but the retention of parliamentary sovereignty means that the Legislature still retains the ability to ride roughshod over the rights of individuals in society. Many respond to this concern with the claim that the fears expressed are unfounded, that such an abuse of power would never occur. It is to those people that I leave these final comments.

In the late 1970s and early 1980s the National government had two regretful policies in place. One was the idea of "Think Big", an economic policy of mass development, out of which came the Clutha Dam project, for example. The other policy was that of tight control over the economy via the Economic Stabilisation Act 1948. Out of this came the ability of the government to order a range of regulations fixing wages, prices and limiting people's freedom of movement. The Act was a clear example of the oppressive powers of an executive granted through the abuse of parliamentary sovereignty.

But the Clutha Dam project gave rise to an even bigger abuse of power. When the Crown started construction of the dam it had not obtained the water consents necessary for construction. When this was challenged in the High Court, the Crown lost and the consent was refused.[59] The Legislature then passed the Clutha Development Empowering Act 1982. This legislation did what recourse to the law would not: it granted the Crown a water right for the building of the dam. In this instance the Crown ignored the rights of equal protection under law through its abuse of parliamentary sovereignty, and in so doing destroyed a priceless piece of New Zealand's natural heritage.

Some may argue that it was only a dam, that it was half-built and needed to be completed, but that is not the point. The law was there to protect those who had orchards below the site, the local environment and other minorities that had interests in the dam not proceeding. The government ignored those rights and used the doctrine of parliamentary sovereignty to further its own ends. It is these very cases of abuse of power that a system of substantive judicial review would prevent.

---

[59] *Gilmore v National Water and Soil Conservation Authority and Minister of Energy* (1981-82) 8 NZTPA 298.